

A
DIGEST OF CASES,
OVERRULED, APPROVED, OR OTHERWISE DEALT
WITH IN THE ENGLISH AND OTHER
COURTES.

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OVERRULED, APPROVED, OR OTHERWISE DEALT
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COURTS.

WITH
A SELECTION OF EXTRACTS FROM JUDGMENTS
REFERRING TO SUCH CASES.

BY
WILLIAM ANDREW GEORGE WOODS, LL.B.
OF THE MIDDLE TEMPLE, ESQ., BARRISTER-AT-LAW,

AND
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*FOUNDED ON DALE AND LEHMANN'S "DIGEST
CASES OVERRULED," ETC.*

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DIGEST OF CASES OVERRULED, APPROVED, OR OTHERWISE DEALT WITH.

LANDLORD AND TENANT.

1. AGREEMENTS FOR LEASES.
2. LEASES.
3. YEARLY TENANCIES.
4. RENT.
5. USE AND OCCUPATION.
6. TERMINATION OF TENANCY.
7. ASSIGNMENT.
8. COVENANTS.
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1. AGREEMENTS FOR LEASES.

Lucas v. James (1849) 7 Hare 410; 18 L. J. Ch. 329; 13 Jur. 912.—V.C., *dictum distinguished*.

- **Hope v. Walter** (1900) [1900] 1 Ch. 257; 69 L. J. Ch. 166; 82 L. T. 30.—C.A. **LINDLEY, M.R., WILLIAMS and ROMER, L.J.J.**; *partly reversing* (1899) 68 L. J. Ch. 659; [1899] 1 Ch. 879; 80 L. T. 355; 47 W. R. 479.—**COZENS-HARDY, J.**

LINDLEY, M.R.—It is unnecessary to say whether the decision in that case was right or wrong, and I express no opinion upon it; but it was a totally different case from this, and the ground on which I wish to put my judgment is this: that this Court will not compel a man to buy a property which, if he takes no steps to prevent it, will expose him, as owner, to criminal proceedings by reason of its state at the time of the sale. If he knows or ought to know the state of the property, that proposition may not apply; but to force that position upon an innocent purchaser would be wrong.—p. 260.

- **Morgan v. Griffith** (1871) 40 L. J. Ex. 46; L. R. 6 Ex. 70; 23 L. T. 783; 19 W. R. 957.—EX.

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Erskine v. Adeane (1873) 42 L. J. Ch. 849; L. R. 8 Ch. 756; 29 L. T. 234; 21 W. R. 802.—L.J.J.

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Erskine v. Adeane.

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Erskine v. Adeane, applied.

De Lassalle v. Guildford (1901) 70 L. J. K. B. 533; [1901] 2 K. B. 215; 84 L. T. 549; 49 W. R. 467.—C.A.

Erskine v. Adeane, followed.

Lloyd v. Sturgeon Falls-Pulp Co. (1901) 85 L. T. 162.—**BRUCE and PHILLIMORE, JJ.**

Mann v. Nunn (1874) 43 L. J. C. P. 241; 30 L. T. 526.—C.P., *disapproved*.

Angell v. Duke (1875) 44 L. J. Q. B. 78; L. R. 10 Q. B. 174; 32 L. T. 320; 23 W. R. 548.—Q.B.

BLACKBURN, J.—It is a most important rule that where there is a contract in writing, it should not be added to if the written contract is intended to be the record of all the terms agreed upon between the parties; where there is a collateral contract the written contract does not contain the whole of the terms. As to the cases which have been cited, I should decide **Morgan v. Griffith** (L. R. 6 Ex. 70) the same way; the decision in **Mann v. Nunn** I am inclined to think wrong, but it is unnecessary to say how that may be.

Angell v. Duke, followed.

Bunsal v. Bianchi (1889) 65 L. T. 678.—**CHARLES, J.**

SMITH, M.R.—In the present case [*De Lassalle v. Guildford*], as above stated, the lease does not contain the whole terms of the bargain.—p. 228.

Green v. Symons (1897) 3 Times L. R. 301; **Kennard v. Ashman** (1894) 10 Times L. R. 213; **Best v. Edwards** (1895) 60 J. P. 9; and **Longman v. Bloynt** (1896) 12 Times L. R. 520, *referred to*.

De Lassalle v. Guildford (1901) [1901] 2 K. B. 215; 70 L. J. 533; 84 L. T. 549; 49 W. R. 467.—C.A. SMITH, M.R., COLLINS and ROMER, L.JJ.

De Lassalle v. Guildford, followed.
Lloyd v. Sturgeon Falls Pulp Co. (1901) 85 L. T. 162.—BRUCE and PHILLIMORE, JJ.

Nesham v. Selby (1872) 41 L. J. Ch. 173; L. R. 13 Eq. 191; 26 L. T. 145.—M.R.; *affirmed*, 41 L. J. Ch. 551; L. R. 7 Ch. 406; 26 L. T. 568.—L.JJ., *followed*.

Cartwright v. Miller (1877) 36 L. T. 398.—MALINS, V.-C.

Nesham v. Selby, distinguished.

Jaques v. Millar (1877) 47 L. J. Ch. 544; 6 Ch. D. 153; 37 L. T. 151; 25 W. R. 846.—FRY, J.

Frame v. Dawson (1807) 14 Ves. 386; 9 R. R. 304.—M.R., *observed upon*.
Williams v. Evans (1875) 44 L. J. Ch. 319; L. R. 19 Eq. 547; 32 L. T. 359; 23 W. R. 466.

Frame v. Dawson, adopted.

Maddison v. Alderson (1883) 52 L. J. Q. B. 737; 8 App. Cas. 467; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.—H.L. (E.).

Mundy v. Joliffe, 9 Sim. 413; 8 L. J. Ch. 62.—V.-C.; *reversed*, (1839) 5 Myl. & C. 167; 9 L. J. Ch. 95; 3 Jur. 1045.—L.C.

Mundy v. Joliffe, applied.

Phillips v. Alderton (1875) 24 W. R. 8; V.-C.

Jennings v. Major (1837) 8 Car. & P. 61.—DENMAN, C.J., *adopted*.

Gray, In re (1900) 70 L. J. Ch. 133; [1901], 1 Ch. 239; 84 L. T. 24; 49 W. R. 298.—COZENS-HARDY, J.

Wilkinson v. Clements (1872) 42 L. J. Ch. 38; L. R. 8 Ch. 96; 27 L. T. 834; 21 W. R. 90.—L.JJ., *followed*.

Lowther v. Heaver (1889) 58 L. J. Ch. 482; 41 Ch. D. 248; 60 L. T. 310; 37 W. R. 465.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

Pain v. Coombs (1857) 1 De G. & J. 34; 3 Jur. (N.S.) 847.—L.C. and L.JJ., *commented on*.

Hodson v. Heuland [1896] 2 Ch. 428; 65 L. J. Ch. 754; 74 L. T. 311; 44 W. R. 684.

KEKEWICH, J.—It does not clearly appear why the question as to possession taken before the parol agreement was started in that case, because

Nesbitt v. Meyer (1818) 1 Swanst. 223; 1 Wils. Ch. 97; 5 W. R. 340.—M.R., *distinguished but principle applied*.

Wilkinson v. Torkington (1837) 2 Y. & C. Ex. C. 726; 7 L. J. Ex. Eq. 30.—ALDERSON, J.

Nesbitt v. Meyer, referred to.

Walters v. Northern Coal Mining Co. (1855) 5 De G. M. & G. 629; 25 L. J. Ch. 633; 2 Jur. (N.S.) 1; 4 W. R. 140.—L.C.

Nesbitt v. Meyer and Wilkinson v. Torkington (1837) 2 Y. & C. Ex. Eq. 726; 7 L. J. Ex. Eq. 30.—ALDERSON, B., *applied*.

De Brassac v. Martyn (1863) 9 L. T. 287; 11 W. R. 1020.—WOOD, V.-C.

Clayton v. Illingworth (1853) 10 Hare 451.—V.-C., *distinguished*.

De Brassac v. Martyn, approved.

Lever v. Koffler (1901) 70 L. J. Ch. 395; [1901] 1 Ch. 543; 84 L. T. 534; 49 W. R. 506.—BYRNE, J.

Phillips v. Everard (1831) 5 Sim. 102.—V.-C., *followed*.

Stephens v. Hotham (1855) 1 Kay & J. 571; 24 L. J. Ch. 665; 3 Eq. R. 571; 1 Jur. (N.S.) 842; 3 W. R. 340.—V.-C.

Hodgson v. Johnson (1858) E. B. & E. 685; 28 L. J. Q. B. 88; 5 Jur. (N.S.) 290.—Q.B., *questioned*.

Pulbrook v. Lawes (1876) 1 Q. B. D. 284; 45 L. J. Q. B. 178; 34 L. T. 95.

LUSH, J.—I quite feel, in deciding as we do, we are going counter to *Hodgson v. Johnson*. There the defendant, tenant of a brickyard, agreed verbally with the plaintiff that the plaintiff should go into possession taking the plant and bricks at a valuation, and the defendant was to pay the rent due from him. It was held that the plaintiff, though he had gone into possession, and had his goods sold under a distress, could not recover under the agreement to pay the rent, as it was not in writing. But the only point taken before the Court was whether the agreement to take the bricks could be severed from the agreement as to the occupation. It is strange that the Court seems to have overlooked the fact that, quite independently of the agreement to transfer the lease, the circumstances of the case originated a claim for compensation. If the point were to arise again, I am inclined to think that the decision would not be followed.—p. 290.

Gwillim v. Stone (1811) 3 Taunt. 433, *explained*.

Stranks v. St. John (1867) L. R. 2 C. P. 376; 36 L. J. C. P. 118; 16 L. T. 283; 15 W. R. 678.

WILLES, J.—Lord Mansfield only intended to decide that the plaintiff was not entitled to recover a large sum which he had expended before he obtained the lease, and not to decide that the lessor was not bound to grant a valid lease. Law-

momentous one, and advised a settlement. The Court, therefore, certainly did not think it was decided by *Gwillim v. Stone*.—p. 379.

Stranks v. St. John, *commented on and distinguished.*

Baynes v. Lloyd (1895) 14 R. 678; 64 L. J. Q. B. 787; [1895] 2 Q. B. 610; 73 L. T. 250; 44 W. R. 328; 59 J. P. 710.—C.A. *ESHER, M.R., KAY and SMITH, L.JJ.*; *affirming* 43 W. R. 525. —*RUSSELL, C.J.*

KAY, L.J. (for the Court).—The case of *Stranks v. St. John* was referred to, in which there was an agreement in writing to let for seven years. This by 8 & 9 Vict. c. 106, could not be a lease for seven years, because it was not by deed. It was, therefore, treated as an agreement to grant a lease by deed, under which the intended lessee would be entitled to investigate the lessor's title if he had not waived that right. The action seems to have been brought by the lessee on an implied contract to make a good title, the breach alleged being that the lessor never had any right or title to let for the term. Mr. Justice Willes said in his judgment that a lease for years is really only a sale of land for that period, and all sales of land imply a stipulation that the vendor has a good title. But it is clear law that no action will lie against a vendor for damages for contracting to sell land to which he has not a good title.—*Flureau v. Thornhill* (2 W. Bl. 1078); *Bain v. Fothergill* (43 L. J. Ex. 243; L. R. 7 H. L. 158)—except perhaps to recover the expenses to which the purchaser has been put in investigating such title. The case was tried on demurrer, and is not of any value in the present discussion.—p. 683.

Camden (Marquis) v. Batterbury (1859) 28 L. J. C. P. 335; 7 C. B. (N.S.) 864; 5 Jur. (N.S.) 1405; 7 W. R. 616.—*EX. CH., followed.*

Holland (Lady) v. Kensington Vestry (1867) 36 L. J. M. C. 105; L. R. 2 C. P. 565; 17 L. T. 73; 15 W. R. 1045.—C.P.; *Adams v. Hagger* (1879) 4 Q. B. D. 480; 27 W. R. 402.—C.A.; *Driscoll v. Battersea Borough Council* (1903) 72 L. J. K. B. 564; [1903] 1 K. B. 881; 88 L. T. 795; 67 J. P. 264; 1 L. G. R. 511.—*ALVERSTON, C.J., WILLS and CHANNELL, JJ.*

Walsh v. Lonsdale (1882) 52 L. J. Ch. 2; 21 Ch. D. 9; 46 L. T. 858; 31 W. R. 109.—C.A. *JESSEL, M.R., COTTON and LINDLEY, L.JJ., followed.*
Allhusen v. Brooking (1884) 53 L. J. Ch. 520; 26 Ch. D. 559, 565; 51 L. T. 87; 32 W. R. 657.—*CHITTY, J.*

Walsh v. Lonsdale, *followed.*

Maughan, In re Monkhause, Ex parte (1885) 54 L. J. Q. B. 128; 14 Q. B. D. 956; 33 W. R. 308; 2 Morrell 25.—*FIELD, J.*

Walsh v. Lonsdale, *explained.*

Swain v. Ayres (1888) 21 Q. B. D. 289; 57 L. J. Q. B. 428; 36 W. R. 798.—C.A. *ESHER, M.R., LINDLEY and LOPES, L.JJ.*; *affirming* 52 T. P. 500. *CHARLES, J.*

Walsh v. Lonsdale, *dictum applied.*

Strong v. Stringer (1839) 61 L. T. 470.—*KEKEWICH, J.*

Walsh v. Lonsdale; Lowther v. Heaver and Swain v. Ayres, *explained.*

Foster v. Reeves (1892) [1892] 2 Q. B. 255; 61 L. J. Q. B. 763; 67 L. T. 537; 40 W. R. 695.—C.A. *ESHER, M.R., FRY and LOPES, L.JJ.*

ESHER, M.R.—But it is suggested that there are cases to show that, if equity would decree specific performance of the agreement, the case must be treated in all Courts as if such a decree had been made, so that the equitable is converted into a common law debt. Some of the words used by Sir George Jessel in *Walsh v. Lonsdale* are capable of that construction; but the ground of the decision is that, since the Judicature Act, there is only one Court, and that equity rules prevail in it. The M.R. was speaking of a Court that could give relief by decreeing specific performance because the equity rules prevail. In the same way, *Cotton, L.J.* in *Lowther v. Heaver* . . . was directing his remarks to a Court in which specific performance could be decreed. There is another case which bears on this matter: *Swain v. Ayres*. . . The equitable doctrine, as to the effect of an agreement for a lease, was there also confined to cases in the High Court, and the decision does not go the length of saying that it should apply in any other Court. These decisions do not apply to such a case as this in the County Court, and that Court had no equitable jurisdiction in the matter.—p. 257.

Walsh v. Lonsdale, *limited.*

Murgatroyd v. Silkstone and Dodsworth, &c. Co., Charlesworth, Ex parte (1896) 65 L. J. Ch. 111; 44 W. R. 198.

CHITTY, J. was of opinion that the doctrine in *Walsh v. Lonsdale* only applied where there was a tenant in possession under the agreement for a lease.

Walsh v. Lonsdale, *explained.*

Fitzgerald v. McCowan (1897) [1898] 2 Ir. R. 1.—*Q.B.D.*

Walsh v. Lonsdale, *referred to.*

Lowe v. Adams (1901) 70 L. J. Ch. 783; [1901] 2 Ch. 598; 85 L. T. 195; 50 W. R. 37.—*COZENS-HARDY, J.*

Walsh v. Lonsdale and Lowther v. Heaver (*supra*), *followed.*

Manchester Brewery Co. v. Coombes (1901) 70 L. J. Ch. 814; [1901] 2 Ch. 608.—*FARWELL, J.*

Stratton v. Pettit (1855) 16 C. B. 420; 3 C. L. R. 925; 24 L. J. C. P. 182; 1 Jur. (N.S.) 662; 3 W. R. 549.—C.P., *considered.*

Parker v. Taswell (1858) 2 De G. & J. 559; 27 L. J. Ch. 812; 4 Jur. (N.S.) 1006; 6 W. R. 608.—*L.G.*

Stratton v. Pettit, *doubted.*

Rollason v. Leon (1861) 7 Jur. (N.S.) 608; 7 H. & N. 73; 31 L. J. Ex. 96.

BRAMWELL, B.—With the greatest respect for

presume that parties, who expressed themselves as agreeing to lease, intended to work an actual demise, because there was no inconvenience attendant upon their doing so; but after the statute passed that reasoning became impossible. The Court of Common Pleas, however, held that the same reasoning applied, and I, with great respect, believe that exception may be taken to that decision.—p. 609.

• **Stratton v. Pettit, overruled.**

Tidey v. Mollett (1864) 16 C. B. (N.S.) 298; 33 L. J. Q. P. 235; 10 Jur. (N.S.) 800; 10 L. T. 380; 12 W. R. 802.

• BYLES, J.—The error which this Court fell into in *Stratton v. Pettit*, has now been corrected; and it is settled that, though void as a lease by reason of the 8 & 9 Vict. c. 106, s. 3, not being by deed, these instruments may still be held good as agreements for a tenancy.—p. 310.

Arden v. Sullivan (1850) 19 L. J. Q. B. 268;

14 Q. B. 832; 14 Jur. 712.—Q.B., *applied*.
Wyatt v. Cole (1877) 36 L. T. 613.—C.P.D.

2. LEASES.

• **Winter's Case** (1572) 3 Dyer, 308, b., and **Knigh's Case** (1588) 5 Co. Rep. 54, b., *referred to*.

Lloyd v. Keys (1900) [1901] 2 Ir. R. 416.—Q.B.D.

Tanfield v. Rogers (1594) Cro. Eliz. 340.

See Evans v. Robins (1863) 33 L. J. Ex. 68; 2 H. & C. 410; 10 Jur. (N.S.) 473; 11 L. T. 211; 12 W. R. 604.—EX. CH.

Morgan d. Dowding v. Bissell (1810) 3 Taunt. 65, *held overruled*.

Doe d. Phillip v. Benjamin (1839) 1 P. & D. 440; 9 A. & E. 644; 2 W. W. & H. 96; 8 L. J. Q. B. 117.

DENMAN, C.J.—Mansfield, C.J., it is true, held there that when the instrument appears on the face of it to be an agreement, if the parties intend by it to give a future lease, it shall be an agreement only, notwithstanding there are words of present demise, but that is overruled.—p. 444.

Wright v. Trevezant (1828) 3 Car. & P. 441; and **Richardson v. Gifford** (1834) 3 N. & M. 325; 1 A. & E. 52; 3 L. J. K. B. 122.—K.B., *distinguished*.

Doe d. Marlow v. Wiggins (1843) 4 Q. B. 367; 3 G. & D. 504; 12 L. J. Q. B. 177; 7 Jur. 529.—Q.B.

Hand v. Hall, 46 L. J. Ex. 242; 2 Ex. D. 318; 36 L. T. 765; 25 W. R. 512; *reversed*, (1877) 46 L. J. Ex. 603; 2 Ex. D. 355; 36 L. T. 765; 25 W. R. 734.—C.A.

Smyth v. Nangle (1840) 7 Cl. & F. 405; West 184; 4 Jur. 476.—H.L. (IR.); *affirming* 1 Ir. Eq. R. 119; S. C. at law, 1 Jebb & S. 199.

See Sherlock v. Kennedy (1863) 15 L. Ch. R. 160.—M.F.

Swinburne v. Milburn, 53 L. J. Q. B. 226; 50 L. T. 311; 32 W. R. 400.—C.A. BRETT, M.R. and BOWEN, L.J.; *reversed*, (1884) 54 L. J. Q. B. 6; 9 App. Cas. 844; 52 L. T. 222; 33 W. R. 325.—H.L. (E.).

Cooke v. Booth (1778) Cowp. 819, *dissented from*.

Baynham v. Guy's Hospital (1796) 3 Ves. 295.—M.R.

Cooke v. Booth, commented on.

Iggulden v. May (1806) 7 East 237; 9 Ves. 325; 3 Smith 269; 2 Bos. & P. (N.R.) 449; 8 R. R. 623. *And see* 9 R. R. 104, n.

ELLENBOROUGH, C.J. (for the Court).—The only case on the subject which has yet been decided in a Court of common law is the case of *Cooke v. Booth*, which is certainly a case very analogous to the present, both in respect of the words of covenant on which the claim to perpetual renewal is founded and also in respect of the fact of successive renewals of a lease similar in terms with the one claimed. In that case, however, the series of successive renewals from the first downwards was uniform and unbroken; in this case it is only alleged that the covenants correspond with those in various other leases successively made, which allegations as to various other leases might be true, although there should have been several instances to the contrary. The case was decided upon two grounds: first, that the parties themselves had by successive renewals of the lease, in all of which the covenants of renewal had been uniformly repeated in the same terms, put their own construction upon this covenant, and upon this first ground the judgment of Lord Mansfield, Willes, J. and Ashurst, J. proceeded. The second ground (and on this the judgment of Buller, J. proceeded) was that the authority of *Bridges v. Itchcock* (1 Bro. P. C. 522) decided the case then in question. As to the first of these grounds, inasmuch as the fact stated respecting the successive renewals is so materially different in this case from the statement in *Cooke v. Booth*, this case cannot be governed thereby, even if it were competent "in any form of action to bring upon the record the fact with reference to the former leases as explaining the contract contained in the last lease." Upon which point very grave and serious doubts have been entertained, and which it is not now necessary to decide.—p. 244.

Cooke v. Booth, inapplicable.

Swinburne v. Milburn (1884) 54 L. J. Q. B. 6; 9 App. Cas. 844; 52 L. T. 222; 33 W. R. 325.—H.L. (E.).

Baynham v. Guy's Hospital (1796) 3 Ves. 295.—M.R., *referred to*.
Sadlier v. Biggs (1853) 4 H. L. Cas. 435.—H.L. (IR.).

Sadlier v. Biggs (1853) 4 L. H. Cas. 435, *adopted*.

Wight v. Hopetoun (Earl) (1864) 4 Macq. H. L. 729.—H.L. (SC.).

Brereton v. Tuohey (1858) 8 Ir. C. L. R. 190.—EX. CH.; **Kent v. Stoney** (1858) 9 Ir. Ch. R. 249.—M.R.; and **Coey v. Pascoe** (1898) [1899] 1 Ir. R. 125.—M.R., *followed*.
Muller v. Trafford (1900) 70 L. J. Ch. 72; [1901] 1 Ch. 54; 49 W. R. 132.—**FARWELL, J.**

London City v. Mitford (1807) 14 Ves. 42, 58; 9 R. R. 234.—L.C., *referred to*.
Nicholson v. Smith (1882) 52 L. J. Ch. 191; 22 Ch. D. 640; 47 L. T. 650; 31 W. R. 471.—**PEARSON, J.**

Lennon v. Napper (1802) 2 Sch. & Lef. 682.—L.C., *followed*.
Tilley v. Thomas (1867) L. R. 3 Ch. 61; 17 L. T. 422; 16 W. R. 166.—**L.J.J.**

Lennon v. Napper, *considered*.
Nicholson v. Smith (1882) 52 L. J. Ch. 191; 22 Ch. D. 640; 47 L. T. 650; 31 W. R. 471.
PEARSON, J.—But looking at the case of **Lennon v. Napper**, I am of opinion that the passage which I have just read [on p. 635, from "The meaning of the parties" down to "only object"] must be held to apply to the practice of the Court in Ireland with regard to the renewal of leases—a practice which, at the time when Lord Redesdale delivered his judgment, had been, I think I am not wrong in stating, so-wild that the legislature thought it right to restrain it by an Act of Parliament, which was professedly passed for the purpose of stating under what circumstances only leases might be renewed, and, in fact, so far as I understand it, limiting the power which the Irish Court of Chancery had exercised formerly of granting indiscriminately renewal of leases, when the time within which they ought properly to have been renewed had elapsed (p. 196). . . . But I do not feel myself justified by what I believe to have been the practice and the decisions of this Court to adopt Lord Redesdale's views.—p. 197.

Finch v. Underwood, 33 L. T. 634.—V.-C.; *reversed*, (1876) 45 L. J. Ch. 522; 2 Ch. D. 310; 34 L. T. 779; 24 W. R. 637.—C.A.

Finch v. Underwood, *considered*.
Bastin v. Bidwell (1881) 18 Ch. D. 238; 44 L. T. 742.—**KAY, J.**

Hare v. Burges (1857) 5 W. R. 585, *distinguished*.
Finch v. Underwood (1876) 24 W. R. 657; 45 L. J. Ch. 522; 2 Ch. D. 310; 34 L. T. 779.—C.A.

JAMES, J.J.—[Distinguished on the ground that in that case there was no condition precedent.]

SELBORNE, L.C.— . . . There is [in this lease] no provision, as in **Hare v. Burges**, that any new lease shall contain a similar covenant for renewal.—p. 850.

Kane v. Hamilton (1774) Wallis (Lyne) 172.—EX.; *reversed*, (1784) 1 Ridgw. P. C. 180.—**LORD MANSFIELD.**

Keating v. Sparrow (1810) 1 Ball & B. 367.—L.C., *distinguished*.
Att.-Gen. of Victoria v. Evershank (1875) 44 L. J. P. C. 65; L. R. 6 P. C. 354; 24 W. R. 327.—P.C.

Tardiff v. Robinson (1819) 27 Beav. 629, n.—L.C.; and **Morres v. Hodges** (1860) 27 Beav. 625.—M.R., *considered and distinguished*.
Wood's Estate, In re (1870) 40 L. J. Ch. 59; L. R. 10 Eq. 572; 23 L. T. 430; 19 W. R. 59.—**JAMES, V.-C.**

Tardiff v. Robinson, *explained and distinguished*.
Maddy v. Hale (1876) 3 Ch. D. 327; 45 L. J. Ch. 791; 35 L. T. 134; 24 W. R. 1005.—C.A.

Tardiff v. Robinson, *followed*.
Ranelagh's (Lord) Will, In re (1884) 53 L. J. Ch. 689; 26 Ch. D. 590; 51 L. T. 87; 32 W. R. 714.—**PEARSON, J.**

Wood's Estate, In re (*supra*).
See Hollier v. Burne (1873) 42 L. J. Ch. 789; L. R. 16 Eq. 163; 28 L. T. 531; 21 W. R. 805.—L.C.

Wood's Estate, In re, and **Hollier v. Burne**, *applicable*.
Maddy v. Hale (1876) 45 L. J. Ch. 791; 3 Ch. D. 327; 35 L. T. 134; 24 W. R. 1005.—C.A. [See extract, *supra*.]

Wood's Estate, In re; **Hollier v. Burne**; and **Maddy v. Hale**, *followed*.
Barber's Settled Estates, In re (1881) 50 L. J. Ch. 769; 18 Ch. D. 624; 45 L. T. 433; 29 W. R. 909.—**FRY, J.**

Wood's Estate, In re; **Hollier v. Burne**; and **Maddy v. Hale**, *followed*.
Ranelagh's (Lord) Will, In re (1884) 53 L. J. Ch. 689; 26 Ch. D. 590; 51 L. T. 87; 32 W. R. 714.—**PEARSON, J.**

Mostyn (Lord) v. Fitzsimmons (1902) 71 L. J. K. B. 89; [1902] 1 K. B. 512.—**WRIGHT, J.**; *reversed*, (1903) 72 L. J. K. B. 164; [1903] 1 K. B. 349; 88 L. T. 7; 51 W. R. 257.—C.A.

Berkeley v. Hardy (1826) 8 D. & R. 102; 5 B. & C. 355; 4 L. J. (O.S.) K. B. 184; 29 R. R. 261.—**K.B.**; **Cardwell v. Lucas** (1836) 2 M. & W. 111; 6 L. J. Ex. 52.—

Cooch v. Goodman, explained.

Doe d. Marlow v. Wiggins (1843) 4 Q. B. 367; 3 G. & L. 504; 12 L. J. Q. B. 177; 7 Jur. 529.—Q.B.

Cooch v. Goodman, questioned.

Wheatley v. Boyd (1851) 7 Ex. 20.

PARKE, B.—The authority of that decision may be questionable. All the law on this subject was considered in a late case in this Court: *Pitman v. Woodbury* (3 Ex. 4).—p. 21.

Pitman v. Woodbury (1848) 3 Ex. 4, *applied*.

Wheatley v. Boyd (1851) 7 Ex. 20.—EX.; Swatman v. Ambler (1852) 8 Ex. 72; 22 L. J. Ex. 81.—EX.

Pitman v. Woodbury and Swatman v. Ambler, distinguished.

Morgan v. Pike (1854) 14 C. B. 473; 2 C. L. R. 696; 23 L. J. C. P. 64; 2 W. R. 193.—C.P.

Swatman v. Ambler, adopted but distinguished.

Rabington v. O'Connor (1887) 20 L. R. Ir. 246.—Q.B.D.

Burchell v. Clark, 45 L. J. C. P. 671; 1 C. P. D. 602; 35 L. T. 372; 25 W. R. 8.—C.P.D.; *reversed*, (1876) 46 L. J. C. P. 115; 2 C. P. D. 88; 35 L. T. 690; 25 W. R. 334.—C.A.

Friary, Holroyd and Healey's Breweries v. Singleton (1898) 68 L. J. Ch. 13; [1899] 1 Ch. 86; 79 L. T. 465; 47 W. R. 93.—ROMER, J.; *reversed on facts*, (1899) 68 L. J. Ch. 622; [1899] 2 Ch. 261; 81 L. T. 101; 47 W. R. 662.—G.A. LINDLEY, M.R., SIR F. H. JEUNE and RIGBY, L.J.

Feret v. Hill (1854) 23 L. J. C. P. 185; 15 C. B. 207; 2 C. L. R. 1366; 18 Jur. 1014; 2 W. R. 493.—C.P.

Distinguished, Taylor v. Chester (1869) 38 L. J. Q. B. 225; L. R. 4 Q. B. 309, 314; 10 B. & S. 237; 21 L. T. 359.—Q.B.; *adopted*, Fisher v. Tully (1878) 47 L. J. P. C. 59; 3 App. Cas. 627, 639; 38 L. T. 236.—P.C.

Cosser v. Collinge (1832) 3 Myl. & K. 283; 1 L. J. Ch. 130.—M.R., *explained*.

Hyde v. Warden (1877) 47 L. J. Ex. 121; 3 Ex. D. 72; 37 L. T. 567; 26 W. R. 201.—C.A.

BRETT, L.J.—... We think it may be considered as settled that the principle of that case can only be applied where, as, indeed, was the fact in *Cosser v. Collinge* the defendant had a fair opportunity of ascertaining for himself the provisions of the original lease: see *Grosvenor v. Green* (28 L. J. Ch. 173) and *Smith v. Capron* (19 L. J. Ch. 322). In the present case there was no such fair opportunity before the copy lease was sent to the defendant's solicitor.—p. 127.

Cosser v. Collinge, distinguished.

Porter v. Drew (1880) 49 L. J. C. P. 482; 5 C. P. D. 143; 42 L. T. 151; 28 W. R. 672; 44 L. J. 267.—C.P.D.

Andrews v. Hailes and Doe d. Croft v. Tidbury, principle applied.

Att.-Gen. v. Tomline (1877) 46 L. J. Ch. 654; 5 Ch. D. 750, 766; 36 L. T. 684; 25 W. R. 802.—FRY, J.

Ward (Lord) v. Lumley (1860) 22 L. J. Ex. 322; 5 H. & N. 87; 1 L. T. 376; 8 W. R. 184.—EX.

Approved, Ward (Lord) v. Lumley (1860) 29 L. J. Ex. 322; 5 H. & N. 656; 2 L. T. 158; 8 W. R. 184.—EX.; *dictum explained and not applied*, Shaw v. Lomas (1888) 59 L. T. 477; 52 J. P. 821.—FIELD and WILLS, JJ.

3. YEARLY TENANCIES.

Browne v. Warner (1807, 1808) 14 Ves. 156, 409.—L.C., *followed*.

King's Leasehold Estates in re, East London Ry., Ex parte (1873) L. R. 16 Eq. 521; 29 L. T. 268; 21 W. R. 831.—MALINS, V.-C.

Browne v. Warner and King's Leasehold Estates, in re, East London Ry., Ex parte, distinguished.

Wood v. Beard (1876) 2 Ex. D. 30; 46 L. J. Q. B. 100; 35 L. T. 866.

CLEASBY, B.—These authorities do not apply to the present case, by reason of the additional condition (in the present case) "so long as the lessor has power to let."

Browne v. Warner and Wood v. Beard, distinguished.

King's Leasehold Estates, in re, East London Ry., Ex parte, adopted.

Kuscl v. Watson (1878) 47 L. J. Ch. 825; 11 Ch. D. 129.—V.-C.; *affirmed*, (1879) 48 L. J. Ch. 413; 11 Ch. D. 129; 27 W. R. 744.—C.A.

Browne v. Warner, followed.

King's Leasehold Estates, in re, East London Ry., Ex parte, commented upon.

Kuscl v. Watson, distinguished.

Cheshire Lines Committee v. Lewis (1880) 50 L. J. Q. B. 121; 44 L. T. 293; 45 J. P. 404.—C.A.

BRETT, L.J.—*Kuscl v. Watson* is not in point here, because there, beyond all doubt, there was an express agreement for a lease of which specific performance could be granted. I do not express an opinion whether the decision in *Re King's Leasehold Estates* was right or wrong, but I must say that in my view Vice-Chancellor Malins did not truly interpret what was said by Lord Eldon in *Browne v. Warner*.—p. 129.

Browne v. Warner, followed.

Zimble v. Abrahams (1903) 72 L. J. K. B. 103; [1903] 1 K. B. 577; 88 L. T. 46; 51 W. R. 343.—C.A.

Cheshire Lines Committee v. Lewis (supra), considered.

Zimble v. Abrahams (1903) 72 L. J. K. B. 103; [1903] 1 K. B. 577; 88 L. T. 46; 51 W. R. 343.—C.A.

Parker v. Taswell (1858) 27 L. J. Ch. 812; 2 De G. & J. 559; 4 Jur. (N.S.) 1006; 6 W. R. 608.—L.C.

Doe d. Cates v. Somerville (1826) 6 B. & C. 126; 9 D. & R. 100; 5 L. J. (o.s.) K. B. 28.—K.B., *adopted*.
Reg. v. Halifax (1855) 24 L. J. M. C. 65; 4 El. & Bl. 647; 3 C. L. R. 843; 1 Jur. (N.S.) 181; 3 W. R. 239.—Q.B.

Doe d. Cates v. Somerville, *followed*.
Keefe v. Walsh (1880) 8 L. R. Ir. 184.—C.A.

Oakley v. Monck (1866) 4 H. & C. 251; 35 L. J. Ex. 87; L. R. 1 Ex. 159; 12 Jur. (N.S.) 213; 14 L. T. 20; 14 W. R. 406.—EX. CH., *distinguished*.
Wyatt v. Cole (1877) 36 L. T. 613.—C.P.D.

Bennett v. Ireland (1858) El. Bl. & El. 326; 28 L. J. Q. B. 48; 4 Jur. (N.S.) 1104.—Q.B., *adopted*.
Swain v. Ayres (1888) 57 L. J. Q. B. 428; 21 Q. B. D. 289; 36 W. R. 798.—C.A. BSHER, M.R., LINDLEY and LOPES, L.J.J.; *affirming* 52 J. P. 500.—CHARLES, J.

Bishop v. Howard (1823) 3 D. & R. 293; 2 B. & C. 100; 1 L. J. (o.s.) K. B. 243; 26 L. R. 291.—K.B., *dicta considered*.
Doe d. Clarke v. Smarridge (1845) 7 Q. B. 957; 14 L. J. Q. B. 327; 9 Jur. 781.—Q.B.

Bishop v. Howard, *distinguished*.
Doe d. Lord v. Crago (1848) 6 C. B. 90; 17 L. J. C. P. 263.—C.P.

Doe d. Davenish v. Moffatt (1850) 15 Q. B. 257; 19 L. J. Q. B. 438; 14 Jur. 935.—Q.B., *followed*.
Tress v. Savage (1854) 4 E. & B. 36; 23 L. J. Q. B. 339; 2 C. L. R. 1315; 18 Jur. 680; 2 W. R. 564.—Q.B.

Tress v. Savage, *followed*.
Martin v. Smith (1874) 43 L. J. Ex. 42; L. R. 9 Ex. 50; 30 L. T. 268; 22 W. R. 336.—EX.

Freeman v. Jewry (1826) M. & M. 19.—K.B., *questioned*.

Woodcock v. Nuth (1832) 8 Bing. 170; 1 M. & Scott, 317.—C.P.

ALDERSON, J.—If this case depended on the principle said to have been laid down by Lord Tenterden in *Freeman v. Jewry*, I should pause before I gave it my assent. But it is not necessary to decide that point; for though under some circumstances a man may become tenant by act of law, the lessor may afterwards accept another tenant in his stead.—p. 174.

• **Right d. Flower v. Derby** (1786) 1 Term Rep. 159; 1 R. R. 169; and **Boe d. Durant v. Doe** (1830) 6 Bing. 574; 4 M. & P. 391; 8 L. J. (o.s.) C. P. 227; 31 R. R. 499.—C.P., *followed*.
Morgan v. Davies (1878) 3 C. P. D. 260; 26 W. R. 816.—C.P.D.

Right d. Flower v. Derby, *followed*.
Dougal v. McCarthy (1893) 62 L. J. Q. B. 462; [1893] 1 Q. B. 736; 4 R. 402; 68 L. T. 699; 41 W. R. 484; 57 J. P. 597.—C.A. BSHER, M.R., LOPES and SMITH, L.J.J.

Rogers v. Kingston Dock Co. (1864) 34 L. J. Ch. 165; 11 L. T. 463.—L.C., *distinguished*.
Morgan v. Davies (1878) 3 C. P. D. 260; 26 W. R. 816.—C.P.D.

Tomkins v. Lawrance (1834) 8 Car. & P. 729, *discussed*.
Reg. v. Thornton (Township) (1860) 29 L. J. M. C. 162; 2 El. & El. 788; 6 Jur. (N.S.) 799; 2 L. T. 212; 3 W. R. 435.

CROMPTON, J.—In this case it was considered that a tenancy from year to year recommenced every year; but the contrary was held in *Doe d. Ingh v. Wood* (14 M. & W. 682; 15 L. J. Ex. 41). . . . Though some doubts may once have existed as to whether, in the case of a tenancy from year to year, there was a fresh tenancy at the end of each year, it is now clear beyond all doubt that the same tenancy continues till the one or other of the parties determines it at his pleasure: and the same principle must apply to any shorter tenancy, as from week to week.—p. 164.

Tenancies for Smaller Terms.

• **Carpenter v. Colins** (1604) Yelv. 73, *principle applied*.
Pinhorn v. Souster (1853) 8 Ex. 763; 22 L. J. Ex. 266; 16 Jur. 1001; 1 W. R. 336.—EX.

Doe d. Jones v. Jones (1830) 10 B. & C. 718; 8 L. J. (o.s.) K. B. 310.—K.B.; and **Doe d. Nicholl v. M. Kaeg** (1830) 10 B. & C. 721.—K.B., *applied*.
Spurgin v. White (1860) 7 Jur. (N.S.) 15; 3 L. T. 609; 9 W. R. 266.—V.-C.

Day v. Day (1871) 40 L. J. P. C. 35; L. R. 3 P. C. 751; 24 L. T. 853; 19 W. R. 1017.—P.C., *dictum doubted*.
Jarman v. Hale (1899) 68 L. J. Q. B. 681; [1899] 1 Q. B. 994.—DARLING and CHANNELL, JJ.
 CHANNELL, J.—It is not necessary to express a definite opinion now as to whether the passage which has been cited from the judgment of the P. C. in *Day v. Day* is good law, and whether it is consistent with the judgment of the Ex. Ch. in *Turner v. Doe d. Bennett* (9 M. & W. 643; 11 L. J. Ex. 453). I will only say that I am not myself clear that the passage is well founded. It seems to me that when a definite acknowledgment has been obtained from the tenant that he is holding with the owner's permission, it is all that is wanted.—p. 683.

4. RENT.

Vesey v. Bodkin (1825) Jones 139.—EX.; *reversed*, (1830) 4 Bli. (N.S.) 64; 1 Dow & Cl. 456.—H.L. (IR.).

Browne v. Amyot (1844) 3 Hare 173; 13 L. J. Ch. 232.—V.-C., *approved*.
Beer v. Beer (1852) 12 C. B. 60; 21 L. J. C. P.

Brown v. Candler (1831) 9 L. J. (o.s.) Ch. 212.—L.C., *followed*.
Mills v. Trumper (1869) L. R. 4 Ch. 320; 20 L. T. 384; 17 W. R. 428.—L.JJ.

Fitzgerald v. Portarlington (Lord) (1835) 1 Jones Ir. Ex. R. 431.—EX. EQ., *explained*.

Smith and Hartogg, In re, Official Receiver, Ex parte (1895) 15 R. 641; 73 L. T. 221; 44 W. R. 79; 2 Manson 400.

VAUGHAN WILLIAMS, J.—All that was decided in *Fitzgerald v. Portarlington* (Lord) was that the tenant had an equity to have the ejectment restrained, he being ready and willing to carry out the substituted agreement. . . . What you have here is not an agreement for a new tenancy, but a collateral agreement to accept payment of rent at a reduced rate if paid at the proper times, and it has not been paid at the proper times. The consequence of that is, that the right to the rent reserved under the lease remains unaffected, and also the right of distress incident to such rent.—p. 642.

Hearn v. Tomlin (1793) 1 Peake N. P. 253.—K.B.; **Kirtland v. Pounsett** (1809) 2 Taunt. 145; and **Hull v. Vaughan** (1818) 6 Price 157.—EX., *observed upon*.
Winterbottom v. Ingham (1845) 7 Q. B. 611; 14 L. J. Q. B. 298; 10 Jur. 4.—Q.B.

Paradine v. Jane (1647) Aleyn, 26.—K.B.
Rule applied, **Atkinson v. Ritchie** (1809) 30 East, 530.—K.B.; **Lloyd v. Guibert** (1865) 35 L. J. Q. B. 74; L. R. 1 Q. B. 115; 6 B. & S. 100; 13 L. T. 602.—EX. CH.; *discussed*, **Clifford** (Lord) v. **Watts** (1870) 40 L. J. C. P. 36; L. R. 5 C. P. 577; 22 L. T. 717; 18 W. R. 925.—C.P.; *adopted*, **Carstairs v. Taylor** (1871) 40 L. J. Ex. 129; L. R. 6 Ex. 217; 19 W. R. 723.—EX.; *questioned and not applied*, **The Teutonia** (1871) 41 L. J. Adm. 4; L. R. 3 A. & E. 394, 411.—ADM. (*affirmed* P.C., *see Shipping*); **Limited Jackson v. Union Marine Insurance Co.** (1874) 44 L. J. G. P. 27, 39; L. R. 10 C. P. 125, 139; 31 L. T. 789; 23 W. R. 169; 2 Asp. M. C. 435.—EX. CH.; *explained*, **Wear River Commissioners v. Adamson** (1877) 47 L. J. Q. B. 193; 2 App. Cas. 743; 37 L. T. 543; 26 W. R. 217.—H.L. (E.); *rule applied* **Sheffield Waterworks Co. v. Carter** (1882) 51 L. J. M. C. 97; 8 Q. B. D. 632; 30 W. R. 889; 46 J. P. 548.—**MATHEW and CAVE, JJ.**; **Jacobs v. Crédit Lyonnais** (1884) 53 L. J. Q. B. 156; 12 Q. B. D. 589; 50 L. T. 194; 32 W. R. 761.—C.A.

Smith v. Raleigh (1814) 3 Camp. 513, *applied*.
Upton v. Townsend (1855) 17 C. B. 30; 25 L. J. C. P. 44; 1 Jur. (N.S.) 1089; 4 W. R. 56.—C.P.

Stokes v. Cooper (1814) 3 Camp. 514, n., *questioned*.
Reeve v. Bird (1834) 1 C. M. & R. 31; 4 Tyr. 612; 3 L. J. Ex. 282.—**PARKE, B.**

Swansea Bank v. Thomas (1879) 48 L. J. Ex. 344; 4 Ex. D. 94; 40 L. T. 558; 27 W. R. 491.—EX. D., *considered*.
Hopkinson v. Lovering (1888) 52 L. J. Q. B. 391; 11 Q. B. D. 92; 47 J. P. 519.—**DYNNAN, J.**

Swansea Bank v. Thomas, followed.
Wilson, In re, Hastings (Lord), *Ex parte* (1895) 62 L. J. Q. B. 628; 5 R. 455; 10 Morrell, 219.—**V. WILLIAMS, J.**

Swansea Bank v. Thomas, explained.
Wilson, In re, Hastings (Lord), *Ex parte, explained and distinguished*.
Howell, In re, Mandelberg, Ex parte (1895) 64 L. J. Q. B. 454; [1895] 1 Q. B. 844; 15 R. 372; 72 L. T. 472; 43 W. R. 447; 2 Manson, 192.—**VAUGHAN WILLIAMS, J.**

Swansea Bank v. Thomas and Wilson, In re, Hastings, Ex parte, approved.
Glass v. Patterson [1902] 2 Ir. R. 660.—K.B.D., **KENNY, J.**, *dissenting*.

Binns, In re, Hale, Ex parte (1875) 45 L. J. Bk. 21; 1 Ch. D. 285; 33 L. T. 706; 24 W. R. 300.—BK., *followed*.
Howell, In re, Mandelberg, Ex parte (1895) 64 L. J. Q. B. 454; [1895] 1 Q. B. 844; 15 R. 372; 72 L. T. 472; 43 W. R. 447; 2 Manson 192.—**WILLIAMS and KENNEDY, JJ.**

Att.-Gen. v. Stephens, 24 L. J. Ch. 694; 1 K. & J. 724; 3 Eq. R. 1072; 1 Jur. (N.S.) 1039; 3 W. R. 649.—V.-C.; *reversed*, (1855) 6 De G. M. & G. 111; 25 L. J. Ch. 888; 2 Jur. (N.S.) 51; 4 W. R. 191.—L.C.

Williams v. Bartholomew (1798) 1 Bos. & P. 326; 4 R. R. 81, *adopted*.
Doe d. Lord v. Crngo (1848) 6 C. B. 90; 17 L. J. C. P. 263.—C.P.

Hitchings v. Thompson (1850) 5 Ex. 50; 19 L. J. Ex. 146, *considered*.
Att.-Gen. v. Stephens (1855) 25 L. J. Ch. 888; 6 De G. M. & G. 111; 2 Jur. (N.S.) 51; 4 W. R. 191.—L.C.

Hitchings v. Thompson and Cox v. Knight (or **Knight v. Cox**), 18 C. B. 645; 25 L. J. C. P. 314, *applied*.
Carlton v. Bowcock (1884) 51 L. T. 659.—**CAVE, J.**

Crouch v. Fastolfe (1680) Sir T. Raym. 418, *distinguished*.
Buskin v. Edmunds (1595—1598) Cro. Eliz. 415, 535, *commented upon adversely*.
Haldane v. Johnson (1853) 22 L. J. Ex. 264; 8 Ex. 689; 17 Jur. 937.—EX.

Fryer v. Coombs (1840) 11 A. & E. 403; 4 P. & D. 120, n.—Q.B., *approved*.
Vigers v. St. Paul's Dean (1849) 19 L. J. Q. B. 84; 14 Q. B. 920; 14 Jur. 1017.—EX. CH.

Howard v. Shaw (1841) 8 M. & W. 118, 122.—EX., *observed upon*.
Crouch v. Tregonning (1872) 41 L. J. Ex. 97; L. R. 7 Ex. 88; 26 L. T. 286; 20 W. R. 536.—EX.

Haldane v. Johnson (1853) 22 L. J. Ex. 264; 8 Ex. 689; 17 Jur. 937.—EX. *referred to*.

Bayley v. Bradley (1847) 5 C. B. 396; 16 L. J. C. P. 206.—C.P., *adopted*.

Leigh v. Dickeson (1883) 53 L. Q. B. 120; 12 Q. B. D. 194.—**POLLOCK, B.**; **Leigh v. Dickeson** (1884) 54 L. J. Q. B. 18; 15 Q. B. D. 60; 52 L. T. 790; 33 W. R. 538.—C.A.

Poulteney v. Holmes (1721) 1 Str. 405.—K.B., *adopted*.

Baker v. Gostling (1834) 1 Bing. (N.C.) 19; 3 J. C. P. 292.—C.P.

Poulteney v. Holmes, *questioned*.

Brett v. Rolph (1845) 14 M. & W. 348; 14 L. J. Ex. 308.—EX.

PARKE, B.—The case of *Poulteney v. Holmes* is certainly a very doubtful authority. If this objection could be cured there ought not to be a new trial; and it might be cured if *Poulteney v. Holmes* be good law; but it is very questionable whether that case be good law, especially since the decision of the Court of Common Pleas in *Parmenter v. Webber* (8 Taunt. 593). It is very difficult to say that, because an agreement is by parol, and therefore cannot operate as an assignment, it is to be construed to give a less interval than the parties intended. I think that doctrine cannot be sustained, and therefore that, if the plaintiff went down to a new trial, there would be a verdict against her.—p. 352.

Poulteney v. Holmes, *sustained*.

Pollock v. Stacey (1847) 9 Q. B. 1033; 16 L. J. Q. B. 132; 11 Jur. 267.—Q.B.

DENMAN, C.J. (for the Court).—Upon this review of the authorities, we do not consider that the case of *Poulteney v. Holmes* has been overruled.—p. 1035.

Pollock v. Stacey, *considered and distinguished*.

Beardman v. Wilson (1868) L. R. 4 Q. P. 57; 38 L. J. C. P. 91; 19 L. T. 282; 17 W. R. 54.—C.P.

[The question in the case was whether an underlease for the whole of the residue of the original term necessarily amounts to an assignment, and it was argued that in *Pollock v. Stacey* it was held that the relation of landlord and tenant may be created by a lease of all the lessor's interest.]

BOVILL, C.J.—No doubt the question was sought to be in some degree raised in *Pollock v. Stacey*, but there the action was brought for use and occupation, and it was not necessary that there should have been any actual demise or assignment. The only question was whether the person in occupation was liable to payment. There was no deed in that case which could act as an assignment, and the Court say, "the parties intended to contract the relation of landlord and tenant. This they were at liberty to do by law; and we therefore carry their lawful intentions into effect." The case was decided on its special circumstances and is no authority in support of Mr. Pollock's contention.

Newcome v. Hardy (1690) Carth. 161; and **Lloyd v. Langford** (1677) 2 Mod. 174.

Newcome v. Hardy, *applied*.

Williams v. Hayward (1859) 1 El. & El. 1040; 28 L. J. Q. B. 374; 5 Jur. (N.S.) 1417; 5 W. R. 563.—Q.B.

Braithwaite v. Cooksey (1790) 1 H. Bl. 465; 2 R. R. 807.—*distinguished*.

Turner v. Barnes (1862) 31 L. J. Q. B. 170; 2 B. & S. 435; 9 Jur. (N.S.) 199; 10 W. R. 561.—Q.B.

Keen v. Priest (1859) 28 L. J. Ex. 157; 4 H. & N. 236; 7 W. R. 376.—EX., *applied*.

Johnson v. Lancashire and Yorkshire Ry. (1878) 3 C. P. D. 499; 39 L. T. 448; 27 W. R. 459.—C.P.D.

Anderson v. Midland Ry. (1861) 30 L. J. Q. B. 94; 3 El. & El. 614; 7 Jur. (N.S.) 411; 3 L. T. 809.—Q.B., *discussed and approved*.

Kearsley v. Phillips (1883) 52 L. J. Q. B. 581; 11 Q. B. D. 621; 49 L. T. 435; 31 W. R. 909.—C.A.

5. USE AND OCCUPATION.

Standen v. Christmas (1841) 10 Q. B. 135; 16 L. J. Q. B. 265; 11 Jur. 694.—Q.B., *held erroneous*.

Churchward v. Ford (1857) 26 L. J. Ex. 354; 2 H. & N. 446; 5 W. R. 831.—EX.

BRAMWELL, B.—In *Hellier v. Sillico* (*infra*) the Court thought that the occupation was by permission of the plaintiff. In *Standen v. Christmas* there had not only been a notice to pay rent to the plaintiff, but the defendant had afterwards paid rent to him; and the Court were in error in saying that to give the action for use and occupation the relation of landlord and tenant need not subsist between the parties. The word "landlord" implies not the mere lordship or ownership of the soil, but the relationship to a tenant; and in Webster's Dictionary a landlord is defined to be a person who has tenants under him. And so in Johnson's Dictionary.—p. 356.

Standen v. Christmas, *adopted*.

Smith v. Eggington (1874) 43 L. J. C. P. 140; L. R. 9 C. P. 145; 30 L. T. 521.—C.P.; and **Phillips v. Miller** (1875) 44 L. J. C. P. 265; L. R. 10 C. P. 420.—EX. CH.

Hellier v. Sillico (1850) 19 L. J. Q. B. 295; 14 Jur. 573.—Q.B.

Referred to Churchward v. Ford (1857) 26 L. J. Ex. 354; 2 H. & N. 446; 5 W. R. 831.—EX., *supra*; *adopted Phillips v. Homfray* (1883) 52 L. J. Ch. 833; 24 Ch. D. 439; 49 L. T. 5; 32 W. R. 6.—C.A.

Churchward v. Ford (1857) 26 L. J. Ex. 354; 2 H. & N. 446; 5 W. R. 831.—EX., *approved and applied*.

Howe v. Scarriott (1859) 28 L. J. Ex. 325; 4 H. & N. 723.—EX.; **Sloper v. Saunders** (1860) 29 L. J. Ex. 275.—EX.; **Phillips v. Homfray** (1883) 52 L. J. Ch. 833; 24 Ch. D. 439; 49 L. T. 5; 32 W. R. 6.—C.A.

Coggan v. Warwick (1852) 3 Car. & K. 40.—ERLE, J.; and **Smith v. Eldridge** (1854) 15 C. B. 236; 2 C. L. R. 855.—C.P., *followed*.

Birch v. Wright, *observation cited*.

De Nichols v. Saunders (1870) 39 L. J. C. P. 297; L. R. 5 C. P. 589; 22 L. T. 661; 18 W. R. 1106.—C.P.

Birch v. Wright, *adopted*.

Phillips v. Homfray (1883) 52 L. J. Ch. 833; 24 Ch. D. 439; 49 L. T. 5; 32 W. R. 6.—C.A.

Balls v. Westwood (1805) 2 Camp. 11, *over-ruled*.

Mountnoy v. Collier (1853) 1 El. & Bl. 630; 22 L. J. Q. B. 124; 17 Jur. 503; 1 W. R. 179.

ERLE, J.—**Balls v. Westwood** is an authority to the contrary; but there are numerous authorities to show that a tenant is not estopped from showing that his landlord's title has expired. —p. 639.

Tomlinson v. Day (1821) 5 Moore, 558; 2 Br. & B. 680; 23 R. R. 541.—C.P., *dis-tinguished*.

Neale v. Mackenzie (1837) 6 L. J. Ex. 263; 1 M. & W. 747; 1 Gale, 319.—EX. CH.

Harding v. Crethorn (1793) 1 Esp. 57, *approved*.

Christy v. Tancred (1842) 9 M. & W. 438; 11 L. J. Ex. 109.—EX., *considered*.

Henderson v. Squire (1869) 38 L. J. Q. B. 73; L. R. 4 Q. B. 170; 10 B. & S. 183; 19 L. T. 601; 17 W. R. 519.—Q.B.

BLACKBURN, J.—**Christy v. Tancred** was the case of a tenant holding over, and in that case the Court of Exchequer, including Parke, B., held that the co-tenants were liable in an action for use and occupation. In the same case, as reported 9 M. & W. p. 447, Parke, B. doubted whether there might not be a distinction between the case of a co-tenant and that of an under-tenant, but no doubt was ever raised whether Lord Kenyon was right in what he laid down.—p. 75.

Evans v. Evans (1835) 3 A. & E. 132; 1 H. & W. 239.—K.B., *explained and dis-tinguished*.

Fisher v. Marsh (1865) 6 B. & S. 411; 34 L. J. Q. B. 177; 11 Jur. (N.S.) 795; 12 L. T. 604; 13 W. R. 834.—Q.B.

Evans v. Evans and Fisher v. Marsh con-sidered.

Wood v. Baxter (1883) 49 L. T. 45.—Q.B.D.

Pinero v. Judson (1829) 3 M. & P. 497; 6 Bing. 206; 8 L. J. (O.S.) C. P. 19; 31 R. R. 388.—C.P., *applied*.

Atkins v. Humphrey (1846) 2 C. B. 654; 3 D. & L. 612; 15 L. J. C. P. 120.—C.P.

How v. Kennett (1835) 4 L. J. K. B. 220; 3 A. & E. 659; 5 N. & M. 1; 1 H. & W. 391.—K.B., *adopted*.

White v. Hunt (1870) 40 L. J. Ex. 23; L. R. 6 Ex. 23, 34; 23 L. T. 559.—EX. [See extract, ante, vol. i, col. 192.]

Atkins v. Humphrey (1846) 2 C. B. 654; 3 D. & L. 612; 15 L. J. C. P. 120, *dictum disapproved*.

a case there is no reason why the party so taking, inasmuch as he keeps another from the occupation, should not be liable under the statute.”]

PARKE, B.—That *dictum* is certainly at variance with the cases of *Nation and Tozer* (1 C. M. & R. 172) and *Edge v. Strafford* (1 C. & J. 397), in the latter of which it was expressly held that an entry is necessary.—p. 554.

Pope v. Biggs (1829) 7 L. J. (O.S.) K. B. 246; 9 B. & C. 245; 4 Man. & Ry. 193.

Commented on **Evans v. Elliot** (1838) 9 A. & E. 342.—Q.B.; *approved* **Boodle v. Cambell** (1844) 13 L. J. C. P. 142; 7 Man. & G. 386; 8 Scott (N.R.) 104; 2 D. & L. 66; 8 Jur. 475.—C.P.; *observed upon* **Wilton v. Dunn** (1851) 21 L. J. Q. B. 60; 17 Q. B. 294; 15 Jur. 1104.—Q.B.

Waddilove v. Barnett (1836) 2 Bing. (N.C.) 538; 4 D. P. C. 347; 2 Scott 763; 1 Hodges 395; 5 L. J. C. P. 145.—C.P., *commented on*.

Evans v. Elliot (1838) 9 A. & E. 342.—Q.B.

Waddilove v. Barnett, *disapproved*.

Wilton v. Dunn (1851) 17 Q. B. 294; 21 L. J. Q. B. 60; 15 Jur. 1104.

PATTESON, J.—I cannot comprehend how a right of action for the rents already due should be vested in the mortgagee before the notice; and the notice should undo that vested right of action, and set up in lieu of it a right of action in the mortgagee. It was said so in *Waddilove v. Barnett*, but that case is beyond my comprehension.—p. 301.

6. TERMINATION OF TENANCY.

Notice to Quit.

Thunder d. Weaver v. Belcher (1803) 3 East, 449.—K.B., *adopted*.

Gibbs v. Cruikshank (1873) 42 L. J. C. P. 273; L. R. 8 C. P. 454; 28 L. T. 735; 21 W. R. 734.—C.P.

Doe d. Grubb v. Grubb (1826) 8 L. J. (O.S.) K. B. 321; 5 R. & C. 457.—K.B., *dis-cussed*.

Howard v. Howard (1892) 32 L. R. Ir. 454.—Q.B.D.; *affirmed* C.A.

Doe d. Gray v. Stanion (1836) 1 M. & W. 695; 2 Gale 154; 5 L. J. Ex. 253.—EX.; and **Doe d. Calvert v. Frowd** (1828) 4 Bing. 557; 1 M. & P. 480; 29 R. R. 624.—C.P., *observations applied*.

Vivian v. Moat (1881) 50 L. J. Ch. 331; 16 Ch. D. 730; 44 L. T. 210; 29 W. R. 504.—EX. J.

Doe d. Gray v. Stanion, *dictum applied*.

Ellis v. Rogers (1885) 29 Ch. D. 661; 53 L. T. 377.—C.A.

Wilkinson v. Calvert (1878) 47 L. J. C. P. 679; 3 C. P. D. 360; 38 L. T. 813; 26 W. R. 829.—COLERIDGE, C.J., *followed*.

Barlow v. Teal (1885) 54 L. J. Q. B. 564; 15

Doe d. Mann v. Walters (1830) 40 B. & C. 626; 5 M. & Ry. 357; 8 L. J. (O.S.) K. B. 297.—K.B. *applied*.

Doe d. Lyster v. Goldwin (1841) 2 Q. B. 148; 1 G. & D. 163; 10 L. J. Q. B. 275.—Q.B.

Doe d. Mann v. Walters, *considered*.

Ancona v. Marks (1862) 31 L. J. Ex. 163; 7 H. & N. 686; 8 Jur. (N.S.) 516; 5 L. T. 753; 10 W. R. 251.—EX.

Doe d. Lyster v. Goldwin, *discussed*.

Doe d. Parsley v. Day (1841) 12 L. J. Q. B. 86; 2 Q. B. 147; 2 G. & D. 757; 6 Jur. 913.—Q.B.

Doe d. Lyster v. Goldwin, *observed upon*.

Jones v. Phipps (1868) L. R. 3 Q. B. 567; 37 L. J. Q. B. 198; 18 L. T. 813; 16 W. R. 1044; 9 B. & S. 761.

LUSH, J. (for the Court).—**Doe v. Goldwin** was cited, where Lord Denman, C.J., in delivering the judgment of the Court, laid it down that a mortgagor, who had mortgaged subsequently to the demise to the defendant, could not give a notice to quit in his own name; the case, however, did not call for a decision upon that point. . . .

This *dictum* had been adopted in the text-books as an authority for the proposition that a notice by an agent is bad if it does not state that it is given by authority, or in the name of the principal,—a proposition we think too general, and which requires the qualification we have adverted to.—p. 572.

Doe d. Lyster v. Goldwin, *followed*.

Dibbins v. Dibbins (1896) 65 L. J. Ch. 724; [1896] 2 Ch. 348; 75 L. T. 137; 44 W. R. 595.—CHITTY, J.

Doe d. Huntingtower (Lord) v. Culliford (1824) 4 D. & R. 249, *disapproved*.

Doe d. Richmond Corporation v. Morphet (1845) 7 Q. B. 577; 14 L. J. Q. B. 345; 9 Jur. 776.

DENMAN, C.J.—I am of opinion that this case is not good law. I cannot agree with Bayley, J. in altering the language for the purpose of making the notice good.—p. 579.

Doe d. Huntingtower (Lord) v. Culliford, *approved*.

Doe d. Richmond Corporation v. Morphet, *dissented from*.

Wride v. Dyer (1899) 69 L. J. Q. B. 17; [1900] 1 Q. B. 23; 81 L. T. 453; 48 W. R. 73; 64 J. P. 118.—RIDLEY and DARLING, JJ.

RIDLEY, J.—I agree . . . with the rule laid down by Bayley, J. in **Doe v. Culliford**, that we must look at the intention of the landlord, and that when language is used which leaves the effect of the notice open to doubt, the rule of construction is to make it sensible and not insensible. In **Doe v. Morphet**, however, **Doe v. Culliford** was treated as bad law, and the principles of construction laid down in the judgment of Bayley, J. were said to be incorrect. I cannot agree with that. As it seems to me the judgment of Bayley, J. in **Doe v. Culliford** was quite right, and I can find nothing in the principles of inter-

4 Ex. D. 201; 40 L. T. 771; 27 W. R. 923.—C.A., BRETT, L.J. *dissenting*.

Doe d. Matthews v. Jackson, *referred to*.
Ahearn v. Bellman, *followed*.

Bury v. Thompson (1895) 64 L. J. Q. B. 500; [1895] 1 Q. B. 696; 14 R. 299; 72 L. T. 187; 43 W. R. 338; 59 J. P. 228.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

Thompson v. Maberly (1811) 2 Camp. 573, *followed*.

Brown v. Symons (1860) 5 C. B. (N.S.) 208; 29 L. J. C. P. 251; 6 Jur. (N.S.) 1079; 8 W. R. 460.—C.P.

Thompson v. Maberly, *questioned*.

Gardner v. Ingram (1889) 61 L. T. 729; 54 J. P. 311.—COLERIDGE, C.J. and BOWEN, L.J. COLERIDGE, C.J.—Mr. Cross relied on **Thompson v. Maberly**, where Lord Ellenborough, C.J. stated that if premises are taken for "twelve months certain and six months' notice to quit afterwards," the tenancy may be determined by a six months' notice to quit expiring at the end of the first year. That case is not, however, quite satisfactory, as it appears to have been decided on the meaning of the word "certain," and as Lord Campbell points out in a note, the decision was for the plaintiff on another point, so that Lord Ellenborough's observation was *obiter*. It is true that in **Brown v. Symons** (*supra*) in the C. B., which was an apprenticeship case and turned upon the words "for twelve months certain," **Thompson v. Maberly** was cited in the argument, and was not disapproved of. But I think that in a case of a similar agreement where the word "certain" does not occur, it would be very doubtful whether **Thompson v. Maberly** should be treated as an authority.—p. 730.

Doe d. King v. Grafton (1852) 18 Q. B. 496; 21 L. J. Q. B. 276; 16 Jur. 833.—Q.B., *referred to*.

Florence v. Robinson (1871) 24 L. T. 705.—C.P.

Kemp v. Derrett (1814) 3 Camp. 510; **Doe d. King v. Grafton**; and **Doe d. Cornwall v. Matthews** (1851) 11 C. B. 675, *referred to*.

Sidebotham v. Holland (1894) 64 L. J. Q. B. 200; [1895] 1 Q. B. 378; 14 R. 135; 72 L. T. 62; 43 W. R. 228.—C.A. LORD HALSBURY and LINDLEY, L.J.; SMITH, L.J. *doubting*.

Kemp v. Derrett and **Doe d. King v. Grafton**, *considered*.

Threlfall, In re, Queen's Benefit Society, Ex parte (1880) 50 L. J. Ch. 318; 16 Ch. D. 274; 44 L. T. 74; 29 W. R. 128.—C.A. JAMES, COTTON and LUSH, L.JJ., *followed*.

King v. Eversfield (1897) 66 L. J. Q. B. 809; [1897] 2 Q. B. 475; 77 L. T. 195; 46 W. R. 51; 61 J. P. 740.—C.A. ESHER, M.R., SMITH and RIGBY, L.JJ.

RIGBY, L.J.—Two authorities were cited in support of the respondent's contention [that a clause in an agreement for a lease providing that the tenancy may be determined by a three

notice was to be sufficient, and I feel a difficulty in following the argument in these cases. It seems to have been to the effect that, the tenancy being a tenancy from year to year, it followed that, whether the parties agreed to the contrary or not, it could only be put an end to by such a notice as the law ordinarily requires in the case of such a tenancy, and the parties could not vary the character of the notice requisite by agreement. In *Doe d. King v. Grafton*, Lord Campbell used certain expressions upon which the respondent's counsel relied, but they appear to me to be merely *obiter dicta*; and on the other hand there is *In re Threlfall*, by which we are bound as being a decision of the Court of Appeal. It was there laid down that the parties to a tenancy from year to year may agree to any terms they like with regard to the notice to quit. It was attempted to distinguish that case from the present on the ground that there a tenancy from year to year was expressly mentioned, but I do not think that constitutes any valid distinction. It is a clear authority that a stipulation for a three months' notice to quit is not inconsistent with a yearly tenancy.

Roe d. Jordan v. Ward (1789) 1 H. Bl. 97; 2 R. R. 728.—C.P.; *Doe d. Collins v. Weller* (1798) 7 Term Rep. 478; 4 R. R. 496; *Berrey v. Lindley* (1841) 3 M. & G. 498; 4 Scott (N.R.) 61; 11 L. J. C. P. 27; 5 Jur. 1061.—C.P.; *Humphreys v. Franks* (1856) 18 C. B. 323; and *Doe d. Buddle v. Lines* (1848) 11 Q. B. 402; 17 L. J. Q. B. 108; 12 Jur. 80.—Q.B., *discussed and applied*.
Kelly v. Patterson (1874) 43 L. J. C. P. 320; L. R. 9 C. P. 681; 30 L. T. 842.—C.P.

Jenner v. Clegg (1832) 1 M. & Rob. 213.—PARKE, J., *distinguished*.
Williams v. Stiven (1846) 15 L. J. Q. B. 321; 9 Q. B. 14; 13 Jur. 804.—Q.B.

Taylor v. Wildin (1868) 37 L. J. Ex. 173; L. R. 3 Ex. 303; 18 L. T. 655; 16 W. R. 1018.—EX., *distinguished*.
Holme v. Brunskill (1877) 47 L. J. Q. B. 610; 3 Q. B. D. 495; 38 L. T. 838.—C.A.

Forfeiture.

Silcock v. Farmer (1882) 46 L. T. 404.—C.A. COLERIDGE, C.J., BRETT and HOLKER, L.J.J., *commented upon*.
Morrish, In re, Dyke, Ex parte (1882) 22 Ch. D. 410; 48 L. T. 303.—C.A.

JESSEL, M.R.—I have not been able to extract from that case any new principle, and I am not quite confident that I know exactly what was the ground of the decision. Therefore, I would rather not say anything more about it.—p. 426.

BOWEN, L.J.—As to *Silcock v. Farmer*, I entirely agree with what Cotton, L.J. has said. It appears to me that the decision there turned upon a different covenant.—p. 429.

Hyde v. Warden, questioned.

Barrow v. Isaacs (1890) 60 L. J. Q. B. 179; [1891] 61 Q. B. 417; 64 L. T. 686; 39 W. R. 338; 55 J. P. 517.—C.A., *followed*.
Eastern Telegraph Co. v. Dent (1899) 68 L. J. Q. B. 564; [1899] 1 Q. B. 835; 80 L. T. 459.—C.A., SMITH, COLLINS and ROMER, L.J.J.

Shaw v. Coffin (1863) 14 C. B. (N.S.) 372, *followed*.
Crawley v. Price (1875) L. R. 10 Q. B. 302; 33 L. T. 203; 23 W. R. 874.—Q.B.

Goodtitle d. Luxmore v. Saville (1812) 16 East, 87, 95, *dicta discussed*.
Wooler v. Knott (1876) 34 L. T. 362; 45 L. J. Ex. 313; 1 Ex. D. 124; 24 W. R. 615; *affirmed*, 45 L. J. Ex. 884; 1 Ex. D. 265; 35 L. T. 121; 24 W. R. 1004.—C.A.

HUDDLESTON, B.—Now, in the present case, I have not without difficulty come to a conclusion, and in doing so I have adopted Lord Ellenborough's rule [in the above case in preference to that of Le Blanc, J.], and have endeavoured to look at the covenant neither adversely nor favourably.—p. 366.

Wooler v. Knott, followed.
Fleetwood v. Hull (1889) 58 L. J. Q. B. 341; 23 Q. B. D. 35; 60 L. T. 790; 37 W. R. 714; 54 J. P. 229.—CHARLES, J.; *Harman v. Powell* (1891) 60 L. J. Q. B. 628; 65 L. T. 255; 56 J. P. 150.—SMITH and GRANTHAM, JJ.

Croft v. Lumley (1855) 25 L. J. Q. B. 73; 2 Jur. (N.S.) 62.—Q.B.; *partly reversed*, (1856) 25 L. J. Q. B. 223; 5 E. & B. 648; 2 Jur. (N.S.) 275.—EX. CH.; *the latter decision affirmed*, (1858) 6 H. L. Cas. 672; 27 L. J. Q. B. 321; 4 Jur. (N.S.) 903; 6 W. R. 523.—H.L. (E.).

Croft v. Lumley (supra in EX. CH.), observed upon.
Toleman v. Portbury (1871) L. R. 6 Q. B. 245; 40 L. J. Q. B. 125; 24 L. T. 24; 19 W. R. 623.—Q.B.; *affirmed*, 44 L. J. Q. B. 98; L. R. 7 Q. B. 344; 26 L. T. 292; 20 W. R. 441.—EX. CH.

[In *Croft v. Lumley*, it was decided that the receipt of money paid by the tenant as rent, though the landlord is protesting at receiving it as such, amounted to a waiver, and that the landlord's protest was useless.]

HANNEN, J.—Lord Wensleydale, when that case was in the House of Lords, expressed a strong dissent from that view, though it was not necessary to decide the point (6 H. L. 744, and 27 L. J. Q. B. 345).—p. 248.

Croft v. Lumley, observation adopted.
Clough v. L. & N. W. Ry. (1871) 41 L. J. Ex. 17; L. R. 7 Ex. 26; 25 L. T. 708; 20 W. R. 189.—EX. CH.; and *Morrison v. Universal Marine Insurance Co.* (1873) 42 L. J. Ex. 115; L. R. 8 Ex. 197; 21 W. R. 774; 1 Asp. M. C. 503.—C.A.

Croft v. Lumley (supra, in H.L.), opinion applied.
Davenport v. Reg. (1877) 47 L. J. P. C. 8; 3

Oland's Case (or **Oland v. Burdwick**) (1595) 5 Coke 116; 2 Cro. Eliz. 460, *commented on*.

Davis v. Eyton (1830) 4 M. & P. 820; 7 Bing. 151; 9 L. J. (o.s.) C. P. 44.

GASELKE, J.—The only case cited is *Oland's Case*, reported by Lord Coke, and also to be found in Cro. Eliz. The report in Coke does not refer to any particular place where the judgment passed, but in Croke it is not treated as a judgment that had actually passed; it is merely cited as a supposed case.—p. 827.

Doe d. Bridgman v. David (1834) 1 C. M. & L. 405; 5 Tyr. 125.—EX.; **Doe d. Lloyd v. Ingleby** (1846) 15 M. & W. 465.—EX.; and **Smith v. Gronow** (1891) 60 L. J. Q. B. 776; [1891] 2 Q. B. 394; 65 L. T. 117; 40 W. R. 46.—**WRIGHT, J.**, *applied*.

Horsely Estate Co. v. Steiger (1899) 68 L. J. Q. B. 743; [1899] 2 Q. B. 79; 80 L. T. 857; 47 W. R. 644.—C.A. **RUSSELL, C.J.**, **SMITH** and **COLLINS, L.JJ.**

Horsely Estate Co. v. Steiger (1898) 67 L. J. Q. B. 747; [1898] 2 Q. B. 259; 79 L. T. 116.—**HAWKINS, J.**, *reversed*, (1899) 68 L. J. Q. B. 743; [1899] 2 Q. B. 79; 80 L. T. 857; 47 W. R. 644.—C.A. **RUSSELL, C.J.**, **SMITH** and **COLLINS, L.JJ.**

Horsely Estate Co. v. Steiger (*supra*, in C.A.), *distinguished*.

Pannell v. City of London Brewery Co. (1900) [1900] 1 Ch. 496; 69 L. J. Ch. 244; 82 L. T. 53; 48 W. R. 264.

BUCKLEY, J.—I do not . . . read the decision of the Appeal Court in *Horsely Estate, Ltd. v. Steiger* as being in conflict with the decision in *Lock v. Pearce* ([1893] 2 Ch. 271), which is not cited in *Horsely Estate, Ltd. v. Steiger*. It appears to me that the decision of the Appeal Court in the last-mentioned case comes only to this, and can be supported entirely only upon this—that having regard to the very short time allowed between the notice and the commencement of the proceedings, the proceedings on the notice were bad; not necessarily that the notice itself was bad.—p. 503.

Horsely Estate Co. v. Steiger (*supra*, in C.A.), *followed*.

Ewart v. Fryer (1900) 70 L. J. Ch. 138; [1901] 1 Ch. 499; 83 L. T. 551; 49 W. R. 145.—C.A. **RIGBY, WILLIAMS** and **ROMER, L.JJ.**; *affirmed*, *nom.* **Fryer v. Ewart** (1902), 71 L. J. Ch. 433; [1902] A. C. 187; 86 L. T. 242.—H.L. (E.). **LORDS HALSBURY, L.C.**, **MACNAGHTEN, DAVEY, BRAMPTON, ROBERTSON** and **LINDLEY**.

Horsely Estate Co. v. Steiger, *referred to*.

Riggs, In re, Lovell, Ex parte (1901) 70 L. J. K. P. 541; [1901] 2 K. B. 16; 84 L. T. 428; 49 W. R. 624.—**WRIGHT, J.**

Doe d. Graves v. Wells (1890) 2 P. & D. 396; 10 A. & E. 427; 8 L. J. Q. B. 265; 3 Jur. 820.—Q.B., *adopted*.

Archbold v. Scully (1861) 9 H. L. Cas. 360.—H.L. (IR.).

Goodright d. Walter v. Davids (1778) Cowp. 803, *applicable*.

Doe d. Ambler v. Woodbridge (1829) 9 B. & C. 376; 4 M. & Ry. 303; 7 L. J. (o.s.) K. B. 203; 28 R. R. 426.—K.B.; and **Doe d. Marton v. Gladwin** (1845) 6 Q. B. 953; 14 L. J. Q. B. 189; 9 Jur. 508.—Q.B., *distinguished*.

Walrond v. Hawkins (1875) 44 L. J. Q. P. 116; L. R. 10 C. P. 342; 32 L. T. 119; 23 W. R. 340.—C.P.

Walrond v. Hawkins, *followed*.

Griffin v. Tomkins (1880) 42 L. T. 359; 42 J. P. 457.—Q.B.D.

Walrond v. Hawkins, *distinguished*.

Lawrie v. Lees (1880) 14 Ch. D. 249; 49 L. J. Ch. 636; 42 L. T. 435; 28 W. R. 779.

BRAMWELL, L.J.—I see a distinction (whether well founded or not) between this case and *Walrond v. Hawkins*. The covenant in that case was that the lessee was not to assign or demise or to permit any other person to occupy the premises or any part thereof without the consent of the lessor. What the Court of Common Pleas said was this: "What the lessee has done is a demise, and it is a breach of the covenant not to demise, but the lessor has elected not to treat it as a breach of forfeiture, and he cannot say also that the lessee has broken the other covenant that he would not permit any other person to occupy." That decision seems to me not applicable to the present case. Here there is no covenant not to demise, but a covenant that the lessee will not permit the use of the premises in a particular way.—p. 262.

Butler v. Smith (1864) 16 Ir. C. L. R. 213.—C.P., *followed*.

Leinster (Duke) v. Metcalf (1847) 11 Ir. L. R. 365.—Q.B.; and **O'Brien v. Bernard** (1843) 6 Ir. L. R. 6.—Q.B., *disapproved*.

Clifford v. Reilly (1870) Ir. R. 4 C. L. 218.—C.P.

Jones v. Carter (1846) 15 M. & W. 718.—EX., *referred to*.

Croft v. Lumley (1858) 6 H. L. Cas. 672, 705; 27 L. J. Q. B. 321; 4 Jur. (N.S.) 903; 6 W. R. 523.—H.L. (E.).

Jones v. Carter and **Doe d. Nash v. Birch** (1836) 1 M. & W. 402; 5 L. J. Ex. 185.—EX., *commented on*.

Dendy v. Nicholl (1859) 4 C. B. (N.S.) 376; 27 L. J. C. P. 220; 6 W. R. 502.

WILLES, J.—It has been contended on the part of the plaintiff, that the bringing an action of ejectment was such an election on the part of the landlord to take advantage of the forfeiture, and put an end to the term, as to prevent the subsequent acceptance of the rent from operating to revive the lease, and that that view is sustained by the decision of the Court of Exchequer in *Jones v. Carter*. I am glad we are not bound to lay down so capricious a doctrine as that, although the bringing an action of ejectment is an unequivocal demonstration of intention on the part

substantial distinction between an action of ejectment for the recovery of land, and an action to recover rent, and none such has been pointed out.—p. 386.

Jones v. Carter, applied.

Toleman v. Portbury (1871) 40 L. J. Q. B. 125; L. R. 6 Q. B. 245; 24 L. T. 24; 19 W. R. 623.—Q.B.

Jones v. Carter, explained.

Grimwood v. Moss (1872) 41 L. J. C. P. 239; L. R. 7 C. P. 360; 27 L. T. 268; 20 W. R. 972.—C.P.

WILLES, J.—I am not prepared to shake that [the above] decision. There was no equivocation, as has been contended about the action, for it was a distinct assertion of every reason on which the plaintiff could rely; and, indeed, even if a man gives a bad reason, he may afterwards rely on any good one, as was laid down by Lord Holt in *Greenhill v. The College of Physicians* (12 Mod. 387).

Jones v. Carter, referred to.

Evans v. Wyatt (1880) 43 L. T. 176; 44 J. P. 767.—LINDLEY, J.

Jones v. Carter, discussed and approved.

Scarfe v. Jardine (1882) 51 L. J. Q. B. 612; 7 App. Cas. 345; 47 L. T. 238; 30 W. R. 893.—H.L. (E.).

Jones v. Carter, adopted.

James v. Young (1884) 53 L. J. Ch. 793; 27 Ch. D. 652; 51 L. T. 75; 32 W. R. 981.—NORTH, J.

Toleman v. Portbury (1871) 40 L. J. Q. B. 125; L. R. 6 Q. B. 245; 24 L. T. 24; 19 W. R. 623.—Q.B., *inapplicable*.

Evans v. Davis (1878) 48 L. J. Ch. 223; 10 Ch. D. 747; 39 L. T. 391; 27 W. R. 285.—FRY, J.

Toleman v. Portbury and Grimwood v. Moss (1872) 41 L. J. C. P. 239; L. R. 7 C. P. 360; 27 L. T. 268; 20 W. R. 972.—C.P., *referred to*.

Evans v. Wyatt (1880) 43 L. T. 176; 44 J. P. 767.—LINDLEY, J.

Toleman v. Portbury and Grimwood v. Moss, *approved*.

Serjeant v. Nash (1903) 72 L. J. K. B. 630; [1903] 2 K. B. 304; 89 L. T. 112.—C.A.

Doe d. Cheny v. Batten (1775) 1 Cowp. 243; and Dendy v. Nicholl (1858) 4 C. B. (N.S.) 376; 27 L. J. C. P. 220; 6 W. R. 502.—C.P., *referred to*.

Toleman v. Portbury (1871).—Q.B. (*supra*); Evans v. Wyatt (1880) 43 L. T. 176; 44 J. P. 767.—LINDLEY, J.

Dendy v. Nicholl, referred to.

Penton v. Barnett (1897) 67 L. J. Q. B. 11;

Doe d. Sheppard v. Allen (1810) 3 Taunt. 78; 12 R. R. 579, *referred to*.

Johnstone v. Hall (1856) 25 L. J. Ch. 462; 2 K. & J. 414; 2 Jur. (N.S.) 780; 4 W. R. 417.—V.-C.

Doe d. Sheppard v. Allen, distinguished.

Griffin v. Tomkins (1880) 42 L. T. 359; 44 J. P. 457.—Q.B.D.

Cotesworth v. Spokes (1861) 10 C. B. (N.S.) 103; 30 L. J. C. P. 220; 4 L. T. 214; 9 W. R. 436; 7 Jur. (N.S.) 803.—C.P., *considered*.

Brewer v. Eaton (1783) 3 Doug. 230, *approved*.

Thomas v. Lulham (1895) 14 R. 692; 64 L. J. Q. B. 720; [1895] 2 Q. B. 400; 73 L. T. 146; 43 W. R. 689; 59 J. P. 709.—C.A. ESHER, M.R., KAY and SMITH, L.JJ.

SMITH, L.J.—It is said, however, that this case [*Brewer v. Eaton*] was overruled by the Court of C. P. in *Cotesworth v. Spokes*, but this is not so. That case decided that for a landlord to bring himself within the section he must prove that half-a-year's rent was in arrear at the time of the service of the writ. A passage at the end of the judgment (which was delivered by Williams, J.) was pressed upon us to show that the forfeiture was waived in the present case by what the landlord had done; but, in my judgment, though the passage is hard to understand, it does not decide this; and I must point out that it was not competent for the Court of C. P. to overrule the Court of K. B.; and it is not correct to say that it has done so. It should be noted that in *Cotesworth v. Spokes* the distress was within twenty-one days, which is not so in the present case; but be this as it may, in my judgment the case leaves that of *Brewer v. Eaton* untouched upon the point now under consideration. The Court of K. B. put the true construction upon the section, which has apparently been acted upon for over one hundred years, and as the plaintiff has fulfilled the requirements of sect. 210, he is entitled to judgment and this appeal must be allowed.—p. 696.

Doe d. Kensington (Lord) v. Brindley (1826) 12 Moore 37; 5 L. J. (O.S.) C. P. 3.—C.P., *questioned*.

Garrud, In re, Newitt, Ex parte (1881) 16 Ch. D. 522; 51 L. J. Ch. 381; 44 L. T. 5; 29 W. R. 344.—C.A.

JAMES, L.J.—Another point which has been raised is, that the forfeiture by the default of the builder has been waived by the landowner. If this had been confined to a default in completing the houses at the date fixed, and the landowner had, after that date, gone on dealing with the builder on the footing of the agreement being still subsisting, I might have thought that this would have amounted to a waiver. It would require a good deal of consideration before I could assent to the decision of the Court of Common Pleas in *Doe v. Brindley*.—p. 531.

the position has been altered, so that relief could not be given without causing injury to third parties. If, at the time of the application, the position is not altered in such a way as that to grant relief will cause injustice to third parties, I think, if the conditions mentioned in the section are complied with, that, according to the settled practice in equity, there is no longer a discretion in the judge, but that he ought to make the order. It does not matter whether it is called discretionary or not, if the discretion ought always to be exercised in one way. If the conditions are complied with, and no interests of third parties have intervened, there is no longer any real discretion in the matter.—p. 528.

West v. Dobb (1870) 10 B. & S. 987; 39 L. J. Q. B. 190; L. R. 5 Q. B. 460; 23 L. T. 76; 18 W. R. 1167.—EX. CH., *commented on*.

Timms v. Baker (1883) 49 L. T. 106.—LOPES, J.

Berney v. Moore (1791) 2 Ridgeway Parl. Cas. 310, 323, *explained*.

Doe d. Whitfield v. Roe (1811) 3 Taunt. 402; and **Doe d. Wyatt v. Byron** (1845) 1 C. B. 623; 3 D. & L. 31; 14 L. J. C. P. 207.—C. P., *distinguished*.

Hare v. Elms (1893) 62 L. J. Q. B. 187; [1893] 1 Q. B. 604; 5 R. 189; 68 L. T. 223; 41 W. R. 297.—DAY and COLLINS, JJ.

[**Berney v. Moore** was distinguished on the ground that there the lessee was before the Court.]

[Where mortgagees by underlease applied for relief, under sect. 1 of the Common Law Procedure Act, 1860, against forfeiture for non-payment of rent by the tenants in possession, it was held that relief ought not to be granted unless the original lessee was made a party to the application. **Doe d. Whitfield v. Roe** was distinguished on the grounds that it decided only that the mortgagee had the same right to relief against forfeiture for non-payment of rent as the lessee against whom recovery had been had, and that if it decided that relief could be granted in such a case, that would imply that the Courts of common law had before the Act the jurisdiction which was extended to them by that Act—namely, to deal with applications for relief after judgment and execution in ejectment, and sect. 1 of the Act was therefore unnecessary.]

Taylor v. Knight (1726) 4 Vin. Abr. tit. "Chancery," pl. 31, p. 406, *held overruled*.

Hill v. Barclay (1811) 18 Ves. 56; 11 R. R. 147.—L.C., *observations held overruled*.

Bowser v. Colby (1841) 1 Hare 109; 11 L. J. Ch. 332; 5 Jur. 1106.—V.-C.

Hill v. Barclay, *applied*.

Brain, *in re* (1874) 44 L. J. Ch. 103; L. R. 18 Eq. 389; 31 L. T. 17; 22 W. R. 867.—MALINS, V.-C.

Arnsby v. Woodward (1827) 6 B. & C. 519;

Wadman v. Calcraft; **Davis v. West**; **Sanders v. Pope** (1806) 12 Ves. 282.—L.C.; and **Bowser v. Colby** (*supra*), *observations considered*.

Hare v. Elms (1893) 62 L. J. Q. B. 187; [1893] 1 Q. B. 604; 5 R. 189; 68 L. T. 223; 41 W. R. 297.—DAY and COLLINS, JJ., *distinguished*.

Howard v. Fanshawe (1895) 64 L. J. Ch. 664; [1895] 2 Ch. 581; 13 R. 663; 73 L. T. 77; 43 W. R. 645.—STIRLING, J.

Gentle v. Faulkner (1899) 68 L. J. Q. B. 848; 81 L. T. 294.—RIDLEY, J.; *reversed*, (1900) 69 L. J. Q. B. 777; [1900] 2 Q. B. 267; 82 L. T. 708.—C.A. SMITH, WILLIAMS and ROMER, L.JJ.

Gentle v. Faulkner, *referred to*.

Masters and G. W. Ry., *in re* (1901) 70 L. J. K. B. 516; [1901] 2 K. B. 84; 84 L. T. 515; 49 W. R. 499; 65 J. P. 420.—C.A.

Skinner's Co. v. Knight (1891) 60 L. J. Q. B. 629; [1891] 2 Q. B. 542; 65 L. T. 240; 40 W. R. 57; 56 J. P. 36.—C.A. HALSBURY, L.C., ESHER, M.R. and FRY, L.J., *distinguished*.

Bridge v. Quick (1892) 61 L. J. Q. B. 375; 67 L. T. 54; 56 J. P. 696.—CAYE and WILLIAMS, JJ.

Headnote.—Where in an action for re-entry upon breach of covenant to repair, the defendant applies to the Court for relief under sect. 14, sub-sect. 2, of the Conveyancing Act 1881, the Court may, in its discretion, make an order to stay the action upon payment by the defendant of the plaintiff's costs as between solicitor and client, as well as the costs of surveys and schedules of dilapidations. And the Court is not fettered by the *Skinner's Co. v. Knight*, which was a decision upon sect. 14, sub-sect. 1.

Skinner's Co. v. Knight and Bridge v. Quick. *See now* 55 & 56 Vict. c. 13, s. 2 (1).

Skinner's Co. v. Knight, *adopted*.

Lock v. Pearce (1892) 61 L. J. Ch. 606; [1892] 2 Ch. 328; 67 L. T. 164; 40 W. R. 508.—NORTH, J.

Skinner's Co. v. Knight, *distinguished*.

Pannell v. City of London Brewery Co. (1900) 69 L. J. Ch. 244; [1900] 1 Ch. 496; 82 L. T. 53; 48 W. R. 264.—BUCKLEY, J.

Quilter v. Mapleson (1882) 52 L. J. Q. B. 44; 9 Q. B. D. 672; 31 W. R. 75.—C.A., *distinguished*.

Leeds and County Bank v. Walker (1883) 52 L. J. Q. B. 590; 11 Q. B. D. 84; 47 J. P. 502.

Quilter v. Mapleson, *approved and followed*. **Thomas**, *Ex parte* (1889) 60 L. T. 728.—C.A.

Quilter v. Mapleson, *dicta approved*.

North London Land Co. v. Jacques (1883) 49 L. T. 659; 32 W. R. 283; 48 J. P. 505.—BACON, V.-C., *distinguished*.

Rogers v. Rice (1892) 61 L. J. Ch. 573; [1892] 2 Ch. 170; 66 L. T. 640; 40 W. R. 489.—C.A.

North London Land Co. v. Jacques, *questioned*.

Lock v. Pearce (1892) 61 L. J. Ch. 606; [1892] 2 Ch. 328; 67 L. T. 164; 40 W. R. 508.—**NORTH, J.**; *affirmed in C.A., infra*.

[**NORTH, J.** questioned *North London Land Co. v. Jacques* and *Jacques v. Harrison* (12 Q. B. D. 136, 165), inasmuch as they appeared to decide that when a lessor gives notice of breach of covenant under sect. 14, sub-sect. 1, of the Conveyancing Act, 1881, in order to enforce a right of re-entry under sub-sect. 2 he must in every case require compensation in money whether he wishes it or not and whether it can be properly assessed or not. He also intimated an opinion that in these cases a writ had been issued before the originating summons was taken out.]

Fletcher v. Nokes (1897) 66 L. J. Ch. 177; [1897] 1 Ch. 271; 76 L. T. 107; 45 W. R. 471; 61 J. P. 232.—**NORTH, J.**, *followed*.

Serle, In re, Gregory v. Serle (1898) 67 L. J. Ch. 344; [1898] 1 Ch. 652; 78 L. T. 384; 46 W. R. 440.—**KEKEWICH, J.**

Lock v. Pearce (1893) 62 L. J. Ch. 582; [1893] 2 Ch. 271; 68 L. T. 569; 41 W. R. 369.—**C.A.**; and **Serle, In re, Gregory v. Serle** (1898) 67 L. J. Ch. 344; [1898] 1 Ch. 652; 78 L. T. 384; 46 W. R. 440.—**KEKEWICH, J.**, *followed*.

Pannell v. City of London Brewery Co. (1900) 69 L. J. Ch. 244; [1900] 1 Ch. 496; 82 L. T. 53; 48 W. R. 264.—**BUCKLEY, J.**

Swain v. Ayres (1888) 57 L. J. Q. B. 428; 21 Q. B. D. 289; 36 W. R. 798.—**C.A.**; *affirming* 52 J. P. 500.—**CHARLES, J.**, *considered*.

Strong v. Stringer (1889) 61 L. T. 470.—**KEKEWICH, J.**

Swain v. Ayres and Strong v. Stringer. *See* 55 & 56 Vict. c. 13, s. 5.

Darlington v. Hamilton (1854) Rhy 550; 2 Eq. R. 906; 23 L. J. Ch. 1000.—**V.C.**, *applied*.

Waddell v. Wolfe (1874) 43 L. J. Q. B. 138; L. R. 9 Q. B. 515; 23 W. R. 44.—**Q.B.**

Darlington v. Hamilton, *recognised*.

Creswell v. Davidson (1887) 56 L. T. 811.—**KAY, J.**

Creswell v. Davidson, *followed*.

Burt v. Gray (1891) 60 L. J. Q. B. 664; [1891] 2 Q. B. 98; 65 L. T. 229; 39 W. R. 429.—**MATHEW and WILLIAMS, L.JJ.**

Creswell v. Davidson and Burt v. Gray. *See* *new* Conveyancing Act, 1892 (55 & 56 Vict. c. 13), s. 4.

Cresswell v. Davidson and Burt v. Gray, *approved*.

Nind v. Nineteenth Century Building Society

906; 71 L. T. 88; 58 J. P. 591; 10 R. 368.—**CHARLES, J.**

Nind v. Nineteenth Century Building Society [1894] 1 Q. B. 472.—**DAY and LAWRENCE, JJ.**; *reversed*. (1894) 63 L. J. Q. B. 636; [1894] 2 Q. B. 226; 9 R. 468; 70 L. T. 831; 42 W. R. 481; 58 J. P. 732.—**C.A.** **ESHER, M.R., SMITH and DAVEY, L.JJ.**

Nind v. Nineteenth Century Building Society, *referred to*.
Cholmeley School v. Sewell (1894).—**CHARLES, J.** (*supra*).

Cholmeley School v. Sewell, *applied*.
Imray v. Oakshette (1897) 66 L. J. Q. B. 544; [1897] 2 Q. B. 218; 76 L. T. 632; 45 W. R. 681.—**C.A.** **LOPES and RIGBY, L.JJ.**

Surrender.

Thomas v. Cook (1818) 2 B. & Ald. 119; 2 Stark. 408; 20 R. R. 374, *recognised*.
Walker v. Richardson (1837) 2 M. & W. 882; M. & H. 251; 6 L. J. Ex. 229.—**EX.**

Thomas v. Cook, *doubted*.
Lyon v. Reed (1844) 13 M. & W. 285; 13 L. J. Ex. 377; 8 Jur. 762.—**EX.**

Thomas v. Cook, *limited*.
Lyon v. Reed, *approved*.
Lynch v. Lynch (1843) 6 Ir. L. R. 131.—**EX.**, *doubted*.

Crengh v. Blood (1845) 8 Ir. Eq. R. 688; 3 Jo. & Lat. 138.

SUGDEN, L.C.—*Thomas v. Cook* established a new doctrine; but it proceeded upon the act of the former tenant, who had placed another in possession, and agreed to the latter becoming immediate tenant to the landlord. . . . If *Thomas v. Cook* is not to be overruled, the doctrine should not be carried further. The plaintiffs' counsel relied on *Lynch v. Lynch* as an authority that this doctrine equally applies to a freehold interest; but with the highest respect for the judges who decided that case, I cannot follow it.—p. 705.

Thomas v. Cook, *adopted*.
Lyon v. Reed, *commented on and followed*.
Nickells v. Atherstone (1847) 10 Q. B. 944; 16 L. J. Q. B. 371; 11 Jur. 778.—**Q.B.**

DENMAN, C.J. (for the Court).—Although we do not assent to the observations upon the line of cases, from *Thomas v. Cook* (2 B. & Ald. 119) downwards, in the learned and able judgment given in *Lyon v. Reed*, we wish to express our entire concurrence in the decision of that case.—p. 951.

Thomas v. Cook, *held not overruled*.
Davidson v. Gent (1857) 1 H. & N. 744; 26 L. J. Ex. 122; 3 Jur. (N.S.) 342; 5 W. R. 229.—**EX.**

Lyon v. Reed, *observations applied*.
Grimwood v. Moss (1872) 41 L. J. C. P. 239; L. R. 7 C. P. 360; 27 L. T. 268; 20 W. R. 972.

Thomas v. Cook and Lyon v. Reed, *discussed*.

Davison v. Gent, *followed*.

Baring v. Abingdon (1892) 62 L. J. Ch. 105; [1892] 2 Ch. 374; 67 L. T. 6.—C.A., *dictum in, explained*.

Wallis v. Hands (1893) 62 L. J. Ch. 586; [1893] 2 Ch. 75; 3 R. 351; 68 L. T. 428; 41 W. R. 471.

CHITTY, J.—In *Thomas v. Cook* (2 B. & Ald. 119) there was in fact a change of possession, the old tenant, Cook, having gone out of possession when the plaintiff accepted Perkes as his tenant. . . . In his judgment in *Davison v. Gent*, Pollock, C.B. states the law thus: "It must therefore be taken to be established that where a lessee assents to a lease being granted to another, and gives up his own possession to the new lessee, that is a surrender by operation of law." This statement appears to me not to be qualified by any subsequent expressions in the same judgment. It substantially reconciles *Thomas v. Cook* with the principles enunciated by Parke, B. in *Lyon v. Reed* (13 M. & W. 285), so far as relates to leases in possession. It is not perhaps of any great practical importance in which of the two following ways the proposition of law is stated: (1) there is no surrender by operation of law unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents; or (2) the change of possession is a necessary part of the consent; I prefer, however, the first as being the more correct form. . . . The plaintiff's counsel relied on a *dictum* of Stirling, J. in *Baring v. Abingdon* that the granting of a new lease to a stranger with the assent of the lessee operates as a surrender of the old lease. But on the facts of the case it appears that there was a change of possession; the learned judge himself refers to *Davison v. Gent* (1 H. & N. 744), and I have his authority for stating that he did not intend to express any opinion on the point whether a change of possession was necessary.

Lyon v. Reed, *inapplicable*.

Fenner v. Blake (1900) 69 L. J. Q. B. 257; [1900] 1 Q. B. 426; 82 L. T. 149; 48 W. R. 392.—**CHANNELL** and **BUCKNILL, JJ.**

Dodd v. Acklom (1833) 6 Man. & G. 672; 7 Scott (N.R.) 415; 13 L. J. C. P. 11; 7 Jur. 1017.—C.F., *explained*.

Gore v. Wright (1838) 3 N. & P. 243; 8 A. & E. 118; 1 W. W. & H. 266; 7 L. J. Q. B. 147; 2 Jur. 840.—Q.B., *distinguished*.

Furnival v. Grove (1860) 8 C. B. (N.S.) 496; 30 L. J. C. P. 3.—C.P.

Dodd v. Acklom and Grimman v. Legge (1828) 8 B. & C. 324; 2 M. & Ry. 438; 6 L. J. (O.S.) K. B. 321.—K.B., *followed*.

Bessell v. Landsberg (1845) 7 Q. B. 638; 14 L. J. Q. B. 355; 9 Jur. 576.—Q.B.; and **Redpath v. Roberts** (1801) 3 Esp. 225, *distinguished*.

Phené v. Popplewell (1862) 12 C. B. (N.S.) 334; 31 L. J. C. P. 235; 8 Jur. (N.S.) 1104; 6 L. T.

the tenancy must be referred back to the time when the key was sent, before the rent became due. . . . All I can say is, that if the mere fact of the plaintiff letting the premises afterwards is considered in that case a ground for relation back I respectfully decline to follow that decision, for I see no principle on which it could be justified. If that is the ground of the decision we are not bound by it and ought to overrule it. If upheld, it is because the taking possession afterwards was not relied on as relating back to a former time, but as an explanation of an act done before, which so explained, amounted to a resumption of possession, and so the case came within *Nicholls v. Atherstone* (10 Q. B. 944; 16 L. J. Q. B. 371), and it is only so that I agree with *Phené v. Popplewell*.—p. 611.

Wootley v. Gregory (1828) 2 Y. & J. 536; 31 R. R. 626.—EX., *applied*.

Trent v. Hunt (1853) 22 L. J. Ex. 318; 9 Ex. 14; 17 Jur. 899; 1 W. R. 481.—EX.

Wilson v. Sewell (1766) 4 Barr. 1975, 1980; and **Davison v. Bromley v. Stanley** (1768) 4 Burr. 2210, 2213, *approved*.

Doe d. Egremont (Earl) v. Courtenay (1848) 11 Q. B. 702; 17 L. J. Q. B. 151; 12 Jur. 454.—Q.B.; and **Doe d. Biddulph v. Poole** (1848) 11 Q. B. 713; 17 L. J. Q. B. 143; 12 Jur. 450.—Q.B.

Doe d. Egremont (Earl) v. Forwood (1842) 3 Q. B. 627; 11 L. J. Q. B. 321.—Q.B. *considered and distinguished*.

Doe d. Egremont (Earl) v. Courtenay (1848) 11 Q. B. 702; 17 L. J. Q. B. 151; 12 Jur. 454.—Q.B.; and **Doe d. Biddulph v. Poole** (1848) 11 Q. B. 713; 17 L. J. Q. B. 143; 12 Jur. 450.—Q.B.

Doe d. Egremont v. Forwood, *held overruled*. **Noble v. Ward** (1867) L. R. 2 Ex. 135; 36 L. J. Ex. 91; 15 L. T. 672; 15 W. R. 520.—EX. CH.; *affirming* (1866) 4 H. & C. 149; 12 Jur. (N.S.) 167.—EX.

WILLES, J.—It is quite in accordance with *Doe d. Egremont v. Courtenay* (11 Q. B. 702), and *Doe d. Biddulph v. Poole* (11 Q. B. 713), overruling the previous decision of *Doe d. Egremont v. Forwood*, to hold that where parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights. This is good sense and sound reasoning, on which a jury might at least hold that there was no such intention. And if direct authority were wanted to sustain this conclusion, it is supplied by *Moore v. Campbell* (23 L. J. Ex. 310; 10 Ex. 323; 2 C. L. R. 1084), where, upon a plea of rescission, the very point was taken by Sir H. Hill, who would, no doubt, have made it good, had it been capable of being established.—p. 138.

Doe d. Egremont (Earl) v. Courtenay and **Doe d. Biddulph v. Poole**, *referred to*.

Noble v. Ward (1867).—EX. CH. *See extract, supra*.

laid down, of making a great advance on the law, as stated in previous decisions and in text-books, particularly Shepherd's Touchstone. Of course these decisions must be maintained in the limits to which they go. But the surrender in each of these cases was a result emanating from the power of the tenant alone, whereas in the case of a tenancy from year to year it emanates also from the power existing in the lessor, so that it is partly an effect of his own act, which cannot be undone. In my opinion, the doctrine of those cases cannot be extended to a case [like the present] where the elements exist of a tenancy from year to year, and where the new lease includes other lands.—p. 539.

Doe d. Beadon v. Pyke (1816) 5 M. & S. 146; 17 R. R. 296, *applied*.

Piggott v. Stratton (1859) 1 De G. F. & J. 33; 29 L. J. Ch. 1; 6 Jur. (N.S.) 129; 1 L. T. 111; 8 W. R. 13.—L.C. and L.J.: *affirming* 1 Johns. 341.

Doe d. Burdett v. Wrighte (1819) 2 B. & Ald. 710; 21 R. R. 461, *questioned*.

Doe d. Blacknell v. Plowman (1831) 2 B. & Ald. 573; 9 L. J. (O.S.) K. B. 289.

Doe d. Burdett v. Wrighte, *dictum adopted*.

Bolton v. Bolton (1870) L. R. 5 Ex. 145.—EX.

Doe d. Burdett v. Wrighte, *dictum adopted*.

Churcher v. Martin (1889) 58 L. J. Ch. 586; 42 Ch. D. 312; 61 L. T. 113; 37 W. R. 682.—KEKEWICH, J.

Doe d. Putland v. Hilder (1819) 2 B. & Ald. 782; 21 R. R. 488.—K.B., *questioned*.

Doe d. Blacknell v. Plowman (1831) 2 B. & Ald. 573; 9 L. J. (O.S.) K. B. 289.—K.B.

Doe d. Putland v. Hilder, *doubted*.

Cottrell v. Hughes (1855) 24 L. J. C. P. 107; 15 C. B. 532; 1 Jur. (N.S.) 448; 3 C. L. R. 496; 3 W. R. 248.

JERVIS, C.J.—We should probably decline to act on the authority of *Doe d. Putland v. Hilder*, if the occasion called for it, notwithstanding it may not have been expressly overruled in a Court of law.—p. 114.

7. ASSIGNMENT.

Ringer v. Cann (1838) 3 M. & W. 443; 1 H. & H. 67; 7 L. J. Ex. 108; 2 Jur. 256.—EX., *distinguished*.

Harrison v. Blackburn (1864) 17 C. B. (N.S.) 678; 34 L. J. C. P. 109; 10 Jur. (N.S.) 1131; 11 L. T. 453; 13 W. R. 135.—C.P.

Ringer v. Cann, *principle applied*.

Jenner v. Jenner (1866) 35 L. J. Ch. 329; L. R. 1 Eq. 361; 12 Jur. (N.S.) 138; 14 W. R. 305.—V.-C.

Willmott v. Barber (1880) 49 L. J. Ch. 792; 15 Ch. D. 96; 43 L. T. 95; 28 W. R. 911.

—FRY, J., *principle not applied*.

Preston Corporation v. Fulwood Local Board (1885) 53 L. T. 718; 34 W. R. 196; 50 J. P.

Racecourse Co. (1901) 70 L. J. Ch. 468; [1901] 2 Ch. 37; 8 L. T. 436; 49 W. R. 418.—C.A. RIGBY, WILLIAMS and STIRLING, L.J.J.; *affirming with a variation*, 69 L. J. Ch. 850.—BRANWELL, J.

Walker's Case (1587) 3 Rep. 22 a, *approved*.

Russell Road Purchase Monies, In re (1871) L. R. 12 Eq. 78; 40 L. J. Ch. 673; 23 L. T. 839; 19 W. R. 520, 706; and **Swansea Corporation v. Thomas** (1882).—Q.B.D. (*infra*).

Wadham v. Marlowe (1784) 4 Dougl. 54; 1 H. Bl. 438, n.; 8 East, 314, n.; 2 Chit. 600; 9 R. R. 456.—K.B., *followed*.

Slipper v. Tottenham and Hampstead Junction Ry. (1867) 36 L. J. Ch. 841; L. R. 4 Eq. 112; 16 L. T. 446; 15 W. R. 861.—M.R.

Smyth v. North (1872) 41 L. J. Ex. 103; L. R. 7 Ex. 242; 20 W. R. 683.—EX.

Approved and applied **Clarke**, In re, East and West India Dock Co., Ex parte (1881) 50 L. J. Ch. 789; 17 Ch. D. 759; 45 L. T. 6; 30 W. R. 22.—C.A.; *discussed and applied* **Harding v. Preece** (1882) 51 L. J. Q. B. 515; 9 Q. B. D. 281; 47 L. T. 100; 31 W. R. 42; 46 J. P. 68.—Q.B.D.; *adopted* **Hill v. East and West India Dock Co.** (1884) 53 L. J. Ch. 842; 9 App. Cas. 448, 456; 51 L. T. 163; 32 W. R. 925; 48 J. P. 788.—H.L. (E.), LORD BRANWELL *dissenting*.

Stevenson v. Lambard (1802) 2 East, 575; 6 R. R. 511.—K.B., *dictum dissented from*. **Swansea Corporation v. Thomas** (1882) (*infra*).

Stevenson v. Lambard, *observed upon*.

Baynton v. Morgan (1888) 57 L. J. Q. B. 465; 21 Q. B. D. 101; 59 L. T. 478; 52 J. P. 710.—SMITH and CAVE, JJ.; *affirmed* 58 L. J. Q. B. 139; 22 Q. B. D. 74.—C.A.

Bliss v. Collins (1822) 5 B. & Ald. 876; 1 D. & R. 291; 24 R. R. 601; and **Twynam v. Pickard** (1818) 2 B. & Ald. 105; 20 R. R. 368, *adopted*.

Swansea Corporation v. Thomas (1882) 52 L. J. Q. B. 340; 10 Q. B. D. 48; 47 L. T. 657; 31 W. R. 506; 47 J. P. 135.

Remnant v. Bremridge (1818) 2 Moore 94; 8 Taunt. 191; 19 R. R. 495, *questioned*.

Hornidge v. Wilson (1840) 11 A. & E. 645; 3 P. & D. 641; 9 L. J. Q. B. 72.—Q.B., *referred to*.

Hopwood v. Whaley (1848) 6 C. B. 744; 18 L. J. C. P. 43; 6 D. & L. 342; 12 Jur. 1088.

COLTMAN, J.—The case of *Remnant v. Bremridge* has not met with general approbation. In *Hornidge v. Wilson*, Patteson, J. says, "That case is unintelligible to me as reported." As appears by *Rubery v. Stephens* (4 B. & Ald. 241), it is an established principle that a person charged as executor cannot discharge himself without showing that the premises are of no value. The only way in which the case of *Remnant v. Bremridge* can be sustained is by

Chancellor v. Poole (1781) 2 Doug. 764, *questioned*.
Steward v. Wolveridge (1832) 9 Bing. 60; 2 M. & Scott 75 (*reversed infra*).
BOSANQUET, J.—This is a deed *inter partes*, and in *Chancellor v. Poole*, where the assignment was by deed poll, Lord Mansfield said, "The question is, whether the plaintiff is a contracting or merely an assenting party in the deed poll;" however, if our decision were to depend on that case there might be some doubt, because the deed there, in addition to the word *paying*, which the plaintiff treated as a covenant, contained the word *indemnifying*, to which it may be thought the judgment of the Court also applies.—p. 67.

Staines v. Morris (1812) 1 V. & B. 8.—L.C., *rule applied*.

Gardiner v. Gardiner (1861) 12 Ir. C. L. R. 565.—C.P.

Burnett v. Lynch (1826) 4 L. J. (O.S.) K. B. 274; 5 B. & C. 589; 8 D. & R. 368; 29 R. L. 343.—K.B., *referred to*.

Hancock v. Caffyn (1832) 1 L. J. C. P. 104; 1 M. & Scott, 521; 8 Bing. 358.—C.P.

Burnett v. Lynch, *not applied*.

Humble v. Langston (1841) 10 L. J. Ex. 442; 7 M. & W. 517.—EX.

Burnett v. Lynch, *applied*.

Gardiner v. Gardiner (1861) 12 Ir. C. L. R. 565.—C.P.; **Rudge v. Bowman** (1868) L. R. 3 Q. B. 689, 698; 37 L. J. Q. B. 193.—Q.B.

Burnett v. Lynch, *considered*.

Moule v. Garrett (1870) 39 L. J. Ex. 69; L. R. 5 Ex. 132; 22 L. T. 343; 18 W. R. 697.—EX.; *affirmed* EX. CH. (*see infra*); **Lee v. Mathews** (1880) 6 L. R. Ir. 530.—C.A.

Burnett v. Lynch.

Referred to **Kellock v. Enthoven** (1874) 43 L. J. Q. B. 90; L. R. 9 Q. B. 241; 30 L. T. 68; 22 W. R. 322.—EX. CH.; *adopted* **Woodhouse v. Walker** (1880) 49 L. J. Q. B. 609; 5 Q. B. D. 404; 42 L. T. 770; 28 W. R. 765; 44 J. P. 666.—Q.B.; *dictum commented upon* **Baynes v. Lloyd** (1895) 64 L. J. Q. B. 787; [1895] 2 Q. B. 610; 73 L. T. 250; 59 J. P. 710; 14 R. 678.—C.A.

Thomas v. Thomas (1842) 11 L. J. Q. B. 104; 2 Q. B. 851; 2 G. & D. 226; 6 Jur. 645.—Q.B., *discussed*.

Gardiner v. Gardiner (1861) 12 Ir. C. L. R. 565.—C.P.; **Lee v. Mathews** (1880) 6 L. R. Ir. 530.—C.A.

Steward v. Wolveridge (1832) 9 Bing. 60; 2 M. & Scott 75.—C.P.; *reversed, nom.* **Wolveridge v. Steward** (1833) 3 M. & Scott 561; 1 Cr. & M. 644; 3 Tyr. 637; 3 L. J. Ex. 360.—EX. CH.

Wolveridge v. Steward, *approved*.

Moule v. Garrett (1870) L. R. 5 Ex. 132; 39

Moule v. Garrett (1872) 41 L. J. Ex. 62; L. R. 7 Ex. 101; 26 L. T. 367; 2 W. R. 416.—EX. CH., *applied*.

Roberts v. Crowe (1872) 41 L. J. C. P. 198; L. R. 7 C. P. 629; 27 L. T. 238.—C.P.

Moule v. Garrett, *discussed*.

Bonner v. Tottenham and Edmonton Permanent Investment Building Society (1898) 68 L. J. Q. B. 114; [1899] 1 Q. B. 161; 79 L. T. 611; 47 W. R. 161.—C.A.

SMITH, L.J.—The *ratio decidendi* of *Moule v. Garrett* is this: If A. is compellable to pay B. damages, which C. is also compellable to pay B., then A., having been compelled to pay B., can maintain an action against C. for money so paid, for the circumstances raise an implied request by C. to A. to make such payment in his case. In other words, A. can call upon C. to indemnify him. (*See the notes to Lamplough v. Brathwaite*, 1 Smith's Leading Cases, 9th ed., p. 160, and cases there cited.) To raise this implied request, both A. and C. must, in my judgment, be compellable to pay B.; otherwise, as it seems to me, the payment by A. to B., so far as regards C., is a voluntary payment, which raises no implication of a request by C. to A. to pay. If Cockburn, C.J., in his alternative reason in *Moule v. Garrett* for holding the defendants liable, meant this by the expression "by the legal default of another," I agree; but, if it means by a default for which they were not compellable to pay in that case to the original lessor, I do not agree, and none of the other learned judges who decided that case adopted what Cockburn, C.J., then said, and, indeed, Willes, J., expressly points out that the obligation of the contract must be common to the plaintiff and the defendants, and that the whole benefit was taken by the defendants.—p. 116.

Moule v. Garrett, *considered and held inapplicable*.

Johns v. Pink (1899) 69 L. J. Ch. 98; [1900] 1 Ch. 226; 81 L. T. 712; 48 W. R. 247.—STIRLING, J.

[Although the execution creditor takes the whole interest in a term of years extended, he is not so far an assignee of the judgment debtor as to be liable for rent and covenants upon the principles of *Moule v. Garrett*.]

Bonner v. Tottenham and Edmonton Permanent Investment Building Society (*supra*), *principle applied*.

Moxham v. Grant (1899) 69 L. J. Q. B. 97; [1900] 1 Q. B. 88; 7 Manson, 65.—C.A.

Jones v. Hill (1817) 7 Taunt. 392; 1 Moore, 100.—C.P., *referred to*.

Yellowly v. Gower (1855) 11 Ex. 274; 24 L. J. Ex. 289.—EX.

Jones v. Hill, *applied*.

Cartwright, In re, Avis v. Newman (1889) 58 L. J. Ch. 590; 41 Ch. D. 532; 60 L. T. 891; 37 W. R. 312.—KAY, J.

Eaton v. Jaques (1780) 2 Doug. 455, *overruled*.

Williams v. Bosanquet (1819) 1 Br. & B. 238; 3 Moore 500; 21 R. R. 585.

DALLAS, C.J. (for the Court).—We have authority to say that, in the opinion of a great majority, *Eaton v. Jaques* is not to be considered as having been rightly decided.—p. 264.

Noke v. Awder (1595) Cro. Eliz. 436; Moore 419, *explained*.

Whitton v. Peacock (1835) 5 L. J. C. P. 124; 2 Bing. (N.C.) 411; 2 Scott 630.—C.P., *considered*.

Cuthbertson v. Irving (1859) 28 L. J. Ex. 306; 4 H. & N. 742; 5 Jur. (N.S.) 740.—EX.; *affirmed*, (1860) 29 L. J. Ex. 485; 6 H. & N. 135; 6 Jur. (N.S.) 1211; 3 L. T. 335.—EX. CH.

[See also the subsequent case of *Webb v. Austen* (7 Man. & G. 701), and the observations there of Tindal, C.J., upon the case of *Gouldsworth v. Knight*, and also the elaborate argument in the case of *Purgeter v. Harris* (7 Q. B. 708), and the dictum of Wightman, J. at p. 722, "that several cases show that in leases by estoppel the assignee does not take the legal right to sue on covenants."]

Lucas v. Comerford (1790) 1 Ves. 235; 3 Bro. C. C. 166; 8 Sim. 499.—L.C., *followed*.

Flight v. Bentley (1835) 7 Sim. 149; 4 L. J. Ch. 262.—V.-C.

Lucas v. Comerford, *considered*.

Flight v. Bentley (1835) 7 Sim. 149; 4 L. J. Ch. 262.—V.-C., *overruled*.

Moore v. Choat (1839) 8 Sim. 508; 8 L. J. Ch. 128; 3 Jur. 220.

Lucas v. Comerford and Flight v. Bentley, *held overruled*.

Moore v. Choat, *approved*.

Moore v. Greg (1848) 18 L. J. Ch. 15; 2 Ph. 717; 12 Jur. 952.—L.C.; *affirming* 2 De G. & Sm. 304.—V.-C.

Lucas v. Comerford and Flight v. Bentley, *held overruled*.

Sanders v. Benson (1841) 4 Beav. 250.—M.R., *commented on*.

Moore v. Choat, *followed*.

Cox v. Bishop (1857) 26 L. J. Ch. 389; 8 De G. M. & G. 815; 3 Jur. (N.S.) 499; 5 W. R. 437.—L.JJ.

TURNER, L.J. said it appeared to him unnecessary to consider any of the cases previous to *Moore v. Choat*. If, as it had been argued, the case of an equitable mortgagee was favourably considered by the Court, of course, if he were held liable, any other equitable assignee must be held in like manner. So long as the law was governed by *Lucas v. Comerford* and *Flight v. Bentley* there could be no doubt that it was so; but these cases were overruled, or, at all events, their authority was displaced, by *Moore v. Choat*,

Lucas v. Comerford and Moore v. Choat, *inapplicable*.

M'Craith v. Foster (1870) L. R. 5 Ch. 607, n.; M.R.; *reversed* L.C.

Close v. Wilberforce (1838) 1 Beav. 112.—M.R.

Distinguished Moore v. Greg (1848) 18 L. J. Ch. 15; 2 Ph. 717; 12 Jur. 952.—V.C.; *applied* **Harding v. Metropolitan Ry.** (1871) L. R. 7 Ch. 156, n.—M.R.; *reversed* (1872) 41 L. J. Ch. 374; L. R. 7 Ch. 154; 26 L. T. 109; 20 W. R. 321.—L.C.

Moore v. Greg (1848) 18 L. J. Ch. 15; 2 Ph. 717; 12 Jur. 952.—L.C., *applied*.

Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co. (1901) 71 L. J. Ch. 158; [1902] 1 Ch. 146, 157; 85 L. T. 652; 50 W. R. 177; 9 Manson, 56.—C.A.

Clavering v. Westley (1735) 3 P. W. 402.—M.R., *disapproved*.

Walters v. Northern Coal Mining Co. (1855) 5 De G. M. & G. 629; 25 L. J. Ch. 633; 2 Jur. (N.S.) 1; 4 W. R. 140.—CRANWORTH, L.C.

[*Clavering v. Westley*, so far as it might be an authority for the recovery of rent as an equitable debt, *disapproved of*.—p. 646.]

Walters v. Northern Coal Mining Co., *applied*.

De Brassac v. Martyn (1863) 9 L. T. 287; 11 W. R. 1020.—WOOD, V.-C.

Walters v. Northern Coal Mining Co., *not applied*.

Wright v. Pitt (1870) 40 L. J. Ch. 558; L. R. 12 Eq. 408; 25 L. T. 13; 20 W. R. 27.—MALINS, V.-C.; and **Ramage v. Womack** (1899) 69 L. J. Q. B. 40; [1900] 1 Q. B. 116; 81 L. T. 526.—WRIGHT, J.

Cox v. Bishop (1857) 8 De G. M. & G. 815; 26 L. J. Ch. 389; 3 Jur. (N.S.) 499; 5 W. R. 437.—L.JJ., *applied*.

Torrington v. Lowe (1868) 38 L. J. C. P. 121; L. R. 4 C. P. 26; 19 L. T. 316; 17 W. R. 78.—C.P.

Cox v. Bishop, *not applied*.

Wright v. Pitt (1870) 40 L. J. Ch. 558; L. R. 12 Eq. 408; 25 L. T. 13; 20 W. R. 27.—MALINS, V.-C.

Cox v. Bishop, *applied*.

Haywood v. Brunswick Building Society (1881) 51 L. J. Q. B. 73; 8 Q. B. D. 403; 45 L. T. 699; 30 W. R. 299.—C.A.

Cox v. Bishop, *followed*.

Friary v. Singleton (1898) 68 L. J. Ch. 13; [1899] 1 Ch. 86; 79 L. T. 465; 47 W. R. 93.—ROMER, J.; **Ramage v. Womack** (1899) 69 L. J. Q. B. 40; [1900] 1 Q. B. 116; 81 L. T. 526.—WRIGHT, J.

Cox v. Bishop and Ramage v. Womack,

1 Ch. 146; 85 L. T. 632; 50 W. R. 177; 9 Mans. 56.—C.A.

8. COVENANTS.

Usual.

Henderson v. Hay (1792) 3 Bro. C. C. 632.—L.C., *followed*.

Church v. Brown (1808) 15 Ves. 258.—L.C.

Henderson v. Hay and Church v. Brown (1808) 15 Ves. 258.—L.C., *applied*.

Hodgkinson v. Crowe (1875) 44 L. J. Ch. 680; L. R. 10 Ch. 622; 33 L. T. 388; 23 W. R. 885.—L.J.J.; *reversing* 44 L. J. Ch. 238; L. R. 19 Eq. 591; 33 L. T. 122; 23 W. R. 406.—V.C.

Henderson v. Hay; Church v. Brown and Hodgkinson v. Crowe—L.J.J. (*supra*), *followed*.

Haines v. Burnett (1859) 27 Beav. 500; 29 L. J. Ch. 289; 5 Jur. (N.S.) 1279; 1 L. T. 18; 8 W. R. 130.—M.R., *disapproved*.

Hampshire v. Wickens (1878) 7 Ch. D. 555; 47 L. J. Ch. 243; 38 L. T. 408; 26 W. R. 491.

JESSEL, M.R.—*Haines v. Burnett* appears to me to be opposed both to principle and authority, and it must now be treated as distinctly overruled by *Hodgkinson v. Crowe* (L. R. 10 Ch. 622). In *Haines v. Burnett*, Lord Romilly, without any special provision having been made in the contract to that effect, held that a covenant should be inserted making the lease determinable on the bankruptcy of the lessee, or on his making any arrangement for the benefit of his creditors. That was in fact nothing less than a variation of the contract. I cannot see any reason for holding such a contract to be usual. Yet it is rather difficult, in looking at the case, to understand how it was decided. Lord Romilly seems to have thought that in considering general covenants, and all such other covenants as are usually inserted in leases of property of a similar description, some regard might be had to the peculiar nature and tenure of the property. But I cannot find any evidence on that point mentioned in the report, and it would seem that the judge, from his view of the nature of the property, inserted the clause. But when we look at the reasoning of Vice-Chancellor Bacon, in *Hodgkinson v. Crowe*, I think it is conclusive against any judge being allowed to say from his own view that such a covenant ought to be introduced. The Court of Appeal affirmed that decision, and went further, and held that, under an agreement for a lease to contain "all usual and customary mining clauses," the landlord was not entitled to have inserted in the lease a proviso for re-entry except on non-payment of rent.—p. 560.

Hodgkinson v. Crowe—L.J.J. (*supra*), *followed*.

Anderton and Milner, In re (1890) 59 L. J. Ch. 765; 45 Ch. D. 476; 63 L. T. 332; 39 W. R. 44.—CHITTY, J.

Running with the Land.

Brewster v. Kitchin (or *Kitchell* or *Kidgill*)

(1697) 1 Ld. Raym. 317; 12 Mod. 166; Holt 175, 669; 1 Salk. 198, *dictum questioned*.

Milnes v. Branch (1816) 5 M. & S. 411; 17 R. R. 373.

ELLENBOROUGH, C.J.—I am inclined to think that the language of Lord Holt, as to the right of the assignee of the rent to have the covenant, was extra-judicial, and putting aside that *dictum*, I do not find any authority to warrant the position that this covenant runs with the rent.—p. 417.

Brewster v. Kitchin, *explained and distinguished*.

Louch v. Peters (1834) 3 L. J. Ch. 167; 1 Myl. & K. 489.—L.C.; and **Baily v. De Crespigny** (1869) 38 L. J. Q. B. 98; L. R. 4 Q. B. 180; 19 L. T. 681; 17 W. R. 494.—Q.B.

Brewster v. Kitchin, *principle applied*.

Newby v. Sharpe (1878) 47 L. J. Ch. 617; 8 Ch. D. 39.—FRY, J.: *reversed* C.A., **Newington Local Board v. Cottingham Local Board** (1879) 48 L. J. Ch. 226; 12 Ch. D. 725; 40 L. T. 58.—MALINS, V.-C.

Brewster v. Kitchin, *discussed and applied*.

Austerberry v. Oldham Corporation (1885) 29 Ch. D. 750; 53 L. T. 543; 33 W. R. 807; 49 J. P. 532.—C.A.

Doughty v. Bowman (1848) 11 Q. B. 444; 17 L. J. Q. B. 111; 12 Jur. 182.—EX. CH., *commented on*.

Minshall v. Oakes (1858) 2 H. & N. 793; 27 L. J. Ex. 194; 4 Jur. (N.S.) 170.—POLLOCK, C.B.

Doughty v. Bowman, *dictum applied*.

Piggott v. Stratton (1859) 1 De G. F. & J. 33; 29 L. J. Ch. 1; 6 Jur. (N.S.) 129; 1 L. T. 111; 8 W. R. 13.—L.C. and L.J.J.

Uxbridge v. Staveland (1746) 1 Ves. sen. 56.

—L.C., *questioned*.

Vyvyan v. Arthur (1823) 1 B. & C. 410; 2 D. & R. 670; 1 L. J. (O.S.) K. B. 138; 25 R. R. 437, *commented on*.

Keppell v. Bailey (1834) 2 My. & K. 517; Coop. T. Brough. 298.—BROUGHAM, L.C.

Keppell v. Bailey, *dictum questioned*.

Tulk v. Moxhay (1848) 2 Ph. 774; 18 L. J. Ch. 83; 13 Jur. 89; 12 L. T. (O.S.) 469.—M.R.; *affirmed* L.C.

Keppell v. Bailey, *held overruled*.

Luker v. Dennis (1877) 7 Ch. D. 227; 47 L. J. Ch. 174; 37 L. T. 827; 26 W. R. 167.

FRY, J.—The question I have to consider is whether I am bound by *Keppell v. Bailey* after those observations of Knight Bruce, L.J. [in *De Mattos v. Gibson* (4 De G. & J. 282)], after the mode in which they were applied by the Court of Appeal in *Cutt v. Twarle* (L. R. 4 Ch. 654), and after the long series of cases of which *Wilson v. Hart* (L. R. 1 Ch. 463) is a well-known example, in which the distinction which

with the more recent cases, and it is more straightforward to say this than to attempt to draw refined distinctions. I think, therefore, I am bound to give effect to the equitable doctrine of notice notwithstanding *Keppell v. Bailey*.—p. 236.

Keppell v. Bailey, inapplicable.

Wendelraan v. Société Générale d'Electricité (1881) 19 Ch. D. 246, 252.—C.A.

Keppell v. Bailey, commented upon.

Zetland (Earl) v. Hislop (1882) 7 App. Cas. 427.—H.L. (SC.).

Marshall v. Holloway (1832) 5 Sim. 196.—V.-C., adopted.

Christie v. Gosling (1866) 35 L. J. Ch. 667; L. R. 1 H. L. 279, 298; 15 L. T. 40.—H.L. (E.).

Marshall v. Holloway, discussed.

Martelli v. Holloway (1872) 42 L. J. Ch. 26; L. R. 5 H. L. 532.—H.L. (E.).

Marshall v. Holloway, applied.

Tewart v. Lawson (1874) 43 L. J. Ch. 673; L. R. 18 Eq. 490; 22 W. R. 822.—V.-C.

Marshall v. Holloway, explained.

Eccles v. Mills (1898) 67 L. J. P. C. 25; [1898] A. C. 360; 78 L. T. 206; 46 W. R. 398.—H.L. (E.).

Mansel v. Norton (1883) 52 L. J. Ch. 357; 22 Ch. D. 769; 48 L. T. 654; 31 W. R. 325.—C.A., explained.

Eccles v. Mills (1898) 67 L. J. P. C. 25; [1898] A. C. 360; 78 L. T. 206; 46 W. R. 398.—P.C.

Tulk v. Moxhay (1848) 2 Ph. 774; 1 Hall & Tw. 105; 18 L. J. Ch. 83; 13 Jur. 89; 12 L. T. (O.S.) 469.—L.C. See

Patching v. Dubbins (1853) 1 Kay 1; 17 Jur. 1118; 2 W. R. 2.—V.-C.; affirmed, 23 L. J. Ch. 45; 2 Eq. R. 71.—L.JJ.

Tulk v. Moxhay, referred to.

Cole v. Sims (1854) 23 L. J. Ch. 258; 5 De G. M. & G. 1; 1 W. R. 151.—L.JJ.

Tulk v. Moxhay, applied.

Wilson v. Hart (1866) 35 L. J. Ch. 569; L. R. 1 Ch. 463; 12 Jur. (N.S.) 460; 14 L. T. 499; 14 W. R. 748.—L.JJ.

Tulk v. Moxhay, applied.

Western v. Macdermott (1866) 36 L. J. Ch. 76; L. R. 2 Ch. 72; 15 L. T. 64; 15 W. R. 265.—L.C.; affirmed 35 L. J. Ch. 190; L. R. 1 Eq. 490; 12 Jur. (N.S.) 366.—M.R.

Tulk v. Moxhay, applicable.

Morland v. Cook (1868) 37 L. J. Ch. 825; L. R. 6 Eq. 252; 18 L. T. 496; 16 W. R.

Tulk v. Moxhay, approved.

Cooke v. Chilcott (1876) 3 Ch. D. 694; 34 L. T. 207.—V.-C.

Tulk v. Moxhay, applied.

Richards v. Revitt (1877) 47 L. J. Ch. 472; 7 Ch. D. 224; 37 L. T. 632; 26 W. R. 166.—FRY, J.; Fairclough v. Marshall (1878) 48 L. J. Ex. 146; 4 Ex. D. 37; 39 L. T. 389; 27 W. R. 145.—C.A.; Bewley v. Atkinson (1879) 49 L. J. Ch. 153; 13 Ch. D. 283; 41 L. T. 603; 28 W. R. 638.—C.A.

Tulk v. Moxhay, referred to.

Greaves v. Tofield (1880) 50 L. J. Ch. 118; 14 Ch. D. 563, 573; 43 L. T. 100; 28 W. R. 840.—C.A.

Tulk v. Moxhay, applied.

Patnam v. Harland (1881) 50 L. J. Ch. 642; 17 Ch. D. 353, 359; 44 L. T. 728; 29 W. R. 707.—M.R.

Tulk v. Moxhay, explained and limited.

Haywood v. Brunswick Permanent Benefit Building Society (1881) 8 Q. B. D. 403; 51 L. J. Q. B. 73; 45 L. T. 699; 30 W. R. 299; 46 J. P. 356.—C.A.

BRETT, L.J.—Now the equitable doctrine was brought to a focus in *Tulk v. Moxhay*, which is the leading case on this subject. It seems to me that that case decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule is that covenants restricting the mode of using the land only will be enforced. It may be also, but it is not necessary to decide here that all covenants also which impose such a burden on the land as can be enforced against the land would be enforced (p. 407). . . . But it is said that if we decide for the defendants we shall have to overrule *Cooke v. Chilcott*. If that case was decided on the equitable doctrine of notice, I think we ought to overrule it. But I think that there is much to show that the ground of the decision was that Malins, V.-C. was of opinion—wrongly, as it now turns out—that the covenant ran with the land, and the decision of the Court of Appeal appears to have proceeded on an admission.—p. 408.

Tulk v. Moxhay, limited.

L. & S. W. Ry. v. Gomm (1882) 20 Ch. D. 562; 51 L. J. Ch. 530; 46 L. T. 449; 30 W. R. 620.—C.A.; reversing KAY, J.

[KAY, J. in the inferior Court dissented from the cases of *Gilbertson v. Richards* and *Birmingham Canal Co. v. Cartwright*. At the same time he held that in the present case the covenant did not create any estate or interest in land, and therefore was not obnoxious to the rule against perpetuities, and that specific performance must be decreed, the covenant being binding on an alienee with notice on the principle of *Tulk v.*

Brunswick Permanent Benefit Building Society, and the Court there decided that they would not extend the doctrine of *Tulk v. Moxhay* to affirmative covenants, compelling a man to lay out money, or do any other act of what I may call an active character, but that it was to be confined to restrictive covenants. Of course that authority would be binding upon us if we did not agree to it, but I most cordially accede to it. I think we ought not to extend the doctrine of *Tulk v. Moxhay* in the way suggested here.—p. 586.

• *Tulk v. Moxhay, Limited.*

Holmes v. Buckley (1691) 1 Eq. C. Ab. 27; Pre. Ch. 99, *observed upon*.

Austerberry v. Oldham Corporation (1835) 29 Ch. D. 750; 53 L. T. 543; 33 W. R. 807; 49 J. P. 532.—C.A. COTTON, LINDLEY and FRY, L.JJ.

[*Tulk v. Moxhay* limited to restrictive stipulations, not to be extended so as to bind in equity a purchaser taking with notice of a covenant to expend money on repairs, or otherwise, which does not run with the land at law.]

COTTON, L.J.—The case principally relied upon by the appellant was one before Vice-Chancellor Malins. That was the case of *Cooke v. Chilcott*. Now undoubtedly the Vice-Chancellor did decide that case on the equitable doctrine, and said that he would enforce the covenants; but that is an authority which in my opinion was not right on that point. In the subsequent case of *Haywood v. Brunswick Permanent Benefit Building Society*—both Lord Justice Lindley and myself were members of the Court which decided that case—we expressed our opinion against *Cooke v. Chilcott* being a correct development of the doctrine established by *Tulk v. Moxhay*, or for which *Tulk v. Moxhay* was an authority. Then there was another case, before the late Lord Romilly, of *Morland v. Cook*, which was relied upon; but that was really a case not turning upon that doctrine, because it was this—there was a deed of partition of land all of which was below the sea level and was protected by a river or sea-wall, and a covenant was entered into by the different parties to pay their proportion of the expense of repairing the sea-wall, whoever should do it; and that covenant was enforced for and against the successors of those who were parties to the deed. But in that case it appeared that there was, according to the view of the Master of the Rolls, a common law liability, independently of that covenant, to repair the sea-wall, so that it would be very different from the case of creating a new liability; the covenant there was framed in such a way as to create a grant by the different persons who took, on partition, portions of the property or a rent-charge out of their lands in order to provide for the expense. The covenant was in this form: . . . So, although in terms it was a covenant, it was a covenant of those parties that the expense should be paid out of their proportions of the land by an acre-scut payable thereon in the same proportions in ready-money. That is, therefore, really a grant by each of the parties of a rent-charge of so much

COTTON, L.J.—Here the plaintiff [the superior landlord] does not seek to restrain Ewin [the lessee] from using the house in a particular way, or from doing something which will enable the tenant so to use it, but to compel him to bring an action against his tenant who is in possession of the house. The principle of *Tulk v. Moxhay* has never been carried so far except in a case before Malins, V.-C.: *Cooke v. Chilcott*. The question came practically before the Court of Appeal in *Haywood v. Brunswick Permanent Benefit Building Society*, and the Court there laid down that the principle in *Tulk v. Moxhay* was not to be applied so as to compel a man to do that which will involve him in expense.

• *Tulk v. Moxhay, dictum adopted.*

Mackenzie v. Childers (1889) 59 L. J. Ch. 188; 43 Ch. D. 265; 62 L. T. 98; 38 W. R. 243.—KAY, J.

• *Tulk v. Moxhay, referred to.*

Stuart v. Diplock (1889) 59 L. J. Ch. 142; 43 Ch. D. 343; 62 L. T. 333; 38 W. R. 223.—C.A.

• *Tulk v. Moxhay, applied.*

Clegg v. Hands (1890) 59 L. J. Ch. 477; 44 Ch. D. 503; 62 L. T. 502; 38 W. R. 433; 55 J. P. 180.—C.A.

• *Tulk v. Moxhay, applied.*

Mander v. Faleke (1891) [1891] 2 Ch. 554; 65 L. T. 203.—C.A. LINDLEY, BOWEN and FRY, L.JJ.

• *Tulk v. Moxhay, discussed and applied.*

Craig v. Greer (1898) [1899] 1 Ir. R. 258.—V.-C.

• *Tulk v. Moxhay, not applied.*

Holford v. Acton Urban Council (1898) 67 L. J. Ch. 636; [1898] 2 Ch. 240; 78 L. T. 829.—STIRLING, J.

• *Tulk v. Moxhay, referred to.*

Rogers v. Hosegood (1900) 69 L. J. Ch. 652; [1900] 2 Ch. 388; 83 L. T. 186; 48 W. R. 659.—C.A.; *affirming FARWELL, J.*

• *Tulk v. Moxhay, referred to.*

Manchester Ship Canal Co. v. Manchester Racecourse Co. (1901) 70 L. J. Ch. 468; [1901] 2 Ch. 37; 84 L. T. 436; 49 W. R. 418.—C.A.

• *Tulk v. Moxhay, referred to.*

Metropolitan Electric Supply Co. v. Ginder (1901) 70 L. J. Ch. 862; [1901] 2 Ch. 799; 84 L. T. 818; 49 W. R. 508; 65 J. P. 519.—BUCKLEY, J.; *Noakes v. Rice* (1901) 71 L. J. Ch. 139; [1902] A. C. 24; 86 L. T. 62; 50 W. R. 305; 66 J. P. 147.—H.L. (E.).

• *Morland v. Cook* (1868) 37 L. J. Ch. 825;

L. R. 6 Eq. 252; 18 L. T. 496; 16 W. R.

777.—M.R., *distinguished*.

Allen v. Seckham (1879) 48 L. J. Ch. 611; 11 Ch. D. 790; 41 L. T. 260; 28 W. R. 26.—C.A.; *Haywood v. Brunswick Building Society* (1881) 51 L. J. Ch. 73; 8 Q. B. D. 403; 45 L. T. 600.

Cooke v. Chilcott (1876) 3 Ch. D. 694; 34 L. T. 207.—V. C.

Questioned **Haywood v. Brunswick Permanent Benefit Building Society** (1881) 51 L. J. Q. B. 73; 8 Q. B. D. 403; 45 L. T. 699; 30 W. R. 299; 46 J. P. 356.—C.A. (*supra*, col. 1474); *overruled on this point* **Austerberry v. Oldham Corporation** (1885) 29 Ch. D. 750; 53 L. T. 543; 33 W. R. 807; 49 J. P. 532.—C.A. (*see extract, supra*, col. 1475); *commented upon* **Hall v. Ewin** (1887) 57 L. J. Ch. 95; 37 Ch. D. 74; 57 L. T. 831; 36 W. R. 84.—C.A.

Haywood v. Brunswick Permanent Benefit Building Society (1881) 51 L. J. Q. B. 73; 8 Q. B. D. 403; 45 L. T. 699; 30 W. R. 299; 46 J. P. 356.—C.A., *approved and adopted*.

L. & S. W. Ry. v. Gomm (1882) 51 L. J. Ch. 530; 20 Ch. D. 562; 46 L. T. 449; 30 W. R. 620.—C.A. (*see extract, supra*, col. 1474); **Austerberry v. Oldham Corporation** (1885) 29 Ch. D. 750; 53 L. T. 543; 33 W. R. 807; 49 J. P. 532.—C.A. (*see extract, supra*, col. 1475).

Haywood v. Brunswick Permanent Benefit Building Society and Austerberry v. Oldham Corporation (*supra*), *followed*.
Hall v. Ewin (1887) 57 L. J. Ch. 95; 37 Ch. D. 74; 57 L. T. 831; 36 W. R. 84.—C.A. (*see extract, supra*, col. 1476).

Haywood v. Brunswick Permanent Benefit Building Society and Austerberry v. Oldham Corporation, *discussed and applied*.
Craig v. Greer (1898) [1899] 1 Ir. R. 258.—V. C.

Hall v. Ewin (1887) 57 L. J. Ch. 95; 37 Ch. D. 74; 57 L. T. 831; 36 W. R. 84.—C.A.

Distinguished **Craig v. Greer** (1898) [1899] 1 Ir. R. 258.—V. C.; *applied* **John Brothers Abergarw Brewery Co. v. Holmes** [1900] 1 Ch. 188; 81 L. T. 771; 48 W. R. 236; 64 J. P. 153.—KEKEWICH, J.

Gilbertson v. Richards (1860) 5 H. & N. 453; 29 L. J. Ex. 213; 6 Jur. (N.S.) 672.—EX. CH.; *affirming* (1859) 28 L. J. Ex. 158; 4 H. & N. 277.—EX., *followed*.
Birmingham Canal Co. v. Cartwright (1879) 48 L. J. Ch. 552; 11 Ch. D. 421; 40 L. T. 784; 27 W. R. 987.—FRY, J.

Gilbertson v. Richards, *dissented from*.
Birmingham Canal Co. v. Cartwright, *overruled*.

L. & S. W. Ry. v. Gomm (1882) 51 L. J. Ch. 530; 20 Ch. D. 562; 46 L. T. 449; 30 W. R. 620.—C.A. *See extract, supra*, col. 1474.

Gilbertson v. Richardson and Birmingham Canal Co. v. Cartwright, *disapproved*.

Radington v. Browne (1893) 32 L. R. Ir. 347.—BEWLEY, J.

Daniel v. Stepney (1872) 41 L. J. Ex. 208; L. R. 7 Ex. 327; 27 L. T. 380; 21 W. R. 17.—EX.; *reversed*, (1874) L. R. 9 Ex. 185; 22 W. R. 662.—EX. CH.

Daniel v. Stepney, *referred to*.

Daniel v. Stepney.

See **Haywood v. Brunswick Building Society** (1881) 51 L. J. Q. B. 73; 8 Q. B. D. 403; 45 L. T. 699; 30 W. R. 299; 46 J. P. 356.—C.A.

Thomas v. Hayward (1869) 38 L. J. Ex. 175; L. R. 4 Ex. 311; 20 L. T. 814.—EX., *distinguished*.

Fleetwood v. Hull (1889) 58 L. J. Q. B. 341; 23 Q. B. D. 35; 60 L. T. 790; 37 W. R. 714; 54 J. P. 229.—CHARLES, J.

To Repair.

Lant v. Norris (1757) 1 Burr. 290.—K.B., *dictum applied*.

Monypenny v. Monypenny (1859) 28 L. J. Ch. 303; 3 De G. & J. 572; 5 Jur. (N.S.) 253; 7 W. R. 276.—L.C.

Saner v. Bilton (1878) 47 L. J. Ch. 267; 7 Ch. D. 815; 38 L. T. 281; 26 W. R. 394.—FRY, J., *followed*.

Manchester Bonded Warehouse Co. v. Carr (1880) 49 L. J. C. P. 809; 5 C. P. D. 507; 43 L. T. 476; 29 W. R. 354; 45 J. P. 7.—C.P.

Beaufort (Duke) v. Bates, 5 L. T. 546.—V. C.; *reversed*, (1862) 3 De G. F. & J. 381; 31 L. J. Ch. 481; 8 Jur. (N.S.) 270; 10 W. R. 200; 6 L. T. 82.—L.JJ.

Beaufort (Duke) v. Bates, *distinguished*.

Turner v. Cameron (1870) 39 L. J. Q. B. 125; L. R. 5 Q. B. 306; 10 B. & S. 931; 22 L. T. 525; 18 W. R. 544.—Q.B.

Hughes v. Metropolitan Ry. (1877) 46 L. J. C. P. 583; 2 App. Cas. 439; 36 L. T. 932; 25 W. R. 680.—H.L. (E.), *principle applied*.

Birmingham and District Land Co. v. L. & N. W. Ry. (1888); 40 Ch. D. 268; 60 L. T. 527.—C.A.; *affirming* 36 Ch. D. 650; 57 L. T. 185.—KEKEWICH, J.

Hughes v. Metropolitan Ry., *referred to*.

Ormsby v. Good (1894) [1895] 1 Ir. R. 113.—GIBSON, J.

Moore v. Clark (1813) 5 Taunt. 90.—C.P., *dictum considered*.

Makin v. Watkinson (1870) 40 L. J. Ex. 33; L. R. 6 Ex. 25; 23 L. T. 592; 19 W. R. 286.—EX.; **MARTIN, B. dissenting**.

Makin v. Watkinson, *applied*.

L. & S. W. Ry. v. Flower (1875) 45 L. J. C. P. 54; 1 C. P. D. 77; 33 L. T. 687.—C.P.D.; **Manchester Bonded Warehouse Co. v. Carr** (1880) 49 L. J. C. P. 809; 5 C. P. D. 507; 43 L. T. 476; 29 W. R. 354; 45 J. P. 7.—C.P.D.

Makin v. Watkinson, *followed*.

Hugall v. McKean (1885) 53 L. T. 94; 33 W. R. 588.—C.A.; *affirming* 1 Cab. & E. 391.—WILLS, J.

Sampson v. Easterby, 5 L. J. (O.S.) K. B. 291; 9 B. & C. 505; 4 M. & Ry. 422.—K.F.; *affirmed nom.* **Easterby v. Sampson** (1830) 6

Easterby v. Sampson, *considered*.
Aspdin v. Austin (1844) 13 L. J. Q. B. 153; 5 Q. B. 671; 8 Jur. 355.—Q.B.

Tyndall v. White (1886) 18 L. R. 1r. 263.—C.P.D.; *reversed*, (1886) 20 L. R. 1r. 517.—C.A.; *the latter decision reversed, nom. White v. Tyndall* (1888) 57 L. J. C. P. 114; 13 App. Cas. 263; 53 L. T. 741; 52 J. P. 675.—H.L. (IR.).

• **White v. Tyndall** (*supra*, in H.L.), *distinguished*.

National Society for Distribution of Electricity v. Gibbs (1900) 69 L. J. Ch. 457; [1900] 2 Ch. 280; 82 L. T. 443; 48 W. R. 499.—C.A.

Levy v. Sale (1877) 37 L. T. 709.—LUSH, J., *observations referred to*.

White v. Tyndall (1888) 57 L. J. P. C. 114; 13 App. Cas. 263; 53 L. T. 741; 52 J. P. 675.—H.L. (IR.).

Burdett v. Withers (1837) 7 A. & E. 136; 2 N. & P. 122; W. W. & D. 444; 6 L. J. K. B. 219; 1 Jur. 514.—K.B., *commented on*.

Payne v. Haine (1847) 16 L. J. Ex. 130; 16 M. & W. 541.

ALDERSON, B.—I doubt whether the marginal note to *Burdett v. Withers* is good law, although the case itself is perfectly good; for it is not competent for the tenant to prove the state of repair of the premises, but only the general class.—p. 181.

Payne v. Haine, *approved*.
Easton v. Pratt (1864) 33 L. J. Ex. 233; 10 Jur. (N.S.) 732; 9 L. T. 841; 12 W. R. 805.—EX. CH.

Payne v. Haine, *applied*.
Saner v. Bilton (1878) 47 L. J. Ch. 267; 7 Ch. D. 815; 38 L. T. 281; 26 W. R. 394.—FRY, J.

Payne v. Haine, *principles applied*.
Pontifex v. Foord (1884) 53 L. J. Q. B. 321; 12 Q. B. D. 152; 49 L. T. 808; 32 W. R. 316.—POLLOCK, B., and LOPES, J.; Catton v. Bennett (1884) 53 L. J. Ch. 685; 26 Ch. D. 161; 50 L. T. 383; 32 W. R. 485.—KAY, J.

Payne v. Haine, *approved*.
Proudfoot v. Hart (1890) 59 L. J. Q. B. 389; 25 Q. B. D. 42; 63 L. T. 171; 38 W. R. 730; 55 J. P. 20.—C.A. ESHER, M.R. and LOPES, L.J.

Payne v. Haine; Gutteridge v. Munyard (1834) 7 Car. & P. 129; 1 M. & Rob. 334.—TINDAL, C.J.; and **Soward v. Leggatt** (1836) 7 Car. & P. 613.—ABINGER, C.B., *applied*.

Lister v. Lane (1893) 62 L. J. Q. B. 583; [1893] 2 Q. B. 212; 4 R. 474; 69 L. T. 176; 41 W. R. 626; 57 J. P. 725.—C.A.

Payne v. Haine, *referred to*.
Gaskell's Settled Estates, In re (1894) 63 L. J. Ch. 243; [1894] 1 Ch. 485; 8 R. 67; 70 L. T. 554; 42 W. R. 219.—CHITTY, J.

• **Neale v. Ratcliffe** (1850) 15 Q. B. 916; 20 L. J. Q. B. 130; 15 Jur. 166.—Q.B., *followed*.
Rolt v. Cozens (1856) 25 L. J. C. P. 254; 18 Q. B. 673; 2 Jur. (N.S.) 1073.—C.P.; Coward v. Gregory (1866) 36 L. J. C. P. 1; L. R. 2 C. P. 153; 15 L. T. 279; 15 W. R. 170; 19 Jur. (N.S.)

Collins v. Barrow (1831) 1 M. & Rob. 112.—BAYLEY, B., *commented on*.
Arden v. Pullen (1842) 10 M. & W. 321; 11 L. J. Ex. 359.—EX.

Collins v. Barrow and Edwards v. Etherington (1825) Ry. & M. 268; 7 D. & R. 117, *adopted*.

Smith v. Marrable (1843) 11 M. & W. 5; 12 L. J. Ex. 223; 2 D. (N.S.) 810; Car. & M. 459; 7 Jur. 70.—EX.

Collins v. Barrow; Edwards v. Etherington, and Salisbury v. Marshall (1829) 4 Car. & P. 65.—TINDAL, C.J., *overruled*.

Hart v. Windsor (1843) 12 M. & W. 68; 13 L. J. Ex. 129; 8 Jur. 150.—EX. See extract, *post*, col. 1502.

Coward v. Gregory (1866) 36 L. J. C. P. 1; L. R. 2 C. P. 153; 15 L. T. 279; 15 W. R. 170; 12 Jur. (N.S.) 1000.—C.P., *principles applied*.

Mills v. East London Union (1872) 42 L. J. C. P. 46; L. R. 8 C. P. 79; 27 L. T. 557; 21 W. R. 142.—C.P.

Coward v. Gregory, *followed*.
Jacob v. Down (1900) 69 L. J. Ch. 493; [1900] 2 Ch. 156; 83 L. T. 191; 48 W. R. 441; 64 J. P. 552.—STIRLING, J.

• **Morgan v. Hardy** (1886) 17 Q. B. D. 770.—DENMAN, J.; *affirmed*, 35 W. R. 588.—C.A., *applied*.

• Joyner v. Weeks (1891) 60 L. J. Q. B. 510; [1891] 2 Q. B. 31; 65 L. T. 16; 39 W. R. 583; 55 J. P. 725.—C.A. ESHER, M.R. and FRY, L.J.

Joyner v. Weeks, *applied*.
Henderson v. Thorn (1893) 62 L. J. Q. B. 586; [1893] 2 Q. B. 164; 5 R. 404; 69 L. T. 430; 41 W. R. 509; 57 J. P. 679.—WILLS and LAWRENCE, JJ.

Vivian v. Champion (1705) 2 Ld. Raym. 1125, *applied*.
Jones v. Simcs (1890) 43 Ch. D. 607; 59 L. J. Ch. 351; 62 L. T. 447.—CHITTY, J.

Vivian v. Champion; Doe d. Worcester v. Rowlands (1840) 9 Car. & P. 734; 5 Jur. 177; and **Turner v. Lamb** (1845) 14 M. & W. 412.—EX., *observations cited*.
Conquest v. Ebbetts (1896) 65 L. J. Ch. 808; [1896] A. C. 490; 75 L. T. 36; 45 W. R. 50.—H.L. (E.); *affirming* S. C. *nom.* Ebbetts v. Conquest, 64 L. J. Ch. 702; [1895] 2 Ch. 377; 12 R. 430; 73 L. T. 69; 44 W. R. 56.—C.A.

For Quiet Enjoyment.

Witchcot v. Nine (1610) Brownl. & G. 81, *explained*.
Edge v. Boileau (1885) 55 L. J. Q. B. 90; 16 Q. B. D. 117; 53 L. T. 907; 34 W. R. 103.—POLLOCK, B., and MANISTY, J.

Adams v. Gibney (1830) 6 Bing. 656; 4 M. & P. 491; 8 L. J. (O.S.) C. P. 242; 31 R. R. 514.—C.P., *referred to*.
Monypenny v. Monypenny (1861) 9 H. L. Cas. 114; 31 L. J. Ch. 269.—H.L. (E.).

Adams v. Gibney, *followed*.

Adams v. Gibney and Swan v. Stransham, Dyer 257 a, *followed*.
Baynes v. Lloyd (1895) 64 L. J. Q. B. 787; [1895] 2 Q. B. 610; 14 R. 678; 73 L. T. 257; 59 J. P. 710.—C.A.; *affirming* 43 W. R. 525.—RUSSELL, C.J.

Line v. Stephenson (1838) 5 Bing. (N.C.) 183; 7 Scott 69; 1 Arn. 385; 7 L. J. C. P. 263.—EX. CH., *adopted*.
Mostyn v. West, Mostyn Coal and Iron Co. (1876) 45 L. J. C. P. 401; 1 C. P. D. 145; 34 L. T. 325; 24 W. R. 401.—C.P.D.

Bandy v. Cartwright (1853) 8 Ex. 913; 22 L. J. Ex. 285; 1 W. R. 418.—EX., *followed*.
Hall v. City of London Brewery Co. (1862) 31 L. J. Q. B. 257; 2 B. & S. 737; 9 Jur. (N.S.) 18.—Q.B.

Bandy v. Cartwright, *adopted*.
Robinson v. Kilvert (1889) 58 L. J. Ch. 392; 41 Ch. D. 88; 61 L. T. 60; 37 W. R. 545.—C.A.

Bandy v. Cartwright, *applied*.
Aldin v. Latimer Clark (1894) 63 L. J. Ch. 601; [1894] 2 Ch. 437; 8 R. 352; 71 L. T. 119; 42 W. R. 553.—STIRLING, J.

Bandy v. Cartwright; Hall v. City of London Brewery Co. (1862) 31 L. J. Q. B. 257; 2 B. & S. 737; 9 Jur. (N.S.) 18.—Q.B.; and **Holder v. Taylor** (1612) Hob. 12, *commented on*.

Baynes v. Lloyd (1895) 64 L. J. Q. B. 787; [1895] 2 Q. B. 610; 14 R. 678; 73 L. T. 250; 59 J. P. 710.—C.A.; *affirming* 43 W. R. 525.—RUSSELL, C.J.

KAY, L.J. (for the Court).—In **Bandy v. Cartwright** the lease was by parol; it was held that a covenant for quiet enjoyment during the term could be implied, and further that such covenant was broken by a distress for a rent-charge granted before the parol demise by a predecessor in title of the lessor, under whom he claimed by purchase. The reason for this decision is not given in the report. Probably this parol lease was made by the word "demise," or, in the absence of evidence, that was assumed to be the case. That decision was followed in **Hall v. City of London Brewery Co.** The weight of authority is in favour of the view that a covenant in law is not implied from the mere relation of landlord and tenant, but only from certain words used in creating the lease. . . . In **Holder v. Taylor** the implied covenant seems to have been treated as an absolute covenant, broken by the fact that the lessor had no title at the date of the lease.

Bandy v. Cartwright and Hall v. City of London Brewery Co., *considered and followed*.

Budd-Scott v. Daniel (1902) 71 L. J. K. B. 706; [1902] 2 K. B. 371; 87 L. T. 392; 51 W. R. 134.—LORD ALDERSTONE, C.J., DARLING and STANNELL, JJ.

Baynes v. Lloyd (*supra*).
Dictum questioned Budd-Scott v. Daniel (1902) *supra*; *discussed* Jones v. Lavington (1902) 2 L. J. K. B. 98; [1903] 1 K. B. 253; 88 L. T. 223; 51 W. R. 161.—C.A.

Hudson v. Cripps (1896) 65 L. J. Ch. 328; [1896] 1 Ch. 265; 73 L. T. 741; 44 W. R. 200; 60 J. P. 393.—NORTH, J., *referred to*.
Holford v. Acton Urban Council (1898) 67 L. J. Ch. 636; [1898] 2 Ch. 240; 78 L. T. 829.—STIRLING, J.

Hudson v. Cripps, *discussed*.
Alexander v. Mansions Proprietary, Limited (1900) 16 Times L. R. 431.—STIRLING, J.

Spencer v. Marriott (1823) 1 B. & C. 457; 2 D. & R. 655; 1 L. J. (O.S.) K. B. 134; 25 R. R. 453.—K.B., *approved*.
Dennett v. Atherton (1872) L. R. 7 Q. B. 316; 41 L. J. Q. B. 165; 20 W. R. 442.—EX. CH.

Spencer v. Marriott, *applied*.
Besley v. Besley (1878) 9 Ch. D. 103; 38 L. T. 841; 27 W. R. 184.—V.-C.

Locke v. Furze (1866) 35 L. J. C. P. 141; L. R. 1 C. P. 441; 15 L. T. 161; 14 W. R. 403; 1 H. & R. 397.—EX. CH.; *affirming* 19 C. B. (N.S.) 96; 11 Jur. (N.S.) 726.—C.P.; and **Gillard v. Cheshire Lines Committee** (1884) 32 W. R. 943.—C.A., *distinguished*.
Wallis v. Hands [1893] 2 Ch. 75; 62 L. J. Ch. 586; 3 R. 351; 68 L. T. 428; 41 W. R. 471.

CHITTY, J.—In **Locke v. Furze** . . . the plaintiff was in possession when the lease, originally reversionary, but then possessory, was avoided by title paramount; and he remained in possession for a short period (some twenty days) during the currency of the term granted by the avoided lease, upon the covenant in which the action was brought. It is consequently no authority on the point (p. 85).

The plaintiff's counsel . . . cited the decision of the Court of Appeal in **Gillard v. Cheshire Lines Committee**. The Court there held that a person having a mere *interesse terminum* could maintain an action for injury to his right. The cases on trespass, though not cited, were of course present to the minds of the members of the Court who so held; there was no intention to overrule them, either directly or indirectly. . . . The judgment turned on the proposition that the defendants had injured the plaintiff's proprietary right. While accepting that decision, as I am bound to do without question, I think that it does not apply to the facts of this case. . . . The plaintiff has refrained, and as I think deliberately refrained, from exercising his right of entry under his voidable lease of 1887. I think he is not entitled to any damages; if I thought otherwise, I should assess them at a mere nominal sum.—p. 86.

Andrew v. Pearce (1805) 1 Bos. & P. (N.R.) 158; 8 R. R. 776.—C.P., *explained*.
Williams v. Burrell (1845) 1 C. B. 402; 71 L. J. C. P. 98; 9 Jur. 282.—C.P.

Williams v. Burrell (1845) 1 C. B. 402; 14 L. J. C. P. 98; 9 Jur. 282.—C.P., *followed*.
Locke v. Furze (*supra*) and **Child v. Stenning** (1879) 11 Ch. D. 82; 48 L. J. Ch. 392; 40 L. T. 302; 27 W. R. 462.—C.A.

Cooke v. Forbes (1867) 37 L. J. Ch. 178; L. R. 5 Eq. 166; 17 L. T. 371.—V.-C., *referred to*.
Gaunt v. Fynney (1872) 42 L. J. Ch. 122; 71 L. R.

Cooke v. Forbes, *distinguished*.
Robinson v. Kilvert (1889) 58 L. J. Ch. 392;
 41 Ch. D. 88; 61 L. T. 60; 37 W. R. 545.—C.A.
COTTON, LINDLEY and LOPES, L.JJ.

Dennett v. Atherton (1872) 41 L. J. Q. B.
 165; L. R. 7 Q. B. 316; 20 W. R. 442.—
 EX. CH., *referred to*.
Porter v. Drew (1880) 49 L. J. C. P. 482; 5
 C. P. D. 143; 42 L. T. 151; 28 W. R. 672; 44
 J. P. 267.—C.P.D.

Dennett v. Atherton, *observations not
 applied*.

Sanderson v. Berwick-upon-Tweed Corporation
 (1884) 53 L. J. Q. B. 559; 13 Q. B. D. 547; 51
 L. T. 495; 33 W. R. 67; 49 J. P. 6.—C.A.

Dennett v. Atherton, *discussed*.

Robinson v. Kilvert (1889) 58 L. J. Ch. 392;
 41 Ch. D. 88; 61 L. T. 60; 37 W. R. 545.—C.A.

Dennett v. Atherton, *applied*.

Spurling v. Bantoft (1891) 60 L. J. Q. B. 745;
 [1891] 2 Q. B. 384; 65 L. T. 584; 40 W. R. 157;
 17 Cox C. C. 372; 56 J. P. 132.—CAVE and
CHARLES, JJ.

Dennett v. Atherton, *referred to*.

Harrison v. Muncaster (Lord) (1891) 61 L. J.
 Q. B. 102; [1891] 2 Q. B. 680; 65 L. T. 481; 40
 W. R. 102; 56 J. P. 69.—C.A.

Dennett v. Atherton, *considered*.

Tebb v. Cave (1900) 69 L. J. Ch. 282; [1900]
 1 Ch. 642; 82 L. T. 115; 48 W. R. 318.—BUCKLEY,
 J. *See extract, post*, col. 1484.

Shaw v. Stenton (1858) 2 H. & N. 858; 27
 L. J. Ex. 253; 6 W. R. 327.—EX., *applied*.
Anderson v. Oppenheimer (1880) 49 L. J. Q. B.
 708; 5 Q. B. D. 602.—C.A.

**Shaw v. Stenton and Sanderson v. Berwick-
 upon-Tweed Corporation** (1884) 53 L. J.
 Q. B. 559; 13 Q. B. D. 547; 51 L. T. 495;
 33 W. R. 67; 49 J. P. 6.—C.A., *varying*
DENMAN, J., explained.

Jenkins v. Jackson (1889) 58 L. J. Ch. 124;
 40 Ch. D. 71; 60 L. T. 105; 37 W. R. 253.

KEKEWICH, J. *discussed Shaw v. Stenton and
 Sanderson v. Berwick-upon-Tweed Corporation*,
 and *came to the conclusion that they did not
 support the proposition that a nuisance com-
 mitted on adjoining land (in this case an upper
 flat) by the lessor or his tenant is a breach of the
 covenant for quiet enjoyment*.

**Sanderson v. Berwick-upon-Tweed Corpora-
 tion**, *discussed*.

Robinson v. Kilvert (1889) 58 L. J. Ch. 392;
 41 Ch. D. 88; 61 L. T. 60; 37 W. R. 545.—C.A.

**Shaw v. Stenton and Sanderson v. Berwick-
 upon-Tweed Corporation**, *considered*.

Harrison v. Muncaster (Lord) (1891) 61 L. J.
 Q. B. 102; [1891] 2 Q. B. 680; 65 L. T. 481; 40
 W. R. 102; 56 J. P. 69.—C.A.

ESHER, M.R.—*Sanderson v. Mayor of Berwick-
 upon-Tweed* is a clear authority that the interruption
 contemplated by the covenant need not neces-
 sarily be an interference with the title, but may
 extend to an interference with the enjoyment;
 and that decision, interpreted in that way was,
 in my opinion, authorised by *Shaw v. Stenton*;
 but it goes no further. [His lordship proceeded to

**Sanderson v. Berwick-upon-Tweed Corpora-
 tion and Robinson v. Kilvert** (1889) 58
 L. J. Ch. 392; 41 Ch. D. 88; 61 L. T. 60;
 37 W. R. 545.—C.A., *applied*.

Aldin v. Latimer Clark (1894) 63 L. J. Ch. 601;
 [1894] 2 Ch. 437; 8 R. 352; 71 L. T. 119; 42
 W. R. 553.—STIRLING, J.

**Sanderson v. Berwick-upon-Tweed Corpora-
 tion**, *explained*.

**Manchester, Sheffield and Lincolnshire Ry. v.
 Anderson** (1898) 67 L. J. Ch. 568; [1898] 2 Ch.
 394; 78 L. T. 821.—C.A., *affirming* 46 W. R. 509.
 —BYRNE, J.

**Sanderson v. Berwick-upon-Tweed Corpora-
 tion, and Manchester, Sheffield and Lin-
 colnshire Ry. v. Anderson**, *considered*.

Tebb v. Cave (1900) 69 L. J. Ch. 282; [1900]
 1 Ch. 642; 82 L. T. 115; 48 W. R. 318.

BUCKLEY, J.—In *Dennett v. Atherton* Willes,
 J. stated the law in this way: "Now there can
 be no doubt that a proceeding of the Court of
 Chancery, or of a Court of common law, inter-
 fering with the title and possession of the land,
 does amount to a breach of the covenant for
 quiet enjoyment. . . . On the other hand, it
 has long been settled that such a proceeding,
 interfering only with a particular mode of enjoy-
 ment of the land, or part of it, but not with the
 title or possession, is not a breach." . . .
Dennett v. Atherton was, however, considered
 and commented on in the C. A. in *Sanderson v.
 Berwick-upon-Tweed Corporation*. . . . Instating
 the law, Fry, L.J., who delivered the judg-
 ment of the Court, said this: ". . . It
 appears to us to be in every case a question of
 fact whether the quiet enjoyment of the land
 has or has not been interrupted; and where the
 ordinary and lawful enjoyment of the demised
 land is substantially interfered with by the acts
 of the lessor, or those lawfully claiming under
 him, the covenant appears to us to be broken,
 although neither the title to the land nor the
 possession of the land may be otherwise
 affected." Now, it is said by the defendant,
 and I think truly said, that *Sanderson v.
 Berwick-upon-Tweed Corporation* is the utmost
 extent to which this law has been carried. The
 law is by that decision extended beyond title
 and possession, to those cases in which quiet
 enjoyment of the land is substantially interfered
 with by the acts of the lessor. That case was
 again referred to in the C. A. in *Robinson v.
 Kilvert*. . . . Then the defendant has referred
 to *Manchester, Sheffield and Lincolnshire Ry. v.
 Anderson*, in which the present M.R., referring
 to *Sanderson v. Berwick-upon-Tweed Corpora-
 tion*, says this: ". . . I take it that a mere
 temporary inconvenience caused by a lessor,
 not in depriving his tenant of a right of way,
 but in rendering his access less convenient than
 it was, is not a breach of covenant for quiet
 enjoyment. A temporary inconvenience which
 does not interfere with the estate, or title, or
 possession, is not to my mind a breach of
 covenant, nor is there any case that goes any-
 thing like the length required to show that it is.
 Even the judgment of Fry, L.J. in the case that
 carried it furthest—*Sanderson v. Berwick-upon-
 Tweed Corporation*, in which he says that any-
 thing which substantially interferes with the

facts then before the Court, which were that water was poured on the land demised so as to interfere with the enjoyment of the demised property. It did not interfere with the possession, except in a very technical sense, and still less with the title. . . . That is the greatest qualification of *Sanderson v. Berwick-upon-Tweed Corporation* which, so far I know, is to be found.

Tebb v. Cave (*supra*), *questioned and distinguished*.

Davis v. Town Properties Investment Corporation (1903) 72 L. J. Ch. 389; [1903] 1 Ch. 797; 88 L. T. 665; 51 W. R. 417.—C.A.

Stanley v. Hayes (1842) 3 Q. B. 105; 2 G. & D. 411; 11 L. J. Q. B. 176.—Q. B., *approved and applied*.

Harrison v. Muncaster (Lord) (1891) 61 L. J. Q. B. 102; [1891] 2 Q. B. 680; 65 L. T. 481; 40 W. R. 102; 56 J. P. 69.—C.A., *observations inapplicable*.

Kelly v. Rogers (1892) 61 L. J. Q. B. 604; [1892] 1 Q. B. 910; 66 L. T. 582; 40 W. R. 516; 56 J. P. 789.—C.A.

Harrison v. Muncaster, *applied*.

Davis v. Town Properties Investment Corporation (1902) 71 L. J. Ch. 900; [1902] 2 Ch. 635; 87 L. T. 430; 51 W. R. 42.—BYRNE, J.

Kelly v. Rogers (1892) 61 L. J. Q. B. 604; [1892] 1 Q. B. 910; 66 L. T. 582; 40 W. R. 516; 56 J. P. 789.—C.A., *distinguished*.

Cohen v. Tamar (1900) 69 L. J. Q. B. 904; [1900] 2 Q. B. 609; 83 L. T. 64; 48 W. R. 642.—C.A.

A. L. SMITH, L.J.—It is urged on behalf of the defendant that the present case is covered by the decision in *Kelly v. Rogers*, because the act of the superior landlord was not the act of any person claiming by, through, or under the defendant. If all that had happened here, were that judgment had been recovered against the defendant by his superior landlord, no doubt *Kelly v. Rogers* would have been a clear authority in the defendant's favour, but here, here is the fact that the defendant having a perfect defence to the action by the superior landlord, consented to judgment. It was this of his which caused the plaintiff to be turned out of possession, and the defendant thereby as guilty of a breach of the covenant for quiet enjoyment.—p. 906.

Butler v. Swinerton (Lady) (1622) Cro. Jac. 656, *distinguished*.

Woodhouse v. Jenkins (1832) 9 Bing. 431; 2 & Scott, 599; 2 L. J. C. P. 38.—C.P.

Not to Assign or Underlet.

Crusoe d. Blencowe v. Bugby (1771) 3 Wils. 234; 2 W. Bl. 766, *observed upon*.

Varley v. Coppard (1872) L. R. 7 C. P. 505; 26 T. 882; 20 W. R. 972.—C.P.

Crusoe d. Blencowe v. Bugby, *observation applied*.

Grove v. Portal (1902) 71 L. J. Ch. 299; [1902]

Greenaway v. Adams (1806) 12 Ves. 395—M.R., *not followed*.

Gwilliam v. Stone (1807) 14 Ves. 128.—M.R.; *Aberaman Ironworks v. Wickens* (1868) L. R. 5 Eq. 515.—V.-C.; *reversed* L. R. 4 Ch. 101; 20 L. T. 89; 17 W. R. 211.—L.C.

Greenaway v. Adams, *distinguished*.

Doyle and O'Hara's Contract, In re (1898) [1899] 1 Ir. R. 113.—C.A.

ASHBOURNE, C.—On the terms of the lease in *Greenaway v. Adams*, it would be difficult to come to any other conclusion, for it is impossible to see any difference, except in phraseology, between a covenant restraining alienation of a public-house and a covenant restraining sub-letting the same for the entire term for which it was held. On the other hand, in the covenant entered into between John D'Arcy and Denis Doyle, there is nothing whatever to indicate that the parties were thinking of the entire interest in the term. It may well be that the landlord has no objection to the premises being assigned, while he had an objection to their being sub-let.—p. 121.

Greenaway v. Adams, *observation applied*.

Grove v. Portal (1902) 71 L. J. Ch. 299; [1902] 1 Ch. 727; 86 L. T. 350.—JOYCE, J.

Church v. Brown (1808) 15 Ves. 258; 10 R. R. 74.—L.C., *applied*.

Hodgkinson v. Crowe (1875) 44 L. J. Ch. 680; L. R. 10 Ch. 622; 33 L. T. 388; 23 W. R. 885.—L.J.; *Hampshire v. Wickens* (1878) 47 L. J. Ch. 243; 7 Ch. D. 555; 38 L. T. 408; 26 W. R. 491.—M.R.; *Lander and Bagley's Contract*, In re (1892) 61 L. J. Ch. 707; [1892] 3 Ch. 41; 67 L. T. 521.—CHITTY, J.; *Grove v. Portal* (1902) 71 L. J. Ch. 299; [1902] 1 Ch. 727; 86 L. T. 350.—JOYCE, J.

Doe d. Pitt v. Laming (1814) 4 Camp. 77; 15 R. R. 728, *questioned*.

Greenslade v. Tapscott (1834) 1 C. M. & R. 55; 4 Tyr. 566; 3 L. J. Ex. 328.—EX.

PARKE, B.—It is more difficult to say that *Doe v. Laming* is not applicable. There, however, the demise was of a coffee-house, and, unless there was a distinct agreement with the lodger for the occupation of a particular room, it may be said he had not such an exclusive possession of it as would have entitled him to maintain trespass. If there had been any such distinct demise, then it would have resembled the case of a ready-furnished lodging, and the act might have come within the terms of the covenant. In this view the case of *Doe v. Laming* may be supported; but I cannot say that the grounds upon which Lord Ellenborough decided the case appear to be satisfactory to my mind.—p. 59.

Doe d. Pitt v. Laming, *applied*.

Universal Non-Tariff Fire Insurance Co., In re (1875) 44 L. J. Ch. 761; L. R. 19 Eq. 485; 23 W. R. 464.—MALINS, V.-C.; *Phillips v. Henson* (1877) 47 L. J. C. P. 273; 3 C. P. D. 26; 37 L. T. 432; 26 W. R. 214.—C.P.D.

Lehmann v. McArthur, L. R. 3 Eq. 746; 16 L. T. 196.—V.-C.; *reversed*, (1868) 37 L. J. Ch. 625; L. R. 3 Ch. 496; 18 L. T. 806; 16 W. R.

Williamson v. Williamson (1854) 43 L. J. Ch. 738; L. R. 9 Ch. 729; 31 L. T. 291.—L.J.J.; *reversing* 43 L. J. Ch. 382; L. R. 17 Eq. 549; 30 L. T. 154; 22 W. R. 682.—V.C., *distinguished*.

Haywood v. Silber (1885) 30 Ch. D. 404; 54 L. T. 108; 34 W. R. 114.—C.A.

LINDLEY, L.J.—The contract is different in this respect, the contract in *Williamson v. Williamson* consisted only of one portion of the clause we have got here. It provided simply that the underlease should contain the like provisions, conditions and stipulations in all respects as were contained in the original lease, and did not contain any such bargain as we have here that the underlease is to contain all usual and customary clauses.—p. 414.

Williams v. Earle (1868) 37 L. J. Q. B. 281; L. R. 3 Q. B. 739; 9 B. & S. 740; 19 L. T. 238; 16 W. R. 1041.—Q.B., *explained*.

West v. Dobb (1869) 38 L. J. Q. B. 289; L. R. 4 Q. B. 634.—Q.B.; *affirmed*, (1870) 10 B. & S. 987; 39 L. J. Q. B. 190; L. R. 5 Q. B. 460; 23 L. T. 76; 18 W. R. 1167.—EX. CH.

Varley v. Coppard (1872) L. R. 7 C. P. 505; 26 L. T. 882; 20 W. R. 972.—C.P., *observed upon*.

Bristol Corporation v. Westcott (1879) 12 Ch. D. 461; 41 L. T. 117; 27 W. R. 841.—C.A.

JESSEL, M.R.—In *Varley v. Coppard* the outgoing partner purported to assign, so the case does not go far enough [to prove that the agreement to assign subject to lessor's consent coupled with a giving up of possession to one partner by the other is a breach of a covenant against parting with possession]. I do not know that I should have decided even that case in the same way, for the deed was not in point of law an assignment, but a release. But you have to rely on the words "part with possession," and how can possession be parted with to a person who already has it?—p. 465.

Williams v. Earle and Varley v. Coppard, *applied*.

Horsey Estate Co. v. Steiger (1899) 68 L. J. Q. B. 743; [1899] 2 Q. B. 79; 80 L. T. 857; 47 W. R. 644.—C.A. **RUSSELL, C.J., SMITH and COLLINS, L.J.J.**

Williams v. Earle, *inapplicable*.

Lepla v. Rogers (1892) [1893] 1 Q. B. 31; 5 R. 57; 68 L. T. 584; 57 J. P. 55.—**HAWKINS, J.**

Roe d. Dingley v. Sales (1813) 1 M. & S. 297. *applied*.

Horsey Estate Co. v. Steiger (1899) 68 L. J. Q. B. 743; [1899] 2 Q. B. 79; 80 L. T. 857; 47 W. R. 644.—C.A.

Treloar v. Bigge (1874) 43 L. J. Ex. 95; L. R. 9 Ex. 151; 22 W. R. 343.—EX., *adopted*.

Hyde v. Warden (1877) 47 L. J. Ex. 121; 3 Ex. D. 72; 37 L. T. 567; 26 W. R. 201.—C.A.

Treloar v. Bigge, *followed*.

Sear v. House Property and Investment Society (1880) 50 L. J. Ch. 77; 16 Ch. D. 387; 43 L. T. 531; 29 W. R. 192; 45 J. P. 204.—V.C.

Treloar v. Bigge, *applied*.

Lepla v. Rogers (1892) [1893] 1 Q. B. 31; 5

As to Rates and Taxes.

Cranston v. Clarke (1753) Sayer 78, *not followed*.

Patish v. Sleeman (1860) 1 De G. F. & J. 326; 29 L. J. Ch. 96; 6 Jur. (N.S.) 385; 8 W. R. 166; 1 L. T. (O.S.) 506.—L.C.

CAMPBELL, L.C.—The respondent has relied mainly upon the case of *Cranston v. Clarke*, but this authority was outweighed by other authorities, particularly *Bradbury v. Wright* (1 Dougl. 602), and *Bennett v. Womach* (7 B. & C. 629).

Sweet v. Seager (1857) 2 C. B. (N.S.) 119; 3 Jur. (N.S.) 588; 5 W. R. 560.—C.P., *distinguished*.

Tidswell v. Whitworth (1867) 36 L. J. C. P. 103; L. R. 2 C. P. 326; 15 L. T. 574; 15 W. R. 427.—C.P.

Sweet v. Seager, *applied*.

Thompson v. Lapworth (1868) (*infra*). **Crosse v. Raw** (1874) (*infra*). **Budd v. Marshall** (1879) (*infra*, col. 1489).

Baker v. Greenhill (1842) 3 Q. B. 148; 2 G. & D. 435; 11 L. J. Q. B. 161; 6 Jur. 710.—Q.B., *distinguished*.

Thompson v. Lapworth (1868) 37 L. J. C. P. 74; L. R. 3 C. P. 149; 17 L. T. 507; 16 W. R. 312.—C.P.

Baker v. Greenhill, *referred to*.

Jeffrey v. Neale (1871) 40 L. J. C. P. 191; L. R. 6 C. P. 240; 24 L. T. 362; 19 W. R. 700.—C.P.

Waller v. Andrews (1838) 7 L. J. Ex. 67; 3 M. & W. 312; 1 H. & H. 87.—EX.

Payne v. Burridge (1844) 12 M. & W. 727; 13 L. J. Ex. 190.—EX.

Distinguished **Tidswell v. Whitworth** (1867) (*supra*); *followed* **Thompson v. Lapworth** (1868) (*supra*); **Budd v. Marshall** (1879) (*infra*, col. 1489).

Payne v. Burridge, *followed*.

Brett v. Rogers (1897) 66 L. J. Q. B. 287; [1897] 1 Q. B. 525; 76 L. T. 26; 45 W. R. 334.—**WRIGHT and BRUCE, JJ.**

Brett v. Rogers, *approved and followed*.

Farlow v. Stevenson (1899) 69 L. J. Ch. 106; [1900] 1 Ch. 128; 81 L. T. 589; 48 W. R. 213.—C.A.

Brett v. Rogers and Farlow v. Stevenson, *considered*.

Foulger v. Arding (1902) 71 L. J. K. B. 499; [1902] 1 K. B. 700; 86 L. T. 488; 50 W. R. 417.—C.A.

Tidswell v. Whitworth (1867) 36 L. J. C. P. 103; L. R. 2 C. P. 326; 15 L. T. 574; 15 W. R. 427.—C.P., *distinguished*.

Thompson v. Lapworth (1868) 37 L. J. C. P. 74; L. R. 3 C. P. 149; 17 L. T. 507; 16 W. R. 312.—C.P.

Tidswell v. Whitworth, *referred to*.

Jeffrey v. Neale (1871) 40 L. J. C. P. 191; L. R. 6 C. P. 240; 24 L. T. 362; 19 W. R. 700.—C.P.

Tidswell v. Whitworth, *distinguished*.

Thompson v. Lapworth, *followed*. **Crosse v. Raw** (1874) 43 L. J. Ex. 144. T. R.

Tidswell v. Whitworth, *followed*.

Thompson v. Lapworth, *distinguished*.

Rawlins v. Briggs (1878) 3 C. P. D. 368; 47 L. J. C. P. 487; 27 W. R. 138.—C.P.D.

Tidswell v. Whitworth and Thompson v. Lapworth, *considered*.

Hartley v. Hudson (1879) 48 L. J. C. P. 751; 4 C. P. D. 367.—C.P.D.

Tidswell v. Whitworth, Thompson v. Lapworth and Rawlins v. Briggs (1878) 47 L. J. C. P. 487; 3 C. P. D. 368; 27 W. R. 138.—LINDLEY, J., *considered*.

Budd v. Marshall (1880) 50 L. J. Q. B. 24; 5 C. P. D. 481; 42 L. T. 793; 29 W. R. 148; 44 J. P. 584.—C.A.; **Wilkinson v. Collyer** (1884) 53 L. J. Q. B. 278; 13 Q. B. D. 1; 51 L. T. 299; 32 W. R. 614; 48 J. P. 791.—MANISTY and WILLIAMS, JJ.

Thompson v. Lapworth, *followed*.

Wix v. Rutson (1899) 68 L. J. Q. B. 298; [1899] 1 Q. B. 474; 80 L. T. 168.—BRUCE, J.

Tidswell v. Whitworth, *distinguished*.

Farlow v. Stevenson (1899) 69 L. J. Ch. 106; [1900] 1 Ch. 128; 81 L. T. 589; 48 W. R. 213.—C.A.

Tidswell v. Whitworth and Thompson v. Lapworth, *considered*.

Foulger v. Arding (1902) 71 L. J. K. B. 499; [1902] 1 K. B. 700; 86 L. T. 488; 50 W. R. 417.—C.A. COLLINS, M.R., ROMER and MATHEW, L.JJ.

Crosse v. Raw (1874) 43 L. J. Ex. 144; 14 R. 9 Ex. 209; 23 W. R. 6.—EX., *distinguished*.

Rawlins v. Briggs (1878) 47 L. J. C. P. 487; 3 C. P. D. 368; 27 W. R. 138.—LINDLEY, J.

Crosse v. Raw, *considered*.

Hartley v. Hudson (1879) 48 L. J. C. P. 751; 4 C. P. D. 367.—C.P.D.

Crosse v. Raw, *considered*.

Budd v. Marshall (1880) 50 L. J. Q. B. 24; 5 C. P. D. 481; 42 L. T. 793; 29 W. R. 148; 44 J. P. 584.—C.A.

Crosse v. Raw, *followed*.

Gardner v. Furness Ry. (1883) 47 J. P. 232.—CAVE and DAY, JJ.

Crosse v. Raw, *followed*.

Batchelor v. Bigger (1889) 60 L. T. 416.—KAY, J.

Crosse v. Raw, *applied*.

Weld v. Clayton-le-Moor Urban Council (1902) 86 L. T. 584.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Hartley v. Hudson (1879) 48 L. J. C. P. 751; 4 C. P. D. 367.—C.P.D., *considered*.

Budd v. Marshall (1880) 50 L. J. Q. B. 24; 5 C. P. D. 481; 42 L. T. 793; 29 W. R. 148; 44 J. P. 584.—C.A.

Hartley v. Hudson, *considered*.

Wilkinson v. Collyer (1884) 53 L. J. Q. B. 278; 13 Q. B. D. 1; 51 L. T. 299; 32 W. R. 614; 48 J. P. 791.—MANISTY and WILLIAMS, JJ.; **Baylis v. Jiggins** (1898) 67 L. J. Q. B. 793; [1898] 2 Q. B. 315.—CHANNELL, J.

Hartley v. Hudson, *applied*.

Weld v. Clayton-le-Moor Urban Council (1902) 86 L. T. 584.—ALVERSTONE, C.J., DARLING and

Allum v. Dickinson (1882) 52 L. J. Q. B. 190; 9 Q. B. D. 632; 47 L. T. 493; 30 W. R. 930; 47 J. P. 102.—C.A. JESSEL, M.R., LINDLEY and BOWEN, L.JJ., *applied*.
Wilkinson v. Collyer (1884) 53 L. J. Q. B. 278; 13 Q. B. D. 1; 51 L. T. 299; 32 W. R. 614; 48 J. P. 791.—MANISTY and WILLIAMS, JJ.; **Batchelor v. Bigger** (1889) 60 L. T. 416.—KAY, J.; **Home and Colonial Stores v. Todd** (1891) 63 L. T. 829.—NORTH, J.

Wilkinson v. Collyer (1884) 53 L. J. Q. B. 278; 13 Q. B. D. 1; 51 L. T. 299; 32 W. R. 614; 48 J. P. 791.—MANISTY and WILLIAMS, JJ., *principle applied*.

Hill v. Edward (1885) W. N. 32; 1 Cab. & E. 481.—MATHEW, J., *commented on and distinguished*.

Aldridge v. Ferne (1886) 55 L. J. Q. B. 587; 17 Q. B. D. 212; 34 W. R. 578.—GROVE and STEPHEN, JJ.

Wilkinson v. Collyer, *distinguished*.

Batchelor v. Bigger (1889) 60 L. T. 416.—KAY, J.

Wilkinson v. Collyer, *observation applied*.

Home and Colonial Stores v. Todd (1891) 63 L. T. 829.—NORTH, J.

Wilkinson v. Collyer and Baylis v. Jiggins (1898) 67 L. J. Q. B. 793; [1898] 2 Q. B. 315.—CHANNELL, J., *followed*.

Lumby v. Faupel (1903) 88 L. T. 562; 51 W. R. 522; 67 J. P. 202; 1 L. G. R. 493.—K.B.D.

Aldridge v. Ferne (1886) 55 L. J. Q. B. 587; 17 Q. B. D. 212; 34 W. R. 578.—GROVE and STEPHEN, JJ., *applied*.

Batchelor v. Bigger (1889) 60 L. T. 416.—KAY, J.

Aldridge v. Ferne, *applied*.

Weld v. Clayton-le-Moor Urban Council (1902) 86 L. T. 584.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Direct Spanish Telegraph Co. v. Shepherd (1884) 53 L. J. Q. B. 420; 13 Q. B. D. 202; 51 L. T. 124; 32 W. R. 717; 48 J. P. 550.—HAWKINS and SMITH, JJ., *discussed*.

Badeock v. Hunt (1888) 58 L. J. Q. B. 134; 22 Q. B. D. 145; 60 L. T. 314; 37 W. R. 205; 53 J. P. 340.—C.A.

ESHER, M.R.—It may be necessary on a future occasion, but it seems to me unnecessary in this case, to consider whether the case of *Spanish Telegraph Co. v. Shepherd* was rightly decided or not. The words of the covenant in that case were different from those of the covenant in the case now before us; and therefore I express no opinion as to that decision.

Badeock v. Hunt, *referred to*.

Floyd, In re, Floyd v. Lyons (1897) 66 L. J. Ch. 350; [1897] 1 Ch. 633; 76 L. T. 251; 45 W. R. 435.—C.A. LINDLEY, SMITH and RIGBY, L.JJ.

Bettingham, In re, Melhado v. Woodcock (1892) 9 Times L. R. 48.—NORTH, J., *followed*.

Smith v. Robinson (1893) 62 L. J. Q. B. 409; [1893] 2 Q. B. 53; 5 R. 469; 69 L. T. 434; 41

Foulger v. Arding (1901) 70 L. J. K. B. 580; [1901] 2 K. B. 151; 84 L. T. 467; 49 W. R. 442. LORD ALVERSTONE, C.J. and LAWRENCE, J.: *reversed*. (1902) 71 L. J. K. B. 499; [1902] 1 K. B. 700; 86 L. T. 488; 50 W. R. 417.—C.A. COLLINS, M.R., ROMER and MATHEW, L.JJ.

• **Foulger v. Arding**, *considered and applied*. Shephard v. Barber (1902) 1 L. G. R. 157; 67 J. P. 238.—LAWRENCE, J.: *Valpy v. St. Leonard's Wharf Co.* (1903) 1 L. G. R. 305; 67 J. P. 402.—FARWELL, J.; Lumby v. Faupel (1903) 88 L. T. 562; 51 W. R. 522; 67 J. P. 202; 1 L. G. R. 493.—K.B.D.; Stockdale v. Ascherberg (1903) 72 L. J. K. B. 492; [1903] 1 K. B. 873; 88 L. T. 767; 52 W. R. 13; 67 J. P. 435; 1 L. G. R. 548.—WRIGHT, J.; Goldstein v. Hollingsworth (1904) 73 L. J. K. B. 826; [1904] 2 K. B. 578; 91 L. T. 85; 68 J. P. 383; 2 L. G. R. 879.—ALVERSTONE, C.J., WILLES and KENNEDY, JJ.; Morris v. Beal (1904) 73 L. J. K. B. 830; [1904] 2 K. B. 585.—ALVERSTONE, C.J., KENNEDY and PHILLIMORE, JJ.

• *Relating to Husbandry.*

Hurst v. Hurst (1849) 4 Ex. 571; *see also* 19 L. J. Ex. 410, *corrected*. Leigh v. Lillie (1860) 6 H. & N. 170. n.; 30 L. J. Ex. 25; 6 H. & N. 165; 9 W. R. 55. [The Reporter says:—In the copy belonging to the Court of Exchequer, the report has been corrected by Pollock, C.B., as follows:—Page 579, line 7, for “unliquidated” read “liquidated,” and insert after the word “damage” “but the action being brought for the penalty plus the value of the tree, the action is for unliquidated damages.”]

• **Lybbe v. Hart** (1885) 54 L. J. Ch. 860; 29 Ch. D. 8; 52 L. T. 634.—C.A., BAGGALLAY, BOWEN and FRY, L.JJ., *dictum questioned*. Clegg v. Hands (1890) 59 L. J. Ch. 477; 44 Ch. D. 503; 62 L. T. 502; 38 W. R. 433; 55 J. P. 180.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

Whittaker v. Barker (1832) 1 C. & M. 113; 3 Tyr. 135.—EX., *considered and applied*. • **England v. Shearburn** (1884) 52 L. T. 22; 49 J. P. 86.—STEPHEN and MATHEW, JJ.

Kingsbury v. Collins (1827) 4 Bing. 202; 5 L. J. (o.s.) C. P. 151.—C.P., *questioned*. Graves v. Weld (1833) 5 B. & Ad. 105; 2 N. & M. 725; 2 L. J. K. B. 176. DENMAN, C.J. (for the Court).—No authority was cited to show that things which take more than a year to arrive at maturity are capable of being emblements, except the case of *Kingsbury v. Collins*, in which teasels were held by the Court of C. P. to be so. But this point was not argued, and the Court does not appear to have been made acquainted with the nature of that crop, or its mode of cultivation, or it may be, that in the year when the plant is fit to gather, so much labour and expense is incurred, as to put it on the same footing as hops.—p. 120.

Haines v. Welch (1868) 38 L. J. C. P. 118; L. R. 4 C. P. 91; 19 L. T. 422; 17 W. R. 163.—C.P., *referred to*.

To Give up Possession.

Harding v. Crethorn (1793) 1 Esp. 579; 5 R. K. 719.—KENTON, C.J., *applied*. Henderson v. Squire (1869) 38 L. J. Q. B. 73; L. R. 4 Q. B. 170; 10 B. & S. 183; 19 L. T. 601; 17 W. R. 519.—Q.B.

• **Henderson v. Squire**, *distinguished*. L. & N. W. Ry. v. Hill (1883) 12 L. R. Ir. 140 [MAX, C.J., and JOHNSON, J.J. Held that an action in tort for mesne profits, there being no count in contract for not giving up possession, lies only against such persons as have been actually or virtually in possession of the premises at the time when the plaintiff became rightfully entitled to such possession.

Doe d. Gardner v. Kennard (1848) 12 Q. B. 244; 12 Jur. 821.—Q.B., *adapted*. Liddly v. Kennedy (1871) L. R. 5 H. L. 134; 20 W. R. 150.—H.L. (IR.).

To Insure.

Reynard v. Arnold (1875) L. R. 10 Ch. 386; 23 W. R. 804.—L.JJ., *distinguished*. Edwards v. West (1878) 47 L. J. Ch. 463; 7 Ch. D. 858; 38 L. T. 481; 26 W. R. 507.—FRY, J.

Reynard v. Arnold, *discussed and distinguished*. Andrews v. Patriotic Assurance Co. (1866) 18 L. R. Ir. 355.—EX. D.

In Restraint of Trade.

• **Doe d. Bish v. Keeling** (1813) 1 M. & S. 95; 14 R. R. 405, *explained*. Harrison v. Good (1871) 40 L. J. Ch. 294; L. R. 11 Eq. 338; 24 L. T. 263; 19 W. R. 346.—BACON, V.-C.

Doe d. Bish v. Keeling, *followed*. Rolls v. Miller (1884) 53 L. J. Ch. 510, 682; 27 Ch. D. 71; 50 L. T. 597; 32 W. R. 806; 48 J. P. 357, 518.—C.A., COTTON and LINDLEY, L.JJ.; *affirming* 25 Ch. D. 206; 49 L. T. 628.—PEARSON, J.; *and* 50 L. T. 153.—PEARSON, J.

Rolls v. Miller, *applied*. Tritton v. Bankart (1887) 56 L. T. 306.—KEELEY, J.

Harrison v. Good (1871) 40 L. J. Ch. 294; L. R. 11 Eq. 338; 24 L. T. 263; 19 W. R. 346.—V.-C., *questioned*.

Tod-Heatley v. Benham (1888) 58 L. J. Ch. 83; 40 Ch. D. 80; 60 L. T. 241; 37 W. R. 38.—C.A. COTTON, LINDLEY and BOWEN, L.JJ.

This case questions *Harrison v. Good* in so far as it limits the term “nuisance” in a restrictive covenant in a lease to that which is a legal nuisance.

Harrison v. Good, *commented upon*. Davis and Cavey, In re (1888) 58 L. J. Ch. 143; 40 Ch. D. 601; 60 L. T. 100; 37 W. R. 217; 53 J. P. 407.—STIRLING, J.

Doe d. Calvert v. Reid (1830) 10 B. & C. 849; 8 L. J. (o.s.) K. B. 328.—K.B., *distinguished*.

Clegg v. Hands (1890) 59 L. J. Ch. 477; 44 Ch. D. 503; 62 L. T. 502; 38 W. R. 433; 55 J. P.

upon the construction of the covenant and the words "or their successors in their late or present trade as brewers," though not in terms limiting the assigns to assigns in that position, afforded in that case a rule of construction. The Court accordingly held, that what was meant was successors carrying on the same trade, and not merely carrying on the trade of brewers, but carrying on the trade which was carried on by Phillips and Miall at that particular brewery. Now this particular clause which governs the construction of the covenant in *Doe v. Reid* does not occur in the present case, and its absence leads me to put a different construction and effect upon this covenant. . . .

Doe d. Calvert v. Reid, considered.

Birmingham Breweries v. Jameson (1898) 67 L. J. Ch. 403; 78 L. T. 512.—C.A. LINDLEY, M.R., RIGBY and COLLINS, L.J.J.; reversing 46 W. R. 375.—BYRNE, J.

LINDLEY, M.R. referred to the similarity between this case and *Doe v. Reid*, and remarked that the latter case was not overruled by *Clegg v. Hands* (59 L. J. Ch. 477; 44 Ch. D. 503).

Tailors of Aberdeen v. Coutts (1840) 1 Rob. App. Cas. 296, *followed*.

Zetland (Earl) v. Hislop (1882) 7 App. Cas. 427.—H.L. (SC.).

Johnstone v. Hall (1856) 25 L. J. Ch. 462; 2 K. & J. 414; 2 Jur. (N.S.) 780; 4 W. R. 417.—V.C., *considered*.

Holloway Bros. v. Hill (1902) 71 L. J. Ch. 818; [1902] 2 Ch. 612; 87 L. T. 201.—BYRNE, J.

Bird v. Lake (1863) 1 H. & M. 111, 338.—V.C., *applied*.

Smith v. Hancock (1894) 63 L. J. Ch. 477; [1894] 2 Ch. 377; 7 R. 200; 70 L. T. 578; 42 W. R. 466; 58 J. P. 638.—C.A. LINDLEY, KAY and SMITH, L.J.J.

Clements v. Welles (1865) 35 L. J. Ch. 265; L. R. 1 Eq. 200; 11 Jur. (N.S.) 991; 13 L. T. 548; 14 W. R. 187.—M.R., *distinguished*.

Evans v. Davis (1878) 48 L. J. Ch. 223; 10 Ch. D. 747; 39 L. T. 391; 27 W. R. 285.—FRY, J.

[The case is referred to and distinguished in the arguments, counsel contending that no injunction should be granted against D., because he had not parted with his whole interest in the property as the lessee had done in *Clements v. Welles*. FRY, J. granted the injunction, but the case is not referred to in his judgment.]

Fielden v. Slater (1869) 38 L. J. Ch. 379; L. R. 7 Eq. 523; 20 L. T. 112; 17 W. R. 485.—V.C., *distinguished*.

Jones v. Bone (1870) L. R. 9 Eq. 674; 39 L. J. Ch. 405; 23 L. T. 304; 18 W. R. 489.

JAMES, V.C.—The decision, *Fielden v. Slater*, has been pressed upon me; but I observe in that case the covenant was against the use of the house "for the sale of spirituous liquors;" here it is against using, exercising, or carrying on the business of "a seller" by retail of wine, beer, or spirituous liquors. Now at the time when this covenant was entered into there was a trade perfectly well known as the trade of an innkeeper or public-house keeper: and "the business of a

expression which would naturally apply to the case of a gin-palace bar, or the like, and which might not have been thought sufficiently covered by the words "business of a tavern-keeper, inn-keeper, or publican." That was a trade perfectly well known; and it was against that trade that this covenant was directed, and not against the trade of a wine merchant. Since then, under the new excise laws, a perfectly new line of business has sprung up—this sale of wines and spirits in bottles by grocers, which is really only a modification of the old wine merchants' business.—p. 677.

Fielden v. Slater, distinguished.

Stuart v. Diplock (1890) 59 L. J. Ch. 142; 43 Ch. D. 343; 62 L. T. 333; 38 W. R. 223.—C.A. COTTON, BOWEN and FRY, L.J.J.

COTTON, L.J.—This is an action by a lady to restrain the defendant from carrying on the business of a ladies' outfitter at the house and shop No. 9, Mount Pleasant, Tunbridge Wells, on the ground that they took their lease of this house with notice of a covenant which prohibited the carrying on there of that business. The covenant was a covenant by the lessors contained in a lease of No. 10 to the plaintiff's testator, and was as follows: "That they will not permit or suffer to be carried on in or upon the adjoining dwelling-houses and shops known as 11 and 12 Mount Pleasant, the trades or businesses of ladies' outfitting, juvenile outfitting, or sale of baby linen, nor give their consent to such trades or businesses being carried on at or upon the shop numbered 9, Mount Pleasant, now occupied by Mr. Kempson as a wine merchant." . . .

Fielden v. Slater was relied on . . . but there the covenant was quite different. It was that the building should not be used "as an inn, public-house, or taproom, or for the sale of spirituous liquors, or ale, or beer," and the sale by the defendant of spirits in bottle, though in the course of his business as a grocer, was within the plain words of the covenant. If the covenant here had been framed with more careful regard to the interest of the plaintiff's testator it might have been said that the premises should not be used for the sale of ladies' underclothing, which would have made the case similar to *Fielden v. Slater*.

Fielden v. Slater, considered.

Holloway Brothers v. Hill (1902) 71 L. J. Ch. 818; [1902] 2 Ch. 612; 87 L. T. 201.—BYRNE, J.

Jones v. Bone (1870) 39 L. J. Ch. 405; L. R. 9 Eq. 674; 23 L. T. 304; 18 W. R. 489.—V.C., *applied*.

Holt v. Collyer (1881) 50 L. J. Ch. 311; 16 Ch. D. 718; 44 L. T. 214; 29 W. R. 502; 45 J. P. 456.—FRY, J.

Jones v. Bone, distinguished.

Shoolbred v. St. Pancras J.J. (1890) 59 L. J. M. C. 63; 24 Q. B. D. 346; 62 L. T. 287; 38 W. R. 399; 54 J. P. 231.—FRY, L.J. and MATHEW, J.

Jones v. Bone, distinguished.

Buckle v. Friedricks (1890) 44 Ch. D. 244; 62 L. T. 884; 38 W. R. 742; 55 J. P. 165.—C.A. COTTON, LINDLEY and LOPES, L.J.J.

COTTON, L.J.—The defendant is proprietor of a theatre. Better means of egress being required, he pulled down a house adjoining the theatre, and erected a building of considerable height by

there was a counter at which wine, spirits, and beer were sold to the persons frequenting the theatre. I think that this was a carrying on by the defendant of the trade of a retailer of wine, spirits, and beer. . . . The appellant relies on the case of *Jones v. Bone*. I do not understand James, L.J. to have decided in that case that there was no breach of covenant, but only that there was no case for an injunction.

Buckle v. Fredericks, followed.

Stuart v. Diplock (1890) 59 L. J. Ch. 142; 43 Ch. D. 343; 62 L. T. 333; 38 W. R. 223.—C.A., *distinguished*.

Fitz v. Iles (1892) 62 L. J. Ch. 258; [1893] 1 Ch. 77; 2 R. 132; 68 L. T. 108.—C.A. LINDLEY and SMITH, L.JJ.

Headnote.—The defendants were bound by a covenant in the lease of their house not to use the same as a coffee-house. They proposed, as ancillary to their business of grocers, to sell light refreshments consisting of cups of tea and coffee, bread and butter, &c., to be consumed by their customers on the premises. Held, following *Buckle v. Fredericks* and distinguishing *Stuart v. Diplock*, a violation of the covenant and an injunction granted.

Kemp v. Bird (1877) 46 L. J. Ch. 828; 5 Ch. D. 974; 37 L. T. 53; 25 W. R. 838.—C.A., *distinguished*.

Nicoll v. Fenning (1881) 51 L. J. Ch. 166; 19 Ch. D. 258; 45 L. T. 738; 30 W. R. 95.—BACON, V.-C.

Kemp v. Bird, followed; Fitz v. Iles, discussed.

Ashby v. Wilson (1899) 69 L. J. Ch. 47; [1900] 1 Ch. 66; 81 L. T. 480; 48 W. R. 105.

KEKEWICH, J.—It is obvious from the report of the case [*Fitz v. Iles*] that the whole contest was directed to the question whether there was any infringement of the covenant, and not to the question of the right to sue. . . . *Kemp v. Bird* was not cited in *Fitz v. Iles*, and I think *Kemp v. Bird* is binding on me. Perhaps I ought not to say that, if I were obliged to choose between the two cases, *Kemp v. Bird* seems to be sounder with regard to the law, but it does seem so to my mind.—p. 49.

Kemp v. Bird; Fitz v. Iles and Ashby v. Wilson, considered.

Holloway Brothers v. Hill (1902) 71 L. J. Ch. 818; [1902] 2 Ch. 612; 87 L. T. 201.—BYRNE, J.

Tait v. Gosling (1879) 48 L. J. Ch. 397; 11 Ch. D. 273; 40 L. T. 251; 27 W. R. 394.—FRY, J., *applied*.

Bryant v. Hancock (1898) 67 L. J. Q. B. 507; [1898] 1 Q. B. 716; 78 L. T. 397; 46 W. R. 386; 62 J. P. 324.—C.A.; *affirmed*, (1899) 68 L. J. Q. B. 889; [1899] A. C. 442; 81 L. T. 96.—H.L. (E.).

Piggott v. Stratton (1859) 1 De G. F. & J. 33; 29 L. J. Ch. 1; 6 Jur. (N.S.) 129; 1 L. T. 111; 8 W. R. 13.—L.C. and L.JJ.; *affirming* 1 Johns. 341, *adopted*.

Maddison v. Alderson (1883) 52 L. J. Q. B. 737; 8 App. Cas. 473; 49 L. T. 303; 31 W. R. 820; 47 J. P. 321.—H.L. (E.).

Piggott v. Stratton, distinguished.

Spicer v. Martin (1888) 58 L. J. Ch. 309; 14 App. Cas. 12; 63 L. T. 546; 37 W. R. 689; 53 J. P. 516.—H.L. (E.); *affirming* S. C. *nom.* **Martin v. Spicer** (1886) 56 L. J. Ch. 393; 34

Renals v. Cowlishaw (1879) 48 L. J. Ch. 830; 11 Ch. D. 865; 41 L. T. 116; 28 W. R. 9.—C.A., *applied*.

Mackenzie v. Childers (1889) 59 L. J. Ch. 188; 43 Ch. D. 265; 62 L. T. 98; 38 W. R. 243.—KAY, J.

Renals v. Cowlishaw, distinguished.

Clegg v. Hands (1890) 59 L. J. Ch. 477; 44 Ch. D. 503; 62 L. T. 502; 38 W. R. 433; 35 J. P. 180.—C.A.

COTTON, L.J.—Here there has been a sale to the plaintiff by the lessors of the goodwill of the business. The plaintiff is, therefore, independently of the question whether the covenant runs with the land, entitled to sue so far as by assignment the landlord who entered into this covenant could give him the right. That being so, the difficulty as to the title to sue which there was in the case of *Renals v. Cowlishaw* . . . is got rid of. There is no doubt that there is here an actual assignment of the benefit of the covenant . . . even if that benefit did not pass by the mere assignment . . . of the reversion of this public-house.

Renals v. Cowlishaw, approved.

Spicer v. Martin (1888) 58 L. J. Ch. 309; 14 App. Cas. 12; 63 L. T. 546; 37 W. R. 689; 53 J. P. 516.—H.L. (E.).

Spicer v. Martin, applied.

Mackenzie v. Coulson (1889) 59 L. J. Ch. 188; 43 Ch. D. 265; 62 L. T. 98; 38 W. R. 243.—KAY, J.

Spicer v. Martin, discussed and applied.

Hudson v. Cripps (1896) 65 L. J. Ch. 328; [1896] 1 Ch. 265; 73 L. T. 741; 44 W. R. 200; 60 J. P. 393.—NORTH, J.

Tatem v. Chaplin (1793) 2 H. Bl. 133; 3 R. R. 360.—C.P., *applied*.

Williams v. Earle (1868) 37 L. J. Q. B. 231; L. R. 3 Q. B. 739; 9 B. & S. 740; 19 L. T. 238; 16 W. R. 1041.—Q.B.; and **Fleetwood v. Hull** (1889) 58 L. J. Q. B. 341; 23 Q. B. D. 35; 60 L. T. 790; 37 W. R. 714; 54 J. P. 229.—CHARLES, J.

Tatem v. Chaplin; Clegg v. Hands (1890) 59 L. J. Ch. 477; 44 Ch. D. 503; 62 L. T. 502; 38 W. R. 433.—C.A.; and **Fleetwood v. Hull** (1889) 58 L. J. Q. B. 341; 23 Q. B. D. 35; 60 L. T. 790; 37 W. R. 714; 54 J. P. 229.—CHARLES, J., *applied*.

White v. Southend Hotel Co. (1897) 66 L. J. Ch. 387; [1897] 1 Ch. 767; 76 L. T. 273; 45 W. R. 434.—C.A. LINDLEY, SMITH and RIGBY, L.JJ.

[Held by the Court of Appeal, on the authority of *Tatem v. Chaplin*, *Clegg v. Hands*, and *Fleetwood v. Hull*, that a covenant in the lease of an hotel that the lessee would not during the term buy or sell on the premises any foreign wines other than should have been supplied by the lessor, his successors or assigns, although it did not in terms include the assigns of the lessee, nevertheless ran with the tenant's interest under the lease.]

Clegg v. Hands, followed.

Manchester Brewery Co. v. Coombes (1900) 70 L. J. Ch. 814; [1901] 2 Ch. 608; 82 L. T. 347,

Bryant v. Hancock (1898) 67 L. J. Q. B. 507; [1898] 1 Q. B. 716; 78 L. T. 377; 46 W. R. 386; 62 J. P. 324.—C.A., *affirmed*, (1899) 68 L. J. Q. B. 889; [1899] A. C. 442; 81 L. T. 96.—H.L. (E.), *explained*.

Mumford v. Walker (1901) 71 L. J. K. B. 19; 85 L. T. 518.—RIDLEY J.

Bryant v. Hancock, *referred to*.
Tollway Brothers v. Hill (1902) 71 L. J. Ch. 818; [1902] 2 Ch. 612; 87 L. T. 201.—BYRNE, J.

As to Building.

Tod-Heatley v. Benham (1888) 58 L. J. Ch. 83; 40 Ch. D. 80; 60 L. T. 241; 37 W. R. 38.—C.A., *referred to*.

Davis and Cavey, In re (1888) 58 L. J. Ch. 143; 40 Ch. D. 601; 60 L. T. 100; 37 W. R. 217; 53 J. P. 407.—STIRLING, J.

Tod-Heatley v. Benham, *applied*.
Wool v. Cooper (1894) 63 L. J. Ch. 845; [1894] 3 Ch. 671; 8 R. 517; 71 L. T. 222; 43 W. R. 201.—ROMER, J.

Tod-Heatley v. Benham, *followed*.
Wauton v. Coppard (1898) 68 L. J. Ch. 8; [1899] 1 Ch. 92; 79 L. T. 467; 47 W. R. 72.—ROMER, J.

White v. Harrow; Harrow v. Marylebone District Property Co. (1901) 85 L. T. 677.—JOYCE, J.; *reversed*, (1902) 86 L. T. 4; 50 W. R. 259.—C.A. WILLIAMS, STIRLING and COZENS-HARDY, L.JJ.

9. OTHER RIGHTS AND LIABILITIES.

Tenant's Power to dispute Title.

Watson v. Lane (1856) 25 L. J. Ex. 101; 11 Ex. 769, 772; 2 Jur. (N.S.) 119; 4 W. R. 293.—EX., *commented on*.

Delaney v. Fox (1857) 2 C. B. (N.S.) 768; 26 L. J. C. P. 248.—C.P. *See also* 26 L. J. C. P. 5; 1 C. B. (N.S.) 166; 2 Jur. (N.S.) 1233; 5 W. R. 148.—C.P.

GRESSWELL, J.—I fully concur in the reasons assigned for doubting whether a constructive eviction can be considered as a determination of the landlord's title. An expression of opinion to that effect is thrown out by the Court of Exchequer in *Watson v. Lane*: but there was no decision upon the point.—p. 776.

Doe d. Johnson v. Baytup (1835) 3 A. & E. 184; 4 N. & M. 837; 1 H. & W. 270; 4 L. J. K. B. 263.—K.B., *inapplicable*.

Tadman v. Henman (1893) [1893] 2 Q. B. 168; 5 L. 479; 57 J. P. 664.—CHARLES, J.

Doe d. Bullen v. Mills (1834) 1 N. & M. 25; 2 A. & E. 17; 1 M. & Rob. 385; 4 L. J. K. B. 10.—K.B., *distinguished*.

Ford v. Ager (1863) 32 L. J. Ex. 269; 2 H. & C. 279; 9 Jur. (N.S.) 804; 8 L. T. 546; 11 W. R. 1073.—EX.

Greenaway v. Hart (1854) 14 C. B. 340; 2 C. L. R. 370; 23 L. J. C. P. 115; 18 Jur. 449; 2 W. R. 702.—C.P., *referred to*.

Yellowly v. Gower (1855) 11 Ex. 274; 24 L. J. Ex. 289.—EX.

Cornish v. Searell (1828) 8 B. & C. 471; 1 M. & Ry. 703; 6 L. J. (O.S.) K. B. 254.—K.B., *applied*.

Jolly v. Arbuthnot (1859) 28 L. J. Ch. 547; 4 De G. & J. 224; 5 Jur. (N.S.) 689; 7 W. R. 532.—L.-C.

Cornish v. Searell; Cooper v. Blandy (1834) 1 Bing. (N.C.) 45; 4 M. & Scott 562; 3 L. J. C. P. 274.—C.P.; and **Doe d. Marlow v. Wiggins** (1843) 4 Q. B. 367; 3 G. & D. 504; 12 L. J. Q. B. 177; 7 Jur. 529.—Q.B., *applied*.

Carlton v. Bowcock (1884) 51 L. T. 659.—CAVE, J.

Doe d. Freeland v. Burt (1787) 1 Term Rep. 701; 1 R. R. 367; and **Kerslake v. White** (1819) 2 Stark. 508; 20 R. R. 731, *explained*.

Martyr v. Lawrence (1864) 2 De G. J. & S. 261; 4 N. R. 312; 10 Jur. (N.S.) 858; 10 L. T. 677; 12 W. R. 1043.—L.JJ.

Doe d. Freeland v. Burt, *applied*.

Thomas v. Owen (1887) 57 L. J. Q. B. 198; 20 Q. B. D. 225; 58 L. T. 162; 36 W. R. 440; 52 J. P. 516.—C.A.; and **Devonshire (Duke) v. Pattinson** (1887) 57 L. J. Q. B. 189; 20 Q. B. D. 263; 58 L. T. 392; 52 J. P. 276.—C.A.

Tenant's Right to Compensation.

Wight v. Hopetoun (Earl) (1864) 4 Macq. H. L. 729.—H.L. (SC.), *distinguished*.
Black v. Clay (1894) [1894] A. C. 368; 6 R. 362; 71 L. T. 446.—H.L. (SC.).

Black v. Clay, *dictum followed*.

Paul, In re, Portarlington (Earl), Ex parte (1889) 59 L. J. Q. B. 30; 24 Q. B. D. 247; 61 L. T. 835; 54 J. P. 644.—COLERIDGE, C.J. and MATHEW, J., *distinguished*.
Morley v. Carter (1897) 66 L. J. Q. B. 843; [1898] 1 Q. B. 8; 77 L. T. 337; 46 W. R. 77.—WRIGHT and KENNEDY, JJ.

Paul, In re, Portarlington (Earl), Ex parte, and Morley v. Carter. *See* Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 2, sub-s. 2.

Gas Light and Coke Co. v. Holloway (1885) 52 L. T. 434; 49 J. P. 344.—GROVE and MANISTY, JJ., *followed*.

Schofield v. Hincks (1888) 58 L. J. Q. B. 147; 60 L. T. 573; 37 W. R. 157.—COLERIDGE, C.J. and MANISTY, J.

Newby v. Eckersley (1899) 69 L. J. Q. B. 261; [1899] 1 Q. B. 465; 80 L. T. 314; 47 W. R. 245.—C.A. *See* Agricultural Holdings Act, 1900 (63 & 64 Vict. c. 50), s. 1, sub-s. 5.

Holmes and Formby, In re (1894) 64 L. J. Q. B. 391; [1895] 1 Q. B. 174; 15 R. 114; 71 L. T. 842; 43 W. R. 205.—GRANTHAM and LAWRAUCE, JJ., *inapplicable*.

Lloyd and Tooth, In re (1899) 68 L. J. Q. B. 376; [1899] 1 Q. B. 559; 80 L. T. 394.—C.A.

Smith v. Callander (1901) 70 L. J. P. C. 53; [1901] A. C. 297; 84 L. T. 801.—H.L. (SC.), *followed*.

Mears v. Callander (1901) 70 L. J. Ch. 621; [1901] 2 Ch. 388; 84 L. T. 618; 49 W. R. 584; 65 J. P. 615.—COZENS-HARDY, J.

Wrongful Acts and Nuisances.

- White v. Jameson** (1874) L. R. 18 Eq. 303; 22 W. R. 761.—M.R., *applied*.
- Tritton v. Bankart** (1887) 56 L. T. 306.—KEKEWICH, J.: *Winter v. Baker* (1887) 3 Times L. R. 569.—KEKEWICH, J.; *Jenkins v. Jackson* (1888) 58 L. J. Ch. 124; 40 Ch. D. 71; 60 L. T. 105; 37 W. R. 253.—KEKEWICH, J.: *referred to Phillips v. Thomas* (1890) 62 L. T. 793.—CHITTY, J.
- **Payne v. Rogers** (1794) 2 H. Bl. 349; 3 R. R. 415, *commented on and explained*.
- Russell v. Shenton** (1842) 11 L. J. Q. B. 289; 3 Q. B. 449; 2 G. & D. 573; 6 Jur. 1059.—Q.B.
- Payne v. Rogers, distinguished.**
- Nelson v. Liverpool Brewery Co.** (1877) 46 L. J. C. P. 675; 2 C. P. D. 311; 25 W. R. 877.—C.P.D.
- Rex v. Pedley** (1834) 1 A. & E. 822; 3 N. & M. 627; 3 L. J. M. C. 119.—K.B., *explained*.
- Russell v. Shenton** (1842) 3 Q. B. 449; 2 G. & D. 573; 11 L. J. Q. B. 289; 6 Jur. 1059.—Q.B.
- Rex v. Pedley, commented on.**
- Rich v. Basterfield** (1847) 4 C. B. 783; 2 Car. & K. 257; 16 L. J. C. P. 273; 11 Jur. 696.—C.P.
- GRESSWELL, J.** (for the Court).—If, then, *Rex v. Pedley* is to be considered as a case in which the defendant was held liable because he had demised the buildings when the nuisance existed; or because he had re-let them after the user of the buildings had created a nuisance; or because he had undertaken the cleansing and had not performed it, we think the judgment right, and that it does not militate against our present decision. But, if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance by the manner in which he uses the premises demised, we think it goes beyond the principle to be found in any previously decided cases, and we cannot assent to it.—p. 805.
- Rex v. Pedley; Payne v. Rogers** (*supra*), and **Rosewell v. Prior** (1701) 2 Salk. 460; 1 Ld. Ray. 713, *followed*.
- Todd v. Flight** (1860) 9 O. B. (N.S.) 377; 30 L. J. C. P. 21; 7 Jur. (N.S.) 291; 3 L. T. 325; 9 W. R. 145.—C.P.
- **ERLE, J.** (for the Court).—These cases are authorities for saying that, if the wrong causing the damage arises from the non-feasance or the misfeasance of the lessor, the party suffering from the wrong may sue him. And we are of opinion that the principle so contended for on behalf of the plaintiff is the law, and that it reconciles the cases.—p. 889.
- Rex v. Pedley, approved and followed.**
- Gandy v. Jubber** (1864) 5 B. & S. 78; 33 L. J. Q. B. 151; 10 Jur. (N.S.) 652; 9 L. T. 800; 12 W. R. 526.—Q.B. *But see S. C. infra*, in EX. CH.
- Rex v. Pedley, considered.**
- Pretty v. Bickmore** (1873) L. R. 8 C. P. 401; 28 L. T. 704; 21 W. R. 733.—C.P.
- Rex v. Pedley, referred to.**
- Gwinnell v. Eamer** (1875) L. R. 10 C. P. 658; 32 L. T. 835.—C.P.
- Gandy v. Jubber** (1864) 33 L. J. Q. B. 151; 5 B. & S. 78; 12 W. R. 526; 9 L. T. 801.—Q.B., *questioned*.
- Bartlett v. Baker** (1864) 3 H. & C. 153; 34 L. J. Ex. 8, 11.

MARTIN, B.—*Gandy v. Jubber* was decided on the ground of the interest that existed between the reversioner and the tenant: and the Court said (what I doubt) that there was a fresh letting from year to year. My brother Blackburn was evidently not entirely satisfied with the judgment on that point.

Gandy v. Jubber (1864) 5 B. & S. 78; 33 L. J. Q. B. 151; 10 Jur. (N.S.) 652; 9 L. T. 800; 12 W. R. 526.—Q.B.: *questioned on appeal*, (1865) 5 B. & S. 485; 13 W. R. 1022.—EX. CH. *See also* 9 B. & S. 15.

Gandy v. Jubber, referred to.

Gwinnell v. Eamer (1875) L. R. 10 C. P. 658; 32 L. T. 835.—C.P.

Gandy v. Jubber commented on.

Harris v. James (1876) 45 L. J. Q. B. 545; 35 L. T. 240.—Q.B.

BLACKBURN, J.—*Gandy v. Jubber* appears to have been not quite correctly reported in Best & Smith, for I seem to speak of *Rich v. Basterfield* as being a sensible judgment, whereas for long before that time I was of opinion it was desperately refined.

Gandy v. Jubber, discussed.

Sandford v. Clarke (1888) 57 L. J. Q. B. 507; 21 Q. B. D. 398; 59 L. T. 226; 37 W. R. 28; 52 J. P. 773.—WILLS and GRANTHAM, JJ.

WILLS, J.—An owner of real property is bound to maintain his premises so as not to be dangerous to persons frequenting the highway of which they form a portion. It seems to me that the liability is clear on the authority of *Gandy v. Jubber*. That was the case of a tenancy from year to year, and the Court of Q. B. held that the nature of the tenancy was such that the landlord might re-enter at the end of every year; but the Court of Exchequer Chamber in the undelivered judgment referred to, thought that view was erroneous; and Martin, B. in *Bartlett v. Baker* [34 L. J. Ex. p. 11], was of opinion that the decision of the Q. B. was not right. That decision was due to the misapprehension of the true nature of a tenancy from year to year. That tenancy does not of itself and mechanically come to an end, but requires legal notice on the part of either side to determine it.—p. 508.

Sandford v. Clarke, explained.

Jones v. Mills (1861) 10 C. B. (N.S.) 788; 31 L. J. C. P. 66; 8 Jur. (N.S.) 387; 58 J. P. 213.—C.P., *followed*.

Bowen v. Anderson (1893) [1894] 1 Q. B. 164; 10 R. 47; 42 W. R. 236.—WILLS and COLLINS, JJ.

WILLS, J.—With regard to the case of *Sandford v. Clarke*, I think that the decision in that case was right, but that the grounds on which I based my decision were wrong. There was in that case ample evidence that the defect was structural, and had existed at the time when the tenancy was created, and the landlord was therefore rightly held to be liable; but the ground on which I based my decision was that a weekly tenancy terminates at the end of each week without any notice, and that there had therefore been a reletting of the premises after the defect occurred. . . . It is clear from *Jones v. Mills* (31 L. J. C. P. 66) that some notice is necessary to put an end to a weekly tenancy (though the Court in that case were not unanimous as to what the notice should be), and that the continuance of the tenancy on the expiration of each week does not render the landlord liable for

defects then existing as he would be in the case of a letting.

Todd v. Flight (1860) 9 C. B. (N.S.) 377; 30 L. J. C. P. 21; 7 Jur. (N.S.) 291; 2 L. T. 325; 9 W. R. 145.—C.P., *applied*.
Pretty v. Bickmore (1873) L. R. 8 C. P. 401; 28 L. T. 704; 21 W. R. 733.—C.P.

Todd v. Flight, and **Pretty v. Bickmore**, *followed*.
Gwynnell v. Eamer (1875) L. R. 10 C. P. 658; 32 L. T. 835.—C.P.

Todd v. Flight and **Pretty v. Bickmore** *applied*.
Nelson v. Liverpool Brewery Co. (1877) 46 L. J. C. P. 675; 2 C. P. D. 311; 25 W. R. 877.—C.P.D.

Pretty v. Bickmore, *applied*.
Barham v. Ipswich Dock Commissioners (1885) 54 L. T. 23, 27.—HUDDLESTON, B.

Pretty v. Bickmore, *considered and applied*.
Hall v. Norfolk (Duke) (1900) 69 L. J. Ch. 571; [1900] 2 Ch. 493; 82 L. T. 836; 48 W. R. 565; 64 J. P. 710.—KEKEWICH, J.; and *see* **Kieffer v. Le Séminaire de Québec** (1902) 72 L. J. P. C. 18; [1903] A. C. 85; 87 L. T. 484.—P.C.

Humphreys v. Gousins (1877) 46 L. J. C. P. 438; 2 C. P. D. 239; 36 L. T. 180; 25 W. R. 371.—C.P.D., *followed*.
Holland v. Lazarus (1897) 66 L. J. Q. B. 285; 61 J. P. 262.—BRUCE, J.

Young v. Spencer (1830) 5 M. & Ry. 47; 10 B. & C. 145; 8 L. J. (O.S.) K. B. 106.—K.B., *distinguished*.
Baxter v. Taylor (1832) 1 N. & M. 14; 4 B. & Ad. 72; 2 L. J. K. B. 65.—K.B.

Young v. Spencer, *referred to*.
Johnstone v. Hall (1836) 25 L. J. Ch. 462; 2 K. & J. 414; 2 Jur. (N.S.) 780; 4 W. R. 417.—V.-C.

Darcy (Lord) v. Askwith (1617) Hob. 234, *test in applied*.

Queen's College, Oxford v. Hallett (1811) 14 East 489; 13 R. R. 293, *observed upon*.
West Ham Central Charity Board v. East London Waterworks Co. (1900) 69 L. J. Ch. 257; [1900] 1 Ch. 624; 82 L. T. 85; 48 W. R. 284.—BUCKLEY, J.

Smyth v. Carter (1853) 18 Beav. 78.—M.R., *inapplicable*.

Doherty v. Allman (1878) 3 App. Cas. 709; 39 L. T. 129; 26 W. R. 513.—H.L. (IR.).

Doherty v. Allman (1878) 3 App. Cas. 709; 39 L. T. 129; 26 W. R. 513.—H.L. (IR.), *applied*.

Meux v. Cobley (1891) 61 L. J. Ch. 449; [1892] 2 Ch. 253; 66 L. T. 86.—KEKEWICH, J.

Bishop v. Elliott (1855) 24 L. J. Ex. 229; 11 Ex. 113; 1 Jur. (N.S.) 962.—EX. CH., *applied*.

Lambourn v. McLellan (1903) 72 L. J. Ch. 617; [1903] 2 Ch. 268; 88 L. T. 748; 51 W. R. 594.—C.A.

10. FURNISHED HOUSES.

Smith v. Marrable (1843) 11 M. & W. 5; 12 L. J. Ex. 223; 2 D. (N.S.) 810; Car. & M. 479; 7 Jur. 70.—EX., *distinguished*.
Sutton v. Temple (1843) 13 L. J. Ex. 17; 12 M. & W. 52; 7 Jur. 1065.—EX.

Smith v. Marrable, *considered*.

Sutton v. Temple, *referred to*.
Hart v. Windsor (1843) 12 M. & W. 68; 13 L. J. Ex. 129; 8 Jur. 150.—EX.

PARKE, B. (for the Court).—But the defendant chiefly rests his case upon the decision of **Smith v. Marrable**. My judgment in that case certainly proceeded upon the authority of two previous decisions, which, though they continued a novel doctrine, had not been questioned in Westminster Hall, and had received, to a certain degree, the sanction of the Lord Chief Justice Tindal in a subsequent case. Those cases were **Edwards v. Etherington**, before Lord Tentorden, and afterwards the Court of King's Bench; and **Collins v. Barrow**; and the last that before Lord Chief Justice Tindal, was **Salisbury v. Marshall**; and I thought they established the doctrine, not merely that there was an implied contract on the part of the lessor, that the house demised should be habitable, but an implied condition, that the lease should be void if it were not, and the tenant chose to quit. From the full discussion which those cases have now undergone, on the present argument and that in the recent case of **Sutton v. Temple** (12 M. & W. 52), I feel satisfied they cannot be supported, if the reports of them are correct; and we all concur in opinion that they are not law—an opinion strongly intimated, in the case of **Sutton v. Temple**, in which this Court decided that there was no implied warranty of condition or fitness for a particular purpose on a lease of aftermath. We are under no necessity of deciding in the present case, whether that of **Smith v. Marrable** be law or not. It is distinguishable from the present case on the ground on which it was put by Lord Abinger, both on the argument of the case itself, but more fully in that of **Sutton v. Temple**; for it was the case of a demise of a ready-furnished house for a temporary residence at a watering-place. It was not a lease of real estate merely. But that case certainly cannot be supported on the ground on which I rested my judgment.—p. 86.

Smith v. Marrable, *approved*.

Wilson v. Finch Hatton (1877) 2 Ex. D. 336; 46 L. J. Ex. 489; 36 L. T. 473; 25 W. R. 537.

KELLY, C.B.—I am prepared to hold that the law, as laid down in **Smith v. Marrable**, is good and sound law, and I may add that, although some discussion may have taken place about that case, and although some doubts may have been thrown on the law as there propounded by judges of learning and eminence, still I have no hesitation in holding that it is an implied condition in the letting of a furnished house that it shall be reasonably fit for habitation.—p. 343.

Smith v. Marrable and **Wilson v. Finch Hatton**, *not extended*.

Manchester Bonded Warehouse Co. v. Carr (1880) 49 L. J. C. P. 809; 5 C. P. D. 507; 43 L. T. 476; 29 W. R. 354; 45 J. P. 7.—C.P.D.

Smith v. Marrable and **Wilson v. Finch Hatton**, *discussed*.

Robertson v. Amazon Tug and Lighthouse Co. (1881) 51 L. J. Q. B. 68; 7 Q. B. D. 598; 46 L. T. 146; 4 Asp. M. C. 496.—C.A. BRETT and COTTON, L.J.J.; BRAMWELL, L.J. *dissenting*; *reversing* 45 L. T. 317; 4 Asp. M. C. 448.—COLERIDGE, C.J.

Smith v. Marrable, distinguished.

Chester v. Powell (1885) 52 L. T. 22.
 BACON, V.-C.—If that case [*Smith v. Marrable*] had remained completely untouched, and was still . . . the law of the land, yet that is only an authority for the proposition that in taking furnished apartments at the seaside, or for temporary occupation only, there is an implied warranty that they must be fit for occupation. . . . Parke, B., who was one of the judges who decided *Smith v. Marrable*, was anxious to pare down that decision to some extent and to limit it to the facts which existed in that particular case.

Wilson v. Finch Hatton, explained.

Sarson v. Roberts (1895) 65 L. J. Q. B. 37; [1895] 2 Q. B. 395; 14 R. 616; 73 L. T. 174; 43 W. R. 690; 59 J. P. 643.—C.A. ESHER, M.R., KAY and SMITH, L.JJ.

SMITH, L.J.—Our attention has been called to what was said by Kelly, C.B. towards the exclusion of his judgment in *Wilson v. Finch Hatton*, but it seems to me apparent from earlier passages that the judgment of the learned judge did not go, and was not intended to go beyond the decision in *Smith v. Marrable* [which does not extend the warranty beyond the commencement of the term]. . . . It seems to me that what the learned Chief Baron desired to point out in the passage that has been relied on was that the plaintiff was entitled to enter into occupation on the 7th of May, and if the house was not in a fit state until the 26th of May, she did not get what she bargained for.—p. 39.

Hart v. Windsor (1844) 12 M. & W. 68; 13

L. J. Ex. 129; 8 Jur. 150.—EX., *adapted*.

Mostyn v. West Mostyn Coal and Iron Co. (1876) 45 L. J. C. P. 401; 1 C. P. D. 145; 34 L. T. 325; 24 W. R. 401.—C.P.D.; Wilson v. Finch Hatton (1877) 46 L. J. Ex. 489; 2 Ex. D. 336; 36 L. T. 473; 25 W. R. 537.—EX. D.; Manchester Bonded Warehouse Co. v. Carr (1884) 49 L. J. C. P. 809; 5 C. P. D. 507; 43 L. T. 476; 29 W. R. 354; 45 J. P. 7.—C.P.D.

Hart v. Windsor, *referred to*.

Westropp v. Elligott (1884) 9 App. Cas. 815, 827.—H.L. (Ir.).

Hart v. Windsor, *dictum questioned*.

Baynes v. Lloyd (1895) 64 L. J. Q. B. 787; [1895] 2 Q. B. 610; 14 R. 678; 73 L. T. 250; 59 J. P. 710.—C.A. ESHER, M.R., KAY and SMITH, L.JJ.; *affirming* 43 W. R. 525.—RUSSELL, C.J.

11. LODGINGS.

Cowan v. Milbourn (1867) 36 L. J. Ex. 124; L. R. 2 Ex. 230; 16 L. T. 290; 15 W. R. 750.—EX., *discussed*.

Reg. v. Ramsay (1883) 1 Cab. & E. 126; 48 L. T. 733; 15 Cox, C. C. 231.—COLERIDGE, C.J.

Phillips v. Henson (1877) 47 L. J. C. P. 273; 3 C. P. D. 26; 37 L. T. 432; 26 W. R. 214. C.P.D.; and Morton v. Palmer (1881) 51 L. J. Q. B. 7; 45 L. T. 426; 30 W. R. 115.—C.A., *discussed and applied*.

Ness v. Stephenson (1882) 9 Q. B. D. 245; 47 J. P. 134.—Q.B.D.

Langdon v. Broadbent (1877) 37 L. T. 434.—C.P.D., *referred to*.

Logsdon v. Booth (1899) 69 L. J. Q. B. 131; [1900] 1 Q. B. 401; 81 L. T. 602; 48 W. R. 266; 64 J. P. 165.—RUSSELL, C.J., BIGHAM and DARLING, JJ.

Langdon v. Broadbent, *adapted*.

Logsdon v. Trotter (1900) 69 L. J. Q. B. 312; [1900] 1 Q. B. 617; 82 L. T. 151; 48 W. R. 365; 64 J. P. 421.—CHANNELL and BUCKNILL, JJ.

Dansey v. Richardson (1854) 3 El. & Pl. 144.

722; 2 C. L. R. 1412; 23 L. J. Q. B. 217;

18 Jur. 721.—Q.B., *discussed*.

Holder v. Soulby (1860) 8 C. B. (N.S.) 254; 29 L. J. C. P. 246; 6 Jur. (N.S.) 1031; 2 L. T. 219; 8 W. R. 438.

ERLE, C.J.—The whole tenor of my judgment in that case is distinctly to the effect that there is no such liability cast upon the keeper of a boarding-house, and that it would be an unreasonable thing to make a person responsible for the safety of the goods which are never entrusted to his safety at all; and I am strongly opposed to the imposition of such a liability upon a lodging-house keeper. The other judges who differed from me in the case of *Dansey v. Richardson* were only taking up the proposition which was assumed there, but was not the proposition in dispute in the case.—p. 266.

LANDS CLAUSES ACT.

1. PURCHASE OF LANDS.
2. ENTRY UPON LANDS.
3. COMPENSATION.
4. SUPERFLUOUS LANDS.

1. PURCHASE OF LANDS.**Generally.**

Baker v. Metropolitan Ry. (1862) 32 L. J. Ch. 7; 31 Beav. 504; 9 Jur. (N.S.) 61; 7 L. T. 494; 11 W. R. 18.—M.R., *explained*.

Wycombe Ry. v. Donnington Hospital (1866) L. R. 1 Ch. 268; 12 Jur. (N.S.) 347; 14 L. T. 179; 14 W. R. 359.—L.JJ., *applied*.

Bridgend Gas and Water Co. v. Durnraven (1885) 55 L. J. Ch. 91; 31 Ch. D. 219, 222; 53 L. T. 714; 34 W. R. 119.—CHITTY, J.

Simpson v. South Staffordshire Waterworks

Co. (1865) 34 L. J. Ch. 380; 4 De G. J. & S. 679; 12 L. T. 360; 13 W. R. 729, 908.—L.C., *reversing* STUART, V.-C., *distinguished*.

Huddersfield Corporation and Jacomb, In re (1874) L. R. 17 Eq. 476, 487; 30 L. T. 78.—MALINS, V.-C., *affirmed* 44 L. J. Ch. 96; L. R. 10 Ch. 92; 31 L. T. 466; 23 W. R. 100.—L.JJ.

Notice to Treat.

Stretton v. G. W. and Brentford Ry., 23 L. T. 44; 18 W. R. 859.—MALINS, V.-C.; *reversed*, (1870) 40 L. J. Ch. 50; L. R. 5 Ch. 751; 23 L. T. 379; 18 W. R. 1078.—C.A. HATHERLEY, L.C. and JAMES, L.J.; *referred to* Dowling v. Pontypool, Caerleon, and Newport Ry. (1874) 43 L. J. Ch. 761, 771; L. R. 18 Eq. 714, 746.—HALL, V.-C.

Bristol and North Somerset Ry. v. Somerset and Dorset Ry., 22 W. R. 399.—MALINS, V.-C.; *reversed*, (1874) 22 W. R. 601.—SELBORNE, L.C.

Edwards, Ex parte, Marylebone (Stingo Lane) Improvement Act, 1868, In re (1871) 40 L. J. Ch. 697; L. R. 12 Eq. 389.—**ROMILLY, M.R., referred to.**
Doyne's Traverses, In re (1888) 24 L. R. Ir. 287.—**JOHNSON, J.**

Edwards, Ex parte, and Wilkins v. Birmingham Corporation (1883) 53 L. J. Ch. 93; 25 Ch. D. 78; 49 L. T. 468; 32 W. R. 118; 48 J. P. 231.—**MATHEW, J., explained.**
Mercer v. Liverpool, St. Helens and South Lancashire Ry. (1901) 70 L. J. K. B. 775; [1901] 2 K. B. 753; 85 L. T. 283; 50 W. R. 155.—**ALVERSTONE, C.J., reversed.**
Mercer v. Liverpool, St. Helens, &c., Ry. (1903) 72 L. J. K. B. 128; [1903] 1 K. B. 652; 88 L. T. 374; 51 W. R. 308; 67 J. P. 77.—**C.A.**

Burkinshaw v. Birmingham and Oxford Junction Ry. (1850) 20 L. J. Ex. 246; 5 Ex. 475; 6 Railw. Cas. 600.—**EX., referred to.**

Haynes v. Haynes (1861) 30 L. J. Ch. 578; 1 Dr. & Sm. 426 (*post*, col. 1506); **Spencer v. Metropolitan Board of Works** (1882) 52 L. J. Ch. 249; 22 Ch. D. 142; 47 L. T. 459; 31 W. R. 347.—**C.A. JESSEL, M.R. and BOWEN, L.J.; COTTON, J.J. dissenting;** **Church v. London School Board** (1892) 8 Times L. R. 310.—**CAVE and CHARLES, L.JJ.**

Webb v. Manchester and Leeds Ry. (1839) 4 Myl. & Cr. 116; 1 Railw. Cas. 576.—**COTTENHAM, L.C., referred to.**

Stamps v. Birmingham, Wolverhampton and Stour Valley Ry. (1848) 17 L. J. Ch. 431; 2 Ph. 673; 6 Railw. Cas. 123, 132.—**L.C.; Lamb v. North London Ry.** (1869) L. T. 4 Ch. 522, 527; 21 L. T. 98; 17 W. R. 746.—**L.JJ.; Dowling v. Pontypool, &c., Ry. (supra, col. 1504).**

Simpson v. Lancaster and Carlisle Ry. (1847) 15 Sin. 580; 4 Railw. Cas. 625; 11 Jur. 879.—**SHADWELL, V.-C., approved.**
Stamps v. Birmingham, &c., Ry. (supra).

Walker v. Eastern Counties Ry. (1848) 6 Hare 591; 12 Jur. 787; 5 Railw. Cas. 469.—**WIGRAM, V.-C., not followed.**

Stone v. Commercial Ry. (1839) 4 Myl. & Cr. 122; 1 Railw. Cas. 375.—**COTTENHAM, L.C., explained. And see post, col. 1506.**

Adams v. London and Blackwall Ry. (1850) 19 L. J. Ch. 557; 2 Mac. & G. 118; 2 Hall & Tw. 285; 14 Jur. 679.—**COTTENHAM, L.C.; reversing** (1849) 18 L. J. Ch. 357.—**WIGRAM, V.-C.**

Walker v. Eastern Counties Ry., disapproved.

Pinchin v. London and Blackwall Ry., 1 K. & J. 34.—WOOD, V.-C.; affirmed on other grounds, (1854) 24 L. J. Ch. 417; 5 De G. M. & G. 851; 3 W. R. 125.—**CRANWORTH, L.C., KNIGHT BRUCE and TURNER, L.JJ.**

Walker v. Eastern Counties Ry., dissented from.

Adams v. London and Blackwall Ry., discussed.

Hill v. G. N. Ry. (1854) 24 L. J. Ch. 212; 1 Jur. (N.S.) 102.—**KINDERSLEY, V.-C. And see S. C.** (1853) 23 L. J. Ch. 524; 5 De G. M. & G. 66; 18 Jur. 685; 2 W. R. 335.—**L.JJ.; reversing** 20 L. J. Ch. 20.—**KINDERSLEY, V.-C.**

Stone v. Commercial Ry. (supra) and Walker v. Eastern Counties Ry., discussed.

Adams v. London and Blackwall Ry., distinguished.

Regent's Canal Co. v. Ware (1857) 26 L. J. Ch. 566; 23 Beav. 575; 3 Jur. (N.S.) 924; 5 W. R. 617.—**ROMILLY, M.R.**

Walker v. Eastern Counties Ry., disapproved.

Adams v. London and Blackwall Ry.: Stone v. Commercial Ry.; Hill v. G. N. Ry. (supra); Salmon v. Randall (1838) 3 Myl.

& Cr. 439.—**COTTENHAM, L.C.; Tawney v. Lynn and Ely Ry.** (1847) 16 L. J. Ch. 282; 4 Railw. Cas. 615.—**SHADWELL, V.-C.; Edinburgh and Perth Ry. v. Leven** (1852) 1 Macq. 284.—**H.L. (SC.); Inge v. Birmingham, Wolverhampton and Stour Valley Ry.** (1853) 3 De G. M. & G. 658; 2 Eq. R. 80; 2 W. R. 22.—**CRANWORTH, L.C.; affirming** 1 Sm. & G. 347.—**STUART, V.-C.; Doo v. London and Croydon Ry.** (1839) 8 L. J. Ch. 200; 1 Railw. Cas. 257.—**COTTENHAM, L.C.; and Monroe v. Newry Ry.** (1852) 2 Ir. Ch. R. 260.—**BLACKBURN, L.C., discussed.**

Haynes v. Haynes (1861) 30 L. J. Ch. 578; 1 Dr. & Sm. 426; 7 Jur. (N.S.) 595; 4 L. T. 199; 9 W. R. 497.

KINDERSLEY, V.-C.—On examining these cases, therefore, I think I am justified in saying that, except *Walker v. Eastern Counties Ry.*, there is no case in which it has been held that a bill for specific performance would lie on a so-called notice to treat, even by the landowner. In *Pinchin v. London and Blackwall Ry. (post)*, Wood, V.-C. thought *Walker v. Eastern Counties Ry.* not binding, and Stuart, V.-C., in plain terms, thought such a bill would not lie. Indeed, the decree in *Walker v. Eastern Counties Ry.* was most anomalous, and without precedent, for it directed a thing to be done (summoning a jury) to create a new fact to be imported, by some means, into the suit; there being no declaration that there should be specific performance; and reserved further directions and costs. Further consideration is never reserved, except upon inquiries, and if an issue is directed, the case stands over until after trial. Such a decree would present a strange spectacle of compelling a company to do that which they are perfectly willing to do, and may do any moment.—p. 582.

Stone v. Commercial Ry., principle applied.

Ecclesiastical Commissioners v. Sewers Commissioners (1880) 14 Ch. D. 305, 308; 28 W. R. 824.—**MALINS, V.-C.**

Adams v. London and Blackwall Ry., not applied.

Regent's Canal Co. v. Ware (supra), approved.

Mason v. Stokes Bay Pier and Ry. Co. (1862) 32 L. J. Ch. 110; 1 N. R. 84; 11 W. R. 80.—**WOOD, V.-C.**

Adams v. London and Blackwall Ry. followed.

Walker v. Eastern Counties Ry., commented on.

Lind v. Isle of Wight Ferry Co. (1862) 1 N. R. 13; 7 L. T. 416.—**WOOD, V.-C.**

Adams v. London and Blackwall Ry. and Mason v. Stokes Bay Pier and Ry. Co. (supra), discussed and explained.

Harding v. Metropolitan Ry. (1872) 41 L. J. Ch. 371; L. R. 7 Ch. 154; 26 L. T. 109; 20 W. R. 321.—HATHERLEY, L.C.

Adams v. London and Blackwall Ry. and Regent's Canal Co. v. Ware, *referred to*. Pigott and G. W. Ry., *In re* (1881) 50 L. J. Ch. 679; 18 Ch. D. 146; 44 L. T. 792; 29 W. R. 727.—JESSEL, M.R.

Richmond v. North London Ry. (1868) 37 L. J. Ch. 886; L. R. 3 Ch. 679.—CAIRNS, L.C.; *affirming* 18 L. T. 8; 16 W. R. 449.—ROMILLY, M.R., *followed*.

Ystalyfera Iron Co. v. Neath and Brecon Ry. (1873) L. R. 17 Eq. 142, 419; 43 L. J. Ch. 476; 29 L. T. 662; 22 W. R. 149.—JESSEL, M.R.

Richmond v. North London Ry., *referred to*. Tiverton and North Devon Ry. v. Loosemore (1884) 53 L. J. Ch. 12; 9 App. Cas. 480, 489.—H.L. (E.) (*post*, col. 1527).

Lind v. Isle of Wight Ferry Co. (*supra*, col. 1506), *explained*.

Tiverton and North Devon Ry. v. Loosemore (1884) 53 L. J. Ch. 812; 9 App. Cas. 480, 491.—H.L. (E.) (*post*, col. 1527).

Pinchin v. London and Blackwall Ry. (*supra*, col. 1505), *commented on*.

Haynes v. Haynes (*supra*); G. W. Ry. v. Swinford and Cheltenham, &c., Ry. (1884) 53 L. J. Ch. 1075; 9 App. Cas. 787, 803.—H.L. (E.) (*post*, col. 1536).

Pinchin v. London and Blackwall Ry., *referred to*.

London Association of Shipowners and Brokers v. London and India Joint Committee (1892) 62 L. J. Ch. 294; [1892] 3 Ch. 242, 269; 2 R. 23; 47 L. T. 238; 7 Asp. M. C. 195.—C.A.

Haynes v. Haynes (1861) 30 L. J. Ch. 578; 1 Dr. & Sm. 426 (*supra*, col. 1506); and Gardner v. Charing Cross Ry. (1861) 31 L. J. Ch. 181; 2 J. & H. 248; 8 Jur. (N.S.) 151; 5 L. T. 418; 10 W. R. 120.—WOOD, V.-C., *followed*.

Rawlings v. Metropolitan Ry. (1868) 37 L. J. Ch. 824; 18 L. T. 871.—MALINS, V.-C.

• Haynes v. Haynes.

Referred to Harding v. Metropolitan Ry. (1872) 41 L. J. Ch. 371; L. R. 7 Ch. 154, 158 (*supra*); *applied* Watts v. Watts (1873) 43 L. J. Ch. 77; L. R. 17 Eq. 217; 29 L. T. 671; 22 W. R. 105.—RAIL, V.-C.; Edwards v. West (1878) 47 L. J. Ch. 463; 7 Ch. D. 858, 862; 38 L. T. 481; 26 W. R. 507.—FRY, J.: *not applied* Sewell v. Harrow and Uxbridge Ry. (1902) 19 Times L. R. 130.—RIDLEY, J.; *approved* Mercer v. Liverpool, St. Helen's, &c., Ry. (1903) 72 L. J. K. B. 128, 132; [1903] 1 K. B. 631, 661.—C.A. (*supra*, col. 1505).

Metropolitan Ry. v. Woodhouse (1865) 34 L. J. Ch. 297; 11 Jur. (N.S.) 296; 12 L. T. 113; 13 W. R. 516.—STUART, V.-C.

Referred to Doyné's Traverses, *In re* (1888) 24 L. R. Ir. 287.—JOHNSON, J.; *distinguished* Sewell v. Harrow and Uxbridge Ry. (1902) 19 Times L. R. 130.—RIDLEY, J.

• Harding v. Metropolitan Ry. (*supra*), *referred to*.

Mills v. East London Union (1872) 42 L. J.

C. P. 46; L. R. 8 C. P. 79, 86; 27 L. T. 557; 21 W. R. 142.—C.P.; Parkinson, *In re* [1898] 1 Ir. R. 330, 338.—MADDEN, J.

Bwlfa and Merthyr Dare Steam Collieries and Pontypridd Waterworks Co., *In re* (1901) 70 L. J. K. B. 1041; [1901] 2 K. B. 798; 85 L. T. 233; 50 W. R. 135; 65 J. P. 691.—RIDLEY and PHILLIMORE, JJ.: *reversed*, (1902) 71 L. J. K. B. 613; [1902] 2 K. B. 435; 87 L. T. 291; 50 W. R. 627.—C.A. v. WILLIAMS, ROMER and MATHEW, L.JJ.; C.A. *reversed*, (1903) 72 L. J. K. B. 805; [1903] A. C. 426; 89 L. T. 280.—H.L. (E.).

What Lands or Interests.

Bedford and Cambridge Ry. v. Stanley (1862) 32 L. J. Ch. 60; 2 J. & H. 746; 1 N. R. 162; 9 Jur. (N.S.) 152; 7 L. T. 477; 11 W. R. 139.—WOOD, V.-C., *distinguished*. Kemp v. S. E. Ry. (1872) 41 L. J. Ch. 404; L. R. 7 Ch. 364; 26 L. T. 110; 20 W. R. 306.—HATHERLEY, L.C.: *reversing* 41 L. J. Ch. 50; 25 L. T. 622.—BACON, V.-C.

Kemp v. S. E. Ry.

Explained, Errington v. Metropolitan District Ry. (1882) 51 L. J. Ch. 305; 19 Ch. D. 559, 576 (*post*, col. 1509); *referred to* Wilkinson v. Hull, &c., Ry. and Dock Co. (1882) 20 Ch. D. 323, 340 (*post*, col. 1509); L. & S. W. Ry. v. Gomm (1882) 51 L. J. Ch. 530; 20 Ch. D. 562, 569; 46 L. T. 449; 30 W. R. 620.—C.A.; James v. Lovel (1887) 56 L. T. 739, 742; 35 W. R. 626.—KEKEWICH, J.

Walker, *Ex parte* (1853) 22 L. J. Ch. 888; 1 Drew. 505.—KINDERSLEY, V.-C., *discussed and explained*.

Rangeley v. Midland Ry. (1868) 37 L. J. Ch. 313; L. R. 3 Ch. 306; 18 L. T. 69; 16 W. R. 547.—CAIRNS and SELWYN, L.JJ.

Rangeley v. Midland Ry., *discussed*.

Beauchamp (Earl) v. G. W. Ry. (1869) 38 L. J. Ch. 162; L. R. 3 Ch. 745, 749; 19 L. T. 189; 16 W. R. 115.—WOOD and SELWYN, L.JJ.; Dowling v. Pontypool, &c., Ry. (*supra*, col. 1504).

Rangeley v. Midland Ry., *applied*.

Finck v. L. & S. W. Ry. (1890) 59 L. J. Ch. 458; 44 Ch. D. 330; 62 L. T. 881; 38 W. R. 513.—C.A., COTTON, LINDLEY and LOPES, L.JJ.

Rangeley v. Midland Ry., *referred to*.

Simpson v. Godmanchester Corporation (1895) 64 L. J. Ch. 837; 73 L. T. 90; 13 R. 861; 11 Times L. R. 551.—WRIGHT, J.; *affirmed* 65 L. J. Ch. 154; [1896] 1 Ch. 214; 73 L. T. 423; 44 W. R. 149; 12 Times L. R. 56.—C.A.; and (1897) 40 L. J. Ch. 770; [1897] A. C. 696; 77 L. T. 669; 13 Times L. R. 544.—H.L. (E.); Macfie v. Callander and Oban Ry. (1897) 24 Rettie, 1156, 1171.—CT. OF SESSION; Att.-Gen. v. Copeland (1901) 70 L. J. K. B. 512; [1901] 2 K. B. 101, 106; 84 L. T. 562; 49 W. R. 489; 65 J. P. 581.—ALVERSTONE, C.J. (*reversed*, C.A. See "WAY.")

Stoekton and Darlington Ry. v. Brown (1860) 9 H. L. Cas. 246; 6 Jur. (N.S.) 1168; 3 L. T. 131; 8 W. R. 708.—H.L. (E.), *discussed and explained*.

Flower v. L. B. & S. C. Ry. (1865) 34 L. J. Ch. 540; 2 Dr. & Sm. 330; 6 N. R. 200; 11 Jur. (N.S.) 406; 12 L. T. 10; 13 W. R. 518.—KINDERSLEY, V.-C., and *see post*.

Flower v. L. B. & S. C. Ry., distinguished.
Galloway v. London Corporation (1866) L. R. 1 H. L. 34, 56.—H.L. (E.) (*post*); *Butt v. Imperial Gas Co.* (1866) L. R. 2 Ch. 158, 162; 16 L. T. 820; 15 W. R. 92.—K.C.

Stockton, &c., Ry. v. Brown, referred to.
City of Glasgow Union Ry. v. Caledonian Ry. (1871) L.R. 2 H. L. (sc.) 160, 164.

Flower v. L. B. & S. C. Ry., explained.

Stockton, &c., Ry. v. Brown, approved.
Kemp v. S.E. Ry. (1872) 41 L. J. Ch. 404; L. R. 7 Ch. 364, 375; 26 L. T. 110; 20 W. R. 386.
 HATHERLEY, L.C.—What *Kindersley, V.-C.* decided in *Flower v. L. B. & S. C. Ry.* was that the mere *ipse dixit* of the engineer was not sufficient; he must point out how the land was required. It is most important that the principle in *Stockton and Darlington Ry. v. Brown*, making the statement of the engineer of the company conclusive, should be maintained so as to save the Courts from a flood of affidavits with which it would otherwise be deluged.—p. 407.

Stockton, &c., Ry. v. Brown and Flower v. L. B. & S. C. Ry., referred to.
Temple v. Flower (1872) 41 L. J. Ch. 605, 609; 26 L. T. 657; 20 W. R. 587.—BACON, V.-C.

Stockton, &c., Ry. v. Brown.
Referred to, Hooper v. Bourne (1877) 46 L. J. Q. B. 509; 2 Q. B. D. 339, 343; 25 W. R. 672.—MELLOR and MANISTY, JJ. (affirmed C.A. and H.L. *see post*, col. 1554); *explained* *Errington v. Metropolitan District Ry.* (1882) 51 L. J. Ch. 305; 19 Ch. D. 559, 570; 46 L. T. 443; 30 W. R. 668.—C.A., JESSEL, M.R., BRETT and HOLKER, L.JJ.; *followed* *Wilkinson v. Hull, &c. Ry. and Dock Co.* (1882) 51 L. J. Ch. 788; 20 Ch. D. 323, 331; 46 L. T. 455; 30 W. R. 617.—C.A. JESSEL, M.R., COTTON and LINDLEY, L.JJ.

Stockton, &c., Ry. v. Brown, and Flower v. L. B. & S. C. Ry., referred to.
James v. Lovel (1887) 56 L. T. 739, 742; 35 W. R. 626.—KEENEWICH, J.

Stockton, &c., Ry. v. Brown, principle applied.

Flower v. L. B. & S. C. Ry., explained.
Lewis v. Weston-super-Mare Local Board (1888) 58 L. J. Ch. 39; 40 Ch. D. 55, 62; 59 L. T. 769; 37 W. R. 121.—STIRLING, J.

Stockton, &c., Ry. v. Brown and Lewis v. Weston-super-Mare Local Board, referred to.

Stroud v. Waudsworth District Board of Works (1893) [1894] 1 Q. B. 68.—CHARLES and WRIGHT, JJ.; *affirmed*, (1894) 63 L. J. M. C. 88; [1894] 2 Q. B. 1; 9 R. 194; 70 L. T. 190; 42 W. R. 355; 58 J. P. 652.—C.A.

Stockton, &c., Ry. v. Brown, applied.
Goldberg v. Liverpool Corporation (1900) 82 L. T. 362.—C.A., LINDLEY, M.R., SIR F. JEUNE and RIGBY, L.JJ.

Galloway v. London Corporation (1866) 35 L. J. Ch. 477; L. R. 1 H. L. 34; 12 Jur. (N.S.) 747; 14 L. T. 865.—H.L. (E.); *reversing* WOOD, V.-C. and *affirming, with a variation*, 2 De G. J. & S. 213, 639.—KNIGHT BRUCE, L.J., who had *agreed with ROMILLY, M.R.; TURNER, L.J. dissenting, distinguished.*

L. C. & D. Ry. v. London Corporation (1868)

19 L. T. 250.—L.JJ.; *Kent Coast Ry. v. L. C. & D. Ry.* (1868) L. R. 3 Ch. 656, 669; 19 L. T. 174; 16 W. R. 1027.—L.JJ.

Galloway v. London Corporation, applied.

Dodd v. Salisbury and Yeovil Ry. (1859) 1 Giff. 158; 5 Jur. (N.S.) 782.—STUART, V.-C., *discussed and not applied.*

Quinton v. Bristol Corporation (1874) 43 L. J. Ch. 783; L. R. 17 Eq. 524; 30 L. T. 112; 22 W. R. 434.—MALINS, V.-C.

Galloway v. London Corporation, dictum applied.

Baker v. Portsmouth Corporation (1878) 47 L. J. Ex. 223; 3 Ex. D. 157, 160; 37 L. T. 822; 26 W. R. 303.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.; L. B. & S. C. Ry. v. St. Giles, Camberwell, Vestry (1879) 48 L. J. M. C. 184; 4 Ex. D. 239, 245; 41 L. T. 162.—EX. D. KELLY, C.B. and HAWKINS, J.; *Robinson v. Barton-Eccles Local Board* (1883) 53 L. J. Ch. 226; 8 App. Cas. 798, 804; 50 L. T. 57; 32 W. R. 249; 48 J. P. 276.—H.L. (E.).

Galloway v. London Corporation, distinguished.

Gard v. Sewers Commissioners (1885) 54 L. J. Ch. 698; 28 Ch. D. 486, 496; 52 L. T. 827.—C.A. BAGGALLAY, BOWEN and FRY, L.JJ.

Galloway v. London Corporation and Quinton v. Bristol Corporation, referred to.

Bristol Governors v. Bristol Corporation (1887) 56 L. J. Q. B. 320; 18 Q. B. D. 549, 555; 56 L. T. 641; 35 W. R. 619; 51 J. P. 676.—C.A. [*see judgment of WILLS, J. in Court below*]; *James v. Lovel (supra)*; *Lewis v. Weston-super-Mare Local Board* (1888) 40 Ch. D. 55, 62 (*supra*, col. 1549).

Galloway v. London Corporation, distinguished.

Donaldson v. South Shields Corporation (1899) 68 L. J. Ch. 102, 162; 79 L. T. 685.—C.A.

LINDLEY, M.R.—In *Galloway v. London Corporation*, the broad features of the case were different, and power was given to take land "for the purposes of the Act," instead of "for the purpose of the street works."—p. 163.

Reddin v. Metropolitan Board of Works

(1862) 31 L. J. Ch. 660; 4 De G. F. & J. 532; 7 L. T. 6; 10 W. R. 764.—WESTBURY, L.C.; *reversing* 10 W. R. 726.—WOOD, V.-C., *applied.*

Benington & Sons v. Metropolitan Board of Works (1886) 54 L. T. 837, 839; 50 J. P. 740.—CHITTY, J.

Marson v. L. C. & D. Ry. (1868) 37 L. J. Ch.

483; L. R. 6 Eq. 101; 18 L. T. 319.—GIFFARD, V.-C.; (1869) 38 L. J. Ch. 371; L. R. 7 Eq. 546; 20 L. T. 773.—JAMES V.-C., *form followed.*

Falkner v. Somerset and Dorset Ry. (1873) 42 L. J. Ch. 851; L. R. 16 Eq. 458, 461.—L.C., *for M. R.*

Marson v. L. C. & D. Ry., explained.

Grierson v. Cheshire Lines Committee (1874) 44 L. J. Ch. 35; L. R. 19 Eq. 83; 31 L. T. 428; 23 W. R. 68.

BACON, V.-C.—There there had been a litigation disposed of by a decree and no question raised by the defendants whether they were or were not bound to fulfil the contract, the decree

having been in the terms in which it appears to have been. On further consideration there was no other mode of dealing with it, the matter was concluded, the decree had settled it. They were to be purchasers, they did not dispute it themselves, and thereupon the duty was incumbent upon them to do that which was necessary in order to give full effect to that decree, and that is all the order on further consideration did.—p. 37.

• **Marson v. L. C. & D. Ry., referred to.**
Wright v. Wallasey Local Board (1887) 56 L. J. Q. B. 259; 18 Q. B. D. 783, 785; 52 J. P. 4.—A. L. SMITH, J.

Lincolnshire Ry. Act, In re, Flamank, Ex parte (1851) 1 Sim. (N.S.) 260.—V.C., *disapproved*.

Tugwell, In re (1884) 27 Ch. D. 309; 53 L. J. Ch. 1006; 51 L. T. 83; 83 W. R. 132.

PEARSON, J.—But, having read *Flamank, Ex parte*, very carefully, I am compelled to say that I am utterly unable to follow it. With all respect for Lord Cranworth, looking at the reasons which he gives for his judgment, it seems to me utterly impossible to say that any title to the money had been acquired by the personal representative. In that case, as in the present, land belonging to a person of unsound mind not so found by inquisition had been taken under the Lands Clauses Act, and the purchase-money had been paid into Court. After the death of the lunatic the question arose whether the money was to be treated as real or as personal estate, and Lord Cranworth held that it was personal estate. He said: "Now did sect. 7 authorise Cross (the lunatic) to sell or did it not? If it did, the effect, in my opinion, was to make his contract as good as if he had been *compos mentis*; and his executrixes would clearly be entitled to the 740*l*. He was compelled to sell; but, when he had sold, he stood in the same situation as he would have been in if he had been *compos mentis* and had sold voluntarily." Now, looking at the terms of sect. 7, I am unable to come to the conclusion that it authorises, or was intended to authorise, or that it can be construed as enabling, a person of unsound mind himself to do that which he would otherwise have been incapable of doing. Inasmuch as that section says that the persons who are to be able to sell the lands of lunatics or idiots are, not the lunatics or idiots themselves, but their committees, it seems to me impossible to conceive that it could have been intended that a person who from his condition of mind was absolutely incapable of entering into any agreement should be able to enter into an agreement to sell his land. There are, moreover, other sections of the Act which point out what is to be done in such cases. . . . Then Lord Cranworth continued: "If he was not authorised to sell, and, therefore, the company were not justified in taking his land under the compulsory powers of the Lands Clauses Consolidation Act, still the devisees under his will cannot be entitled to the money. Their claim would be to the land, and not to the money. And it does not lie in the mouth of the company to make objection; for they have taken the land, and, therefore, they cannot say there was no authority to take it. Therefore I can deal with the money in no other way than as if it had been paid for the purchase of land sold by a person seised in fee,

and who is competent to sell it." I have read that passage over a great many times, and, with all respect to Lord Cranworth, I find it impossible to understand how he could have arrived at such a conclusion. The purchase-money was in Court, and the heir, who could have brought ejectment for the land, was willing to accept the money and to confirm the sale, and yet Lord Cranworth arrived at the extraordinary conclusion that the money must be handed over to persons who could not make out any title to it or to the land. The land might be taken from the company because they had bought it from the wrong person, and the money must be taken away from them, because they could be heard to say that they had not bought from the right person. I cannot understand why a Court of equity, having the money in its hands, should not be able to say, "A mistake having been made, which is capable of being set right by paying the money to the rightful owner of the land who is willing to accept it, let justice be done by paying the money to him."—pp. 312—314.

Eastern Counties and London and Blackwall Ry. v. Marriage (1860) 31 L. J. Ex. 73; 9 H. L. Cas. 32; 7 Jur. (N.S.) 53; 8 W. R. 748.—H.L. (E.); *reversing S. C. nom. Marriage v. Eastern Counties and London and Blackwall Ry.* (1857) 27 L. J. Ex. 185.—

EX. CH., *referred to*.

Tetley v. Wanless (1865) 36 L. J. Ch. 25; 29 L. R. 2 Ex. 29.—EX.: Latham v. Lafone (1867) 36 L. J. Ex. 97; L. R. 2 Ex. 123.—EX. CH.: Hammersmith and City Ry. v. Brand (1869) 38 L. J. Q. B. 265; L. R. 4 H. L. 171, 190; 21 L. T. 238; 18 W. R. 12.—H.L. (E.).

Eastern Counties, &c., Ry. v. Marriage, distinguished.

Union Steamship Company of New Zealand v. Melbourne Harbour Trust Commissioners (1884) 9 App. Cas. 365; 53 L. J. P. C. 59; 50 L. T. 337; 5 Asp. M. C. 232.—P.C.

SIR B. COLLIER (for the COURT).—It should be observed as to that case, which dealt with the construction of the Lands Clauses Act, that in that Act were several headings so drawn as to be applicable grammatically to the sections which followed them. The heading then in question was this: "And with respect to small portions of intersected land, be it enacted as follows." Then came two sections: first, the 93rd, relating to lands not being situate in a town; and then the 94th, beginning with "If SUCH land shall be so cut through and divided." It was held by the H. L. that "SUCH land" referred, not to land mentioned in sect. 93, but referred back to the heading before sect. 93; namely, "with respect to small portions of intersected land, be it enacted as follows." That case appears to their lordships to have no application to the present. Here the heading "officers" is not such a heading as could be grammatically read into any of the sections which follow. It seems to their lordships to have been inserted for the purpose of convenience of reference, and not intended to control the interpretation of the clauses which follow.—p. 369.

Eastern Counties, &c. Ry. v. Marriage, referred to.

Leader's Estate, In re (1886) 17 L. R. Ir. 300.

—C.A. NAISH, L.C. *dissenting; affirmed, nom.*
Leader v. Duffey (1888) 13 App. Cas. 294.—
 H.L. (Ex.).

Vendor's Lien.

Walker v. Ware, Hadham and Buntingford Ry. (1865) 35 L. J. Ch. 94; L. R. 1 Eq. 195; 12 Jur. (N.S.) 18; 13 L. T. 517; 14 W. R. 158.—ROMILLY, M.R., *followed*.

Sedgwick v. Watford and Rickmansworth Ry. (1867) 36 L. J. Ch. 379.—M.R.; *Cambrian Ry., In re* (1867) L. R. 3 Ch. 281, n.—WOOD, V.-C.; (affirmed with a variation (1868) 37 L. J. Ch. 409; L. R. 3 Ch. 278; 18 L. T. 522; 16 W. R. 346.—CAIRNS, L.J.) *Pell v. Northampton and Banbury Ry.* (1865) 16 W. R. 1077.—M.R.; *Raper v. Crystal Palace Ry.* (1868) 18 L. T. 8; 16 W. R. 413.—M.R.; *Wing v. Tottenham and Hampstead Junction Ry.* (1868) 37 L. J. Ch. 654; L. R. 3 Ch. 740; 16 W. R. 1098.—L.J.J.; *Goodford v. Stonehouse and Nailsworth Ry.* (1869) 38 L. J. Ch. 307; 20 L. T. 137; 17 W. R. 515.—MALINS, V.-C.; *Sutton v. Hoylake Ry.* (1869) 20 L. T. 214.—MALINS, V.-C.

Wing v. Tottenham and Hampstead Junction Ry. *followed*.

Jersey (Earl) v. South Wales Mineral Ry. (1868) 19 L. T. 446.—MALINS, V.-C.; *Sutton v. Hoylake Ry.* (*supra*).

Cosens v. Bognor Ry. (1866) 36 L. J. Ch. 104; L. R. 1 Ch. 594; 12 Jur. (N.S.) 738; 15 L. T. 168; 14 W. R. 1002.—KNIGHT BRUCE and TURNER, L.J.J., *not followed*.

Munns v. Isle of Wight Ry. (1870) 39 L. J. Ch. 522; L. R. 5 Ch. 414; 23 L. T. 96; 18 W. R. 781.—GIFFARD, L.J.; *varying* (1869) L. R. 8 Eq. 653.—JAMES, V.-C.

Munns v. Isle of Wight Ry. *followed*.

St. Germans (Earl) v. Crystal Palace Ry. (1871) L. R. 11 Eq. 568; 24 L. T. 288; 19 W. R. 584.—BACON, V.-C., *not followed*.
Lycett v. Stafford and Uttoxeter Ry. Co. (1872) 41 L. J. Ch. 474; L. R. 13 Eq. 261; 25 L. T. 870.—BACON, V.-C.

Williams v. Aylesbury and Buckingham Ry. (1873) 28 L. T. 547; 21 W. R. 819.—L.C.; and *Munns v. Isle of Wight Ry.*, *discussed*.

Wing v. Tottenham, &c. Ry. *approved*.

Allgood v. Merrybent and Darlington Ry. (1886) 33 Ch. D. 571; 55 L. J. Ch. 743; 55 L. T. 835; 35 W. R. 180.

CHITTY, J.—It appears that Lord Selborne in *Williams v. Aylesbury and Buckingham Ry.*, after the order had been made for a sale, made an order in the form that Mr. Farwell asks for at the bar, and that is the order asked for upon the present notice of motion. The order asked for in *Williams v. Aylesbury, &c. Ry.* was for delivery of possession to the plaintiff, but the L.C. declined to make that order in the first instance, because he said that the plaintiff had elected to take his remedy founded on a lien, and obtained an order for sale, and consequently he declined to make the order which is stated in Seton on Decrees (4th ed. p. 1331), unless it was proved to his satisfaction that the order for sale would not be carried out. . . . Selwyn, L.J. stated the law with regard to this matter correctly, if I may say so with respect to him, in *Wing v. Tottenham, &c. Ry.* He said: "I have

no hesitation in saying that the whole practice of the Court shows that a vendor of land to a railway company is, with respect to his lien, in no different position from a vendor of land to any other person." . . . There is nothing in the case before Giffard, L.J. of *Munns v. Isle of Wight Ry.* to conflict with what I have stated. He in that case thought that there had been a miscarriage in granting the injunction, and, as I read his judgment, he thought it reasonable to discharge the injunction, and he made an order for a receiver with a direction against the company, who were to give immediate possession to the receiver.—pp. 573, 574.

Pell v. Northampton and Banbury Ry. (1866) 36 L. J. Ch. 319; L. R. 2 Ch. 100; 15 L. T. 169; 15 W. R. 27.—L.J.J.

Referred to, *Cambrian Ry., In re* (*supra*, col. 1513); *Munns v. Isle of Wight Ry.* (col. 1513); *observed on* *Winchester (Bishop) v. Mid Hants Ry.* (1867) 37 L. J. Ch. 64; L. R. 5 Eq. 17, 20; 17 L. T. 161; 16 W. R. 72.—STUART, V.-C.; *Latimer v. Aylesbury and Buckingham Ry.* (1878) 9 Ch. D. 385; 39 L. T. 460; 9 W. R. 141.—C.A.

Winchester (Bishop) v. Mid Hants Ry. *followed*.

Drax v. Somerset and Dorset Ry. (1868) 38 L. J. Ch. 232; 19 L. T. 626.—ROMILLY, M.R.; *Marling v. Stonehouse and Nailsworth Ry.* (1869) 38 L. J. Ch. 306; 17 W. R. 515.—JAMES, V.-C.; (*Goodford v. Stonehouse and Nailsworth Ry.* (*supra*, col. 1513).

Interest on Purchase-money.

Catling v. G. N. Ry. (1868) 21 L. T. 769; 18 W. R. 121.—HATHERLEY, L.C. and GIFFARD, L.J.; *reversing* 21 L. T. 17.—MALINS, V.-C., *referred to*.

Rhys v. Dare Valley Ry. (1874) L. R. 19 Eq. 93; 23 W. R. 23.—BACON, V.-C. *And see post*.

Rhys v. Dare Valley Ry. *applied*.

Ballard v. Siffitt (1880) 49 L. J. Ch. 618; 15 Ch. D. 122; 43 L. T. 173; 29 W. R. 73.—DENMAN, J.

Eccleshill Local Board, In re (1879) 49 L. J. Ch. 214; 13 Ch. D. 365; 28 W. R. 536.—V.-C., *disapproved*.

Pigott and G. W. Ry., In re (1881) 48 Ch. D. 146; 50 L. J. Ch. 679; 44 L. T. 792; 29 W. R. 727.

JESSEL, M.R.—There is one case before Bacon, V.-C., *Eccleshill Local Board, In re*, where he adverted to the fact of the verdict of the jury having been given, and he held interest to arise from that moment, though possession was not taken until afterwards. I am quite unable to understand the principle on which that case proceeded. I am not embarrassed by it, because I have no verdict of a jury to deal with in this case; but I am free to confess that if I had that case to deal with, I should not have been able to decide it otherwise than I have decided the one before me.—p. 154.

Pigott and G. W. Ry., In re, applied.

Eccleshill Local Board, In re, referred to.

Rhys v. Dare Valley Ry., approved.

Shaw and Birmingham Corporation, In re (1884) 54 L. J. Ch. 51; 27 Ch. D. 614, 619; 51 L. T. 684; 33 W. R. 74.—CHITTY, J.

Pigott and G. W. Ry., In re, followed.

Spencer-Bell to L. & S. W. Ry. (1885) 33 W. R. 771.—CHITTY, J.

Caledonian Ry. v. Carmichael (1870) L. R. 2 H. L. (sc.) 56, 66, *principles applied*.
Webster v. British Empire Mutual Life Assurance Co. (1887) 49 L. J. Ch. 769; 15 Ch. D. 169; 179; 43 L. T. 229; 28 W. R. 818.—C.A.

Rhys v. Dare Valley Ry., *principles applied*.

• **Caledonian Ry. v. Carmichael distinguished**.
Fletcher v. Lancashire and Yorkshire Ry. (1902) 71 L. J. Ch. 590; [1902] 1 Ch. 901, 908; 50 W. R. 423; 63 J. P. 631.

• **BUCKLEY, J.**—The facts there [*Caledonian Ry. v. Carmichael*] were that the railway company were to become debtors to Sir Thomas Carmichael in an event. They acquired the surface of a subterranean stone that was there upon terms that when a future event happened—namely, when a certain face of stone was exposed—they should become debtors to Sir Thomas in a certain sum. When the event happened upon which they were to become debtors to him he did not take the steps which were necessary for ascertaining what was the debt. He never asked for payment. Then the ordinary rule applied that a debt does not carry interest except by way of contract, if there be such, or by operation of law if notice be given pursuant to the statute. There was neither one nor the other. So that is a case in which it appears to me that principles upon which I decide this case have no application at all.—p. 593.

Disposal of Purchase-money.

Birmingham Blue Coat School, In re (1866) 35 L. J. Ch. 837; L. R. 1 Eq. 682; 35 Beav. 345.—**ROMILLY, M.R.**, *followed*.

Adams's Will, In re (1868) 17 L. T. 641.—**MALINS, V.-C.**; **Wilkinson's Estate**, In re (1870) L. R. 9 Eq. 343.—**MALINS, V.-C.**

• **Wilkinson's Estate**, In re, *followed*.

Cook's Settled Estates, In re (1871) 40 L. J. Ch. 400; L. R. 12 Eq. 12; 24 L. T. 413; 19 W. R. 693.—**M.R.**, *not followed*.
Shaw's Settled Estates, In re (1871) L. R. 14 Eq. 9; 41 L. J. Ch. 166.—**ROMILLY, M.R.**

Wilkinson's Estate, In re, *followed*.

Thorold's Settled Estates, In re (1872) 41 L. J. Ch. 780; L. R. 14 Eq. 31; 26 L. T. 682; 20 W. R. 898.—**MALINS, V.-C.**

• **Blyth's Trusts**, In re (1873) L. R. 16 Eq. 468; 28 L. T. 890; 21 W. R. 819.—**SELBORNE, L.C.** (for **ROMILLY, M.R.**), *followed*.

Sewart's Estate, In re (1874) L. R. 18 Eq. 278; 30 L. T. 355; 22 W. R. 625.—**MALINS, V.-C.**

Shaw's Settled Estates, In re *followed*.

Thorold's Settled Estates, In re, *not followed*.

Boyd's Settled Estates, In re (1873) 42 L. J. Ch. 506; 28 L. T. 799; 21 W. R. 667.—**SELBORNE, L.C.** (for **ROMILLY, M.R.**).

Boyd's Settled Estates, In re, and **Shaw's Settled Estates**, In re, *not followed*.
Taddy's Settled Estates, In re (1873) 43 L. J. Ch. 191; L. R. 16 Eq. 532; 29 L. T. 243.—**MALINS, V.-C.**

Cook's Settled Estates, In re (*supra*), and **Taddy's Settled Estates**, In re, *followed*.

Fryer's Settlement, In re, **Fryer v. Dorset Junction Ry.** (1875) 45 L. J. Ch. 96; L. R. 20 Eq. 468.—**HALL, V.-C.**

Fryer's Settlement, In re, *followed*.

G. N. Ry., In re (1870) L. R. 9 Eq. 274.—**ROMILLY, M.R.**, *not followed*.

Southwold Ry. Co.'s Bill, In re, **Depositors**.
 Ex parte (1876) 45 L. J. Ch. 800; 1 Ch. D. 697; 24 W. R. 293.—**HALL, V.-C.**

Boyd's Settled Estates, In re, *followed*.

Taddy's Settled Estates, In re, and **Fryer's Settlement**, In re, *not followed*.

Langmead v. Cockerton (1877) 25 W. R. 315.—**JESSEL, M.R.**

Boyd's Settled Estates, In re, *followed*.

Taddy's Settled Estates, In re; **Fryer's Settlement**, In re, and **Foy's Trusts**, In re (1873) 33 L. T. 161; 23 W. R. 744.—**HALL, V.-C.**, *not followed*.

St. Mary, Wigton (Vicar), Ex parte (1881) 18 Ch. D. 646; 45 L. T. 134; 29 W. R. 883.

FRY, J.—Different judges have taken different views, and indeed the same judges have acted differently at different times. But I find that the question came before the present L.C., who was then L.C., though he was trying the cases set down before the M.R. in *Boyd's Settled Estates*, In re, and he decided that the power of investment conferred by Lord St. Leonard's Act does not apply to funds which, by the special Act under which they are paid into Court, are directed to be invested in a particular way. I think I am bound by that decision. I am quite aware that **Malins, V.-C.** has expressed an opinion that it was to be treated as only the decision of a Court of co-ordinate jurisdiction, and that it was not binding on him. But the present M.R. has taken an opposite view, and I agree with him. I think the L.C., wherever he is sitting and whatever cases he is trying, is still L.C., and that his decision is binding on me. I shall, therefore, follow *Boyd's Settled Estates*, In re, and shall refuse the application for investment in India Four per cent. Stock. I should be very glad if the question were taken before the C. A., for there is really a serious conflict in the decisions.—p. 648.

Fryer's Settlement, In re, *not followed*.

Kirkmeaton (Rector), Ex parte, **Hull Ry. and Dock Act**, In re (1882) 51 L. J. Ch. 581; 20 Ch. D. 203; 30 W. R. 539.—**HALL, V.-C.**

Boyd's Settled Estates, In re; **Langmead v. Cockerton** (*supra*); **St. Mary, Wigton (Vicar)**, Ex parte, and **Kirkmeaton (Rector)**, Ex parte, *overruled*.

St. John Baptist College, Oxford, Ex parte, **Metropolitan and District Rys. Act**, In re (1882) 22 Ch. D. 93; 52 L. J. Ch. 268; 48 L. T. 331; 31 W. R. 55.—C.A. **JESSEL, M.R.** and **COTTON, L.J.**

COTTON, L.J.—With respect to the decision of Lord Selborne in *Boyd's Settled Estates*, In re, it is plain that he intended to follow the last decision of Lord Romilly, in whose Court he was sitting; as to which decision he appears to have been mistaken.—p. 97.

St. John Baptist College, Oxford, Ex parte, **Metropolitan and District Rys. Act**, In re, *applied*.

Jackson v. Tyas (1883) 52 L. J. Ch. 830.—**PEARSON, J.**; **Brown**, In re (1890) 59 L. J. Ch. 530; 63 L. T. 131; 38 W. R. 529.—C.A. **HALSBURY, L.C.**, **COTTON** and **LINDLEY, L.J.**

St. John Baptist College Oxford, Ex parte, and **Brown**, In re, *applied*.

Gaselee, In re (1901) 70 L. J. Ch. 441; [1901]

1 Ch. 923, 929; 84 L. T. 386; 49 W. R. 372.—BUCKLEY, J.

Brammer's Estate, In re (1849) 14 Jur. 236. KNIGHT BRUCE, V.-C., *followed*.

Att.-Gen. v. Rochester Corporation (1867) 15 W. R. 765.—MALINS, V.-C.

Phillips' Trusts, In re (1868) L. R. 6 Eq. 250.—ROMILLY, M.R.; and **Pfleger, In re** (1868) L. R. 6 Eq. 426.—GIFFARD, V.-C., *explained*.

Askew v. Woodhead (1880) 14 Ch. D. 27; 49 L. J. Ch. 320; 42 L. T. 567; 28 W. R. 874.—C.A. *varying* (1879) 41 L. T. 670.—BACON, V.-C. COTTON, L.J.—The decision in *Phillips' Trusts, In re*, is in accordance with our view, for we must look, not to the order [Seton on Decrees, 4th ed. p. 1435], which no doubt was by arrangement, but to the judgment. In *Pfleger, In re*, Giffard, V.-C. directed an annuity to be purchased for the life of the petitioner, so as to give her the same income as before, but as she thus received more than she would have received if the fund had been invested in an annuity to last as long as the term, the case decides nothing in favour of the respondents.—p. 36.

Askew v. Woodhead, applied.

Walsh's Trusts, In re (1881) 7 L. R. Ir. 554.—CHATTERTON, V.-C.

Walsh's Trusts, In re, followed.

South City Market Co., In re, Bergin, Ex parte (1884) 13 L. R. Ir. 245.—CHATTERTON, V.-C.

Wootton's Estate, In re (1866) 35 L. J. Ch. 305; L. R. 1 Eq. 589; 14 L. T. 125; 14 W. R. 469.—KINDERSLEY, V.-C., *followed*.

Mette's Estate, In re (1869) 38 L. J. Ch. 445; L. R. 7 Eq. 72, 75.—HALL, V.-C.; Wilkes' Estate, In re (1880) 50 L. J. Ch. 199; 16 Ch. D. 597.—HALL, V.-C.; Cottrell v. Cottrell (1885) 54 L. J. Ch. 417; 28 Ch. D. 628; 52 L. T. 486; 33 W. R. 361.—KAY, J.

Mette's Estate, In re, and Wilkes' Estate, approved and applied. Cottrell v. Cottrell (*supra*).

Whitfield (Incumbent), In re (1861) 30 L. J. Ch. 816; 1 J. & H. 610; 7 Jur. (N.S.) 909; 5 L. T. 343; 9 W. R. 764.—WOOD, V.-C.; *followed*.

Lathrop's Charity, In re (1866) L. R. 1 Eq. 467, 470; 35 Beav. 297; 13 L. T. 784; 14 W. R. 326.—M.R.

Whitfield (Incumbent), In re, and Shipton-under-Wychwood (Rector), Ex parte (1871) 19 W. R. 549.—HATHERLEY, L.C., *distinguished*.

Dummer's Will, In re (1865) 34 L. J. Ch. 496; 2 De G. J. & S. 515; 11 Jur. (N.S.) 615; 12 L. T. 626; 13 W. R. 908.—L.J.J., *referred to*.

Nether Stowey Vicarage, In re (1873) L. R. 17 Eq. 156; 29 L. T. 604; 22 W. R. 180.

JESSIEL, M.R.—As to the cases cited, it was doubtful how far they could be treated as binding authorities, having regard to *Dummer's Will, In re*, and *Brunskill v. Caird* (1873) 43 L. J. Ch. 163; L. R. 16 Eq. 493; 21 W. R. 943.—L.C. for M.R.); but at all events they were

decisions under another Act of Parliament, and, moreover, only showed that the Court had sanctioned the expenditure of money in erecting new buildings, whereas the present application was merely to sanction repairs of an old building.—p. 157.

Shipton-under-Wychwood (Rector), Ex parte, applied. Gamston (Rector), Ex parte (1876) 1 Ch. D. 477; 33 L. T. 803; 24 W. R. 359.—BACON, V.-C.

Leigh's Estates, In re (1871) 40 L. J. Ch. 687; L. R. 6 Ch. 887; 25 L. T. 644; 19 W. R. 1105.—L.J.J.; *varying* 40 L. J. Ch. 442.—BACON, V.-C., *applied*. Speer's Trusts, In re (1876) 3 Ch. D. 262; 24 W. R. 880.—BACON, V.-C.; Aldred's Estate, In re (1882) 51 L. J. Ch. 942; 21 Ch. D. 228; 46 L. T. 379; 30 W. R. 777.—NORTH, J.

Leigh's Estates, In re, referred to. Jesse v. Lloyd (1883) 48 L. T. 656, 659.—KAY, J.; Conway v. Fenton (1888) 58 L. J. Ch. 282; 40 Ch. D. 512; 59 L. T. 928; 37 W. R. 156.—KEKEWICH, J.; Arden, In re (1894) 70 L. T. 506.—C.A.

S. E. Ry., In re (1861) 30 L. J. Ch. 602; 30 Beav. 215; 7 Jur. (N.S.) 890; 9 W. R. 404.—ROMILLY, M.R., *followed*.

Notley v. Palmer (1865) L. R. 1 Eq. 241; 11 Jur. (N.S.) 968; 13 L. T. 647; 14 W. R. 170.—KINDERSLEY, V.-C.

S. E. Ry., In re, and Notley v. Palmer, not applied.

Butler's Will, In re (1873) L. R. 16 Eq. 479. SELBORNE, L.C. (for M.R.) declined to follow these cases in a case such as the present, where the fund represented land taken by a railway company under their compulsory powers, and made the order for payment conditionally upon the production to the registrar of a properly executed disentailing deed.—p. 480.

Douglass v. L. & N. W. Ry. (1857) 3 K. & J. 173; 3 Jur. (N.S.) 181.—WOOD, V.-C., *discussed*.

Winder, Ex parte and In re (1887) 46 L. J. Ch. 572; 6 Ch. D. 696; 25 W. R. 768.—HALL, V.-C.

Douglass v. L. & N. W. Ry., not applied. Chamberlain, Ex parte, Metropolitan Street Improvement Act, 1877, In re (1880) 49 L. J. Ch. 354; 14 Ch. D. 323; 42 L. T. 358; 28 W. R. 565.—BACON, V.-C.

Douglass v. L. & N. W. Ry., observations applied.

Wells v. Chelmsford Local Board (1880) 49 L. J. Ch. 827; 15 Ch. D. 108, 111; 43 L. T. 378; 29 W. R. 381; 45 J. P. 6.—FRY, J.

Evans, In re, (1873) 42 L. J. Ch. 357.—JAMES, L.J. (for V.-C.); and **Winder, Ex parte and In re, distinguished.**

Chamberlain, Ex parte, doubted. Gedgo v. Public Works Commissioners (1891) 60 L. J. Ch. 587; [1891] 2 Ch. 630; 65 L. T. 359; 39 W. R. 598.—NORTH, J.; *affirmed*, C.A.

Spurstone's Charity, In re (1874) 43 L. J. Ch. 512; L. R. 18 Eq. 279; 40 L. T. 355; 22 W. R. 366.—MALINS, V.-C., *not followed*.
Norfolk Clergy (Governors), Ex parte, W. N. (1882) 53.—FRY, J.

Brown v. Fenwick (1866) 35 L. J. Ch. 241; 13 L. T. 787; 14 W. R. 237.—KINDERSLEY, V.-C., *not followed*.
Drake v. Greaves (1886) 56 L. J. Ch. 133; 33 Ch. D. 609, 611; 55 L. T. 353; 34 W. R. 757.—NORTH, J.

Hobson's Trusts, In re (1878) 47 L. J. Ch. 310; 7 Ch. D. 708; 38 L. T. 365; 26 W. R. 470.—C.A.

Followed, **Ward's Estate, In re** (1884) 54 L. J. Ch. 231; 28 Ch. D. 100; 33 W. R. 149.—PEARSON, J.; *doubted*, **Smith, In re** L. & N. W. Ry., Ex parte (1888) 53 L. J. Ch. 108; 40 Ch. D. 386; 60 L. T. 77; 37 W. R. 199.—C.A.

Hobson's Trusts, In re, followed.
Ward's Estate, In re, and Smith, In re, L. & N. W. Ry., Ex parte, discussed.
Morgan, In re, Smith v. May (1900) 69 L. J. Ch. 735; [1900] 2 Ch. 474, 479; 48 W. R. 670.
STIRLING, J.—In *Hobson's Trusts, In re*, the question arose under the L. C. C. Act, 1845. . . . James, L.J. said: "When a share has been settled by a marriage settlement duly executed by an adult, and the trustees have a power of sale, the trustees are persons absolutely entitled to the share which has been vested in them." This decision was acted upon in many subsequent cases, including *Ward's Estate, In re*, where an order was made for payment to trustees who held upon trust to sell at the request in writing of the tenant for life, who joined in the petition. However, in *Smith, In re* . . . Cotton and Bowen, L.J.J. expressed serious doubts as to the correctness of the view expressed by James, L.J. in *Hobson's Trusts, In re*; while Lindley, L.J. said that he was not prepared to say that the Court might not have jurisdiction, under the L. C. C. Act, 1845, to order payment out to trustees. All the learned judges agreed that the jurisdiction, if it existed, ought not to be exercised in the case before them. These cases are all decisions upon the L. C. C. Act, 1845, but the language of the Leases and Sales of Settled Estates Act, 1856, is so nearly identical that they have always been taken to be authorities in construing the latter statute. In that state of the authorities, it seems to me that *Hobson's Trusts, In re*, has not been overruled.—p. 737.

Hobson's Trusts, In re, and Morgan, In re, Smith v. May, followed.
Sheffield Corporation and St. William's Roman Catholic Schools, In re (1902) 72 L. J. Ch. 71; [1903] 1 Ch. 208, 210; 88 L. T. 157; 51 W. R. 380.—BYRNE, J.

Costs.

Berkeley's (Earl) Will, In re (1874) 44 L. J. Ch. 3; L. R. 10 Ch. 56; 31 L. T. 531; 23 W. R. 195.—L.J.J., *explained and applied*.

Northwick, Ex parte (1834) 1 Y. & C. 166; 41 R. R. 235.—C.B.; **Trafford, Ex parte, Liverpool and Manchester Ry., In re** (1837) 2 Y. & C. 522.—C.B.; **L. B. &**

S. C. Ry., In re (1854) 18 Beav. 608.—M.R.; and **Beddoes, Ex parte** (1854) 24 L. J. Ch. 175; 2 Sm. & G. 466; 3 Eq. R. 437.—STUART, V.-C., *followed*.
Bethlem Hospital, In re (1875) 44 L. J. Ch. 406; L. R. 19 Eq. 457; 23 W. R. 644.—JESSEL, M.R.

L. B. & S. C. Ry., In re, referred to.
Gaselee, In re (post).

Bethlem Hospital, In re, applied.
Hospital of St. Katherine, Ex parte (1881) 17 Ch. D. 378, 381; 44 L. T. 52; 29 W. R. 495.—MALINS, V.-C.; **Gaselee, In re** (1901) 70 L. J. Ch. 441; [1891] 1 Ch. 923, 928; 84 L. T. 386; 49 W. R. 372.—BUCKLEY, J.

Phillips, Ex parte, L. & S. W. Ry., In re, 2 J. & H. 390.—WOOD, V.-C.; reversed, (1862) 32 L. J. Ch. 102; 3 De G. J. & S. 341; 7 L. T. 452; 11 W. R. 54.—KNIGHT BRUCE and TURNER, L.J.J.

Buck, Ex parte, Hampstead Junction Ry., In re (1863) 33 L. J. Ch. 79; 1 H. & M. 519; 9 Jur. (N.S.) 1172; 9 L. T. 374; 12 W. R. 100.—V.-C., *referred to*.
Morris, Ex parte, (post).

Flower, Ex parte, L. B. & S. C. Ry., In re (1866) 36 L. J. Ch. 193; L. R. 1 Ch. 599; 12 Jur. (N.S.) 872; 15 L. T. 258; 14 W. R. 1016.—L.J.J.
Applied, **Morris, Ex parte** (1871) 40 L. J. Ch. 543; L. R. 12 Eq. 418; 25 L. T. 20; 19 W. R. 943.—MALINS, V.-C.; *not applied*, **Mutlow's Estate, In re** (1873) 48 L. J. Ch. 198; 10 Ch. D. 131; 27 W. R. 245.—JESSEL, M.R.

Cherry's Settled Estates, In re (1862) 31 L. J. Ch. 351; 4 De G. F. & J. 332; 8 Jur. (N.S.) 446; 6 L. T. 31; 10 W. R. 305.—L.C.; *reversing* (1861) 7 Jur. (N.S.) 1184; 5 L. T. 541.—KINDERSLEY, V.-C.

Explained, **St. Sepulchre's (Vicar), Ex parte, Westminster Bridge Act, 1859, In re** (1864) 33 L. J. Ch. 372; 4 De G. J. & S. 232; 3 N. R. 594; 10 Jur. (N.S.) 298; 9 L. T. 819; 12 W. R. 499.—L.C.; *distinguished*, **St. Katherine's Dock Co., In re** (1866) 14 W. R. 978.—KINDERSLEY, V.-C.

Cherry's Settled Estates, In re, followed.
Spitalfields' School, In re (1870) L. R. 10 Eq. 671; 22 L. T. 569; 18 W. R. 799.—STUART, V.-C., *not followed*.
St. Dunstan-in-the-West Charity Schools, In re (1871) L. R. 12 Eq. 537, 539; 24 L. T. 613; 19 W. R. 887.—WICKENS, V.-C.

Cherry's Settled Estates, In re, disapproved.
Wood's Estate, In re, Commissioners of Works, Ex parte (1886) 31 Ch. D. 607; 55 L. J. Ch. 488; 54 L. T. 145; 34 W. R. 375; 2 Times L. R. 347.—C.A.

ESHER, M.R.—Lord Westbury himself, in the subsequent case of *St. Sepulchre*, sitting in the same Court in which he sat when he decided *Cherry's Settled Estates, In re*, explained the grounds of his judgment in that case. He said: "The language of the Act (9 & 10 Vict. c. 34), which was in question in *Cherry's Settled Estates, In re*, was such as to render transactions under it as though they had been transactions under the antecedent Act of 3 & 4 Vict., and to pass

over the Lands Clauses Act altogether; and it followed that the provisions of that general Act could not affect such transactions." That is, he read the new Act into the old Act, instead of reading the old Act into the new Act. . . . His decision, therefore, in *Cherry's Settled Estates, In re*, does not touch the present case, in which, as I think, upon a true construction of the two Acts, the old Act is to be read into the new Act. But I will say candidly, that that explanation of *Cherry's Settled Estates, In re*, is far too refined for my comprehension. I think that if we had to decide that case now we should decide it directly contrary to the way in which Lord Westbury decided it, and when I read his judgment in the *St. Sepulchre's Case*, I cannot help thinking that if he had then had to decide *Cherry's Settled Estates, In re*, again, he would have decided it in exactly the contrary way. Whenever *Cherry's Settled Estates, In re*, is cited hereafter, it will be explained away. I think, therefore, the best thing is to drop it altogether.—p. 617."

LINDLEY, L.J. to the same effect.

Cherry's Settled Estates, In re, approved.

Wood's Estate, In re, Commissioners of Works, Ex parte, dicta dissented from.

Mills' Estate, In re, Commissioners of Works, In re (1886) 56 L. J. Ch. 60; 34 Ch. D. 24, 30; 55 L. T. 465; 35 W. R. 65; 51 J. P. 151.—C.A.

CORTON, L.J.—The first question we have to decide is whether the Lands Clauses Act is to be considered as incorporated in 3 & 4 Vict. c. 87, and 9 & 10 Vict. c. 34, under which the Commissioners acted. It cannot be suggested that the Lands Clauses Act was incorporated in those Acts. That point was decided by Lord Westbury in *Cherry's Settled Estates, In re*. In *Wood's Estate, In re*, the present M.R., though dealing with another question, decided that the case was erroneous and ought to be set aside. I cannot agree with him in that. I think the decision . . . in that case was right, and that it cannot be disregarded.—p. 65.

BOWEN and FRY, L.JJ. to the same effect.

Wood's Estate, In re, referred to.

Reg. v. Cork JJ. (1893) 32 L. R. Ir. 542, 558.—Q.B.D.; Graham v. Public Works Commissioners (1901) 70 L. J. K. B. 860; [1901] 2 K. B. 781, 789; 85 L. T. 96; 50 W. R. 722; 65 J. P. 677.—RIDLEY and PHILLIMORE, JJ.; Wheeler v. Public Works Commissioners (1901) [1903] 2 Ir. R. 202, 264.—C.A.; Madden's Estate, In re (1901) [1902] 1 Ir. R. 63, 66.—C.A.

Cherry's Settled Estates, In re, referred to.

Reg. v. Wall (1897) [1898] 2 Ir. R. 762, 778.—C.A.

Lomax, In re (1864) 34 Beav. 294.—ROMILLY, M.R., followed.

Franklyn, Ex parte, G. N. Ry., In re (1848) 17 L. J. Ch. 166; 1 De G. & Sm. 528.—KNIGHT BRUCE, V.-C., questioned.

Wilkinson's Estate, In re (1868) 37 L. J. Ch. 384; 18 L. T. 17; 16 W. R. 537.

MALINS, V.-C.—As was done in that case [*Lomax, In re*], this must be treated as between the corporation and the parties beneficially interested as a permanent investment. I think *Franklyn, Ex parte*, carries the doctrine to an extent not warranted by the modern practice of the Court, and it has no application to the present case.—p. 384.

South Wales Ry., In re (1851) 20 L. J. Ch. 534; 14 Beav. 418; 15 Jur. 1155.—ROMILLY, M.R., overruled.

Liverpool Improvement Act, In re (1868) L. R. 5 Eq. 282; 37 L. J. Ch. 376; 16 W. R. 667.

ROMILLY, M.R.—Upon consideration, I have come to the conclusion that *South Wales Ry., In re*, was wrongly decided. I therefore overrule that decision, which, I believe, stands alone. . . . I think that the corporation must pay the costs of taking out administration.—p. 283.

Liverpool Improvement Act, In re, followed.

Keatley, Ex parte, Dublin (South) City Market Co. In re (1890) 25 L. R. Ir. 265.—PORTER, M.R.

Liverpool Improvement Act, In re, and Keatley, Ex parte, followed.

Kelly, Ex parte, Dublin Junction Rys., In re (1893) 31 L. R. Ir. 137.—CHATTERTON, V.-C.; Bear Island Defence Works and Doyle, In re (1902) [1903] 1 Ir. R. 164, 166.—C.A.

Hungerford's Trusts, In re (1857) 3 K. & J. 455.—WOOD, V.-C., followed.

Hatfield's Estate, In re (1861) 20 Beav. 370.—ROMILLY, M.R.; S. C. (1863) 32 Beav. 252.—M.R.

Hungerford's Trusts, In re, followed.

Gore-Langton's Estates, In re (1875) L. R. 10 Ch. 328; 44 L. J. Ch. 405; 32 L. T. 785; 23 W. R. 842.—L.JJ. *varying* 44 L. J. Ch. 198; 31 L. T. 665.—MALINS, V.-C.

JAMES, L.J.—But for the future, for the benefit of railway companies and other public bodies paying money into Court, I desire to follow the precedent laid down by Lord Hatherley, when V.-C., in *Hungerford's Trusts, In re*. In the future, therefore, this wholesome rule may fairly be laid down, that whenever there is a petition simply for the reinvestment of money in land, and there are mortgagees or annuitants whose rights are not otherwise affected by the petition, the proper course will be to serve such mortgagees or annuitants with a copy of the petition, and to pay them 40s. for costs, giving them at the same time an intimation that if they appear upon the hearing, they will probably have to pay their own costs.—p. 333. MELLISH, L.J. concurred.

Gore-Langton's Estates, In re, applied.

Halstead United Charities, In re (1875) L. R. 20 Eq. 48.—MALINS, V.-C.

Gore-Langton's Estates, In re, and Halstead United Charities, In re, followed.

Pattison, In re (1876) 4 Ch. D. 207.—MALINS, V.C.

Hatfield's Estate, In re (supra), discussed.

Halstead United Charities, In re, followed.

Artizans' and Labourers' Dwellings Improvement Act, 1875, In re, Jones, Ex parte (1880) 14 Ch. D. 624; 43 L. T. 84.

JESSEL, M.R.—In *Hatfield's Estate, In re*, it was held, upon a petition for payment out to a mortgagee, that the company was not liable to pay any of the mortgagee's costs at all. But that is not the rule now, for it is only fair that the mortgagees should have some costs. . . . In *Halstead United Charities, In re*, Malins, V.-C. held that the rule laid down in *Gore-Langton's Estates, In re*, applied to the case of a petition for the payment out of Court with the consent of the incumbrancers; and he also held that the petitioners were entitled to add to their costs of the petition, in addition to the 40s., a sum sufficient to cover the costs of an affidavit of service.—p. 625.

Halstead United Charities, In re, and Artizans' and Labourers' Dwellings Improvement Act, 1875, In re, Jones, Ex parte. *followed.*

Ruck's Trusts, In re (1895) 13 R. 637.

NORTH, J.—In *Halstead United Charities, In re* as in this case, the mortgages had been made before payment into Court: in most of the other cases the mortgages had been made after payment in. In *Gore-Langton's Estates* the money was being reinvested in land, not paid out to mortgagees. In *Olive's Estate, In re (post)*, the corporation relied on *Jones' Trust Estate, In re (post)*, but it was decided that they must pay the costs of the mortgagee's appearance, those costs being limited to 42s., and the costs of serving the mortgagee with the petition. I think that *Halstead United Charities, In re, Artizans' Dwellings Act, In re, and Olive's Estate, In re*, settle that the mortgagees are entitled to have their costs paid by the corporation; but they have also settled what the amount of such costs is to be. . . . In *Halstead United Charities, In re*, when the petition was presented it was known that the mortgagees were not claiming the fund.—p. 638.

Lye's Estates, In re, Berks and Hants Extension Ry. Act, 1859, In re (1866) 13 L. T. 664.—STUART, V.-C., *followed.*

Brooshooff's Settlement, In re (1889) 58 L. J. Ch. 654; 42 Ch. D. 250; 61 L. T. 320; 37 W. R. 744.—KAY, J.

Eden v. Thompson (1864) 2 H. & M. 6; 10 L. T. 522; 12 W. R. 789.—WOOD, V.-C., *followed.*

Bareham, In re (1881) 17 Ch. D. 329; 29 W. R. 525.—C.A.; *Olive's Estate, In re (post)*.

Bareham, In re, and Brooshooff's Settlement, In re (supra), referred to.

Jones' Trust Estate, In re (1870) 39 L. J. Ch. 190; 18 W. R. 312.—JAMES, V.-C.; and **Gough's Trusts, In re, G. W. Ry., Ex parte (1888) 53 L. J. Ch. 200; 24 Ch. D. 569; 49 L. T. 494; 32 W. R. 147.**—BACON, V.-C., *discussed and not followed.*

Olive's Estate, In re (1890) 59 L. J. Ch. 360; 44 Ch. D. 316; 62 L. T. 626; 38 W. R. 459.—NORTH, J.

Gough's Trusts, In re, distinguished.

Brooshooff's Settlement, In re, and Olive's Estate, In re, referred to.

Kelly, Ex parte, Dublin Junction Rys., In re (1893) 31 L. R. Ir. 137.—CHATTERTON, V.-C.

Olive's Estate, In re, followed.

Ruck's Trusts, In re (supra, col. 1522).

Kelly, Ex parte, followed.

Rorke, Ex parte, Midland Great Western (Ireland) Ry., In re (1893) [1894] 1 Ir. R. 147.—PORTER, M.R.

Kelly, Ex parte, and Rorke, Ex parte, followed.

Lloyd and North London Ry. (City Branch) Act, 1861, In re (1896) 65 L. J. Ch. 626; [1896] 2 Ch. 397; 74 L. T. 548; 44 W. R. 522.—STIRLING, J.

Rorke, Ex parte, principle applied.

Morgan Urban District Council, Ex parte, Kearns, In re (1901) [1902] 1 Ir. R. 157.—PORTER, M.R.

Kelly, Ex parte, and Rorke, Ex parte, followed.

Lloyd and North London Ry. (City Branch) Act, 1861, In re, referred to.

Bear Island Defence Works and Doyle, In re (1902) [1903] 1 Ir. R. 164, 167.—C.A.

L. B. & S. C. Ry. v. Shropshire Union Ry. (1856) 23 Beav. 605.—M.R., *not applied.*

Christ Church, Ex parte (1861) 9 W. R. 474.—STUART, V.-C. *And see post, col. 1525.*

London (Bishop), Ex parte (1860) 29 L. J. Ch. 375; 2 De G. F. & J. 14; 6 Jur. (N.S.) 640; 2 L. T. 365; 8 W. R. 465, 714.—L.JJ.

Applied, Christ Church, Ex parte (supra); Maryport and Carlisle Ry. Act, In re (1863) 32 Beav. 397 (post); Byron's Estate, In re (1863) 32 L. J. Ch. 584; 1 De G. J. & S. 358; 2 N. R. 294; 9 Jur. (N.S.) 838; 8 L. T. 562; 11 W. R. 790.—L.JJ.: **Merton College, In re (1863) 33 Beav. 257; 11 W. R. 237.**—M.R. (affirmed. (1864) 1 De G. J. & S. 361; 10 Jur. (N.S.) 222; 10 L. T. 8; 12 W. R. 503.—L.JJ.); **Christ's Hospital, Ex parte (1864) 2 H. & M. 166; 4 N. R. 14.**—WOOD, V.-C.: **Trinity College, Cambridge, Ex parte (1868) 18 L. T. 849.**—MALINS, V.-C.: **Leigh's Estates, In re (1871) L. R. 6 Ch. 887, 893 (supra, col. 1518); Manchester (Dean), Ex parte (1873) 28 L. T. 184.**—MALINS, V.-C.: **Gore-Langton's Estates, In re (1875) L. R. 10 Ch. 328, 333 (supra, col. 1522).** *And see post.*

London (Bishop), Ex parte, considered.

Christ Church, Ex parte (supra), applied.

St. Bartholomew's Hospital, Ex parte (1875) L. R. 20 Eq. 369, 371; 32 L. T. 652.—MALINS, V.-C.

London (Bishop), Ex parte, applied.

Gaskell, Ex parte (post, col. 1525); Bilston (Perpetual Curate), Ex parte (1889) 37 W. R. 460.—NORTH, J.

London (Bishop), Ex parte, applied.

St. Margaret's, Leicester, In re (1864) 10 L. T. 221.—KINDERSLEY, V.-C., *followed.*
St. Alban's Wood Street, In re (1891) 66 L. T. 51.—KEKEWICH, J.

St. Bartholomew's Hospital, Ex parte, (supra), followed.

London (Bishop) Ex parte, and Christ's Hospital, Ex parte (supra), distinguished.
Bishopsgate Foundation, In re (1893) 8 R. 50; 63 L. J. Ch. 167; [1894] 1 Ch. 185; 70 L. T. 231; 42 W. R. 199.

CHITTY, J.—In this case the system of scale fees has been adopted in the purchase of the land, and where the scale system is used there does not appear to be any such difficulty as was indicated by Knight Bruce, L.J. [in *London (Bishop), Ex parte*] and Wood, V.-C. [in *Christ's Hospital, In re*], so that their observations are without force when the scale fee system has been adopted, and, however true at the time when they were made, are not of universal application at the present day. There is great inequality in the amounts here and the decision . . . in *St. Bartholomew's Hospital, In re*, treats that fact as enough for making an exception to the ordinary rule as to costs. Without departing from the rule in *London (Bishop), In re*, I think that there ought to be apportionment of the costs of the purchase of the land, so far as the scale fees go, amongst the various public bodies, according to the amount of the purchase-money contributed by them.—p. 52.

Maryport and Carlisle Ry. Act, In re (1863) 42 L. J. Ch. 811; 32 Beav. 397; 1 N. R. 506; 9 Jur. (N.S.) 1217; 11 W. R. 410.—M.R., *questioned*.

Corpus Christi College, Oxford, *Ex parte* (1871) 41 L. J. Ch. 170; L. R. 13 Eq. 334.—M.R.

Maryport, &c. Ry. Act, In re, not followed. Manchester and Leeds Ry., *In re* Gaskell, *Ex parte* (1876) 2 Ch. D. 530; 45 L. J. Ch. 368; 24 W. R. 752.

JESSEL, M.R.—When two companies are amalgamated, the new company is only liable to pay such costs as are properly payable at the date of the petition. If the fund in Court had been paid in by three companies, all of which were now amalgamated with the L. & N. W. Ry. Co., I should not allow three petitions to be presented for the purpose of getting out the separate portions of the fund; if such a thing were done I should certainly give only one set of costs against the company. That being so, a petition is presented in respect of which the L. & N. W. Ry. Co. is liable to one set of costs, and the Lancashire and Yorkshire Ry. Co. is also liable to one set of costs; and under the circumstances I think the costs must be borne by the two companies equally. I admit that there is a decision [*Maryport, &c. Ry. Act, In re*] the other way, but for the reasons I have given I am unable to follow it.—p. 361.

Molyneux, Ex parte (1845) 2 Coll. C. C. 273; 9 Jur. 786.—KNIGHT BRUCE, V.-C.; *followed*.

Thoroton, *Ex parte*, Midland Counties Ry., *In re* (1848) 17 L. J. Ch. 167; 12 Jur. 130.—V.-C.; Bristol and Exeter Ry., *In re*, Land's Trust, *In re* (1858) 4 K. & J. 81; 11 Jur. 686.—WOOD, V.-C.; Mousely's Trust, *In re* (1858) 4 K. & J. 80, n. v.c.—*And see* Harrison's Estate, *In re* (*post*).

Buckinghamshire Ry., In re (1850) 14 Jur. 1065.—ROLFE, V.-C.

Followed, Melward (*or* Milward), *Ex parte*, Oxford, Worcester, and Wolverhampton Ry., *In re* (1859) 29 L. J. Ch. 245; 27 Beav. 371; 6 Jur. (N.S.) 478; 1 L. T. 153.—M.R.; *referred to*, Lathropp's Charity, *In re* (1866) L. R. 4 Eq. 467, 469; 35 Beav. 297; 13 L. T. 784; 14 W. R. 326.—M.R.; Arden, *In re* (1894) 70 L. T. 506.—C.A.

Melward (*or* Milward), Ex parte, supra, referred to.

Lathropp's Charity, *In re* (*supra*).

Metford's Trust, In re (1860) 6 Jur. (N.S.) 796; 8 W. R. 634.—V.-C.; Musgrave, *In re* (1860) 6 Jur. (N.S.) 797.—KINDERSLEY, V.-C.; and Ecclesiastical Commissioners, *Ex parte* (1865) 5 N. R. 483.—V.-C., *followed*.

Robertson, In re (1857) 26 L. J. Ch. 349; 23 Beav. 433; 3 Jur. (N.S.) 784.—M.R.; and Tiverton Market Act, *In re* (1858) 26 Beav. 239.—M.R., *approved but not followed*.

Harrison's Estate, *In re* (1870) 40 L. J. Ch. 77; L. R. 10 Eq. 532; 18 W. R. 1065.

MALINS, V.-C. (after discussing the earlier cases) said: These cases thoroughly settle the practice of this Court, but it was contended on the part of the petitioners that as the money in this case was originally paid into the Court of Ex., from which it was in 1828 or thereabouts transferred to this Court, and the jurisdiction also transferred,

that the case was governed by the decision of the M.R. in *Robertson, In re*, and *Tiverton Market Act, In re*. . . . With those two decisions of the M.R. I entirely and heartily concur, and I so entirely concur with them that I should gladly have followed them if I had not been precluded from doing so by subsequent decisions. But the point came before Kindersley, V.-C. in *Metford's Trust, In re*, and he there decided that, although the money was originally paid into the Court of Ex., they [the company] were not liable to pay the costs of the petition to take it out of Court. And again, in *Musgrave, In re*, the same point was decided. . . . The same question came before Stuart, V.-C. in *Ecclesiastical Commissioners, Ex parte*. His expression is that "He should only charge those companies (there were seventeen of them) with the petitioner's costs whose Acts expressly authorised the Court to charge them with the costs of paying out the principal money, and should not follow the practice of the Court of Ex. as to money paid into that Court."—p. 78.

Harrison's Estate, In re.

Applied, Stanley of Alderley (Lord), *In re* (1872) L. R. 14 Eq. 227, 229; 26 L. T. 822.—MALINS, V.-C.; *not applied*, Mercerson, *In re* (1877) 47 L. J. Ch. 114; 7 Ch. D. 184, 187; 38 L. T. 15; 26 W. R. 8.—JESSEL, M.R.

Haynes v. Barton (1866) 35 L. J. Ch. 233; L. R. 1 Eq. 422; 13 L. T. 787; 14 W. R. 257.—KINDERSLEY, V.-C.; and Henniker v. Chafr (1865) 35 Beav. 124; 11 Jur. (N.S.) 919.—ROMILLY, M.R., *followed*.

Sidney v. Wilmer (1862) 31 Beav. 338.—M.R., *not followed*.

English's Trusts, *In re* (1888) 57 L. J. Ch. 1048; 39 Ch. D. 556; 60 L. T. 44; 37 W. R. 191.—NORTH, J.

2. ENTRY UPON LANDS.

Armstrong v. Waterford and Limerick Ry. (1846) 10 Ir. Eq. R. 60.—M.R., *referred to*. Doyne's Traverses, *In re* (1888) 24 L. R. Ir. 287.—JOHNSON, J.

Doyne's Traverses, In re, distinguished.

Parkinson, *In re* [1898] 1 Ir. R. 390, 399.—MADDEN, J.

Brocklebank v. Whitehaven Junction Ry. (1847) 16 L. J. Ch. 471; 15 Sim. 632; 5 Railw. Cas. 373; 11 Jur. 663.—SHADWELL, V.-C.; *affirmed*, L.C.

Not followed, Reg. v. Birmingham and Oxford Junction Ry. (1850) 19 L. J. Q. B. 453; 15 Q. B. 634.—Q.B. (*affirmed* nom. Birmingham, &c., Ry. v. Reg. (1851) 20 L. J. Q. B. 304; 15 Q. B. 647, n.—EX. CH.); *considered overruled*, Salisbury (Marquis) v. G. N. Ry. (*post*, col. 1527); *disapproved and distinguished*, Doe d. Armistead v. North Staffordshire Ry. (1851) 20 L. J. Q. B. 249; 16 Q. B. 526; 15 Jur. 944.—Q.B.

Doe d. Armistead v. North Staffordshire Ry., (supra), followed.

Worsley v. South Devon Ry. (1851) 20 L. J. Q. B. 254; 16 Q. B. 539; 15 Jur. 970.—Q.B.; Doe v. Leeds and Bradford Ry. (1851) 20 L. J. Q. B. 486; 16 Q. B. 796; 15 Jur. 946.—Q.B.; Salisbury (Marquis) v. G. N. Ry. (*post*).

Doe v. North Staffordshire Ry. and Worsley v. South Devon Ry. (supra), explained.

Tiverton and North Devon Ry. v. Loosemore (*post*).

Worsley v. South Devon Ry., *referred to*.
Mercer v. Liverpool, &c., Ry. (*post*, col. 1529).

Kinnarsley v. North Staffordshire Ry. (1849)
 6 Railw. Cas. 662.—SC., *considered over-ruled*.

Salisbury (Marquis) v. G. N. Ry. (1852) 21 L. J. Q. B. 185; 17 Q. B. 840; 16 Jur. 740; 7 Railw. Cas. 175.—Q.B.

Salisbury (Marquis) v. G. N. Ry.

• *Commented on*, *Haynes v. Haynes* (1861) 30 L. J. Ch. 578; 1 Dr. & Sm. 426 (*supra*, col. 1506); *applied*, *Tiverton, &c., Ry. v. Loosemore* (*post*); *referred to*, *G. W. Ry. v. Swindon, &c., Ry.* (*post*); *not applied*, *Church v. London School Board* (1892) 8 Times L. R. 310.—CAVE and CHARLES, JJ.; *referred to*, *Sewell v. Harrow and Uxbridge Ry.* (1902) 19 Times L. R. 130.—RIDLEY, J.; *Mercer v. Liverpool, &c., Ry.* (*post*, col. 1529).

Field v. Carnarvon and Llanberis Ry.

(1867) 37 L. J. Ch. 176; L. R. 5 Eq. 190; 18 L. T. 534; 16 W. R. 273.—MALINS, V.-C., *questioned*.

Loosemore v. Tiverton and North Devon Ry. (1882) 51 L. J. Ch. 570; 47 L. T. 151; 30 W. R. 628; *reversed*, 52 L. J. Ch. 260; 22 Ch. D. 25; 48 L. T. 162; 31 W. R. 130.—C.A.; *but restored* in the H.L. *See post*.

FRY, J.—It is said that the 85th section (Land Clauses Act, 1845) can only be used in cases of urgency, and that in the present instance there was no urgency. For that I am referred to *Field v. Carnarvon and Llanberis Ry.* Probably if the case were before me without reference to any authority, I should feel great difficulty in coming to any such conclusion as Malins, V.-C. there expressed. The words of the 85th section require only a desire on the part of the company to enter and use the lands, and the very fact of the company exercising the powers given by the section is sufficient evidence of such a desire. But even if the decision in that case is to be treated as binding on me in the present case, I think that there was that urgency which justified the company in exercising the power.—p. 573.

Reg. v. Birmingham and Oxford Junction Ry. (*supra*, col. 1526), *referred to*.

• *Tiverton and North Devon Ry. v. Loosemore* (1884) 9 App. Cas. 480; 53 L. J. Ch. 812; 50 L. T. 637; 32 W. R. 929; 48 J. P. 372.—H.L. (E.); *reversing* C.A. and *restoring* FRY, J. (*supra*).

EARL CAIRNS.—It is settled law that the powers under the 85th section [Land Clauses Consolidation Act, 1845], even in the case of a compulsory purchase, are not compulsory powers, and are exercisable after the period for compulsory purchase has expired: *Salisbury (Marquis) v. G. N. Ry.* (*supra*) (p. 488). . . . I take it also to be a principle which runs through the whole course of the decisions under the Lands Clauses Act, that whenever a right to compensation is provided for a landowner by the machinery of the Act, it is given as the sole remedy, and that where it exists it does not exist along with a right in the landowner, at his option, to repudiate the right to compensation and recover the land. I take this to have been the principle on which *Lind v. Isle of Wight Ferry Co.* (*supra*, col. 1507) was decided by the late Lord Hatherley.—p. 491.

• LORD BRAMWELL.—In *Salisbury (Marquis) v. G. N. Ry.* there is no limitation put by the Court on the time within which the company

may complete, having entered under sect. 85. It was not said in the report nor in the judgment whether the time for exercising the powers for making the railway had or had not expired. . . . *Worsley v. South Devon Ry.* (*supra*), was a special pleading question in form, but in reality a substantial question. The Court decided that, whereas it was contended that the replication was good, because the pleas disclosed no claim to an interest in land, that the interest claimed by the pleas is much more than a licence." But from what appears in the report all that the defendants claimed was that they had "entered and continued in possession." Lord Campbell in *Salisbury (Marquis) v. G. N. Ry.* expressly says, referring to this case, that "a plea of entry by a railway company under similar circumstances was held to set up a legal interest in the land." In *Doe v. North Staffordshire Ry.* (*supra*) the judgment is that the absence of the word "take" in the 85th section is immaterial, that the landowner is to take steps to ascertain compensation under sect. 68. And the Court says, "If the original entry was lawful the present possession is lawful." Not a word about its only being so till the general powers expire. The whole tenor of the authorities is that when the notice to treat has been given each party is bound for ever, and that though it is so, powers under sect. 85 must be exercised by entry within the time limited for exercising general powers, though that suffices to give a possessory title whether the railway is finished or not.—p. 510.

LORDS WATSON, BLACKBURN and FITZGERALD to the same effect.

Tiverton and North Devon Ry. v. Loosemore, *referred to*.

G. W. Ry. v. Swindon and Cheltenham Extension Ry. (1884) 53 L. J. Ch. 1075; 9 App. Cas. 787, 805.—H.L. (E.) (*post*, col. 1536).

Tiverton and North Devon Ry. v. Loosemore and G. W. Ry. v. Swindon and Cheltenham Extension Ry., *discussed and explained*.

Charlton v. Rolleston (1884) 28 Ch. D. 237; 54 L. J. Ch. 233; 51 L. T. 612.—C.A.

BAGGALLAY, L.J. (having referred to *Tiverton, &c., Ry. v. Loosemore*) continued: I think we have got the principle applicable to a case of this kind recognised in the judgment of Lord Cairns. . . . It appears to me that that case affirms this proposition. You have got the relative position of vendor and purchaser established by the notice to treat. It may be worked out in one of two ways. It may be worked out either by actual agreement between them, or by an arbitration, or by giving permission to the railway company to enter before the settlement of the amount has been come to, and their paying the amount into Court under the 85th section. In my opinion, it is equally a taking in each of these cases. The landowner is deprived during the notice to treat of the power of exercising any control over his land. What is the effect then of an abandonment? It is simply this, that although you have taken the land you may give it up, and instead of paying the full price which you would have had to pay if you had retained it for the purposes of your railway, you shall pay for that limited use which you have acquired over it, and by means of which you have made your railway (p. 248). [His lordship then discussed *G. W. Ry. v. Swindon and Cheltenham*

Extension Ry. and continued:] There had been an arbitration for settling the amount to be paid for the use of this easement [to carry their railway across the G. W. Ry.] which was granted to the Swindon and Cheltenham Co. by the G. W. Ry. Co., and the amount was paid into Court under the 85th section. That again was not the compulsory taking of land. There was a difference of opinion, I think, between the learned lords who decided the case, as to the meaning of the words "taking of land." Lord Bramwell seems to have thought that the easement was land within the meaning of the Act, and Lord Fitzgerald was of opinion that it was not, and came to the conclusion that what was to be done under the 85th section was not the exercise of compulsory powers: but both those learned lords agreed in affirming the decision of the Court below, that the Swindon Co. could not be restrained, Lord Watson taking a contrary view.—p. 250. BOWEN and FRY, L.J.J. concurred.

Tiverton and North Devon Ry. v. Loosemore

(*supra*), *referred to*.
Shepherd v. Norwich Corporation (1885) 54 L. J. Ch. 1050; 30 Ch. D. 553, 568; 53 L. T. 251; 33 W. R. 841.—NORTH, J.; G. W. Ry. v. Blades (1901) 70 L. J. Ch. 847; [1901] 2 Ch. 624; 85 L. T. 308; 65 J. P. 791.—BUCKLEY, J.; Mercer v. Liverpool, &c., Ry. (1903) 72 L. J. K. B. 128; [1903] 1 K. B. 652, 661; 88 L. T. 374; 51 W. R. 308; 67 J. P. 77.—C.A.

G. W. Ry. v. Swindon, &c., Ry., *referred to*.
Ned's Point Battery, In re (1901) [1903] 2 Ir. R. 192, 198.—K.B.D.

Beaufort (Duke) v. Patrick (1853) 22 L. J. Ch. 489; 17 Beav. 60; 17 Jur. 632; 1 W. R. 280.—M.R.

Applied, Mold v. Wheateroff (1859) 29 L. J. Ch. 11; 27 Beav. 510; 6 Jur. (N.S.) 2; 1 L. T. 226.—M.R.; *distinguished*, Martin v. L. C. & D. Ry. (1866) 35 L. J. Ch. 795; L. R. 1 Ch. 501, 510; 12 Jur. (N.S.) 778; 14 L. T. 814; 14 W. R. 880.—L.C. (*reversing* L. R. 1 Eq. 145; 13 L. T. 355.—STUART, V.-C.); *referred to*, Plimmer v. Wellington Corporation (1884) 53 L. J. P. C. 104; 9 App. Cas. 699, 713; 51 L. T. 475; 49 J. P. 116.—P.C.

Martin v. L. C. & D. Ry., *referred to*.
Parkinson, In re [1898] 1 Ir. R. 390, 398.—MADDEN, J.

Barker v. North Staffordshire Ry. (1848) 2 De G. & Sm. 55; 12 Jur. 324, 575, 589; 5 Railw. Cas. 412.—KNIGHT BRUCE, V.-C.; *affirmed*, L.C., *approved but distinguished*.
Lancashire and Yorkshire Ry. v. Evans (1851) 15 Beav. 322.—ROMILLY, M.R.

Reg. v. Kennedy (1893) 62 L. J. M. C. 168; [1893] 1 Q. B. 533; 5 R. 270; 68 L. T. 454; 41 W. R. 380; 57 J. P. 346.—COLERIDGE, C.J. and CAVE, J.

Explained, Bexley Heath Ry. v. North (1894) 64 L. J. M. C. 17; [1894] 2 Q. B. 579; 9 R. 751; 71 L. T. 533; 58 J. P. 832.—C.A.; *referred to*, Reg. (Moore) v. Abbott (1896) [1897] 2 Ir. R. 362, 414.—Q.B.D.

3. COMPENSATION.

In Respect of what Injuries.

Reg. v. Eastern Counties Ry. (1841) 11 L. J. Q. B. 66; 2 Q. B. 347; 2 Railw. Cas. 736.—Q.B. (*and see post*); and **Rex v.**

Bristol Dock Co. (1810) 12 East 429; 11 R. R. 410.—K.B., *discussed*.

East and West India Docks, &c. Ry. v. Gattke (1851) 20 L. J. Ch. 217; 3 Mac. & G. 155.—TRURO, L.C.

Rex v. Bristol Dock Co.

Applied, Caledonian Ry. v. Ogilvy (*post*); *referred to*, Reg. v. Metropolitan Board of Works (1869) 38 L. J. Q. B. 201, 205; L. R. 4 Q. B. 358, 365 (*post*, col. 1532).

Reg. v. Eastern Counties Ry.

Distinguished, Caledonian Ry. v. Ogilvy (*post*); *applied*, Chamberlain v. West End of London, &c., Ry. (*post*); *distinguished*, Ricket v. Metropolitan Ry. (*post*, col. 1531).

Wilkes v. Hungerford Market Co. (1835) 5

L. J. C. P. 23; 2 Bing. (N.C.) 281; 2 Scott 446; 1 Hodges 281.—C.P.

Distinguished, Rex v. London Dock Co. (1836) 5 L. J. K. B. 195; 5 A. & E. 163; 6 N. & M. 390; 2 H. & W. 267.—K.B.; Caledonian Ry. v. Ogilvy (*post*); *commented on*, Ricket v. Metropolitan Ry. (*post*, col. 1531); *referred to*, Eagle v. Charing Cross Ry. (1867) L. R. 2 C. P. 638, 650 (*post*, col. 1532); *held overruled*, Beckett v. Midland Ry. (1867) L. R. 3 C. P. 82, 96 (*post*, col. 1532); *distinguished*, Fritz v. Hobson (1880) 14 Ch. D. 542, 555; 49 L. J. Ch. 321; 42 L. T. 225; 28 W. R. 459.—FRY, J.; Martin v. London County Council (1898) 79 L. T. 170, 173.—KENNEDY, J.; (*affirmed*, (1899) 80 L. T. 886.—C.A.); *referred to*, Smith v. Wilson (1902) [1903] 2 Ir. R. 45, 72.—K.B.D.

Rex v. London Dock Co.

Distinguished, Cooling and G. N. Ry., In re (1849) 19 L. J. Q. B. 25; S. C. *nam.* Reg. v. G. N. Ry., 14 Q. B. 25; 14 Jur. 128.—Q.B.; *applied*, Caledonian Ry. v. Ogilvy (1856) 2 Macq. 229.—H.L. (SC.); *held overruled*, Chamberlain v. West End of London, &c., Ry. (*post*); *approved*, Ricket v. Metropolitan Ry. (*post*, col. 1531); *applied*, Reg. v. Vaughan (1868) 39 L. J. M. C. 49; L. R. 4 Q. B. 190, 195; 17 W. R. 115.—Q.B.; *explained*, Caledonian Ry. v. Walker's Trustees (1882) 7 App. Cas. 259, 284.—H.L. (SC.) (*post*, col. 1535).

Caledonian Ry. v. Ogilvy.

Approved, Penny and S. E. Ry., In re (1857) 26 L. J. Q. B. 225; 7 El. & Bl. 660; 3 Jur. (N.S.) 957; 5 W. R. 612.—Q.B.; *distinguished*, Chamberlain v. West End of London, &c., Ry. (*post*); *applied*, Wood v. Stourbridge Ry. (1864) 16 C. B. (N.S.) 222.—C.P.; Hall v. Bristol Corporation (1867) 36 L. J. C. P. 110; L. R. 2 C. P. 322, 325; 15 L. T. 572; 15 W. R. 404.—C.P.; *distinguished*, Ricket v. Metropolitan Ry. (*post*, col. 1531); Beckett v. Midland Ry. (*post*, col. 1532); *referred to*, Hammersmith, &c., Ry. v. Brand (1869) L. R. 4 H. L. 171, 197 (*post*, col. 1532); *applied*, Reg. v. Metropolitan Board of Works (*post*, col. 1532); *referred to*, Caledonian Ry. v. Carmichael (1870) L. R. 2 H. L. (SC.) 56, 63; *distinguished*, Metropolitan Board of Works v. McCarthy (1874) L. R. 7 H. L. 243, 256.—H.L. (E.) (*post*, col. 1533); *discussed*, Bell v. Quebec Corporation (1879) 49 L. J. P. C. 1; 5 App. Cas. 84, 99.—P.C.; *distinguished*, Caledonian Ry. v. Walker's Trustees (1882) 7 App. Cas. 259.—H.L. (SC.) (*post*, col. 1535); *applied*, Essex v. Acton Local Board (1889) 14 App. Cas. 153, 166.—H.L. (E.) (*post*, col. 1539).

Tuohey v. Great Southern and Western Ry. (1859) 10 Ir. C. L. R. 98.—Q.B.; and **Lee v. Milner** (1837) 6 L. J. Ex. 205; 2 M. & W. 824.—EX., *distinguished*.

Chamberlain v. West End of London and Crystal Palace Ry. (1863) 32 L. J. Q. B. 173; 2 B. & S. 605; 9 Jur. (N.S.) 1051; 8 L. T. 149; 11 W. R. 472.—EX. CH.; *affirming* (1862) 31 L. J. Q. B. 201; 8 Jur. (N.S.) 935.—Q.B.

● **Chamberlain v. West End and Crystal Palace Ry.**

Followed, **Senior v. Metropolitan Ry.** (1863) 32 L. J. Ex. 225; 2 H. & C. 258; 9 Jur. (N.S.) 802; 8 L. T. 544; 11 W. R. 836.—EX.; *referred to*, **Stockport, Timperley and Altrincham Ry.**, In re (1864) 33 L. J. Q. B. 251 (col. 1532); *distinguished*, **Ricket v. Metropolitan Ry.** (*post*); *referred to*, **Eagle v. Charing Cross Ry.** (1867) L. R. 2 C. P. 638, 644 (*post*, col. 1532); *applied*, **Beckett v. Midland Ry.** (1867) L. R. 3 C. P. 82, 93 (*post*, col. 1532); *approved*, **Metropolitan Board of Works v. McCarthy** (*post*, col. 1533); *referred to*, **Lyon v. Fishmongers' Co.** (1876) 1 App. Cas. 662, 684.—H.L. (E.) (*post*, col. 1539); **Caledonian Ry. v. Walker's Trustees** (1882) 7 App. Cas. 259.—H.L. (SC.) (*post*, col. 1535).

Cameron v. Charing Cross Ry., 16 C. B. (N.S.) 430; 33 L. J. C. P. 313; 12 W. R. 803.—C.P.; *reversed*, (1865) 19 C. B. (N.S.) 764; 11 Jur. (N.S.) 282; 12 L. T. 121; 13 W. R. 390.—EX. CH.

Baker v. Moore (1696) cited 1 Ld. Raym. 486, 491, *denied*.

Reg. v. G. N. Ry. (or **Cooling and G. N. Ry.**, In re) (*supra*, col. 1530), *distinguished*.

Senior v. Metropolitan Ry. (*supra*) and **Cameron v. Charing Cross Ry.**, *overruled*.

● **Ricket v. Metropolitan Ry.** (1867) 36 L. J. Q. B. 205; L. R. 2 H. L. 175; 16 L. T. 542; 15 W. R. 937.—H.L. (E.); *affirming* (1865) 34 L. J. Q. B. 257; 5 B. & S. 156; 11 Jur. (N.S.) 260; 12 L. T. 75; 13 W. R. 455.—EX. CH.; which *reversed*, 5 B. & S. 149.—Q.B. *And see post*, cols. 1533, 1537.

CHELMSFORD, L.C.—As far as I have been able to examine the cases, in all of them except two, in which an individual has been allowed to maintain an action for damage which he has specially sustained by the obstruction of a highway, the injury complained of has been personal to himself, either immediately or by immediate consequence. The two excepted cases are those of **Baker v. Moore**, mentioned by Gould, J. in **Iveson v. Moore** ((1699) 1 Ld. Raym. 486, 491; 1 Salk. 16) and **Wilkes v. Hungerford Market Co.** (*supra*). . . . **Baker v. Moore** appears to me to be even more doubtful than **Wilkes v. Hungerford Market Co.**, and as to this latter case, Erle, C.J., in delivering the judgment of the majority of the judges in the present case, observed: "If the question were raised in an action now, we think it probable that the action would fail, both from the effect of the cases which preceded **Wilkes's Case**, and also from the reasoning of the judgment in **Caledonian Ry. v. Ogilvy** (*supra*)."
In this observation upon **Wilkes's Case** I entirely agree . . . Upon an examination of the cases, it will be seen that in most of them, where the claim to compensation was admitted, there was an actual injury to the house or land itself, either immediate or immediately consequential upon the acts done. [His lordship distinguished **Reg. v. Eastern Counties Ry.** (*supra*), **Reg. v.**

G. N. Ry., and **Chamberlain v. West End, &c. Ry.** (*supra*), on this ground, and continued:] But **Senior v. Metropolitan Ry.** cannot be otherwise regarded than as precisely resembling the present. . . . This case, then, in which the judgments are not very satisfactory, is the only direct authority against the judgment of the Court of Ex. Ch. under consideration. When I say the only authority I have not forgotten **Cameron v. Charing Cross Ry.**, where, upon a similar state of facts, the Court gave judgment for the plaintiff. But the C.J. stated that the Court decided against the argument on the part of the company on the ground that the matter had already undergone consideration in two Courts of co-ordinate jurisdiction. By whose judgment the Court was bound, the C.J. being evidently not satisfied with those decisions. Thus the question stands upon the cases relied upon in the argument for the plaintiff in error, and, if I am right in treating the decision in **Senior v. Metropolitan Ry.** as the only one which can be regarded as a direct authority in his favour, there is opposed to that decision **Reg. v. London Dock Co.** (*supra*), which is at least an equally strong authority the other way.—pp. 213—216.

LORD CRANWORTH.—I fully subscribe to that decision [**Reg. v. London Dock Co.**]; and though, according to the language of the statute then under discussion, the compensation was to be given for injury to be occasioned to any person in his estate or interest in any lands or houses, and not, as in the present case, under the Lands Clauses Act, in consequence of his interest in any land being injuriously affected; yet the meaning of the legislature in both cases seems to me to be the same.—p. 219.
LORD WESTBURY *dissented*.

Ricket v. Metropolitan Ry., *not applied*.

Eagle v. Charing Cross Ry. (1867) 36 L. J. C. P. 297; L. R. 2 C. P. 638, 643; 16 L. T. 593; 15 W. R. 1016.—C.P.

Ricket v. Metropolitan Ry., *distinguished*.

Baker v. Moore (*supra*), *sustained*.

Beckett v. Midland Ry. (1867) 37 L. J. C. P. 11; L. R. 3 C. P. 82; 17 L. T. 499; 16 W. R. 221.—C.P. *And see* S. C. *post*, col. 1548.

Ricket v. Metropolitan Ry.

Approved, **Winterbottom v. Derby (Earl)** (1867) 36 L. J. Ex. 194; L. R. 2 Ex. 316, 320; 16 L. T. 771; 16 W. R. 15.—EX.; *applied*, **Reg. v. Metropolitan Board of Works** (1869) 38 L. J. Q. B. 201; L. R. 4 Q. B. 358, 361; 10 B. & S. 391; 17 W. R. 1094.—Q.B.; *referred to*, **Hammersmith and City Ry. v. Brand** (1869) 38 L. J. Q. B. 265; L. R. 4 H. L. 171, 197; 21 L. T. 238.—H.L. (E.); LORD CAIRNS *dissenting*. See "RAILWAY."

Broadbent v. Imperial Gaslight and Coke Co.

(1856) 26 L. J. Ch. 276; 7 De G. M. & G. 436; 3 Jur. (N.S.) 221; 5 W. R. 272.—L.C., with JJ.; *affirmed*, *nom.* **Imperial Gaslight and Coke Co. v. Broadbent** (1859) 29 L. J. Ch. 377; 7 H. L. Cas. 600; 5 Jur. (N.S.) 1319.—H.L. (E.).

Discussed, **Stockport, Timperley and Altrincham Ry.**, In re (1864) 33 L. J. Q. B. 251; 10 Jur. (N.S.) 614; 10 L. T. 426; 12 W. R. 702.—CROMPTON, J. *referred to*, **Coe v. Wise** (1866) 37 L. J. Q. B. 262; L. R. 1 Q. B. 711, 721; 7 B. & S. 831; 14 L. T. 891; 14 W. R. 865.—EX. CH.; *distinguished*, **Ferrar v. Sewers Commissioners** (1869) 38 L. J. Ex. 102; L. R. 4 Ex. 227.—EX. CH. (*post*, col.

1538); *referred to*, *Dungey v. London Corporation* (1869) 38 L. J. C. R. 298, 304; 20 L. T. 921; 17 W. R. 1006.—C.P.; *Hammersmith and City Ry. v. Brand* (1869) L. R. 4 H. L. 171, 184 (*supra*); *explained*, *Clowes v. Staffordshire Potteries Waterworks Co.* (1872) L. R. 8 Ch. 131; N.—MALINS, V.-C.; (reversed, 42 L. J. Ch. 107; 18 L. J. 8 Ch. 125; 27 L. T. 521; 21 W. R. 32.—L.J.J.; *applied*, *Chester (Dean) v. Smelting Corporation* (1901) 85 L. T. 67.—FARWELL, J.

Ricket v. Metropolitan Ry. (*supra*).

Explained, *City of Glasgow Union Ry. v. Hunter* (1870) L. R. 2 Sc. App. 78; *distinguished*, *Reg. v. Cambrian Ry.* (1871) 40 L. J. Q. B. 169; L. R. 6 Q. B. 422; 25 L. T. 84; 19 W. R. 1138.—COCKBURN, C.J. and BLACKBURN, J.; *referred to*, *Bigg v. London Corporation* (1873) L. R. 15 Eq. 376, 381; 28 L. T. 336.—BACON, V.-C.; *Biscoc v. G. E. Ry.* (1873) L. R. 16 Eq. 636, 640; 21 W. R. 902.—WICKENS, V.-C.

City of Glasgow Union Ry. v. Hunter.

Principle applied, *Jones v. Stanstead, &c. Ry.* (1872) 41 L. J. P. C. 19; L. R. 4 P. C. 98; 8 Moore (N.S.) P. C. 312; 26 L. T. 456; 20 W. R. 417.—P.C.; *distinguished*, *Buccleugh (Duke) v. Metropolitan Board of Works* (1872) 41 L. J. Ex. 137; L. R. 5 H. L. 418; 27 L. T. 1.—H.L. (E.). (See "ARBITRATION," vol. 1, col. 66); *approved*, *Reg. v. Sheward* (1880) 49 L. J. Q. B. 716; 9 Q. B. D. 741.—C.A.; *explained and applied*, *Essex v. Acton Local Board* (1889) 14 App. Cas. 153, 165.—H.L. (E.) (*post*, col. 1539).

Ricket v. Metropolitan Ry., *distinguished and approved*. *And see post*, col. 1537.

Reg. v. Metropolitan Board of Works (*supra*, col. 1532), *distinguished*.

Metropolitan Board of Works v. McCarthy (1874) L. R. 7 H. L. 243; 43 L. J. C. P. 385; 31 L. T. 182; 23 W. R. 115.—H.L. (E.); *affirming* S. C. *nom.* *McCarthy v. Metropolitan Board of Works* (1873) 42 L. J. C. P. 81; L. R. 8 C. P. 191.—EX. CH. *And see* col. 1539.

CARRNS, L.C.—The case appears to me to be extremely analogous to . . . *Beckett v. Midland Ry.* (*post*, col. 1538), in which there was, in front of the premises question in that case, one single highway, the farther half, or the farther third portion of which was taken off and blocked by the execution of the defendant company's works. It was there held that that was an injury which permanently and injuriously affected the premises in question: and it appears to me to be a matter entirely indifferent whether you have one highway, the farther half of which is blocked up and destroyed, or whether you have a double highway, first by land and then by water, and the part of the highway which consists of water is blocked up and destroyed. . . . Mr. Thesiger stated what he would rely upon as a definition of the right to compensation, and having considered this case very fully, I myself should not be disposed to find fault with any part of that definition, although definitions are always matters of very considerable difficulty. Mr. Thesiger stated that the test which he would submit as one which he thought would explain and reconcile the various cases upon this subject, was this, that where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any

particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value. My lords, a case was decided in your lordships' House which at first sight was supposed to militate against this proposition and against the decision in the present case—I mean *Ricket v. Metropolitan Ry.*—but in truth that case has no application whatever to the present. The circumstances out of which the claim was there made were these: There was an interruption—only a temporary interruption—to a particular trade carried on in particular premises, and the claim made was not a claim for injury to the property at all, it was a claim in respect of loss suffered in carrying on a trade. My lords, the words of the definition which I have read are entirely clear of a case of that kind, and although it is unnecessary to do so, I may observe that I do not think your lordships would in any way propose now to depart from the decision in *Ricket v. Metropolitan Ry.*—p. 253.

LORD CHELMSFORD.—The judges in the Ex. Ch. who decided this case in favour of the respondent appear to have been governed in their opinion principally by *Chamberlain v. Westminster End of London, &c. Ry.* (*supra*, col. 1531), and entered very fully into the consideration of the question whether that case would be regarded as having been overruled by the decision of this House in *Ricket v. Metropolitan Ry.* I confess it appears to me extraordinary that so much time should have been occupied upon a question upon which, from the language I used, and which chiefly engaged the attention of the learned judges, I should have thought there could be no doubt. I took some pains to distinguish the two cases. . . . I observed that *Chamberlain's Case* must be classed with the preceding cases where the house or land of the person claiming compensation was itself injuriously affected. By these words I plainly expressed the distinction between the two cases, because in *Ricket's Case* the jury found there was no damage done to the structure of the house, *i.e.*, to the premises (p. 245). This case is clearly distinguishable from that of *Reg. v. Metropolitan Board of Works*, although bearing some resemblance. . . . There can be no doubt that that case was properly decided, as there was nothing to show that the rights obstructed were in any peculiar manner connected with the claimant's premises, nor was there any finding that the premises were by the obstruction diminished in value. It is a case precisely similar to that of *Caledonian Ry. v. Ogilvy* (*supra*, col. 1530). . . . Holding, as I do, *Beckett's Case* to have been rightly decided, it appears to me that the present case is scarcely distinguishable from it. . . . I cannot help observing that the judges in the Court below appear to have needlessly embarrassed themselves with the consideration whether this case is distinguishable from *Ricket's Case*. The distinction is marked and obvious. In *Ricket's Case* there was no finding which related to the premises, but merely of a personal damage; here the special case expressly states an injury and damage to the premises.—p. 259.

LORD HATHERLEY to the same effect.

LORD PENZANCE.—A rule has been established in these cases from which it would, I think, be disastrous to depart. It is this, that whether damage can be recovered under the words "injuriously affected" depends upon whether it might have been the subject of an action if the

works which caused it had been done without the authority of Parliament. Notwithstanding the doubts and adverse criticisms expressed in the last case [*Ricket v. Metropolitan Ry.*] by the late Lord Westbury . . . I trust this rule will be adhered to.—p. 261.

LORD O'HAGAN.—I confess, my lords, that if the case were entirely new, I should scarcely be disposed to agree with some observations which have fallen from Lord Penzance. . . . I should have been very much disposed to agree with the strong observations made by Lord Westbury in *Ricket's Case*, to the effect that there really is not in the statute itself anything to justify the importation of a narrow construction of that description (p. 265). . . . I am very glad that we have now his [Lord Chelmsford's] authoritative declaration, sitting as he did as President of this House at the time, that *Ricket's Case* was not decided upon any principle inconsistent with *Chamberlain's Case*.—p. 269.

Ricket v. Metropolitan Ry., distinguished.
Fritz v. Hobson (1880) 49 L. J. Ch. 321; 14 Ch. D. 542; 42 L. T. 225; 28 W. R. 459.—FRY, J.; Ripley v. G. N. Ry. (1875) L. R. 10 Ch. 435, 439; 31 L. T. 869; 23 W. R. 685.—L.J.

Ricket v. Metropolitan Ry., referred to.
Montreal (Mayor) v. Drummond (1876) 1 App. Cas. 384, 409 (*post*, col. 1538); Burgess v. Northwich Local Board (1880) 50 L. J. Q. B. 219; 6 Q. B. D. 264; 44 L. T. 154; 29 W. R. 931; 45 J. P. 256.—LINDLEY and LOPES, JJ.; South City Market Co., In re, Bergin, Ex parte (1884) 13 L. R. Ir. 245.—CHATTERTON, V.-C.

Ricket v. Metropolitan Ry., examined.
Caledonian Ry. v. Walker's Trustees (1882) 7 App. Cas. 259; 46 L. T. 826; 30 W. R. 569; 46 J. P. 676.—H.L. (SC.). SELBORNE, L.C., LORDS O'HAGAN, BLACKBURN and WATSON; affirming S. C. *nom.* Walker's Trustees v. Caledonian Ry. (1881) 8 Rettie 405.

SELBORNE, L.C.—For the appellants it was contended that compensation was excluded by *Caledonian Ry. v. Ogilvy* (*supra*, col. 1530), and *Ricket v. Metropolitan Ry.* The respondents relied on *Metropolitan Board of Works v. McCarthy* (*post*, col. 1539). It is your lordships' duty to maintain, as far as you possibly can, the authority of all former decisions of this House; and although later decisions may have interpreted and limited the application of earlier, they ought not (without some unavoidable necessity) to be treated as conflicting. The reasons which learned lords who concurred in a particular decision may have assigned for their opinions, have not the same degree of authority with the decisions themselves. A judgment which is right and consistent with sound principles, upon the facts and circumstances of the case which the House had to decide, need not be construed as laying down a rule for a substantially different state of facts and circumstances, though some propositions, wider than the case itself required, may appear to have received countenance from those who then advised the House. With this preface, I think it right to say that all the three decisions of this House, to which I have referred, appear to me to be capable of being explained and justified upon consistent principles.—p. 275.

[See also the other addresses where the cases are discussed at length.]

Reg. v. Cambrian Ry. (*supra*, col. 1533).
Discussed, Jones v. Stanstead, &c. Ry. (1872) L. R. 4 P. C. 98, 118 (*supra*, col. 1533); *overruled*, Hopkins v. G. N. Ry. (1877) 46 L. J. Q. B. 265; 2 Q. B. D. 224; 36 L. T. 598.—C.A.

Reg. v. Cambrian Ry., Hopkins v. G. N. Ry. and Hill v. Midland Ry. (1882) 51 L. J. Ch. 774; 21 Ch. D. 143; 47 L. T. 225; 30 W. R. 774.—FRY, J., *considered*.

G. W. Ry. v. Swindon and Cheltenham Extension Ry. (1884) 9 App. Cas. 787; 53 L. J. Ch. 1075; 51 L. T. 798; 32 W. R. 957; 48 J. P. 821.—H.L. (E.); LORD WATSON *dissenting on one point*; affirming (1882) 52 L. J. Ch. 306; 22 Ch. D. 667; 47 L. T. 709; 31 W. R. 479.—C.A.; COTTON, L.J. *dissenting*. And see *supra*, col. 1528.

LORD WATSON.—The respondents, however, maintained that an easement or right of use, such as their special Act empowers them to take, is not a "hereditament" within the meaning of sect. 3 of the Lands Clauses Act, and, at all events, is not a "hereditament of tenure." As to the first branch of the argument, I confess my inability to understand why the expression "hereditaments" in sect. 3 should not be held to include incorporeal hereditaments. I think it does, and it was so held by the Court of Q. B. in *Reg. v. Cambrian Ry.*, Lord Blackburn observing that "hereditaments," as used in the Act, includes "anything which is the subject of inheritance." That case was overruled in the C. A. in *Hopkins v. G. N. Ry.*, on the ground that the injury to the ferry for which the Court of Q. B. had held the company liable in compensation, was attributable to the user, and not to the construction of the railway. But Mellish, L.J., who delivered the judgment in the C. A., said: "In *Reg. v. Cambrian Ry.* the judges rely on the clause in the Lands Clauses Consolidation Act by which the word 'land' includes 'franchises.' This no doubt proves that if franchises are injured by the construction of the railway or works, which they may be, compensation may be obtained." So that the C. A., in *Hopkins v. G. N. Ry.*, did not differ from, but on the contrary approved of, the decision in *Reg. v. Cambrian Ry.*, in so far as it affirmed that a corporeal hereditament such as a franchise of ferry, is "land" within the meaning of sect. 3, and therefore "land" within the meaning of sect. 68 of the Lands Clauses Act. In the subsequent case of *Hill v. Midland Ry.*, where the company had power by their special Act to acquire (except in a certain event which had not occurred) a right or easement of precisely the same character as that which the respondent company are authorised to take for the purpose of crossing the appellants' Gloucester line, Fry, J. held that such easement or right was, by reason of its having been made the subject of compulsory acquisition by the provisions of the special Act, brought within the scope of the statutory definition of the word "lands" as occurring in sects. 18 and 85 of the general Act. The only authority to the contrary, which was relied upon by the respondents, was *Pinchin v. London and Blackwall Ry.* (*supra*, col. 1506). The observations made by Lord Cranworth in that case are entitled to the greatest respect; but I agree with Cotton, L.J. [in the C. A.] in thinking that these observations were directed to the question whether the word "lands" in sect. 18 of the Lands Clauses Act, apart from any peculiar power conferred by

the special Act, includes an easement. What the noble and learned lord, as I understand him, did say, was, that the context of the general Act forbade the application of sect. 18 to "lands" which were not corporeal hereditaments, a proposition which I do not think it necessary to dispute.—pp. 801—803.

Reg. v. Cambrian Ry. (*supra*), referred to. *Parkdale Corporation v. West* (1887) 56 L. J. P. C. 66; 12 App. Cas. 602, 614; 57 L. T. 602.—P.C.; *North Shore Ry. v. Pion* (1889) 59 L. J. P. C. 25; 14 App. Cas. 612, 628; 61 L. J. 525.—P.C.; *Ned's Point Battery, In re* (1901) [1903] 2 Ir. R. 192, 198.—K.B.D.

Ricket v. Metropolitan Ry. (*supra*), observations of CHELMSFORD, L.C. commented on. *Ford v. Metropolitan and District Rys.* (1886) 17 Q. B. D. 12; 55 L. J. Q. B. 296; 54 L. T. 718; 34 W. R. 426; 50 J. P. 661.—C.A.; *affirming* *Cal. & E.* 593.—DAY, J.

[Lord Chelmsford's expression was this:—"The case was argued at your lordships' bar both upon the 6th and 16th sections of the Railways Clauses Act, but in my opinion the 6th section is inapplicable. It relates to owners and occupiers of and all other persons interested in any lands taken and used for the purposes of the railway or injuriously affected by the construction thereof (not in the course of the construction thereof); and the company is to make full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties by reason of the exercise, as regards such lands, of the powers vested in the company."]

ESHER, M.R.—The chief point argued is this: it was urged that we were bound by authority to hold that if the arbitrator awards any compensation upon such a claim as this for injury, when it is injury only existing during the continuance of the work, and does not confine himself to injury which remains when the work is finished, the award is bad. That has always struck me as an exceedingly strange proposition—that compensation may be given for the injury which exists at the time when the work is finished, and yet that no compensation is to be allowed for the very same injury which exists during the progress of the works. That has always seemed to me to be a very fine distinction, which I could not understand; and when we look into the authorities, we find that it is based on an expression of Lord Chelmsford. I cannot help thinking that that expression, which has been cited from *Ricket v. Metropolitan Ry.*, decided in the H. L., and has been relied upon as an opinion of Lord Chelmsford, is open to the explanation that it is a defective expression; he did not intend to say that which no doubt his words, *prima facie*, seem to imply. But be that as it may, that expression of his, as has been pointed out, was not adopted by Lord Cranworth in the very same case, and certainly has been spoken of, to say the least, with doubt by Lord Selborne in *Caledonian Ry. v. Walker's Trustees* (*supra*, col. 1535). I cannot, therefore, take that expression of Lord Chelmsford's as a binding authority upon this Court as a decision of the H. L. If that be so, we are driven back to principle. As I have said, I cannot believe that a fine drawn distinction which seems to me unreasonable can be the law, and therefore I

cannot think that the mere fact that the arbitrator has given some compensation for injury done before the works were completed invalidates the award.—p. 20.

COTTON and BOWEN, L.JJ. to the same effect.

Ricket v. Metropolitan Ry., referred to. *Reg. (Moore) v. Abbott* (1896) [1897] 2 Ir. R. 362, 410.—Q.B.D.; *Caledonian Ry. v. Morrison* (1898) 25 Rettie 1001—1007; *Martin v. London County Council* (1898) 79 L. T. 170, 174.—KENNEDY, J.: affirmed, (1899) 80 L. T. 866.—C.A.; *Inland Revenue Commissioners v. Muller and Co's. Margarine, Ltd.* (1901) 70 L. J. K. B. 677; [1901] A. C. 217, 232; 84 L. T. 729; 49 W. R. 603.—H.L. (E.); HALSBURY, L.C. *dissenting*; *Smith v. Wilson* (1902) [1903] 2 Ir. R. 45, 74.—K.B.D.

Beckett v. Midland Ry. (1867) 37 L. J. C. P. 11; L. R. 3 C. P. 82; 17 L. T. 499; 16 W. R. 221.—C.P.

Approved, *Metropolitan Board of Works v. McCarthy* (1874) L. R. 7 H. L. 243 (*supra*, col. 1533); referred to, *Montreal (Mayor) v. Drummond* (1876) 45 L. J. P. C. 33; 1 App. Cas. 384, 409; 35 L. T. 106.—P.C.; *Bell v. Quebec Corporation* (1879) 45 L. J. P. C. 1; 5 App. Cas. 84, 98; 41 L. T. 451.—P.C.; *approved*, *Caledonian Ry. v. Walker's Trustees* (*supra*, col. 1535); *discussed*, *Martin v. London County Council* (*supra*).

Caledonian Ry. v. Walker's Trustees (*supra*, col. 1535).

Applied, *Furness Ry. v. Cumberland & Co. Building Society* (1884) 52 L. T. 144.—H.L. (E.); referred to, *Ford v. Metropolitan & Co. Rys.* (*supra*, col. 1537); *Holliday and Wakefield Corporation, In re* (1888) 57 L. J. Q. B. 626; 20 Q. B. D. 699; 59 L. T. 248; 52 J. P. 644.—C.A.; ESHER, M.R., *dissenting*; affirmed, (1890) 60 L. J. Q. B. 361; [1891] A. C. 81.—H.L. (E.) (*post*, col. 1547); *Essex v. Acton Local Board* (1889) 14 App. Cas. 153, 176 (*post*, col. 1539); *Caledonian Ry. v. Morrison* (1898) 25 Rettie 1001, 1007; *Smith v. Wilson* (*supra*).

Ferrar v. Sewers Commissioners (1869) 38 L. J. Ex. 102; L. R. 4 Ex. 227; 21 L. T. 295; 17 W. R. 709.—EX. CH. *reversing* (1868) 38 L. J. Ex. 17; L. R. 4 Ex. 1; 19 L. T. 485.—EX., *approved on one point*.

Reg. v. St. Luke's, Chelsea (1871) 40 L. J. Q. B. 305; L. R. 6 Q. B. 572.—EX.; *affirmed, post*.

LUSH, J. (for).—The second point [that if sect. 68 of the Lands Clauses Act, 1845, were introduced it did not confer the right to compensation] has been already decided by the Court of Ex. in *Ferrar v. Sewers Commissioners*, and we should have been content with saying that we held ourselves bound by that decision were it not for the intimation given in the Ex. Ch., when reversing the judgment of the Court below on another point, that this point was one which had it been necessary to decide it, would have required further consideration. We have, therefore, considered it, and we entirely agree with the Court of Ex., that where the entire Act is incorporated, as it is here, no other enactment is needed in order to confer the right to compensation for lands injuriously affected.—p. 806.

Ferrar v. Sewers Commissioners.

Followed, *Baker v. St. Marylebone Vestry* (1876) 35 L. T. 129; 24 W. R. 848.—EX. D.;

referred to, Kirby v. Harrogate School Board (post).

Leader v. Moxon (1773) 2 W. Bl. 924; 3 Wils. 461.—C.P., applied.
Reg. v. St. Luke's, Chelsea (1871) 41 L. J. Q. B. 81; L. R. 7 Q. B. 148; 25 L. T. 914; 20 W. R. 209.—EX. CH.; affirming S. C., *supra*.

Reg. v. St. Luke's, Chelsea, referred to.
Reg. (Moore) v. Abbott (1896) [1897] 2 Ir. R. 362.—Q.B.D.

Metropolitan Board of Works v. McCarthy (1874) 43 L. J. C. P. 385; L. R. 7 H. L. 243 (*supra*, col. 1533).

Referred to, **Montreal (Mayor) v. Drummmond** (1876) 1 App. Cas. 384, 409 (*supra*, col. 1538); **Lyon v. Fishmongers' Co.** (1876) 46 L. J. Ch. 68; 1 App. Cas. 662, 671; 35 L. T. 569; 25 W. R. 165.—H.L. (E.): **Sharpe v. Metropolitan, &c. Ry.** (1879) 48 L. J. Q. B. 325; 4 Q. B. D. 645, 658.—C.A. (post, col. 1551); **Bell v. Quebec Corporation** (1879) 5 App. Cas. 84, 98 (*supra*, col. 1538); followed, **Caledonian Ry. v. Walker's Trustees** (1882) 7 App. Cas. 259 (*supra*, col. 1535); distinguished, **Reg. v. Essex** (1884) 14 Q. B. D. 753, 762 (post); referred to, **Ford v. Metropolitan, &c. Rys.** (1886) 17 Q. B. D. 12, 21 (*supra*, col. 1537); **North Shore Ry. v. Pion** (1889) 14 App. Cas. 612, 620 (*supra*, col. 1537); **Kirby v. Harrogate School Board** (1896) 65 L. J. Ch. 376; [1896] 1 Ch. 437, 445; 74 L. T. 6; 60 J. P. 182.—C.A.; test applied, **Masters and G. W. Ry.**, in re (1900) 69 L. J. Q. B. 673; [1900] 2 Q. B. 677, 687; 82 L. T. 819; 49 W. R. 29; 64 J. P. 647.—DARLING and BUCKNILL, JJ.; (affirmed, C.A., post); **Long Eaton Recreation Grounds Co. v. Midland Ry.** (1902) 71 L. J. K. B. 74; 83 L. T. 278, 280; 50 W. R. 120.—LAWRANCE, J.; (affirmed, C.A., post); discussed, **Smith v. Wilson** (1902) [1903] 2 Ir. R. 45, 74.—K.B.D.

Metropolitan Board of Works v. Howard (1889) 5 Times L. R. 732.—H.L. (E.), referred to.

Kirby v. Harrogate School Board (*supra*); **Masters and G. W. Ry.**, in re (1901) 70 L. J. K. B. 516; [1901] 2 K. B. 84; 84 L. T. 515; 49 W. R. 499; 65 J. P. 420.—C.A.; and **Manchester, Sheffield and Lincolnshire Ry. v. Anderson** (1898) 67 L. J. Ch. 568; [1898] 2 Ch. 394; 78 L. T. 821.—C.A.; affirming 46 W. R. 509.—BYRNE, J., explained.

Long Eaton Recreation Grounds Co. v. Midland Ry. (1902) 71 L. J. K. B. 837; [1902] 2 K. B. 574; 86 L. T. 873; 50 W. R. 693; 67 J. P. 1.—C.A.; affirming (1901) 71 L. J. K. B. 74; 85 L. T. 278.—LAWRANCE, J. See judgments at length of COLLINS, M.R. and LAWRENCE, J.

Stockport, Timperley and Altrincham Ry., in re (1864) 33 L. J. Q. B. 251; 10 Jur. (N.S.) 614; 10 L. T. 426; 12 W. R. 702.—CROMPTON, J., distinguished.

City of Glasgow Union Ry. v. Hunter (1870) L. R. 2 Sc. App. 78, 80 (*supra*, col. 1533).

Stockport, &c., Ry., in re, approved.
Essex v. Acton Local Board (1889) 58 L. J. Q. B. 594; 14 App. Cas. 153; 61 L. T. 1; 38 W. R. 209; 53 J. P. 756.—H.L. (E.). (see the speeches in the H.L. at length); reversing S. C. nom. **Reg. v. Essex** (1886) 55 L. J. Q. B. 313; 17 Q. B. D. 447; 54 L. T. 779; 34 W. R. 587.—C.A.; which reversed (1884) 54 L. J. Q. B. 459;

14 Q. B. D. 753; 52 L. T. 926; 33 W. R. 214.—MATHEW and DAY, JJ.

Stockport, &c., Ry., in re, discussed.
Essex v. Acton Local Board, principle applied.

London, Tilbury and Southend Ry. and Gower's Walk Schools Trustees, in re (1889) 59 L. J. Q. B. 162; 24 Q. B. D. 326, 331; 62 L. T. 305; 38 W. R. 343.—C.A.

Essex v. Acton Local Board, referred to.
Murray v. Cadwell (1889) 6 Times L. R. 76.—KEKEWICH, J.

London, Tilbury and Southend Ry. and Gower's Walk Schools Trustees, in re, and **Essex v. Acton Local Board**, discussed and applied.

Reg. (Moore) v. Abbott (1896) [1897] 2 Ir. R. 362.—Q.B.D.; affirmed, C.A.

Essex v. Acton Local Board, referred to.
Ned's Point Battery, in re (1901) [1903] 2 Ir. R. 192, 199.—K.B.D.; **Long Eaton Recreation Grounds Co. v. Midland Ry.** (1902) 71 L. J. K. B. 74 (*supra*, col. 1539); **Smith v. Wilson** (1902) [1903] 2 Ir. R. 75.—K.B.D.

Macey v. Metropolitan Board of Works (1864) 33 L. J. Ch. 377; 10 Jur. (N.S.) 333; 10 L. T. 66; 12 W. R. 691.—WOOD, V.-C., approved and followed.

Clark v. London School Board (1874) 43 L. J. Ch. 421; L. R. 9 Ch. 120; 29 L. T. 903; 22 W. R. 354.—C.A.; reversing 21 W. R. 723.—MALINS, V.-C.

Clark v. London School Board, applied.
Bedford (Duke) v. Dawson (1875) 44 L. J. Ch. 549; L. R. 20 Eq. 353, 357; 33 L. T. 156.—JESSEL, M.R.; **Wigram v. Fryer** (1887) 36 Ch. D. 87, 96 (post).

Clark v. London School Board, referred to.
Kirby v. Harrogate School Board (1896) 65 L. J. Ch. 376; [1896] 1 Ch. 437, 441; 74 L. T. 6; 60 J. P. 182.—C.A.

Bedford (Duke) v. Dawson, followed.
French v. London, Tilbury and Southend Ry. (1886) 2 Times L. R. 395.—BACON, V.-C.

Bedford (Duke) v. Dawson, applied.
Wigram v. Fryer (1887) 56 L. J. Ch. 1098; 36 Ch. D. 87; 57 L. T. 255; 36 W. R. 100.—NORTH, J. And see **Long Eaton Recreation Grounds Co. v. Midland Ry.** 71 L. J. K. B. 74, 77 (*supra*, col. 1539).

Wigram v. Fryer, approved.
Goddard v. Midland Ry. (1891) 8 Times L. R. 126.—KEKEWICH, J.

Nash v. Coombs (1868) 37 L. J. Ch. 600; L. R. 6 Eq. 51; 16 W. R. 663.—WOOD, V.-C., referred to.

Richards v. De Winton, **Richards v. Evans** (1901) 70 L. J. Ch. 719; [1901] 2 Ch. 566, 572; 84 L. T. 831.—KEKEWICH, J.; affirmed (1903) 72 L. J. Ch. 269; [1903] 1 Ch. 507; 88 L. T. 333.—C.A.

Ecclesiastical Commissioners v. L. & S. W. Ry. (1854) 23 L. J. C. P. 177; 14 C. B. 743; 2 C. L. R. 1797; 18 Jur. 911; 2 W. R. 560.—C.P., referred to.
Wilson's Estate, in re (1863) 32 L. J. Ch. 191; 2 J. & H. 619; 1 N. R. 301; 9 Jur. (N.S.) 1043; 7 L. T. 772; 11 W. R. 294.—WOOD, V.-C.; affirmed.

3 De G. J. & S. 410. See Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 3.

In respect of what Persons.

Lister v. Lobley (1837) 6 L. J. K. B. 200; 7 A. & E. 124; 2 H. & W. 122.—K.B., referred to.

Hutton v. L. & S. W. Ry. (1849) 18 L. J. Ch. 345; 7 Hare 259; 13 Jur. 486.—WIGRAM, V.-C.; Kennet, &c. Navigation Co. v. Witherington (1852) 21 L. J. Q. B. 419; 18 Q. B. 531.—Q.B.; Macey v. Metropolitan Board of Works (*supra*, col. 1540); Harvey v. Harkin (1896) [1898] 2 Ir. R. 65, 72.—Q.B.D.

Hutton v. L. & S. W. Ry., approved, but distinguished.

Ferrand v. Bradford Corporation (1856) 21 Beav. 412; 2 Jur. (N.S.) 175.—ROMILLY, M.R.

Hutton v. L. & S. W. Ry., referred to.

Macey v. Metropolitan Board of Works (1864) 33 L. J. Ch. 377 (*supra*, col. 1540); Parkdale Corporation v. West (1887) 56 L. J. P. C. 66; 12 App. Cas. 602, 613; 57 L. T. 602.—P.C.

Ferrand v. Bradford Corporation, followed.

Bush v. Trowbridge Waterworks Co. (1875) 44 L. J. Ch. 235, 645; L. R. 10 Ch. 459; 33 L. T. 137; 23 W. R. 641.—L.J.J.; affirming L. R. 19 Eq. 291.—JESSEL, M.R., distinguished.

Stone v. Yecvil Corporation (1876) 2 C. P. D. 99; 46 L. J. C. P. 137; 36 L. T. 279; 25 W. R. 240.—C.A.; affirming 1 C. P. D. 691.—BRETT and ARCHIBALD, JJ.

COCKBURN, C.J.—The present case is, however, plainly distinguishable from that of *Bush v. Trowbridge Waterworks Co.* In the latter case the water company took power to divert only a portion of a brook which flowed through the plaintiff's land, and though the portion abstracted prevented the stream from being of the same practical benefit in the way of irrigation to the plaintiff which it had been before, the brook or stream, though seriously diminished in quantity, continued to run through the land as before, and it is upon this that the judgments of the M.R. and the L.J.J. appeared to have proceeded. In the present case the corporation have taken power to divert the whole body of the stream, and given notice to the plaintiff of their intention to do so, and the case comes within the principle of the decision of Lord Romilly in *Ferrand v. Bradford Corporation*, which is by no means overruled by or inconsistent with the decision in the case of the *Trowbridge Waterworks Co.*—p. 107.

[In the Court below *Ferrand v. Bradford Corporation* had been treated as overruled.]

Solway Ry. Co. v. Jackson (1874) 1 Ct. Sess. Cas. 4th ser. 831, affirmed.

Henderson v. Nimmo and Colquhoun (1874) 2 Ct. Sess. Cas. 2nd ser. 869; and **Crawford v. Field** (1874) 2 Ct. Sess. Cas. 4th ser. 20, distinguished.

Fleming v. Newport Ry. (1883) 8 App. Cas. 265.—H.L. (SC.).

LORD WATSON.—*Henderson v. Nimmo and Colquhoun* has, therefore, no analogy to the present, because in that case the pursuer's title admittedly conferred upon him an immediate right to access by a street 60 feet wide; and what the Court decided was that his right to that access was not impaired by a transaction entered into, *in mala*

fide, between Nimmo and the superior before the formal title to the pursuer's feu was executed. . . . The compulsory taking of part of the superior's estate cannot in my opinion be regarded as equivalent, either in fact or law, to an exercise of the power reserved by the superior himself. That was virtually decided by the Second Division of the Court, in *Solway Ry. v. Jackson*.—p. 281.

Fleming v. Newport Ry., referred to.

Long Eaton Recreation Grounds Co. v. Midland Ry. (1902) 71 L. J. K. B. 74 (*supra*, col. 1539).

Rex v. Liverpool and Manchester Ry. (1836)

4 A. & E. 650; 6 N. & M. 186; 1 H. & W. 689; 50 R. R. 306.—K.B., applied.

Reg. v. London and Southampton Ry. (1839) 8 L. J. Q. B. 220; 10 A. & E. 3; 2 P. & D. 243; 1 Railw. Cas. 717.—Q.B.

Reg. v. London and Southampton Ry., discussed and distinguished.

Cranwell v. London Corporation (1870) L. R. 5 Ex. 284; 39 L. J. Ex. 193; 22 L. T. 760.—EX. CH.

WILLES, J.—It is not surprising, however, that the alderman should have thought himself justified in the conclusion he arrived at, having regard to *Reg. v. London and Southampton Ry.*, where the Court of Queen's Bench refused a rule to assess compensation under circumstances which at first sight seem similar to those of the present case. In fact, however, the cases differ; for there, before the tenant went out, a transaction took place between the parties which led the Court to the conclusion (whether rightly or wrongly, it is unnecessary to consider), that the tenant had accepted an equivalent or satisfaction for the disturbance of his possession, or that something had passed between them which disentitled the tenant to demand damages by way of compensation. This is what the statement at the end of the judgment appears to amount to, namely, that the tenant consented to remain in after the six months, by way of satisfaction, and that the defendants having, meanwhile, acquired the position of landlords, the notice, under the whole circumstances of the case, had the same effect as if it had been a landlord's notice, and therefore deprived the plaintiffs of a right to compensation. No evidence of any such arrangement is to be discovered in the present case; and the plaintiff is therefore entitled to compensation for the value of his interest whatever it may be.—p. 588.

Reg. v. London and Southampton Ry., principle applied.

Cranwell v. London Corporation, referred to. **Great Northern and City Ry. v. Tillet** (1902), 71 L. J. K. B. 525; [1902] 1 K. B. 874, 878; 86 L. T. 723; 50 W. R. 652.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Penny v. Penny (1867) 37 L. J. Ch. 340; L. R. 5 Eq. 227; 18 L. T. 13; 16 W. R. 671.—WOOD, V.-C., referred to.

Doynes's Traverses, In re (1888) 24 L. R. Ir. 287.—JOHNSON, J.

Penny v. Penny and Eldon (Earl) v. N. E. Ry. (1899) 80 L. T. 723.—BRUCE, J., applied.

Athlone Rifle Range, In re [1902] 1 Ir. R. 433, 436.—PORTER, M.R.

Principles of Assessment

Ayr Harbour Trustees v. Oswald (1883)
8 App. Cas. 623.—H.L. (SC.).

Referred to. Tiverton and North Devon Ry. v. Loosemore (1884) 53 L. J. Ch. 812; 9 App. Cas. 480, 515.—H.L. (E.) (*supra*, col. 1527); *applied*. Creyke v. Level of Hatfield Chase Corporation (1896) 12 Times L. R. 383.—ROMER, J.; *referred to*, Thames Conservators v. Southwark &c. Water Co. (1897) 13 Times L. R. 155.—MATHEW, J.; L. & N. W. Ry. v. Runcorn Rural Council (1897) 67 L. J. Ch. 28; [1898] 1 Ch. 34; 77 L. T. 485; 46 W. R. 121; 62 J. P. 9.—STIRLING, J. (affirmed, 67 L. J. Ch. 324; [1898] 1 Ch. 561; 78 L. T. 343; 46 W. R. 484; 62 J. P. 643.—C.A.); *explained and not applied*, Caledonian Ry. v. Turcan (*post*); *referred to*, M'Evoy v. G. W. Ry. (*post*); G. W. Ry. v. Talbot (1902) 71 L. J. Ch. 835; [1902] 2 Ch. 759, 765; 87 L. T. 405.—C.A.

Gonty v. Manchester, Sheffield and Lincolnshire Ry. (1896) 65 L. J. Q. B. 625; [1896] 2 Q. B. 439; 75 L. T. 239; 45 W. R. 83; 12 Times L. R. 620.—C.A., *distinguished*.
Caledonian Ry. v. Turcan (1898) 67 L. J. P. C. 69; [1898] 1 C. 256, 266.—H.L. (SC.); *affirming* [1897] 35 Scottish L. R. 404.

LORD WATSON.—*Ayr Harbour Trustees v. Oswald* (*supra*), does not appear to me to have any application to the circumstances of the present case; and for this reason, that all that was there decided was that the undertaking which the public trustees were there tendering—an undertaking to bind their successors in office in all time to come—was one which the House held to be beyond their power and amounting practically to an abrogation of the rights given to those successors by express statutory enactment. Another question remains behind, which I will not attempt to solve, although Lord Blackburn expressed an opinion favourable to the appellants upon that point, and the English case of *Gonty* seems to me to point in the same direction.—p. 73.

LORD HERSCHELL.—In my view, without expressing any opinion upon the determination of that case [*Gonty's Case*], it does not conflict, as has been supposed, with *Ayr Harbour Trustees v. Oswald*.—p. 74.

Gonty v. Manchester, &c. Ry., *explained*.

M'Evoy v. G. N. (Ireland) Ry. (1898) [1900] 2 Ir. R. 325, 335.—Q.B.D.; *affirmed*, (1899) C.A.

Caledonian Ry. v. Turcan, *discussed*.

Clippen's Oil Co. v. Edinburgh and District Water Trustees (1901) 3 Fraser 1113.—COURT OF SESSION.

Lawrence v. G. N. Ry. (1851) 20 L. J. Q. B. 293; 16 Q. B. 643; 15 Jur. 652; 6 Railw. Cas. 656.—Q.B., *explained*.

Ware v. Regent's Canal Co. (1854) 23 L. J. Ex. 145; 9 Ex. 395; 7 Railw. Cas. 780.—EX.; and **Croft v. L. & N. W. Ry.** (1863) 32 L. J. Q. B. 113; 3 B. & S. 436; 9 Jur. (N.S.) 962; 7 L. T. 741; 11 W. R. 360.—Q.B., *principle applied*.

Lancashire and Yorkshire Ry. v. Evans (1851) 15 Beav. 322.—M.R., *distinguished*.

Todd v. Metropolitan District Ry. (1871) 24 L. T. 435; 19 W. R. 720.—C.P. *And see post*, col. 1548.

Croft v. L. & N. W. Ry., *applied*.

Reg. v. Poulter (1887) 57 L. J. Q. B. 138; 20

Q. B. D. 132, 139; 58 L. T. 534; 36 W. R. 117; 52 J. P. 244.—C.A.; Mercer v. Liverpool, &c. Ry. (1903) 72 L. J. K. B. 128; [1903] 1 K. B. 652, 662; 88 L. T. 374; 51 W. R. 308; 67 J. P. 79.—C.A.

Reg. v. Poulter, 56 L. J. Q. B. 581; 57 L. T. 488.—Q.B.D.; *reversed*, C.A. (*supra*).

Settling Amount and Practice thereon.

L. & N. W. Ry. v. Smith (1849) 19 L. J. Ch. 193; 1 Mac. & G. 216; 1 Hall & Tw. 364; 5 Railw. Cas. 716.—L.C., *distinguished*.

East and West India Docks and Birmingham Junction Ry. v. Gattke (1851) 20 L. J. Ch. 217; 3 Mac. & G. 155; 6 Railw. Cas. 371.—TRURO, L.C.

East and West India Docks and Birmingham Junction Ry. v. Gattke, *followed*.

L. & N. W. Ry. v. Smith, *not followed*.

South Staffordshire Ry. v. Hall (1851) 20 L. J. Ch. 397; 1 Sim. (N.S.) 373.—CRANWORTH, V.-C.; S. C. 3 Mac. & G. 353; 6 Railw. Cas. 389.—TRURO, L.C.

L. & N. W. Ry. v. Smith, *commented on*.

East and West India Docks, &c. Ry. v. Gattke; **L. & N. W. Ry. v. Bradley** (1851) 3 Mac. & G. 336; 6 Railw. Cas. 551.—TRURO, L.C.; and **South Staffordshire Ry. v. Hall**, *approved*.

Lancashire and Yorkshire Ry. v. Evans (1851) 15 Beav. 322.—ROMILLY, M.R.

East and West India Docks, &c. Ry., *not applied*.

L. & N. W. Ry. v. Smith, *held overruled*.

Norfolk (Duke) v. Tennant (1852) 9 Hare 745; 16 Jur. 398.—V.-C.

East and West India Docks, &c. Co. v. Gattke, *followed*.

L. & N. W. Ry. v. Bradley, *commented on*.

Reg. v. Metropolitan Commissioners of Sewers (1853) 22 L. J. Q. B. 234; 1 El. & Bl. 694; 17 Jur. 787; 1 W. R. 286.—Q.B.

L. & N. W. Ry. v. Smith, *explained*.

East and West India Docks, &c. Co. v. Gattke, *discussed*.

Reg. v. L. & N. W. Ry. (1854) 23 L. J. Q. B. 185; 3 El. & Bl. 443; 18 Jur. 993.—Q.B.; ERLE, J. *dissenting*.

South Staffordshire Ry. v. Hall (*supra*); **East and West India Docks, &c. Co. v. Gattke**;

and **L. & N. W. Ry. v. Smith**, *not applied*.

Caledonian Ry. v. Ogilvy (1856) 2 Macq. 229.—H.L. (SC.).

East and West India Docks, &c. Co. v. Gattke, *followed*. *And see post*, col. 1545.

Bradby and Southampton Local Board, In re, (1855) 4 El. & Bl. 1014 (*post*, col. 1546).

L. & N. W. Ry. v. Smith; **East and West India Docks, &c. Co. v. Gattke**; **L. & N. W. Ry. v. Bradley**; and **South Staffordshire Ry. v. Hall**, *referred to*.

Read v. Victoria Station and Pimlico Ry. (1863) 32 L. J. Ex. 167; 1 H. & C. 826; 9 Jur. (N.S.) 1061; 11 W. R. 1032.—EX.

L. & N. W. Ry. v. Bradley, *referred to*.

Hammersmith, &c. Ry. v. Brand (1869) 38 L. J. Q. B. 265; L. R. 4 H. L. 171, 197; 21 L. T. 238.—H.L. (E.)

Read v. Victoria Station and Pimlico Ry.
(*supra*), *followed*.

Barber v. Nottingham and Grantham Ry.
(1864) 33 L. J. C. P. 123; 15 C. B. (N.S.) 726;
10 Jur. (N.S.) 260; 9 L. T. 829; 12 W. R. 376.—C.P.

L. & N. W. Ry. v. Smith (*supra*).

Commented on, **Abrahams v. London Corporation** (1868) L. R. 6 Eq. 625, 633 (*post*); **Brierley Hill Local Board v. Pearsall** (1884) 9 App. Cas. 595, 601 (*post*); **London and Blackwall Ry. v. Cross** (1886) 31 Ch. D. 354, 367 (*post*); **East London Ry., In re, Oliver's Claim** (1890) 24 Q. B. D. 507, 511; 63 L. T. 147; 38 W. R. 312.—C.A.

East and West India Docks, &c. Co. v. Gattke (*supra*).

Not applied, **Maunsell v. Midland Great Western (Ireland) Ry.** (1863) 32 L. J. Ch. 513; 1 H. & M. 130; 8 L. T. 347; 11 W. R. 768.—WOOD, V.-C.; *referred to*, **Rickett v. Metropolitan Ry.** (1867) L. R. 2 H. L. 175, 195 (*supra*, col. 1531); *disented from*, **Abrahams v. London Corporation** (1868) 37 L. J. Ch. 732; L. R. 6 Eq. 625, 633; 18 L. T. 811.—GIFFARD, V.-C.; **Brierley Hill Local Board v. Pearsall** (1884) 54 L. J. Q. B. 25; 9 App. Cas. 595, 601; 71 L. T. 577; 33 W. R. 56; 49 J. P. 84.—H.L. (R.). *followed*, **London and Blackwall Ry. v. Cross** (1886) 55 L. J. Ch. 313; 31 Ch. D. 354, 367; 54 L. T. 309; 34 W. R. 201.—C.A.; *distinguished*, **Birmingham and District Land Co. v. L. & N. W. Ry.** (1887) 57 L. J. Ch. 121; 36 Ch. D. 650; 57 L. T. 185; 36 W. R. 414.—KEKEWICH, J.; (affirmed) (1888) 40 Ch. D. 268; 60 L. T. 527.—C.A.; *referred to*, **Oliver's Claim, In re** (*supra*); **Kitts v. Moore & Co., In re** (*post*). *And see* "ARBITRATION," vol. 1, col. 54.

Abrahams v. London Corporation (*supra*), *explained*.

Starr v. London Corporation (1869) L. R. 7 Eq. 236; 20 L. T. 937.—M.R.

Abrahams v. London Corporation, explained.

Ecclesiastical Commissioners v. Sewers Commissioners (1880) 14 Ch. D. 305; 28 W. R. 824.
MALINS, V.-C.—That case decides that where there are distinct interests, for instance, in the case of landlord and tenant, you cannot compel the landlord and tenant to go to the same jury; they have each separate interests, and each may have a separate inquiry. Here, having given a notice to treat for the four plots of land, they proceed to summon a jury to assess the value of the fee of one of them only. That I restrain, because the jury summoned must be a jury to assess the value of the whole, and not of any one of them.—p. 309.

Reg. v. Lancaster and Preston Junction Ry.

(1845) 14 L. J. Q. B. 84; 6 Q. B. 759; 9 Jur. 303; 3 Railw. Cas. 724.—Q.B., *applied*.
Bradby and Southampton Local Board, In re (*post*, col. 1546).

Myline v. Dickinson (1815) G. Cooper 195; 14 R. R. 243, *discussed*.

Kitts v. Moore & Co. (1894) 64 L. J. Q. B. 152; [1895] 1 Q. B. 253; 12 R. 43; 71 L. T. 676; 43 W. R. 84.—C.A.

London and Greenwich Ry., In re, Keeton, Ex parte (1835) 4 L. J. K. B. 103; 2 A. & E. 678; 4 N. & M. 458; 1 H. & W. 81.—K.B., *followed*.

Corrigall v. London and Blackwall Ry. (1843) 12 L. J. C. P. 209; 5 Man. & G. 219; 6 Scott

(N.R.) 241; 2 D. (N.S.) 851; 3 Railw. Cas. 411.—C.P.; **Bradshaw, In re** (*post*).

Corrigall v. London and Blackwall Ry.

Followed, **Bradshaw, In re** (*post*); *referred to* **East and West India Docks, &c. Ry. v. Gattke** (1851) 20 L. J. Ch. 217 (*supra*, col. 1544); *commented on*, **Reg. v. L. & N. W. Ry.** (1854) 23 L. J. Q. B. 185; 3 El. & Bl. 448; 18 Jur. 993.—Q.B.; *applied*, **Mortimer v. South Wales Ry.** (1859) 28 L. J. Q. B. 121; 1 El. & El. 375; 5 Jur. (S.S.) 784; 7 W. R. 292.—Q.B.; *dismissed*, **Long Eaton Recreation Grounds Co. v. Midland Ry.** (1902) 71 L. J. K. B. 837; [1902] 2 K. B. 574; 86 L. T. 873; 50 W. R. 693; 67 J. P. 1.—C.A.

Skerratt v. North Staffordshire Ry. (1848) 17

L. J. Ch. 161; 2 Ph. 475; 12 Jur. 46; 5 Railw. Cas. 166.—L.C., *followed*.

East and West India Docks, &c. Ry., In re, Bradshaw, In re (1848) 12 Q. B. 562, 575; 17 L. J. Q. B. 362; 12 Jur. 998; 5 Railw. Cas. 527.—Q.B.; **Pullen v. Liverpool Corporation** (*post*).

Thorp v. Cole (1835) 5 L. J. Ex. 24; 2

Cr. M. & R. 367; 4 Dowl. 437, *approved*.
Holdsworth v. Barsham (1862) 37 L. J. Q. B. 145.—Q.B. *And see post*, col. 1551.

Bright v. Durnell (1836) 4 D. P. C. 756.—

EX.; **Cudliffe v. Walters** (1839) 2 M. & Rob. 232.—COLERIDGE, J.; and **Skerratt v. North Staffordshire Ry.** (*supra*), *discussed and distinguished*.

Shepherd v. Norwich Corporation (1885) 54 L. J. Ch. 1050; 30 Ch. D. 553, 564; 53 L. T. 251; 33 W. R. 841.—NORTH, J.

East and West India Docks, &c. Ry., In re,

Bradshaw, In re, followed.
Holdsworth v. Barsham (*supra*); **Pullen and Liverpool Corporation, In re** (1882) 51 L. J. Q. B. 285, 288; 46 L. T. 391; 46 J. P. 468.—Q.B.

Reg. v. L. & N. W. Ry. (*supra*).

Followed, **Bradby and Southampton Local Board, In re** (1855) 24 L. J. Q. B. 239; 4 El. & Bl. 1014; 3 C. L. R. 771; 1 Jur. (N.S.) 778; 3 W. R. 413.—Q.B.; **Chapman v. Monmouthshire Ry. and Canal Co.** (1857) 27 L. J. Ex. 97; 2 H. & N. 267, 277.—EX.; *referred to*, **Read v. Victoria Station, &c. Ry.** (*supra*, col. 1544); *applied*, **Beckett v. Midland Ry.** (1866) L. R. 1 C. P. 241, 247 (*post*, col. 1548); *referred to*, **Great Northern and City Ry. v. Tillett** (1902) 71 L. J. K. B. 525; [1902] 1 K. B. 874 (*supra*, col. 1542).

Mortimer v. South Wales Ry. (*supra*).

Referred to, **Read v. Victoria Station, &c. Ry.** (*supra*, col. 1544); **Long Eaton Recreation Grounds Co. v. Midland Ry.** (*supra*).

Horrocks v. Metropolitan Ry. (1865) 19

C. B. (N.S.) 139.—C.P., *applied*.
Tanner v. Swindon &c. Ry. (1881) 45 L. T. 209.—Q.B.

Caledonian Ry. v. Lockhart (1860) 3 Macq.

803; 6 Jur. (N.S.) 1311; 3 L. T. 65; 8 W. R. 373.—H.L. (SC.).

Distinguished, **Bagnall v. L. & N. W. Ry.** (1862) 31 L. J. J. Ex. 480; 1 H. & C. 544; 9 Jur. (N.S.) 254; 9 L. T. 419; 10 W. R. 802.—EX. CH.; *dismissed*, **Stone v. Yeovil Corporation** (1876) 45 L. J. C. P. 657; 1 C. P. D. 691, 703; 54 L. T. 854; 24 W. R. 1073.—C.P.D. (affirmed, C.A. *supra*, col. 1541); **Bottomley v. Ambler** (1878) 38 L. T.

545; 26 W. R. 566.—JESSEL, M.R., *explained and not applied*, Reg. v. Poulter (1887) 57 L. J. Q. B. 138; 20 Q. B. D. 132, 139; 58 L. T. 534; 36 W. R. 117; 52 J. P. 244.—C.A.

Caledonian Ry. v. Lockhart, *referred to*.

Holliday v. Wakefield Corporation (1890) 60 L. J. Q. B. 361; [1891] A. C. 81; 64 L. T. 1; 40 W. R. 129; 55 J. P. 325.—H.L. (E.); *affirming* S. C. *nom.* Holliday and Wakefield Corporation, In re (1888) 57 L. J. Q. B. 620; 20 Q. B. D. 699.—C.A. (*supra*, col. 1538).

Collins v. South Staffordshire Ry. (1852) 21 L. J. Ex. 247; 7 Ex. 5; 16 Jur. 843.—EX., *referred to*.

Martin v. Leicester Waterworks Co. (1858) 27 L. J. Ex. 432; 3 H. & N. 463.—POLLOCK, C.B. and BRAMWELL, B.

Martin v. Leicester Waterworks Co., *explained*.

Newbold and Metropolitan Ry., In re (1863) 14 C. B. (N.S.) 405.—C.P., *applied*.

Rhodes v. Airedale Drainage Commissioners (1874) 43 L. J. C. P. 323; L. R. 9 C. P. 508, 511; 31 L. T. 59.—C.P.; *reversed, post*.

Newbold and Metropolitan Ry., In re, and Rhodes v. Airedale Drainage Commissioners, *followed*.

Harper, Ex parte (1874) L. R. 18 Eq. 539; 22 W. R. 942.—JESSEL, M.R., *set aside*.

Harper and G. E. Ry., In re (1875) 44 L. J. Ch. 507; L. R. 20 Eq. 39; 33 L. T. 214; 23 W. R. 371.—JESSEL, M.R.

Dare Valley Ry., In re (1869) L. R. 4 Ch. 554.—SELWYN and GIFFARD, L.J.J., *followed*.

Rhodes v. Airedale Drainage Commissioners (1876) 45 L. J. C. P. 361; 1 C. P. D. 402, 406; 35 L. T. 46; 24 W. R. 1053.—C.A.; *reversing* 45 L. J. C. P. 337; 1 C. P. D. 380.—C.P.D.; and *also* S. C. *supra*.

JESSEL, M.R.—I have before stated my views in *Harper, Ex parte* (*supra*), at great length, and they have been published to the profession; so I will not repeat them, but merely say I still adhere to them. That being so, what is the state of the authorities on the subject? Now it is very much to be regretted that the decision of the C. A. in Chancery [*Dare Valley Ry., In re*] was not drawn to the attention of the C. P. when they gave the decision now under appeal. Of course that Court would have been bound by the decision of the superior Court. However, it was not done, and that decision was made, like my own in *Harper, Ex parte*, in ignorance of the existence of any such decision. But really that decision . . . is conclusive on the point, because there it was decided that, inasmuch as the Lands Clauses Act said that the arbitrations under that Act are to be submissions, it is sufficient to show that they are arbitrations by consent within the meaning of the Common Law Procedure Act. Against that decision of the superior Court there is nothing but the two decisions of the Court of C. P. itself, and, therefore, if we are to be guided by authority, we ought to decide contrary to the view expressed by the Court of C. P., and more so, because the decision of the C. A. in Chancery is that of a Court of equal jurisdiction with this Court, though I am far from saying that in every case this Court is bound to follow the decision of a Court of co-ordinate jurisdiction.—p. 864.

Special Case.

Rhodes v. Airedale Drainage Commissioners. *commented on and followed*.

Bidder v. North Staffordshire Ry. (1878) 4 Q. B. D. 412; 48 L. J. Q. B. 248; 40 L. T. 801; 27 W. R. 540.—C.A.

BRETT, L.J.—It seems to me that in *Rhodes v. Airedale Drainage Commissioners* this Court held that where the promoters and the claimant under the Lands Clauses Consolidation Act, 1845, have agreed to appoint arbitrators, they have agreed to that which is a submission to arbitration within the Common Law Procedure Act, 1854, s. 5, and that consequently the arbitrators or umpire have power to state a special case for the opinion of the High Court of Justice. Therefore the Q. B. D. had jurisdiction to hear and decide upon the special case now before us; and it seems to me to follow that their decision was an "order" within the Supreme Court of Judicature Act, 1873, s. 19, and that this Court is bound to hear an appeal from it.—p. 425.

BRAMWELL and COTTON, L.J.J. to the same effect.

Rhodes v. Airedale Drainage Commissioners.

Applied, Warburton v. Haslingden Local Board (1879) 48 L. J. C. P. 451.—DENMAN and LINDLEY, JJ.; *not applied*, Bexley Local Board v. West Kent Main Sewerage Board (1882) 51 L. J. Q. B. 456; 9 Q. B. D. 518, 521; 47 L. T. 192; 31 W. R. 119; 46 J. P. 519.—MANISTY and WATKIN WILLIAMS, JJ.; *referred to*, Reg. (Moore) v. Abbott (1896) [1897] 2 Ir. R. 362, 410.—Q.B.D. (*affirmed*, C.A.); Ned's Point Battery, In re (1901) [1903] 2 Ir. R. 192, 201.—K.B.D.

East London Union v. Metropolitan Ry. (1869) 38 L. J. Ex. 225; L. R. 4 Ex. 309.—EX., *applied*.

Howell v. Metropolitan District Ry. (1881) 51 L. J. Ch. 158; 19 Ch. D. 508, 514; 45 L. T. 707; 30 W. R. 100.—CHITTY, J.

East London Union v. Metropolitan Ry.;

Howell v. Metropolitan District Ry.;
Ferrers (Earl) v. Stafford and Uttoxeter Ry. (1872) 41 L. J. Ch. 362; L. R. 13 Eq. 524; 26 L. T. 652; 20 W. R. 478.—ROMILLY, M.R.; and **Todd v. Metropolitan District Ry.** (1871) 24 L. T. 435; 19 W. R. 720.—C.P., *discussed*.

Capell v. G. W. Ry. (1882) 51 L. J. Q. B. 601; 9 Q. B. D. 459, 461; 47 L. T. 228.—LOPES J.; *affirmed, post*.

Todd v. Metropolitan District Ry., distinguished.

Capell v. G. W. Ry. (1883) 52 L. J. Q. B. 348; 11 Q. B. D. 345, 350; 48 L. T. 505; 31 W. R. 555.—C.A.; London County Council v. Campbell (1890) 6 Times L. R. 420.—DAY, J.

Todd v. Metropolitan District Ry., applied.

Carnochan v. Norwich and Spalding Ry. (1858) 26 Beav. 169.—M.R., *explained*.

Mercer v. Liverpool, St. Helens and South Lancashire Ry. (1903) 72 L. J. K. B. 128; [1903] K. B. 654; 88 L. T. 374; 51 W. R. 308; 67 J. P. 77.—C.A.

Capell v. G. W. Ry. (supra), reasons in, applied.
London County Council v. Campbell (*supra*).

Beckett v. Midland Ry. (1866) 35 L. J. C. P. 163; L. R. 1 C. P. 241; 1 H. & R. 189; 12 Jur. (N.S.) 231; 13 L. T. 672; 14 W. R.

393.—C.P. (*and see S. C. supra*, col. 1538); and *Fisher v. Pimbley* (1802) 11 East 188.—K.B., *distinguished*.

Falkingham v. Victorian Ry. Commissioners (1900) 69 L. J. P. C. 89; [1900] A. C. 452; 82 L. T. 506.—P.C.

Beckett v. Midland Ry. (*supra*), *discussed*.
Long Eaton Recreation Grounds Co. v. Midland Ry. (1902) 71 L. J. K. B. 837; [1902] 2 K. B. 574.—C.A. (*supra*, col. 1546).

Railstone v. York, Newcastle and Berwick Ry. (1850) 19 L. J. Q. B. 464; 15 Q. B. 404; 14 Jur. 1021.—Q.B., *doubted*.

Richardson v. S. E. Ry. (1851) 11 C. B. 154; 20 L. J. C. P. 236.—C.P.; *affirmed, post, nom. S. E. Ry. v. Richardson*.

JERVIS, C.J.—It seems to me that the words of the Act are plain, and that we may fairly hold that the words "in manner herein provided" in the 68th section incorporate all the previous provisions, as if the company themselves were the moving party. Looking at the language of the 38th and 39th sections, I think it plainly applies to *any* case of disputed compensation, and that we shall be doing less violence to the words of the legislature in so holding, than if we were to limit them in the way we are called upon by the defendants to do. I quite feel that this view, to a certain extent, conflicts with the decision of the Court of Q. B. in *Railstone v. York, &c. Ry.* But it is to be observed that was not the unanimous decision of the Court.—p. 167.

Railstone v. York, &c. Ry., *referred to*.
S. E. Ry. v. Richardson (1852) 21 L. J. C. P. 122; 15 C. B. 810; 16 Jur. 151.—EX. CH.

Railstone v. York, &c. Ry. and Richardson v. S. E. Ry., *held binding*.

Hayward v. Metropolitan Ry. (1864) 33 L. J. Q. B. 73; 4 B. & S. 787; 10 Jur. (N.S.) 418; 9 L. T. 680; 12 W. R. 577.—Q.B.

Balls v. Metropolitan Board of Works (1866) 35 L. J. Q. B. 101; L. R. 1 Q. B. 337; 12 Jur. (N.S.) 183; 13 L. T. 702; 14 W. R. 370.—Q.B.; and *Hayward v. Metropolitan Ry.*, *referred to*.

Pearson v. G. N. Ry. (1870) 18 W. R. 259; L. R. 7 Q. B. 785, n.—Q.B., *explained and approved*.

Fitzhardinge (Lord) and Gloucester and Berkeley Canal Co., *In re* (1872) 41 L. J. Q. B. 316; L. R. 7 Q. B. 776, 782; 27 L. T. 196; 20 W. R. 800.—Q.B.

BLACKBURN, J.—If the warrant was issued for causing a jury to be summoned the offer which had been made would be the final and conclusive offer, and it would be too late to make another offer afterwards. That was in fact the decision in . . . *Pearson v. G. N. Ry.* That appears to me to have been a right decision, and is what I myself should lay down if it were *res integra*.—p. 320.

Fitzhardinge (Lord) and Gloucester, &c. Canal Co., *In re*, *followed*.

Gray and N. E. Ry., *In re* (1876) 45 L. J. Q. B. 818; 1 Q. B. D. 696; 34 L. T. 757; 24 W. R. 758.

QUAIN, J.—The true way of looking at it, and I think we are following out the decision in *Fitzhardinge (Lord) and Gloucester, &c. Canal Co.*, *In re*, is to say that the final offer must be made before the arbitration has begun, that is to say, on the appointment of the last arbitrator.—p. 820.
BLACKBURN, J. to the same effect.

Pearson v. G. N. Ry. (*supra*), *approved*.
Reg. v. Manley Smith (1883) 53 L. J. Q. B. 115; 12 Q. B. D. 481; 32 W. R. 275.—COLERIDGE, C.J. and MATHEW, J.

Fitzhardinge (Lord) and Gloucester, &c. Canal Co., *In re* (*supra*), *followed*.

Reg. v. Manley Smith, *distinguished*.

Lascelles v. Swansea School Board (1899) 69 L. J. Q. B. 24.

RIDLEY, J.—In the present case the defendants, who are the promoters, have made an offer, and have done nothing to entitle the plaintiffs to say it has been withdrawn. In *Fitzhardinge (Lord) and Gloucester, &c. Co.*, *In re*, expressions are to be found in the judgments which seem to show that if in that case the second offer by the promoters had not been made, the first would have been held to be still in existence. The decision in *Reg. v. Manley Smith* turned upon a different point. It was there held that, inasmuch as the second offer by the promoters was not made under sect. 38 of the Lands Clauses Act, they could not rely upon it as a "sum previously offered" within the meaning of sect. 51.—p. 26.

Quick v. L. & N. W. Ry. (1849) 18 L. J. Q. B. 89; 5 Railw. Cas. 20; 5 D. & L. 685; 13 Jur. 408.—WIGHTMAN, J. (for ERLE, J.), *overruled*.

Gould v. Staffordshire Waterworks Co. (1850) 19 L. J. Ex. 281; 5 Ex. 214; 6 Railw. Cas. 586; 1 L. M. & P. 264; 14 Jur. 528.—EX.

Morgan v. Smith (1842) 11 L. J. Ex. 379; 9 M. & W. 427.—EX., *applied*.

Loss v. York, Newcastle and Berwick Ry. (1849) 18 L. J. Q. B. 199; 5 D. & L. 695; 5 Railw. Cas. 516.—WIGHTMAN, J. (for ERLE, J.).

Morgan v. Smith, *referred to*.

Holdsworth v. Barsham (1861) 31 L. J. Q. B. 145.—Q.B.; *reversed on one point, nom. Holdsworth v. Wilson* (*post*, col. 1551).

Ross v. York, Newcastle and Berwick Ry., *discussed*.

Metropolitan Ry. v. Turnham (1863) 32 L. J. M. C. 249; 14 C. B. (N.S.) 212, 223; 8 L. T. 280; 11 W. R. 695.—C.P.

Metropolitan Ry. v. Turnham, *approved*.

Hayward v. Metropolitan Ry. (1864) 33 L. J. Q. B. 73; 4 B. & S. 787.—Q.B. (*supra*, col. 1549).

Ross v. York, &c. Ry. (*supra*); *Tennant v. Belfast Corporation* (1847) 11 Ir. L. R. 290.—Q.B.; and *Scully v. G. S. & W. Ry.*, *In re* (1848) 11 Ir. L. R. 292.—Q.B., *followed*.

Metropolitan Ry. v. Turnham, *not followed*.

Owen v. L. & N. W. Ry. (1867) 37 L. J. Q. B. 35; 7 B. & S. 758; L. R. 3 Q. B. 54, 59; 17 L. T. 210; 16 W. R. 125.—Q.B.

Tennant v. Belfast Corporation, *not applied*.

Andrew to Keenan, *In re* (1899) [1900] 1 Ir. R. 33, 39.—PORTER, M.R.

Owen v. L. & N. W. Ry., *approved*.

Sandback Charity Trustees and North Staffordshire Ry., *In re* (1877) 3 Q. B. D. 1; 47 L. J. Q. B. 10; 37 L. T. 391; 26 W. R. 229.—C.A.

BRETT, L.J.—*Owen v. L. & N. W. Ry.* decided two things. First, the ground on which the Courts exercise a jurisdiction in a matter of

taxation is that the office of taxing costs is the business of the Court itself: that this office is delegated to one of its officers, and that the Court has, necessarily, jurisdiction to control this delegated authority, and therefore a right to review the master's taxation. Secondly, that although a master of the Court of Q. B. was appointed by the legislature to tax the costs under the Lands Clauses Consolidation Act, 1845, the master in the matter of taxation was not acting as master, but as a person designated by the Act, and, moreover, as the proceedings were not proceedings in the Court, there was no jurisdiction to review the taxation. I am of opinion that these two points were rightly decided.—p. 4.

Owen v. L. & N. W. Ry. and Sandback Charity Trustees and North Staffordshire Ry., In re.

Followed, Shrewsbury (Earl) v. Wirral Rys. (*post*, col. 1552); *not applied*. Andrew to Keenan, In re (1899) [1900] 1 Ir. R. 33, 39.—PORTER, M.R.

Owen v. L. & N. W. Ry., not applied.

Covington v. Metropolitan District Ry. (1902) 72 L. J. K. B. 93; [1903] 1 K. B. 231, 238: 87 L. T. 649; 51 W. R. 428.—K.B.D.

Collis' Claim, Sheffield Waterworks Act, In re (1865) 35 L. J. Ex. 60; L. R. 1 Ex. 54.—EX., not followed.

Owen v. L. & N. W. Ry. (1867) L. R. 3 Q. B. 54, 57 (*supra*, col. 1550).

Holdsworth v. Wilson (1863) 32 L. J. Q. B. 289; 4 B. & S. 1; 10 Jur. (N.S.) 171; 8 L. T. 434; 11 W. R. 733.—EX. CH.; reversing, on one point, S. C. nom. Holdsworth v. Barsham (*supra*, col. 1550), approved.

Metropolitan District Ry. v. Sharpe (1880) 5 App. Cas. 425; 50 L. J. Q. B. 14; 43 L. T. 130; 28 W. R. 617; 44 J. P. 716.—H.L. (E.); affirming S. C. nom. Sharpe v. Metropolitan District Ry. (1879) 48 L. J. Q. B. 325; 4 Q. B. D. 645; 40 L. T. 416; 27 W. R. 420.—C.A.

SELBORNE, L.C.—It appears to me that the judgment in *Holdsworth v. Wilson* may be supported upon an intelligible principle. The costs are not created by taxation, nor is the legal right to recover them created by taxation. The right to recover them is given by the statute, the costs have been actually incurred, and in other cases of costs which are subject to taxation it is not generally a condition precedent of a demand, or of an action brought upon a demand for costs, that the costs should have been taxed. "Settlement" or taxation is merely a mode of determining in a quasi judicial manner, by a ministerial officer of the Court, disputed questions of amount when they arise. The action is founded upon the right; and a demand of that which the party considers himself entitled to has been made. In the action the first question to be determined is, has he the right which he claims or not? If he has, it is possible that there may be no question as to the amount; in that case there will be no need of taxation. But if a question of amount still remains to be determined, the machinery of taxation is convenient; and it is prescribed by the statutes, as subsidiary for the purpose of justice, but not as the foundation of the right. That seems to me to be the principle of the decision in *Holdsworth v. Wilson*.

•O.C.

I think it is one which cannot be shown to be unsound, although some technical arguments may plausibly be advanced against it; but, it having been so decided, I think your lordships will do wisely not to dissent from that decision.—p. 434.

Metropolitan District Ry. v. Sharpe: Sharpe v. Metropolitan District Ry.

Referred to, Spencer v. Metropolitan Board of Works (1882) 52 L. J. Ch. 249; 22 Ch. D. 142, 157; 47 L. T. 459; 31 W. R. 347.—C.A., COTTON, L.J. *dissenting*; explained and not applied, G. W. Ry. v. Swindon and Cheltenham Extension Ry. (1882) 52 L. J. Ch. 306; 22 Ch. D. 677, 686; 47 L. T. 709; 31 W. R. 479.—C.A. COTTON, L.J. *dissenting*; affirmed (1884) 53 L. J. Ch. 1075; 9 App. Cas. 787.—H.L. (E.) (*supra*, col. 1536); distinguished, Capell v. G. W. Ry. (1883) 52 L. J. Q. B. 348; 11 Q. B. D. 345, 350; 48 L. T. 503; 31 W. R. 555.—C.A.

Metropolitan District Ry. v. Sharpe, explained.

Shrewsbury (Earl) v. Wirral Rys. (1895) 64 L. J. Ch. 850; [1895] 2 Ch. 812, 817; 12 R. 546; 73 L. T. 234; 44 W. R. 19.—C.A.

LINDLEY, L.J.—The point decided there [*Metropolitan District Ry. v. Sharpe*] was that a person could bring an action under this statute for his costs without going to the taxing master at all; but the decision in that case shows that the taxing master is not to be treated as an ordinary taxing master in an action, but as having a jurisdiction imposed or conferred upon him by the statute, and which, treating him as an inferior Court, he can be compelled to perform either by *mandamus*, or *certiorari*, when those are the proper remedies.—p. 854.

LOPES, L.J.—I understand those cases [*Owen v. L. & N. W. Ry. and Sandback Charity Trustees and North Staffordshire Ry., In re* (*supra*)] to come to this, that if [under sect. 1 of the Lands Clauses Consolidation Act, 1869] the master allows costs to one of the parties where the statute does not give them, or disallows them where the statute gives them, the Court has no power to interfere with the taxation on a motion to review, because the master is not acting in the matter *ex officio* as the officer of the Court, but as a person named by the Act.—p. 855.

Metropolitan District Ry. v. Sharpe, referred to.

West Ham Union v. St. Matthew's, Bethnal Green (1896) 65 L. J. M. C. 201; [1896] A. C. 477; 75 L. T. 286; 60 J. P. 740.—H.L. (E.).

LORD MACNAGHTEN.—It has been suggested in the course of the argument that the proper course in the present case would have been for the appellants to have brought an action against the churchwardens and guardians for the recovery of their costs in this House. They would then, it is said, have been within the protection of sect. 4 of the [Poor Law (Payment of Debts)] Act of 1859. But it is difficult to see how such an action could lie. The grounds of convenience which induced this House in *Metropolitan District Ry. v. Sharpe* to follow the decision of the Ex. Ch. in *Holdsworth v. Wilson* (*supra*, col. 1551), would not have any application. The Supreme Court cannot sit in review on the H. L. The officers of the Supreme Court are not competent to deal with costs in

this House. It seems to me that the certificate of the Clerk of the Parliaments must be a condition precedent to an action at law for the recovery of costs in the H. L. I do not think that *Metropolitan District Ry. v. Sharpe* can be regarded as an authority to the contrary.—p. 206.

Reg. v. London Corporation (1867) L. R. 2 Q. B. 292; 16 L. T. 280.—Q.B., *approved*.
Sharpe v. Metropolitan District Ry. (1879) 4 Q. B. D. 645, 649 (*supra*, col. 1551).

Reg. v. London Corporation, *referred to*.

Reg. v. Stone (1866) 35 L. J. M. C. 208; L. R. 1 Q. B. 529; 14 L. T. 552; 14 W. R. 791, *principle applied*.
Great Northern and City Ry. v. Tillett (1902) 71 L. J. K. B. 525; [1902] 1 K. B. 874; 86 L. T. 723; 50 W. R. 652.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Compensation by Justices.

Edmundson, In re (1852) 17 Q. B. 67; S. C. *nom.* **Reg. v. Leeds and Bradford Ry.**, 21 L. J. M. C. 193; 16 Jur. 817.—Q.B., *distinguished*.

Reg. v. Hannay (1874) 44 L. J. M. C. 27; 31 L. T. 702; 23 W. R. 164.

BLACKBURN, J.—In that case [*Edmundson, In re*], the land had been injuriously affected, and then instead of the company taking steps to get the compensation assessed by a jury the party interested becomes the actor and sets the justices in motion; but that proceeding is far more like a complaint than the present case.—p. 29.

Edmundson, In re, *overruled*.

Reg. v. Hannay and Reg. v. Combe (1863) 32 L. J. M. C. 67; 11 W. R. 441.—MELLOR, J., *referred to*.

Reg. v. Edwards (1884) 13 Q. B. D. 586; 53 L. J. M. C. 149; 51 L. T. 586; 49 J. P. 117.—C.A.

BRETT, M.R.—At the time *Edmundson, In re*, was decided, the working of the Lands Clauses Act had not become so well known as it is now. If it had been that case would, I think, have been decided differently. The time, I think, has now come when, upon the invitation of the Div. Court which decided the present case, we ought, as I for one am prepared to do, to say that *Edmundson, In re*, was wrongly decided.—p. 593.

BOWEN and FRY, L.JJ. to the same effect.

Reg. v. Hannay, *referred to*.

Great Northern and City Ry. v. Tillett [1902] 1 K. B. 874 (*supra*).

4. SUPERFLUOUS LANDS.

City of Glasgow Union Ry. v. Caledonian Ry. (1871) L. R. 2 H. L. (Sc.) 160, *applied*.
Horne v. Lymington Ry. (1874) 31 L. T. 167, 171.—Q.B.

G. W. Ry. v. May (1874) 43 L. J. Q. B. 233; L. R. 7 H. L. 283; 31 L. T. 137; 43 W. R. 141.—H.L. (E.); *affirming* S. C. *nom.* **May v. G. W. Ry.** (1872) 42 L. J. Q. B. 6; L. R. 8 Q. B. 26.—EX. CH.; and **City of Glasgow Union Ry. v. Caledonian Ry.**, *explained*.

Moody v. Corbett (1866) 35 L. J. Q. B. 161; L. R. 2 Q. B. 510; 14 W. R. 737.—EX. CH.; *reversing in part* 34 L. J. Q. B. 166; 5 B. & S. 859.—Q.B., *distinguished*.

Hooper v. Bourne (1877) 3 Q. B. D. 258; 47 L. J. Q. B. 437; 37 L. T. 594; 26 W. R. 295.—C.A.; *affirming*, 46 L. J. Q. B. 509; 2 Q. B. D. 339; 25 W. R. 672.—Q.B.D.; C.A. *affirmed*, (1880) 49 L. J. Q. B. 370; 5 App. Cas. 1; 42 L. T. 97; 28 W. R. 493; 44 J. P. 327.—H.L. (E).

BRAMWELL and BRETT, L.JJ. discussed *G. W. Ry. v. May*. See judgments.

COTTON, L.J.—At first sight *City of Glasgow Union Ry. v. Caledonian Ry.* may appear to support the argument for the defendants, but that case really turned upon the provisions of the Lands Clauses Consolidation (Scotland) Act as to lands purchased for extraordinary purposes, which are very similar to those contained in sects. 12 and 13 of the English Act. No doubt some remarks are made in the judgments delivered in the H. L. which appear to favour the contention for the defendants, but it must be recollected that they were uttered with reference to the facts before the House, and that it was intended to point out that lands purchased by agreement for extraordinary purposes do not vest in adjoining owners: I cannot think that it was intended to lay down that lands which might have been taken compulsorily cannot become superfluous if they have been conveyed to the company pursuant to an agreement. . . . If the railway company had after the expiration of the ten years put up the land for sale as superfluous land, that circumstance would, in my opinion, be almost decisive against them; and this seems to have been the view of Lord Blackburn in *Moody v. Corbett*; and if circumstances which tell against a railway company may be looked at, in like manner those may be considered which seem to be in their favour.—pp. 286, 287.

G. W. Ry. v. May, *explained*.

Betts v. G. E. Ry. (1878) 3 Ex. D. 182; 47 L. J. Ex. 461.—C.A.; *affirmed*, (1879) 49 L. J. Ex. 197; 42 L. T. 1; 28 W. R. 50; 44 J. P. 282.—H.L. (E).

BRAMWELL, L.J.—I wish to say that in the judgment which I pronounced in *Hooper v. Bourne* (*supra*), I intended to intimate my entire concurrence with the decision in *G. W. Ry. v. May*. I think that in that case the H. L. laid down a correct principle for determining what are superfluous lands.—p. 186.

BRETT, L.J.—The question, which we have to determine, seems to me to depend upon the principle, which in *Hooper v. Bourne* we considered to be the result of *G. W. Ry. v. May*. It follows that we must consider whether upon the last day of the ten years if all the facts had been known it could have been foreseen that, owing to the ordinary development of the railway or neighbourhood, the land would within a reasonable time be required for the purposes of the undertaking.—p. 190.

COTTON, L.J.—The decision at which we arrived in *Hooper v. Bourne* was entirely consistent with the decision in *G. W. Ry. v. May*. The principle laid down by the H. L. in that case was of course binding upon us, and we intended to follow it. When Lord Cairns spoke of a survey being made at the end of the ten years, for the purpose of determining what land at that moment was

superfluous, he did not mean that the officers of the railway were then to make a survey, and to decide whether the land was required for the purposes of the undertaking: for it is obvious that their decision would in no way be binding: what in my opinion Lord Cairns meant, was that the expiration of the ten years is the period to which the tribunal is to look, when it has to decide whether the land in dispute is superfluous; and the tribunal may take notice of facts which have since become known for the purpose of deciding, whether it could then have been foreseen, that according to the ordinary development of the railway and the neighbourhood, the land would be required for the purposes of the railway within a reasonable time after the expiration of that period.—p. 192.

G. W. Ry. v. May.

Applied, Hooper v. Bourne (1880) 5 App. Cas. 1, 18 (*supra*); *discussed*, Metropolitan District Ry. and Cosh, In re (1880) 49 L. J. Ch. 277; 13 Ch. D. 607, 615; 42 L. T. 73; 28 W. R. 685; 44 J. P. 393.—C.A. BAGGALLAY, L.J., *doubting*; Duffy's Estate, In re (*post*); *explained and not applied*, McEvoy v. G. N. (Ireland) Ry. (1898) [1900] 2 Ir. R. 325.—Q.B.D.; *affirmed*, (1899).—C.A.

Hooper v. Bourne (*supra*, col. 1554).

Explained, Betts v. G. E. Ry. (*supra*); *not applied*, Hobbs v. Midland Ry. (1882) 20 Ch. D. 418, 431 (*post*); *referred to*, Bayley v. G. W. Ry. (1884) 26 Ch. D. 434, 456; 51 L. T. 337.—C.A.; *applied*, James v. Lovel (1887) 56 L. T. 739, 742; 35 W. R. 626.—KEKEWICH, J.; Barnard v. G. W. Ry. (*post*, col. 1557).

Betts v. G. E. Ry., referred to.

* Metropolitan District Ry. and Cosh, In re (1880) 13 Ch. D. 607, 618 (*supra*); Bobbett v. S. E. Ry. (1882) 51 L. J. Q. B. 161; 9 Q. B. D. 424; 46 L. T. 31; 46 J. P. 823.—DENMAN, J.

Metropolitan District Ry. and Cosh, In re.

Applied, Rosenberg v. Cook (1881) 51 L. J. Q. B. 170; 8 Q. B. D. 162, 166; 30 W. R. 344.—C.A.; *discussed*, Ware v. L. B. & S. C. Ry. (1883) 52 L. J. Ch. 198; 47 L. T. 541; 31 W. R. 228.—PEARSON, J.; *referred to*, Smith and Stott's Contract, In re (1888) 29 Ch. D. 1009, n.; 48 L. T. 512; 31 W. R. 411.—FRY, J.; Midland Ry. v. Wright (1901) 70 L. J. Ch. 411; [1901] 1 Ch. 738; 84 L. T. 225; 49 W. R. 474.—BYRNE, J. See "RAILWAY."

Astley v. Manchester, Sheffield and Lincolnshire Ry. (1858) 27 L. J. Ch. 478; 2 De G. & J. 453; 4 Jur. (N.S.) 567; 6 W. R. 561.—CHELMSFORD, L.C., *discussed*.

Smith v. Smith (1868) 38 L. J. Ex. 37; L. R. 3 Ex. 282.—EX., *approved and applied*.

Duffy's Estate, In re (1896) [1897] 1 Ir. R. 295.—ROSS, J.; *affirmed*, (1899).—C.A.

Coventry v. L. B. & S. C. Ry. (1867) 37 L. J. Ch. 90; L. R. 5 Eq. 104; 17 L. T. 368; 16 W. R. 267.—ROMILLY, M.R., *distinguished*.

Hobbs v. Midland Ry. (1882) 51 L. J. Ch. 320; 20 Ch. D. 418, 428; 46 L. T. 270; 30 W. R. 516.—MANISTY, J.

Carington (Lord) v. Wycombe Ry. (1868) 37

L. J. Ch. 213; L. R. 3 Ch. 377.—CAIRNS and SELWYN, L.JJ., *approved*.
L. & S. W. Ry. v. Blackmore (1870) 39 L. J. Ch. 713; L. R. 4 H. L. 616, 620; 23 L. T. 504; 19 W. R. 305.—H.L. (E.); *varying* S. C. *nom.* Blackmore v. L. & S. W. Ry. (1868) 38 L. J. Ch. 19.—STUART, V.-C.

Carington (Lord) v. Wycombe Ry., *distinguished*.

Hobbs v. Midland Ry. (1882) 20 Ch. D. 418, 435 (*supra*).

Carington (Lord) v. Wycombe Ry. and Hobbs v. Midland Ry., *discussed*.

Dunhill v. N. E. Ry. (1895) 65 L. J. Ch. 178; [1896] 1 Ch. 121; 73 L. T. 644; 44 W. R. 231; 60 J. P. 228.—C.A.; *reversing* W. N. (1895) p. 116.—KEKEWICH, J.

LINDLEY, L.J.—In that case [*Carington (Lord) v. Wycombe Ry.*] the land was obviously land not required for the purposes of the railway company; and in that case there was no such element as we have to deal with here—that is to say, an Act of Parliament compelling the railway company to part with the land. With regard to *Hobbs v. Midland Ry.* I think the view taken by Manisty, J. was right—that if a railway company sells land before the prescribed period has expired, *prima facie* that raises an inference that the company does not require the land for the purpose of the railway; but that that does not relieve the Court from the necessity of enquiring whether the land is in fact required or not. If the Court finds, as Manisty, J. found in *Hobbs v. Midland Ry.*, that the land is required, and has nevertheless been sold by an *ultra vires* proceeding, it ought not to infer from the sale itself, what is contrary to the fact, that the land is superfluous land. Therefore I think that that decision was perfectly right, and that the principle upon which the decision proceeded was also perfectly right. Kekewich, J. thought that *Carington (Lord) v. Wycombe Ry.* was opposed to *Hobbs v. Midland Ry.*; but, in my opinion it is clearly distinguishable from that case, and also from this case.—p. 180.

A. L. SMITH and RIGBY, L.JJ. to the same effect.

L. & S. W. Ry. v. Blackmore; Blackmore v. L. & S. W. Ry. (*supra*).

Referred to, Deards v. Goldsmith (1879) 40 L. T. 331.—Q.B.D.; *applied*, Turner v. Turner (1880) 14 Ch. D. 829, 834; 42 L. T. 495; 28 W. R. 859; 44 J. P. 744.—MALINS, V.-C.; *not applied*, Hobbs v. Midland Ry. (1882) 20 Ch. D. 418, 436 (*supra*).

L. & S. W. Ry. v. Blackmore (*supra*), *distinguished*.

Macfie v. Callander and Oban Ry. (1898) 67 L. J. P. C. 58; [1898] A. C. 270; 78 L. T. 598.—H.L. (SC.); *affirming*, (1897) 24 Rettie 1156; 34 Scottish Law Reporter 828.

LORD SHAND.—In *Blackmore's Case* it is to be observed in the first place that sect. 121 [Lands Clauses (Scotland) Act, 1845] was the section with which the Court had to deal, and not the section [sect. 120] with which we are here concerned. In the next place, it appears that in that case both parties were agreed that the land was superfluous, whereas here we have the parties directly in controversy upon that

subject; and in the third place it appears that in the case of *Blackmore* not only had the directors taken the view that the land was superfluous—from which, indeed, they did not depart in the litigation—but in point of fact they had gone on and actually sold the land. In these circumstances it appears to me that that case can be of no authority for the present case; and I agree . . . that the Lord Ordinary was attached rather too great importance to the use of the word "stamping" in the judgment of Lord Westbury, which probably was an expression which may be said to have been a little stronger than the case required, and which is inapplicable to the circumstances here in considering the effect of a different section of the statute.—p. 66.

LORD HERSCHELL to the same effect.

London School Board v. Smith W. N. (1895) 37.—KEKEWICH, J., *followed*.

Barnard v. G. W. Ry. (1903) 86 L. T. 798.—KEKEWICH, J.

L. & S. W. Ry. v. Gomm (1882) 51 L. J. Ch. 530; 20 Ch. D. 562; 46 L. T. 449; 30 W. R. 620.—C.A. JESSEL, M.R., SIR J. HANNEN and LINDLEY, L.JJ.; *reversing* 51 L. J. Ch. 193; 45 L. T. 505; 30 W. R. 321.—KAY, J., *dicta discussed*.

Thackway and Young's Contract, In re (1888) 58 L. J. Ch. 72; 40 Ch. D. 34; 59 L. T. 815; 37 W. R. 74.—CHITTY, J.

L. & S. W. Ry. v. Gomm, *distinguished*.

Ray v. Walker (1892) 61 L. J. Q. B. 718; [1892] 2 Q. B. 88.—CAVE, J. *See judgment*. And *see* "PERPETUITY."

LETTERS.

Pope v. Curl (1741) 2 Atk. 342.—HARDWICKE, L.C.; and **Thompson v. Stanhope** (1774) Amb. 757.—AFSLEY, L.C., *applied*.

Perceval (Lord) v. Phipps (1813) 2 V. & B. 19; 13 R. R. 1.—V.C., *distinguished*.

Geor v. Pritchard (1818) 2 Swanst. 402.—ELDON, L.C.

ELDON, L.C.—Lord Hardwicke [in *Pope v. Curl*] says:—"Another objection has been made by the defendant's counsel, that where a man writes a letter it is in the nature of a gift to the receiver; but I am of opinion that it is only a special property in the receiver; possibly the property of the paper may belong to him; but this does not give a license to any person whatsoever to publish them to the world." If he had stopped there, doubt might have been entertained whether the receiver was not at liberty to publish them to the world, but he proceeds, "for, at most, the receiver has only a joint property with the writer." No one can read *Thompson v. Stanhope* without seeing that this was understood at that time to be the doctrine of the Court. . . . Now I say, that, if in the case before the V.C. [*Perceval v. Phipps*], Lady Perceval had given to Phipps a right to publish her letters, this case is the converse of that; and that the defendant, if he previously had it, has renounced the right of publication.—pp. 425, 426, 427.

Pope v. Curl. *See*

Oliver v. Oliver (1861) 11 C. B. (N.S.) 139; 31 L. J. C. P. 4; 8 Jur. (N.S.) 512; 5 L. T. 287; 10 W. R. 18.—C.P.

Pope v. Curl, *approved*.

Lytton (Earl) v. Devey (1884) 54 L. J. Ch. 293; 52 L. T. 121.—BACON, V.-C.

Pope v. Curl, *referred to*.

Hennessy v. Wright (1888) 57 L. J. Q. B. 580; 21 Q. B. D. 509, 512; 59 L. T. 323; 53 J. P. 52.—FIELD and WILLS, JJ.

Stapleton v. Foreign Vineyard Association (1864) 11 L. T. 77; 12 W. R. 976.—WOOD, V.-C., *referred to*.

Hermann Loog v. Bean (1884) 26 Ch. D. 306; 53 L. J. Ch. 1128; 51 L. T. 442; 32 W. R. 994; 48 J. P. 708.—C.A. COTTON, BOWEN and FRY, L.JJ.

BOWEN, L.J.—I do not in the least rely upon *Stapleton v. Foreign Vineyard Association*—which indeed is not in point—but it seems to suggest a *modus vivendi* in this case, which is that the letters should be opened by those persons to whose premises they are addressed, but in the presence of the appellant, and that they should be handed over to him if they appear to relate to his own private affairs.—p. 317.

LIBRARY.

Att.-Gen. v. Croydon Corporation (1889) 58 L. J. Ch. 527; 42 Ch. D. 178; 61 L. T. 291; 37 W. R. 648; 53 J. P. 726.—STIRLING, J. Superadded by the Public Libraries Act, 1892 (55 & 56 Vict. c. 53), s. 3 (c).

LICENCE.

Cornish v. Stubbs (1870) 39 L. J. C. P. 202; L. R. 5 C. P. 334; 22 L. T. 21; 18 W. R. 547.—C.P., *followed*.

Mellor v. Watkins (1874) L. R. 9 Q. B. 400; 23 W. R. 55.—Q.B.

Winter v. Brockwell (1807) 8 East 308; 9 R. R. 454, *applied*.

Plimmer v. Wellington Corporation (1884) 53 L. J. P. C. 104; 9 App. Cas. 699; 51 L. T. 475; 49 J. P. 116.—P.C.

Winter v. Brockwell, *distinguished*.

Aldin v. Latimer & Co. (1894) 63 L. J. Ch. 601; [1894] 2 Ch. 437; 8 R. 352; 71 L. T. 119; 42 W. R. 453.—STIRLING, J.

Cocker v. Cowper (1834) 1 C. M. & R. 418; 5 Tyr. 102.—EX. PL.; and **Mellor v. Watkins**, *applied*.

Aldin v. Latimer & Co. (1894) (*supra*).

Wood v. Manley (1839) 9 L. J. Q. B. 27; 11 A. & E. 84; 3 P. & D. 5; 3 Jur. 1028.—Q.B., *referred to*.

Salter v. Woollams (1841) 40 L. J. C. P. 145; 2 Man. & G. 650; 3 Scott (N.R.) 59.—C.P.

Kerrison v. Smith (1897) 66 L. J. Q. B. 762; [1897] 2 Q. B. 455, 459; 77 L. T. 344.—**LAWRANCE and COLLINS, JJ.** See **Wilson v. Taverner** (1901) 70 L. J. Ch. 263; [1901] 1 Ch. 578; 84 L. T. 48.—**JOYCE, J.**

Haigh v. Jagger (1847) 17 L. J. Ex. 110; 16 M. & W. 525.—**EX.**, *applied*.
Low Moor Co. v. Stanley Coal Co. (1875) 33 L. T. 436.—**EX.**; *affirmed*, 34 L. T. 186.—**C.A.**

LIEN.

Bock v. Gorrisen, 29 L. J. Ch. 673; 6 Jur. (N.S.) 547; 8 W. R. 488.—**M.R.**; *reversed*, (1860) 2 De G. F. & J. 434; 30 L. J. Ch. 39; 7 Jur. (N.S.) 81; 3 L. T. 424; 9 W. R. 209.—**L.C.**

Reeves v. Capper (1838) 8 L. J. C. P. 44; 5 Bing. (N.C.) 186; 6 Scott, 877; 1 Arn. 427; 2 Jur. 1067.—**C.P.**, *applied*.
Walker v. Clyde (1861) 10 C. B. (N.S.) 381.—**C.P.**; **Donald v. Suckling** (1866) 35 L. J. Q. B. 232; L. R. 1 Q. B. 585, 601; 7 B. & S. 783; 12 Jur. (N.S.) 795; 14 L. T. 772; 15 W. R. 13.—**Q.B.**; **Meyerstein v. Barber** (1866) 36 L. J. C. P. 48; L. R. 2 C. P. 38, 52; 15 L. T. 355.—**C.P.**; *affirmed*, **EX. CH.** and **H.L. (E.)**. [*See post*, "SHIPPING."]
Burdick v. Sewell (1883) 10 Q. B. D. 363; 48 L. T. 705.—**FIELD, J.** (*reversed*, **C.A.**, but *restored*, **H.L. (E.)**). [*See post*, "SHIPPING (CHARTER-PARTY)."]
Cochrane v. Moore (1890) 59 L. J. Q. B. 377; 25 Q. B. D. 57; 63 L. T. 153; 38 W. R. 588; 54 J. P. 804.—**C.A.**; **Mills v. Charlesworth** (1890) 59 L. J. Q. B. 530; 25 Q. B. D. 421; 63 L. T. 508; 39 W. R. 1.—**C.A.**; *discussed*, **Bateman v. Green** (1867) Ir. R. 2 C. L. 166.—**Q.B.**

Alliance Bank v. Broom (1864) 34 L. J. Ch. 256; 2 Dr. & Sm. 289; 5 N. R. 69; 10 Jur. (N.S.) 1121; 11 L. T. 332; 13 W. R. 127.—**KINDERSLEY, V.-C.**
Referred to, **Leask v. Scott** (1877) 46 L. J. Q. B. 576; 2 Q. B. D. 376; 36 L. T. 784; 25 W. R. 654.—**C.A.**; *applied*, **Miles v. New Zealand Alford Estate Co.** (1886) 55 L. J. Ch. 801; 32 Ch. D. 266; 54 L. T. 582; 34 W. R. 669.—**C.A.**; **Reichel v. Oxford (Bishop)** (1887) 56 L. J. Ch. 1023; 35 Ch. D. 48, 69; 56 L. T. 539.—**NORTH, J.**; *affirmed*, **C.A.**

Chapman v. Allen (1832) Cro. Car. 271, *applied*.
Judson v. Etheridge (1833) 1 C. & M. 743; 3 Tyr. 954; 2 L. J. Ex. 300.—**EX.**

Chapman v. Allen and Judson v. Etheridge, *applied*.
Jackson v. Cummins (1839) 5 M. & W. 342; 8 L. J. Ex. 265; 3 Jur. 436.—**EX.**

Chase v. Westmore (1816) 5 M. & S. 180; 2 Marsh. 346; 17 R. R. 301.—**K.B.**, *adopted*.
Scarfe v. Morgan (1838) 4 M. & W. 270; 1 H. & H. 292; 7 L. J. Ex. 324; 2 Jur. 569.—**EX.**

Yorke v. Grenough (1703) 2 Ld. Raym. 866, *followed*.
Wallace v. Woodgate (1824) 1 Car. & P. 575; R. & M. 193.—**BEST, C.J.**

Yorke v. Grenough and Wallace v. Woodgate, *followed*.
Bevan v. Waters (1828) 3 Car. & P. 520; M. & M. 235.—**BEST, C.J.**

Yorke v. Grenough; Wallace v. Woodgate and Jacobs v. Latour (1828) 2 M. & P. 201; 5 Bing. 130; 6 L. J. (C.S.) C. P. 243.—**C.P.**, *followed*.
Judson v. Etheridge (1833) 1 C. & M. 743; 3 Tyr. 954; 2 L. J. Ex. 300.—**EX.**

Jacobs v. Latour, *distinguished*.
Bevan v. Waters (1828) 3 Car. & P. 520; M. & M. 236.—**BEST, C.J.**, *approved*.
Scarfe v. Morgan (1838) 4 M. & W. 270; 1 H. & H. 292; 7 L. J. Ex. 324.—**EX.**

Bevan v. Waters and Scarfe v. Morgan, *adopted*.
Jackson v. Cummins (1839) 5 M. & W. 342; 8 L. J. Ex. 265; 3 Jur. 436.—**EX.**

Scarfe v. Morgan, *referred to*.
Baumont v. Brengeri (1847) 5 C. B. 301.—**C.P.**

Scarfe v. Morgan, *considered*.
Taylor v. Chester (1869) 10 R. & S. 237; 38 L. J. Q. B. 225; L. R. 4 Q. B. 309; 21 L. T. 359.—**Q.B.**

Jackson v. Cummins, *followed*.
Forth v. Simpson (1849) 13 Q. B. 680; 18 L. J. Q. B. 263; 13 Jur. 1024.—**Q.B.**

Somes v. British Empire Shipping Co. (1860) 8 H. L. Cas. 338; 30 L. J. Q. B. 229; 6 Jur. (N.S.) 761; 8 W. R. 707.—**H.L. (E.)**, *applied*.
Bruce v. Everson (1883) 1 Cab. & E. 18.—**STEPHEN, J.**

Deeze, Ex parte (1748) 1 Atk. 228.—**L.C.**, *followed*.

Witt, In re, Shubbrook, Ex parte (1876) 45 L. J. Bk. 118; 2 Ch. D. 489; 34 L. T. 785; 24 W. R. 891.—**C.A.**

Green v. Farmer (1768) 4 Burr. 2214; 1 W. Bl. 651.

Explained, **Turner v. Thomas** (1871) L. R. 6 C. P. 610; 40 L. J. C. P. 271; 24 L. T. 879; 19 W. R. 1170.—**C.P.**; *followed*, **Witt, In re; Shubbrook, Ex parte** (1876)—**C.A.** (*supra*).

Crawshaw v. Homfray (1820) 4 B. & Ald. 50; 22 R. R. 618.—**K.B.**, *distinguished*.

Fisher v. Smith (1878) 48 L. J. Ex. 411; 4 App. Cas. 1; 39 L. T. 430; 27 W. R. 113.—**H.L. (E.)**; *affirming* (1877) 37 L. T. 18.—**C.A.**; *which had reversed* (1876) 34 L. T. 912.—**EX. D.**

CAIRNS, L.C.—A case of **Crawshaw v. Homfray** was cited, in which there was an additional element in the course of business. There a wharfinger was in the habit of receiving goods upon which he might have had a lien, but the course of business was that he parted with the goods from time to time, receiving payment at the end of every six months or every year for all his dues, and it was held that that course of business prevented him from maintaining his right of lien. If it had been the course of business here for the respondent, not merely to effect these policies, but from time to time to give them up as they were effected, and simply to stand upon his right to be paid at the end of the month, then I can understand that the case would be like that I have cited.—p. 413.

Franklin v. Hosier (1821) 4 B. & Ald. 341; 23 R. R. 305.—K.B., *followed*.
Westlake, In re, Willoughby, Ex parte (1881) 16 Ch. D. 604; 44 L. T. 111; 29 W. R. 935.—C.J.

LIMITATIONS (STATUTES OF).

1. COMPUTATION OF PERIOD.
2. APPLICATION IN GENERAL.
3. PERSONAL ACTIONS.
4. ACTIONS RELATING TO LAND.

1. COMPUTATION OF PERIOD.

Bradfield (or Bamfield) v. Tupper (1851) 21 L. J. Ex. 6; 7 Ex. 27.—EX., *followed*.
Rutherford, In re, Brown v. Rutherford (1880) 49 L. J. Ch. 654; 14 Ch. D. 687; 43 L. T. 105; 28 W. R. 802.—C.A.

Rutherford, In re; **Brown v. Rutherford**, 49 L. J. Ch. 345; 42 L. T. 659.—HALL, V.-C.; *reversed*, C.A. (*supra*).

Trevelyan v. Charter (1835) 4 L. J. Ch. 209.—M.R.; *affirmed*, *nom. Charter v. Trevelyan* (1844) 11 Cl. & F. 714; 8 Jur. 1015.—H.L. (E.).

Birks v. Trippett (1666) 1 Wms. Saund. 32; 2 Kel. 126; 1 Sid. 303, *followed*.

Brown's Estate, In re, Brown v. Brown (1893) 62 L. J. Ch. 695; [1893] 2 Ch. 300, 305; 3 R. 463; 69 L. T. 12; 41 W. R. 440.—CHITTY, J.

Sterndale v. Hankinson (1827) 1 Sim. 393; 27 R. R. 210.—LEACH, V.-C.

Applied, **Berrington v. Evans** (1835) 1 Y. & C. 434.—ABINGER, C.B.; *approved but not applied*, **Birmingham v. Burke** (1845) 2 Jo. & Lat. 699; 9 Ir. Eq. R. 86.—SUGDEN, L.C.; *observed on*, **Bennett v. Barnard** (1849) 12 Ir. Eq. R. 229.—BRADY, L.C.; partly reversing on re-argument, 10 Ir. Eq. R. 584; **Manby v. Manby** (1876) 3 Ch. D. 101; 35 L. T. 807; 24 W. R. 699.—MALINS, V.-C.; **Greaves**, In re, **Bray v. Tofield** (1881) 50 L. J. Ch. 817; 18 Ch. D. 551; 45 L. T. 464; 30 W. R. 555.—JESSEL, M.R.; *applied*, **Archdall v. Anderson** (*post*).

Berrington v. Evans, *distinguished*.
Birmingham v. Burke (*supra*).

Berrington v. Evans, *principle applied*.
Archdall v. Anderson (1890) 25 L. R. Ir. 433.—CHATTERTON, V.-C.

Hemp v. Garland (1843) 12 L. J. Q. B. 134; 3 G. & D. 402; 4 Q. B. 519; 7 Jur. 302.—DENMAN, C.J., *followed and approved*.
Reeves v. Butcher (1891) 60 L. J. Q. B. 619; [1891] 2 Q. B. 509; 65 L. T. 329; 39 W. R. 626.—C.A. LINDLEY, FRY and LOPES, L.JJ.

Reeves v. Butcher, *discussed*.
Coburn v. Colledge (1897) 66 L. J. Q. B. 462; [1897] 1 Q. B. 702, 707; 76 L. T. 608; 45 W. R. 438.—C.A.

Collinge v. Heywood (1839) 8 L. J. Q. B. 98; 9 A. & E. 633; 1 P. & D. 502; 2 W. W. & H. 107.—Q.B.

Distinguished, **Spark v. Heslop** (1859) 28 L. J. Q. B. 197; 1 El. & El. 563; 5 Jur. (N.S.) 730; 7 W. R. 312.—Q.B.; *referred to*, **Blyth v. Fladgate** (1890) 60 L. J. Ch. 66; [1891] 1 Ch. 337; 63 L. T. 546; 39 W. R. 422.—STIRLING, J.

2. APPLICATION IN GENERAL.

Sheldon v. Weldman (or Wildeman) (1664) 1 Ch. Ca. 26; 2 Freem. 156, *followed*.
Heath v. Henley (1664) 1 Ch. Ca. 21; 3 Ch. Rep. 8.—L.C.

Bolton, Ex parte, **Baillie**, In re (1834) 3 L. J. Bk. 22; 1 Mont. & Ayr. 60; 1 Denc. & C. 566; *see on re-hearing*, **S. C. nom. Greenwood**, Ex parte, **Baillie**, In re (1834) 3 L. J. Bk. 6, 24; 1 Mont. & Ayr. 65; 3 Denc. & C. 398.

Williams v. Jones (1811) 13 East 439; 12 R. R. 401.—K.B., *commented on*.
Don v. Lippmann (1837) 1 Cl. & F. 1.—H.L.

Curlewis v. Mornington (Earl) (1857) 26 L. J. Q. B. 181; 7 El. & Bl. 283; 3 Jur. (N.S.) 660; 5 W. R. 266.—EX.; *affirmed*, 27 L. J. Q. B. 430; 4 Jur. (N.S.) 1102; 6 W. R. 682.—EX. CH., *applied*.
Swindell v. Bulkeley (1886) 56 L. J. Q. B. 613; 18 Q. B. D. 250, 254; 56 L. T. 38; 3 Times L. R. 188.—C.A.

Murray v. East India Co. (1821) 5 B. & Ald. 204; 24 R. R. 323.—K.B., *referred to*.
Crouch v. Credit Foncier (1873) 42 L. J. Q. B. 132; L. R. 8 Q. B. 374, 382; 29 L. T. 259; 21 W. R. 946.—Q.B.

Murray v. East India Co. and Douglas v. Forrest (1828) 4 Bing. 686; 1 M. & P. 663; 6 L. J. (O.S.) C. P. 157; 29 R. R. 695.—C.P., *applied*.
Musurus Bey v. Gadban (1894) 63 L. J. Q. B. 621; [1894] 2 Q. B. 352; 9 R. 519; 71 L. T. 51; 42 W. R. 545.—C.A.

Thompson v. Waithman (1857) 26 L. J. Ch. 134; 3 Drew. 628; 2 Jur. (N.S.) 1030; 5 W. R. 30.—KINDERSLEY, V.-C., *adapted*.
Cornill v. Hudson (1857) 27 L. J. Q. B. 8; 8 El. & Bl. 429; 3 Jur. (N.S.) 1257; 6 W. R. 37.—Q.B.

Thompson v. Waithman, *overruled*.
Jackson v. Woolley (1858) 27 L. J. Q. B. 448; 8 El. & Bl. 778, 784; 4 Jur. (N.S.) 656; 6 W. R. 686.—EX. CH.; *reversing* 27 L. J. Q. B. 181; 4 Jur. (N.S.) 409.—Q.B.

Cornill v. Hudson, *followed*.
Jackson v. Woolley, *distinguished*.
Pardo v. Bingham (1869) 39 L. J. Ch. 170; L. R. 4 Ch. 735, 740; 20 L. T. 464; 17 W. R. 419.—HATHERLEY, L.C.

Thompson v. Waithman, *applied*.
Jackson v. Woolley, *referred to*.
Watson v. Woodman (1875) 45 L. J. Ch. 57; L. R. 20 Eq. 721, 731; 24 W. R. 47.—HALL, V.-C.

Doe d. Jacobs v. Phillips (1847) 16 L. J. Q. B. 269; 10 Q. B. 130; 11 Jur. 692.—Q.B., *commented on and not followed*.
Garrard v. Tuck (1849) 18 L. J. C. P. 338; 8 C. B. 231.—C.P.

Garrard v. Tuck, *discussed*.
Melling v. Leak (1855) 24 L. J. C. P. 187; 16 C. B. 652; 3 C. L. R. 1017; 1 Jur. (N.S.) 759; 3 W. R. 595.—C.P.

Garrard v. Tuck, *approved*.
Doe d. Stanway v. Rock (1842) 4 Man. & G. 30; Car. & M. 549; 6 Jur. 266.—C.P., *considered*.
Drummond v. Sant (1871) 41 L. J. Q. B. 21; L. R. 6 Q. B. 763; 25 L. T. 419; 20 W. R. 18.

BLACKBURN, J.—*Doe v. Rock* is confusedly reported; but it would seem that the owners of the legal fee had held it as trustees for Woolrich, who had purchased it from them but failed to pay the price; then Woolrich sold his equitable fee to Butler, at an advanced price. It would seem probable from the report in Carrington & Marshman that Butler actually paid the original price to the owners of the fee, and that they became trustees for him only, and that afterwards by some arrangement, not explained in the report, Woolrich became tenant at will to Butler, not to his trustees, except in so far as by implication every trustee may be said to be trustee for those who hold under his immediate *cestui que trust*. This understood, the ruling of Patteson, J., after consulting Cresswell, J., was in truth no more in effect than that where the *cestui que trust* would be barred if his title was legal, his trustee is also barred, a doctrine which in no way comes in question here, and which has since been acted upon in *Melling v. Leuk* (*supra*).—p. 25.

Doe v. Rock and Drummond v. Sant, applied. *Sands & Thompson* (1883) 52 L. J. Ch. 406; 22 Ch. D. 614, 618; 48 L. T. 210; 31 W. R. 397.—FRY, J.

Drummond v. Sant, approved and applied. *Warren v. Murray* (1894) 64 L. J. Q. B. 42; [1894] 2 Q. B. 648; 9 R. 793; 71 L. T. 458; 43 W. R. 3.—C.A. See judgments at length.

Alderson v. White (1858) 2 De G. & J. 97; 4 Jur. (N.S.) 125; 6 W. R. 242.—CRANWORTH, L.C.; reversing 3 Jur. (N.S.) 1316.—STUART, V.-C., approved.

Bhagwan Sahai v. Bhagwan Din (1890) L. R. 17 Ind. App. 98.—P.C.

Bhagwan Sahai v. Bhagwan Din, explained. *Balkishen Das v. Legge* (1899) L. R. 27 Ind. App. 58.—P.C.

Smith v. Clay (1767) Amb. 645; 3 Bro. C. C. 639, n.—CAMDEN, L.C., referred to. *Hovenden v. Annesley* (Lord) (*post*).

Smith v. Clay, followed and approved. *Campbell v. Graham* (1831) 1 Russ. & M. 453; 9 L. J. (O.S.) Ch. 234; affirmed, *nom.* *Campbell v. Sandford* (1834) 2 Cl. & F. 429; 8 Bligh. (N.S.) 622; 32 R. R. 244.—H.L. (E.). **LYNDHURST, L.C.** [The L.C. refers to the fact that at one time Lord Alvanley, in *Pickering v. Stamford* (1793) (2 Ves. 272; 4 Bro. C. C. 214), disapproved of that decision, and, on mature consideration, approved of its principles.]

Smith v. Clay, referred to. *L. C. & D. Ry. v. Bull* (1882) 47 L. T. 413.—FIELD and STEPHEN, JJ.

Smith v. Clay, principle applied. *Allcard v. Skinner* (1887) 56 L. J. Ch. 1052; 36 Ch. D. 145, 186.—C.A. (*post*, col. 1564).

Smith v. Clay, referred to. *Masonic and General Life Assurance Co. v. Sharpe* (1891) [1892] 1 Ch. 154.—C.A. (*post*, col. 1571).

Hovenden v. Annesley (Lord) (1806) 2 Sch. & Lef. 607; 9 R. R. 119.—L.C., approved. *Foley v. Hill* (1844) 13 L. J. Ch. 182; 1 Ph.

399; 8 Jur. 347.—**LYNDHURST, L.C.**; affirmed, *KNIGHT BRUCE, V.-C.*; affirmed. (1848) 2 H. L. Cas. 28.—H.L. (E.). And see "BANKER."

Hovenden v. Annesley (Lord), referred to. *Gwynne v. Gell* (1869) 20 L. T. 508, 510.—M.R.; *Ship v. Crosskill* (1870) 39 L. J. Ch. 550; L. R. 10 Eq. 73, 83; 22 L. T. 315; 18 W. R. 618.—M.R.; *Knox v. Gye* (1872) 42 L. J. Ch. 234; L. R. 5 H. L. 656, 674.—H.L. (E.) (*post*, col. 1574); *Ecclesiastical Commissioners v. N. E. Ry.* (1877) 47 L. J. Ch. 20; 4 Ch. D. 845; 36 L. T. 174.—MALINS, V.-C.

Hovenden v. Annesley (Lord), approved. *Gibbs v. Guild* (1882) 51 L. J. Q. B. 313; 9 Q. B. D. 59, 64.—C.A. (*post*, col. 1586).

Hovenden v. Annesley (Lord), distinguished. *Cross, In re, Harston v. Tenison* (1882) 20 Ch. D. 109; 51 L. J. Ch. 645; 45 L. T. 777; 30 W. R. 376.—C.A.

BAGGALLAY, L.J. (for the Court).—The case with which Lord Redesdale was dealing was not between *cestui que trust* and trustee in respect of a breach of an express trust committed by such trustee, but between *cestui que trust* and a third party, whom it was proposed to treat as a constructive trustee by reason of dealings between himself and the express trustee.—p. 124.

Hovenden v. Annesley (Lord). Applied, *Allcard v. Skinner* (1887) 56 L. J. Ch. 1052; 36 Ch. D. 145, 186; 37 L. T. 61; 36 W. R. 251.—C.A.; referred to, *Thorne v. Heard* (1894) 63 L. J. Ch. 356; [1894] 1 Ch. 599.—C.A. (*post*, col. 1608).

Hovenden v. Annesley (Lord), explained. *Charter v. Watson* (1898) 68 L. J. Ch. 1; [1899] 1 Ch. 175; 79 L. T. 440; 47 W. R. 250.

KEKEWICH, J.—But the mortgage deed contains the policy of insurance, and the question arises whether, as regards this policy also, the right to redeem is gone. I am asked to say that it is gone* mainly on the ground that the Court ought to apply the analogy of the statute; and reference has been made to the well-known judgment of Lord Redesdale in *Hovenden v. Annesley* (Lord), where he accepts the application of the analogy. . . . If I were to attempt to apply the statute by analogy, I should be doing something quite different from what Lord Redesdale did. . . . What Lord Redesdale said was substantially this: that, where a statute does not purport to bind equitable interests, it cannot be applied directly to such interests, but the Court will apply it by analogy, and so in dealing with equitable interests will treat itself as bound by the statute, which in terms only touches legal interests. It seems to me to be very difficult from that to argue that a statute which applies to land shall be applied by analogy to a policy of assurance. I do not see my way to act upon any such principle.—p. 3.

Hovenden v. Annesley (Lord), applied. *McCallum, In re, McCallum v. McCallum* (1900) [1901] 1 Ch. 143.—C.A. (*post*, col. 1608).

Dunne v. Doran (1844) 13 Ir. Eq. R. 545.—EX. EQ.; and *Brereton v. Hutchinson* (1853) 2 Ir. Ch. R. 648; 3 Ir. Ch. R. 361.—M.R. and L.C., not followed.

Baker v. Martin (1832) 5 Sim. 380.—SHADWELL, V.-C.; **Story v. Gape** (1856) 2 Jur. (N.S.) 706.—WOOD, V.-C.; and **Obee v. Bishop** (1859) 29 L. J. Ch. 148; 1 De G. F. & J. 137, 141; 6 Jur. (N.S.) 132; 1 L. T. 151; 8 W. R. 102.—L.J., *dicta approved*.
Brittlebank v. Goodwin (1868) 37 L. J. Ch. 377; L. R. 5 Eq. 545, 552; 16 W. R. 696.
GIFFARD, V.-C.—In opposition to this view *i.e.* the view taken by the judges who decided **Dunne v. Doran** and **Brereton v. Hutchinson**, that an executor could set up the Statute of Limitations against a claim founded on a breach of trust by his testator, there are in this country the *dicta*, at all events, of three eminent judges in three different cases. In **Baker v. Martin** the V.-C. of England said: "The testator was in the situation of a trustee for the creditors of the bankrupt; how, then, can the lapse of time, either in his lifetime or since his death, affect the debt?" In **Story v. Gape** the present Wood, L.J., then V.-C., said: "The Statute of Limitations, of course, never can be set up in a question in this Court between a trustee and *cestui que trust*. If this were a simple contract debt or a specialty debt of the testator, the executor could plead in the one case six years' limitation, in the other case (if such a space of time had elapsed) twenty years. But in the case of a breach of trust he cannot plead the statute, for his testator could not; he must answer as his testator would have had to answer." And in **Obee v. Bishop**, Turner, L.J., said: "With respect to the general personal estate, I am of opinion that it would be most dangerous to hold that a demand against the assets of a deceased trustee or personal representative, in respect of a breach of trust or misappropriation committed by him, is barred at the expiration of six years from his death. Courts of equity, in dealing with equitable debts, are not bound by the Statute of Limitations, 21 Jac. 1, c. 16; and although they have in many instances adopted a rule grounded on an analogy to that statute, they do not extend that analogy to demands arising out of breaches of trust." It is needless to observe, that though this Court is not bound by the decisions in Ireland, it would always treat them as, and feel them to be, of the greatest weight. After much consideration, however, I have felt myself unable to follow them; for I think that the *dicta*, I may almost say in two of the cases the decisions, of the eminent judges in this country, which I have quoted, are founded on sounder principles.—p. 382.

Dunne v. Doran and **Brereton v. Hutchinson** (*supra*, col. 1564), *held overruled*.

Brittlebank v. Goodwin, *approved*.

Smith v. Cork and Bandon Ry. (1870) Ir. R. 5 Eq. 65.—C.A.

Brittlebank v. Goodwin, **Obee v. Bishop**, and **Stone v. Stone** (1869) 39 L. J. Ch. 196; L. R. 5 Ch. 74; 22 L. T. 182; 18 W. R. 225.—**GIFFARD, L.J.**, *distinguished*.

Metropolitan Bank v. Heiron (1880) 5 Ex. D. 319; 43 L. T. 676; 29 W. R. 370.—C.A.

COTTON, L.J.—In those cases a person had money in his hands upon an express trust.—p. 322.

Brittlebank v. Goodwin, *applied*.

Burge, in re, **Gillard v. Lawrenson** (1887) 57 L. T. 364; 52 J. P. 20.—**STIRLING, J.**

Obee v. Bishop (*supra*), *applied*.

Blake, in re, **Blake v. Power** (1889) 60 L. T. 663; 37 W. R. 441.—**KAY, J.**

Spickernell v. Hotham (1854) Kay 669; 2 W. R. 638.—WOOD, V.-C., *applied*.

McGuffie v. Burleigh (1898) 78 L. T. 264.—**BRUCE, J.**

Stone v. Stone (*supra*) and **Spickernell v. Hotham**, *discussed and distinguished*.

Dixon, in re, **Heynes v. Dixon** (1899) 68 L. J. Ch. 689; [1899] 2 Ch. 561; 48 W. R. 71.

BYRNE, J.—In **Spickernell v. Hotham** the covenant was to transfer certain new 4l. per cent. annuities to trustees to hold upon certain trusts; and Wood, V.-C., held that as the trust fund never had any existence, he could not assume that a person had been paying himself the interest of a non-existing fund—that is, the trust security never came into existence. In **Stone v. Stone** no trust fund or security had ever come into existence, and it was held that the contract was simply a legal obligation barred by lapse of time. These cases seem to me to be distinguishable from the present.—p. 692. *And see Rorke v. Sherlock* (1877) Ir. R. 9 Eq. 510.—V.C.

Spickernell v. Hotham, *applied*.

Dixon, in re, **Heynes v. Dixon** (1900) 69 L. J. Ch. 609; [1900] 2 Ch. 561; 83 L. T. 129; 48 W. R. 665.—C.A., *affirming* S. C. *supra*.

Salter v. Cavanagh (1838) 1 Dr. & Wal. 668.

—**PLUNKET, L.C.**, *observed on*.

Charitable Donations Commissioners v. Wybrants (1845) 2 Jo. & Lat. 182, 196; 7 Ir. Eq. R. 580.—**SUGDEN, L.C.**

Salter v. Cavanagh, *referred to*.

Charitable Donations Commissioners v. Wybrants, *not applied*.

Petre v. Petre (1852) 1 Drew. 371.—**KINDERSLEY, V.-C.**

Salter v. Cavanagh and **Charitable Donations Commissioners v. Wybrants**, *discussed*.

Yardley v. Holland (1875) L. R. 20 Eq. 428, 440; 33 L. T. 301.—**BACON, V.-C.**

Salter v. Cavanagh.

Followed, **Nugent v. Nugent** (1884) 15 L. R. Ir. 321.—**PORTER, M.R.**; *distinguished*, **Churcher v. Martin** (1889) 58 L. J. Ch. 586; 42 Ch. D. 312, 319; 61 L. T. 113; 37 W. R. 682.—**KERKEWICH, J.**

Salter v. Cavanagh, *followed*.

Churcher v. Martin, *distinguished*.

Patrick v. Simpson (1889) 59 L. J. Q. B. 7; 24 Q. B. D. 128, 131; 61 L. T. 686.—**HUDDLESTON, B.** and **STEPHEN, J.**

Salter v. Cavanagh and **Patrick v. Simpson**, *distinguished*.

Lacey, in re, **Royal General Theatrical Fund Association v. Kydd** (1899) 68 L. J. Ch. 488; [1899] 2 Ch. 149; 80 L. T. 706; 47 W. R. 664.

STIRLING, J.—The cases of **Salter v. Cavanagh** and **Patrick v. Simpson**, which were relied on by the next of kin, do not appear to me to govern the present. Both related to devises of real estate, and in neither did anything depend on the law applicable to executors.—p. 496.

Adams v. Barry (1845) 2 Coll. 285.—**KNIGHT BRUCE, V.-C.**

Applied, **Binns v. Nichols** (1866) 35 L. J. Ch. 635; L. R. 2 Eq. 256, 260; 14 W. R. 727.—

- WOOD, v.-c.; Johnson, in re (*post*); Ludlam, in re, Ludlam v. Ludlam (1890) 63 L. T. 330.—KAY, J.: *not applied*, Owen, in re (*post*).
- Jennens, in re, Willis v. Howe (Earl) (1880) 50 L. J. Ch. 4; S. C. *nom.* Willis v. Howe (Earl) 43 L. T. 375; 29 W. R. 70.—MALINS, v.-c.
- Referred to*, Johnson, in re (*post*); *followed*, Lacey, in re (*supra*).
- Reed v. Fenn (1866) 35 L. J. Ch. 464; 14 W. R. 704.—ROMILLY, M.R., *principle applied*.
- Johnson, in re, Sly v. Blake (1885) 29 Ch. D. 964; 973; 52 L. T. 682; 33 W. R. 503.—CHITTY, J.
- Davis, in re, Evans v. Moore (1891) 61 L. J. Ch. 85; [1891] 3 Ch. 119; 65 L. T. 128; 39 W. R. 62.—C.A., *applied*.
- Barker, in re, Buxton v. Campbell (1892) 62 L. J. Ch. 76; [1892] 2 Ch. 491; 66 L. T. 848.—NORTH, J.
- Johnson, in re, Sly v. Blake and Davis, in re, Evans v. Moore, *principles not applied*.
- Owen, in re (1894) 63 L. J. Ch. 749; [1894] 3 Ch. 220; 8 R. 566; 71 L. T. 181; 43 W. R. 35.—STIRLING, J.
- Davis, in re, Evans v. Moore, and Rowe, in re, Jacobs v. Hind (1889) 58 L. J. Ch. 703; 61 L. T. 581.—C.A., *referred to*.
- Barker, in re, Buxton v. Campbell, *applied*.
- Johnson, in re, Sly v. Blake, *followed*.
- Lacey, in re, Royal General Theatrical Fund Association v. Kydd (1899) 68 L. J. Ch. 488; [1899] 2 Ch. 149 (*supra*, col. 1566).
- Davis, in re, Evans v. Moore; Swain v. Swain v. Bringeman (1891) 61 L. J. Ch. 20; [1891] 3 Ch. 233; 65 L. T. 296.—ROMER, J.: *and Page, in re, Jones v. Morgan* (1892) 62 L. J. Ch. 592; [1893] 1 Ch. 304; 3 R. 171; 41 W. R. 357.—NORTH, J., *explained*.
- Timmis, in re, Nixon v. Smith (1901) 71 L. J. Ch. 118; [1902] 1 Ch. 176; 85 L. T. 672; 50 W. R. 164.—KEKEWICH, J.
- Lacey, in re, Royal General Theatrical Fund Association v. Kydd (*supra*); Williams, in re, Davies v. Williams (1886) 56 L. J. Ch. 123; 34 Ch. D. 558; 55 L. T. 633; 35 W. R. 182.—STIRLING, J.; and Davis, in re, Evans v. Moore, *discussed*.
- Doyle v. Foley (1901) [1903] 2 Ir. R. 95, 100.—K.B.D. *And see Rankin v. M'Murtry* (col. 1589).
- Cross, in re, Harston v. Tenison (1882) 51 L. J. Ch. 645; 20 Ch. D. 109; 45 L. T. 777; 30 W. R. 376.—C.A.; *reversing* 30 W. R. 313.—FRY, J., *discussed*.
- Soar v. Ashwell [1893] 2 Q. B. 390; 4 R. 602; 69 L. T. 585; 42 W. R. 165.—C.A.
- Cross, in re, Harston v. Tenison, *followed*.
- Rochevoucauld v. Bowstead (1896) 66 L. J. Ch. 74; [1897] 1 Ch. 196; 75 L. T. 502; 45 W. R. 272.—C.A.
- Bowden, in re, Andrew v. Cooper (1890) 59 L. J. Ch. 815; 45 Ch. D. 444; 39 W. R. 219.—FRY, J., *explained*.
- How v. Winterton (Earl) (1896) 65 L. J. Ch. 332; [1896] 2 Ch. 626; 75 L. T. 40; 45 W. R. 103.—C.A.
- LINDLEY, L.J.—In Bowden, in re, Andrew v. Cooper, FRY, L.J. said with reference to this clause [Trustee Act, 1888, s. 8, sub-s. 1, cl. (a)], "It is obvious that, if a person had not been a trustee, he could not be sued for a breach of trust: and, further, that there is no right or privilege that I am aware of, conferred by any statute of limitations in respect of a breach of trust. Therefore, I should have great difficulty in applying that sub-section to the present case." The case before the L.J. was an action by a new trustee against an old trustee to compel him to make good trust funds, which he had misapplied. The L.J. was right in saying that no action or other proceeding could be taken by such a plaintiff against such a defendant if there had been no trust. But, although I share with FRY, L.J., the difficulty presented by clause (a), I cannot avoid the conclusion that to exclude the operation of clause (a) in all cases on the short ground stated by him, would be really to deprive it of all meaning whatever. I cannot think that FRY, L.J. intended to go so far as that. The legislature appears to have assumed that there might be cases in which, if there were no trust, some action or proceeding might be taken by the plaintiff against the defendant, and to which some statute of limitations might be a defence.—p. 834.
- Phillipo v. Munnings (1837) 2 Myl. & Cr. 309.—COTTENHAM, L.C., *applied*.
- Tyson v. Jackson (1861) 30 Beav. 334.—M.R.
- Phillipo v. Munnings, *distinguished*.
- Cadbury v. Smith (1869) L. R. 9 Eq. 37, 43; 24 L. T. 52; 18 W. R. 105.—ROMILLY, M.R.
- Phillipo v. Munnings, *applied*.
- Smith, in re, Henderson-Roe v. Hitchins (1889) 58 L. J. Ch. 860; 42 Ch. D. 302; 61 L. T. 363; 37 W. R. 705.—NORTH, J.
- Phillipo v. Munnings, *referred to*.
- Arnott, in re, Arnott v. Arnott [1899] 1 Ir. R. 201.—PORTER, M.R.
- Edwards v. Warden (1874) 43 L. J. Ch. 644; L. R. 9 Ch. 495; 30 L. T. 540; 22 W. R. 669.—L.J.J.; *varied*, (1876) 45 L. J. Ch. 713; 1 App. Cas. 281; 35 L. T. 174.—H.L. (E.).
- Edwards v. Warden, *referred to*.
- Hughes v. Coles (1884) 53 L. J. Ch. 1047; 27 Ch. D. 231, 235; 51 L. T. 226; 33 W. R. 27.—KAY, J.
- Hughes v. Coles, *referred to*.
- Conolly v. Gorman (1897) [1898] 1 Ir. R. 20.—Q.B.D.; *reversed*, C.A. (*post*, col. 1587).
- Petre v. Petre (1852) 1 Drew. 371.—KIN-DELSLEY, v.-c., *commented on*.
- Banner v. Berridge (1881) 50 L. J. Ch. 630; 18 Ch. D. 254, 262; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. L. 420.—KAY, J.
- Petre v. Petre, *approved*.
- Sands to Thompson (1883) 52 L. J. Ch. 406; 22 Ch. D. 614, 617; 48 L. T. 210; 31 W. R. 397.—FRY, J.
- Sands to Thompson, *referred to*.
- Nugent v. Nugent (1884) 15 L. R. Ir. 321.—PORTER, M.R.
- Petre v. Petre, *applied*.
- Lawrance v. Norreys (Lord) (1888) 39 Ch. D. 213, 224; 59 L. T. 703.—STIRLING, J. and C.A.; *affirmed*, H.L. (*post*, col. 1608).
- Petre v. Petre, *referred to*.
- Price v. Phillips (1894) 13 R. 191 (*post*, col. 1571).

Petre v. Petre (*supra*), explained.
Willis v. Howe (Earl) (1893) 62 L. J. Ch. 690; [1893] 2 Ch. 545.—C.A. (*post*, col. 1608).

Petre v. Petre, discussed.
Thorne v. Heard (1894) 63 L. J. Ch. 356; [1894] 1 Ch. 599.—C.A. (*post*, col. 1608).

Petre v. Petre, applied.
 Arbitration between Astley and Tyldesley Coal Co. and Tyldesley Coal Co., in re (1899) 80 L. T. 116.—BRUCE and RIDLEY, JJ.

Petre v. Petre, discussed and applied.
McCallum, in re, **McCallum v. McCallum** (1900) 70 L. J. Ch. 206; [1901] 1 Ch. 143.—C.A. (*post*, col. 1608).

Hodge v. Churchyard (1847) 16 Sim. 71.—SHADWELL, V.-C., followed.

Dillon v. Cruise (1840) 3 Ir. Eq. R. 70.—PLUNKET, L.C., distinguished.

Cunningham v. Foot (1878) 3 App. Cas. 974; 38 L. T. 889; 26 W. R. 859.—H.L. (IR.).

CAIRNS, L.C.—It was decided, and the decision has always been followed and never quarrelled with since, in *Hodge v. Churchyard*, that a devise of land to pay a sum of money to A. B., was a charge, and was not a trust for A. B. And, my lords, the word "pay" surely cannot mean more than the words "well and truly paying," and the words "well and truly pay" must mean simply on condition of well and truly paying; and therefore, it being established law that a devise to A., "paying," a sum of money to B. is not a trust, but is a charge, "it must also be the law that a devise to A. to well and truly pay" to B. is not a trust, but is a charge; and a devise to A., "on the condition of well and truly paying," must be a charge and not a trust.—p. 989.

LORD O'HAGAN, who concurred as to *Hodge v. Churchyard*, said: Great reliance was placed in the Court below, and a good deal here also by the respondents, upon an Irish case, which is very well known and very generally accepted, *Dillon v. Cruise*, before Lord Plunket. That case was rightly decided, but it appears to me to have been wholly different from the case before your lordships, and in contrast with it; it appears to me to illustrate and establish the true doctrine of the law on the other side. It takes precisely the distinction on which I have endeavoured to insist between a charge and an express trust, and it indicates the conditions necessary to the creation of the latter. . . . So in *Thomson v. Eastwood* ((1877) 2 App. Cas. 215.—H.L. (IR.)) . . . there was an express trust beyond all controversy. . . . There we have a trustee *eo nomine*—we have a trustee in terms, and we have a trustee in effect, but here, on the contrary, though as to the annuity there may be a charge, there is no trustee *eo nomine*, there is no declaration that he takes the land for the special purpose of carrying out the trust, and no direction that from it the trust shall be worked out and satisfied.—p. 996.

LORD SELBORNE, who also concurred, agreed as to *Hodge v. Churchyard* and distinguished *Dillon v. Cruise*.

Foot v. Cunningham (1877) Ir. R. 11 Eq. 306.—M.R.; reversed H.L. (IR.), *supra*.

Cunningham v. Foot, principle applied.
Price v. Phillips (1894) 13 R. 191 (*post*,

col. 1571); **Lacey**, in re, **Royal General Theatrical Fund Association v. Kydd** (1899) 68 L. J. Ch. 488; [1899] 2 Ch. 149 (*supra*, col. 1566).

Hindmarsh, in re (1860) 1 Dr. & Sm. 129; 1 L. T. 475; 8 W. R. 203.—KINDERSLEY, V.-C., commented on.

Burdick v. Garrick (1870) L. R. 5 Ch. 233; 39 L. J. Ch. 369; 18 W. R. 387.

HATHERLEY, L.C.—*Hindmarsh, in re*, depends upon the special facts disclosed in the report, and, in my opinion, the demurrer could not be justified if it had been a simple case of a person holding funds expressly for a particular purpose, and having the duty cast upon him of holding them for the benefit of the person who intrusted him with them. In such a case of agency I apprehend it could not be said that the Statute of Limitations was applicable. I do not say that in every case in which a bill might be filed against an agent the Statute of Limitations would not apply, but in all cases where the bill is filed against an agent on the ground of his being in a fiduciary relation, I think it would be right to say that the Statute has no application.—p. 240.

Hindmarsh, in re, applied.

Bean v. Wade (1885) 2 Times L. R. 157.—C.A.

Burdick v. Garrick, applied.

Gray v. Bateman (1872) 21 W. R. 137.—WICKENS, V.-C. And see *post*, col. 1571.

Hindmarsh, in re, approved.

Burdick v. Garrick, commented on.
Watson v. Woodman (1875) 45 L. J. Ch. 57; L. R. 20 Eq. 721, 731; 24 W. R. 47.—HALL, V.-C.

Watson v. Woodman, distinguished.

Tucker, in re, **Tucker v. Tucker** (1894) 63 L. J. Ch. 734; [1894] 3 Ch. 429; 12 R. 141; 71 L. T. 453.—C.A. And see *post*, col. 1572.

Burdick v. Garrick, discussed.

Kemp v. Westbrook (1749) 1 Ves. sen. 278.

—HARDWICKE, L.C., distinguished.

Banner v. Berridge (1881) 50 L. J. Ch. 630; 18 Ch. D. 254, 263; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. C. 420.—KAY, J. And see *post*, col. 1571, and "MORTGAGE."

Burdick v. Garrick, principle applied.

Exchange Banking Co., in re, **Flitcroft's Case** (1882) 52 L. J. Ch. 217; 21 Ch. D. 519, 525; 48 L. T. 86; 31 W. R. 174.—BACON, V.-C.; affirmed with a variation, C.A.; **Bell, in re**, **Lake v. Bell** (1886) 56 L. J. Ch. 307; 34 Ch. D. 462; 55 L. T. 757; 35 W. R. 212.—CHITTY, J. See col. 1571.

Burdick v. Garrick.

Referred to, **Dooby v. Watson** (1888) 57 L. J. Ch. 865; 39 Ch. D. 178, 185; 58 L. T. 943; 36 W. R. 764.—KEKEWICH, J.; approved, **Lyell v. Kennedy** (*post*); distinguished, **Phillips v. Homfray** (1890) 59 L. J. Ch. 547; 44 Ch. D. 694, 701; 62 L. T. 897; 39 W. R. 45.—STIRLING, J. (affirmed, 61 L. J. Ch. 210; [1892] 1 Ch. 465; 66 L. T. 657.—C.A.); referred to, **Sharpe, in re**, **Bennett, in re** (*post*, col. 1571); approved, **Soar v. Ashwell** (*post*, col. 1571); distinguished, **Friend, in re** (*post*, col. 1572); referred to, **Doyle v. Foley** (*post*, col. 1572).

Metropolitan Bank v. Heiron (1380) 5 Ex. D. 319; 43 L. T. 676; 29 W. R. 370.—C.A.

Not applied, Fitzroy Bessemer Steel, &c. Co., In re (1884) 50 L. T. 144, 147; 32 W. R. 475.—KAY, J. (compromised, 33 W. R. 312.—C.A.): *applied*, Lister v. Stubbs (1890) 59 L. J. Ch. 570; 45 Ch. D. 1, 7; 63 L. T. 75; 38 W. R. 548.—STIRLING, J. (affirmed, C.A.): *referred to*, Sharpe, In re, Bennett, In re, Masonic and General Life Assurance Co. v. Sharpe (or Masonic and General Life Assurance Co. v. Sharpe) (1891) 61 L. J. Ch. 193; [1892] 1 Ch. 154; 65 L. T. 806; 40 W. R. 241.—C.A.

Life Association of Scotland v. Siddal (1861) 3 De G. F. & J. 58; 7 Jur. (N.S.) 785; 4 L. T. 311; 9 W. R. 541.—L.C. and L.J., *principle applied*.

Evans v. Benyon (1887) 37 Ch. D. 329, 336; 58 L. T. 700.—KAY, J.; *reversed*, C.A.; Lyell v. Kennedy (1889) 14 App. Cas. 437, 463.—H.L. (E.) (post, col. 1598). *And see* Quinton v. Frith (1868) Ir. R. 2 Eq. 396, 416.—V.C.

Life Association of Scotland, explained.

Gray v. Bateman; **Bell, In re, Lake v. Bell** (col. 1570); and **Masonic and General Life Assurance Co. v. Sharpe, discussed**.
Soar v. Ashwell [1893] 2 Q. B. 390; 4 R. 602; 69 L. T. 585; 42 W. R. 165.—C.A.; **ESHER, M.R.**, **BOWEN** and **KAY, L.J.** See judgments at length.

Soar v. Ashwell, dictum followed.

Life Association of Scotland v. Siddal, explained.

Price v. Phillips (1894) 13 R. 191.
CHITTY, J.—I take Lord Cairns' speech in *Cunningham v. Foot* (col. 1569). He says (p. 984): "The land must be vested in a trustee upon an express trust, and then the right of the *cestui que trust* to bring an action in the manner pointed out by the 25th section. There must be a trustee in whom the land is vested; there must be an 'express trust,' by which I understand the legislature to mean a trust which arises upon the construction of the written instrument, not upon any inference of law imposing a trust upon the conscience; a trust arising upon the words of the instrument itself." Applying this to the present case, it cannot be said that all that can be found in the construction of this instrument, for it is plain that no valid trust was created. The speech of Lord Cairns in 1878 was subsequent to *Kindersley, V.-C.*'s well-known exposition in *Petre v. Petre* (col. 1568) which has often been deservedly quoted. Then I pass to L.J. (then Mr. J.) Kay's *dictum* in *Bannerv. Bertridge* (col. 1570) in 1881. After quoting the V.-C.'s judgment, the learned judge proceeded to state that he did not think that exhaustive. He says at p. 263: "It probably refers to express trusts of land only, which must be in writing." Then he goes on to deal with cases of personal estate. That the V.-C. did not deal with personal estate is explained by the fact that he had only to deal with real estate under sect. 25; that is clear from the judgment of Kay, L.J. Then in *Soar v. Ashwell*, the late Bowen, L.J., after saying that an express trust can only arise between the *cestui que trust* and his trustee, and that a constructive trust is to be only made out by circumstances, proceeds to say: "It is not unreasonable in the latter class of cases, where the liability of a stranger to the trust arises from his conduct

and depends on the proof of his contemporary acts, that time should run in favour of the person to be charged. In such cases conflicts of evidence are possible or probable, and to deny to the person to be charged the shelter or benefit of a period of limitation would be obviously dangerous and unjust." An excellent exposition of the grounds on which the statute makes a special exception in favour of express trusts, the existence of which can be proved by evidence in a simple and satisfactory way, and not left to a conflict of testimony and, as in the present case, to a conflict as to the meaning and effect of acts done considerably more than one hundred years ago. This case illustrates the proposition of Bowen, L.J. Then he deals with the various cases which have occurred, showing that there may be a difficulty in fixing the line of demarcation between express and constructive trusts, and then mentions *Life Association of Scotland v. Siddal*. That case does not form an exception to the principle of express trusts. It was there held that where a trust of land was duly constituted by writing, and a person assumed to act as trustee under a colour of title in regard to the land, there was an express trust within sect. 25, and therefore the person could not escape it being said, "You were trustee under that document." That case does not conflict with the other authorities, but stands on a sound footing of its own.—p. 194.

Soar v. Ashwell, applied.

Rochefoucauld v. Bowstead [1897] 1 Ch. 196 (col. 1567); **Gallard, In re, Gallard, Ex parte** (1897) 66 L. J. Q. B. 484; [1897] 2 Q. B. 8, 14; 76 L. T. 327; 45 W. R. 556; 4 Manson 52.—**V. WILLIAMS, J.**; **M'Arde v. Gaughran** (1902) [1903] 1 Ir. R. 106.—M.R.

Soar v. Ashwell, distinguished.

Friend, In re, Friend v. Friend (1897) 66 L. J. Ch. 787; [1897] 2 Ch. 421; 77 L. T. 50; 46 W. R. 139.

STIRLING, J.—The defendant there [*Burdick v. Garrick*] was a solicitor, and the fund in respect of which the suit was instituted was entrusted to him, not for the purpose of being remitted when received to the principal, but for the purpose of being employed in a particular manner, in the purchase of land or stock, so that there was much more in that case than the ordinary case of sums of money received for the principal. That case, however, was commented on by Hall, V.-C., in *Watson v. Woodman* (col. 1570), where he expressed his opinion that the case was decided on the special circumstances. The recent case of *Soar v. Ashwell* was also relied on; but in that case the plaintiff's claim was of such a nature as could only be asserted in a court of equity, and this is pointed out by the M.R. at the commencement of his judgment.—p. 744.

Soar v. Ashwell, referred to.

Doyle v. Foley (1901) [1903] 2 Ir. R. 95.—Q.B.D.; **Dixon, In re, Heynes v. Dixon** (1900) 69 L. J. Ch. 609; [1900] 2 Ch. 561; 83 L. T. 129; 48 W. R. 665.—C.A.

Gulliford v. Blandford (1692) Carth. 232; Comberb. 195; Holt 522; 4 Mod. Rep. 129; **S. C. nom. Calliford v. Blawford**, Shower 353; and **Chance v. Adams** (1694) 1 Ld. Raym. 77, *questioned*.

Lookup v. Frederick (1767) 4 Burr. 2018.—K.B., *followed*.

Barrett v. Johnson (1836) 2 Jones, 197.—EX. (IR.), *referred to*.
Dyer v. Best (1866) 35 L. J. Ex. 105; L. R. 1 Ex. 152, 158; 12 Jur. N. S. 143; 13 L. T. 753; 14 W. R. 336; 4 H. & C. 189.—EX.

Calliford v. Blawford, Lookup v. Frederick (*supra*), and **Dyer v. Best**, *observed on*.
Robinson v. Currey (1881) 7 Q. B. D. 465; 50 L. J. Q. B. 561; 45 P. T. 368; 30 W. R. 39.—C.A.; *reversing* 6 Q. B. D. 21; 50 L. J. Q. B. 9; 43 L. T. 504; 29 W. R. 284.—FIELD and MANISTY, JJ.

BRAMWELL, L.J.—When I consider that the words of the statute of 31 Eliz. c. 5, do not include an action by a common informer, I confess I prefer the authority in the Ex. Ch. of *Calliford v. Blawford*, and the construction there put upon the statute in the time of Lord Holt to that in the time of Geo. 3 in *Lookup v. Frederick*, and the subsequent case of *Dyer v. Best*.—p. 471.

BAGGALLAY, L.J.—The statute of 31 Eliz. c. 5, first limits the action of the Queen to two years, and then all *qui tam* actions to one year, and, as the L.J. has pointed out, very shortly after the Act it was held that it did not extend to the action of a common informer who was not suing *qui tam*. That seems to have been dissented from in another case, and in the more recent case of *Dyer v. Best*, the Court of Ex. held that 31 Eliz. c. 5, extends to a common informer, although he is not suing in a *qui tam* action. I must confess there appears to me to be a great deal of force in the reasons given in the judgment in *Dyer v. Best*, in support of what was there held; but, assuming that to be law, it is impossible to say that the Goldsmiths' Company [the present plaintiffs] are in the position of common informers.—p. 474.

Robinson v. Currey.
Dictum commented on, **Saunders v. Wiel** (1892) 62 L. J. Q. B. 37; [1892] 2 Q. B. 321; 4 R. 1; 67 L. T. 207; 40 W. R. 594.—C.A. (*See* "Discovery"); *distinguished*, **Kenealy v. O'Keefe** (1899) [1901] 2 Ir. R. 39.—Q.B.D.

Robinson v. Currey, *discussed*.
Thomson v. Clanmorris (Lord) (1899) 68 L. J. Ch. 727; [1899] 2 Ch. 523; 81 L. T. 286; 48 W. R. 39.

KEKEWICH, J.—I looked at *Robinson v. Currey*, but, though there is a good deal about the party grieved, it does not really touch the exact point with which I now have to deal. I do, however, find that the learned judges in the C. A. who heard that case all of them referred to penalties throughout as if they regarded the statute as dealing with only penalties or damages in the nature of penalties. That seems to me to be the right construction.—p. 729.

Thomson v. Clanmorris (Lord), *affirmed on this point, but reversed on another point (post)*.

Cork and Bandon Ry. v. Goode (1853) 22 L. J. C. P. 198; 13 C. B. 827; 17 Jur. 555; 1 W. R. 410.—C.P., *followed*.
Shepherd v. Hills (1855) 25 L. J. Ex. 6; 11 Ex. 55.—EX.

Cork, &c. Ry. v. Goode, *distinguished*.
Thomson v. Clanmorris (Lord) (1900) 69 L. J. Ch. 337; [1900] 1 Ch. 718; 82 L. T. 277; 48 W. R. 488.—C.A.

V. WILLIAMS, L.J.—It is said that this is not

an action on the case, but an action on the statute [Limitation Act, 1623], and *Cork and Bandon Ry. v. Goode* is relied on for that proposition. But it is to be remembered that that was an action for a statutory debt, and the sole question there was whether that debt was within the terms of the Limitation Act, 1623, founded on specialty or not. It does not seem to me that the decision in that case really is material to the case that we have here to decide. Maule, J., in that case points out that there is a difference between an action which is given by a statute and an action on the statute. The action in that case was, as I have pointed out, an action of debt on a statute. The present case, it seems to me, is a case of a new duty created of accuracy in respect of the preparation and issue of prospectuses, and an action on the case given to those persons who are injured by the breach of the duty.—p. 341.

Scudemore v. White (1687) 1 Vern. 456.—L.C., *held overruled*.

Foster v. Hodgson (1812) 19 Ves. 180, 183.—L.C.

Prior v. Horniblow (1836) 2 Y. & C. 200.—ALDERSON, B., *commented on*.

Adams v. Barry (1845) 2 Coll. 290.—KNIGHT BRUCE, V.-C.

Martin v. Heathcote (1763) 2 Eden 169.—L.C.; and **Barber v. Barber** (1811) 18 Ves. 286.—M.B., *overruled*.

Robinson v. Alexander (1834) 2 Cl. & F. 717; 8 Bligh (N.S.) 352.—H.L. (B.). BROUGHTAM, L.C.

Inglis v. Haigh (1841) 10 L. J. Ex. 406; 8 M. & W. 769; 9 D. P. C. 817; 5 Jur. 704.

—EX.; **Cottam v. Partridge** (1842) 11 L. J. C. P. 161; 4 Man. & G. 271; 4 Scott (N.R.) 819.—C.P.; and **Barber v. Barber**, *referred to*.

Robinson v. Alexander, *discussed*.
Tatam v. Williams (1844) 3 Hare 347.—WIGRAM, V.-C.

Inglis v. Haigh, *followed*.
Pritchard v. Scott (1855) 3 W. R. 482.—ALDERSON and MARTIN, BB.

Martin v. Heathcote, Barber v. Barber and **Tatam v. Williams**, *explained and applied*.

Robinson v. Alexander, *referred to*.
Knox v. Gye (1872) 42 L. J. Ch. 234; L. R. 5 H. L. 656.—H.L. (B.). HATHERLEY, L.C., *dissenting*.

Knox v. Gye.
Applied, **Taylor & Taylor** (1873) 28 L. T. 189.—JAMES, L.J.; *referred to*, **Edwards v. Warden** (1874) L. R. 9 Ch. 495, 505 (*supra*, col. 1568); *explained*, **Noyes v. Crawley** (1878) 48 L. J. Ch. 112; 10 Ch. D. 31, 38; 39 L. T. 267; 27 W. R. 109.—MALINS, V.-C.; *referred to*, **Barton v. North Staffordshire Ry.** (1888) 57 L. J. Ch. 800; 38 Ch. D. 458, 463; 58 L. T. 549; 36 W. R. 754.—KAY, J.; *explained*, **Sharpe, In re, Bennett, In re, Masonic and General Life Assurance Co. v. Sharpe** (1891) 61 L. J. Ch. 193; [1892] 1 Ch. 154.—C.A. (*supra*, col. 1571); *distinguished*, **Betjemann v. Betjemann** (1895) 64 L. J. Ch. 641; [1895] 2 Ch. 474.—C.A. (*post*, col. 1586) (*supra*); *referred to*, **How v. Winterton** (Earl) (1896) 65 L. J. Ch. 832; [1896] 2 Ch. 626.—C.A. (*supra*, col. 1567); *Friend, In re, Friend v. Friend* (1897) 66 L. J. Ch. 737; [1897] 2 Ch. 421 (*supra*, col. 1572); **Bull Coal Mining Co. v. Osborne** (1899) 68 L. J. P. C. 49; [1899] A. C. 351; 80 L. T. 430; 47 W. R. 545.—P.C.

Barton v. North Staffordshire Ry. (*supra*, col. 1574), *referred to*.
Smith v. Cork and Bandon Ry. (1870) Ir. R. 5 Eq. 65.—C.A., *followed*.
 Severn and Wye and Severn Bridge Ry., In re (1896) 65 L. J. Ch. 400; [1896] 1 Ch. 559, 565; 74 L. T. 219; 44 W. R. 347; 3 Manson 90.—ROMER, J.

Smith v. Cork, &c. Ry. and Cornwall Minerals Ry., In re (1897) 66 L. J. Ch. 561; [1897] 2 Ch. 74; 76 L. T. 832; 46 W. R. 5; 61 J. P. 345, 535.—V. WILLIAMS, J., *applied*.
Severn and Wye and Severn Bridge Ry., In re, discussed.
 Drogheda Steam Packet Co., In re [1903] 1 Ir. R. 512, 515.—PORTER, M.R.

Roberts v. Read (1812) 16 East 215; 14 R. R. 335.—K.B., *observed upon*.
 Blakemore v. Glamorganshire Canal Co. (1829) 3 Y. & J. 60; *affirmed*, (1831) 1 Cl. & F. 262; 5 Bligh 547; 1 Myl. & K. 170.—H.L. (E.).: S. C. (1832) 2 L. J. Ch. 95; 1 Myl. & K. 154; 36 R. R. 289.—BROUGHAM, L.C.

HULLOCK, B.—In that case, surveyors of a road had undermined a wall, which did not fall until more than three months had elapsed, within which time, by the statute 13 Geo. 3, c. 78, s. 81, actions must be commenced for anything done or acted in pursuance of the Act. The action was not commenced until the wall had fallen, and it was contended that the action was too late, because the act done was the undermining of the wall. The Court of K. B., however, decided (I shall say with great submission, most properly, and the principle can hardly be controverted), that the *gravamen* of the action (in the language of the learned lord who at that time presided in that Court), did not commence until the falling of the wall. I am quite aware that in a case in the Court of C. P., of *Sutton v. Clarke* (1 Marsh. 429; 6 Taunt. 29, n.), Gibbs, C.J., did, in one part of the argument, say that he thought he should have had great difficulty, as one of the members of the Court, to have acceded to that decision; he said it was a strong case. But I think it may be collected from the subsequent observations in the remaining part of the report, that the learned judge did recognise the decision, and seemed to think no other decision, under the circumstances, should be come to. Assuming that it was a sound one, which it appears to me to be, it goes a long way to show that you cannot sustain this action for the several injuries which occurred at the different intervals during the last two years, but are confined to the injuries sustained during the six months preceding the commencement of the action.—p. 73.

Roberts v. Read, distinguished.
Nicklin v. Williams (1854) 23 L. J. Ex. 335; 10 Ex. 259; 2 C. L. R. 1304.—EX.

Roberts v. Read, referred to.
Mitchell v. Darley Main Colliery Co. (1884) 53 L. J. Q. B. 471; 14 Q. B. D. 125, 136; 32 W. R. 947; 48 J. P. 828.—C.A.; *affirmed*, H.L. (E.). See "MINES AND MINERALS."

3. PERSONAL ACTIONS.

Acknowledgment.

Baillie v. Inchiquin (Lord) (1796) 1 Esp. 435, *held overruled*.

Whippy v. Hillary (1832) 1 L. J. Q. B. 168; 3 B. & Ad. 399; 5 Car. & P. 209; 37 R. R. 450.—K.B., *followed*.

Routledge v. Ramsay (1838) 7 L. J. Q. B. 156; 8 A. & E. 221; 3 N. & P. 319; 1 W. W. & H. 232; 2 Jur. 789.—Q.B.

DENMAN, C.J.—In *Baillie v. Inchiquin (Lord)* it was certainly held by Lord Kenyon that a letter from the defendant, referring the creditor to his trustee, was a sufficient acknowledgment. But *Whippy v. Hillary* decides that a letter containing such words is not an acknowledgment in writing signed by the party chargeable thereby, within 9 Geo. 4, c. 14; and that case governs the present.—p. 223.

A'Court v. Cross (1825) 3 Bing. 329; 11 Moore 198; 4 L. J. (O.S.) C. P. 79.—C.R., *approved*.

Tanner v. Smart (1827) 6 B. & C. 603; 9 D. & R. 549; 5 L. J. (O.S.) K. B. 218; 30 R. R. 461.—K.B. See *post*, cols. 1577, 1578.

Yea v. Fouraker (1760) 2 Burr. 1099; and *Thornton v. Illingworth*, (1824) 2 B. & C. 824; 4 D. & R. 545; 2 L. J. (O.S.) K. B. 175.—K.B., *held overruled*.

Tanner v. Smart, followed.

Bateman v. Pinder (1842) 3 Q. B. 574; 11 L. J. Q. B. 281; 2 G. & D. 790.—Q.B.

DENMAN, C.J.—*Yea v. Fouraker* is acknowledged as an authority in *Thornton v. Illingworth*. But the judges distinguish it from that case. *Yea v. Fouraker* was rightly decided, if, as Bayley and Holroyd, JJ., lay it down in the subsequent case, the Statute of Limitations takes effect upon the ground, that after a certain time it shall be presumed that the debt has been discharged. For, if that be so, an acknowledgment made at any time will rebut that presumption. But in *Tanner v. Smart*, the earlier cases were revised, and the doctrine as to presumption of payment repudiated; and it was held that, to prevent the operation of the statute, a distinct promise was necessary.—p. 575.

Thornton v. Illingworth, observed on.

Slator v. Tifmble (1861) 14 Ir. C. L. R. 342.—Q.B.

Tanner v. Smart, principle stated and approved.

Hart v. Prendergast (1845) 15 L. J. Ex. 223; 15 M. & W. 741.—EX.

Tanner v. Smart, referred to.

Smith v. Thorne (1852) 21 L. J. Q. B. 199; 18 Q. B. 134; 16 Jur. 332.—EX. CH.

Partington v. Butcher (1806) 6 Esp. 66, *held overruled*.

Goate v. Goate (1856) 1 H. & N. 29.—EX.
 BRAMWELL, B.—Since *Tanner v. Smart*, *Partington v. Butcher* cannot be considered law.—p. 31.

Smith v. Thorne, applied.

Rackham v. Marriott (1857) 26 L. J. Ex. 315; 2 H. & N. 196; 3 Jur. (N.S.) 495; 5 W. R. 572.—EX. CH.

Tanner v. Smart and Smith v. Thorne, referred to.

Rackham v. Marriott and Hart v. Prendergast (*supra*), *explained*.

Sidwell v. Mason (1857) 26 L. J. Ex. 407; 2 H. & N. 306; 3 Jur. (N.S.) 649; 5 W. R. 72.—EX.
 MARTIN, B.—*Rackham v. Marriott and Hart*

v. Prendergast were decided on the plain principle that the expression of a hope is no promise.—p. 408.

Smith v. Thorne (*supra*), *applied*.

Everett v. Robertson (1858) 28 L. J. Q. B. 23; 1 El. & El. 16; 4 Jur. (N.S.) 1083; 7 W. R. 9.—Q.B.; *Chasemore v. Turner* (1875) L. R. 10 Q. B. 500, 507 (*post*).

Hart v. Prendergast (*supra*), *referred to*.

Chasemore v. Turner (1875) L. R. 10 Q. B. 500, 519 (*post*); *Mowbray v. Appleby* (1899) 80 L. T. 805.—BUCKNILL, J.

Sidwell v. Mason (*supra*), *referred to*.

Godwin v. Culley (1859) 4 H. & N. 373.—EX.

Sidwell v. Mason, *adhered to*.

Godwin v. Culley, *applied*.

Cornforth v. Smithard (1859) 29 L. J. Ex. 228; 5 H. & N. 13; 8 W. R. 8.—EX.

Sidwell v. Mason, *followed*.

Chasemore v. Turner (*post*).

Godwin v. Culley, *considered*.

Stamford Banking Co. v. Smith (1892) 61 L. J. Q. B. 405; [1892] 1 Q. B. 765.—C.A. (*post*, col. 1579).

Cornforth v. Smithard (*supra*), *discussed*.

Chasemore v. Turner (*post*); *Firth v. Slingsby* (*post*, col. 1578).

France v. Sympton (1854) Kay 678; 18 Jur. 929.—WOOD, V.-C., *explained*.

River Steamer Co., In re, Mitchell's Claim (1871) L. R. 6 Ch. 822; 25 L. T. 319; 19 W. R. 1130.—JAMES and MELLISH, L.JJ.; *Banner v. Berridge* (1881) 18 Ch. 254, 270 (*post*, col. 1578).

France v. Sympton, *applied*.

Quincey v. Sharpe (*post*, col. 1578).

Collis v. Stack (1857) 26 L. J. Ex. 138; 1 H. & N. 605.—POLLOCK, C.B. and MARTIN, B., and **Philips v. Philips** (1844) 13 L. J. Ch. 445; 3 Hare 281.—WIGRAM, V.-C., *followed*.

Fearn v. Lewis (1830) 6 Bing 349; 4 M. & P. 1; 8 L. J. (O.S.) C. P. 95; 31 R. R. 434.—C.P., *distinguished*.

Lee v. Wilmot (1866) 35 L. J. Ex. 175; L. R. 1 Ex. 364; 4 H. & C. 469; 12 Jur. (N.S.) 762; 14 L. T. 627; 14 W. R. 993.—EX., *discussed*.

Chasemore v. Turner (1875) 45 L. J. Q. B. 66; L. R. 10 Q. B. 500; 33 L. T. 323; 24 W. R. 70.—EX. CH. COLERIDGE, C.J., *dissenting*.

Fearn v. Lewis, *referred to*.

Mowbray v. Appleby (1899) 80 L. T. 805.—BUCKNILL, J.

Lee v. Wilmot, *referred to*.

Firth v. Slingsby (*post*, col. 1578).

Lee v. Wilmot, *approved*.

Green v. Humphreys (1884) 53 L. J. Ch. 625; 26 Ch. D. 474 (*post*, col. 1578).

Tanner v. Smart (*supra*, col. 1576), *referred to*.
River Steamer Co., In re, Mitchell's Claim, *applied*.

Morgan v. Rowlands (1872) 41 L. J. Q. B. 187; L. R. 7 Q. B. 493; 26 L. T. 855; 20 W. R. 726.—BLACKBURN and HANNEN, JJ.

Tanner v. Smart, *followed*.

Chasemore v. Turner (*supra*).

Tanner v. Smart, *approved*.

Mitchell's Claim and Chasemore v. Turner, *applied*.

Quincey v. Sharpe (1876) 45 L. J. Ex. 347; 1 Ex. D. 72; 34 L. T. 495; 24 W. R. 373.—EX. D.

Tanner v. Smart and Mitchell's Claim, *referred to*.

Chasemore v. Turner, *explained*.

Skeet (or Skeat) v. Lindsay (1877) 46 L. J. Ex. 249; 2 Ex. D. 314; 36 L. T. 98; 25 W. R. 322.—CLEASBY, B.

Chasemore v. Turner, *principle applied*.

Meyerhoff v. Froelich (1878) 3 C. P. D. 333, 337.—DENMAN, J.; *affirmed*, 48 L. J. C. P. 43; 4 C. P. D. 63; 39 L. T. 620; 27 W. R. 258.—C.A.; *Mowbray v. Appleby* (1899) 80 L. T. 805.—BUCKNILL, J.

Mitchell's Claim, *commented on*.

Banner v. Berridge (1881) 50 L. J. Ch. 630; 18 Ch. D. 254, 272 (*supra*, col. 1570).

Tanner v. Smart, *approved*.

Green v. Humphreys (1884) 53 L. J. Ch. 625; 26 Ch. D. 474, 479 (*post*).

Mitchell's Claim, *referred to*.

Tanner v. Smart, *applied*.

Bethell, In re, Bethell v. Bethell (1887) 56 L. J. Ch. 334; 34 Ch. D. 561, 565; 56 L. T. 92; 35 W. R. 330.—STIRLING, J.

Tanner v. Smart, *referred to*.

Hollingshead, In re, Hollingshead v. Webster (1888) 57 L. J. Ch. 400; 37 Ch. D. 651, 657; 58 L. T. 758; 36 W. R. 660.—CHITTY, J.; *Green v. Humphreys* (*post*); *Stamford Banking Co. v. Smith* (*post*, col. 1579).

Mitchell's Claim and Tanner v. Smart, *referred to*.

Firth v. Slingsby (1888) 58 L. T. 481.—STIRLING, J.

Tanner v. Smart, *followed*.

Rogers v. Quinn (1889) 26 L. R. Ir. 136.—PALLES, C.B., DOWSE, B. and ANDREWS, J.

Mitchell's Claim, *referred to*.

Skeet (or Skeat) v. Lindsay and Quincey v. Sharpe (*supra*), *followed*.

Curwen v. Milburn (1889) 42 Ch. D. 424; 38 W. R. 49.—NORTH, J.; *affirmed*, C.A.

Morgan v. Rowlands (*supra*, col. 1577), *dictum explained*.

Green v. Humphreys (1884) 26 Ch. D. 474; 53 L. J. Ch. 625; 51 L. T. 42.—C.A.; *reversing* (1883) 23 Ch. D. 207; 52 L. J. Ch. 659; 48 L. T. 479.—POLLOCK, B.

COTTON, L.J.—Something was said in argument about an expression used by Lord Blackburn in *Morgan v. Rowlands* that the acknowledgment must be such that a promise may be inferred in fact and not merely implied in law. There was a discussion as to what that meant. In my opinion it is not necessary for the present purpose to decide that; but what I think the learned judge must have meant was this, that an acknowledgment is not sufficient if it merely admits a state of circumstances from which a promise to pay would be implied by law, as, for instance, when goods are sent to a man at his request, without any express contract, and the law implies an obligation to pay. What I think we must find from the writing is not merely an acknowledgment of such a state of circumstances as will throw a duty upon the writer to pay, but words

of such a character that you may reasonably infer from the words a promise to pay. It may be put in this way, that on a fair construction of the language there must be an acknowledgment of the claim as one which is to be paid by the writer.—p. 478.

BOWEN, L.J.—It is clearly settled that to take a case out of the statute there must be an acknowledgment or a promise to pay, and that where there is a clear acknowledgment that the debt is due from the person giving that acknowledgment a promise to pay will be inferred. That was laid down by Lord Tenterden in *Tanner v. Smart* (*supra*), and the proposition, as Kelly, C.B. said in *Quincey v. Sharpe* (*supra*), has never been disputed, and it has been re-stated over and over again in all the Courts. Now, first of all, the acknowledgment must be clear in order to raise the implication of a promise to pay. . . . Secondly, supposing there is an acknowledgment of a debt which would, if it stood by itself be clear enough, still, if words are found combined with it which prevent the possibility of the implication of the promise to pay arising, then the acknowledgment is not clear within the meaning of the definition; because, not merely is there found in the words something that expresses less than a promise to pay (which, as Lord Bramwell pointed out in *Lee v. Wilmut* (*supra*, col. 1577), will not necessarily put an end to the implication of the promise to pay), but because the words express the lesser in such a way as to exclude the greater.—p. 479. **FRY, L.J.** concurred.

Green v. Humphreys, referred to.

Firth v. Slingsby (1888) 58 L. T. 481, 484.—**STIRLING, J.**; *Curwen v. Milburn* (*supra*, col. 1578).

Morgan v. Rowlands (*supra*), applied.

Sims v. Brutton (1850) 20 L. J. Ex. 41; 5 Ex. 802.—**EX.**, referred to.

Somerset, In re, Somerset v. Poulett (Earl) (1894) 63 L. J. Ch. 41; [1894] 1 Ch. 231; 7 L. 34; 69 L. T. 744; 42 W. R. 145.—**C.A.**

Morgan v. Rowlands, distinguished.

Green v. Humphreys, referred to.

Brew v. Brew (1898) [1899] 2 Ir. R. 163.—**Q.B.D.**

Morgan v. Rowlands, referred to.

Lindsay v. Maguire [1899] 2 Ir. R. 554.—**GIBSON, J.**

Foster v. Dawber (1851) 20 L. J. Ex. 385; 6 Ex. 839.—**EX.**

Referred to, *Abrey v. Crux* (1869) 39 L. J. C. P. 9; L. R. 5 C. P. 37, 44; 21 L. T. 327; 18 W. R. 63.—**C.P.**; *Morgan v. Rowlands* (*supra*, col. 1577); applied, *Somerset, In re* (*supra*).

Clark or Clarke v. Hooper (1834) 3 L. J. C. P. 159; 10 Bing. 480; 4 M. & Scott 353; 38 R. R. 508.—**C.P.**, referred to.

Bodger v. Arch (1854) 24 L. J. Ex. 19; 10 Ex. 333, 340; 2 C. & R. 1491.—**EX.**; *Baker v. Baker* (1886) 55 L. T. 723.—**KAY, J.**

Clark or Clarke v. Hooper, considered and distinguished.

Stamford Banking Co. v. Smith (1892) 61 L. J. Q. B. 405; [1892] 1 Q. B. 765; 66 L. T. 306; 40 W. R. 355; 56 J. P. 229.—**C.A.**

Lloyd v. Maund (1788) 2 Term Rep. 760.—**K.B.**, disapproved.

McArel v. Frith (1838) 3 M. & W. 402; 7 L. J.

Ex. 172; 8 Car. & P. 246; 1 H. & H. 100; 2 Jur. 619.

ABINGER, C.B.—The decision in *Lloyd v. Maund* amounted to no more than this, that the judge was wrong in the interpretation he put upon the letter given in evidence, and therefore he should have left it to the jury.—p. 405.

PARKE, B.—I have always acted on that authority in the case of an obscure and doubtful document, but I have always disapproved it. The course I have taken is, to express my own opinion, and then to take that of the jury, in order that, if they differed with me, the opinion of the Court might be fairly taken on the question whether the document should be left to the jury. But if I am called upon to give an opinion, I think *Lloyd v. Maund* is not law.—p. 406.

Kennett v. Milbank (1831) 1 L. J. C. P. 8; 8 Bing. 38; 1 M. & S. 108.—**C.P.**, considered.

Lechmere v. Fletcher (1833) 1 Cr. & M. 623; 3 Tyr. 450; 38 R. R. 648.—**EX.** See judgment.

Lechmere v. Fletcher and Dickenson v. Hatfield (1831) 5 Car. & P. 46; 1 M. & Rob. 141.—**K.B.**, applied.

Edmunds v. Downes (1834) 3 L. J. Ex. 98; 2 Cr. & M. 459; 4 Tyr. 173; 39 R. R. 813.—**EX.** And see post.

Lechmere v. Fletcher, followed.

Bird v. Gammon (1837) 6 L. J. C. P. 258; 3 Bing. (N.C.) 883; 5 Scott 213; 3 Hodges 224.—**C.P.**

Kennett v. Milbank (*supra*), held overruled.

Hartley v. Wharton (1840) 9 L. J. Q. B. 209; 11 A. & E. 934; 3 P. & D. 529; 52 R. R. 547.—**Q.B.**

Hartley v. Wharton, followed.

Harris v. Wall (1847) 16 L. J. Ex. 270; 1 Ex. 122.—**EX.**

Lechmere v. Fletcher (*supra*), followed.

Blyth v. Fladgate (1890) 60 L. J. Ch. 66; [1891] 1 Ch. 337; 63 L. T. 546; 39 W. R. 422; 7 Times L. R. 31.—**STIRLING, J.**

Hartley v. Wharton and Edmunds v. Downes, applied.

McGuffie v. Burleigh (1898) 78 L. T. 264.—**BRUCE, J.**

Edmunds v. Downes, referred to.

Mowbray v. Appleby (1899) 80 L. T. 805.—**BUCKNILL, J.**

Andrews v. Brown (1714) 1 Eq. Cas. Abr. 305; Pre. Ch. 385, disapproved.

Jones v. Scott (1831) 1 Russ. & M. 255; 9 L. J. (o.s.) Ch. 252.—**L.C.**; reversing 8 L. J. (o.s.) Ch. 83.—**M.R.**; reversed, *nom. Scott v. Jones* (1838) 7 L. J. Ch. 242; 4 Cl. & F. 382; 42 R. R. 29.—**H.L. (E.).** And see col. 1581.

LYNDHURST, L.C.—[His lordship read the report in *Precedents in Chancery*, 385, and observed that on two points, at least, the doctrine there laid down could not now be supported; for it was there said that a direction in a will for payment of debts was sufficient to revive debts that had been previously barred: and that, in addition to an acknowledgment of the debt being still due, a promise to pay it was necessary in order to frustrate a plea of the statute.] I

therefore hold the authority of *Andrews v. Brown* to be of very little weight.—p. 270.

Scott v. Jones or Jones v. Scott, adopted.

Freaker v. Cranefield (1838) 8 L. J. Ch. 61; 3 Myl. & Cr. 499; 4 Jur. 1080.—COTTENHAM, L.C.

Scott v. Jones, referred to.

Cudbury v. Smith (1869) L. R. 9 Eq. 37, 42; 24 L. T. 52; 18 W. R. 105.—ROMILLY, M.R.

Scott v. Jones, principle applied.

Hepburn, In re. Smith, Ex parte (1884) 54 L. J. Q. B. 394, 399; 14 Q. B. D. 394.—CAVE, J.

Scott v. Jones and Hepburn, In re. Smith, Ex parte, discussed and not applied.

Cadbury v. Smith, applied.

Stephens, In re. Warburton v. Stephens (1889) 59 L. J. Ch. 109; 43 Ch. D. 39, 44; 61 L. T. 609.—KAY, J.

Whitecomb v. Whiting (1781) 2 Dougl. 652.

—K.B., *discussed.*

Jackson v. Fairbank (1794) 2 H. Bl. 340.

—EX., *distinguished.*

Brandram v. Wharton (1818) 1 B. & Ald. 463; 19 R. R. 354.—K.B.

ABBOTT, J.—If it were necessary in this case to overrule *Jackson v. Fairbank*, I should require further time to consider it, although I am by no means satisfied that that was a sound or good decision. This case is, however, not precisely the same as that. The proof there under the commission of bankruptcy was of the same instrument upon which the action was afterwards brought. Here it is not so. The proof here is of a claim for goods sold and delivered, and the bill of exchange is only incidentally introduced. Now there is a material distinction between a case where the instrument is the ground of the claim, and where it is, as here, only incidentally introduced. Where it is the ground of the claim, it is the interest both of the bankrupt and his assignees to attend to it, and to examine into the circumstances under which it is produced. But in the other case it is not so necessary: for the introduction or omission of it does not increase or diminish the sum on which the dividends are payable. There being this distinction between this case and *Jackson v. Fairbank*, and not being willing to extend that case any further, I am of opinion that the plaintiff in this case must be nonsuited.—p. 470.

Whitecomb v. Whiting, commented on.

Atkins v. Tredgold (1823) 2 B. & C. 23; 3 D. & R. 200; 1 L. J. (o.s.) K. B. 228; 26 R. R. 254.—K.B.

ABBOTT, C.J.—The evidence was, a payment of interest by Robert Tredgold in his own right. *Whitecomb v. Whiting* was relied upon to show that such payment would take the case out of the Statute of Limitations. It is not necessary to say whether that case, which is contrary to a former decision in *Ventris*, would be sustained, if reconsidered; but I am warranted in saying, by what fell from Lord Ellenborough in *Brandram v. Wharton*, that it ought not to be extended. The payment was by one of several originally liable. Here we are called upon to go further, and say, that a payment by one of several, liable *alieno jure*, shall raise an implied promise by them all. Such a decision would introduce great difficulty in administering the affairs of testators. . . . The inconvenience and hardship arising from such a liability satisfies me that the

principle of *Whitecomb v. Whiting* ought not to be extended to this case.—p. 28.

Whitecomb v. Whiting and Jackson v. Fairbank (supra), followed.

Burleigh v. Stott (or Platt) (1828) 8 B. & C. 36; 2 Man. & R. 93; 6 L. J. (o.s.) K. B. 232; D. & L. 53; 32 R. R. 334.—K.B.; *Manderson v. Robertson* (1829) 4 Man. & R. 440; 7 L. J. (o.s.) K. B. 251.—K.B.

Whitecomb v. Whiting, approved.

Channell v. Ditchburn (1839) 9 L. J. Ex. 1; 5 M. & W. 494; 3 Jur. 1107.—EX.

Whitecomb v. Whiting, followed.

Goddard v. Ingram (1842) 12 L. J. Q. B. 9; 3 Q. B. 839; 3 G. & D. 46; 6 Jur. 1060.—Q.B.

Whitecomb v. Whiting, referred to.

Wolmershausen, In re (post).

Jackson v. Fairbank, commented on.

Davies v. Edwards (1851) 21 L. J. Ex. 4; 7 Ex. 22; 15 Jur. 1014.—EX.

Davies v. Edwards, applied.

Topping, Ex parte, Levey, In re (1865) 34 L. J. Bk. 44; 4 De G. J. & S. 551; 12 L. T. 787; 13 W. R. 1025.—CRANWORTH, L.C.

Davies v. Edwards, referred to.

Morgan v. Rowlands (1872) 41 L. J. Q. B. 187; L. R. 7 Q. B. 493, 498 (col. 1577); *Lindsay v. Maguire* [1899] 2 Ir. R. 554.—GIBSON, J.

Davies v. Edwards, applied.

Somerset, In re. Somerset v. Ponlett (Earl) [1894] 1 Ch. 231.—C.A. (*supra*, col. 1579).

Davies v. Edwards, followed.

Jackson v. Fairbank, sensible, overruled.

Taylor v. Holland (1902) 71 L. J. K. B. 278; [1902] 1 K. B. 676, 680; 86 L. T. 228; 50 W. R. 558.—JELF, J.

Atkins v. Tredgold (col. 1581), *applied.*

Slater v. Lawson (1830) 1 B. & Ad. 396, 393; 9 L. J. (o.s.) K. B. 4.—K.B.

Atkins v. Tredgold, Slater v. Lawson and

Channell v. Ditchburn (supra), explained.

Putnam v. Bates (1826) 3 Russ. 188.—M.R., *followed.*

Fordham v. Wallis (1853) 22 L. J. Ch. 548; 10 Hare 217; 17 Jur. 228; 1 W. R. 118.—TURNER, V.-C.

Cockrill v. Sparkes (1863) 32 L. J. Ex. 118;

1 H. & C. 699; 9 Jur. (N.S.) 307; 7 L. T. 752; 11 W. R. 428.—EX., *distinguished.*

Powers, In re, Lindsell v. Phillips (1885) 30 Ch. D. 291; 53 L. T. 647.—C.A. (*post*, col. 1594).

Atkins v. Tredgold; Slater v. Lawson; Cock-

rill v. Sparkes; Perham v. Raynall (1824)

9 Moore 566; 2 Bing. 301; 3 L. J. (o.s.)

C. P. 271; 27 R. R. 655.—C.P.; and *Wyatt*

v. Hodson (1832) 1 M. & Scott 442; 8 Bing.

209; 1 L. J. C. P. 93; 34 R. R. 724.—C.P.,

referred to.

Wolmershausen, In re. Wolmershausen v. Wol-
mershausen (1890) 62 L. T. 541, 544; 38 W. R. 537.—STIRLING, J.

Willis v. Newham (1830) 3 Y. & J. 518.—

EX., *followed.*

Waters v. Tompkins (1835) 5 L. J. Ex. 61; 2 Cr. M. & R. 723; 1 Tyr. & G. 137.—EX.

Willis v. Newham and Waters v. Tompkins, *applied*.

Trentham v. Deverill (1837) 3 Bing. (N.C.) 397; 4 Scott 128.—C.P., *distinguished*.

Bayley v. Ashton (1840) 9 L. J. Q. B. 376; 12 A. & E. 493; 4 P. & D. 214.—Q.B.

Willis v. Newham and Bayley v. Ashton, *commented on*.

Maghee v. O'Neil (1841) 10 L. J. Ex. 326; 7 M. & W. 531.—EX.

Bayley v. Ashton, *followed unwillingly*.

Eastwood v. Saville (1842) 11 L. J. Ex. 383; 9 M. & W. 615.—EX.

Waters v. Tompkins,

Followed, **Bevan (or Bevan) v. Gething (or Gethin)** (1842) 12 L. J. Q. B. 37; 3 Q. B. 740; 3 G. & D. 59; 6 Jur. 971.—Q.B.; *explained*, **Nash v. Hodgson** (*post*).

Willis v. Newham, *overruled*.

Cleave v. Jones (1851) 20 L. J. Ex. 238; 6 Ex. 573; 15 Jur. 515.—EX. CH.

CAMPBELL, C.J.—I am of opinion the time has come when *Willis v. Newham* must be overruled. The question upon this record is, the action being brought on a promissory note, whether an entry in the account book of the defendant in her writing, by which there is a statement that she has paid interest upon the promissory note within six years, be evidence to go to the jury to take the case out of the Statute of Limitations. It was held by the learned judge who tried this case, in deference to that decision, that it was not. . . . If we say, as we feel bound to do, that *Willis v. Newham* was improperly decided, we hold that the evidence rejected ought to have been submitted to the jury.—p. 240.

Cleave v. Jones, *approved*.

Edwards v. Jones (1855) 1 K. & J. 534; 3 W. R. 566.

WOOD, V.-C.—*Cleave v. Jones* . . . shows that an admission by a debtor that he has made a payment may be taken as proof of that payment having been made. That seems to be reasonable.—p. 537.

Tippetts v. Heane (1834) 3 L. J. Ex. 281; 1

Cr. M. & R. 252; 4 Tyr. 772.—EX.;

Mills v. Fowkes (1839) 8 L. J. C. P. 276;

5 Bing. (N.S.) 455; 7 Scott 444; 2 Arn.

62; 3 Jur. 406.—C.P.; **Waugh v. Cope**

(1840) 10 L. J. Ex. 145; 6 M. & W. 824.—

EX.; and **Burn v. Boulton** (1846) 15 L. J.

C. P. 97; 2 C. B. 476.—C.P., *explained*.

Nash v. Hodgson (1856) 25 L. J. Ch. 186; 6 De G. M. & G. 474; 1 Jur. (N.S.) 946.—L.C. and L.J.; *reversing* 23 L. J. Ch. 780; Kay 650.—WOOD, V.-C.

Burn v. Boulton, *distinguished*.

Walker v. Butler (1876) 25 L. J. Q. B. 377; 6 El. & Bl. 506; 2 Jur. (N.S.) 687.—Q.B.

Nash v. Hodgson, *distinguished*.

Walker v. Butler (*supra*); **Friend**, In re (*post*).

Mills v. Fowkes, *referred to*.

City Discount Co. v. McLean (1874) L. R. 9 J. P. 692, 700; 43 L. J. C. P. 344; 30 L. T. 883; —EX. CH.

Mills v. Fowkes, *distinguished*.

Walker v. Butler, *applied*.

Friend, In re, **Friend v. Friend** (1897) 66 L. J. Ch. 737; [1897] 2 Ch. 421; 77 L. T. 50; 46 W. R. 139.

STILLING, J.—In my opinion, these two cases [*Mills v. Fowkes* and *Nash v. Hodgson* (*supra*)] are distinguishable for two reasons: first, that the payment here was made expressly with reference to a statement of account which included as part of it the statute-barred items; and secondly, that, apart from these statute-barred items, there did not exist a balance of 300*l.*, payable to Eastwood & Co., either on the face of the statement or in fact.—p. 746.

Eicke v. Nokes (1834) 3 L. J. C. P. 256; 1 M. & R. 359; 4 M. & Scott 585; 1 Bing. (N.C.) 69.—C.P., *impeached*.

Everett v. Robertson (1858) 28 L. J. Q. B. 23; El. & El. 16; 4 Jur. (N.S.) 1083; 7 W. R. 9.

CAMPBELL, C.J.—With the exception of *Eicke v. Nokes* (which is merely a decision at *nisi prius*) there is no case in which it has been held, that the law will infer a promise to pay where the admission of the debt by the debtor has been coupled with a declaration that he cannot pay it in full.—p. 24.

Everett v. Robertson, *referred to*.

River Steamer Co., In re, **Mitchell's Claim** (1871) L. R. 6 Ch. 822, 828.—L.J. (*supra*, col. 1577).

Everett v. Robertson, *applied*.

Topping, Ex parte, **Levey**, In re (1865) 4 De G. J. & S. 551, 563.—L.C. (*supra*, col. 1582); **McDonnell v. Broderick** (*post*).

Irving v. Veitch (1837) 7 L. J. Ex. 25; 3 M. & W. 90; Mur. & H. 313.—EX., *referred to*.

Evans v. Nicholson (1875) 32 L. T. 778.—C.P.

Irving v. Veitch, *principle applied*.

McDonnell v. Broderick (1895) [1896] 2 Ir. R. 136.—C.A.

Wainman v. Kynman (1847) 16 L. J. Ex. 232; 1 Ex. 118.—EX., *referred to*.

Davies v. Edwards (1851) 21 L. J. Ex. 4; 7 Ex. 22 (col. 1582); **Bodger v. Arch** (1854) 24 L. J. Ex. 19; 10 Ex. 333; 2 C. L. R. 1491.—EX.; **Morgan v. Rowlands** (1872) 41 L. J. Q. B. 187; L. R. 7 Q. B. 493 (col. 1582); **Somerset**, In re, **Somerset v. Poulett** (Earl) (1894) 63 L. J. Ch. 41; [1894] 1 Ch. 231.—C.A. (col. 1582).

Bodger v. Arch (*supra*), *applied*.

Amos v. Smith (1862) 31 L. J. Ex. 423; 1 H. & C. 238; 7 L. T. 46; 10 W. R. 759.—EX.

Bodger v. Arch and Amos v. Smith, *referred to*.

Maber v. Maber (1867) 36 L. J. Ex. 70; L. R. 2 Ex. 153; 16 L. T. 26.—EX.

Bodger v. Arch, *referred to*.

Baker v. Baker (1886) 55 L. T. 723.—KAY, J.

Amos v. Smith, *applied*.

Dixon, In re, **Heynes v. Dixon** (1900) 69 L. J. Ch. 609; [1900] 2 Ch. 561; 83 L. T. 129; 48 W. R. 665.—C.A.

Tullock v. Dunn (1826) R. & M. 416; 27

R. R. 765.—K.B.; and **Scholey v. Walton**

(1843) 13 L. J. Ex. 122; 12 M. & W. 510;

8 Jur. 319.—EX., *commented on*.

Smith v. Poole (1841) 10 L. J. Ch. 192; 12

Sim. 17.—SHADWELL, V.-C., *followed*.

Spollan v. Magan (1851) 1 Ir. C. L. R. 691.—C.P.

Tullock v. Dunn and Scholey v. Walton, *distinguished*.

Macdonald, In re, **Dick v. Fraser** (1897) 66

L. J. Ch. 630; [1897] 2 Ch. 181; 76 L. T. 713; 45 W. R. 628.

STIRLING, J.—It was said that the acknowledgment or promise was by one of several executors, and that it was necessary in order to take the case out of the statute, that it should be by all. In support of this was cited the decision of Lord Tenterden in *Tulloch v. Dunn*, and the opinion of Parke, B. in *Scholey v. Walton*. These cases respectively deal with a verbal acknowledgment or promise by one of several executors previously to Lord Tenterden's Act.—p. 632.

Rainforth, In re, Gwynn v. Gwynn, 48 L. J. Ch. 725.—FRY, J.; *reversed*, (1879) 49 L. J. Ch. 5; 41 L. T. 610.—C.A.

Briggs v. Wilson (1854) 5 De G. M. & G. 12; 2 Eq. R. 153; 17 Beav. 330.—L.J. and M.R., *applied*.

Newbould v. Smith (1885) 29 Ch. D. 882; 53 L. T. 137; 33 W. R. 690.—NORTH, J.; *affirmed, post*.

Newbould v. Smith (1886) 52 L. J. Ch. 788; 33 Ch. D. 127; 55 L. T. 194; 34 W. R. 690.—C.A.; *affirmed*, on the facts (1889) 14 App. Cas. 423; 61 L. T. 814.—H.L. (E.).

Concealed Fraud.

Booth v. Warrington (Lord) (1714) 4 Bro. P. C. 163.—H.L. (E.), *followed*.

South Sea Co. v. Wymondsell (1732) 3 P. Wms. 143.—KING, L.C.

Booth v. Warrington and South Sea Co. v. Wymondsell, *explained*.

Hovenden v. Annesley (Lord) (1806) 2 Sch. & Lef. 629; 9 R. R. 119.—REDESDALE, L.C.

Blair v. Bromley (1846) 16 L. J. Ch. 105; 5 Hare, 542; 11 Jur. 115.—V.-C.; *affirmed*, 16 L. J. Ch. 495; 2 Ph. 354; 11 Jur. 617.—L.C., *not applied*.

Hunter v. Gibbons (1856) 26 L. J. Ex. 1; 1 H. & N. 459; 2 Jur. (N.S.) 1249; 5 W. R. 91.—EX.

Hunter v. Gibbons, South Sea Co. v. Wymondsell, Bond v. Hopkins (1802) 1 Sch. & Lef. 413.—REDESDALE, L.C.; and **Brooksbank v. Smith** (1836) 6 L. J. Ex. Eq. 34; 2 Y. & C. 58.—ANDERSON, B., *referred to*.

Denys v. Shuckburgh (1840) 4 Y. & C. 42; 5 Jur. 21.—ANDERSON, B., *not applied*.

Blair v. Bromley, *commented on*.

Ecclesiastical Commissioners v. N. E. Ry. (1877) 47 L. J. Ch. 20; 4 Ch. D. 845; 36 L. T. 174.—MALINS, V.-C. *And see* "MINES AND MINERALS."

Clark v. Hougham (1823) 2 B. & C. 149; 3 D. & R. 325; 1 L. J. (O.S.) K. B. 249.—K.B.; **Booth v. Warrington (Lord), South Sea Co. v. Wymondsell, Blair and Bromley, and Denys v. Shuckburgh**, *applied*.

Hunter v. Gibbons, *referred to*.

Gibbs v. Guild (1881) 51 L. J. Q. B. 228; 8 Q. B. D. 296; 46 L. T. 135; 30 W. R. 407; 46 J. P. 310.—FIELD, J.; *affirmed*, C.A. (*post*).

Booth v. Warrington (Lord), South Sea Co. v. Wymondsell, Bond v. Hopkins, and Blair v. Bromley, *discussed and approved*.
Hunter v. Gibbons and Imperial Gas Light

and Coke Co. v. London Gas Light Co. (1854) 23 L. J. Ex. 303; 10 Ex. 39; 2 C. L. R. 1230; 18 Jur. 497; 2 W. R. 527.—EX., *commented on*. *And see post*, col. 1587.

Gibbs v. Guild (1882) 51 L. J. Q. B. 313; 9 Q. B. D. 59; 46 L. T. 248; 30 W. R. 591.—C.A. HOLKER, L.J. *dissenting*.

Bond v. Hopkins, *referred to*.

Maddison v. Alderson (1883) 52 L. J. Q. B. 737; 8 App. Cas. 467; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.—H.L. (E.).

Booth v. Warrington, *commented on*.

Gibbs v. Guild, *distinguished*.

Hunter v. Gibbons and Imperial Gas Light and Coke Co. v. London Gas Light Co., *referred to*.

Barber v. Houston (1885) 18 L. R. Ir. 475.—C.A.

Booth v. Warrington, *commented on*.

McCallum, In re, McCallum v. McCallum (1900) 70 L. J. Ch. 206; [1901] 1 Ch. 143.—C.A. (*post*, col. 1608).

Imperial Gas Light and Coke Co. v. London Gas Light Co. and Hunter v. Gibbons, *followed*.

Gibbs v. Guild, *distinguished*.

Armstrong v. Milburn (1885) 54 L. T. 247.—MATHEW, J.; *affirmed*, 54 L. T. 723.—C.A.

Blair v. Bromley (*supra*), *principle applied*.

Moore v. Knight (1890) 60 L. J. Ch. 271; [1891] 1 Ch. 547; 63 L. T. 831; 39 W. R. 312.—STIRLING, J.

Gibbs v. Guild, *referred to*.

Blair v. Bromley and Moore v. Knight, *distinguished*.

Thorne v. Heard (1894) 63 L. J. Ch. 356; [1894] 1 Ch. 599; 7 R. 100; 70 L. T. 541; 42 W. R. 274.—C.A. *And see post*, col. 1608.

Gibbs v. Guild, *examined*.

Betjemann v. Betjemann (1895) 64 L. J. Ch. 641; [1895] 2 Ch. 474; 12 R. 455; 73 L. T. 2; 44 W. R. 182.—C.A. LINDLEY, LOPES and RIGBY, L.JJ.

LINDLEY, L.J.—Field, J. in *Gibbs v. Guild* went a little too far when he said that the 26th section [of 3 & 4 Will. 4, c. 27] expressed the whole doctrine of equity applicable to concealed fraud. As between such persons as vendor and purchaser, where the maxim of *caveat emptor* applies, the observations of the learned judge were not open to criticism that I know of. I am not aware that there is any difference between law and equity in a case of that kind, but the learned judge was not correct in applying that limitation to partners. What right has a partner to say, "You ought not to have trusted me. You were bound to look at the books and see that I was not cheating you"? Such a doctrine as that is unfounded. I am not expressing any new view of the law, for the doctrine will be found very well put in the leading case of *Hawkins v. Wickham* [(1859) 28 L. J. Ch. 188; 3 De G. & J. 304; 7 W. R. 145].—pp. 643, 644.

RIGBY, L.J.—I think we ought to take the law in *Gibbs v. Guild*, so far as it is applicable to this case, from the C. A., and not from the judgment of Field, J. in the Court below. *The judges

of the C. A. proved entirely upon what I have always understood to be the old law, that time runs against one in the Court of Equity from the time when the concealed fraud has been discovered. I agree with what Lindley, L.J. has said about *Raoulins v. Wickham*.—p. 645.

Barber v. Houston (*supra*) and **Gibbs v. Guild**, *distinguished*.

Connolly v. Gorman (1897) [1898] 1 Ir. R. 20.—C.A.

FITZGIBBON, L.J.—Such cases as *Barber v. Houston* and *Gibbs v. Guild* apply only to the common law actions of false representation and deceit.—p. 68.

Hunter v. Gibbons (*supra*), **Imperial Gas Light and Coke Co. v. London Gas Light Co.** (*supra*, col. 1585), **Barber v. Houston** and **Gibbs v. Guild**, *referred to*.

Bulli Coal-Mining Co. v. Osborne (1899) 68 L. J. P. C. 49; [1899] A. C. 351; 80 L. T. 430; 47 W. R. 545.—P.C.

4. ACTIONS RELATING TO LAND.

•Landlord and Tenant.

James v. Salter (1837) 3 Bing. (N.C.) 544; 2 Scott 750; 1 Hodges 405.—C.P.

Referred to, **Magdalen Hospital Governors v. Knotts** (1878) 8 Ch. D. 709, 727.—C.A. (*post*, col. 1590); *approved*, **Irish Land Commission v. Grant** (*post*); *applied*, **Howitt v. Harrington** (*post*, col. 1588).

Grant v. Ellis (1841) 11 L. J. Ex. 228; 9 M. & W. 113.—EX., *approved*.

Daly v. Bloomfield (1842) 5 Ir. C. L. R. 65.—PENNEFATHER, C.J.

• Grant v. Ellis, followed.

Ely (Dean) v. Cash (1846) 15 L. J. Ex. 341; 15 M. & W. 617.—EX. *And see* S. C. *nom.* **Ely (Dean) v. Bliss** (1842) 11 L. J. Ch. 351; 5 Beav. 574.—M.R.; and (1852) 2 De G. M. & G. 459.—L.C. *And see* col. 1588.

Grant v. Ellis and Prescott v. Boucher (1832) 3 B. & Ad. 849.—K.B., *referred to*.

Doe d. Angell v. Angell (1846) 15 L. J. Q. B. 193; 9 Q. B. 328; 10 Jur. 705.—Q.B.

Grant v. Ellis, observed on.

Sheil v. Incorporated Society (1847) 10 Ir. Eq. R. 417.—CUSACK SMITH, M.R.

Grant v. Ellis, referred to.

Owen v. De Beauvoir (1850) 19 L. J. Ex. 177; 5 Ex. 166.—EX. CH.; *affirming* 15 M. & W. 547.—EX.

Doe d. Angell v. Angell (*supra*) and **Grant v. Ellis**, *referred to*.

Baines v. Lumley (1868) 16 W. R. 674.—C.P.

Owen v. De Beauvoir and Grant v. Ellis, *discussed*.

Zouche v. Dalbiac (1875) 44 L. J. Ex. 109; L. R. 10 Ex. 172, 182; 33 L. T. 221; 23 W. R. 564.—EX.

Ely (Dean) v. Bliss, *referred to*.

Esdaile v. Payne (1883) 32 W. R. 285.—KAY, J.; *reversed*, (1884) 33 W. R. 864.—C.A.

Grant v. Ellis, Sheil v. Incorporated Society and Ely (Dean) v. Bliss, *explained*.

Netterville v. Power (1861) 6 Ir. Jur. (N.S.) 123.—CUSACK SMITH, M.R., *discussed*.

Owen v. De Beauvoir, *approved*.

Irish Land Commission v. Grant (1884) 10 App. Cas. 14; 52 L. T. 228; 33 W. R. 357.—H.L. (IR.); *affirming* S. C. *nom.* **Irish Church Temporalities (Commissioners) v. Grant**, 11 L. R. Ir. 430.—C.A.

Irish Land Commission v. Grant, *not applied*.

Bailey v. Badham (1885) 54 L. J. Ch. 1067; 30 Ch. D. 84, 91; 53 L. T. 13; 33 W. R. 770.—BACON, V.-C.

Irish Church Temporalities (Commissioners) v. Grant (*supra*), *referred to and approved*.

Connolly v. Gorman (1897) [1898] 1 Ir. R. 20.—C.A.

Ely (Dean) v. Bliss (*supra*), *applied*.

Irish Land Commission v. Grant, *referred to*.

Grant v. Ellis (*supra*), *commented on*.

Howitt v. Harrington (Earl) (1893) 62 L. J. Ch. 571; [1893] 2 Ch. 497; 5 R. 568; 68 L. T. 703; 41 W. R. 564.—STIRLING, J.

Grant v. Ellis, *applied*.

Jones v. Withers (1896) 74 L. T. 572.—C.A.

Grant v. Ellis, *referred to*.

Hayes v. Woodley (1852) 3 Ir. Ch. R. 143.—

BLACKBURN, L.C., *commented on*.

Grogan v. Regan (1901) [1902] 2 Ir. R. 197.—C.A.; *reversing the* Q.B.D.

Grant v. Ellis, considered.

Skene v. Cook (1901) 70 L. J. K. B. 556; [1901] 2 K. B. 7; 84 L. T. 684; 65 J. P. 533; *affirmed*, (1902) 71 L. J. K. B. 446; [1902] 1 K. B. 682; 86 L. T. 319; 50 W. R. 506.—C.A.

CHANNELL, J.—In *Grant v. Ellis* it was held that ordinary rent reserved on a demise is not within this section [sect. 1 of the Real Property Limitation Act, 1833]. The decision in that case apparently proceeded upon two grounds. Rolfe, B., in delivering the judgment of the Court, substantially adopted the argument of the defendant, which he summed up in the following passage: "The defendant, on the other hand, contends that this is not a case within the statute at all. He contends that the word 'rent' in the 2nd section of the statute cannot be taken as having any reference to rents such as that now in question, namely, rents reserved on leases for years by contract between the parties, as the conventional equivalent for the right of occupation; but must be confined to rents existing as an inheritance distinct from the land, and for which before the statute a party entitled might have had an assize, such as ancient rent service, fee farm rents, or the like. We accede to this latter view of the case." One of the grounds of that decision is that rent reserved on such a lease is merely the conventional equivalent of the right of occupation. The other ground is that "rent" in the section means rent existing as an inheritance distinct from the land. I do not think that it was the intention of the learned judge to lay stress on the word "inheritance," and that he is to be understood as meaning that an annual sum carved out of the land and made property, though not an inheritance, distinct from the land, would not be rent within the section. The word "inheritance" is used because the persons engaged in the case were talking about inheritance.

If the sum here in question is property distinct from the land, even though by an anomaly it is personal property, the reasoning of that case applies to it just as if it were real property. The plaintiff's right to this periodical sum is therefore a right to "rent" within the meaning of the section.—p. 559. BUCKNILL, J. concurred.

Doe d. Evans v. Page (1844) 13 L. J. Q. B. 153; 5 Q. B. 767; D. & M. 601.—Q.B., *distinguished*.

Doe d. Jukes v. Sumner (1845) 14 L. J. Ex. 337; 14 M. & W. 89; 9 Jur. 413.—EX.

Doe d. Evans v. Page and **Doe d. Jukes v. Sumner**, *referred to*.

Doe d. Angell v. Angell (1846) 15 L. J. Q. B. 193; 9 Q. B. 328; 10 Jur. 705.—Q.B.

Doe v. Sumner and Incorporated Society v. Richards (1841) 1 Dr. & War. 258; 1 Con. & L. 58; 4 Ir. Eq. R. 177.—SUGDEN, L.C.

Applied, Rankin v. M'Murtry (*post*); *observations explained*, Tichborne v. Weir (1892) 4 L. 26; 67 L. T. 735.—C.A. ESHER, M.R., BOWEN and KAY, L.J. *And see* Magdalen College, Oxford v. Att.-Gen. (*post*, col. 1590).

Scott v. Nixon (1843) 3 Dr. & War. 338; 2 Con. & L. 185; 6 Ir. Eq. R. 8.—SUGDEN, L.C., *discussed*.

Games v. Bonnor (1884) 51 L. J. Ch. 577, 522; 33 W. R. 64.—C.A.; Rankin v. M'Murtry (1889) 24 L. R. Ir. 290.—Q.B.D.

Scott v. Nixon, *referred to*.

Dalton v. Fitzgerald (1897) 66 L. J. Ch. 604; [1897] 2 Ch. 86.—C.A. (*post*, col. 1597).

Rankin v. M'Murtry, *distinguished*.

Bowman v. Catherwood (1891) 28 L. R. Ir. 572.—Q.B.D.

Corpus Christi College v. Rogers (1879) 49 L. J. Ex. 4; 44 J. P. 216.—C.A., *distinguished*.

Ecclesiastical Commissioners v. Rowe (1880) 5 App. Cas. 736; 49 L. J. Q. B. 771; 43 L. T. 353; 29 W. R. 159; 45 J. P. 36.—H.L. (E.); *reversing* (1878) 48 L. J. Q. B. 152; 4 Q. B. D. 63; 40 L. T. 119; 27 W. R. 373.—C.A.; and *restoring* the judgment of MELLOR, J.

SELBORNE, L.C.—*Corpus Christi College v. Rogers*. . . was relied upon at the bar, as an authority for the proposition that in a case of this kind, when there is either a surrender by operation of law on the acceptance of a new lease, or a surrender and the grant of a new lease by one and the same deed, a right of action does not accrue for want of an "appreciable moment of time between the grant and the surrender." I am not sure that I entirely understand the view which was taken on the occasion by Bramwell, L.J.; but the judgment of Lord Coleridge appears to me to have proceeded upon the particular facts of that case, which were altogether different from the present. The Statute of Limitations was then set up against the college, the superior landlord, not by a trespasser or disseisor, but by an under-tenant of the lessee, to whom the land in question had been let by the lessee in 1818 under a written agreement for a yearly tenancy at 7s. 6d. a year. This under-tenant regularly paid his rent to the lessee till 1853, and the lease, which was current when the rent was last paid,

was renewed by the college to the lessee in 1857, four years afterwards. By the statute 4 Geo. 2, c. 28, s. 6, it is provided that on a surrender by a lessee, and a grant of a new lease, the under-lessees shall hold and enjoy as if the original leases out of which the respective underleases are derived, had been still kept on foot and continued. When this renewal in 1857 took place nothing had been done, notwithstanding the four years' arrear of rent, to put an end to the tenancy of the under-lessee by notice to quit or otherwise; and the college, whose tenant he was not, and to whom his possession was not adverse, had (as I conceive) no right of action against him. The lease which was surrendered on the renewal of 1857 would have continued (if there had been no renewal) till 1870; the renewed lease itself continued till 1877; and the college brought its action in 1878. The section of the Statute of Limitations which the under-tenant relied upon was not, as in this case, the 2nd, read in connection with the 3rd and 5th, but was the 8th, namely, that applicable to tenancies from year to year, when the rent has for twenty years remained unpaid. *Corpus Christi College v. Rogers* is, in my opinion, no authority for the proposition which it was cited to establish.—p. 742. LORD WATSON concurred.

LORD BLACKBURN, who dissented, agreed with the observations of the L.C. on *Corpus Christi College v. Rogers*.

Ecclesiastical Commissioners v. Rowe, *referred to*.

Irish Land Commission v. Grant (1884) 10 App. Cas. 14, 29.—H.L. (E.) (*supra*, col. 1588).

Ecclesiastical Commissioners v. Rowe, *explained*.

Corpus Christi College v. Rogers (*supra*), *referred to*.

Ecclesiastical Commissioners v. Trecemer (1892) 62 L. J. Ch. 119; [1893] 1 Ch. 166, 175; 3 R. 136; 63 L. T. 11; 41 W. R. 166.—CHITTY, J.

Corpus Christi College v. Rogers, *not applied*.
Ecclesiastical Commissioners v. Rowe, *distinguished*.

East Stonehouse Urban Council v. Willoughby Brothers (1902) 71 L. J. K. B. 873; [1902] 2 K. B. 318, 333; 87 L. T. 366; 50 W. R. 698.—CHANNELL, J. *See* judgment at length.

Magdalen College, Oxford v. Att.-Gen. (1857) 26 L. J. Ch. 620; 6 H. L. Cas. 189; 3 Jur. (N.S.) 675.—H.L. (E.); *varying S. C. nom.*

Att.-Gen. v. Magdalen College, Oxford (1854) 23 L. J. Ch. 844; 18 Beav. 223; 18 Jur. 363.—M.R., *applied*.

Att.-Gen. v. Davey (1859) 4 De G. & J. 136.—L.C. and L.J.; **Att.-Gen. v. Payne** (1859) 27 Beav. 168; 7 W. R. 604.—M.R.

Magdalen College, Oxford v. Att.-Gen., Att.-Gen. v. Davey, and Att.-Gen. v. Payne, *applied*.

Magdalen Hospital Governors v. Knotts (1878) 47 L. J. Ch. 726; 8 Ch. D. 709, 728; 38 L. T. 624; 26 W. R. 646.—C.A.; *reversing* (1876) 46 L. J. Ch. 149; 5 Ch. D. 175; 36 L. T. 139; 25 W. R. 181.—JESSEL, M.R.; C.A., *affirmed*, H.L., *post*.

Magdalen College, Oxford v. Att.-Gen.

Discussed, **Bobbett v. S. E. Ry.** (1882) 51 L. J. Q. B. 161; 9 Q. B. D. 424, 427; 46 L. T. 31; 46

J. P. 823.—DENMAN, J.; *applied*, *McGrath v. Dwyer* (1883) 12 L. R. Ir. 17.—C.P.D.

Magdalen Hospital Governors v. Knotts (1879) 48 L. J. Ch. 579; 4 App. Cas. 324; 40 L. T. 466; 27 W. R. 602.—H.L. (E.), *applied*.

Webster v. Southey (1887) 56 L. J. Ch. 785; 36 Ch. D. 9, 19; 56 L. T. 879; 35 W. R. 622; 52 J. P. 36.—KAY, J.; *Churcher v. Martin* (1889) 58 L. J. Ch. 586; 42 Ch. D. 312, 317; 61 L. T. 113; 37 W. R. 682.—KEKEWICH, J.

Archbold v. Scully (1861) 9 H. L. Cas. 360; 7 Jur. (N.S.) 1169; 5 L. T. 160.—H.L. (1R.); *reversing* (1858) Dru. 330; 8 Ir. Ch. R. 177.—C.A. and L.C., *distinguished*.

Webster v. Southey (*supra*).

Adnam v. Sandwich (Earl) (1877) 46 L. J. Q. B. 612; 2 Q. B. D. 485.—MELLOR and FIELD, JJ., *distinguished and not applied*.
Newbould v. Smith (1885) 29 Ch. D. 882; 53 L. T. 137; 33 W. R. 690.—NORTH, J.; *affirmed*, C.A. and H.L. (*supra*, col. 1585).

Haigh v. West (1893) 62 L. J. Q. B. 532; [1893] 2 Q. B. 19; 4 R. 396; 69 L. T. 165.—C.A., *distinguished*.

Wimbleton and Putney Conservators v. Nicol (1894) 10 Times L. R. 247, 251.—CHARLES, J.; *Neaverson v. Peterborough Rural Council* (1902) 71 L. J. Ch. 378; [1902] 1 Ch. 557; 86 L. T. 738; 50 W. R. 549; 66 J. P. 404.—C.A.; *reversing* 70 L. J. Ch. 35; [1901] 1 Ch. 22; 83 L. T. 496; 49 W. R. 154; 65 J. P. 56.—COZENS-HARDY, J.

Mortgagor and Mortgagee.

Doe d. Jones v. Williams (1836) 5 L. J. K. B. 231; 5 A. & E. 291; 6 N. & M. 816; 2 H. & W. 213; 44 R. R. 126, n.—K.B., *approved*.

Dearman v. Wyche (*post*).

Doe v. Williams, *commented on*.

Hughes v. Kelly (1843) 5 Ir. Eq. R. 286.—L.C. *And see post*, col. 1611.

Doe v. Williams, *referred to*.

Hemming v. Blanton (1873) 42 L. J. C. P. 158; 21 W. R. 636.—C.P.; *Heath v. Pugh* (1881) 6 Q. B. D. 345, 359.—C.A. (*post*); *Frisby*, in re (1889) 43 Ch. D. 106, 110.—KAY, J. (col. 1594).

Dearman v. Wyche (1839) 9 L. J. Ch. 76; 9 Sim. 570.—SHADWELL, V.-C., *doubted*.

Wrixon v. Vize (1842) 5 Ir. Eq. R. 173; 3 Dr. & War. 104; 2 Con. & L. 138.—SUGDEN, L.C.

Dearman v. Wyche, *discussed*.

Du Vigier v. Lee (1843) 12 L. J. Ch. 345; 2 Hare 326; 7 Jur. 299.—WIGRAM, V.-C.; *Sinclair v. Jackson* (1853) 17 Beav. 405.—M.R.; *Fowke v. Draycott* (*post*). *And see* *Badeley v. Consolidated Bank* (*post*), and *Lloyd*, in re (*post*).

Wrixon v. Vize, *approved* in C.A. and H.L.

Heath v. Pugh (1881) 50 L. J. Q. B. 473; 6 Q. B. D. 345; 44 L. T. 327; 29 W. R. 904.—C.A.; *affirmed*, *nom.* *Pugh v. Heath* (1882) 51 L. J. Q. B. 367; 7 App. Cas. 235; 46 L. T. 321; 30 W. R. 553.—H.L. (E.).

Wrixon v. Vize and Heath v. Pugh, *applied*.

Harlock v. Ashberry (1882) 19 Ch. D. 539, 543.—C.A. (*post*, col. 1604).

Wrixon v. Vize and Pugh v. Heath, *discussed*.
Fowke v. Draycott (1885) 54 L. J. Ch. 977; 29 Ch. D. 996; 52 L. T. 890; 33 W. R. 707.—NORTH, J.

Wrixon v. Vize, *referred to*.

Conlan's Estate, in re (1892) 29 L. R. Ir. 199.—MONROE, J.; *Barcroft v. Murphy* [1896] 1 Ir. R. 590.—M.R.; *Lloyd*, in re (*post*).

Pugh v. Heath, *applied*.

Irish Land Commission v. Junkin (1888) 24 L. R. Ir. 40.—Q.B.D.; O'BRIEN, J., *dissenting*.

Pugh v. Heath and Irish Land Commission v. Junkin, *distinguished*.

Irish Land Commission v. Ryan [1900] 2 Ir. R. 563.—C.A.

Heath v. Pugh, *referred to*.

Wood v. Wheeler (1882) 52 L. J. Ch. 144; 22 Ch. D. 281; 47 L. T. 440; 31 W. R. 117.—CHITTY, J.; *Badeley v. Consolidated Bank* (1886) 34 Ch. D. 536, 550; 55 L. T. 635; 35 W. R. 106.—STIRLING, J. (*affirmed*), (1888) 57 L. J. Ch. 468; 38 Ch. D. 238; 59 L. T. 412; 36 W. R. 745.—C.A.); *Lake's Trusts*, in re (1890) 63 L. T. 416.—STIRLING, J.; *Owen*, in re (1894) 63 L. J. Ch. 749; [1894] 3 Ch. 220; 8 R. 566; 71 L. T. 181; 43 W. R. 55.—STIRLING, J.; *Conlan's Estate*, in re (*supra*); *Shea v. Moore* (1892) [1894] 1 Ir. R. 158, 174.—C.A.; *Thornton v. France* (*post*); *London and Midland Bank v. Mitchell* [1899] 2 Ch. 161 (*post*, col. 1596); *Lloyd*, in re (*post*).

Owen, in re (*supra*), *referred to*.

Lloyd, in re, *Lloyd v. Lloyd* (1902) 72 L. J. Ch. 78; [1903] 1 Ch. 385; 87 L. T. 541; 51 W. R. 177.—C.A.

Shea v. Moore (*supra*), *applied*.

McCarthy v. Daunt (1848) 11 Ir. Eq. R. 29.—L.C.C., *discussed*.

Barcroft v. Murphy (*supra*).

Tidball v. James (1859) 29 L. J. Ex. 91.—EX., *explained*.

Murphy v. Murphy (1864) 15 Ir. C. L. R. 205.—C.P.

Tidball v. James and Murphy v. Murphy, *referred to*.

Doe d. Palmer v. Eyre (1851) 20 L. J. Q. B. 431; 17 Q. B. 366; 15 Jur. 1031.—Q.B.; and **Eyre v. Walsh** (1860) 10 Ir. C. L. R. 346.—C.P., *discussed*.

Doe d. Badeley v. Massey (1851) 20 L. J. Q. B. 434; 17 Q. B. 373; 15 Jur. 1031.—Q.B., *distinguished*.

Thornton v. France (1897) 66 L. J. Q. B. 705; [1897] 2 Q. B. 143, 155; 77 L. T. 38; 46 W. R. 56.—C.A. *And see* *Hemming v. Blanton* (*supra*, col. 1591).

Thornton v. France, *applied*.

Ludbrook v. Ludbrook (1901) 70 L. J. K. B. 552; [1901] 2 K. B. 96, 100; 84 L. T. 485; 49 W. R. 465.—C.A.

ROMER, L.J.—If the mortgage be an existing one and was executed before the commencement of the possession of the person claiming to have acquired a title by such possession under the Statute of Limitations, then the statute 7 Will. 4 & 1 Vict. c. 28 undoubtedly applies in favour of the mortgagee, although the person in possession may have acquired a good title as against the mortgagor and those claiming under the mortgagor—see *Thornton v. France*, a decision of the C. A. where the earlier authorities are considered.—p. 555.

Rakestraw v. Bruyer (1728) 2 P. Wms. 511; Sel. Ch. Cas. 55; Moseley, 189, *overruled*.
Kinsman v. Rouse (1881) 17 Ch. D. 104; 50 L. J. Ch. 436; 44 L. T. 597; 29 W. R. 627.

[The rule that prevailed prior to the Statute of Limitations, 3 & 4 Will. 4, c. 27, that no lapse of time barred the right of a mortgagor of lands to redeem the whole, provided he held possession of part (*Rakestraw v. Bruyer*), has been abolished by sect. 28 of the statute.]

[JESSEL, M.R. did not refer to the above case, but he decided as above.]

Corbett v. Barker (1793) 1 Anstr. 138.—EX.; *reversed*, (1796) 3 Anstr. 755; 4 R. R. 856.—EX.

Burrell v. Egremont (Earl) (1844) 13 L. J. Ch. 309; 7 Beav. 205; 7 Jur. 587.—LANGDALE, M.R.; and **Wynne v. Styan** (1847) 2 Ph. 303.—COTTENHAM, L.C., *applied*.

Carbery (Lord) v. Preston (1850) 13 Ir. Eq. R. 455.—BRADY, L.C.

Burrell v. Egremont (Earl), *not applied*.
Spickernell v. Holman (1854) Kay 669; 2 W. R. 638.—WOOD, V.-C.

Burrell v. Egremont (Earl), *referred to*.
Kensington (Lord) v. Bonverie (1859) 29 L. J. Ch. 537; 7 H. L. Cas. 537; 6 Jur. (N.S.) 105.—H.L. (E.); LORDS CRANWORTH and WENSLEYDALE *dissenting*.

Burrell v. Egremont (Earl), *followed and explained*.

Topham v. Booth (1887) 35 Ch. D. 607; 56 L. J. Ch. 812; 57 L. T. 170; 35 W. R. 715.

KEKEWICH, J.—I consider that in his long and carefully-considered judgment Lord Langdale did lay down a principle applicable to a case of this kind quite independently of the case before him, though he applied it to that case. I understand the principle which he lays down to be this: that in order to apply the Statute of Limitations to a particular case you must find a person liable to pay and a person liable to receive the interest, *i.e.*, two different persons, and that when he speaks of an assignable person, to use his own expression, or the person entitled to the interest, he does not necessarily mean the person legally entitled to claim it from the tenants by virtue of the ownership of the legal estate. In the same way he does not refer to the person who is bound to pay as the legal owner of the estate charged, but he means that when the interest beneficially belongs to the same person, who would suffer if the interest were paid, that is to say, from whose income the payment would be a deduction, the statute cannot apply.—p. 611.

Burrell v. Egremont (Earl) (*supra*), *applied*.
Smith v. Smith (1887) 19 L. R. Ir. 514, 522.—PORTER, M.R.; **Patten v. Bond (or Boyd)** 60 L. T. 583; 37 W. R. 373.—KAY, J.

Topham v. Booth (*supra*), *referred to*.
Hawes, In re, Burchell, In re, Burchell v. Hawes (1893) 62 L. J. Ch. 463; 3 R. 133; 67 L. T. 756; 41 W. R. 173.—KEKEWICH, J.

Burrell v. Egremont (Earl), *applied*.
England, In re (post, col. 1595); **Harvey, In re, Harvey v. Hobday** (1895) 65 L. J. Ch. 370; [1896] 1 Ch. 137; 73 L. T. 613; 44 W. R. 242.—C.A.

Burrell v. Egremont (Earl) and Topham v. Booth, *not applied*.
Allen, In re, Bassett v. Allen (1898) 67 L. J. Ch.

614; [1898] 2 Ch. 499, 503; 79 L. T. 107; 47 W. R. 55.—NORTH, J.

Burrell v. Egremont (Earl), *followed*.
Gifford (Lord) v. Fitzhardinge (Lord) (1899) 68 L. J. Ch. 529; [1899] 2 Ch. 32, 34; 81 L. T. 106; 47 W. R. 618.—NORTH, J.

Sutton v. Sutton (1882) 52 L. J. Ch. 333; 22 Ch. D. 511; 48 L. T. 95; 31 W. R. 369.—C.A. JESSEL, M.R., COTTON and BOWEN, L.J., *followed*.

Fearnside v. Flint (1883) 52 L. J. Ch. 479; 22 Ch. D. 579; 48 L. T. 154; 31 W. R. 318.—FRY, J.

Sutton v. Sutton and Fearnside v. Flint, *distinguished*.

Powers, In re, Lindsell v. Phillips (1885) 30 Ch. D. 291; 53 L. T. 647.—C.A.

COTTON, L.J.—The case is quite different from *Sutton v. Sutton*, where it was sought to sue the mortgagor on the covenant in his mortgage deed, where the remedy against the land was barred by the statute. The debt there was one and the same debt, and we held that the words of the section must have full effect given to them, and that the debt could not be recovered from the mortgagor personally, any more than out of the land. Fry, L.J. extended this rule to the case where the bond was a separate instrument [*Fearnside v. Flint*]. Those cases appear to me to have no application to a case where a bond is given by another person conditioned to be void if the mortgagor pays the mortgage debt, and where the mortgage is still alive. If the remedy on the bond taken by itself was barred, I am of opinion that no payment by the mortgagor would keep it alive, but where a bond which by itself is not barred, is given for the purpose of guaranteeing the payment by the mortgagor of the mortgage debt, and the mortgagor makes payments which prevent the remedy on the mortgage from being barred, I am of opinion that the remedy on the bond is not barred. The decision in *Cockrill v. Sparkes* (*supra*, col. 1582) is not inconsistent with this. There were in that case two makers of a joint and several promissory note, and it was decided that under the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 14, a part payment by one did not take the case out of the Statute of Limitations as against the other. I do not think that this applies where a separate bond is given by sureties to guarantee the payment of a mortgage debt, and the mortgagor makes payments.—p. 295.

LINDLEY, L.J. concurred.

BOWEN, L.J. to the same effect.

Sutton v. Sutton, *referred to*.
Firth v. Slingsby (1888) 58 L. T. 481.—STIRLING, J. *And see post*, col. 1595.

Sutton v. Sutton, *principle applied*.
Nugent's Trusts, In re (1885) 19 L. R. Ir. 140.—PORTER, M.R.; **Evans v. O'Donnell** (1886) 18 L. R. Ir. 170.—C.A. *And see post*, col. 1610.

Sutton v. Sutton, *commented on*.
Fearnside v. Flint and Powers, In re, Lindsell v. Phillips (*supra*), *discussed*.

Frisby, In re, Allison v. Frisby (1889) 60 L. T. 922; 37 W. R. 603.—KAY, J.; *affirmed*, 43 Ch. D. 106; 61 L. T. 632; 38 W. R. 65.—C.A.

Sutton v. Sutton, *explained*.
Turner's Estate, In re, Turner v. Spicer (1894) 13 R. 132; 43 W. R. 153.—CHITTY, J.

Frisby, In re (*supra*), *discussed*.

Wolmershausen, In re, *Wolmershausen v. Wolmershausen* (1890) 62 L. T. 541.—STIRLING, J.

Sutton v. Sutton, *applied*.

Frisby, In re, *distinguished*.

England, In re, *Stewart v. England* (1895) 65 L. J. Ch. 21; [1895] 2 Ch. 820; 12 R. 539; 73 L. T. 237; 44 W. R. 119.—C.A.; *affirming* KEKEWICH, J.

LINDLEY, L.J.—In that case [*Frisby, In re*] there was a person in fact liable to pay interest, and in this case there has been no payment in fact of a shilling of interest, and no person is liable to pay a shilling of interest. That is the peculiarity of this case.—p. 28.

England, In re, Stewart v. England, *discussed*.

Leahy v. De Moleyns (1895) [1896] 1 Ir. R. 206.—C.A.

England, In re, *followed*.

Allen, In re, *Bassett v. Allen* (1898) 67 L. J. Ch. 614; [1898] 2 Ch. 499; 79 L. T. 107; 47 W. R. 55.—NORTH, J.

Sutton v. Sutton and Frisby, In re (*supra*), *applied*.

Baillie v. Irwin [1897] 2 Ir. R. 614.—Q.B.D.

Frisby, In re, *discussed*.

Baillie v. Irwin, *referred to*.

Brew v. Brew (1898) [1899] 2 Ir. R. 163.—Q.B.D.

Sutton v. Sutton and Fearnside v. Flint (*supra*), *referred to*.

Conolly v. Gorman (1897) [1898] 1 Ir. R. 20.—Q.B.D.; *reversed*, C.A.; *McDonnell v. Fitzgerald* [1897] 1 Ir. R. 556.—PORTER, M.R.

Sutton v. Sutton, *distinguished*.

Firth v. Slingsby (col. 1594), *approved*.

Toplis v. Baker (1787—89) 2 Cox 119; 2 R. R. 21; **Brocklehurst v. Jessop** (1835) 7 Sim. 438.—SHADWELL, V.-C.; and **Stephens, In re, Warburton v. Stephens** (1889) 59 L. J. Ch. 109; 43 Ch. D. 39; 61 L. T. 609.—KAY, J., *discussed*.

Barnes v. Glenton (1899) 68 L. J. Q. B. 502; [1899] 1 Q. B. 885; 80 L. T. 606; 47 W. R. 435.—C.A.; *reversing* (1898) 67 L. J. Q. B. 731; [1898] 2 Q. B. 223; 79 L. T. 94; 47 W. R. 13.—RUSSELL OF KILLOWEN, C.J.

A. L. SMITH, L.J.—That decision [*Sutton v. Sutton*] is binding on us, no doubt; but how does it hamper the case of a debt which, though charged on land, is not a specialty debt, but a simple contract debt? No question as to the six years' Statute of Limitations arose in *Sutton's Case* from first to last. It was argued that the conclusion contended for on behalf of the plaintiffs follows from the judgments of Jessel, M.R. and Bowen, L.J. in *Sutton v. Sutton*, and it was sought to apply those judgments to simple contract debts by reading passages which had no application thereto extracted from them relating to matters which were not before the Court. *Sutton v. Sutton* is not an authority, nor anything approaching an authority, compelling us to hold that the limit of six years in bringing an action on a simple contract debt has been abolished, even though the debt be charged on land. Of the other cases cited, *Toplis v. Baker* and *Brocklehurst v. Jessop* show that before the Real Property Limitation Acts the action on the

debt might be barred in six years, although the remedy against the land was not; and in *Stephens, In re, Warburton v. Stephens*, Kay, J., so far from holding that the statute of James I had been abrogated by that of Will. 4, recognised the former statute as still outstanding, and showed that that case was outside its provisions. Then there is *Firth v. Slingsby*, a decision of Stirling, J., with every word of which I agree. He expressly deals with the point, that the statute of James I. is still in force, and, not by way of a dictum, but as the foundation of his judgment, holds that it is.—p. 505.

COLLINS and ROMER, L.JJ. to the same effect.

Hancock, In re, Hancock v. Berrey (1888)

57 L. J. Ch. 793; 59 L. T. 197; 36 W. R.

710.—KAY, J., *applied*.

Lake's Trusts, In re (1890) 63 L. T. 416.—STIRLING, J.

Barnes v. Glenton and Conlan's Estate, In re (*supra*, col. 1592), *referred to*.

Hancock, In re, *explained and applied*.

London and Midland Bank v. Mitchell (1899) 68 L. J. Ch. 568; [1899] 2 Ch. 161; 81 L. T. 263; 47 W. R. 602.—STIRLING, J.

Conlan's Estate, In re, *dissented from*.

Clifden (Viscount), In re, *Annaly v. Agar Ellis* (1900) 69 L. J. Ch. 478; [1900] 1 Ch. 774 (*post*, col. 1607).

Possession.

Smith v. Lloyd (1854) 23 L. J. Ex. 194; 9

Ex. 562; 2 C. L. R. 1008; 2 W. R. 271.—

EX., *referred to*.

Smith v. Stocks (1869) 38 L. J. Q. B. 306; 10 B. & S. 701; 20 L. T. 740; 17 W. R. 1135.—Q.B.; **Dartmouth (Earl) v. Spittle** (1871) 24 L. T. 67; 19 W. R. 444.—EX.

McDonnell v. McKinty (1847) 10 Ir. L. R.

514.—Q.B.; and **Smith v. Lloyd**, *applied*.

Low Moor Co. v. Stanley Coal Co. (1875) 33 L. T. 436.—EX.; *affirmed*, 34 L. T. 186.—C.A.

McDonnell v. McKinty and Smith v. Lloyd, *discussed*.

Trustees, Executors and Agency Co. v. Short (1888) 13 App. Cas. 793; 58 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132.—P.C.; *reversing* SUPREME COURT OF NEW SOUTH WALES.

LORD MACNAGHTEN (for self, SIR B. PEACOCK and SIR R. COUCH).—There is no direct authority on the point in this country. But such authority as there is seems to be opposed to the doctrine laid down by the Supreme Court. It is sufficient to refer to *McDonnell v. McKinty*, Lord St. Leonards' Real Property Statutes, p. 31, and *Smith v. Lloyd*. In the latter case, which was decided in 1854, Parke, B., in giving the judgment of the Court, says: "We are clearly of opinion that the statute applies, not to want of actual possession by the plaintiff, but to cases where he has been out of, and another in, possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of Blackburne, C.J. in *McDonnell v. McKinty*, and the principle on which it is founded." Their lordships have only to add that, in their opinion, there is no difference in

principle as regards the application of the statute between the case of mines and the case of other land where the fact of possession is more open and notorious.—p. 799.

Trustees, Executors and Agency Co. v. Short (*supra*), distinguished.

Willis v. Howe (Earl) (1893) 62 L. J. Ch. 690; [1893] 2 Ch. 545; 2 R. 427; 69 L. T. 358; 41 W. R. 433.—C.A. See col. 1608.

Trustees, &c., Agency Co. v. Short and Smith v. Lloyd (*supra*), referred to.

Duffy's Estate, In re (1896) [1897] 1 Ir. R. 295.—ROSS, J.; affirmed (1897).—C.A.

Anstee v. Nelms (1856) 26 L. J. Ex. 5; H. & N. 225; 4 W. R. 612.—EX., approved.

Board v. Board (1873) 43 L. J. Q. B. 4; L. R. 9 Q. B. 48; 29 L. T. 459; 22 W. R. 206.—Q.B.

Board v. Board and Hawksbee v. Hawksbee (1853) 23 L. J. Ch. 521; 11 Hare 230.—WOOD, V.-C., distinguished.

Paine v. Jones (1874) 43 L. J. Ch. 787; L. R. 18 Eq. 320; 30 L. T. 779; 22 W. R. 837.—MALINS, V.-C.

Board v. Board, approved and applied.

Paine v. Jones; Kernaghan v. McNally (1861) 12 Ir. Ch. R. 89.—C.A.; and **Stringer's Estate, In re, Shaw v. Jones-Ford** (1877) 46 L. J. Ch. 633; 6 Ch. D. 1; 37 L. T. 233; 25 W. R. 815.—JESSEL, M.R.; reversed, C.A., commented on.

Dalton v. Fitzgerald (1897) 66 L. J. Ch. 604; [1897] 2 Ch. 86; 76 L. T. 700; 45 W. R. 685.—C.A.; affirming [1897] 1 Ch. 440.—STIRLING, J. LINDLEY, L.J.—That section [sect. 34 of the Real Property Limitation Act, 1833] does not confer a statutory title against everybody upon the person in whose favour the statute has run, although it does as against those persons whose rights are barred by the statute. This was pointed out by Martin, B. in *Anstee v. Nelms*, where he said that "the Statute of Limitations can never be so construed that a person claiming a life estate under a will shall enter, and then say that such possession was unlawful, so as to give his heir a right against the remainderman." This was approved as good sense and good law in *Board v. Board*. . . . *Board v. Board* is, in my opinion, clearly in point, and clearly right. Whether *Kernaghan v. McNally* did not go too far it is not necessary to consider. I have great difficulty in reconciling it with Sir E. Sugden's previous decision in *Scott v. Neon* (*supra*, col. 1589). *Paine v. Jones* is intelligible, having regard to the facts of that case. The widow, who had entered as tenant for life under a will which did not pass the lands in question, was allowed by the Court (under circumstances which do not appear) to exclude them from a conveyance to new trustees, and she was allowed to keep possession of them after it had been ascertained that she had no right to them. But I am not satisfied of the soundness of the distinction drawn by Malins, V.-C. between cases of persons having no title under a will, because it does not purport to include the lands they claim, although they believe that it does, and persons claiming under a will which purports to deal with land to which the testator had no title, although they thought he had. No doubt a person may by mistake treat himself as tenant for life of property of which he is himself the owner, and such

a mistake can be set right unless he has so acted as to render a rectification of the mistake unjust to others. But the distinction drawn by the V.-C., although it would include such a case, goes much further, and unless restricted it seems to me likely to lead to error. That case, which is the one principally relied upon by the defendants, is not really an authority for them, owing to its peculiar facts. Nor is the passage read from Sir G. Jessel's judgment in *Stringer's Estate, In re*. What he was objecting to was the extension of the doctrine of estoppel to tenants for life who do not dispute their testators' title, but who do dispute the legal validity of their dispositions of property which was their own.—p. 611.

LOPES and RIGBY, L.JJ. to the same effect.

Board v. Board and Dalton v. Fitzgerald (*supra*), referred to.

Doyle v. Foley (1901) [1903] 2 Ir. R. 95.—K.B.D.

Bushby v. Dixon (1824) 3 B. & C. 298; D. & R. 126; 3 L. J. (o.s.) K. R. 22; 27 R. R. 362.—K.B., applied.

Kennedy v. Lyell (1885) 15 Q. B. D. 491, 500; 53 L. T. 466; 1 Cab. & E. 584.—DENMAN, J.

Bushby v. Dixon and Kennedy v. Lyell, explained and approved.

Lyell v. Kennedy (1887) 56 L. J. Q. B. 303; 18 Q. B. D. 796; 56 L. T. 647; 35 W. R. 725.—STEPHEN, J.; reversed, C.A., but restored, H.L. (E.). See post.

Bushby v. Dixon; Gawton v. Dacres (Lord) (1590) 1 Leon. 219.—C.P.; and **Shaw v. Keighron** (1869) Ir. R. 3 Eq. 574.—WALSH, M.R., approved.

Audley (Lord) v. Pollard (1597) Cro. Eliz. 561.—Q.B., approved but held inapplicable.

Lyell v. Kennedy (1889) 59 L. J. Q. B. 268; 14 App. Cas. 437, 456; 62 L. T. 77; 38 W. R. 353.—H.L. (E.); reversed (1887) 56 L. J. Q. B. 303; 18 Q. B. D. 796; 56 L. T. 647; 36 W. R. 725.—C.A.

Lyell v. Kennedy.

Applied, *McAuliffe v. Fitzsimons* (1889) 26 L. R. Ir. 29.—PALLES, C.B. and ANDREWS, J.; referred to, *Keighley Maxsted & Co. v. Durant* (1901) 70 L. J. K. B. 662; [1901] A. C. 240, 254; 84 L. T. 777.—H.L. (E.) (see "PRINCIPAL AND AGENT"); *Doyle v. Foley* (*supra*); applied, *M'Ardle v. Gaughran* (1902) [1903] 1 Ir. R. 106, 113.—PORTER, M.R.

Keyse v. Powell (1853) 22 L. J. Q. B. 305; 2 El. & Bl. 132; 17 Jur. 1052.—Q.B., referred to.

Randall v. Stevens (1853) 23 L. J. Q. B. 68; 2 El. & Bl. 641; 1 C. L. R. 642; 18 Jur. 128.—Q.B.

Randall v. Stevens, applied.

Locke v. Matthews (1863) 13 C. B. (N.S.) 753; 32 L. J. C. P. 98; 9 Jur. (N.S.) 874; 7 L. T. 824; 11 W. R. 343.—C.P.

Randall v. Stevens, referred to.

Solling v. Broughton (1893) 63 L. J. P. C. 21; [1893] A. C. 559.—P.C.

Abergavenny (Earl) v. Brace (1872) 41 L. J. Ex. 120; L. R. 7 Ex. 145; 26 L. T. 514; 20 W. R. 462.—EX., distinguished.

Brighton (Mayor) v. Brighton Guardians (1880) 49 L. J. C. P. 648; 5 C. P. D. 368, 374; 44 J. P. 683.—DENMAN and LOPES, JJ.

Abergavenny (Earl) v. Brace and Brighton (Mayor) v. Brighton Guardians, considered.
 Bobbett v. S. E. Ry. (1883) 51 L. J. Q. B. 161;
 9 Q. B. D. 424; 46 L. T. 31; 46 J. P. 823.—
 DENMAN, J. *And see* Rankin v. M'Murtry (*post*,
 col. 1600).

Abergavenny (Earl) v. Brace, and Brighton (Mayor) v. Brighton Guardians, and Doe d. Goody v. Carter (1847) 18 L. J. Q. B. 305;
 9 Q. B. 693.—Q.B., *referred to*.
 Wimbledon and Putney Conservators v. Nicol
 (1894) 10 Times L. R. 247, 251.—CHARLES, J.

Smales v. Dale (1615) Hob. 120.—C.P., *dis-*
approved.

Daniel v. Woodroffe (1848) 2 H. L. Cas. 811;
 18 L. J. Ex. 498; 13 Jur. 1013.—H.L. (E.);
affirming S. C. *nom.* Woodroffe v. Doe d. Daniel
 (1846) 15 L. J. Ex. 356; 15 M. & W. 769; 7 Jur.
 959.—EX. CH.

ALDERSON, B. (for the JUDGES).—It is, indeed,
 said that the entry of one coparcener is an entry
 of both, and that so the entry of William Wood-
 roffe, by which he was remitted, was an entry
 also by Mrs. Walker, and, therefore, that she
 also was remitted as to her moiety, and the whole
 base fee defeated; and for this *Smales v. Dale*
 was cited. It may be well doubted whether the
 third manner of entry by a coparcener, mentioned
 by the Court there, viz., an entry where one copar-
 cener claimeth the whole expressly (which is the
 present case, for W. Woodroffe here clearly
 entered under the then supposed good title
 created under Hester and George Woodroffe's
 deed and recovery), could be an entry by the
 other coparcener at all. For Coke Littleton,
 373, seems quite contrary to this extrajudicial
 opinion of the judges in *Smales v. Dale*. But
 we agree with the Court of Ex. Ch. in thinking,
 that after the statute 3 & 4 Will. 4, c. 27, s. 12,
 this cannot be so. There seems no doubt this
 statute has a relation back, and makes the pos-
 session of one coparcener no longer the possession
 of the other.—p. 832.

Doe d. Dayman v. Moore (1846) 15 L. J. Q. B.
 324; 9 Q. B. 553; 10 Jur. 815.—Q.B.,
distinguished.

Peakin v. Peakin [1895] 2 Ir. R. 359.—EX. D.

Peakin v. Peakin, not applied.

Lynes v. Maith (1899) 68 L. J. Q. B. 275;
 [1899] 1 Q. B. 486; 80 L. T. 122; 47 W. R.
 411.—Q.B.D.

Searby v. Tottenham Ry. (1868) L. R. 5 Eq.
 409.—WOOD, V.-C., *dissented from*.

Norton v. L. & N. W. Ry. (1879) 13 Ch. D. 268,
 271, n. (3); 41 L. T. 429; 28 W. R. 173.—C.A.

Searby v. Tottenham Ry., referred to.

Craven (Earl) v. Pridmore (1901) 17 Times L. R.
 399.—RIDLEY, J.; *reversed*, C.A. (*see* col. 1601).

Dixon v. Gayfere (1854) 23 L. J. Ch. 60; 17
 Beav. 421.—ROMILLY, M.R., *questioned*.

Doe d. Hughes v. Dyeball (1829) M. & M. 346;
 3 Car. & P. 610.—K.B., *approved*.

Doe d. Carter v. Barnard (1869) 18 L. J. Q. B.
 306; 13 Q. B. 945.—Q.B., *distinguished*.

Asher v. Whitlock (1865) 35 J. J. Q. B. 17;
 L. R. 1 Q. B. 1; 11 Jur. (N.S.) 925; 13 L. T. 254;
 14 W. R. 26.

COCKBURN, C.J.—The decision in that case
 [*Dixon v. Gayfere*] may be right in equity, but
 is wrong in law. . . . *Doe v. Dyeball* shows that
 possession, even for a year, is sufficient against a
 mere subsequent possession.—p. 19.

MELLOR, J.—In *Doe d. Carter v. Barnard*, the
 lessor of the plaintiff, in showing her own title,
 showed that someone else had a better title.—
 p. 20. LUSH, J., *concurrent*.

Asher v. Whitlock, applied.

Paine v. Jones (1874) L. R. 18 Eq. 320, 328.—
 V.C. (*supra*, col. 1597).

Asher v. Whitlock, referred to.

Reilly v. Thompson (1877) Ir. R. 11 C. L. 238.
 —EX.: *Mussamat Sundar v. Mussamat Par-*
bati (1889) L. R. 16 Ind. App. 186, 193; 5 Times
 L. R. 683.—P.C.: *Rankin v. M'Murtry* (1889) 24
 L. R. Ir. 290.—Q.B.D.

Tottenham v. Byrne (1861) 12 Ir. C. L. 376.

—EX.: *PIGOT, C.B., dissenting; reversed*,
 EX. CH.; EX. CH., *followed*.

Reilly v. Thompson (supra).

Leigh v. Jack (1879) 49 L. J. Ex. 220; 5
 Ex. D. 264; 42 L. T. 463; 28 W. R. 452;
 44 J. P. 488.—C.A., *discussed*.

Micklethwait v. Newlay Bridge Co. (1886) 33
 Ch. D. 146; 55 L. T. 366; 51 J. P. 132.—C.A.

Leigh v. Jack, applied.

Doe v. Barnard (supra), referred to.

Solling v. Broughton (1893) 63 L. J. P. C. 21;
 [1893] A. C. 559.—P.C.

Leigh v. Jack, distinguished.

Marshall v. Taylor (1895) 12 R. 310; 64 L. J. Ch.
 416; [1895] 1 Ch. 641; 72 L. T. 670.—C.A.

LORD HALSBURY.—In *Leigh v. Jack* . . . the
 person who established a possession inconsistent
 with the rights of the person to whom the
 property had originally belonged, had a strip of
 land on each side of an intended road, and he
 had obstructed that intended road by various
 articles of his trade, but in no sense was there any
 exclusive possession calculated to make the legal
 possession change so as to put it in him and to
 dispossess the real owner of the land. . . . The
 very nature of this particular piece of land is that
 it is enclosed.—p. 513.

A. L. SMITH, L.J.—*Norton v. L. & N. W. Ry.*
 [*supra*, col. 1599]. *And see* "RAILWAY" is
 very apposite. In that case the land at one time
 had been the land of the railway company, still
 by non-user they had lost their right to it. The
 only possession they had kept was by their work-
 men going over it to trim a hedge, and that, it
 was held, was not an act of possession, but was
 to be attributed simply to an easement.—p. 319.

LINDLEY, L.J., to the same effect.

Leigh v. Jack, referred to.

Duffy's Estate, In re (1896) [1897] 1 Ir. R. 295.
 —ROSS, J.; *affirmed* (1897).—C.A.

Rains v. Buxton (1880) 49 L. J. Ch. 473; 14
 Ch. D. 537; 43 L. T. 88; 28 W. R. 954.—
 FRY, J., *explained*.

Willis v. Howe (Earl) (1893) 62 L. J. Ch. 690;
 [1893] 2 Ch. 545.—C.A. (*post*, col. 1608).

Rains v. Buxton, applied.

Astley and Tyldesley Coal, &c., Co., and
Tyldesley Coal Co., In re (1899) 68 L. J. Q. B.
 252; 80 L. T. 116.—BRUCE and RIDLEY, JJ.

Leigh v. Jack, Rains v. Buxton, and Seddon
v. Smith (1877) 36 L. T. 168.—C.A., *dis-*
tinguished.

Littledale v. Liverpool College (1899) 69 L. J.
 Ch. 87; [1900] 1 Ch. 19; 81 L. T. 564; 48 W. R.
 177.—C.A.

LINDLEY, M.R.—When possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all important—see *Leigh v. Jack*. . . I have looked at all the decisions I can find which throw any light on this subject. *Leigh v. Jack* is the nearest and most instructive. *Rains v. Burton* (the underground cellar case) presented no difficulty except on the point of concealed fraud. The owner of the cellar was there plainly dispossessed by the plaintiff, who took and kept possession of the cellar, intending to acquire it for himself. In *Seddon v. Smith and Norton v. L. & N. W. Ry.* [*supra*, col. 1599] the acts of ownership were unequivocal—there was ploughing up and cultivation of a slip of land.—p. 89.

Leigh v. Jack, discussed and applied.

Vernon's Estate, *In re* (1900) [1901] 1 Ir. R. 1. ROSS, J.

Littledale v. Liverpool College, referred to. *Craven (Earl) v. Pridmore* (1901) 17 Times L. R. 399.—RIDLEY, J.

Craven (Earl) v. Pridmore, reversed (1902) 18 Times L. R. 282.—C.A.

Acknowledgment.

Stansfield v. Hobson (1853) 22 L. J. Ch. 657; 3 De G. M. & G. 620; 1 W. R. 216.—L.J.J., commented on.

Sanders v. Sanders (1881) 19 Ch. D. 373, 377; 51 L. J. Ch. 276; 45 L. T. 637; 30 W. R. 280.—C.A.; affirming on different grounds, 50 L. J. Ch. 367; 44 L. T. 171; 29 W. R. 413.—MALINS, V.-C. **JESSER, M.R.**—As I said in *Alison*. *In re* [(1879) 11 Ch. D. 284. See "MORTGAGE"], when a title has been extinguished by the statute, no mere acknowledgment by the person who has acquired, under the statute, as good a title as if a conveyance had been made to him, can restore the old title. The contrary was, indeed, decided in *Stansfield v. Hobson*, but when we look at that case we find that the point is not noticed in the judgment of either of the L.J.J., though it appears to have been taken in argument. Considering the importance of the point, I cannot think that either of those learned judges would have decided it without making any remark on the subject, and I think it must have been overlooked by them. I think, therefore, that *Stansfield v. Hobson* is no authority in support of the proposition that an acknowledgment after the statute has run can take the case out of the statute; and *Alison*, *In re*, which is a decision by the C.A., shows that it cannot. In justice to the V.-C., I must observe that *Alison*, *In re*, was not referred to before him.—p. 379.

BAGGALLAY, L.J., to the same effect.

Sanders v. Sanders, applied.

Hobbs, *In re*, *Hobbs v. Wade* (1887) 57 L. J. Ch. 184; 36 Ch. D. 553, 557; 58 L. T. 9; 36 W. R. 445.—NORTH, J.

Sanders v. Sanders, referred to.

Lyell v. Kennedy (1887) 56 L. J. Q. B. 303; 18 Q. B. D. 796, 814.—C.A.; reversed, H.L. (E.) (see *supra*, col. 1598); **Rankin v. M'Murtry** (1889) 24 L. R. Ir. 290.—Q.B.D.

Perry v. Jackson (1792) 1 Term Rep. 516; 2 R. R. 452.—K.B., applied.

Fannin v. Anderson (1845) 14 L. J. Q. B. 282; 7 Q. B. 811; 9 Jur. 969.—Q.B.

Fannin v. Anderson, approved.

Townes v. Mead (1855) 24 L. J. C. P. 89; 16 C. B. 123; 3 C. L. R. 381; 1 Jur. (N.S.) 355.—C.P. And see *Coope v. Cresswell* (*post*).

Fannin v. Anderson and Townes v. Mead, discussed.

Roddam v. Morley (1857) 26 L. J. Ch. 438; 1 De G. & J. 1; 3 Jur. (N.S.) 449; 5 W. R. 510.—L.C. and J.J.; reversing 25 L. J. Ch. 329; 2 K. & J. 336; 2 Jur. (N.S.) 805.—WOOD, V.-C. And see col. 1603.

Roddam v. Morley, distinguished.

Dickenson v. Teasdale (1862) 1 De G. J. & S. 52; 32 L. J. Ch. 37; 9 Jur. (N.S.) 237; 7 L. T. 655.—L.C., approved.

Coope v. Cresswell (1866) 36 L. J. Ch. 114; L. R. 2 Ch. 112; 15 L. T. 427; 15 W. R. 242.—L.C.; reversing 35 L. J. Ch. 496; L. R. 2 Eq. 106.—KINDERSLEY, V.-C.

CHELMSFORD, L.C.—After a careful examination of *Roddam v. Morley*, upon which the V.-C. founded his judgment upon the defence of the Statute of Limitations, I am unable to concur with the reasoning which led to the ultimate decision in that case. It is unnecessary for me to consider whether the parties, tenant for life and remainderman, were to be united in interest, that payment by one might be regarded as an acknowledgment of the debt of the other. This, I think, would undoubtedly be the case if the bond debt had been a charge upon the land; but whether they were so or not, the relation between the parties in *Roddam v. Morley* renders that case inapplicable to the present. This was the opinion of Westbury, L.C., in *Dickenson v. Teasdale*, where a similar question arose as to the effect of an acknowledgment by a devisee upon the defence of the Statute of Limitations by a co-devisee. In that case his lordship shortly expressed the same view as I have taken upon this question, and I have, therefore, his authority in support of the view at which I have arrived.—p. 120.

Dickenson v. Teasdale, referred to.

Cunningham v. Foot (1878) 3 App. Cas. 974, 993; 38 L. T. 889; 26 W. R. 859.—H.L. (IR.).

Coope v. Cresswell (*supra*), referred to.

Hollingshead, *In re* (1888) 37 Ch. D. 651, 680 (*post*, col. 1603); **Hyatt**, *In re*, *Bowles v. Hyatt* (1888) 57 L. J. Ch. 777; 38 Ch. D. 609, 621; 59 L. T. 297.—CHITTY, J.

Coope v. Cresswell, applied.

England, *In re*, *Stewart v. England* [1895] 2 Ch. 820.—KEKEWICH, J.; affirmed, C.A. (*supra*, col. 1595).

Coope v. Cresswell, referred to.

Astbury v. Astbury (1898) 67 L. J. Ch. 471; [1898] 2 Ch. 111 (*post*, col. 1606).

Roddam v. Morley (*supra*), approved.

Pears v. Laing (1871) 40 L. J. Ch. 225; L. R. 12 Eq. 41; 24 L. T. 19; 19 W. R. 653.

BACON, V.-C.—The case of *Roddam v. Morley*, which, notwithstanding all that has been said of it in *Coope v. Cresswell*, or elsewhere, I conceive to be of unquestionable authority, has decided that payment of interest by the tenant for life of a devised estate keeps a specialty alive against the persons entitled in remainder. But the case is also of great value, by reason of the

close and careful examination into the Statutes of Limitation, as well by the common law judges, whose assistance was procured by the L.C., as by the L.C. himself. The judges pointed out that the action to be brought could only be one and the same action on the specialty, and not on any new promise, express or implied, from the terms of the acknowledgment, whatever it might have been. They held that a devisee who might plead the bar, if it existed, could only plead it on such single action, and observing that he was capable of making the acknowledgment, and the Statute of Fraudulent Devises having declared that the devisee should be liable and chargeable in the same manner as the heir, they concluded, without hesitation, that the devisee might as properly be said to be "liable by virtue of the indenture," as either the real or personal representative, and, therefore, that by the acknowledgment the action, the only action that could be brought, was set free generally, the statutes having nowhere said that it could be brought only against the party making the acknowledgment.—p. 229.

Roddam v. Morley, *considered*.
Hollingshead, *In re* (*post*).

Roddam v. Morley and Pears v. Laing (*supra*), *referred to*.
Barelay v. Owen (1889) 60 L. T. 222.—KAY, J.

Forayth v. Bristowe (1853) 22 L. J. Ex. 255; 8 Ex. 716; 17 Jur. 675; 1 W. R. 356.
—EX.: and **Roddam v. Morley**, *followed*.
Dibb v. Walker (1893) 62 L. J. Ch. 536; [1893] 2 Ch. 429; 3 R. 474; 68 L. T. 610; 41 W. R. 427.—CHITTY, J.

Roddam v. Morley, Pears v. Laing and Dibb v. Walker, *applied*.
Leahy v. De Moleyns (1895) [1896] 1 Ir. R. 206.—C.A.

Roddam v. Morley, *discussed*.
Astbury v. Astbury (*post*, col. 1606).

Fordham v. Wallis (1853) 22 L. J. Ch. 548; 10 Hare 217; 17 Jur. 228; 1 W. R. 118.—TURNER, V.-C., *referred to*.
Hunter v. Young (1879) 48 L. J. Ex. 689; 4 Ex. D. 256, 261; 41 L. T. 142; 27 W. R. 637.—C.A.; Marsden, *In re*, Bowden v. Layland (1884) 54 L. J. Ch. 640; 26 Ch. D. 783, 790; 51 L. T. 417; 33 W. R. 28.—KAY, J.; Shea v. Moore (*post*).

Fordham v. Wallis, *considered*.
Hollingshead, *In re*, Hollingshead v. Webster (1888) 57 L. J. Ch. 400; 37 Ch. D. 651; 58 L. T. 758; 36 W. R. 660.—CHITTY, J.

Hollingshead, In re, Hollingshead v. Webster, *followed*.
Edwards v. Walters (1896) 65 L. J. Ch. 557; [1896] 2 Ch. 157; 74 L. T. 396; 44 W. R. 547.—C.A. LINDLEY, LOPES and KAY, L.JJ.

Fordham v. Wallis and Hollingshead, In re, Hollingshead v. Webster, *applied*.
Macdonald, *In re*, Dick v. Fraser (1897) 66 L. J. Ch. 630; [1897] 2 Ch. 181; 76 L. T. 713; 45 W. R. 628.—STIRLING, J.

Hollingshead, In re, and Fordham v. Wallis, *discussed*.
Astbury v. Astbury (1898) 67 L. J. Ch. 471; [1898] 2 Ch. 111.—STIRLING, J. (*post*, col. 1606).

Toft v. Stephenson (1848) 1 Hare 7.—WIGRAM, V.-C.; *reversed*. (1851) 21 L. J. Ch. 129; 1 De G. M. & G. 28; 14 Jur. 1187.—L.JJ.

Toft v. Stephenson, *referred to*.
Pears v. Laing (1871) L. R. 12 Eq. 41, 54 (*supra*, col. 1602); **Lewin v. Wilson** (*post*); **Shea v. Moore** (1892) [1894] 1 Ir. R. 158, 170.—C.A.

Bolding v. Lane (1863) 32 L. J. Ch. 219; 1 De G. J. & S. 122; 9 Jur. (N.S.) 506; 1 N. R. 248; 7 L. T. 812; 11 W. R. 386.—WESTBURY, L.C.; *reversing* (1862) 3 Giff. 561; 8 Jur. (N.S.) 407; 6 L. T. 276; 10 W. R. 556.—STUART, V.-C., *distinguished*.
Chinnery v. Evans (1864) 11 H. L. Cas. 115; 10 Jur. (N.S.) 855; 11 L. T. 68; 13 W. R. 20.—H.L. (IR.). *And see* cols. 1605—1608.

Chinnery v. Evans, *principle applied*.
Pears v. Laing (*supra*, col. 1602).

Chinnery v. Evans, *explained*.
Cockburn v. Edwards (1881) 51 L. J. Ch. 46; 18 Ch. D. 449, 456; 45 L. T. 560; 30 W. R. 446.—C.A.

Chinnery v. Evans, *discussed and applied*.
Harlock v. Ashberry (1882) 51 L. J. Ch. 894; 19 Ch. D. 539; 46 L. T. 356; 30 W. R. 327.—C.A.: *reversing* 50 L. J. Ch. 745; 18 Ch. D. 229; 45 L. T. 341; 29 W. R. 887.—FRY, J.

Harlock v. Ashberry, *referred to*.
Newbould v. Smith (1885) 29 Ch. D. 882, 887; 53 L. T. 137; 33 W. R. 690.—NORTH, J. (*see supra*, col. 1585); **Badeley v. Consolidated Bank** (1886) 34 Ch. D. 536, 550 (*supra*, col. 1592).

Chinnery v. Evans and Harlock v. Ashberry, *discussed*.

Bolding v. Lane (*supra*), *referred to*.
Lewin v. Wilson (1886) 11 App. Cas. 639; 55 L. J. P. C. 75; 55 L. T. 410.—P.C.; *reversing* THE SUPREME COURT OF CANADA. *And see* cols. 1606—1608.

LORD HOBHOUSE (for the Court).—It is . . . necessary to see how far the authorities have determined the meaning of the word "payment" in sect. 30 [Consolidated Statutes of New Brunswick, c. 84]. • Sect. 29 deals with actions to recover money secured on land and legacies, and provides a limit of twenty years after the right accrued, "unless, in the meantime, some part of the principal money or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent;" a fresh term of twenty years being given after any such occurrence. It has been disputed whether the words which require that acknowledgment shall be given by the person by whom the money shall be payable or his agent, apply also to payment. It is argued that *Chinnery v. Evans* and *Harlock v. Ashberry* have decided that they do so apply. But that was not the *ratio decidendi* in either case. In both cases the question arose under the English Act of 1837, which corresponds with sect. 30 of the New Brunswick Statute, and not under sect. 40 of the English Act of 1833, which corresponds with sect. 29. . . . In *Harlock v. Ashberry* the judges considered that the principle which underlies the statutes is that payment must be an admission of right, but they do not discuss the question how far a payment by A. may be admission of right against B. Their

conclusion is that statutory payment must be by a person bound, or at least entitled, to pay; and that was quite sufficient for their decision. In *Chinnery v. Evans* a more direct and simple criticism is applied both by Lord Westbury and Lord Cranworth to the word "payment." They consider that money brought in by a stranger to the mortgage contract would not have the characteristics or legal quality of payment; it would be a gift from a person not entitled to tender it to a person not entitled to demand it. Both learned lords treat the supposed case as almost beyond the bounds of practical matters. . . . The judgment of the three other judges [in the Supreme Court of Canada] who constituted the majority, was delivered by Gwynne, J. . . . He relies on the decision in *Bolding v. Lane*, where the question related to acknowledgment under the English Act of 1833, corresponding with sect. 29, and on the *dictum* in *Toft v. Stephenson* (*supra*, col. 1604), which Lord Cranworth carefully confines to a case falling under the same enactment. The principle he finds to be established by authority is, that the only person by whom a payment can be made to stay the currency of the statute, is the mortgagor, or some person in privity of estate with him, or the agent of one of them. It will have been seen that their lordships think it necessary to qualify that doctrine.—pp. 643—647.

Bolding v. Lane (*supra*), *discussed*.
Astbury v. Astbury (1898) 67 L. J. Ch. 471 : [1898] 2 Ch. 111 (*post*, col. 1606).

Harlock v. Ashberry (*supra*), *applied*.
Hugill v. Wilkinson (1888) 38 Ch. D. 480 ; 57 L. J. Ch. 1019 ; 58 L. T. 880 ; 36 W. R. 633.

NORTH, J.—Now the right of John Wilkinson against Joseph Wilkinson and the persons claiming under him, is a right to enforce a charge. That charge may be enforced by way of foreclosure. An action for foreclosure, or the right to bring an action for foreclosure, seems to me to be the same thing, for this purpose. It is clearly within *Harlock v. Ashberry* an action or right to bring an action for the recovery of land, and it is expressly held to be within sect. 2 of the Act of 3 & 4 Will. 4, and it follows it is equally within sect. 1 of the Act of 1874.—p. 483.

Harlock v. Ashberry, *referred to*.
Hugill v. Wilkinson, *discussed*.
Conlan's Estate, In re (1892) 29 L. R. Ir. 199.
 —MONROE, J. *And see post*, col. 1607.

Harlock v. Ashberry, *referred to*.
Hugill v. Wilkinson, *explained and distinguished*.
Owen, In re (1894) 63 L. J. Ch. 749 : [1894] 3 Ch. 220 ; 8 R. 566 ; 71 L. T. 181 ; 43 W. R. 55.
 —STIRLING, J.

Hugill v. Wilkinson, *referred to*.
Powell v. Brodhurst (1901) 70 L. J. Ch. 587 ; [1901] 2 Ch. 160 ; 84 L. T. 620 ; 49 W. R. 532.—
 FARWELL, J.

Chinnery v. Evans (col. 1604), *referred to*.
Barclay v. Owen (1889) 60 L. T. 222.—KAY, J. ;
Frisby, In re, Allison v. Frisby (1889) 59 L. J. Ch. 94 ; 43 Ch. D. 106, 116 ; 61 L. T. 632 ; 38 W. R. 65.—C.A.

Chinnery v. Evans, *principle applied*.
Harlock v. Ashberry (*and see post*) ; and

Lewin v. Wilson (*supra*, col. 1604), *discussed*.

Brew v. Brew (1898) [1899] 2 Ir. R. 163.—
 Q.B.D.

Chinnery v. Evans, *applied*.

Astbury v. Astbury (1898) 67 L. J. Ch. 471 : [1898] 2 Ch. 111 ; 78 L. T. 494 ; 46 W. R. 536.

STIRLING, J.—The only decision to which I have been referred on this particular clause [Real Property Limitation Act, 1833, sect. 42] is *Bolding v. Lane* (col. 1604), where it was decided that an acknowledgment by a mortgagor of more than six years' arrears of interest being due upon a first mortgage does not preclude a personal mortgagee from relying upon the Statute of Limitations. [His lordship read passages from the judgment of Westbury, L.C., and continued:] "If that be taken literally as an interpretation of the statute, then an acknowledgment by an executor does not fall within it. But it may be, having regard to some decisions which I am about to mention, the words of the L.C. are to be taken with some qualification. However that may be, the decision—which is binding on me—appears to be in favour of the view that an acknowledgment made by one executor is not effectual to keep alive the debt against the devisee of the real estate, supposing him to be a different person. If the acknowledgment of the mortgagor, who has an interest in the land, does not prevent a mortgagee from claiming the benefit of the statute, why should the acknowledgment of the executor (who as such has no interest in the land) be more effectual? This seems to be in accordance with decisions on other statutes. It was held in *Chinnery v. Evans* that payment of interest on a mortgage comprising several estates by a receiver appointed in a mortgagee's action, the rents of one of them operated (under sect. 40 of the Real Property Limitation Act, 1833) to keep alive the mortgage debt against the others. It was also held in *Roddam v. Morley* (*supra*, col. 1602) that payment by a tenant for life of devised real estate of interest on a specialty debt, in which the heirs were bound, was sufficient (under sect. 9 of the Act) to keep the debt alive against the remainderman, and a similar decision was given in *Hollingshead, In re, Hollingshead v. Webster* (*supra*, col. 1603), with respect to payment of interest on a simple contract debt, the relevant statute being the Limitation Act, 1623 (21 Jac. 1, c. 16). In all these cases the position or interest of the person making the payment was such that he might fairly be held to represent other persons interested in the land. On the other hand, it was held by Turner, V.-C., in *Fordham v. Wallis* (*supra*, col. 1603), following *Putnam v. Bates* (*supra*, col. 1582), that the payment of interest on a debt of a testator by the executors, who were also devisees in trust of his real estate, although it kept the debt alive against the personal estate, did not have the same effect against the real estate, the relevant statute being again the Limitation Act, 1623. The V.-C. says: "The case rests upon the decisions in *Atkins v. Tredgold* (*supra*, col. 1581) and *Slater v. Lawson* (*supra*, col. 1582), and the principle of those cases was this—that one party was not to be bound by the admissions of another, except in cases of continuing joint contract. This principle is surely founded in justice. Apart from purely legal considerations, it cannot,

I think, be doubted that it ought not to be in the power of any person by his admission to revive a right against another, which, but for that admission, would have been wholly extinguished, as was the case in *Channell v. Ditchburn*" (*supra*, col. 1582). . . . It was also held by Chelmsford, L.C., in *Coope v. Cresswell* (*supra*, col. 1602) . . . that payment of interest on a specialty debt by the executors of the debtor was not sufficient under the Real Property Limitation Act, 1833, sect. 5, to keep the debt alive against the devisees of the real estate.—p. 473.

Chinnery v. Evans, explained.

Hale, In re, *Lilley v. Foad* (1899) 68 L. J. Ch. 517; [1899] 2 Ch. 107; 80 L. T. 827; 47 W. R. 579.—C.A.; *affirmed* 79 L. T. 468.—BYRNE, J.

SIR F. JEUNE.—In the case of a receiver, *Chinnery v. Evans* does appear to me to go so far as to show that a receiver acting within the scope of his authority and dealing with a matter within the mortgage can bar the operation of the statute by part payment of interest on the mortgage debt. The reason is that he is acting within the scope of his authority.—p. 520.

Harlock v. Ashberry (col. 1604), *referred to*.
London and Midland Bank v. Mitchell (1899) 68 L. J. Ch. 568; [1899] 2 Ch. 161; 81 L. T. 263; 47 W. R. 602.—STIRLING, J.

Harty v. Davis (1850) 13 Ir. L. R. 23.—C.P., *referred to*.

Shea v. Moore (1892) [1894] 1 Ir. L. R. 158, 170.—C.A.

Harty v. Davis, approved.

Chinnery v. Evans, Harlock v. Ashberry, and Lewin v. Wilson (*supra*), *explained*.

Cliffen (Viscount), In re, *Annaly v. Agar Ellis* (1900) 69 L. J. Ch. 478; [1900] 1 Ch. 774; 82 L. T. 538; 48 W. R. 428.

BYRNE, J.—It is argued that the receipt of the policy-moneys operates as a payment within the meaning of sect. 8 of the Real Property Limitation Act, 1874. With reference to the phrase "unless in the meantime some part of the principal money shall have been paid," I think that the words "in the meantime" must be taken to refer to the period between the time when the action or suit is brought and the time after which the remedy for the debt will otherwise have been barred. The words were so interpreted in . . . *Harty v. Davis*, with which I must express my agreement. . . . These cases [*Chinnery v. Evans, Harlock v. Ashberry, and Lewin v. Wilson*] establish that payments by persons standing in certain relations are to be treated as payments giving a new starting point, from which lapse of time is to be calculated. There is but one other authority in which the question has been discussed, and that is *Conlan's Estate, In re* (col. 1596). . . . I am unable myself to reconcile that decision, so far as the point now under discussion is concerned, with the decision of the C. A. in *Harlock v. Ashberry*. It appears to me that where the statutory period has run by reason of the twelve years having elapsed, the realisation of the security by the mortgagee after that date does not amount to and cannot be construed as a payment by the mortgagor or his agent, or by some person entitled by virtue of the contract to make a tender of the money, and to enforce payment of it.—p. 480.

Harlock v. Ashberry, principle applied.

Grogan v. Regan (1901) [1902] 2 Ir. R. 197.—C.A.; *Taylor v. Holland* [1902] 1 K. B. 576, 681.—JELF, J. (*post*, col. 1610).

Chinnery v. Evans, Harlock v. Ashberry, and Lewin v. Wilson (col. 1604), *discussed*.

Bradshaw v. Widdrington (1902) 71 L. J. Ch. 627; [1902] 2 Ch. 430; 84 L. T. 726; 50 W. R. 561.—BUCKLEY, J.; *affirmed*, C.A.

Concealed Fraud.

Rolfe v. Gregory (1864) 34 L. J. Ch. 274; 11 Jur. (N.S.) 98; 12 L. T. 162; 13 W. R. 355.—WESTBURY, L.C., *explained and not applied*.

Stone v. Stone (1869) 39 L. J. Ch. 196; L. R. 5 Ch. 74; 22 L. T. 182; 18 W. R. 225.—GIFFARD, L.J. *And see supra*, col. 1565.

Lawrance v. Norreys (Lord) (1890) 59 L. J. Ch. 681; 15 App. Cas. 210; 62 L. T. 706; 38 W. R. 753; 54 J. P. 708; 6 Times L. R. 285.—H.L. (E.), *approved*.

Haggard v. Pelicier Frères (1891) 61 L. J. P. C. 19; [1892] A. C. 61; 65 L. T. 769.—P.C.

Lawrance v. Norreys (Lord) and Vane v. Vane (1873) 42 L. J. Ch. 299; L. R. 8 Ch. 383; 28 L. T. 320; 21 W. R. 252.—JAMES and MELLISH, L.JJ., *explained and applied*.

Willis v. Howe (Earl) (1893) 2 R. 427; 62 L. J. Ch. 690; [1893] 2 Ch. 545; 69 L. T. 358; 41 W. R. 433.—C.A.

LINDLEY, L.J.—The meaning of sect. 26 [Statute of Limitations, 3 & 4 Will. 4, c. 27] has been very much discussed in various cases, such as *Petre v. Petre* (*supra*, col. 1568), *Rains v. Buxton* (*supra*, col. 1600), *Lawrance v. Norreys*, and *Vane v. Vane*. These cases show that, in order to obtain the benefit of sect. 26, the plaintiff in such an action [*i.e.*, of ejectment] must make out three things: (1) that there has been a concealed fraud; (2) that he or his predecessor in title had been deprived of the estate by that fraud; (3) that the fraud had not and could not with reasonable diligence have been known or discovered but within the statutory period (now twelve years) before the action was brought. . . . The case is not like *Trustees, Executors and Agency Co. v. Short* (*supra*, col. 1596), where the lands had been left vacant.—pp. 430, 431.

BOWEN, L.J., concurred. KAY, L.J., to the same effect.

Willis v. Howe (Earl) and Lawrance v. Norreys (Lord), discussed.

Thorne v. Heard (1894) 63 L. J. Ch. 356; [1894] 1 Ch. 599; 7 R. 100; 70 L. T. 541; 42 W. R. 274; 10 Times L. R. 216.—C.A.; *affirmed* (1895) 64 L. J. Ch. 652; [1895] A. C. 495; 11 R. 254; 73 L. T. 291; 11 Times L. R. 464.—H.L. (E.).

Thorne v. Heard, referred to.

How v. Winterton (Earl) (1896) 65 L. J. Ch. 832; [1896] 2 Ch. 626 (*supra*, col. 1567).

Thorne v. Heard, discussed and applied.

McCallum, In re, *McCallum v. McCallum* (1900) 70 L. J. Ch. 206; [1901] 1 Ch. 143; 83 L. T. 717; 49 W. R. 129.—C.A.

ALVERSTONE, C.J.—As I understand, the old jurisdiction exercised by the Court of equity

rested upon the fact that the conscience of the party who was setting up possession as against the title of true owner was affected so that he ought not to be allowed to avail himself of the lapse of time. This is the reason given by the L.C. of Ireland in *Morenden v. Annesley* (Lord) (*supra*, col. 1563), and when Kindersley, V.-C., in *Petre v. Petre* (*supra*, col. 1568) was considering the meaning of the same sect. 26 [Real Property Limitation Act, 1833], he uses these words: "It does not mean the case of a party entering wrongfully into possession: it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold." This passage was quoted *verbatim* in Lord St. Leonards' Real Property Statutes (2nd ed.), p. 98. It may be said, of course, that these statements of the law are not exhaustive; but I cannot think that such judges would have used the words they did—namely, "by means of such concealment enables him to enter and hold"—if they had contemplated that this section of the statute was dealing with cases of the fraud of third persons (through whom the person in possession does not claim), of which fraud the persons claiming under the statute were wholly innocent. Similarly, in *Willis v. Howe* (Earl) (*supra*), Kay, L.J., approves of the passage already cited from *Petre v. Petre*, and adds these words: "But the word 'concealed' seems to indicate that there were facts known to the person who enters, and designedly concealed by him from the real owner, which facts, if known, would enable the real owner to recover. The deprivation of which the section speaks in such a case is by the fraudulent entry. But that which makes a wrongful entry fraudulent is not only the knowledge, but the concealment of those facts." And, lastly, in *Thorne v. Heard*, Lord Lindley in the C. A. states the principle of the law in the way I have indicated, and refers to the authorities above mentioned; and Lord Davey, in the H. L., uses language which, though it was uttered with reference to another statute, in my opinion lays down the principle of construction that we ought to apply to this Act, an Act, be it remembered, which only laid down a uniform rule as to the length of time which must have elapsed since possession taken in order to oust the true owner.—p. 210.

V. WILLIAMS, L.J., discussed *Petre v. Petre*, *Willis v. Howe* (Earl), and *Thorne v. Heard*, and continued: I wish to add that the view of Kay, L.J., that the fraud must have deprived the claimant or his predecessors in title of the estate has already been fully established by the judgment of Herschell, L.C., in *Lawrance v. Norreys* (Lord) (*supra*); and I wish here to point out two reasons why *Scholefield v. Templer* ((1859) 28 L. J. Ch. 452; 4 De G. & J. 429; Johns. 155; 5 Jur. (N.S.) 619; 7 W. R. 633.—WOOD, V.-C.) has no application in the present case—first, because in that case the defendant sought to take a benefit from the very fraud which he said deprived the plaintiff of his right of action against him the surety, whereas in the present case neither the defendant nor the general in any sense adopt or seek to take a benefit from the fraud of the plaintiff's mother; secondly, because the fraud of the plaintiff's mother had nothing to do with the possession of General McCallum or the depriving the plaintiff of her land: she was deprived of her land by the

possession of her father, she was not deprived of the land by the fraud of her mother.—pp. 215, 216.

RIGBY, L.J., who dissented, also discussed the authorities.

Judgment Debts.

Martin v. McCausland (1840) 3 Ir. L. R. 113.—C.P., *not law*.

Kirkwood v. Lloyd (1849) 12 Ir. Eq. R. 585.—BRADY, L.C.

Sheppard v. Duke (1839) 8 L. J. Ch. 228; 9 Sim. 567; 3 Jur. 168.—V.-C., *referred to*.

Henry v. Smith (1842) 2 Dr. & War. 381; 4 Ir. Eq. R. 502; 1 Con. & L. 506.—SUGDEN, L.C.

Henry v. Smith.

Commented on, Sherwood v. Hannan (*post*); *referred to*, Evans v. O'Donnell (*post*): *applied*, Lake's Trusts, In re (1890) 63 L. T. 416.—STIRLING, J.; *referred to*, Shea v. Moore (1892) [1894] 1 Ir. R. 158, 177.—C.A.; M'Donnell v. Fitzgerald (*post*): Lloyd, In re (1902) [1903] 1 Ch. 385, 398.—C.A. (*post*, col. 1614).

Watson v. Birch (1847) 16 L. J. Ch. 188; 15 Sim. 523; 11 Jur. 198.—V.-C., *commented on*.

Sherwood v. Hannan (1885) 15 L. R. Ir. 331.—CHATTERTON, V.-C.

Sherwood v. Hannan, *reversed*.

Watson v. Birch, *referred to*.

Evans v. O'Donnell (1886) 18 L. R. Ir. 170.—C.A.

Evans v. O'Donnell, *explained*.

Breslin v. Hodgins (1876) 10 Ir. Eq. R. 260.—CHATTERTON, V.-C., *discussed*.

M'Donnell v. Fitzgerald [1897] 1 Ir. R. 556.—PORTER, M.R.

Evans v. O'Donnell, *explained and applied*. Johnson v. Lowry [1900] 1 Ir. R. 316.—C.A.

Hebblethwaite v. Peever (1891) [1892] 1 Q. B. 124; 40 W. R. 318.—COLLINS, J., and **Watson v. Birch** (*supra*), *followed*.

Jay v. Johnstone (1892) [1893] 1 Q. B. 25.—COLERIDGE, C.J., and WILLS, J., *affirmed* (*post*).

Watson v. Birch, *explained*.

Jay v. Johnstone (1892) 62 L. J. Q. B. 128; [1893] 1 Q. B. 189; 4 R. 196; 68 L. T. 129; 47 W. R. 161; 57 J. P. 309.—C.A.

LINDLEY, L.J.—Judgments were specially mentioned in 3 & 4 Will. 4, c. 27, and not in the other Act, though, being specialties, they might be, and *prima facie* would be, included in 3 & 4 Will. 4, c. 42. But the V.-C. in *Watson v. Birch* determined that upon the true construction of these two statutes, the statute which related to judgments was 3 & 4 Will. 4, c. 27. Taking that view, he held that a judgment debt twenty years old could not be enforced even as against the personal estate of the judgment debtor. That decision has been accepted and acted upon by everybody without question ever since; and the law as settled by that decision, and by other decisions which have followed it, is to the short effect that, under that Act, a judgment is barred after twenty years.—p. 132. BOWEN, L.J. concurred.

Jay v. Johnstone, *referred to*.

Taylor v. Holland (1902) 71 L. J. K. B. 278; [1902] 1 K. B. 676; 86 L. T. 228; 50 W. R. 558.—JELF, J.

Arrears of Rent and Interest.

Paget v. Foley (1836) 5 L. J. C. P. 258; 2 Bing. (N.C.) 679; 3 Scott 120; 2 Hodges 32.—C.P., *followed*.
Strachan v. Thomas (1840) 9 L. J. Q. B. 397; 12 A. & E. 536; 4 P. & D. 229; 4 Jur. 1183.—Q.B.

Paget v. Foley, *discussed*.
Du Vigier v. Lee (1843) 12 L. J. Ch. 345; 2 Hare 326; 7 Jur. 299.—WIGRAM, V.-C.

Paget v. Foley and Strachan v. Thomas, *discussed and distinguished*.
Hughes v. Kelly (1843) 5 Ir. Eq. R. 286; 3 Dr. & War. 482; 2 Con. & L. 223.—SUGDEN, L.C.

Paget v. Foley, *referred to*.
Doe d. Angell v. Angell (1846) 15 L. J. Q. B. 193; 9 Q. B. 328; 10 Jur. 705.—Q.B.

Paget v. Foley, *followed*.
Hunter v. Nockolds (1850) 19 L. J. Ch. 177; 1 Mac. & G. 640; 1 H. & T. 644; 14 Jur. 256.—COTTENHAM, L.C.; *reversing* (1849) 18 L. J. Ch. 407.—WIGRAM, V.-C. *And see* col. 1613.

Paget v. Foley.
Referred to, **Baines v. Lumley** (1868) 16 W. R. 674.—C.P.; *discussed*, **Howitt v. Harrington** (Earl) [1893] 2 Ch. 497 (*supra*, col. 1588); *applied*, **Jones v. Withers** (1896) 74 L. T. 572.—C.A.; *referred to*, **McDonnell v. Fitzgerald** (*supra*, col. 1610).

Du Vigier v. Lee (*supra*), *followed*.
Hughes v. Kelly and Hunter v. Nockolds (*supra*), *referred to*.
Elvy v. Norwood (1852) 21 L. J. Ch. 716; 5 De G. & Sm. 240; 16 Jur. 493.—PARKER, V.-C.

Elvy v. Norwood, Du Vigier v. Lee, Hunter v. Nockolds and Hughes v. Kelly (*supra*), *discussed*.
Sinclair v. Jackson (1853) 17 Beav. 405.—ROMILLY, M.R. *And see post*, col. 1612.

Hunter v. Nockolds, *distinguished*.
Cox v. Dolman (*post*, col. 1612).

Du Vigier v. Lee.
Commented on, **Round v. Bell** (1861) 31 L. J. Ch. 127; 30 Beav. 121; 7 Jur. (N.S.) 1183; 5 L. T. 25; 9 W. R. 846.—M.R.; *distinguished*, **Pile v. Pile** (1875) 23 W. R. 440.—HALL, V.-C.; *discussed*, **Dingle v. Coppen** [1899] 1 Ch. 726 (*post*, col. 1614); **Lloyd, In re** [1903] 1 Ch. 385 (*post*, col. 1614).

Hughes v. Kelly (*supra*), *referred to*.
Cunningham v. Foot (1878) 3 App. Cas. 974; 1002; 38 L. T. 889; 26 W. R. 859.—H.L. (IR.); **Lloyd, In re** (*post*, col. 1614).

Elvy v. Norwood (*supra*), *referred to*.
Stead's Mortgaged Estates, In re (*post*, col. 1614).

Bowyer v. Woodman, Clarke, Ex parte (1867) L. R. 3 Eq. 313.—WOOD, V.-C., *applied*.

Pawsey v. Barnes (1851) 20 L. J. Ch. 393; 15 Jur. 943.—KNIGHT BRUCE, V.-C., *distinguished*.
Mutlow v. Bigg (*post*, col. 1613).

Vincent v. Going (1844) 1 Jo. & Lat. 697; 7 Ir. Eq. R. 463.—SUGDEN, L.C.; **Sinclair v. Jackson** (*supra*); **Wheeler v. Howell**

(1857) 3 K. & J. 198.—WOOD, V.-C.; and **Bowyer v. Woodman**, *discussed*.
Smith v. Hill (1878) 9 Ch. D. 143; 47 L. J. Ch. 788; 38 L. T. 638; 26 W. R. 878.

HALL, V.-C.—The question which has been argued as to the application of the statute 3 & 4 Will. 4, c. 27, to this case, the property mortgaged being a reversionary interest, is not upon the authorities in a satisfactory state. I find that the point was considered by Lord St. Leonards in **Vincent v. Going**. [The V.-C., after stating the facts of the case, continued:] It seems, therefore, to me that that is a direct decision by Lord St. Leonards on the point, and in the year 1844. That case is not, I think, referred to in any of the subsequent cases, and that is rather remarkable. The next case, **Sinclair v. Jackson**, was decided in 1853, and it is a direct authority upon the point to the same effect. . . . I consider that the judgment of the V.-C. in **Wheeler v. Howell** is a decision the other way upon the point. It is very shortly put, as it merely shows that the statute does not apply to arrears of an annuity charged upon a reversionary interest on land, so long as the interest continues to be reversionary. I think the case was decided upon sect. 42. . . . In regard to the other case of **Bowyer v. Woodman**, which was a decision of Wood, V.-C., the other way, I do not think I can put it in competition with his previous judgment, as I do not think the point there was really very much before the Court. . . . In this state of the authorities on that part of the case, I should consider myself . . . bound to hold that the arrears would not be recoverable while this property was reversionary.—p. 147.

Sinclair v. Jackson, *discussed*.
Dingle v. Coppen, and Lloyd, In re (*post*, col. 1614).

Young v. Waterpark (Lord) (1842) 11 L. J. Ch. 367; 13 Sim. 199, 204; 6 Jur. 656.—V.-C.; *affirmed* (1845) 15 L. J. Ch. 63; 10 Jur. 1.—L.C., *commented on*.
Chappell v. Rees (1852) 16 Jur. 417.—ST. LEONARDS, L.C.

Young v. Waterpark (Lord) and Chappell v. Rees, *referred to*.
Ward v. Arch (1842) 12 Sim. 472.—V.-C.; and **Goff v. Bult** (1848) 16 Sim. 323.—V.-C., *not applied*.
Petre v. Petre (1852) 1 Drew. 371.—KINDERSLEY, V.-C. *And see supra*, col. 1568.

Goff v. Bult, *applied*.
Mutlow v. Bigg (*post*, col. 1613).

Young v. Waterpark (Lord), *followed*.
Cox v. Dolman (1852) 22 L. J. Ch. 427; 2 De G. M. & G. 592; 17 Jur. 97.—L.C. and L.JJ.

Young v. Waterpark (Lord) and Cox v. Dolman, *followed*.
Wyse, In re, Gore, Ex parte (1855) 4 Ir. Ch. R. 297.—P.C. (IR.).

Cox v. Dolman and Young v. Waterpark (Lord), *applied*.
Snow v. Booth (1856) 2 K. & J. 132.
WOOD, V.-C.—All that **Hunter v. Nockolds** (*supra*, col. 1611) determined was, that in a suit for the administration of the assets of a grantor of an annuity the annuitant cannot prove, as a personal debt, for more than six

years' arrears. If the decision went beyond that, it is overruled by *Cox v. Dolman*.—p. 135.

Cox v. Dolman, *followed*.

Snow v. Booth (1856) 25 L. J. Ch. 417; 8 De G. M. & G. 69; 2 Jur. (N.S.) 244; 4 W. R. 345.—L.J.; *affirming* S. C. *supra*.

Young v. Waterpark (Lord), *applied*.

Burrowes v. Gore (1857) 6 H. L. Cas. 907; 4 Jur. (N.S.) 1245; 3 W. R. 699.—H.L. (IR.); LORD WENSLEYDALE *dissenting*.

Cox v. Dolman, *applied*.

Snow v. Booth, *referred to*.

Lewis v. Duncombe (1861) 30 L. J. Ch. 732; 29 Beav. 175; 7 Jur. (N.S.) 695; 3 L. T. 867; 9 W. R. 446.—M.R.

Cox v. Dolman, *referred to*.

Lawton v. Ford (1866) L. R. 2 Eq. 97; 14 L. T. 320; 14 W. R. 575.—STUART, V.-C.

Burrowes v. Gore (*supra*).

Applied, *Mutlow v. Bigg* (1874) L. R. 18 Eq. 246, 248; 22 W. R. 469.—HALL, V.-C. (*reversed on further evidence*, (1875) 45 L. J. Ch. 282; 1 Ch. D. 385; 31 L. T. 273; 24 W. R. 401.—C.A.); *not applied*, *Rorke v. Sherlock* (1877) Ir. R. 9 Eq. 510.—CHATTERTON, V.-C.; *explained*, *Marshall's Estate*, in re (1898) [1899] 1 Ir. R. 96.—ROSS, J.

Lewis v. Duncombe (*supra*), *adhered to*.

Round v. Bell (1861) 30 Beav. 121—(*supra*, col. 1611).

Round v. Bell, *referred to*.

Lloyd, in re (*post*, col. 1614).

Rorke v. Sherlock (*supra*), *referred to*.

Marshall's Estate, in re (*supra*).

Hunter v. Nockolds (*supra*, col. 1611).

Explained, *Snow v. Booth* (1856) 2 K. & J. 132 (*supra*, col. 1612); *applied*, *Shaw v. Johnson* (1861) 30 L. J. Ch. 645; 1 Dr. & Sm. 412; 7 Jur. (N.S.) 1005; 4 L. T. 460; 9 W. R. 629.—V.-C.: *Mason v. Broadbent* (*post*); *Edmunds v. Waugh* (*post*); *Sutton v. Sutton* (1882) 22 Ch. D. 511, 518.—C.A. (*supra*, col. 1594); *applied*, *Darley v. Tennant* (1885) 53 L. T. 257.—NORTH, J.; *referred to*, *Nugent's Trusts*, in re (1885) 19 L. R. Ir. 140.—PORTER, M.R.; *Frishby*, in re, (1889) 43 Ch. D. 106, 110 (*supra*, col. 1594); *discussed*, *McDonnell v. Fitzgerald* [1897] 1 Ir. R. 556.—PORTER, M.R.; *commented on*, *Bailie v. Irwin* [1897] 2 Ir. R. 614.—Q.B.D.; *approved*, *Lloyd*, in re (*post*).

Shaw v. Johnson (*supra*), *referred to*.

Stead's Mortgaged Estates, in re (*post*); *Lloyd*, in re (*post*).

Mason v. Broadbent (1863) 33 Beav. 296; 9

L. T. 565; 12 W. R. 1118.—M.R., *questioned*.

Edmunds v. Waugh (1866) L. R. 1 Eq. 418; 35 L. J. Ch. 234; 12 Jur. 326; 13 L. T. 739; 14 W. R. 257.

KINDERSLEY, V.-C.—In *Mason v. Broadbent*, which was a suit by a mortgagor to recover the surplus money, the decision appears to have been that the mortgagee should only retain six years' arrears of interest. . . . I am bound to say that, with all deference, I cannot concur in the conclusion that a bill by a mortgagor to recover the surplus money comes within the terms of the 42nd section, as being a suit by which arrears of interest are sought to be recoverable.—p. 421.

Mason v. Broadbent.

Distinguished, *Archdall v. Anderson* (*post*); *discussed*, *Dingle v. Coppen* (*post*); *referred to*, *Lloyd*, in re (*post*).

Edmunds v. Waugh (*supra*), *explained*.

Stead's Mortgaged Estates, in re (1876) 2 Ch. D. 713; 45 L. J. Ch. 634; 35 L. T. 465; 24 W. R. 698.

MALINS, V.-C.—But that was a case in which the proceeds of the sale of certain mortgaged premises, sold under the power of sale in the mortgage deed, were standing in Court to the credit of a suit for the administration of the estate of the mortgagee. . . . And in *Edmunds v. Waugh* the position of the parties was as if the mortgagee had the money actually in his hands as mortgagee, and what Kindersley, V.-C. really dealt with was the right of retainer, and he held that the petition, which in effect put the mortgagee in possession of funds which really belonged to him, was not a suit to recover interest within the meaning of the Statutes of Limitation.—p. 717.

Edmunds v. Waugh, *approved*.

Marshfield, in re, *Marshfield v. Hutchings* (1887) 56 L. J. Ch. 599; 34 Ch. D. 721; 56 L. T. 694; 35 W. R. 491.—KAY, J.

Marshfield, in re, *Marshfield v. Hutchings*, *referred to*.

Hancock, in re, *Hancock v. Berrey* (1888) 57 L. J. Ch. 785; 59 L. T. 197; 36 W. R. 710.—KAY, J. *And see* col. 1596.

Edmunds v. Waugh, and **Marshfield**, in re.

Distinguished, *Archdall v. Anderson* (1890) 25 L. R. Ir. 433.—CHATTERTON, V.-C.; *referred to*, *Shea v. Moore* (1892) [1894] 1 Ir. R. 158.—C.A.; *approved*, *Lloyd*, in re (*post*).

Edmunds v. Waugh, *followed*.

Dingle v. Coppen (1898) 68 L. J. Ch. 337; [1899] 1 Ch. 726; 79 L. T. 693; 47 W. R. 279.—BYRNE, J. *See* judgment at length.

Dingle v. Coppen, *referred to*.

Powell v. Brodhurst (1901) 70 L. J. Ch. 587; [1901] 2 Ch. 160; 84 L. T. 620; 49 W. R. 532.—FARWELL, J.

Dingle v. Coppen, *approved*.

Stead's Mortgaged Estates, in re (*supra*), *not applied*.

Lloyd, in re, *Lloyd v. Lloyd* (1902) 72 L. J. Ch. 78; [1903] 1 Ch. 385; 87 L. T. 541; 51 W. R. 177.—C.A.

Archdall v. Anderson (*supra*), *approved*.

Lloyd, in re, **Lloyd v. Lloyd**, *applied*.

Owen Lewis' Estate, in re [1903] 1 Ir. R. 348.—ROSS, J.

Jolly, in re, *Gathercole v. Norfolk*, 69 L. J. Ch. 103; [1900] 1 Ch. 292.—NORTH, J.; *reversed*, (1900) 69 L. J. Ch. 661; [1900] 2 Ch. 616; 83 L. T. 118; 48 W. R. 657.—C.A.

LIS PENDENS.

Culpepper v. Aston (1682) 2 Ch. Cas. 115; 1 Eq. Cas. Abr. 272.—L.C.; **Garth v. Ward** (1741) 2 Atk. 174.—L.C.; and **Mead v. Orrery (Lord)** (1745) 3 Atk. 235.—L.C., *adopted*.

Bellamy v. Sabine (1857) 1 De G. & J. 566.—L.C. and L.J. (*infra*); *and see* *Price v. Price* (1857).—KAY, J. (*infra*).

Sorrell v. Carpenter (1728) 2 P. Wms. 482.—
L.C., *adopted*.

Bellamy v. Sabine (1857) 1 De G. & J. 566;
26 L. J. Ch. 797; 3 Jur. (N.S.) 943; 6 W. R. 1.—
L.C. and L.JJ.

Sorrell v. Carpenter, *considered*.

Wigram v. Buckley (1894) 63 L. J. Ch. 689;
[1894] 3 Ch. 483; 7 R. 469; 71 L. T. 287; 43
W. R. 147.—C.A. LORD HERSCHELL, LINDLEY
and DAVEY, L.JJ.

Metcalf v. Pulvertoft (1813) 2 V. & B. 200;
13 R. R. 63.—V.C., *adopted*.

Bellamy v. Sabine (1857) 1 De G. & J. 566;
26 L. J. Ch. 797; 3 Jur. (N.S.) 943; 6 W. R. 1.—
L.C. and L.JJ.

Metcalf v. Pulvertoft, *considered*.

Wigram v. Buckley (1894) 63 L. J. Ch. 689;
[1894] 3 Ch. 483; 7 R. 469; 71 L. T. 287; 43
W. R. 147.—C.A.

Drew v. Norbury (Earl), (1846) 3 Jo. &
Lat. 267; 9 Ir. Eq. R. 171, 524.—L.C.,
considered.

Price v. Price (1887) 56 L. J. Ch. 530; 35
Ch. D. 297; 56 L. T. 842; 35 W. R. 386.—
KAY, J.; and **Wigram v. Buckley** (1894) 63
L. J. Ch. 689; [1894] 3 Ch. 483; 7 R. 469; 71
L. T. 287; 43 W. R. 147.—C.A.

Drew v. Norbury (Earl), *applied*.

Mackesy v. Mackesy (1895) [1896] Ir. R.
511.—M.R.; and **Taylor v. London and County
Banking Co.** (1901) 70 L. J. Ch. 477; [1901] 2
Ch. 231; 84 L. T. 397; 49 W. R. 451.—C.A.

Walker v. Flamstead (1754) 2 Ld. Ken.
Ch. pt. 2, p^o 57; **Walker v. Smallwood**
(1768) 2 Ambl. 676; and **Jennings v. Bond**
(1845) 2 Jo. & Lat. 720; 8 Ir. Eq. R. 755.
—L.C., *considered*.

Price v. Price (1887) 56 L. J. Ch. 530; 35
Ch. D. 297; 56 L. T. 842; 35 W. R. 386.

KAY, J.—My conclusion from these authorities
is that where debts are charged upon a testator's
real estate by his will, or as judgment debts under
the old law, a suit by such creditors to administer
real and personal estate is a *lis pendens*, which,
when registered, gives the plaintiffs priority over
a purchaser or mortgagee from any defendant
entitled to real estate under the will. But there
is an exception where the defendant is in such a
position that the purchaser has a right to suppose
he is selling or mortgaging for the purpose of
paying the testator's debts. This was the case,
as Lord St. Leonards points out [in *Drew v.
Norbury (Earl)*], in *Walker v. Flamstead*.—
p. 534.

Higgins v. Shaw (1842) 2 Dr. & War. 356;
1 Con. & L. 400, *applied*.

Patch v. Holland (1873) 29 L. T. 419.—
HALL, V.C.; and **Price v. Price** (1887).—KAY, J.
(*supra*).

Barned's Banking Co., In re, Thornton,
Ex parte (1867) 36 L. J. Ch. 190; L. R.
2 Ch. 171; 15 L. T. 523; 15 W. R. 292.—
L.JJ., *considered*.

Wigram v. Buckley (1894) 63 L. J. Ch. 689;
[1894] 3 Ch. 483; 7 R. 469; 71 L. T. 287; 43
W. R. 147.—C.A.

Berry v. Gibbons (1872) 42 L. J. Ch. 89;
L. R. 8 Ch. 749, n.; 28 L. T. 5; 21 W. R. 255.—
O.C.

M.R.; *reversed* (1873) L. R. 8 Ch. 747; 29 L. T.
88; 21 W. R. 754.—L.JJ.

Berry v. Gibbons, *considered*.

Price v. Price (1887).—KAY, J. (*supra*);
Wigram v. Buckley (1894).—C.A. (*supra*);
Hoban, In re, Lonergan v. Hogan [1896] 1 Ir. R.
401.—M.R.

Meux v. Maltby (1818) 2 Swanst. 277.—
M.R., *referred to*.

**Taff Vale Ry. v. Amalgamated Society of
Railway Servants** (1901) 70 L. J. K. B. 905;
[1901] A. C. 426; 85 L. T. 147; 50 W. R. 44;
65 J. P. 596.—H.L. (E.).

Bellamy v. Sabine (1857) 1 De G. & J. 566;
26 L. J. Ch. 797; 3 Jur. (N.S.) 943; 6
W. R. 1.—L.C. and L.JJ., *distinguished*.

Plant v. Pearman (1872) 41 L. J. Q. B. 169;
26 L. T. 313; 20 W. R. 314.—Q.B.

Bellamy v. Sabine, *considered*.

Price v. Price (1887) 56 L. J. Ch. 530; 35
Ch. D. 297; 56 L. T. 842; 35 W. R. 386.—
KAY, J.

Bellamy v. Sabine, *considered*.

Wigram v. Buckley (1894) 63 L. J. Ch. 689;
[1894] 3 Ch. 483; 7 R. 469; 71 L. T. 287; 43
W. R. 147.—C.A. LORD HERSCHELL, LINDLEY
and DAVEY, L.JJ.

LOCAL GOVERNMENT.

1. AUTHORITIES.
2. JURISDICTION.
3. EXPENSES.
4. RATES.
5. LIABILITY OF AUTHORITIES.

1. AUTHORITIES.

Walker, Ex parte (1889) 58 L. J. Q. B. 190;
22 Q. B. D. 384; 60 L. T. 581; 37 W. R.
293; 53 J. P. 260.—C.A., *approved*.

Thomas, Ex parte (1889) 60 L. T. 728.—C.A.
ESHER, M.R., BOWEN and FRY, L.JJ.

Kent County Council, Ex parte (1891) 60
L. J. Q. B. 314; [1891] 1 Q. B. 389; 64
L. T. 421; 55 J. P. 248.—STEPHEN and
WILLIAMS, JJ.; *appeal dismissed*. 60 L. J.
Q. B. 435; [1891] 1 Q. B. 725; 65 L. T.
213; 39 W. R. 465; 55 J. P. 647.—
C.A.; **Herefordshire County Council, In re**
(1894) 64 L. J. M. C. 26; [1895] 1 Q. B.
43; 15 R. 77; 71 L. T. 576; 59 J. P. 348.
—MATHEW and CHARLES, JJ.; and **Corn-
wall County Council v. Truro Town Council**
(1894) 63 L. J. M. C. 60; 70 L. T. 354; 58
J. P. 299; 10 R. 595.—COLERIDGE, C.J.
and DAY, J., *overruled*.

**Thetford Corporation v. Norfolk County Coun-
cil** (1898) 67 L. J. Q. B. 907; [1898] 2 Q. B.
468; 79 L. T. 315; 47 W. R. 1; 62 J. P. 724.—
C.A. SMITH, BIGBY and V. WILLIAMS, L.JJ.;
varying 67 L. J. Q. B. 55; 77 L. T. 498.—
WILLS, J.

SMITH, L.J.—With all submission to the late
Mr. Justice Stephen and to my brother Vaughan
Williams, who, in *Dover Borough Council and*

Kent County Council, In re, and Kent County Council and Sandwich Borough Council, In re, held that sub-sect. 5 of sect. 35 [of the Local Government Act, 1888] was to be read as a general provision applicable to both the larger and smaller class of boroughs, I cannot agree. To hold so would, in my opinion, be doing such violence to the provisions and framework of the Act as no Court would be justified in doing, even if the suggested imputations upon the legislation be well founded, which I am by no means convinced of. The special provisions of sub-sect. 5 of sect. 35 applicable to the larger boroughs are, in my judgment, purposely omitted from sect. 38, which is applicable to the smaller boroughs. The special provisions of sub-sect. 5 of sect. 38 are, as was pointed out by counsel for the defendants, such as to tax the borough for the expenses of the county, and not the county for the expenses of the borough; and yet it is now said by the borough that the true reading of the Act is that the county should pay these expenses (salaries of recorder and clerk of the peace) of the borough. . . . My brother Wills has followed and agreed with *Herefordshire County Council, In re*, wherein a Divisional Court held, following *Cornwall County Council v. Truro Town Council*, a case of a borough with a population of over 10,000, that the salary of the clerk to borough petty sessions had since the Act of 1888 to be paid by the county council and not by the borough. The correctness of this decision is now challenged in this Court, and we have to say if it be rightly decided. . . . It is not suggested that any Act prior to the Petty Sessions Act, 1849, placed the appointment and payment of a salaried clerk to a borough petty sessions in the county council, and it is not denied that prior to the passing of the Local Government Act, 1888, the borough appointed and paid the salaried clerk to its own petty sessions. It is, however, said that the Local Government Act, 1888, changes all this, and that sect. 84 is the section which affects this. . . . Section 84, which follows sect. 83, deals, in my judgment, with exactly the same class of salaried clerks as sect. 83—that is, salaried clerks of county petty sessional divisions, and not with salaried clerks of borough petty sessional divisions. The words “every petty sessional division” in sect. 84, according to the context and whole scope of the Act, mean, in my opinion, a county and not a borough petty sessional division. It will be seen that by sect. 84, sub-sect. 1, the appointment as well as the removal of the salaried clerk mentioned in the section is expressly left where this had been prior to the passing of the Act—that is, the appointment and removal of a county petty sessional salaried clerk is left with the county authority. If this sub-section applied to a borough petty sessions salaried clerk, which, I think, it does not, then the appointment and removal of a borough petty sessional salaried clerk is left with the borough authority. Sub-section 2 of sect. 84 also appears to throw light upon this, for by it the joint committee, composed as above-mentioned of county men, is introduced to deal with the “officers” mentioned in sects. 83 and 84. What has such a committee to do with a borough officer, to whose selection, appointment, and approval they are strangers, and advisedly kept strangers by the Act, though it is now said they are by reason of the Act to pay his salary? I do not see the object or sense

of this, and, in my opinion, it is not the true construction of the Act. In my judgment, sect. 84 of the Act of 1888 does not apply to borough petty sessions salaried clerks at all, and therefore does not shift the payment of such salaried clerks on to the county council. In my judgment, the corporation of Thetford is liable to pay the salary of its own clerk to its own borough petty sessions, as it was before the passing of the Act of 1888, and this obligation is not by the Act cast upon the county of Norfolk; and *Herefordshire County Council, In re*, was not rightly decided.—pp. 909, 910, 911.

Salford Corporation v. Lancaster (1890) 59 L. J. Q. B. 576; 25 Q. B. D. 384; 63 L. T. 409; 38 W. R. 661; 55 J. P. 85.—C.A., *adopted*.

Bootle-cum-Linacre Corporation v. Lancashire County Council (1890) 60 L. J. Q. B. 323.—C.A. LINDLEY, BOWEN and FRY, L.JJ.; *reversing SMITH, J.*

Reg. v. Cross (1852) 19 L. T. (O.S.) 35.—CAMPBELL, C.J., *followed*.

Reg. v. Collins (1876) 46 L. J. Q. B. 257; 2 Q. B. D. 30; 36 L. T. 192.—C.A.; *affirming* 24 W. R. 732.—Q.B.D.

Nutton v. Wilson (1889) 58 L. J. Q. B. 443; 22 Q. B. D. 744; 37 W. R. 522; 53 J. P. 644.—C.A. Esher, M.R., LINDLEY and LOPES, L.JJ., *followed*.

Barnacle v. Clark (1899) 69 L. J. Q. B. 15; [1900] 1 Q. B. 279; 81 L. T. 484; 48 W. R. 336; 64 J. P. 87.—RIDLEY and DARLING, JJ.

Smith v. Fieldhouse (1876) 35 L. T. 602; S. C. *nom. Rochfort v. Atherley*, 1 Ex. D. 511.—EX. D., *not followed*.

Fletcher v. Hudson (1880) 5 Ex. D. 287; 49 L. J. Ex. 793; 43 L. T. 404; 45 J. P. 5.—C.A. BRAMWELL, BAGGALLAY and BRETT, L.JJ.

BRAMWELL, L.J.—As to authorities, we have opinions of judges both ways; on the one hand, Lord Coleridge and Pollock, B., in *Smith v. Fieldhouse*, and Bowen, J., in the present case, thought that consent was necessary; on the other, Huddleston, B. and Stephen, J., in the Court below, thought that it was not. Having to choose between them, I prefer the opinion of the Court below.—p. 291.

Lea v. Facey (1887) 56 L. J. Q. B. 536; 19 Q. B. D. 352; 58 L. T. 32; 35 W. R. 721; 51 J. P. 756.—C.A., *distinguished*.

Kennedy v. G. S. & W. Ry. (1889).—C.A. (IR.).

Jefferys v. Gurr (1831) 2 B. & Ad. 833, 1 L. J. K. B. 23.—K.B.; and **Tone Conservators v. Ash** (1829) 10 B. & C. 349; 8 L. J. (O.S.) K. B. 226.—K.B., *distinguished*.

Salford Corporation v. Lancashire County Council (1890) 59 L. J. K. B. 576; 25 Q. B. D. 384; 63 L. T. 409; 38 W. R. 661; 55 J. P. 85.—C.A. Esher, M.R., LINDLEY and LOPES, L.JJ.

Aberdeen Ry. v. Blakie (1854) 1 Macq. H. L. 461; 2 Eq. R. 1281.—H.L. (SC.), *applied*.

Flanagan v. G. W. Ry. (1868) L. R. 7 Eq. 116, 123.—GIFFARD, V.-C.; and **Imperial Mercantile Credit Association v. Coleman** (1870) L. R. 6 Ch.

563, n.—MALINS, v.-c.; *reversed* (1871) L. R. 6 Ch. 558.—HATHERLEY, L.C.

Aberdeen Ry. v. Blakie, *discussed and distinguished*.

Murray v. Epsom Local Board (1896) 66 L. J. Ch. 107; [1897] 1 Ch. 35; 75 L. T. 579; 45 W. R. 185; 61 J. P. 71.—STIRLING, J.

STIRLING, J.—The plaintiffs do allege that Mr. L. has influence with the board, that he has used it with a view to his own private interest and advantage, and not with a view to the proper discharge by the board of their public duties, and that consequently the plaintiffs have not succeeded in inducing the board to take steps for the protection of the footway. It is not alleged that the members of the board other than Mr. L. have been guilty of any malpractice, or that the influence he is alleged to have over them has been acquired by any illegitimate means, or even that they have surrendered their judgment to him, or acted as his tools. It is consistent with the plaintiffs' allegations that all the members of the board (other than Mr. L.) do in good faith believe that their acts are entirely in accordance with the due discharge by them of their public duties; but it is contended that the acts of the board are vitiated by reason of Mr. L. having been present at the meetings when the plaintiffs' applications were discussed, being allowed to speak and use his influence with the board, and ultimately succeeding in inducing the board to take his views. . . . In support of this argument *Aberdeen Railway v. Blakie* was cited. It was there held that a contract entered into between the company and a firm of which one of the directors was a partner could not be enforced against the company, and was voidable at the option of the company. If, however, the company or the directors, after a full disclosure of the interest of the contracting director, chose to affirm the contract, I apprehend that it would be binding on the company. At all events the case is not an authority for the proposition that the existence of such an interest, disclosed or undisclosed, as is attributed to Mr. L., vitiates the resolution of the board.—p. 109.

Att.-Gen. v. Southampton Corporation (1858) 29 L. J. Ch. 282; 1 Giff. 363; 6 Jur. (N.S.) 36; 1 L. T. 155.—v.-c., *discussed and distinguished*.

Att.-Gen. v. Teddington Urban Council (1897) 67 L. J. Ch. 23; [1898] 1 Ch. 66; 77 L. T. 426; 46 W. R. 88; 61 J. P. 825.—ROMER, J.

Att.-Gen. v. Southampton Corporation, *applied*.

Att.-Gen. v. Hanwell Urban Council (1900) 69 L. J. Ch. 626; [1900] 2 Ch. 377; 82 L. T. 778; 48 W. R. 690.—C.A. LORD ALVERSTONE, M.R., RIGBY and COLLINS, L.JJ.

Bayley v. G. W. Ry. (1884) 26 Ch. D. 434; 51 L. T. 337.—C.A., *applied*.

Brown v. Alabaster (1887) 57 L. J. Ch. 255; 37 Ch. D. 490, 505; 58 L. T. 265; 36 W. R. 155.—KAY, J.

Bayley v. G. W. Ry., *discussed and distinguished*.

Att.-Gen. v. Teddington Urban Council (1897).—ROMER, J. (*supra*).

Att.-Gen. v. Teddington Urban Council (1897) 67 L. J. Ch. 23; [1898] 1 Ch. 66; 77 L. T. 426; 46 W. R. 88; 61 J. P. 825.—ROMER, J., *followed*.

Att.-Gen. v. Hanwell Urban Council (1899) 69 L. J. Ch. 39; [1900] 1 Ch. 51; 81 L. T. 504; 48 W. R. 69.—KEKEWICH, J.; *affirmed* in C.A. (*see supra*).

Rochdale Union and Haslingden Union, In re (1898) 67 L. J. Q. B. 846; [1898] 2 Q. B. 206; 78 L. T. 563; 62 J. P. 678.—CHANNELL and RIDLEY, JJ.; *affirmed*, 68 L. J. Q. B. 531; [1899] 1 Q. B. 540; 80 L. T. 146; 47 W. R. 322.—C.A. RUSSELL, C.J., SMITH and COLLINS, L.JJ. *See* London Government Act, 1899 (62 & 63 Vict. c. 14), s. 16.

Rochdale Union and Haslingden Union, In re, *applied*.

St. Thomas Rural Council and Heavitree Urban Council, *In re* (1902) 86 L. T. 153; 66 J. P. 597.—WRIGHT, J.

Rochdale Union and Haslingden Union, In re, and Buckinghamshire County Council and Herefordshire County Council, In re (1899) 68 L. J. Q. B. 417; [1899] 1 Q. B. 515; 80 L. T. 85; 63 J. P. 356.—WILLS and BRUCE, JJ., *overruled*.

Caterham Urban Council and Godstone Rural Council, *In re* (1904) 73 L. J. K. B. 589; [1904] A. C. 171; 90 L. T. 653; 52 W. R. 625; 68 J. P. 429; 2 L. G. R. 596.—H.L. (E.); *reversing* 72 L. J. K. B. 279; [1903] 1 K. B. 554; 88 L. T. 414; 51 W. R. 353.—C.A.

Reg. v. Worksop Local Board (1864) 5 B. & S. 951; 34 L. J. M. C. 220; 11 Jur. (N.S.) 1015; 10 L. T. 297; 13 W. R. 253.—Q.B.; S. C., 12 W. R. 710, *explained and distinguished*.

Barnsley Local Board v. Sedgwick (1867) 36 L. J. M. C. 65; L. R. 2 Q. B. 185; 15 L. T. 569; 15 W. R. 514.—Q.B.

Barnsley Local Board v. Sedgwick, *commented upon*.

Firth v. Staines (1897) 66 L. J. Q. B. 510; [1897] 2 Q. B. 70; 76 L. T. 496; 45 W. R. 575; 61 J. P. 452.—HAWKINS and WRIGHT, JJ.

Contracts with Authorities.

Nowell v. Worcester Corporation (1854) 9 Ex. 457; 2 C. L. R. 981; 23 L. J. Ex. 139; 18 Jur. 64.—EX., *principle applied*.

Andrews v. Ryde Corporation (1874) 43 L. J. Ex. 174; L. R. 9 Ex. 302; 23 W. R. 58.—EX.

Nowell v. Worcester Corporation, *distinguished*.

Hunt v. Wimbledon Local Board (1878) 47 L. J. C. P. 540; 3 C. P. D. 208, 215; 39 L. T. 35.—LINDLEY, J.; *affirmed* C.A. (col. 1621).

Nowell v. Worcester Corporation, *distinguished*.

Young v. Leamington Corporation (1882) 51 L. J. Q. B. 292; 8 Q. B. D. 579; 46 L. T. 555; 30 W. R. 500.—C.A.; *affirmed* H.L. (E.) (*post*, col. 1621).

Att.-Gen. v. Gaskell (1882) 52 L. J. Ch. 163; 22 Ch. D. 537; 47 L. T. 566; 31 W. R. 135.—BACON, J.-C., *followed*.
Williams v. Barmouth Urban Council (1897) 77 L. T. 383.—LAWRENCE and COLLINS, JJ.; *affirmed* in C.A. LINDLEY, M.R. and CHITTY, L.J.

Hunt v. Wimbledon Local Board (1878) 48 L. J. C. P. 207; 4 C. P. D. 48; 40 L. T. 115; 27 W. R. 123.—C.A., *distinguished*.
Eaton v. Basker (1881) 50 L. J. Q. B. 444; 7 Q. B. D. 529; 44 L. T. 703; 29 W. R. 597; 45 J. P. 616.—C.A.

Hunt v. Wimbledon Local Board, *approved*.
Young v. Leamington Corporation (1883) 52 L. J. Q. B. 713; 8 App. Cas. 517; 49 L. T. 1; 31 W. R. 925; 47 J. P. 660.—H.L. (E.). LORDS BLACKBURN, WATSON, BRAMWELL and FITZGERALD.

Hunt v. Wimbledon Local Board and Young v. Leamington, *distinguished*.
Bournemouth Commissioners v. Watts (1884) 54 L. J. Q. B. 93; 14 Q. B. D. 87; 51 L. T. 823; 33 W. R. 280; 49 J. P. 102.—HAWKINS and SMITH, JJ.; and **Scott v. Great Clifton School Board** (1884) 1 Cab. & E. 435; 14 Q. B. D. 500; 52 L. T. 105; 33 W. R. 368.—MATHEW, J.

Young v. Leamington Corporation, *applied*.
Tunbridge Wells Improvement Commissioners v. Southborough Local Board (1888) 60 L. T. 172.—KAY, J.

Young v. Leamington Corporation, *referred to*.
British Insulated Wire Co. v. Prescott Urban District Council (1895) 64 L. J. Q. B. 811; [1895] 2 Q. B. 463; 15 R. 633; 73 L. T. 383; 44 W. R. 224; 59 J. P. 552.—POLLOCK, B. and WRIGHT, J.; *affirmed*, 65 L. J. Q. B. 190; [1895] 2 Q. B. 538; 15 R. 636, n.—C.A.

Bournemouth Commissioners v. Watts (1884). —HAWKINS and SMITH, JJ. (*supra*), *principle applied*.
Brooks v. Torquay Corporation (1902) 71 L. J. K. B. 109; [1902] 1 K. B. 601; 85 L. T. 785.—WALTON, J.

Eaton v. Basker (1881) 50 L. J. Q. B. 194; 6 Q. B. D. 201; 44 L. T. 60; 29 W. R. 398.—Q.B.D.; *reversed*, (1881) 50 L. J. Q. B. 444; 7 Q. B. D. 529; 44 L. T. 703; 29 W. R. 597; 45 J. P. 616.—C.A.

Eaton v. Basker (*supra* in C.A.), *distinguished*.

Melliss v. Shirley Local Board (1885) 54 L. J. Q. B. 408; 14 Q. B. D. 911; 52 L. T. 544.—CAVE, J.

CAVE, J.—It was contended by Mr. Mackenzie that although the sum did amount ultimately to 62l. 8s., yet at the time when the order was given for the special report to be made, it did not necessarily follow that the amount would be over 50l., and consequently that no contract under seal was necessary; and he referred me on that point to the case of *Eaton v. Basker*, which was an action brought by a medical man against a local board, where he had verbally agreed with the committee to attend patients at the rate of 5s. 3d. per tent per day. Now it is obvious that according to the terms of that agreement, at the

end of each day he was entitled to his 5s. 3d. per tent, and that if he were discharged, for instance, at the end of the day, or if the fever proved to be more tractable than it turned out to be, the sum to which he would be entitled would be considerably less than 50l., and that in any event he would be entitled to recover a series of sums none of them coming up to the sum of 50l. In this case, on the contrary, there is no evidence to satisfy me that it was ever contemplated that a special report would come to a less sum than 50l., and there never was a period when the plaintiffs were entitled to sue for a less sum than 50l.—p. 413.

Melliss v. Shirley Local Board, 54 L. J. Q. B. 408; 14 Q. B. D. 911; 52 L. T. 544.—CAVE, J.; *reversed on one point*, (1885) 55 L. J. Q. B. 143; 16 Q. B. D. 446; 53 L. T. 810; 34 W. R. 187; 50 J. P. 214.—C.A.

Melliss v. Shirley Local Board, *applied*.
Whiteley v. Barley (1887) 20 Q. B. D. 196.—MATHEW, J.; *affirmed*, 57 L. J. Q. B. 643; 21 Q. B. D. 154.—C.A.

Reg. v. Prest (1850) 20 L. J. Q. B. 17; 16 Q. B. 32; 15 Jur. 554.—Q.B., *followed*.
Reg. v. Norwich Corporation (1882) 30 W. R. 752.—GROVE and LOPES, JJ.

Reg. v. Prest and Reg. v. Norwich Corporation, *applied*.
Bournemouth Commissioners v. Watts (1884) 54 L. J. Q. B. 93; 14 Q. B. D. 87; 51 L. T. 823; 33 W. R. 280; 49 J. P. 102.—HAWKINS and SMITH, JJ.

Reg. v. Prest, *inapplicable*.
Reg. v. Exeter Corporation (1880) 6 Q. B. D. 135; 44 L. T. 101; 29 W. R. 441; 45 J. P. 158.—FIELD, J., *applied*.
Reg. v. Ramsgate Corporation (1889) 58 L. J. Q. B. 352; 23 Q. B. D. 66; 61 L. T. 333; 37 W. R. 781; 53 J. P. 740.—FIELD and CAVE, JJ.

Burgess v. Clark (1884) 14 Q. B. D. 735; 33 W. R. 269; 49 J. P. 388.—C.A., *applied*.
Whiteley v. Barley (1887) 20 Q. B. D. 196.—MATHEW, J.; *affirmed* C.A. (*supra*).

Burgess v. Clark, *dictum approved*.
Reg. v. Ramsgate Corporation (1889).—FIELD and CAVE, JJ. (*supra*).

Burgess v. Clark, *approved*.
Edwards v. Salmon (1889) 58 L. J. Q. B. 571; 23 Q. B. D. 531; 58 W. R. 166; 54 J. P. 180.—C.A. HALSBURY, L.C., BRETT, M.R. and LINDLEY, L.J.

Newington Local Board v. Cottingham Local Board (1879) 48 L. J. Ch. 226; 12 Ch. D. 725; 40 L. T. 58.—MALINS, V.-C., *observations applied*.

New Windsor Corporation v. Stovell (1884) 54 L. J. Ch. 113; 27 Ch. D. 665; 51 L. T. 626; 33 W. R. 228.—NORTH, J.

2. JURISDICTION.

Streets and Roads.

Cleckheaton Local Board v. Burnup (1886) 50 J. P. 598.—MATHEW and SMITH, JJ., *disapproved*.

Jowett v. Idle Local Board (1887) 57 L. T. 928; 36 W. R. 138.—STEPHEN and CHARLES, JJ.;

affirmed, (1888) 36 W. R. 530.—C.A. Esher, M.R. and BOWEN, L.J.

Cleckheaton Local Board v. Burnup, *not followed*.

Fenwick v. Croydon Sanitary Authority (1891) 60 L. J. M. C. 161; [1891] 2 Q. B. 216; 65 L. T. 645; 40 W. R. 124; 55 J. P. 470.—CAVE and CHARLES, JJ.

Maude v. Baildon Local Board (1883) 10

Q. B. D. 394; 48 L. T. 874; 47 J. P. 644.—POLLOCK and HUDDLESTON, BB., and NORTH, J., *questioned*.

Portsmouth Corporation v. Smith (1883) 13 Q. B. D. 184; 53 L. J. Q. B. 92; 50 L. T. 308.—C.A.; *affirmed*, (1885) 54 L. J. Q. B. 473; 10 App. Cas. 364; 53 L. T. 394; 49 J. P. 676.—H.L. (E.).

BRETT, M.R.—We have been referred to *Maude v. Baildon Local Board*. That case was determined by Pollock and Huddleston, BB., and North, J., who appear to have considered that *Reg. v. Dryman* (7 E. & B. 672; 26 L. J. M. C. 128), was an authority binding upon them in that case. I respectfully differ from the judgment in *Maude v. Baildon Local Board*: I think that the learned judges in that case mistook the point actually decided in *Reg. v. Dayman*.—p. 195. BOWEN, L.J. agreed.

Maude v. Baildon Local Board, *disapproved*.

Richards v. Kessick (1888) 57 L. J. M. C. 48; 59 L. T. 318; 52 J. P. 756.—FIELD and WILLS, JJ.

Maude v. Baildon Local Board, *held over-ruled*.

Ellis v. L. C. C. (1892) 67 L. T. 558; 57 J. P. 24.—POLLOCK, B. and HAWKINS, J.

Portsmouth Corporation v. Smith (1883) 53

L. J. Q. B. 92; 13 Q. B. D. 184; 50 L. T. 308.—C.A.; *affirmed*, (1885) 54 L. J. Q. B. 473; 10 App. Cas. 364; 53 L. T. 394; 49 J. P. 676.—H.L. (E.); and *Jowett v. Idle Local Board* (1887) 57 L. T. 928; 36 W. R. 138.—STEPHEN and CHARLES, JJ.; *affirmed*, (1888) 36 W. R. 530.—C.A., *applied*.

Richards v. Kessick (1888) 57 L. J. M. C. 48; 59 L. T. 318; 52 J. P. 756.—FIELD and WILLS, JJ.

Portsmouth Corporation v. Smith and Jowett v. Idle Local Board, *followed*.

Fenwick v. Croydon Sanitary Authority (1891) 60 L. J. M. C. 161; [1891] 2 Q. B. 216; 65 L. T. 645; 40 W. R. 124; 55 J. P. 470.—CAVE and CHARLES, JJ.

Portsmouth Corporation v. Smith, *distinguished*.

Barry and Cadoxton Local Board v. Parry (1895) 64 L. J. Q. B. 512; [1895] 2 Q. B. 110; 15 R. 430; 72 L. T. 692; 43 W. R. 504; 59 J. P. 421.—RUSSELL, C.J. and CHARLES, J.

Baker v. Portsmouth Corporation (1878) 47

L. J. Ex. 223; 3 Ex. D. 157; 37 L. T. 822; 26 W. R. 303.—C.A., *approved and observations adopted*.

Robinson v. Barton Local Board (1888) 53 L. J. Ch. 226; 8 App. Cas. 798; 50 L. T. 57; 32 W. R. 249; 48 J. P. 276.—H.L. (E.). LORDS SELBORNE, L.C., BLACKBURN and FITZGERALD.

Baker v. Portsmouth Corporation, *followed*.

James v. Wyvill (1884) 51 L. T. 237; 48 J. P. 725.—COLERIDGE, C.J. and STEPHEN, J.

Baker v. Portsmouth Corporation, *followed*. Hendon Local Board v. Pounce (1889) 42 Ch. D. 602; 61 L. T. 465; 38 W. R. 377.—NORTH, J.

Richards v. Kessick (1888) 57 L. J. M. C.

48; 59 L. T. 318; 52 J. P. 756.—FIELD and WILLS, JJ., *considered and applied*. White v. Fulham Vestry (1896) 74 L. T. 425; 60 J. P. 327.—HAWKINS and WILLIAMS, JJ.

Richards v. Kessick, *approved*.

Property Exchange (No. 1) v. Wandsworth Board of Works (1902) 71 L. J. K. B. 515; [1902] 2 K. B. 61; 86 L. T. 481; 66 J. P. 435.—C.A. COLLINS, M.R., ROMER and MATHEW, L.JJ.

Austerberry v. Oldham Corporation (1886)

55 L. J. Ch. 633; 29 Ch. D. 750; 53 L. T. 543; 33 W. R. 807; 49 J. P. 532.—C.A., *applied*.

Midland Ry. v. Watton (1886) 55 L. J. M. C. 99; 17 Q. B. D. 30; 54 L. T. 482; 34 W. R. 524; 50 J. P. 405.—C.A. Esher, M.R., LINDLEY and LOPES, L.JJ.

Kingston-upon-Hull Local Board v. Jones

(1856) 26 L. J. Ex. 33; 1 H. & N. 489; 2 Jur. (N.S.) 1193; 5 W. R. 161.—EX., *adopted*.

Hesketh v. Atherton Local Board (1878) 43 L. J. M. C. 37; L. R. 9 Q. B. 4; 29 L. T. 530; 22 W. R. 58.—Q.B.; St. Mary, Islington, Vestry v. Barrett (1874) 43 L. J. M. C. 85; L. R. 9 Q. B. 278; 30 L. T. 11; 22 W. R. 402.—Q.B.

Robinson v. Barton Local Board (1882) 52

L. J. Ch. 5; 21 Ch. D. 621; 47 L. T. 286.—C.A.; *reversed*, (1883) 53 L. J. Ch. 226; 8 App. Cas. 798; 50 L. T. 57; 32 W. R. 249; 48 J. P. 276.—H.L. (E.).

Robinson v. Barton Local Board (C.A.), *inapplicable*.

Williams v. Powning (1883) 48 L. T. 672; 47 J. P. 486.—DENMAN and HAWKINS, JJ.

Robinson v. Barton Local Board, *distinguished*.

Portsmouth Corporation v. Smith (1885) 54 L. J. Q. B. 473; 10 App. Cas. 364; 53 L. T. 394; 49 J. P. 676.—H.L. (E.). LORDS BLACKBURN, WATSON and FITZGERALD.

Robinson v. Barton Local Board (in H.L.), *applied*.

M. B. W. v. Nathan (1885) 54 L. T. 423; 34 W. R. 164; 50 J. P. 502.—MATHEW and SMITH, JJ.

Robinson v. Barton Local Board, *dicta applied*.

Williams v. Wallasey Local Board (1886) 55 L. J. M. C. 133; 16 Q. B. D. 718; 55 L. T. 27; 34 W. R. 517; 50 J. P. 582.—MATHEW and SMITH, JJ.; and *Midland Ry. v. Watton* (1886) 55 L. J. M. C. 99; 17 Q. B. D. 30, 38; 54 L. T. 482; 34 W. R. 524; 50 J. P. 405.—C.A.

Robinson v. Barton Local Board, *observation referred to*.

Davis v. Greenwich Board of Works (1895) 64 L. J. M. C. 257; [1895] 2 Q. B. 219; 14 R. 552; 72 L. T. 674; 59 J. P. 517.—C.A. Esher, M.R., SMITH and RIGBY, L.JJ.

Robinson v. Barton Local Board, applied.
Att.-Gen. v. Rufford (1899) 68 L. J. Ch. 179;
[1899] 1 Ch. 537; 80 L. T. 17; 47 W. R. 405;
63 J. P. 232.—NORTH, J.

Robinson v. Barton Local Board, dictum applied.

Allen v. Fulham Vestry (1899) 68 L. J. Q. B. 450; [1899] 1 Q. B. 681; 80 L. T. 253; 47 W. R. 428; 63 J. P. 212.—C.A. SMITH, COLLINS and ROMER, L.JJ.

Att.-Gen. v. Rufford (1899) 68 L. J. Ch. 179; [1899] 1 Ch. 537; 80 L. T. 17; 47 W. R. 405; 63 J. P. 232.—NORTH, J., *applied*.

Att.-Gen. v. Ashbourne Recreation Co. (1902) 72 L. J. Ch. 67; [1903] 1 K. B. 101; 87 L. T. 561; 51 W. R. 125; 67 J. P. 73.—BUCKLEY, J.

Att.-Gen. v. Ashbourne Recreation Co., approved and followed.

Devonport Corporation v. Tozer (1903) 72 L. J. Ch. 411; [1903] 1 Ch. 759; 88 L. T. 113; 52 W. R. 6; 1 L. G. R. 421; 67 J. P. 269.—C.A.; and Att.-Gen. v. Wimbledon House Estate Co. (1904) 73 L. J. Ch. 593; [1904] 2 Ch. 34; 91 L. T. 163; 68 J. P. 341; 2 L. G. R. 828.—FARWELL, J.

Tunbridge Wells Corporation v. Baird (1896) 65 L. J. Q. B. 451; [1896] A. C. 434; 74 L. T. 385; 60 J. P. 788.—H.L. (E.). *followed*.

St. Mary, Battersea, Vestry v. County of London and British Provincial Electric Lighting Co. (1899) 68 L. J. Ch. 238; [1899] 1 Ch. 474; 80 L. T. 31.—C.A.; *reversing* JUNE, P.; Armagh Union v. Bell (1899) [1900] 2 Ir. R. 371.—Q.B.D.; *affirmed* C.A.; and Finchley Electric Light Co. v. Finchley Urban Council (1903) 72 L. J. Ch. 297; [1903] 1 Ch. 437; 88 L. T. 215; 51 W. R. 375; 67 J. P. 97; 1 L. G. R. 244.—C.A.

Nutter v. Accrington Local Board, 47 L. J. Q. B. 521; 38 L. T. 609.—Q.B.D.; *reversed*, (1878) 48 L. J. Q. B. 487; 4 Q. B. D. 375; 40 L. T. 802.—C.A.; the latter decision *affirmed, nom.* Accrington Corporation v. Nutter (1880) 48 L. T. 710.—H.L. (E.). LORDS SALISBURY, L.C., PENZANCE, BLACKBURN and WATSON.

Nutter v. Accrington Local Board (1878) 48 L. J. Q. B. 487; 4 Q. B. D. 375; 40 L. T. 802.—C.A., *commented on and followed*.

Swansea Improvement and Tramways Co. v. County Roads Board, Glamorganshire (1879) 41 L. T. 583.

FRY, J.—But then, it is said that I am precluded from coming to that conclusion by the judgment of the Court of Appeal in *Nutter v. Accrington Local Board of Health*. That case has decided clearly that a street is not the less a street because it is a turnpike road; but I find in it no decision upon the effect of the section of the Act of 15 & 16 Vict. to which I have been referred. It is true that the section seems to have been stated to the Court; but for some reason or other, I know not what, it did not attract their attention sufficiently to receive from them any judicial decision. That case, therefore, not determining it, I should feel myself bound to give effect to what appears to me to be a very clear cause in an Act of Parliament. But further than that, the conclusion I have arrived at is in perfect harmony with the decision of the Court of Appeal in that case. . . . The

68th section, in my judgment, does not exclude the statutory title of the defendants.—p. 585.

Coverdale v. Charlton (1878) 48 L. J. Q. B. 128; 4 Q. B. D. 104; 40 L. T. 88; 27 W. R. 257.—C.A., *adopted*.

Nutter v. Accrington Local Board (1878) 48 L. J. Q. B. 487; 4 Q. B. D. 375; 40 L. T. 802.—C.A.; Burgess v. Northwich Local Board (1880) 50 L. J. Q. B. 219; 6 Q. B. D. 264, 274; 44 L. T. 154; 29 W. R. 931; 45 J. P. 256.—C.P.D.

Coverdale v. Charlton, followed.

Rolls v. St. George, Southwark, Vestry (1880) 14 Ch. D. 785; 49 L. J. Ch. 691; 43 L. T. 140; 28 W. R. 867; 44 J. P. 680.—C.A. JAMES, COTTON and THESIGER, L.JJ.

JAMES, L.J.—It is impossible to read any of the three judgments delivered on that occasion without seeing that in the view of the learned judges the soil and freehold, in the ordinary sense of the words "soil and freehold," that is to say, the soil from the centre of the earth up to an unlimited extent into space, did not pass, and that no stratum or portion of the soil, defined or ascertainable like a vein of coal, or stratum of ironstone, or anything of that kind, passed, but that the board had only the surface, and with the surface such right below the surface as was essential to the maintenance and occupation and exclusive possession of the street, and the making and maintaining of the street for the use of the public.—p. 795.

Coverdale v. Charlton, followed.

Wandsworth Board of Works v. United Telephone Co. (1884) 53 L. J. Q. B. 449; 13 Q. B. D. 904; 51 L. T. 148; 32 W. R. 776; 48 J. P. 676.—C.A. BRETT, M.R., BOWEN and FRY, L.JJ.

Coverdale v. Charlton, referred to.

Reg. v. London County J.J., Fulham Vestry, Ex parte (1890) 59 L. J. M. C. 146; 25 Q. B. D. 357; 63 L. T. 243; 39 W. R. 11.—COLERIDGE, C.J. and WILKS, J.

Coverdale v. Charlton and Fenwick v. Croydon Rural Sanitary Authority (1891) 60 L. J. M. C. 161; [1891] 2 Q. B. 216; 65 L. T. 645; 40 W. R. 124; 55 J. P. 470.—CAVE and CHARLES, J.J., *adopted*.

Hill v. Wallasey Local Board (1894) 63 L. J. Ch. 1; 7 R. 51; 42 W. R. 81.—C.A. LINDLEY, SMITH and DAVEY, L.JJ.

Coverdale v. Charlton, dicta disapproved.

Tunbridge Wells Corporation v. Baird (1896) 65 L. J. Q. B. 451; [1896] A. C. 434; 74 L. T. 385; 60 J. P. 788.—H.L. (E.). LORDS HALSBURY, L.C., HERSHELL, MACNAGHTEN and MORRIS.

LORD HERSHELL.—But no doubt the opinion was expressed there that the vesting of the street would carry something more than the mere surface, and that in addition to what was necessary for its maintenance as a highway there would be transferred to the urban authority soil below that sufficient for all the ordinary uses of land below a highway. I confess I see considerable difficulty in accepting any such view. In the first place, the language of the enactment [the Public Health Act, 1875] seems to me to point in the contrary direction. The vesting words are "such street" (the street a highway repairable by the inhabitants at large) "and the pavement stones and other materials thereof." All that seems to point to the surface use of the street as a highway and nothing more, and I am

unable to see why it should be supposed to transfer to and vest in the urban authority the subsoil below for sewerage purposes, because that is provided for, and amply provided for, by other provisions in the same statute.—p. 456.

Finchley Electric Light Co. v. Finchley Urban Council (1902) 71 L. J. Ch. 450; [1902] 1 Ch. 866; 86 L. T. 286; 50 W. R. 470; 66 J. P. 502.—**FARWELL, J.**; *reversed*, (1903) 72 L. J. Ch. 297; [1903] 1 Ch. 437; 88 L. T. 215; 51 W. R. 375; 67 J. P. 97; 1 L. G. R. 244.—**C.A.**

Taylor v. Oldham Corporation (1876) 46 L. J. Ch. 105; 4 Ch. D. 395; 35 L. T. 696; 25 W. R. 303.—**JESSEL, M.R.**, *adopted*.

Midland Ry. v. Watton (1886) 55 L. J. M. C. 99; 17 Q. B. D. 30; 54 L. T. 482; 34 W. R. 524; 50 J. P. 405.—**C.A.**; and **Northern Bridge Co. v. Reg.** (1886) 55 L. T. 759.—**CHITTY, J.**

Taylor v. Oldham Corporation, *dictum applied*.

Richards v. Kessick (1888) 57 L. J. M. C. 48; 59 L. T. 318; 52 J. P. 756.—**FIELD and WILLS, JJ.**

Taylor v. Oldham Corporation, *followed*.
Reg. v. Goole Local Board (1891) 60 L. J. Q. B. 617; [1891] 2 Q. B. 212; 64 L. T. 595; 39 W. R. 608; 55 J. P. 535.—**DAY and LAWRENCE, JJ.**

Taylor v. Oldham Corporation, *applied*.
Hill v. Wallasey Local Board (1892) [1892] 3 Ch. 117; 67 L. T. 49; 56 J. P. 469.—**KEKEWICH, J.**

Taylor v. Oldham Corporation, *adopted*.
Hill v. Wallasey Local Board (1894) 63 L. J. Ch. 1; [1894] 1 Ch. 133; 7 R. 51; 69 L. T. 641; 42 W. R. 81.—**C.A.** **LINDLEY and DAVEY, L.JJ.**; **SMITH L.J.** *dissenting*; *reversing* **ROMER, J.**

Midland Ry. v. Watton (1886) 55 L. J. M. C. 99; 17 Q. B. D. 30; 54 L. T. 482; 34 W. R. 524; 50 J. P. 405.—**C.A.**, *applied*.

Eccles v. Wirral Sanitary Authority (1886) 55 L. J. M. C. 106; 17 Q. B. D. 107; 34 W. R. 412; 50 J. P. 596.—**MATHEW and SMITH, JJ.**; **Hill v. Wallasey Local Board** (1894).—**C.A.** (*supra*).

Anderson v. Dublin Corporation (1885) 15 L. R. Ir. 410.—**V.-C.**, *distinguished*.

Collins v. Hornsey Urban Council (1901) 70 L. J. K. B. 802; [1891] 2 K. B. 180; 84 L. T. 839; 49 W. R. 620; 65 J. P. 600.—**LORD ALVERSTONE, C.J.** and **LAWRENCE, J.**

Ashton-under-Lyne Corporation v. Pugh (1897) 67 L. J. Q. B. 32; [1898] 1 Q. B. 45; 77 L. T. 588; 46 W. R. 100; 61 J. P. 788.—**C.A.**, *followed*.

Lodge v. Huddersfield Corporation (1898) 67 L. J. Q. B. 568; [1898] 1 Q. B. 847; 78 L. T. 422; 62 J. P. 387; *affirmed on facts*, 67 L. J. Q. B. 571; [1898] 1 Q. B. 859; 62 J. P. 515.—**C.A.** **SMITH and CHITTY, L.JJ.**

Bagshaw v. Buxton Local Board (1875) 45 L. J. Ch. 260; 1 Ch. D. 220; 34 L. T. 112; 24 W. R. 231.—**M.R.**

Distinguished, **Denny v. Thwaites** (1876) 46 L. J. M. C. 141; 2 Ex. D. 21; 35 L. T. 628.—**DIVISIONAL CT.**; *applied*, **Harris v. Northamptonshire County Council** (1897) 61 J. P. 599.—**BYRNE, J.**

Hendon Local Board v. Pounce (1889) 42 Ch. D. 602; 61 L. T. 465; 38 W. R. 377.—**NORTH, J.**, *followed*.

Bromley Local Board v. Lloyd (1892) 66 L. T. 462; 56 J. P. 278.—**KEKEWICH, J.**

Uckfield Rural Council v. Crowborough Water Co. (1899) 68 L. J. Q. B. 1009; [1899] 2 Q. B. 664; 81 L. T. 539; 48 W. R. 63.—**D.**, *applied*.

L.C.C. v. Wandsworth Gas Co. (1900) 82 L. T. 562; 64 J. P. 500.—**RIDLEY and DARLING, JJ.**

Buildings.

Hibbert v. Acton Local Board (1889) 5 Times L. R. 274.—**C.A.**, *not followed*.

Brown v. Leicester Corporation (1892) 67 L. T. 686; 41 W. R. 78.—**POLLOCK, B.** and **HAWKINS, J.**

Marshall v. Smith (1873) 42 L. J. C. P. 108; L. R. 8 C. P. 416; 28 L. T. 538.—**C.P.**, *distinguished*.

Rumball v. Schmidt (1882) 8 Q. B. D. 603; 46 L. T. 661; 30 W. R. 949; 46 J. P. 567.—**GROVE, J.** and **HUDDLESTON, B.**

Marshall v. Smith, *followed*.
Reay v. Gateshead Corporation (1886) 55 L. T. 92; 34 W. R. 682; 50 J. P. 805.—**DENMAN and HAWKINS, JJ.**

Marshall v. Smith, *referred to*.
Welsh v. West Ham Corporation (1899) 69 L. J. Q. B. 114; [1900] 1 Q. B. 324; 82 L. T. 262.—**DARLING and CHANNELL, JJ.**

Hattersley v. Burr (1866) 4 H. & C. 523; 12 Jur. (N.S.) 894; 14 L. T. 565; 14 W. R. 864.—**EX.**; and **Young v. Edwards** (1864) 33 L. J. M. C. 227; 11 L. T. 424.—**EX.**, *not followed*.

Hall v. Nixon (1875) 44 L. J. M. C. 51; L. R. 10 Q. B. 152; 32 L. T. 87; 23 W. R. 612.—**Q.B.**

MELLOR, J.—I confess myself quite unable to see the exact reasons on which the cases cited to us proceeded. The first case, that of *Young v. Edwards*, although it was decided two years before the other (*Hattersley v. Burr*), was not quoted in the argument. Those being cases which could not be carried to error, and which are not, therefore, binding decisions on us, we must form the best opinion we can on the case before us, if we do not see in the cases cited reasons satisfactory to our minds.—p. 55.

Hattersley v. Burr; Young v. Edwards; and Hall v. Nixon, *applied*.

Baker v. Portsmouth Corporation (1877) 3 Ex. D. 4, 12; 37 L. T. 381; 25 W. R. 677.—**EX.D.**; *affirmed*, 47 L. J. Ex. 223; 3 Ex. D. 157; 37 L. T. 822; 26 W. R. 303.—**C.A.**

Young v. Edwards and Hall v. Nixon, *considered*.

Reay v. Gateshead Corporation (1886) 55 L. T. 92; 34 W. R. 682; 50 J. P. 805.—**DENMAN and HAWKINS, JJ.**

Rumball v. Schmidt (1882) 8 Q. B. D. 603; 46 L. T. 661; 30 W. R. 949; 46 J. P. 567.—**GROVE, J.** and **HUDDLESTON, B.**; **James v. Wyvill** (1884) 51 L. T. 237; 48 J. P. 725.—**COLERIDGE, C.J.** and **STEPHEN, J.**; and **Brown v. Holyhead Local Board**

(1862) 1 H. & C. 601; 32 L. J. Ex. 25; 7 L. T. 332; 11 W. R. 71.—EX., *considered*.
 Reay v. Gateshead Corporation (1886) 55 L. T. 92; 34 W. R. 682; 50 Q. B. 805.—DENMAN and HAWKINS JJ.

Rumball v. Schmidt, *distinguished*.
 Blackpool Corporation v. Johnson (1902) 71 L. J. K. B. 485; [1902] 1 K. B. 646; 87 L. T. 28.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Reay v. Gateshead Corporation (1886) 55 L. T. 92; 34 W. R. 682; 50 J. P. 805.—DENMAN and HAWKINS, JJ., *dictum explained*.

Welsh v. West Ham Corporation (1899) 69 L. J. Q. B. 114; [1900] 1 Q. B. 324; 82 L. T. 262.—DARLING and CHANNELL, JJ.

Welsh v. West Ham Corporation, *distinguished*.

Blackpool Corporation v. Johnson (1902) 71 L. J. K. B. 485; [1902] 1 K. B. 646; 87 L. T. 28.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Williams v. Wallasey Local Board (1886) 55 L. J. M. C. 133; 16 Q. B. D. 718; 55 L. T. 27; 34 W. R. 517; 50 J. P. 582.—MATHEW and SMITH, JJ., *referred to*.

Warren v. Mustard (1891) 61 L. J. M. C. 18; 66 L. T. 26; 56 J. P. 502.—MATHEW and SMITH, JJ.

Newhaven Local Board v. Newhaven School Board (1885) 30 Ch. D. 350; 53 L. T. 571; 34 W. R. 172.—C.A., *opinion adopted*.

Att.-Gen. v. Hatch (1893) 62 L. J. Ch. 857; [1893] 3 Ch. 36; 2 R. 533; 69 L. T. 469; 57 J. P. 825.—C.A. LINDLEY, LOPES and SMITH, L.JJ.

Att.-Gen. v. Hatch, *applied*.
 Att.-Gen. v. Ashbourne Recreation Co. (1902) 72 L. J. Ch. 67; [1903] 1 K. B. 101; 87 L. T. 561; 51 W. R. 125; 67 J. P. 73.—BUCKLEY, J.

Ravensthorpe Local Board v. Hinchcliffe (1889) 59 L. J. M. C. 19; 24 Q. B. D. 168; 61 L. T. 780; 54 J. P. 421.—FRY, L.J. and MATHEW, J., *distinguished*.

Warren v. Mustard (1891) 61 L. J. M. C. 18; 66 L. T. 26; 56 J. P. 502.—MATHEW and SMITH, JJ.

Att.-Gen. v. Edwards (1890) [1891] 1 Ch. 194; 63 L. T. 639.—ROMER, J., *distinguished*.

Reg. v. Fulwood Local Board (1895) 72 L. T. 592; 59 J. P. 311.—WRIGHT and KENNEDY, JJ.

Reg. v. Fullford (1864) L. & C. 403; 33 L. J. M. C. 122; 10 Jur. (N.S.) 522; 10 L. T. 346; 12 W. R. 715; 9 Cox C. C. 453.—C.G.R., *applied*.

Dryden v. Putney Overseers (1876) 1 Ex. D. 223; 34 L. T. 69.—D.; Robinson v. Barton Local Board (1882) 52 L. J. Ch. 5; 21 Ch. D. 621, 630; 47 L. T. 286.—C.A.; *reversed*, H.L. (E.) (*ante*, col. 1624); Reg. v. Shcil (1884) 50 L. T. 590.—COLERIDGE, C.J. and LOPES, J.

Reg. v. Fullford, *dictum applied*.
 Richards v. Kessick (1888) 57 L. J. M. C. 48; 59 L. T. 318; 52 J. P. 756.—FIELD and WILLS, JJ.

Goldstraw v. Duckworth (1880) 49 L. J. M. C. 73; 5 Q. B. D. 275; 42 L. T. 440; 28 W. R. 594; 44 J. P. 410.—COCKBURN,

C.J., LUSH and MANISTY, JJ., *considered and distinguished*.

St. Mary, Islington, Vestry v. Goodman (1889) 58 L. J. M. C. 122; 23 Q. B. D. 154; 61 L. T. 44.—DENMAN and HAWKINS, JJ.

Reg. v. Newcastle-upon-Tyne Corporation (1889) 60 L. T. 963; 53 J. P. 788.—FIELD and CAVE, JJ., *applied*.

Cook v. Hainsworth (1896) 65 L. J. M. C. 190; [1896] 2 Q. B. 85; 75 L. T. 51; 44 W. R. 541; 60 J. P. 439.—RUSSELL, C.J. and WILLS, J.

Slee v. Bradford Corporation (1863) 4 Giff. 262; 1 N. R. 386; 9 Jur. (N.S.) 815; 8 L. T. 491.—STUART, V.-C., *applied*.

Ashworth v. Hobden Bridge Local Board (1877) 47 L. J. Ch. 195; 37 L. T. 496.—MALLINS, V.-C.

Slee v. Bradford Corporation, *applied*.
 Masters v. Pontypool Local Board (1878) 47 L. J. Ch. 797; 9 Ch. D. 677.—FRY, J.

Cheetham v. Manchester Corporation (1875) 44 L. J. C. P. 139; L. R. 10 C. P. 249; 32 L. T. 28.—C.P., *adopted*.

Hopkins v. Smethwick Local Board (1890) 59 L. J. Q. B. 250; 24 Q. B. D. 712, 715; 62 L. T. 783; 38 W. R. 499.—DENMAN and WILLS, JJ.; *affirmed* C.A. (*see infra*).

Masters v. Pontypool Local Board, *approved*.
 Hopkins v. Smethwick Local Board (1890) 59 L. J. Q. B. 250; 24 Q. B. D. 712; 62 L. T. 783; 38 W. R. 499; 54 J. P. 693.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Wanstead Local Board v. Wooster (1873) 38 J. P. 21.—Q.B., *not applied*.

Heap v. Burnley Union (1884) 53 L. J. M. C. 76; 12 Q. B. D. 617; 32 W. R. 660; 48 J. P. 359.—COLERIDGE, C.J. and STEPHEN, J.

Heap v. Burnley Union and Waite v. Garston Local Board (1867) 37 L. J. M. C. 19; L. R. 3 Q. B. 5; 17 L. T. 201; 16 W. R. 78.—Q.B., *commented on*.

Radland v. Sunderland Corporation (1884) 52 L. T. 617; 33 W. R. 164; 49 J. P. 359.—GROVE and HAWKINS, JJ.

Gough v. Liverpool Corporation (1891) 64 L. T. 596; 55 J. P. 648.—DAY and LAWRENCE, JJ.; *varied*, (1891) 65 L. T. 512; 55 J. P. 789.—C.A. LOPES and KAY, L.JJ.

Baxter v. Bedford Corporation (1885) 1 Times Rep. 424.—CAVE, J.; Clark v. Bloomfield (1885) 1 Times Rep. 323.—COLERIDGE, C.J. and SMITH, J.; and Thompson v. Fallsworth Local Board (1881) 46 J. P. 21.—COLERIDGE, C.J. and MANISTY, J., *inapplicable*.

McIntosh and Pontypidd Improvements Co., In re (1891) 61 L. J. Q. B. 164.—COLERIDGE, C.J. and WRIGHT, J.

McIntosh and Pontypidd Improvements Co., In re, *approved and followed*.

Yabbicom v. King (1899) 68 L. J. Q. B. 560; [1899] 1 Q. B. 444; 80 L. T. 159; 47 W. R. 318; 63 J. P. 149.—DAY and LAWRENCE, JJ.

Sewers.

Travis v. Uttley (1893) 63 L. J. M. C. 48; [1894] 1 Q. B. 233; 70 L. T. 242; 42 W. R. 461; 58 J. P. 85.—WILLS and WRIGHT, JJ., *considered and distinguished*.

Self v. Hove Commissioners (1895) 64 L. J. Q. B. 217; [1895] 1 Q. B. 635; 15 R. 283; 72

L. T. 234; 43 W. R. 300; 59 J. P. 103.—WILLS and WRIGHT, JJ.

WILLS, J.—It is to be regretted that the parties appear to have been misled by the report of *Travis v. Uttley* in the Law Reports having alluded to the Act of 1890 as if it had been really cited by way of argument, whereas in fact that Act, not having been adopted by the local authority in that case, as it has been by the defendants here, did not apply. It is fortunate that both the counsel in that case have been present in Court to-day to confirm our mutual impression that *Travis v. Uttley* did not have any reference to the interpretation of the Public Health Act, 1890.—p. 220.

WRIGHT, J.—If *Travis v. Uttley* could have been carried to the Appeal Court, I should have been glad, though I am perfectly satisfied with the decision so far as it goes.—p. 220.

[NOTE.—It has since been ascertained that the Halifax Corporation, the appellants in *Travis v. Uttley*, had adopted the Public Health Acts Amendment Act, 1890, but that sect. 19 of that Act did not apply owing to the drain, there held to be a sewer, being connected with houses belonging to one owner, whereas the section only applies to a drain "of two or more houses belonging to different owners."]

Travis v. Uttley, commented on.

Self v. Hove Commissioners, distinguished.

Hill v. Hair (1895) 64 L. J. M. C. 164; [1895] 1 Q. B. 906; 15 K. 424; 72 L. T. 629; 43 W. R. 651; 59 J. P. 374.—CAVE and LAWRENCE, JJ.

CAVE, J.—*Travis v. Uttley* lays down no new doctrine, but one already very well understood. . . . The only case which caused me any difficulty was that of *Self v. Hove Commissioners*, and I was for a time pressed by the observations of Wills, J. in that case; but I observe that, as is often the case, the observations of a judge must be read closely in connection with the subject-matter under observation, and I find in that case both houses were stated to be semi-detached and enclosed by one outer wall, and apparently within one curtilage, and that certainly seems to me to afford a ground for an explanation of Wills, J.'s observations in that place. . . . Whether that may have been the fact or not, it was immaterial to the main point decided in that case. The subject-matter here is found not to be a private drain, nor is it a sewer for private profit within the exception of sect. 13 of the Public Health Act, 1875. I think that the provision of the local Act may be found applicable to private drains of more than one house without making it repeal the clause of the General Act, and thereby turning that which, under the General Act, is within the meaning of a "sewer," into a private drain.

Travis v. Uttley, explained.

Beckenham Urban District Council v. Wood (1896) 60 J. P. 490.—CAVE and WILLS, JJ.

WILLS, J.—I must say, and I speak for myself only, because I do not presume to criticise my brother Wright's view, that if the expression attributed to me is understood to mean that a part of the system which ends in an undoubted sewer must necessarily be a sewer above the point where it becomes a sewer, I think that is erroneous, and I have no hesitation in saying so, because it is my own expression, which I am free to criticise as I like. I am certainly not

prepared to abide by any such general statement as that.—p. 491.

Travis v. Uttley (and see infra, col. 1635), dictum commented on.

Self v. Hove Commissioners, followed.

Hill v. Hair (supra), disapproved.

Bradford v. Eastbourne Corporation (1896) 65 L. J. Q. B. 571; [1896] 2 Q. B. 205; 74 L. T. 762; 45 W. R. 31; 60 J. P. 401.—RUSSELL, C.J. and WILLS, J.

RUSSELL, C.J.—There is no substantial difference between the drain in the case before us and that in *Self v. Hove Commissioners* and that in *Hill v. Hair*. In the present case it drains houses belonging to different owners, and enters the public sewer, and the local authority have adopted the Act of 1890. In consequence of the impossibility of reconciling the decisions in *Self v. Hove Commissioners* and *Hill v. Hair*, I have reconsidered the whole question independently of those cases.

The real question is, what is the proper application of sect. 19 of the Public Health Acts Amendment Act, 1890? The section says that where two or more houses belonging to different owners are connected with the public sewer by a single private drain, the local authority may deal with that drain in the same way, both as to the execution of works and recovery of expenses, as it may deal with drains, ashpits, and cesspools under sect. 41 of the Public Health Act, 1875. The first point of difficulty is, what is a single private drain? Sub-sect. 3 says that a drain includes a drain used for the drainage of more than one building. This very much widens the definition of drain given in sect. 4 of the principal Act of 1875. In that section a drain means any drain of and used for the drainage of one building only, or of premises within the same curtilage. What, then, is the meaning in sect. 19 of the words "single private drain"? What is a private drain, and can there be a private drain connecting two or more houses (belonging to different owners) with a public sewer? Prior to the passing of the Act of 1890, by the operation of the Act of 1875 (and, indeed, by the operation of the prior Act of 1848), there could not be a private drain which connected two or more houses (belonging to different owners) with a public sewer, because any such drain was a sewer, and was a sewer vested in the local authority. Therefore it might be said that the drain in this case is not a private drain, because it was vested in the local authority, if the word "private" is to be taken and used in the sense of belonging to an individual; and it was not a drain at all, because it came under the definition of "sewer" in sect. 4 of the Act of 1875, and in sect. 2 of the Act of 1848. But the Act of 1890, for the purposes of sect. 19, and for those purposes only, widens the definition of "drain" contained in sect. 4 of the Act of 1875; and therefore there seems to be no difficulty in interpreting sect. 19 with regard to the word "drain." In the case before us it seems to me to be clear that the drain was a drain within the meaning of the definition given in sub-sect. 3 of sect. 19.

The next question is, what is the meaning of the word "private" in "single private drain," and what meaning can be given to it which shall harmonise with the application of sect. 13 of the Public Health Act, 1875? It has been suggested that the expression "private drain" might be said to apply only to drains of the character set out in sect. 19 of the Act of 1890, which were

constructed after the passing of the Act of 1890; in other words, that the Act had no retrospective force. That would be a very simple way of getting out of the difficulties of the section. But the words of the section are not "shall be," but "are"; and therefore when it says that where two or more houses belonging to different owners "are" connected with the public sewer, it points, I think, to a state of things in existence at the time of the passing of the Act, which is to be altered. If, then, the provision is retrospective, what effect is to be given to sect. 13 of the Act of 1875 in this connection? Now that section says that all existing and future sewers shall vest in and be under the control of the local authority. The word "sewer" here will no longer include the drain in question in this case, which is a drain under and for the purposes only of sect. 19 of the Act of 1890. But inasmuch, as prior to the passing of the Act of 1890 that drain was a sewer vesting in the local authority, does the vesting control the natural application of the new definition? If, indeed, the absolute property in the sewer were given by sect. 13 of the Act of 1875 to the local authority, one might feel some difficulty in making this section applicable to drains constituted prior to 1890, notwithstanding the use of the word "are." But what is the meaning of the word "vest" in sect. 13 of the Act of 1875? It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter—*Coverdale v. Charlton* (48 L. J. Q. B. 128; 4 Q. B. D. 104), *Rolls v. St. George the Martyr, Southwark* (49 L. J. Ch. 691; 14 Ch. D. 785), *A. G. v. Dorking* (51 L. J. Ch. 585; 20 Ch. D. 595) and *Birkenhead Corporation v. L. & N. W. Ry.* (55 L. J. Q. B. 48; 15 Q. B. D. 572). But if the duty is partly or entirely shifted from the local authority to individuals, that right which the word "vest" gives to the local authority disappears to the same extent. Therefore it does not appear that there is any difficulty arising from the word "vest" in sect. 13 of the Act of 1875.

I am unable to see any special use in the word "private" in this section, but it is intelligible, and, I think, means a drain originally constructed for the drainage of one or more houses, as distinguished from a drain or sewer which any member of the public may have a right to use by connecting to it the drain from his own house. We must put some reasonable interpretation on the section, and in this construction of it there is no difficulty in applying it to the present case. If it does not govern the class of drain in this case, which is for all purposes identical with that in *Self v. Hove Commissioners* and in *Hill v. Hair*, what application can the section have? A drain now, by the combined operation of sect. 4 of the Public Health Act, 1875, and sect. 19 of the Act of 1890, for the purposes of this latter section and for these purposes only, includes—first, a drain used for the drainage of one building only; secondly, a drain used for the drainage of premises within the same curtilage; and, thirdly, a drain used for the drainage of more than one building. The section therefore applies to two or more houses belonging to different owners connected with a public sewer

by a single private drain, whether within the same curtilage or not. If it were only intended to apply to drains which did not vest in the local authority prior to 1890, it is difficult to understand the object of making a new definition of the word "drain" for the purpose of applying sect. 41 of the Act of 1875. The local authorities could already deal with drains draining one building, and drains draining premises within the same curtilage—see sect. 4 of the Act of 1875, and sect. 41 of the same Act. Moreover, the object of sect. 19 of the Act of 1890 is to give increased power to the local authorities enumerated in the Act, and therefore the second exception under the definition "sewer" in sect. 4 of the Act of 1875 does not help us, especially as the class of drains there mentioned are not sewers.

Further, since it is intended to throw upon owners of houses certain expenses, it is difficult to suppose that the section can have been intended to operate on the first exception to sect. 13 of the Act of 1875—namely, sewers made for profit. It is difficult to suppose that the legislature intended that the owners of houses are to be called upon to pay the cost of repairing a sewage system such as that in *Minehead Local Board v. Luttrell*. The second exception to sect. 13 of the Act of 1875 affords no assistance, as it deals with land drainage; neither does the third exception, because the local authority can have no power over these sewers except as provided by sect. 327, sub-sect. 1. Nor does the proviso of sect. 13 help us, as it points to public sewers constructed by a public body for public use. It appears to me to follow that the section could practically have no operation at all if it were not intended to apply to such cases as that before us. I am therefore of opinion that in this case the drain was a single private drain connecting two or more houses belonging to different owners, with the public sewer, and that therefore, under sect. 19 of the Act of 1890, the local authority were entitled to proceed under sect. 41 of the Act of 1875. I agree in the decision of *Self v. Hove Commissioners*, and I think the County Court judge was right in following it. It follows that I do not agree with the judgment of *Hill v. Hair*.—pp. 573, 574 and 575.

WILKS, J.—There is an expression in my judgment [in *Travis v. Uttley*] which my brother Cave and myself have very recently decided to be erroneous. I have said that "it is impossible to say that the part which is used for the drainage of one building is a drain, and the rest a sewer. The drain is a sewer from end to end." In *Kershaw v. Taylor*, however, the C. A. decided that under such circumstances the same conduit was a drain so long as it received the drainage of one house only, but a sewer from the point where the drainage of the second house came into the conduit. The passage, therefore, that I have cited from my judgment in *Travis v. Uttley* must be considered as erroneous. It was not necessary for the judgment, and the correction does not affect the decision. The error, however, in the *obiter dictum* and the decision itself are alike foreign to the present inquiry. *Travis v. Uttley* had nothing to do with sect. 19 of the Act of 1890, and it has no bearing at all upon the present case. *Self v. Hove Commissioners*, unless it is to be discarded, is a decision precisely in point with respect to the present case,—p. 578.

Self v. Hove Commissioners; Hill v. Hair; and Bradford v. Eastbourne Corporation, distinguished.

Reg. v. Hastings Corporation (1896) 66 L. J. Q. B. 80; [1897] 1 Q. B. 46; 75 L. T. 377; 45 W. R. 109; 60 J. P. 759.—GRANTHAM and WRIGHT, JJ.

Hill v. Hair, discussed and doubted.

Bradford v. Eastbourne Corporation, followed.

Seal v. Merthyr Tydfil Urban Council (1897) 67 L. J. Q. B. 37; [1897] 2 Q. B. 543; 77 L. T. 303; 61 J. P. 551.—CAVE and RIDLEY, JJ.

CAVE, J.—That section [19 of the Public Health Acts Amendment Act, 1890] applies to a drain constructed upon private ground to which the public have not access, and means that the public are to be relieved from repairing that which they are not free to use. Therefore, a "private drain" must be a drain not only within sub-sect. 3, but also one which is private and not open to public user. Where a drain runs through private land it is private. Although entry may be made upon the land for the purpose of making the drain effectual, there is no power to carry the drainage of other houses through the private land into that drain. That appears to be the most reasonable meaning to place upon the words "private drain." It may be said that although that construction is in harmony with the decisions in some of the former cases, it is not in accordance with *Hill v. Hair*, to which I was a party. I think that the law was wrongly applied in *Hill v. Hair* if the drain was a private drain within the meaning I have attributed to those words. It has been said that the inference ought to be drawn that the drain was a private drain from the fact that it was made through private ground. It may have been a drain into which the owner thereof would be entitled to allow other people to drain on payment of money, or to refuse such permission. If so, it undoubtedly would be a private drain, and in that sense would come within the suggestion which I threw out in that case—namely, that a private drain means a drain which a person makes for his own profit. It is not one into which the public can drain. That is, I think, the substantial distinction between the private drain mentioned in sect. 19, and other sewers which are vested, although they may drain only a few houses, in the local authority.—pp. 39, 40.

Self v. Hove Commissioners, commented on.

North Walthamstow Urban Council (1898) 67 L. J. Q. B. 972; 62 J. P. 836.—CHANNELL, J. See extract, *post*, col. 1791.

Travis v. Uttley (*supra*, col. 1630). *referred to.*

Hedley v. Webb (1901) 70 L. J. Ch. 663; [1901] 2 Ch. 126; 84 L. T. 526; 65 J. P. 425.—COZENS-HARDY, J.

Travis v. Uttley; Beckenham Urban Council v. Wood (1896) 60 J. P. 490.—CAVE and WILLS, JJ.; and *Hedley v. Webb*, *referred to.*

Humphery v. Young (1902) 72 L. J. K. B. 6.—LORD ALVERSTONE, C.J., WILLS and CHANNELL, JJ.

Reg. v. Epsom Union (1863) 8 L. T. 383; 11 W. R. 593.—Q.B., *distinguished, but principle applied.*

Mcader v. West Cowes Local Board (1892) 61 L. J. Ch. 561; [1892] 3 Ch. 18; 67 L. T. 454; 40 W. R. 676.—C.A. COLERIDGE, C.J., LINDLEY and LOPES, L.JJ.

Meador v. West Cowes Local Board, applied.

Kinson Pottery Co. v. Poole Corporation (1899) 68 L. J. Q. B. 819; [1899] 2 Q. B. 41; 81 L. T. 24; 47 W. R. 607; 63 J. P. 580.—DARLING and CHANNELL, JJ.

Meador v. West Cowes Local Board, referred to.

Hedley v. Webb (1901) 70 L. J. Ch. 663; [1901] 2 Ch. 126; 84 L. T. 526; 65 J. P. 425.—COZENS-HARDY, J.

Meador v. West Cowes Local Board, followed.

Butt v. Snow (1903) 89 L. T. 302; 67 J. P. 454; 2 L. G. R. 222.—K.B.D.

Handsworth Local Board v. Taylor (1893) 69 L. T. 798.—ROMER, J., *explained.*

Rishton v. Haslingden Corporation (1897) 67 L. J. Q. B. 387; [1898] 1 Q. B. 294; 77 L. T. 620; 62 J. P. 85.—HAWKINS and CHANNELL, JJ.

CHANNELL, J.—We think that the decision of Romer, J., in *Handsworth Local Board v. Taylor*, which was quoted to us, applies only to a growing street, and that in the present case if there had been new buildings fronting this street, the authority might have said that they had never been satisfied with the sewerage of the street which it had become. They have, however, been satisfied with the sewerage of the street which it in fact is. The necessity for the works now proposed has not arisen from any change of things in the street in question, but from a new general system of sewerage of the district having been recently adopted. The new sewer in this locality is really wanted for the houses in Picasant Street and Hindle Street, and it would be a very remarkable result of the legislation if the fact of there being a private back passage between these two streets enabled the local authority to do at the private expense of the owners, work which, if there were no such passage, would have to be done at the public expense.—p. 392.

Kirkheaton Local Board v. Ainley (1891) 60

L. J. Ch. 734; 55 J. P. 230.—STIRLING, J., *considered and distinguished.*
Wycombe Rural Sanitary Authority (or Fordom) v. Parsons (1894) 64 L. J. M. C. 22; [1894] 2 Q. B. 780; 10 R. 426; 71 L. T. 428; 58 J. P. 765.—MATHEW and LAWRENCE, JJ.

Derby (Earl) v. Bury Improvement Commissioners, 37 L. J. Ex. 64; L. R. 3 Ex. 121; 18 L. T. 147; 17 W. R. 257.—EX.; *reversed*, (1869) 38 L. J. Ex. 100; L. R. 4 Ex. 222; 17 W. R. 772; 20 L. T. 927.—EX. CH.

Kinson Pottery Co. v. Poole Corporation

(1899) 68 L. J. Q. B. 819; [1899] 2 Q. B. 41; 81 L. T. 24; 47 W. R. 607; 63 J. P. 580.—DARLING and CHANNELL, JJ., *followed.*
Graham v. Wroughton (1901) 70 L. J. Ch. 673;

[1901] 2 Ch. 451; 84 L. T. 744; 49 W. R. 643.—
C.A. RIGBY and COLLINS, L.JJ.; *affirming*
BYRNE, J.

Kinson Pottery Co. v. Poole Corporation,
distinguished.

Wilkinson v. Llandaff Rural Council (1903) 73
L. J. Ch. 8; [1903] 2 Ch. 695; 89 L. T. 462; 52
W. R. 50; 68 J. P. 1; 2 L. G. R. 174.—C.A.

Att.-Gen. v. Cockermouth Local Board (1874)
44 L. J. Ch. 118; L. R. 18 Eq. 172; 30
L. T. 590; 22 W. R. 619.—JESSEL, M.R.,
observation adopted.

Att.-Gen. v. Logan (1891) [1891] 2 Q. B.
100; 65 L. T. 162; 55 J. P. 615.

Scarborough Corporation v. Scarborough
Sanitary Authority (1876) 1 Ex. D. 344;
34 L. T. 768.—EX. D., *followed.*

Letterkenny Commissioners v. Collins (1891) 28
L. R. Ir. 235.—Q.B.D.

Scarborough Corporation v. Scarborough
Sanitary Authority, questioned as
reported.

Parker v. Inge (1886) 55 L. J. M. C. 149; 17
Q. B. D. 584; 55 L. T. 300; 51 J. P. 20.—
POLLOCK, B. and CAVE, J.

Swanston v. Twickenham Local Board, 40 L. T.
208.—FRY, J.; *reversed*, (1879) 48 L. J. Ch. 623;
11 Ch. D. 838; 40 L. T. 734; 27 W. R. 924.—
C.A. JAMES, BRETT and COTTON, L.JJ.

Reg. v. Godmanchester Local Board (1866)
5 B. & S. 886, 936; 35 L. J. Q. B. 125;
L. R. 1 Q. B. 328; 14 L. T. 104; 14 W. R.
375.—EX. CH., *referred to.*

L. & N. W. Ry. v. Runcorn Rural Council
(1897) 67 L. J. Ch. 23; [1898] 1 Ch. 34; 77
L. T. 485; 46 W. R. 121; 62 J. P. 9.—STIRLING,
J.; *affirmed*, (1898) 67 L. J. Ch. 324; [1898] 1
Ch. 561; 78 L. T. 343; 46 W. R. 484; 62
J. P. 643.—C.A. LINDLEY, M.R., RIGBY and
WILLIAMS, L.JJ.

Bonella v. Twickenham Local Board (1887)
57 L. J. M. C. 1; 20 Q. B. D. 63; 58 L. T.
299; 36 W. R. 50; 52 J. P. 356.—C.A.,
referred to.

Hornsey Local Board v. Davis (1893) 62 L. J.
Q. B. 427; [1893] 1 Q. B. 756; 4 R. 322; 68
L. T. 503; 57 J. P. 612.—C.A. ESHER, M.R.,
LINDLEY and LOPES, L.JJ.

Bonella v. Twickenham Local Board and Acton
Local Board v. Batten (1884) 54 L. J. Ch.
251; 28 Ch. D. 283; 52 L. T. 17; 49 J. P.
357.—KAY, J., *followed.*

Ferrand v. Hallas Land and Building Co.
(1893) 62 L. J. Q. B. 479; [1893] 2 Q. B. 135;
4 R. 430; 69 L. T. 8; 41 W. R. 580; 57 J. P.
692.—C.A. ESHER, M.R., LOPES and SMITH, L.JJ.

Acton Local Board v. Batten and Bonella
v. Twickenham Local Board, distinguished.
Minehead Local Board v. Luttrell (1894) 63
L. J. Ch. 497; [1894] 2 Ch. 178; 8 R. 379; 70
L. T. 446; 42 W. R. 667.

ROMER, J.—None of these cases at all touch,
as it appears to me, the case before me, or the
facts on which I have to decide the case. The

case here is not a case where a landowner has
merely put in sewers for the purpose of draining
his own houses, and merely looks to be compen-
sated for his expenditure in the advantages that
accrue to his houses that are drained by having
a proper system of drainage. That is not the
case here. This is a case where, it appears to
me, the defendant has laid out money for the
purpose of making sewers, intending to be com-
pensated and paid directly for his expenditure
on the sewers, and to be remunerated for his
expenditure directly by receiving payments
from all persons, whether they are his tenants
or not, who avail themselves of the benefit of
his sewers; and where he is intending to receive,
and did receive payments, direct to himself by
the persons using his sewers, for the benefit of
his sewers; and where he has, by reason of his
expenditure, received direct remuneration for
the expenditure in the way I have indicated.
. . . It appears to me that this is undoubtedly a
case where the defendant made the sewer for his
own profit within the meaning of sect. 13,
sub-sect. 1, of the Public Health Act, 1875.—
pp. 499, 500.

Bonella v. Twickenham Local Board, applied.

Handsworth Urban Council v. Derrington
(1897) 66 L. J. Ch. 621; [1897] 2 Ch. 438; 77
L. T. 73; 61 J. P. 518.—KEKEWICH, J.

Bonella v. Twickenham Local Board, dis-
tinguished.

Simmons v. Fulham Vestry (1900) 69 L. J.
Q. B. 560; [1900] 2 Q. B. 188; 82 L. T. 497;
48 W. R. 574; 64 J. P. 548.—RIDLEY and
DARLING, JJ.

RIDLEY, J.—The present case is distinguish-
able from *Bonella v. Twickenham Local Board*.
There is no doubt some resemblance between the
material provisions of the [Metropolis Manage-
ment] Act of 1855, and of the Public Health
Act, 1875. Under the Act of 1855 the pave-
ment vested in the respondents, just as under
the Act of 1875 the sewer vested in the local
board. Section 105 of the former Act, like
sect. 150 of the latter Act, empowers the local
authority, in case the property vested in them is
not to their satisfaction, to put it in proper
condition at the expense of the adjoining owners.
The facts of the two cases, however, are by no
means identical. In *Bonella v. Twickenham*
Local Board, the owners of the estate had made
a sewer which, at the time when it vested in the
local board, was sufficient for the purposes for
which it was required, and would have remained
sufficient if the system of drainage had not been
altered. In the present case, however, the
adjoining owners have only paved a part of the
footway on the east side of the street, and it
does not even appear that the paving is of a
permanent character. Moreover, the magistrate
finds that all the works done by the respondents
to the street, with the exception of some paving
on the east footway, were temporary repairs
done by them as surveyors of highways. The
owners have done substantially nothing, and the
respondents have done substantially nothing,
and have recovered nothing from the owners.
Further, in *Bonella v. Twickenham Local Board*,
at the time when the sewer vested in the local
board, it was engaged in the work of discharging,
and the local board, having done nothing for
some years were taken by the Court to have

been satisfied that it was sufficient for that purpose. Here, the traffic in the road was at first very small, and it is only by reason of its subsequent increase that the work of repaving has become necessary. Section 105 of the Act of 1855 empowers the vestry, if they deem it necessary that a street which is not paved to their satisfaction should be paved, to pave it at the expense of the adjoining owners. The idea underlying the section seems to be that where a district is becoming populous and the traffic consequently increasing, the adjoining owners shall bear the expense of paving the streets when it becomes necessary that they should be paved, and shall not be called upon to do so again. In view of these considerations, it seems to me that the case is outside the principle of *Bonella v. Twickenham Local Board*, and that the respondents have not lost the right to proceed under sect. 105 merely by not having caused the street to be repaved for 16 years after it vested in them.—p. 566.

Ferrand v. Hallas Land and Building Co. (1893) 62 L. J. Q. B. 479; [1893] 2 Q. B. 135; 4 R. 430; 69 L. T. 8; 41 W. R. 580; 57 J. P. 692.—C.A., *distinguished*.
Minehead Local Board v. Luttrell (1894) 63 L. J. Ch. 497; [1894] 2 Ch. 178; 8 R. 379; 70 L. T. 446; 42 W. R. 667.—ROMER, J. See extract, *supra*, col. 1637.

Ferrand v. Hallas Land and Building Co., *applied*.

Minehead Local Board v. Luttrell, *distinguished*.

Vowles v. Colmer (1895) 64 L. J. Ch. 414; 13 R. 583; 72 L. T. 389.

ROMER, J.—I do not think that the sewers made by the plaintiffs were made "for their own profit," within the meaning of that term as used in the section [sect. 13, sub-sect. 1, of the Public Health Act, 1875]. . . . I cannot myself, on the real facts of the case, distinguish the case before me from the other authorities, of which *Ferrand v. Hallas Land and Building Co.* is an example. In my opinion, on the facts, I am satisfied that these sewers were laid out merely for the purpose of this particular building scheme, and for no other purpose. . . . No doubt the plaintiffs did expect to be recouped by the purchasers the sum they expended; but what did they do? They apportioned the expenses between the different plots, and when a particular plot was sold they took care to get from each purchaser of the plot, who had to pay a proportionate rent, a payment in respect of his proportion of the sewer. It is only thus that the plaintiffs expected to be recouped their expenses of the sewer—namely, by the increased value of the plots let out. That is exactly, neither more nor less, what is the case in the present instance. . . . I need scarcely say that the case referred to, which was decided by me, of *Minehead Local Board v. Luttrell*, is clearly distinguishable by reason of the obvious facts which are stated in that case.—p. 415.

Minehead Local Board v. Luttrell, *referred to*.

Bradford v. Eastbourne Corporation (1896) 65 L. J. Q. B. 571; [1896] 2 Q. B. 205; 74 L. T. 762; 45 W. R. 31; 60 J. P. 501.—RUSSELL, C.J. and WILLS, J. See extract, *supra*, col. 1634.

Ferrand v. Hallas Land and Building Co. and Minehead Local Board v. Luttrell, *discussed and applied*.

Croysdale v. Sunbury-on-Thames Urban Council (1898) 67 L. J. Ch. 585; [1898] 2 Ch. 515; 79 L. T. 26; 46 W. R. 667; 62 J. P. 520.

STIRLING, J.—It is, however, contended for the plaintiff that they [the pipes] fall within the first exception in sect. 13—viz., "sewers made by any person for his own profit." The meaning of this exception has been considered in several cases. In *Minehead Local Board v. Luttrell* it was held that sewers constructed by a landowner for the use of persons by whom he was to be remunerated by a direct money payment for the use of them fall within the exception. The word "profit," however, is not, in my opinion, to be restricted to a direct money payment. This was laid down in *Ferrand v. Hallas Land and Building Co.* . . . When the object of making the sewer is not either for sanitary or mere ordinary drainage purposes, but to enable the land to be occupied more profitably or to avoid an expenditure which would otherwise have to be incurred, in order that the occupation might be equally beneficial, it seems to me that the sewer is made for the "profit" of the occupier.—pp. 588, 589.

Ferrand v. Hallas Land and Building Co., *referred to*.

Nasli v. Hollinshead (1901) 70 L. J. K. B. 571; [1901] 1 Q. B. 700; 84 L. T. 483; 49 W. R. 424; 65 J. P. 357.—C.A. SMITH, M.R., COLLINS and ROMER, L.JJ.

Croysdale v. Sunbury-on-Thames Urban Council (1898) 67 L. J. Ch. 585; [1898] 2 Ch. 515; 79 L. T. 26; 46 W. R. 667; 62 J. P. 520.—STIRLING, J., *approved*.

Sykes v. Sowerby Urban Council (1900) 69 L. J. Q. B. 464; [1900] 1 Q. B. 584; 82 L. T. 177; 64 J. P. 340.—C.A. SMITH, COLLINS and ROMER, L.JJ.; *reversing* (1899) 68 L. J. Q. B. 652; [1899] 1 Q. B. 979; 80 L. T. 592; 47 W. R. 560.—DARLING and CHANNELL, JJ.

Wallasey Local Board v. Gracey (1887) 56 L. J. Ch. 739; 36 Ch. D. 593; 57 L. T. 51; 35 W. R. 694; 51 J. P. 740.—STIRLING, J., *approved*.

Tottenham Urban District Council v. Williamson (1896) 65 L. J. Q. B. 591; [1896] 2 Q. B. 353; 75 L. T. 238; 44 W. R. 676; 60 J. P. 725.—C.A.

Wallasey Local Board v. Gracey and Tottenham Urban Council v. Williamson, *applied*.

Stoke Parish Council v. Price (1899) 68 L. J. Ch. 447; [1899] 2 Ch. 277; 80 L. T. 643; 47 W. R. 663; 63 J. P. 502.—NORTH, J.

G. W. Ry. v. Bishop (1872) 41 L. J. M. C. 120; L. R. 7 Q. B. 550; 26 L. T. 905; 20 W. R. 969.—Q.B., *considered*.

Malton Local Board v. Malton Manure Co. (1879) 4 Ex. D. 302; 49 L. J. M. C. 90; 44 J. P. 155.—KELLY, C.B. and STEPHEN, J.

STEPHEN, J.—There are two questions reserved by the justices. To the first of them I answer that it was sufficient to prove that the manufacture being one causing effluvia, such effluvia

was a nuisance whether causing injury to health or not. The four sections, commencing with the 112th, relate to the subject of offensive trades, some of which are enumerated and the others dealt with by general words. The 114th section speaks of effluvia which are "a nuisance, or injurious to health," and it is said that this must be read as if it ran "a nuisance injurious to health." I do not think that is its meaning, and it obviously is not its literal meaning. The way in which it is sought to show that it is its proper meaning is by reference to 18 & 19 Vict. c. 121, and the case of the *Great Western Railway Co. v. Bishop* decided on the construction of the 8th section of that Act. This decision, regard being had to the subject-matter of it, seems to me to come to this (a principle which is contained in part of the judgment of the Lord Chief Justice), that the word "nuisance" cannot there be taken in its fullest sense, as that would lead to some obvious absurdities. It is said, then, that in the Act in question the word must be restricted to nuisances affecting the public health, because that was the object of the Act, and must not be extended to nuisances with which it was not the intention of the Act to deal. Applying that principle to this enactment it seems to me that in these sections the word nuisance must mean any nuisance connected with the carrying on of any offensive trade specified, and that the diminution of comfort thereby is one of the nuisances included in the Act. I am not convinced by Mr. Cave's argument as to the analogous section of 18 & 19 Vict. c. 121, because the sections under this heading "offensive trades" in the Act we are now considering are complete in themselves.—p. 306.

G. W. Ry. v. Bishop, applied.

Dixon v. M. B. W. (1881) 50 L. J. Q. B. 772; 7 Q. B. D. 418, 424; 45 L. T. 312; 30 W. R. 83; 46 J. P. 4.—COLERIDGE, C.J.

G. W. Ry. v. Bishop, distinguished.

Bishop Auckland Local Board v. Bishop Auckland Iron Co. (1882) 10 Q. B. D. 138; 52 L. J. M. C. 38; 48 L. T. 223; 31 W. R. 288; 47 J. P. 380.—FIELD and STEPHEN, JJ.

STEPHEN, J.—Now in the case of *Great Western Railway Co. v. Bishop*, the particular nuisance complained of was not only not injurious to health, but it was not a nuisance that in any kind of way related to the health, or even to the permanent comfort, of any of the neighbours. It was a mere common law nuisance like the repair of a highway. The appellants allowed ruin-water to drip from one of their bridges on to the highway, and the Court held that that was not the sort of thing the legislature meant by using the words "nuisance or injurious to health" in 18 & 19 Vict. c. 121. I think that that case does not throw any light upon what the decision of the Court would have been if the nuisance, though not absolutely injurious to health, was one which would interfere with the permanent comfort of those in the neighbourhood, and might probably become injurious to health. I see a great distinction between water dripping from a bridge, and a heap of ashes and refuse producing noisome effluvia, as in the present case. The Court, in *Great Western Railway Co. v. Bishop*, abstained from bringing within the purview of the Nuisance Removal Act, 1855, a nuisance of an entirely

different kind from the nuisances the legislature intended to deal with.—p. 140.

Water Closets.

Bogle v. Sherborne Local Board (1880) 46 J. P. 675.—Q.B.D., *applied*.

Tracey v. Pretty (1901) 70 L. J. K. B. 234; [1901] 1 Q. B. 444; 83 L. T. 767; 49 W. R. 282; 65 J. P. 196; 19 Cox C. C. 593.—LORD ALVERSTONE, C.J., GRANTHAM, BRUCE and DARLING, JJ.; PHILLIMORE, J. *dissenting*.

Wood v. Widnes Corporation (1898) 67

L. J. Q. B. 254; [1898] 1 Q. B. 463; 77 L. T. 779; 46 W. R. 293; 62 J. P. 117.—C.A., *distinguished*.

Nicholl v. Epping Urban Council (1899) 68 L. J. Ch. 393; [1899] 1 Ch. 844; 80 L. T. 515; 47 W. R. 457; 63 J. P. 600.—STIRLING, J.

Whitechurch, Ex parte (1881) 50 L. J. M. C.

41; 6 Q. B. D. 545; 29 W. R. 507; 45 J. P. 392.—POLLOCK, B. and STEPHEN, J., *appeal dismissed on another ground nom. Reg. v. Whitechurch* (1881).—C.A. (see vol. 1, col. 32).

Whitechurch, Ex parte, distinguished.

Saunders, Ex parte (1883) 52 L. J. M. C. 89; 11 Q. B. D. 191; 31 W. R. 918; 47 J. P. 584.—CAVE and SMITH, JJ.

SMITH, J.—That [the above case] is distinguishable because the order was to make a particular kind of closet, and the Court thought it too precise. Here, however, the order is to move the closet from one place to another, and it falls directly within the terms of the Act [Public Health Act, 1875]—namely, to do such things as may be necessary to prevent the recurrence of the nuisance.—p. 90.

Whitechurch, Ex parte, commented on.

Saunders, Ex parte, followed.

Reg. v. Llewellyn (1884) 13 Q. B. D. 681; 55 L. J. M. C. 9, n.; 33 W. R. 150; 49 J. P. 101.—MATHEW and DAY, JJ.

MATHEW, J.—It may be that in *Whitechurch, Ex parte*, the justices went too far in ordering the owner of the premises "to fill up the ashpit, to abandon the privy, and to construct a proper and sufficient pail-closet in lieu thereof." Here, there being an existing privy which was found to be a nuisance and injurious to health, the sanitary authority, in order to abate it, have directed certain works to be done—not the construction of a new privy, but the amendment of the existing one, subject to an appeal to the sessions—and the sessions have adopted the mode suggested by the sanitary authority for the abatement of the nuisance. I cannot doubt that they had jurisdiction to make the order they have made. I adopt the decision in *Saunders, Ex parte*. If that case differs from *Whitechurch, Ex parte*, I differ too.—p. 683.

Whitechurch, Ex parte; Saunders, Ex parte; and Reg v. Llewellyn, discussed.

Whitaker v. Derby Sanitary Authority (1885) 55 L. J. M. C. 8; 50 J. P. 357.—DAY and SMITH, JJ.

Reg. v. Jewellyn, *approved*.

Reg. v. Wheatley (1885) 55 L. J. M. C. 11; 16 Q. B. D. 34; 54 L. T. 680; 34 W. R. 257; 50 J. P. 424.—**MATHEW** and **SMITH**, JJ.

Reg. v. Kent Inhabitants, 55 L. J. M. C. 9, n., *discussed*.

Whitaker v. Derby Urban Sanitary Authority (1885) 55 L. J. M. C. 8; 50 J. P. 357.—**DAY** and **SMITH**, JJ.

Lodging Houses.

Booth v. Ferrett (1890) 59 L. J. M. C. 136; 25 Q. B. D. 87; 63 L. T. 346; 38 W. R. 718; 55 J. P. 7.—**COLERIDGE**, C.J. and **MATHEW**, J., *disapproved and not followed*.

Logsdon v. Booth (1899) 69 L. J. Q. B. 131; [1900] 1 Q. B. 401; 81 L. T. 602; 48 W. R. 266; 64 J. P. 165.—**RUSSELL**, C.J., **BIGHAM** and **DARLING**, JJ.

RUSSELL, C.J., after stating the facts, continued: "The Harbour" so described and so conducted in no material particular differs from the house the subject of inquiry in *Booth v. Ferrett*. We therefore think that the present case is not in principle different from that case. The next inquiry is: Was that case rightly decided? The learned judges in *Booth v. Ferrett* came to the conclusion (but with hesitation) that a similar house and similarly conducted to the present was not a common lodging-house on two grounds: First, that it was not carried on as a business for the sake of profit, but as a humane or charitable enterprise; and secondly, that it was not open to all comers, as it was stated a common lodging-house was. Before examining these grounds of decision more closely it will be well to examine the scheme of legislation on this subject, and to endeavour to get a clear conception of its object. [His lordship considered the material sections of the Common Lodging-Houses Acts, 1851 and 1853, and continued:] The legislation, therefore, on this subject had for its object, by inspection and control, to secure for the poor in these houses conditions safeguarding health and preventing the spread of disease, which people better off are supposed to be able to secure for themselves. (*See per Lindley, J., in Langdon v. Broadbent*, 37 L. T. 434.) The statutes in question are therefore to be regarded simply as measures of sanitary protection. Applying these considerations to the first ground on which the decision in *Booth v. Ferrett* was based, it seems impossible to admit that the fact that the house or building in question was carried on for charitable objects, and not for gain, would take it out of the measure of sanitary protection, if otherwise it would be within it. The question is not with what object or prompted by what motive the house is carried on, but whether the house is such and is so carried on as a lodging-house as to be within the provisions of the Act, as it is clearly within the mischief aimed at by the Act. It is to be observed that the learned judges in *Booth v. Ferrett* differentiated the house in that case from a common lodging-house only on the two grounds which I have mentioned. If large numbers of the most wretched class are sleeping in common rooms, insanitary conditions are, in the absence of inspection, supervision, and control, not unlikely to arise; and it was the object of the law to secure that inspection, supervision,

and control. We fail to see the relevance, in this connection, for the motive actuating the keeper of such a house, whether it be philanthropic or mercenary. But the second ground of the decision is that "The Harbour" is not within the statute, on the ground that a common lodging-house is open to all comers in this sense—that the keeper of such a house cannot refuse admission to any applicant. Is this so? To give to a common lodging-house this character is to attach to its keeper obligations analogous to those of a common carrier or a common innkeeper. We are unaware of any authority for this position. The language of *Lindley, J.* in *Langdon v. Broadbent* is referred to, where he speaks of a common lodging-house as one "open to all comers"; that is, as we understand the language, where practically all comers are received without discrimination. But that is a very different thing from saying that the keeper is under an obligation to receive all comers. We see no reason to doubt that the keeper of a common lodging-house might refuse to admit drunk or disorderly, or uncleanly men, or men of known evil reputation, or thieves and the like, or indeed any person whom he chose to exclude. Further, it seems to us, on the facts before us, that "The Harbour" might properly be described in the same sense as open to all comers. . . . The only restrictions on admission which may suggest a difference between "The Harbour" and registered common lodging-houses are the regulations—first, that men who are able to pay for better accommodation are not allowed to make "The Harbour" their permanent home; and secondly, that "The Harbour" is not to be used to assist idle men to lead a lazy life. We cannot assent to the view that this is sufficient to differentiate the two classes of houses. We know of no better description of a common lodging-house than that given by the then law officers, *Sir Alexander Cockburn* and *Sir W. Page Wood*, to the effect that a common lodging-house is that class of lodging-house in which persons of the poorer class are received for short periods, and though strangers to one another, are allowed to inhabit one common room (*see Lumley, Public Health*, 5th ed., p. 99). If this be the proper description of a common lodging-house, as we think it is, we cannot see in what material respect it differs from the respondent's shelter. We arrive, therefore, without hesitation, at the conclusion that such shelter is a common lodging-house within the meaning of the Act of 1853. It follows that we think that *Booth v. Ferrett* was wrongly decided, and that the magistrate's decision was wrong in point of law. It is to be observed, however, that the magistrate decided in deference to the authority of *Booth v. Ferrett*, and indeed that the same magistrate had in that very case decided that in his judgment the shelter was a common lodging-house. We desire to point out that in delivering his judgment *Lord Coleridge* was careful to say that he delivered it without any great degree of confidence. Differing from the decision of the Court in that case, ought we nevertheless to act upon it? We think not. The case being criminal in its nature could not have been brought under review by appeal. It was decided only nine years ago, and there has been no such acceptance of it and no such action upon it as should preclude us from expressing the view of the law which we are convinced is right.—pp. 135 *et seq.*

Booth v. Ferrett, treated as overruled.

Logsdon v. Booth, discussed and followed.

Logsdon v. Trotter (1900) 69 L. J. Q. B. 312; [1900] 1 Q. B. 617; 82 L. T. 151; 48 W. R. 365; 64 J. P. 421.—CHANNELL and BUCKNILL, JJ.

CHANNELL, J.—We have the advantage of a recent authoritative decision upon a point extremely similar, as to whether a Salvation Army shelter was a common lodging-house. In the first instance it struck me that the institutions in that case and in the present were practically identical, but counsel for the respondent pointed out some distinctions between them. He pointed out (and when the facts are looked at there is no doubt about it) that this institution is of a somewhat higher class than the Salvation Army shelter. We must therefore now look at *Logsdon v. Booth*, and find out where the line was drawn there, and then see whether the present case is only a very small step beyond it, but whether that small step does not carry the present case beyond the line there laid down. We have therefore to see what principle was laid down in *Logsdon v. Booth* by which a common lodging-house is to be defined. Four different things have been mentioned in various cases upon the subject as either the only tests, or some of the possible tests as to whether an institution was a common lodging-house or not. One of these, applied in *Booth v. Ferrett*, as to the institution being one not carried on for profit, has been conclusively disposed of by *Logsdon v. Booth*, and this is the one upon which the case now before us was in fact decided, because at the time the magistrate decided it *Booth v. Ferrett* was standing as an authority. The other three grounds mentioned as tests are these: First of all, that "common lodging-house" means a low-class lodging-house—one for people of low class—that is to say, a class of society which is dirty, likely to be diseased, and so on. All the earlier cases, I think, agree that that is one element, and that unless the place under consideration is a lodging-house for people of that class it does not come within the description "common lodging-house." I think the element exists in the present case. . . . The second ground suggested and apparently made the principle of the decision in *Langdon v. Broadbent*, was that "common lodging-house" meant a lodging-house which is open to all comers. . . . The ground that the house must be open to all comers, in the sense that the keeper of such house could not refuse admission to any applicant, has been clearly negatived by the decision of *Logsdon v. Booth*. . . . If it was meant by what was said by Lindley, J. [in *Langdon v. Broadbent*] that the house must be open to all comers, in that sense that particular ground has been negatived, as I have said [in *Logsdon v. Booth*]. In a less wide sense I think it has been hardly negatived but rather explained [by that case]. It has been explained to mean that where the place is so open to all comers that the fact of a person being dirty, possibly infectious, and of a character and appearance likely to disseminate something offensive or dangerous amongst those with whom he is associated, the fact that it is open to people of that class, and that they are not necessarily excluded by reason of their being of that class, is a necessary element. It is one of the things required to bring the house within the mischief of the statute. In that sense it seems, again,

that this institution comes within it. . . . There remains one more ground only. . . . It is this—that a "common lodging-house" means a place where people live in common. In *Logsdon v. Booth* the opinion of the law officers of the Crown . . . was quoted and apparently assented to. The L.C.J. said: "We know of no better description of a common lodging-house than that given by the then law-officers . . . to the effect that a common lodging-house is that class of lodging-house in which persons of the poorer class are received for short periods, and, though strangers to one another, are allowed to inhabit one common room." . . . Now what is the meaning of the passage, "though strangers to one another, are allowed to inhabit one common room"? Counsel for the respondent says "inhabit" necessarily means sleeping, and sleeping in the same room. In *Logsdon v. Booth* the people did sleep in one common room, and it was not necessary for the learned judges there to consider whether that was an essential element or not, but there is a previous passage in the judgment to this effect: "If large numbers of the most wretched class are sleeping in common rooms, insanitary conditions are, in the absence of inspection, supervision, and control, not unlikely to arise; and it was the object of the law to secure that inspection, supervision and control." I do not think it is necessary for us to say whether or not sleeping in the same bedroom is an essential to making it a common lodging-house. There is of course the case of *Langdon v. Broadbent* (37 L. T. 434), in which the Court refused to send the case back to the magistrates to have it made clear as to whether the people did sleep in the same bedroom. Therefore, there is some authority for saying that it is not necessary that they should do so. Where the people really occupy separately completely separate apartments, I do not think it would be a common lodging-house. I think this much is necessary—that in order to make it a common lodging-house the people of the character who are admitted must be allowed so to associate with each other as to make the danger of these insanitary conditions likely to arise and likely to spread. If that be the test, and I think it is an important one, we are bound to say that the present institution comes within it. The people do associate with each other in a way entirely within the mischief against which that statute provides. Their living-rooms are all in common, and their sleeping-rooms or apartments are only partially separated. These cubicle arrangements seem to me to be not very much more than curtains dividing the beds. They are apparently so divided for purposes of decency, and not for preventing the spread of infection, nor would they have that effect. They are no more than screens. Taking that view of these facts, I think we are bound to say that, applying what appear to be the principles laid down in *Logsdon v. Booth*, this institution is also a common lodging-house as the institution of the Salvation Army was. My difficulty has been that this is an institution of a somewhat superior class, there are somewhat better arrangements made for the inmates than in the other case, and a higher sum is charged, although the charge here is not above the charge made, as the case finds, in some common lodging-houses, but it is rather above the average. Further, there are regulations which are intended to have the same

effect as regulations under the statute; but I think it is impossible to hold that because the proprietor of what would otherwise be a common lodging-house in effect endeavours himself to carry out the same object which the statute has in view, that therefore it is not a common lodging-house. That would be leaving the proprietor to do something the statute makes compulsory, and it would be impossible to say whether he did it. It seems to me that, although this case is a step beyond *Lugsdon v. Booth*, yet the step is not one which takes us over the boundary-line which is there laid down as to what is a common lodging-house. I desire to add that it does not appear that much intervention is required in this case, but I do not feel entitled on that ground to say that this institution does not come within the description of "common lodging-house."—pp. 315 *et seq.*

Markets and Shops.

Reg. v. Wood (1869) 38 L. J. M. C. 144; L. R. 4 Q. B. 559; 10 B. & S. 534; 20 L. T. 654; 17 W. R. 850.—Q.B., *observed upon*.

Aerated Bread Co. v. Gregg (or Grigg) (1873) 42 L. J. M. C. 117; L. R. 8 Q. B. 355; 28 L. T. 816.—Q.B.

BLACKBURN, J.—Now the case of *Reg. v. Wood* has been much pressed upon us. In that case two judges decided one way and one the other: there was, therefore, a very slight majority, but the majority of the Court came to the conclusion that the statute was different in principle to that which I have just expressed as my opinion of it. It seems to have been in the mind of my brother Lush that the reason why French bread was not required to be weighed was because it was an article of luxury, and he seems to have put it to us: that what was an article of luxury at the time the Act of Parliament was passed, and would have been considered very fine and luxurious bread, would be considered very inferior now, and that the Act must mean that the article of luxury which need not be weighed would vary from time to time, and that that which was an article of luxury to our ancestors would become no article of luxury at all to our descendants. I do not think that is the meaning of the Act. I think it means the article that at that time did not require to be weighed, because it was of that description that depended mainly on the shape. If the case of *Reg. v. Wood* were precisely in point, we should have had to consider whether we should dissent from it, for that we should never do without much thought and consideration, and we should have taken time to consider the matter before we went so far as that, though I am inclined to think that my brother Hannen's opinion is the better one. I do not think our judgment in this case is in conflict with *Reg. v. Wood*, but I have not disguised the fact that I do not take the same view as the majority of the judges took in that case.—p. 119.

ARCHIBALD, J.—Although I am of opinion that the conviction in this case should be affirmed, and although I agree with my brother Blackburn in not adopting the reasons given by the majority of the Court in the case of *Reg. v. Wood*, yet in truth our decision is not in conflict with the decision in that case. We are not in any way overruling that case. We proceed upon a different reasoning.—p. 120.

O.C

Anthony v. Brecon Markets Co. (1867) 36 L. J. Ex. 113; L. R. 2 Ex. 167; 15 L. T. 645.—EX.; *reversed*, (1872) 41 L. J. Ex. 201; L. R. 7 Ex. 399; 26 L. T. 979; 21 W. R. 27.—EX. CH.

Anthony v. Brecon Markets Co., *distinguished*.

Hughes v. Trew (1877) 36 L. T. 585.—Q.B.D.

Wanstead Local Board v. Hill (1862) 13

C. B. (N.S.) 479; 32 L. J. M. C. 135; 9

Jur. (N.S.) 972; 7 L. T. 744; 11 W. R.

368.—C.P., *considered and applied*.

Braintree Local Board v. Boyton (1885) 52 L. T. 99; 48 J. P. 582.—DAY and SMITH, JJ.

Cleansing Pavements.

Lyndon v. Standbridge (1857) 2 H. & N. 45; 26 L. J. Ex. 386; 5 W. R. 590.—EX., *dictum referred to*.

London and Provincial Laundry v. Willesden Local Board [1892] 2 Q. B. 271; 67 L. T. 499; 40 W. R. 557; 56 J. P. 696.—DAY and CHARLES, JJ.

Food and Drink.

Reg. v. White (or White v. Redfern) (1879)

49 L. J. M. C. 19; 5 Q. B. D. 15; 41

L. T. 524; 28 W. R. 168; 44 J. P. 87.—

FIELD and MANISTY, JJ., *referred to*.

Vinter v. Hind (1882) 52 L. J. M. C. 93; 10 Q. B. D. 63; 48 L. T. 359; 31 W. R. 198; 47 J. P. 373.—FIELD and STEPHEN, JJ.

Reg. v. White (or White v. Redfern) *applied*.

Vinter v. Hind, *dictum not adopted*.

Waye v. Thompson (1885) 54 L. J. M. C. 140; 15 Q. B. D. 342; 53 L. T. 358; 33 W. R. 733; 15 Cox C.C. 785; 49 J. P. 693.—MATHEW and WILLS, JJ.

Vinter v. Hind, *distinguished*.

Mallinson v. Carr (1890) 60 L. J. M. C. 34; [1891] 1 Q. B. 48; 63 L. T. 459; 39 W. R. 270; 17 Cox C.C. 229; 55 J. P. 102.—HAWKINS and STEPHEN, JJ.

STEPHEN, J.—I gave judgment in *Vinter v. Hind*, and I think the judgment must have been misunderstood by the magistrates. That case in its circumstances differed from the present case, and turned on a different portion of the sections, and required different things to constitute an offence. I am reported to have said that the words essential to the offence charged were, "Any person who exposes for sale any meat unfit for human food shall be liable to a penalty of 20*l*." But these words do not occur in the portion of sect. 117 with which we are dealing. Here the respondent was in possession of the carcass, and it is not an element of the offence that the carcass should be exposed for sale. There are one or two other passages in the section that may call for comment. Thus the expression "unfit for food of man" is not followed by any proviso that it was so to the knowledge of the person to whom it belonged at the time of sale. The definition of the offence in the case before us does not include the exposure; and I have heard nothing in the respondent's argument which convinces me that a man can be held to be not guilty on the score of ignorance.—p. 36.

Reg. v. White (or **White v. Redfern**), and **Vinter v. Hind**. *See now* 54 & 55 Vict. c. 76, s. 47 (3).

Reg. v. White (or **White v. Redfern**); **Vinter v. Hind**, and **Waye v. Thompson** (1885) 54 L. J. M. C. 140; 15 Q. B. D. 342; 53 L. T. 358; 33 W. R. 733; 15 Cox C. C. 785; 49 J. P. 693.—**MATHEW** and **WILLS, JJ.**, *dismissed*.

Bater and Birkenhead Corporation, In re (1893) 62 L. J. M. C. 107; [1893] 1 Q. B. 679; 4 R. 438; 68 L. T. 680; 41 W. R. 513; 57 J. P. 487.—**WILLS** and **CHARLES, JJ.**, *affirmed*, 62 L. J. M. C. 107; [1893] 2 Q. B. 77; 4 R. 438; 69 L. T. 220; 41 W. R. 513.—**C.A.** **ESHER, M.R.**, **BOWEN** and **KAY, L.JJ.**

Reg. v. White (or **White v. Redfern**), *applied*.

Blaker v. Tillstone (1894) 63 L. J. M. C. 72; [1894] 1 Q. B. 345; 10 R. 94; 70 L. T. 81; 42 W. R. 253; 58 J. P. 184.—**COLERIDGE, C.J.** and **DAY, J.**

Vinter v. Hind, *referred to*.
Reg. v. Dennis (1894) 63 L. J. M. C. 153; [1894] 2 Q. B. 438; 10 R. 316; 71 L. T. 486; 42 W. R. 586; 58 J. P. 622.—**C.C.R.**

Reg. v. White (or **White v. Redfern**), *followed*.

Thomas v. Van Os (1900) 69 L. J. Q. B. 665; [1900] 2 Q. B. 448; 82 L. T. 845; 49 W. R. 57; 64 J. P. 582.—**RIDLEY** and **BIGHAM, JJ.**

Mallinson v. Carr (1890) 60 L. J. M. C. 34; [1901] 1 Q. B. 48; 63 L. T. 459; 39 W. R. 270; 17 Cox C. C. 220; 55 J. P. 102.—**Q.B.D.**, *distinguished*.

Wieland v. Butler-Hogan (1904) 73 L. J. K. B. 513; 90 L. T. 588; 68 J. P. 310.—**K.B.D.**

Bater and Birkenhead Corporation, In re (1893) 62 L. J. M. C. 107; [1893] 2 Q. B. 77; 4 R. 438; 69 L. T. 220; 41 W. R. 513.—**C.A.**, *applied*.

Walshaw v. Brighthouse Corporation (1899) 68 L. J. Q. B. 828; [1899] 2 Q. B. 286; 81 L. T. 2; 47 W. R. 600.—**C.A.** **SMITH, RIGBY** and **WILLIAMS, L.JJ.**

James v. Jones (1894) 63 L. J. M. C. 41; [1894] 1 Q. B. 304; 10 R. 410; 70 L. T. 351; 42 W. R. 400; 17 Cox C. C. 726; 58 J. P. 230.—**HAWKINS** and **LAWRANCE, JJ.** *See now* Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 26.

White v. Bywater (1887) 19 Q. B. D. 582; 36 W. R. 280; 51 J. P. 821.—**COLERIDGE, C.J.** and **SMITH, J.**; and **Beardsley v. Walton** (1900) 69 L. J. Q. B. 344; [1900] 2 Q. B. 1; 82 L. T. 119; 64 J. P. 436.—**CHANNELL** and **BUCKNILL, JJ.**, *adopted*.

Houghton v. Taplin (1897) 13 Times L. R. 386.—**HAWKINS** and **WRIGHT, JJ.**, *referred to*.

Dickins v. Randerson (1901) 70 L. J. K. B. 344; [1901] 1 Q. B. 437; 84 L. T. 204; 65 J. P. 262; 19 Cox C. C. 643.—**BRUCE** and **PHILLIMORE, JJ.**

Dickins v. Randerson, *explained*.
Boots v. Cowling (1903) 88 L. T. 539; 67 J. P. 195; 1 L. G. R. 884; 20 Cox C. C. 420.—**K.B.D.**

Lane v. Collins (1884) 54 L. J. M. C. 76; 14 Q. B. D. 193; 52 L. T. 257; 33 W. R. 365; 49 J. P. 89.—**MATHEW** and **DAY, JJ.**, *explained*.

Smithies v. Bridge (1902) 71 L. J. K. B. 555; [1902] 2 K. B. 13; 87 L. T. 167; 50 W. R. 686.—**LORD ALVERSTONE, C.J.** and **CHANNELL, J.**; **DARLING, J.**, *dissenting*.

Core v. James (1871) 41 L. J. M. C. 19; L. R. 7 Q. B. 135; 25 L. T. 593; 20 W. R. 201.—**Q.B.**

Observed upon, **Nichols v. Hall** (1873) 42 L. J. M. C. 105; L. R. 8 C. P. 322; 28 L. T. 473; 21 W. R. 579.—**C.P.**; *not followed*, **Pain v. Boughtwood** (1890) 59 L. J. M. C. 45; 24 Q. B. D. 353; 62 L. T. 284; 38 W. R. 428; 16 Cox C. C. 747; 54 J. P. 469.—**GRANTHAM** and **CHARLES, JJ.**

Betts v. Armstead (1888) 57 L. J. M. C. 100; 20 Q. B. D. 771; 58 L. T. 811; 36 W. R. 720; 16 Cox C. C. 418; 52 J. P. 471.—**CAVE** and **SMITH, L.JJ.**, *followed*.

Pain v. Boughtwood (1890) 59 L. J. M. C. 45; 24 Q. B. D. 353; 62 L. T. 284; 38 W. R. 428; 16 Cox C. C. 747; 54 J. P. 469.—**GRANTHAM** and **CHARLES, JJ.**

Pain v. Boughtwood, *followed*.
Dyke v. Gower (1891) 61 L. J. M. C. 70; [1892] 1 Q. B. 220; 65 L. T. 760; 56 J. P. 168; 17 Cox C. C. 421.—**COLERIDGE, C.J.** and **WRIGHT, J.**

Dyke v. Gower (1891) 61 L. J. M. C. 70; [1892] 1 Q. B. 220; 65 L. T. 260; 56 J. P. 168; 17 Cox C. C. 421.—**COLERIDGE, C.J.** and **WRIGHT, J.**, *commented on*.

Fitzpatrick v. Kelly (1873) 42 L. J. M. C. 132; L. R. 8 Q. B. 337; 28 L. T. 538; 21 W. R. 681.—**Q.B.**, *considered*.

Spiers and Pond v. Bennett (1896) 65 L. J. M. C. 144; [1896] 2 Q. B. 65; 74 L. T. 697; 44 W. R. 510; 18 Cox C. C. 332; 60 J. P. 437.—**RUSSELL OF KILLOWEN, C.J.** and **WILLS, J.**

RUSSELL, C.J.—I do not feel called upon to express any opinion as to the case of *Dyke v. Gower*. I think there is a great deal more to be said as to that case than was said, or could properly be expected to be said, by counsel for the appellants, who was attacking it. I do not think there need be a *mens rea* in order to constitute an offence under the second part of the section. If the article, which was in fact altered by abstraction, was sold without disclosure it would constitute an offence under that section.—p. 147.

Davidson v. McLeod (1878) *Justiciary Cases*, 4th ser., vol. v., part 22, p. 1; J. P. January 9th, 1878.—**CR. OF SESS.**, *dis-sented from*.

Hoyle v. Hitchman (1879) 48 L. J. M. C. 97; 4 Q. B. D. 233; 40 L. T. 252; 27 W. R. 487.—**Q.B.D.**

LUSH, J.—I am anxious to guard against being thought to agree in the further construction which all the Scotch judges have put on sect. 6 (Sale of Food and Drugs Act, 1875), when they say that it only applies to the admixture of a foreign substance in the article demanded. That is a question which must, in our Courts, be decided when it arrives.—p. 102.

Sandys v. Markham (1877) 41 J. P. 52.—
Q.B.D., *explained and applied*.
Hoyle v. Hitchman (1879) 48 L. J. M. C. 97; 4
Q. B. D. 233; 40 L. T. 252; 27 W. R. 487—Q.B.D.

Hoyle v. Hitchman, *applied*.
Horder v. Scott (1880) 49 L. J. M. C. 78; 5
Q. B. D. 552; 42 L. T. 660; 28 W. R. 918; 44
J. P. 520.—LUSH and FIELD, JJ.

Sandys v. Markham and Hoyle v. Hitchman,
approved.
Smith v. Wislen (1902) 85 L. T. 760; 66 J. P.
150.—LORD ALVERSTONE, C.J., DARLING and
CHANNELL, JJ.

Parsons v. Birmingham Dairy Co. (1882)
51 L. J. M. C. 111; 9 Q. B. D. 172; 30
W. R. 748; 46 J. P. 727.—FIELD and
CAVE, JJ., *dissented from*.
Enniskillen Union v. Hilliard (1884) 14 L. R.
Ir. 214.—EX. D.

Parsons v. Birmingham Dairy Co., *dis-*
approved.
Enniskillen Guardians v. Hilliard, *ap-*
proved.
Buckler v. Wilson (1895) 65 L. J. M. C. 18;
[1896] 1 Q. B. 83; 73 L. T. 580; 44 W. R. 220;
60 J. P. 118.—RUSSELL, C.J., POLLOCK, B. and
WRIGHT, J.

Parsons v. Birmingham Dairy Co. *See* Sale
of Food and Drugs Act, 1899 (62 & 63 Vict.
c. 51), s. 2.

Buckler v. Wilson (*supra*), *distinguished*.
Tyler v. Kingham (1900) 69 L. J. Q. B. 630;
[1900] 2 Q. B. 413; 83 L. T. 169; 64 J. P. 598;
19 Cox C. C. 547.—RIDLEY and BIGHAM, JJ.

Rouch v. Hall (1880) 50 L. J. M. C. 6;
6 Q. B. D. 17; 44 L. T. 183; 29 W. R. 304;
45 J. P. 220.—FIELD and MANISTY, JJ.,
followed.

Rolfe v. Thompson (1892) 61 L. J. M. C. 184;
[1892] 2 Q. B. 196; 67 L. T. 295; 56 J. P.
425; 17 Cox C. C. 531.—GRANTHAM and
CHARLES, JJ.

Newby v. Sims (1894) 63 L. J. M. C. 228;
[1894] 1 Q. B. 478; 10 R. 596; 70 L. T.
105; 58 J. P. 263.—DAY and LAWRENCE,
JJ., *principle adopted*.

Fortune v. Hanson (1896) 65 L. J. M. C. 71;
[1896] 1 Q. B. 202; 74 L. T. 145; 44 W. R. 431;
18 Cox C. C. 258; 60 J. P. 88.—HAWKINS and
KENNEDY, JJ.

Fortune v. Hanson, *explained*.
Reg. v. Smith (1896) 65 L. J. M. C. 104;
[1896] 1 Q. B. 596; 74 L. T. 348; 44 W. R. 492;
18 Cox C. C. 307; 60 J. P. 372.—HAWKINS and
KENNEDY, JJ.

HAWKINS, J.—The expression used by me in
my judgment in *Fortune v. Hanson*, that the
certificate is "practically conclusive," was in-
tended only to convey the impression I enter-
tained that in the vast majority of cases
brought before justices no other evidence was
offered of the impurity of the article, and to
point out the great importance of insisting
upon its containing all the material details of
the analysis to enable the justices themselves
to form a judgment on the question before
them. Had I intended to do more I should have
qualified my expression by what I have now
stated.—p. 108.

Fortune v. Hanson, *distinguished*.
Bridge v. Howard (1899) 65 L. J. M. C. 229;
[1897] 1 Q. B. 80; 75 L. T. 300; 45 W. R. 78;
18 Cox C. C. 421; 60 J. P. 790.—GRANTHAM
and KENNEDY, JJ.

KENNEDY, J.—There the analyst had only told
the Court through his certificate that there was
5 per cent. of added water. It was, on the face
of it, a mere expression of his opinion to that
effect: and the Divisional Court held, in support
of the magistrate, that such a form of certificate
constituted an insufficient statement in so far as
it was a mere expression of an opinion, without
any grounds being stated on which the magis-
trate could form his judgment. There was
nothing to show on what ground the conclusion
of the analyst was scientifically based. Here,
in my judgment, the form of the certificate
follows the words of the Act as given in the
schedule, so far as it is material. . . . Seeing
that this form of certificate has been specially
drafted with a view of conforming with the
decision in *Fortune v. Hanson*, and that, as was
not done in that case, the analyst has given the
scientific data on which his opinion is based,
and not confined himself to stating how much
foreign ingredient in the form of "added water"
was present in the sample, I think that there has
been a sufficient compliance with the Act, while
at the same time I entirely maintain the view
expressed in the case mentioned, and simply say
that this is not a similar case.—p. 230.

Reg. v. Field, White, Ex parte (1895) 64 L. J.
M. C. 158.—WILLS and LAWRENCE, JJ.,
followed.
Shortt v. Robinson (1899) 68 L. J. Q. B. 352;
80 L. T. 261; 63 J. P. 295; 19 Cox C. C. 243.—
LAWRENCE and CHANNELL, JJ.

Brown v. Foot (1892) 61 L. J. M. C. 110;
66 L. T. 649; 17 Cox C. C. 509; 56 J. P.
581.—HAWKINS and WILLS, JJ., *approved*.
Parker v. Alder (1898) 68 L. J. Q. B. 7; [1899]
1 Q. B. 20; 79 L. T. 381; 47 W. R. 142; 62 J. P.
772.—RUSSELL, C.J. and WILLS, J.

Barnes v. Rider (1892) 62 L. J. M. C. 25; 5
R. 42; 68 L. T. 447; 17 Cox C. C. 623; 57
J. P. 473.—POLLOCK, B. and HAWKINS, J.,
distinguished and dissented from.

Reg. v. Wakefield (1890) 54 J. P. 148.—
Q.B.D., *followed*.

Neal v. Devenish (1894) 63 L. J. M. C. 78;
[1894] 1 Q. B. 544; 10 R. 578; 10 L. T. 628; 58
J. P. 246.—MATHEW and CAVE, JJ.

MATHEW, J.—As regards the decision in *Barnes*
v. Rider, where the particulars were held to be
insufficient, the facts were somewhat different,
and I wish, moreover, to point out that the
decision in that case was not in accordance with
the decision in *Reg. v. Wakefield*.—p. 79.

Neal v. Devenish, *distinguished*.
Batt v. Mattinson (1900) 82 L. T. 800; 64 J. P.
615; 19 Cox C. C. 532.—RIDLEY and PHILLI-
MORE, JJ.

Rook v. Hopley (1878) 47 L. J. M. C. 118;
3 Ex. D. 209; 38 L. T. 649; 26 W. R. 663.
—EX. D., *distinguished*.

Laidlaw v. Willson (1893) 63 L. J. M. C. 35;
[1894] 1 Q. B. 74; 10 R. 6; 42 W. R. 78; 48
J. P. 58.—CHARLES and WRIGHT, JJ. *And see*
Sale of Food and Drugs Act, 1899 (62 & 63 Vict.
c. 51), s. 20.

Book v. Hopley *considered.*

Iorns v. Van Tromp (1895) 64 L. J. M. C. 171; 15 R. 392; 72 L. T. 99; 18 Cox C. C. 132; 59 J. P. 246.—CAVE and WRIGHT, JJ.

Harris v. May (1883) 53 L. J. M. C. 39; 12 Q. B. D. 97; 48 J. P. 261.—COLERIDGE, C.J. and MATHEW, J., *distinguished.*

Laidlaw v. Willson (1893) 63 L. J. M. C. 35; [1891] 1 Q. B. 74; 10 R. 6; 42 W. R. 78; 48 J. P. 58.—CHARLES and WRIGHT, JJ. *And see* Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 20.

Harris v. May and Laidlaw v. Willson, *considered.*

Iorns v. Van Tromp (1895) 64 L. J. M. C. 171; 15 R. 392; 72 L. T. 499; 18 Cox C. C. 132; 59 J. P. 246.—CAVE and WRIGHT, JJ.

Harris v. May and Laidlaw v. Willson, *considered.*

Robertson v. Harris (1900) 69 L. J. Q. B. 526; [1900] 2 Q. B. 117; 82 L. T. 536; 48 W. R. 571; 64 J. P. 565.—RIDLEY and DARLING, JJ.

Laidlaw v. Willson, *followed.*

Harris v. May and Robertson v. Harris, *not followed.*

Elliot v. Pilcher (1901) 70 L. J. K. B. 795; [1901] 2 K. B. 817; 85 L. T. 50; 65 J. P. 743.—BIGHAM and RIDLEY, JJ.

Harris v. May, *questioned.*

Laidlaw v. Willson and Iorns v. Van Tromp (1895) 64 L. J. M. C. 171; 15 R. 392; 72 L. T. 499; 18 Cox C. C. 132; 59 J. P. 246.—CAVE and WRIGHT, JJ., *considered.*

Irving v. Callow Park Dairy Co. (1902) 87 L. T. 70.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Farmers and Cleveland Dairy Co. v. Stevenson (1890) 60 L. J. M. C. 70; 63 L. T. 776; 17 Cox C. C. 201; 55 J. P. 407.—HAWKINS and STEPHEN, JJ., *distinguished.*

Hutchin v. Hindmarsh (1891) 60 L. J. M. C. 146; [1891] 2 Q. B. 181; 65 L. T. 149; 39 W. R. 607; 55 J. P. 775.—COLERIDGE, C.J. and MATHEW, J.

Farmers and Cleveland Dairy Co. v. Stevenson, *considered.*

Iorns v. Van Tromp (1895) 64 L. J. M. C. 171; 15 R. 392; 72 L. T. 499; 18 Cox C. C. 132; 59 J. P. 246.—CAVE and WRIGHT, JJ.

Sandys v. Small (1878) 47 L. J. M. C. 115; 3 Q. B. D. 449; 39 L. T. 118; 26 W. R. 814.—COCKBURN, C.J. and MELLOR, J.; and **Spiers and Pond v. Bennett** (1896) 65 L. J. M. C. 144; [1896] 2 Q. B. 65; 74 L. T. 697; 44 W. R. 510; 18 Cox C. C. 332; 60 J. P. 437.—RUSSELL, C.J. and WILLS, J., *followed.*

Pearks v. Houghton (1902) 71 L. J. K. B. 385; [1902] 1 K. B. 889; 86 L. T. 325; 50 W. R. 605; 66 J. P. 422.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Sandys v. Small, *dicta inapplicable.*

Hoyle v. Hitchman (1879) 48 L. J. M. C. 97; 4 Q. B. D. 233; 40 L. T. 252; 27 W. R. 487.—Q.B.D.

Jones v. Jones (1894) 58 J. P. 653.—MATHEW and CAVE, JJ. and **Pearks v. Knight**

(1901) 70 L. J. K. B. 1002; [1901] 2 K. B. 825; 85 L. T. 379; 50 W. R. 104; 65 J. P. 822.—WILLS and KENNEDY, JJ., *distinguished.*

Pearks v. Houghton (1902) 71 L. J. K. B. 385; [1902] 1 K. B. 889; 86 L. T. 325; 50 W. R. 605; 66 J. P. 422.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Pearks v. Houghton, *distinguished.*

Hayes v. Rule (1902) 87 L. T. 133; 66 J. P. 661.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Jones v. Davies (1893) 69 L. T. 497; 57 J. P. 808; 17 Cox C. C. 694.—DAY and LAW-RANCE, JJ.; and **Platt v. Tyler** (1894) 58 J. P. 71.—COLERIDGE, C.J. and DAY, J., *explained.*

Petchey v. Taylor (1898) 78 L. T. 501; 62 J. P. 360; 19 Cox C. C. 38.—WILLS and KENNEDY, JJ.

Crane v. Lawrence (1890) 59 L. J. M. C. 110; 25 Q. B. D. 152; 63 L. T. 197; 38 W. R. 620; 17 Cox C. C. 135; 54 J. P. 471.—CAVE and SMITH, JJ., *explained.*

Wheat v. Brown (1892) 61 L. T. 9. M. C. 94; [1892] 1 Q. B. 418; 66 L. T. 464; 40 W. R. 462; 56 J. P. 153.—LAWRANCE and WRIGHT, JJ.

Wheat v. Brown. Compare Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 18.

Wray v. Ellis (1858) 1 E. & E. 276; 28 L. J. M. C. 45; 7 W. R. 91.—Q.B., *distinguished and doubted.*

Reg. v. Titterton (1895) 64 L. J. M. C. 202; [1895] 2 Q. B. 61; 15 R. 418; 73 L. T. 345; 43 W. R. 603; 59 J. P. 327.—RUSSELL, C.J. and CHARLES, J.

Contagious Diseases.

Nichols v. Hall (1873) 42 L. J. M. C. 105; L. R. 8 C. P. 322; 28 L. T. 473; 21 W. R. 579.—C.P., *referred to.*

Dickinson v. Fletcher (1873) 43 L. J. M. C. 25; L. R. 9 C. P. 1; 29 L. T. 540.—C.P.

Bodger v. Nicholls (1873) 28 L. T. 441.—Q.B., *opinion not adopted.*

Ward v. Hobbs (1878) 48 L. J. C. P. 281; 4 App. Cas. 13; 40 L. T. 73; 27 W. R. 114.—H.L. (E.).

Muir v. Hore (1877) 47 L. J. M. C. 17; 37 L. T. 315.—C.P.D., *discussed.*

Reg. v. Waterford JJ. (1899) [1900] 2 Ir. R. 307.—Q.B.D.

Rex v. Sutton (1767) 4 Burr. 2116; and **Rex v. Vantandillo** (1815) 4 M. & S. 73; 16 R. R. 389; **Rex v. Burnett** (1815) 4 M. & S. 272; 16 R. R. 468.

Adopted. Ward v. Hobbs (1877) 46 L. J. Q. B. 473; 2 Q. B. D. 331; 36 L. T. 511.—Q.B.D.; [*reversed*, C.A. and H.L. (E.). *see supra*]; Reg. v. Clarence (1880) 58 L. J. M. C. 10; 22 Q. B. D. 23; 59 L. T. 780; 37 W. R. 166; 53 J. P. 149.—C.C.R.: *considered.* Metropolitan Asylum District v. Hill (1881) 50 L. J. Q. B. 353; 6 App. Cas. 193; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664.—H.L. (E.).

Rex v. Vantandillo and Rex v. Burnett, *referred to.*

Att.-Gen. v. Manchester Corporation (1893) 62

L. J. Ch. 459; [1893] 2 Ch. 87; 68 L. T. 608; 41 W. R. 459; 57 J. P. 343.—CHITTY, J.

Fleet v. Metropolitan Asylums Board (1886) 2 Times L. R. 361.—C.A.

Applied, Bendelow v. Wortley Union (1887) 57 L. J. Ch. 762; 57 L. T. 849; 36 W. R. 168.—STIRLING, J.; *referred to*, Att.-Gen. v. Manchester Corporation (1893).—CHITTY, J. (*supra*).

Water Supply.

Lewis v. Weston-super-Mare Local Board (1888) 58 L. J. Ch. 39; 40 Ch. D. 55; 59 L. T. 769; 37 W. R. 121.—STIRLING, J., *distinguished*.

Kendal v. Lewisham Borough Council (1903) 1 L. G. R. 416; 67 J. P. 236.—KEKEWICH, J.

Cleveland Water Co. v. Redcar Local Board (1894) 64 L. J. Ch. 64; [1895] 1 Ch. 168; 13 R. 18; 43 W. R. 90; 59 J. P. 7.—CHITTY, J., *distinguished*.

Huddersfield Corporation v. Ravensthorpe Urban Council (1897) 66 L. J. Ch. 581; [1897] 2 Ch. 121; 45 L. T. 817; 45 W. R. 642; 61 J. P. 596.—C.A. LINDLEY, LOPES and RIGBY, L.J.; *reversing* 66 L. J. Ch. 286; [1897] 1 Ch. 652.—NORTH, J.

LINDLEY, L.J.—Reliance is placed on the decision of Chitty, J. in *Cleveland Water Co. v. Redcar Local Board*. That decision appears to me perfectly right, and if it had been the other way, the learned judge would have attributed to sect. 52 an operation which he saw, and which I think everybody else sees, was never contemplated by the legislature at all. He had not to deal with what we have here—the extension of waterworks into a new district; he had not that problem before him at all. He had before him the question of whether established waterworks in a particular district were prohibited from extending those waterworks within that same district.—p. 584.

Hill v. Wallasey Local Board (1892) [1892] 3 Ch. 117; 67 L. T. 49; 56 J. P. 469.—KEKEWICH, J.; *reversed* (1893) 63 L. J. Ch. 1; [1894] 1 Ch. 133; 7 R. 51; 69 L. T. 641; 42 W. R. 81.—C.A. WISEMAN, M.R., LOPES and KAY, L.JJ.

By-laws.

Bentham v. Hoyle (1878) 47 L. J. M. C. 51; 3 Q. B. D. 289; 37 L. T. 753; 26 W. R. 314.—COCKBURN, C.J. and MANISTY, J., *adopted*.

London and Brighton Ry. v. Watson (1878) 47 L. J. C. P. 634; 3 C. P. D. 429, 436; 39 L. T. 199; 36 W. R. 856.—C.P.D.; Dyson v. L. & N. W. Ry. (1881) 50 L. J. M. C. 78; 7 Q. B. D. 32; 44 L. T. 609; 29 W. R. 565.—Q.B.D.; and **White v. Morley** (1899) 68 L. J. Q. B. 702; [1899] 2 Q. B. 34; 80 L. T. 761; 47 W. R. 583; 63 J. P. 550.—DARLING and CHANNELL, JJ.

Flack, Ex parte (1880) 1 N. S. W., L. R. 27; and **Brooks v. Selwyn** (1882) 3 N. S. W., L. R. 256, *adopted*.

Slattery v. Naylor (1888) 57 L. J. P. C. 73; 13 App. Cas. 446; 59 L. T. 41; 36 W. R. 897.—P.C.

Kent County Council v. Humphrey (1895) 64 L. J. M. C. 190; [1895] 1 Q. B. 903; 15

R. 414; 72 L. T. 567; 43 W. R. 506; 18 Cox C. C. 163; 59 J. P. 520.—CHARLES and WRIGHT, JJ., *adopted*.

Alty v. Farrell (1896) 65 L. J. M. C. 115; [1896] 1 Q. B. 636; 74 L. T. 492; 18 Cox C. C. 321; 60 J. P. 373.—RUSSELL, C.J. and WRIGHT, J.

Slattery v. Naylor (1888) 57 L. J. P. C. 73; 13 App. Cas. 446; 59 L. T. 41; 36 W. R. 897.—P.C.; and **Alty v. Farrell** (*supra*), *considered*.

Kruse v. Johnson (1898) 67 L. J. Q. B. 782; [1898] 2 Q. B. 91; 78 L. T. 647; 46 W. R. 630; 62 J. P. 469.—RUSSELL, C.J., JEUNE, P., CHITTY, L.J., WRIGHT, DARLING and CHANNELL, JJ.

Strickland v. Hayes (1896) 65 L. J. M. C. 55; [1896] 1 Q. B. 290; 74 L. T. 137; 44 W. R. 398; 18 Cox C. C. 244; 60 J. P. 164.—LINDLEY and KAY, L.JJ., *commented on*.

Burnett v. Berry (1896) 65 L. J. M. C. 118; [1896] 1 Q. B. 641; 74 L. T. 494; 44 W. R. 512; 60 J. P. 375; 18 Cox C. C. 325.—RUSSELL, C.J. and WRIGHT, J.

RUSSELL, C.J.—I observe that in *Strickland v. Hayes*, Lindley, L.J. (sitting as a member of a divisional Court) is reported to have said in effect that by-laws could not create new offences; and that they could only prohibit such acts as would be recognised as offences and prohibited as such by the criminal law. I cannot think that the learned L.J. meant to say, or did say, that the power to make by-laws was restricted to offences already existing and for which a summary method of punishment has already been provided.—p. 119.

Burnett v. Berry and Kruse v. Johnson (*supra*), *followed*.

White v. Morley (1899) 68 L. J. Q. B. 702; [1899] 2 Q. B. 34; 80 L. T. 761; 47 W. R. 583; 63 J. P. 550.—DARLING and CHANNELL, JJ.

Strickland v. Hayes, *distinguished*.

Burnett v. Berry and White v. Morley (*supra*), *approved*.

Thomas v. Sutters (1899) 69 L. J. Ch. 27; [1900] 1 Ch. 10; 81 L. T. 469; 48 W. R. 133.—C.A. LINDLEY, M.R., SIR F. H. JEUNE and ROMER, L.J.

LINDLEY, M.R.—What is there in this by-law which can said to be unreasonable or objectionable, having regard to the very wide powers which are given by sect. 23 of the Act? . . . To come within the by-law they (the public) must frequent the street for the purpose of betting. It is said that there is something unreasonable in that. As regards the authorities, *Burnett v. Berry* and *White v. Morley* are in favour of the validity of the by-law. We are asked to overrule those cases, but there is no reason for it to my mind. Counsel for the appellant has done what he can to persuade us; but when we come to examine his reasons, they are reduced to this—that the decision (in which I took part) in *Strickland v. Hayes* goes the whole length of his argument. . . . The difference between that case and this is obvious. In the Metropolitan Streets Act, 1867, the legislature was not dealing with betting at all, but with street traffic. The whole object of the Act was to regulate the traffic of the metropolis. It is true that they inserted sect. 23 in the Act, and with

reference to the traffic they have said that three persons should be deemed to be obstructing the street if they assembled together in any part of it for the purpose of betting. That is the only point that counsel has. I decline to extend or stretch the decision in *Strickland v. Hayes*, which I think perfectly right, to the length of holding that because there is a provision of that kind in an Act for the regulation of traffic, the County Council have no power to make a by-law for the regulation of the streets with reference to another matter—namely, betting without obstruction.—pp. 28, 29.

Strickland v. Hayes, considered.

Kruse v. Johnson (*supra*), *applied*.

Gentel v. Rapps (1901) 71 L. J. K. B. 105; [1902] 1 K. B. 160; 85 L. T. 683; 50 W. R. 216; 66 J. P. 117.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

LORD ALVERSTONE, C.J.—If *Strickland v. Hayes* is to be understood as meaning more than that a by-law cannot convert an offence which a statute has created into a different offence, it cannot be regarded as law. If the effect of the decision is that a local authority empowered by the legislature to make by-laws for the prevention of nuisances can in no case make a by-law defining a particular act to be a nuisance which would not otherwise be a nuisance, it cannot now be supported. In that case, however, *Lindley, L.J.* appears to have recognised that a by-law, provided it is not repugnant to the law, may deal with a matter with which the law has not already dealt. He said, "Looking at that section . . . they were made." The judgments in *Kruse v. Johnson* and the cases relating to by-laws for the suppression of betting, clearly recognise the right of the local authority in making by-laws to define and describe what particular acts will be nuisances in particular circumstances.—p. 108.

Kruse v. Johnson, applied.

Nash v. Finlay (1902) 85 L. T. 682; 66 J. P. 183.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Badley v. Cuckfield Rural Council (1895) 59

J. P. 582.—RUSSELL, C.J., and CHARLES, J., *adopted*.

Salt v. Scott-Hall (1903) 72 L. J. K. B. 627; [1903] 2 K. B. 245; 88 L. T. 868; 52 W. R. 95; 67 J. P. 306; 1 L. G. R. 753; 20 Cox C. C. 492.—ALVERSTONE, C.J., WILLS and CHANNELL, JJ.

Salt v. Scott-Hall, followed.

Pomeroy v. Malvern Urban Council (1903) 89 L. T. 555; 1 L. G. R. 825; 67 J. P. 375.—K.B.D.

3. EXPENSES.

Wakefield Sanitary Authority v. Mander

(1880) 5 C. P. D. 248; 28 W. R. 922; 44 J. P. 522.—GROVE and DENMAN, JJ., *distinguished*.

Clacton Local Board v. Young (1894) 64 L. J. M. C. 124; [1895] 1 Q. B. 395; 15 R. 92; 71 L. T. 877; 43 W. R. 219; 59 J. P. 581.—POLLOCK, B. and GRANTHAM, J.

POLLOCK, B.—*Wakefield Urban Sanitary Authority v. Mander* raised a momentary doubt in my mind; but there the section spoke of the owners of premises abutting on the part which required to be paved, which in that case was a footway. The language in the present case is very different.—p. 127.

Bowditch v. Wakefield Local Board (1871)

40 L. J. M. C. 214; L. R. 6 Q. B. 567; 25 L. T. 88.—Q.B., *adopted*.

Pound v. Plumstead Board of Works (1871) 41 L. J. M. C. 51; L. R. 7 Q. B. 183; 25 L. T. 461; 20 W. R. 177.—Q.B.; *Plumstead Board of Works v. British Land Co.* (1874) 44 L. J. Q. B. 38; L. R. 10 Q. B. 16, 25.—Q.B.; *reversed*, 44 L. J. Q. B. 38; L. R. 10 Q. B. 203; 32 L. T. 94.—EX. CH.

Bowditch v. Wakefield Local Board,

approved.

Wright v. Ingle (1885) 55 L. J. M. C. 17; 16 Q. B. D. 379; 54 L. T. 511; 31 W. R. 220; 50 J. P. 436.—C.A. ESHER, M.R., COTTON and BOWEN, L.JJ.

Bowditch v. Wakefield Local Board, applied.

Christchurch Inclosure Act, In re, Meyrick v. Att.-Gen. (1894) 63 L. J. Ch. 657; [1894] 3 Ch. 209; 8 R. 480; 71 L. T. 122; 42 W. R. 614; 58 J. P. 556.—STIRLING, J.

Bowditch v. Wakefield Local Board, applied.

St. Mary, Islington, Vestry v. Colbett (1894) 64 L. J. M. C. 36; [1895] 1 Q. B. 369; 15 R. 83; 71 L. T. 573; 43 W. R. 44.—MATHEW and CHARLES, JJ.

Bowditch v. Wakefield Local Board,

approved.

Hornsey Urban Council v. Smith (1897) 66 L. J. Ch. 476; [1897] 1 Ch. 843; 76 L. T. 431; 45 W. R. 581.—C.A. LINDLEY, SMITH and REGBY, L.JJ.; *reversing* 61 J. P. 311.—KEKEWICH, J.

Hesketh v. Atherton (1873) 43 L. J. M. C.

37; L. R. 9 Q. B. 4; 29 L. T. 530; 22 W. R. 58.—Q.B.

Applied, Reg. v. Local Government Board (1882) 51 L. J. M. C. 121; 9 Q. B. D. 600; 46 J. P. 820.—GROVE and NORTH, JJ.; *explained*, *Wake, Ex parte* (1883) 52 L. J. M. C. 78; 11 Q. B. D. 291.—Q.B.D.; *applied*, *Bournemouth Commissioners v. Watts* (1884) 54 L. J. Q. B. 93; 14 Q. B. D. 87; 51 L. T. 823; 33 W. R. 280; 49 J. P. 102.—HAWKINS and SMITH, JJ. *And see* *Midland Ry. v. Watton* (1886) 55 L. J. M. C. 99; 17 Q. B. D. 30; 54 L. T. 482; 34 W. R. 524; 50 J. P. 405.—C.A.

Hesketh v. Atherton, applied.

Reeles v. Wirral Union (1886) 55 L. J. M. C. 106; 17 Q. B. D. 107; 34 W. R. 412; 50 J. P. 596.—MATHEW and SMITH, JJ.

Parkinson v. Blackburn Corporation (1859)

33 L. T. (O.S.) 119.—Q.B., *distinguished*.

Bayley v. Wilkinson (1864) 16 C. B. (N.S.) 161; 33 L. J. M. C. 161; 10 Jur. (N.S.) 726; 10 L. T. 543; 12 W. R. 797.—C.P.; *Hall v. Potter* (1869) 39 L. J. M. C. 1; 21 L. T. 454.—Q.B.

Bayley v. Wilkinson, followed.

Cook v. Ipswich Local Board (1871) L. R. 6 Q. B. 451; 40 L. J. M. C. 169; 24 L. T. 579; 19 W. R. 1079.—Q.B.

Bayley v. Wilkinson, followed.

Walthamstow Local Board v. Staines (1891) 60 L. J. Ch. 738; [1891] 2 Ch. 606; 65 L. T. 480.—C.A. LINDLEY, BOWEN and KAY, L.JJ.

Cook v. Ipswich Local Board (1871) 40 L. J.

M. C. 169; L. R. 6 Q. B. 451; 24 L. T.

579; 19 W. R. 1079.—Q.B., *dictum* approved.

Shanklin Local Board v. Miller (1880) 49 L. J. C. P. 512; 5 C. P. D. 272; 42 L. T. 788; 29 W. R. 63; 44 J. P. 635.

LOPES, J.—In *Cook v. The Ipswich Local Board*, Blackburn, J. says: "It appears to me to be only directory; there is nothing to make the deposit of plans a condition precedent so as to make void the notices and prevent the expenses from being recoverable." It is true, as was pointed out, that this is a *dictum*, but I have no hesitation in saying I entirely agree with it.—p. 515.

Cook v. Ipswich Local Board, applied.

Wake (or Reg.) v. Sheffield Corporation (1883) 53 L. J. M. C. 1; 12 Q. B. D. 142; 50 L. T. 76; 32 W. R. 82; 48 J. P. 197.—C.A. BRETT, M.R. and BOWEN, L.J.

Cook v. Ipswich Local Board, followed.

Walthamstow Local Board v. Staines (1891) 60 L. J. Ch. 738; [1891] 2 Ch. 606; 65 L. T. 430.—C.A. LINDLEY, BOWEN and KAY, L.JJ.

Cook v. Ipswich Local Board, explained and distinguished.

Derby Corporation v. Grudgings (1894) 63 L. J. M. C. 170; [1894] 2 Q. B. 496; 10 R. 565; 72 L. T. 594; 43 W. R. 74.—CHARLES and COLLINS, JJ.

COLLINS, J.—The *Sheffield Case* [*infra*, col. 1660] appears to me to be an authority directly in point upon this question. . . . At the root of that decision lies the conclusion that the order was sufficient to found the jurisdiction of the magistrate. That being so all distinctions between that case and the present fall to the ground. It is said that here the order in terms referred to the carriage-way as well as the footway; but so in the *Sheffield Case* the order must by reference to the plan have referred to the land which did not form a part of the street. The only difficulty I have felt arises from *Cook v. Ipswich Local Board*. There an apportionment was made in which two streets were lumped together. It was disputed and the justices treated it as a nullity, and a fresh apportionment was made. The point was then taken that there was no jurisdiction to make the second apportionment, and upon that the Court held that the first apportionment was to be treated as a nullity. But on examining the case it will be seen that the conclusion that the first apportionment was a nullity was come to by the magistrates sitting as arbitrators. In *Shanklin Local Board v. Miller* it was so stated in argument by Mr. Archibald, and the view was accepted in terms by the Court. But the matter does not rest there, because in *Mayor of Manchester v. Hampson* (35 W. R. 335, 591) there is a clear expression of opinion by Manisty, J. that a notice given by a local authority embracing works which the frontagers cannot be legally called upon to do, is only erroneous and not void.—pp. 175, 176.

Cook v. Ipswich Local Board, distinguished.

Wirral Highway Board v. Newell (1895) 64 L. J. M. C. 181; [1895] 1 Q. B. 827; 15 R. 309; 72 L. T. 535; 43 W. R. 328; 59 J. P. 183.—LAWRENCE and KENNEDY, JJ.

Cook v. Ipswich Local Board, referred to.

Hayles v. Sandown Urban Council (1902) 72

L. J. K. B. 48; [1903] 1 L. B. 169; 88 L. T. 61; 51 W. R. 348; 67 J. P. 177.—LORD ALVERSTONE, C.J., WILLS and CHANNELL, JJ.

Shanklin Local Board v. Miller (1880) 49

L. J. C. P. 512; 5 C. P. D. 272; 42 L. T. 738; 29 W. R. 63; 44 J. P. 635.—C.P.D., *referred to*.

Derby Corporation v. Grudgings (1894) 63 L. J. M. C. 170; [1894] 2 Q. B. 496; 10 R. 565; 72 L. T. 594; 43 W. R. 74.—CHARLES and COLLINS, JJ.

Wake, *Ex parte*, 52 L. J. M. C. 78; 11 Q. B. D. 291.—Q.B.D.; *affirmed nom.* Wake (or Reg.) v. Sheffield Corporation (1883) 53 L. J. M. C. 1; 12 Q. B. D. 142; 50 L. T. 76; 32 W. R. 82; 48 J. P. 197.—C.A.

Wake (or Reg.) v. Sheffield Corporation (1883)

53 L. J. M. C. 1; 12 Q. B. D. 142; 50 L. T. 76; 32 W. R. 82; 48 J. P. 197.—C.A., *followed*.

Midland Railway v. Watton (1886) 55 L. J. M. C. 99; 17 Q. B. D. 30; 54 L. T. 482; 34 W. R. 524; 50 J. P. 405.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Wake (or Reg.) v. Sheffield Corporation, considered.

Eccles v. Wirral Union (1886) 55 L. J. M. C. 106; 17 Q. B. D. 107; 34 W. R. 412; 50 J. P. 596.—MATHEW and SMITH, JJ.

MATHEW, J.—It was argued for the respondents that the position of a person charged under sect. 150 is similar to that of a person charged with a poor rate, where a warrant must issue as a matter of course, the duty of the magistrate in that case being only ministerial. And they relied on *Ex parte Wake* as showing that the appellant's remedy was under sect. 268, by appeal to the Local Government Board. But I do not think that Cave, J. intended to lay down such a general proposition as is contended for, and in the Court of Appeal the Master of the Rolls carefully abstained from expressing an opinion that the question of liability cannot be raised before the magistrates.

Wake (or Reg.) v. Sheffield Corporation, followed.

Walthamstow Local Board v. Staines (1891) 60 L. J. Ch. 738; [1891] 2 Ch. 606; 65 L. T. 430.—C.A. LINDLEY, BOWEN and KAY, L.JJ.

Wake (or Reg.) v. Sheffield Corporation, followed.

Derby Corporation v. Grudgings (1894) 63 L. J. M. C. 170; [1894] 2 Q. B. 496; 10 R. 565; 72 L. T. 594; 43 W. R. 74.—CHARLES and COLLINS, JJ. See extract, *supra*, col. 1659.

Walthamstow Local Board v. Staines (1891)

60 L. J. Ch. 738; [1891] 2 Ch. 606; 65 L. T. 430.—C.A., *followed*.

West Hartlepool Corporation v. Robinson (1897) 75 L. T. 677; 45 W. R. 312; 61 J. P. 200.—STIRLING, J.; *affirmed*, 77 L. T. 387; 46 W. R. 218; 62 J. P. 35.—C.A.

West v. Downman (1880) 14 Ch. D. 111

42 L. T. 340; 29 W. R. 6.—C.A. JESSEL, M.R., BRETT and COTTON, L.JJ.; *affirming* BACON, V.C.

Dicta adopted, Lea v. Abergavenny Improvement Commissioners (1885) 55 L. J. M. C. 25;

16 Q. B. D. 18, 23; 33 L. T. 728; 34 W. R. 105; 50 J. P. 165.—POLLOCK, B., and MANISTY, J.; Bettsworth and Richer, In re (1888) 57 L. J. Ch. 749; 37 Ch. D. 535, 540; 58 L. T. 796; 36 W. R. 544; 52 J. P. 740.—NORTH, J.; Hornsey Local Board v. Monarch Building Society (1889) 58 L. J. Q. B. 418; 23 Q. B. D. 149.—MATHEW and GRANTHAM, JJ.; *followed*, Boor, In re, Boor v. Hopkins (1889) 58 L. J. Ch. 285; 40 Ch. D. 572; 60 L. T. 412; 37 W. R. 349; 53 J. P. 467.—KAY, J.

West v. Downman, dictum disapproved.

Sandgate Local Board v. Keene (1892) 61 L. J. Q. B. 775; [1892] 1 Q. B. 831; 66 L. T. 741; 56 J. P. 484.—C.A. Esher, M.R., FRY and LOPES, L.JJ.

[In *West v. Downman*, Bacon, V.-C. expressed the opinion that where an owner disputes not only the amount of an apportionment, but also his liability, the matter is not the subject of arbitration under the Act.]

ESHER, M.R.—I cannot agree with the *dictum* of Bacon, V.-C., in *West v. Downman*.—p. 777.

West v. Downman, followed.

Willesden Local Board and Wright, In re (1896) 65 L. J. Q. B. 567; [1896] 2 Q. B. 412; 75 L. T. 13; 44 W. R. 676; 60 J. P. 708.—C.A. Esher, M.R. and SMITH, L.J.

Sandgate Local Board v. Keene (1892) 61

L. J. Q. B. 775; [1892] 1 Q. B. 831; 66 L. T. 741; 56 J. P. 484.—C.A., *explained and distinguished*.

Folkestone Corporation v. Brooks (1893) 62 L. J. Ch. 863; [1893] 3 Ch. 22; 69 L. T. 403; 58 J. P. 53.—C.A. LINDLEY, LOPES and SMITH, L.JJ.; *reversing in part* 68 L. T. 674.—WRIGHT, J.

WRIGHT, J.—The judgment of the M.R. in *Sandgate Local Board v. Keene* does not contain any expression extending the right (to go to arbitration) to any case except cases in which the apportionment itself is disputed; the other judgments do contain expressions which are consistent with an intention to hold that the right extends to every dispute on any subject; but I think it is implied that there must be a dispute of the apportionment—that is, a dispute, on whatever ground, of the proportion which the party is called upon to pay . . . this construction seems to me to be required by the very terms of the section.—p. 866.

[The C.A. allowed the appeal on the ground that the local authority had by their conduct precluded themselves from denying that there was a dispute as to the apportionment.]

Sandgate Local Board v. Keene, considered.

Folkestone Corporation v. Brooks, followed.

West Hartlepool Corporation v. Robinson (1897) 75 L. T. 677; 45 W. R. 312; 61 J. P. 200.—STIRLING, J.; *affirmed*, 77 L. T. 887; 46 W. R. 218; 62 J. P. 35.—C.A. LINDLEY, M.R., CHITTY and WILLIAMS, L.JJ.

Tunbridge Wells Local Board v. Ackroyd, 41

L. T. 101.—EX. D.; *reversed*, (1880) 49 L. J. Ex. 403; 5 Ex. D. 199; 28 W. R. 450; 42 L. T. 640; 44 J. P. 504.—C.A. BRAMWELL, COTTON, and THESIGER, L.JJ.

Wilson v. Bolton Corporation (1871) 41

L. J. M. C. 4; L. R. 7 Q. B. 105; 25 L. T. 597; 20 W. R. 246.—Q.B., *distinguished*.

Tottenham Local Board v. Rowell (1880) 50 L. J. Ch. 99; 15 Ch. D. 378; 43 L. T. 616; 29 W. R. 86.—C.A. JAMES, BRETT, and COTTON, L.JJ.

Eddleston v. Francis (1860) 7 C. B. (N.S.)

568; 3 L. T. 270; 9 W. R. C. L. Dig. 73.—C.P., *distinguished*.

Greece v. Hunt (1877) 46 L. J. M. C. 202; 2 Q. B. D. 389; 36 L. T. 404; 25 W. R. 543.—Q.B.D.

FIELD, J.—The case of *Eddleston v. Francis*, although at first sight apparently an authority to the contrary, is not so really, for, although the case was decided after the passing of the Local Government Act of 1858, the proceedings in question in that case had taken place before its passing, and the Court upon that ground, declined to apply the 62nd section of the Act to proceedings commenced before its passing.

Eddleston v. Francis, referred to.

Prescott v. Nicholson (1889) 60 L. T. 563; 53 J. P. 597.—DENMAN and MANISTY, JJ.

Greece v. Hunt (1877) 46 L. J. M. C. 202;

2 Q. B. D. 389; 36 L. T. 404; 25 W. R. 543.—Q.B.D., *applied*.

Simcox v. Handsworth Local Board (1881) 51 L. J. Q. B. 168; 8 Q. B. D. 39; 30 W. R. 273; 46 J. P. 260.—GROVE and BOWEN, JJ.; Reg. v. Local Government Board (1882) 51 L. J. M. C. 121; 9 Q. B. D. 600, 608; 46 J. P. 820.—GROVE and NORTH, JJ. [*affirmed*, C.A.]

Greece v. Hunt, inapplicable.

Pool Highway Board v. Gunning (1882) 51 L. J. M. C. 49; 46 L. T. 163; 31 W. R. 30; 46 J. P. 708.—FIELD, J.

Greece v. Hunt, referred to.

Hornsey Local Board v. Monarch Investment Building Society (1889) 59 L. J. Q. B. 105; 24 Q. B. D. 1; 61 L. T. 867; 38 W. R. 85; 54 J. P. 391.—C.A. Esher, M.R., LINDLEY and LOPES, L.JJ.

West Ham Local Board v. Maddams (1876)

1 Ex. D. 516, n.; 33 L. T. 809; 40 J. P. 470.—Q.B.D., *approved*.

Tottenham Local Board v. Rowell (No. 1) (1876) 46 L. J. Q. B. 432; 1 Ex. D. 514; 35 L. T. 887; 25 W. R. 435.—C.A.

Tottenham Local Board v. Rowell (No. 1)

(1876) 46 L. J. Q. B. 432; 1 Ex. D. 514; 35 L. T. 887; 25 W. R. 135.—C.A., *approved*.

Tottenham Local Board v. Rowell (No. 2) (1880) 50 L. J. Ch. 99; 15 Ch. D. 378; 43 L. T. 616; 29 W. R. 36.—C.A. JAMES, BRETT and COTTON, L.JJ.

West Ham Local Board v. Maddams and

Tottenham Local Board v. Rowell (No. 1), distinguished.

Leeds Corporation v. Robshaw (1887), 51 J. P. 441.—COLERIDGE, C.J., MELLISH, L.J. and SMITH, J.

A. L. SMITH, J.—It should be noticed that in the Act of 1877, which was the first Act as applicable to Leeds in which, remedy was given

by way of summary proceedings, one year was the limit given for such proceedings (*see* sect. 96), and by the same Act, sect. 109, when it provided for an action being brought by way of debt upon the statute, no limit is mentioned or prescribed. In the face of these two sections, how can it be said that the limitation is the same? . . . But it is said that *West Ham Local Board v. Maddams* and *Tottenham Local Board v. Rowell*, in the C. A., have held otherwise. Have they? Those cases were decided upon sect. 24 of the Local Government Amendment Act (24 and 25 Vict. c. 61). . . . What the Court of Q. B. held the meaning of this section to be was, that before its enactment the only mode of recovering the expenses being in a summary manner, and, therefore, only recoverable within six months, if the party exercised the option given by the section of proceedings in the County Court, he must do so within the same limit of time, the section expressly stating that proceedings may be taken in the County Court as if such demands were debts within the cognisance of such courts.

Tottenham Local Board v. Rowell (No. 1), *followed*.

Hammersmith Vestry v. Lowenfeld (1896) 65 L. J. Q. B. 662; [1896] 2 Q. B. 278; 75 L. T. 182; 45 W. R. 60; 60 J. P. 600.—CAVE and WILLS JJ

West Ham Local Board v. Maddams, and **Tottenham Local Board v. Rowell** (No. 1), *distinguished*.

Blackburn Corporation v. Sanderson (1902) 71 L. J. K. B. 590; [1902] 1 K. B. 794; 86 L. T. 304; 66 J. P. 452.—C.A. WILLIAMS, STIRLING and COZENS-HARDY, L.JJ.

Hornsey Local Board v. Monarch Investment Building Society (1889) 59 L. J. Q. B. 105; 24 Q. B. D. 1; 61 L. T. 867; 38 W. R. 85; 54 J. P. 391.—C.A., *referred to*.

Owen, *In re* (1894) 63 L. J. Ch. 749; [1894] 3 Ch. 220; 8 R. 566; 71 L. T. 181; 43 W. R. 55.—STIRLING, J.

Reg. v. Swindon Local Board (1879) 48 L. J. M. C. 1. 9; 4 Q. B. D. 305; 40 L. T. 424; 27 W. R. 732.—Q.B.D.; *affirmed*, (1880) 49 L. J. Q. B. 522; 42 L. T. 614; 28 W. R. 80; 44 J. P. 505.—C.A.

Distinguished, *Illingworth v. Bulmer Highway Board* (1884) 53 L. J. M. C. 60; 32 W. R. 450.—C.A.; *Reg. v. St. Maryebone Vestry* (1887) 20 Q. B. D. 415.—POLLOCK, B., and HAWKINS, J.; *Bettesworth and Richer, In re* (1888) 57 L. J. Ch. 749; 37 Ch. D. 535; 58 L. T. 796; 36 W. R. 544; 52 J. P. 740.—NORTH, J.

Reg. v. Swindon Local Board, *followed with reluctance*.

Millard v. Bulby-with-Heathorpe Urban Council (1904) 90 L. T. 489; 68 J. P. 245; 2 L. G. R. 539.—ALVERSTONE, C.J., WILLS and KENNEDY, JJ.

Reg. v. Swindon Local Board, *distinguished*.

Tottenham Local Board v. Williamson (1893) 62 L. J. Q. B. 322; 69 L. T. 51.—LOPES, L.J.

Tottenham Local Board v. Rowell (No. 2) 49 L. J. Ch. 147; 41 L. T. 720; 28 W. R. 409.—

MALINS, V.-C.; *reversed*, (1889) 50 L. J. Ch. 99; 15 Ch. D. 378; 43 L. T. 616; 29 W. R. 36.—C.A. JAMES, BRETT and COTTON, JJ.

Tottenham Local Board v. Rowell (No. 2), *observations adopted*.

Birmingham Corporation v. Baker (1881) 17 Ch. D. 782; 46 J. P. 52.—JESSEL, M.R.; Sunderland Corporation v. Alcock (1882) 51 L. J. Ch. 546; 46 L. T. 377; 30 W. R. 655.—KAY, J.

Tottenham Local Board v. Rowell (No. 2), *applied*.

Bettesworth and Richer, *In re* (1888) 57 L. J. Ch. 749; 37 Ch. D. 535; 58 L. T. 796; 36 W. R. 544; 52 J. P. 740.—NORTH, J.

Tottenham Local Board v. Rowell (No. 2), *approved*.

Hornsey Local Board v. Monarch Investment Building Society (1889) 59 L. J. Q. B. 105; 24 Q. B. D. 1; 61 L. T. 867; 38 W. R. 85; 54 J. P. 391.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Bettesworth and Richer, In re (1888) 57 L. J. Ch. 749; 37 Ch. D. 535; 58 L. T. 796; 36 W. R. 544; 52 J. P. 740. *approved*.

Egg v. Hlayney (1888) 57 L. J. Q. B. 460; 21 Q. B. D. 107; 59 L. T. 65; 36 W. R. 893; 52 J. P. 517.—FIELD and WILLS, JJ.

Bettesworth and Richer, In re, *distinguished*.

Boor, *In re*, Boor v. Hopkins (1889) 58 L. J. Ch. 285; 40 Ch. D. 572; 60 L. T. 412; 37 W. R. 349; 53 J. P. 467.—KAY, J.

Bettesworth and Richer, In re, *approved*.

Hornsey Local Board v. Monarch Investment Building Society (1889) 59 L. J. Q. B. 105; 24 Q. B. D. 1; 61 L. T. 867; 38 W. R. 85; 54 J. P. 391.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Bettesworth and Richer, In re, *considered*.

Stock v. Meakin (1900) 69 L. J. Ch. 401; [1900] 1 Ch. 683; 82 L. T. 248; 48 W. R. 420.—C.A. LINDLEY, M.R., RIGBY and WILLIAMS, L.JJ.

Bettesworth and Richer, In re, *observations applied*.

Allen and Driscoll's Contract, *In re* (1904) 73 L. J. Ch. 382; [1904] 1 Ch. 493; 90 L. T. 637; 52 W. R. 392; 68 J. P. 253; 2 L. G. R. 512.—BYRNE, J.; *affirmed*, 73 L. J. Ch. 614; [1904] 2 Ch. 226; 52 W. R. 681.—C.A.

Boor, In re, Boor v. Hopkins (1889).—KAY, J. (*supra*).

Distinguished Hornsey Local Board v. Monarch Investment Building Society (1889).—Q.B.D. (*supra*, col. 1663); Tubbs v. Wynne (1896) 66 L. J. Q. B. 116; [1897] 1 Q. B. 74.—COLLINS, J.

Stock v. Meakin (1900) 69 L. J. Ch. 401; [1900] 1 Ch. 683; 82 L. T. 248; 48 W. R. 420.—C.A., *followed*.

Allen and Driscoll's Contract, *In re* (1904) 73 L. J. Ch. 614; [1904] 2 Ch. 226; 52 W. R. 681.—C.A.

Reg. v. Local Government Board (1882) 52 L. J. M. C. 4; 10 Q. B. D. 309; 48 L. T. 173; 31 W. R. 72; 47 J. P. 228.—C.A.

Applied Wake, *Ex parte* (1883) [*ante*, col. 1660]; *observations referred to*, Eccles v. Wirral

Union (1886) 55 L. J. M. C. 106; 17 Q. B. D. 107; 34 W. R. 453; 50 J. P. 596.—**MATHEW and SMITH, JJ.**

Birmingham Corporation v. Baker (1881) 17 Ch. D. 782; 46 J. P. 52.—**JESSEL, M.R.**
Adopted, **Sunderland Corporation v. Alcock** (1882) 51 L. J. Ch. 546; 46 L. T. 377; 30 W. R. 655.—**KAY, J.**; *distinguished*, **Tendring Union v. Downton** (1891) 61 L. J. Ch. 82; [1891] 3 Ch. 265; 35 L. T. 434; 40 W. R. 145.—**C.A.**; *reversing* (1890) 59 L. J. Ch. 528; 45 Ch. D. 583; 62 L. T. 805; 38 W. R. 653.—**STIRLING, J.**

4. RATES.

Elmer v. Norwich Local Board (1854) 3 El. & Bl. 517; 2 C. L. R. 886; 23 L. J. Q. B. 203; 18 Jur. 870; 2 W. R. 306.—**Q.B.**, *confirmed*.

Reg. v. Worthing Roads Trustees (1854) 3 El. & Bl. 989; 2 C. L. R. 1678; 23 L. J. M. C. 187; 18 Jur. 907; 2 W. R. 478.—**Q.B.**

Elmer v. Norwich Local Board and Reg. v. Worthing Roads Trustees, *approved*.
Moseley v. Ely Local Board (1856) 6 El. & Bl. 518; 26 L. J. M. C. 23; 3 Jur. (N.S.) 42; 4 W. R. 607.—**Q.B.**

Lancashire Asylums Board v. Manchester Corporation (1899) 68 L. J. Q. B. 320; [1899] 1 Q. B. 759; 80 L. T. 533; 47 W. R. 361.—**BRUCE and RIDLEY, JJ.**; *reversed*, (1900) 69 L. J. Q. B. 234; [1900] 1 Q. B. 458; 82 L. T. 1; 48 W. R. 356; 64 J. P. 101.—**C.A.** **SMITH, COLLINS and WILLIAMS, L.JJ.**

Wallington v. White (1861) 30 L. J. M. C. 209; 10 C. B. (N.S.) 128; *affirmed, nom.* **Willes v. Wallington** (1863) 32 L. J. C. P. 86; 13 C. B. (N.S.) 865; 1 N. R. 129.—**EX. CH.**

Wallington v. White, *distinguished*.

Hirst v. Halifax Local Board (1870) 40 L. J. M. C. 43; L. R. 6 Q. B. 181; 25 L. T. 28; 19 W. R. 279.—**Q.B.**

Hill v. Crediton Urban Council (1898) 78 L. T. 351; 62 J. P. 340.—**WILLS and DARLING, JJ.**; *reversed*, (1899) 80 L. T. 861.—**C.A.** **SMITH and ROMER, L.JJ.**; **WILLIAMS, L.J.** *dissenting*.

Williams v. L. & N. W. Ry. (1899) 68 L. J. Q. B. 883; [1899] 2 Q. B. 197; 80 L. T. 803; 63 J. P. 661.—**DAY and LAWRENCE, JJ.**; *reversed*, (1900) 69 L. J. Q. B. 531; [1900] 1 Q. B. 760; 82 L. T. 287; 64 J. P. 372.—**C.A.** **SMITH, COLLINS and ROMER, L.JJ.**

Purser v. Worthing Local Board (1887) 56 L. J. M. C. 78; 18 Q. B. D. 818; 35 W. R. 682; 51 J. P. 596.—**C.A.**, *distinguished*.
Meux v. Cobley (1891) 61 L. J. Ch. 449; [1892] 2 Ch. 253; 66 L. T. 86.—**KEKEWICH, J.**

Le Feuvre v. Miller (1857) 26 L. J. M. C. 175; 8 El. & Bl. 321; 3 Jur. (N.S.) 1255.—**Q.B.**, *distinguished*.

Beeson v. Derby Overseers (1903) 89 L. T. 47; 67 J. P. 282; 1 L. G. R. 624.—**ALVERSTONE, C.J.**, **WILLS and CHANNELL, JJ.**

Reg. v. Rotherham Local Board (1858) 8 El. & Bl. 906; 27 L. J. Q. B. 156; 4 Jur. (N.S.) 261; 6 W. R. 248.—**Q.B.**, *distinguished*.
Burland v. Kingston-upon-Hull Local Board

(1862) 3 B. & S. 271; 32 L. J. Q. B. 17; 9 Jur. (N.S.) 275; 7 L. T. 316; 11 W. R. 33.—**Q.B.**

Reg. v. Rotherham Local Board and Burland v. Kingston-upon-Hull Local Board, *inapplicable*.

Worthington v. Hulton (1865) 6 B. & S. 943; 35 L. J. Q. B. 61; L. R. 1 Q. B. 63; 12 Jur. (N.S.) 73; 13 L. T. 463; 14 W. R. 632.—**Q.B.**

Reg. v. Rotherham Local Board and Worthington v. Hulton, *adopted*.

Julius v. Oxford (Bishop) (1880) 49 L. J. Q. B. 577; 5 App. Cas. 214, 244; 42 L. T. 546; 28 W. R. 726; 44 J. P. 600.—**H.L. (E.)**.

Worthington v. Hulton, *discussed*.

Reg. v. Leigh Rural Council (1898) 67 L. J. Q. B. 562; [1898] 1 Q. B. 886; 78 L. T. 604; 46 W. R. 471; 62 J. P. 355.—**C.A.** **SMITH and COLLINS, L.JJ.**

Sandgate Local Board v. Pledge (1885) 14 Q. B. D. 730; 52 L. T. 546; 33 W. R. 565; 49 J. P. 342.—**MATHEW and SMITH, JJ.**, *distinguished*.

Sheffield Waterworks v. Sheffield Corporation (1885) 55 L. J. M. C. 40; 54 L. T. 179; 34 W. R. 153; 50 J. P. 6.—**MATHEW and SMITH, JJ.**

SMITH, J.—Speaking for myself, I consider that we are not trenching upon anything we said in the case of the *Sandgate Local Board v. Pledge*. What we held then was that the magistrates could not go into the validity of the rate when demand was made, and they were called upon to make the ratepayer pay the rate as it appeared upon the face of it, there having been no appeal against the rate itself. What I now think is that the learned magistrate made a mistake in applying the decision of the *Sandgate* case to the present facts, namely, that when a man is summoned to pay a rate, the magistrates cannot go into the validity of it, which is the matter in dispute; but there was nothing in dispute here when the time came for the appellants to be called upon, as they were, to pay the rate.—p. 43.

Sandgate Local Board v. Pledge, *considered*.

Bates v. Plumstead Overseers (1895) 64 L. J. M. C. 127; 72 L. T. 393; 59 J. P. 118.—**WILLS and WRIGHT, JJ.**

Reg. v. Hannam (1886) 34 W. R. 355.—**C.A.**, *applied*.

Baglan Bay Tin Plate Co. v. John (1895) 72 L. T. 805.—**CHARLES and WRIGHT, JJ.**

5. LIABILITY OF AUTHORITIES.

Att.-Gen. v. Basingstoke Corporation (1876) 45 L. J. Ch. 726; 24 W. R. 817.—**V.C.**, *explained and applied*.

Glossop v. Heston and Isleworth Local Board (1892) 49 L. J. Ch. 89; 12 Ch. D. 102; 40 L. T. 736; 28 W. R. 111.—**C.A.**

Glossop v. Heston and Isleworth Local Board (1879) 49 L. J. Ch. 89; 12 Ch. D. 102; 40 L. T. 736; 28 W. R. 111.—**C.A.**, *followed*.

Att.-Gen. v. Dorking Guardians (1882) 51 L. J. Ch. 585; 20 Ch. D. 555; 46 L. T. 573; 30

W. R. 579.—C.A. JESSEL, M.R., COTTON and LINDLEY, L.JJ.

Att.-Gen. v. Dorking Guardians, followed.

Att.-Gen. v. Acton Local Board (1882) 52 L. J. Ch. 108; 22 Ch. D. 221; 47 L. T. 510; 31 W. R. 153.—FRY, J.

Glossop v. Heston and Isleworth Local Board and Att.-Gen. v. Dorking Guardians, distinguished.

Charles v. Finchley Local Board (1883) 52 L. J. Ch. 554; 23 Ch. D. 767; 48 L. T. 569; 31 W. R. 717; 47 J. P. 791.—PEARSON, J.

Att.-Gen. v. Dorking Guardians, observations adopted.

Hall v. Rwin (1887) 57 L. J. Ch. 95; 37 Ch. D. 74, 82; 57 L. T. 831; 36 W. R. 84.—C.A.

Glossop v. Heston and Isleworth Local Board and Att.-Gen. v. Dorking Guardians, followed.

Reg. v. Staines Local Board (1888) 60 L. T. 261; 53 J. P. 358.—FIELD and WILLS, JJ.; **Holland v. Dickson (1888)** 57 L. J. Ch. 502; 37 Ch. D. 669; 58 L. T. 845; 36 W. R. 320.—CHITTY, J.

Glossop v. Heston and Isleworth Local Board, dictum adopted.

Reg. v. Parlyby (1889) 58 L. J. M. C. 49; 22 Q. B. D. 250; 60 L. T. 422; 37 W. R. 335; 53 J. P. 327.—HUDDLESTON, B. and WILLS, J.

Glossop v. Heston and Isleworth Local Board, applied.

Ainley v. Kirkheaton Local Board (1891) 60 L. J. Ch. 734; 55 J. P. 230.—STIRLING, J.

Glossop v. Heston and Isleworth Local Board and Att.-Gen. v. Dorking Guardians, followed.

Att.-Gen. v. Clerkenwell Vestry (1891) 60 L. J. Ch. 788; [1891] 3 Ch. 527; 65 L. T. 312; 40 W. R. 185.—ROMER, J.

Att.-Gen. v. Dorking Guardians, followed.

Ogilvie v. Blything Sanitary Authority (1892) 67 L. T. 18.—C.A. LINDLEY, BOWEN and KAY, L.JJ.

Glossop v. Heston and Isleworth Local Board and Att.-Gen. v. Dorking Guardians, distinguished.

Yorkshire (W.R.) County Council v. Holmfirth Local Board (1894) 63 L. J. Q. B. 485; [1894] 2 Q. B. 842; 9 R. 462; 71 L. T. 217; 59 J. P. 213.—C.A. LINDLEY and LOPES, L.JJ.

Glossop v. Heston and Isleworth Local Board, followed.

Robinson v. Workington Corporation, 66 L. J. Q. B. 388; [1897] 1 Q. B. 619; 75 L. T. 674; 45 W. R. 453; 61 J. P. 164.—C.A. JESSEL, M.R., COTTON and LINDLEY, L.JJ.

Glossop v. Heston and Isleworth Local Board, explained and applied.

Dent v. Bournemouth Corporation (1897) 66 L. J. Q. B. 395.—V. WILLIAMS, J.

Glossop v. Heston and Isleworth Local Board, explained.

Conolly v. Gorman (1897) [1898] 1 Ir. R. 20.—C.A.

Glossop v. Heston and Isleworth Local Board, observations referred to.

Pasmore v. Oswaldtwistle Urban Council

(1898) 67 L. J. Q. B. 635; [1898] A. C. 387; 78 L. T. 569; 62 J. P. 628.—H.L. (E). LORDS HALSBURY, L.C., MACNAGHTEN, MORRIS, and JAMES.

Att.-Gen. v. Acton Local Board (1882) 52 L. J. Ch. 108; 22 Ch. D. 221; 47 L. T. 510; 31 W. R. 153.—FRY, J., *distinguished*.

Charles v. Finchley Local Board (1883) 52 L. J. Ch. 554; 23 Ch. D. 767; 48 L. T. 569; 31 W. R. 717; 47 J. P. 791.—PEARSON, J.

Att.-Gen. v. Acton Local Board, followed.

Charles v. Finchley Local Board, distinguished.

Att.-Gen. v. Clerkenwell Vestry (1891) 60 L. J. Ch. 788; [1891] 3 Ch. 527; 65 L. T. 312; 40 W. R. 185.—ROMER, J.

Att.-Gen. v. Acton Local Board and Ainley v. Kirkheaton Local Board (1891) 60 L. J. Ch. 734; 55 J. P. 230.—STIRLING, J., *followed*.

Charles v. Finchley Local Board, dissented from.

Brown v. Dunstable Corporation (1899) 68 L. J. Ch. 498; [1899] 2 Ch. 378; 80 L. T. 650; 47 W. R. 538; 63 J. P. 519.

COZENS-HARDY, J.—Upon consideration I adopt the view of Stirling, J. [in *Ainley v. Kirkheaton Local Board*] in preference to the view of Pearson, J. [in *Charles v. Finchley Local Board*], and I must follow the precedent of Fry, J. [in *Att.-Gen. v. Acton Local Board*] and decline to grant an injunction which would prohibit the defendants from permitting or allowing fresh connections to be made [with their sewer which discharged sewage upon private property so as to create a nuisance], or, in other words, would oblige the defendants to stop up all future connections. A sanitary authority, in whom sewers are vested, has only a limited property in these sewers. It is not in the same position as an owner of a private sewer, who can absolutely prevent any one from touching his property.—p. 502.

Ainley v. Kirkheaton Local Board, applied.

Eastwood v. Honley Urban Council (1900) 69 L. J. Ch. 470; [1900] 1 Ch. 781; 83 L. T. 22; 48 W. R. 614; 64 J. P. 792.—BYRNE, J.

Peebles v. Oswaldtwistle Urban Council (1896) 66 L. J. Q. B. 106; [1897] 1 Q. B. 384; 75 L. T. 689.—CHARLES, J.; *reversed on one point*, (1897) 66 L. J. Q. B. 392; [1897] 1 Q. B. 625; 76 L. T. 315; 45 W. R. 454; 61 J. P. 308.—C.A. ESHER, M.R., LOPES and CHITTY, L.JJ.; the latter decision *affirmed, nom.* **Pasmore v. Oswaldtwistle Urban Council (1898)** 67 L. J. Q. B. 635; [1898] A. C. 387; 78 L. T. 569; 62 J. P. 628.—H.L. (E). LORDS HALSBURY, L.C., MACNAGHTEN, MORRIS and JAMES.

Peebles v. Oswaldtwistle Urban Council, followed.

Eastwood v. Honley Urban Council (1900) 69 L. J. Ch. 470; [1900] 1 Ch. 781; 83 L. T. 22; 48 W. R. 614; 64 J. P. 792.—BYRNE, J.

Pasmore v. Oswaldtwistle Urban Council.

Distinguished. **Rex v. Stepney Corporation (1901)** 71 L. J. K. B. 238; [1902] 1 K. B. 317; 86 L. T. 21; 50 W. R. 412; 66 J. P. 183.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.;

referred to, Devonport Corporation v. Tozer (1902) 71 L. J. Ch. 754; [1902] 2 Ch. 182, 193; 86 L. T. 612.—JOYCE, J.

Stone v. Cartwright (1795) 6 Term Rep. 411; 3 R. R. 220, *distinguished*.
Weir v. Bell (or Barnett) (1877) 3 Ex. D. 32, 40; 38 L. T. 929.—EX. D.; [*affirmed*, (1878) 47 L. J. Ex. 704; 3 Ex. D. 238; 38 L. T. 929.—C.A.]; **Monks v. Dillon** (1883) 12 L. R. 321.—C.A.

Itchen Bridge Co. v. Southampton Local Board (1857) 27 L. J. Q. B. 128; 8 El. & Bl. 803; 3 Jur. (N.S.) 1261; 6 W. R. 75.—Q.B.

Followed, **Ruck v. Williams** (1858) 27 L. J. Ex. 357; 3 H. & N. 308; 6 W. R. 622.—EX.; *referred to*, **Bostock v. Ramsey Urban Council** (1900) 69 L. J. Q. B. 945; [1900] 2 Q. B. 616; 83 L. T. 358; 64 J. P. 660.—C.A.

Midland Ry. v. Withington Local Board (1883) 53 L. J. Q. B. 689; 11 Q. B. D. 788; 49 L. T. 489; 47 J. P. 789.—C.A., *followed*.

Cree v. St. Pancras Vestry (1899) 68 L. J. Q. B. 389; [1899] 1 Q. B. 693; 80 L. T. 388.—BRUCE, J.

Att.-Gen. v. Birmingham Drainage Board (1881) 50 L. J. Ch. 786; 17 Ch. D. 685; 44 L. T. 906; 29 W. R. 793; 46 J. P. 36.—C.A. **JESSEL, M.R., JAMES and LUSH, L.JJ.** See *Rivers Pollution Prevention Acts, 1876 and 1893* (56 & 57 Vict. c. 31).

Att.-Gen. v. Birmingham Drainage Board, *explained*.
Conolly v. Gorman (1897) [1898] 1 Ir. R. 20.—C.A.

Att.-Gen. v. Hackney Local Board (1875) 44 L. J. Ch. 545; 12 L. R. 20 Eq. 626; 33 L. T. 244.—BACON, V.-C., *adopted*.

Flower v. Low Leyton Local Board (1877) 46 L. J. Ch. 621; 5 Ch. D. 347; 36 L. T. 760; 25 W. R. 545.—C.A. **JESSEL, M.R., JAMES and BAGGALLAY, L.JJ.**

Att.-Gen. v. Hackney Local Board, *followed*.
Chapman v. Auckland Union (1889) 58 L. J. Q. B. 504; 23 Q. B. D. 294; 61 L. T. 446; 53 J. P. 820.—C.A. **ESHER, M.R., LINDLEY and BOWEN, L.JJ.**

Flower v. Low Leyton Local Board 36 L. T. 236; 25 W. R. 423.—MALINS, V.-C.; *reversed*, (1877) 46 L. J. Ch. 621; 5 Ch. D. 347; 36 L. T. 760; 25 W. R. 545.—C.A. **JESSEL, M.R., JAMES and BAGGALLAY, L.JJ.**

Flower v. Low Leyton Local Board (*supra*, in C.A.), *applied*.
Sellers v. Matlock Bath Local Board (1885) 14 Q. B. D. 928; 52 L. T. 762.—DENMAN, J.

Flower v. Low Leyton Local Board, *followed*.
Bateman v. Poplar Board of Works (1886) 56 L. J. Ch. 149; 33 Ch. D. 360, 387; 55 L. T. 374.—C.A.

Flower v. Low Leyton Local Board, *explained and principle applied*.
Chapman v. Auckland Union (1889) 58 L. J. Q. B. 504; 23 Q. B. D. 294; 61 L. T. 446; 53 J. P. 820.—C.A. **ESHER, M.R., LINDLEY and BOWEN, L.JJ.**

Flower v. Low Leyton Local Board, *superseded by* Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.

Reg. v. Poole Corporation (1887) 56 L. J. M. C. 131; 19 Q. B. D. 602, 683; 57 L. T. 485; 36 W. R. 239; 16 Cox C. C. 323; 52 J. P. 84.—COLERIDGE, C.J. and DENMAN, J.
Applied, **Reg. v. Wakefield Corporation** (1888) 57 L. J. M. C. 52; 20 Q. B. D. 810; 36 W. R. 911; 16 Cox C. C. 439; 52 J. P. 422.—Q.B.D.; **Cowley v. Newmarket Local Board** (1890) 6 Times L. R. 321.—DENMAN, J.; *affirmed*, C.A. and H.L. (R.). [*See post*, "WAY."]

Hall v. Bristol Corporation (1867) 36 L. J. C. P. 110; 1 L. R. 2 C. P. 322; 15 L. T. 572; 15 W. R. 404.—C.P.

Adopted, **Rhodes v. Airedale Commissioners** (1876) 1 C. P. D. 380, 390.—C.P.D.; [*reversed*, C.A.; *see* "LANDS CLAUSES," *ante*, col. 1547]; *explained*, **Fairbrother v. Bury Rural S. A.** (1889) 37 W. R. 544.—Q.B.D.

Bradford Local Board v. Hopwood (1858) 6 W. R. 818.—WOOD, V.-C., *commented on*.

Reg. v. Burslem Local Board (1860) 6 Jur. (N.S.) 696; 29 L. J. Q. B. 234; 1 El. & Bl. 1077; 8 W. R. 584.—EX. CH.

WILLES, J.—I am not at all sure that there was not some circumstance in the case before Wood, V.-C., which does not appear in the report, and which might make his decision consistent with that of the Court of Queen's Bench in *Reg. v. Metropolitan Commissioners of Sewers*.

Reg. v. Burslem Local Board and Bradby and Southampton Local Board, *In re* (1855) 4 El. & Bl. 1014; 24 L. J. Q. B. 239; 3 C. L. R. 771; 1 Jur. (N.S.) 778; 3 W. R. 413.—Q.B., *commented on*.

Burgess v. Northwich Local Board (1877) 6 Q. B. D. 264; 37 L. T. 355; 26 W. R. 19.—COLERIDGE, C.J. and DENMAN, J., *explained*.

Brierley Hill Local Board v. Pearsall (1884) 54 L. J. Q. B. 25; 9 App. Cas. 595; 51 L. T. 577; 33 W. R. 56; 49 J. P. 84.—H.L. (R.). **LORDS SELBORNE, L.-C., WATSON and FITZGERALD**; *affirming* S.C. *nom.* **Pearsall v. Brierley Hill Local Board** (1883) 52 L. J. Q. B. 529; 11 Q. B. D. 735; 49 L. T. 486; 32 W. R. 141; 47 J. P. 628.—C.A. **BRETTE, M.R., LINDLEY and FRY, L.JJ.**

Brierley Hill Local Board v. Pearsall, *applied*.

East London Ry., In re, Oliver's Claim (1890) 24 Q. B. D. 507, 511; 63 L. T. 147; 38 W. R. 312.—C.A.; **Walshaw v. Brighouse Corporation** (1899) 68 L. J. Q. B. 828; [1899] 2 Q. B. 286; 81 L. T. 2; 47 W. R. 600.—C.A. **SMITH, RIGBY and WILLIAMS, L.JJ.**

Brierley Hill Local Board v. Pearsall, *discussed*.

Clippens Oil Co. v. Edinburgh and District Water Trustees (1901) 3 Fraser 1113.—CT. OF SESS.

Yeadon Local Board and Yeadon Waterworks Co., In re (1888) 59 L. T. 844.—KAY, J.; *reversed*, (1889) 58 L. J. Ch. 563; 41 Ch. D. 52; 60 L. T. 550; 37 W. R. 360.—C.A. **COTTON, LINDLEY and LOPES, L.JJ.**

LUNATIC.

1. LUNATIC SO FOUND.
2. LUNATIC NOT SO FOUND.
3. INSANITY IN RELATION TO CIVIL RIGHTS AND DUTIES.
4. INSANITY AFFECTING REAL ESTATE.
5. ACTIONS BY AND AGAINST.
6. LUNATIC ASYLUMS.

1. LUNATIC SO FOUND.

Bowmer, In re (1859) 28 L. J. Ch. 68; 3 De G. & J. 658; 5 Jur. (N.S.) 348; 7 W. R. 318.—**KNIGHT BRUCE** and **TURNER, L.J.**, *approved*.

Noyce, In re (1892) 61 L. J. Q. B. 628; [1892] 1 Q. B. 642; 66 L. T. 331; 40 W. R. 371; 56 J. P. 564.—**C.A. ESHER, M.R., FRY** and **LOPES, L.J.**, *explained*.

Shortridge, In re (1894) 64 L. J. Ch. 191; [1895] 1 Ch. 278; 12 R. 81; 71 L. T. 799; 43 W. R. 257; 63 J. P. 38.—**C.A. LORD HALSBURY, LINDLEY** and **A. L. SMITH, L.J.**

A. L. SMITH, L.J.—I only wish to say one word about *Noyce, In re*, to which I was a party. That case has nothing to do with the point argued to-day. All that was decided there was that Mr. Prentice, sitting as a County Court judge who had made a vesting order, and purported to act under sect. 133 [Lunacy Act, 1890], was wrong. The bank had objected to that order, and said that the county court judge had no power to make such an order, because the power of such a judge was prescribed by sect. 132, and anything outside that section the County Court judge had no jurisdiction to deal with in lunacy. We decided that that was so, and the C. A. upheld us. No point was taken there as to the jurisdiction of the judge in lunacy under sects. 128 and 129.—p. 194.

Shortridge, In re, referred to.

C. M. G., In re (1898) 67 L. J. Ch. 468; [1898] 2 Ch. 324; 78 L. T. 669.—**C.A. LINDLEY, M.R., CHITTY** and **COLLINS, L.J.**

Sottomaio, In re (1874) L. R. 9 Ch. 677.—**JAMES** and **MELLISH, L.J.**, *dictum dissented from*.

Danby, In re (1885) 30 Ch. D. 320; 55 L. J. Ch. 583; 53 L. T. 850; 34 W. R. 125.

COTTON, L.J.—We have been pressed with *Sottomaio, In re*. In this case no doubt James, L.J. expressed a clear opinion that the power of the Court to direct an inquiry when the lunacy commenced was not taken away by the Act of 1862. . . . The opinion of James, L.J. is entitled to the highest respect, but in the later case of *Stamper, In re* (30 Ch. D. 320, n.) . . . the Court held that the inquiry could not be carried back, for that the Act was positive.—p. 322.

LINDLEY and **BOWEN, L.J.** to the same effect.

Sottomaio, In re, applied.

Burbidge, In re (1902) 71 L. J. Ch. 271; [1902] 1 Ch. 426; 86 L. T. 331.—**C.A. WILLIAMS, STIRLING** and **COZENS-HARDY, L.J.**

Webb, In re (1848) 2 Ph. 532.—**COTTENHAM, L.C.**, *distinguished*.

Scarlett, In re (1873) L. R. 8 Ch. 739; 29 L. T. 232; 21 W. R. 71.—**MELLISH, L.J.**

Pigott, In re (1851) 3 Mac. & G. 268.—

TRURO, L.C., *overruled*.

Wilkinson, In re (1874) 2 L. R. 10 Ch. 73; 44 L. J. Ch. 328; 23 W. R. 51.

JAMES, L.J.—I think the order [a stop order by assignee of one of next of kin] in *Pigott, In re*, was made *per incuriam*. According to the present practice in lunacy no such order is ever made or will be made.—p. 74.

Clarke, Ex parte, Norfolk, In re (1822)

Jacob, 589; 23 R. R. 150.—**ELDON, L.C.**; and **Fitzgerald, In re** (1805) 2 Sch. & Lef. 432; 1 L. L. & G. 20.—**REDESDALE, L.C.**, *applied*.

Butler, In re (1866) L. R. 1 Ch. 607, 610.—**KNIGHT BRUCE** and **TURNER, L.J.**

Fitzgerald, In re, Butler, In re and **Clarke, Ex parte, explained and distinguished**.

Ferrior, In re, Carrow v. Ferrior, Dunn v. Ferrior (1867) 37 L. J. Ch. 571, n.; L. R. 3 Ch. 175, 179; 18 L. T. 65; 16 W. R. 298.—**ROLT, L.J.**

Fitzgerald, In re, referred to.

French, In re (1868) L. R. 3 Ch. 317 (*post*, col. 1673); **Att.-Gen. v. Ailesbury (Marquis)** (1837) 12 App. Cas. 672, 692.—**H.L. (E.)** (*post*, col. 1679).

Fitzgerald, In re, commented on.

Lahiff, In re (1903) [1904] 1 Ir. R. 147.—**C.A.**

Ferrior, In re, Carrow v. Ferrior, explained.

Butler, In re, considered.

Carrow v. Ferrior, Dunn v. Ferrior (1868) L. R. 3 Ch. 719; 37 L. J. Ch. 569; 18 L. T. 806; 16 W. R. 454, 922.—**L.J.**; *varying MALINS, V.-C.*

WOOD, L.J.—As regards *Mordaunt v. Hooper* (Ambl. 311), the circumstances of that case were very peculiar, and may be sufficient to take it out of the general rule [that a person claiming by a dry legal title as heir-at-law, and out of possession, could not obtain the appointment of a receiver]; if not, it must be considered as overruled by the later authorities (p. 729) . . . *Butler, In re*, shows the principle on which the Court proceeds in such cases, and it falls far short of the proposition that after the office of the committee has determined, and his possession of the property has ceased, the gentleman who has been his solicitor cannot act as solicitor for one of the adverse claimants. **Rolt, L.J.** founded his judgment in the present case [*Ferrior, In re*] on the principle that the case was reduced to the simple one of three persons claiming adversely to each other as heirs, and that, the office and title of the committee having ceased, there was no jurisdiction to interfere . . . The V.-C. appears to have relied very much on the *dictum* of **Turner, L.J.**, in *Butler, In re*, but that *dictum* cannot be accepted in all its breadth, it must either have been uttered *per incuriam*, or must have been qualified by circumstances not appearing in the report. His lordship cannot have intended deliberately to lay down as a general rule that a person claiming an estate by a legal title can, by calling upon the tenants to pay their rents to him, entitle himself to apply to this Court for a receiver.—pp. 730, 731.

SELWYN, L.J. to the same effect.

Ferrior, In re, Carrow v. Ferrior, referred to.

Hinchliffe, In re (1894) 64 L. J. Ch. 76 [1895] 1 Ch. 117; 12 R. 33; 71 L. T. 532; 43 W. R.

82.—C.A. HERSCHELL, L.C., LINDLEY and A. L. SMITH, L.JJ.

Grosvenor v. Drax (1833) 2 Knapp 82.—P.C., *referred to*.

Ponsonby, In re (1842) 3 Dr. & War. 27; 2 Con. & Law. 30; 5 Ir. Eq. R. 268.—SUGDEN, L.C.

Grosvenor v. Drax, *discussed*.

Ponsonby, In re, *commented on*.

Jodrell, In re (1829) Shelford on Lunacy, 1st ed., p. 143; 2nd ed., p. 182, *explained*, French, *In re* (1868) 37 L. J. Ch. 537; L. R. 3 Ch. 317; 18 L. T. 139; 16 W. R. 657.

CAIRNS, L.J.—In *Grosvenor v. Drax*, the application was made after the death of the lunatic, by the representative of the lunatic, against the committee; and it is an observation which has been frequently made, and justly, as I apprehend, that it was sufficient for the determination of that case to say that the jurisdiction in lunacy was at an end, and that if any right could be asserted against the committee it must be asserted in some other form. Accordingly, the order of Her Majesty in Council, reversing the order made in the Court below, made that reversal distinctly without prejudice to any other proceeding which the respondent might be advised to institute. In *Ponsonby, In re*, the expressions used by Lord St. Leonards are certainly very large, and but for them I myself should have thought that *Grosvenor v. Drax* had not gone to such an extent. . . . It [*Fitzgerald, In re* (*supra*, col. 1672)] has really no bearing upon the point, and only amounts to a statement of what I suppose is very clear, that the committee of the estate (not of the person) who accepts his office on the condition that he should always account, must account accordingly. As to *Jodrell, In re*, it seems to amount to this, that a specific sum was to be handed over by the committee of the estate to the committee of the person to pay for the outfit of a member of the lunatic's family; it was asserted that the payment had not been made, and the committee of the estate was held entitled to apply against the committee of the person to find out what had become of the money which had been handed over for that specific purpose.—p. 539.

Ponsonby, In re, *explained*.

French, In re, *referred to*.

Strangeways v. Read (1898) 67 L. J. Ch. 581; [1898] 2 Ch. 419; 79 L. T. 245; 46 W. R. 671.

ROMER, J.—*Grosvenor v. Drax* is dealt with by Lord Cairns in *French, In re*, and I need not again refer to it. But with regard to *Ponsonby, In re*, I think the observations made by Lord St. Leonards, when he said of *Grosvenor v. Drax*, that the great lawyers in the P. C. who decided that case, decided that the committee was entitled to retain the savings of the lunatic's maintenance, must be considered with reference to the ordinary case where the committee has duly maintained the lunatic for the full period for which the allowance was made, and no case has been made against the committee of having not properly applied the allowance in accordance with the provisions of the scheme under which the order was made, or having not properly maintained the lunatic. I do not think Lord St. Leonards could have intended to lay down the general proposition that when once the

committee has received the lunatic's money, he is under no circumstances bound to account for the money so received.—p. 584.

Ashley, In re (1830) 1 Russ. & M. 371; 32

R. R. 227.—LYNDHURST, L.C., *applied*.

Gisborne v. Gisborne (1877) 2 App. Cas. 300, 310; 46 L. J. Ch. 556; 36 L. T. 564; 25 W. R. 516.—H.L. (E.); *varying* 32 L. T. 46; 23 W. R. 410; W. N. (1875) 21.—L.JJ., *who had reversed* 31 L. T. 472; 23 W. R. 151; W. N. (1874) 198.—HALL, V.-C.

Gisborne v. Gisborne, *principle applied*.

Tabor v. Brooks (1878) 48 L. J. Ch. 130; 10 Ch. D. 273; 39 L. T. 528.—MALINS, V.-C.; **Tempest v. Camoys** (Lord) (1882) 51 L. J. Ch. 785; 21 Ch. D. 571; 48 L. T. 13; 31 W. R. 326.—CHITTY, J.; *affirmed*, C.A.

Gisborne v. Gisborne, *distinguished*.

Weaver, In re (1882) 21 Ch. D. 615; 48 L. T. 93; 31 W. R. 224; 47 J. P. 68.—C.A.

JESSEL, M.R.—In *Gisborne v. Gisborne* there was power to apply the whole or such portion of the income as they might think fit. In the present case the trustees have only a discretion as to the time and manner of the application.—p. 618.—See now Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2.

Gisborne v. Gisborne and Weaver, In re, *referred to*.

Lofthouse, In re (1885) 54 L. J. Ch. 1087; 29 Ch. D. 921; 53 L. T. 174; 33 W. R. 668.—C.A.

Gisborne v. Gisborne, *not applied*.

Tempest v. Camoys (Lord) (1888) 58 L. T. 221, 224; 52 J. P. 532.—CHITTY, J.

Gisborne v. Gisborne, *referred to*.

Sanson, In re, **Sanson v. Turner** (1896) 12 Times L. R. 142.—CHITTY, J.

Weaver, In re, *referred to*.

Newbegin's Estate, In re, **Eggleton v. Newbegin** (1887) 56 L. J. Ch. 906; 36 Ch. D. 477, 484; 57 L. T. 390; 36 W. R. 69.—CHITTY, J. *And see "POOR LAW."*

Weaver, In re, *dictum dissented from*.

Rhodes, In re, **Rhodes v. Rhodes** (1890) 59 L. J. Ch. 298; 41 Ch. D. 94 (*post*, col. 1686).

Hastings, Ex parte (1807) 14 Ves. 182; 9

R. R. 272.—L.C., *discussed*.

Horne v. Pountain (*post*); **Clarke, In re** [1898] 1 Ch. 336, 340.—C.A. (*post*, col. 1676).

Pink, In re (1883) 52 L. J. Ch. 674; 23

Ch. D. 577; 49 L. T. 418; 31 W. R.

728.—C.A., *explained*.

Horne v. Pountain (1889) 58 L. J. Q. B. 413; 23 Q. B. D. 264, 269; 61 L. T. 510; 38 W. R. 240.—FIELD and CAVE, JJ.

Horne v. Pountain, *applied*.

Leavesley, In re (1891) 60 L. J. Ch. 385; [1891] 2 Ch. 1; 64 L. T. 269; 39 W. R. 276.—C.A. LINDLEY and KAY, L.JJ.

Pink, In re; **Pountain, In re** (1888) 57

L. J. Ch. 465; 37 Ch. D. 609; 59 L. T. 76.

—C.A.; **Leavesley, In re**; and **Horne v.**

Pountain, *discussed*.

Plenderleith, In re [1893] 3 Ch. 332; 62 L. J. Ch. 993; 2 R. 625; 69 L. T. 325; 42 W. R. 224; 58 J. P. 164.—C.A.

LINDLEY, L.J. (for self, LOPES and A. L. SMITH.

L.J.J.).—But for the charging order, it is clear that the creditor would have no right to be paid out of the lunatic's estate in Court or under the protection of a judge in lunacy. This is plain from *Pink, In re*, and a long series of order authorities; and in *Pountain, In re*, the Court appointed a receiver to protect the property of a lunatic not so found by inquisition against (*inter alia*) execution by a judgment creditor. . . . The effect of a charging order against a lunatic was considered by this Court in *Leavesley, In re*; but there the lunatic was dead, and after his death the Court gave effect to the order as against his executors. The Court, however, carefully abstained from expressing any opinion on what would have been done in his lifetime. In *Pountain's Case*, referred to in *Leavesley, In re* ([1891] 2 Ch. 3), however, the Court had to deal with the very point before us. In *Horne v. Pountain*, a judgment creditor of the lunatic obtained a charging order upon a fund standing to the credit of the lunatic in the books of the paymaster of the Chancery Division. The judgment creditor applied in lunacy for payment, but his application was refused. The statement in the Law Reports ([1891] 2 Ch. 3) proves to be correct. This I have ascertained from the registrar's book. From a note in that book, however, it appears that the order sought to be enforced may have been the order made in chambers, and not the order as rectified by the Divisional Court. But inasmuch as the L.J.J. had before them the order of the Divisional Court which is recited in their own order, I cannot think that their refusal to order payment was based upon so technical a mistake, which might have been at once put right by an amendment.—p. 335.

Pountain, In re, referred to.

Clarke, *In re* [1898] 1 Ch. 336, 340.—C.A. (*post*, col. 1676).

Weaver, *In re* (1837) 2 Myl. & Cr. 441.—

COTTENHAM, L.C., distinguished.

Townshend, *In re* (1865) 2 De G. J. & S. 519.

—L.J.J., approved and applied.

Windham, *In re*, *Windham v. Giubilei* (1862) 31 L. J. Ch. 720; 4 De G. F. & J. 53; 8 Jur. (N.S.) 448; 6 L. T. 479; 10 W. R. 499.—L.J.J., referred to.

Brockwell v. Bullock (1889) 22 Q. B. D. 567, 573; 58 L. J. Q. B. 289; 37 W. R. 455; 53 J. P. 403; 54 J. P. 19.—C.A.

Weaver, *In re*, referred to.

Clarke, *In re* [1898] 1 Ch. 336, 341.—C.A. (*post*, col. 1676).

Brockwell v. Bullock, discussed.

Rhodes, *In re*, *Rhodes v. Rhodes* (1890) 59 L. J. Ch. 298; 44 Ch. D. 94, 101.—KAY, J.; affirmed, C.A. (*post*, col. 1687).

Windham, *In re*, discussed and approved.

Cathcart, *In re* (1892) 62 L. J. Ch. 320; [1893] 1 Ch. 466; 2 R. 268; 63 L. T. 358; 41 W. R. 277.—C.A.

Brockwell v. Bullock and Platt, *In re* (1887) 59 L. J. Ch. 152; 36 Ch. D. 410; 56 L. T. 857; 36 W. R. 273.—C.A., discussed and applied.

Farnham, *In re* (No. 2) (1896) 65 L. J. Ch. 456; [1896] 1 Ch. 336; 74 L. T. 214; 44 W. R. 465; 60 J. P. 389; 3 Manson 123.—C.A.

LINDLEY, L.J.—in that case [*Farnham, In re*

(*post*, col. 1692)] the property was claimed by the trustee in bankruptcy, by which it was under our control. The property consisted of plate, and was in the hands of the Lunacy Court, and the trustee asked that it should be given up to him. That was quite a different matter. We said, "No. We have it in our hands for the benefit of the lunatic, and we will not part with it." In the course of that judgment there may be words which apply to the present question, but now the tables are turned. We are not asserting a right to retain property already in our custody, as on that occasion, when we had the plate ourselves, and had clear jurisdiction to deal with it. Our observations were addressed to that state of things. I have looked in vain in the Lunacy Act and the Bankruptcy Act, and have found nothing to show that we have any jurisdiction in the present case. Counsel for the trustee has called my attention to *Brockwell v. Bullock*, where an elaborate judgment was given by Fry, L.J., who went into the whole question, and held that there was no jurisdiction in lunacy to restrain any proceedings taken in another Court. It does not quite stop there, for under the Judicature Act, 1873, s. 51, as explained in *Platt, In re*, we are authorised to act as additional judges of the Chancery Division. Thus the lunacy judges have power to sit as judges of the High Court, but that will not assist the committee in this case: for sitting as judges of the High Court we cannot interfere with the jurisdiction of the County Court. It is true that there is a right of appeal from the County Court in bankruptcy to the Divisional Court, and by special leave to this Court under the Bankruptcy Appeals (County Courts) Act, 1884 (47 Vict. c. 9), s. 2, which repealed sect. 104 of the Act of 1883; but putting that and the effect of the Judicature Act and the decision in *Platt, In re*, together, we are of opinion that we have no power to do what we are asked to do, and the summons must be dismissed.—p. 457.

Brockwell v. Bullock and Farnham, In re

(No. 2), referred to.

Clarke, *In re* [1898] 1 Ch. 336, 341.—C.A. (*post*).

Brockwell v. Bullock, explained.

Stedman v. Hart (1854) 23 L. J. Ch. 908;

Kay 607; 18 Jur. 744; 2 W. R. 462.—

WOOD, V.-C., distinguished.

Watson, *In re*, *Stamford Union v. Bartlett* (1898) 68 L. J. Ch. 21; [1899] 1 Ch. 72; 79 L. T. 462; 47 W. R. 359.—STIRLING, J. See judgment.

Winkle, *In re* (1894) 63 L. J. Ch. 541;

[1894] 2 Ch. 519; 7 R. 255; 70 L. T.

710; 42 W. R. 513.—C.A. LINDLEY,

LOPES and KAY, L.J.J., distinguished.

Winkle v. Bailey (1896) 66 L. J. Ch. 181; [1897] 1 Ch. 123; 77 L. T. 577; 61 J. P. 135.—NORTH, J.

Winkle, *In re*, distinguished.

Plenderleith, *In re* (*supra*, col. 1674), explained.

Smart v. Taylor (1724) 9 Mod. 98; Ridge-

way v. Darwin (1802) 8 Ves. 65; 6 R. R.

227; and Hall. *Ex parte*, Legard, *In re*

(1821) Jacob. 160, referred to.

Clarke, *In re* (1898) 67 L. J. Ch. 234; [1898] 1 Ch. 336, 339; 78 L. T. 275; 46 W. R. 337.—C.A. See judgment of the Court delivered by LINDLEY, M.R.

Plenderleith, In re, and Winkle, In re (*supra*), distinguished.

Brown, *In re*, *Mewellin v. Brown* (1900) 69 L. J. Ch. 234; [1900] 1 Ch. 489; 82 L. T. 83; 48 W. R. 461; 64 J. P. 327.

COZENS-HARDY, J.—*Plenderleith, In re*, and *Winkle, In re* . . . seem to me to decide this:—that when once property has come under the jurisdiction of lunacy, the requirements of the lunatic for maintenance are to be considered before the rights of any execution creditor . . . but here the Court in lunacy has not yet taken these funds under its protection. The committee is not in the same position as a receiver.—p. 235.

Winkle, In re, explained.

Clarke, *In re* (*supra*, col. 1676), referred to. Davies v. Thomas (1900) 69 L. J. Ch. 643; [1900] 2 Ch. 462; 83 L. T. 11; 49 W. R. 68.—C.A.

ALVERSTONE, M.R.—It is said that *Winkle, In re* shows that when the property of a lunatic has become subject to the control of the Court by the appointment of a receiver, this would prevent a charge on the property from being effective. In my opinion the Court in that case did not decide anything of the kind. If we thought that they did it is doubtful if we should have followed the case to that length. . . . What the Court decided in *Winkle, In re*, was that on their view of the facts of that case there was no charge on the goods which put the goods in the possession of the judgment creditor, or gave him a lien on the goods at the time when the lunatic's wife took possession. Dealing with that case in *Clarke, In re*, Lindley, M.R. said: "Even if an order appointing a receiver related back, which it never does, the receiver has never in fact been in possession of the goods. This circumstance distinguishes this case from *Winkle, In re*, where the receiver had possession and the sheriff had not, he having gone out of possession under an order of a judge at chambers. The judgment of the Court proceeded entirely on this ground, and *Winkle, In re*, is no authority for saying that the Court in lunacy can deprive execution creditors of their rights over property not under the control of the Court when seized under legal process." . . . There is a long line of authorities referred to by Lindley, M.R., showing that an order like this made under sect. 116 [Lunacy Act, 1890 (53 Vict. c. 5)] is only intended to authorise the receiver to take possession of the property of the lunatic and not to interfere with the rights of third parties.—p. 646.

Starkie, Ex parte, Clayton, In re (1834) 3 Myl. & K. 247.—L.C.

Followed, *Skerrett, In re*, (1842) 2 Dr. & War. 585.—L.C.; referred to, *Batteste v. Maunsell* (1876) 11 R. 10 Eq. 314, 327.—C.A.

Grimstone, Ex parte (1772) Amb. 706; 4 Bro. C. C. 235. n.—L.C., followed.

Bromfield, Ex parte (1792) 1 Ves. 453; 3 Bro. C. C. 310; 2 R. R. 126.—L.C.; *Oxenden v. Compton* (Lord) (*post*).

Anandale (or Annandale), Ex parte (1749) Amb. 80; S. C. *nom. Anandale* (or *Anandale*) (*Marquis*) v. *Anandale* (or *Anandale*) (*Marchioness*) (1751) 2 Ves. sen. 381.

—L.C., commented on.

Oxenden v. Compton (Lord) (1793) 2 Ves. 69; 4 Bro. C. C. 231; 2 R. R. 131.—THURLOW, L.C.

Grimstone, Ex parte, not followed.

Anandale, Ex parte, Digby (Earl), Ex parte,

Norfolk (Duchess), In re (1820) 1 J. & W. 640.—L.C.; and **Phillips, Ex parte** (1812)

19 Ves. 118; 12 R. R. 151.—L.C., discussed. *Weld v. Tew* (1829) Beatt. 273.—HAUT, L.C.

Grimstone, Ex parte, followed.

Weld v. Tew, dictum not followed.

Newcombe v. Newcombe (1841) 3 Ir. Eq. R. 414; Dr. 358.—PLUNKET, L.C.

Grimstone, Ex parte, followed and approved.

Bromfield, Ex parte (*supra*); and *Newcombe v. Newcombe, referred to.*

Weld v. Tew, not followed.

Leitrim (Earl) v. Enery (1844) 6 Ir. Eq. R. 357; Dr. 330.—SUGDEN, L.C.

Annandale, Ex parte (*supra*), and **Grimstone, Ex parte, referred to.**

Att.-Gen. v. Ailesbury (Marquis) (1887) 12 App. Cas. 672, 688 (*post*, col. 1679).

Grimstone, Ex parte, not applied.

Lahiff, In re (1903) [1904] 1 Ir. R. 147.—C.A.

Oxenden v. Compton (Lord), (col. 1677), referred to.

Leitrim (Earl) v. Enery (*supra*); *Dyer v. Dyer* (1865) 34 L. J. Ch. 513; 34 Beav.

504; 12 L. T. 442; 13 W. R. 732.—M.R.; *Steel v. Preece* (1874) 43 L. J. Ch. 687; L. R.

18 Eq. 192, 196; 22 W. R. 432.—JESSEL, M.R.; *Freer, In re* (*post*); *Pickard, In re*, *Turner v. Nicholson* (1885) 53 L. T. 293.—PEARSON, J.

Att.-Gen. v. Ailesbury (Marquis) (*post*, col. 1679).

Jones v. Green (1868) 37 L. J. Ch. 603; L. R. 5 Eq. 555; 16 W. R. 603.—V.-C.:

Barker, In re (1881) 50 L. J. Ch. 331; 17 Ch. D. 241; 44 L. T. 33; 29 W. R. 873.

—C.A.; and **Leeming, In re** (1861) 30 L. J. Ch. 263; 3 De G. F. & J. 43; 7 Jur.

(N.S.) 115; 3 L. T. 686; 9 W. R. 403. L.J., observed on.

Freer, In re, *Freer v. Freer* (1882) 22 Ch. D. 622; 52 L. J. Ch. 301; 31 W. R. 426.

CHITTY, J.—The nature of the jurisdiction in lunacy is well explained in *Oxenden v. Compton* (Lord) (*supra*): it is only a power of administration. . . . It is said that Giffard, L.J., when V.-C., in *Jones v. Green*, made some observations which show that the L.C. intrusted in lunacy can give a direction in the order for sale that the proceeds of the property converted shall belong to the persons who would have been the owners of the property if it had remained unconverted. There is, no doubt, a statement to that effect in the judgment, but no authority has been produced to me which justifies that dictum; and, moreover, against that dictum I must cite the dictum of Cotton, L.J., in *Barker, In re*, where he says: "With regard to the payment into Court in the lunacy, without carrying it to a real estate account, that, in my opinion, ought not to alter the rights of the parties. The money must be dealt with without reference to the account to which it has been carried, and as if there had been no such carrying over at all. Indeed, the carrying it to a real estate account would not alter the rights at all, but simply call the attention of the Court, when the money is paid out, to the fact that a question arises about it, and that, instead of being, as apparently it is, cash, it is to be considered whether it does not still preserve the character of real estate." That is the opinion at which I have arrived upon the order before me, and with great respect to Giffard, L.J., I think that Cotton, L.J.'s dictum

is to be preferred. . . . The decision in *Leeming, In re*, so far as it requires explanation, may be explained by reference to the 118th section [Lunacy Regulation Act, 1853]: but the case really explains itself. The order made in that case was that the amount due on a mortgage of real estate created by the lunatic's ancestor, should be paid out of the fund in Court standing to the credit of the lunacy, this fund having arisen from the lunatic's personal estate: but the order was made without prejudice to the question how the mortgage debt ought ultimately to be borne. The order also directed the mortgage to be kept on foot. Upon the question reserved coming before the Court for decision, it was held that the mortgage being an incumbrance on the real estate, the mortgage debt ought to be raised out of the real estate.—pp. 626, 627.

Barker, In re, referred to.

Morgan, In re, Smith v. May (1900) 69 L. J. Ch. 735; [1900] 2 Ch. 474, 478; 48 W. R. 670.—STIRLING, J.

Leeming, In re (supra), followed.

Melly, In re (1883) 53 L. J. Ch. 248; 49 L. T. 429; 31 W. R. 898.—C.A.

Barker, In re, discussed.

Hyett v. Mekin (1884) 53 L. J. Ch. 241; 25 Ch. D. 735; 50 L. T. 54; 32 W. R. 513.—KAY, J.; *Att.-Gen. v. Ailesbury* (Marquis) (*post*).

Leeming, In re, referred to.

Att.-Gen. v. Ailesbury (Marquis) (*post*).

Freer, In re, Freer v. Freer (supra, col. 1678), referred to.

Att.-Gen. v. Ailesbury (Marquis) (1885) 14 Q. B. D. 895, 904 (*post*).

Awdley v. Awdley (1690) 2 Vern. 192.—L.C., *discussed*.

Weld v. Tew (1829) Beatt. 273.—L.C.; *Att.-Gen. v. Ailesbury* (Marquis) (*post*); *Loveridge, In re, Drayton v. Loveridge* (1902) 71 L. J. Ch. 865; [1902] 2 Ch. 859, 864; 87 L. T. 294.—BUCKLEY, J.

Dege, Ex parte (1764) 4 Bro. C. C. 235, n.—L.C., *discussed*.

Weld v. Tew (*supra*); *Att.-Gen. v. Ailesbury* (Marquis) (*post*).

Badcock, In re (1840) 8 L. J. Ch. 283; 4 Myl. & Cr. 440; 3 Jur. 694.—L.C., *referred to*.

Att.-Gen. v. Ailesbury (Marquis) (1885) 14 Q. B. D. 901; and (1887) 12 App. Cas. 689 (*post*).

Leitrim (Earl) v. Enery (1844) 6 Ir. Eq. R. 357; Dr. 330.—SUGDEN, L.C., *referred to*.

Batteste v. Mansell (1876) Ir. R. 10 Eq. 314, 327.—C.A.

Leitrim (Earl) v. Enery, discussed.

Ryder, In re (1882) 20 Ch. D. 514; 30 W. R. 417.—C.A., *commented on*.

Att.-Gen. v. Ailesbury (Marquis) (1887) 12 App. Cas. 672; 57 L. J. Q. B. 83; 58 L. T. 192; 36 W. R. 737.—H.L. (E.); *reversing* (1885) 55 L. J. Q. B. 257; 16 Q. B. D. 408; 54 L. T. 921; 34 W. R. 261.—C.A.; and *restoring* (1885) 54 L. J. Q. B. 324; 14 Q. B. D. 895; 52 L. T. 809; 33 W. R. 731.—MATHEW and A. L. SMITH, JJ.

EARL OF SELBORN, E.—Some of the older authorities, applicable to cases in which the investment has been unauthorized, are referred to in the first

volume of Sir E. Williams' book on Executors and Administrators (7th edition), pp. 666 and 667. Two of these were cases of infants (*Gibson v. Scudamore* (1726) 1 Dick. 45, and *Witter v. Witter* (1730) 3 P. Wms. 99): and one, that of a lunatic (reported under the name of Lord Plymouth, as Committee, in Freeman's Ch. R., p. 114, and under the title of *Awdley v. Awdley* in 2 Vern. 193 (*supra*)). In *Gibson v. Scudamore* the Court treated the purchase-money as in equity charged on the estate. In *Witter v. Witter* the same L.C. (Lord King) said: "The renewed lease, though for lives, shall follow the nature of the original one, and go to the executors or administrators of the infant, as that should have done. . . . This might and ought to have been declared in trust for the executors and administrators of the infant, if he should die during infancy." Lord King there pointed out, as proper to preserve the personal character of the right during infancy, the same form which was afterwards used by the Court in *Bridges v. Bridges* in 1752 [Seton on Decrees, 2nd edition, p. 345]; and which was followed with approval by Lord Eldon in 1801 (in *Ashburton v. Ashburton*, 6 Ves. 7; 5 R. R. 201) expressly to prevent the Court from "changing the nature of the property." That form was for a long period of time, and under very great judges, sanctioned by the general course of the Court of Chancery in such cases. I do not see how your lordships could now hold a trust, declared in such terms, to be ineffectual for the preservation of the personal right, with its proper incidents (of which the devolution of the equitable title to executors or administrators was certainly not the least important, nor the least distinctly in view), without practically declaring that all those judges were mistaken, and that the course of the Court of Chancery, in those cases, proceeded upon a misconception of the powers of the Court, and of the effect in equity of what it authorised to be done. In the old lunacy case, as reported by Freeman, the Lords Commissioners (in 1690) held "that the administrator should have the benefit of the purchase, and not the heir; for if the money had not been laid out, it had been clear that the administrator should have had it; and if laying out the money would alter the case, then it would be in the power of the grantee of the custody to prefer the heir or administrator as he pleased;" and they said: "This Court may either follow the land purchased or the estate of my Lord Plymouth." The report of the same case in Vernon [Raithby's edition, vol. ii., p. 194, n.] gives an extract from the decree, which declared, "that it was not in the power of any committee to alter the nature of a lunatic's estate;" and adds that the decree, in effect, declared the money laid out in the purchase to be a charge on the land.—p. 682.

LORD MACNAGHTEN.—This is no new doctrine. In substance it is to be found in the Statute de Prerogativa Regis [17 Edw. 2, c. 10], which has been construed as impliedly forbidding the investment of a lunatic's personal estate in the purchase of land: *Awdley v. Awdley*. Lord Hardwicke lays down the rule. . . . In *Annandale, Ex parte* (*supra*, col. 1677), he says: "In cases of lunacy the first care of the Court is the maintenance of the lunatic, and after that it is a rule never departed from not to vary or change the property of the lunatic so as to effect any alteration as to the succession

to it." In 1772, in a case which was much considered (*Grimstone, Ex parte*, col. 1677), Lord Bathurst expresses himself as follows: "It was said to be a general rule that the Court will not alter the lunatic's property to the prejudice of his successor. Rightly understood, it is true. The Court will not buy or sell land for him, but in the management of the estate the governing principle is the interest of the lunatic" (p. 688). . . . [After quoting James L.J.'s observations in *Barker, In re (supra)*, his lordship continued:] In dealing with the property of lunatics, in late years at any rate, and since the [Lunacy Regulation] Act of 1853, the Court has given effect to the rule in cases which at first sight appear to lie rather on the line, and which might possibly have been dealt with differently but for the Act. I will only refer to two instances. In *Leeming, In re (supra)*, a mortgage created by the ancestor of the lunatic was paid off out of the lunatic's personal estate. The mortgage was kept alive, and on the death of the lunatic, intestate, it was held that the sum expended out of the personal estate in paying off the mortgage ought to be raised out of the real estate comprised in the mortgage and dealt with as personal estate. In *Ryder, In re*, the Court sanctioned the enfranchisement of a copyhold estate belonging to a lunatic, but as the descent of copyholds in the manor was different from the descent of freeholds, the Court made a declaration for the purpose of carrying the equitable interest in the enfranchised copyholds, in the event of the lunatic dying intestate, to the persons who would have taken the property if it had not been enfranchised. In making the order the late M.R., referring of course to cases outside the ordinary course of management, observed that it was "a settled principle in lunacy that the Court would not alter the rights of succession to the lunatic's property" (p. 690). . . . The Court is guided by the same principles and speaks in the same language, whether it is sitting in Chancery or in lunacy. The origin of the Crown having the custody of idiots and lunatics is as Lord Bathurst said in *Grimstone, Ex parte*, "more matter of curiosity than use." He adds that it certainly existed before the Statute de Prerogativa Regis, and that "after custody is granted the Great Seal acts in matters relative to the lunatic not under the sign manual, but by virtue of its general power as keeper of the King's conscience." The observations of Lord Redesdale in *Fitzgerald, In re (supra)*, col. 1672, are to the same effect. Now the order of the L.J.J. [in the present case] was not a novel experiment in lunacy administration, nor was it couched in language unfamiliar to Courts of equity. In *Simon Degge's Case (supra)*, it appears that the lunatic was entitled to a freehold lease held for three lives, of which the lunatic was ultimately the survivor. On the dropping of each of the other two lives, the lease was renewed under the order of the Court, and the fines and charges were paid out of the lunatic's personal estate. On each occasion it was ordered, in the one case by Lord Hardwicke, in the other by Lord Northampton, that the interest in the renewed lease during the life added was to be considered as part of the lunatic's personal estate for the benefit of his next of kin. Those orders were commented on, by Sir E. Sugden in *Leitrim v. Ebery*, and certainly he appears to treat them as well founded and effectual for the purpose of preserving the character of the lunatic's estate.

In Elmer's Pract. in Lunacy, 6th edition, p. 206, a precedent is given of an order sanctioning the purchase of a house for the residence of a lunatic. It orders "that the property to be so purchased, be deemed and taken to be part of the personal estate of the lunatic." It directs that the conveyance be made to trustees "upon trust for the lunatic, his executors, administrators, and assigns." . . . Turning now to the practices in the Court of Chancery, we find in Seton on Decrees, 3rd edition, vol. ii., p. 692, a precedent on precisely the same lines, which was in use in the Court of Chancery for some hundred years. It is the form of order employed before the Wills Act, when real estate was purchased with personality belonging to an infant. The object was to preserve the character of the property, and thus to enable the owner, though an infant, notwithstanding the outward form of the property, to deal with it by will. That precedent had the sanction of Lord Eldon, and seems to have been uniformly adopted by him when the occasion required it. See *Ashburton v. Ashburton*; *Ware v. Polhill* ((1805) 11 Ves. 278; 8 R. R. 144). The efficacy of the precedent was never questioned. If such an order was efficacious in the case of an infant, why is it futile, or less efficacious, in the case of a lunatic?—p. 692.

Weld, In re (1885) 38 Ch. D. 514; 52 L. T. 703; 33 W. R. 845.—C.A., *considered*.

Gaitskell, In re (1889) 58 L. J. Ch. 262; 40 Ch. D. 416.—C.A.

Fox, In re (1886) 33 Ch. D. 37; 55 L. T. 39; 35 W. R. 81.—C.A., *explained*.

Ray, In re (1896) 65 L. J. Ch. 316; [1896] 1 Ch. 468; 73 L. T. 723; 44 W. R. 353; 60 J. P. 340.—C.A.

LINDLEY, L.J.—*In re*, was a peculiar case. We were asked to sanction a covenant by the committee of a lunatic to pay money not for debts of his own, but other people's debts, and we doubted whether that could be done, and would not do it. Certainly there are passages in the report which look at first as if Cotton, L.J. thought there was no power to do it. I doubt myself whether we intended to go that length; and if we did, we put an uncommonly narrow construction on sect. 116 [Lunacy Act, 1853], and one not likely to be abided by.—p. 318.

KAY and A. L. SMITH, L.J.J. to the same effect.

2. LUNATIC NOT SO FOUND.

Adams, In re (1861) 4 De G. J. & S. 182; 10 Jur. (N.S.) 137; 3 N. R. 339; 9 L. T. 626; 12 W. R. 291.—L.C., *explained*.

Faircloth, In re (1879) 13 Ch. D. 307; 42 L. T. 72; 28 W. R. 481.

BAGGALLAY, L.J.—The only authority referred to on the question whether the debts of the lunatic and the expenses of her past maintenance can be deducted in ascertaining the amount of her property is *Adams, In re*, before Lord Westbury. The facts of that case can only be come at by comparing the different reports. Lord Westbury laid it down that the word "property" in the Act must be taken to mean beneficial property clear of debts. The report in 4 De G. J. & S. does not state the nature of the debts, and on referring to the Weekly Reporter I find it stated that they were debts of ancestors of the person of unsound mind. From the

report in the Law Times, however, it appears that the property of the lunatic consisted of a moiety of a real estate subject to a mortgage, the net income of his share of which, after payment of interest on the mortgage debt, was 43*l.* 14*s.* 1*d.* and of real estate derived from his father of the value of 820*l.*, subject to so much of the father's debts, amounting to 891*l.*, as the father's personal estate, amounting to 350*l.*, was insufficient to pay, leaving a surplus value of 289*l.* In this state of circumstances the property must clearly have been of a value exceeding 1,000*l.*, unless the claims against the lunatic's estate for past maintenance and simple contract debts, which are stated to have amounted to 330*l.* 15*s.* 7*d.*, were to be deducted. In the New Reports the statement of the property is somewhat different, but there, also, it appears that the property could only be brought below the limit by deducting the past maintenance. The case therefore is an authority for the position that in estimating the value of a lunatic's property for the purposes of the 12th section [Lunacy Regulation Act, 1862], his debts and the expenses of his past maintenance are to be deducted. This seems reasonable, for the object of the section was to provide a cheap way of applying the lunatic's property for his benefit when it was below a certain amount, and there is just as much reason for such a jurisdiction where the balance, after making these deductions, is below 1,000*l.*, as where the whole property is below that amount.—p. 308.

Peters v. Grote (1835) 7 Sim. 238.—V.C., *followed*.

Baker's Trusts, In re (1871) 41 L. J. Ch. 162; L. R. 13 Eq. 168, 171; 25 L. T. 783; 20 W. R. 325.—WICKENS, V.C.

Taylor, In re (1861) 2 De G. F. & J. 125.—L.J., *applied*.

Grimmett's Trusts, In re (*post*).

Vane v. Vane (1876) 45 L. J. Ch. 381; 2 Ch. D. 124; 34 L. T. 613; 24 W. R. 602.—JESSEL, M.R., *distinguished*.

Edwards, In re (1879) 10 Ch. D. 606, n.—LITTLE, V.C.; *reversed*, 48 L. J. Ch. 233; 10 Ch. D. 605; 40 L. T. 113; 27 W. R. 611.—C.A.

Vane v. Vane, questioned.

Bligh, In re (1879) 12 Ch. D. 364; 49 L. J. Ch. 56; 41 L. T. 570; 27 W. R. 876.—C.A.

JAMES, L.J.—There must be some mistake in the case cited as to the power of a judge of the Ch. Div. to appoint a guardian to a person of unsound mind. The Ch. Div. often directs the income of the property of a person of unsound mind to be applied for his maintenance, but that is only by way of administering a trust. It has no power to appoint a guardian of his person.—p. 365. COTTON and BRETT, L.JJ. concurred.

Vane v. Vane, corrected.

Brandon's Trusts, In re (1879) 13 Ch. D. 773; 41 L. T. 755.

JESSEL, M.R.—I do not think I appointed a guardian in *Vane v. Vane*.—p. 773.

Vane v. Vane; Brandon's Trusts, In re, and Tuer's Will Trusts, In re (1886) 55 L. J. Ch. 454; 32 Ch. D. 39; 54 L. T. 910; 34 W. R. 751.—C.A., *distinguished*.

Grimmett's Trusts, In re (1887) 56 L. J. Ch. 419.—NORTH, J.

Vane v. Vane, report commented on.

Brandon's Trusts, In re, referred to.

Silva's Trusts, In re (1888) 57 L. J. Ch. 281; 58 L. T. 46; 36 W. R. 366.—CHITTY, J.

Barlow's Will, In re, Barton v. Spencer

(1887) 56 L. J. Ch. 795; 36 Ch. D. 287; 57 L. T. 95; 35 W. R. 737.—C.A. COTTON, BOWEN and FRY, L.JJ., *distinguished*.

Brown, In re (1895) 64 L. J. Ch. 808; [1895] 2 Ch. 666; 12 R. 587; 73 L. T. 375; 44 W. R. 17.—C.A. LINDLEY, LOPES and RIGBY, L.JJ.

Brown, In re, referred to.

Barlow's Will, In re, distinguished.

De Linden, In re, Spurrier, In re, De Hayn r. Garland (1897) 66 L. J. Ch. 295; [1897] 1 Ch. 453; 76 L. T. 180; 45 W. R. 342.

STIRLING, J.—The difficulty which appeared to my mind, when I desired the summons, so far as it asked for transfer of the *corpus* of the fund, to be adjourned for discussion in Court, was that presented by *Barlow's Will, In re*, and I am bound to say that there are expressions of the C. A. which would have presented some difficulty to my mind if it had not been for *Brown, In re*. The decision in that case is not in point, because it was an appeal to the statutory jurisdiction of the Court under the Lunacy Act, 1890. But the importance of it is that it contains a full discussion by Lindley, L.J. of the previous cases, including *Barlow's Will, In re*. He says: "If now we turn to previous decisions, we find that orders have been made transferring stocks, funds, and securities to curators of lunatics resident out of England, namely, in France, Holland, and Scotland, although the property of such lunatics was not vested in their curators in the strict technical sense of that expression"; so that he recognises the fact that the transfer may be made, although the property is not vested in the person to whom it will be transferred. Then dealing with *Barlow, In re*, he says, "The Master in Lunacy, appointed by the Supreme Court of New South Wales under the New South Wales Lunacy Act, applied for a transfer to him of the sum of 2,249*l.* 18*s.* New Three Per Cent. Annuities belonging to the lunatic, and paid into Court under the Trustee Relief Act. The lunatic there was not judicially declared lunatic, and the Court held, first, that the Colonial Master had no absolute right to have the whole sum transferred to him, but an order was nevertheless made for the payment to him of part of the capital, namely, 803*l.*, and of the future dividends. The lunatic in that case was only a patient not judicially declared to be insane, and the Court felt considerable difficulty in making any order at all for payment to the Colonial Master." Now what have we here? Really, in substance, though not in form, it is a request from the Court of Bavaria asking me to direct a transfer.—p. 296.

Brown, In re, considered.

Knight, In re (1898) 67 L. J. Ch. 136; [1898] 1 Ch. 257; 77 L. T. 773; 46 W. R. 239.—C.A.

LINDLEY, M.R.—In *Brown, In re*, the Court placed an extensive rather than a restrictive construction on the meaning of the words, "vested in a person appointed for the management thereof"; and having regard to that decision, I think we are quite right in saying that the personal property of this lady has become "vested" in the petitioner within the true meaning of the section [sect. 134 of the Lunacy

Act, 1890] and the decision in *Brown, In re*. . . The real truth is, that the right of the Court over lunatics who have property within its jurisdiction cannot be ousted by such ambiguous words as we find in sect. 131. The point to some extent was considered in *Brown, In re*, where it was said that the Court must be cautious not to hand over the property unless satisfied that a proper case was made out, and the Court was satisfied there that the property was in fact required for the maintenance and support of the lunatic.—p. 138.

Barlow's Will, In re; Brown, In re; and Knight, In re (*supra*), *referred to*.

Didisheim v. London and Westminster Bank (1899) 81 L. T. 108.—NORTH, J.; *reversed* (*see post*).

Barlow's Will, In re, referred to.

Chatard's Settlement, In re (1899) 68 L. J. Ch. 350; [1899] 1 Ch. 712; 80 L. T. 645; 47 W. R. 515.—KEKEWICH, J.

Barlow's Will, In re; Brown, In re, and De Linden, In re; Spurrier, In re, De Hayn v. Garland (*supra*, col. 1684), *followed*.

Didisheim v. London and Westminster Bank and Chatard's Settlement, In re, distinguished.

Thiery v. Chalmers, Guthrie & Co. (1899) 69 L. J. Ch. 122; [1900] 1 Ch. 80; 81 L. T. 511; 48 W. R. 148.—KEKEWICH, J.

Didisheim v. London and Westminster Bank, reversed.

Tarratt, In re (1884) 51 L. T. 310.—C.A., *De Linden, In re* (*supra*), and *Thiery v. Chalmers, Guthrie & Co.*, *discussed*.

Brown, In re, and Knight, In re (*supra*), *distinguished*.

Barlow's Will, In re, explained.

Seager Hunt's Case (1899) 69 L. J. Ch. 450, n.; [1900] 2 Ch. 54; 82 L. T. 741, n.; 48 W. R. 50.—C.A., *referred to*.

Didisheim v. London and Westminster Bank (1900) 69 L. J. Ch. 443; [1900] 2 Ch. 15.—C.A. (*post*, col. 1693).

Didisheim v. London and Westminster Bank.—C.A., *considered*.

New York Security and Trust Co. v. Keyser & Co. (1901) 70 L. J. Ch. 330; [1901] 1 Ch. 666 (*post*, col. 1695).

Barlow's Will, In re, distinguished.

Selot's Trust, In re (1902) 71 L. J. Ch. 192; [1902] 1 Ch. 488.

FARWELL, J.—The person there applying had no legal right to payment of the fund out of Court. He was the Master in Lunacy of New South Wales, and he had not, therefore, the legal right at all.—p. 194.

Morgan, In re (1849) 1 H. & Tw. 212.—COTTENHAM, L.C., *applied*.

Stark, In re (1850) 2 Mac. & G. 174; 2 H. & Tw. 467.—LANGDALE, LORD COMMISSIONER.

Newton v. Manning (1849) 1 Mac. & G. 362.—COTTENHAM, L.C., *applied*.

Scott v. Bentley (1855) 24 L. J. Ch. 244; 1 K. & J. 281 (*post*, col. 1690).

Newton v. Manning, referred to.

Hessing v. Sutherland (1856) 25 L. J. Ch. 687; 4 W. R. 820.—L.J., *not applied*.

Stark, In re; Morgan, In re; and Elias,

In re (1851) 3 Mac. & G. 234.—TRURO, L.C., *discussed and applied*.

Garnier, In re (1872) 41 L. J. Ch. 419; L. R. 13 Eq. 532; 25 L. T. 928; 20 W. R. 288.—MALINS, V.-C.

Newton v. Manning and Hessing v. Sutherland, discussed and not applied.

Didisheim v. London and Westminster Bank (1899) 81 L. T. 108.—NORTH, J. *See supra*, col. 1685.

Stark, In re; Elias, In re; Garnier, In re; and Mitchell, In re (1881) 17 Ch. D. 515; 45 L. T. 60.—C.A., *referred to*.

Brown, In re (1895) 64 L. J. Ch. 808; [1895] 2 Ch. 666.—C.A. (*supra*, col. 1684).

Garnier, In re, and Stark, In re, referred to. *Didisheim v. London and Westminster Bank* (1900) 69 L. J. Ch. 443; [1900] 2 Ch. 15.—C.A. (*post*, col. 1693).

Garnier, In re, applied.

Hill, In re [1900] 1 Ir. R. 349.—CHATTERTON, V.-C.

Irby, In re (1853) 17 Beav. 334.—ROMILLY, M.R., *not followed*.

Macfarlane, In re (1861) 31 L. J. Ch. 335; 2 J. & H. 673; 8 Jur. (N.S.) 208; 6 L. T. 154; 10 W. R. 369.—WOOD, V.-C.

Fuller, In re (1900) 69 L. J. Ch. 738; [1900] 2 Ch. 551; 83 L. T. 208; 40 W. R. 90.—C.A., *distinguished*.

Browne, In re (1894) 63 L. J. Ch. 729; [1894] 3 Ch. 412; 7 R. 580; 71 L. T. 365; 43 W. R. 175.—C.A., *dicta followed*.

Langdale, In re (1900) 70 L. J. Ch. 38; [1901] 1 Ch. 3; 83 L. T. 451; 49 W. R. 177.—C.A. *See judgment of RIGBY, L.J.*

3. INSANITY IN RELATION TO CIVIL RIGHTS, AND DUTIES.

Baxter (or Bagster) v. Portsmouth (Earl) (1826) 5 B. & C. 170; 2 C. & P. 178; 7 D. & R. 614.—K.B., *referred to*.

Howard v. Digby (Earl) (1834) 2 Cl. & F. 634; 8 Bligh (N.S.) 224; 5 Sim. 330; 37 R. R. 276.—H.L. (E.). BROUGHAM, L.C.; *Campbell v. Hooper* (1855) 24 L. J. Ch. 644; 3 Sm. & G. 153 (*post*, col. 1688).

Digby (Earl) v. Howard (1831) 1 L. J. Ch. 3; 4 Sim. 588; 37 R. R. 276.—V.-C.; *reversed nom.* **Howard v. Digby (Earl)** (*supra*).

Howard v. Digby (Earl).

Referred to, Leach v. Way (1835) 5 L. J. Ch. 100.—M.R.; *Wentworth v. Tubb* (1842) 12 L. J. Ch. 61; 6 Jur. 980.—L.C. (affirming 1 Y. & C. C. C. 171.—KNIGHT BRUCE, V.-C.); *distinguished, Rowley v. Unwin* (1855) 2 K. & J. 138.—WOOD, V.-C.; *referred to, Dixon's Trusts, In re, Dixon v. Dixon* (1878) 48 L. J. Ch. 592; 9 Ch. D. 587, 589; 40 L. T. 208; 27 W. R. 282.—JESSEL, M.R.; *Edward v. Cheyne* (No. 2) (1884) 13 App. Cas. 385, 398.—H.L. (sc.); *discussed, Rhodes, In re* (1890) 44 Ch. D. 97.—KAY, J. (*post*); *distinguished, Tuffnell v. O'Donohue* (1896) [1897] 1 Ir. R. 360.—CHATTERTON, V.-C.

Gibson, In re (1871) L. R. 7 Ch. 52; 25 L. T. 551; 20 W. R. 107.—JAMES and MELLISH, L.JJ., *explained*.

Harris, In re, (1880) 49 L. J. Ch. 327.—C.A.

Gibson, In re, commented on.
Weaver, In re (1882) 21 Ch. D. 615.—C.A. (*supra*, col. 1674).

Gibson, In re, discussed.
Rhodes, In re (*post*).

Williams v. Wentworth (1842) 5 Beav. 325.—M.R., *applied*.
Meares, In re (1879) 48 L. J. Ch. 190; 10 Ch. D. 552; 40 L. T. 111; 27 W. R. 369.—C.A.

Wentworth v. Tubb (*supra*); **Williams v. Wentworth**; and **Wentworth v. Tubb** (1843) 2 Y. & C. C. C. 537; 7 Jur. 738.—KNIGHT BRUCE, V.-C., *discussed*.

Carter v. Beard (1839) 10 Sim. 7; 3 Jur. 532.—V.-C., *doubted by the C.A.*

Rhodes, In re, **Rhodes v. Rhodes** (1890) 44 Ch. D. 94; 59 L. J. Ch. 298; 62 L. T. 342; 38 W. R. 385.—KAY, J.; *affirmed*, C.A.

KAY, J., after discussing the cases other than **Carter v. Beard**, continued.—Then there is **Gibson, In re** (*supra*), in which Mellish, L.J. says in the course of the argument: "A lunatic cannot contract for his maintenance, so whoever maintains him becomes a creditor by implied contract." I have read a considerable body of authority in support of that proposition. . . . But in **Weaver, In re** (*supra*, col. 1674), the late M.R., sitting in the C.A., commenting on that statement of Mellish, L.J., which was read in argument by the counsel for the respondents, says: "That is only an interlocutory observation. It is difficult to see how there can be an implied contract with a lunatic, if he is incompetent to make an express contract. It is not always safe to report interlocutory observations of judges, they are very liable to be misunderstood." If I may respectfully say so, the reporter ought to have remembered that before he reported the interlocutory observation of the late M.R.—p. 100.

COTTON, L.J.—I think that the expression "implied contract" is erroneous and very unfortunate. In . . . **Weaver, In re**, the question whether there could be what has been called an implied contract by a lunatic, was left undecided by the Court, and one of the judges said that it was difficult to see how there could be an implied contract on the part of a lunatic if he was himself incompetent to make an express contract. But we all agree with the view that I have thus expressed [that the law implies an obligation to repay money spent in supplying necessities] in order to prevent any doubt from arising in consequence of our having declined to settle the question in the case to which I have alluded.—p. 105.

LINDLEY, L.J.—The question whether an implied obligation arises in favour of a person who supplies a lunatic with necessities is a question of law, and in **Weaver, In re**, a doubt was expressed whether there is any obligation on the part of the lunatic to repay. I confess I cannot participate in that doubt. I think that doubt has arisen from the unfortunate terminology of our law, owing to which the expression "implied contract" has been used to denote not only a genuine contract established by inference, but also an obligation which does not arise from any real contract, but which can be enforced as if it had a contractual origin. Obligations of this class are called by civilians *obligationes quasi ex contractu*. But that a lunatic's estate may be

made liable for necessities was treated as settled as long ago as **Manby v. Scott** ((1603) 1 Sid. 112), where three learned judges, after holding that an infant might be bound for necessities provided for him, said, "and what has been said of an infant is applicable to an idiot in case of house-keeping."—p. 107.
LOPES, L.J. to the same effect.

Rhodes, In re, Rhodes v. Rhodes, and Read v. Legard (1851) 20 L. J. Ex. 309; 6 Ex. 637; 15 Jur. 494.—EX., *referred to*.
Healing v. Healing (1902) 51 W. R. 221; 19 Times L. R. 90.—RIDLEY, J.

Richards, Ex parte, Lewis, In re (1820) 1 J. & W. 264; 21 R. R. 166.—ELDON, L.C., *commented on*.

Marrow, In re (1841) 10 L. J. Ch. 340; Cr. & Ph. 142.—COTTENHAM, L.C.

Richards, Ex parte, followed reluctantly.
Townsend, In re (1847) 16 L. J. Ch. 456; 2 Ph. 348; 1 Mac. & G. 686; 2 Hall & Tw. 185.—COTTENHAM, L.C.

Richards, Ex parte, discussed.
King v. Smith (1848) 18 L. J. Ch. 43; 6 Hare 473; 12 Jur. 1083.—INGRAM, V.-C.

Richards, Ex parte, followed reluctantly.
Wheeler, In re (1852) 21 L. J. Ch. 759; 1 De G. M. & G. 434.

ST. LEONARDS, L.C.—**Richards, Ex parte**, . . . disposes of this case. If I had originally to decide this question, I should not have so decided it. Though that case has been doubted, yet I find it has been so repeatedly followed that I do not feel myself at liberty to alter the practice. I do not, however, approve of it, thinking it contrary to principle, and opposed to the settled rule that the costs occasioned by the mortgagee putting the mortgaged estate in settlement are to be borne by the mortgagor.—p. 760.

See now Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 142.

Snook v. Watts (1848) 11 Beav. 105; 12 Jur. 144.—LANGDALE, M.R., *commented on*.
Jacobs v. Richards (1854) 23 L. J. Ch. 557; 18 Beav. 300; 2 Eq. R. 299; 18 Jur. 527; 2 W. R. 174.—ROMILLY, M.R.; *varied*, L.J.

Snook v. Watts and Jacobs v. Richards, commented on.

Dane v. Kirkwall (Viscountess) (1838) 8 C. & P. 679.—PATTESON, J., *discussed*.

Campbell v. Hooper (1885) 24 L. J. Ch. 644; 3 Sm. & G. 153; 3 Eq. R. 727; 1 Jur. (N.S.) 670; 3 W. R. 528.

STUART, V.-C.—It has been said, however, that there are cases in this Court in which a different doctrine has prevailed, and in which the Court has made decrees and dealt with a mortgagee's right in such a way as to make his claim to depend upon the question whether, at the time of the contract, the person alleged to be a lunatic was so. **Snook v. Watts** is stated to be a case of that kind. It would seem, from the report of that case, that the Court had not before it all the authorities which would require consideration before it decided that the right of the mortgagee depended on the fact of the sanity of the mortgagor. No doubt Lord Langdale, in directing an issue in that case, countenanced the notion that he entertained that view. Being an issue, it excluded every question but that of sanity or insanity. An action would have been a different

matter, for according to the law as settled by the Ex. Ch. in *Molton v. Camroux* (1849) 18 L. J. Ex. 356; 4 Ex. 17, see "ANNUITY", and this Court, it would depend on circumstances, whether, notwithstanding the lunacy, the contract was invalid. It seems to me that *Snook v. Watts*, if it supports the proposition in favour of which it has been cited, is entirely at variance with the law of contract both at law and in equity. I cannot consider that *Jacobs v. Richards* ought to govern my decision. In that case there was wanting, what I have here—the proof of circumstances which might have come out in an action which the plaintiff, under the decree of the Court, was to bring, and I can well understand that the L.J.J. satisfied that mere lunacy would not avoid a contract, might consider that, in the action, circumstances might appear which would enable them to deal completely with the question before them.—p. 616.

Niell v. Morley (1804) 9 Ves. 478.—M.R., *distinguished*.

Wiltshire v. Marshall (1866) 14 L. T. 396; 14 W. R. 602.—WOOD, V.-C.

Niell v. Morley, *discussed*.
Campbell v. Hooper (*supra*).

Skerrett, In re (1842) 2 Dr. & War. 585.—L.C. *referred to*.

Baltaste v. Maunsell (1876) Ir. R. 10 Eq. 314, 327.—C.A.

4. INSANITY AFFECTING REAL ESTATE.

Baggs, In re (1893) 63 L. J. Ch. 612; [1894] 2 Ch. 416, n.; 71 L. T. 138.—C.A., *distinguished*.

Salt, In re (1895) 65 L. J. Ch. 152; [1896] 1 Ch. 117; 73 L. T. 598; 44 W. R. 146.—C.A.

A. L. SMITH, L.J.—In that case an application was made under sect. 116, sub-sect. 2 of the Lunacy Act, 1890, not for an order to lease, but for an order to "sell property belonging to the lunatic," she having only a life estate therein; and this Court held that the applicant could not bring that case within that sub-section because the property did not "belong" to the lunatic, she having only a life interest therein; and that he could not bring the case within the provisions of sect. 62 of the Settled Land Act, 1882, because that section only applied to a tenant for life who was a lunatic so found by inquisition, which Martha Baggs was not; and this Court therefore held that it was a case not provided for by either the Lunacy Act of 1890 or the Settled Land Act of 1882.—p. 153.

RIGBY, L.J. to the same effect.

Baggs, In re, *explained and not applied*.

X., *In re* [1894] 2 Ch. 415; 63 L. J. Ch. 613; 7 R. 365; 71 L. T. 139; 42 W. R. 657.—C.A.
LINDLEY, LOPES and DAVEY, L.JJ.

DAVEY, L.J.—Our decision in *Baggs, In re*, was that in consequence of the language used in the Settled Land Act, 1882, s. 62, the powers of that Act could not be exercised on behalf of a lunatic tenant for life, except where he was a lunatic so found by inquisition, and there was a committee. That case has no application to the present one.—p. 418.

5. ACTIONS BY AND AGAINST.

Beverley's Case (1603) 4 Co. Rep. 123 b, *referred to*.

Leving v. Caverly (1704) Prec. Ch. 229, *disapproved*.

Stanton v. Percival (1855) 5 H. L. Cas. 257; 24 L. J. Ch. 369; 3 W. R. 391.

GRANWORTH, L.C.—The committee sometimes has interests adverse to those of a lunatic, and then a guardian is appointed specially to conduct the defence. In such a case it is clear that neither the committee nor the special guardian can make admissions binding on the lunatic. All principle seems to me to be against the power contended for, and I have discovered no authority in favour of it, except *Leving v. Caverly*, the reasoning in which is so unsatisfactory, not to say absurd, that I think it would be impossible to follow it.—p. 273.

LORD ST. LEONARDS to the same effect. LORD BROUGHAM concurred.

Morison's Lunacy, In re, Morison v. Sutherland (Earl) (1749) Morison's Decisions, 4595; S. C. nom. **Bayne v. Sutherland (Earl)** (1750) 1 Craigie Stewart & Paton 454, *referred to*.

Thorne v. Watkins (1750) 2 Ves. sen. 35.—HARDWICKE, L.C.

Morison's Lunacy, In re, *applied*.

Scott v. Bentley (1855) 24 L. J. Ch. 244; 1 K. & J. 281; 3 Eq. R. 428; 1 Jur. (N.S.) 394; 3 W. R. 280.—WOOD, V.-C.

Morison's Lunacy, In re, *explained*.

Didisheim v. London and Westminster Bank (1900) 69 L. J. Ch. 443; [1900] 2 Ch. 15.—C.A. (*post*, col. 1693).

Scott v. Bentley (*supra*), *not applied*.

Garnier, In re (1872) 41 L. J. Ch. 419; 1 R. 13 Eq. 532, 539 (*supra*, col. 1686).

Scott v. Bentley, *corrected*.

Grimwood v. Bartels (1877) 46 L. J. Ch. 788; 25 W. R. 843.—HALL, V.-C.

[Mr. Pearson mentioned an inaccuracy in the judgment in *Scott v. Bentley*, where *Morison's Case* (*supra*) is referred to as deciding that an English committee might sue in Scotland in respect of the lunatic's personal estate, whereas it appears from the report of that case (which is *Bayne v. Earl of Sutherland* (*supra*)) that the L.C. held the direct contrary.—p. 789.]

Scott v. Bentley, *distinguished*.

Barlow's Will, In re (1887) 56 L. J. Ch. 795; 36 Ch. D. 287.—C.A. (*supra*, col. 1684).

Scott v. Bentley, *referred to*.

Brown, In re (1895) 64 L. J. Ch. 808; [1895] 2 Ch. 666.—C.A. (*supra*, col. 1684).

Scott v. Bentley, *commented on*.

Didisheim v. London and Westminster Bank (1899) 81 L. T. 108 (*supra*, col. 1685); *Thiery v. Chalmers, Guthrie & Co.* (1899) 69 L. J. Ch. 122; [1900] 1 Ch. 80 (*supra*, col. 1685).

Scott v. Bentley, *considered and approved*.

Didisheim v. London and Westminster Bank (1900) 69 L. J. Ch. 443; [1900] 2 Ch. 15.—C.A. (*post*, col. 1693).

Scott v. Bentley, *applied*.

New York Trust and Securities Co. v. Keyser & Co. (1901) 70 L. J. Ch. 330; [1901] 1 Ch. 666, 670 (*post*, col. 1695).

Light v. Light (1858) 25 Beav. 248.—**ROMILLY, M.R.**; and **Beall v. Smith** (1873) 43 L. J. Ch. 245; L. R. 9 Ch. 85; 29 L. T. 625; 22 W. R. 121.—**JAMES, L.J.**; *reversing* 28 L. T. 834; 21 W. R. 734.—**WICKENS, V.-C.**, *followed*.

Jones v. Lloyd (1874) 43 L. J. Ch. 826; L. R. 18 Eq. 265; 30 L. T. 487; 22 W. R. 785.—**JESSEL, M.R.** And see *post*, cols. 1693, 1695.

Jones v. Lloyd, *followed*.

Wilder v. Piggott (1882) 52 L. J. Ch. 141; 22 Ch. D. 263; 48 L. T. 112; 31 W. R. 377.—**KAY, J.**

Halfhide (or Halfhyde) v. Robinson (1874)

43 L. J. Ch. 498; L. R. 9 Ch. 373; 30 L. T. 216; 22 W. R. 448.—**JAMES** and **MELLISH, L.J.**, *no longer law*.

Watt v. Leach (1878) 26 W. R. 475.

MALINS, V.-C., assumed that *Halfhide v. Robinson* was correctly decided at the date of that decision, and therefore that, in 1874, a person of unsound mind not so found by inquisition could not institute an action by his next friend where real estate was affected. But in 1876 the legislature had passed 39 & 40 Vict. c. 17, s. 6, under which the next friend of such a person might "request a sale," and, that being so, the next friend might also institute an action for sale, the section having to that extent altered the law since the decision in *Halfhide v. Robinson*.

Beall v. Smith and Jones v. Lloyd (*supra*), *explained*.

Halfhide v. Robinson, *distinguished*.

Porter v. Porter (1888) 37 Ch. D. 420; 58 L. T. 688; 36 W. R. 580.—**C.A.**

COTTON, L.J.—No doubt *Halfhide v. Robinson* causes a difficulty, but James, L.J. does not lay down that there can be no bill filed for partition by a person of unsound mind by his next friend. He only asks the question: Is there any authority for it? I asked the question once or twice, whether there was any authority one way or the other, but no authority could be produced. The difficult question is, whether we are not bound by what was said by James, L.J. at the end of his judgment: "I wish it to be understood that a bill cannot be filed by a next friend on behalf of a person of unsound mind not so found by inquisition, for dealing with his real estate. The consequences of such a course might be monstrous." . . . The case came before James, L.J. in a very peculiar way. . . . The Court was not asked to carry out an order for sale made in a partition action. Apparently the application was not under any of the provisions of the Act, it was a petition presented in the suit, not for carrying the decree into effect, but for vesting the share of the person who was of unsound mind in one of the other parties to the action. Taking the judgment of James, L.J. reasonably, I think he only meant that the course taken was not the proper course, but that there should be a petition to the L.J. under the Lunacy Regulation Act, 1862, and then the Court might make the order. —p. 428.

BOWEN, L.J., after discussing *Beall v. Smith* and *Jones v. Lloyd*, continued: I entirely concur in the view which Cotton, L.J. has taken of that case [*Halfhide v. Robinson*]. . . . I do not fail to observe that in that particular case the person who was of unsound mind and sued by his next friend, was the sole plaintiff, and the history of

the case and what took place in the course of the litigation was no doubt the pivot on which the reasoning in the mind of James, L.J. turned.—p. 432. And see *post*, cols. 1693, 1695.

Beall v. Smith, *referred to*.

Fry (or Routh) v. Fry (1890) 59 L. J. P. 43; 15 P. D. 50; 62 L. T. 501; 38 W. R. 615.—**C.A.**, *explained*.

Lee v. Ryder (1822) 6 Madd. 294.—**V.-C.**, *applied*.

Howell v. Lewis (1891) 61 L. J. Ch. 89; 65 L. T. 692; 40 W. R. 88.—**KEKEWICH, J.**

Beall v. Smith, *principle applied*.

Fuller v. Lance (1662) 1 Ch. Ca. 18, *explained*.

Whatman, In re, Hoar v. Whatman (1889) W. N. (1889) 213.—**STIRLING, J.**; and

Farnham, In re (1895) 64 L. J. Ch. 717; [1895] 2 Ch. 799; 12 R. 554; 73 L. T. 231; 3 Manson 102.—**C.A.**, *explained*.

And see "BANKRUPTCY," vol. 1, col. 137.

Farnham v. Milward & Co. (1895) 64 L. J. Ch. 816; [1895] 2 Ch. 730; 13 R. 810; 73 L. T. 434; 44 W. R. 135.—**STIRLING, J.**

Farnham, In re, *distinguished*.

Farnham, In re (No. 2) (1896) 65 L. J. Ch. 456; [1896] 1 Ch. 836.—**C.A.** (*supra*, col. 1675).

Farnham, In re, *explained*.

Clarke, In re (1898) 67 L. J. Ch. 234; [1898] 1 Ch. 336.—**C.A.** (*supra*, col. 1676).

Hartley v. Gilbert (1843) 13 Sim. 596.—

SHADWELL, V.-C.; and **Beall v. Smith**, *explained*.

Armstrong (George) & Sons, In re (1896) 65 L. J. Ch. 258; [1896] 1 Ch. 536; 74 L. T. 134; 44 W. R. 281.

STIRLING, J.—It was said that Shadwell, V.-C. in *Hartley v. Gilbert*, held that to take or continue proceedings in a suit after a petition in lunacy had been presented against the party was in one sense a fraud upon the lunacy jurisdiction. . . . The V.-C. there does use the word "fraud," but it does not seem to me that he meant to go the length of saying that a solicitor who believed his client to be sane could not take proceedings in the name of the client if he knew that a petition in lunacy against the client had been presented. If that were so, it might be very disadvantageous to the client. All that that case goes to, in my opinion, is that the Court, when informed of the petition, will in a proper case stay the proceedings until the inquiry into the state of mind of the party has been completed. . . . In that case [*Beall v. Smith*], after the inquisition had been held, proceedings in the name of the lunatic were prosecuted without the committee being communicated with, and the C.A. held that there had been professional misconduct on the part of the solicitor. I am bound by the decision in that case. Moreover, I agree with what was laid down in it, and in no way desire to dissent from it. In the present case, when the proceedings were instituted there had been no inquisition, and the case is only relied upon because James, L.J. in his judgment said: "There is no decision that it" (a suit) "can go on in the interval between the inquisition and the appointment, and Shadwell, V.-C. expressed a clear opinion that going on even after the commencement of proceedings in lunacy would be a fraud on the

jurisdiction." The L.J. there adopts the language of Shadwell, V.-C., who, as I have said, used the word "fraud" in a qualified sense.—p. 260.

Waterhouse v. Worsnop (1888) 59 L. T. 140. —WILLS and GRANTHAM, J.J.; **Dennis v. Dennis** (1871) 2 Wms. Saund. 334; **Gleddon v. Trebble** (or **Gliddon v. Treble**) (1860) 9 Cl. B. (N.S.) 367; 30 L. J. Cl. P. 160.—G.P.; **Jones v. Lloyd**; **Beall v. Smith** (col. 1691); **Farnham v. Milward & Co.**; **Howell v. Lewis** (col. 1692); **Armstrong (George) and Sons, In re** (*supra*); **Wartnaby v. Wartnaby** (1821) Jacob, 377; **Porter v. Porter** (col. 1691); **Hartley v. Gilbert** (col. 1692); and **Alivon v. Furnival** (1834) 3 L. J. Ex. 241; 1 Cr. M. & R. 277; 4 Tyr. 751; 3 D. P. C. 202.—EX., *discussed*. **Dilidshelm v. London and Westminster Bank** (1900) 69 L. J. Ch. 443; [1900] 2 Ch. 15; 82 L. T. 738; 48 W. R. 501.—C.A.

LINDLEY, M.R. (for self, RIGBY and V. WILLIAMS, L.J.).—If, before the Judicature Acts, an action at law had been brought in the name of such a person [*i.e.*, of unsound mind] to enforce a purely legal demand—say, an action on a covenant, or of debt detain, or trover—there would have been no defence to the action on the ground that the plaintiff on the record was of unsound mind. No plea in bar or in abatement applicable in such a case is to be found in the books. Such an action might, perhaps, have been stayed on an application showing that the action was an abuse of the process of the Court—that is, was brought in the plaintiff's name without his authority—see *Waterhouse v. Worsnop*, which, however, was since the Judicature Act. Such an action could certainly have been stayed by proceedings in lunacy and the appointment of a committee. Unless the action were stayed it would proceed to trial in the ordinary way, and on proof of the plaintiff's case judgment would have been entered for the plaintiff on the record and execution issued accordingly—see *Dennis v. Dennis*. If the plaintiff had sued by attorney payment or delivery to him would have discharged the defendant or sheriff. If the plaintiff had sued in person a difficulty would obviously have arisen. An application to stay execution on payment into Court might, we apprehend, have been successfully made; or the Court could, as in *Gleddon v. Trebble*, have ordered payment to his next friend, and so the necessity of instituting proceedings in lunacy would be avoided—see generally Collinson on Lunatics, vol. i., pp. 339, &c. In Chancery it had long been the settled practice to institute suits in the names of lunatics not so found by inquisition by a next friend. Applications to stay such suits were also frequently made with success. See generally on such suits, *Jones v. Lloyd*, *Beall v. Smith*, *Farnham v. Milward*, and *Armstrong (George) & Sons, In re*. The alleged lunatic could make such an application himself if he asserted his sanity, and anyone willing to act as next friend could make it in the alleged lunatic's name, as in *Howell v. Lewis*. Even the defendant might apply—see *Wartnaby v. Wartnaby* and *Porter v. Porter*, per Cotton, L.J. When a lunatic was so found by inquisition, the Court of Chancery would stay a suit instituted in his name until the appointment of a committee—see *Hartley v. Gilbert*. We are not aware of any case in which a foreign curator has been held to be an improper next

friend of the person whose curator he is. . . . It is well settled that until the Crown interferes, or at all events until its interference is invoked by a petition for an inquisition or by an application for the appointment of a receiver, the prerogative of the Crown has no practical effect. In other words, no person can avail himself of that prerogative without taking the proper steps to induce the Crown to exercise it. This point was examined by this Court last summer, when *Seager Hunt's Case* (*supra*, col. 1685) was before it. In the present case no lunacy proceedings have been taken in this country; nor was any attempt made to stay the action (p. 449). . . . [The M.B. then discussed *Scott v. Bentley* (*supra*, col. 1690) and continued:] *Scott v. Bentley* has been questioned mainly because it proceeded to some extent on the supposed authority of a decision of the H. L. on an appeal from Scotland, *Morison's Lunacy, In re* (*supra*, col. 1690). This case appears to have been to some extent misunderstood. The V.-C. refers to it as an unreported case cited in *Johnstone v. Beattie* (1843) 10 Cl. & F. 42; affirming 10 L. J. Ch. 309; 1 Ph. 17) and in *Sill v. Worswick* (1791) 1 H. Bl. 665). In *Johnstone v. Beattie*, Lord Brougham refers to *Morison's Case*, as cited in the note to *Sill v. Worswick*, and as an authority for the proposition that the legally appointed curator in one country was held entitled to act in another. This it is plain was also Wood, V.-C.'s view of *Morison's Case*, as is apparent from his remarks that in *Morison's Case* the curator sued alone. But the reports of that case to which we have been referred, show that the decision of the H. L. in *Morison's Case* did not go that length, and Lord Campbell was not satisfied that it did—see 10 Cl. & F. 133. We understand the decision as showing that a committee appointed in England of a Scotchman resident in England could not sue in Scotland simply in his own name and as committee for the recovery of the lunatic's personal estate; but that such committee could sue there in the name of the lunatic for the recovery of the lunatic's personal estate. *Morison's Case*, therefore, did not go so far as Wood, V.-C. thought, but it goes a long way to show that the proceedings in this action are properly framed. . . . In *Scott v. Bentley*, Wood, V.-C. did not by any means base his judgment only on the supposed decision in *Morison's Case*, and after making every allowance for his misapprehension of that case, *Scott v. Bentley* was, in our opinion, well decided, although we cannot help thinking that if Wood, V.-C. had known the form of the order made in *Morison's Case*, he would have directed the bill to be amended by making it in form a bill by the lunatic by his curator and next friend. In *Alivon v. Furnival*, Parke, B. expressed a clear opinion to the effect that a foreign curator could sue here in his own name for goods and chattels of a person of unsound mind. *Scott v. Bentley* is consistent, and is really supported by several other cases cited by counsel for the plaintiffs, of which *Tarratt, In re* (*supra*, col. 1685); *De Linden, In re* (*supra*, col. 1684); *Thiery v. Chalmers, Guthrie & Co.* (*supra*, col. 1685) are the most recent and important. [His lordship then discussed *De Linden, In re*, and *Thiery v. Chalmers, Guthrie & Co.* and continued:] Kekewich, J. [*Thiery v. Chalmers, Guthrie & Co.*] thought that the tuteur might have sued alone in his own name. He regarded the decision in *Brown, In re* (*supra*,

col. 1684), as an authority for so holding, inasmuch as in *Brown, In re*, and in *Thiery v. Chalmers, Guthrie & Co.*, the lunatic had been formally so declared by the foreign Court. But *Brown, In re*, was not an action; it was an application to the Court in lunacy under sect. 134 of the Lunacy Act, and we doubt whether the action of *Thiery v. Chalmers, Guthrie & Co.* would have been rightly framed if brought by the *tuteur* as sole plaintiff. An alteration in the status of a lunatic appears to be necessary in order to enable the Court in lunacy to exercise the jurisdiction conferred upon it by sect. 134 of the Lunacy Act, 1890; but it by no means follows that persons, whose status has not been altered by their being judicially declared lunatic, cannot sue by themselves by a next friend for the recovery of their own property. *Knight, In re (supra)*, col. 1684, turned on the discretion which the Court had under sect. 134 of the Lunacy Act, 1890, and throws no real light on this case. The only difficulty in the way of the plaintiffs is occasioned by *Barlow's Will, In re (supra)*, col. 1684). . . . It is to be observed that the general statutory authority given by the colonial Act to the Master as an officer of the colonial Court was not supplemented by any order giving the Master any express authority as the lunatic's attorney to get in any property not locally within the jurisdiction of the Court; and, as we understand Cotton, L.J.'s judgment, he was much influenced by the omission of any such order. If the Master's authority derived from the colonial statute was unsatisfactory, it is obvious that such authority was not improved by his assumption of the right to use the lunatic's name. In that view of the case the fact that the lunatic petitioned in her own name by her next friend did not remove the difficulty. Having decided that the Master was not entitled as a matter of right to demand payment to himself, it became necessary for the Court, acting as trustees, to consider what it was the duty of trustees to do in such a case as that before them, and they considered that in such a case the trustees ought not to part with the trust fund without seeing to its application, and ought not to part with the fund to the Master further than they were satisfied that the interests of the lunatic rendered it necessary to do so. This was the view taken in *Garnier, In re (supra)*, col. 1686), where, however, the lunatic was a domiciled Englishman; and we see no reason to dissent from it where the authority of the foreign curator to get in the trust property is regarded by the Court as unsatisfactory. But where it is not, the considerations which weighed with the Court in *Barlow's Will, In re*, do not arise.—pp. 452—454.

Light v. Light; *Beall v. Smith*; *Jones v. Lloyd*; and *Porter v. Porter (supra)*, col. 1691), referred to.

New York Trust and Securities Co. v. Keyser & Co. (1901) 70 L. J. Ch. 330; [1901] 1 Ch. 666; 84 L. T. 43; 49 W. R. 371.

COZENS-HARDY, J.—Now, if the lady had been domiciled in New York, the decision of the C.A. in *Didisheim v. London and Westminster Bank (supra)* would have been a direct authority. But the M.R. says in his judgment in that case, "If, as in *Garnier, In re (supra)*, col. 1686), the lunatic were an Englishman temporarily abroad, and confined as a lunatic abroad, we should

feel considerable difficulty in holding that the Courts of this country were bound to recognise the title of a foreign curator to sue in this country." The point thus left open now arises for my decision. The lady sues by a next friend as provided by Ord. XVI. r. 17, which refers to the old practice of the Ch. Div. There is nothing in that order or in the established practice of the Court of Chancery prior to that order, which entitles the next friend—who may be anybody—to receive and give a discharge for the lady's money. It is only on the footing that the action is for the benefit of the lady, and in so far as it is for her benefit, that the Court allows such an action to proceed—see *Light v. Light, Beall v. Smith, Jones v. Lloyd*, and *Porter v. Porter*. . . . I am not satisfied that the lady suing by her next friend can as a matter of strict right insist upon such payment, but in the exercise of my discretion I can see no reason why the order should not be made in the present case. . . . *Scott v. Bentley (supra)*, col. 1690), as explained and corrected by the C.A. in *Didisheim v. London and Westminster Bank*, seems to me to warrant the view which, apart from authority, I should be prepared to adopt.—p. 331. And see *Lahiff, In re* (1903) [1904] 1 Ir. R. 147.—C.A.

6. LUNATIC ASYLUMS.

Pegge v. Lampeter Union (1872) L. R. 7 C. P. 366; 41 L. J. C. P. 204; 27 L. T. 269; 20 W. R. 973.—C.P.; reversed, (1874) L. R. 9 C. P. 373; 43 L. J. C. P. 181; 31 L. T. 132; 22 W. R. 882.—EX. CH.

MALICIOUS PROCEDURE AND FALSE IMPRISONMENT.

1. FALSE IMPRISONMENT.
2. MALICIOUS PROCEDURE.
3. WHAT MUST BE PROVED.
4. PRACTICE.

1. FALSE IMPRISONMENT.

Grainger v. Hill (1838) 4 Bing. (N.C.) 212; 5 Scott 561; 7 L. J. C. P. 85.—C.P., principle applied.

Parton v. Hill (1864) 10 L. T. 414; 13 W. R. 753.—Q.B.

Timothy v. Simpson (1835) 1 C. M. & R. 757; 5 Tyrw. 244; 6 Car. & P. 499; 4 L. J. Ex. 81.—EX., followed.

Rex v. Howarth (1828) 1 M. C. C. 207.—C.C.R., explained and held inapplicable.

Baynes v. Brewster (1841) 2 Q. B. 375; 1 G. & D. 669; 11 L. J. M. C. 5; 6 Jur. 392.—Q.B.

Timothy v. Simpson, approved.

Price v. Seeley (1843) 10 Cl. & F. 28.—H.L. (E.).

West v. Smallwood (1838) 3 M. & W. 418; 7 L. J. Ex. 144; 6 D. P. C. 580.—EX.;

and *Barber v. Rollinson* (1833) 1 C. & M. 330; 2 L. J. Ex. 101; 3 Tyr. 267.—EX., applied.

Brown v. Chapman (1848) 17 L. J. C. P. 329; 6 C. B. 365; 12 Jur. 799.—C.P.

West v. Smallwood, applied.

Austin v. Dowling (1870) 39 L. J. C. P. 260; L. R. 5 C. P. 534; 22 L. T. 721; 18 W. R. 1003.—C.P.

Chivers v. Savage (1855) 25 L. J. Q. B. 85; 5 El. & Bl. 697; 2 Jur. (N.S.) 137; 4 W. R. 117.—Q.B., *followed*.
Brandt v. Craddock (1858) 27 L. J. Ex. 314.—EX.

2. MALICIOUS PROCEDURE.

Elsee v. Smith (1822) 1 D. & R. 97; 2 Chit. 304; 24 R. & L. 639.—EX. CH., *applied*.
Jones v. German (1897) 66 L. J. Q. B. 281; [1897] 1 Q. B. 374; 76 L. T. 136; 45 W. R. 278; 18 Cox C. C. 497; 61 J. P. 180.—C.A. **ESHER, M.R., LOPES and RIGBY, L.JJ.**

Cohen v. Morgan (1825) 6 D. & R. 8; 28 R. R. 533.—K.B., *followed*.
Carratt v. Morley (1841) 10 L. J. Q. B. 259; 1 Q. B. 18; 1 G. & D. 275.—Q.B.

Hope v. Evered (1886) 55 L. J. M. C. 146; 17 Q. B. D. 338; 55 L. T. 320; 34 W. R. 742; 16 Cox C. C. 112.—**COLERIDGE, C.J.** and **MATTHEW, J.**, *followed*.

Lea v. Charrington (1889) 58 L. J. Q. B. 461; 23 Q. B. D. 45; 61 L. T. 222; 37 W. R. 736; 53 J. P. 614.—**POLLOCK, B.** and **MANISTY, J.**, *affirmed on other grounds*, 58 L. J. Q. B. 461; 23 Q. B. D. 272; 61 L. T. 450; 54 J. P. 19; 16 Cox C. C. 704.—C.A. **ESHER, M.R., COTTON and LINDLEY, L.JJ.**

Oldfield v. Dodd (1853) 22 L. J. Ex. 144; 8 Ex. 578.—EX. CH., *applied*.
Farley v. Danks (1855) 24 L. J. Q. B. 244; 4 El. & Bl. 493; 1 Jur. (N.S.) 331; 3 W. R. 173.—Q.B.

Oldfield v. Dodd, *referred to*.
Johnson v. Emerson (1871) 40 L. J. Ex. 201; L. R. 6 Ex. 329; 25 L. T. 337.—EX.

Whitworth v. Hall (1831) 2 B. & Ad. 695; 9 L. J. (O.S.) K. B. 297.—K.B., *applied*.
Atkinson v. Raleigh (1842) 11 L. J. Q. B. 165; 3 Q. B. 79.—Q.B.

Whitworth v. Hall, *applied*.
Gilding v. Eyre (1861) 10 C. B. (N.S.) 592; 31 L. J. C. P. 174; 7 Jur. (N.S.) 1105; 5 L. T. 136; 9 W. R. 946.—C.P.

Whitworth v. Hall; Cotton v. James (1830) 1 B. & Ad. 128.—K.B.; and **Farley v. Danks** (1855) 24 L. J. Q. B. 244; 4 El. & Bl. 493, 499; 1 Jur. (N.S.) 331; 3 W. R. 173.—Q.B., *referred to*.

Johnson v. Emerson (1871) 40 L. J. Ex. 201; L. R. 6 Ex. 329; 25 L. T. 337.—EX.

Whitworth v. Hall, *applied*.
Metropolitan Bank v. Pooley (1885) 54 L. J. Q. B. 449; 10 App. Cas. 210; 53 L. T. 163; 33 W. R. 709; 49 J. P. 756.—H.L. (E.).

Johnson v. Emerson (1871) L. R. 6 Ex. 329; 40 L. J. Ex. 201; 25 L. T. 337.—EX., *commented on*.

Quartz Hill Gold Mining Co. v. Eyre (1883) 11 Q. B. D. 674; 52 L. J. Q. B. 488; 49 L. T. 249; 31 W. R. 668.—C.A.

BRETT, M.R.—In *Johnson v. Emerson*, it was suggested by Martin, B. that under the present law as to bankruptcy an action could not be maintained for falsely and maliciously, and without reasonable or probable cause, procuring an adjudication in bankruptcy. . . . This is, in substance, the view suggested by Martin, B., but it was not adopted by the other judges of the Exchequer, and I think that it cannot be maintained. The fault

of the proposition involved in this view is that it is too large. The proposition is that an action cannot be maintained because the petitioning creditor merely asks the Court to act judicially, and because it was to be assumed that the Court would decide rightly. If that proposition were well founded, it would be an answer to an action for malicious prosecution on a criminal charge, because even in that case the prosecutor merely asks the tribunal to decide upon the guilt of the person whom he charges. If a man is summoned before a justice of the peace falsely and maliciously, and without reasonable or probable cause, he will be put to expense in defending himself, and his fair fame may suffer from the accusation; nevertheless, the prosecutor only asks the justice to adjudicate upon the charge. Therefore it is not a good answer to an action for maliciously procuring an adjudication in bankruptcy to say, that the alleged creditor has only asked for a judicial decision. It seems to me that an action can be maintained for maliciously procuring an adjudication under the Bankruptcy Act, 1869, because by the petition, which is the first process, the credit of the person against whom it is presented is injured before he can show that the action made against him is false: he is injured in his fair fame, even although he does not suffer a pecuniary loss. That seems to me to be the ground upon which Cleasby, B. supported the action in *Johnson v. Emerson*, and I think that his view was right.—p. 683.

Quartz Hill Consolidated Gold Mining Co. v. Eyre (1883) 52 L. J. Q. B. 488; 11 Q. B. D. 674; 49 L. T. 249; 31 W. R. 668.—C.A., *considered*.

Wyatt v. Palmer (1899) 68 L. J. Q. B. 709; [1899] 2 Q. B. 106; 80 L. T. 639; 47 W. R. 540.—C.A. **LINDLEY, M.R. and RIGBY, L.J.**

Saxon v. Castle (1837) 6 L. J. K. B. 177; 6 A. & E. 652; 1 N. & P. 661; W. W. & D. 305.—K.B.; and **De Medina v. Grove** (1847) 17 L. J. Q. B. 321; 10 Q. B. 172; 11 Jur. 145.—EX. CH., *referred to*.

Churchill v. Siggers (1854) 23 L. J. Q. B. 308; 3 El. & Bl. 929; 2 C. L. R. 1509; 18 Jur. 773; 2 W. R. 551.—Q.B.

Churchill v. Siggers and Jenings v. Florence (1857) 2 C. B. (N.S.) 467; 26 L. J. C. P. 277; 3 Jur. (N.S.) 774.—C.P., *applied*.
Gilding v. Eyre (1861) 10 C. B. (N.S.) 592; 31 L. J. C. P. 174; 5 L. T. 136; 9 W. R. 946.—C.P.

Gilding v. Eyre, *rule applied*.
Parton v. Hill (1864) 10 L. T. 414; 12 W. R. 753.—Q.B.

Venafra v. Johnson (1833) 3 M. & Scott 847; 10 Bing. 301; 6 Car. & P. 50; 3 L. J. C. P. 51.—C.P., *considered and applied*.

Stewart v. Gromett (1860) 7 C. B. (N.S.) 191; 29 L. J. C. P. 170; 6 Jur. (N.S.) 776.—C.P.

Temperton v. Russell (1893) 62 L. J. Q. B. 412; [1893] 1 Q. B. 715; 69 L. T. 78; 41 W. R. 565; 57 J. P. 676; 4 R. 376.—C.A., *discussed*.

Wood v. McCarthy (1893) 62 L. J. Q. B. 373; [1893] 1 Q. B. 775; 5 R. 408; 69 L. T. 431; 41 W. R. 523.—**WILLS and LAWRENCE, JJ.**

Temperton v. Russell, *commented on*.
Allen v. Flood (1897) 67 L. J. Q. B. 119; [1898] A. C. 1; 77 L. T. 717; 46 W. R. 258; 62 J. P. 595.—H.L. (E.). (*See judgments.*)

Temperton v. Russell, followed.

Leathem v. Craig [1899] 2 Ir. R. 667.—C.A.

Temperton v. Russell, reflected on.

Bedford (Duke) v. Ellis (1901) 70 L. J. Ch. 102; [1901] A. C. 1; 83 L. T. 686.—H.L. (E.). LORDS HALSBURY and BRAMPTON *dissenting*.

Temperton v. Russell, not applied.

Linaker v. Pilcher (1901) 70 L. J. K. B. 396; 84 L. T. 421; 49 W. R. 413.—MATHEW, J.

Temperton v. Russell, referred to.

Taff Vale Ry. v. Amalgamated Society of Railway Servants (1901) 70 L. J. K. B. 905; [1901] A. C. 426; 85 L. T. 147; 50 W. R. 44; 65 J. P. 596.—H.L. (E.); *reversing* (1900) [1901] 1 K. B. 170; 83 L. T. 474; 49 W. R. 101; 64 J. P. 788.—C.A., and *restoring* FARWELL, J.

Temperton v. Russell, dicta overruled.

Quinn v. Leatham (1901) 70 L. J. P. C. 76; [1901] A. C. 495; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708.—H.L. (IR.).

Temperton v. Russell, applied.

Read v. Friendly Society of Operative Stonemasons (1902) 71 L. J. K. B. 994; [1902] 2 K. B. 732; 87 L. T. 493; 51 W. R. 115; 66 J. P. 822.—C.A. COLLINS, M.R., STIRLING and HARDY, L.JJ.

Flood v. Jackson (1895) 64 L. J. Q. B. 665; [1895] 2 Q. B. 21; 73 L. T. 161; 43 W. R. 453; 14 R. 397; 59 J. P. 388.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.; *reversed, nom.* Allen v. Flood (1897) 67 L. J. Q. B. 119; [1898] A. C. 1; 77 L. T. 717; 46 W. R. 258; 62 J. P. 595.—H.L. (E.). LORDS HERSCHELL, WATSON, DAVEY, MACNAGHTEN, SHAND and JAMES; LORDS HALSBURY, L.C., ASHBOURNE and MORRIS *dissenting*.

Allen v. Flood (1897) 67 L. J. Q. B. 119; [1898] A. C. 1; 77 L. T. 717; 46 W. R. 258; 62 J. P. 595.—H.L. (E.), *considered and applied*.

Ajello v. Worsley (1898) 67 L. J. Ch. 172; [1898] 1 Ch. 274; 77 L. T. 783; 46 W. R. 245.—STIRLING, J.

Allen v. Flood, discussed.

Huttly v. Nymmons (1897) 67 L. J. Q. B. 213; [1898] 1 Q. B. 181.—DARLING, J.

Allen v. Flood, distinguished.

Lyons v. Wilkins (1898) 68 L. J. Ch. 146; [1899] 1 Ch. 255; 79 L. T. 709; 47 W. R. 291; 63 J. P. 339.—C.A. LINDLEY, M.R., CHITTY and VAUGHAN WILLIAMS, L.JJ.

CHITTY, L.J.—The point decided in *Allen v. Flood* is that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action. No such general question of motive arises in the present case. The sole question is whether upon the facts the case is brought within sect. 7 [of the Conspiracy and Protection of Property Act, 1875]. To bring a case of watching or besetting within the section it must be shown that the watching or besetting was done with a view to compel a person to abstain from doing or to do any act which such person has a legal right to do or abstain from doing. That the watching and besetting were done with that view is found by the judge and not disputed. "View" does not import motive. It imports purpose.—p. 152.

Allen v. Flood, explained.*

Quinn v. Leatham (1901) 70 L. J. P. C. 76; [1901] A. C. 495; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708.—H.L. (IR.).

Allen v. Flood, not applied.

Linaker v. Pilcher (1901) 70 L. J. K. B. 396; 84 L. T. 421; 49 W. R. 413.—MATHEW, J.

Allen v. Flood, applied.

Read v. Friendly Society of Operative Stonemasons (1902) 71 L. J. K. B. 994; [1902] 2 K. B. 732; 87 L. T. 493; 51 W. R. 115; 66 J. P. 822.—C.A.; and Glamorgan Coal Co. v. South Wales Miners' Federation (1903) (*infra*).

Leatham v. Craig [1899] 2 Ir. R. 667.—C.A.; *affirmed, nom.* Quinn v. Leatham (1901) 70 L. J. P. C. 76; [1901] A. C. 495; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708.—H.L. (IR.).

Quinn v. Leatham, applied.

Read v. Friendly Society of Operative Stonemasons (1902) 71 L. J. K. B. 994; [1902] 2 K. B. 732; 87 L. T. 493; 51 W. R. 115; 66 J. P. 822.—C.A. COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.

Quinn v. Leatham, and Read v. Friendly Society of Operative Stonemasons, considered and applied.

Glamorgan Coal Co. v. South Wales Miners' Federation (1903) 72 L. J. K. B. 893; [1903] 2 K. B. 545; 89 L. T. 393.—C.A.

Quinn v. Leatham, considered and applied.

Giblan v. National Amalgamated Labourers' Union (1903) 72 L. J. K. B. 907; [1903] 2 K. B. 600; 89 L. T. 386.—C.A.

Glamorgan Coal Co. v. South Wales Miners' Federation

(1902) 71 L. J. K. B. 1001; [1903] 1 K. B. 118; 87 L. T. 232; 51 W. R. 59.—BIGHAM, J.; *reversed*, (1903) 72 L. J. K. B. 893; [1903] 2 K. B. 545; 89 L. T. 393.—C.A.

Cotterell v. Jones

(1851) 11 C. B. 713, 735; 21 L. J. C. P. 2; 16 Jur. 88.—C.P.

Approved, Ram Coomar Coondoo v. Chunder Canto Mookerjee (1876) 2 App. Cas. 186.—P.C.; and see Quartz Hill Gold Mining Co. v. Eyre (1883) 52 L. J. Q. B. 488; 11 Q. B. D. 674; 49 L. T. 249; 31 W. R. 668.—C.A.

Cotterell v. Jones and Whalley v. Pepper

(1836) 7 Car. & P. 506.—LITLEDALE, J., *applied*.

The Walter D. Wallet (1893) 62 L. J. Adm. 88; [1893] P. 202; 1 R. 627; 69 L. T. 771; 7 Asp. M. C. 398.—JEUNE, P.

Parsons v. Lloyd

(1772) 2 W. Bl. 845; 3 Wils. 341.—C.P.

Referred to, Barker v. Braham (1773) 2 W. Bl. 866; 3 Wils. 368.—C.P.; *dismissed*, Jarman v. Hooper (1843) 13 L. J. C. P. 63; 6 Man. & G. 827, 850; 1 D. & L. 769; 7 Scott, N. R. 663; 8 Jur. 127.—C.P.

3. WHAT MUST BE PROVED.

Castrique v. Behrens

(1861) 3 El. & El. 709; 30 L. J. Q. B. 163; 7 Jur. (N.S.) 1028; 4 L. T. 52.—Q.B., *observations applied*.

Basché v. Matthews (1867) 36 L. J. M. C. 93; L. R. 2 C. P. 684; 16 L. T. 417; 15 W. R. 839.—C.P.

Basebe v. Matthews, followed.

Bynoe v. Bank of England (1902) 71 L. J. K. B. 208; [1902] 1 K. B. 467; 86 L. T. 140; 50 W. R. 359.—C.A.

- Windham v. Clere** (1588) Cro. Eliz. 130; 1 Leon. 187, *disapproved*.
- Morgan v. Hughes** (1788) 2 Term Rep. 225.
- ASHHURST, J.**—I have no difficulty in saying that the case as cited from Cro. Eliz. cannot be law; if it were it would confound all legal principles which have governed cases of this kind.—p. 231.
- Smith v. Macdonald** (1799) 3 Esp. 7, *disapproved*.
- Willans v. Taylor** (1829) 3 M. & P. 359; 7 L. J. (O.S.) C. P. 250; 31 R. R. 379.—C.P., *affirmed, nom.* Taylor v. Willans (1831) 2 B. & Ad. 845; 1 L. J. K. B. 17.—EX. CH.
- PARK, J.**—Although Lord Kenyon said in *Smith v. Macdonald* "that if the evidence offered to the jury by a prosecutor, on the trial of an indictment, be sufficient to cause them to pause, he shall hold it to be a probable cause," I cannot accede to that doctrine; for a person might then suffer from the prejudices or capricious feelings of a jury.—p. 365.
- Wilkinson v. Howel** (1830) M. & M. 495.—K.B., *questioned*.
- Gilding v. Eyre** (1861) 7 Jur. (N.S.) 1105; 10 C. B. (N.S.) 592; 31 L. J. C. P. 174; 5 L. T. 136; 9 W. R. 946.—C.P.
- WILLIAMS, J.**—It is difficult to reconcile the reasoning in that case with the other case.—p. 1106.
- Pope v. Foster** (1792) 4 Term Rep. 590, *overruled*.
- Green v. Bennett** (1787) 1 Term Rep. 656, and **Rex v. Payne**, Mich. 29 Geo. 3, *approved*.
- Purcell v. Macnamara** (1867) 9 East 157. See S. C., 9 East 361; 1 Camp. 199; 9 R. R. 578.
- ELLENBOROUGH, C.J.**—This nonsuit proceeded on the authority of *Pope v. Foster*: if that case be law the nonsuit ought to stand; if it be not, both that case and this nonsuit must fall together (p. 160). . . . The ground, therefore, on which I consider that the case of *Pope v. Foster* ought not to bind us, as having been decided against principle, is that this is an allegation of substance and not of description. And this distinguishes it from *Green v. Bennett*, which was a case of description: it described the writ in terms, when sued out, and when returnable; and the return of the writ was part of the description of the thing alleged, and could only be proved by the production of a writ so returnable. That case, therefore, was rightly decided: and so it appears to me was that of *The King v. Payne*, where a better opinion was delivered than in *Pope v. Foster*, which passed without discussion.—p. 161.
- Purcell v. Macnamara** (1807) 9 East 157 (see S. C., 9 East 361; 1 Camp. 199; 9 R. R. 578), *dictum disapproved*.
- Stoddart v. Palmer** (1824) 3 B. & C. 2; 2 L. J. (O.S.) K. B. 204.—K.B.
- ABBOTT, C.J.** (for the Court).—The declaration in *Purcell v. Macnamara*, and the count on which the verdict was taken in *Phillips v. Shaw* (4 B. & A. 435), did not contain any such averment; and Lord Ellenborough, in the former case, intimated an opinion that if there had been such an averment [that if the plaintiff had stated the record], it might have been as descriptive of the record, and the variance would have been fatal. But, upon consideration, it appears to us that that opinion is not correct, and that the introduction of the averment in this case is wholly immaterial.—p. 5.
- Purcell v. Macnamara** (1808) 9 East 361; 1 Camp. 199; 9 R. R. 578, *referred to*.
- Henderson v. Midland Ry.** (1871) 24 L. T. 881; 20 W. R. 23.—EX.
- Sutton v. Johnstone** (1787) 1 Term Rep. 784; 1 Bro. P. C. 76.—H.L. (E.); *affirming* S. C. *nom.* Johnstone v. Sutton (1786) 1 Term Rep. 493, 510; 1 R. R. 257, 269.—EX. CH., *applied*.
- Panton v. Williams** (1841) 2 Q. B. 169; 1 G. & D. 504; 10 L. J. Ex. 545.—EX. CH.
- Sutton v. Johnstone, considered.**
- Dawkins v. Paulet** (Lord) (1869) 39 L. J. Q. B. 53; L. R. 5 Q. B. 94; 9 B. & S. 768; 21 L. T. 584; 18 W. R. 336.—Q.B.
- Sutton v. Johnstone, adopted.**
- Lister v. Perryman** (1870) 39 L. J. Ex. 177; L. R. 4 H. L. 521; 23 L. T. 269; 19 W. R. 9.—H.L. (E.); **Sullivan v. Spencer** (Barl) (1872) Ir. R. 6 C. L. 173.—Q.B.; **Dawkins v. Rokeby** (1873) 42 L. J. Q. B. 63; L. R. 8 Q. B. 255, 271.—EX. CH. [*affirmed* H.L., see *ante*, vol. I, col. 837]; and **Grant v. Secretary of State for India** (1877) 46 L. J. C. P. 681; 2 C. P. D. 445; 37 L. T. 188; 25 W. R. 818.—C.P.D.
- Sutton v. Johnstone, referred to.**
- Brown v. Hawkes** (1891) 61 L. J. Q. B. 151; [1891] 2 Q. B. 718; 65 L. T. 108; 55 J. P. 823.—O.A. **ESHER, M.R., BOWEN and KAY, L.JJ.**
- Warden v. Bailey** (1811) 4 Taunt. 67.—C.P.; S. C. *nom.* **Bailey v. Warden**, 4 M. & S. 400.—EX. CH.; and **Grant v. Gould** (1792) 2 H. Bl. 69; 3 R. R. 342, *considered*.
- Dawkins v. Paulet** (Lord) (1869) 9 B. & S. 768; 39 L. J. Q. B. 53; L. R. 5 Q. B. 94; 21 L. T. 584; 18 W. R. 336.—Q.B.; **COCKBURN, C.J. dissenting**.
- Warden v. Bailey, explained.**
- Grant v. Gould, applied.**
- Dawkins v. Rokeby** (1873).—EX. CH. (*supra*).
- Broad v. Ham (or How)** (1839) 5 Bing. (N.C.) 722; 8 Scott 40; 8 L. J. C. P. 357.—C.P., *adopted*.
- Lister v. Perryman** (1870) 39 L. J. Ex. 177; L. R. 4 H. L. 521; 23 L. T. 269; 19 W. R. 9.—H.L. (E.).
- Broad v. Ham (or How), referred to.**
- Johnson v. Emerson** (1871) 40 L. J. Ex. 201; L. R. 6 Ex. 329; 25 L. T. 337.—EX.
- Broad v. Ham (or How), commented on.**
- Shroshery v. Osmaston** (1877) 37 L. T. 792.—GROVE and **LINDLEY, JJ.**
- Panton v. Williams** (1841) 2 Q. B. 169; 1 G. & D. 504; 10 L. J. Ex. 545.—EX. CH., *commented on*.
- Rowlands v. Samuel** (1847) 11 Q. B. 39, 41, n.; 17 L. J. Q. B. 65.—Q.B.
- Panton v. Williams, followed.**
- Busst v. Gibbons** (1861) 30 L. J. Ex. 75.—EX.; **Hailes v. Marks** (1861) 7 H. & N. 56; 30 L. J. Ex. 389; 7 Jur. (N.S.) 851; 4 L. T. 805; 9 W. R. 808.—EX.

Panton v. Williams, adopted.

Lister v. Perryman (1870) 39 L. J. Ex. 177; L. R. 4 H. L. 521; 23 L. T. 269; 19 W. R. 9.—H.L. (E.); Johnson v. Emerson (1871) 40 L. J. Ex. 201; L. R. 6 Ex. 329; 25 L. T. 337.—EX.

Haddrick v. Heslop (1848) 12 Q. B. 267; 17 L. J. Q. B. 313; 12 Jur. 600.—Q.B., followed.

Chapman v. Heslop (or Heslop v. Chapman) (1853) 2 C. L. R. 139; 23 L. J. Q. B. 49; 18 Jur. 348; 2 W. R. 74.—EX. CH.

Haddrick v. Heslop, applied.

Shrosbery v. Osmaston (1877) 37 L. T. 792.—GROVE and LINDLEY, JJ.

Turner v. Ambler (1847) 16 L. J. Q. B. 158; 10 Q. B. 252; 6 Jur. 346.—Q.B.; **Chapman v. Heslop** (1853) 23 L. J. Q. B. 49; 2 C. L. R. 139; 18 Jur. 348; 2 W. R. 74.—EX. CH.; **Ravenga v. Mackintosh** (1833) 2 L. J. K. B. 137; 2 B. & C. 693; 4 D. & R. 107; 1 Car. & P. 204.—K.B., referred to.

Johnson v. Emerson (1871) 40 L. J. Ex. 201; L. R. 6 Ex. 329; 25 L. T. 337.—EX.

Turner v. Ambler; Chapman v. Heslop, and Williams v. Banks (1859) 1 F. & F. 557.—WIGHTMAN, J., applied.

Shrosbery v. Osmaston (1877) 37 L. T. 792.—GROVE and LINDLEY, JJ.

Turner v. Ambler and Mitchell v. Jenkins (1833) 5 B. & Ad. 588, 594; 2 N. & M. 301; 3 L. J. K. B. 35; adopted.

Hicks v. Faulkner (1882) 51 L. J. Q. B. 268; 8 Q. B. D. 167; 46 L. T. 127; 30 W. R. 545.—HUDDLESTON, B. and HAWKINS, J.; affirmed, 46 L. T. 127; 46 J. P. 420.—C.A. COLERIDGE, C.J., BRETT and HOLKER, L.JJ.

Perryman v. Lister (1868) 37 L. J. Ex. 166; L. R. 3 Ex. 197; 18 L. T. 574.—EX. CH.; reversed, nom. **Lister v. Perryman** (1870) 39 L. J. Ex. 177; L. R. 4 H. L. 521; 23 L. T. 269; 19 W. R. 9.—H.L. (E.).

Lister v. Perryman, applied.

Hicks v. Faulkner (1882) 51 L. J. Q. B. 268; 8 Q. B. D. 167; 46 L. T. 127; 30 W. R. 545.—HUDDLESTON, B. and HAWKINS, J.; affirmed, 46 L. T. 127; 46 J. P. 420.—C.A. COLERIDGE, C.J., BRETT and HOLKER, L.JJ.

Lister v. Perryman, applied.

Walker v. S. E. Ry. (1870) 39 L. J. C. P. 346; L. R. 5 C. P. 640; 32 L. T. 14; 18 W. R. 1032.—C.P.

Lister v. Perryman, applied.

Quartz Hill Gold Mining Co. v. Eyre (1884) 50 L. T. 274.—DENMAN and MANISTY, JJ.

Lister v. Perryman, distinguished.

Lea v. Charrington (1889) 58 L. J. Q. B. 461; 23 Q. B. D. 45; 61 L. T. 222; 37 W. R. 736; 16 Cox C. C. 704; 53 J. P. 614.—POLLOCK, B. and MANISTY, J.; affirmed on other grounds, 58 L. J. Q. B. 461; 23 Q. B. D. 272; 61 L. T. 450; 16 Cox C. C. 704; 54 J. P. 19.—C.A. ESHER, M.R., COTTON and LINDLEY, L.JJ.

Lister v. Perryman, referred to.

Brown v. Hawkes (1891) 61 L. J. Q. B. 151; [1891] 2 Q. B. 718; 65 L. T. 108; 55 J. P. 823.—C.A. ESHER, M.R., BOWEN and KAY, L.JJ.

Lister v. Perryman, distinguished.

King v. Henderson (1898) 67 L. J. P. C. 134; [1898] A. C. 420; 79 L. T. 37; 47 W. R. 157; 5 Manson 308.—P. C. LORDS WATSON, ROBHOUSE, DAVEY and SIR R. COUCH.

Abrath v. N. E. Ry., 52 L. J. Q. B. 352; 11 Q. B. D. 79.—GROVE and LOPES, L.JJ.; reversed, (1883) 52 L. J. Q. B. 620; 11 Q. B. D. 440; 49 L. T. 618; 32 W. R. 50.—C.A. BRETT, M.R., BOWEN and FRY, L.JJ.; the latter decision affirmed, (1886) 55 L. J. Q. B. 457; 11 App. Cas. 247; 55 L. T. 63; 50 J. P. 659.—H.L. (E.). LORDS SELBORNE, L.C., WATSON, BRAMWELL and FITZGERALD.

Abrath v. N. E. Ry. (supra in C.A.), applied.

Quartz Hill Gold Mining Co. v. Eyre (1884) 50 L. T. 274.—DENMAN and MANISTY, JJ.

Abrath v. N. E. Ry. (supra in C.A.), dictum applied.

Lea v. Charrington (1889) 58 L. J. Q. B. 461; 23 Q. B. D. 45; 61 L. T. 222; 37 W. R. 736; 16 Cox C. C. 704; 53 J. P. 614.—POLLOCK, B. and MANISTY, J.; affirmed on other grounds, 58 L. J. Q. B. 461; 23 Q. B. D. 272; 61 L. T. 450; 16 Cox C. C. 704; 54 J. P. 19.—C.A. ESHER, M.R., COTTON and LINDLEY, L.JJ.

Abrath v. N. E. Ry. (supra in H.L.), commented on.

Cornfoot v. Carlton Bank (1899) 68 L. J. Q. B. 196; [1899] 1 Q. B. 392; 80 L. T. 121.—DARLING, J.

4. PRACTICE.

Bank of New South Wales v. Owston (1879)

48 L. J. P. C. 25; 4 App. Cas. 270; 40 L. T. 500; 14 Cox C. C. 267.—P.C., applied.

Abrahams v. Deakin (1890) 60 L. J. Q. B. 238; [1891] 1 Q. B. 516; 63 L. T. 690; 39 W. R. 183; 55 J. P. 212.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Bank of N. S. Wales v. Owston, applied.

Jones v. Duck, "Times" Newspaper, March 16, 1900, adopted.

Hanson v. Waller (1900) 70 L. J. Q. B. 231; [1901] 1 Q. B. 390; 84 L. T. 91; 49 W. R. 415.—KENNEDY and DARLING, JJ.

Flewster v. Royle (1808) 1 Camp. 187, dissented from.

Gosden v. Elphick (1849) 4 Ex. 445; 19 L. J. Ex. 9; 13 Jur. 989.—EX., approved.

Grinham v. Willey (1859) 28 L. J. Ex. 242; 4 H. & N. 496; 5 Jur. (N.S.) 444; 7 W. R. 463.—EX.

POLLOCK, C.B.—I quite agree with what fell from Rolfe, B. and Alderson, B. in *Gosden v. Elphick*, which has been referred to. There the marginal note of *Flewster v. Royle* being cited, that "if A. states positively to the commander of a pressgang that B. is liable to the impress service, who in truth is not so, and B., in consequence of this information, is impressed, A. is liable to an action of trespass for false imprisonment at the suit of B." Rolfe, B. said: "I must dissent from that ruling. The case may mean that the facts were evidence from which the jury might infer a wrongful imprisonment;" and Alderson, B. adds, "It would come to this, that if a constable, in search of a delinquent,

says, 'Which is the man?' the persons present must not point him out; or if I see a person who is perfectly innocent taken into custody, and the guilty man running away, I must not say so, or I shall be liable in trespass." The evidence in *Fleuster v. Royle* very likely showed that the defendant bore some spite to the plaintiff.—p. 243.

Grinham v. Willey (1859) 28 L. J. Ex. 242; 4 H. & N. 496; 5 Jur. (N.S.) 444; 7 W. R. 463.—EX.; and **Hunt v. North Staffordshire Ry.** (1857) 2 H. & N. 451; 5 W. R. 731.—EX., *distinguished*.
Austin v. Dowling (1870) 39 L. J. C. P. 260; L. R. 5 C. P. 534; 22 L. T. 721; 18 W. R. 1003.—C.P.

Grinham v. Willey, *adopted*.
Rowe v. London Pianoforte Co. (1876) 34 L. T. 450; 13 Cox C. C. 211.—DIV. CT.

Dubois v. Keats (1840) 3 P. & D. 306; 11 A. & E. 329; 9 L. J. Q. B. 66; 4 Jur. 148.—Q.B., *distinguished*.
Fitzjohn v. Mackinder (1861) 30 L. J. C. P. 257; 9 C. B. (N.S.) 505; 7 Jur. (N.S.) 1283; 4 L. T. 149; 9 W. R. 477.—EX. CH.

Atkinson v. Warne (1835) 1 C. M. & R. 827; 5 Tyr. 481; 3 D. P. C. 483; 6 Car. & P. 687.—EX., *applied*.
Hayling v. Okey (1853) 8 Ex. 531; 22 L. J. Ex. 139; 17 Jur. 325; 1 W. R. 182.—EX. CH.

Sandback v. Thomas (1816) 1 Stark. 306; 18 R. R. 771, *disapproved*.
Grace v. Morgan (1836) 2 Bing. (N.C.) 534; 5 L. J. C. P. 180; 2 Scott 790; 1 Hodges 398.—C.P.

TINDAL, C.J.—It may be observed that all the cases relied on by the plaintiff, as authority that the full costs of the former action are recoverable in a subsequent suit for vexatiously prosecuting the former action, are cases where there has been no taxation of costs in the former action; such as ejection, where the judgment was obtained by default against the casual ejector; or foreclosure, where there are no costs given in the action itself; or upon a writ of error, where no costs are given, in which cases the plaintiff must recover his full expenses, if he is entitled to recover any. But in ejection, where the action has been defended and the costs taxed, he is not entitled to recover the extra costs in a subsequent action (*Doe v. Davis*, 1 Esp. 358). There is only one case that has been cited in opposition to the principle above laid down, namely, that of *Sandback v. Thomas*; but whatever respect is due to the opinion of the very eminent judge who tried the case, we cannot think it sufficient to outweigh the authorities to which we have referred.—p. 537.

Brown v. Allen (1808) 4 Esp. 158.—K.B.; and **Eliot v. Allen** (1845) 1 C. B. 18.—C.P., *discussed and applied*.
Dawson v. McClelland [1899] 2 Ir. R. 486.—Q.B.D.; *affirmed* C.A.

MARKETS AND FAIRS.

Holcroft v. Heel (1799) 1 Bos. & P. 400.—C.P., *commented on*.

Campbell v. Wilson (1803) 3 East 294; 7 R. R. 462.

LE BLANC, J.—The ground on which that case went off was merely this, that the Court having intimated their opinion that if the case went down to trial again upon the same facts, it would be left to the jury to find for the defendant upon the ground of a presumption of a grant after twenty years' uninterrupted user of the market; the plaintiff's counsel said that if it were to be left to the jury in that manner, with the recommendation of the Court in favour of such a presumption, it would answer no purpose to go to trial again.—p. 298.

The Prince's Case (1605) 8 Co. 1 a, 8 b, 9 b.

Distinguished, **Beauchamp (Earl) v. Winn** (1869) 38 L. J. Ch. 556; L. R. 4 Ch. 562; 21 L. T. 253.—L.J. [*affirmed*, H.L., *post*, col. 1833]; **The Buckhurst Peerage** (1876) 2 App. Cas. 1, 38.—H.L. (E.); *referred to*, **Penryn Corporation v. Holm** (1877) 46 L. J. Ex. 506; 2 Ex. D. 328; 37 L. T. 133; 25 W. R. 498.—EX. D.

The Prince's Case, *examined and discussed*.
G. E. Ry. v. Goldsmid (1884) 54 L. J. Ch. 162; 9 App. Cas. 927; 52 L. T. 270; 33 W. R. 81; 49 J. P. 260.—H.L. (E.). **LORDS SELBORNE, L.C. and FITZGERALD; LORD BLACKBURN** *doubting*.

SELBORNE, L.C.—On turning to the report of *The Prince's Case* it certainly does appear that though there was ample evidence of usage and long judicial and public recognition of the charter granted to the prince in the eleventh year of the reign, of a kind which is not on this record as to this particular charter, yet that with regard to the form of the instrument the very learned judges who had to consider *The Prince's Case* were clearly of opinion that that form, *prima facie* at all events, was evidence of that which on the face of it was asserted—namely, the concurrence of Parliament in the grant of the Crown; and where, as in that case, public interests were concerned, and things purported to be granted which could not possibly be granted without the assent of Parliament, the effect of an Act of Parliament to all intents and purposes was ascribed to the grant.—p. 165.

Monopolies Case (1602) 11 Co. Rep. 81, b, *explained and distinguished*.

G. E. Ry. v. Goldsmid (1884) 54 L. J. Ch. 162; 9 App. Cas. 927; 52 L. T. 270; 33 W. R. 81; 49 J. P. 260.—H.L. (E.).

Yard v. Ford (1670) 2 Wms. Saund. 172; 1 Lev. 296; Sir T. Raym. 195; 1 Mod. 69; 1 Vent. 98; 2 Kel. 689.—K.B.

Adopted, **Bryant v. Foot** (1867) 36 L. J. Q. B. 65; L. R. 2 Q. B. 161, 174.—Q.B. [*affirmed*, EX. CH., *ante*, vol. 1, col. 803]; **Dorchester Corporation v. ENSOR** (1869) 39 L. J. Ex. 11; L. R. 4 Ex. 335, 343.—EX.; **Elwes v. Payne** (1879) 48 L. J. Ch. 831; 12 Ch. D. 468; 41 L. T. 118; 28 W. R. 234.—M.B., *reversed* C.A.; **Dalton v. Angus** (1881) 50 L. J. Q. B. 689; 6 App. Cas.

740, 812; 44 L. T. 844; 30 W. R. 191.—H.L. (E.);
G. E. Ry. v. Goldsmid (1884).—H.L. (E.) [*supra*].

Islington Market Bill, In re (1835) 3 Cl. &
F. 513; 12 M. & W. 20, n.—H.L. (E.),
considered.

Manchester Corporation v. Peverley (1876) 22
Ch. D. 295, n.—V.C.

**Islington Market Bill, In re, and Prince v.
Lewis** (1826) 5 B. & C. 363; 3 D. & R.
121; 2 Car. & P. 66; 4 L. J. (o.s.) K. B.
188; 29 R. R. 265.—K.B., *considered*.

G. E. Ry. v. Goldsmid (1884) 54 L. J. Ch.
162; 9 App. Cas. 927; 52 L. T. 270; 33 W. R.
81; 49 J. P. 260.—H.L. (E.).

LORD BLACKBURN.—If you read carefully
what Littledale, J., giving the opinion of him-
self and Parke, B., says, it is impossible not
to perceive that they did not consider that in
Prince v. Lewis the fact that the plaintiff
did not maintain the market in good and
sufficient order was a bar to an action such as
this for disturbing the market, or even to an
action against an individual for disturbance;
but only that if it was the fact that it did pre-
vent a person from using the market, that might
disprove the allegation that he had disturbed
the market by selling as he did, inasmuch as he
could not have sold in the market, but was
prevented from doing so. That is what they
pointedly say, and that I think no one would
quarrel with.—p. 179.

Islington Market Bill, In re, applied.

Middleton (Lord) v. Power (1886) 19 L. R. Ir.
1.—V.C.

G. E. Ry. v. Goldsmid (1883) 53 L. J. Ch.
371; 25 Ch. D. 511; 49 L. T. 717; 32
W. R. 341.—C.A. (*affirmed, supra*, in H.L.),
applied.

Att.-Gen. v. Horner (1884) 54 L. J. Q. B. 227;
14 Q. B. D. 245; 33 W. R. 93; 49 J. P. 326.—
C.A.; *affirmed*, (1885) 55 L. J. Q. B. 193; 11
App. Cas. 66; 54 L. T. 281; 34 W. R. 641; 50
J. P. 564.—H.L. (E.).

G. E. Ry. v. Goldsmid and Elwes v. Payne
(1879) 48 L. J. Ch. 831; 12 Ch. D. 468;
41 L. T. 118; 28 W. R. 234.—C.A., *applied*.

**Wolverhampton New Waterworks Co. v.
Hawkesford** (1859) 28 L. J. C. P. 242,
246; 6 C. B. (N.S.) 336; 5 Jur. (N.S.)
1104; 7 W. R. 464.—C.P., *considered*.

Abergavenny Improvement Commissioners v.
Straker (1889) 58 L. J. Ch. 717; 42 Ch. D. 83;
60 L. T. 756; 38 W. R. 158.—KEKEWICH, J.

G. E. Ry. v. Goldsmid, *referred to*.

Birmingham Corporation v. Foster (1894) 70
L. T. 371.—ROMER, J.

G. E. Ry. v. Goldsmid, *considered*.

Wilcox v. Steel (1903) 73 L. J. Ch. 217;
[1904] 1 Ch. 212; 89 L. T. 640; 2 L. G. R. 105;
68 J. P. 146.—C.A.

Manchester Corporation v. Lyons (1882) 22

Ch. D. 287; 47 L. T. 677.—C.A., *adopted*.
Birmingham Corporation v. Foster (1894) 70
L. T. 371.—ROMER, J.

Manchester Corporation v. Lyons, referred to.
Abergavenny Improvement Commissioners v.
Straker (1889) 58 L. J. Ch. 717; 42 Ch. D. 83;
60 L. T. 756; 38 W. R. 158.—KEKEWICH, J.

Manchester Corporation v. Lyons, followed.

Taylor v. New Windsor Corporation (1897) 67
L. J. Q. B. 96; [1898] 1 Q. B. 186; 77 L. T.
585; 62 J. P. 5.—C.A. SMITH, RIGBY and COL-
LINS, L.J.J.; *affirmed, nom.* New Windsor Corpo-
ration v. Taylor (1898) 68 L. J. Q. B. 87; 79
L. T. 450.—H.L. (E.). LORDS HALSBURY, L.C.,
WATSON, SHAND, DAVEY and LUDLOW.

Middleton (Lord) v. Power (1886) 19 L. R.

Ir. 1.—V.C., *explained*.

Newcastle (Duke) v. Worksop Urban Council
(1902) 71 L. J. Ch. 487; [1902] 2 Ch. 145; 86
L. T. 405.—FARWELL, J.

Mosley v. Chadwick (1782) 3 Doug. 117;
7 B. & C. 47, n.; 31 R. R. 150, n., *dictum*
adopted.

Mosley v. Walker (1827) 7 B. & C. 40, 53; 9
D. & R. 863; 5 L. J. (o.s.) K. B. 358; 31 R. R.
146.—K.B.

Mosley v. Chadwick, referred to.

Dorchester Corporation v. Ensor (1869) 39
L. J. Ex. 11; L. R. 4 Ex. 335.—EX.

Mosley v. Chadwick, applied.

G. E. Ry. v. Goldsmid (1884) 54 L. J. Ch. 162;
9 App. Cas. 927, 960; 52 L. T. 270; 33 W. R.
81; 49 J. P. 260.—H.L. (E.).

Mosley v. Chadwick, see.

Att.-Gen. v. Horner (1884).—C.A.; *affirmed*,
H.L. (E.) (*supra*).

Mosley v. Walker (1827) 7 B. & C. 40, 53;
9 D. & R. 863; 5 L. J. (o.s.) K. B. 358;
31 R. R. 146.—K.B., *observation adopted*.

Macclesfield Corporation v. Chapman (1843)
13 L. J. Ex. 32; 12 M. & W. 18; 7 Jur.
1041.—EX., *adopted*.

Pope v. Whalley (1865) 6 B. & S. 303; 34
L. J. M. C. 76; 11 Jur. (N.S.) 444; 11 L. T.
769; 13 W. R. 402.—Q.B.

Mosley v. Walker and Pope v. Whalley
(*supra*), *referred to*.

McFarren v. Mitchell (1872) 41 L. J. M. C. 170;
L. R. 7 Q. B. 690; 27 L. T. 53.—Q.B.

Mosley v. Walker, referred to.

Penryn Corporation v. Best (1878) 48 L. J.
Ex. 103; 3 Ex. D. 292; 38 L. T. 805; 27 W. R.
126.—C.A.

Mosley v. Walker, considered and explained.

G. E. Ry. v. Goldsmid (1884) 54 L. J. Ch.
162; 9 App. Cas. 927; 52 L. T. 270; 33 W. R.
81; 49 J. P. 260.—H.L. (E.).

Mosley v. Walker and Lockwood v. Wood

(1841) 6 Q. B. 31; 15 L. J. Q. B. 365; 10
Jur. 158.—Q.B., *adopted*.

Att.-Gen. v. Horner (1884) 54 L. J. Q. B. 227;
14 Q. B. D. 245; 33 W. R. 93; 49 J. P. 326.—C.A.;
affirmed, (1885) 55 L. J. Q. B. 193; 11 App. Cas.
66; 54 L. T. 281; 34 W. R. 641; 50 J. P. 564.—
H.L. (E.).

Mosley v. Walker, considered.

Wilcox v. Steel (1903) 73 L. J. Ch. 217;
[1904] 1 Ch. 212; 89 L. T. 640; 2 L. G. R. 105;
68 J. P. 146.—C.A.

Macclesfield Corporation v. Pedley (1833) 4 B. & A. 397; 1 N. & M. 708.—K.B., *approved*.
Macclesfield Corporation v. Chapman (1843) 12 M. & W. 18; 13 L. J. Ex. 32; 7 Jur. 1041.—EX.
Macclesfield Corporation v. Pedley, *dictum not applied*.
Fearon v. Mitchell (1872) 41 L. J. M. C. 170; L. R. 7 Q. B. 690f; 27 L. T. 33.—Q.B.
Macclesfield Corporation v. Pedley, *dictum adopted*.
Dorchester Corporation v. Ensor (1869) 39 L. J. Ex. 11; L. R. 4 Ex. 335.—EX., *explained and distinguished*.
Manchester Corporation v. Lyons (1882) 22 Ch. D. 287; 47 L. T. 677.—C.A. JESSEL, M.B., COTTON and BOWEN, L.JJ.
Bridgland v. Shapter (1839) 8 L. J. Ex. 246; 5 M. & W. 375.—EX., *approved and distinguished*.
Brecon Corporation v. Edwards (1862) 1 H. & C. 51; 31 L. J. Ex. 368; 8 Jur. (N.S.) 461; 6 L. T. 293.—EX.
Rex v. Cotterill (1817) 1 B. & Ald. 67; 2 Chit. 487; **Curwen v. Salkeld** (1803) 3 East 538; 7 L. R. 510; and **De Rutzen v. Lloyd** (1836) 5 A. & E. 456; 6 N. & M. 776; 5 L. J. K. B. 202.—K.B., *distinguished*.
Rex v. Starkey (1837) 7 A. & E. 95; W. W. & D. 502; 6 L. J. K. B. 202, *followed*.
Ellis v. Bridgnorth Corporation (1863) 15 C. B. (N.S.) 52; 32 L. J. C. P. 273; 9 Jur. (N.S.) 1078; 8 L. T. 668; 12 W. R. 56.—C.P.
Ellis v. Bridgnorth Corporation, *referred to*.
Lawrence v. Hitch (1868) 37 L. J. Q. B. 209; L. R. 3 Q. B. 521; 9 B. & S. 467; 18 L. T. 483; 16 W. R. 813.—EX. CH.; **Edgar v. English Fisheries Commissioners** (1870) 23 L. T. 732, 738.—C.P.
Att.-Gen. v. Simpson (1901) 70 L. J. Ch. 828; [1901] 2 Ch. 671, 688; 85 L. T. 325.—C.A., *applied*.
Newcastle (Duke) v. Workson Urban Council (1902) 71 L. J. Ch. 487; [1902] 2 Ch. 145; 86 L. T. 405.—FARWELL, J.
Heddy v. Wheelhouse (1598) Cro. Eliz. 591; and **Abbot of Strata Marcella's Case** (1590) 9 Rep. 24 a. 25 b.
Followed, **Northumberland (Duke) v. Houghton** (1870) 39 L. J. Ex. 66; L. R. 5 Ex. 127; 22 L. T. 49; 18 W. R. 495.—EX.: *inapplicable*.
Penryn Corporation v. Best (1878) 48 L. J. Ex. 103; 3 Ex. D. 292; 38 L. T. 805; 27 W. R. 126.—EX. D., *affirmed C.A.*; *followed*, **Saltash Corporation v. Goodman** (1880) 49 L. J. C. P. 565; 5 C. P. D. 431, 442; 42 L. T. 872.—C.P.D., *reversed H.L. (B.) (ante, vol. 1, col. 1142)*; *applied*, **Newcastle (Duke) v. Workson Urban Council** (1902) 71 L. J. Ch. 487; [1902] 2 Ch. 145; 86 L. T. 405.—FARWELL, J.
Rex v. London Corporation (1682) 2 Show. 263, 265, 276, *commented upon*.
Egremont (Earl) v. Saul (1837) 6 A. & E. 924; 6 L. J. K. B. 205; 45 R. R. 647, *adopted*.
Newcastle (Duke) v. Workson Urban Council (1902) 71 L. J. Ch. 487; [1902] 2 Ch. 145; 86 L. T. 405.—FARWELL, J.

Stamford Corporation v. Pawlett (1830) 1 Cr. & J. 57; 1 Tyr. 291; 35 R. R. 675, *adopted*.
Brecon Markets Co. v. Neath and Brecon Ry. (1872) 41 L. J. C. P. 257; L. R. 7 C. P. 555, 568; 27 L. T. 316.—C.P. [*affirmed*, EX. CH.]; **Newcastle (Duke) v. Workson Urban Council** (1902) (*supra*).
Tewkesbury Bailiffs v. Diston (1805) 6 East 438; 2 Smith 508; and **Hill v. Smith** (1812) 4 Taunt. 520, *see S. C.*, 10 East 476; 10 R. R. 357.—EX. CH., *dicta adopted*.
Crane v. London Dock Co. (1864) 5 B. & S. 313; 33 L. J. Q. B. 221; 10 Jur. (N.S.) 984; 10 L. T. 372; 12 W. R. 745.—Q.B.
Ashworth v. Heyworth (1869) 38 L. J. M. C. 91; L. R. 4 Q. B. 316; 20 L. T. 439; 17 W. R. 668; 10 B. & S. 309.—Q.B., *applied*.
Wilson v. Cunliffe (1874) 29 L. T. 913.—Q.B.
Fearon v. Mitchell (1872) 41 L. J. M. C. 170; L. R. 7 Q. B. 690; 27 L. T. 33.—Q.B., *referred to*.
London Corporation v. Low (1879) 49 L. J. Q. B. 144; 42 L. T. 16; 28 W. R. 250; 44 J. P. 169.—Q.B.D.; **Wright v. Wallasey Local Board** (1887) 56 L. J. Q. B. 259; 18 Q. B. D. 783; 52 J. P. 4.—Q.B.D.
Fearon v. Mitchell, *applied*.
Spurling v. Bantoft (1891) 60 L. J. Q. B. 745; [1891] 2 Q. B. 384; 65 L. T. 581; 40 W. R. 157; 17 Cox C. C. 372; 56 J. P. 132.—CAVE and CHARLES, JJ.
Northampton Corporation v. Ward (1745-6) 2 Str. 1238; 1 Wils. 107, *applied*.
Swindon Central Market Co. v. Panting (1872) 27 L. T. 578.—Q.B.; **London Corporation v. Greenwich Union** (1883) 48 L. T. 437; 47 J. P. 420.—Q.B.D., and **Att.-General v. Tynemouth Corporation** (1900) 17 Times L. R. 77.—BUCKLEY, J.
Northampton Corporation v. Ward and Swindon Central Market Co. v. Panting, *adopted*.
Newcastle (Duke) v. Workson Urban Council (1902) 71 L. J. Ch. 487; [1902] 2 Ch. 145, 159, 160; 86 L. T. 405.—FARWELL, J.
Rex v. McGill (1823) 2 B. & C. 142; 3 D. & R. 377.—K.B.; and **Rex v. Websdell** (1823) 2 B. & C. 136; 3 D. & R. 360.—K.B., *applied*.
Benjamin v. Andrews (1858) 5 C. B. (N.S.) 299; 27 L. J. M. C. 310; 4 Jur. (N.S.) 41; 6 W. R. 692.—C.P.
Howard v. Lupton (1875) 44 L. J. M. C. 150; L. R. 10 Q. B. 598.—Q.B., *not followed*.
Woolwich Local Board v. Gardiner (1895) 64 L. J. M. C. 248; [1895] 2 Q. B. 497; 15 R. 590; 73 L. T. 218; 44 W. R. 46; 18 Cox C. C. 173; 59 J. P. 597.—GRANTHAM and WRIGHT, JJ.
WRIGHT, J.—I do not desire to criticise **Howard v. Lupton** further than to say that I have come to the same conclusion as Lush, J. came to in that case, and that I think that both Blackburn, J. and Mellor, J. would have looked at the matter differently if sect. 2 of the Pedlars Act, 1881, had been passed at the time the case came before them.—p. 250.

Woolwich Local Board v. Gardiner (1895)
64 L. J. M. C. 248; [1895] 2 Q. B. 497;
15 R. 590; 73 L. T. 218; 44 W. R. 46;
18 Cox C. C. 173; 59 J. P. 597.—GRANTHAM
and WRIGHT, JJ., *distinguished*.
Llandudno Urban Council v. Hughes (1900)
69 L. J. Q. B. 303; [1900] 1 Q. B. 472; 82 L. T.
147; 48 W. R. 366; 64 J. P. 357; 19 Cox C. C.
456.—CHANNELL and BUCKNILL, JJ.

MASTER AND SERVANT.

1. CONTRACT OF HIRING.
2. INJURIES TO SERVANT GENERALLY.
3. EMPLOYERS' LIABILITY ACT.
4. WORKMEN'S COMPENSATION ACT.
5. OTHER STATUTES.
6. RIGHTS OF MASTER AGAINST THIRD PARTIES.
7. LIABILITIES OF MASTER TO THIRD PARTIES.

I. CONTRACT OF HIRING.

Williamson v. Taylor (1843) D. & M. 389;
5 Q. B. 175; 13 L. J. Q. B. 81.—Q.B.,
impugned.
Whittle v. Frankland (1862) 31 L. J. M. C. 81;
2 B. & S. 49; 8 Jur. (N.S.) 382; 5 L. T. 639.—Q.B.

Aspdin v. Austin (1844) D. & M. 515; 5
Q. B. 671; 13 L. J. Q. B. 155; 8 Jur. 355.
—Q.B.; and **Dunn v. Sayles** (1844) 5 Q. B.
685; D. & M. 579; 13 L. J. Q. B. 159; 8
Jur. 358.—Q.B., *questioned*.
Emmens v. Elderton (1853) 4 H. L. Cas. 624;
13 C. B. 495; 18 Jur. 21.—H.L. (E.); *affirming*
6 C. B. 160; 17 L. J. C. P. 307.—EX. CH.
[The judges were called in to advise the House
of Lords.]

CROMPTON, J.—If they (the above cases) are to
be taken as deciding that there is no obligation on
the part of the employer to continue the relation
between the parties in cases like the present, or
that, where there is an agreement to employ and
serve for a specified time at a specified salary, an
action is not maintainable against the employer
immediately for a wrongful termination of the
relation, but that the party discharged, instead
of suing for damages immediately, must wait,
and remain idle until the end of the specified
period, and then sue for the salary as a sum
certain, I should think that they ought not to be
supported in a Court of error.—p. 647.

Aspdin v. Austin, *impugned*.
Whittle v. Frankland (1862) 31 L. J. M. C.
81; 2 B. & S. 49; 8 Jur. (N.S.) 382; 5 L. T. 639.
—Q.B.

CROMPTON, J.—Those cases have been much
shaken in the House of Lords in *Emmens v.*
Elderton [*supra*].

Aspdin v. Austin, *questioned*.
Worthington v. Sudlow (1862) 31 L. J. Q. B.
131; 2 B. & S. 508; 8 Jur. (N.S.) 668; 6 L. T.
283; 10 W. R. 621.—Q.B.

CROMPTON, J.—No case has been more ques-
tioned than that. **Pilkington v. Scott** (15 M. &
W. 657; 15 L. J. Ex. 329) and **Reg. v. Welch**
(2 El. & B. 357; 22 L. J. M. C. 145).—p. 134.

O.C.

Aspdin v. Austin, *commented on*.
Phillips v. G. W. Ry. (1872) 41 L. J. Ch. 614;
L. R. 7 Ch. 409; 26 L. T. 532; 20 W. R. 562.
—C.A.

Aspdin v. Austin, *observations adopted*.
Pallikelagatha Marcar v. Sigg (1880) L. R. 7
Ind. App. 83, 105.—P.C.

Elderton v. Emmens (1847) 16 L. J. C. P.
209; 4 C. B. 479; 11 Jur. 612.—C.P.;
reversed, (1848) 17 L. J. C. P. 307; 6 C. B.
160.—EX. CH.; *the latter decision affirmed*
nom. **Emmens v. Elderton** (1853) 4
H. L. Cas. 624; 13 C. B. 495; 18 Jur. 21.
—H.L. (E.).

Emmens v. Elderton (1853) 4 H. L. Cas.
624; 13 C. B. 495; 18 Jur. 21.—H.L. (E.);
S. C., 6 C. B. 160; 17 L. J. C. P. 307.—
EX. CH., *considered*.

Hochster v. De la Tour (1853) 2 El. & Bl.
678; 22 L. J. Q. B. 455; 17 Jur. 972; 1 W. R.
469.—Q.B.; **Whittle v. Frankland** (1862) 2
B. & S. 49; 31 L. J. M. C. 81; 8 Jur. (N.S.)
382; 5 L. T. 639.—Q.B.; **Churchward v. Reg.**
(1865) L. R. 1 Q. B. 173, 207; 14 L. T. 57.—
Q.B.; **Frost v. Knight** (1870) 39 L. J. Ex. 227;
L. R. 5 Ex. 329; 23 L. T. 714.—EX.; **MARTIN, B.**
dissenting (reversed), (1872) 41 L. J. Ex. 78;
L. R. 7 Ex. 111; 26 L. T. 77; 20 W. R. 471.—
EX. CH.).

Emmens v. Elderton, *applied*.
Turner v. Sawdon (1901) 70 L. J. K. B. 897;
[1901] 2 K. B. 633; 85 L. T. 222; 49 W. R. 712.
—C.A. SMITH, M.R., WILLIAMS and STIRLING,
L.JJ.

Gravely v. Barnard (1874) 43 L. J. Ch. 639;
L. R. 18 Eq. 518; 30 L. T. 863; 22 W. R.
891.—JESSEL, M.R.

Discussed and applied, **London and Yorkshire**
Bank v. Pritt (1887) 56 L. J. Ch. 987; 57 L. T.
875; 36 W. R. 135.—CHITTY, J.; *adopted*,
Weston, In re, Davies v. Tagart (1900) 69
L. J. Ch. 535; [1900] 2 Ch. 164, 173; 82 L. T.
591; 48 W. R. 467.—STIRLING, J.

Middleton v. Brown, *referred to*.
Rae v. Joyce (1892) 29 L. R. Ir. 500.—C.A.

Crane v. Powell (1868) 38 L. J. M. C. 43;
L. R. 4 C. P. 123; 2e L. T. 703; 17 W. R.
161.—C.P., *observations dissented from*.
Banks v. Crossland (1874) 44 L. J. M. C. 8;
L. R. 10 Q. B. 97; 32 L. T. 226; 23 W. R. 414.
—Q.B.

Fairman v. Oakford (1860) 5 H. & N. 635; 29
L. J. Ex. 459.—EX.; and **Hiscox v.**
Batchellor (1867) 15 L. T. 543.—BYLES,
J., *adopted*.

Green v. Wright (1876) 1 C. P. D. 591; 35 L. T.
339.—C.P.D.

Fairman v. Oakford, *dictum dissented from*.
Buckingham v. Surrey and Hants Canal Co.
(1882) 46 L. T. 885; 46 J. P. 774.

[In *Fairman v. Oakford*, Pollock, C.B. said,
"There is no inflexible rule that a general hiring
is a hiring for a year. Each particular case
must depend on its own circumstances."]

GROVE, J. (MATHEW, J. agreeing).—As a
general rule, where the hiring is a yearly hiring,
it cannot be put an end to by either party before
the end of the year. This rule, however, is
subject to an exception in cases in which the

agreement of hiring is subject to some stipulation, either express or implied by custom, enabling either party to determine the contract by notice.—p. 886.

Fairman v. Oakford, *dictum not adopted*.

Foxall v. International Land Credit Co. (1867) 16 L. T. 637.—C.P.

Riley v. Warden (1848) 2 Ex. 59; 18 L. J. Ex. 120.—EX., *adopted*.

Ingram v. Barnes (1857) 7 Bl. & Bl. 182; 26 L. J. Q. B. 319; 3 Jur. (N.S.) 861; 5 W. R. 726.—EX. CH.

Riley v. Warden and Ingram v. Barnes, *followed*.

Steeleman v. Barrett (1864) 2 H. & C. 934; 33 L. J. Ex. 153; 10 Jur. (N.S.) 476; 9 L. T. 834; 12 W. R. 411.—EX.

Ingram v. Barnes, *applied*.

Pillar v. Llynvi Coal and Iron Co. (1869) 38 L. J. C. P. 294; L. R. 4 C. P. 752; 20 L. T. 923; 17 W. R. 1123.—C.P.

Chawner v. Cummings (1846) 8 Q. B. 311; 15 L. J. Q. B. 161; 10 Jur. 454.—Q.B., *discussed*.

Archer v. James (1862) 31 L. J. Q. B. 153; 2 B. & S. 61; 8 Jur. (N.S.) 166; 6 L. T. 167; 10 W. R. 489.—EX. CH.

Redgrave v. Kelly (1889) 37 W. R. 543; 54 J. P. 70.—MATHEW and GRANTHAM, JJ. *See now* 59 & 60 Vict. c. 41.

Morris, In re, Cooper, Ex parte (1884) 26 Ch. D. 693; 51 L. T. 374.—C.A., *inapplicable*.

Lamb v. G. N. Ry. (1891) 60 L. J. Q. B. 489; [1891] 2 Q. B. 281; 65 L. T. 225; 39 W. R. 475; 56 J. P. 22.—SMITH and GRANTHAM, JJ.

Morris, In re, Cooper, Ex parte, *explained*.
Lamb v. G. N. Ry., *distinguished*.

Hewlett v. Allen (1892) 62 L. J. Q. B. 9; [1892] 2 Q. B. 662; 4 R. 77; 67 L. T. 457; 41 W. R. 197; 57 J. P. 260.—C.A.; *affirmed*, 63 L. J. Q. B. 608; [1894] A. C. 383; 6 R. 175; 71 L. T. 94; 42 W. R. 670; 58 J. P. 700.—H.L. (E.).

Saunders v. Whittle (1876) 33 L. T. 816; 24 W. R. 406.—CLEASBY, B., GROVE and FIELD, JJ., *referred to*.

Gregson v. Watson (1876) 34 L. T. 143.—CLEASBY, B., GROVE and FIELD, JJ.

Saunders v. Whittle; Gregson v. Watson, and Walsh v. Walley (1874) 43 L. J. Q. B. 102; L. R. 3 Q. B. 367; 22 W. R. 571.—Q.B., *distinguished*.

Warburton v. Heywood (or Heyworth) (1880) 50 L. J. Q. B. 137; 6 Q. B. D. 1; 43 L. T. 461; 29 W. R. 91; 45 J. P. 38.—C.A.; *reversing* 44 J. P. 798.—Q.B.D.

Tippling v. Clarke (1843) 2 Hare 383.—V.-C., *considered*.

Merryweather v. Moore (1892) 61 L. J. Ch. 503; [1892] 2 Ch. 518; 66 L. T. 719; 40 W. R. 540.—KEKEWICH, J.

Tippling v. Clarke, *see*

Ashworth v. Roberts (1890) 60 L. J. Ch. 27; 45 Ch. D. 623, 627; 63 L. T. 160; 39 W. R. 170.—KEKEWICH, J.

Reuter's Telegram Co. v. Byron (1874) 43 L. J. Ch. 661.—JESSEL, M.R. *considered*.
Merryweather v. Moore (1892) (*supra*).

Reuter's Telegram Co. v. Byron, *doubted*.

Lamb v. Evans (1892) 62 L. J. Ch. 404; [1893] 1 Ch. 218; 2 R. 189; 68 L. T. 131; 41 W. R. 405.—C.A. LINDLEY, BOWEN and KAY, L.JJ.

LINDLEY, L.J.—I do not think an agent has a right to employ, as against his principal, materials which the agent has obtained only for his principal and in the course of his agency. . . . It is said that the case of *Reuter's Telegram Co. v. Byron* before the late M.R., is contrary to that. I think that case goes rather too far. If that case rests upon this—namely, that the application was merely interlocutory, and the M.R. was not satisfied that the case was plain for an injunction—then it need not be questioned; but if it goes further than that, then there can, I think, be no doubt that the true principle was applied in that case more narrowly than it ought to have been.—p. 407.

Lamb v. Evans (1892) 62 L. J. Ch. 404; [1893] 1 Ch. 218; 2 R. 189; 68 L. T. 131; 41 W. R. 405.—C.A., *followed*.

Robb v. Green (1895) 64 L. J. Q. B. 593; [1895] 2 Q. B. 315; 14 R. 580; 73 L. T. 15; 44 W. R. 25; 59 J. P. 695.—C.A.

Lamb v. Evans, *approved*.

Louis v. Smellie (1895) 73 L. T. 226.—C.A. LINDLEY, LOPES and RIGBY, L.JJ.; *varying* KEKEWICH, J.

Lamb v. Evans, *approved and principle applied*.

Walter v. Lane (1900) 69 L. J. Ch. 699; [1900] A. C. 539; 83 L. T. 289; 49 W. R. 95.—H.L. (E.).

Oriental Bank Corporation, In re, MacDowall's Case (1886) 55 L. J. Ch. 620; 32 Ch. D. 366; 54 L. T. 667; 34 W. R. 529.—CHITTY, J., *approved*.

Forster, In re, Schumann, Ex parte (1887) 19 L. R. Ir. 240.—V.-C.

Reid v. Explosives Co. (1887) 56 L. J. Q. B. 388; 19 Q. B. D. 264; 57 L. T. 439; 35 W. R. 509.—C.A., *considered and applied*.

De Grelle v. Bull (1894) 1 Manson 118.—CHARLES, J.

Spain v. Arnott (1817) 2 Stark. 256, *dictum applied*.

Harmer v. Cornelius (1858) 5 C. B. (N.S.) 286; 28 L. J. C. P. 85; 4 Jur. (N.S.) 1110; 6 W. R. 749.—C.P.

Harmer v. Cornelius, *observations applied*.

Cuckson v. Stones (1858) 1 El. & El. 218; 28 L. J. Q. B. 25; 5 Jur. (N.S.) 337; 7 W. R. 134.—Q.B.

Cuckson v. Stones, *dictum applied*.

K—— v. Raschen (1878) 38 L. T. 38.—EX. D.

Cuckson v. Stones, *followed*.

Warren v. Whittingham (1902) 18 Times L. R. 508.—BRUCE, J.

Cuckson v. Stones, *see*

Elliott v. Liggins (1902) 71 L. J. K. B. 483; [1902] 2 K. B. 84; 87 L. T. 29; 50 W. R. 524.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Powell v. Bradbury (1849) 7 C. B. 201; 18 L. J. C. P. 116; 13 Jur. 349.—C.P., *overruled*.

P. 369; 19 L. J. Ex. 244; 14 Jur. 435; 7 D. & L. 228.—EX.

Powell v. Bradbury, held overruled.

Horton v. McMurtry (1860) 5 H. & N. 667; 29 L. J. Ex. 260; 2 L. T. 297; 8 W. R. 285.—EX.

MARTIN, B.—The case of *Powell v. Bradbury* was cited, in which it was held that a traverse, that the defendant wrongfully dismissed the plaintiff did not involve the question of wrongfulness, but merely put in issue the fact of dismissal. But it is to be observed that there is a case in this Court of *Lush v. Russell*, directly to the contrary. That was subsequent to the case of *Powell v. Bradbury*, which was then considered by this Court and overruled. In *Lush v. Russell* it was expressly held that on a traverse concluding to the contrary "without this, that the defendant wrongfully dismissed and discharged the plaintiff without reasonable cause," though it might be bad on special demurrer, as putting in issue an immaterial allegation, yet an issue had been taken on the plea, the plaintiff's misconduct, as well as the fact of his service, was in issue. This case, if law, is a direct authority in point.—p. 673.

Dunn v. Murray (1829) 7 L. J. (O.S.) K. B. 390; 9 B. & C. 780; 4 Man. & Ry. 571.—K.B., *adopted*.

Baker, Ex parte (1857) 26 L. J. M. C. 155; 2 H. & N. 219; 3 Jur. (N.S.) 514.—EX.

Lush v. Russell (1849) 19 L. J. Ex. 56; 4 Ex. 637.—EX., *considered*.

Reindel v. Schell (1858) 27 L. J. C. P. 146; 4 C. B. (N.S.) 97; 4 Jur. (N.S.) 310.—C.P.

London Tramways Co. v. Bailey (1877) 47 L. J. M. C. 3; 3 Q. B. D. 217; 37 L. T. 499; 26 W. R. 494.—Q.B.D., *not applied*.

Armstrong v. South London Tramways Co. (1890) 64 L. T. 96; 55 J. P. 340.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

2. INJURIES TO SERVANT GENERALLY.

Priestley v. Fowler (1837) 7 L. J. Ex. 42; 3 M. & W. 1; M. & H. 305; 1 Jur. 987.—EX.

Explained and applied, *Wigmore v. Jay* (1850) 5 Ex. 354; 19 L. J. Ex. 296; 14 Jur. 837.—EX.; *inapplicable*, *Bland v. Ross*, *The Julia* (1860) 14 Moore P. C. 210; *Lush*, 231.—P.C.: *approved*, *Riley v. Baxendale* (1861) 30 L. J. Ex. 87; 6 H. & N. 445; 9 W. R. 347.—EX.; *applied*, *Clarke v. Holmes* (1872) 41 H. & N. 937; 31 L. J. Ex. 356; 8 Jur. (N.S.) 992; 10 W. R. 405.—EX. CH.; *rule applied*, *Tunney v. Midland Ry.* (1866) 1 L. R. 1 C. P. 291; 12 Jur. (N.S.) 691.—C.P.; *considered*, *Fowler v. Lock* (1872) 40 L. J. C. P. 99; 1 L. R. 7 C. P. 272, 278; 29 L. T. 476.—C.P. [see in EX. CH., *post*, col. 1742]; *referred to*, *Turner v. G. E. Ry.* (1875) 33 L. T. 431.—C.P.; *applied*, *Lovell v. Howell* (1876) 45 L. J. C. P. 387; 1 C. P. D. 161; 34 L. T. 183; 24 W. R. 672.—C.P.D.; *followed*, *Rourke v. White Moss Colliery Co.* (1876) 46 L. J. C. P. 283; 1 C. P. D. 556; 35 L. T. 160.—C.P.D. [*affirmed*, C.A., *post*, col. 1717]; *referred to*, *Woodley v. Metropolitan Ry.* (1877) 46 L. J. Ex. 521; 2 Ex. D. 384; 36 L. T. 419.—C.A.; *applied*, *Swainson v. N. E. Ry.* (1878) 3 Ex. D. 341; 37 L. T. 102; 25 W. R. 676.—EX. D. [*reversed*, C.A., see col. 1719]; *referred to*, *Griffiths v. Dudley*

(Earl) (1882) 51 L. J. Q. B. 543; 9 Q. B. D. 357; 47 L. T. 10; 30 W. R. 797; 46 J. P. 711.—FIELD and CAVE, JJ.; *referred to*, *Murphy v. Wilson* (1883) 52 L. J. Q. B. 524; 48 L. T. 788; 47 J. P. 565; 48 J. P. 24.—POLLOCK, B., LOPES and CAVE, JJ.; *applied*, *Gibbs v. G. W. Ry.* (1883) 11 Q. B. D. 22; 48 L. T. 640.—FIELD, J. (*affirmed*, 53 L. J. Q. B. 543; 12 Q. B. D. 208; 50 L. T. 7.—C.A.); *adopted*, *Griffiths v. London and St. Katherine's Dock Co.* (1884) 53 L. J. Q. B. 504; 13 Q. B. D. 259; 51 L. T. 533; 33 W. R. 35; 49 J. P. 100.—C.A.; *referred to*, *Thomas v. Quartermaine* (1887) 56 L. J. Q. B. 340; 13 Q. B. D. 685; 57 L. T. 537; 35 W. R. 555; 51 J. P. 516.—C.A. BOWEN and FRY, L.JJ.; ESHER, M.R. *dissenting*.

Priestley v. Fowler, considered.

The Petrel (1893) 62 L. J. P. 92; [1893] P. 320; 1 R. 651; 70 L. T. 417; 7 Asp. M. C. 434.—JEUNE, P.

Priestley v. Fowler, held inapplicable.

Groves v. Wimborne (Lord) (1898) 67 L. J. Q. B. 862; [1898] 2 Q. B. 402; 79 L. T. 284; 47 W. R. 87.—C.A.

Williams v. Clough, (1858) 3 H. & N. 258; 27 L. J. Ex. 325.—EX., *referred to*.

Fowler v. Lock (1872) 40 L. J. C. P. 99; 1 L. R. 7 C. P. 272, 286; 29 L. T. 476.—C.P.; S. C. in EX. CH. (*post*, col. 1742).

Williams v. Clough and Watling v. Oastler (1871) 40 L. J. Ex. 43; 1 L. R. 6 Ex. 73; 23 L. T. 815; 19 W. R. 388.—EX., *considered*.

Griffiths v. London and St. Katherine's Dock Co. (1884) 53 L. J. Q. B. 504; 13 Q. B. D. 259; 51 L. T. 533; 33 W. R. 35.—C.A.

Hutchinson v. York, Newcastle and Berwick Ry. (1850) 5 Ex. 343; 6 Railw. Cas. 580; 19 L. J. Ex. 296.—EX., *followed*.

Wigmore v. Jay (1850) 5 Ex. 354; 19 L. J. Ex. 300; 14 Jur. 837.—EX.

Hutchinson v. York, Newcastle and Berwick Ry., questioned.

Morgan v. Vale of Neath Ry. (1864) 33 L. J. Q. B. 260; 12 W. R. 1032.—Q.B.; *affirmed*, (1865) 35 L. J. Q. B. 23; 1 L. R. 1 Q. B. 149; 5 B. & S. 736; 13 L. T. 564; 14 W. R. 144.—EX. CH.

Hutchinson v. York, Newcastle and Berwick Ry., applied.

Swainson v. N. E. Ry. (1878) 3 Ex. D. 341; 37 L. T. 102; 25 W. R. 676.—EX. D.; *reversed*, C.A. [see *post*, col. 1719].

Hutchinson v. York, Newcastle and Berwick Ry., considered.

The Petrel (1893) 62 L. J. P. 92; [1893] P. 320; 1 R. 651; 70 L. T. 417; 7 Asp. M. C. 434.—JEUNE, P.

Wiggett v. Fox (1856) 25 L. J. Ex. 188; 11 Ex. 832; 4 W. R. 254.—EX., *considered*.

Abraham v. Reynolds (1860) 5 H. & N. 143; 6 Jur. (N.S.) 53; 1 L. T. 330; 8 W. R. 181.—EX.

Wiggett v. Fox, distinguished.

Turner v. G. E. Ry. (1875) 33 L. T. 431.—C.P.

Wiggett v. Fox.

Commented upon and not applied, *Rourke v. White Moss Colliery Co.* (1877) 46 L. J. C. P.

283; 2 C. P. D. 205; 36 L. T. 49; 25 W. R. 263.
—C.A.; Charles v. Taylor (1878) 3 C. P. D. 492;
38 L. T. 773; 27 W. R. 32.—LOPES, J. (*affirmed*
C.A.); *distinguished*, Thrussell v. Handyside
(1888) 57 L. J. Q. B. 347; 20 Q. B. D. 359, 366;
58 L. T. 344; 52 J. P. 279.—Q.B.D.

Wiggett v. Fox, *explained*.

Woodhead v. Gartness Mineral Co. (1877)
4 C. of Sess. Cas. (4th series) 469, *dis-*
approved.

Johnson v. Lindsay (1891) 61 L. J. Q. B. 90;
[1891] A. C. 371; 65 L. T. 97; 40 W. R. 405;
55 J. P. 644.—H.L. (E.).

[Limits of the doctrine of "collaborateur"
defined and illustrated.]

Vose v. Lancashire and Yorkshire Ry. (1858)

3 H. & N. 734; 27 L. J. Ex. 249; 4 Jur.
(N.S.) 364; 6 W. R. 295.—EX., *opinion*
adopted.

Griffiths v. Gidlow (1858) 3 H. & N. 648; 27
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H. L. 266; 4 Jur. (N.S.) 767; 6 W. R. 664.
—H.L. (SC.), *applied*.

Senior v. Ward (1859) 28 L. J. Q. B. 139; 1
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—Q.B.; Clarke v. Holmes (1862) 7 H. & N. 937;
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The Petrel (1858) 62 L. J. P. 92; [1893] P.
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Wilson v. Merry (1868) L. R. 1 H. L. Sc. 331;
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Waller v. S. E. Ry. (1863) 32 L. J. Ex. 205;

2 H. & C. 102; 9 Jur. (N.S.) 501; 8 L. T.
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718; 12 W. R. 988.—C.P., *dictum adopted*.

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Feltham v. England (1866) 36 L. J. Q. B.

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Wilson v. Merry (1868) L. R. 1 H. L. Sc. 331;
19 L. T. 30.—H.L. (SC.); Allen v. New Gas Co.
(1876) 45 L. J. Ex. 668; 1 Ex. D. 251; 34 L. T.
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14 W. R. 144; 5 B. & S. 736.—EX. CH.,
rule applied.

Tunney v. Midland Ry. (1866) L. R. 1 C. P.
291; 12 Jur. (N.S.) 691.—C.P.

Morgan v. Vale of Neath Ry., *followed*.

Warburton v. G. W. Ry. (1866) 36 L. J. Ex. 9;
L. R. 2 Ex. 30; 15 L. T. 361; 15 W. R. 108;
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Morgan v. Vale of Neath Ry., *applied*.

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48 L. T. 788; 47 J. P. 565; 48 J. P. 24.—Q.B.D.;
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Tunney v. Midland Ry. (1866) L. R. 1 C. P. 291; 12 Jur. (N.S.) 691.—C.P., *applied*.
Jovell v. Howell (1876) 45 L. J. C. P. 387; 1 C. P. D. 161; 34 L. T. 183; 24 W. R. 672.—C.P.D.

Tunney v. Midland Ry. and Brydon v. Stewart (1855) 2 Macq. H. L. 30.—H.L. (SC.), *discussed and distinguished*.
Holness v. Mackay (1899) 68 L. J. Q. B. 724; [1899] 2 Q. B. 319; 80 L. T. 831; 47 W. R. 531.—C.A. ROMER, L.J. *dissenting*.

Wilson v. Merry (1868) L. R. 1 H. L. (SC.) 331; 19 L. T. 30.—H.L. (SC.), *applied*.
Howells v. Landore Steel Co. (1874) 44 L. J. Q. B. 25; L. R. 10 Q. B. 62; 32 L. T. 19; 23 W. R. 335.—Q.B.: **Smith v. Steele** (1875) 44 L. J. Q. B. 60; L. R. 10 Q. B. 125; 32 L. T. 195; 23 W. R. 388.—Q.B.: **Allen v. New Gas Co.** (1876) 45 L. J. Ex. 668; 1 Ex. D. 251; 34 L. T. 541.—EX. D.: **Charles v. Taylor** (1878) 3 C. P. D. 492; 38 L. T. 773; 27 W. R. 32.—C.A.

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Kiddle v. Lovett (1885) 16 Q. B. D. 605, 611; 34 W. R. 518.—DENMAN, J.

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Johnson v. Lindsay (1891) 61 L. J. Q. B. 90; [1891] A. C. 371; 65 L. T. 97; 40 W. R. 405; 55 J. P. 644.—H.L. (E.).

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Hedley v. Pinkney (1894) 63 L. J. Q. B. 419; [1894] A. C. 222; 6 R. 106; 70 L. T. 630; 42 W. R. 497; 7 Asp. M. C. 483.—H.L. (E.).

Wilson v. Merry, held inapplicable.
Groves v. Winborne (Lord) (1898) 67 L. J. Q. B. 862; [1898] 2 Q. B. 402; 79 L. T. 284; 47 W. R. 87.—C.A. SMITH, RIGBY, and WILLIAMS, L.JJ.

Warburton v. G. W. Ry. (1866) 36 L. J. Ex. 9; L. R. 2 Ex. 30; 4 H. & C. 695; 15 L. T. 361; 15 W. R. 108.—EX.

Distinguished. **Rourke v. White Moss Colliery Co.** (1876) 46 L. J. C. P. 283; 1 C. P. D. 556; 35 L. T. 160.—C.P.D.; **Swainson v. N. E. Ry.** (1878).—EX. D. (*infra*); *applied*, **Johnson v. Lindsay** (1889).—C.A. (*infra*).

Swainson v. N. E. Ry. (1877) 37 L. T. 102; 25 W. R. 676.—EX. D.; *reversed*, (1878) 47 L. J. Ex. 372; 3 Ex. D. 341; 38 L. T. 201; 26 W. R. 413.—C.A.

Johnson v. Lindsay, 53 J. P. 599.—Q.B.D.: *affirmed*, (1889) 58 L. J. Q. B. 581; 23 Q. B. D. 508; 61 L. T. 864; 38 W. R. 119; 54 J. P. 228.—C.A., *the latter decision reversed*; (1891) 61 L. J. Q. B. 90; [1891] A. C. 371; 65 L. T. 97; 40 W. R. 405; 55 J. P. 644.—H.L. (E.).

Johnson v. Lindsay, applied.
Donovan v. Laing (1893) 63 L. J. Q. B. 25; [1893] 1 Q. B. 629; 68 L. T. 512; 41 W. R. 455.—C.A.: **McCallum v. N. B. Ry.** (1893) 20 Rettie, 385.—CT. OF SESS.

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Cameron v. Nystrom (1893) 62 L. J. P. C. 85; [1893] A. C. 308; 1 R. 362; 68 L. T. 772; 57 J. P. 550; 7 Asp. M. C. 320.—P.C.

Johnson v. Lindsay, followed.
Hedley v. Pinkney (1894) 63 L. J. Q. B. 419; [1894] A. C. 222; 6 R. 106; 70 L. T. 630; 42 W. R. 497; 7 Asp. M. C. 483.—H.L. (E.).

Johnson v. Lindsay, applied.
Stamp v. Williams (1896) 12 Times L. R. 516.—C.A.

Johnson v. Lindsay, referred to.
Cooper v. Wright (1902) 71 L. J. K. B. 642; [1902] A. C. 302; 86 L. T. 776; 51 W. R. 12.—H.L. (E.).

Skipp v. Eastern Counties Ry. (1853) 23 L. J. Ex. 23; 9 Ex. 223; 2 C. L. R. 185.—EX.

Applied. **Feltham v. England** (1866) 36 L. J. Q. B. 14; L. R. 2 Q. B. 33; 7 R. & S. 676; 15 W. R. 151.—Q.B.: *referred to*, **Saxton v. Hawksworth** (1872) 26 L. T. 851.—EX. CH.

Woodley v. Metropolitan District Ry. (1877) 46 L. J. Ex. 521; 2 Ex. D. 384; 36 L. T. 419.—C.A., *dictum applied*.

Griffiths v. London and St. Katharine Docks (1884) 53 L. J. Q. B. 504; 13 Q. B. D. 259; 51 L. T. 533; 33 W. R. 35; 49 J. P. 100.—C.A., *applied*.

Thomas v. Quartermaine (1887) 56 L. J. Q. B. 340; 18 Q. B. D. 685; 57 L. T. 537; 35 W. R. 555; 51 J. P. 516.—C.A. BOWEN and FRY, L.JJ.; *ESHER, M.R. dissenting*.

Woodley v. Metropolitan District Ry. and Griffiths v. London and St. Katharine Docks Co., considered.

Yarmouth v. France (1887) 57 L. J. Q. B. 7; 19 Q. B. D. 647; 36 W. R. 281.—*ESHER, M.R. and LINDLEY, L.J.; LOPES, L.J. dissenting in part.*

Woodley v. Metropolitan District Ry., distinguished.

Thrussell v. Handyside (1888) 57 L. J. Q. B. 347; 20 Q. B. D. 359; 58 L. T. 344; 52 J. P. 279.—Q.B.D.

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Members v. G. W. Ry. (1889) 58 L. J. Q. B. 563; 14 App. Cas. 179; 61 L. T. 566; 38 W. R. 145; 54 J. P. 244.—H.L. (E.).

Griffiths v. London and St. Katharine Docks, explained.

Lloyd v. Woolland (1902) 87 L. T. 73.—BRUCE, J.

Wilson v. Glasgow Tramways and Omnibus Co. (1878) 5 Ct. of Sess. Cas. (4th series) 981, *not followed*.

Morgan v. London General Omnibus Co. (1884) 53 L. J. Q. B. 352; 13 Q. B. D. 832; 51 L. T. 213; 32 W. R. 759.—C.A. BRETT, M.R., BOWEN and FRY, L.JJ.

3. EMPLOYERS' LIABILITY ACT.

Morgan v. London General Omnibus Co. (1884) 53 L. J. Q. B. 352; 13 Q. B. D. 832; 51 L. T. 213; 32 W. R. 759.—C.A., *followed*.
Cook v. North Metropolitan Tramway Co. (1887) 56 L. J. Q. B. 309; 18 Q. B. D. 683; 56 L. T. 448; 35 W. R. 577; 51 J. P. 630.—SMITH and GRANTHAM, JJ.

Morgan v. London General Omnibus Co. and Cook v. North Metropolitan Tramway Co. (*supra*), *explained and applied*.

Hunt v. G. N. Ry. (1891) 60 L. J. Q. B. 216; [1891] 1 Q. B. 601; 64 L. T. 418; 55 J. P. 470.—POLLOCK, B. and CHARLES, J.

Morgan v. London General Omnibus Co., *applied*.

Bound v. Lawrence (1891) 61 L. J. M. C. 21; [1892] 1 Q. B. 226; 65 L. T. 844; 40 W. R. 1; 56 J. P. 118.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Morgan v. London General Omnibus Co., *discussed and applied*.

Reg. v. Louth, J.J. [1900] 2 Ir. R. 711. —Q.B.D.

Bound v. Lawrence (1891) 60 L. J. M. C. 137; 64 L. T. 470; 39 W. R. 457; 55 J. P. 599.—GRANTHAM and SMITH, JJ.; *reversed*, 61 L. J. M. C. 21; [1892] 1 Q. B. 226; 65 L. T. 844; 40 W. R. 1; 56 J. P. 118.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Marrow v. Flimby and Broughton Moor Coal Co. (1898) 67 L. J. Q. B. 976; [1898] 2 Q. B. 588; 79 L. T. 397.—C.A., *followed*.

Fitzpatrick v. Evans (1902) 71 L. J. K. B. 302; [1902] 1 K. B. 505; 86 L. T. 141; 50 W. R. 290.—C.A. COLLINS, M.R., ROMER and MATHEW, L.JJ.; *affirming* (1901) 70 L. J. K. B. 353; [1901] 1 K. B. 756; 84 L. T. 233; 49 W. R. 491.—WILLS and CHANNELL, JJ.

Moyle v. Jenkins (1881) 51 L. J. Q. B. 112; 8 Q. B. D. 116; 30 W. R. 324.—GROVE, LOPES and BOWEN, JJ., *referred to*.

Keen v. Millwall Dock Co. (1882) 51 L. J. Q. B. 277; 8 Q. B. D. 482; 46 L. T. 472; 30 W. R. 503.—C.A. COLERIDGE, C.J., BRETT and HOLKER, L.JJ.

Keen v. Millwall Dock Co., *distinguished*.

Previti v. Gatti (1888) 58 L. T. 762; 36 W. R. 670; 52 J. P. 646.—CAVE and SMITH, JJ.

Wright v. Wallis (1887) 3 Times L. R. 779.—C.A., *distinguished*.

Kellard v. Rooke (1888) 57 L. J. Q. B. 599; 21 Q. B. D. 367; 37 W. R. 875; 52 J. P. 820.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.

Shaffers v. General Steam Navigation Co. (1888) 52 L. J. Q. B. 260; 10 Q. B. D. 356; 48 L. T. 228; 31 W. R. 656; 47 J. P. 327.

—MANISTY and MATHEW, JJ., *explained and distinguished*.

Osborne v. Jackson (1883) 11 Q. B. D. 619; 48 L. T. 642.—DENMAN and HAWKINS, JJ.

Millward v. Midland Ry. (1881) 54 L. J. Q. B. 202; 11 Q. B. D. 68; 52 L. T. 255; 33 W. R. 366.—MATHEW and DAY, JJ., *distinguished*.

Kellard v. Rooke (1887) 19 Q. B. D. 585.—Q.B.D. (*affirmed* C.A., *supra*); Snowden v. Baynes (1890) 24 Q. B. D. 568; 38 W. R. 558.—Q.B.D. (*affirmed*, 59 L. J. Q. B. 325; 38 W. R. 744.—C.A.).

Howard v. Bennett (1888) 58 L. J. Q. B. 129; 60 L. T. 152.—COLERIDGE, C.J. and MANISTY, J., *considered*.

Wild v. Waygood (1892) 61 L. J. Q. B. 391; [1892] 1 Q. B. 783; 66 L. T. 309; 40 W. R. 501; 56 J. P. 389.—C.A. LORD HERSCHELL, LINDLEY

and KAY, L.JJ.; *reversing* (1891) 65 L. T. 710; 56 J. P. 166.—MATHEW and SMITH, JJ.

McCord v. Cammell (1894) 59 J. P. 245.—C.A. ESHER, M.R. and LOPES, L.J.; RIGBY, L.J., *dissenting*; *reversed*. (1895) 65 L. J. Q. B. 202; [1896] A. C. 57; 73 L. T. 631; 60 J. P. 180.—H.L. (C.), LORDS HALSBURY, L.C., WATSON, HERSCHELL, MACNAGHTEN, MORRIS, SHAND and DAVEY.

Britton v. Great Western Cotton Co. (1872) 41 L. J. Ex. 99; L. R. 7 Ex. 130; 27 L. T. 125; 20 W. R. 525. —EX., *applied*.

Thomas v. Quartermaine (1886) 55 L. J. Q. B. 439; 17 Q. B. D. 414, 417; 55 L. T. 360; 34 W. R. 741. WILLS and GRANTHAM, JJ.; *affirmed* C.A. (*infra*).

McGiffin v. Palmer's Shipbuilding Co. (1882) 52 L. J. Q. B. 25; 10 Q. B. D. 5; 47 L. T. 346; 31 W. R. 118; 47 J. P. 70.—FIELD and STEPHEN, JJ., *applied*.

Pegram v. Dixon (1886) 55 L. J. Q. B. 417; 51 J. P. 198.—WILLS and GRANTHAM, JJ.; Willets v. Watt (1892) 61 L. J. Q. B. 540; [1892] 2 Q. B. 92; 66 L. T. 185, 818; 40 W. R. 237, 497; 56 J. P. 599, 772.—HAWKINS and WILLS, JJ.; *affirmed with variation* C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Heske v. Samuelson (1883) 53 L. J. Q. B. 45; 12 Q. B. D. 30; 49 L. T. 474.—COLERIDGE, C.J. and STEPHEN, J., *approved and followed*.

Cripps v. Judge (1884) 13 Q. B. D. 583; 53 L. J. Q. B. 517; 51 L. T. 182; 33 W. R. 35; 49 J. P. 100.—C.A. BRETT, M.R., BOWEN and FRY, L.JJ.

BRETT, M.R.—I am of opinion that that was a right decision, and governs the present case.—p. 585.

Heske v. Samuelson, *applied*.

Paley v. Garnett (1885) 16 Q. B. D. 52; 34 W. R. 295; 50 J. P. 169.—MATHEW and SMITH, JJ.

Heske v. Samuelson and Cripps v. Judge (*supra*), *applied*.

Webbin v. Ballard (1886) 55 L. J. Q. B. 395; 17 Q. B. D. 122; 54 L. T. 532; 31 W. R. 155.—MATHEW and SMITH, JJ.

Heske v. Samuelson and Cripps v. Judge, *explained*.

Thomas v. Quartermaine (1887) 18 Q. B. D. 685; 56 L. J. Q. B. 340; 57 L. T. 537; 35 W. R. 555; 51 J. P. 516.—C.A. BOWEN and FRY, L.JJ.; ESHER, M.R., *dissenting*.

FRY, L.J.—I will only observe that neither the case of *Heske v. Samuelson* nor that of *Cripps v. Judge* appears to me to have attempted to lay down an exhaustive definition of what is a defect within the Act; they only held that there is a defect when a machine is unfit for its purpose.—p. 703.

Heske v. Samuelson and Cripps v. Judge, *distinguished*.

Walsh v. Whiteley (1888) 57 L. J. Q. B. 586; 21 Q. B. D. 371; 36 W. R. 876; 53 J. P. 38.—C.A. LINDLEY and LOPES, L.JJ.; ESHER, M.R., *dissenting*.

Heske v. Samuelson, *principle applied*.

Morgan v. Hutchins (1890) 59 L. J. Q. B. 197; 38 W. R. 412.—COLERIDGE, C.J., and ESHER, M.R.

Weblin v. Ballard (1886) 55 L. J. Q. B. 395; 17 Q. B. D. 122; 54 L. T. 532; 34 W. R. 455.—**MATHEW and SMITH, JJ., doubted.**
Thomas v. Quartermaine (1887) 56 L. J. Q. B. 340; 18 Q. B. D. 685; 57 L. T. 537; 35 W. R. 555; 51 J. P. 516.—**C.A. BOWEN and FRY, L.JJ.; ESHER, M.R. dissenting.**

Weblin v. Ballard, distinguished.
Walsh v. Whiteley (1888) 57 L. J. Q. B. 586; 21 Q. B. D. 371; 36 W. R. 876; 53 J. P. 38.—**C.A. LINDLEY and LOPES, L.JJ.; ESHER, M.R. dissenting.**

Walsh v. Whiteley, explained.
Morgan v. Hutchins (1890) 59 L. J. Q. B. 197; 38 W. R. 412.—**COLERIDGE, C.J. and ESHER, M.R.**

Willets v. Watt (1892) 61 L. J. Q. B. 540; [1892] 2 Q. B. 92; 66 L. T. 818; 40 W. R. 497; 56 J. P. 772.—**C.A. ESHER, M.R., FRY and LOPES, L.JJ.; affirming with variation** 66 L. T. 185; 40 W. R. 237; 56 J. P. 599.—**HAWKINS and WILLS, JJ., distinguished.**

Tate v. Latham (1897) 66 L. J. Q. B. 349; [1897] 1 Q. B. 502; 76 L. T. 336; 45 W. R. 400.—**C.A. ESHER, M.R. and CHITTY, L.J.; affirming** **WRIGHT and BRUCE, JJ.**

WRIGHT, J.—The judgment in *Willets v. Watt* has caused the only difficulty that I have felt, but I think there is a clear distinction between that case and this. In that case the catchpit was left uncovered, but it was properly so left in carrying on business, and the negligence consisted not in leaving it uncovered, but in not giving warning. With regard to the expression attributed to Lord Justice Fry in the report of the case in the Law Reports, to the effect that the defect must be chronic, I observe that in the Law Journal Reports the expression attributed to him is "somewhat chronic," and I think there was enough here to satisfy the latter description.—p. 351.

Thomas v. Quartermaine (1887) 56 L. J. Q. B. 340; 18 Q. B. D. 685; 57 L. T. 537; 35 W. R. 555; 51 J. P. 516.—**C.A., discussed.**
Baddeley v. Granville (1887) 56 L. J. Q. B. 501; 19 Q. B. D. 423; 57 L. T. 263; 36 W. R. 63; 51 J. P. 822.

WILLS, J., referring to the doctrine *Volenti non fit injuria*, said: But assuming its general applicability in the widest sense, it is sufficient in this case that the two judges who in *Thomas v. Quartermaine* formed the majority of the Court, thought that the maxim did not apply at all when the injury complained of arises from a direct breach of a statutory obligation. It is true that the Master of the Rolls expressed a contrary opinion and also that the observations of Bowen and Fry, L.JJ. were not necessary for the decision, and therefore not a binding authority on us. Yet it is a deliberate expression of opinion by two judges of the Court of Appeal in a case in which, as is well known, the judgment was long in suspense. Therefore I am disposed to follow that opinion.—p. 502.

GRANTHAM, J. to the same effect.

Thomas v. Quartermaine, distinguished.
Yarmouth v. France (1887) 57 L. J. Q. B. 7; 19 Q. B. D. 647; 36 W. R. 281.—**ESHER, M.R.**

and **LINDLEY, L.J.; LOPES, L.J. dissenting in part.**

LINDLEY, L.J.—The principles laid down in that case are, no doubt, to be accepted and followed; and, if I may say so, I entirely concur in them, but it is not in my opinion correct to regard that case as conclusive on this one. The facts there and the facts here are materially different. Under these circumstances the question is whether the plaintiff with knowledge and appreciation of both the risk and the danger, voluntarily took the risk upon himself. The plaintiff was not engaged to drive vicious horses; and the conversation with the foreman, though not evidence against the defendant of any promise by him to take the risk, is in my opinion admissible to explain the conduct of the plaintiff, and to rebut the inference that he voluntarily took the risk upon himself.—pp. 12, 13.

Thomas v. Quartermaine, dictum applied.
Evans v. M. S. & L. Ry. (1887) 57 L. J. Ch. 153; 36 Ch. D. 626; 57 L. T. 194; 36 W. R. 328.—**KEKEWICH, J.**

Thomas v. Quartermaine, distinguished.
Yarmouth v. France, observations applied.
Thruswell v. Handyside (1888) 57 L. J. Q. B. 347; 20 Q. B. D. 359; 58 L. T. 344; 52 J. P. 279.—**HAWKINS and GRANTHAM, JJ.**

Thomas v. Quartermaine and Yarmouth v. France, distinguished.
Walsh v. Whiteley (1888) 57 L. J. Q. B. 586; 21 Q. B. D. 371; 36 W. R. 876; 53 J. P. 38.—**C.A. LINDLEY and LOPES, L.JJ.; ESHER, M.R. dissenting.**

Thomas v. Quartermaine and Yarmouth v. France, followed.
Osborne v. L. & N. W. Ry. (1888) 57 L. J. Q. B. 618; 21 Q. B. D. 220; 59 L. T. 227; 36 W. R. 809; 52 J. P. 806.—**WILLS and GRANTHAM, JJ.**

Thomas v. Quartermaine, commented upon.
Church v. Appleby (1888) 58 L. J. Q. B. 144; 60 L. T. 542.—**COLERIDGE, C.J. and MANISTY, J.**

Thomas v. Quartermaine and Yarmouth v. France, considered and explained.
Amos v. Duffy (1890) 6 Times L. R. 339.—**C.A.**

Yarmouth v. France, explained.
Hunt v. G. N. Ry. (1891) 60 L. J. Q. B. 216; [1891] 1 Q. B. 601; 64 L. T. 418; 55 J. P. 470.—**POLLOCK, B. and CHARLES, J.**

Thomas v. Quartermaine, discussed.
Yarmouth v. France, considered.
Approved. **Smith v. Baker** (1891) 60 L. J. Q. B. 683; [1891] A. C. 325; 65 L. T. 467; 40 W. R. 392; 55 J. P. 660.—**H.L. (E.). LORDS HALSBURY, L.C., BRANWELL, WATSON, HERSHELL and MORRIS.**

Thomas v. Quartermaine. See 60 & 61 Vict. c. 37, s. 1.

Yarmouth v. France, distinguished.
London and Eastern Counties Loan and Discount Co. v. Creasy (1897) 66 L. J. Q. B. 503;

[1897] 1 Q. B. 768 & 76 L. T. 612; 45 W. R. 497.
—C.A. **ESHER, M.R., SMITH and CHETTY, L.JJ.**

Yarmouth v. France, distinguished.
Reg. v. Louth JJ. [1900] 2 Ir. R. 714.—Q.B.D.

Yarmouth v. France, referred to.
Thompson v. City Glass Bottle Co. (1901) 70 L. J. K. B. 817; [1901] 2 K. B. 483; 85 L. T. 251.—**RIDLEY and BIGHAM, JJ.; reversed, (1901) 71 L. J. K. B. 145; [1902] 1 K. B. 233; 85 L. T. 661.—C.A. COLLINS, M.R., STEELING and MATHEW, L.JJ.**

Yarmouth v. France, dictum commented on.
Corbett v. Pearce (1904) 73 L. J. K. B. 885; [1904] 2 K. B. 422; 90 L. T. 781; 68 J. P. 387; 20 T. L. R. 473.—**ALVERSTONE, C.J., WILLS and CHANNELL, JJ.**

Smith v. Baker (1891) 60 L. J. Q. B. 683; [1891] A. C. 325; 65 L. T. 467; 40 W. R. 392; 55 J. P. 660.—H.L. (E.). discussed and followed.
Williams v. Birmingham Battery and Metal Co. (1899) 68 L. J. Q. B. 918; [1899] 2 Q. B. 338; 81 L. T. 62; 47 W. R. 680.—C.A. **SMITH, WILLIAMS and ROMER, L.JJ.**

Smith v. Baker, observations applied.
Lloyd v. Woodland (1902) 87 L. T. 73.—**BRUCE, J.**

Griffiths v. Dudley (Earl) (1882) 51 L. J. Q. B. 543; 9 Q. B. D. 357; 47 L. T. 10; 36 W. R. 797; 46 J. P. 711.—FIELD and CAVE, JJ. See 60 & 61 Vict. c. 37, s. 3(1).

4. WORKMEN'S COMPENSATION ACT.

Hensey v. White (1899) 69 L. J. Q. B. 188; [1900] 1 Q. B. 481; 81 L. T. 767; 48 W. R. 257; 63 J. P. 804.—C.A., applied.

Lloyd v. Sugg & Co. (1899) 69 L. J. Q. B. 190; [1900] 1 Q. B. 481; 81 L. T. 768; 48 W. R. 257.—C.A., distinguished.

Walker v. Lilleshall Co. (1899) 69 L. J. Q. B. 192; [1900] 1 Q. B. 481; 81 L. T. 769; 48 W. R. 257; 64 J. P. 85.—C.A. SMITH, COLLINS and VAUGHAN WILLIAMS, L.JJ.

A. L. SMITH, L.J.—This Court has already in two cases—*Hensey v. White* and *Lloyd v. Sugg & Co.*—considered the meaning of the word “accident” in sect. 1 of this Act. In the former it was held that there had not, in the latter that there had, been an accident. Those cases stand one on each side of the dividing line. In *Hensey v. White* the workman was suffering from inherent internal weakness. He was starting the flywheel of an Otto gas engine in the ordinary course of his employment, when by reason of his internal weakness he ruptured a blood-vessel. The Court held there was no accident, for there was nothing fortuitous which intervened. . . . In *Lloyd v. Sugg & Co.* the injured workman was holding on an anvil a bar, the head of which had to be flattened by another workman with a hammer. The latter by a mis-hit struck the bar itself instead of the head, and thereby jarred the hand of the injured workman. There the mis-hit was unexpected and an accident. But in this case there was nothing fortuitous.—pp. 192, 193.

Hensey v. White; Lloyd v. Sugg & Co.; and Walker v. Lilleshall Coal Co., applied.
Timmins v. Leeds Forge Co. (1900) 83 L. T. 120.—C.A. **SMITH, WILLIAMS and ROMER, L.JJ.**

Hensey v. White; Lloyd v. Sugg & Co.; Walker v. Lilleshall Coal Co.; and Timmins v. Leeds Forge Co., referred to.
Roper v. Greenwood (1900) 83 L. T. 471.—C.A. **SMITH, M.R., COLLINS and STEELING, L.JJ.**

Hensey v. White; Lloyd v. Sugg; and Walker v. Lilleshall Coal Co., disapproved.
Fenton v. Thorley (1903) 72 L. J. K. B. 787; [1903] A. C. 443; 89 L. T. 311; 52 W. R. 81.—H.L. (E.).

Stewart v. Wilson's and Clyde Coal Co. (1902) 5 Fraser, 120.—CT. OF SESS., approved.
Fenton v. Thorley (1903).—H.L. (E.) (*supra*).

Lowe v. Pearson (1898) 68 L. J. Q. B. 122; [1899] 1 Q. B. 261; 79 L. T. 654; 47 W. R. 193.—C.A., approved.
Rees v. Thomas (1899) 68 L. J. Q. B. 539; [1899] 1 Q. B. 1015; 80 L. T. 578; 47 W. R. 504.—C.A. **SMITH, COLLINS and ROMER, L.JJ.**

Lowe v. Pearson, distinguished.
Whitehead v. Reader (1901) 70 L. J. K. B. 546; [1901] 2 K. B. 48; 84 L. T. 514; 49 W. R. 562; 65 J. P. 403.—C.A. **SMITH, M.R., COLLINS and ROMER, L.JJ.**

Powell v. Main Colliery Co. (1900) 69 L. J. Q. B. 542; [1900] 2 Q. B. 145; 82 L. T. 340; 48 W. R. 534; 64 J. P. 323.—C.A. SMITH and COLLINS, L.JJ.; ROMER, L.J., dissenting; reversed, (1900) 69 L. J. Q. B. 758; [1900] A. C. 366; 83 L. T. 85; 49 W. R. 49.—H.L. (E.).

Wright v. Bagnall (1900) 69 L. J. Q. B. 551; [1900] 2 Q. B. 240; 82 L. T. 346; 48 W. R. 533; 64 J. P. 420.—C.A., distinguished.

Rendall v. Hill's Dry Docks and Engineering Co. (1900) 69 L. J. Q. B. 554; [1900] 2 Q. B. 245; 82 L. T. 521; 48 W. R. 530; 64 J. P. 451.—C.A. SMITH, WILLIAMS and ROMER, L.JJ.

Rendall v. Hill's Dry Docks and Engineering Co., discussed.

Oliver v. Nautilus Steam Shipping Co. (1903) 72 L. J. K. B. 857; [1903] 2 K. B. 639; 89 L. T. 318; 52 W. R. 200; 9 Asp. M. C. 436.—C.A.

Oliver v. Nautilus Steam Shipping Co., distinguished.
Mulligan v. Dick (1903) 6 F. 126.—CT. OF SESS.

Petrie v. Weir (1900) 2 F. 1041.—CT. OF SESS. (SC.), discussed.
Law v. Graham (1901) 70 L. J. K. B. 608; [1901] 2 K. B. 327; 84 L. T. 599; 49 W. R. 622; 65 J. P. 501.—**LORD ALVERSTONE, C.J. and LAWRENCE, J.**

Law v. Graham, distinguished.
Hoare v. Truman, Hanbury, Buxton & Co. (1902) 71 L. J. K. B. 380; 86 L. T. 417; 50 W. R. 396; 66 J. P. 342.—**LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.**

Powell v. Brown (1898) 68 L. J. Q. B. 151; [1899] 1 Q. B. 157; 79 L. T. 631; 47 W. R. 145.—C.A., *followed*.
Lowth v. Ibbotson (1899) 68 L. J. Q. B. 465; [1899] 1 Q. B. 1003; 80 L. T. 341; 47 W. R. 506.—C.A. SMITH, COLLINS and ROMER, L.JJ.

Powell v. Brown and Lowth v. Ibbotson (*supra*), *considered*.
Chambers v. Whitehaven Harbour Commissioners (1899) 68 L. J. Q. B. 740; [1899] 2 Q. B. 132; 80 L. T. 586; 47 W. R. 533.—C.A. SMITH, WILLIAMS and ROMER, L.JJ.

Powell v. Brown, *referred to*.
Hall v. Snowden, Hubbard & Co. (1899) 68 L. J. Q. B. 645; [1899] 2 Q. B. 136; 80 L. T. 554; 47 W. R. 486.—C.A. SMITH, COLLINS and WILLIAMS, L.JJ.

Powell v. Brown and Lowth v. Ibbotson, *approved*.
Fenn v. Miller (1900) 69 L. J. Q. B. 439; [1900] 1 Q. B. 788; 82 L. T. 284; 48 W. R. 369; 64 J. P. 356.—C.A. SMITH, COLLINS and ROMER, L.JJ.

Chambers v. Whitehaven Harbour Commissioners (1899) 68 L. J. Q. B. 740; [1899] 2 Q. B. 132; 80 L. T. 586; 47 W. R. 533.—C.A., *distinguished*.
Middlemiss v. Berwickshire County Council (1900) 2 F. 392.—CT. OF SESS.

Chambers v. Whitehaven Harbour Commissioners, *approved*.
Fenn v. Miller (1900).—C.A. (*supra*).

Chambers v. Whitehaven Harbour Commissioners and Middlemiss v. Berwickshire County Council, *considered*.
Atkinson v. Lumb (1903) 72 L. J. K. B. 460; [1903] 1 K. B. 861; 88 L. T. 789; 51 W. R. 516; 67 J. P. 414.—C.A.

Fenn v. Miller, *referred to*.
Turnbull v. Lambton Collieries Co. (1900) 82 L. T. 589; 64 J. P. 404.—C.A. SMITH, WILLIAMS and ROMER, L.JJ.

Hall v. Snowden, Hubbard & Co. (1899) 68 L. J. Q. B. 645; [1899] 2 Q. B. 136; 80 L. T. 554; 47 W. R. 486.—C.A., *commented on*.

Bruce v. Henry (1900) 2 F. 717.—CT. OF SESS.

LORD PRESIDENT.—In *Hall v. Snowden, Hubbard & Co.*, the Court held that the provision as to giving notice of accidents (sect. 18) does not apply unless and until an accident has occurred "in" a factory (in the statutory sense), and that if the accident only occurred "about" a factory, that provision does not apply. . . . I entertain considerable doubt as to whether the views expressed in that case in regard to sect. 18 are correct, seeing that although the obligation to give the notice only arises when the accident happens the more natural construction would seem to me to be that the statutory requirement applies to the place throughout. I should, however, hesitate to dissent from the view expressed by a Court of co-ordinate jurisdiction, which has had such large experience of cases under the Act of 1897 as the C. A., by which *Hall v. Snowden*,

Hubbard & Co. was decided, has had, unless this was necessary for the decision of the case under consideration, and I therefore prefer to rest my judgment upon the other grounds before and after stated.—p. 721.

Hall v. Snowden, *disapproved*.
Strain v. Sloan (1901) 3 F. 663.—CT. OF SESS. (SC.).

Hall v. Snowden, *held overruled*.
Barrett v. Kemp (1904) 73 L. J. K. B. 138; [1904] 1 K. B. 517; 90 L. T. 305; 52 W. R. 257; 68 J. P. 196; 20 T. L. R. 162.—C.A.

Haddock v. Humphrey (1900) 69 L. J. Q. B. 327; [1900] 1 Q. B. 609; 82 L. T. 72; 48 W. R. 292; 64 J. P. 86.—C.A. RIGBY, L.J., *dissenting, distinguished*.
Kenny v. Harrison (1902) 71 L. J. K. B. 783; [1902] 2 K. B. 168; 87 L. T. 318.—C.A. COLLINS, M.R., MATHEW and HARDY, L.JJ.

Flowers v. Chambers (1899) 68 L. J. Q. B. 648; [1899] 2 Q. B. 142; 80 L. T. 834; 47 W. R. 513.—C.A., *applied*.
Hennessey v. McCabe (1899) 69 L. J. Q. B. 173; [1900] 1 Q. B. 491; 81 L. T. 575; 48 W. R. 231; 64 J. P. 4.—C.A. SMITH, COLLINS and WILLIAMS, L.JJ.

Hennessey v. McCabe, *followed*.
Spencer v. Livett (1900) 69 L. J. Q. B. 338; [1900] 1 Q. B. 498; 82 L. T. 75; 48 W. R. 323; 64 J. P. 196; 16 Times L. R. 105.—C.A. SMITH, COLLINS and ROMER, L.JJ.

Flowers v. Chambers, *followed*.
Spencer v. Livett (*supra*), *commented on*.
Low v. Abernethy (1900) 2 F. 722.—CT. OF SESS.

LORD PRESIDENT.—It may be a question whether the words defining "ship-building yards" in Part Two of the Fourth Schedule to the [Factory and Workshop] Act of 1878, although expressed alternatively, do not require that the place shall be one in which ships are built, as well as finished or repaired,—in short, a ship-building yard in the proper sense. In *Spencer v. Livett and others*, Romer, L.J., said with regard to the definition of ship-building yard in question, that, "in his opinion, the legislature contemplated premises where the business of making, finishing and repairing ships was carried on."—p. 725.

Flowers v. Chambers, *disapproved*.
Merrill v. Wilson (1900) 70 L. J. K. B. 97; [1901] 1 K. B. 35; 83 L. T. 490; 49 W. R. 161; 65 J. P. 53.—C.A., *approved*.
Raine v. Jobson (1901) 70 L. J. K. B. 771; [1901] A. C. 404; 85 L. T. 141; 49 W. R. 705.—H. L. (E.).

Flowers v. Chambers, *not followed*.
Raine v. Jobson (*supra*), *followed*.
Cattermole v. Atlantic Transport Co. (1901) 71 L. J. K. B. 173; [1902] 1 K. B. 204; 85 L. T. 513; 50 W. R. 129; 66 J. P. 4.—C.A. COLLINS, M.R., STIRLING and MATHEW, L.JJ.

Raine v. Jobson, *explained*.
Barrett v. Kemp (1904) 73 L. J. K. B. 138; [1904] 1 K. B. 517; 90 L. T. 305; 52 W. R. 257; 68 J. P. 196; 20 T. L. R. 162.—C.A.

Griffin v. Howlder Line (1901) 73 L. J. K. B. 202; [1901] 1 K. B. 510; 90 L. T. 142; 52 W. R. 323; 68 J. P. 213; 20 T. L. R. 255.—C.A., *distinguished*.
Owens v. Campbell (1904) 73 L. J. K. B. 631; [1904] 2 K. B. 60; 90 L. T. 811; 52 W. R. 481; 68 J. P. 410; 20 T. L. R. 459.—C.A.

Woodham v. Atlantic Transport Co. (1898) 79 L. T. 395.—C.A., *followed*.
Lawson v. Atlantic Transport Co. (1900) 82 L. T. 77.—C.A. SMITH, COLLINS and ROMER, L.JJ.

Burns v. N. B. Ry. (1900) 2 F. 629.—COURT OF SESS. (SC.), *not followed*.

Pearce v. L. & S. W. Ry. (1900) 69 L. J. Q. B. 683; [1900] 2 Q. B. 100; 82 L. T. 487; 48 W. R. 599.—C.A., *approved*.
Dundee and Arbroath Joint Ry. v. Carlin (1901) 3 F. 843.—COURT OF SESS. (SC.).

Pearce v. L. & S. W. Ry., *referred to*.
Wrigley v. Bagley and Wright (1901) 70 L. J. K. B. 538; [1901] 1 K. B. 780; 84 L. T. 415; 49 W. R. 472; 65 J. P. 372.—C.A. SMITH, M.R., COLLINS and ROMER, L.JJ.; *affirmed, nom.* **Wrigley v. Whittaker** (1902) 71 L. J. K. B. 600; [1902] A. C. 299; 86 L. T. 775; 50 W. R. 656; 66 J. P. 420.—H.L. (E.).

Francis v. Turner (1899) 69 L. J. Q. B. 182; [1900] 1 Q. B. 478; 81 L. T. 770; 48 W. R. 228; 64 J. P. 53.—C.A., *approved*.
Wrigley v. Whittaker (1902).—H.L. (E.) (*supra*).

Wood v. Walsh (1899) 68 L. J. Q. B. 492; [1899] 1 Q. B. 1009; 80 L. T. 345; 47 W. R. 504; 63 J. P. 212.—C.A., *considered*.

Mason v. Dean (1900) 69 L. J. Q. B. 358; [1900] 1 Q. B. 770; 82 L. T. 139; 48 W. R. 353; 64 J. P. 244.—C.A. SMITH, COLLINS and ROMER, L.JJ.

Wood v. Walsh, *considered*.
Hoddinott v. Newton, Chambers & Co. (1900) 70 L. J. Q. B. 150; [1901] A. C. 49; 84 L. T. 1; 49 W. R. 380.—H.L. (E.). LORDS SHAND and LINDLEY *dissenting*.

Wood v. Walsh, *no longer law*.
Dredge v. Conway, Jones & Co. (1901) 70 L. J. K. B. 494; [1901] 2 K. B. 42; 84 L. T. 345; 49 W. R. 518.—C.A. SMITH, M.R., ROMER and COLLINS, L.JJ.

Wood v. Walsh, *dissented from*.
Reddy v. Broderick (1901) [1901] 2 Ir. R. 328.—C.A.

Wood v. Walsh, *considered*.
Veazey v. Cheattle (1901) 71 L. J. K. B. 252; [1902] 1 K. B. 494; 85 L. T. 574; 50 W. R. 263; 66 J. P. 389.—C.A. COLLINS, M.R., STIRLING and MATHEW, L.JJ.

Hoddinott v. Newton, Chambers & Co. (1899) 68 L. J. Q. B. 495; [1899] 1 Q. B. 1018; 80 L. T. 558; 47 W. R. 499.—C.A., *reversed*; (1900) 70 L. J. Q. B. 150; [1901] A. C. 49; 84 L. T. 1; 49 W. R. 380.—H.L. (E.).

Hoddinott v. Newton, Chambers & Co., *discussed*.

Maunder v. Brook (1900) 69 L. J. Q. B. 322; [1900] 1 Q. B. 575; 82 L. T. 39; 48 W. R. 290; 64 J. P. 181.—C.A. SMITH and RIGBY, L.JJ.; COLLINS, L.J., *dissenting*.

Hoddinott v. Newton, Chambers & Co., *considered*.

Veazey v. Cheattle (1901) 71 L. J. K. B. 252; [1902] 1 K. B. 494; 85 L. T. 574; 50 W. R. 263; 66 J. P. 389.—C.A., *and see* **Marshall v. Rudeforth** (1902) 71 L. J. K. B. 781; [1902] 2 K. B. 175; 86 L. T. 752; 50 W. R. 596; 66 J. P. 627.—C.A.

Hoddinott v. Newton, Chambers & Co.; **Veazey v. Cheattle** and **Marshall v. Rudeforth**, *considered*.

Elvin v. Woodward (1903) 72 L. J. K. B. 468; [1903] 1 K. B. 838; 88 L. T. 671; 51 W. R. 518; 67 J. P. 413.—C.A.

Maunder v. Brook (1900) 69 L. J. Q. B. 322; [1900] 1 Q. B. 575; 82 L. T. 39; 48 W. R. 290; 64 J. P. 181.—C.A. SMITH and RIGBY, L.JJ.; COLLINS, L.J., *dissenting, discussed*.

Ferguson v. Green (1900) 70 L. J. Q. B. 21; [1901] 1 Q. B. 25; 83 L. T. 461; 49 W. R. 105; 64 J. P. 819.—C.A. SMITH, M.R., COLLINS and STIRLING, L.JJ.

Maunder v. Brook; **Ferguson v. Green**, and **Billings v. Holloway** (1898) 68 L. J. Q. B. 16; [1899] 1 Q. B. 70; 79 L. T. 396; 47 W. R. 105.—C.A., *considered*.

Hoddinott v. Newton, Chambers & Co. (1900) 70 L. J. Q. B. 150; [1901] A. C. 49; 84 L. T. 1; 49 W. R. 380.—H.L. (E.). LORDS SHAND and LINDLEY *dissenting*.

Mason v. Dean (1900) 69 L. J. Q. B. 358; [1900] 1 Q. B. 770; 82 L. T. 139; 48 W. R. 353; 64 J. P. 244.—C.A., *distinguished*.

Cass v. Butler (1900) 69 L. J. Q. B. 362; [1900] 1 Q. B. 777; 82 L. T. 182; 48 W. R. 309; 64 J. P. 261.—C.A. SMITH, COLLINS and ROMER, L.JJ.

Cass v. Butler, *overruled*.
Cooper v. Wright (1902) 71 L. J. K. B. 642; [1902] A. C. 302; 86 L. T. 776; 51 W. R. 12.—H.L. (E.). LORDS BRAMPTON and ROBERTSON, *dissenting*.

Cooper v. Wright, *followed*.
Topping v. Rhind (1904) 6 F. 666.—CT. OF SESS.

Simmons v. White Brothers (1899) 68 L. J. Q. B. 507; [1899] 1 Q. B. 1005; 80 L. T. 344; 47 W. R. 513.—C.A., *approved*.

Main Colliery Co. v. Davies (1900) 69 L. J. Q. B. 755; [1900] A. C. 358; 83 L. T. 83; 65 J. P. 20.—H.L. (E.). [The above case approved by Lord Shand.]

Main Colliery Co. v. Davies, *considered*.
Howells v. Vivian & Son (1901) 85 L. T. 529.—C.A. COLLINS, M.R., STIRLING and MATHEW, L.JJ.

- Irons v. Davis and Timmins** (1899) 68 L. J. Q. B. 673; [1899] 2 Q. B. 330; 80 L. T. 673; 47 W. R. 616.—C.A.; and **Chandler v. Smith** (1899) 68 L. J. Q. B. 909; [1899] 2 Q. B. 506; 81 L. T. 317; 47 W. R. 677.—C.A., *approved*.
- Freeland v. Macfarlane** (1900) 2 F. 832.—CT. OF SESS. LORD PRESIDENT. LORDS ADAM and McLAREN.
- Irons v. Davis and Timmins and Chandler v. Smith**, *followed*.
- Pomphrey v. Southwark Press** (1900) 70 L. J. Q. B. 48; [1901] 1 Q. B. 86; 83 L. T. 468.—C.A. A. L. SMITH, M.R., COLLINS and STIRLING, L.JJ.
- Jones v. Ocean Coal Co.** (1899) 68 L. J. Q. B. 731; [1899] 2 Q. B. 124; 80 L. T. 582; 47 W. R. 484.—C.A., *followed*.
- Giles v. Belford** (1903) 72 L. J. K. B. 569; [1903] 1 K. B. 843; 88 L. T. 754; 51 W. R. 692; 67 J. P. 399.—C.A.
- Lysons v. Knowles** (1900) 69 L. J. Q. B. 449; [1900] 1 Q. B. 780; 82 L. T. 189; 48 W. R. 408; 64 J. P. 292.—C.A. A. L. SMITH, COLLINS and ROMER, L.JJ. (*reversed, infra*), *followed*.
- Stuart v. Nixon** (1900) 69 L. J. Q. B. 598; [1900] 2 Q. B. 95; 82 L. T. 489; 48 W. R. 598.—C.A. COLLINS, VAUGHAN WILLIAMS and ROMER, L.JJ.
- Stuart v. Nixon** (1900), *overruled*.
- Lysons v. Knowles** (1900) 70 L. J. Q. B. 170; [1901] A. C. 79; 84 L. T. 65; 49 W. R. 636; 65 J. P. 388.—H.L. (E.). LORDS HALSBURY, L.C., MACNAGHTEN, SHAND, DAVEY, BRAMPTON and ROBERTSON v. LORD LINDLEY *dissenting*; *reversing* (1900) 69 L. J. Q. B. 449; [1900] 1 Q. B. 780; 82 L. T. 189; 48 W. R. 408; 64 J. P. 292.—C.A. SMITH, COLLINS and ROMER, L.JJ.
- Lysons v. Knowles and Stuart v. Nixon**, *adopted*.
- Hathaway v. Argus Printing Co.** (1900) 70 L. J. K. B. 12; [1901] 1 K. B. 96; 83 L. T. 465; 49 W. R. 113; 64 J. P. 804.—C.A. SMITH, M.R., COLLINS and STIRLING, L.JJ.
- Lysons v. Knowles**, *applied*.
- Ayres v. Buckeridge** (1901) 71 L. J. K. B. 28; [1902] 1 K. B. 57; 85 L. T. 472; 50 W. R. 115; 65 J. P. 804.—C.A. COLLINS, M.R., STIRLING and MATHEW, L.JJ.
- Lysons v. Knowles**, *followed*.
- Peacock v. Niddrie and Benhar Coal Co.** 4 F. 443.—CT. OF SESS. (SC.), *explained*.
- Fleming v. Lochgelly Iron and Coal Co.** (1902) 4 F. 890.—CT. OF SESS. (SC.).
- Lysons v. Knowles**, *not applied*.
- Giles v. Belford** (1903) 72 L. J. K. B. 569; [1903] 1 K. B. 843; 88 L. T. 754; 51 W. R. 692; 67 J. P. 399.—C.A.
- Fleming v. Lochgelly Iron and Coal Co.** (1902) 4 F. 890.—CT. OF SESS., *followed*.
- Campbell v. Fife Coal Co.** (1902) 5 F. 170.—CT. OF SESS.
- Ayres v. Buckeridge** (1901) 71 L. J. K. B. 28; [1902] 1 K. B. 57; 85 L. T. 472; 50 W. R. 115; 65 J. P. 804.—C.A., *not followed*.
- Grewar v. Caledonian Ry.** (1902) 4 F. 895.—CT. OF SESS. (SC.).

Grewar v. Caledonian Ry., *followed*.
M'One v. Barclay (1902) 4 F. 909.—CT. OF SESS. (SC.).

Edwards v. Godfrey (1899) 68 L. J. Q. B. 666; [1899] 2 Q. B. 333; 80 L. T. 672; 47 W. R. 551.—C.A., *explained and limited*.
Rouse v. Dixon (1904) 73 L. J. K. B. 662; [1904] 2 K. B. 628; 91 L. T. 436; 68 J. P. 406; 20 T. L. R. 553.

Crossfield v. Tania (1900) 69 L. J. Q. B. 790; [1900] 2 Q. B. 629; 82 L. T. 813; 48 W. R. 609.—C.A., *not applied*.
Sharman v. Holliday (1903) 73 L. J. K. B. 176; [1904] 1 K. B. 235; 90 L. T. 46; 68 J. P. 151; 20 T. L. R. 135.—C.A.

Fagan v. Murdoch (1899) 1 F. 1179.—CT. OF SESS., *doubted*.

Bevan v. Crawshaw (1901) 71 L. J. K. B. 49; [1902] 1 K. B. 25; 85 L. T. 496; 50 W. R. 98.—C.A., *followed*.

Hughes v. Summerlee and Mossend Iron and Steel Co. (1903) 5 F. 784.—CT. OF SESS.

Houghton v. Sutton Heath & Co., Colliery Co. (1900) 70 L. J. K. B. 61; [1901] 1 K. B. 93; 83 L. T. 472; 49 W. R. 196; 65 J. P. 134.—C.A., *approved*.

Abram Coal Co. v. Southern (1903) 72 L. J. K. B. 691; [1903] A. C. 806; 89 L. T. 103.—H.L. (E.).

Morton v. Woodward (1902) 71 L. J. K. B. 736; [1902] 2 K. B. 276; 86 L. T. 878.—C.A.

Disapproved. **Steel v. Oakbank Oil Co.** (1902) 5 F. 244.—CT. OF SESS.; **Pumphreston Oil Co. v. Cavaney** (1903) 5 F. 963.—CT. OF SESS.

Steel v. Oakbank Oil Co., *approved*.
Pumphreston Oil Co. v. Cavaney (1903) 5 F. 963.—CT. OF SESS.

Davidson v. Summerlee and Mossend Steel and Iron Co. (1903) 5 Ct. of Sess. Cas. (5th Series) 991.—CT. OF SESS.

Questioned. **Niddrie and Benhar Coal Co. v. M'Kay** (1903) 5 F. 1121.—CT. OF SESS.; *dissenting judgment approved*, **Neagles v. Nixon's Navigation Co.** (1904) 73 L. J. K. B. 165; [1904] 1 K. B. 339; 90 L. T. 49; 52 W. R. 356; 68 J. P. 297; 20 T. L. R.—C.A.

Niddrie and Benhar Coal Co. v. M'Kay, *approved*.
Neagles v. Nixon's Navigation Co. (1904).—C.A. (*supra*).

5. OTHER STATUTES.

Factory Acts.

Wells v. Parker (1785) 1 Term Rep. 37; 1 Bro. P. C. 545.—Q.B.; **S. C. nom. Parker v. Wells** (1787) 1 Term Rep. 783.—EX. CH., *observations applied*.
Kent v. Astley (1869) 39 L. J. M. C. 3; L. R. 5 Q. B. 19; 10 B. & S. 802; 21 L. T. 425; 18 W. R. 185.—Q.B.

Kent v. Astley, *followed*.
Redgrave v. Lee (1874) L. R. 9 Q. B. 363; 48 L. J. M. C. 105; 30 L. T. 519; 22 W. R. 857.—Q.B.

Hewlett v. Allen (1894) 63 L. J. Q. B. 608; [1894] A. C. 388; 6 R. 175; 71 L. T. 94; 42 W. R. 670; 58 J. P. 700.—H.L. (E.), *commented on and explained*.
Williams v. North's Navigation Collieries (1904) 73 L. J. K. B. 575; [1904] 2 K. B. 44; 91 L. T. 3; 52 W. R. 564; 68 J. P. 371; 20 T. L. R. 448.—C.A.

Caswell v. Worth (1856) 5 El. & Bl. 849; 25 L. J. Q. B. 121; 2 Jur. (N.S.) 116; 4 W. R. 231.—Q.B., *disapproved*.
Britton v. Great Western Cotton Co. (1872) L. R. 7 Ex. 130; 41 L. J. Ex. 99; 27 L. T. 125; 20 W. R. 525.—EX.

PIGOTT, B.—I may add that I should have been better satisfied if *Caswell v. Worth* had been otherwise decided; and that the master there should have been held liable, as he had been clearly guilty of a breach of his statutory duty.—p. 139.

L.C.C. v. Lewis (1900) 69 L. J. Q. B. 277; 82 L. T. 195; 64 J. P. 39.—PHILLIMORE and BUCKNILL, JJ., *followed*.
Toller v. Spiers and Pond (1902) 72 L. J. Ch. 191; [1903] 1 Ch. 362; 87 L. T. 578; 51 W. R. 381; 67 J. P. 234.—BUCKLEY, J.

Toller v. Spiers and Pond, *followed*.
Brass v. London County Council (1901) 73 L. J. K. B. 841; [1904] 2 K. B. 336; 91 L. T. 344; 53 W. R. 27; 68 J. P. 365; 2 L. T. R. 809; 20 T. L. R. 464.—K.B.D.

Employers and Workmen Act.

Lowther v. Radnor (Earl) (1806) 8 East 113, *explained and distinguished*.
Riley v. Warden (1848) 2 Ex. 59; 18 L. J. Ex. 120.—EX.

Lowther v. Radnor (Earl), *adopted*.
Disney, In re, Allsop, Ex parte (1875) 32 L. T. 433.—BKOY.

Clemson v. Hubbard (1876) 45 L. J. M. C. 69; 1 Ex. D. 179; 33 L. T. 816; 24 W. R. 312.—CLEASBY, B., GROVE and FIELD, JJ., *followed*.
Charles v. Plymouth Waterworks (1890) 60 L. J. M. C. 20; 64 L. T. 466; 39 W. R. 122; 55 J. P. 469.—STEPHEN and WILLIAMS, JJ.

Clemson v. Hubbard, *applied*.
James v. Evans & Co. (1897) 66 L. J. Q. B. 742; [1897] 2 Q. B. 180; 77 L. T. 78; 45 W. R. 654; 61 J. P. 631.—HAWKINS and WRIGHT, JJ.

Baker, Ex parte (1857) 2 H. & N. 219; 26 L. J. M. C. 155; 3 Jur. (N.S.) 514.—EX., *dissented from*.

Whittle v. Frankland (1862) 31 L. J. M. C. 81; 2 B. & S. 49; 8 Jur. (N.S.) 382; 5 L. T. 639.—Q.B.

Unwin v. Clarke (1866) 35 L. J. M. C. 193; L. R. 1 Q. B. 417; 12 Jur. (N.S.) 429; 14 L. T. 356; 14 W. R. 688, *adopted*.
Smart v. Pessol (1874) 30 L. T. 632.—Q.B.

Shop Hours Act.

Hammond v. Pulsford (1894) 64 L. J. M. C. 63; [1895] 1 Q. B. 223; 15 R. 95; 71 L. T. 767; 43 W. R. 236; 18 Cox C. C. 58; 59 J. P. 533.—POLLOCK, B. and GRANTHAM, J. Rendered obsolete by Shop Hours Act, 1895 (58 & 59 Vict., c. 5).

6. RIGHTS OF MASTER AGAINST THIRD PARTIES.

Everard v. Hopkins (1614) 2 Bulstr. 332.
Distinguished, **Alton v. Midland Ry.** (1865) 31 L. J. C. P. 292; 19 C. B. (N.S.) 213; 11 Jur. (N.S.) 672; 12 L. T. 703; 13 W. R. 918.—C.P.; *held erroneous*, **Horne v. Midland Ry.** (1872) L. R. 7 C. P. 583, 590; 41 L. J. C. P. 264.—C.P.

Hall v. Hollander (1825) 4 B. & C. 660; 7 D. & R. 133; 4 L. J. (O.S.) K. B. 39.—K.B.; and **Martinez v. Geber** (1841) 3 Scott (N.R.) 386; 3 Man. & G. 88; 10 L. J. C. P. 314; 5 Jur. 463.—C.P.
Distinguished, **Alton v. Midland Ry.** (1865) 34 L. J. C. P. 292; 19 C. B. (N.S.) 213; 11 Jur. (N.S.) 672; 12 L. T. 703; 13 W. R. 918.—C.P.

Hall v. Hollander, *referred to*.
Evans v. Walton (1867) 36 L. J. C. P. 307; L. R. 2 C. P. 615; 17 L. T. 92; 15 W. R. 1062.—C.P.

Alton v. Midland Ry. (*supra*).
Discussed, **Potter v. Metropolitan District Ry.** (1874) 32 L. T. 36.—EX. CH.; **Bradshaw v. L. & Y. Ry.** (1875) 44 L. J. C. P. 148; L. R. 10 C. P. 189; 31 L. T. 847; 23 W. R. 310.—C.P.; *distinguished, but observations applied*, **Daly v. Dublin, &c., Ry.** (1892) 30 L. R. Ir. 514.—C.A.; *discussed*, **Taylor v. M. S. & L. Ry.** (1894) 64 L. J. Q. B. 6; [1895] 1 Q. B. 134; 14 R. 34; 71 L. T. 596; 43 W. R. 120.—C.A. (*ante*, vol. 1, col. 285).

Higgins v. Butcher (1606) Yelv. 89; 1 Brownl. 205; and **Baker v. Bolton** (1808) 1 Camp. 493; 10 R. R. 734, *approved*.
Osborne v. Gillett (1873) 42 L. J. Ex. 53; L. R. 8 Ex. 88; 28 L. T. 147; 21 W. R. 409.—EX.

Higgins v. Butcher, *considered and applied*.
Midland Insurance Co. v. Smith (1881) 50 L. J. Q. B. 329; 6 Q. B. D. 561, 568; 45 L. T. 411; 29 W. R. 850; 45 J. P. 699.—Q.B.D.

Maunder v. Venn (1829) 1 M. & M. 323; 31 R. R. 734.—LITTLEDALE, J., *followed*.
Torrence v. Gibbins (1843) 13 L. J. Q. B. 36; 5 Q. B. 297; D. & M. 226; 7 Jur. 1158.—Q.B.

Maunder v. Venn, *dicta adopted*.
Terry v. Hutchinson (1868) 9 B. & S. 487; 37 L. J. Q. B. 257; L. R. 3 Q. B. 599; 18 L. T. 521; 16 W. R. 932.—Q.B.

Speight v. Oliveira (1819) 2 Stark. 493; 20 R. R. 728.—K.B., *adopted*.
Evans v. Walton (1867) 36 L. J. C. P. 307; L. R. 2 C. P. 615; 17 L. T. 92; 15 W. R. 1062.—C.P.

Speight v. Oliveira, *referred to*.
Morgan v. Molony (1873) Ir. R. 7 C. L. 240.—C.P.

Davies v. Williams (1847) 10 Q. B. 725; 16 L. J. Q. B. 369; 11 Jur. 750.—Q.B., *observations applied*.

Terry v. Hutchinson (1868) 9 B. & S. 487; 37 L. J. Q. B. 257; L. R. 3 Q. B. 599; 18 L. T. 521; 16 W. R. 932.—Q.B., *inapplicable*.

Hedges v. Tagg (1872) 41 L. J. Ex. 169; L. R. 7 Ex. 283; 20 W. R. 976.—EX.

Hartley v. Cummings (1846) 5 C. B. 247; 2 Car. & K. 433; 17 L. J. C. P. 84; 12 Jur. 57.—C.P.; and **Sykes v. Dixon** (1839) 9

A. & E. 693; 1 P. & D. 463; 1 W. W. & H. 120; 8 L. J. Q. B. 102.—Q.B., *adopted*.
 Evans v. Walton (1867) 36 L. J. C. P. 307; L. R. 2 C. P. 615; 17 L. T. 92; 15 W. R. 1062.—C.P.

Grinnell v. Wells (1844) 7 Man. & G. 1033; 8 Scott (N.R.) 741; 2 D. & L. 610; 14 L. J. C. P. 19; 8 Jur. 1101.—C.P.; and
 Hedges v. Tagg (1872) 41 L. J. Ex. 169; L. R. 7 Ex. 283; 20 W. R. 976.—EX., *dicta approved*.

Whitbourne v. Williams (1901) 70 L. J. K. B. 933; [1901] 2 K. B. 722; 85 L. T. 271.—C.A.
 SMITH, M.R., WILLIAMS and STIRLING, L.JJ.

Thompson v. Ross (1859) 5 H. & N. 16. 18; 29 L. J. Ex. 1; 5 Jur. (N.S.) 1133; 1 L. T. 43; 8 W. R. 44.—EX.

Dictum adopted, Evans v. Walton (1867).—C.P. (*supra*); *followed*, Whitbourne v. Williams (1901).—C.A. (*supra*).

Torrence v. Gibbins (1843) 13 L. J. Q. B. 26; 5 Q. B. 297; D. & M. 226; 7 Jur. 1158.—Q.B., *followed*.

Salter v. Walker (1869) 21 L. T. 360; 18 W. R. 65.—Q.B.

Bird v. Randall (1762) 3 Burr. 1345. 1353; 1 W. Bl. 373, 387.—K.B., *overruled*.

Voight v. Winch (1819) 2 B. & Akl. 662; 21 R. R. 446.—K.B.

ABBOTT, C.J.—I am aware that in *Bird v. Randall* Lord Mansfield is reported to have said that a former recovery need not be pleaded, but will be a bar when given in evidence. I cannot, however, accede to that, for the very first thing I learned in the study of the law was that a judgment recovered must be pleaded; that has so strongly engrafted itself on my mind as a general principle, that nothing I have heard in argument this day has shaken it. BAYLEY, J. agreed.

Bird v. Randall, *principle considered*.

Brunsdon v. Humphrey (1884) 53 L. J. Q. B. 476; 14 Q. B. D. 141; 51 L. T. 529; 32 W. R. 944; 49 J. P. 4.—C.A.

Blake v. Lanyon (1795) 6 Term Rep. 221; 3 R. R. 162, *followed*.

De Francesco v. Barnum (1890) 63 L. T. 514.—FRY, L.J.

Adams v. Bafeald (1590) 1 Leon. 240.—K.B., *held overruled*.

Taylor v. Neri (1795) 1 Esp. 386.—C.P., *questioned*.

Lumley v. Gye (1853) 2 El. & Bl. 216; 22 L. J. Q. B. 463; 17 Jur. 827; 1 W. R. 432.—Q.B.

CHROMPTON, J.—In *Blake v. Lanyon* it was held by the Court of King's Bench, in accordance with the opinion of Gawdy, J. in *Adams v. Bafeald*, and against the opinion of the two other judges who delivered their opinions in that case, that an action will lie for continuing to employ the servant of another after notice, without having enticed him away, and although the defendant had received the servant innocently.—p. 244.

WIGHTMAN, J.—The other case was that of *Taylor v. Neri*, which certainly bears more directly on the present. The declaration stated that the plaintiff being manager of the Opera House had engaged Breda to sing, that the defendant beat him, whereby the plaintiff lost his service. Eyre, L.C.J., expressed a doubt whether the action was maintainable, observing that if such an action could be supported, every

person whose servant whether domestic or not, was kept away a day from his business could maintain an action. He was of opinion that Breda was not a servant at all. The case was very little discussed, was a decision at *nisi prius*, and does not appear to have undergone much consideration; and, without adverting to some distinctions between that and the present case, it can hardly be considered as an authority of much weight for the defendant.—p. 243.

Lumley v. Gye, *affirmed*.

Bowen v. Hall (1881) 6 Q. B. D. 333; 50 L. J. Q. B. 305; 44 L. T. 75; 29 W. R. 367; 45 J. P. 373.—C.A.

BRETT, L.J. (for self and SELBORNE, L.C.).—The decision of the majority [in the above case] will be seen, on a careful consideration of their judgments, to have been founded upon two chains of reasoning. First, that whenever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it; produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby v. White* (1 Sm. L. C. 8th ed. p. 264) (p. 337). . . . We are of opinion that the propositions deduced above from *Ashby v. White* are correct (p. 338). . . . Another chain of reasoning was relied on by the majority in *Lumley v. Gye*, and powerfully combated by Coleridge, J. It was said that the contract in question was within the principle of the Statute of Labourers. . . . We think the case is better supported upon the first and larger doctrine.—p. 339.

[COLERIDGE, C.J. considered that *Lumley v. Gye* ought to have been overruled.]

Lumley v. Gye and Bowen v. Hall, *applied*.

Mogul Steamship Co. v. McGregor (1889) 58 L. J. Q. B. 465; 23 Q. B. D. 598, 608; 61 L. T. 820.—C.A. (*see in H.L., post, "TRADE"*); De Francesco v. Barnum (1890) 63 L. T. 514.—FRY, L.J.

Lumley v. Gye and Bowen v. Hall, *followed*.

Temperton v. Russell (1893) 62 L. J. Q. B. 412; [1893] 1 Q. B. 715; 4 R. 376; 69 L. T. 78; 41 W. R. 565; 57 J. P. 676.—C.A. Esher, M.R., LOPES and SMITH, L.JJ.

Lumley v. Gye and Bowen v. Hall, *commented on*.

Allen v. Flood (1897) 67 L. J. Q. B. 119; [1898] A. C. 1; 77 L. T. 717; 46 W. R. 258; 62 J. P. 595.—H.L. (E.). *See judgments*.

Lumley v. Gye and Bowen v. Hall, *applied*.

Read v. Friendly Society of Operative Stonemasons (1902) 71 L. J. K. B. 994; [1902] 2 K. B. 732; 87 L. T. 493; 51 W. R. 115; 66 J. P. 822.—C.A.

Lumley v. Gye and Bowen v. Hall.

(Hamorgan Coal Co. v. South Wales Miners' Federation (1902) 72 L. J. K. B. 893; [1903] 2 K. B. 545; 89 L. T. 393.—C.A.

7. LIABILITIES OF MASTER TO THIRD PARTIES.

Cox v. Midland Counties Ry. (1849) 18 L. J. Ex. 65; 3 Ex. 268; 13 Jur. 65.—EX. *considered*.

Walker v. G. W. Ry. (1867) L. R. 2 Ex.

228; 36 L. J. Ex. 123; 16 L. T. 327; 15 W. R. 769.—EX.

MARTIN, B.—When that case was decided, it was generally supposed that a company, except in some very few cases of daily recurrence, could not contract under seal. But there has been much more freedom in this respect accorded to companies since the time of that decision.

Cox v. Midland Counties Ry., distinguished.
Langdon v. G. W. Ry. (1874) 30 L. T. 173.—EX. CH.

Alexander v. Gibson (1811) 2 Camp. 555; 11 R. R. 797.

Held overruled. Udell v. Atherton (1861) 30 L. J. Ex. 35; 7 H. & N. 172; 7 Jur. (N.S.) 777; 4 L. T. 797.—EX.; *adopted*, McKay v. Commercial Bank of New Brunswick (1874) 43 L. J. P. C. 81; L. R. 5 P. C. 394, 410; 30 L. T. 180; 22 W. R. 473.—P.C.; *applied*, Baldry v. Bates (1885) 52 L. T. 620.—HUDDLESTON, B.

Brady v. Todd (1861) 30 L. J. C. P. 223; 9 C. B. (N.S.) 592; 7 Jur. (N.S.) 827; 4 L. T. 212; 9 W. R. 483.—C.P., *followed*.

Udell v. Atherton (1861) 7 H. & N. 172; 30 L. J. Ex. 35; 7 Jur. (N.S.) 777; 4 L. T. 797.—EX. **MARTIN, B.**—But the point has been expressly decided by the Court of Common Pleas in *Brady v. Todd*, where it was held, that an agent, being a servant, authorised to sell a horse, had not authority to bind his master by a warranty that the horse was sound and quiet in harness. This case therefore substantially overrules the *nisi prius* decision in *Alexander v. Gibson*.—p. 198.

Brady v. Todd, explained.
Howard v. Sheward (1866) 36 L. J. C. P. 42; L. R. 2 C. P. 148; 12 Jur. (N.S.) 1015; 15 L. T. 183; 15 W. R. 45.—C.P.

Brady v. Todd, applied.
Payne v. Leconfield (1882) 51 L. J. Q. B. 642, 644; 30 W. R. 814.—GROVE and MATHEW, JJ.

Brady v. Todd, distinguished.
Brooks v. Hassall (1883) 49 L. T. 569.
COLERIDGE, C.J.—Whether a servant has authority to bind his master by a warranty must depend upon the circumstances of each case. In the case of *Brady v. Todd*, which is relied upon to support the contention that the servant had no authority, the Court expressly reserved and excluded from their judgment a case where the circumstances were the same as those in the present case, that is to say, where stranger meets stranger at a fair.

Brady v. Todd, principle applied.
Baldry v. Bates (1885) 52 L. T. 620.—HUDDLESTON, B.

Morley v. Gaisford (1795) 2 H. Bl. 442.—C.P., *dictum adopted*.

Gordon v. Rolt (1849) 18 L. J. Ex. 432; 4 Ex. 365; 7 D. & L. 87.—EX., *followed*.
Sharrod v. L. & N. W. Ry. (1849) 20 L. J. Ex. 185; 4 Ex. 580; 6 Railw. Cas. 239; 7 D. & L. 213; 14 Jur. 23.—EX.

Sharrod v. L. & N. W. Ry., principle applied.
Holmes v. Mather (1875) 44 L. J. Ex. 176; L. R. 10 Ex. 261; 33 L. T. 361; 23 W. R. 364.—EX.

Peachey v. Rowland (1853) 13 C. B. 182; 22 L. J. C. P. 81; 17 Jur. 764.—C.P., *followed*.

Sadler v. Henlock (1855) 4 El. & Bl. 570; 3

C. L. R. 760; 24 L. J. Q. B. 138; 1 Jur. (N.S.) 677; 3 W. R. 181.—Q.B.

Croft v. Alison (1821) 4 B. & Ald. 590; 23 R. R. 407.—K.B., *observations applied*.
Seymour v. Greenwood (1861) 30 L. J. Ex. 327; 7 H. & N. 355; 4 L. T. 833; 9 W. R. 785.—EX. CH.; *affirming* 30 L. J. Ex. 189; 6 H. & N. 359; 9 W. R. 518.—EX.

Croft v. Alison and Lyons v. Martin (1838) 8 A. & E. 512; 3 N. & P. 509; 7 L. J. Q. B. 214.—Q.B., *principles adopted*.
Limpus v. London General Omnibus Co. (1862) 32 L. J. Ex. 84; 1 H. & C. 526; 9 Jur. (N.S.) 333; 7 L. T. 641; 11 W. R. 149.—EX. CH.

Lyons v. Martin, considered.
Bayley v. Manchester, Sheffield and Lincolnshire Ry. (1872) L. R. 7 C. P. 415; 41 L. J. C. P. 278.—C.P.; *affirmed*, (1873) 42 L. J. C. P. 78; L. R. 8 C. P. 148; 28 L. T. 366.—EX. CH.

WILLES, J. (for the Court).—The case of *Lyons v. Martin* was relied upon for the defendants as furnishing an appropriate illustration. There, the master was not held answerable for the act of a servant employed to impound sheep found upon his master's land, but who thought proper to impound sheep found upon a highway out of the land. If he had improperly impounded sheep found upon his master's land, the decision would have been different.—p. 420.

Eastern Counties Ry. v. Broom (1851) 6 Ex. 314; 20 L. J. Ex. 196; 15 Jur. 297.—EX. CH., *discussed*.

Whitfield v. S. E. Ry. (1858) 27 L. J. Q. B. 229; El. Bl. & El. 115; 4 Jur. (N.S.) 688; 6 W. R. 545.—Q.B.

Eastern Counties Ry. v. Broom, not followed.
Goff v. G. N. Ry. (1861) 3 El. & El. 672; 30 L. J. Q. B. 148; 7 Jur. (N.S.) 286; 3 L. T. 850.—Q.B.

BLACKBURN, J. (for the Court).—But if the decision in *Eastern Counties Railway Co. v. Broom*, is on a principle inconsistent with that subsequently laid down by the Court of Exchequer Chamber in *Giles v. Taff Vale Railway Co.*, we consider ourselves free to choose which of the two authorities we shall follow, and we prefer the latest in date, which we think also the soundest in principle.—p. 683.

Eastern Counties Ry. v. Broom, adopted.
Walker v. S. E. Ry. (1870) 39 L. J. C. P. 346; L. R. 5 C. P. 640; 23 L. T. 14; 18 W. R. 1082.—C.P.

Eastern Counties Ry. v. Broom, distinguished.
Bank of New South Wales v. Owston (1879) 48 L. J. P. C. 25; 4 App. Cas. 270; 40 L. T. 500; 14 Cox C. C. 267.—P.C.

Roe v. Birkenhead, &c., Junction Ry. (1851) 21 L. J. Ex. 9; 7 Ex. 36; 6 Railw. Cas. 795.—EX., *distinguished and commented upon*.
Bank of New South Wales v. Owston (1879).—P.C. (*supra*).

Giles v. Taff Vale Ry. (1853) 2 El. & Bl. 822.—EX. CH.

Followed, Goff v. G. N. Ry. (1861) 30 L. J. Q. B. 148; 3 El. & El. 672; 7 Jur. (N.S.) 286; 3 L. T. 850.—Q.B.; *adopted*, Moore v. Metropolitan Ry. (1872) 42 L. J. Q. B. 23; L. R. 8 Q. B. 36; 27 L. T. 579; 21 W. R. 145.—Q.B.

- Goff v. G. N. Ry.** (1861) 30 L. J. Q. B. 148; 3 El. & El. 672; 7 Jur. (N.S.) 286; 3 L. T. 850.—Q.B.
- Distinguished*, **Poulton v. L. & S. W. Ry.** (1867) 36 L. J. Q. B. 294; L. R. 2 Q. B. 534; 8 B. & S. 616; 17 L. T. 11; 16 W. R. 309.—Q.B.; *referred to*, **Van den Eynde v. Ulster Ry.** (1871) Ir. R. 5 C. L. 328.—EX. CH.; *approved*, **Moore v. Metropolitan Ry.** (1872) L. R. 8 Q. B. 36; 42 L. J. Q. B. 23; 27 L. T. 579; 21 W. R. 145.—Q.B.; *applied*, **Kirkstall Brewery Co. v. Furness Ry.** (1874) 43 L. J. Q. B. 142; L. R. 9 Q. B. 468; 30 L. T. 783; 22 W. R. 876.—Q.B.; *distinguished*, **Bank of New South Wales v. Owston** (1879) 48 L. J. P. C. 25; 4 App. Cas. 270; 40 L. T. 500; 14 Cox C. C. 267.—P.C.
- Stevens v. Midland Counties Ry.** (1854) 23 L. J. Ex. 328; 10 Ex. 352; 2 C. L. R. 1800; 18 Jur. 932.—EX., *distinguished*.
- Bank of New South Wales v. Owston** (1879) 48 L. J. P. C. 25; 4 App. Cas. 270; 40 L. T. 500; 14 Cox C. C. 267.—P.C.
- Stevens v. Midland Counties Ry.**, *not followed*.
- Edwards v. Midland Ry.** (1880) 6 Q. B. D. 287; 50 L. J. Q. B. 281; 43 L. T. 694; 29 W. R. 609; 45 J. P. 374.
- FRY, J.**—Those who deny that the company can be made liable rely principally on Baron Alderson's judgment in *Stevens v. Midland Counties Railway Co.*, where he held that, in order to support such an action, it must be shown that the defendant was actuated by a motive in his mind, and that a corporation has no mind. The two other judges, Barons Platt and Martin, did not agree with Baron Alderson's reasons, but decided in the company's favour on other grounds. Has Baron Alderson's opinion, which in that case stands alone, been followed by other judges? (p. 288). [After reviewing various cases.] In *Green v. London General Omnibus Co.* (7 C. B. (N.S.) 290), Chief Justice Erle continues: "The doctrine relied on, that a corporation having no soul cannot be actuated by a malicious intention is more quaint than substantial." In other words, the *ratio decidendi* of Baron Alderson was in this case disregarded, and as his decision has not been followed in the English Courts, I am at liberty to decide in conformity with the later decisions, and I hold, therefore, that the action will lie in this case.—p. 289.
- Stevens v. Midland Counties Ry.**, *not followed*.
- Cornfoot v. Carlton Bank** (1899) 68 L. J. Q. B. 196; [1899] 1 Q. B. 392; 80 L. T. 121.—DARLING, J.
- Poulton v. L. & S. W. Ry.** (1867) 36 L. J. Q. B. 294; L. R. 2 Q. B. 534; 8 B. & S. 616; 17 L. T. 11; 16 W. R. 309.—Q.B.
- Followed*, **Allen v. L. & S. W. Ry.** (1870) 40 L. J. Q. B. 55; L. R. 6 Q. B. 65; 23 L. T. 612; 19 W. R. 127; 11 Cox C. C. 621.—Q.B.; *distinguished*, **Moore v. Metropolitan Ry.** (1872) 42 L. J. Q. B. 23; L. R. 8 Q. B. 36; 27 L. T. 579; 21 W. R. 145.—Q.B.; *considered*, **Mill v. Hawker** (1874) 43 L. J. Ex. 129; L. R. 9 Ex. 309; 30 L. T. 894; 23 W. R. 26.—EX., *affirmed*.
- Poulton v. L. & S. W. Ry.**, *distinguished*.
- Bolingbroke (Lord) v. Swindon New Town Local Board** (1874) 30 L. T. 723; 43 L. J. C. P. 287; L. R. 9 C. P. 575; 23 W. R. 47.—C.P.
- Poulton v. L. & S. W. Ry. and Moore v. Metropolitan Ry.** (*supra*), *distinguished*.
- Bank of New South Wales v. Owston** (1879) 48 L. J. P. C. 25; 4 App. Cas. 270; 40 L. T. 500; 14 Cox C. C. 267.—P.C.
- Poulton v. L. & S. W. Ry.**, *distinguished*.
- Charleston v. London Tramways Co.** (1887) 36 W. R. 367.—MATHEW and CHARLES, JJ.
- Seymour v. Greenwood** (1861) 30 L. J. Ex. 327; 7 H. & N. 355; 4 L. T. 833; 9 W. R. 785.—EX. CH.; *affirming* 30 L. J. Ex. 189; 6 H. & N. 359; 9 W. R. 518.—EX., *distinguished*.
- Poulton v. L. & S. W. Ry.** (1867) 36 L. J. Q. B. 294; L. R. 2 Q. B. 534; 8 B. & S. 616; 17 L. T. 11; 16 W. R. 309.—Q.B.
- Seymour v. Greenwood**, *adopted*.
- Walker v. S. E. Ry.** (1870) 39 L. J. C. P. 346; L. R. 5 C. P. 640; 23 L. T. 14; 18 W. R. 1032.—C.P.; **Bayley v. Manchester, Sheffield & Lincolnshire Ry.** (1873) 42 L. J. C. P. 78; L. R. 8 C. P. 148; 28 L. T. 366.—EX. CH.
- Seymour v. Greenwood**, *distinguished*.
- Lucas v. Mason** (1875) 44 L. J. Ex. 145; L. R. 10 Ex. 251; 33 L. T. 13; 23 W. R. 924.—EX.
- Seymour v. Greenwood**, *applied*.
- Dyer v. Munday** (1895) 64 L. J. Q. B. 448; [1895] 1 Q. B. 742; 14 R. 306; 72 L. T. 448; 43 W. R. 440; 59 J. P. 276.—C.A. **ESHER, M.R., LOPES and RIGBY, L.JJ.**
- Limpus v. London General Omnibus Co.** (1862) 1 H. & C. 526; 32 L. J. Ex. 34; 9 Jur. (N.S.) 333; 7 L. T. 641; 11 W. R. 149.—EX. CH.
- Distinguished*, **Poulton v. L. & S. W. Ry.** (1867) 36 L. J. Q. B. 294; L. R. 2 Q. B. 534; 8 B. & S. 616; 17 L. T. 11; 16 W. R. 309.—Q.B.; *followed*, **Ward v. London General Omnibus Co.** (1873) 27 L. T. 761; 21 W. R. 358.—C.P.; *affirmed*, 42 L. J. C. P. 265; 28 L. T. 850.—EX. CH.; *adopted*, **British Mutual Banking Co. v. Charnwood Forest Ry.** (1887) 56 L. J. Q. B. 449; 18 Q. B. D. 714; 57 L. T. 833; 35 W. R. 590; 52 J. P. 150.—C.A.; *inapplicable*, **Harding v. Barker** (1888) 37 W. R. 78.—FIELD and WILLS, JJ.; *applied*, **Farry v. G. N. Ry. of Ireland** (1897) [1898] 2 Ir. R. 352.—Q.B.D.; *referred to*, **Whitechurch v. Cavanagh** (1901) 71 L. J. K. B. 400; [1902] A. C. 117; 85 L. T. 349; 50 W. R. 218.—H.L. (E.); *discussed and not applied*, **Byrne v. Londonderry Tramway Co.** [1902] 2 Ir. R. 457.—C.A., and **O'Callimore v. Savage South Africa Co.**

Poulton v. L. & S. W. Ry., *distinguished*.
Smith v. North Metropolitan Tramways Co. (1891) 55 J. P. 630.—C.A. **ESHER**, M.R., **FRY** and **LOPES**, L.JJ.

Edwards v. L. & N. W. Ry. (1870) 39 L. J. C. P. 241; L. R. 5 C. P. 445; 22 L. T. 656; 18 W. R. 834.—C.P.

Followed, **Allen v. L. & S. W. Ry.** (1870).—Q.B. [*infra*] § *distinguished*, **Bank of New South Wales v. Owston** (1879).—P.C. (*supra*).

Edwards v. Midland Ry. (1880) 50 L. J. Q. B. 281; 6 Q. B. D. 287; 43 L. T. 694; 29 W. R. 609; 45 J. P. 374.—**FRY**, J., *followed*.

Kemp v. Courage (1890) 7 Times L. R. 50.—**POLLOCK**, B.; **Cornford v. Carlton Bank** (1899) 68 L. J. Q. B. 196; [1899] 1 Q. B. 392; 80 L. T. 121.—**DARLING**, J.

Allen v. L. & S. W. Ry. (1870) 40 L. J. Q. B. 55; L. R. 6 Q. B. 65; 23 L. T. 612; 19 W. R. 127; 11 Cox C. C. 621.—Q.B., *distinguished*.

Bank of New South Wales v. Owston (1879) 48 L. J. P. C. 25; 4 App. Cas. 270, 287; 40 L. T. 500; 14 Cox C. C. 267.—P.C.

Allen v. L. & S. W. Ry., *applied*.

Abrahams v. Deakin (1890) 60 L. J. Q. B. 238; [1891] 1 Q. B. 516; 63 L. T. 690; 39 W. R. 183; 55 J. P. 212; 7 Times L. R. 117.—C.A. **ESHER**, M.R., **LOPES** and **KAY**, L.JJ.; **Stevens v. Henshelwood** (1891) 55 J. P. 341.—C.A. **ESHER**, M.R., **BOWEN** and **FRY**, L.JJ.

Allen v. L. & S. W. Ry., *dicta discussed and not applied*.

Knight v. North Metropolitan Tramways Co. (1898) 78 L. T. 227.—**BRUCE**, J.

Allen v. L. & S. W. Ry., *discussed*.

Cullimore v. Savage South Africa Co. [1903] 2 Ir. R. 589, 609.—K.B.D. and C.A.

Tebbutt v. Bristol and Exeter Ry. (1870) 40 L. J. Q. B. 78; L. R. 6 Q. B. 73; 23 L. T. 772; 19 W. R. 383.—Q.B., *applied*.

Tolhausen v. Davies (1888) 57 L. J. Q. B. 395; 59 L. T. 436; 52 J. P. 804.—Q.B.D.: *affirmed*, 58 L. J. Q. B. 98; W. N. (1888) 197.—C.A.

Bayley v. M. S. & L. Ry. (1873) 42 L. J. C. P. 78; L. R. 8 C. P. 148; 28 L. T. 366.—EX. CH., *distinguished*.

Bolingbroke (Lord) v. Swindon New Town Local Board (1874) 43 L. J. C. P. 287; L. R. 9 C. P. 575; 30 L. T. 723; 23 W. R. 47.—C.P. **Richards v. West Middlesex Waterworks Co.** (1885) 54 L. J. Q. B. 551; 15 Q. B. D. 660; 33 W. R. 902; 49 J. P. 631.—**COLERIDGE**, C.J. and **SMITH**, J.

Bayley v. M. S. & L. Ry., *applied*.

Dyer v. Munday (1895) 64 L. J. Q. B. 448; [1895] 1 Q. B. 742; 14 R. 306; 72 L. T. 448; 43 W. R. 440; 59 J. P. 276.—C.A. **ESHER**, M.R., **LOPES** and **RIGBY**, L.JJ.

Abrahams v. Deakin (1891) 60 L. J. Q. B. 238; [1891] 1 Q. B. 516; 63 L. T. 690; 39 W. R. 183; 55 J. P. 212.—C.A.

Followed, **Steadman v. Baker** (1896) 12 T. L. R. 451.—C.A.; *applied*, **Hanson v. Waller** (1900) 70 L. J. K. B. 231; [1901] 1 K. B. 390; 84 L. T.

91; 49 W. R. 445.—K.B.D.; and **Cullimore v. Savage South Africa Co.** [1903] 2 Ir. R. 589.—K.B.D., *affirmed* C.A.

Steadman v. Baker (1896) 12 T. L. R. 451.—C.A., *applied*.

Hanson v. Waller (1900) 70 L. J. K. B. 231; [1901] 1 K. B. 390; 84 L. T. 91; 49 W. R. 445.—K.B.D..

Steadman v. Baker and Hanson v. Waller, *applied*.

Cullimore v. Savage South Africa Co. [1903] 2 Ir. R. 589.—K.B.D.; *affirmed* C.A.

Morley v. Dunscombe (1848) 11 L. T. (O.S.) 199.—Q.B., *followed*.

Powles v. Hider (1856) 25 L. J. Q. B. 331; 6 El. & Bl. 207; 2 Jur. (N.S.) 472; 4 W. R. 492.—Q.B.

Powles v. Hider (1856) 6 El. & Bl. 207; 25 L. J. Q. B. 331; 2 Jur. (N.S.) 472; 4 W. R. 492.—Q.B., *discussed*.

Fowler v. Lock (1872) 40 L. J. C. P. 99; L. R. 7 C. P. 272; 29 L. T. 476.—C.P.; S. C. (1874) 43 L. J. C. P. 394; L. R. 9 C. P. 751, n.; 30 L. T. 800.—EX. CH.; S. C. (1874) L. R. 10 C. P. 90; 31 L. T. 844; 23 W. R. 415.—C.P.

Powles v. Hider, *followed*.

Fowler v. Lock, *discussed*.

Venables v. Smith (1877) 2 Q. B. D. 279; 46 L. J. Q. B. 470; 36 L. T. 509; 25 W. R. 584.—K.B.D.

COCKBURN, C.J.—I agree that, independently of the Acts of Parliament relating to this subject, the relation between the proprietor and the driver would be that of bailor and bailee, not that of master and servant. The cab proprietor hands over the horse and cab to the charge of the driver to be used by him for the purpose of plying for hire at his own discretion, and not subject to the proprietor's control. So far I agree with the reasoning of the majority of the Court in **Fowler v. Lock**. But I think that the provisions of the Act of Parliament alter what would otherwise be the relation of the proprietor and the driver, and, for the protection of the public, produce the result that as regards mischief done by the driver who is selected by the proprietor, the relation of master and servant so far exists as to render the proprietor responsible for the acts of the driver.—p. 282.

[N.B.—The injuries in the above case of **Venables v. Smith** were inflicted on one of the public.]

Powles v. Hider, *referred to*.

Fowler v. Lock, *distinguished*.

Steel v. Lester (1877) 47 L. J. C. P. 43; 3 C. P. D. 121; 37 L. T. 642; 26 W. R. 212.—C.P.D.

GROVE, J.—Another case which has been referred to is **Fowler v. Lock**, but the distinction between that case and the present is manifest. It was an action brought by the cabdriver against the cab proprietor for supplying an unfit horse. **Fowler v. Lock** does not touch the case of an action by one of the public against the cab proprietor, and, as it has never been overruled, we must assume it to be good law. If the action in the present case had been by **Lilee** against **Lester**, by master of ship in fact against owner of ship, then **Fowler v. Lock** would have strongly applied.—p. 46.

Powles v. Hider, considered.**Fowler v. Lock, referred to.**

King v. Spurr (1881) 8 Q. B. D. 104; 51 L. J. Q. B. 105; 45 L. T. 709; 30 W. R. 152.—Q.B.D.
 GROVE, J.—In *Powles v. Hider* both cab and horses belonged to the proprietor, and the cabman paid so much a day for the use of them, and this circumstance is referred to by Lord Campbell in his judgment. There is a great difference between this and the case where a man hires only the cab and provides the horses himself.—p. 106. *And see* judgment at length.

Powles v. Hider, approved.**Fowler v. Lock, opinion adopted.**

King v. London Improved Cab Co. (1889) 58 L. J. Q. B. 456; 23 Q. B. D. 281; 61 L. T. 34; 37 W. R. 737.—C.A.

Powles v. Hider, approved.

Keen v. Henry (1893) 63 L. J. Q. B. 211; [1894] 1 Q. B. 292; 9 R. 102; 69 L. T. 671; 42 W. R. 214; 58 J. P. 262.—C.A.

Powles v. Hider and Fowler v. Lock, considered.

Gates v. Bill (1902) 71 L. J. K. B. 102; [1902] 2 K. B. 38; 87 L. T. 288; 50 W. R. 546.—C.A.

Venables v. Smith (1877) 46 L. J. Q. B. 470; 2 Q. B. D. 279; 36 L. T. 509; 25 W. R. 584.—Q.B.D.

Discussed and applied, Steel v. Lister (1877) 47 L. J. C. P. 43; 3 C. P. D. 121; 37 L. T. 642; 26 W. R. 212.—C.P.D.; *considered, King v. Spurr* (1881) 51 L. J. Q. B. 105; 8 Q. B. D. 104; 45 L. T. 709; 30 W. R. 152.—Q.B.D.; *approved, King v. London Improved Cab Co.* (1889) 58 L. J. Q. B. 456; 23 Q. B. D. 281; 61 L. T. 34; 37 W. R. 737.—C.A.; *Keen v. Henry* (1893) 63 L. J. Q. B. 211; [1894] 1 Q. B. 292; 9 R. 102; 69 L. T. 671; 42 W. R. 214; 58 J. P. 262.—C.A.; *referred to, Gates v. Bill* (1902) 71 L. J. K. B. 102; [1902] 2 K. B. 38; 87 L. T. 288; 50 W. R. 546.—C.A.

King v. Spurr, distinguished.

King v. London Improved Cab Co. (1889) 58 L. J. Q. B. 456; 23 Q. B. D. 281; 61 L. T. 34; 37 W. R. 737.—C.A.

King v. Spurr, held overruled.**King v. London Improved Cab Co., followed.**

Keen v. Henry (1893) 63 L. J. Q. B. 211; [1894] 1 Q. B. 292; 9 R. 102; 69 L. T. 671; 42 W. R. 214; 58 J. P. 262.—C.A.

ESHER, M.R.—I may add that we are all of opinion that *King v. Spurr* is overruled.—pp. 212, 213.

King v. London Improved Cab Co., and**Keen v. Henry, considered.**

Gates v. Bill (1902) 71 L. J. K. B. 702; [1902] 2 K. B. 38; 87 L. T. 288; 50 W. R. 546.—C.A. WILLIAMS, ROMER and MATHEW, L.JJ.

Joel v. Morrison (1834) 6 Car. & P. 501.—PARKER, B., *adopted*.

Mitchell v. Crassweller (1853) 13 C. B. 237; 22 L. J. C. P. 100; 17 Jur. 716; 1 W. R. 153.—C.P.

Joel v. Morrison, dicta applied.

Whatman v. Pearson (1868) 37 L. J. C. P. 156; L. R. 3 C. P. 422; 18 L. T. 290; 16 W. R. 649.—C.P.

O.C.

Joel v. Morrison, considered.

Burns v. Poulson (or Poulson) (1873) 42 L. J. C. P. 302; L. R. 8 C. P. 563; 29 L. T. 329; 22 W. R. 20.—C.P.; BRETT, J. *dissenting*.

Sleath v. Wilson (1839) 9 Car. & P. 607;

S. C. *nom. Heath v. Wilson*, 2 M. & Rob. 181.—C.P., *disapproved*.

Mitchell v. Crassweller (1853) 13 C. B. 237;

22 L. J. C. P. 100; 17 Jur. 716; 1 W. R. 153.—C.P., *approved*.

Storey v. Ashton (1869) 10 B. & S. 337; 38 L. J. Q. B. 223; L. R. 4 Q. B. 476; 17 W. R. 727.—Q.B.

COCKBURN, C.J.—I cannot adopt the view of Erskine, J., in *Sleath v. Wilson*, that wherever a master has intrusted his servant with the control of his carriage the master is responsible for the servant's improper management of it. He is responsible when the act of the servant which causes the injury is done in the course of his employment as servant. I am far from saying that if the servant, while on his master's business, made a deviation from it for his own purpose, the master might not be liable. It would be a question of degree as to the extent of the deviation.—p. 339.

Mitchell v. Crassweller and Storey v. Ashton (supra), considered.

Burns v. Poulson (or Poulson) (1873) 42 L. J. C. P. 302; L. R. 8 C. P. 563; 29 L. T. 329; 22 W. R. 20.—C.P.; BRETT, J. *dissenting*.

Mitchell v. Crassweller and Storey v. Ashton, discussed and applied.

Stevens v. Woodward (1881) 50 L. J. Q. B. 231; 6 Q. B. D. 318; 44 L. T. 153; 29 W. R. 506; 45 J. P. 603.—Q.B.D.

Lamb v. Palk (1840) 9 Car. & P. 629.—EX., *overruled*.

Page v. Defries (1866) 7 B. & S. 137.—Q.B.

BLACKBURN, J.—At the trial I thought *Lamb v. Palk* was not law, or was misreported.

MELLOR, J.—That case is in point, but is not law.—p. 139.

Brucker v. Fromont (1796) 6 Term Rep. 659;

3 R. R. 303.—K.B., *inapplicable*.

Lyons v. Martin (1838) 3 A. & E. 512; 3 N. & P. 509; 7 L. J. Q. B. 214.—Q.B.

The Apollo (1889) 61 L. T. 286; 6 Asp. M. C. 402.—C.A. FRY and LOPES, L.JJ.; ESHER, M.R. *dissenting; reversed*, [1891] A. C. 499; 65 L. T. 590; 55 J. P. 820.—H.L. (E.). LORDS BRAMWELL and MORRIS *dissenting*.

Keith v. Keir (1812) 13 Faculty Decisions, 679.—CT. OF SESS., *disapproved*.

Mackenzie v. McLeod (1834) 4 M. & Scott 249; 3 L. J. C. P. 79.—C.P.

PARK, J.—With regard to the case cited of *Lord Keith v. Keir*, I am of opinion that that decision was contrary to law, as it is repugnant to good sense and justice. The master there expressly prohibited the act which caused the damage: it was very strange to hold him liable under such circumstances.—p. 254.

Sadler v. Henlock (1855) 4 El. & Bl. 570;

24 L. J. Q. B. 138; 1 Jur. (N.S.) 677; 3 W. R. 181.—Q.B., *test in applied*.

Turner v. G. E. Ry. (1875) 33 L. T. 431.—C.P.

Sadler v. Henlock, *see*
Johnson v. Lindsay (1889) 58 L. J. Q. B. 581;
 23 Q. B. D. 508; 61 L. T. 864; 38 W. R. 119;
 54 J. P. 228.—C.A.; *FRY, L.J. dissenting.*

Stevens v. Woodward (1881) 50 L. J. Q. B.
 231; 6 Q. B. D. 318; 44 L. T. 153; 29
 W. R. 506; 45 J. P. 603.—GROVE and
 LINDLEY, JJ., *distinguished.*
Ruddiman v. Smith (1889) 60 L. T. 708; 37
 W. R. 528; 53 J. P. 518.—COLERIDGE C.J. and
 HAWKINS, J.

Matthews v. West London Waterworks Co.
 (1813) 3 Camp. 403, *disapproved.*
Overtan v. Freeman (1852) 11 C. B. 867; 3
 Car. & K. 52; 21 L. J. C. P. 52; 16 Jur. 65.

MAULE, J.—I can find no case in which a
 party, sitnated like these defendants are, has
 been held liable under circumstances like those
 of the present case, except the case of *Matthews*
v. The West London Waterworks Co., where it
 appears a verdict was obtained against a water-
 works company for an injury resulting to the
 plaintiff from negligence of men employed by
 certain pipe-layers with whom the company had
 contracted for the laying down of certain water-
 pipes in a public street. That, however, is but
 a *nisi prius* case; the report is short and un-
 satisfactory, and the particular circumstances
 are not detailed; it certainly does, as it stands,
 somewhat countenance the argument which has
 been urged in this case. That is the only case,
 with the exception of *Bush v. Steinman* (*supra*),
 which has been considered as having laid down
 the law erroneously.—p. 872.

Murray v. Currie (1870) 40 L. J. C. P. 26;
 L. R. 6 C. P. 24; 23 L. T. 557; 19 W. R.
 104.—C.P.

Distinguished. **Turner v. G. E. Ry.** (1875) 33
 L. T. 431.—C.P.; *considered and applied.* **Rourke**
v. White Moss Colliery Co. (1876) 46 L. J. C. P.
 283; 1 C. P. D. 556; 35 L. T. 160.—C.P.D.;
affirmed, C.A. (*see col. 1747*); *distinguished.* **Jones**
v. Liverpool Corporation (1885) 54 L. J. Q. B.
 345; 14 Q. B. D. 890; 33 W. R. 551; 49 J. P.
 311.—GROVE and MANISTY, JJ.

Murray v. Currie, *distinguished.*
Oldfield v. Furniss (1893) 53 J. P. 102.—C.A.
 ESHER, M.R., BOWEN and KAY, L.JJ.

Murray v. Currie, *applied.*
Hall v. Lees (1904) 73 L. J. K. B. 819; [1904]
 2 K. B. 602; 91 L. T. 20; 53 W. R. 17; 20
 T. L. R. 678.—C.A.

Lethbridge v. Phillips (1819) 2 Stark. 544.
 —ABBOTT, C.J., *applied.*
Neuwith v. Over Darwen Industrial Society
 (1894) 63 L. J. Q. B. 290; 10 R. 588; 70 L. T.
 374.—MATHEW and COLLINS, JJ.

Randleston v. Murray (1838) 8 A. & E. 109;
 3 N. & P. 239; 1 W. W. & H. 149; 7
 L. J. Q. B. 132; 2 Jur. 324.—Q.B.,
distinguished.

Peachey v. Rowland (1853) 13 C. B. 182; 22
 L. J. C. P. 81; 17 Jur. 764.—C.P.

Randleston v. Murray, *impugned.*
Murphy v. Caralli (1864) 34 L. J. Ex. 14; 3
 H. & C. 462; 10 Jur. (N.S.) 1207; 13 W. R.
 165.—EX.

POLLOCK, C.B.—*Randleston v. Murray* is cer-
 tainly opposed to the general current of decisions
 on this subject.

Bower v. Peate (1876) 45 L. J. Q. B. 446; 1
 Q. B. D. 321; 35 L. T. 321.—Q.B.D.,
approved and followed.

Angus v. Dalton (1878) 4 Q. B. D. 162; 48
 L. J. Q. B. 225; 40 L. T. 605.—C.A.; *affirmed*,
 (1881) 6 App. Cas. 740; 50 L. J. Q. B. 689; 44
 L. T. 844; 30 W. R. 191.—H.L. (E.).

Bower v. Peate, *applied.*
Burt v. Victoria Graving Dock Co. (1882) 47
 L. T. 378.—FIELD, J.

Bower v. Peate, *commented on.*
Hughes v. Percival (1883) 8 App. Cas. 443; 52
 L. J. Q. B. 719; 49 L. T. 189; 31 W. R. 725; 47
 J. P. 772.—H.L. (E.).

Bower v. Peate and Hughes v. Percival,
considered and distinguished.
Barham v. Ipswich Dock Commissioners (1885)
 54 L. T. 23, 26.—HUDDLESTON, B.

Hughes v. Percival, *followed.*
Black v. Christchurch Finance Co. (1893) 63
 L. J. P. C. 32; [1894] A. C. 43; 6 R. 394; 70
 L. T. 77; 53 J. P. 332.—P.C.

Hughes v. Percival and Black v. Christ-
church Finance Co., *commented on.*
Holliday v. National Telephone Co. (1899) 68
 L. J. Q. B. 1016; [1899] 2 Q. B. 392; 81 L. T.
 252; 47 W. R. 658.—C.A. HALSBURY, L.C.,
 SMITH and WILLIAMS, LJJ.; *reversing* (1898)
 68 L. J. Q. B. 302; [1899] 1 Q. B. 221; 79 L. T.
 593; 47 W. R. 203; 63 J. P. 133.—WILLS and
 LAWRENCE, JJ.

Whatman (or Whitman) v. Pearson (1868)
 37 L. J. C. P. 156; L. R. 3 C. P. 422; 18
 L. T. 290; 16 W. R. 649.—C.P., *considered.*
Burns v. Poulson (or Poulson) (1873) 42 L. J.
 C. P. 302; L. R. 8 C. P. 563; 29 L. T. 329; 22
 W. R. 20.—C.P.

Whatman v. Pearson, *distinguished.*
Edwards v. St. Mary, Islington (1889) 58
 L. J. Q. B. 165; 22 Q. B. D. 338; 60 L. T. 725;
 37 W. R. 347; 53 J. P. 180.—C.A.

Gregory v. Piper (1829) 9 B. & C. 591; 4
 M. & Ry. 400.—K.B., *distinguished.*
Sharrod v. L. & N. W. Ry. (1849) 20 L. J. Ex.
 185; 6 Railw. Cas. 239; 7 D. & L. 213; 14 Jur.
 23.—EX.

Bush v. Steinman (1799) 1 Bos. & P. 404,
overruled.
Reedie v. L. & N. W. Ry. (1849) 4 Ex. 244;
 6 Railw. Cas. 184; 20 L. J. Ex. 65.—EX.

Laugher v. Pointer (1826) 5 B. & C. 547; 8
 D. & R. 550; 4 L. J. (O.S.) K. B. 309.—
 K.B.

Adopted. **Quarman v. Burnett** (1840) 9 L. J.
 Ex. 308; 6 M. & W. 499; 4 Jur. 969.—EX.; and
Reedie v. L. & N. W. Ry. (1849) 20 L. J. Ex. 65;
 4 Ex. 244; 6 Railw. Cas. 184.—EX.; *applied.*
Dalyell v. Tyrer (1858) 28 L. J. Q. B. 552;
 E. B. & E. 899; 5 Jur. (N.S.) 335; 6 W. R. 684.
 —Q.B.; **White v. Jameson** (1874) L. R. 18 Eq.
 303; 22 W. R. 761.—M.R.; *distinguished but dicta*
applied. **Chibnall v. Paul** (1881) 29 W. R. 536.—
 KAY, J.; *followed.* **Jones v. Liverpool Corporation**
 (1885) 54 L. J. Q. B. 345; 14 Q. B. D. 890; 33 W. R.
 551; 49 J. P. 311.—GROVE and MANISTY, JJ.;
adopted. **The Quickstep** (1890) 59 L. J. Adm. 65;
 15 P. D. 196; 63 L. T. 713; 6 Asp. M. C. 603.—

HANNEN, P., and BUTT, J.; *discussed*, Greenwell v. Low Beechburn Colliery Co. (1897) 66 L. J. Q. B. 643; [1897] 2 Q. B. 165; 76 L. T. 759.—BRUCE, J.; Jones v. Scullard (1898) 67 L. J. Q. B. 895; [1898] 2 Q. B. 565; 79 L. T. 386.—RUSSELL, C.J.

Quarman v. Burnett (1840) 6 M. & W. 499; 9 L. J. Ex. 308; 4 Jur. 969.—EX.

Acted upon, Milligan v. Wedge (1840) 10 L. J. Q. B. 19; 12 A. & E. 737.—Q.B.; Rapson v. Cubitt (1842) 11 L. J. Ex. 271; 9 M. & W. 710.—EX.; Allen v. Hayward (1845) 15 L. J. Q. B. 99; 7 Q. B. 960; 10 Jur. 92.—Q.B.; *adopted*, Reddie v. L. & N. W. Ry. (1849) 20 L. J. Ex. 65.—EX.; *applied*, Dalyell v. Tyrer (1858) E. B. & E. 899; 28 L. J. Q. B. 52; 5 Jur. (N.S.) 335; 6 W. R. 684.—Q.B.; *dictum applied*, Williams v. Jones (1865) 3 H. & C. 602; 11 Jur. (N.S.) 843; 13 L. T. 300; 13 W. R. 1023.—EX. CH. (*affirming* (1864) 33 L. J. Ex. 297.—EX.); *referred to*, Wear River Commissioners v. Adamson (1877) 47 L. J. Q. B. 193; 2 App. Cas. 743; 37 L. T. 543; 26 W. R. 217.—H.L. (E.); Spaight v. Tedcastle (1881) 6 App. Cas. 217; 44 L. T. 589; 29 W. R. 761.—H.L. (E.); *recognised*, Dalton v. Angus (1881) 50 L. J. Q. B. 689; 6 App. Cas. 740, 829; 44 L. T. 844; 30 W. R. 191.—H.L. (E.); Hughes v. Percival (1883) 52 L. J. Q. B. 719; 8 App. Cas. 443; 49 L. T. 189; 31 W. R. 725.—H.L. (E.); The European (1885) 54 L. J. P. 61; 10 P. D. 99; 52 L. T. 868; 33 W. R. 937; 5 Asp. M. C. 417.—ADM.; *followed*, Jones v. Liverpool Corporation (1885) 54 L. J. Q. B. 345; 14 Q. B. D. 890; 33 W. R. 551; 49 J. P. 311.—GROVE and MANISTY, JJ.; *distinguished*, but *dictum adopted*, The Niobe (1888) 57 L. J. P. 33; 13 P. D. 55; 36 W. R. 812; 59 L. T. 257.—HANNEN, P.; *adopted*, The Quickstep (1890) 59 L. J. Adm. 65; 15 P. D. 196; 63 L. T. 713; 6 Asp. M. C. 603.—HANNEN, P. and BUTT, J.

Quarman v. Burnett and Brady v. Giles (1835) 1 M. & Rob. 494.—EX. *considered*.

Jones v. Scullard (1898) 67 L. J. Q. B. 895; [1898] 2 Q. B. 565; 79 L. T. 386.—RUSSELL, C.J.; Powell v. McGlynn [1902] 2 Ir. R. 154.—K.B.D. and C.A.

Rourke v. White Moss Colliery Co. (1877) 46 L. J. C. P. 283; 2 C. P. D. 205; 36 L. T. 49; 25 W. R. 263.—C.A., *distinguished*.

Jones v. Liverpool Corporation (1885) 54 L. J. Q. B. 345; 14 Q. B. D. 890; 33 W. R. 551; 49 J. P. 311.—GROVE and MANISTY, JJ.; Swain v. Follows (1887) 56 L. J. Q. B. 310; 18 Q. B. D. 585; 56 L. T. 335; 35 W. R. 408.—Q.B.D.

Rourke v. White Moss Colliery Co., *referred to*.

Johnson v. Lindsay (1889) 58 L. J. Q. B. 581; 23 Q. B. D. 508; 38 W. R. 119.—C.A.

Rourke v. White Moss Colliery Co., *followed*.

Donovan v. Laing (1893) 63 L. J. Q. B. 25; [1893] 1 Q. B. 629; 4 R. 317; 63 L. T. 512; 41 W. R. 455; 57 J. P. 583.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.

Rourke v. White Moss Colliery Co., *applied*.

Jones v. Scullard (1898) 67 L. J. Q. B. 895; [1898] 2 Q. B. 565; 79 L. T. 386.—RUSSELL, C.J.

Rourke v. White Moss Colliery Co., *distinguished*.

Waldock v. Winfield (1901) 70 L. J. K. B. 925; [1901] 2 K. B. 596; 85 L. T. 202.—C.A. SMITH, M.R., WILLIAMS and STIRLING, L.JJ.

Jones v. Liverpool Corporation (1885) 54 L. J. Q. B. 345; 14 Q. B. D. 890; 33 W. R. 551; 49 J. P. 311.—GROVE and MANISTY, JJ.

Discussed, Donovan v. Laing (1893).—C.A. (*supra*); *followed*, Mileham v. St. Marylebone Borough Council (1903) 1 L. G. R. 412.—K.B.D.

Donovan v. Laing (1893) 63 L. J. Q. B. 25; [1893] 1 Q. B. 629; 4 R. 317; 63 L. T. 512; 41 W. R. 455; 57 J. P. 583.—C.A.

Applied, Jones v. Scullard (1898).—RUSSELL, C.J. (*supra*); Waddock v. Winfield (1901).—C.A. (*supra*).

Coupe Co. v. Maddick (1891) 60 L. J. Q. B. 676; [1891] 2 K. B. 413; 62 L. T. 489; 56 J. P. 39.—CAVE and CHARLES, JJ., *considered and distinguished*.

Sanderson v. Collins (1904) 73 L. J. K. B. 358; [1904] 1 K. B. 624; 90 L. T. 243; 52 W. R. 354.—C.A.

Ross v. Hill (1846) 2 C. B. 877; 3 D. & L. 788; 15 L. J. C. P. 182; 10 Jur. 435.—C.P.; and Jones v. Scullard (1898) 67 L. J. Q. B. 895; [1898] 2 Q. B. 565; 79 L. T. 386.—RUSSELL, C.J., *distinguished*. Abraham v. Bullock (1901) 85 L. T. 237; 49 W. R. 653.—RIDLEY, J.; *reversed*, (1902) 86 L. T. 796; 50 W. R. 626.—C.A. COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.

Abrahams v. Bullock, *followed*.

Cheshire v. Bailey (1904) 52 W. R. 631; 20 T. L. R. 561.—WALTON, J.; *reversed*, 21 T. L. R. 130.—C.A.

Degg v. Midland Ry. (1857) 26 L. J. Ex. 171; 1 H. & N. 773; 3 Jur. (N.S.) 395; 5 W. R. 364.—EX., *distinguished*.

Abraham v. Reynolds (1860) 5 H. & N. 143; 6 Jur. (N.S.) 53; 1 L. T. 330; 8 W. R. 181.—EX.

Degg v. Midland Ry., *approved*.

Potter v. Faulkner (1861) 1 B. & S. 800; 31 L. J. Q. B. 30; 8 Jur. (N.S.) 259; 5 L. T. 455; 10 W. R. 93.—EX. CH.

Degg v. Midland Ry., *distinguished*.

Wright v. L. & N. W. Ry. (1876) 45 L. J. Q. B. 570; 1 Q. B. D. 252; 33 L. T. 830.—C.A.

MELLISH, L.J.—The present case differs in two important particulars from *Degg v. Midland Ry.* First, in that case the plaintiff was not a mere volunteer, but was assisting in the shunting in order to get his heifer. . . . The other point of distinction is, that in *Degg v. Midland Ry.* the Court held that the deceased was a wrongdoer, because, although he was invited to do the act by the servants of the company, yet the knowledge and assent of the servants in that case was not the knowledge and assent of the masters.—p. 572.

Degg v. Midland Ry., *referred to*.

Swainson v. N. E. Ry. (1878) 47 L. J. Ex. 372; 3 Ex. D. 341; 38 L. T. 201; 26 W. R. 413.—C.A.

Potter v. Faulkner (1861) 1 B. & S. 800; 31 L. J. Q. B. 30; 8 Jur. (N.S.) 259; 5 L. T. 455; 10 W. R. 93.—EX. CH., *distinguished*.

Tebbutt v. Bristol and Exeter Ry. (1870) 40 L. J. Q. B. 78; L. R. 6 Q. B. 73; 23 L. T. 772; 19 W. R. 383.—Q.B.; **Wright v. L. & N. W. Ry.** (1876) 45 L. J. Q. B. 570; 1 Q. B. D. 252; 33 L. T. 830.—C.A.

Abraham v. Reynolds (1860) 5 H. & N. 143; 6 Jur. (N.S.) 53; 1 L. T. 330; 8 W. R. 181.—EX.

Considered, **Turner v. G. E. Ry.** (1875) 33 L. T. 431.—C.P.; *referred to*, **Rourke v. White Moss Colliery Co.** (1876) 46 L. J. C. P. 283; 2 C. P. D. 205; 36 L. T. 49; 25 W. R. 263.—C.A.; *adopted*, **Swainson v. N. E. Ry.** (1878) 47 L. J. Ex. 372; 3 Ex. D. 341, 349; 38 L. T. 201; 26 W. R. 413.—C.A.; *distinguished*, **Charles v. Taylor** (1878) 3 C. P. D. 492; 38 L. T. 773.—C.P.D.; *affirmed*, C.A.

Abraham v. Reynolds, distinguished.

Johnson v. Lindsay (1889) 58 L. J. Q. B. 581; 23 Q. B. D. 508; 61 L. T. 864; 38 W. R. 119; 54 J. P. 228.—C.A. **COTTON and LOPES, L.JJ.**; **FRY, L.J. dissenting.**

Gwilliam v. Twist (1895) [1895] 1 Q. B. 557; 72 L. T. 115.—**LAWRANCE and WRIGHT, JJ.**; *reversed*, (1895) 64 L. J. Q. B. 474; [1895] 2 Q. B. 84; 14 R. 461; 72 L. T. 579; 43 W. R. 566; 59 J. P. 484.—C.A. **ESHER, M.R., SMITH and RIGBY, L.JJ.**

Reg. v. Stephens (1866) 7 B. & S. 710; 35 L. J. Q. B. 251; L. R. 1 Q. B. 702; 12 Jur. (N.S.) 961; 14 L. T. 593; 14 W. R. 859.—Q.B., *observed upon*.

Chisholm v. Doulton (1889) 58 L. J. M. C. 133; 22 Q. B. D. 736; 60 L. T. 966; 37 W. R. 749; 16 Cox C. C. 675; 53 J. P. 550.—**FIELD and CAVE, JJ.**

Att.-Gen. v. Siddon (1830) 1 C. & J. 220; 1 Tyr. 41; 9 L. J. (O.S.) Ex. 7.—EX., *adopted*.

Coleman v. Riches (1855) 16 C. B. 104; 3 C. L. R. 795; 24 L. J. C. P. 125; 1 Jur. (N.S.) 596; 3 W. R. 453.—C.P.; **Searle v. Reynolds** (1866) 35 L. J. Q. B. 18; 7 B. & S. 704; 14 L. T. 518.—Q.B.

Att.-Gen. v. Siddon, distinguished.

Newman v. Jones (1886) 55 L. J. M. C. 113; 17 Q. B. D. 132; 55 L. T. 327; 50 J. P. 373.—**MATHEW and SMITH, JJ.**

MAYOR'S COURT.

Read v. Brown (1888) 58 L. J. Q. B. 120; 22 Q. B. D. 128; 60 L. T. 250; 37 W. R. 131.—C.A., *explained and followed*.

Coburn v. Colledge (1897) 66 L. J. Q. B. 462; [1897] 1 Q. B. 702; 76 L. T. 608; 45 W. R. 488.—C.A. **ESHER, M.R., LOPES and CHITTY, L.JJ.**

Adams v. Lindsell (1818) 1 B. & Ald. 681; 19 R. R. 415.—K.B.

Adopted, **Dunlop v. Higgins** (1848) 1 H. L. Cas. 381; 12 Jur. 295.—H.L. (SC.); *inapplicable*, **British and American Telegraph Co. v. Coulson** (1871) 40 L. J. Ex. 97; L. R. 6 Ex. 108, 122;

23 L. T. 868.—EX.; *dicta applied*, **Imperial Land Co. of Marseilles, In re, Townsend's Case** (1871) 41 L. J. Ch. 198; L. R. 13 Eq. 148, 155; 25 L. T. 692; 20 W. R. 164.—**MALINS, V.-C.**; *discussed and applied*, **Imperial Land Co. of Marseilles, In re, Harris's Case** (1872) 41 L. J. Ch. 621; L. R. 7 Ch. 587, 595; 26 L. T. 781; 20 W. R. 690.—**L.JJ.**; *considered*, **Evans v. Nicholson** (1875) 32 L. T. 778.—C.P., **DENMAN, J. dissenting**; *applied*, **Taylor v. Jones** (1875) 45 L. J. C. P. 110; 1 C. P. D. 87; 34 L. T. 131.—C.P.D.; **Stevenson v. McLean** (1880) 49 L. J. Q. B. 701; 5 Q. B. D. 346, 351; 42 L. T. 897; 28 W. R. 916.—**LUSH, J.**

Evans v. Nicholson, (1875) 32 L. T. 778.—C.P., *adopted*.

Taylor v. Jones (1875) 45 L. J. C. P. 110; 1 C. P. D. 87; 34 L. T. 131.—C.P.D.

Evans v. Nicholson and Wallace v. Allen (1875) 44 L. J. C. P. 351; L. R. 10 C. P. 607; 32 L. T. 830; 23 W. R. 703.—C.P., *distinguished and explained*.

Taylor v. Nicholls (1876) 45 L. J. C. P. 455; 1 C. P. D. 242; 24 W. R. 673.—C.P.D.

BRETT, J.—The decisions in the cases of *Evans v. Nicholson*, and *Wallace v. Allen*, have been distinguished on the ground that in one case the objection was taken after, and the other before verdict, but these cases were not decided simply on that ground. In *Evans v. Nicholson* the judgment had been obtained on an account stated; the accounts were stated within the City, and therefore no prohibition was granted, and consequently it becomes an authority for what we are doing now. It is true it was after verdict, but what the Chief Justice meant to say when he commented on that case in *Wallace v. Allen* was, "In yesterday's case it is clear the matter was on accounts stated, because we have seen the judgments in the Lord Mayor's Court, and we have seen that is on the accounts stated, and on nothing more." Where, as in the case of *Wallace v. Allen*, it was doubtful whether what took place in the City amounted to an account stated, and if the action had been tried, and if judgment had not been suffered by default, it might have been sought to make the defendant liable for what took place outside the City, i.e., in Surrey, and therefore not merely on accounts stated within the City.—p. 456. **ARCHIBALD and LINDLEY, JJ. agreed.**

Evans v. Nicholson, applied.

Reg. v. Rogers (1877) 47 L. J. M. C. 11; 3 Q. B. D. 28; 37 L. T. 473; 26 W. R. 61; 14 Cox C. C. 22.—C.G.R.

Evans v. Nicholson, followed.

Taylor v. Jones (1876) 45 L. J. C. P. 110; 1 C. P. D. 87; 34 L. T. 131.—C.P.D., *distinguished*.

Bennett v. Cosgriff (1878) 38 L. T. 177.

DENMAN, J.—*Evans v. Nicholson* was a case in which the Court of Common Pleas held that a letter posted in the country, though it might have been held to speak when it was posted, did nevertheless also amount to a continuous statement of account at the place where it was received. Then it is argued that *Taylor v. Jones* is a decision the other way. It must be remembered, however, that *Evans v. Nicholson* was cited in that very case, and the Court intimated that they did not intend to overrule it. Nor

was it necessary to do so, because they did not hold that the letter did not speak in the place where it was received, but only that it did speak in the place where it was posted. To say that the letter completed the cause of action in the place where the sender posted it is a very different thing from saying that, if a question had arisen as to the effect of the writing where it was received, the decision of the Court would have been opposed to that of *Evans v. Nicholson*.

LINDLEY, J.—It seems to me to have been properly decided that a letter posted in one place and received in another has a continuous effect, and speaks in the place where it is received. That view is not only consistent with *Evans v. Nicholson*, but was adopted and approved by the Court for the Consideration of Crown Cases Reserved in *Reg. v. Rogers* (47 L. J. M. C. 11: 37 L. T. 473). I think the true construction of both cases is that a letter is a continuing offer, or order, or statement by the sender, which takes effect in the place where the person to whom it is sent receives it.

Evans v. Nicholson, *dicta adopted*.

Grundy v. Townsend (1888) 36 W. R. 531.—C.A.

London Corporation v. Cox (1867) 36 L. J.

Ex. 225; L. R. 2 H. L. 239; 16 W. R.

44.—H.L. (E.), *applied*.

Frith v. Guppy (1866) 36 L. J. C. P. 45:

L. R. 2 C. P. 32; 12 Jur. (N.S.) 1011; 15 L. T.

616; 15 W. R. 280.—C.P.: Banque de Crédit

Commercial v. De Gas (1871) L. R. 6 C. P. 142;

24 L. T. 235.—C.P.: Byrne v. Guano Consign-

ment Co. (1872) 20 L. T. 935.—C.P.

London Corporation v. Cox, *explained*.

Cooke v. Gill (1873) 42 L. J. C. P. 98; L. R.

8 C. P. 107; 28 L. T. 32; 21 W. R. 334.—C.P.

KEATING, J.—In the copy of the Law Reports in this Court (Common Pleas), I find in the handwriting of my late brother Willes the following addition to the headnote to *Mayor of London v. Cox*: "The cause of action must arise and the garnishee reside within the city, in order to give the Lord Mayor's Court jurisdiction." We have repeatedly held since that that means substantially the whole cause of action.—p. 110.

London Corporation v. Cox, *dictum applied*.

Worthington v. Jeffries (1875) 44 L. J. C. P.

209; L. R. 10 C. P. 379; 32 L. T. 606; 23 W. R.

750.—C.P.

London Corporation v. Cox, *discussed and applied*.

Jacobs v. Brett (1875) 44 L. J. Ch. 377; L. R.

20 Eq. 1; 32 L. T. 522; 23 W. R. 556.—M.R.:

Chambers v. Green (1875) 44 L. J. Ch. 600; L. R.

20 Eq. 552.—M.R.

London Corporation v. Cox, *distinguished*.

Hawes v. Paveley (1876) 1 C. P. D. 418; 46

L. J. C. P. 18; 34 L. T. 835.—C.A.

MELLISH, L.J.—Here the legislature says that the Court shall decide on this matter, and the Court is precluded from having cognizance of the want of jurisdiction, for there is no mode by which the want of jurisdiction can be brought before it. The necessary conclusion is, that the legislature meant that there should be no prohibition in cases within the twelfth section [of the Mayor's Court of London Procedure Act, 1867]. The only argument raised before us to the contrary was that the House of Lords, in the case of

Mayor of London v. Cox, put a different construction on the fifteenth section. The House of Lords held that in cases within that section, but not within the twelfth section, although no objection could be taken to the want of jurisdiction in the Mayor's Court except by plea, nevertheless the superior Court could issue a prohibition. But that decision is not in conflict with what we are now deciding. When the fifteenth section says that there shall be no objection except by way of plea in the Mayor's Court, it follows that by way of plea an objection to the jurisdiction may be taken. This assumes that there is a want of jurisdiction. So in cases within the fifteenth section, and not the twelfth, the very words of the Act show that there is no jurisdiction. But if there is no jurisdiction, then there must be express words taking away the right of prohibiting from the superior Court, or it will remain. It would be an anomaly that there should be an inferior Court in which there might be a plea to the jurisdiction in cases where there was no jurisdiction, and yet the superior Court shall have no right to prohibit. That decision does not apply to a case where the legislature says that in such a case no want of jurisdiction shall be objected to, either by way of plea or in any other way. That is equivalent to saying there shall be jurisdiction. By a necessary implication it follows that the prohibition is taken away.—p. 421

London Corporation v. Cox.

Referred to, Bridge v. Branch (1876) 1 C. P. D. 633; 34 L. T. 905.—C.P.D.; and Oran v. Breary (1877) 46 L. J. Ex. 481; 2 Ex. D. 346; 36 L. T. 475; 23 W. R. 750.—EX. D.; *applied*, Serjeant v. Dale (1877) 46 L. J. Q. B. 781; 2 Q. B. D. 558, 568; 37 L. T. 153.—Q.B.D.: Appleford v. Judkins (1878) 47 L. J. C. P. 615; 3 C. P. D. 489; 38 L. T. 801; 26 W. R. 734.—C.A.

London Corporation v. Cox, *referred to*.

London Corporation v. London Joint Stock Bank (1881) 50 L. J. Q. B. 594; 6 App. Cas. 393; 45 L. T. 81; 29 W. R. 870.—H.L. (E.). LORDS SELBORNE, L.C., BLACKBURN and WATSON; Combe v. De la Bere (1882) 22 Ch. D. 316, 325; 47 L. T. 185; 21 W. R. 24.—CHITTY, J. (*affirmed*, C.A.); Chadwick v. Ball (1885) 54 L. J. Q. B. 896; 14 Q. B. D. 855; 52 L. T. 949.—C.A.

London Corporation v. Cox, *observations adopted*.

Reg. v. Shropshire County Court Judge (1887) 57 L. J. Q. B. 143; 20 Q. B. D. 242; 58 L. T. 86; 36 W. R. 476.—POLLOCK, B. and HAWKINS, J.

London Corporation v. Cox, *opinion of WILLES, J., approved*.

Broad v. Perkins (*or* Jenkins) (1888) 57 L. J. Q. B. 638; 21 Q. B. D. 533; 60 L. T. 8; 37 W. R. 41; 53 J. P. 39.—C.A. ESHER, M.R., COTTON, LINDLEY, BOWEN, FRY and LOPES, L.JJ.

London Corporation v. Cox, *considered*.

British South Africa Co. v. Companhia de Moçambique (1893) 63 L. J. Q. B. 70; [1893] A. C. 602; 6 R. 1; 69 L. T. 604.—H.L. (E.); Farquharson v. Morgan (1894) 63 L. J. Q. B. 474; [1894] 1 Q. B. 552; 9 R. 202; 70 L. T. 152; 42 W. R. 306; 58 J. P. 495.—C.A. LORD HALSBURY, LOPES and DAVEY, L.JJ.; Watson v.

Petts (1899) 68 L. J. Q. B. 249; [1899] 1 Q. B. 430; 80 L. T. 797; 47 W. R. 463.—DARLING and CHANNELL, JJ.

London Corporation v. Cox.

Opinion adopted, Falkingham v. Victorian Railways Commissioners (1900) 69 L. J. P. C. 89; [1900] A. C. 452, 464; 82 L. T. 506.—P.C.; *discussed*, Devonshire (Duke) v. O'Callaghan [1900] 2 Ir. R. 211.—EX. CH.; *dictum applied*, McIntosh v. Simpkins (1900) 17 T. L. R. 11.—LAWRENCE and KENNEDY, JJ.; *applied*, Rex v. Enniskillen Urban Council (1901) [1902] 2 Ir. R. 456.—K.B.D.; *rule explained and limited*, Rex v. Tristram (1902) 71 L. J. Q. B. 418; [1902] 1 K. B. 816, 829; 86 L. T. 515; 50 W. R. 477.—C.A.

Quartly v. Timmins (1874) L. R. 9 C. P. 416; 22 W. R. 488.—C.P., *followed*.

Robinson v. Emanuel (1874) 43 L. J. C. P. 244; L. R. 9 C. P. 414; 30 L. T. 500.—C.P.

Quartly v. Timmins, observations applied.

Jacobs v. Brett (1875) 44 L. J. Ch. 377; L. R. 20 Eq. 1; 82 L. T. 522; 23 W. R. 556.—M.R.

Robinson v. Emanuel, acted upon.

Mem. L. R. 9 C. P. 751, n.

Chambers v. Green (1875) L. R. 20 Eq. 552; 44 L. J. Ch. 600.—M.R., *dictum considered*.

Ellis v. Fleming (1876) 45 L. J. C. P. 512; 1 C. P. D. 237.—C.P.D.

BRETT, J.—It is true that in *Chambers v. Green* the M.R. expressed his dissent from that view of ours [in *Worthington v. Green*]. But, notwithstanding the respect which we all feel to be due to everything that falls from that eminent judge, I do not think that that *dictum* at all derogates from the authority of *Worthington v. Jeffries*.

De Haber v. Portugal (Queen) (1851) 20 L. J. Q. B. 488; 17 Q. B. 171; 16 Jur. 164.—Q.B., *applied*.

Westoby v. Day (1853) 22 L. J. Q. B. 418; 2 EL. & BL. 605; 18 Jur. 10; 1 W. R. 431.—Q.B.; Frith v. Guppy (1866) 36 L. J. C. P. 45; L. R. 2 C. P. 32; 12 Jur. (N.S.) 1011; 15 L. T. 616; 15 W. R. 280.—C.P.; London Corporation v. Cox (1867).—H.L. (R.) (*supra*); Cooke v. Gill (1873) 42 L. J. C. P. 98; L. R. 8 C. P. 107; 28 L. T. 32; 21 W. R. 334.—C.P.; Whinney v. Schmidt (1873) L. R. 8 C. P. 118.—C.P.; The Charkieh (1873) 42 L. J. Ad. 17; L. R. 4 A. & E. 59, 94; 28 L. T. 513; 1 Asp. M. C. 581.—ADM.; Worthington v. Jeffries (1875) 44 L. J. C. P. 209; L. R. 10 C. P. 379, 387; 32 L. T. 606; 23 W. R. 700.—C.P.; The Parlement Belge (1880) 5 P. D. 197, 210; 42 L. T. 273; 28 W. R. 642; 4 Asp. M. C. 234.—C.A.

Cooke v. Gill (1873) 42 L. J. C. P. 98; L. R. 8 C. P. 107; 28 L. T. 32; 21 W. R. 334.—C.P., *followed*.

Whinney v. Schmidt (1873) L. R. 8 C. P. 118.—C.P.

Cooke v. Gill, distinguished.

Cowan v. O'Connor (1888) 57 L. J. Q. B. 401; 20 Q. B. D. 640; 58 L. T. 857; 36 W. R. 895.—MANISTY and HAWKINS, JJ.

Cooke v. Gill, dictum adopted.

Read v. Brown (1888) 58 L. J. Q. B. 120; 22 Q. B. D. 128; 60 L. T. 250; 37 W. R. 131.—C.A. ESHER, M.R., FRY and LOPES, JJ.

Cooke v. Gill, referred to.

Payne v. Hogg (1900) 69 L. J. Q. B. 579; [1900] 2 Q. B. 43; 82 L. T. 584; 48 W. R. 417.—C.A. SMITH, COLLINS and ROMER, L.JJ.

Manning v. Farquharson (1860) 30 L. J. Q. B.

22; 6 Jur. (N.S.) 1300; 3 L. T. 378; 9 W. R. 107.—BAIL CT., *opinion discussed*.

London Corporation v. Cox (1867) 36 L. J. Ex. 225; L. R. 2 H. L. 239, 259; 16 W. R. 44.—H.L. (E.).

Manning v. Farquharson and Baker v. Clark

(1873) L. R. 8 C. P. 121.—C.P., *not followed*.

Jacobs v. Brett (1875) 44 L. J. Ch. 377; L. R. 20 Eq. 1; 82 L. T. 522; 23 W. R. 556.—JESSEL, M.R.

Jacobs v. Brett, approved.

Baker v. Clark, explained.

Bridge v. Branch (1876) 1 C. P. D. 633; 34 L. T. 905.—C.P.D.

COLERIDGE, C.J.—As to the other part of the rule, I think the true answer has been given by my brother Brett in the case of *Baker v. Clark*, which was relied on to show that a writ of prohibition to the Mayor's Court cannot be granted upon the application of the defendant himself. That case really arose in this way. It being suggested that sect. 15 of the Mayor's Court of London Procedure Act, 1857, precluded the defendant from objecting to the jurisdiction of the Court otherwise than by plea, the applicant was recommended, in order to obviate the supposed difficulty, to renew the motion in the name of a stranger. The M.R., in *Jacobs v. Brett*, in a deliberate judgment, clearly demonstrates that that section relates only to the procedure in the Mayor's Court. I entirely agree with that very learned judge, and so I believe do all the judges with whom I have had the opportunity of speaking on the subject.—p. 636.

Manning v. Farquharson, not followed.

Jacobs v. Brett, approved.

Oram v. Brearey (1877) 2 Ex. D. 346; 46 L. J. Ex. 481; 36 L. T. 475; 23 W. R. 750.—EX.

POLLOCK, B.—We are pressed with [*Manning v. Farquharson*] on the ground that it has not been reversed, although it has been subject to an adverse decision of the M.R., and also in consequence of the mode in which it was spoken of in the considered judgment of the Exchequer Chamber in *Cox v. Mayor of London* (*supra*). As to its being an authority, if that case and *Jacobs v. Brett* stood alone, I think we should be entitled to give preference to the latter, as, since the decision of the former case, much more light has been thrown on the subject. Then as to the judgment of the Exchequer Chamber in *Cox v. Mayor of London*, that was reversed in the House of Lords; and the opinion of Willes, J., who gave the answers to the questions put to the judges, was against the case of *Manning v. Farquharson*.—p. 348.

Oram v. Brearey, disapproved.

Chadwick v. Ball (1885) 14 Q. B. D. 855; 54 L. J. Q. B. 396; 52 L. T. 949.—C.A. BAGGALLAY and LINDLEY, L.JJ.

BAGGALLAY, L.J.—Mr. Henn Collins has called our attention to the case of *Oram v. Brearey*, where he had to contend to the contrary of his

present contention. I have given my best attention to the treatment in that case, but I cannot concur in it. I think the argument of Mr. Henn Collins in that case ought to have prevailed, and that his present argument ought not to prevail.—p. 857.

LINDLEY, L.J.—I think the decision in this case may be placed on safer ground, viz., upon the words at the end of the 7th section of the Salford Hundred Court Act. But for those words the section would have been identical with the 15th section of the Mayor's Court Act; but this section goes on to say, that "if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes." I think we must give some effect to those words beyond the effect given to the preceding words in the first part of the section. The language is peculiar; it does not say that the defendant shall not take advantage of the want of jurisdiction in arrest of judgment, or on a plea of the general issue, or otherwise: such matters are already provided for by the first part of the section. It says that the Court shall have jurisdiction for all purposes. These words seem to me entirely to meet the observations of Pollock, B., in *Oram v. Brearey*, where he says that the jurisdiction of the superior Court is not to be ousted except by express provision.—p. 858.

Oram v. Brearey, discussed.

Payne v. Hogg (1900) 69 L. J. Q. B. 579; [1900] 2 Q. B. 43; 82 L. T. 584; 48 W. R. 417.—C.A.

Bruce v. Wait (1837) 7 L. J. Ex. 13; 3 M. & W. 21.—EX., adopted.

London Joint Stock Bank v. London Corporation (1880).—C.A. (*infra*).

Bruce v. Wait (No. 2) (1840) 9 L. J. C. P. 237; 1 Man. & G. 1; 1 Scott (N.R.) 81.—C.P., adopted.

London Corporation v. Cox (1869) 36 L. J. Ex. 225; L. R. 2 H. L. 239, 275; 16 W. R. 44.—H.L. (E.).

London Joint Stock Bank v. London Corporation (1875) 45 L. J. C. P. 213; 1 C. P. D. 1; 33 L. T. 781.—C.P.D.; affirmed on other grounds, (1880) 5 C. P. D. 494; 42 L. T. 747; 28 W. R. 696.—C.A.; affirmed, *nom. London Corporation v. London Joint Stock Bank* (1881) 50 L. J. Q. B. 594; 6 App. Cas. 393; 45 L. T. 81; 29 W. R. 870.—H.L. (E.).

London Corporation v. London Joint Stock Bank, referred to.

Vickers v. Stevens (1881) 44 L. T. 679; 29 W. R. 562.—BACON, V.-C.

Magrath v. Hardy (1838) 4 Bing. (N.C.) 783; 6 Scott 627; 6 D. P. C. 749; 1 Arn. 352; 7 L. J. C. P. 299; 2 Jur. 594.—C.P., adopted.

Richter v. Laxton (1878) 48 L. J. Q. B. 184; 39 L. T. 499; 27 W. R. 214.—LUSH, J.

Wetter v. Rucker (1820) 4 Moore 172; 1 Br. & B. 494; 21 R. R. 690; and *Magrath v. Hardy*, adopted.

London Corporation v. London Joint Stock Bank (1881) 50 L. J. Q. B. 594; 6 App. Cas. 393; 45 L. T. 81; 29 W. R. 870.—H.L. (E.).

Rhodes v. Liverpool Commercial Investment Co. (1879) 4 C. P. D. 425.—C.P.D., confirmed and followed.

Pierpoint v. Cartwright (1880) 5 C. P. D. 139; 42 L. T. 259; 28 W. R. 588.—C.P.D.; *Clarkson v. Musgrave* (1882) 51 L. J. Q. B. 525; 9 Q. B. D. 386; 31 W. R. 47.—FIELD and CAVE, JJ.

Palmer v. Hooke (1700) 1 Ld. Raym. 727. *questioned*.

M'Daniel v. Hughes (1803) 3 East 367.

ELLENBOROUGH, C.J. (for the Court).—As to the case in Lord Raymond 727, before Lord Holt at Nisi Prius, there must have been some mistake in that report, for it would defeat the whole effect of the custom of foreign attachment if the garnishee should, without means of proving it, be obliged to prove the debt of the plaintiff below in his own defence here, such plaintiff not having been before by the terms of the plea required to do so in the Court below.—p. 380.

M'Daniel v. Hughes, recognised.

Harrington v. Macmorris (1813) 5 Taunt. 228; 1 Marsh. 33.—C.P.; and *Banks v. Self* (1813) 5 Taunt. 234.—C.P.

Palmer v. Hooke, referred to.

M'Daniel v. Hughes and *Huxham v. Smith* (1809) 2 Camp. 21; 11 R. R. 651.—K.B., commented on.

Westoby v. Day (1853) 22 L. J. Q. B. 418; 2 El. & Bl. 605; 18 Jur. 10; 1 W. R. 431.—Q.B.

M'Daniel v. Hughes, explained.

London Corporation v. Cox (1867) 36 L. J. Ex. 225; L. R. 2 H. L. 239; 16 W. R. 44.—H.L. (E.).

Westoby v. Day (1853) 22 L. J. Q. B. 418; 2 El. & Bl. 605; 18 Jur. 10; 1 W. R. 431.—Q.B., distinguished.

Matthey v. Wiseman (1865) 34 L. J. C. P. 216; 18 C. B. (N.S.) 657; 11 Jur. (N.S.) 603; 12 L. T. 846; 13 W. R. 914.—C.P.

Westoby v. Day.

Adopted, *London Corporation v. Cox* (1867).—H.L. (E.) (*supra*); *Cooke v. Gill* (1873) 42 L. J. C. P. 98; L. R. 8 C. P. 107; 28 L. T. 32; 21 W. R. 334.—C.P.; *Smith, In re, Brown, Ex parte* (1888) 57 L. J. Q. B. 212; 20 Q. B. D. 321, 329; 36 W. R. 403.—C.A.

Cherry v. Endean (1886) 55 L. J. Q. B. 292;

54 L. T. 763; 34 W. R. 458.—SMITH and MATHEW, JJ., explained and distinguished, *Banks v. Hollingsworth* (1893) 62 L. J. Q. B. 239; [1893] 1 Q. B. 442; 4 R. 228; 68 L. T. 477; 41 W. R. 225; 57 J. P. 436.—C.A.

Cherry v. Endean, principle adopted.

Simpson v. Shaw (1886) 56 L. J. Q. B. 92; 56 L. T. 24.—Q.B.D.

West Devon Great Consols Mine, In re (1888)

57 L. J. Ch. 850; 38 Ch. D. 51; 58 L. T. 61; 36 W. R. 342.—C.A., dictum applied.

Morgan v. Bowles (1893) 63 L. J. Q. B. 84; [1894] 1 Q. B. 236; 10 R. 62; 42 W. R. 269.—CHARLES and WRIGHT, JJ.

West Devon Great Consols Mine, In re, and *Morgan v. Bowles*, observations held applicable.

Kirby v. North British and Mercantile Insurance Co. (1896) 65 L. J. Q. B. 527; [1896] 2 Q. B. 99; 74 L. T. 723; 44 W. R. 529; 60 J. P. 549.—C.A. ESHER, M.R., KAY and SMITH, L.JJ.

MEDICINE.

- Apothecaries Co. v. Bentley** (1824) 1 Car. & P. 538; R. & M. 159.—ABBOTT, C.J.; and **Apothecaries Co. v. Burt** (1850) 5 Ex. 363; 1 L. M. & P. 405; 19 L. J. Ex. 334.—EX., *referred to*.
- Apothecaries Co. v. Jones** (1892) [1893] 1 Q. B. 89; 5 R. 101; 67 L. M. 667; 41 W. R. 267; 17 Cox C. C. 588; 57 J. P. 56.—POLLOCK, B. and HAWKINS, J.
- La Mert, Ex parte** (1863) 4 B. & S. 582; 33 L. J. Q. B. 69; 9 L. T. 410; 12 W. R. 201.—Q.B., *approved and followed*.
- Allbutt v. General Medical Council** (1889) 58 L. J. Q. B. 606; 23 Q. B. D. 400; 61 L. T. 585; 37 W. R. 771; 54 J. P. 36.—C.A. COLERIDGE, C.J., LINDLEY and LOPES, L.JJ.
- Leeson v. General Medical Council** (1889) 59 L. J. Ch. 233; 43 Ch. D. 366; 61 L. T. 849; 38 W. R. 308.—C.A. FRY, L.J. *partly dissenting, dictum cited*.
- Reg. v. London County Council, Akkersdyk, Ex parte** (1891) 61 L. J. M. C. 75; [1892] 1 Q. B. 190; 66 L. T. 168; 40 W. R. 285; 56 J. P. 8.
- Leeson v. General Medical Council, referred to.**
- Reg. v. McKenzie** (1892) 61 L. J. M. C. 181; [1892] 2 Q. B. 519; 67 L. T. 201; 41 W. R. 144; 56 J. P. 712.—COLLINS and BRUCE, JJ.
- Leeson v. General Medical Council, applied.**
- Allinson v. General Medical Council** (1894) 63 L. J. Q. B. 534; [1894] 1 Q. B. 750; 9 R. 217; 70 L. T. 471; 42 W. R. 289; 58 J. P. 542.—C.A. ESHER, M.R., LOPES and DAVEY, L.JJ.
- Leeson v. General Medical Council, referred to.**
- Reg. v. London County Council, Edwardes, Ex parte** (1894) 15 R. 66; 71 L. T. 638.—CHARLES and WRIGHT, JJ.
- Leeson v. General Medical Council, and Allinson v. General Medical Council, applied.**
- Reg. v. Burton, Young, Ex parte** (1897) 66 L. J. Q. B. 831; [1897] 2 Q. B. 468; 77 L. T. 364; 46 W. R. 127; 61 J. P. 727.—LAWRANCE and COLLINS, JJ.; **Rex v. Howard** (1902) 71 L. J. K. B. 754; [1902] 2 K. B. 363; 86 L. T. 839; 51 W. R. 21; 66 J. P. 579.—C.A.; O'Duffy v. Jaffe [1904] 2 Ir. R. 43.—K.B.D.
- Chorley v. Bolcot** (1791) 4 Term Rep. 317; 2 R. R. 395, *considered*.
- Veitch v. Russell** (1842) 3 G. & D. 198; 3 Q. B. 928; Car. & M. 362; 12 L. J. Q. B. 13; 7 Jur. 60.—Q.B., *commented upon*.
- Att.-Gen. v. Royal College of Physicians** (1861) 30 L. J. Ch. 757; 1 John. & H. 561; 7 Jur. (N.S.) 511; 4 L. T. 356; 9 W. R. 590.—WOOD, V.-C.
- Haffield v. Mackenzie** (1860) 10 Ir. C. L. R. 289.—EX., *approved*.
- Turner v. Reynall (or Reynell)** (1863) 32 L. J. C. P. 164; 14 C. B. (N.S.) 328; 9 Jur. (N.S.) 1077; 8 L. T. 281; 11 W. R. 700.—C.P.
- Haffield v. Mackenzie and Turner v. Reynall, discussed.**
- Leman v. Houseley** (1874) 14 L. J. Q. B. 22;

L. R. 10 Q. B. 66; 31 L. T. 833; 23 W. R. 235.—Q.B.

Haffield v. Mackenzie and Turner v. Reynall, disapproved.

Leman v. Houseley, followed.

Howarth v. Brearley (1887) 56 L. J. Q. B. 543; 19 Q. B. D. 303; 56 L. T. 743; 36 W. R. 302; 51 J. P. 440.—COLERIDGE, C.J. and DENMAN, J.

Ladd v. Gould (1860) 1 L. T. 325.—Q.B., *approved*.

Ellis v. Kelly (1860) 30 L. J. M. C. 35; 6 H. & N. 222; 6 Jur. (N.S.) 1113; 3 L. T. 331; 9 W. R. 56.—EX.

Ladd v. Gould, distinguished.

Royal College of Veterinary Surgeons v. Robinson (1892) 61 L. J. M. C. 146; [1892] 1 Q. B. 557; 66 L. T. 263; 40 W. R. 412; 17 Cox C. C. 477; 56 J. P. 313.—HAWKINS and WILLS, JJ.

Ellis v. Kelly (1860) 30 L. J. M. C. 35; 6 H. & N. 222; 6 Jur. (N.S.) 1113; 3 L. T. 331; 9 W. R. 56.—EX., *followed*.

Reg. v. Baker (1891) 66 L. T. 416; 17 Cox C. C. 575; 56 J. P. 406.—COLERIDGE, C.J. and WRIGHT, J.

Ellis v. Kelly, followed.

Andrews v. Styrap (1872) 26 L. T. 704.—EX., *distinguished*.

Hunter v. Clare (1899) 68 L. J. Q. B. 278; [1899] 1 Q. B. 635; 80 L. T. 197; 47 W. R. 394; 63 J. P. 308.—LAWRANCE and CHANNELL, JJ.

Pharmaceutical Society v. London and Provincial Supply Association, 48 L. J. Q. B. 387; 4 Q. B. D. 313; 40 L. T. 584; 27 W. R. 709.—COCKBURN, J. and MELLOR, J.; *reversed* (1880) 49 L. J. Q. B. 338; 5 Q. B. D. 310; 28 W. R. 608; 42 L. T. 569.—C.A.; the latter decision *affirmed*, (1880) 49 L. J. Q. B. 736; 5 App. Cas. 857; 43 L. T. 389; 28 W. R. 957; 45 J. P. 20.—H.L. (E.).

Pharmaceutical Society v. London and Provincial Supply Association (*supra*, in H.L.).

Applied, **Pharmaceutical Society v. Wheeldon** (1890) 59 L. J. Q. B. 400; 24 Q. B. D. 683; 62 L. T. 727; 54 J. P. 407.—POLLOCK, B. and HAWKINS, J.; **Pharmaceutical Society of Ireland v. Boyd** [1896] 2 Ir. R. 394.—Q.B.D.; **Pharmaceutical Society v. White** (1901) 70 L. J. K. B. 386; [1901] 1 K. B. 601; 84 L. T. 188; 49 W. R. 407; 65 J. P. 340.—C.A. SMITH, M.R., COLLINS and ROMER, L.JJ.; **Hirst v. West Riding Union Banking Co.** (1901) 70 L. J. K. B. 828; [1901] 2 K. B. 560; 85 L. T. 3; 49 W. R. 715.—C.A.; *distinguished*, **Lawler v. Egans** [1901] 2 Ir. R. 589.—K.B.D.; *referred to*, **Pearks v. Ward** (1902) 71 L. J. K. B. 656; [1902] 2 K. B. 1; 87 L. T. 51; 66 J. P. 774.—K.B.D.; O'Duffy v. Jaffe (1903) [1904] 2 Ir. R. 33.—K.B.D.; **Cope v. Gabbett** [1904] 2 Ir. R. 253.—K.B.D.

Berry v. Henderson (1870) 39 L. J. M. C. 77; L. R. 5 Q. B. 296; 22 L. T. 331.—Q.B., *observation adopted*.

Pharmaceutical Society v. Piper (1893) 62 L. J. Q. B. 305; [1893] 1 Q. B. 686; 5 R. 296; 68 L. T. 490; 41 W. R. 447; 57 J. P. 502.—LAWRANCE and COLLINS, JJ.

Pharmaceutical Society v. Piper, *approved*.
Pharmaceutical Society v. Armon (1894) 64 L. J. Q. B. 32; [1894] 2 Q. B. 720; 9 R. 587; 71 L. T. 315; 42 W. R. 662; 59 J. P. 52.—C.A.
 Esher, M.R., Kay and Smith, L.JJ.

MERGER.

Philips v. Brydges (or **Brydges v. Brydges**) (1796) 3 Ves. 120.—M.R., *referred to*.
Selby v. Alston (1797) 3 Ves. 339; 4 R. R. 10.—M.R.

Philips v. Brydges, *applied*.
Douglas, In re, **Wood v. Douglas** (1884) 54 L. J. Ch. 421; 28 Ch. D. 327; 52 L. T. 131; 33 W. R. 390.—PEARSON, J.

Brandon v. Brandon (1861) 31 L. J. Ch. 47; 2 Dr. & Sm. 305; 11 Jur. (N.S.) 30; 5 L. T. 339; 9 W. R. 825.—KINDERSLEY, V.-C., *applied*.
Bogg v. Midland Ry. (1867) 36 L. J. Ch. 440; L. R. 4 Eq. 310; 16 L. T. 113.—WOOD, V.-C.

Brandon v. Brandon and Snow v. Boycott (1892) 61 L. J. Ch. 591; [1892] 3 Ch. 110; 66 L. T. 762; 40 W. R. 603.
 —KEKEWICH, J., *discussed*.

Thellusson v. Liddard (1900) 69 L. J. Ch. 673; [1900] 2 Ch. 635; 82 L. T. 753; 49 W. R. 10.

STIRLING, J., after referring to the judgment in **Brandon v. Brandon**, continued: The decision appears to me to rest on the ground that there had been a course of dealing between the parties which rendered it inequitable that the legal merger should be set up. In a case which has been decided since the Judicature Act came into operation, namely, **Snow v. Boycott** . . . a question arose as to the effect of a merger as regards lands which are stated in the report as being subject in part only to legal mortgages in fee, and it was there decided as regards the sites which were purely equitable that the question as to merger was governed by the ordinary rule in equity—namely, that of intention—and no distinction seems to have been drawn with regard to the portion as to which there was a legal merger. That is a conclusion at which in such a case one no doubt would desire to arrive, but I do not think it is necessary for me in the present case to decide that the mere expression of intention is sufficient to prevent a merger where legal interests are involved.—p. 678.

Thellusson v. Liddard, *referred to*.
Capital and Counties Bank v. Rhodes (1902) 71 L. J. Ch. 573; 87 L. T. 17.—KEKEWICH, J.

Tyler, In re, **Higgins**, Ex parte (1858) 27 L. J. Bk. 27; 3 De G. & J. 33; 4 Jur. (N.S.) 595; 6 W. R. 406.—L.JJ., *discussed*.

Irish Land Commission v. Junkin (1888) 24 L. R. Ir. 40.—Q.B.D.; O'BRIEN, J. *dissenting*.

Florence v. Jennings (1857) 26 L. J. C. P. 274; 2 C. B. (N.S.) 454; 3 Jur. (N.S.) 772.—C.P., *distinguished*.
Sneyd, In re, **Fewings**, Ex parte (1883) 53

L. J. Ch. 545; 25 Ch. D. 332; 50 L. T. 109; 32 W. R. 352.—C.A.

Florence v. Jennings, *considered and applied*.
Usborne v. Limerick Market Trustees (1899) [1900] 1 Ir. R. 85, 107.—C.A.

Holmes v. Bell (1841) 3 Man. & G. 213; 3 Scott (N.E.) 479.—C.P.; and **Norfolk Ry. v. M'Namara** (1849) 3 Ex. 628.—EX., *distinguished and commented upon*.
Price v. Moulton (1851) 20 L. J. C. P. 102; 10 C. B. (N.S.) 561; 15 Jur. 228.—C.P.

Holmes v. Bell and Norfolk Ry. v. M'Namara, *referred to*.
Chetwynd v. Allen (1898) 68 L. J. Ch. 160; [1899] 1 Ch. 353; 80 L. T. 110; 47 W. R. 200.—ROMER, J.

Sharpe v. Gibbs (1864) 16 C. B. (N.S.) 527; 12 W. R. 711.—C.P., *followed*.
Price v. Moulton (1851) 20 L. J. C. P. 102; 10 C. B. (N.S.) 561; 15 Jur. 228.—C.P., *explained and distinguished*.
Boaler v. Mayor (1865) 34 L. J. C. P. 230; 19 C. B. (N.S.) 76; 11 Jur. (N.S.) 565; 12 L. T. 457; 13 W. R. 775.—C.P.

Price v. Moulton and Boaler v. Mayor, *considered*.
Stamps Commissioners v. Hope (1891) 60 L. J. P. C. 44; [1891] A. C. 476; 65 L. T. 268.—P.C.

Chester v. Willes (1754) Amb. 246.—L.C., *principle applied, report commented on*.
Powell v. Grigby (1835) 3 Cl. & F. 103; 9 Bligh (N.S.) 646.—H.L. (E.). LORD BROUGHAM.

Wyndham v. Egremont (Earl) (1775) Amb. 753; and **Compton (Lord) v. Oxenden** (1793) 2 Ves. Ir. 261; 4 Bro. C. C. 397.—L.C., *applied*.
Forbes v. Moffatt (1811) 18 Ves. 384.—M.R.

Wyndham v. Egremont (Earl), *distinguished*.
Johnston v. Webster (1854) 24 L. J. Ch. 300; 4 De G. M. & G. 474; 3 Eq. R. 101; 1 Jur. (N.S.) 145; 3 W. R. 84.—L.C.

Wyndham v. Egremont (Earl), *referred to*.
Compton (Lord) v. Oxenden, *considered*.
Horton v. Smith (1858) 27 L. J. Ch. 773; 4 K. & J. 624; 6 W. R. 783.—V.-C.

Compton (Lord) v. Oxenden, *followed*.
French-Brewster, In re, **Walters v. French Brewster** (1904) 73 L. J. Ch. 405; [1904] 1 Ch. 713; 90 L. T. 378; 52 W. R. 377.—SWINFEN-EADY, J.

Shrewsbury (Countess) v. Shrewsbury (Earl) (1790) 1 Ves. 227; 3 Bro. C. C. 120; 2 R. R. 101.—L.C., *applied*.
Pride, In re, **Shackell v. Colnett** (1891) 61 L. J. Ch. 9; [1891] 2 Ch. 135; 64 L. T. 768; 39 W. R. 471.—STIRLING, J.

Ware v. Folhill (1805) 11 Ves. 257; 8 R. R. 144.—L.C., *explained*.
Ware v. Folhill (1852) 5 De G. & Sm. 455.—V.-C.

- Ware v. Polhill**, *considered and distinguished*.
Bulkeley v. Hope (1855) 24 L. J. Ch. 356; 1 K. & J. 482; 3 W. R. 360.—WOOD, V.-C.
- Ware v. Polhill**, *discussed*.
Lantsbery v. Collier (1856) 2 K. & J. 709; 25 L. J. Ch. 672; 4 W. R. 826.—V.-C.
- Ware v. Polhill**, *referred to*.
Horton v. Smith (1858) 27 L. J. Ch. 773; 4 K. & J. 624; 6 W. R. 783.—V.-C.
- Forbes v. Moffatt** (1811) 18 Ves. 384; 11 R. R. 222.—M.R., *referred to*.
Clarendon (Earl) v. Barham (1842) 1 Y. & C. C. 688; 12 L. J. Ch. 215; 6 Jur. 963.—V.-C.
- Forbes v. Moffatt**, *principle applied*.
Grice v. Shaw (1852) 10 Hare 76.—V.-C.
- Forbes v. Moffatt and Clarendon (Earl) v. Barham** (1842) 1 Y. & C. C. 688; 12 L. J. Ch. 215; 6 Jur. 963.—V.-C., *distinguished*.
Johnston v. Webster (1854) 24 L. J. Ch. 300; 4 De G. M. & G. 474; 4 Eq. R. 101; 1 Jur. (N.S.) 145; 3 W. R. 84.—L.C.
- Forbes v. Moffatt**, *referred to*.
Horton v. Smith (1858) 27 L. J. Ch. 773; 4 K. & J. 624; 6 W. R. 783.—V.-C.
- Forbes v. Moffatt**, *referred to*.
Swinfen v. Swinfen (1860) 29 Beav. 199; 7 Jur. (N.S.) 89; 4 L. T. 194; 9 W. R. 175.—M.R.
- Forbes v. Moffatt**, *discussed and explained*.
Richards v. Richards (1860) Johns. 754.—WOOD, V.-C.
- Forbes v. Moffatt**, *discussed*.
Nunn's Estate, In re (1888) 23 L. R. Ir. 286.—C.A.
- Forbes v. Moffatt**, *applied*.
Patten v. Bond (1889) 60 L. T. 583; 37 W. R. 373.—KAY, J.; **French-Brewster**, In re (1904) 73 L. J. Ch. 405; [1904] 1 Ch. 713; 90 L. T. 378; 52 W. R. 377.—SWINFEN-EADY, J.
- Drinkwater v. Combe** (1825) 3 L. J. (O.S.) Ch. 178; 2 Sim. & S. 340, 345.—V.-C., *discussed*.
Smith v. Smith (1887) 19 L. R. Ir. 514.—PORTER, M.R.
- Drinkwater v. Combe**, *applied*.
Pride, In re **Shackell v. Colnett** (1891) 61 L. J. Ch. 9; [1891] 2 Ch. 135; 64 L. T. 768; 39 W. R. 471.—STIRLING, J.
- Astley v. Milles** (1827) 1 Sim. 298; 27 R. R. 190.—V.-C., *referred to*.
Horton v. Smith (1858) 27 L. J. Ch. 773; 4 K. & J. 624; 6 W. R. 783.—V.-C.
- Astley v. Milles and Selsey (Lord) v. Lake (Lord)** (1839) 1 Beav. 146.—M.R., *referred to*.
Nunn's Estate, In re (1888) 23 L. R. Ir. 286.—C.A.
- Wigsell v. Wigsell** (1825) 4 L. J. (O.S.) Ch. 84; 2 Sim. & S. 364; 25 R. R. 224.—V.-C., *considered and followed*.
Horton v. Smith (1858) 27 L. J. Ch. 773; 4 K. & J. 624; 6 W. R. 783.—V.-C.

- Wigsell v. Wigsell**, *discussed*.
Smith v. Smith (1887) 19 L. R. Ir. 514.—M.R.
- Hood v. Phillips** (1841) 3 Beav. 513.—M.R., *principle applied*.
Nunn's Estate, In re (1888) 23 L. R. Ir. 286.—C.A.
- Grice v. Shaw** (1852) 10 Hare 76.—V.-C.; and **Davis v. Barrett** (1851) 14 Beav. 542.—M.R., *distinguished*.
Johnston v. Webster (1854) 24 L. J. Ch. 300; 4 De G. M. & G. 474; 3 Eq. R. 101; 1 Jur. (N.S.) 145; 3 W. R. 84.—L.C.; *reversing* 23 L. J. Ch. 480.—V.-C.
- Grice v. Shaw**, *referred to*.
Horton v. Smith (1858) 27 L. J. Ch. 773; 4 K. & J. 624; 6 W. R. 783.—V.-C.
- Grice v. Shaw and Davis v. Barrett**, *discussed and explained*.
Richards v. Richards (1860) 29 L. J. Ch. 863; Johns. 754; 6 Jur. (N.S.) 1145.—WOOD, V.-C.
- Grice v. Shaw**, *distinguished*.
Swinfen v. Swinfen (1860) 29 Beav. 199; 7 Jur. (N.S.) 89; 4 L. T. 194; 9 W. R. 175.—M.R.
- Grice v. Shaw**, *applied*.
Ingle v. Vaughan-Jenkins (1900) 69 L. J. Ch. 618; [1900] 2 Ch. 368; 83 L. T. 155; 48 W. R. 684.—FARWELL, J.
- Alsop v. Bell** (1857) 24 Beav. 451.—M.R., *applied*.
Ralph v. Carrick (1877) 46 L. J. Ch. 530; 5 Ch. D. 984, 998; 37 L. T. 112; 25 W. R. 530.—HALL, V.-C. (*affirmed*, C.A.).
- Alsop v. Bell and Wilkes v. Collin** (1869) L. R. 8 Eq. 338; 17 W. R. 878.—JAMES, V.-C., *referred to*.
Nunn's Estate, In re (1888) 23 L. R. Ir. 286.—C.A.
- Richards v. Richards** (1860) Johns. 754; 29 L. J. Ch. 836; 6 Jur. (N.S.) 1145.—WOOD, V.-C., *applied*.
Bury's Estate, In re [1898] 1 Ir. R. 379.—ROSS, J.; and **Bayly's Estate**, In re [1898] 1 Ir. R. 383.—ROSS, J.
- Swinfen v. Swinfen** (1860) 29 Beav. 199; 7 Jur. (N.S.) 89; 4 L. T. 194; 9 W. R. 175.—M.R., *distinguished*.
Nunn's Estate, In re (1888) 23 L. R. Ir. 286.—C.A.
- Swinfen v. Swinfen**, *principle applied*.
Godley's Estate, In re (1895) [1896] 1 Ir. R. 45.—MADDEN, J.
- Tyrwhitt v. Tyrwhitt** (1863) 32 Beav. 244; 32 L. J. Ch. 553; 9 Jur. (N.S.) 346; 1 N. R. 458; 8 L. T. 140; 11 W. R. 409.—M.R., *discussed*.
Smith v. Smith (1887) 19 L. R. Ir. 514.—M.R.
- Jones v. Morgan** (1783) 1 Bro. C. C. 206.—L.C., *discussed and distinguished*.
Kensington (Lord) v. Bouverie (1859) 29 L. J. Ch. 537; 7 H. L. Cas. 557; 6 Jur. (N.S.) 105.—H.L. (E.).
- Crow v. Pettingell**, 38 L. J. Ch. 186; 20 L. T. 7; 17 W. R. 364.—STUART, V.-C.; *reversed*. (1869) 20 L. T. 342; 17 W. R. 562.—L.J.

Lewis Bowles's Case (1615) 11 Co. 79: *nom.*

Bowles v. Berrie, 1 Rolle 177.

Applied, *Duncomb v. Duncomb* (1695) 3 Lev. 437.—C.P.: *explained*, *Doe v. Martin* (1790) 4 Term. Rep. 39: 2 R. R. 324.—K.B.: *referred to*, *Chambers v. Taylor* (1837) 2 Myl. & Cr. 376: 6 L. J. Ch. 193.—L.C.

Lewis Bowles's Case and Williams v. Williams (1808) 15 Ves. 419.—L.C.: *considered and explained*.

Craigh v. Blood (1845) 3 Jo. & Lat. 133: 8 Ir. Eq. R. 688.

SUGDEN, L.C.—These cases then show that where there is an estate for life to A., remainder to the same person for life (as far as regards quantity of estate), the first estate for life is not merged in the second: and by parity of reason, an estate in B. for the life of A. cannot merge by the descent to B. of an estate in C. for the life of A., subsequently created, which is the case now before me. The estates are equal in quantity: for they are for the same life.—p. 710.

Lewis Bowles's Case.

Adopted, *Leigh v. Dickeson* (1883) 53 L. J. Q. B. 120: 12 Q. B. D. 194: 50 L. T. 124.—**POLLOCK, B.** (*affirmed*, C.A.): *discussed*, *Lemon v. Mark* (1898) [1899] 1 Ir. R. 416.—M.R.

Webb v. Russell (1789) 3 Term Rep. 393: 1 R. R. 725, *referred to*.

Ecclesiastical Commissioners v. Rowe (1880) 49 L. J. Q. B. 771: 5 App. Cas. 736, 748: 43 L. T. 353: 29 W. R. 159.—H.L. (E.).

Webb v. Russell, considered.

Rogers v. Hosegood (1900) 69 L. J. Ch. 652: [1900] 2 Ch. 388: 33 L. T. 186: 48 W. R. 659.—C.A. **SILVERSTONE, M.R., RIGBY and COLLINS, L.JJ.**: *partly affirming and partly reversing* **FARWELL, J.**

Chambers v. Kingham (1878) 48 L. J. Ch. 169: 10 Ch. D. 743: 39 L. T. 472: 27 W. R. 289.—**FRY, J.**: and **Ingle v. Vaughan-Jenkins** (1900) 69 L. J. Ch. 618: [1900] 2 Ch. 368: 33 L. T. 155: 48 W. R. 684.—**FARWELL, J.**, *applied*.

Capital and Counties Bank v. Rhodes (1903) 72 L. J. Ch. 536: [1903] 1 Ch. 631: 88 L. T. 255: 51 W. R. 470.—C.A.

METROPOLIS.

1. AUTHORITIES.
2. JURISDICTION.
3. RATES.
4. EXPENSES.
5. LIABILITY OF AUTHORITIES.

1. AUTHORITIES.

Mogg v. Clark (1835) 54 L. J. Q. B. 334: 15 Q. B. D. 82: 53 L. T. 890: 34 W. R. 66: 50 J. P. 342.—C.A., *followed*.

Re v. St. Pancras (1834) 1 A. & E. 80: 3 N. & M. 425: 3 L. J. M. C. 90.—K.B., *distinguished*.

Reg. v. Soutter (1890) 60 L. J. Q. B. 71: [1891] 1 Q. B. 57: 64 L. T. 40: 39 W. R. 65: 55 J. P. 229.—C.A. **ESHER, M.R., LINDLEY and LOPES, L.JJ.**

Reg. v. Soutter, explained.

Gordon v. Williamson (1892) 61 L. J. Q. B. 820: [1892] 2 Q. B. 459: 67 L. T. 214: 40 W. R. 692.—C.A. **ESHER, M.R., BOWEN and KAY, L.JJ.**: *reversing* [1892] 1 Q. B. 616: 40 W. R. 496: 56 J. P. 456.—**DENMAN, J.**

Reg. v. London County Council, Akkersdyk,

Ex parte (1891) 61 L. J. M. C. 75: [1892] 1 Q. B. 190: 66 L. T. 168: 40 W. R. 285.—**COLERIDGE, C.J. and SMITH, J.**, *distinguished*.

Royal Aquarium v. Parkinson (1892) 61 L. J. Q. B. 409: [1892] 1 Q. B. 431: 66 L. T. 513: 40 W. R. 450: 56 J. P. 404.—C.A. **ESHER, M.R., FRY and LOPES, L.JJ.**

Reg. v. London County Council, Akkersdyk,

Ex parte, applied.

Reg. v. L. C. C., Edwardes, Ex parte (1894) 15 R. 66: 71 L. T. 638.—**CHARLES and WRIGHT, JJ.**

Reg. v. London County Council, Akkersdyk,

Ex parte, distinguished.

Murray v. Epsom Local Board (1896) 66 L. J. Ch. 107: [1897] 1 Ch. 35: 75 L. T. 579: 45 W. R. 185: 61 J. P. 71.—**STIRLING, J.**

Anthony v. Seger (1789) 1 Hag. Const. 9, 13.

—**SIR W. SCOTT**, *applied*.

Reg. v. St. Matthew, Bethnal Green (1875) 32 L. T. 558.—Q.B.: *Reg. v. Wimbledon Local Board* (1882) 51 L. J. Q. B. 219: 8 Q. B. D. 459: 46 L. T. 47: 30 W. R. 400: 46 J. P. 292.—C.A. **BRETT and COTTON, L.JJ.**

Reg. v. St. George's Vestry (1887) 56 L. J.

Q. B. 652: 19 Q. B. D. 533: 35 W. R. 841: 52 J. P. 6.—**STEPHEN and WILLS, JJ.**, *dissented from*.

Reg. v. St. Pancras Vestry (1890) 59 L. J. Q. B. 244: 24 Q. B. D. 371: 62 L. T. 440: 38 W. R. 311.—C.A. **ESHER, M.R. and FRY, L.J.**

[*Headnote*.—Under the provisions of sect. 1 of 29 & 30 Vict. c. 31, a Metropolitan Vestry have a discretion not only as to whether they will grant a superannuation allowance to a retiring officer, but also as to the amount of such allowance, provided that such allowance does not exceed the maximum sum prescribed by the scale in sect. 4.]

2. JURISDICTION.

Streets.

Reg. v. Dayman (1857) 26 L. J. M. C. 128: 7 El. & Bl. 672: 3 Jur. (N.S.) 744: 5 W. R. 578.—Q.B., *applied*.

Vaughan, Ex parte (1866) 36 L. J. M. C. 17: L. R. 2 Q. B. 114: 7 B. & S. 902: 15 L. T. 277: 15 W. R. 198.—Q.B.: *Maude v. Baildon Local Board* (1883) 10 Q. B. D. 394: 48 L. T. 874: 47 J. P. 644.—**POLLOCK and HUDDLESTON, BB.**, and **NORTH, J.**: *Reg. v. Sheil* (1884) 50 L. T. 590.—**COLERIDGE, C.J. and LOPES, J.**

Reg. v. Dayman, explained.

Portsmouth Corporation v. Smith (1883) 53 L. J. Q. B. 92: 13 Q. B. D. 184: 50 L. T. 308.—C.A. **BRETT, M.R., BAGGALLAY and BOWEN, L.JJ.**: *affirmed*, (1885) 54 L. J. Q. B. 473: 10 App. Cas. 364: 53 L. T. 394: 49 J. P. 676.—**H.L. (E.). LORDS BLACKBURN, WATSON and FITZGERALD.**

Reg. v. Dayman, *referred to*.
Richards v. Kessick (1888) 57 L. J. M. C. 48; 59 L. T. 318; 52 J. P. 756.—FIELD and WILLS, JJ.

Le Neve v. Mile End Old Town Vestry (1858) 8 EL. & BL. 1054; 27 L. J. Q. B. 208; 4 Jur. (N.S.) 660; 6 W. R. 338.—Q.B., *considered and applied*.

McIntosh v. Romford Local Board (1889) 61 L. T. 185.—KAY, J.

Pound v. Plumstead Board of Works (1871) 41 L. J. M. C. 51; L. R. 7 Q. B. 183; 25 L. T. 461; 20 W. R. 177.—Q.B., *distinguished*.

Plumstead Board of Works v. British Land Co. (1875) 44 L. J. Q. B. 38; L. R. 10 Q. B. 203; 32 L. T. 94; 23 W. R. 634.—EX. CH.

Pound v. Plumstead Board of Works, *followed*.
Dryden v. Putney Overseers (1876) 1 Ex. D. 223; 54 L. T. 69.—EX. D.

Pound v. Plumstead Board of Works, *dictum adopted*.

L. B. & S. (C. Ry. v. St. Giles, Camberwell, Vestry (1879) 48 L. J. M. C. 184; 4 Ex. D. 239; 41 L. T. 162.—EX. D.

Pound v. Plumstead Board of Works, *adopted*.

Robinson v. Barton Local Board (1883) 53 L. J. Ch. 226; 8 App. Cas. 798; 50 L. T. 57; 32 W. R. 249; 48 J. P. 276.—H.L. (E.).

Pound v. Plumstead Board of Works, *followed*.

St. Giles, Camberwell v. Crystal Palace Co. (1892) 61 L. J. Q. B. 802; [1892] 2 Q. B. 33; 66 L. T. 840; 40 W. R. 648; 57 J. P. 5.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Pound v. Plumstead Board of Works, *commented on*.

Clerkenwell Vestry v. Edmondson (1900) 70 L. J. Q. B. 9; 83 L. T. 501; 49 W. R. 171.—LORD ALVERSTONE, C.J., and KENNEDY, J.

LORD ALVERSTONE, C.J.—Speaking for myself, I should have been glad to have adopted the argument of counsel for the appellants, for I think that by the fresh building operations Colney Hatch Lane had substantially become a new street, and ought to have fallen within the decision of the *Plumstead Case*. But in the present case the justices have found as a fact that the lane had become a street previously to the year 1856. Upon this finding I think the street, for this purpose, was the whole street—that is to say, that both sides of Colney Hatch Lane must be taken together as forming one street, and therefore that that portion of the street which lay on the Clerkenwell side had become a street prior to 1856.—p. 11.

Wilson v. St. Giles, Camberwell (1891) 61 L. J. M. C. 3; [1892] 1 Q. B. 1; 65 L. T. 790; 40 W. R. 41; 56 J. P. 167.—CAVE and CHARLES, JJ.; and *St. Giles, Camberwell v. Crystal Palace Co.* (1892) 61 L. J. Q. B. 802; [1892] 2 Q. B. 33; 66 L. T. 840; 40 W. R. 648; 57 J. P. 5.—C.A., *followed*.

Davis v. Greenwich Board of Works (1895) 64 L. J. M. C. 257; [1895] 2 Q. B. 219; 14 R. 552; 72 L. T. 674; 59 J. P. 517.—C.A. ESHER, M.R., SMITH and RIGBY, L.JJ.

Wilson v. St. Giles, Camberwell, *distinguished*.

St. Giles, Camberwell v. Crystal Palace Co., *dictum adopted*.

White v. Fulham Vestry (1896) 74 L. T. 425; 60 J. P. 327.—HAWKINS and WILLIAMS, JJ.

St. Mary, Battersea, Vestry v. Palmer (1896) 66 L. J. Q. B. 77; [1897] 1 Q. B. 220; 75 L. T. 362; 45 W. R. 110; 60 J. P. 774.—GRANTHAM and WRIGHT, JJ., *approved*.

Allen v. Fulham Vestry (1899) 68 L. J. Q. B. 450; [1899] 1 Q. B. 681; 80 L. T. 253; 47 W. R. 428; 63 J. P. 212.—C.A. SMITH, COLLINS and ROMER, L.JJ.

Ellis v. London County Council (1892) 67 L. T. 558; 57 J. P. 24.—POLLOCK, B. and HAWKINS, J., *distinguished*.

L. C. C. v. Mitchell (1894) 63 L. J. M. C. 104; 10 R. 308.—CAVE and WILLS, JJ.

Rolls v. St. George's, Southwark (1880) 28 W. R. 366.—JESSEL, M.R.; *reversed*, [1880] 49 L. J. Ch. 691; 14 Ch. D. 785; 43 L. T. 140; 28 W. R. 867; 44 J. P. 680.—C.A. JAMES, COTTON and THESIGER, L.JJ.

Rolls v. St. George's, Southwark (*supra*, in C.A.), *applied*.

Burgess v. Northwich Local Board (1880) 50 L. J. Q. B. 219; 6 Q. B. D. 264, 274; 41 L. T. 154; 29 W. R. 931.—C.P.D.

Rolls v. St. George's, Southwark, *approved*.

Wandsworth Board of Works v. United Telephone Co. (1884) 53 L. J. Q. B. 449; 13 Q. B. D. 904; 51 L. T. 148; 32 W. R. 776; 48 J. P. 676.—C.A. BRETT, M.R., BOWEN and FRY, L.JJ.

Wandsworth Board of Works v. Pretty (1898) 68 L. J. Q. B. 193; [1899] 1 Q. B. 1; 47 W. R. 256; 63 J. P. 132.—RUSSELL, C.J. and WILLS, J., *approved*.

Reg. v. Francis, Walton, Ex parte (1899) 68 L. J. Q. B. 609; 63 J. P. 469.—DARLING and CHANNELL, JJ.

London County Council v. Edmondson & Sons (1892) 66 L. T. 200; 56 J. P. 343.—LAWRANCE and WRIGHT, JJ. *Met by* 57 & 58 Vict. c. cexiii. s. 9 (4).

Metropolitan Board of Works v. Steed (1881) 51 L. J. M. C. 22; 8 Q. B. D. 445; 45 L. T. 611; 30 W. R. 391; 46 J. P. 199.—GROVE and LOPES, JJ., *explained and adopted*.

Daw v. L. C. C. (1890) 59 L. J. M. C. 112; 62 L. T. 937; 54 J. P. 502.—COLERIDGE, C.J. and MATHEW, J.

Daw v. London County Council, *distinguished*.

L. C. C. v. Davis (1895) 64 L. J. M. C. 212; 15 R. 509; 43 W. R. 574; 59 J. P. 583.—POLLOCK, B. and WRIGHT, J.

London County Council v. Davis, *referred to*.

Wood v. L. C. C. (1895) 64 L. J. M. C. 276; 15 R. 569; 73 L. T. 313; 44 W. R. 144; 59 J. P. 615.—GRANTHAM and LAWRENCE, JJ.

Wood v. London County Council (1895) 64 L. J. M. C. 267; 15 R. 569; 73 L. T. 313; 44 W. R. 144; 59 J. P. 615.—GRANTHAM and LAWRENCE, JJ., *dissented from*.

Armstrong v. L. C. C. (1899) 69 L. J. Q. B.

267 : [1900] 1 Q. B. 416 : 81 L. T. 638 ; 48 W. R. 367 ; 64 J. P. 197.—RUSSELL, C.J., BIGHAM and DARLING, JJ.

RUSSELL, C.J.—We have examined, but do not think it necessary to refer to the cases cited during the argument. Each case depends on its particular circumstances. It is indeed worth noting that the question of street or no street is uniformly treated in these cases as largely a question of fact. The decisions, except in *Wood v. London County Council*, upheld the views taken by the magistrates [viz., that the appellant had commenced to form and lay out a street within sect. 7 of the London Building Act, 1894], and, in our opinion, that case was wrongly decided.—p. 271.

Taylor v. Metropolitan Board of Works (1867) 36 L. J. M. C. 53 ; L. R. 2 Q. B. 213 ; 15 W. R. 765.—Q.B., *distinguished*.
M. B. W. v. *Clover* (1868) 37 L. J. M. C. 126 ; L. R. 3 C. P. 531 ; 18 L. T. 723 ; 16 W. R. 1016.—C.P.

Lynch v. Sewers Commissioners (1885) 55 L. J. Ch. 211 ; 53 L. T. 938 ; 34 W. R. 226.—KAY, J.; *reversed*, (1886) 55 L. J. Ch. 409 ; 32 Ch. D. 72 ; 54 L. T. 699 ; 50 J. P. 548.—C.A. COTTON, BOWEN and FRY, L.JJ.

Thomas v. Daw (1866) 36 L. J. Ch. 201 ; L. R. 2 Ch. 1 ; 15 L. T. 200 ; 15 W. R. 113.—CHELMSFORD, L.C., *followed*.

Gard v. Sewers Commissioners (1885) 54 L. J. Ch. 698 ; 28 Ch. D. 486 ; 52 L. T. 827.—C.A. BAGGALLAY, BOWEN and FRY, L.JJ.

Thomas v. Daw and Gard v. Sewers Commissioners, considered.

Teuliere v. St. Mary Abbott's Vestry (1885) 55 L. J. Ch. 23 ; 30 Ch. D. 642 ; 53 L. T. 422.—PEARSON, J.

Thomas v. Daw and Gard v. Sewers Commissioners, explained.

Lynch v. Sewers Commissioners (1886) 55 L. J. Ch. 409 ; 32 Ch. D. 72 ; 54 L. T. 699 ; 50 J. P. 548.—C.A. COTTON, BOWEN and FRY, L.JJ.
BOWEN, L.J.—Supposing, then, that the Commissioners adjudicate that houses or lands "project into and obstruct or prevent them from so altering" the street, what is the effect of their adjudication? It has been urged that it is final, and that we cannot go behind it. The contrary to that was distinctly decided in *Gard v. Commissioners of Sewers of City of London*. In that case it was decided not merely that the adjudication, in order to be final, must be an honest and *bona fide* adjudication, but also that it must be an adjudication which bore some relation to reason, and that the Commissioners could not clothe themselves with jurisdiction to take a man's property by only thinking that which it was unreasonable for any sensible man to think. That was the construction placed upon the section by Lord Justice Baggallay ; the same construction was expounded by myself ; and the Lord Justice Fry, who gave a shorter judgment than Lord Justice Baggallay or myself, stated that he entirely concurred in the reasoning of the Lords Justices who had preceded him. Therefore the argument that the adjudication is necessarily final cannot be successful.

FRY, L.J.—I will only add one or two observations upon the point which the learned judge in the Court below decided, viz., that the conduct

of the plaintiff precluded him from taking advantage of the present objection. The learned judge proceeded upon the authority of Vice-Chancellor Kindersley, in *Thomas v. Daw*, with regard to the house No. 49, there mentioned. It appears to me that if this case is looked into carefully it will be seen to be no authority on the present one. The plaintiff then had full knowledge of the line upon which the Commissioners desired to proceed ; they had written to him insisting upon adhering to that line. That line was apparent to the eye of anybody who walked along the street, because the other houses had been put back to it ; and, with that knowledge, the plaintiff thought fit to make a claim in respect of the entire house. In the present case, no knowledge on the part of the plaintiff is shown ; and having regard to the letters which were written by the solicitor for the defendants, after the plan had been communicated, in which he threw doubt upon the binding nature of that plan, and asserted that the Commissioners had not made up their minds, it is extremely difficult to see how the plaintiff could be affected with any knowledge of the defendant's intentions, those intentions being kept as vague as it was possible to keep them.

Gard v. Sewers Commissioners, applied.
Gordon v. St. Mary Abbott's Vestry (1894) 63 L. J. M. C. 193 ; [1894] 2 Q. B. 742 ; 10 R. 539 ; 71 L. T. 196 ; 58 J. P. 463.—CAVE and COLLINS, JJ.

Gard v. Sewers Commissioners, and Teuliere v. St. Mary Abbott's Vestry (1885) 55 L. J. Ch. 23 ; 30 Ch. D. 642 ; 53 L. T. 422 ; 50 J. P. 53.—PEARSON, J., *observations applied*.

Fernley v. Limehouse Board of Works (1900) 82 L. T. 524 ; 64 J. P. 328.—KEKEWICH, J.

Gordon v. St. Mary Abbott's Vestry (1894) 63 L. J. M. C. 193 ; [1894] 2 Q. B. 742 ; 10 R. 539 ; 71 L. T. 196 ; 58 J. P. 463.—CAVE and COLLINS, L.JJ., *considered and explained*.

Aldis v. London Corporation (1899) 68 L. J. Ch. 576 ; [1899] 2 Ch. 169 ; 80 L. T. 683 ; 47 W. R. 514 ; 63 J. P. 376.—KEKEWICH, J.

Gordon v. St. Mary Abbott's Vestry, dicta followed.

Gibbon v. Paddington Vestry (1900) 69 L. J. Ch. 746 ; [1900] 2 Ch. 794 ; 83 L. T. 136 ; 49 W. R. 8 ; 64 J. P. 727.—STIRLING, J.

Aldis v. London Corporation (1899) 68 L. J. Ch. 576 ; [1899] 2 Ch. 169 ; 80 L. T. 683 ; 47 W. R. 514 ; 63 J. P. 376.—KEKEWICH, J., *referred to*.

Fernley v. Limehouse Board of Works (1900) 82 L. T. 524 ; 64 J. P. 328.—KEKEWICH, J.

Summers v. Holborn Board of Works (1893) 62 L. J. M. C. 81 ; [1893] 1 Q. B. 612 ; 5 R. 284 ; 68 L. T. 226 ; 41 W. R. 445 ; 57 J. P. 326.—COLERIDGE, C.J., and CAVE, J., *considered and distinguished*.

Wyatt v. Gems (1893) 62 L. J. M. C. 158 ; [1893] 2 Q. B. 225 ; 5 R. 507 ; 69 L. T. 456 ; 42 W. R. 28 ; 17 Cox C. C. 679 ; 57 J. P. 665.—DAY and WRIGHT, JJ.

Summers v. Holborn Board of Works, considered.

Keep v. St. Mary, Newington (1894) 63

L. J. Q. B. 369; [1894] 2 Q. B. 524; 9 R. 346; 70 L. T. 509; 53 J. P. 748.—C.A. LINDLEY, KAY and SMITH, L.JJ.

Bermondsey Vestry v. Brown (1865) 35 Beav. 226; L. R. 1 Eq. 204; 11 Jur. (N.S.) 1031; 13 L. T. 574; 14 W. R. 213.—M.R., *discussed*.

Wallasey Local Board v. Gracey (1887) 56 L. J. Ch. 739; 36 Ch. D. 593; 57 L. T. 51; 35 W. R. 694; 51 J. P. 740.—STIRLING, J.

Buildings.

Stevens v. Gourley, 1 F. & F. 498.—MARTIN. B.; *reversed*, (1859) 29 L. J. C. P. 1; 7 C. B. (N.S.) 99; 6 Jur. (N.S.) 147; 1 L. T. 33; 8 W. R. 85.—C.P.

Stevens v. Gourley (1859) 29 L. J. C. P. 1; 7 C. B. (N.S.) 99; 6 Jur. (N.S.) 147; 1 L. T. 33; 8 W. R. 85.—C.P.

Recognised but distinguished, **Harris v. De Pinna** (1886) 33 Ch. D. 238, 248; 54 L. T. 38; 50 J. P. 308.—CHITTY, J. (*affirmed* C.A.); **Hall v. Smallpiece** (1890) 59 L. J. M. C. 57, 98; 54 J. P. 710.—Q.B.D.; *referred to*, L. C. C. v. **Pearce** (1892) [1892] 2 Q. B. 109; 66 L. T. 685; 40 W. R. 543; 56 J. P. 790.—POLLOCK, B. and WILLIAMS, J.

Josolyne v. Meeson (1885) 53 L. T. 319; 49 J. P. 805.—COLERIDGE, C.J. and MATHEW, J., *followed*.

Moses v. Marsland (1901) 70 L. J. K. B. 261; [1901] 1 K. B. 668, 671; 83 L. T. 740; 49 W. R. 217; 65 J. P. 183.—BRUCE and PHILLIMORE, JJ.

Hall v. Smallpiece (1890) 59 L. J. M. C. 97; 54 J. P. 710.—COLERIDGE, C.J. and MATHEW, J., *applied*.

London County Council v. Pearce (1892) [1892] 2 Q. B. 109; 66 L. T. 685; 40 W. R. 543; 56 J. P. 790.—POLLOCK, B. and WILLIAMS, J.

Hall v. Smallpiece and London County Council v. Pearce, *followed*.

London County Council v. Humphreys (1894) 63 L. J. M. C. 215; [1894] 2 Q. B. 755; 10 R. 533; 71 L. T. 201; 43 W. R. 13; 58 J. P. 734.—WILLS and KENNEDY, JJ.

Coole v. Lovegrove (1893) 62 L. J. M. C. 153; [1893] 2 Q. B. 44; 5 R. 418; 69 L. T. 19; 41 W. R. 570; 57 J. P. 647.—POLLOCK, B. and KENNEDY, J., *distinguished*.

Elliott v. London County Council (1899) 68 L. J. Q. B. 837; [1899] 2 Q. B. 277, 281; 81 L. T. 155; 6 J. P. 645.—DAY and LAWRENCE, JJ.

London County Council v. Davis (1897) 77 L. T. 693.—HAWKINS and CHANNELL, JJ. *See* London Building Act, 1898 (61 & 62 Vict. c. cxxxvii.), s. 4.

London County Council v. Davis, *distinguished*.

Crow v. Davis (1903) 89 L. T. 407; 67 J. P. 319.—K.B.D.

St. George, Hanover Square v. Sparrow (1864) 16 C. B. (N.S.) 209; 33 L. J. M. C. 118; 10 Jur. (N.S.) 771; 10 L. T. 504; 12 W. R. 832.—C.P., *considered*.

Bauman v. St. Pancras Vestry (1867) 36

L. J. M. C. 126; L. R. 2 Q. B. 528; 8 B. & S. 446; 15 W. R. 904.—Q.B.

St. George, Hanover Square v. Sparrow, *discussed*.

Wandsworth Board of Works v. Hall (1868) L. R. 4 C. P. 85; 38 L. J. M. C. 69; 19 L. T. 641; 17 W. R. 256.—C.P.

WILLES, J.—It is unnecessary to enter into a discussion as to whether the view taken by three judges in this Court (*St. George, Hanover Square v. Sparrow*) or that taken by two judges in the Court of Queen's Bench (*Bauman v. Vestry of St. Pancras*) was right. It may be proper, however, to observe that in the case of the Queen's Bench, Shee, J. said that he did not think in deciding that case their judgment would necessarily conflict with the case in this Court; and he goes on to state the reason, viz., because the magistrate in *Bauman v. Vestry of St. Pancras* adopted the line that had been decided by the architect as the true line, which, of course, he had a right to do: the question in that case, in fact, was rather whether the architect's certificate had been given in time, than whether the magistrate was bound by it if it were so; but in the case of *St. George, Hanover Square v. Sparrow*, it was assumed that it made no difference when the architect gave his certificate, for one reason why the Court thought that the line fixed by the architect was not conclusive against the builder (no one doubted it was so against the architect's employers, the Metropolitan Board of Works), was the hardship of his being bound by a decision *ex post facto*. The cases in both Courts, therefore, are against the respondent. I may say, without any disrespect to the Court of Queen's Bench, that the opinion of the judges of this Court was misapprehended, for it is stated in *Bauman v. Vestry of St. Pancras* that the Court of Common Pleas had overlooked that it was the decision of the architect which gave the magistrate jurisdiction; it is quite obvious that that remark proceeds on the assumption that the judges of this Court thought that, even if the building was within the line laid down by the architect, yet if it was outside what the magistrate thought to be the true line, he could decide against the builder and order the buildings to be pulled down. No such opinion was entertained here; the judges here, equally with the judge I have quoted, thought that the magistrate had no jurisdiction except in relation to the architect's line; they thought the magistrate ought not to convict unless the building was beyond the line so laid down by the architect, but they also thought that he ought not to convict if he was of opinion that the building was not really beyond the general line of houses, though it was beyond that fixed by the architect. To that extent, therefore, the judgment in this Court appears to have been misapprehended.—p. 89.

St. George, Hanover Square v. Sparrow, *followed*.

Simpson v. Smith (1871) L. R. 6 C. P. 87; 40 L. J. M. C. 89; 24 L. T. 100; 19 W. R. 355.—C.P.

WILLES, J.—With the utmost respect for the opinion of the Court of Queen's Bench, as expressed in the case of *Bauman v. Vestry of St. Pancras*, I must say that, in my opinion, the observations made in that case do not seem at all successful in impugning the reasoning of the judges of this Court in the case of *St. George, Hanover Square v. Sparrow*.—p. 96.

St. George, Hanover Square v. Sparrow,
distinguished.

Cheetham v. Manchester Corporation (1875)
44 L. J. C. P. 139; L. R. 10 C. P. 249; 32 L. T.
28.—C.P.

St. George, Hanover Square v. Sparrow,
disapproved.

Plumstead Board of Works v. Spackman (1884)
53 L. J. M. C. 142; 13 Q. B. D. 878; 51 L. T.
757.—C.A. BRETT, M.R., BOWEN and FRY, L.J.J.;
affirmed in H.L., infra. See extract, infra.

St. George, Hanover Square v. Sparrow,
overruled.

Spackman v. Plumstead Board of Works (1885)
54 L. J. M. C. 81; 10 App. Cas. 229; 53 L. T.
157; 33 W. R. 661; 49 J. P. 420.—H.L. (E.).
See infra.

Wandsworth Board of Works v. Hall (1868)

38 L. J. M. C. 69; L. R. 4 C. P. 85; 19
L. T. 641; 17 W. R. 256.—C.P., *referred to.*

Simpson v. Smith (1871) 40 L. J. M. C. 89;
L. R. 6 C. P. 87; 24 L. T. 100; 19 W. R. 355.
—C.P.

**Wanstead Board of Works v. Hall and
Simpson v. Smith,** *not applied.*

Cheetham v. Manchester Corporation (1875)
44 L. J. C. P. 139; L. R. 10 C. P. 249, 265; 32
L. T. 28.—C.P.

**Wanstead Board of Works v. Hall and
Simpson v. Smith,** *followed.*

Paddington Vestry v. Snow (1881) 45 L. T.
475; 30 W. R. 46; 46 J. P. 87.—COLERIDGE,
C.J. and MANISTY, J.

**Wandsworth Board of Works v. Hall and
Simpson v. Smith,** *disapproved.*

Plumstead Board of Works v. Spackman (1884)
53 L. J. M. C. 142; 13 Q. B. D. 878; 51 L. T.
757.—C.A.; *affirmed in H.L., infra.*

FRY, L.J. (for self and BOWEN, L.J.; BRETT, M.R.
dissenting).—The first question stated by the
magistrate is, whether he is bound by the archi-
tect's certificate as conclusive, or ought to have
considered for himself what the true general line
of buildings was. This is a point which has been
several times before the Courts prior to the de-
cision now under appeal, and which has elicited
a great diversity of opinion. In the cases of *St.
George v. Sparrow* and *Wandsworth v. Hall*
eminent judges of the Court of Common Pleas
expressed an opinion that the certificate of the
architect was not binding on the justice; and in
the case of *Simpson v. Smith*, that Court decided
the question in accordance with their previously
expressed opinion. But, on the other hand, in
the case of *Bauman v. St. Pancras*, Cockburn,
L.C.J. and Mellor, J. criticised the case of *St.
George v. Sparrow*, and expressed an opinion
that the certificate of the architect was final and
binding on the justice. In such a diversity of
opinion on the point in controversy, we think
that the Queen's Bench Division were right in
considering that they were not precluded by
authority from determining the question on its
merits. We shall pursue the same course, not
regardless of the views enunciated by the various
judges who have expressed their opinions, but
supported by remembering that, in our conclusion,
whatever it may be, though we must differ from
some great authorities, we must also be in accord-
ance with others (p. 146). . . . It appears to us
that there is nothing unreasonable or improbable

in the conclusion that the power of finally deter-
mining this line should be vested in the super-
intending architect of the Metropolitan Board.
He is, as we have already shown, an officer filling
a responsible position under the Metropolitan
Board; that Board is itself entrusted with large
powers of superintendence over the metropolis,
and over the vestries and districts. The question
to be determined is one of a technical character,
on which the legislature might think an architect
as good a judge as a magistrate; and it may
have been thought that such a reference was
more likely to secure uniformity of decision than
leaving the question open to each magistrate
before whom it might come.—p. 148.

**Wandsworth Board of Works v. Hall and
Simpson v. Smith,** *overruled.*

Spackman v. Plumstead Board of Works (1885)
54 L. J. M. C. 81; 10 App. Cas. 229; 53 L. T.
157; 33 W. R. 661; 49 J. P. 420.—H.L. (E.).
LORDS SELBORNE, L.C., WATSON, BRAMWELL
and FITZGERALD.—[The result is that the archi-
tect's certificate is held conclusive; the decisions
of the Common Pleas are overruled, and the
decision of the Queen's Bench in *Bauman v.
Vestry of St. Pancras* (*infra*) is approved.]

Bauman v. St. Pancras Vestry (1867) 36 L. J.
M. C. 126; L. R. 2 Q. B. 528; 8 B. & S.
446; 15 W. R. 904.—Q.B., *discussed.*

Wandsworth Board of Works v. Hall (1868) 38
L. J. M. C. 69; L. R. 4 C. P. 85; 19 L. T. 641;
17 W. R. 256.—C.P. *See extract, supra, col. 1770.*

Bauman v. St. Pancras Vestry, *discussed.*

Simpson v. Smith (1871) 40 L. J. M. C. 89;
L. R. 6 C. P. 87; 24 L. T. 100; 19 W. R. 355.—
C.P. *See extract, ante, col. 1770.*

Bauman v. St. Pancras Vestry, *opinion
dissented from.*

Cheetham v. Manchester Corporation (1875)
44 L. J. C. P. 139; L. R. 10 C. P. 249, 265; 32
L. T. 28.—C.P.

Bauman v. St. Pancras Vestry, *approved.*

Spackman v. Plumstead Board of Works (1885)
54 L. J. M. C. 81; 10 App. Cas. 229; 53 L. T.
157; 33 W. R. 661; 49 J. P. 420.—H.L. (E.). *See
extract, supra.*

Spackman v. Plumstead Board of Works,
followed.

Barlow v. St. Mary Abbott, Kensington (1886)
55 L. J. Ch. 680; 11 App. Cas. 257; 55 L. T.
221; 34 W. R. 521.—H.L. (E.). LORDS HERSCHELL,
L.C., WATSON, BRAMWELL, FITZGERALD and
HALSBURY; *reversing* (1884) 53 L. J. Ch. 899;
29 Ch. D. 362; 52 L. T. 155; 32 W. R. 966.—
C.A. BAGGALLAY, COTTON and LINDLEY, L.J.J.;
which had reversed (1883) 53 L. J. Ch. 38; 48
L. T. 348; 31 W. R. 514.—BACON, V.-C.

Spackman v. Plumstead Board of Works,
applied.

Gilbart v. Wandsworth Board of Works (1888)
60 L. T. 149; 53 J. P. 229.—COLERIDGE, C.J.
and CAVE, J.

Barlow v. St. Mary Abbott, Kensington
(1886) 55 L. J. Ch. 680; 11 App. Cas. 257;
55 L. T. 221; 34 W. R. 521.—H.L. (E.).
distinguished.

Gilbart v. Wandsworth Board of Works (1888)
60 L. T. 149; 53 J. P. 229.—COLERIDGE, C.J. and
CAVE, J.

Barlow v. St. Mary Abbott, Kensington, applied.
 Warren v. Mustard (1891) 61 L. J. M. C. 18; 66 L. T. 26; 56 J. P. 502.—MATHEW and SMITH, JJ.

Barlow v. St. Mary Abbott, Kensington, considered.

Allen v. L. C. C. (1895) 64 L. J. M. C. 228; [1895] 2 Q. B. 537; 14 R. 749; 73 L. T. 101; 43 W. R. 674; 59 J. P. 644.—C.A. LINDLEY, LOPES and RIGBY, L.JJ.

LINDLEY, L.J.—No far the interpretation of the statute [sect. 75 of the Metropolis Management Act, 1862] is reasonably plain: but then it is said that the question still remains who is to determine whether the building complained of is in the particular street, place, or row of houses to which the architect's certificate is applicable. This is the point on which Lords Watson and Bramwell differed in *Barlow v. St. Mary Abbott's Vestry*. A careful perusal of Lord Herschell's judgment has led me to the conclusion that he agreed with Lord Watson, and that Lord Fitzgerald took the same view. There is much to be said for this interpretation of the Act, for, the object of the Act being to regulate lines of building, the architect, rather than the magistrate, seems naturally to be the person to say what line of building a particular house should conform to. The general line of building the architect is to decide is "such general line," and by "such" is meant the general line for the street, place, or row of houses in which the house in question is.

Barlow v. St. Mary Abbott, Kensington. Met by the London Building Act, 1894 (57 & 58 Vict. c. ccciii.), s. 49.

Gilbart v. Wandsworth Board of Works (1888) 60 L. T. 149; 53 J. P. 229; 5 Times L. R. 31.—COLERIDGE, C.J. and CAVE, J. *Met by the London Building Act, 1894 (57 & 58 Vict. c. ccciii.), s. 29.*

London County Council v. Aylesbury Dairy Co. (1897) 67 L. J. Q. B. 24; [1898] 1 Q. B. 106; 77 L. T. 440; 61 J. P. 759.—WRIGHT and KENNEDY, JJ. *See now London Building Act, 1898 (61 & 62 Vict. c. cxxxvii.), s. 3.*

London County Council v. Best & Co. (1893) 9 Times L. R. 499. *Apparently met by the London Building Act, 1894 (57 & 58 Vict. c. ccciii.), s. 26 (1).*

Tear v. Freebody (1858) 4 C. B. (N.S.) 228, 259; 6 W. R. 520.—C.P.

Confirmed, Simpson v. Smith (1871) 40 L. J. M. C. 89; L. R. 6 C. P. 87, 95; 24 L. T. 100; 19 W. R. 355.—C.P.; *considered and distinguished, Manners v. Johnson* (1875) 45 L. J. Ch. 404; 1 Ch. D. 673; 24 W. R. 481.—HALL, V.-C.; *St. Mary, Islington, Vestry v. Goodman* (1889) 58 L. J. M. C. 122; 23 Q. B. D. 154; 61 L. T. 44.—DENMAN and HAWKINS, JJ.

Hull v. London County Council (1901) 70 L. J. K. B. 364; [1901] 1 K. B. 580; 84 L. T. 160; 49 W. R. 396; 65 J. P. 309.—K.B.D., *disapproved.*

London County Council v. Illuminated Advertisements Co. (1904) 73 L. J. K. B. 1034; [1904] 2 K. B. 886; 91 L. T. 352; 68 J. P. 445; 2 L. G. R. 905; 20 T. L. R. 527.—K.B.D.

Auckland (Lord) v. Westminster Board of Works (1872) 41 L. J. Ch. 723; L. R. 7 Ch. 597; 26 L. T. 961; 20 W. R. 845.—L.JJ. (*and see ante*, vol. 1, cols. 1336, 1337), *distinguished.*

Barlow v. St. Mary Abbott, Kensington (1884) 53 L. J. Ch. 899; 27 Ch. D. 362; 52 L. T. 155; 32 W. R. 966.—C.A. BAGGALLAY, COTTON and LINDLEY, L.JJ.; *reversed in H.L. See ante*, col. 1772.

Auckland (Lord) v. Westminster Board of Works, considered and distinguished.

St. Mary, Islington, Vestry v. Goodman (1889) 58 L. J. M. C. 122; 23 Q. B. D. 154; 61 L. T. 44.—DENMAN and HAWKINS, JJ.

Auckland (Lord) v. Westminster Board of Works, distinguished.

Worley v. St. Mary Abbott, Kensington (1892) 61 L. J. Ch. 601; [1892] 2 Ch. 404; 66 L. T. 747; 40 W. R. 566.

NORTH, J.—The state of things existing here is precisely that described by Lord Justice Mellish in his judgment (in the above case) by way of illustration—a case to which sect. 74 [of the Metropolis Management Amendment Act, 1862] would not apply.—p. 604.

Auckland (Lord) v. Westminster Board of Works, and Worley v. St. Mary Abbott, Kensington (1892) 61 L. J. Ch. 601; [1892] 2 Ch. 404; 66 L. T. 747; 40 W. R. 566.—NORTH, J. *Affected by 57 & 58 Vict. c. ccciii. s. 22 (2).*

Auckland (Lord) v. Westminster Board of Works, explained.

Clark v. St. Pancras Vestry (1869) 34 J. P. 181.—Q.B., *approved.*

Wendon v. L. C. C. (1894) 63 L. J. M. C. 117; [1894] 1 Q. B. 812; 9 R. 292; 70 L. T. 440; 42 W. R. 370; 58 J. P. 606.—C.A. ESHER, M.R., LOPES and DAVEY, L.JJ.

Auckland (Lord) v. Westminster Board of Works, considered.

Lavy v. L. C. C. (1895) 64 L. J. M. C. 262; [1895] 2 Q. B. 577; 73 L. T. 106; 43 W. R. 677; 14 R. 634; 59 J. P. 630.—C.A. LINDLEY, LOPES and RIGBY, L.JJ.

Auckland (Lord) v. Westminster Board of Works, distinguished.

London County Council v. Pryor (1896) 65 L. J. M. C. 89; [1896] 1 Q. B. 465; 74 L. T. 234; 60 J. P. 292.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

ESHER, M.R.—*Lord Auckland's Case* upon the facts differs from the present case. In that case there was an existing street, in which there was a house together with a plot of land. The house was pulled down, and the owner claimed the right to rebuild not only on the site of the old house, but also upon the adjoining plot of land. The Court of Appeal held, first, that he was entitled to rebuild upon the old site; and secondly, that the plot of land in question was part of the curtilage of the house, and was in law a part of the old house. He was not bound to build a house of the same shape upon the site of the old house, but might build both upon that site and also upon the plot of land. That is not like the present case. Here there was a house with a forecourt, and behind the house was a garden, at the end of which were

some stables. It is impossible to say that that was part of the curtilage of the house. If so, the land was mere land. The statute [Metropolis Management Act, 1862, s. 75] merely provides that the owner may rebuild upon land which was occupied by the old building. This case, therefore, is not within *Lord Auckland's Case*,—p. 93.

Wendon v. London County Council (1894) 63 L. J. M. C. 117; [1894] 1 Q. B. 812; 9 R. 292; 70 L. T. 440; 42 W. R. 370; 58 J. P. 606.—C.A.; and **Ellis v. Plumstead Board of Works** (1893) 68 L. T. 291; 41 W. R. 496; 5 R. 237.—COLERIDGE, C.J. and CAVE, J., *considered*.

Lavy v. London County Council (1895) 64 L. J. M. C. 262; [1895] 2 Q. B. 577; 73 L. T. 106; 43 W. R. 677; 14 R. 634; 59 J. P. 630.—C.A. LINDLEY, LOPES and RIGBY, L.JJ.

London County Council v. Cross, 56 J. P. 550.—SMITH and DENMAN, JJ.; *reversed*, (1892) 61 L. J. M. C. 160; 66 L. T. 731; 56 J. P. 550.—C.A. LINDLEY and KAY, L.JJ.

London County Council v. Cross, *followed*.

Lavy v. L.C.C. (1895) 64 L. J. M. C. 262; [1895] 2 Q. B. 577; 73 L. T. 106; 43 W. R. 677; 14 R. 634; 59 J. P. 630.—C.A. LINDLEY, LOPES and RIGBY, L.JJ.

London County Council v. Cross, *adopted*.

Hull v. London County Council (1901) 70 L. J. K. B. 364; [1901] 1 Q. B. 580; 84 L. T. 160; 49 W. R. 396; 65 J. P. 309; 19 Cox C. C. 635.—BRUCE and PHILLIMORE, JJ.

St. Mary, Islington v. Goodman (1889) 58 L. J. M. C. 122; 23 Q. B. D. 154; 61 L. T. 44; 54 J. P. 52.—DENMAN and HAWKINS, JJ., *dissented from*.

Fortescue v. St. Matthew, Bethnal Green (1891) 60 L. J. M. C. 172; [1891] 2 Q. B. 170; 65 L. T. 256; 55 J. P. 758.—COLERIDGE, C.J., MATHEW, CAVE, SMITH and CHARLES, JJ.

CHARLES, J. (for the Court).—Now this section [119 of the Metropolis Management Act, 1855] certainly imposes a restraint upon a building owner on the use of his own land, and forbids projections within specified limits, without the consent of the Metropolitan Board, beyond the general building line; and in the *Islington Case* the majority of the Court considered that sect. 26 of 18 & 19 Vict. c. 122 did no more than relieve him from this restriction so far as his own land was concerned. But it is to be observed that there is not, either in the Metropolis Local Management Act, 1855, or in the Amending Act, 1862, which gives authority to the architect of the Board to fix the general building line, anything to prevent that building line from being brought up to the line of the highway of the street itself, and in many instances the building line does actually adjoin the highway. In all such cases the permission granted by sect. 26 of 18 & 19 Vict. c. 122, for projecting shop-fronts seems to carry with it, of necessity, the right to build to the extent mentioned in the section on the soil of the street itself, which belongs not to the building owner, but to the vestry or district board, and, with the sincerest respect for the judgment of the majority of the Court in the *Islington Case*, we think that this is the true construction of the words.—p. 177.

O.C.

Fortescue v. St. Matthew, Bethnal Green, *adopted*.

Summers v. Holborn District Board of Works (1893) 62 L. J. M. C. 81; [1893] 1 Q. B. 612; 5 L. 284; 68 L. T. 226; 41 W. R. 445; 57 J. P. 326.—COLERIDGE, C.J. and CAVE, J.

City and South London Ry. v. London County Council (1891) 60 L. J. M. C. 149; [1891] 2 Q. B. 513; 65 L. T. 552; 40 W. R. 166; 56 J. P. 6.—C.A., *followed*.

London County Council v. London School Board (1892) 62 L. J. M. C. 30; [1892] 2 Q. B. 606; 5 R. 1; 40 W. R. 604; 56 J. P. 791.—WRIGHT and COLLINS, JJ.

City and South London Ry. v. London County Council, *distinguished*.

Uckfield Rural Council v. Crowborough District Water Co. (1899) 68 L. J. Q. B. 1009; [1899] 2 Q. B. 664; 81 L. T. 539; 48 W. R. 63.—RIDLEY and DARLING, JJ.

City and South London Ry. v. London County Council.

Applied, **Stretford Urban Council v. Manchester, &c., Ry.** (1903) 1 L. G. R. 683; 68 J. P. 59; 19 T. L. R. 547.—C.A.; *distinguished, but principle applied*, **Surrey Commercial Dock Co. v. Bermondsey Corporation** (1904) 73 L. J. K. B. 293; [1904] 1 K. B. 474; 90 L. T. 123; 52 W. R. 446; 58 J. P. 155; 20 T. L. R. 208.—K.B.D.

London County Council v. London School Board (1892) 62 L. J. M. C. 30; [1892] 2 Q. B. 606; 5 R. 1; 40 W. R. 604; 56 J. P. 791.—WRIGHT and COLLINS, JJ. *Extended by London Building Act, 1894* (57 & 58 Vict. c. cxxiii.), s. 21.

London County Council v. London School Board, *applied*.

Stretford Urban Council v. Manchester, &c., Ry. (1903).—C.A. (*supra*).

Uckfield Rural Council v. Crowborough District Water Co. (1899) 68 L. J. Q. B. 1009; [1899] 2 Q. B. 664; 81 L. T. 539; 48 W. R. 63.—RIDLEY and DARLING, JJ., *applied*.

London County Council v. Wandsworth and Putney Gas Co. (1900) 82 L. T. 562; 64 J. P. 500.—RIDLEY and DARLING, JJ.

St. Margaret's and St. John's Vestry v. Hoskins (1899) 68 L. J. Q. B. 840; [1899] 2 Q. B. 474; 81 L. T. 390; 47 W. R. 649; 63 J. P. 725.—Q.B.D., *distinguished*.

Hornsey Urban Council v. Hennell (1902) 71 L. J. K. B. 479; [1902] 2 K. B. 73; 86 L. T. 423; 50 W. R. 521; 66 J. P. 613.—K.B.D.

Scott v. Legg, 46 L. J. M. C. 117; 2 Ex. D. 39; 35 L. T. 487.—CLEASBY, B. and GROVE, J.; *reversed*, (1877) 46 L. J. M. C. 267; 10 Q. B. D. 236; 36 L. T. 456; 25 W. R. 594.—C.A. BAGGALLAY, BRANWELL and BRETT, L.JJ.

Scott v. Legg (1877) 46 L. J. M. C. 267; 10 Q. B. D. 236; 36 L. T. 456; 25 W. R. 594.—C.A. *See London Building Act, 1894* (57 & 58 Vict. c. cxxiii.), s. 75.

London County Council v. Lawrance (1893) 62 L. J. M. C. 176; [1893] 2 Q. B. 228; 5 R. 494; 69 L. T. 344; 41 W. R. 688.—MATHEW, WRIGHT and COLLINS, JJ. *Met by London Building Act, 1894* (57 & 58 Vict. c. cxxiii.), s. 49.

Blashill v. Chambers (1884) 14 Q. B. D. 479; 53 L. T. 38; 49 J. P. 388.—**GROVE and HAWKINS, JJ.** *Apparently met by* London Building Act, 1894 (57 & 58 Vict. c. ccciii.), s. 5 (9).

Dicksee v. Hoskins (1901) 70 L. J. K. B. 577; [1901] 2 K. B. 122; 84 L. T. 625; 49 W. R. 523.—**LORD ALVERSTONE, C.J.** and **LAWRANCE, J.**; *reversed*. (1901) 70 L. J. K. B. 851; [1901] 2 K. B. 660; 49 W. R. 693; 65 J. P. 612.—**C.A. SMITH, M.R., WILLIAMS and STIRLING, L.JJ.**

Carritt v. Godson (1899) 68 L. J. Q. B. 799; [1899] 2 Q. B. 193; 80 L. T. 771; 63 J. P. 644; 19 Cox C. C. 355.—**DAY and LAWRENCE, JJ., considered.**
Reg. v. Shiel (1900) 82 L. T. 587; 19 Cox C. C. 507.—**C.A. SMITH, WILLIAMS and ROMER, L.JJ.**

Carritt v. Godson, considered.
Dicksee v. Hoskins (1901) 70 L. J. K. B. 851; [1901] 2 K. B. 660; 49 W. R. 693; 65 J. P. 612.—**C.A. SMITH, M.R., WILLIAMS and STIRLING, L.JJ.**

Cubitt v. Porter (1828) 8 B. & C. 257; 2 Mau. & Ry. 267; 6 L. J. (o.s.) K. B. 306.—**K.B., applied.**

Standard Bank of British South America v. Stokes (1878) 47 L. J. Ch. 554; 9 Ch. D. 68; 38 L. T. 672; 26 W. R. 492.—**JESSEL, M.R.**

Cubitt v. Porter, dictum adopted.
Stedman v. Smith (1857) 8 El. & Bl. 1; 26 L. J. Q. B. 314; 3 Jur. (N.S.) 1248.—**Q.B., applied.**

Watson v. Gray (1880) 49 L. J. Ch. 243; 14 Ch. D. 192; 42 L. T. 294; 28 W. R. 438; 44 J. P. 537.—**FRY, J.**

Holland v. Wallen (1894) 70 L. T. 376; 10 R. 583.—**MATHEW and CAVE, JJ.** *See* London Building Act, 1894 (57 & 58 Vict. c. ccciii.), ss. 5 (20), 75.

Cowen v. Phillips (1863) 33 Beav. 18; 9 Jur. (N.S.) 657; 8 L. T. 622; 11 W. R. 706.—**M.R., followed.**

Hunt v. Harris (1865) 19 C. B. (N.S.) 13; 34 L. J. C. P. 249; 11 Jur. (N.S.) 485; 12 L. T. 421; 13 W. R. 742.—**C.P., explained.**
Fillingham v. Wood (1890) 60 L. J. Ch. 232; [1891] 1 Ch. 51; 64 L. T. 46; 39 W. R. 282.—**CHITTY, J.**

Fillingham v. Wood. See London Building Act, 1894 (57 & 58 Vict. c. ccciii.), s. 5 (32).

Thompson v. Hill (1870) 39 L. J. C. P. 264; L. R. 5 C. P. 564; 22 L. T. 820; 18 W. R. 1070.—**C.P. Met by** London Building Act, 1894 (57 & 58 Vict. c. ccciii.), s. 90 (2).

Reg. v. Mead (1897) 66 L. J. Q. B. 874; [1898] 1 Q. B. 110; 77 L. T. 462; 46 W. R. 61; 61 J. P. 759; 18 Cox C. C. 670.—**WRIGHT and KENNEDY, JJ. See** London Building Act, 1898 (61 & 62 Vict. c. cxxxvii.).

North Kent Ry. v. Badger (1858) 27 L. J. M. C. 106; **S. C. nom. Badger, In re**, 8 El. & Bl. 728; 4 Jur. (N.S.) 454; 6 W. R. 246.—**Q.B. Partially met by** London Building Act, 1894 (57 & 58 Vict. c. ccciii.), s. 81.

Brutton v. St. George's (Hanover Square) Vestry (1872) 41 L. J. Ch. 134; L. R. 13 Eq. 339; 25 L. T. 552; 20 W. R. 84.—**MALINS, V.-C., partly dissented from.**

Bermondsey Vestry v. Johnson (1873) 42 L. J. M. C. 67; L. R. 8 C. P. 441; 28 L. T. 665; 21 W. R. 626.

KEATING, J.—I find that although undoubtedly it was brought to the attention of the learned Vice-Chancellor, that he took no notice of the argument as to the want of limitation, but assumed that the section applied. But it is observable, that to a certain extent this opinion is extra-judicial, because, before the learned judge came to that part of his decision, he had in truth already decided the case, because he says: "First of all, therefore, I decide that the summons upon Mr. Rudkin, the builder, was a mere nullity going against the wrong man, because he was no longer the builder engaged in the erection of the building." Therefore he decided that the foundation of the whole proceedings was an absolute nullity, and consequently there was an end to the plaintiff's case on those proceedings. . . . Had we deemed it to be a decision upon the point raised, we should have thought ourselves bound by that decision, as being the decision of a Court of what may be termed co-ordinate jurisdiction with ourselves; but as we think it was rather assumed argumentatively than decided, we do not feel so bound.—p. 68. **HONYMAN, J. agreed.**

Brutton v. St. George's (Hanover Square) Vestry, not followed.

Morant v. Taylor (1876) 45 J. J. M. C. 78; 1 Ex. D. 188; 34 L. T. 139; 24 W. R. 461.—**CLEASBY, B., GROVE and FIELD, JJ.**

Brutton v. St. George's (Hanover Square) Vestry. See

London Building Act, 1894 (57 & 58 Vict. c. ccciii.), s. 152.

Parsons v. Timewell (1879) 44 J. P. 296.—**Q.B.D., followed.**

Smith v. Legg (1893) [1893] 1 Q. B. 398; 5 L. 233; 68 L. T. 347; 41 W. R. 464; 57 J. P. 295.—**COLERIDGE, C.J. and CAVE, J.**

Smith v. Legg, followed.
Wallen v. Lister (1894) 63 L. J. M. C. 51; [1894] 1 Q. B. 312; 10 R. 127; 70 L. T. 348; 42 W. R. 318; 53 J. P. 283.—**HAWKINS and LAWRENCE, JJ.**

Smith v. Legg and Wallen v. Lister. See London Building Act, 1894 (57 & 58 Vict. c. ccciii.), s. 152.

Morant v. Taylor (1876) 45 J. J. M. C. 78; 1 Ex. D. 188; 34 L. T. 139; 24 W. R. 461.—**CLEASBY, B., GROVE and FIELD, JJ., followed.**

Paddington Vestry v. Snow (1881) 45 L. T. 475; 30 W. R. 46; 46 J. P. 87.—**COLERIDGE, C.J. and MANISTY, J.**

Morant v. Taylor. See London Building Act, 1894 (57 & 58 Vict. c. ccciii.), s. 116 (3).

Metropolitan Board of Works v. Anthony (1884) 54 L. J. M. C. 39; 33 W. R. 166; 49 J. P. 229.—**MATHEW and DAY, JJ. Applied, Reay v. Gateshead Corporation** (1886)

55 L. T. 92; 34 W. R. 682; 50 J. P. 805.—DENMAN and HAWKINS, JJ.; *followed*, L. C. C. v. Worley (1894) 63 L. J. M. C. 218; [1894] 2 Q. B. 826; 10 R. 510; 71 L. T. 487; 43 W. R. 11; 18 Cox C. C. 37; 59 J. P. 263; 10 Times L. R. 552.—MATHEW and KENNEDY, JJ.

London County Council v. Worley. *Met by* London Building Act, 1891 (57 & 58 Vict. c. ccciii.), s. 49.

Cooper v. Wandsworth Board of Works (1863) 32 L. J. C. P. 185; 14 C. B. (N.S.) 180; 9 Jur. (N.S.) 1155; 8 L. T. 278; 11 W. R. 646.—C.P.

Distinguished, Cheetham v. Manchester Corporation (1875) 44 L. J. C. P. 139; L. R. 10 C. P. 249, 265; 32 L. T. 28.—C.P.; *discussed*, Smith v. Reg. (1878) 47 L. J. P. C. 51; 3 App. Cas. 614; 38 L. T. 233.—P.C.; *applied*, Masters v. Pontypool Local Board (1878) 47 L. J. Ch. 797; 9 Ch. D. 677.—FRY, J.; *followed*, St. James's, Clerkenwell, Vestry v. Feary (1890) 59 L. J. M. C. 82; 24 Q. B. D. 703; 62 L. T. 697; 54 J. P. 676.—COLERIDGE, C.J. and ESHER, M.R.; *approved*, Hopkins v. Smethwick Local Board (1890) 59 L. J. Q. B. 250; 24 Q. B. D. 712; 62 L. T. 783; 34 W. R. 499; 54 J. P. 693.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Cooper v. Wandsworth Board of Works, *considered*.

Att.-Gen. v. Hooper (1893) 63 L. J. Ch. 18; [1893] 3 Ch. 483; 8 R. 535; 69 L. T. 340; 57 J. P. 564.—STIRLING, J.

Cooper v. Wandsworth Board of Works, *distinguished*.

Robinson v. Sunderland Corporation (1899) 68 L. J. Q. B. 330; [1899] 1 Q. B. 751; 80 L. T. 262; 63 J. P. 341.—LAWRANCE and CHANNELL, JJ.

Whitechapel Board of Works v. Crow (1901) 84 L. T. 595; 65 J. P. 549.—K.B.D., *approved and followed*.

Charing Cross, &c., Electric Supply Corporation v. Woodthorpe (1903) 88 L. T. 772; 1 L. G. R. 551; 67 J. P. 286.—K.B.D.

* Sowers.

Bateman v. Poplar District Board of Works (1886) 56 L. J. Ch. 149; 33 Ch. D. 360; 55 L. T. 374.—C.A. LOPES, L.J. *dis-senting (reversing NORTH, J.)*, *followed*.

Greater London Property Co. v. Foot (1899) 68 L. J. Q. B. 628; [1899] 1 Q. B. 972; 80 L. T. 390; 47 W. R. 541; 63 J. P. 420.—DARLING and CHANNELL, JJ.; Lambert v. Lowestoft Corporation (1901) 70 L. J. K. B. 333; [1901] 1 K. B. 590; 84 L. T. 237; 49 W. R. 316; 65 J. P. 326.—K.B.D.

Kershaw v. Taylor (1895) 64 L. J. M. C. 245; [1895] 2 Q. B. 471; 14 R. 698; 73 L. T. 274; 44 W. R. 28; 59 J. P. 726.—C.A., *applicable*.

Reg. v. St. Matthew, Bethnal Green (1896) 65 L. J. M. C. 215; [1896] 2 Q. B. 319; 75 L. T. 60; 44 W. R. 697; 60 J. P. 582.—C.A. ESHER, M.R. and SMITH, L.J.; *referred to*, Hedley v. Webb (1901) 70 L. J. Ch. 663; [1901] 2 Ch. 126; 84 L. T. 526; 65 J. P. 425.—COZENS-HARDY, J.; *distinguished*, Gorrings v. Shoreditch Borough Council (1902) 86 L. T. 592; 66 J. P.

565.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.; and Heaven's Executors v. Fulham Borough Council (1901) 73 L. J. K. B. 715; [1904] 2 K. B. 383; 91 L. T. 31; 68 J. P. 278; 2 L. G. R. 672; 20 T. L. R. 383.—CHANNELL, J.

Reg. v. St. Matthew, Bethnal Green (1896) 65 L. J. M. C. 215; [1896] 2 Q. B. 319; 75 L. T. 60; 44 W. R. 697; 50 J. P. 582.—C.A., *followed*.

Holland v. Lazarus (1897) 66 L. J. Q. B. 285; 61 J. P. 262.—BRUCE, J.

Holland v. Lazarus (1897) 66 L. J. Q. B. 285; 61 J. P. 262.—BRUCE, J.

Followed, Geen v. Newington Vestry (1898) 67 L. J. Q. B. 557; [1898] 2 Q. B. 1; 46 W. R. 624; 62 J. P. 564.—WILLS and KENNEDY, JJ.; *distinguished*, Gorrings v. Shoreditch Borough Council (1902) 86 L. T. 592; 66 J. P. 565.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.; Silles v. Fulham Borough Council (1903) 72 L. J. K. B. 397; [1903] 1 K. B. 829; 88 L. T. 753; 51 W. R. 598; 67 J. P. 273.—C.A.; Heaven's Executors v. Fulham Borough Council (1904) 73 L. J. K. B. 715; [1904] 2 K. B. 383; 91 L. T. 31; 68 J. P. 278.—CHANNELL, J.

Geen v. Newington Vestry (1898) 67 L. J. Q. B. 557; [1898] 2 Q. B. 1; 46 W. R. 624; 62 J. P. 564.—WILLS and KENNEDY, JJ., *followed*.

Greater London Property Co. v. Foot (1899) 68 L. J. Q. B. 628; [1899] 1 Q. B. 972; 80 L. T. 390; 47 W. R. 541; 63 J. P. 420.—DARLING and CHANNELL, JJ.

Greater London Property Co. v. Foot, *held applicable*.

Gorrings v. Shoreditch Borough Council (1902) 86 L. T. 592; 66 J. P. 565.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Silles v. Fulham Borough Council (1903) 72 L. J. K. B. 397; [1903] 1 K. B. 829; 88 L. T. 753; 51 W. R. 598; 67 J. P. 273; 1 L. G. R. 643.—C.A., *discussed*.

Heaven's Executors v. Fulham Borough Council (1904) 73 L. J. K. B. 715; [1904] 2 K. B. 383; 91 L. T. 31; 68 J. P. 278; 2 L. G. R. 672.—CHANNELL, J.

St. Martin's Vestry v. Bird (1894) 64 L. J. Q. B. 230; [1895] 1 Q. B. 428; 14 R. 146; 71 L. T. 868; 43 W. R. 194; 60 J. P. 52.—C.A., *distinguished*.

Pilbrow v. St. Leonard, Shoreditch, Vestry (1895) 64 L. J. M. C. 130; [1895] 1 Q. B. 433; 14 R. 181; 72 L. T. 135; 43 W. R. 342; 59 J. P. 68.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

St. Martin's Vestry v. Bird, *applied*.

Reg. v. St. Matthew, Bethnal Green (1896) 65 L. J. M. C. 215; [1896] 2 Q. B. 319; 75 L. T. 60; 44 W. R. 697; 60 J. P. 582.—C.A. ESHER, M.R. and SMITH, L.J.

Reg. v. St. Luke's, Chelsea (1862) 1 B. & S. 903; 31 L. J. Q. B. 50; 8 Jur. (N.S.) 308; 5 L. T. 744; 10 W. R. 293.—Q.B., *relied upon*.

Reg. v. St. George's, Hanover Square (1895) 64 L. J. Q. B. 715; [1895] 2 Q. B. 275; 15 R. 504; 73 L. T. 62; 44 W. R. 16; 59 J. P. 535.—WRIGHT and KENNEDY, JJ.

North London Ry. v. Metropolitan Board of Works (1859) 28 L. J. Ch. 909; Johns. 405; 5 Jur. (N.S.) 1121; 7 W. R. 640.—WOOD, V.-C., *explained and not applied*.
Macey v. Metropolitan Board of Works (1864) 33 L. J. Ch. 377; 10 Jur. (N.S.) 333; 10 L. T. 66; 12 W. R. 691.—WOOD, V.-C.

North London Ry. v. Metropolitan Board of Works and Pettward v. Metropolitan Board of Works (1865) 34 L. J. C. P. 301; 12 C. B. (N.S.) 489; 11 Jur. (N.S.) 932; 12 L. T. 764.—C.P., *explained*.
Metropolitan Board of Works v. Metropolitan Ry. (1869) 38 L. J. C. P. 172; L. R. 4 C. P. 192; 19 L. T. 744; 17 W. R. 416.—EX. CH.

North London Ry. v. Metropolitan Board of Works.
Explained and not applied, Dudley Corporation, in re (1881) 51 L. J. Q. B. 121; 8 Q. B. D. 86; 45 L. T. 733; 46 J. P. 340.—C.A.; *applied*, Lewis v. Weston-super-Mare Local Board (1888) 58 L. J. Ch. 39; 40 Ch. D. 55; 59 L. T. 769; 37 W. R. 121.—STIRLING, J.

Metropolitan Board of Works v. Metropolitan Ry. (1868) 37 L. J. C. P. 281; L. R. 3 C. P. 612; 19 L. T. 10; 16 W. R. 1117.—C.P.; *affirmed* in EX. CH. (*infra*), *approved*.

Thames Conservators v. Victoria Station and Pimlico Ry. (1868) 38 L. J. C. P. 4; L. R. 4 C. P. 59; 19 L. T. 734.—C.P.

Metropolitan Board of Works v. Metropolitan Ry. (1869) 38 L. J. C. P. 172; L. R. 4 C. P. 192; 19 L. T. 744; 17 W. R. 416.—EX. CH., *distinguished*.
L. & N.W. Ry. v. Evans (1892) 62 L. J. Ch. 1; [1893] 1 Ch. 16; 2 R. 120; 67 L. T. 630; 41 W. R. 149.—C.A. LINDLEY, BOWEN and SMITH, L.JJ.

Thames Conservators v. Victoria Station and Pimlico Ry. (1868) 38 L. J. C. P. 4; L. R. 4 C. P. 59; 19 L. T. 734.—C.P., *referred to*.

Thames Conservators v. Port of London Sanitary Authority (1893) 63 L. J. M. C. 121; [1894] 1 Q. B. 647; 69 L. T. 803; 58 J. P. 335.—COLERIDGE, C.J. and MATHEW, J.

Cator v. Lewisham Board of Works, 10 L. T. 235; 12 W. R. 576.—Q.B.; *reversed*, (1864) 5 B. & S. 115; 34 L. J. Q. B. 74; 11 Jur. (N.S.) 340; 13 L. T. 212; 13 W. R. 254.—EX. CH.

Metropolitan Board of Works v. L. & N.W. Ry. (1880) 49 L. J. Ch. 355; 14 Ch. D. 521; 42 L. T. 830.—HALL, V.-C.; *affirmed*, (1881) 50 L. J. Ch. 409; 17 Ch. D. 246; 44 L. T. 270; 29 W. R. 693.—C.A. JAMES, COTTON and LUSH, L.JJ.

Metropolitan Board of Works v. L. & N.W. Ry. (1881) 50 L. J. Ch. 409; 17 Ch. D. 246; 44 L. T. 270; 29 W. R. 693.—C.A., *extended*.

Att.-Gen. v. Acton Local Board (1882) 52 L. J. Ch. 108; 22 Ch. D. 221; 47 L. T. 510; 31 W. R. 153.—FRY, J.

Held.—That the *ratio decidendi* of the above case applies to a local board just as it does to an ordinary landowner.

Metropolitan Board of Works v. L. & N.W. Ry., *approved on one point*.

St. Mary, Islington, Vestry v. Hornsey Urban Council (1900) 69 L. J. Ch. 324; [1900] 1 Ch. 695; 82 L. T. 530; 48 W. R. 401.—C.A. LINDLEY, M.R., RIGBY and WILLIAMS, L.JJ.; *reversing* 80 L. T. 746; 63 J. P. 488.—KEKEWICH, J.

Meek v. Whitechapel Board of Works (1860) 2 F. & F. 144.—WILDE, B., *considered*.

Hammond v. St. Pancras Vestry (1874) 43 L. J. C. P. 157; L. R. 9 C. P. 316; 30 L. T. 296; 22 W. R. 826.—C.P.

Hammond v. St. Pancras Vestry.

Distinguished, **Humphries v. Cousins** (1877) 46 L. J. C. P. 438; 2 C. P. D. 239; 36 L. T. 180; 25 W. R. 371.—C.P.D.; *followed*, **Fleming v. Manchester Corporation** (1881) 44 L. T. 517; 45 J. P. 423.—Q.B.D. (*reversed* C.A.); and **Bateman v. Poplar Board of Works** (1887) 57 L. J. Ch. 579; 37 Ch. D. 272; 58 L. T. 720; 36 W. R. 501.—NORTH, J.

Crinals.

Vernon v. St. James's, Westminster, Vestry

(1880) 50 L. J. Ch. 81; 16 Ch. D. 449; 44 L. T. 229; 29 W. R. 222.—C.A., *applied*.
Sellors v. Matlock Local Board (1885) 14 Q. B. D. 928; 52 L. T. 762.—DENMAN, J.; **Pethick v. Plymouth Corporation** (1893) 8 L. 107; 70 L. T. 304; 42 W. R. 246; 58 J. P. 476.—CHITTY, J.

Prices.

Tinkler v. Wandsworth Board of Works

(1858) 2 De G. & J. 261; 27 L. J. Ch. 342; 4 Jur. (N.S.) 293; 6 W. R. 390.—L.JJ.
Applied, **Ashworth v. Hebden Bridge Local Board** (1877) 47 L. J. Ch. 195; 37 L. T. 496.—MALINS, V.-C.; *not applied*, **St. James, Clerkenwell v. Feary** (1890) 59 L. J. M. C. 82; 24 Q. B. D. 703; 62 L. T. 697; 54 J. P. 676.—Q.B.D.; *followed*, **Wood v. Widnes Corporation** (1897) 66 L. J. Q. B. 797; [1897] 2 Q. B. 357; 77 L. T. 306; 46 W. R. 30; 61 J. P. 646.—LAWRANCE and RIDLEY, JJ.; *considered*, **Nicholl v. Epping Urban Council** (1899) 68 L. J. Ch. 393; [1899] 1 Ch. 844; 80 L. T. 515; 47 W. R. 457; 63 J. P. 600.—STIRLING, J.

St. Luke's, Middlesex, Vestry v. Lewis

(1862) 31 L. J. M. C. 73; 1 B. & S. 865; 8 Jur. (N.S.) 432; 5 L. T. 608; 10 W. R. 249.—Q.B., *applied*.
Nicholl v. Epping Urban Council (1899) 68 L. J. Ch. 393; [1899] 1 Ch. 844; 80 L. T. 515; 47 W. R. 457; 63 J. P. 600.—STIRLING, J.

St. James's, Clerkenwell, Vestry v. Feary

(1890) 59 L. J. M. C. 82; 24 Q. B. D. 703; 62 L. T. 697; 54 J. P. 676.—COLERIDGE, C.J. and ESHER, M.R., *considered*.
Att.-Gen. v. Hooper (1893) 63 L. J. Ch. 18; [1893] 3 Ch. 483; 69 L. T. 340; 57 J. P. 564.—STIRLING, J.

Fulham Vestry v. Solomon (1896) 65 L. J.

M. C. 33; [1896] 1 Q. B. 198; 60 J. P. 72.—Q.B.D., *distinguished*.
Southwold Corporation v. Crowdy (1903) 67 J. P. 278; 1 L. G. R. 899.—K.B.D.

Other Matters.

Gay v. Cadby (1877) 46 L. J. M. C. 260; 2 C. P. D. 391; 36 L. T. 410.—GROVE and LINDLEY, JJ., *doubted*.

St. Martin's Vestry v. Gordon (1890) 60 L. J. M. C. 37; [1891] 1 Q. B. 61; 64 L. T. 243; 39 W. R. 295; 55 J. P. 437.—C.A. **ESHER, M.R., LINDLEY and LOPES, L.JJ.**

ESHER, M.R.—As to the case of *Gay v. Cadby*, having considered it, and having tried to understand the judgments of my brother Lindley and Mr. Justice Grove, I can only say that I cannot agree with it.—p. 40.

LINDLEY, L.J.—I do not, however, think that *Gay v. Cadby* compels the Court to say that the clinkers [which were from hotel furnaces] here must be trade refuse within sect. 128 [of the Metropolis Management Act, 1855]. The furnaces here are principally used for the same domestic purposes as ordinary grates and stoves, and are not used as in *Gay v. Cadby*, exclusively for wholly different purposes. I am not prepared to define trade refuse, but I can see that in many trades and manufactures clinkers might come under that description. I think *Gay v. Cadby* was right, but I also think that these clinkers may, consistently with that decision, be regarded as falling within that kind of stuff which the scavengers must remove without extra payment.—p. 41.

Barker, In re, Gorely, Ex parte (1864) 31 L. J. Bk. 1; 4 De. & J. & S. 477; 10 Jur. (N.S.) 1085; 11 L. T. 319; 13 W. R. 60.—**WESTBURY, L.C., referred to.**

Westminster Fire Office v. Glasgow Provident Investment Society (1888) 13 App. Cas. 699; 59 L. T. 641.—**H.L. (SC.).**

Millard v. Wastall (1898) 67 L. J. Q. B. 277; [1898] 1 Q. B. 342; 77 L. T. 692; 46 W. R. 258; 62 J. P. 135; 18 Cox C. C. 695.—**Q.B.D., confirmed.**

Central London Ry. v. Hammersmith Bridge Co. (1904) 73 L. J. K. B. 623; 90 L. T. 645; 68 J. P. 217; 2 L. G. R. 446.—**K.B.D.**

Central London Ry. v. Hammersmith Bridge Co., followed.

Tough v. Hopkins (1904) 73 L. J. K. B. 628; [1904] 1 K. B. 804; 90 L. T. 672; 52 W. R. 605; 68 J. P. 274.—**K.B.D.**

Reg. v. Mead, Gates, Ex parte (1895) 64 L. J. M. C. 169; 59 J. P. 150.—**WILLES and LAWRENCE, JJ., approved.**

Reg. v. Slade, Robinson, Ex parte (1896) 65 L. J. M. C. 108; 74 L. T. 656; 18 Cox C. C. 316; 60 J. P. 358.—**RUSSELL, C.J. and WRIGHT, J.**

3. RATES.

Vaughan v. Imray (1859) 1 El. & El. 633; 28 L. J. M. C. 78; 5 Jur. (N.S.) 980; 7 W. R. 240.—**Q.B., adopted.**

Reg. v. Stretfield (1863) 32 L. J. M. C. 236; 11 W. R. 736.—**BAIL COURT.**

Howell v. London Dock Co. (1858) 8 El. & Bl. 212; 27 L. J. M. C. 177; 4 Jur. (N.S.) 205; 5 W. R. 753.—**Q.B., commented on.**

Reg. v. G. W. Ry. (1858) E. B. & E. 600; 28 L. J. M. C. 59; 5 Jur. (N.S.) 386; 6 W. R. 771.—**Q.B.**

ERLE, J.—We regret that we answered the

questions submitted to us in that case, as it is so often quoted as a decision. It was an anomalous case; and we gave our opinion, at the request of the parties, rather than deny our jurisdiction; but we gave it merely as between those parties, and said expressly at the time that we did not mean to lay down the general law.—p. 613, n.

Howell v. London Dock Co., referred to.

Dryden v. Putney Overseers (1876) 1 Ex. D. 223; 34 L. T. 69.—**EX. D.**

Howell v. London Dock Co., commented on.

Reg. v. L. B. & S. C. Ry. (1879) 49 L. J. M. C. 32; 5 Q. B. D. 89; 41 L. T. 577; 28 W. R. 288.—**C.A.**

BRETT, L.J.—With regard to the case of *Howell v. London Dock Co.*, I incline to agree with what was said by Erle, J., in *Reg. v. Great Western Ry.* (*supra*), and I think that it cannot be cited as an authority of general application. There the Court was asked to deal with facts. A Court generally refuses to do so in such a case, but there it consented to do so.—p. 34.

Reg. v. G. W. Ry. (1858).—**Q.B. (supra), dictum adopted.**

Reg. v. L. B. & S. C. Ry. (1879) 49 L. J. M. C. 32; 5 Q. B. D. 89; 41 L. T. 577; 28 W. R. 288.—**C.A.**

Sion College v. London Corporation (1901)

70 L. J. K. B. 369; [1901] 1 K. B. 617; 84 L. T. 133; 49 W. R. 361; 65 J. P. 324.—**C.A., distinguished.**

Netherlands Steamboat Co. v. London Corporation (1904) 2 L. G. R. 840; 68 J. P. 377.—**C.A.**

Whitchurch v. Fulham Board of Works (1866) 35 L. J. M. C. 145; 1 L. R. 1 Q. B. 233; 13 L. T. 631; 14 W. R. 277.—**Q.B., applied.**

Reg. v. Hutchings (1881) 50 L. J. M. C. 35; 6 Q. B. D. 300; 44 L. T. 364; 29 W. R. 724; 45 J. P. 504.—**C.A.; Paddington Vestry v. North Metropolitan Railway and Canal Co.** (1893) 63 L. J. Q. B. 316; [1894] 1 Q. B. 633; 10 L. 41; 42 W. R. 223; 58 J. P. 413.—**WILLES and WRIGHT, JJ.**

Metropolitan Board of Works v. Vauxhall Bridge Co. (1857) 7 El. & Bl. 964; 26 L. J. Q. B. 253; 3 Jur. (N.S.) 1216.—**Q.B., followed.**

Reg. v. Head (1863) 3 B. & S. 429; 32 L. J. M. C. 115; 9 Jur. (N.S.) 871; 7 L. T. 708; 11 W. R. 339.—**Q.B.**

Metropolitan Board of Works v. Vauxhall Bridge Co., dicta not adopted.

Pew v. M. B. W. (1865) 6 B. & S. 235; 34 L. J. M. C. 97; 11 Jur. (N.S.) 346; 12 L. T. 140; 13 W. R. 580.—**Q.B.**

Metropolitan Board of Works v. Vauxhall Bridge Co., discussed.

Dorling v. Epsom Local Board (1855) 24 L. J. M. C. 152; 5 E. & B. 471.—**Q.B., held applicable.**

Hammersmith Bridge Co. v. Hammersmith Overseers (1871) 1 L. R. 6 Q. B. 230; 40 L. J. M. C. 79; 24 L. T. 267; 19 W. R. 750.—**Q.B.**

HANNEN and BLACKBURN, JJ.—In *Metropolitan Board of Works v. Vauxhall Bridge*, Lord Campbell intimated, for the guidance of

the parties, an extra-judicial opinion of the Court (though, as he says, aware that it was not binding), that the commissioners, in making the rate, "ought not to have considered merely the value of the property of the company as in making a poor-rate, but should have been guided by the benefit which they considered that the property derived from the sewers." . . . We are not to be understood as affirming the principle laid down in the *Vauxhall Bridge Case* . . . or as determining that the principle of *Darling v. Epsom Board* is not applicable to a district within the metropolis; but we do not think it necessary in this case to decide the general question.—p. 239.

Metropolitan Board of Works v. Vauxhall Bridge Co., commented on.

Knight v. Langport Drainage Board (1898) 67 L. J. Q. B. 432; [1898] 1 Q. B. 588; 78 L. T. 260; 46 W. R. 392; 62 J. P. 245.—WRIGHT and DARLING, JJ.

WRIGHT, J.—I can see no one clear and satisfactory authority in favour of the contention. The only one seemingly in its favour is the *Vauxhall Bridge Case*, to the effect that the benefit the property derived from the sewers rate should be taken into account in making the rate; but that was only the extra-judicial opinion expressed by the eminent lawyers who decided it—an opinion which, after all, did not carry the case so far as has been suggested in this case. It seems to me that whatever was said in that case was said with reference to a special Act (11 & 12 Vict. c. 112); and the decision, besides containing an extra-judicial opinion, was founded on the somewhat ambiguous words of sect. 76 of that Act, which provided for "reduction or allowances in respect of sewers rate." The observations of the judges in *Pew v. Metropolitan Board of Works*, decided in 1865, suggest the view that the extra-judicial expression of opinion by the judges in the *Vauxhall Bridge Case* did not express the law. One of the same judges (Blackburn, J.), who in 1865 intimated his doubt as to the *Vauxhall Bridge Case*, laid down the law—*whiter, it is true*—in *Griffiths v. Longdon and Eversfield Drainage Board*, that the true rule is that only those who derive benefit within the district in which the works are executed are to be rated, and rated to an equal rate. I therefore come to the conclusion on the authorities, particularly with regard to *Reg. v. Head*, that the rate must be an equal rate upon all property in the district benefited by the works of improvement.—p. 434.

Reg. v. East and West India Dock Co. (or Poplar Union), 53 L. J. M. C. 20; 11 Q. B. D. 721; 49 L. T. 363; 32 W. R. 321.—(GROVE and MANISTY, JJ.; *reversed*, (1884) 53 L. J. M. C. 97; 13 Q. B. D. 364; 51 L. T. 97; 48 J. P. 564.—C.A. BRETT, M.R. and BOWEN, L.J.; FRY, L.J. *dissenting in part*.)

Reg. v. New River Co. (1879) 48 L. J. M. C. 123; 4 Q. B. D. 309; 40 L. T. 322; 27 W. R. 785.—COCKBURN, C.J. and MELLOR, J., *adapted*.

Reg. v. East and West India Dock Co. (or Poplar Union) (*supra*, in C.A.), *applied*.

Reg. v. St. Mary, Islington (1887) 56 L. J. Q. B. 597; 19 Q. B. D. 529; 57 L. T. 270; 35 W. R. 664; 51 J. P. 789.—COLERIDGE, C.J. and DAY, J.

Reg. v. General Assessment Sessions (1886)

17 Q. B. D. 394; 35 W. R. 12; 50 J. P. 724.—MATHEW and SMITH, JJ., *applied*.
Reg. v. Edlin (1891) 65 L. T. 83; 55 J. P. 790.—SMITH and CHARLES, JJ.

4. EXPENSES.

Marylebone Vestry v. Viret (1865) 31 L. J.

M. C. 214; 19 Q. B. (N.S.) 424; 11 Jur. (N.S.) 907; 12 L. T. 673; 13 W. R. 1064.—C.P., *followed*.

St. Martin's Vestry v. Ward (1896) 66 L. J. Q. B. 97; [1897] 1 Q. B. 40; 75 L. T. 319; 45 W. R. 81; 61 J. P. 19.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

Reg. v. Hackney Board of Works (1873) 42

L. J. M. C. 151; L. R. 8 Q. B. 528.—Q.B., *adapted*.

White v. Fulham Vestry (1896) 74 L. T. 425; 60 J. P. 327.—HAWKINS and WILLIAMS, JJ.

St. Giles, Camberwell v. Hunt (1887) 56 L. J.

M. C. 65; 52 J. P. 132.—POLLOCK, B. and MATHEW, J., *distinguished*.

Wilson v. St. Giles, Camberwell (1891) 61 L. J. M. C. 3; [1892] 1 Q. B. 1; 65 L. T. 790; 40 W. R. 41; 56 J. P. 167.—CAVE and CHARLES, JJ.

St. Giles, Camberwell v. Hunt, adapted.

White v. Fulham Vestry (1896) 74 L. T. 425; 60 J. P. 327.—HAWKINS and WILLIAMS, JJ.

Dryden v. Putney Overseers (1876) 1 Ex. D.

223; 34 L. T. 69.—EX. D., *followed*.

Att.-Gen. v. Wandsworth District Board of Works (1877) 46 L. J. Ch. 771; 6 Ch. D. 539.—M.R.

L. & N. W. Ry. v. St. Pancras Vestry (1868)

17 L. T. 654.—C.P.; and **Higgins v. Harding** (1872) 42 L. J. M. C. 31; L. R. 8 Q. B. 7; 27 L. T. 483; 21 W. R. 191.—Q.B., *approved and distinguished*.

L. B. & S. C. Ry. v. **St. Giles, Camberwell Vestry** (1879) 48 L. J. M. C. 184; 4 Ex. D. 239; 41 L. T. 162.—EX. D.

L. & N. W. Ry. v. St. Pancras Vestry;

Higgins v. Harding; and **L. B. & S. C. Ry. v. St. Giles, Camberwell Vestry**, *approved and distinguished*.

G. E. Ry. v. Hackney Board of Works (1883) 52 L. J. M. C. 105; 8 App. Cas. 687; 49 L. T. 509; 31 W. R. 769.—H.L. (E.).

L. & N. W. Ry. v. St. Pancras Vestry, *followed*.

Williams v. Wandsworth Board of Works (1884) 53 L. J. M. C. 187; 13 Q. B. D. 211; 32 W. R. 908; 48 J. P. 439.—HAWKINS and SMITH, JJ.

Northbrook (Lord) v. Plumstead Board of Works (1871) 41 L. J. M. C. 51; L. R. 7

Q. B. 183; 25 L. T. 461; 20 W. R. 177.—Q.B., *distinguished*.

Plumstead Board of Works v. British Land Co. (1875) 44 L. J. Q. B. 38; L. R. 10 Q. B. 293; 32 L. T. 94; 23 W. R. 634.—EX. CH.; *reversing on one point* L. R. 10 Q. B. 16; 31 L. T. 752; 23 W. R. 133.—Q.B.

COLERIDGE, C.J.—The cases do not seem to me to embarrass us. The only case which might

at first be thought to do so is *Northbrook v. Plumstead Board of Works*, in which the circumstances were very different, but expressions fell from the Court which are, perhaps, capable of being pressed to the length Mr. Barrow pressed them, but which the case itself does not warrant. There Lord Northbrook had preserved the property in a private road. There had been no dedication to the public which would be past recall, and on that ground (from which I am not prepared to differ) the Court held Lord Northbrook liable to contribute.—p. 44.

Northbrook (Lord) v. Plumstead Board of Works, adapted.

(*G. E. Ry. v. Hackney Board of Works* (1883) 52 L. J. M. C. 105; 8 App. Cas. 687; 49 L. T. 509; 31 W. R. 769.—H. L. (E.).

Hackney Board of Works v. G. E. Ry. (1882) 51 L. J. M. C. 57; 9 Q. B. D. 412; 46 L. T. 679; 30 W. R. 765.—C.A. BAGGALLAY, BRETT and HOLKER, L.JJ.; *reversed, nom. G. E. Ry. v. Hackney Board of Works* (1883) 52 L. J. M. C. 105; 8 App. Cas. 687; 49 L. T. 509; 31 W. R. 769.—H. L. (E.).

G. E. Ry. v. Hackney Board of Works, distinguished.

Williams v. Wandsworth Board of Works (1884) 53 L. J. M. C. 187; 13 Q. B. D. 211; 32 W. R. 908; 48 J. P. 439.—HAWKINS and SMITH, JJ.

G. E. Ry. v. Hackney Board of Works, inapplicable.

Wright v. Ingle (1885) 55 L. J. M. C. 17; 16 Q. B. D. 379; 54 L. T. 511; 34 W. R. 220.—C.A. See extract, col. 1789.

G. E. Ry. v. Hackney Board of Works, considered.

Hornsey District Council v. Smith (1897) 66 L. J. Ch. 476; [1897] 1 Ch. 843; 76 L. T. 431; 45 W. R. 581.—C.A. LINDLEY, SMITH and RIGBY, L.JJ.

G. E. Ry. v. Hackney Board of Works, applied.

Fulham Vestry v. Minter (1901) 70 L. J. K. B. 348; [1901] 1 Q. B. 501; 84 L. T. 49; 49 W. R. 415; 65 J. P. 180.—BRUCE and PHILLIMORE, JJ.

G. E. Ry. v. Hackney Board of Works, dictum considered.

Hackney Borough Council v. Lee Conservancy Board (1904) 73 L. J. K. B. 766; [1904] 2 K. B. 541; 91 L. T. 13; 68 J. P. 485; 2 L. G. R. 1144; 20 T. L. R. 646.—C.A.

Baddeley v. Gingell (1847) 1 Ex. 319; 17 L. J. Ex. 63.—EX., *followed*.

London School Board v. St. Mary, Islington (1875) 1 Q. B. D. 64; 45 L. J. M. C. 1; 33 L. T. 504; 24 W. R. 137.—Q.B.D.

Baddeley v. Gingell and London School Board v. St. Mary, Islington, considered.

Wakefield Local Board v. Lee (1876) 1 Ex. D. 336; 35 L. T. 481.—EX. D.

Baddeley v. Gingell and London School Board v. St. Mary, Islington, distinguished.

Lightbound v. Higher Bebbington Local Board (1885) 55 L. J. M. C. 94; 16 Q. B. D. 577; 53 L. T. 812; 34 W. R. 219; 50 J. P. 500.—C.A. ESHER, M.R., COTTON and BOWEN, L.JJ.

London School Board v. St. Mary, Islington, referred to.

Stotesbury v. St. Giles, Camberwell, Vestry (1888) 57 L. J. M. C. 114; 59 L. T. 473; 53 J. P. 5.—WILLS and GRANTHAM, JJ.

Holland (Lady) v. Kensington Vestry (1867) 36 L. J. M. C. 105; L. R. 2 C. P. 565; 17 L. T. 73; 15 W. R. 104.—C.P., *followed*.

Driscoll v. Battersea Borough Council (1903) 72 L. J. K. B. 564; [1903] 1 K. B. 881; 88 L. T. 795; 67 J. P. 264; 1 L. G. R. 511.—K.B.D.

Angell v. Paddington Vestry (1868) 37 L. J. M. C. 171; L. R. 3 Q. B. 714; 9 B. & S. 496; 16 W. R. 1167.—Q.B., *distinguished*.

Bowditch v. Wakefield Local Board (1871) 40 L. J. M. C. 214; L. R. 6 Q. B. 567; 25 L. T. 88.—Q.B.

Angell v. Paddington Vestry, inapplicable.

Folkstone Corporation v. Woodward (1872) 42 L. J. Ch. 782; L. R. 15 Eq. 159; 27 L. T. 574; 21 W. R. 97.—MALINS, V.-C.

Angell v. Paddington Vestry, approved.

Plumstead Board of Works v. British Land Co. (1875) 44 L. J. Q. B. 38; L. R. 10 Q. B. 203; 32 L. T. 94; 23 W. R. 634.—EX. CH.

Angell v. Paddington Vestry, distinguished.

Caiger v. St. Mary, Islington, Vestry (1881) 50 L. J. M. C. 59; 44 L. T. 605; 29 W. R. 538; 45 J. P. 570.—GROVE and LINDLEY, JJ.

Angell v. Paddington Vestry, adopted.

G. E. Ry. v. Hackney Board of Works (1883) 52 L. J. M. C. 105; 8 App. Cas. 687; 49 L. T. 509; 31 W. R. 769.—H. L. (E.). LORDS WATSON, BLACKBURN and FITZGERALD.

Angell v. Paddington Vestry and Caiger v. St. Mary, Islington (1881) 50 L. J. M. C. 59; 44 L. T. 605; 29 W. R. 538;

45 J. P. 570.—GROVE and LINDLEY, JJ., *commented on*.
Wright v. Ingle (1885) 16 Q. B. D. 379; 55 L. J. M. C. 17; 54 L. T. 511; 34 W. R. 220; 50 J. P. 436.—C.A. ESHER, M.R., COTTON and BOWEN, L.JJ.

ESHER, M.R.—Therefore the question is whether, under such circumstances, this chapel is brought into the same category as a church or a building which is dealt with by Act of Parliament, and it seems to me that it certainly is not. That makes the whole difference, and this appears to have been the view of Lord Mansfield in *Robson v. Hyde*. He said (p. 314): "It is said, indeed, that he is restrained from doing this by covenant, but the restriction by covenant does not vary the nature of the property." The common law of England has varied the nature of the property in the case of buildings which are by statute put into the same position as a church as to the possibility of letting them. These covenants are no more than agreements between the parties for breach of which some remedy will be given at law. They do not vary the nature of the property, because they may at any moment be put an end to by the consent of the parties interested. I agree with the decision of Lord Mansfield, and, therefore, I hold that this chapel is within the subject-matter dealt with by these Acts, and that the trustees are such owners as are liable to contribute to these expenses. In my opinion, therefore, the decision

of the Divisional Court is right, and must be affirmed. In coming to this conclusion I think we shall not be overruling any previous decision. We do not overrule *Angell v. Vestry of Paddington*; that decision remains untouched, and so, I think, does *Bowditch v. Wakefield Board of Health*. *Great Eastern Railway Co. v. Hackney Board of Works*, whatever may be the meaning of the judgment of the House of Lords, which I do not at present fully comprehend, cannot have anything to do with the present case. If we had decided otherwise we should have been overruling *Caiger v. Vestry of St. Mary, Islington*. We do not interfere in any way with *Plumstead Board of Works v. British Land Co.* We do not overrule any previous decision, but we give a wider interpretation to the word "house" than has been suggested by several learned judges, certainly by Lord Coleridge.—p. 394.

Angell v. Paddington Vestry, distinguished.
St. Mary, Islington, Vestry v. Cobbett (1894) 64 L. J. M. C. 26; [1895] 1 Q. B. 369; 15 R. 83; 71 L. T. 573; 43 W. R. 44.—MATHEW and CHARLES, JJ.

Angell v. Paddington Vestry, considered.
Hornsey Urban Council v. Smith (1897) 66 L. J. Ch. 476; [1897] 1 Ch. 843; 76 L. T. 431; 45 W. R. 581.—C.A. LINDLEY, SMITH and RIGBY, L.JJ.

Plumstead Board of Works v. Ingoldby (1872)
42 L. J. Ex. 50; L. R. 8 Ex. 63; 27 L. T. 656; 21 W. R. 77.—EX.; *affirmed, nom.* **Ingoldby v. Plumstead Board of Works (1873)** 42 L. J. Ex. 136; L. R. 8 Ex. 174; 29 L. T. 375; 21 W. R. 817.—EX. CH.

Plumstead Board of Works v. British Land Co. (1875) 44 L. J. Q. B. 38; L. R. 10 Q. B. 203; 32 L. T. 94; 23 W. R. 634.—EX. CH., *distinguished*.

Caiger v. St. Mary, Islington, Vestry (1881) 50 L. J. M. C. 59; 44 L. T. 605; 29 W. R. 538; 45 J. P. 570.—GROVE and LINDLEY, JJ.

Plumstead Board of Works v. British Land Co., adopted.

G. E. Ry. v. Hackney Board of Works (1883) 52 L. J. M. C. 105; 8 App. Cas. 687; 49 L. T. 509; 31 W. R. 769.—H.L. (E.). LORDS WATSON, BLACKBURN and FITZGERALD.

Plumstead Board of Works v. British Land Co., referred to.

Wright v. Ingle (1885) 55 L. J. M. C. 17; 16 Q. B. D. 379; 54 L. T. 511; 34 W. R. 220.—C.A. ESHER, M.R., COTTON and BOWEN, L.JJ. See extract, *supra*.

Plumstead Board of Works v. British Land Co., applied.

St. John's, Hampstead v. Cotton (1885) 16 Q. B. D. 475; 55 L. J. Q. B. 213; 54 L. T. 441; 34 W. R. 244.—C.A. ESHER, M.R., COTTON and BOWEN, L.JJ.; *affirmed* in H.L., *infra*, cols. 1792-3.

[In the Divisional Court, Pollock, B. and Manisty, J. held that *Plumstead Board of Works v. British Land Co.* applied to the case of making a sewer as well as paving a road; and on this point their judgment was not impugned by the Court of Appeal or House of Lords.]

Plumstead Board of Works v. British Land Co., adopted.

Thames Conservators v. Port of London

Sanitary Authority (1893) 63 L. J. M. C. 121; [1894] 1 Q. B. 647; 69 L. T. 803; 58 J. P. 335.—COLERIDGE, C.J., MATHEW and COLLINS, JJ.

Plumstead Board of Works v. British Land Co., considered.

Hornsey Urban Council v. Smith (1897) 66 L. J. Ch. 476; [1897] 1 Ch. 843; 76 L. T. 431; 45 W. R. 581.—C.A. LINDLEY, SMITH and RIGBY, L.JJ.; *reversing* 61 J. P. 311.

Plumstead Board of Works v. British Land Co., observations adopted.

Mappin v. Liberty (1902) 72 L. J. Ch. 63; [1903] 1 Ch. 118; 87 L. T. 523.—JOYCE, J.

Wright v. Ingle (1885) 55 L. J. M. C. 17; 16 Q. B. D. 379; 54 L. T. 511; 34 W. R. 220; 50 J. P. 436.—C.A., *distinguished*.

St. Giles, Camberwell, Vestry v. London Cemetery Co. (1894) 63 L. J. M. C. 74; [1894] 1 Q. B. 699; 70 L. T. 734; 42 W. R. 446; 58 J. P. 382.—MATHEW and COLLINS, JJ.

Wright v. Ingle, inapplicable.

Christchurch Inclosure Act, in re Meyrick v. Att.-Gen. (1894) 63 L. J. Ch. 657; [1894] 3 Ch. 209; 8 R. 480; 71 L. T. 122; 42 W. R. 611; 58 J. P. 556.—STIRLING, J.

Wright v. Ingle, distinguished.

St. Mary, Islington, Vestry v. Cobbett (1894) 64 L. J. M. C. 36; [1895] 1 Q. B. 369; 15 R. 83; 71 L. T. 573; 43 W. R. 44.—MATHEW and CHARLES, JJ.

Wright v. Ingle, considered.

Hornsey Urban Council v. Smith (1897) 66 L. J. Ch. 476; [1897] 1 Ch. 843; 76 L. T. 431; 45 W. R. 581.—C.A. LINDLEY, SMITH and RIGBY, L.JJ.

Wright v. Ingle and St. Giles, Camberwell, Vestry v. London Cemetery Co. (1894) 63 L. J. M. C. 74; [1894] 1 Q. B. 699; 70 L. T. 734; 42 W. R. 446; 58 J. P. 382.—MATHEW and COLLINS, JJ., *applied*.

Fulham Vestry v. Minter (1901) 70 L. J. K. B. 348; [1901] 1 K. B. 501; 84 L. T. 49; 49 W. R. 415; 65 J. P. 180.—BRUCE and PHILLIMORE, JJ.

Fulham Vestry v. Minter, overruled.

L. C. C. v. Wandsworth Borough Council (1903) 72 L. J. K. B. 399; [1903] 1 K. B. 797; 88 L. T. 783; 51 W. R. 499; 67 J. P. 215.—C.A.

Gebhardt v. Saunders (1892) [1892] 2 Q. B. 452; 67 L. T. 684; 40 W. R. 571; 56 J. P. 741.—DAY and CHARLES, JJ., *not applied*.

Thompson and Norris Manufacturing Co. v. Hawes (1895) 73 L. T. 369; 59 J. P. 589.—C.A. LINDLEY, LOPES and RIGBY, L.JJ.; *reversing* LAWRENCE, J.

Gebhardt v. Saunders, followed.

Andrew v. St. Olave's Board of Works (1898) 67 L. J. Q. B. 592; [1898] 1 Q. B. 775; 78 L. T. 504; 46 W. R. 424; 62 J. P. 328.—RUSSELL, C.J. and MATHEW, J.

Gebhardt v. Saunders and Andrew v. St. Olave's Board of Works, explained and followed.

North v. Walthamstow Urban Council (1898) 67 L. J. Q. B. 972; 62 J. P. 836.—CHANNELL, J. CHANNELL, J.—I think that notwithstanding

the difference between the two cases, *Andrew v. St. Olave's B. W.* really proceeds upon a principle which is applicable to the present case. . . . I am satisfied from what counsel for the present defendants, who was in the case, tells me, that *Self v. Hove Commissioners* (ante, col. 1630, seq.) was before the Court when *Andrew's Case* was decided . . . and that it must be treated as having been held by the Court not to be so much in point as the other case of *Gebhardt v. Saunders* ([1892] 2 Q. B. 452) which they professed to follow. I am strengthened in this view by the fact that *Self v. Hove Commissioners* is not, in my opinion, an entirely satisfactory case. . . . Mr. Justice Wills . . . went on to say that in his opinion it was not the defendants' duty to do the work at all, and of course, if that were so, the other point, which is the point in this case, would not arise. . . . Accordingly, we are brought back to the question, what is the true principle of *Andrew's Case* and of *Gebhardt v. Saunders* which pre-cooled it? . . . I find that both in *Gebhardt v. Saunders* and in *Andrew's Case* attention is drawn to the necessity of the party acting at once; and I think that the point of that observation is to be found in this—that where there is such a necessity, less must be considered to amount to such compulsion as to prevent a man being a mere volunteer than would be considered so to do in other cases. . . . The question, therefore, to my mind, is what degree of compulsion, if I may say so, is necessary to make that principle applicable? . . . I do not think that the compulsion need be, if I may so express it, irresistible. . . . If a person or body of persons either commences or threatens to commence proceedings against any-one, and he submits, he is no longer a mere volunteer. . . . That it need not be actual legal compulsion is, I think, fairly clear.—pp. 973—976.

Gebhardt v. Saunders and Andrew v. St. Olave's Board of Works, referred to.
Ellis v. Bromley Rural Council (1899) 81 L. T. 224; 63 J. P. 711.—RIDLEY, J.

Andrew v. St. Olave's Board of Works, distinguished.
Harris v. Hickman (1903) 73 L. J. K. B. 31; [1904] 1 K. B. 13; 89 L. T. 722; 68 J. P. 65; 2 L. G. R. 1; 20 T. L. R. 18.—WRIGHT, J.

Thompson and Norris Manufacturing Co. v. Hawes (1895) 59 J. P. 580.—C.A., followed.
Oliver v. Camberwell Borough Council (1904) 90 L. T. 285; 52 W. R. 511; 68 J. P. 165; 2 L. G. R. 617.—K.B.D.

Nisbet (or Nesbitt) v. Greenwich Board of Works (1875) 44 L. J. M. C. 119; L. R. 10 Q. B. 465; 32 L. T. 762; 24 W. R. 223.—Q.B., referred to.
Stotesbury v. St. Giles, Camberwell, Vestry (1888) 57 L. J. M. C. 114; 59 L. T. 473; 53 J. P. 5.—WILLS and GRANTHAM, JJ.

Nisbet (or Nesbitt) v. Greenwich Board of Works, followed.
Davis v. Greenwich Board of Works (1895) 64 L. J. M. C. 257; [1895] 2 Q. B. 219; 14 R. 552; 72 L. T. 674; 59 J. P. 517.—C.A. Esher, M.R., SMITH and RIGBY, L.JJ.

Chelsea Vestry v. Evans (1820) 34 J. P. 404.—Q.B., followed.

Stotesbury v. St. Giles, Camberwell, Vestry (1888) 57 L. J. M. C. 114; 59 L. T. 473; 53 J. P. 5.—WILLS and GRANTHAM, JJ.

Stotesbury v. St. Giles, Camberwell, Vestry, approved.

Metropolitan District Ry. v. Fulham Vestry (1895) 65 L. J. Q. B. 29; [1895] 2 Q. B. 448; 73 L. T. 330; 44 W. R. 53; 59 J. P. 679.—C.A. Esher, M.R., KAY and SMITH, L.JJ.

Reg. v. Marsham (1891) 61 L. J. M. C. 52; [1892] 1 Q. B. 371; 65 L. T. 778; 40 W. R. 84; 56 J. P. 164.—C.A., distinguished.

Stroud v. Wandsworth Board of Works (1894) 63 L. J. M. C. 88; [1894] 2 Q. B. 1; 9 R. 194; 70 L. T. 190; 42 W. R. 355; 58 J. P. 652.—C.A. LINDLEY, KAY and SMITH, L.JJ.

KAY, L.J.—I quite agree that the case of *Reg. v. Marsham* decided that when these expenses had been apportioned, and the Local Board were seeking to recover a proportionate part for the work which had been done by them, they would be bound to show that the repairs had been done, and certain moneys had been expended in those repairs; and, having shown that, it seems to me that the decision in *Reg. v. Marsham* is satisfied. That case does not go on to decide, and it is not necessary for the decision of that case to hold that the word "necessary" in this Act [the Metropolis Management Amendment Act, 1890], which I have just referred to is also a matter which is to be brought for the decision of a magistrate, when payment of the apportioned part is sought to be enforced.

St. Giles, Camberwell, Vestry v. Weller (1869) 17 W. R. 973; L. R. 6 Q. B. 168 n.—EX., dissented from.

Sawyer v. Paddington Vestry (1870) L. R. 6 Q. B. 164; 40 L. J. M. C. 8; 23 L. T. 662; 19 W. R. 96.—Q.B.

BLACKBURN, J.—It is contended for the appellant that sect. 53 (of 25 & 26 Vict. c. 102) applies to new as well as old streets; and that the proviso as to streets in which sewer rates have been levied for five years prior to the 1st of January, 1856, exempts the appellant's land from liability to contribute to the expense of constructing the sewer; and that the case of *St. Giles' Vestry, Camberwell v. Weller* is in his favour, in which the Court of Exchequer decided that the expense of constructing a sewer in a new street where sewer rates had been paid, was to be divided between the adjoining landowners and the rest of the parish. And it must be admitted that if that case were right, inasmuch as sewer rates were levied on the appellant's land more than five years before the 1st January, 1856, it would be exempt from liability by the proviso.—p. 170. [His lordship then discussed the effect of such a construction, and decided, against *St. Giles' Vestry, Camberwell v. Weller*, that sect. 53 applies "to streets which are not new but old, having either no sewer or only an open sewer."]

St. Giles, Camberwell, Vestry v. Weller and Sheffield v. Fulham Board (1876) 1 Ex. D. 395.—EX. D., approved.

Sawyer v. Paddington Vestry (1870) 40 L. J. M. C. 8; L. R. 6 Q. B. 164; 23 L. T. 662; 19 W. R. 96.—Q.B., overruled.
St. John's, Hampstead v. Cotton (1886) 36

L. J. Q. B. 225; 12 App. Cas. 1; 56 L. T. 1; 85 W. R. 505.—H.L. (E.). HALSBURY, L.C., LORDS WATSON and FITZGERALD.

[*Headnote*.—The word "street" in sect. 53 of the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), includes a new street as defined by sect. 112, as well as an old street.]

Fulham Board of Works v. Goodwin (1876) 1 Ex. D. 400; 35 L. T. 907.—CLEASBY, B., GROVE and FIELD, JJ., *distinguished*, but *principle applied*.

Bonella v. Twickenham Board of Works (1887) 57 L. J. M. C. 1; 20 Q. B. D. 63; 58 L. T. 299; 36 W. R. 50; 52 J. P. 356.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

Fulham Board of Works v. Goodwin, *applied*. **Handsworth District Council v. Derrington** (1897) 66 L. J. Ch. 691; [1897] 2 Ch. 438; 77 L. T. 73; 61 J. P. 518.—KEKEWICH, J.

White v. Fulham Vestry (1896) 74 L. T. 425; 60 J. P. 327.—HAWKINS and WILLIAMS, JJ., *approved*.

Property Exchange (No. 1) v. Wandsworth Board of Works (1902) 71 L. J. K. B. 515; [1902] 2 K. B. 61; 86 L. T. 481; 66 J. P. 435.—C.A. COLLINS, M.R., ROMER and MATHEW, L.JJ.

St. Pancras Vestry v. Batterbury (1857) 2 C. B. (N.S.) 477; 26 L. J. C. P. 243; 3 Jur. (N.S.) 1106.—C.P.

Distinguished, **New River Co. v. Mather** (1875) 44 L. J. M. C. 105; L. R. 10 C. P. 442; 32 L. T. 658.—C.P.: *explained*, **Crystal Palace Gas Co. v. Idris** (1900) 82 L. T. 200; 64 J. P. 452.—CHANNELL and BUCKNILL, JJ.

Hammersmith Vestry v. Lowenfeld (1896) 65 L. J. Q. B. 662; [1896] 2 Q. B. 278; 75 L. T. 182; 45 W. R. 60; 60 J. P. 600.—CAVE and WILLS, JJ., *doubted*.

Blackburn Corporation v. Sanderson (1902) 71 L. J. K. B. 590; [1902] 1 K. B. 794; 86 L. T. 304; 66 J. P. 452.—C.A.

Boyce v. Paddington Borough Council (1902) 72 L. J. Ch. 28; [1903] 1 Ch. 109; 87 L. T. 564; 51 W. R. 109; 67 J. P. 23.—BUCKLEY, J.; *reversed* (1903) 72 L. J. Ch. 695; [1903] 2 Ch. 556; 89 L. T. 383; 52 W. R. 114; 1 L. G. R. 696.—C.A.

Wortley v. St. Mary, Islington (1886) 51 J. P. 166.—MATHEW and SMITH, JJ., *explained*.

Prescott v. Nicholson (1889) 60 L. T. 563; 53 J. P. 597.—DENMAN and MANISTY, JJ.

5. LIABILITY OF AUTHORITIES.

Parsons v. St. Matthew, Bethnal Green (1867) 37 L. J. C. P. 62; L. R. 3 C. P. 56; 17 L. T. 211; 16 W. R. 85.—C.P.

Referred to, **Wilson v. Halifax Corporation** (1868) 37 L. J. Ex. 44; L. R. 3 Ex. 114; 17 L. T. 660; 16 W. R. 707.—EX.: *adopted*, **White v. Hindley Local Board** (1875) 44 L. J. Q. B. 114; L. R. 10 Q. B. 219; 32 L. T. 460; 23 W. R. 651.—Q.B.: *distinguished*, **Holborn Union v. St. Leonard's, Shoreditch** (1876) 46 L. J. Q. B. 36; 2 Q. B. D. 145; 35 L. T. 400; 25 W. R. 40.—Q.B.D.: **Bathurst Borough v. Macpherson** (1879) 48 L. J. P. C. 61; 4 App. Cas. 256; 41 L. T. 778.—P.C.

Blackmore v. Mile End Vestry (1882) 51 L. J. Q. B. 496; 9 Q. B. D. 451; 46 L. T. 869; 30 W. R. 740; 47 J. P. 52.—C.A. BRETT and COTTON, L.JJ.

Distinguished, **Moore v. Lambeth Waterworks** (1886) 55 L. J. Q. B. 304; 17 Q. B. D. 462; 55 L. T. 309; 34 W. R. 559; 50 J. P. 756.—C.A.: *referred to*, **Steel v. Dartford Local Board** (1891) 60 L. J. Q. B. 256.—C.A. LINDLEY, LOPES and KAY, L.JJ.

Holliday v. St. Leonard's, Shoreditch, Vestry (1861) 11 C. B. (N.S.) 192; 30 L. J. C. P. 360; 8 Jur. (N.S.) 74; 4 L. T. 406; 9 W. R. 694.—C.P.

Considered and held inapplicable, **Mersey Docks v. Gibbs** (1866) 35 L. J. Ex. 225; L. R. 1 H. L. 93, 113; 11 H. L. Cas. 686; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.—H.L. (E.): *held overruled*, **Foreman v. Canterbury Corporation** (1871) 40 L. J. Q. B. 138; L. R. 6 Q. B. 214; 24 L. T. 385; 19 W. R. 719.—Q.B.

Holborn Union v. St. Leonard's, Shoreditch, Vestry (1876) 46 L. J. Q. B. 36; 2 Q. B. D. 145; 35 L. T. 400; 25 W. R. 10.—Q.B.D., *distinguished*.

Ellis v. Strand Board of Works (1892) 67 L. T. 307.—C.A. LINDLEY, LOPES and SMITH, L.JJ.

LINDLEY, L.J.—The vestry are required by sect. 125 [of the Metropolis Management Act, 1855] either to employ a sufficient number of persons to remove dust, or to contract with other persons for its removal. Here the defendants have performed their statutory duty by entering into a contract, and it then becomes the duty of the contractor to do the work. Of course the board could not discharge that duty by entering into an illusory contract: but nothing of that kind is alleged in the present case. In my opinion . . . the board have discharged their statutory duty. . . . It is said that this view of sect. 125 is inconsistent with the judgments of Mellor and Lush, JJ., in *The Guardians of the Holborn Union v. The Vestry of St. Leonard's, Shoreditch*. There are, no doubt, some passages in those judgments which at first sight appear to be in favour of the plaintiff, but when the facts of that case are looked at, it is plain that it has no application to the present case.—p. 308.

Holborn Union v. St. Leonard's, Shoreditch, Vestry, *distinguished*.

Saunders v. Holborn Board of Works (1894) 64 L. J. Q. B. 101; [1895] 1 Q. B. 64; 15 L. 25; 71 L. T. 519; 43 W. R. 26; 59 J. P. 453.—MATHEW and CHARLES, JJ.

Gas Light and Coke Co. v. St. Mary Abbott's Vestry (1885) 54 L. J. Q. B. 414; 15 Q. B. D. 1; 53 L. T. 457; 33 W. R. 892; 49 J. P. 469.—C.A.: *affirming* 1 Cal. & E. 368, *distinguished*.

Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works (1898) 67 L. J. Ch. 657; [1898] 2 Ch. 603; 79 L. T. 132; 47 W. R. 107; 62 J. P. 756.—C.A.

Gas Light and Coke Co. v. St. Mary Abbott's Vestry, *principle applied*. **Armagh Union v. Bell** [1900] 2 Ir. R. 371.—Q.B.D., *affirmed* C.A.

Att.-Gen. v. Camberwell Vestry (1894) 63 L. J. Ch. 878; 8 L. 627; 71 L. T. 478; 10 Times

L. R. 653; [1894] W. N. 163.—NORTH, J., *no longer law*. See 60 & 61 Vict. c. 56, s. 2.

Saunders' Estate, In re (1869) L. R. 8 Eq. 681.—JAMES, V.-C., *held not binding*.

Merceron, *In re* (1877) 7 Ch. D. 184; 47 L. J. Ch. 114; 38 L. T. 15; 26 W. R. 187.—M.R.

JESSEL, M.R.—Now this very section, the 89th, was read by the learned L.J. (James, L.J., when V.-C.), as empowering the Court to order so much of the expenses of all purchases made in pursuance of the Act as it should deem reasonable to be paid by the "other persons" therein mentioned, including a vestry, and thereupon he ordered the vestry to pay the costs of a petition for the payment out of Court of purchase-money paid in by them. The section, however, says nothing about the costs of payment out, and I am afraid the L.J.'s sense of what ought to have been inserted in the Act led him to treat it as if it had been inserted. I cannot think he meant that as the Act rendered the vestry liable to pay the costs of purchases, therefore they were liable to pay the costs of a petition for payment out. There must have been some other reason; possibly the L. J. felt himself bound by a sense of abstract justice to take the view he did. But in *Vicar and Churchwardens of St. Sepulchre's, Ex parte* (33 L. J. Ch. 372), Lord Westbury decided this very point the other way, and *Straehan's Estate, In re* (9 Hare, 185), before Turner, V.-C., is another case which has a strong bearing upon it. Though I see James, L.J., was counsel in the latter case, he does not seem to have remembered it when *Saunders' Estate, In re*, came before him, and neither of those two cases was cited to him. I cannot, therefore, consider *Saunders' Estate, In re*, as a binding decision.—p. 187.

Drew v. Metropolitan Board of Works, 47 L. T. 616.—PEARSON, J.; *reversed* (1883) 50 L. T. 138.—C.A.

Hyams v. Webster (1867) 36 L. J. Q. B. 166; L. R. 2 Q. B. 264; 8 B. & S. 272; 16 L. T. 118; 15 W. R. 619.—Q.B.; *affirmed*, (1868) 38 L. J. Q. B. 21; L. R. 4 Q. B. 138; 17 W. R. 232.—EX. CH., *distinguished*.

Cox v. Paddington Vestry (1891) 64 L. T. 566. SMITH, J.

MINES AND MINERALS.

1. RIGHTS TO.
2. LEASES.
3. WORKING AND WINNING.
4. CUSTOMS AND PRESCRIPTION.
5. GRANT, SALE AND PURCHASE.
6. MINING COMPANIES.
7. REGULATION AND INSPECTION.

1. RIGHTS TO.

Purcell v. Nash (1833—1836) 1 Jones 625; 2 Jones 116.—EX. (IR.), *commented on*.

Coppinger v. Gubbins (1846) 3 Jo. & Lat. 397, 414; 9 Ir. Eq. R. 304.—SUGDEN, L.C.

Coppinger v. Gubbins, *distinguished*.

Doherty v. Allman (1878) 3 App. Cas. 709, 724, 731; 39 L. T. 129; 26 W. R. 513.—H.L. (IR.).

Purcell v. Nash and Coppinger v. Gubbins, *referred to*.

Elias v. Griffith (1878) 8 Ch. D. 521; 38 L. T. 871; 26 W. R. 869.—C.A.; *reversing* HALL, V.-C.

Clavering v. Clavering (1726) 2 P. Wms. 388; Ncl. Ch. Cas. 79; Mos. 219.—L.C., *followed*.

Spencer v. Scurr (1862) 31 L. J. Ch. 808; 31 Beav. 354; 9 Jur. (N.S.) 9; 10 W. R. 878.—ROMILLY, M.R.

Elias v. Griffith, *affirmed*.

Clavering v. Clavering, Bagot v. Bagot (1863) 33 L. J. Ch. 116; 32 Beav. 509; 2 N. R. 297; 9 Jur. (N.S.) 1022; 9 L. T. 217; 12 W. R. 35.—M.R.; *compromised* (1864) 33 L. J. Ch. 122 n.—L.C.; and **Cowley (Earl) v. Wellesley** (1866) 35 Beav. 635; L. R. 1 Eq. 656; 14 L. T. 425; 14 W. R. 528.—M.R., *approved*.

Elias v. Snowdon Slate Quarries Co. (1879) 48 L. J. Ch. 811; 4 App. Cas. 454, 466; 41 L. T. 289; 28 W. R. 54.—H.L. (E.). *And see* Dashwood v. Magniac (*post*, col. 1804).

Bagot v. Bagot, *referred to*.

Barrington, In re, Gamlen v. Lyon (1886) 56 L. J. Ch. 175; 33 Ch. D. 523, 527; 55 L. T. 87; 34 W. R. 165.—KAY, J.

Cowley (Earl) v. Wellesley and Daly v. Beckett (1857) 24 Beav. 114; 3 Jur. (N.S.) 754; 5 W. R. 514.—M.R., *applied*.

Kemeys-Tynte, In re, Kemeys-Tynte v. Kemeys-Tynte (1892) 61 L. J. Ch. 377; [1892] 2 Ch. 211; 66 L. T. 752; 40 W. R. 423.—NORTH, J.

Elias v. Snowdon Slate Quarries Co. and Bagot v. Bagot, *considered*.

Clavering v. Clavering and Cowley (Earl) v. Wellesley, *explained*.

Maynard's Settled Estate, In re (1899) 68 L. J. Ch. 609; [1899] 2 Ch. 347, 353; 81 L. T. 163; 48 W. R. 60; 63 J. P. 552.

KEKEWICH, J.—What the petitioner's counsel has called the *dictum* of Lord Selborne in *Elias v. Snowdon Slate Quarries Co.*, but which, I think, is more than a *dictum*, gives us in a few sentences what is the settled law on the subject. What he says is this: "When a mine or quarry is once open, so that the owner of an estate impeachable for waste may work it, I do not consider that the sinking of a new pit on the same vein, or breaking ground in a new place on the same rock, is necessarily the opening of a new mine or a new quarry." . . . But it is obvious that you must not construe that without any limitation whatever. Where a settler, the owner of an estate in one county, in which there is a seam of coal, is also owner of another estate in an adjoining county where the same seam of coal is found, and has only worked the seam under one estate, Lord Selborne's words cannot mean that the working of the mine and opening a pit on the estate in an adjoining county is not an opening of a new mine. I do not think it would be right to wrest his language to make it fit such an extreme case as that. And I am justified in making that limitation because Lord Selborne, though he laid down the law thus clearly, says this immediately afterwards: "And for this, authority is to be found

in the cases, which were cited at the bar, of *Clavering v. Clavering*, *Bagot v. Bagot*, and *Cowley (Earl) v. Wellesley*. . . I do not think it necessary to refer to *Bagot v. Bagot* further. We have the judgment of King, L.C., in *Clavering v. Clavering*, which contains a curious expression relative to a practice in the county of Devonshire, that "any person having a right to dig in mines may pursue the mine, and open new shafts or pits to follow the same vein." The point which was before the L.C.'s mind, which he brings out in a very clear manner, was that in reality you are pursuing the same mine, or the same seam. It is a "pursuing" by means not of boring to one level under one particular mine, but by sinking a new pit so as to work the minerals in connection with the shaft under the old pit. That is what he means by pursuing the same vein, notwithstanding that it is reached in a different way. That is exactly what is said, with reference to a very different subject, in *Cowley (Earl) v. Wellesley*. There it was a case of waste land, under which was gravel and no coal, and the gravel was reached by pits dug upon the surface, each pit being separate. The gravel had been taken there for some time, and the question was whether each new gravel pit was a new working, or only a continuation of the old working, and Lord Romilly said that "The whole of the gravel or sand on the waste land must be treated as a mine, and each gravel pit as if it were a fresh pit in the mine"—that is to say, he treats the waste of the manor and the gravel or sand under it as one mine. The lord of the manor digs a pit here and there all over the waste; on each occasion he is what King, L.C. calls "pursuing the vein"; he does not pursue it in the sense of working it out inch by inch through the soil by continuing along the line or vein, but by attacking the vein at another place. He is still working the vein in the waste land. Now, I fail to see how you can apply that to this case.—p. 610.

Clavering v. Clavering, *referred to*.

Greville-Nugent v. Mackenzie (1899) 69 L. J. P. C. 1; [1900] A. C. 83; 81 L. T. 793.—H.L. (SC.); *reversing* 25 *Rettie* 475.—COURT OF SESSION.

Campbell v. Wardlaw (1883) 8 App. Cas. 641.—H.L. (SC.).

Referred to, *Dashwood v. Magniac* [1891] 3 Ch. 306, 327, 361 (*post*, col. 1804); *Home (Earl) v. Belhaven (Lord)* [1903] A. C. 327, 347.—H.L. (SC.); *applied*, *Chaytor v. Trotter* (1902) 87 L. T. 33.—C.A.

James v. Reg. (1876) 24 W. R. 914.—MALINS, V.-C.; *reversed*, (1877) 46 L. J. Ch. 516; 5 Ch. D. 153; 36 L. T. 903; 25 W. R. 615.—C.A.

James v. Reg. (1874) 43 L. J. Ch. 754; L. R. 17 Eq. 502; 30 L. T. 84; 22 W. R. 466.—MALINS, V.-C., *referred to*.

Brain, In re (1874) 44 L. J. Ch. 103; L. R. 18 Eq. 389, 401; 31 L. T. 17; 22 W. R. 867.—MALINS, V.-C.

James v. Reg. (1874 and 1877) (*supra*), and **Young and Grindell, Ex parte** (1880) 50 L. J. Ch. 221; 43 L. T. 725.—BACON, V.-C., *discussed*.

James v. Young (1884) 53 L. J. Ch. 793; 27 Ch. D. 652; 51 L. T. 75; 32 W. R. 981.—NORTH, J.

Brain, In re (*supra*), *distinguished*.

Att.-Gen. (Victoria) v. Eitershank (1875) 14 L. J. P. C. 65; L. R. 6 P. C. 354, 371; 24 W. R. 327.—P.C.

Mines, Case of (1568) 1 Plowd. 310, 336.—EX., *referred to*.

Att.-Gen. (British Columbia) v. Att.-Gen. (Canada) (1889) 58 L. J. P. C. 88; 14 App. Cas. 295, 302; 60 L. T. 712; 5 T. L. R. 385.—P.C.; *Att.-Gen. v. Morgan* (1890—1891) 59 L. J. Ch. 772; 60 L. J. Ch. 126; [1891] 1 Ch. 132, 443, 455; 63 L. T. 337; 64 L. T. 409; 39 W. R. 169, 324; 6 T. L. R. 176.—NORTH, J. and C.A.

2. LEASES.

G. W. Ry. v. Rous (1870) 39 L. J. Ch. 553; L. R. 4 H. L. 650; 23 L. T. 360; 19 W. R. 169.—H.L. (E.), *referred to*.

Wright v. Pitt (1870) 40 L. J. Ch. 558; L. R. 12 Eq. 108, 416; 25 L. T. 13; 20 W. R. 27.—MALINS, V.-C.

Wright v. Pitt, *discussed*.

Ramage v. Wonnack (1899) 69 L. J. Q. B. 40; [1900] 1 Q. B. 116; 81 L. T. 526.—WRIGHT, J.

Gowan v. Christie (1873) L. R. 2 H. L. Sc. 273.

Not applied, *Strelley v. Pearson (post)*; *applied*, *Coltness Iron Co. v. Black* (1881) 51 L. J. Q. B. 626; 6 App. Cas. 315, 335; 45 L. T. 145; 29 W. R. 717; 46 J. P. 20.—H.L. (SC.); *referred to*, *Campbell v. Wardlaw (supra)*.

Abinger (Lord) v. Ashton (1873) L. R. 17 Eq. 358; 22 W. R. 582.—JESSEL, M.R., *explained*.

Strelley v. Pearson (1880) 15 Ch. D. 113; 49 L. J. Ch. 406; 43 L. T. 155; 28 W. R. 752.

FRY, J.—In the first place it appears that such a clause is not uncommon in Scotland, and the observations of one of the noble lords in *Gowan v. Christie (supra)* were referred to. But the practice in Scotland and in England is very different in many respects in regard to dealings in landed property and mines, and it is impossible for me to hold the one practice to be a precedent for the other, or an authority binding on me. The other argument was derived from the observations of the M.R. in *Abinger (Lord) v. Ashton*. But he was there dealing with the proper construction to be put upon a covenant to work mines, and he pointed out that an unreasonable construction had been contended for, which might require the lessee to work at a continuous and regular loss. The difference between that and the present argument is very plain. There the M.R. was only showing that, during the continuance of the lease, the lessee might not be under any obligation to do more than pay the dead rent; he might be under no additional obligation to work at an actual loss. Here the contention is that the lessee, if he cannot work at a profit, has a right to escape from the payment of the dead rent which is reserved during the term.—p. 118.

Abinger (Lord) v. Ashton, *referred to*.

Newton v. Nock (1880) 43 L. T. 197.—DENMAN, J.

Davis v. Shepherd (1865) 12 L. T. 538.—WOOD, V.-C.; *reversed*, (1866) 35 L. J. Ch. 581; L. R. 1 Ch. 410; 15 L. T. 122.—L.C. and L.JJ.

Davis v. Shepherd, *applied*.
Low Moor Co. v. Stanley Coal Co. (1875) 33 L. T. 436, 446.—EX.; *affirmed*, 34 L. T. 186.—C.A.

Wake v. Hall (1883) 52 L. J. Q. B. 494; 8 App. Cas. 195; 48 L. T. 834; 31 W. R. 585.—H.L. (E.); *affirming* (1880) 50 L. J. Q. B. 545; 7 Q. B. D. 295; 44 L. T. 42; 45 J. P. 340.—C.A., L.JJ., *discussed*.

Ward v. Dudley (Countess) (1887) 57 L. T. 20.—CHITTY, J.

Wake v. Hall, *principle approved*.

Ward v. Dudley (Countess), *followed*.

Antrim (Earl) v. Dobbs (1891) 30 L. R. Ir. 424, 434.—HOLMES, J.

Antrim (Earl) v. Dobbs, *distinguished*.

Ingham v. Mackay (1897) [1898] 1 Ir. R. 272, 281.—PORTER, M.R.

Wake v. Hall, *referred to*.

Mears v. Callender (1901) 70 L. J. Ch. 621; [1901] 2 Ch. 388, 397; 84 L. T. 618; 49 W. R. 584; 65 J. P. 615.—COZENS-HARDY, J.

Bute (Marquis) v. Thompson (1844) 14 L. J. Ex. 95; 13 M. & W. 487.—EX., *referred to*.

Jervis v. Tomkinson (1856) 26 L. J. Ex. 41; 1 H. & N. 195; 4 W. R. 683.—EX.

Bute (Marquis) v. Thompson, *explained*.

Clifford (Lord) v. Watts (1870) L. R. 5 C. P. 577; 40 L. J. C. P. 36; 22 L. T. 717; 18 W. R. 925.

WILLES, J.—It remains only to deal with *Bute* (Marquis) v. Thompson. There, by the express terms of the contract, the lessee covenanted absolutely to raise a given quantity of coal in each year, or to pay a minimum rent which should represent the minimum amount of coal agreed to be worked; and the lessee failing to raise the stipulated quantity of coal, he was held bound at all events to pay the minimum rent. . . . The judgment, however, must be read with reference to the subject-matter with which the Court was dealing; and, so reading it, it is plain that the Court construed the covenant, not as a stipulation exhausting itself upon the first breach as to the raising of the coal, but as an alternative covenant to secure the lessor at all events a minimum rent during the term, whether or not coal was worked or was there to be worked. There, is, however, no such covenant here.—p. 587.

Smith v. Morris (1788) 2 Bro. C. C. 311; S. C. at law, 3 Dougl. 279.—M.R., *distinguished*.

Phillips v. Jones (1839) 9 Sim. 519; 3 Jur. 242.—SHADWELL, V.-C.; **Mellers v. Devonshire** (Duke) (1852) 22 L. J. Ch. 310; 16 Beav. 252; 1 W. R. 44.—M.R.; **Ridgway v. Sneyd** (1854) Kay, 627, 632.—WOOD, V.-C.

Phillips v. Jones, *followed*.

Ridgway v. Sneyd (*supra*).

Smith v. Morris, **Phillips v. Jones**, and **Ridgway v. Sneyd**, *discussed*.

Simpson v. Ingleby (1872) 26 L. T. 543.—MALINS, V.-C. *See post*.

Jervis v. Tomkinson (*supra*, col. 1799); **Quarrington v. Arthur** (1842) 11 L. J. Ex. 418; 10 M. & W. 335.—EX.; and **Jones v. Shears** (1836) 7 C. & P. 346.—COLERIDGE, J., *discussed*.

Simpson v. Ingleby (1872) 26 L. T. 543.—MALINS, V.-C.; *reversed*, 27 L. T. 695.—L.JJ.

Wheatley v. Westminster Brymbo Coal and Coke Co. (1869) 39 L. J. Ch. 175; L. R. 9 Eq. 538; 22 L. T. 7; 18 W. R. 162.—MALINS, V.-C., *applied*.

Simpson v. Ingleby.—V.-C. (*supra*).

Wheatley v. Westminster Brymbo Coal and Coke Co., *dissented from*.

Kinsman v. Jackson (1880) 42 L. T. 80; 28 W. R. 337.—M.R.; *affirmed*, 42 L. T. 558; 28 W. R. 601.—C.A.

JESSEL, M.R.—I do not agree with Malins, V.-C. [*Wheatley v. Westminster, &c. Co.*] when he says that there is not any obligation on the part of the lessors to work at all, or to work beyond the minimum rent. I do not agree that a covenant to work efficiently is a covenant so long as the lessee pleases not to work provided that he pays the dead rent.—p. 80.

3. WORKING AND WINNING.

Rights and Obligations.

Lewis v. Fothergill (1869) L. R. 5 Ch. 103.

—HATHERLEY, L.C., *approved*.

Rokeby (Lord) v. Elliot (1879) 13 Ch. D. 277; 49 L. J. Ch. 163; 41 L. T. 537; 28 W. R. 282.—C.A.; *affirming with a variation* (1878) 47 L. J. Ch. 764; 9 Ch. D. 684; 38 L. T. 846; 27 W. R. 58.—FRY, J.

JAMES, L.J.—We think the definitions of winning given in *Lewis v. Fothergill* are accurate, as accurate as definitions can be of a term like winning, which probably is itself as intelligible and plain as any definition can be.—p. 279.

Lewis v. Fothergill, *referred to*.

Kinsman v. Jackson (*supra*).

Rokeby (Lord) v. Elliott (*supra*).—C.A., *varied, nom.* Elliot v. Rokeby (Lord) (1881) 7 App. Cas. 43; 51 L. J. Ch. 249; 45 L. T. 769; 30 W. R. 249.—H.L. (E.).

Harris v. Ryding (1839) 8 L. J. Ex. 181; 5 M. & W. 60.—EX., *discussed*.

Humphries v. Brogden (1850) 20 L. J. Q. B. 10; 12 Q. B. 739, 751; 15 Jur. 124.—Q.B.

Humphries v. Brogden, *referred to*.

Keyse v. Powell (1853) 22 L. J. Q. B. 305; 2 El. & Bl. 132; 17 Jur. 1052.—Q.B.

Harris v. Ryding and **Humphries v. Brogden**, *approved and applied*.

Smart v. Morton (1855) 24 L. J. Q. B. 260; 5 El. & Bl. 30; 3 C. L. R. 1004; 1 Jur. (N.S.) 825.—Q.B. *And see post*, col. 1801.

Harris v. Ryding and **Humphries v. Brogden** (*supra*), *referred to*.

Caledonian Ry. v. Sprot (1856) 2 Macq. H. L. 450.—H.L. (SC.).

Humphries v. Brogden, *approved*.

Roberts v. Haines (1856) 25 L. J. Q. B. 353; 6 El. & Bl. 645.—Q.B.; *affirmed*, (1857) 27 L. J. Ex. 49; 7 El. & Bl. 625; 3 Jur. (N.S.) 886; 5 W. R. 631.—EX. CH.

Harris v. Ryding.

Approved, Dugdale v. Robertson (1857) 3 K. & J. 695 (*post*); *not applied*, Williams v. Bagnall (1866) 12 Jur. (N.S.) 987; 15 W. R. 272. —WOOD, V.-C.; *referred to*, Taylor v. Shafto (1867) 8 B. & S. 247 (*post*); *explained*, Richards v. Jenkins (*post*); *discussed*, Hext v. Gill (1872) L. R. 7 Ch. 699, 714 (*post*); Eadon v. Jeffcock (1872) L. R. 7 Ex. 379, 390 (*post*); Aspden v. Seddon (1874) L. R. 10 Ch. 397 n.; 31 L. T. 626 (*post*, col. 1803); Mundy v. Rutland (Duke) (1882) 23 Ch. D. 81, 89 (*post*); *applied*, Love v. Bell (1884) 9 App. Cas. 286 (*post*).

Humphries v. Brogden.

Explained, Richards v. Jenkins (1868) 18 L. T. 437; 17 W. R. 30.—EX.; *referred to*, Eadon v. Jeffcock (1872) L. R. 7 Ex. 379, 390 (*post*); Lamb v. Walker (1878) 3 Q. B. D. 389, 401 (*post*, col. 1806); Dalton v. Angus (1881) 6 App. Cas. 740, 791 (*post*, col. 1806); Mundy v. Rutland (Duke) (1882) 46 L. T. 477.—KAY, J.; *affirmed*, (1883) 23 Ch. D. 81; 31 W. R. 510.—C.A.

Humphries v. Brogden, referred to.

Trinidad Asphalt Co. v. Ambard (1899) 68 L. J. P. C. 114; [1899] A. C. 594, 602; 81 L. T. 132; 48 W. R. 116.—P.C.

LORD MACNAGHTEN.—As was laid down by the Court of Q. B. in *Humphries v. Brogden*, the nature of the strata must be immaterial; it is impossible for the Court to measure out degrees to which the right of support for the surface may extend. "The only reasonable support," as Lord Campbell observed, "is that which will protect the surface from subsidence, and keep it securely at its ancient and natural level."—p. 117.

Roberts v. Haines (supra) and Smart v. Morton (supra, col. 1800), discussed.

Hext v. Gill (1872) 41 L. J. Ch. 761; L. R. 7 Ch. 699; 27 L. T. 291; 20 W. R. 957.—L.J.; *reversing* 41 L. J. Ch. 293; 26 L. T. 502; 20 W. R. 520.—WICKENS, V.-C. *See post*, col. 1803.

Smart v. Morton, referred to.

Smith v. Darby (1872) 42 L. J. Q. B. 140; L. R. 7 Q. B. 716, 726.—Q.B. (*post*, col. 1810); Aspden v. Seddon (*post*, col. 1803).

Roberts v. Haines, referred to.

Chapman v. Day (1883) 47 L. T. 705, 708 (*post*, col. 1803); Bell v. Love (1883) 10 Q. B. D. 547, 568 (*post*, col. 1806).

Williams v. Bagnall (supra), applied.

Buchanan v. Andrew (1873) L. R. 2 H. L. (Sc.) 286, 293.

Dugdale v. Robertson (1857) 3 K. & J. 695; 3 Jur. (N.S.) 687.—WOOD, V.-C.

Followed, Proud v. Bates (1865) 34 L. J. Ch. 407; 11 Jur. (N.S.) 441; 6 N. R. 92; 13 L. T. 61. —WOOD, V.-C.; *distinguished*, Eadon v. Jeffcock (*post*); *referred to*, Atkinson v. King (1878) 2 L. R. Ir. 320, 332.—C.A.; *applied*, Love v. Bell (1884) 9 App. Cas. 286; 53 L. J. Q. B. 257 (*post*, col. 1826).

Shafto v. Johnson (1863) 8 B. & S. 252, n.—V.-C.; and Taylor v. Shafto (1867) 8 B. & S. 228, 247; 16 L. T. 205.—Q.B. and EX. CH., approved.

Eadon v. Jeffcock (1872) 42 L. J. Ex. 36;

L. R. 7 Ex. 379, 391; 28 L. T. 273; 20 W. R. 1033.—EX., BRAMWELL, B. *doubting*.

CLEASBY, B.—In *Dugdale v. Robertson (supra)*, in which the minerals had been leased at certain rents and royalties, with a provision that they should not be taken from underneath certain specified places, the V.-C. (Wood) was of opinion that in a lease of that description there was a presumption that the right to support was reserved unless it appeared distinctly by express words upon the instrument that it was intended to be given up. Upon that case, it may be observed, as distinguishing it from the present, that the demise there was of all the minerals of any description under the land and not of one seam of coal called the High Hazle Bed, as in the present case, and further, that it does not appear what the reservation of rent was, whether of an acreage rent or in any other form. We may assume, however, that there was not a minimum rent as for two acres got, or so important a feature would not be omitted from the report of the case and of the judgment. . . . But this decision appears to us to be qualified by the subsequent cases of *Shafto v. Johnson*, decided by the same learned judge (of which there is a full report in 8 Best & Smith, p. 252), and *Taylor v. Shafto*. Both these cases involved the same question, viz., whether lessees of coal mines under a certain lease who had so worked the mines as to let down the surface, had committed an actionable wrong, in which case the mining lease would not have been an incumbrance to the title to the surface afterwards conveyed, or had only done acts which the lease authorised them to do, in which case the lease would have been an incumbrance. In *Shafto v. Johnson* Wood, V.-C. came to a different conclusion from that which he had arrived at in *Dugdale v. Robertson*, and though there were no words distinctly reserving the right to support, he held in effect that the lessees were not responsible for the subsidence caused by getting the minerals. . . . In the subsequent part of the same judgment . . . the learned judge refers to the case of *Dugdale v. Robertson*, as one which went to the full extent of the authorities, and in which the case was put as strongly as it well could be against the view which he was entertaining in the case under consideration. No doubt *Dugdale v. Robertson* is not disapproved of, but it does appear to us, that the principle of the two decisions is not the same, and that the correct view is that taken at the beginning of the judgment in *Shafto v. Johnson* which we have given above. The judgment in the Ex. Ch., in *Taylor v. Shafto*, agrees with that of the V.-C. in making the terms of the lease decisive as to the extent to which the lessees were justified in going in working the mines.—p. 44.

Shafto v. Johnson and Taylor v. Shafto, distinguished.

Chapman v. Day (*post*, col. 1803).

Taylor v. Shafto, referred to.

Davis v. Treharne (*post*); Union Lighterage Co. v. London Graving Dock Co. (1902) 71 L. J. Ch. 791; [1902] 2 Ch. 557, 567; 87 L. T. 381.—C.A.; V. WILLIAMS, L.J. *dissenting*.

Eadon v. Jeffcock (supra), considered.

Aspden v. Seddon (1874) L. R. 10 Ch. 399, n.; 31 L. T. 626.—JESSEL, M.R.; *affirmed*, (1875) 41 L. J. Ch. 359; L. R. 10 Ch. 394; 32 L. T. 415;

23 W. R. 580.—L.J.J.; *Davis v. Treharne* (*post*); *Dalton v. Angus* (1881) 50 L. J. Q. B. 689; 6 App. Cas. 740, 809 (*post*, col. 1806); *Chapman v. Day* (No. 1) (1883) 47 L. T. 705, 709.—DENMAN, J. and POLLOCK, B.

Hext v. Gill (*supra*, col. 1801), referred to. *Aspden v. Seddon* (1874) L. R. 10 Ch. 398, n. (*supra*): *Hall v. Byron* (1877) 46 L. J. Ch. 297; 4 Ch. D. 667; 36 L. T. 367; 25 W. R. 317.—HALL, V.-C.: *Att.-Gen. v. Tomline* (1877) 46 L. J. Ch. 654; 5 Ch. D. 750, 762; 36 L. T. 684; 25 W. R. 802.—FRY, J.: *Newington Local Board v. Cottingham Local Board* (1879) 48 L. J. Ch. 226; 12 Ch. D. 725, 734; 40 L. T. 58.—MALINS, V.-C.: *Att.-Gen. (Isle of Man) v. Mylchreest* (1879) 48 L. J. P. C. 56; 4 App. Cas. 294, 307; 40 L. T. 764.—P.C.

Hext v. Gill, approved.

Davis v. Treharne (1881) 6 App. Cas. 460; 50 L. J. Q. B. 665; 29 W. R. 869.—H.L. (E.). LORD BLACKBURN.—When I come to look at the documents, though one is more ready, it being a lease, to believe that the parties meant to say, You shall take all the minerals letting down the surface, than one would have been if it was a sale or reservation of minerals below to be taken out at some future time, I cannot agree with what seems to have been said (I do not know whether that was what was meant) by Cleasby, B., in *Eadon v. Jeffcock* (*supra*). I cannot agree that it follows from that that there is not a right of support. I think the right of support exists unless it is taken away. I think the fact that it is a lease may be one of the elements to be taken into consideration in seeing whether it is taken away or not, but that it is not enough of itself to decide the question.—p. 467.

LORD WATSON.—When a proprietor of the surface and the subjacent strata grants a lease of the whole or part of his minerals to a tenant, I think it is an implied term of that contract that support shall be given in the course of working to the surface of the land. If it is not intended that that right should be reserved, the parties must make it very clear upon the face of their contract; in other words they must express their intention so clearly as to enable a Court to say that such intention is plain. I think that rule was laid down by the late Mellish, L.J. in *Hext v. Gill*, and I quite agree with that ruling. It may be done in express terms; but of course it is not necessary that express language must be used; for it may appear by a plain implication from other clauses of the deed, as in *Taylor v. Shafto* (*supra*), where an obligation was laid upon the tenant to perform certain acts which were plainly inconsistent with supporting the surface.—p. 469.

Hext v. Gill, discussed.

Midland Ry. v. Haunchwood Brick and Tile Co. (1882) 51 L. J. Ch. 778; 20 Ch. D. 552; 46 L. T. 301; 30 W. R. 640.—KAY, J.

Hext v. Gill and Att.-Gen. (Isle of Man) v. Mylchreest (*supra*), referred to.

Tucker v. Linger (1882) 51 L. J. Ch. 713; 21 Ch. D. 18, 25; 46 L. T. 198; 30 W. R. 425.—KAY, J.; *affirmed*, C.A., and (1883) 52 L. J. Ch. 941; 8 App. Cas. 508; 49 L. T. 373; 32 W. R. 40.—H.L. (E.): *Att.-Gen. v. Welsh Granite Co.* (1887) 35 W. R. 617.—C.A.; FRY, L.J. *doubting*.

Tucker v. Linger (*supra*), discussed.

Dashwood v. Magniac (1891) 69 L. J. Ch. 809; [1891] 3 Ch. 306, 324, 355; 65 L. T. 811.—CHITTY, J., and C.A.; KAY, L.J. *dissenting*. And see *Fishbourne v. Hamilton* (*post*).

Hext v. Gill (*supra*), discussed.

Loosemore v. Tiverton and North Devon Ry. (1882) 22 Ch. D. 25, 42.—FRY, J. [*see LANDS CLAUSES ACT, supra*, col. 1527]; *Bell v. Love* (1883) 10 Q. B. D. 547, 568 (*post*, col. 1806); *Pountney v. Clayton* (1883) 11 Q. B. D. 820, 830 (*post*, col. 1823); *Love v. Bell* (1884) 9 App. Cas. 286, 298 (*post*, col. 1826); *Robinson v. Milne* (1884) 53 L. J. Ch. 1070.—NORTH, J.; *Elwes v. Brigg Gas Co.* (1886) 55 L. J. Ch. 734; 33 Ch. D. 562, 566; 55 L. T. 831; 35 W. R. 192.—CHITTY, J.

Hext v. Gill, applied.

Shafto v. Bolckow Vaughan & Co. (1887) 56 L. J. Ch. 735; 34 Ch. D. 725, 729; 56 L. T. 608; 35 W. R. 562.—CHITTY, J.; *Phillips v. Thomas* (1890) 62 L. T. 793.—CHITTY, J.

Hext v. Gill, doubted.

Glasgow (Lord Provost) v. Farie (1888) 58 L. J. P. C. 33; 13 App. Cas. 657, 669; 60 L. T. 274; 73 W. R. 627.—H.L. (SC.); LORD HERSCHELL *dissenting*.

Hext v. Gill, applied.

Glasgow (Lord Provost) v. Farie, explained and distinguished. *Jersey (Earl) v. Neath Union* (1889) 58 L. J. Q. B. 573; 22 Q. B. D. 555; 37 W. R. 388; 53 J. P. 404.—C.A.

Glasgow (Lord Provost) v. Farie, discussed.

Midland Ry. v. Robinson (1889) 59 L. J. Ch. 442; 15 App. Cas. 19; 62 L. T. 194; 38 W. R. 577; 54 J. P. 580.—H.L. (E.); LORD MACNAGHTEN *dissenting*. And see *post*, col. 1824.

Hext v. Gill, considered and approved.

Glasgow (Lord Provost) v. Farie and Jersey (Earl) v. Neath Union, discussed. *Fishbourne v. Hamilton* (1890) 25 L. R. Ir. 483.—CHATTERTON, V.-C., and C.A.

Hext v. Gill, Glasgow (Lord Provost) v. Farie, Jersey (Earl) v. Neath Union, and Fishbourne v. Hamilton, referred to.

Shaftesbury v. Wallace [1897] 1 Ir. R. 381.—CHATTERTON, V.-C.

Hext v. Gill, examined and explained.

Glasgow (Lord Provost) v. Farie and Jersey (Earl) v. Neath Union, discussed. *Johnstone v. Crompton* (1899) 68 L. J. Ch. 559; [1899] 2 Ch. 190; 81 L. T. 165; 47 W. R. 604.

BYRNE, J.—Without dealing with the circumstances of that case [*Hext v. Gill*], I refer at once to a passage in the judgment where Mellish, L.J. says that “the result of the authorities, without going through them, appears to be this: that a reservation of ‘minerals’ includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning.” . . . In *Glasgow (Lord Provost) v. Farie* a

question arose as to the meaning, within the Waterworks Clauses Act, 1847, of a reservation of the whole coal and other minerals in the land, and there was some discussion as to the true effect of *Hext v. Gill*. Lord Halsbury says: "I cannot help thinking that the true test of what are mines and minerals in a grant was suggested by James, L.J. in *Hext v. Gill* . . . and although the L.J. held himself bound by authority so that he yielded to the technical sense which had been attributed to those words, I still think (to use his language) that a grant of 'mines and minerals' is a question of fact 'what these words meant in the vernacular of the mining world, the commercial world, and landowners,' at the time when they were used in the instrument." . . . Now the observations of the noble lords in *Glasgow (Lord Provost) v. Farie* were very much considered in *Jersey (Earl) v. Neath Union*. . . . In reference to the criticism of the L.C. in *Glasgow (Lord Provost) v. Farie*, Bowen, L.J. observes: "I would only say, with regard to Lord Halsbury's criticisms on *Hext v. Gill*, I cannot help thinking either that he has not been perfectly reported, or else the L.C. had not in his mind at the moment the exact canon of construction of Mellish, L.J., because Mellish, L.J. does not say, nor, I think, mean, that the test was whether the minerals could be worked at a market profit at the time, but whether they had a use and a value of their own independent of and separable from the rest of the soil." Reading the passage from Mellish, L.J.'s judgment, to which I have referred, together with what Bowen, L.J. says in the passage I last read, it does not appear to me that, as interpreted by Bowen, L.J., there is anything in the law as laid down in *Hext v. Gill* open to the criticism before mentioned. *Jersey (Earl) v. Neath Union* is a clear decision, if it were wanted, that *Hext v. Gill* is a binding authority, not only upon me, but also in the C.A. Now the question is, what is the true rule in *Hext v. Gill*? . . . I understand the true rule to be this: You inquire what the substances are; then you see whether they are minerals, in the sense that they belong to a class of substances, or form a class or kind of substance of which it can be said that that substance is a valuable article, either for the purpose of sale or for other purposes. —p. 561.

Glasgow (Lord Provost) v. Farie, applied.
Scott v. Midland Ry. (1900) 70 L. J. K. B. 228; [1901] 1 Q. B. 317, 321; 83 L. T. 737; 49 W. R. 318; 65 J. P. 135.—Q.B.D.

Jersey (Earl) v. Neath Union, referred to.
Glasgow (Lord Provost) v. Farie, explained and followed.

Hext v. Gill, discussed.
G. W. Ry. v. Blades (1901) 70 L. J. Ch. 847; [1901] 2 Ch. 624, 631; 85 L. T. 308; 65 J. P. 791.—BUCKLEY, J. See judgment.

Glasgow (Lord Provost) v. Farie, explained.
Hext v. Gill and Jersey (Earl) v. Neath Union, commented on.

G. W. Ry. v. Blades, approved.
Todd Birleston and Co. and N. E. Ry., In re (1903) 72 L. J. K. B. 337; [1903] 1 K. B. 603; 88 L. T. 366; 67 J. P. 105.—C.A.

Partridge v. Scott (1838) 7 L. J. Ex. 101; 3 M. & W. 220; 1 H. & B. 31.—EX., *observed on*.

Bonomi v. Backhouse (1859) El. Bl. & El. 646; 23 L. J. Q. B. 378; 5 Jur. (N.S.) 1345.—EX. CH.

WATSON, B.—The doctrine of this case has been much questioned, as in *Rowbotham v. Wilson* (8 El. & Bl. 123), especially in the elaborate judgment of my brother Cresswell. —p. 651.

Partridge v. Scott.

Approved, *Birmingham Corporation v. Allen* (1877) 46 L. J. Ch. 673; 6 Ch. D. 284, 293; 37 L. T. 207; 25 W. R. 810.—C.A.; *referred to*, *Angus v. Dalton* (1877) 48 L. J. Q. B. 225; 4 Q. B. D. 162, 169; 40 L. T. 605; 27 W. R. 623.—C.A.; *Dalton v. Angus* (1881) 6 App. Cas. 740, 744 (*post*); *Green v. Belfast Tram Co.* (1887) 20 L. R. Ir. 35, 41.—Q.B.D.

Nicklin v. Williams (1854) 23 L. J. Ex. 335; 10 Ex. 259; 2 C. L. R. 1304.—EX.

Discussed, *Bonomi v. Backhouse* (1859) 28 L. J. Q. B. 378; El. Bl. & El. 646; 5 Jur. (N.S.) 1345.—EX. CH. (reversing 27 L. J. Q. B. 378; El. Bl. & El. 622; 4 Jur. (N.S.) 1182.—EX.); *Backhouse v. Bonomi* (*post*); *applied*, *Lamb v. Walker* (*post*); *disapproved*, *Darley Main Colliery Co. v. Mitchell* (*post*, col. 1807).

Bonomi v. Backhouse.

Approved, *Rowbotham v. Wilson* (1860) 30 L. J. Q. B. 49; 8 H. L. Cas. 348; 6 Jur. (N.S.) 695; 2 L. T. 642.—H.L. (E.); *applied*, *Smith v. Thackerah* (1866) 35 L. J. C. P. 276; L. R. 1 C. P. 564; 1 H. & R. 615; 12 Jur. (N.S.) 545; 14 L. T. 761; 14 W. R. 832.—C.P.; *referred to*, *Metropolitan Board of Works v. Metropolitan Ry.* (1868) 37 L. J. C. P. 281; L. R. 3 C. P. 612, 626; 19 L. T. 10; 16 W. R. 1117.—C.P.

Backhouse v. Bonomi (1861) 34 L. J. Q. B. 181; 9 H. L. Cas. 503; 7 Jur. (N.S.) 809; 4 L. T. 754; 9 W. R. 769.—H.L. (E.); *affirming Bonomi v. Backhouse*.—EX. CH.

Referred to, *Spoor v. Green* (1873) L. R. 9 Ex. 99, 111; 43 L. J. Ex. 57; 30 L. T. 393; 22 W. R. 547.—EX.; *distinguished*, *Bower v. Peate* (1876) 45 L. J. Q. B. 446; 1 Q. B. 1, 321, 325; 35 L. T. 321.—Q.B.D.; *explained*, *Ecclesiastical Commissioners v. N. E. Ry.* (1877) 47 L. J. Ch. 20; 4 Ch. D. 845, 862 (*post*, col. 1816); *Birmingham Corporation v. Allen* (1877) 6 Ch. D. 284.—JESSE, M.R. (*affirmed*, C.A., *supra*); *applied*, *Lamb v. Walker* (1878) 3 Q. B. D. 389; 45 L. J. Q. B. 451; 38 L. T. 643; 26 W. R. 775.—Q.B.; COCKBURN, J. *dissenting*; *discussed*, *Dalton v. Angus* (1881) 6 App. Cas. 740, 791 (*post*).

Birmingham Corporation v. Allen (*supra*).

Discussed, *Dalton v. Angus* (1881) 50 L. J. Q. B. 689; 6 App. Cas. 740, 827; 44 L. T. 844; 30 W. R. 191; 46 J. P. 132.—H.L. (E.); *distinguished*, *Green v. Belfast Tram Co.* (1887) 20 L. R. Ir. 35, 42.—Q.B.D.

Bonomi v. Backhouse, referred to.

Bell v. Love (1883) 52 L. J. Q. B. 290; 10 Q. B. D. 547, 559.—C.A.; *affirmed* (*post*, col. 1826).

Bonomi v. Backhouse, discussed.**Lamb v. Walker (supra), overruled.**

Darley Main Colliery Co. v. Mitchell (1886) 11 App. Cas. 127; 55 L. J. Ch. 529; 54 L. T. 882; 51 J. P. 148.—H.L. (E.); affirming *S. C. nom. Mitchell v. Darley Main Colliery Co.* (1884) 14 Q. B. D. 125; 32 W. R. 947.—C.A.

HALSBURY, L.C.—With respect to the authorities, *Nicklin v. Williams* (supra) was urged by the Att.-Gen. as an authority upon the question now before your lordships, by reason of some words attributed to Lord Westbury in *Bonomi v. Backhouse*. If Lord Westbury really did use the words attributed to him, it is, I think, open to doubt in what sense they are to be understood. Parke, B. in that case delivered the judgment against the plaintiffs recovering any subsequently accruing damage, because, he said, the cause of action was the original injury to the right by withdrawing support. That principle is admittedly wrong, and was expressly held to be wrong in *Bonomi v. Backhouse*, since if that had been law there could have been no answer to the plea of the Statute of Limitations in that case. It is difficult to follow the M.R. when he says it was not necessary to overrule *Nicklin v. Williams* by that decision. It seems to me to have been the whole point decided in *Nicklin v. Williams*, and how that case so decided can be an authority for anything I am at a loss to understand. I think the decision of this case must depend as matter of logic upon the decision of your lordships' House in *Bonomi v. Backhouse*, and I do not know that it is a very legitimate inquiry, when a principle has been laid down by a tribunal from which there is no appeal, and which is bound by its own decisions, whether that principle is upon the whole advantageous or convenient; but if such considerations were permissible, I think Cockburn, C.J., in his judgment in *Lamb v. Walker*, established the balance of convenience to be on the side of the law, as established by *Bonomi v. Backhouse*. I cannot logically distinguish between a first and a second, or a third, or more subsidences, and after *Bonomi v. Backhouse* it is impossible to say that it was wrong in any sense for the defendant to remove the coal. Cresswell, J. has said, and I think rightly, that he might remove every atom of the mineral. The wrong consists, and, as it appears to me, wholly consists in causing another man damage, and I think he may recover for that damage as and when it occurs.—p. 134.

LORD FITZGERALD.—My lords, the real, though not the formal question for your lordships' determination is, whether *Lamb v. Walker* was correctly decided. . . . I think that we may deduce from the authorities some propositions as now settled in law, and applicable to the circumstances of the appeal now before your lordships' House, and to similar cases:—I proceed to state those propositions, though in doing so I am conscious of the danger pointed out by my noble and learned friend, Lord Bramwell [viz., that in laying down general propositions some necessary qualification or exception is generally omitted, and that such propositions are generally called "obiter"]. (1) That the owner of the surface has a natural and legal right to the undisturbed enjoyment of that surface in the absence of any binding agreement to the contrary. (2) That the owner of the subjacent minerals may excavate and remove them to the utmost extent, but should exercise

that right so as not to disturb the lawful enjoyment of the owner of the surface. (3) That the excavation and removal of the minerals does not, *per se*, constitute any actionable invasion of the right of the owner of the surface, although subsequent events show that no adequate supports have been left to sustain the surface. (4) But that, when in consequence of not leaving or providing sufficient supports, a disturbance of the surface takes place, that disturbance is an invasion of the right of the owner of the surface, and constitutes his cause of action (p. 148). . . . I am of opinion that Cockburn, C.J., in *Lamb v. Walker*, and the C. A. in the case before us, were respectively right in resting on *Backhouse v. Bonomi*, and deducing from it a principle which governs the question. *Backhouse v. Bonomi* is not satisfactorily reported. We gather from the report in your lordships' House with some difficulty what was actually decided. Mr. Manisty, in his argument in that case at your lordships' bar, puts it thus:—"The act done was a perfectly innocent act at the time it was done; the argument on the other side is that it must be treated as having been injurious, because it might afterwards become so. If the action had been brought when the act was first done, the answer would have been that the defendant had a right to do the act, and that no damage had been occasioned." Lord Westbury says, "I think it is abundantly clear, both on principle and authority, that when the enjoyment of the house is interfered with by the actual occurrence of the mischief, the cause of action *then* arises, and the action may *then* be maintained." And Lord Cranworth adds:—"It has been supposed that the right of the party whose land is interfered with is a right to what is called the pillars or the support. In truth, his right is to the ordinary enjoyment of his land, and until that ordinary enjoyment is interfered with he has nothing of which to complain. That seems the principle on which the case ought to be disposed of." It seems to me that *Backhouse v. Bonomi* did decide that the removal of the subjacent strata was an act (I will not say an innocent act) done in the legitimate exercise of ordinary ownership, which, *per se*, gave no right of action to the owner of the surface, and that the latter had no right of action until his enjoyment of the surface was actually disturbed. The disturbance then constituted his right of action. There was a complete cause of action in 1868, in respect of which compensation was given, but there was a liability to further disturbance. The defendants permitted the state of things to continue without taking any steps to prevent the occurrence of any future injury. A fresh subsidence took place, causing a new and further disturbance of the plaintiff's enjoyment, which gave him a new and distinct cause of action. . . . The necessary conclusion is that *Lamb v. Walker* is not correctly decided, and that the able reasoning of Cockburn, C.J. in that case ought to have prevailed.—p. 150. *And see* col. 1809.

[LORD BLACKBURN, dissenting, held that the view of the majority in *Lamb v. Walker* was right.]

Darley Main Colliery Co. v. Mitchell (supra), explained.

Crumble v. Wallsend Local Board (1891) 60 L. J. Q. B. 392; [1891] 1 Q. B. 503; 64 L. T. 490; 55 J. P. 421.—C.A.

ESHER, M.R.—It seems to me that the law

applicable to this case has been laid down by the H. L. in *Darley Main Colliery Co. v. Mitchell*. It is contended on behalf of the defendants that that case is distinguishable, the distinction relied upon by Mr. Walton being, that there the subsidence occurred by fits and starts, as he puts it, whereas here the subsidence was continuous—it went on without stopping . . . assuming it to be so, still, inasmuch as no cause of action accrues until damage has been done, when only a certain amount of damage has been done there is only a cause of action to that amount; but when the damage goes on—when it becomes more, though of the same kind—that additional damage is another and a different damage. There is no cause of action in respect of that additional damage until that damage has occurred, and the H. L. has in *Darley Main Colliery Co. v. Mitchell*, laid down that there is a new cause of action for each successive damage.—p. 894.

Darley Main Colliery Co. v. Mitchell, and **Bonomi v. Backhouse** (*supra*), *discussed*.

Att.-Gen. v. Conduit Colliery Co. (1894) 64 L. J. Q. B. 207; [1895] 1 Q. B. 301; 15 R. 267; 71 L. T. 777; 43 W. R. 366; 59 J. P. 70; 11 Times L. R. 57.—COLLINS, J.; WRIGHT, J. *doubting*.

Bonomi v. Backhouse, **Lamb v. Walker** (col. 1806), and **Mitchell v. Darley Main Colliery Co.** (col. 1807), *discussed*.

Greenwell v. Low Beechburn Colliery Co. (1897) 66 L. J. Q. B. 643; [1897] 2 Q. B. 165; 76 L. T. 759.—BRUCE, J.

Greenwell v. Low Beechburn Colliery Co., *considered and followed*.

Darley Main Colliery Co. v. Mitchell, *considered*.

Hall v. Norfolk (Duke) (1900) 69 L. J. Ch. 571; [1900] 2 Ch. 493; 82 L. T. 836; 48 W. R. 565; 64 J. P. 710.—KEKEWICH, J.

Browne (or Brown) v. Robins (1859) 28 L. J. Ex. 250; 4 H. & N. 186.—EX.

Applied, **Richards v. Jenkins** (1868) 18 L. T. 437; 17 W. R. 30.—EX.; *discussed*, **Green v. Belfast Tram Co.** (1887) 20 L. R. Ir. 35, 41.—Q.B.D.; Att.-Gen. v. Conduit Colliery Co. (*supra*).

Hamer v. Knowles, **Stroyan v. Knowles** (1861) 30 L. J. Ex. 102; 6 H. & N. 454; 3 L. T. 746; 9 W. R. 615.—EX.

Applied, **Richards v. Jenkins** (*supra*); *referred to*, **Lamb v. Walker** (1878) 3 Q. B. D. 394 (*supra*, col. 1806); Att.-Gen. v. Conduit Colliery Co. (*supra*).

Cardigan (Earl) v. Armitage (1823) 2 B. & C. 197; 3 D. & R. 414; 26 R. R. 313.—K.B., *discussed*.

Proud v. Bates (1865) 34 L. J. Ch. 406; 11 Jur. (N.S.) 441; 6 N. R. 92; 13 L. T. 61.—WOOD, V.-C.

Cardigan (Earl) v. Armitage, *commented on*. **Proud v. Bates**, *approved*.

Hamilton (Duke) v. Graham (1871) L. R. 2 H. L. Sc. 166, 173.—H.L. (SC.); LORD CHELMSFORD *dissenting*.

Proud v. Bates and Hamilton (Duke) v. Graham, *referred to*.

Ballacorkish Silver, Lead and Copper Mining Co. v. Dumbell (or Harrison) (1873) 43 L. J. P. C.

19; L. R. 5 P. C. 49, 62; 29 L. T. 658; 22 W. R. 227.—P.C.

Hamilton (Duke) v. Graham, *explained*.

Ramsay v. Blair (1876) 1 App. Cas. 701, 704.—H.L. (SC.).

Hamilton (Duke) v. Graham, **Proud v. Bates**, and **Ballacorkish Silver, Lead and Copper Mining Co. v. Dumbell (or Harrison)**, *discussed and explained*.

Eardley v. Granville (1876) 45 J. J. Ch. 669; 3 Ch. D. 826, 834; 34 L. T. 609; 24 W. R. 528.—JESSEL, M.R.

Proud v. Bates, *referred to*.

Atkinson v. King (1878) 2 L. R. Ir. 320.—C.A.

Ballacorkish, &c. Mining Co. v. Dumbell, *referred to*.

Att.-Gen. (Isle of Man) v. Mylchreest (1879) 48 L. J. P. C. 36; 4 App. Cas. 294, 309; 40 L. T. 764.—P.C. (*supra*, col. 1803).

Eardley v. Granville, *referred to*.

Ruabon Brick and Terra Cotta Co. v. (t. W. Ry. (1892) 62 L. J. Ch. 483; [1893] 1 Ch. 427.—KEKEWICH, J.; *affirmed*, C.A. (*post*, col. 1823).

Rowbotham v. Wilson (1860) 30 L. J. Q. B. 49; 8 H. L. Cas. 348; 6 Jur. (N.S.) 695; 2 L. T. 642.—H.L. (SC.) *discussed*.

Shafto v. Johnson (1863) 8 B. & S. 252, n.—WOOD, V.-C.; **Proud v. Bates** (1865) 34 L. J. Ch. 406 (*supra*); **Williams v. Bagnall** (1866) 15 W. R. 272.—WOOD, V.-C.; **Richards v. Jenkins** (1868) 18 L. T. 437, 445; 17 W. R. 30.—EX.; **Hammersmith, &c., Ry. v. Brand** (1869) 38 L. J. Q. B. 265; L. R. 4 H. L. 171, 183; 21 L. T. 238.—H.L. (SC.) (*see* "RAILWAY"); **Buccleuch (Duke) v. Wakefield** (1870) L. R. 4 H. L. 377, 399 (*post*, col. 1824); **Hext v. Gill** (1872) L. R. 7 Ch. 699, 715 (*post*, col. 1811); **Eadon v. Jeffcock** (1872) L. R. 7 Ex. 379, 387 (*supra*, col. 1802); **Aspden v. Seddon** (1875) L. R. 10 Ch. 394, 401 (*post*); **Ramsay v. Blair** (1876) 1 App. Cas. 701, 703.—H.L. (SC.); **Hall v. Byron** (1877) 46 L. J. Ch. 297; 4 Ch. D. 667, 678 (*post*, col. 1825); **Dalton v. Angus** (1881) 6 App. Cas. 740, 791 (*supra*, col. 1806); **Bell v. Love** (1883) 10 Q. B. D. 547, 558 (*post*, col. 1826); **Pountney v. Clayton** (1883) 11 Q. B. D. 820, 839 (*post*, col. 1823); **Dixon v. White** (1883) 8 App. Cas. 833.—H.L. (SC.); **Darley Main Colliery Co. v. Mitchell** (1886) 11 App. Cas. 127, 133 (col. 1807).

Rowbotham v. Wilson, *applied*.

Smith v. Darby (1872) 42 L. J. Q. B. 140; L. R. 7 Q. B. 716, 722; 26 L. T. 762; 20 W. R. 982.—Q.B.

Smith v. Darby, *applied*.

Aspden v. Seddon (1875) 44 L. J. Ch. 359; L. R. 10 Ch. 394, 404; 32 L. T. 415; 23 W. R. 580.—L.J. (S.C.) (1876) 48 L. J. Ex. 353; 1 Ex. D. 496; 36 L. T. 545; 25 W. R. 277.—C.A.).

Smith v. Darby and Aspden v. Seddon, *referred to*. *And see post*, col. 1811.

Dalton v. Angus (1881) 6 App. Cas. 740, 809 (*supra*, col. 1806); **Bell v. Love** (1883) 10 Q. B. D. 547, 569.—C.A. (*post*, col. 1826).

Smith v. Darby, *referred to*.

Pountney v. Clayton (1883) 52 L. J. Q. B. 566; 11 Q. B. D. 820, 839.—C.A. (*post*, col. 1823).

Aspden v. Seddon (*supra*), *approved but distinguished*.
Dixon v. White (1883) 8 App. Cas. 833, 851.—H.L. (SC.).

Aspden v. Seddon, *explained*.
Love v. Bell (1884) 53 L. J. Q. B. 257; 9 App. Cas. 286, 299.—H.L. (E.) (*see post*, col. 1826).

Smith v. Darby, *applied*.
Aspden v. Seddon, *referred to*.
Anderson v. McCracken Bros. (1900) 2 Fraser, 780, 787.—CT. OF SESSION.

Buchanan v. Andrew (1873) L. R. 2 H. L. (SC.) 286 (*reversing* 9 Rottie, 554.—CT. OF SESSION), *discussed*.
Bell v. Love (1883) 52 L. J. Q. B. 290; 10 Q. B. D. 547, 558.—C.A.; *affirmed* (*post*, col. 1826).

Buchanan v. Andrew, *rule in, cited*.
Dixon v. White (1883) 8 App. Cas. 833, 843.

Bell v. Wilson (1866) 35 L. J. Ch. 337; L. R. 1 Ch. 303; 12 Jur. (N.S.) 263; 14 L. T. 115; 14 W. R. 493.—L.J.J.; *varying* (1865) 34 L. J. Ch. 572; 2 Dr. & Sm. 395.—KINDERSLEY, V.-C., *not applied*.
Midland Ry. v. Checkley (1867) 36 L. J. Ch. 380; L. R. 4 Eq. 19, 25; 16 L. T. 260; 15 W. R. 671.—ROMILLY, M.R.

Bell v. Wilson, *referred to*. *And see post*.
Cleveland (Duchess) v. Meyrick (1867) 37 L. J. Ch. 125; 17 L. T. 238; 16 W. R. 104.—MALINS, V.-C.; *Hecht v. Hill* (1872) 41 L. J. Ch. 761; L. R. 7 Ch. 699, 715; 27 L. T. 291; 20 W. R. 957.—L.J.J.

Rosse (Earl) v. Wainman (1845) 15 L. J. Ex. 67; 14 M. & W. 859.—EX.; *affirmed, nom.*
Wainman v. Rosse (Earl) (1848) 2 Ex. 800.—EX. CH., *followed*.
Micklethwait v. Winter (1851) 20 L. J. Ex. 313; 6 Ex. 644.—EX.

Rosse (Earl) v. Wainman and Micklethwait v. Winter, *commented on*.
Darvill (or Davvell) v. Roper (1855) 24 L. J. Ch. 779; 3 Drew. 291; 3 W. R. 467.—KINDERSLEY, V.-C.

Darvill (or Davvell) v. Roper, *applied*.
Rosse (Earl) v. Wainman and Micklethwait v. Winter, *distinguished*.
Brown v. Chadwick (1857) 7 Ir. C. L. R. 101.—C.P. *And see post*, col. 1812.

Darvill v. Roper, *applied*.
Listowel (Countess) v. Gibbings (1858) 9 Ir. C. L. R. 223, 233.—Q.B.

Rosse (Earl) v. Wainman and Micklethwait v. Winter, *followed*.
Jamieson v. North British Ry. (1868) 6 Scot. L. R. 188.—LORD KINLOCH.

Rosse (Earl) v. Wainman, Darvill v. Roper, and Bell v. Wilson (*supra*), *referred to*.
Att.-Gen. (Isle of Man) v. Mylchreest (1879) 4 App. Cas. 294, 305.—P.C. (*supra*, col. 1810).

Bell v. Wilson and Rosse (Earl) v. Wainman, *discussed*.
Jamieson v. North British Ry., *applied*.
Midland Ry. v. Haunchwood Brick and Tile Co. (1882) 20 Ch. D. 552.—KAY, J. *See post*, col. 1823.

Rosse (Earl) v. Wainman, *referred to*.
Bell v. Wilson, *distinguished*.
Att.-Gen. v. Welsh Granite Co. (1887) 35 W. R. 619.—C.A.; FRY, L.J. *doubting*.

Rosse (Earl) v. Wainman, *explained*.
Darvill v. Roper (*supra*) and **Bell v. Wilson**, *referred to*.
Breadalbane (Lord) v. Merties (1818) 1 Shaw Ap. 225.—H.L. (SC.), *approved*.
Glasgow (Lord Provost) v. Farie (1888) 13 App. Cas. 657.—H.L. (SC.) (*supra*, col. 1804).

Rosse (Earl) v. Wainman, *referred to*.
Jersey (Earl) v. Neath Union (1889) 22 Q. B. D. 555, 563.—C.A. (*supra*, col. 1804).

Bell v. Wilson, *referred to*.
Midland Ry. v. Robinson (1889) 59 L. J. Ch. 442; 15 App. Cas. 19, 35 (*post*, col. 1823).

Bell v. Wilson, *referred to*.
Darvill v. Roper (*supra*), *explained*.
Brown v. Chadwick and Listowel (Countess) v. Gibbings (col. 1811), *not followed*.
Fishbourne v. Hamilton (1890) 25 L. L. Ir. 483, 491, 500.—V.-C., and C.A.

Inundation of Mines.

Beaufort (Duke) v. Morris (1847) 6 Hare 340.—WIGRAM, V.-C.; *varied*, (1848) 2 Ph. 683; 12 Jur. 614.—COTTENHAM, L.C.

Wilson v. Waddell (1876) 2 App. Cas. 95; 35 L. T. 639.—H.L. (SC.), *applied*.
Smith v. Musgrave (or Fletcher v. Smith) (1877) 47 L. J. Ex. 4; 2 App. Cas. 781, 786; 37 L. T. 367; 26 W. R. 83.—H.L. (E.).

Wilson v. Waddell, *discussed*.
Hurdman v. N. E. Ry. (1878) 47 L. J. C. P. 368; 3 C. P. D. 168, 174; 38 L. T. 339; 26 W. R. 489.—C.A.

Haward v. Bankes (1760) 2 Burr. 1113; and **Firmstone v. Wheeley** (1844) 13 L. J. Ex. 361; 2 D. & L. 203.—EX., *distinguished*.
Smith v. Kenrick (1849) 18 L. J. C. P. 172; 7 C. B. 515, 563; 13 Jur. 362.—C.P.

Smith v. Kenrick.
Distinguished, **Humphries v. Brogdon** (1850) 20 L. J. Q. B. 10; 15 Q. B. 739; 15 Jur. 124.—Q.B. (*supra*, col. 1800); *dissented from*, **Dickinson v. Grand Junction Canal Co.** (1852) 21 L. J. Ex. 241; 7 Ex. 282; 16 Jur. 200.—EX.; *approved*, **Baird v. Williamson** (1863) 33 L. J. C. P. 101; 15 C. B. (N.S.) 376; 10 Jur. (N.S.) 152; 9 L. T. 412; 12 W. R. 150.—C.P.

Smith v. Kenrick and Baird v. Williamson.
Approved, **Rylands v. Fletcher** (1868) 37 L. J. Ex. 161; L. R. 3 H. L. 330, 339; 19 L. T. 220.—H.L. (E.) (*and see* "WATER"); *discussed*, **Crompton v. Lea** (1874) 44 L. J. Ch. 69; L. R. 19 Eq. 115, 126; 31 L. T. 469; 23 W. R. 53.—HALL, V.-C.; **Humphreys (or Humphries) v. Cousins** (1877) 46 L. J. C. P. 438; 2 C. P. D. 239, 243; 36 L. T. 180; 25 W. R. 371.—C.P.D.; **Att.-Gen. v. Tomline** (1879) 48 L. J. Ch. 593; 12 Ch. D. 214, 227; 40 L. T. 775; 28 W. R. 76.—FRY, J. (*affirmed*, C.A., *post*). *And see* col. 1813.

Smith v. Kenrick (*supra*).

Referred to, West Cumberland Iron and Steel Co. v. Kenyon (1879) 48 L. J. Ch. 793; 11 Ch. D. 782; 40 L. T. 703.—C.A.; *not applied*, Att.-Gen. v. Tomline (1880) 49 L. J. Ch. 377; 14 Ch. D. 58, 63; 42 L. T. 880; 28 W. R. 870; 44 J. P. 617.—C.A.; Whalley v. Lancashire, &c., Ry. (1884) 53 L. J. Q. B. 285; 13 Q. B. D. 131, 140; 50 L. T. 472; 32 W. R. 711; 48 J. P. 500.—C.A.

Baird v. Williamson (col. 1812), *applied*.

Young v. Bankier Distillery Co. [1893] A. C. 691; 69 L. T. 838; 58 J. P. 100.—H.L. (SC.).

Smith v. Kenrick and Lonsdale (Earl) v.

Littledale (1793) 2 H. Bl. 267; 2 Austr. 356; 5 Bro. P. C. 519, *referred to*.
Jordeson v. Sutton Southcoates and Drypool (Gas Co.) (1899) 68 L. J. Ch. 457; [1899] 2 Ch. 217; 80 L. T. 815; 63 J. P. 692.—C.A.

Grompton v. Lea (col. 1812), *referred to*.

Wilson v. Watldell (1876) 2 App. Cas. 95, 98; 35 L. T. 639.—H.L. (SC.) (*supra*, col. 1812).

West Cumberland Iron and Steel Co. v. Kenyon (1877) 46 L. J. Ch. 850; 6 Ch. D. 773.—FRY, J.; *reversed*, C.A. (*supra*).

*Wrongful Working.***Lewis v. Branthwaite** (1831) 9 L. J. (O.S.)

K. B. 263.—K.B., *referred to*.
Keyse v. Powell (1853) 23 L. J. Q. B. 305; 2 El. & Bl. 132; 17 Jur. 1052.—Q.B.

Lewis v. Branthwaite and Keyse v. Powell.

Approved, Bowser v. Maclean (1860) 30 L. J. Ch. 273; 2 De G. F. & J. 415; 6 Jur. (N.S.) 1220; 3 L. T. 456; 9 W. R. 112.—CAMPBELL, L.C.; *explained*, Eardley v. Granville (*post*).

Bowser v. Maclean, *referred to*.

Proud v. Bates (1865) 34 L. J. Ch. 406 (*supra*, col. 1809).

Bowser v. Maclean, *explained*.

Eardley v. Granville (1876) 45 L. J. Ch. 669; 3 Ch. D. 826, 834 (*supra*, col. 1810); Cooper v. Crabtree (1882) 51 L. J. Ch. 514; 20 Ch. D. 589, 592; 46 L. T. 573; 30 W. R. 579.—C.A.

Powell v. Aiken (1858) 4 K. & J. 343.—

WOOD, V.-C., *applied*.
Hilton v. Woods (*post*); Llynvi, &c., Co. v. Brogden (*post*, col. 1814); Elias v. Griffith (1878) 8 Ch. D. 521, 528.—HALL, V.-C. (*reversed*, C.A.; *see supra*, col. 1796).

Hunt v. Peake (1860) Johns. 705.—

WOOD, V.-C., *applied*.
Richards v. Jenkins (1868) 18 L. T. 437, 445; 17 W. R. 30.—EX.; Llynvi, &c., Co. v. Brogden (*post*, col. 1814).

Martin v. Porter (1830) 5 M. & W. 352;

2 H. & H. 70.—EX., *followed*.
Morgan v. Powell (1842) 11 L. J. Q. B. 263; 3 Q. B. 278; 2 G. & D. 721; 6 Jur. 1109.—Q.B.; Wild v. Holt (1842) 11 L. J. Ex. 235; 9 M. & W. 672; 1 D. (N.S.) 876.—EX.

Martin v. Porter, *discussed*.

Wood v. Morewood (1841) 3 Q. B. 440, n.—PARKER, B., *principle applied*.
Hilton v. Woods (1867) 36 L. J. Ch. 941;

L. R. 4 Eq. 432, 440; 16 L. T. 736; 15 W. R. 1105.—MALINS, V.-C.

Martin v. Porter, Wood v. Morewood, and Hilton v. Woods, *discussed and applied*.

Llynvi Coal and Iron Co. v. Brogden (1870) 40 L. J. Ch. 46; L. R. 11 Eq. 188; 23 L. T. 518; 19 W. R. 196.—BACON, V.-C.

Martin v. Porter and Wood v. Morewood, *discussed*.

Jegon v. Vivian (1871) 40 L. J. Ch. 389; L. R. 6 Ch. 742, 760; 19 W. R. 365.—HATHERLEY, L.C.

Wood v. Morewood and Hilton v. Woods, *discussed*.

Trotter v. Maclean (1879) 13 Ch. D. 574, 586 (*post*, col. 1816).

Martin v. Porter, *applied*.

Phillips v. Homfray; Fothergill v. Phillips (1871) L. R. 6 Ch. 770, 780.—HATHERLEY, L.C.

Martin v. Porter, *referred to*.

Brown v. Dibbs (1877) 37 L. T. 171; 25 W. R. 776.—P.C.; Dreyfus v. Peruvian Guano Co. (1889) 42 Ch. D. 66, 76 (*post*, col. 1815).

Phillips v. Homfray, *applied*.

Williams v. Raggett (1877) 46 L. J. Ch. 849, 850; 37 L. T. 96; 25 W. R. 874.—FRY, J.; Phillips v. Homfray (1883) 52 L. J. Ch. 401, 833; 24 Ch. D. 439, 445; 49 L. T. 5; 32 W. R. 6.—PEARSON, J.; *reversed* C.A.; BAGGALLAY, L.J. *dissenting*. *See* "EXECUTOR," vol. i., col. 1113.

Martin v. Porter and Phillips v. Homfray, *applied*.

Whitwham v. Westminster, &c., Co. (*post*, col. 1815).

Jegon v. Vivian (*supra*), *applied*.

Ashton v. Stock (1877) 6 Ch. D. 719; 25 W. R. 862.—HALL, V.-C.; and **United Merthyr Collieries Co., in re** (1872) L. R. 15 Eq. 46; 21 W. R. 117.—BACON, V.-C., *referred to*.

Trotter v. Maclean (1879) 13 Ch. D. 574, 586 (*post*, col. 1816).

Jegon v. Vivian, *principle sustained*.

Livingstone v. Rawyards Coal Co. (1880) 5 App. Cas. 25; 42 L. T. 334; 28 W. R. 357; 44 J. P. 392.—H.L. (SC.).

LORD BLACKBURN.—Now, my lords, there was a technical rule in the English Courts in these matters. When something that was part of the realty (we are talking of coal in this particular case) is severed from the realty and converted into a chattel, then instantly on its becoming a chattel, it becomes the property of the person who had been the owner of the fee in the land whilst it remained a portion of the land; and then in estimating the damages against a person who had carried away that chattel, it was considered and decided that the owner of the fee was to be paid the value of the chattel at the time when it was converted, and it would in fact have been improper, as qualifying his own wrong, to allow the wrongdoer anything for that mischief which he had done, or for that expense which he had incurred in converting the piece of rock into a chattel, which he had no business to do. Such was the rule of the common law. Whether or not that was a judicious rule at any time I do not take upon myself to say; but a

long while ago (and when I say a long while I mean twenty-five years ago), Parke, B. put this qualification on it, as far as I am aware, for the first time. He said, If however the wrongdoer has taken it perfectly innocently and ignorantly, without any negligence and so forth, and if the jury, in estimating the damages, are convinced of that, then you should consider the mischief that has really been done to the plaintiff who lost it whilst it was part of the rock, and therefore you should not consider its value when it had been turned into a piece of coal after it had been severed from the rock, but you should treat it at what would have been a fair price if the wrongdoer had bought it whilst it was yet a portion of the land, as you would buy a coalfield [*Wood v. Morewood (supra)*]. That was the rule to be applied where it was an innocent person that did the wrong; that rule was followed in *Jegon v. Vivian*, which has been so much mentioned; it was followed in the Court of Chancery, and, so far as I know, it has never been questioned since, that where there is an innocent wrong-doing the point that is to be made out for the damages is, as was expressed in the minutes of the decree:—"The defendants to be charged with the fair value of such coal and other minerals at the same rate as if the mines had been purchased by the defendants at the fair market value of the district;" that I understand to mean as if the mines had been purchased while the minerals were yet part of the soil.—p. 39.

Jegon v. Vivian, applied.

Whitwham v. Westminster Brymbo Coal and Coke Co. (1896) 65 L. J. Ch. 508, 741; [1896] 1 Ch. 894; [1896] 2 Ch. 538; 74 L. T. 405, 804; 44 W. R. 459, 698.—CHITTY, J., and C.A.

Llynvi Coal and Iron Co. v. Brogden (supra, col. 1814), referred to.

Trotter v. Maclean (1879) 8 Ch. D. 574, 587 (*post*); Tucker v. Linger (1882) 51 L. J. Ch. 713; 21 Ch. D. 18, 29.—KAY, J. (*supra*, col. 1803).

Livingstone v. Rawyards Coal Co. (supra, col. 1814), distinguished.

Taylor v. Mostyn (1886) 55 L. J. Ch. 893; 33 Ch. D. 226, 233; 55 L. T. 651.—C.A.

COTTON, L.J.—That was a Scotch case, and it was a very peculiar one, because there the party claiming damages for the wrongful taking of the minerals was the owner of a little bit of coal, which by itself could never have been worked, being situated in the midst of other mines and quite surrounded by them, having no shaft in it. Therefore it could not be worked, and the owner was in this position, that if his neighbour had not taken it, he never could have got for that coal, or for a licence to work that coal, more than the House of Lords gave him, which was not the value of the coal when severed from the mine, but only the royalty which his own witnesses said he could have got for the coal. That was entirely different from this. Here there was a shaft down to the coal, and because the coal was all worked out there was nothing to prevent the pillars being taken, and the coal claimed by the landlord, which pillars the lessees were expressly prohibited from taking.—p. 897.

Livingstone v. Rawyards Coal Co., referred to.

Dreyfus v. Peruvian Guano Co. (No. 2) (1889) 58 L. J. Ch. 758; 42 Ch. D. 60, 77; 61 L. T. 180; 5 Times L. R. 595.—KAY, J.; *affirmed*, 43

Ch. D. 316; 42 L. T. 518; 6 Asp. M. C. 492.—C.A.; BOWEN, L.J. *dissenting*. And see S. C. *nom.* Peruvian Guano Co. v. Dreyfus (1892) 61 L. J. Ch. 749; [1892] A. C. 166, 175, n.; 66 L. T. 536; 7 Asp. M. C. 225.—H.L. (E.); *varying* C.A. (*supra*).

Dean v. Thwaite (1855), 21 Beav. 621.—M.R.

Applied, Dawes v. Bagnall (1875) 23 W. R. 690.—HALL, V.-C.; Trotter v. Maclean (*post*); *commented on*, Ecclesiastical Commissioners v. N. E. Ry. (1877) 47 L. J. Ch. 20; 4 Ch. D. 845, 860; 36 L. T. 174.—MALINS, V.-C.

Ecclesiastical Commissioners v. N. E. Ry., referred to.

Trotter v. Maclean (1879) 49 L. J. Ch. 256; 13 Ch. D. 574, 587; 42 L. T. 118; 28 W. R. 244.—FRY, J.; Gibbs v. Guild (1881) 51 L. J. Q. B. 228; 8 Q. B. D. 296, 304.—FIELD, J. (*affirmed* C.A.; see *supra*, col. 1585).

Trotter v. Maclean, approved.

Joicey v. Dickinson (1881) 45 L. T. 643.—C.A.

Dean v. Thwaite, referred to.

Barber v. Houston (1885) 18 L. R. Ir. 475.—C.A.

Ecclesiastical Commissioners v. N. E. Ry., not followed.

Dean v. Thwaite, Dawes v. Bagnall (supra), and Trotter v. Maclean, applied.

Astley and Tyldesley Coal and Salt Co., and Tyldesley Coal Co., In re (1899) 68 L. J. Q. B. 252; 80 L. T. 116.—BRUCE and RIDLEY, JJ.

Ecclesiastical Commissioners v. N. E. Ry., disapproved.

Dean v. Thwaite and Trotter v. Maclean, discussed.

Bulli Coal-Mining Co. v. Osborne (1899) 68 L. J. P. C. 49; [1899] A. C. 351; 80 L. T. 430; 47 W. R. 545.—P.C.

LORD JAMES OF HEREFORD.—It is very difficult to follow the reasoning of the learned V.-C. [*Ecclesiastical Commissioners v. N. E. Ry.*]. His honour said distinctly "there was no improper intention." He held that what was done "was done under a mistake." Yet the defendants were visited with all the pains and penalties of fraud. The account was carried back beyond the six years; the measure of damages was in accordance with the severest rule ever applied. The ground of the decision seems to have been that although there was no moral fraud—no fraud in fact—yet "for the purposes of the statute the breaking of bounds into a neighbour's colliery must be considered a fraudulent act." There is no foundation for that proposition. . . . In all or almost all the other cases cited at the bar the Court held that fraud was not established. But Sir J. Romilly, in *Dean v. Thwaite*, and Fry, J., in *Trotter v. Maclean*, expressed their opinion that fraud would or might be an answer to the plea of the statute. In *Dean v. Thwaite*, where the learned M.R. held that the evidence of fraud was not conclusive, his honour made these observations: "The case of fraud alleged, and the only fraud that I think would justify the Court in coming to the conclusion that the coal gotten before that period"—that is, before the period of limitation—"ought to be accounted for, is that the defendant had intentionally taken

the plaintiff's cost, and had concealed the fact, and during the process had taken steps to prevent the plaintiff discovering it." If those observations are to be construed to mean that in his honour's opinion something more was required beyond taking the coal furtively, their lordships are unable to agree in them. But they think that is not the fair meaning of the passage cited, which must be understood as applied to the alleged facts of the case on which his honour was then commenting. . . . It may be observed that in *Trotter v. Maclean* no fraud was suggested beyond the fraud that lies in the secrecy of wilful trespass underground, and that the plaintiffs failed to prove in that case that the trespass was wilful.—p. 33.

Under Canals.

Fletcher v. G. W. Ry. (1860) 29 L. J. Ex. 253; 5 H. & N. 689; 6 Jur. (N.S.) 961; 2 L. T. 803; 8 W. R. 501.—EX. CH.

Considered, L. & N. W. Ry. v. Aekroyd (1862) 31 L. J. Ch. 5; 8 Jur. (N.S.) 911; 6 L. T. 124; 10 W. R. 367.—WOOD, V.-C.: *approved*, G. W. Ry. v. Bennett (*post*); *explained*, Dunn v. Birmingham Canal Co. (*post*); *dictum commented on*, Pountney v. Clayton (1883) 11 Q. B. D. 820, 843.—C.A. (*post*, col. 1823): *discussed*, Midland Ry. v. Haunchwood Brick and Tile Co. (1882) 20 Ch. D. 552, 559 (col. 1823); Consett Waterworks Co. v. Ritson (1889) 22 Q. B. D. 318, 337 (*post*, col. 1827).

Dudley Canal Company v. Grazebrook (1830) 8 L. J. (O.S.) K. B. 361; 1 B. & Ad. 59; 35 R. R. 212.—BAYLEY, J., *approved*.

G. W. Ry. v. Bennett (1837) 36 L. J. Q. B. 133; 1 L. R. 2 H. L. 27.—H.L. (E.) (*post*, col. 1823).

Dudley Canal Co. v. Grazebrook; Wyrley and Essington Canal v. Bradley (1806) 7 East 368; 8 R. R. 642.—K.B.; **Birmingham Canal Co. v. Dudley (Earl)** (1862) 7 H. & N. 969; 9 Jur. (N.S.) 24.—EX. CH.; **Swindell v. Birmingham Navigation Co.** (1860) 29 L. J. C. P. 364; 9 C. B. (N.S.) 241; 7 Jur. (N.S.) 190.—C.P.; and **Stourbridge Canal Co. v. Dudley (Earl)** (1860) 30 L. J. Q. B. 108; 3 El. & El. 409; 7 Jur. (N.S.) 329; 3 L. T. 449; 9 W. R. 158.—EX. CH., *applied*.

Midland Ry. v. Checkley (1867) 36 L. J. Ch. 380; 1 L. R. 4 Eq. 19, 28; 16 L. T. 260; 15 W. R. 671.—ROMILLY, M.R.

Dudley Canal Co. v. Grazebrook and Stourbridge Canal Co. v. Dudley (Earl), *discussed*.

Dunn v. Birmingham Canal Co. (1872) 41 L. J. Q. B. 121; 1 L. R. 7 Q. B. 256; 26 L. T. 241; 20 W. R. 573.—Q.B.; HANNEN, J. *dissenting*; *affirmed*, 42 L. J. Q. B. 34; 1 L. R. 8 Q. B. 42; 27 L. T. 683; 21 W. R. 266.—EX. CH.

Stourbridge Canal Co. v. Dudley (Earl), *distinguished*.

Lancashire, &c., Ry. v. Knowles, 20 Q. B. D. 391, 404 (*post*).

Dudley Canal Co. v. Grazebrook.

Distinguished, Lancashire, &c., Ry. v. Knowles (1887) 57 L. J. Q. B. 150; 20 Q. B. D. 391; 52 J. P. 340.—C.A.; Knowles v. Lancashire, &c., Ry. (*post*) (affirming C.A.); *referred to*, Att.-Gen. v. Conduit Colliery Co. (*post*, col. 1818).

Midland Ry. v. Checkley (*supra*).

Distinguished, G. W. Ry. v. Smith (1875) 2 Ch. D. 235, 240.—HALL, V.-C. (reversed, C.A.): *see post*, col. 1822; *discussed*, Midland Ry. v. Haunchwood Brick, &c., Co. (1882) 20 Ch. D. 552 (*post*, col. 1823); *referred to*, Tucker v. Linger (1882) 21 Ch. D. 18, 25.—KAY, J. (*see supra*, col. 1803); *approved*, Robinson v. Milne (1884) 53 L. J. Ch. 1070.—NORTH, J.; Jersey (Earl) v. Neath Union Guardians (1889) 22 Q. B. D. 555, 561 (*supra*, col. 1804); *considered*, Fishbourne v. Hamilton (1890) 25 L. R. Ir. 483, 508.—C.A.

Cromford Canal Co. v. Cutts (1848) 5 Railw. Cas. 442.—COTTENHAM, L.C., *applied*.

Whitehouse v. Wolverhampton and Walsall Ry. (1869) 39 L. J. Ex. 1; 1 L. R. 5 Ex. 6, 15; 21 L. T. 558; 18 W. R. 147.—EX.

Cromford Canal Co. v. Cutts, *approved*.

Knowles v. Lancashire and Yorkshire Ry. (1889) 59 L. J. Q. B. 39; 14 App. Cas. 248; 61 L. T. 91; 54 J. P. 103.—H.L. (E.).

HATSBURY, L.C.—*Dudley Canal Co. v. Grazebrook* (*supra*) may have been quite right, and I should be very loth to say it was wrong; but the statute there seems to me to be distinguishable in such important respects from the statute now under consideration that I am unable to derive the least assistance from the decision in that case. The scheme and structure of the Acts are entirely different. Here the plain words of the 37th section make the mine-owner liable if he causes injury to the canal. . . . I agree with Fry, L.J., that sect. 38 gives rights and remedies to a larger class of persons than the mine-owners who are mentioned in sect. 37. The section seems to me to contemplate the case of the mine-owner who is hindered by the existence of the canal from the further prosecution of his mining enterprise. It appears to me, therefore, I confess, without any doubt or hesitation, that the supposed injustice of construing the language in its natural and ordinary sense does not arise. But when I find the high authority of Lord Cottenham in favour of construing these words as I construe them, and that in no uncertain terms, in a decision which has now for many years been an unquestioned authority upon the subject (*Cromford Canal Co. v. Cutts*), I certainly can feel no difficulty whatever in moving your lordships that the judgment of the C. A. be affirmed, and this appeal dismissed with costs.—p. 42.

Knowles v. Lancashire and Yorkshire Ry., *referred to*.

Att.-Gen. v. Conduit Colliery Co. (1894) 64 L. J. Q. B. 207; [1895] 1 Q. B. 301; 15 R. 267; 71 L. T. 777; 43 W. R. 366; 59 J. P. 70; 11 Times L. R. 57.—COLLINS, J.; WRIGHT, J. *doubting*.

Cromford Canal Co. v. Cutts and Knowles v. Lancashire &c., Ry. (*supra*), *discussed and distinguished*.

Chamber Colliery Co. v. Rochdale Canal Co. (1895) 64 L. J. Q. B. 645; [1895] A. C. 564; 11 R. 264; 73 L. T. 258.—H.L. (E.).

LORD HERSCHELL.—The main question to be determined is the effect of sects. 39 and 40 of the Act of 1794. Precisely similar sections in another Canal Act came under the consideration of this House in *Knowles v. Lancashire, &c., Ry.* . . . It appears clear that sect. 39

has no application to this coal, that section being in terms confined to the subjacent minerals. As regards these there is a clear statutory prohibition of any such working of them as will injure or prejudice the canal or towing-path, and there is therefore a statutory liability imposed if these minerals are so worked as prejudicially to affect the canal or any of the accompanying works belonging to the proprietors. As regards the working of minerals adjacent to the canal there is no corresponding prohibition or liability. In *Knowles v. Lancashire, &c., Ry.* the plaintiffs' claim was for working coal under and near the canal and works, whereby they had been injured. . . . In the argument on behalf of the defendants [in that case] in this House, no distinction was drawn between subjacent and adjacent coal. It may probably have been the case that if the subjacent coal had been left, the working of the adjacent coal would have caused no subsidence. But, however that may be, the judgment of this House was rested entirely upon the express provisions of sect. 37 in the Act then under consideration, which corresponds with sect. 39 of the statute of 1794. The L.C. pointed out that the plain words of the 37th section made the mine-owner liable if he caused injury to the canal, and that no reason for cutting down the plain meaning of the words could be derived from the enactment contained in the succeeding section. Lord Macnaghten took the same view. . . . It is to be observed that in the opinion of the noble and learned lord, sects. 37 and 38 (in this Act sects. 39 and 40) were to be read together, and that his judgment as to the liability of the mine-owner, and the right which he has to insist that the amount of compensation payable to him for the coal necessary for the support of the canal should be ascertained, is based on the statutory liability created by the earlier section. In a case, therefore, like the present, in which sect. 39 is inapplicable, and where there is no statutory liability in relation to the working of the coal, the entire reasoning of this House in *Knowles v. Lancashire, &c., Ry.* is equally inapplicable. What I have said with reference to *Knowles's Case* applies also to . . . *Cromford Canal Co. v. Cutts*.—pp. 648—651.

Chamber Colliery Co. v. Rochdale Canal Co.,
applied.

Knowles v. Lancashire, &c., Ry., considered.
New Moss Colliery Co. v. Manchester, Sheffield and Lincolnshire Ry. (1897) 66 L. J. Ch. 381; [1897] 1 Ch. 725; 76 L. T. 231; 45 W. R. 493.—BYRNE, J.

Cromford Canal Co. v. Cutts (*supra*) and
Knowles v. Lancashire, &c., Ry., explained
and not applied.

Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co. (1901) 85 L. T. 53.—C.A.

ROMER, L.J.—Those cases dealt with two special Acts of Parliament which were almost identical in terms. The cases turned entirely upon the very special wording of those Acts, and all that they decided was this: They were Acts dealing with Canal Companies who had power to acquire property for the purpose of a canal. The Acts showed that, owing to their special terms, compensation for any difficulties placed in the way of a mine owner in working his minerals under or near the canal, were to be compensated

for at the time when the working of the mine owner came so near to the canal as to be likely to damage it. On the true construction of the Acts, one of the difficulties in question, entitling the coal owner to compensation, was his being obliged, for fear of injury to the canal, not to continue his workings. It is with regard to those Acts that the L.J., in the report of *Knowles v. Lancashire, &c., Ry.*, observed, first, that no general principle was involved in the determination of the case; and, secondly, that the decision of the case in no way affected the Railway Clauses Consolidation Act of 1845, or, indeed, any other statute not enacted in the same terms.—p. 58.

Whitehouse v. Wolverhampton and Walsall Ry. (*supra*, col. 1818), *considered.*

Holliday v. Wakefield Corporation (1890) 60 L. J. Q. B. 361; [1891] A. C. 81; 64 L. T. 1; 40 W. R. 129; 55 J. P. 325.—H.L. (E.).

Holliday v. Wakefield Corporation, explained
and applied.

Gerard (Lord) and L. & N. W. Ry., *In re* (1895) 64 L. J. Q. B. 260; [1895] 1 Q. B. 459; 14 R. 201; 72 L. T. 142; 43 W. R. 374.—C.A.

Gerard (Lord) and L. & N. W. Ry., In re,
explained and not applied.

Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co. (1901) 85 L. T. 53.—C.A.

Under Railways.

N. E. Ry. v. Crosland (1862) 32 L. J. Ch. 353; 4 De G. F. & J. 550; 1 N. R. 72; 7 L. T. 765; 11 W. R. 83.—L.J.; *affirming* 2 J. & H. 565.—WOOD, V.-C., *followed.*

Elliot v. N. E. Ry. (1863) 32 L. J. Ch. 402; 10 H. L. Cas. 333; 2 N. R. 87; 9 Jur. (N.S.) 555; 8 L. T. 337; 11 W. R. 604.—H.L. (E.); *affirming* S. C. *nom.* N. E. Ry. v. Elliot (1860) 30 L. J. Ch. 160; 2 De G. F. & J. 423; 8 W. R. 603.—L.C., *who affirmed, with a variation*, 29 L. J. Ch. 808; 1 J. & H. 145.—WOOD, V.-C. *And see* col. 1821.

N. E. Ry. v. Crosland, distinguished.

Reg. v. L. & N. W. Ry. (1899) 68 L. J. Q. B. 685; [1899] 1 Q. B. 921; 80 L. T. 728.—C.A.; *affirmed*, on the ground that the award ought to have been taken up, *nom.* L. & N. W. Ry. v. Walker (1900) 69 L. J. Q. B. 367; [1900] A. C. 109; 82 L. T. 93; 48 W. R. 384; 64 J. P. 483.—H.L. (E.).

A. L. SMITH, L.J.—The actual decision in that case [*N. E. Ry. v. Crosland*] is to me clear; for it was that, where a landowner has conveyed to a railway company "the right and privilege of making, and for ever hereafter maintaining," a tunnel through his land, he could not afterwards call upon the railway company to compensate him for the minerals when he desired to work them within forty yards of the line, because he had sold the right to support to the tunnel to the railway company, and consequently could not make the company again pay for the minerals. It will be seen at p. 357 of the report of the case in the Law Journal Reports, that the bill was framed upon this hypothesis, and upon this alone, by the company against the landowner, by which

bill the company sought to restrain the landowner from winning minerals within forty yards of the line, which he threatened to do unless the company paid him for them, and the company were successful. Knight Bruce, L.J., gave judgment against the landowner, solely upon the ground upon which the bill was framed. Turner, L.J. dealt with the statutes which existed in that case; but I must point out that, although some parts of the Acts therein referred to were similar to those in the present case, when taken as a whole, the legislation in that case does not appear to me to cover this case.—p. 694.

COLLINS, L.J., who dissented, thought *N. E. Ry. v. Crosland* was directly in point.

N. E. Ry. v. Crosland, *applied*.

Reg. v. L. & N. W. Ry. (C.A., *supra*), *overruled*.
L. & N. W. Ry. v. Walker (1903) 72 L. J. K. B. 578; [1903] A. C. 280; 88 L. T. 705.—H.L. (E.).

Caledonian Ry. v. Sprot (1856) 2 Macq. H. L. 449; 4 W. R. 659.—H.L. (SC.), *followed*.

Caledonian Ry. v. Bellhaven (Lord) (1857) 3 Macq. H. L. 56.—H.L. (SC.); **Elliot v. N. E. Ry.** (1863) 10 H. L. Cas. 333 (*supra*, col. 1820).

Caledonian Ry. v. Sprot and Elliot v. N. E. Ry., *not applied*.

G. W. Ry. v. Bennett (1867) 36 L. J. Q. B. 133; L. R. 2 H. L. 27, 38 (*post*, col. 1823); Midland Ry. v. Checkley (1867) L. R. 4 Eq. 19, 26 (*supra*, col. 1817).

Caledonian Ry. v. Sprot and Elliot v. N. E. Ry., *referred to*.

Richards v. Jenkins (1868) 18 L. T. 437, 444; 17 W. R. 30.—EX.; Metropolitan Board of Works v. Metropolitan Ry. (1868) 37 L. J. C. P. 281; L. R. 3 C. P. 612; 19 L. T. 10; 16 W. R. 1117.—C.P.; *affirmed*, 38 L. J. C. P. 172; L. R. 4 C. P. 192; 19 L. T. 744; 17 W. R. 416.—EX. CH.

Elliot v. N. E. Ry.

Approved and followed, Popplewell v. Hodgkinson (1869) 38 L. J. Ex. 126; L. R. 4 Ex. 248, 253; 20 L. T. 578; 17 W. R. 806.—EX. CH.; *not applied*, Midland Ry. v. Haunchwood, &c., Co. (1882) 20 Ch. D. 552, 558 (*post*, col. 1823); *referred to*, Board of Works v. Symes (1892) 32 L. R. Ir. 608.—C.A.; L. & N. W. Ry. v. Evans (*post*); *applied*, Aldin v. Latimer Clark [1894] 2 Ch. 437 (*post*); L. & N. W. Ry. v. Walker (*supra*).

Caledonian Ry. v. Sprot, *referred to*.

Hammersmith and City Ry. v. Brand (1869) 38 L. J. Q. B. 265; L. R. 4 H. L. 171; 21 L. T. 238; 18 W. R. 12.—H.L. (E.); LORD CAIRNS *dissenting*. *And see* "RAILWAY."

Caledonian Ry. v. Sprot, *distinguished*.

Buchanan v. Andrew (1874) L. R. 2 H. L. Sc. 286 (*see supra*, col. 1811); Aspden v. Seddon (1875) 44 L. J. Ch. 359; L. R. 10 Ch. 394.—L.J. (*supra*, col. 1810); Midland Ry. v. Haunchwood, &c., Co. (*post*, col. 1823).

Caledonian Ry. v. Sprot, *referred to*.

Dalton v. Angus (1881) 50 L. J. Q. B. 689; 6 App. Cas. 740, 792; 41 L. T. 844; 30 W. R. 191; 46 J. P. 182.—H.L. (E.); Rigby v. Bennett (1882) 21 Ch. D. 559, 569; 40 L. T. 47; 31 W. R. 222; 47 J. P. 217.—C.A.; Pountney v. Clayton (1883) 11 Q. B. D. 820, 840.—C.A. (*post*, col. 1823).

Rigby v. Bennett (*supra*) and **Caledonian Ry. v. Sprot**.

Explained, Birmingham, Dudley and District

Banking Co. v. Ross (1888) 57 L. J. Ch. 601; 38 Ch. D. 295, 308; 59 L. T. 609; 36 W. R. 914.—C.A.; *distinguished*, Green v. Belfast Tram Co. (1887) 20 L. R. Ir. 35, 43.—Q.B.D.

Caledonian Ry. v. Sprot.

Referred to, L. & N. W. Ry. v. Evans (1892) 62 L. J. Ch. 1; [1893] 1 Ch. 16; 67 L. T. 630; 41 W. R. 149.—C.A. (reversing [1892] 2 Ch. 432; 66 L. T. 526.—KEKEWICH, J.); *applied*, G. W. Ry. v. Cefn Cribbwr Brick Co. (1894) 63 L. J. Ch. 500; [1894] 2 Ch. 157; 8 R. 178; 70 L. T. 279; 42 W. R. 493.—KEKEWICH, J.; Aldin v. Latimer Clark (1894) 63 L. J. Ch. 601; [1894] 2 Ch. 437; 8 L. 352; 71 L. T. 119; 42 W. R. 553.—STIRLING, J.

Caledonian Ry. v. Sprot, *referred to*.

L. & N. W. Ry. v. Evans, *applied*.

Edinburgh and District Water Trustees v. Clippens Oil Co. (1900) 3 Fraser, 156.—CT. OF SESSION; Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co. (1901) 85 L. T. 53.—C.A.

Smith v. G. W. Ry. (1877) 47 L. J. Ch. 97;

3 App. Cas. 165, 182; 37 L. T. 645; 26 W. R. 130.—H.L. (E.); *affirming, with a variation*, S. C. *nom.* G. W. Ry. v. Smith (1876) 45 L. J. Ch. 235; 2 Ch. D. 235; 34 L. T. 267; 24 W. R. 443.—C.A., *dictum not followed*.

Dixon v. Caledonian and Glasgow and S. W. Rys. (1880) 5 App. Cas. 820; 43 L. T. 513; 29 W. R. 249; 45 J. P. 105.—H.L. (SC.).

SELBORNE, L.C.—My lords, the Second Division of the Court of Session in this case have held that the railway company is not placed by the Railways Clauses Consolidation (Scotland) Act, 1845, in the position of having thirty days after the receipt of a notice from a mine-owner and no more, within which to make up their minds whether they will give a counter-notice to prevent the working of the minerals under the railway and for a certain distance from it upon the terms of compensation provided by the Act. There appears to be no authority upon this subject, unless it be a *dictum* which incidentally fell from the late L.C. in this House in *Smith v. G. W. Ry.* Undoubtedly, the L.C. did in that case, in which no counter-notice had been given, and when the question did really not arise, and was in no way material to the decision, say this: "There is no doubt that when Mr. Smith gave his notice to the directors of his intention to work, he stated to them that he intended to work both coal and ironstone, and if that notice was to be held a good notice entitling him to work as to the ironstone, the time has passed for the railway directors to give a counter-notice, and he would be entitled, whether they were willing to compensate him or not, now to work the ironstone." Your lordships will, I am sure, feel great respect for any *dictum*, even when unnecessary for the purpose of the decision of the particular case with reference to which it was said, which fell from so eminent a judge. . . . At the most it indicates the *prima facie* impression of a very eminent and learned judge which certainly, so far as it goes, is favourable to the argument of the appellants in this case.—p. 826.

Smith v. G. W. Ry.

Discussed, Consett Waterworks Co. v. Ritson (1889) 22 Q. B. D. 318, 333 (*post*, col. 1823);

applied, Holliday v. Wakefield Corporation [1891] A. C. 81 (*supra*, col. 1820); *considered*, G. N. Ry. v. Inland Revenue Commissioners [1899] 2 Q. B. 652 (*post*).

G. W. Ry. v. Bennett (1867) 36 L. J. Q. B. 133; L. R. 2 H. L. 27; 16 L. T. 186; 15 W. R. 647.—H. L. (E.), *referred to*.

Dunn v. Birmingham Canal Co. (1872) L. R. 7 Q. B. 256, 266 (*supra*, col. 1817); Hooper v. Bourne (1877) 46 L. J. Q. B. 509; 2 Q. B. D. 339, 346, and (1880) 49 L. J. Q. B. 370; 5 App. Cas. 1, 24 (*see* "LANDS CLAUSES ACT," *supra*, col. 1554).

G. W. Ry. v. Bennett and Errington v. Metropolitan District Ry. (1882) 51 L. J. Ch. 305; 19 Ch. D. 559; 46 L. T. 443; 30 W. R. 663.—C.A.; *reversing* HALL, V.-C., *discussed*.

Dixon v. Caledonian and Glasgow and S. W. Rys. (*supra*, col. 1822), *applied*.

Midland Ry. v. Haunchwood Brick and Tile Co. (1882) 51 L. J. Ch. 778; 20 Ch. D. 552, 556; 46 L. T. 301; 30 W. R. 640.—KAY, J.

G. W. Ry. v. Bennett, *discussed and applied*.

Pountney v. Clayton (1883) 52 L. J. Q. B. 566; 11 Q. B. D. 820, 827, 834; 49 L. T. 283; 31 W. R. 664.—C.A.; *reversing* (1882) 47 L. T. 731; 31 W. R. 501.—DENMAN, J.; MANISTY, J. *dissenting*.

Midland Ry. v. Haunchwood Brick and Tile Co. (*supra*) and **G. W. Ry. v. Bennett**, *discussed*. *And see* col. 1824.

Midland Ry. v. Miles (1886) 55 L. J. Ch. 745; 33 Ch. D. 632, 642; 55 L. T. 428; 35 W. R. 76.—STIRLING, J. *And see* S.C. (1885) 30 Ch. D. 634, 639; 53 L. T. 380; 34 W. R. 136.—PEARSON, J.; and Glasgow (Lord Provost) v. Farie, 13 App. Cas. 688 (*post*).

G. W. Ry. v. Bennett, *applied*.

Glasgow (Lord Provost) v. Farie (1888) 58 L. J. P. C. 33; 13 App. Cas. 657, 671.—H. L. (SC.) (*supra*, col. 1804).

G. W. Ry. v. Bennett, *followed*.

Dixon v. Caledonian, &c., Rys., and Errington v. Metropolitan District Ry. (*supra*), *referred to*.

Midland Ry. v. Robinson (1889) 59 L. J. Ch. 442; 15 App. Cas. 19, 27; 62 L. T. 194; 38 W. R. 577; 54 J. P. 580.—H. L. (E.); LORD MACNAGHTEN *dissenting*.

Pountney v. Clayton (*supra*), and **G. W. Ry. v. Bennett**, *discussed*.

Consett Waterworks Co. v. Ritson (1889) 22 Q. B. D. 318, 327; 60 L. T. 360; 53 J. P. 373.—CAVE and A. L. SMITH, JJ.

G. W. Ry. v. Bennett; Dixon v. Caledonian, &c., Rys.; Errington v. Metropolitan District Ry.; Midland Ry. v. Miles (*supra*); and **Pountney v. Clayton**, *dicta discussed and followed*. *And see* col. 1824.

Ruabon Brick and Terra Cotta Co. v. G. W. Ry. (1892) 62 L. J. Ch. 483; [1893] 1 Ch. 427; 2 L. 237; 68 L. T. 110; 41 W. R. 418.—C.A.

Errington v. Metropolitan District Ry., *applied*.

G. N. Ry. v. Inland Revenue Commissioners (1899) 68 L. J. Q. B. 978; [1899] 2 Q. B. 652; 81 L. T. 385; 48 W. R. 170; 64 J. P. 21.—DARLING and PHILLIMORE, JJ.

G. W. Ry. v. Bennett; Errington v. Metropolitan District Ry.; and Midland Ry. v. Miles (*supra*), *referred to*.

Midland Ry. v. Haunchwood Brick and Tile Co. (*supra*), *explained*.

G. W. Ry. v. Blades (1901) 70 L. J. Ch. 847; [1901] 2 Ch. 624; 85 L. T. 308; 65 J. P. 791.—BUCKLEY, J. *See* judgment at length.

Midland Ry. v. Robinson (col. 1823).

Discussed, Fishbourne v. Hamilton (1890) 25 L. R. Ir. 483, 506.—C.A.; *applied*, Ruabon Brick, &c., Co. v. G. W. Ry. [1893] 1 Ch. 427, 439 (*supra*); Shaftesbury v. Wallace [1897] 1 Ir. R. 381.—CHATTERTON, V.-C.; *referred to*, G. W. Ry. v. Blades [1901] 2 Ch. 624, 630 (*supra*); *explained*, Todd Birlestone & Co. and N. E. Ry., *In re* [1903] 1 K. B. 603, 605, 609.—C.A. (*post*).

Ruabon Brick and Terra Cotta Co. v. G. W. Ry. (*supra*).

Applied, Reg. v. G. W. Ry. (1893) 62 L. J. Q. B. 572; 9 R. 1; 69 L. T. 572.—C.A.; *referred to*, G. W. Ry. v. Blades (*supra*); *explained*, Todd Birlestone & Co. and N. E. Ry., *In re* (1903) 72 L. J. K. B. 337; [1903] 1 K. B. 603, 609; 88 L. T. 366; 67 J. P. 105.—C.A.

Barrington, In re, Gamlen v. Lyon (1886)

56 L. J. Ch. 175; 33 Ch. D. 523; 55 L. T. 87; 35 W. R. 164.—KAY, J., *distinguished*. Robinson's Settlement Trusts, *In re* (1891) 60 L. J. Ch. 776; [1891] 3 Ch. 129; 65 L. T. 244; 39 W. R. 632.—CHITTY, J.

4. CUSTOMS AND PRESCRIPTION.

Bateson v. Green (1793) 5 Term Rep. 411.

—K.B., *commented on*.

Hilton v. Granville (Earl) (1844) 13 L. J. Q. B. 193; 5 Q. B. 701, 729; D. & M. 614; 8 Jur. 310.—Q.B.; (*and see* S.C. Cr. & Ph. 283.—L.C.). Humphries v. Brogden (*post*); Hall v. Byron (1877) 46 L. J. Ch. 297; 4 Ch. D. 667, 675 (*post*, col. 1825); Robertson v. Hartopp (1889) 59 L. J. Ch. 553; 43 Ch. D. 484, 501; 62 L. T. 585; 6 Times L. R. 126.—C.A.

Hilton v. Granville (Earl).—Q.B.

Discussed, Humphries v. Brogden (1850) 20 L. J. Q. B. 10; 12 Q. B. 739, 753; 15 Jur. 124.—Q.B. (*see supra*, col. 1800); *commented on, but held binding*, Beckett (or Blackett) v. Bradley (1862) 31 L. J. Q. B. 65; 1 B. & S. 940; 8 Jur. (N.S.) 588; 5 L. T. 832.—Q.B.; *referred to*, Williams v. Bagnall (1866) 12 Jur. (N.S.) 987; 15 W. R. 272.—WOOD, V.-C.; Taylor v. Shafto (1869) 8 B. & S. 228, 251; 16 L. T. 207.—Q.B.

Hilton v. Granville (Earl), *dictum held over-ruled*.

Buccleuch (Duke) v. Wakefield (1870) 39 L. J. Ch. 441; L. R. 4 H. L. 377, 399; 23 L. T. 102.—H. L. (E.); *reversing* S.C. nom. Wakefield v. Buccleuch (Duke) (1867) 36 L. J. Ch. 763; L. R. 4 Eq. 613.—MALINS, V.-C.

HATHERLEY, L.C.—Now without considering the present authority of the above case, a certain *dictum* occurs in that case which has been entirely set aside by a subsequent case in the H. L., namely, *Rowbotham v. Wilson* (*supra*, col. 1810) the *dictum* that if a deed could be produced containing such a grant as was then necessary to be presumed, in order for the defendant to establish his case, the deed itself would not be considered reasonable, because such a deed would be

inconsistent with the right granted. That *dictum* has been entirely overthrown, and as far as regards the case before us there is nothing unreasonable in the construction that is put upon the Act of Parliament.—p. 451. LORDS CHELMSFORD and COLONSAY to the same effect.

Hilton v. Granville (Earl) (*supra*), referred to.

Buccleuch (Duke) v. Wakefield, Wakefield v. Buccleuch (Duke) (*supra*), distinguished.

Hext v. Gill (1872) 41 L. J. Ch. 761; L. R. 7 Ch. 699, 716; 27 L. T. 291; 20 W. R. 957.—L.JJ.

Hilton v. Granville (Earl), referred to.

Buchanan v. Andrew (1873) L. R. 2 H. L. (Sc.) 286, 297.

Buccleuch (Duke) v. Wakefield, discussed.

Aspden v. Seddon (1874) L. R. 10 Ch. 396, n.—JESSEL, M.R.; affirmed, L.JJ. (*supra*, col. 1810).

Hilton v. Granville (Earl) and Buccleuch (Duke) v. Wakefield, referred to.

Hall v. Byron (1877) 46 L. J. Ch. 297; 4 Ch. D. 667, 677; 36 L. T. 367; 25 W. R. 317.—HALL, V.-C. And see "COMMON," vol. i., col. 375.

Hilton v. Granville (Earl), discussed.

Beckett (or Blackett) v. Bradley (*supra*, col. 1824), not followed.

Gill v. Dickinson (1880) 5 Q. B. D. 159; 49 L. J. Q. B. 262; 42 L. T. 510; 28 W. R. 415; 44 J. P. 587.

LUSH, J.—If I could see that the attention of the Court had been directed in *Blackett v. Bradley* to the distinction between that case and *Hilton v. Granville (Earl)*, and to the provisions of the Inclosure Act, I should feel myself bound to follow the decision in that case. But it is clear that the Court proceeded on the admission that the decision in *Hilton v. Granville (Earl)* did govern the case, and, moreover, the attention of the Court does not seem to have been called to the effect of the words of the Inclosure Act expressly giving the lord the right to let down the surface without making compensation. It appears to me that, whether well founded originally or not, this right is expressly legalized by the Act. The allottees take their allotments subject to the conditions imposed by the Act, and among them to the condition that the lord of the manor may work the mines without leaving sufficient support, and without making compensation. Furthermore, the Act expressly provides for compensation from a different source, namely, from contributions to be levied upon the other allotments in the same township. Under these circumstances I do not feel myself bound by *Blackett v. Bradley*.—p. 161.

Buccleuch (Duke) v. Wakefield; Hall v. Byron (*supra*); **Hilton v. Granville (Earl); Beckett (or Blackett) v. Bradley**; and **Gill v. Dickinson**, discussed.

Bell v. Love (1883) 52 L. J. Q. B. 290; 10 Q. B. D. 547, 568.—C.A.; affirmed, post, col. 1826.

Hall v. Byron, referred to.

Att.-Gen. v. Welsh Granite Co. (1887) 35 W. R. 617.—C.A., FRY, L.J. doubting; Roe v. Siddons (1888) 22 Q. B. D. 224, 234; 60 L. T. 345; 37 W. R. 228; 53 J. P. 246.—C.A.; Robertson v. Hartopp (1888—9) 43 Ch. D. 484, 498.—STIRLING, J.; affirmed C.A. (see *supra*, col. 1824).

Buccleuch (Duke) v. Wakefield (*supra*), distinguished.

Benfield's Local Board v. Consett Iron Co. (1877) 47 L. J. Ex. 491; 3 Ex. D. 54; 38 L. T. 530; 26 W. R. 114.—KELLY, C.B. and CLEASBY, B.

Buccleuch (Duke) v. Wakefield, distinguished. And see col. 1827.

Love v. Bell (1884) 9 App. Cas. 286; 53 L. J. Q. B. 257; 51 L. T. 1; 32 W. R. 725; 48 J. P. 516.—H.L. (E.); affirming S. C. nom. Bell v. Love (1888) 52 L. J. Q. B. 290; 10 Q. B. D. 547; 48 L. T. 592; 47 J. P. 468.—C.A.

SELBORNE, L.C.—No authority whatever was cited in support of the appellant's argument except the case of *Buccleuch (Duke) v. Wakefield*, which appears to me to differ from the present in every material particular. In the first place, the words to be construed there were not words occurring in an enumeration of various rights reserved of different kinds, but they were words having direct and special application to the subject of mines, minerals, and mineral working; and in connection with that it was said that the lord was to retain his former status and to exercise his powers, not simply "in the same way as if the Act had not been made" (which words occur here), but the words were very emphatic and very remarkable, namely, in the same way, as "if the lands had remained open and uninclosed, or this Act had not been passed;" that is to say, that for the purpose of giving effect to the reservation in the lord's favour, and the rights expressly conferred upon the lord by the Inclosure Act, the hypothesis of the lands remaining in an uninclosed state was, as between him and the surface owner, established by the Act; and that was pointed out as one of the reasons for the conclusion which was arrived at by one of the noble and learned lords who then advised the House. But, secondly, in that case there was not a mere reservation, but there were words operating by themselves to confer, by the authority of the legislature, upon the lord, in respect of the exercise of those reserved rights, a great number of privileges expressly enumerated, and affecting the surface, which might or might not, but probably would not, have followed from a mere reservation. And Lord Hatherley, in advising the House as to its judgment, said that the enumeration of those rights, granted and not merely reserved by the Act of Parliament, was the reason which mainly weighed upon his mind in leading him to the conclusion to which he came, he finding in those words, not indeed in express language a power to let down the surface, but what he thought was practically equivalent to it, namely, a power totally and permanently to destroy the surface, and to take away the beneficial enjoyment of any part of it from the persons to whom the allotment had been made. And thirdly, there was there (which was also much and justly relied upon) an absolute and unqualified clause of compensation; so that whatever might be the extent of the damage sustained, full reparation for that damage would be made to whoever might be the person who sustained it. All those things were relied upon, and all formed ingredients in that judgment, but all are absent here.—p. 295.

LORD WATSON also distinguished *Buccleuch (Duke) v. Wakefield* and continued: The clause [providing compensation] may, nevertheless, be so expressed as to explain the character and

extent of these powers, as was the case in *Aspleen v. Seddon* (*supra*, col. 1810), where the power reserved to the mine owner was to work the subjacent minerals without entering upon the surface of the lands. That power would not, of itself, have warranted letting down the surface; but it was made subject to the condition that the person working the mines should pay for all damages to erections on the surface occasioned by the exercise of the reserved power. Entry on the land being prohibited, it was a reasonable, if not a necessary, inference in that case, that the kind of underground working, contemplated and sanctioned, was such as would cause subsidence and injure buildings erected on the surface.—p. 299.

Davis v. Treharne (1881) 50 L. J. Q. B. 665; 6 App. Cas. 460; 29 W. R. 869.—H.L. (E.).
Referred to, *Mundy v. Rutland* (Duke) (1882) 23 Ch. D. 81, 89; 46 L. T. 477.—KAY, J. (affirmed, (1883) 31 W. R. 510.—C.A.); *applied*, *Chapman v. Day* (1883) 47 L. T. 705.—Q.B.; *Love v. Bell* (1884) 9 App. Cas. 286 (*supra*).

Love v. Bell, *distinguished*.

Buccleuch (Duke) v. Wakefield, *referred to*.
Att.-Gen. v. Welsh Granite Co. (*post*).

Davis v. Treharne (*supra*): **Dixon v. White** (1883) 8 App. Cas. 835.—H.L. (SC.); and **Love v. Bell**, *applied*.
Marquiss v. Pease and Partners (1888) 4 Times L. R. 696.—C.A.

Buccleuch (Duke) v. Wakefield; **Love v. Bell**; and **Davis v. Treharne**, *discussed*.
Consett Waterworks Co. v. Ritson (1889) 22 Q. B. D. 318; 60 L. T. 360; 53 J. P. 373.—CAVE and A. L. SMITH, JJ., *reversed on another point*, C.A., *post*.

Buccleuch (Duke) v. Wakefield, *applied*.
Fishbourne v. Hamilton (1890) 25 L. R. Ir. 483, 500.—C.A.

Bell v. Love.—C.A. (*supra*, col. 1826), *principles applied*.

Love v. Bell.—H.L., *discussed*.
Consett Waterworks Co. v. Ritson (1889) 64 L. J. Ch. 293 n.; 13 R. 123 n.; 22 Q. B. D. 702; 43 W. R. 122 n.; 59 J. P. 199.—C.A.

Bell v. Love; **Davis v. Treharne**; and **Benfieldside Local Board v. Consett Iron Co.** (*supra*, col. 1826), *referred to*.
L. & N. W. Ry. v. Evans (1892) 62 L. J. Ch. 1; [1893] 1 Ch. 16; 67 L. T. 630; 41 W. R. 149.—C.A.

Benfieldside Local Board v. Consett Iron Co., *referred to*.
Att.-Gen. v. Conduit Colliery Co. (1894) [1895] 1 Q. B. 301 (*supra*, col. 1809).

Bell v. Love; **Buccleuch (Duke) v. Wakefield** (*supra*); and **Consett Waterworks Co. v. Ritson**.—C.A., *explained and principles applied*.
Bell v. Dudley (Earl) (1894) 64 L. J. Ch. 291; [1895] 1 Ch. 182; 13 R. 120; 72 L. T. 14; 43 W. R. 122; 59 J. P. 199.—CHITTY, J.

Love v. Bell (*supra*), *considered and applied*.
Att.-Gen. v. Welsh Granite Co. (1887) 35 W. R. 617.—C.A. ESHER, M.R. and LOPES, L.J.; *FRY, L.J., doubting, referred to*.
Hayles v. Pease (1899) 68 L. J. Ch. 222;

[1899] 1 Ch. 567; 80 L. T. 220; 47 W. R. 370.
—STIRLING, J. *See judgment at length*.

5. GRANT, SALE AND PURCHASE.

Roberts v. Davey (1833) 4 B. & Ad. 664; 1 N. & M. 443; 2 L. J. K. B. 141.—K.B., *applied*.
Davenport v. Reg. (1877) 47 L. J. P. C. 8; 3 App. Cas. 115, 129; 37 L. T. 727.—P.C.

Roberts v. Davey, *discussed*.
James v. Young (1884) 53 L. J. Ch. 793; 27 Ch. D. 652, 661; 51 L. T. 75; 32 W. R. 981.
—NORTH, J.

Pryse's Settled Estates, In re (1870) 39 L. J. Ch. 760; L. R. 10 Eq. 531; 18 W. R. 1064.—MALINS, V.-C., *followed*.
Powell, In re (1874) 23 W. R. 151.—BAOON, V.-C.; *Nagle's Trusts, In re* (1877) 6 Ch. D. 104.
—JESSUP, M.R.

Witham v. Vane, 42 L. T. 686; 28 W. R. 276, 812.—FRY, J.; *reversed*, (1881) 44 L. T. 718.—C.A.; *latter decision C.A. partly reversed*, (1884) 32 W. R. 617.—H.L. (E.).

Doe d. Hanley v. Wood (1819) 2 B. & Ald. 724; 21 R. R. 469.—K.B.

Discussed, *Roads v. Trumpington Overseers* (1870) 40 L. J. M. C. 35; L. R. 6 Q. B. 56, 64; 23 L. T. 821.—Q.B.; *distinguished*, *Low Moor Co. v. Stanley Coal Co.* (1875) 33 L. T. 436, 445.
—EX., and (1876) 34 L. T. 186.—C.A.

Chetham v. Williamson (1804) 4 East 469; 1 Smith 278.—K.B., *dictum dissented from*.

Sutherland (Duke) v. Heathcote (1891) 60 L. J. Ch. 841; [1891] 3 Ch. 504.—V. WILLIAMS, J.; *affirmed*, C.A. (*post*).

Hamilton (Duke) v. Dunlop (1885) 10 App. Cas. 813.—H.L. (SC.), *not applied*.

Mountjoy's (Lord) Case (1588) 1 And. 307; 4 Leon. 147.—K.B.: **Chetham v. Williamson**; **Doe d. Hanley v. Wood** (*supra*); and **Carr v. Benson** (1868) L. R. 3 Ch. 524; 18 L. T. 696; 16 W. R. 744.—L.C., *referred to*.
Sutherland (Duke) v. Heathcote [1892] 1 Ch. 475; 61 L. J. Ch. 248; 66 L. T. 210.—C.A.

LINDLEY, L.J.—In *Lord Mountjoy's Case*, property was conveyed to two persons, John and Charles, in fee, and they covenanted and granted with and to their grantor as follows: "That it shall be lawful for Lord Mountjoy, his heirs and assigns, at all times hereafter to have, take, and dig in and upon the heath-ground of the premises from time to time, sufficient ores, heath, turves, and other necessaries for the making, &c., of allom or copperas . . . without let or interruption of the said John and Charles (i.e., the grantees of the land), their heirs or assigns, or either of them." In Anderson's report it is said to have been resolved (*inter alia*) "(3) that Lord Mountjoy might dig ore and other things for making of allom and copperas, &c., as he should think good." The report leaves it uncertain whether the Lord Mountjoy had an exclusive license or not. But it appears from the report in Leonard that it was held that there was a new grant of an interest to dig to Lord Mountjoy and his heirs in the land, and not a mere covenant, and

that Brown (*i.e.*, the grantee of the lands) and his heirs and assigns might dig there notwithstanding the said grant to the said lord. Now, Leonard is well known to have been a very accurate reporter, and *Lord Mountjoy's Case* has always been regarded as a leading authority for the proposition that a grant in fee of a liberty to dig ores does not confer on the grantee an exclusive right to dig them, even if the grant is in terms without any interruption by the grantor. This was the view taken of the case in *Chetham v. Williamson*, and in *Doe v. Wood*, and has never been judicially questioned.—p. 485.

Mountjoy's (Lord) Case (*supra*), *discussed*.

Aldam's Settled Estate, *In re* (1902) 71 L. J. Ch. 552; [1902] 2 Ch. 46; 86 L. T. 510; 50 W. R. 500.—C.A.

Carr v. Benson and Sutherland (Duke) v. Heathcote (*supra*), *approved*.

Atkinson v. King (1878) 2 L. R. Ir. 320. C.A.; CHRISTIAN, L.J. *dissenting, distinguished*.

Stanley v. Riky (1893) 31 L. R. Ir. 196.—C.A.

6. MINING COMPANIES.

Sibley v. Minton (1857) 27 L. J. Ch. 53; 5 W. R. 675.—KINDERSLEY, V.-C., *applied*.

Escott v. Gray (1878) 47 L. J. C. P. 606; 39 L. T. 121.—GROVE and LINDLEY, JJ.

Sharpe v. Dawes (1876) 46 L. J. Q. B. 104; 2 Q. B. D. 26; 36 L. T. 188; 25 W. R. 66.—C.A., *followed*.

Sanitary Carbon Co., *In re*, W. N. (1877) 223.—JESSEL, M.R.

Hybart v. Parker (1858) 27 L. J. C. P. 120; 4 C. B. (N.S.) 209; 4 Jur. (N.S.) 265; 6 W. R. 364.—C.P., *applied*.

Gray v. Pearson (1870) L. R. 5 C. P. 568, 575; 23 L. T. 416.—C.P.

Guthrie v. Fisk (1824) 3 B. & C. 178; 5 D. & R. 24; 3 Stark. 151.—K.B., *followed*.

Nance, *In re*, Ashmead, *Ex parte* (1893) 62 L. J. Q. B. 500; [1893] 1 Q. B. 590, 594; 4 R. 311; 68 L. T. 733; 41 W. R. 370.—C.A.

Norway v. Rowe (1812) 19 Ves. 144; 12 R. R. 157.—L.C.

Applied, *Prendergast v. Turton* (1843) 13 L. J. Ch. 268.—L.C. (affirming (1841) 1 Y. & C. C. 98.—KNIGHT BRUCE, V.-C.); *Cowell v. Watts* (1850) 19 L. J. Ch. 455; 2 H. & Tw. 224.—L.C.; *discussed*, *Clarke v. Hart* (1858) 27 L. J. Ch. 615; 6 H. L. Cas. 633; 5 Jur. (N.S.) 447.—H.L. (E.) (affirming S. C. *nom.* *Hart v. Clarke* (1854) 24 L. J. Ch. 137; 6 De G. M. & G. 232; 3 Eq. R. 264; 3 W. R. 147.—L.J.J.; *Erlanger v. New Sombbrero Phosphate Co.* (1878) 3 App. Cas. 1218, 1235; 39 L. T. 269; 26 W. R. 65.—H.L. (E.); *referred to*, *Palmer v. Moore* (*post*, col. 1830); *Moung Tha Hnyin v. Ma Thein Myah* (1900) L. R. 27 Ind. App. 189, 193.—P.C.

Prendergast v. Turton (*supra*).

Not applied, *Clements v. Hall* (1858) 27 L. J. Ch. 349; 2 De G. & J. 173; 4 Jur. (N.S.) 494.—L.C. and L.J.J. (reversing 24 Beav. 333.—M.R.); *discussed*, *Clarke v. Hart* (*supra*); *approved but distinguished*, *Shadwell Waterworks Co., In re*, Dibbens, *Ex parte* (1869) 18

W. R. 160.—MALINS, V.-C.; *explained*, *Garden Gully United Quartz Mining Co. v. McLister* (1875) 1 App. Cas. 39, 57; 33 L. T. 408; 24 W. R. 744.—P.C.; *referred to*, *Erlanger v. New Sombbrero, &c., Co.* (*supra*); *followed*, *Rule v. Jewell* (*post*); *not applied*, *Palmer v. Moore* (*post*).

Clarke v. Hart (or *Hart v. Clarke*) (col. 1829).

Referred to, *Garden Gully, &c., Mining Co. v. McLister* (*supra*); *Erlanger v. New Sombbrero, &c., Co.* (*supra*); *distinguished*, *Rule v. Jewell* (1881) 18 Ch. D. 660; 29 W. R. 755.—KAY, J. (*see judgment at length*); *applied*, *Palmer v. Moore* (1900) 69 L. J. P. C. 64; [1900] A. C. 293, 297; 82 L. T. 166.—P.C.

Prosper United Mining Co., In re, Palmer, Ex parte (1872) L. R. 7 Ch. 206; 26 L. T. 374; 20 W. R. 323.—L.J.J., *referred to*.

Frank Mills Mining Co., In re (1883) 52 L. J. Ch. 457; 23 Ch. D. 52; 49 L. T. 193; 31 W. R. 440.—C.A.

7. REGULATION AND INSPECTION.

Netherseal Colliery Co. v. Bourne (1889) 59

L. J. Q. B. 66; 14 App. Cas. 228; 61 L. T. 125; 54 J. P. 84.—H.L. (E.); *affirming* 36 W. R. 405.—C.A. (FRY, L.J. *dissenting*), *applied*.

Brace v. Abercarn Colliery Co. (1891) 60 L. J. Q. B. 706; [1891] 2 Q. B. 699; 65 L. T. 694; 40 W. R. 3; 56 J. P. 20; 7 Times L. R. 634.—C.A.

Netherseal Colliery Co. v. Bourne, considered and applied.

Kearney v. Whitehaven Colliery Co. (1893) 4 R. 388; 62 L. J. M. C. 129; [1893] 1 Q. B. 700, 707; 68 L. T. 690; 41 W. R. 594; 57 J. P. 645.—C.A.; *affirming* (1892) 8 Times L. R. 646.—GRANTHAM and CHARLES, JJ.

ESHER, M.R.—It has been suggested that some of the propositions there laid down by the learned lords were not necessary to the decision of that case. But I cannot agree that even this Court ought ever to say of a judgment in the House of Lords, which is founded on certain propositions as to a statute, that, though it is clear the House of Lords meant to put a particular interpretation on that statute, we shall disregard what they said because it was not necessary to the case. I take the judgment in that case to be founded on certain propositions enunciated by each of the learned lords. . . . Lord Halsbury says: "In cases to which the statute applies the payment must be according to the weight gotten. From that weight gotten only certain things can be deducted, and the deductions can only be ascertained in a particular way." Lord Bramwell says: "The effect of the enactment, then, is, that the men must be paid by weight, that the weight is to be the weight of all they send up, but that from it may be deducted the weight of certain matters, provided that weight is ascertained in a certain way." Lords Fitzgerald and Herschell seem to me to assent to these propositions. And Lord Macnaghten says: "If the agreement had stated in plain terms that a deduction was to be made from the wages of the miners in respect of slack—whatever form the deduction might have taken, whether the slack was to be absolutely rejected or paid for at a lower rate—no one, I

think, could have doubted that that part of the agreement would have been in contravention of the Act of Parliament." Having regard to these opinions . . . how can we hold that the judgment of Grantham, J. in this case is right? It is clear that his judgment is wrong, and that of Charles, J. is right.—p. 392.

Kearney v. Whitehaven Colliery Co., *not applied*.

Chell v. Hall (1896) 12 Times L. R. 408.—GRANTHAM and COLLINS, JJ.

Baker v. Carter (1878) 47 L. J. M. C. 87; 3 Ex. D. 132; 26 W. R. 497.—CLEASBY and POLLOCK, BB., *referred to*.

Wynne v. Forrester (1879) 48 L. J. M. C. 140; 5 C. P. D. 361; 40 L. T. 524; 27 W. R. 820.—C.P.D., *distinguished*.

Stokes v. Checkland (1893) 5 R. 240; 68 L. T. 457; 17 Cox C. C. 631; 57 J. P. 232.—Q.B.D.

Baker v. Carter; Stokes v. Checkland; and Wynne v. Forrester, *discussed*.

Stokes v. Mitcheson (1902) 71 L. J. K. B. 677; [1902] 1 K. B. 857, 863; 86 L. T. 767; 50 W. R. 553; 66 J. P. 615.—K.B.D.

Sybray v. White (1836) 5 L. J. Ex. 173; 1 M. & W. 435; 2 Gale 68; 1 Tyr. & G. 746.—EX., *discussed*.

Carr v. Smith (1843) 5 Q. B. 128, 138; D. & M. 192.—Q.B.; Williams v. Groucott (1863) 32 L. J. Q. B. 237; 4 B. & S. 149; 9 Jur. (N.S.) 1237; 8 L. T. 458; 11 W. R. 886.—Q.B.

Williams v. Groucott, *distinguished*.

Great Laxey Mining Co. v. Clague (1878) 4 App. Cas. 115; 27 W. R. 417.—P.C.

SIR R. COLLIER.—The defendant there [*Williams v. Groucott*] had a right to dig his shaft; but he had not a right to dig it, or to maintain it, in such a manner as to be dangerous to his neighbour who occupied the surface of the adjoining land. The present is not an action against a wrong doer for a trespass, or against a person negligently and improperly exercising a right so as to injure the rights of another. It is a claim against persons who are exercising their undoubted rights,—not negligently or improperly, but subject to a condition which did not exist in the case which has been quoted, namely, that they should pay compensation for damage done. That compensation has been assessed by a competent tribunal once for all, which puts the plaintiff in as good a position as if the damage of which he complains had never been done. After receiving that compensation he will have no right of action for any subsequent damage he may suffer from the same cause.—p. 119.

MISTAKE.

Bingham v. Bingham (1748) 1 Ves. Sen. 126.—FORTESCUE, M.R., for L.C., *applied*.

Cochrane v. Willis (1866) 35 L. J. Ch. 36; L.R. 1 Ch. 58; 13 L. T. 339; 14 W. R. 19.—L.J.J. *affirming* 34 Beav. 368.—M.R.

Bingham v. Bingham, *approved*.

Cooper v. Phibbs (1867) L. R. 2 H. L. 149, 164; 16 L. T. 678; 15 W. R. 1049.—H.L. (IR.);

reversing 17 Ir. Ch. R. 73.—L.C.; Jones v. Clifford (1876) 45 W. L. J. Ch. 809; 3 Ch. D. 779; 35 L. T. 937; 24 W. R. 979.—HALL, V.-C.

Bingham v. Bingham and Davis v. Morier (1845) 2 Coll. 303.—V.-C., *distinguished*.

Rogers v. Ingham (1876) 3 Ch. D. 351; 35 L. T. 677; 25 W. R. 338.—C.A.; *affirming* HALL, V.-C.

JAMES, L.J.—I have no doubt that there are some cases which have been relied on in which this Court has not adhered strictly to the rule that a mistake in law is not always incapable of being remedied in this Court: but relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties. It is said that there have been two cases of that kind. In *Bingham v. Bingham*, a man was held to be entitled to get his money back when he had paid it for a conveyance of his own land from another person. It was held in that case that he was entitled to recover back the money, because he had not the consideration for which he had bargained. The other case is *Davis v. Morier*, where the relation of trustee and *cestui que trust* existed between the parties; but when the facts of that case come to be looked into, the person who received the whole income of the fund on trust to apply the same properly, and who was the trustee, retained to himself all except 500*l.* a year, and it appeared that the 500*l.* a year was not all that he ought to have paid to the *cestui que trust*, and, that being so, the V.-C. (Knight Bruce) directed an inquiry, first, as to whether he had retained more than he ought to have retained; and, secondly, under what circumstances, and whether the other *cestuis que trust* had in any manner assented to such retainer—that is to say, had acquiesced in it so as to show whether they had given it up. Therefore, there was there a question of a *cestui que trust* against a trustee, which trustee—no doubt under mistake—had retained trust money in his own possession. That is the nearest case that I have been able to find to the case now before us, but that case is far from establishing the proposition contended for.—p. 355.

Bingham v. Bingham, *referred to*.

Bettyes v. Maynard (1882) 46 L. T. 766; 30 W. R. 793.—KAY, J. (*reversed*, (1883) 49 L. T. 389; 31 W. R. 461.—C.A.); Jolliffe v. Baker (1883) 52 L. J. Q. B. 609; 11 Q. B. D. 255; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.—Q.B.D.

Bingham v. Bingham, *approved*.

Strickland v. Turner (1852) 22 L. J. Ex. 115; 7 Ex. 208.—EX., *referred to*.
Huddersfield Banking Co. v. Lister & Co. (1895) 64 L. J. Ch. 523; [1895] 2 Ch. 273; 12 R. 331; 72 L. T. 703; 43 W. R. 567.—C.A.

Bingham v. Bingham, *referred to*.

Debenham v. Sawbridge [1901] 2 Ch. 98; 70 L. J. Ch. 525; 84 L. T. 519; 49 W. R. 502.

BYRNE, J.—In *Bingham v. Bingham*, the bargain and conveyance were nugatory; the defendant had nothing to sell or convey. This case has been repeatedly approved and acted upon. See per Lord Cranworth in *Cooper v. Phibbs* (*supra*), and per Hall, V.-C. in *Jones v. Clifford* (*post*).—p. 109.

Cochrane v. Willis (*supra*, col. 1831),
referred to.
Jones v. Clifford (1876) 45 L. J. Ch. 809; 3
Ch. D. 779, 791 (*supra*, col. 1831).

Cooper v. Phibbs (*supra*, col. 1831).
Applied, **O'Brien v. Hearn** (1870) 18 W. R.
514.—**SULLIVAN, M.R.**; **Jones v. Clifford** (*supra*);
explained, **Allen v. Richardson** (1879) 49 L. J. Ch.
187; 13 Ch. D. 524, 543; 41 L. T. 614; 28 W. R. 313.
—**MALINS, V.-C.**; *referred to*, **Kilvington v. Parker**
(1872) 21 W. R. 121.—**BACON, V.-C.**; **Daniell**
v. Sinclair (1881) 50 L. J. P. C. 50; 6 App. Cas.
181, 191; 44 L. T. 257; 29 W. R. 569.—**P.C.**;
Bettyes v. Maynard (1882) 46 L. T. 766 (*supra*,
col. 1832); **Wemyss' Trustees v. Lord Advocate**
(1896) 24 Rottic, 216, 228.—**CR. OF SESSION**
(*reversed nom.* **Lord Advocate v. Wemyss** (1899)
[1900] A. C. 48.—**H.L. (SC.)**); **Manifold v.**
Johnston (1901) [1902] 1 Ir. R. 11.—**PORTER, M.R.**

Jones v. Clifford (*supra*), *referred to*.
Allen v. Richardson (*supra*); **Bettyes v. May-**
nard (*supra*).

Jones v. Clifford, *distinguished*.
Soper v. Arnold (1887) 37 Ch. D. 96; 57 L. J.
Ch. 145; 57 L. T. 747; 36 W. R. 207; 52 J. P.
374.—**C.A.**; *affirmed* (1889) 59 L. J. Ch. 214;
14 App. Cas. 429; 61 L. T. 702; 38 W. R. 449.
—**H.L. (E.)**.

COTTON, L.J.—The question there was, how
far, while the contract was still *in fieri*, the
vendor was at liberty to correct a mistake he
made in stating that he was selling freeholds
when he had only a leasehold interest, and how
far the purchaser was entitled to correct the
mistake he made in accepting the title under a
misapprehension.—p. 102.

Jones v. Clifford, *discussed*.
National Provincial Bank of England and
Marsh, In re (1894) 64 L. J. Ch. 255; [1895]
1 Ch. 190, 199; 13 R. 347; 71 L. T. 629; 43
W. R. 186.—**NORTH, J.**

Beauchamp (Earl) v. Winn (or Wynn)
L. R. 6 H. L. 223; 22 W. R. 193.—
H.L. (E.); *affirming*, (1873) 38 L. J. Ch.
556; 21 L. T. 253; 17 W. R. 866.—
J.J., *referred to*.

Daniell v. Sinclair (1881) 6 App. Cas. 181,
190.—**P.C.** (*supra*); **Bettyes v. Maynard** (1882)
46 L. T. 776 (*supra*); **Barrow v. Isaacs** (1890) 60
L. J. Q. B. 179; [1891] 1 Q. B. 417, 426; 64 L. T.
686; 39 W. R. 338; 55 J. P. 517.—**C.A.**

Daniell v. Sinclair (*supra*), *referred to*.
Ward v. Sharp (1884) 53 L. J. Ch. 313; 50
L. T. 557; 32 W. R. 584.—**NORTH, J.**

Davies (or Davis) v. Fitton (1842) 2
Dr. & War. 225; 4 Ir. Eq. R. 612.—
SUGDEN, L.C.

Discussed, **Gun v. McCarthy** (*post*, col. 1834);
applied, **May v. Platt** (*post*, col. 1834).

Garrard v. Frankel (1862) 31 L. J. Ch. 604;
30 Beav. 445; 8 Jur. (N.S.) 985.—**M.R.**,
approved.

Harris v. Pepperell (1867) L. R. 5 Eq. 1; 17
L. T. 191; 16 W. R. 68.—**ROMILLY, M.R.**

Garrard v. Frankel, *followed*.
Mortimer v. Shortall (1842) 2 Dr. & War. 363;
1 Con. & L. 417.—**SUGDEN, L.C.**, *referred to*.
Bloomer v. Spittle (1872) 41 L. J. Ch. 369;
L. R. 13 Eq. 427; 26 L. T. 272; 20 W. R. 435.
—**ROMILLY, M.R.**

Garrard v. Frankel and Harris v. Pepperell
(*supra*), *commented on*.

Mortimer v. Shortall, *referred to*.
Gun v. McCarthy (1884) 13 L. R. Ir. 304, 309.
—**FLANAGAN, J.**

Harris v. Pepperell; **Garrard v. Frankel**;
and **Paget v. Marshall** (1884) 54 L. J. Ch.
575; 28 Ch. D. 255; 51 L. T. 351; 33
W. R. 608; 49 J. P. 85.—**BACON, V.-C.**,
discussed.

May v. Platt [1900] 1 Ch. 616; 69 L. J. Ch.
357; 83 L. T. 123; 48 W. R. 617.

FARWELL, J.—I have always understood the
law to be that in order to obtain rectification
there must be a mistake common to both parties,
and if the mistake is only unilateral, there must
be fraud or misrepresentation amounting to
fraud. It is true that **Lord Romilly**, in **Harris**
v. Pepperell and **Garrard v. Frankel**, and,
perhaps, **Bacon, V.-C.** in **Paget v. Marshall**,
appear to have shrunk from stigmatising the
defendant's conduct in terms as fraud, but they
treated it as equivalent to fraud, and in my
opinion would have had no jurisdiction to grant
the relief that they did in the absence of
fraud.—p. 623.

Fowler v. Fowler (1859) 4 De G. & J. 250.—
L.C., *referred to*.

Clark v. Girdwood (1877) 7 Ch. D. 9, 18; 37
L. T. 614; 25 W. R. 575.—**MALINS, V.-C.**; **Gun**
v. McCarthy (*supra*); **Blake v. Hooper** (1900) 83
L. T. 669.—**KEKEWICH, J.**

James, Ex parte, Condon, In re (1874) 43
L. J. Bk. 107; L. R. 9 Ch. 609; 30 L. T.
773; 22 W. R. 937.—**L.J.**, *referred to*.

Crew v. Terry (1877) 46 L. J. C. P. 787; 2
C. P. D. 403, 408.—**DENMAN, J.**; **McHenry,**
Ex parte and In re (1883) 53 L. J. Ch. 27; 24
Ch. D. 35, 46; 48 L. T. 921; 31 W. R. 873.—**C.A.**

James, Ex parte, *followed and extended*.

Simmonds, Ex parte, Carnac, In re (1885) 16
Q. B. D. 308; 55 L. J. Q. B. 74; 54 L. T. 439;
34 W. R. 421; 2 Times L. R. 18.—**C.A.**

COTTON, L.J.—In my opinion, **James, Ex**
parte, lays down this proposition, that when the
officer of the Court has in his hands a sum of
money which has been paid to him erroneously
under a mistake of law, the ordinary rule as
between adverse litigants does not apply, but he
will be ordered to repay it. It has been urged,
and rightly urged, that in **James, Ex parte**, the
money was still in the hands of the trustee,
whereas in the present case the money has been
distributed among the creditors, and that our
decision will be a development of the principle
of **James, Ex parte**. But, in my opinion we
must regard the funds available for distribution
among the creditors under a bankruptcy or
liquidation as one entire fund, and, if that fund
has been erroneously increased, I think it is a
just extension of **James, Ex parte**, to say that,
out of any moneys which may hereafter be in
the hands of the trustee and applicable to the
payment of dividends to the creditors, the
amount which has come into his hand by mis-
take ought to be repaid.—p. 313.

James, Ex parte, and **Simmonds, Ex parte**,
applied.

Brown, In re, Dixon v. Brown (1886) 55 L. J.
Ch. 556; 32 Ch. D. 597, 602; 54 L. T. 789.

KAY, J.—The judges in those cases treat the assignee or the trustee in bankruptcy as being an officer of the Court, and lay down the rule that money paid to him in mistake of law must be repaid by him; and even if he has spent the actual money, he will be ordered, according to the later of these decisions, to recoup the parties entitled to that money out of other of the bankrupt's assets coming to his hands afterwards. That, as James, L.J. said in the earlier of those cases, is because the Court of Bankruptcy in dealing with its own officers thinks it best to be perfectly honest, and not to regard the technical rule, which is scarcely honest in some cases. Of course I am not exercising the jurisdiction of the Court of Bankruptcy, but this question is submitted to this Court, and I have no doubt or hesitation in saying that the Court of Chancery does not consider itself bound to act on principles less honest than the Court of Bankruptcy: and if this money was really paid to the trustee in liquidation in mistake of law, I have no hesitation in saying that he must repay it—p. 558.

James, Ex parte, and Simmonds, Ex parte, applied.

Opera, In re (1891) 60 L. J. Ch. 464; [1891] 2 Ch. 154; 64 L. T. 313; 39 W. R. 398.—KEENE-WICH, J. (*reversed*, [1891] 3 Ch. 260; 60 L. J. Ch. 839; 65 L. T. 371; 39 W. R. 705.—C.A. (*see* "COMPANY," vol. I., col. 448)); Rhoades, In re, Rhoades, Ex parte (1899) 68 L. J. Q. B. 536, 804; [1899] 1 Q. B. 905; [1899] 2 Q. B. 347, 355; 80 L. T. 493, 742; 47 W. R. 432, 561; 6 Manson 277.—WRIGHT, J., and C.A.

James, Ex parte, and Simmonds, Ex parte, commented on.

Hand v. Blow (1900) 70 L. J. Ch. 687; [1901] 2 Ch. 721, 728; 85 L. T. 156; 50 W. R. 5.—STIRLING, J.; *affirmed*, (1901) C.A.

Lowry v. Bourdieu (1780) 2 Dougl. 468. —K.B., referred to.

Bilbie v. Lumley (1802) 2 East 469; 6 R. R. 479.—ELLENBOROUGH, C.J.

Lowry v. Bourdieu, questioned.

Brisbane v. Dacres (1813) 5 Taunt. 143; 14 R. R. 718.—C.P.

CHAMBER, J.—I am not aware of any particular danger in extending the law in cases of this sort, for they are for the furtherance of justice; neither do I see the application of the maxim used by Buller, J. in *Lowry v. Bourdieu*, and cited by the Court in *Bilbie v. Lumley*, *ignorantia juris non excusat*. It applies only to cases of delinquency, where an excuse is to be made; I have searched far, to see if I could find any instance of similar application of this maxim. I have a very large collection of maxims, but can find no instance in which this has been so applied. I cannot see how it applies here. In *Lowry v. Bourdieu* the decision turned on the transaction being illegal, and it being illegal, the maxim applied, *in pari delicto potior est conditio defendentis*.—p. 158. See "MONEY COUNTS."

Bramston v. Robins (1826) 4 Bing. 11; 12

Moore 68; 5 L. J. (o.s.) C. P. 13; 29 R. R. 493.—C.P., *referred to*.
De Cordova v. De Cordova (1879) 4 App. Cas. 692 700; 41 L. T. 43.—P.C.

Brown v. M'Kinally (1795) 1 Esp. 279; 5 R. R. 739.—K.B.; and Milnes v. Duncan (1827) 6 B. & C. 671; 9 L. & R. 731; 5 L. J. (o.s.) K. B. 239; 30 R. R. 498.—K.B., followed.

Cobden v. Kendrick (1791) 4 Term Rep. 431, 432, n.; 2 R. R. 424.—K.B., questioned.

Hamlet v. Richardson (1833) 9 Bing. 644; 2 M. & Scott 811; 35 R. R. 650.—C.P.

TINDAL, C.J.—In *Milnes v. Duncan*, Holroyd, J., says: "If the money had been paid after proceedings had actually commenced, I should have been of opinion that, inasmuch as there was no fraud in the defendant, it could not be recovered back." And as to *Cobden v. Kendrick*, if it can be supported as to this point, we think it can only be so on the ground of fraud in the defendant. We think the rule of law is accurately laid down by Holroyd, J.—p. 647.

Milnes v. Duncan.

Dictum overruled, Kelly v. Solari (1841) 9 M. & W. 54, 58; 11 L. J. Ex. 10; 6 Jur. 107.—EX.: *referred to*, Mather v. Maidstone (Lord) (1856) 25 L. J. C. P. 310; 18 C. B. 273.—C.P.; *approved*, Moore v. Fulham Vestry (*post*).

Mather v. Maidstone (Lord), discussed.

London and River Plate Bank v. Bank of Liverpool (1895) 65 L. J. Q. B. 80; [1896] 1 Q. B. 7; 73 L. T. 473.—MATHEW, J. *And see* Imperial Bank of Canada v. Bank of Hamilton [1903] A. C. 49, 57 (*post*, col. 1838).

Marriot v. Hampton (1797) 7 Term Rep. 269; 2 Esp. 546; 4 R. R. 439.—K.B., applied.

Brisbane v. Dacres (*supra*, col. 1835); Hamlet v. Richardson (*supra*).

Marriot v. Hampton; Hamlet v. Richardson; and Brown v. M'Kinally (*supra*), distinguished.

Davis v. Hedges (1871) 40 L. J. Q. B. 276; 1 L. R. 6 Q. B. 687, 692; 25 L. T. 155; 20 W. R. 60.—Q.B.

Marriot v. Hampton, referred to.

Caird v. Moss (1886) 55 L. J. Ch. 854; 33 Ch. D. 22, 36; 55 L. T. 453; 35 W. R. 52; 5 Asp. M. C. 565.—C.A. COTTON, LINDLEY and LOPES, L.J.; *reversing* 54 L. T. 331; 34 W. R. 485.—KAY, J.

Marriot v. Hampton and Hamlet v. Richardson, followed.

Caird v. Moss, explained.

Moore v. Fulham Vestry (1894) 64 L. J. Q. B. 226; [1895] 1 Q. B. 399; 14 R. 343; 71 L. T. 862; 43 W. R. 277; 59 J. P. 596.—C.A.

HALSBURY, L.C.—In *Milnes v. Duncan* (*supra*), Holroyd, J. states quite accurately what I think is the principle. . . . In *Caird v. Moss* . . . my brother Lopes, in dealing with the case then before him, not unnaturally referred to the fact of the judgment still standing; and for this reason, because the money in that case was paid under a judgment founded on the construction of an agreement. Then an action was brought to rectify that agreement, on the ground that such a construction was contrary to the intention of the parties. . . . He [Lopes, L.J.] was referring to the fact that the money was paid in that particular case under a judgment, and that that judgment was still standing and no effort had

been made to upset it. Under those circumstances, it was *a fortiori*, of course, that the money could not be recovered back.—p. 227.

LINDLEY, L.J.—The money there [*Hamlet v. Richardson*] was produced after a writ to recover it had been issued and served and after an appearance had been entered. But what does that mean? It means this—that the defendant says, in substance, to his opponent: "I do not intend to fight you. I will pay rather than fight." If he chooses to take that course he cannot back out of it, whether he discovers that he has made a mistake or does not. That is the *ratio decidendi* in that case and in several others; of course, money paid under a judgment may be recovered if the judgment is set aside. The C. A., in setting aside a final judgment, always orders the money paid under it to be refunded. That is what my brother Lopes had in his mind in *Caird v. Moss*.—p. 228.

A. L. SMITH, L.J.—A summons had been taken out against the present appellant to compel him to pay this apportionment, and under that threat or fear he paid this money. A series of authorities, from *Marriot v. Hampton* to the present time, have held that money paid under those circumstances cannot be recovered back.—p. 228.

Marriot v. Hampton, explained and applied. **Moore v. Fulham Vestry** (*supra*) and **Hamlet v. Richardson**, referred to.

Ward & Co. v. Wallis (1900) 69 L. J. Q. B. 423; [1900] 1 Q. B. 675; 82 L. T. 261.

KENNEDY, J.—In the first place, the plaintiffs claim to recover the 15% for work and labour done and materials supplied. As to that there has been a settlement of the plaintiffs' claim in the sense that the defendant has satisfied it in the terms of the legal process demanding payment; and in regard to that the plaintiffs' claim is untenable upon the principle laid down in the cases referred in the notes to *Marriot v. Hampton*, and especially in *Moore v. Fulham Vestry*, that a payment made under pressure of legal process cannot afterwards be recovered. *Marriot v. Hampton* and *Hamlet v. Richardson* were the converse of the present case. In *Marriot v. Hampton* the defendant submitted to judgment, having lost his receipt, which was his only proof of payment. He afterwards found it, and sought to recover back the amount which had been wrongfully recovered from him. It was held, however, that the matter could not be re-opened. In *Moore v. Fulham Vestry* it was argued that *Marriot v. Hampton* was decided upon the principle of *res judicata*, but it clearly was not. The ground of the decision was that, in the interests of public policy, where a settlement has been arrived at by means of legal process, the money ought not to be allowed to be recovered. . . . It is clear from the authorities collected in the notes to *Marriot v. Hampton* that the principle that money paid under compulsion of legal process is not recoverable is subject to the qualification that there must have been *bona fides* on the part of the defendant. In my opinion the same principle applies to the present case.—p. 424.

Kelly v. Solari (1841) 11 L. J. Ex. 10; 9

M. & W. 54; 6 Jur. 107.—EX., followed.

Bell v. Gardiner (1842) 11 L. J. C. P. 195; 4 Man. & G. 11; 4 Scott, N. R. 621; 1 D. (N.S.) 688.—C.P.; **Dails v. Lloyd** (1848) 17 L. J. Q. B.

247; 12 Q. B. 531; 5 Railw. Cas. 572; 12 Jur. 827.—Q.B.

Kelly v. Solari, Bell v. Gardiner, and Dails v. Lloyd, followed.

Townsend v. Crowdy (1860) 29 L. J. C. P. 300; 8 C. B. (N.S.) 477, 493; 7 Jur. (N.S.) 71; 2 L. T. 537.—C.P.

ERLE, C.J.—It seems to me that the series of decisions, from *Kelly v. Solari* down to *Dails v. Lloyd*, showing that a party who pays money under a mistake of facts is entitled to recover it back, extends to this case.—p. 305.

Bell v. Gardiner, approved.

Brownlie v. Campbell (1880) 5 App. Cas. 925, 952.—H.L. (SC.).

Kelly v. Solari.

Distinguished, **Chambers v. Miller** (1862) 32 L. J. C. P. 30; 13 C. P. (N.S.) 125.—C.P.; referred to, **Barrow v. Isaacs** [1891] 1 Q. B. 417, 425 (*supra*, col. 1833); **Brownlie v. Campbell** (*supra*).

Chambers v. Miller, referred to.

Pollard v. Bank of England (1871) 40 L. J. Q. B. 233; L. R. 6 Q. B. 623, 631; 25 L. T. 415; 19 W. R. 1168.—Q.B.

Chambers v. Miller, distinguished.

Kelly v. Solari and Aiken v. Short (1856) 25 L. J. Ex. 321; 1 H. & N. 210; 4 W. R. 645.—EX., referred to.

Deutsche Bank (London Agency) v. Beriro & Co. (1895) 73 L. T. 669; 1 Com. Cas. 255.—C.A.

Kelly v. Solari, approved.

Imperial Bank of Canada v. Bank of Hamilton (1902) 72 L. J. P. C. 1; [1903] A. C. 49; 87 L. T. 457; 51 W. R. 289.—P.C.

Skyring v. Greenwood (1825) 4 B. & C. 281; 6 D. & R. 401; 1 C. & P. 517; 28 L. R. 264.—EX., applied.

Langley v. Langley (1839) 2 Ir. Eq. R. 313, 321.—EX. EQ.; **Wilson v. Burne** (1888) 24 L. R. Ir. 14.—Q.B.D.; affirmed, (1889) C.A.

Skyring v. Greenwood, referred to.

De Cordova v. De Cordova (1879) 4 App. Cas. 692, 700; 41 L. T. 43.—P.C.; **Daniell v. Sinclair** (1881) 50 L. J. P. C. 50; 6 App. Cas. 181, 190; 44 L. T. 257; 29 W. R. 569.—P.C.

Skyring v. Greenwood, distinguished.

Reg. v. Blenkinsop (1891) [1892] 1 Q. B. 43; 61 L. J. M. C. 45; 66 L. T. 187; 40 W. R. 272; 56 J. P. 246.

MATHEW, J.—The distinction between that case and the present is twofold; in the first place the liability of a ratepayer to pay his rates is not a mere private debt but a public obligation; and secondly, there was here no representation whatever as to the extent of the company's liability beyond the fact that the overseers omitted to collect as much as they ought to have done.—p. 46.

A. L. SMITH, J.—Then it was said that the case came within the rule of *Skyring v. Greenwood*, that money allowed in account under a mistake of law cannot be recovered back, and that the non-demand of the two-thirds was equivalent to an allowance in account. But I do not think that this could in any sense be treated as an allowance in account. The money was not allowed; it was merely not claimed.—p. 47.

Skyring v. Greenwood, followed.

Deutsche Bank (London Agency) v. Beriro & Co. (1895) 73 L. T. 689; 1 Com. Cas. 123.—MATHEW, J.; *affirmed, supra*, col. 1838.

Cocks v. Masterman (1829) 9 B. & C. 902; 4 M. & R. 676; 8 L. J. (o.s.) K. B. 77.—K.B., *distinguished*.

Durrant v. Ecclesiastical Commissioners (1880) 50 L. J. Q. B. 30; 6 Q. B. D. 234; 44 L. T. 348; 29 W. R. 443; 45 J. P. 270.—Q.B.D.; Leeds and County Bank v. Walker (1883) 52 L. J. Q. 590; 11 Q. B. D. 84; 47 J. P. 502.—DENMAN, J.

Cocks v. Masterman, followed.

London and River Plate Bank v. Bank of Liverpool (1895) 65 L. J. Q. B. 80; [1896] 1 Q. B. 7; 73 L. T. 473.—MATHEW, J.

Cocks v. Masterman and London and River Plate Bank v. Bank of Liverpool, discussed and not applied.

Durrant v. Ecclesiastical Commissioners, Leeds and County Bank v. Walker and Gaden v. Newfoundland Savings Bank (1899) 68 L. J. P. C. 57; [1899] A. C. 281; 80 L. T. 320.—P.C., *referred to*.

Imperial Bank of Canada v. Bank of Hamilton (1902) 72 L. J. P. C. 1; [1903] A. C. 49, 58; 87 L. T. 457; 51 W. R. 289.—P.C.

LORD LINDLEY.—The rule laid down in *Cocks v. Masterman* and recently asserted in even wider language by Mathew, J. in *London and River Plate Bank*, has reference to negotiable instruments, on the dishonour of which notice has to be given to some one—namely, to some drawer or indorser who would be discharged from liability unless such notice were given in proper time. Their lordships are not aware of any authority for applying so stringent a rule to any other cases. Assuming it to be as stringent as is alleged in such cases as those above described, their lordships are not prepared to extend it to other cases where notice of the mistake is given in reasonable time and no loss has been occasioned by the delay in giving it.—p. 4.

MONEY COUNTS.**King v. Basingham** (1724) 8 Mod. 199, 341.—K.B.

Explained, Jones v. Cuthbertson (1873) 42 L. J. Q. B. 221; L. R. 8 Q. B. 504; 28 L. T. 673; 21 W. R. 919.—EX. CH.

Morgan v. Palmer (1824) 2 B. & C. 729; 4 D. & R. 283; 2 L. J. (o.s.) K. B. 145; 26 R. R. 537.—K.B.

Discussed, Waterhouse v. Keen (1825) 6 D. & R. 357; 4 B. & C. 200.—K.B.; *principle applied*, Cooke v. Leonard (1827) 3 L. J. (o.s.) M. C. 99; 6 B. & C. 351; 9 D. & R. 339; 30 R. R. 348.—K.B.

Morgan v. Palmer and Steele v. Williams (1853) 23 L. J. Ex. 225; 8 Ex. 625; 17 Jur. 464.—EX., *applied*.

Hooper v. Exeter Corporation (1887) 56 L. J. Q. B. 457.—COLERIDGE, C.J. and A. L. SMITH, J.

Yates v. Aston (1843) 12 L. J. Q. B. 160; 4 Q. B. 182; 3 G. & D. 351.—Q.B., *distinguished*.

Mathew v. Blackmore (1857) 26 L. J. Ex. 150; 1 H. & N. 762; 5 W. R. 363.—EX.

POFFLOCK, C.B.—The Court of Q. B. in the case O.C.

cited [*Yates v. Aston*] stated that there was no covenant in the mortgage deed, either express or implied, upon which an action for the money advanced could be maintained. In the present case there is a covenant expressly upon the subject, although not an absolute but a limited one. This circumstance, therefore, clearly distinguishes the case from *Yates v. Aston*.—p. 152.

Yates v. Aston, questioned.

Painter v. Abel (1863) 9 Jur. (N.S.) 549; 33 L. J. Ex. 60; 2 H. & C. 113; 8 L. T. 287; 11 W. R. 651.—EX.

MARTIN, B.—*Yates v. Aston* has not been generally approved of; it is a case where an action in simple contract is brought in respect of money transferred by deed.—p. 550.

Yates v. Aston, distinguished.

Att.-Gen. v. Featherstonchaugh (1892) 30 L. R. 1r. 585, 595.—Q.B.D.

Faikney v. Reynous (1767) 4 Bur. 2069.—

K.B.; and *Petrie v. Hannay* (1789) 3 Term Rep. 418.—K.B., *overruled*.

Cannan v. Bryce (1819) 3 B. & Ald. 179; 22 R. R. 342.—K.B.

ABBOTT, C.J. (for the Court).—The authorities principally in favour of the defendant are those of *Faikney v. Reynous* and *Petrie v. Hannay*. The propriety, however, of those decisions has been questioned in the several subsequent cases that were quoted on the part of the plaintiff; and the distinction taken in the former of them between *malum prohibitum* and *malum in se* was expressly disallowed in the case of *Aubert v. Maze* (2 B. & P. 371).—Indeed, we think no such distinction can be allowed in a Court of law; the Court is bound, in the administration of the law, to consider every act to be unlawful which the law has prohibited to be done.—p. 183.

Cannan v. Bryce, followed and approved.

Pearce v. Brooks (1866) 35 L. J. Ex. 134; L. R. 1 Ex. 213; 12 Jur. (N.S.) 342; 14 L. T. 288; 14 W. R. 614.

Exall v. Partridge (1799) 8 Term Rep. 308; 3 Esp. 8; 4 R. R. 656.—K.B., *distinguished*.

England v. Marsden (1866) L. R. 1 C. P. 529; 35 L. J. C. P. 259; 12 Jur. (N.S.) 706; 14 L. T. 405; 14 W. R. 650.

ERLE, C.J.—There is, however, one great distinction between that case and this. There, Partridge was a coachmaker, and Exall, at his request, bailed his carriage with him. The landlord distrained it for rent, and Exall cleared it from that burden by paying the sum claimed; and it was held that the action lay, because the carriage was left upon the defendant's premises at the defendant's request and for his benefit. Here, however, the plaintiff's goods were upon the defendant's premises for the benefit of the owner of the goods, and without any request of the defendant. The plaintiff having seized the goods under the bill of sale, they were his absolute property. He had a right to take them away; indeed, it was his duty to take them away.—p. 532.

Exall v. Partridge, referred to.

Edmunds v. Wallingford (1885).—C.A. (*infra*).

Griffenhoof v. Daubuz (1857) 25 L. J. Q. B. 237; 5 E. & B. 746; 2 Jur. (N.S.) 392; 4 W. R. 131.—EX. CH.
Applied, Att.-Gen. v. Durham (1882) 46 L. T. 16, 19.—HALL, V.C.; *explained*, Edmunds v. Wallingford (1885).—C.A. (*infra*).

England v. Marsden (1866) (*supra*), *commented on*.
 Fox, In re, Bishop, Ex parte (1880) 50 L. J. Ch. 18; 15 Ch. D. 400; 43 L. T. 165; 29 W. R. 144.—C.A. See extract, *ante*, vol. i., col. 205.

England v. Marsden, *overruled*.
 Edmunds v. Wallingford (1885) 14 Q. B. D. 811; 54 L. J. Q. B. 305; 52 L. T. 720; 33 W. R. 647; 49 J. P. 549.—C.A. COLERIDGE, C.J., HANNEN, P. and LINDLEY, L.J.
 LINDLEY, L.J. (for the Court).—This appears to us a very questionable decision. The evidence did not show that the plaintiff's goods were left in the defendant's house against his consent; and although it is true that the plaintiff only had himself to blame for exposing his goods to seizure, we fail to see how he thereby prejudiced the defendant, or why, having paid the defendant's debt in order to redeem his own goods from lawful seizure, the plaintiff was not entitled to be reimbursed by the defendant. This decision has been questioned before by Thesiger, L.J. [*see Ex parte Bishop, In re Fox*, 15 Ch. D. at p. 417, where the Lord Justice assumes for the purpose of the case before him, that *England v. Marsden* was rightly decided, but "will not say that, together with *Sleigh v. Sleigh* (5 Ex. 514), it may not be open to further consideration when the occasion for it arises"], and by the late Vaughan Williams, J. in the notes to the last edition of Wms. Saunders, vol. i., p. 361, and we think the decision ought not to be followed.—p. 815.

Edmunds v. Wallingford, *followed*.
 The Orchis (1890) 59 L. J. P. 31; 15 P. D. 38; 62 L. T. 407; 38 W. R. 472; 6 Asp. M. C. 501.—C.A. COLERIDGE, C.J., Esher, M.R. and FRY, L.J.

Simpson v. Bloss (1816) 7 Taunt. 246.—C.P. *Adopted*, Taylor v. Chester (1869) 38 L. J. Q. B. 225; L. R. 4 Q. B. 309, 314; 21 L. T. 359.—Q.B.; *followed*, Begbie v. Phosphate Sewage Co. (1875) 44 L. J. Q. B. 233; L. R. 10 Q. B. 491, 500; 33 L. T. 470.—Q.B. (*affirmed*, C.A.); *principle applied*, Taylor v. Bowers (1876) 46 L. J. Q. B. 39; 1 Q. B. D. 291; 34 L. T. 938; 24 W. R. 499.—C.A.

Lewis v. Campbell (1849) 19 L. J. C. P. 130; 8 C. B. 541; 14 Jur. 396.—C.P., *followed*.
 Pellman v. Keble (1850) 19 L. J. C. P. 325; 9 C. B. 701; 15 Jur. 38.—C.P.

Israel v. Douglas (1789) 1 H. Bl. 239, *disapproved*.
 Taylor v. Higgins (1802) 3 East 169.—K.B.
 LAWRENCE, J.—That case has been since mentioned in this Court [2 Esp. 571], and was not approved of upon that point, and Wilson, J., expressed his dissent to it on that ground at the time. I have a note of the case, which differs materially from that cited.—p. 171. *And see* Williams v. Everett, 14 East 587, n.

Israel v. Douglas, *discussed*.
 Wharton v. Walker (1825) 4 B. & C. 163; 6 D. & R. 258; 3 L. J. (O.S.) K. B. 183.—K.B.

Israel v. Douglas, *questioned*.
 Liversidge v. Broadbent (1859) 4 H. & N. 603; 28 L. J. Ex. 332; 7 W. R. 615.—EX.
 WATSON, B.—*Israel v. Douglas* is relied upon as an authority, but the correctness of that decision has been doubted in several subsequent cases. In order to maintain an action for money paid and received, the money must have been received actually, or constructively received for the use of the plaintiff.—p. 614.

Crowfoot v. Gurney (1832) 2 L. J. C. P. 21; 9 Bing. 372; 2 M. & Sc. 473.—C.P., *commented on*.
 Liversidge v. Broadbent (1859) 4 H. & N. 603; 28 L. J. Ex. 332; 7 W. R. 615.—EX.
 BRAMWELL, B.—The marginal note of that case is not warranted by the decision (p. 607). . . . *Crowfoot v. Gurney* is a good authority for the plaintiff in the marginal note, but, if the law is to be read from the body of the case, it is against him, because the Court says that there was merely an equitable assignment of the debt.—p. 613.

Liversidge v. Broadbent, *referred to*.
 Greenway v. Atkinson (1881) 29 W. R. 560.—C.A.; Tolhurst v. Associated Portland Cement Manufacturers (1902) 71 L. J. K. B. 949; [1902] 2 K. B. 660, 668; 87 L. T. 465; 51 W. R. 81.—C.A. COLLINS, M.R., JEUENE, P. and COZENS-HARDY, L.J.; *reversing* (1901) 70 L. J. K. B. 1036; [1901] 2 K. B. 811.—MATHEW, J.

Barclay v. Gooch (1797) 2 Esp. 571.—KENYON, C.J., *not followed*.
 Taylor v. Higgins (1802) 3 East 169.—K.B.

Barclay v. Gooch, *not followed*.
 Taylor v. Higgins, *followed*.
 Maxwell v. Jameson (1818) 2 B. & Ald. 51.—K.B.

BAYLEY, J.—The plaintiff in this case has paid no money. It is said, indeed, that he has given what was equivalent to it, and that it ought to be considered for this purpose as money, and so it was held in *Barclay v. Gooch*. But in *Taylor v. Higgins*, the Court having the former case before them, held that the action for money paid could not be maintained. There are, therefore, at all events, conflicting authorities on this point, the last of which is in favour of the defendant.—p. 54.

Barclay v. Gooch, *adopted*.
 Rodgers v. Maw (1846) 16 L. J. Ex. 137; 15 M. & W. 444; 4 D. & L. 66.—EX.

Barclay v. Gooch, *discussed*.
 Fahey v. Frawley (1890) 26 L. R. Ir. 78.
 HOLMES, J.—*Barclay v. Gooch* and *McKenna v. Hurnett* (13 Ir. L. R. 206), in which it was held that a surety who had extinguished the debt by giving his own note could maintain an action for money paid against the principal debtor, were cited by counsel for the plaintiff as authorities that the action will lie where only an equivalent for money has been given. These cases are inconsistent with *Maxwell v. Jameson* (2 B. & Ald. 51) and *Whelan v. Crotty* (2 Ir. L. T. 285); and I do not think that they can ever be considered law, for the manifest reason that, as nothing had been paid on the new note before action, the surety had not sustained any damage.—p. 89.

MURPHY, J.—I think that *Barclay v. Gooch*

has never been overruled in such a way that we should hold it not to be law. I should be prepared to hold that that case has been clearly affirmed by two eminent judges in this country—the late Baron Pennefather and the late Chief Justice Leffroy in *McKenna v. Harnett*—and I consider it is still law.—p. 91.

Moore v. Pyrke (1809) 11 East 52, *doubted*.
Rodgers v. Maw (1846) 16 L. J. Ex. 137; 15 M. & W. 444; 4 D. & L. 66.—EX.

Moore v. Pyrke, disapproved.
Bandy v. Cartwright (1853) 22 L. J. Ex. 285; 8 Ex. 913.

POLLOCK, C.B.—In my opinion that case was badly argued and hastily decided.—p. 286.

Maxwell v. Jameson (1818) 2 B. & Ald. 51.
—K.B., *observed upon*.

Tuck v. Tuck (1840) 8 L. J. Ex. 165; 5 M. & W. 109; 7 D. P. C. 373.—EX., *applied but report in Doubling held erroneous*.
Rodgers v. Maw (1846) 16 L. J. Ex. 137; 15 M. & W. 444; 4 D. & L. 66.—EX.

Howes v. Martin (1794) 1 Esp. 162.—K.B. *applied*.

The Lord of the Isles, *Williams v. Knight* (1894) 64 L. J. P. 15; [1894] P. 342; 71 L. T. 92.—BRUCE, J.

Jones v. Orchard (1855) 16 C. B. 614; 24 L. J. C. P. 229; 1 Jur. (N.S.) 936; 3 W. R. 554.—C.P., *opinion adopted*.
Wilson v. Strugnell (1881) 50 L. J. M. C. 145; 7 Q. B. D. 548; 45 L. T. 219; 14 Cox C. C. 624; 45 J. P. 831.—STEPHEN, J.

Lanchester v. Frewer (1824) 3 L. J. (O.S.) C. P. 40; 2 Bing. 361; 9 Moore 688.—C.P., *distinguished*.
Sprott v. Powell (1826) 4 L. J. (O.S.) C. P. 161; 3 Bing. 478; 11 Moore 398; 28 R. R. 665.—C.P.

Fenner v. Meares (1779) 2 W. Bl. 1269, *questioned*.
Johnson v. Collings (1800) 1 East 104.
KENYON, C.J.—I cannot as at present advised and upon the general view of it agree with *Fenner v. Meares*.—p. 104.
And see *Williams v. Everett*, 14 East 587, n.

Green v. Austin (1812) 3 Campb. 260.—ELLENBOROUGH, C.J., *adopted*.
Mackenzie, In re (1899) 68 L. J. Q. B. 1003; [1899] 2 Q. B. 566, 574; 81 L. T. 214.—C.A.

Lilly v. Hays (1836) 6 L. J. K. B. 5; 5 A. & E. 548; 1 N. & P. 26; 2 H. & W. 338, *approved*.
Moore v. Bushell (1857) 27 L. J. Ex. 3.—EX.

Lilly v. Hays, discussed.
Liversidge v. Broadbent (1859) 28 L. J. Ex. 332; 4 H. & N. 603; 7 W. R. 615.—EX.

Lamine v. Dorrell (1705) 2 Ld. Raym. 1216, *referred to*.
Neat v. Harding (1851) 20 L. J. Ex. 250; 6 Ex. 349.—EX.

Lamine v. Dorrell, adopted.
Arnold v. Cheque Bank (1876) 45 L. J. C. P. 562; 1 C. P. D. 578; 34 L. T. 729; 24 W. R. 759.—C.P.D.; *Phillips v. Homfray* (1883) 52

L. J. Ch. 833; 24 Ch. D. 439, 462; 49 L. T. 5; 32 W. R. 6.—C.A.

Astley v. Reynolds (1732) 2 Str. 915.
Referred to, *Ashmole v. Wainwright* (1842) 11 L. J. Q. B. 79; 2 Q. B. 837; 2 G. & D. 217; 6 Jur. 729.—Q.B.; *principle applied*, *Oates v. Hudson* (1851) 20 L. J. Ex. 234; 6 Ex. 346.—EX.; *approved*, *Green v. Duckett* (1883) 52 L. J. Q. B. 435, 438; 11 Q. B. D. 275, 278; 48 L. T. 677; 31 W. R. 607; 47 J. P. 487.—DENMAN and HAWKINS, JJ.

Lindon v. Hooper (1776) Cowp. 414.
Ashmole v. Wainwright (1842) 11 L. J. Q. B. 79; 2 Q. B. 837; 2 G. & D. 217; 6 Jur. 729.—Q.B.

Lindon v. Hooper and Gulliver v. Cosens (1845) 14 L. J. C. P. 215; 1 C. B. 788; 9 Jur. 666.—C.P., *applied*.
Glyn v. Thomas (1856) 25 L. J. Ex. 125; 11 Ex. 870; 2 Jur. (N.S.) 378; 4 W. R. 363.—EX. CH.

Skeate v. Beale (1840) 9 L. J. Q. B. 233; 3 P. & D. 597; 11 A. & E. 983; 4 Jur. 766.—Q.B.

Referred to, *Ashmole v. Wainwright* (1842).—Q.B. (*supra*); *distinguished*, *The Keroula* (1886) 55 L. J. Ad. 45; 11 P. D. 92; 55 L. T. 61; 35 W. R. 60; 6 Asp. 23.—HANNEN, P.

Snowdon v. Davis (1808) 1 Taunt. 359.—C.P., *principle applied*.
Oates v. Hudson (1851) 20 L. J. Ex. 234; 6 Ex. 46.—EX.

Snowdon v. Davis, followed.
Steele v. Williams (1853) 22 L. J. Ex. 225; 8 Ex. 625; 17 Jur. 464.—EX.

Ashmole v. Wainwright (1842) 11 L. J. Q. B. 79; 2 Q. B. 837; 2 G. & D. 217; 6 Jur. 729.—Q.B., *doubted, but followed*.

Parker v. Bristol and Exeter Ry. (1851) 6 Ex. 702; 6 Railw. Cas. 776.—EX.

POLLOCK, C.B.—But I think it right to state, that, while I yield to that authority, I am not convinced by it, as I think the broad principle, that an action for money had and received must be brought for a clear and definite sum, is one which has prevailed, I believe, for many years in Westminster Hall and is, I think, worth preserving.—p. 706.

Ashmole v. Wainwright, followed.
Green v. Duckett (1883) 52 L. J. Q. B. 435; 11 Q. B. D. 275; 48 L. T. 677; 31 W. R. 607; 47 J. P. 487.—DENMAN and HAWKINS, JJ.

Yates v. Eastwood (1851) 20 L. J. Ex. 303; 6 Ex. 805.—EX., *followed*.
Evans v. Wright (1857) 27 L. J. Ex. 50; 2 H. & N. 527.—EX.

Close v. Phipps (1844) 7 M. & G. 586; 8 Scott (N.R.) 381.—C.P., *followed*.
Fraser v. Pendlebury (1861) 31 L. J. C. P. 1; 10 W. R. 104.—C.P.

Bilbie v. Lumley (1802) 2 East, 469; 6 R. R. 479.—K.B.; and *Brisbane v. Dacres* (1813) 5 Taunt. 143.—C.P.
Distinguished, *Halcs v. Freeman* (1819) 1 Br. & B. 391; 4 Moore, 21; 21 R. R. 663.—C.P.;

discussed, Smith v. Alsop (1824) 13 Price, 823; M'Clcl. 623.—EX.

Brisbane v. Dacres.

Distinguished, Morgan v. Palmer (1824) 2 L. J. (o.s.) K. B. 145; 2 B. & C. 729; 4 D. & R. 288; 26 R. R. 537.—K.B.; *approved*, Braunston v. Robins (1826) 5 L. J. (o.s.) C. P. 13; 4 Bing. 11; 12 Moore 68; 29 R. R. 493.—C.P.

Standish v. Ross (1840) 19 L. J. Ex. 185; 3 Ex. 527.—EX., *applied*.

Lee v. Merrett (1846) 15 L. J. Q. B. 289; 8 Q. B. 820; 10 Jur. 916.—Q.B., *not applied*.
Gingell v. Purkins (1850) 19 L. J. Ex. 129; 4 Ex. 720.—EX.

Baxendale v. Eastern Counties Ry. (1858) 27

L. J. C. P. 137; 4 C. B. (N.S.) 63.—C.P.; and **Baxendale v. G. W. Ry.** (1864) 33 L. J. C. P. 197; 16 C. B. (N.S.) 137; 10 Jur. (N.S.) 496; 9 L. T. 814; 12 W. R. 602.—EX. CH. *See*

(i. W. Ry. v. Sutton (1869) 38 L. J. Ex. 177; L. R. 4 H. L. 226; 22 L. T. 43; 18 W. R. 92.—H.L. (E.).

Piddington v. S. E. Ry. (1858) 27 L. J. C. P. 295; 5 C. B. (N.S.) 111; 4 Jur. (N.S.) 953.—C.P. *See*

G. W. Ry. v. Sutton (1869) 38 L. J. Ex. 177; L. R. 4 H. L. 226; 22 L. T. 43; 18 W. R. 92.—H.L. (E.).

Shand v. Grant (1863) 15 C. B. (N.S.) 324; 9 L. T. 390.—C.P., *distinguished*.

Newall v. Tomlinson (1871) L. R. 6 C. P. 405; 25 L. T. 382.—C.P.

Hennings v. Rothschild (1827) 4 Bing. 315; 12 Moore 559; 5 L. J. (o.s.) C. P. 182.—C.P.; *reversed*, *nom.* **Rothschild v. Hennings** (1829) 9 B. & C. 470; 4 M. & Ry. 411; 7 L. J. (o.s.) K. B. 230.—EX. CH.

Weston v. Downes (1778) 1 Dougl. 23.—K.B., *discussed*.

Cross v. Bartlett (1829) 8 L. J. (o.s.) C. P. 22; 3 M. & P. 537.—C.P.

Jones v. Ryde (1814) 5 Taunt. 488; 1 Marsh. 157; 15 R. R. 561.—C.P., *followed*.

Gompertz v. Bartlett (1853) 23 L. J. Q. B. 65; 2 El. & Bl. 849; 2 C. L. R. 395; 18 Jur. 266; 2 W. R. 43.—Q.B.

Jones v. Ryde, *applied*.

Leeds and County Bank v. Walker (1883) 52 L. J. Q. B. 590; 11 Q. B. D. 84; 47 J. P. 502.—DENMAN, J.

Keele v. Wheeler (1844) 7 Man. & G. 665; 8 Scott (N.R.) 323; 13 L. J. C. P. 170.—C.P., *referred to*.

Megaw v. Molloy (1878) 2 L. R. Ir. 530.—C.A.

Gurney v. Womersley (1854) 24 L. J. Q. B. 46; 4 El. & Bl. 139; 3 C. L. R. 3; 1 Jur. (N.S.) 328.—Q.B.

Distinguished, Kennedy v. Panama, &c., Mail Co. (1867) 36 L. J. Q. B. 260; L. R. 2 Q. B. 580; 17 L. T. 62; 15 W. R. 1039.—Q.B.; *referred to*, **Megaw v. Molloy** (1878) 2 L. R. Ir. 530.—C.A.

Kenney v. Wrexham (1822) 6 Madd. 355.—V.-C., *distinguished*.

Strickland v. Turner (1852) 22 L. J. Ex. 115; 7 Ex. 208.—EX.

Scurfield v. Gowland (1805) 6 East 241, *applied*.

Wilkinson (or Leeman) v. Lloyd (1845) 7 Q. B. 27; 14 L. J. Q. B. 165; 9 Jur. 328.—Q.B.

Johnson v. Johnson (1802) 3 Bos. & P. 162; 6 R. R. 736.—C.P.

Referred to, Walker v. Moore (1829) 8 L. J. (o.s.) K. B. 159; 10 B. & C. 416.—K.B.; *Bain v. Fothergill* (1874) 43 L. J. Ex. 243; L. R. 7 H. L. 158, 201; 31 L. T. 387; 23 W. R. 261.—H.L. (E.); *applied*, **Clare v. Lamb** (1875) 44 L. J. C. P. 177; L. R. 10 C. P. 334; 32 L. T. 196; 23 W. R. 389.—C.P.

Bree v. Holbech (1781) 2 Dougl. 654.—K.B.

Discussed, Thompson v. Thompson (1871) Ir. R. 6 Eq. 113.—V.-C.; *applied*, **Clare v. Lamb** (1875) 44 L. J. C. P. 177; L. R. 10 C. P. 334; 32 L. T. 196; 23 W. R. 389.—C.P.; *referred to*, **Allen v. Richardson** (1879) 49 L. J. Ch. 137; 13 Ch. D. 524, 540; 41 L. T. 614; 28 W. R. 313.—MALINS, V.-C.; *discussed*, **Gibbs v. Guild** (1881) 51 L. J. Q. B. 228; 8 Q. B. D. 296; 46 L. T. 135.—FIELD, J.; *observations adopted*, **Jolliffe v. Baker** (1883) 52 L. J. Q. B. 609; 11 Q. B. D. 255, 273; 48 L. T. 966; 32 W. R. 59.—Q.B.D.

Beed v. Blandford (1828) 2 Y. & J. 278.—EX., *distinguished*.

Head v. Tattersall (1871) 41 L. J. Ex. 4; L. R. 7 Ex. 7; 25 L. T. 631; 20 W. R. 115.—EX.

CLEASBY, B.—The cases cited do not bear much on the question, because here there was an express reservation of the right to rescind.—p. 8.

Smith v. Bromley, 2 Dougl. 696, n.; and **Williams v. Hedley** (1807) 8 East 378.

adopted.

Smith v. Cuff (1817) 6 M. & S. 160, *dictum doubted*.

Higgins v. Pitt (1849) 4 Ex. 312, 325.—EX.

Smith v. Bromley, Williams v. Hedley, and **Smith v. Cuff**, *followed*.

Atkinson v. Denby (1862) 31 L. J. Ex. 362; 7 H. & N. 934; 8 Jur. (N.S.) 1012; 7 L. T. 93; 10 W. R. 389.—EX. CH.

Timmis v. Gibbins (1852) 21 L. J. Q. B. 403; 18 Q. B. 722.—Q.B., *followed*.

Woodland v. Fear (1857) 26 L. J. Q. B. 202; 7 El. & Bl. 519; 3 Jur. (N.S.) 587; 5 W. R. 624.—Q.B.

Smith v. Mercer (1815) 6 Taunt. 76; 1 Marsh. 453; 16 R. R. 576.—C.P., *inapplicable*.

Leeds and County Bank v. Walker (1883) 52 L. J. Q. B. 590; 11 Q. B. D. 84; 47 J. P. 502.—DENMAN, J.

Price v. Neal (1762) 3 Burr. 1354; 1 W. Bl. 390.—K.B.; and **Smith v. Mercer**, *discussed*.

London and River Plate Bank v. Bank of Liverpool (1895) 65 L. J. Q. B. 80; [1896] 1 Q. B. 7; 73 L. T. 473.—MATHEW, J.

Woodland v. Fear (1857) 7 El. & Bl. 519; 26 L. J. Q. B. 202; 3 Jur. (N.S.) 587; 5 W. R. 624.—Q.B., *explained and not applied*.

Garnett v. McKewan (1872) 42 L. J. Ex. 1; L. R. 8 Ex. 10; 27 L. T. 560; 21 W. R. 57.—EX., *adopted*.

Prince v. Oriental Bank (1878) 47 L. J. P. C.

42; 3 App. Cas. 325; 38 L. T. 41; 26 W. R. 513.—P.C.

Harington v. Macmorris (1813) 5 Taunt. 228; 1 Marsh. 33.—C.P.

Applied, **Ehrensperger v. Anderson** (1848) 18 L. J. Ex. 132; 3 Ex. 148.—EX.; *inapplicable*, **London Corporation v. Cox** (1867) 36 L. J. Ex. 225; L. R. 2 H. L. 239, 269; 16 W. R. 44.—H.L. (E.).

MacLachlan v. Evans (1827) 1 Y. & J. 380.—EX., *commented upon*.

Ehrensperger v. Anderson (1848) 18 L. J. Ex. 132; 3 Ex. 148.—EX.

Wilkinson v. Godefroy (1839) 9 A. & E. 536; 3 P. & D. 411.—Q.B., *referred to*.

Freeman v. Jeffries (1869) 38 L. J. Ex. 116; L. R. 4 Ex. 189; 20 L. T. 533.—EX.

Moses v. Macferlan (1760) 2 Burr. 1005, 1012.—K.B.

Commented upon, **Johnson v. Johnson** (1802) 3 Bos. & P. 162; 6 L. R. 736.—C.P.; *discussed and applied*, **Jacobs v. Morris** (1900) 70 L. J. Ch. 183; [1901] 1 Ch. 261; 84 L. T. 112; 49 W. R. 365.—FARWELL, J. (*affirmed C.A.*).

Moses v. Macferlan and Freeman v. Jeffries (1869) 38 L. J. Ex. 116, 121; L. R. 4 Ex. 189, 199; 20 L. T. 533.—EX., *dicta applied*.
Bradford Corporation v. Ferrand (1902) 71 L. J. Ch. 859; [1902] 2 Ch. 655; 87 L. T. 338; 51 W. R. 122; 67 J. P. 21.—FARWELL, J.

Morison v. Thompson (1874) 43 L. J. Q. B. 215; L. R. 9 Q. B. 480; 30 L. T. 869; 22 W. R. 859.—Q.B., *distinguished*.

Metropolitan Bank v. Heiron (1880) 5 Ex. D. 319.—C.A. JAMES, BRETT and COTTON, L.JJ.

JAMES, L.J.—In that case the agent divided the purchase-money between the vendor and himself. I cannot see how a bribe paid to an agent can be considered money had and received for the use of the principal.—p. 322.

Morison v. Thompson, *discussed and not applied*.

Lister v. Stubbs (1890) 45 Ch. D. 1; 62 L. T. 654.—STIRLING, J. (*affirmed C.A.*).

Atlee v. Backhouse (1838) 7 L. J. Ex. 234; 3 M. & W. 633; 1 H. & H. 135.—EX., *followed*.

Oates v. Hudson (1851) 20 L. J. Ex. 284; 6 Ex. 346.—EX.

Atlee v. Backhouse, *observations applied*.

Fraser v. Pendlebury (1861) 31 L. J. C. P. 1; 10 W. R. 104.—C.P.

Watson v. Charlmont (Earl) (1848) 18 L. J. Q. B. 65; 12 Q. B. 856; 13 Jur. 117.—Q.B., *distinguished*.

Moore v. Garwood (1849) 19 L. J. Ex. 15; 4 Ex. 681.—EX. CH.

Highmove v. Primrose (1816) 5 M. & S. 65.—K.B., *adopted*.

Bayne v. Hare (1859) 1 L. T. 40; 8 W. R. 79.—EX.

Kirton v. Wood (1833) 1 M. & Rob. 253, *adopted*.

Lane v. Hill (1852) 21 L. J. Q. B. 318; 18 Q. B. 252; 16 Jur. 496.—Q.B.

Teall v. Auty (1820) 4 Moore, 542; 2 Br. & B. 99; 22 R. R. 656.—C.P., *discussed*.

Savage v. Canning (1867) Ir. R. 1 C. L. 431; 16 W. R. 133.—C.P.

Cocking v. Ward (1845) 15 L. J. C. P. 245; 1 C. B. 858.—C.P., *commented on*.

Kennedy v. Broun (1863) 9 Jur. (N.S.) 119; 13 C. B. (N.S.) 677; 32 L. J. C. P. 137; 7 L. T. 626; 11 W. R. 284.—C.P.

WILLIAMS, J.—**Cocking v. Ward** created a great sensation in the profession.

Cocking v. Ward, *discussed*.

Savage v. Canning (1867) Ir. R. 1 C. L. 431; 16 W. R. 133.—C.P.

Cocking v. Ward, *commented on*.

Knowlman v. Bluett (1874) 43 L. J. Ex. 151; L. R. 9 Ex. 307; 32 L. T. 262; 22 W. R. 758.—EX. CH.

BLACKBURN, J.—If in that case Tindal, (C.J., meant that the Statute of Frauds applied to actions upon an executed consideration, he seems to have changed his opinion a year after. See **Snuch v. Strawbridge** (12 C. B. 808; 15 L. J. C. P. 170).—p. 152.

Cocking v. Ward, *distinguished and questioned*.

Angell v. Duke (1875) 44 L. J. Q. B. 78; L. R. 10 Q. B. 174; 32 L. T. 25; 23 W. R. 307.—Q.B.

Cocking v. Ward, *referred to*.

Pulbrook v. Lawes (1876) 45 L. J. Q. B. 178; 1 Q. B. D. 284; 34 L. T. 95.—BLACKBURN and LUSH, JJ.

Emery v. Bartlett (1728) 2 Ld. Raym. 1555; 2 Str. 827; 1 Barn. 128.—K.B., *distinguished*.

Williams v. Gibbs (1836) 6 N. & M. 788; 5 A. & E. 208; 2 H. & W. 241.—K.B.

MORTGAGE.

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tions adopted, Danby v. Coutts (1885) 54 L. J. Ch.
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referred to, Sewell v. Burdick (1884) 54 L. J.
Q. B. 126; 10 App. Cas. 74, 96; 52 L. T. 445;
33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.);
Cochrane v. Moore (1890) 59 L. J. Q. B. 377; 25
Q. B. D. 57, 63; 63 L. T. 153; 38 W. R. 588; 54
J. P. 801.—C.A.

Maughan v. Sharpe (*supra*).

Referred to, Reeves v. Watts (1866) 35 L. J.
Q. B. 171; 1 L. R. 1 Q. B. 412, 416; 7 B. & S.
523; 12 Jur. (N.S.) 565; 14 L. T. 478; 14 W. R.
672.—Q.B.; Ramsden v. Lupton (1873) 43 L. J.
Q. B. 17; 1 L. R. 9 Q. B. 17, 31; 29 L. T. 510; 22
W. R. 129.—EX. CH.; *applied*, Simmons v.
Woodward (1892) 61 L. J. Ch. 252; [1892]
A. C. 100; 66 L. T. 534; 40 W. R. 641.—
H.L. (E.) (see "BILLS OF SALE," vol. i.,
col. 240); *approved*, Johnson v. Diprose (1893)
62 L. J. Q. B. 291; [1893] 1 Q. B. 512; 4 R. 291;
68 L. T. 485; 41 W. R. 371; 57 J. P. 517.—C.A.;
discussed, Gilligan and Nugent v. National Bank
[1901] 2 Ir. R. 513.—Q.B.D.

Patten v. Bond (or **Boyd**) (1889) 60 L. T.
583; 37 W. R. 373.—KAY, J., *followed*.
Ghotwynd v. Allen (1898) 68 L. J. Ch. 160;
[1899] 1 Ch. 353; 80 L. T. 110; 47 W. R. 200.
—ROMER, J.

Vorley v. Cooke (1857) 27 L. J. Ch. 185;
1 Giff. 230.—STUART, V.-C., *not applied*.
Hunter v. Walters (1871) 41 L. J. Ch. 175;
1 L. R. 7 Ch. 75, 84; 25 L. T. 765; 20 W. R. 218.
—L.C. and L.JJ.

Jennings v. Ward (1705) 2 Vern. 520.—
M.R.; and **Broad v. Selfe** (1863) 9 Jur.
(N.S.) 885; 2 N. R. 541; 9 L. T. 43; 11
W. R. 1036.—ROMILLY, M.R., *referred to*.
James v. Kerr (1889) 58 L. J. Ch. 355; 40
Ch. D. 449, 459; 60 L. T. 212; 37 W. R. 279;
53 J. P. 628.—KAY, J.

Broad v. Selfe; **James v. Kerr**; and **Anglo-**
Danubian Steam Navigation Co., In re.
International Financial Association, Ex
parte (1875) 44 L. J. Ch. 502; 1 L. R. 20
Eq. 339; 33 L. T. 118; 23 W. R. 783.—
—JESSEL, M.R., *discussed*.

Mainland v. Upjohn (1889) 58 L. J. Ch. 361;
41 Ch. D. 126; 60 L. T. 614; 37 W. R. 411.—
KAY, J.

James v. Kerr; **Jennings v. Ward**; and
Broad v. Selfe, *followed*.

Field v. Hopkins (1890) 59 L. J. Ch. 174; 44
Ch. D. 524, 530; 62 L. T. 774.—KEKEWICH, J.;
affirmed, C.A.

James v. Kerr, *principle applied*.

Rees v. De Bernardy (1896) 65 L. J. Ch. 656;
[1896] 2 Ch. 437; 74 L. T. 585.—ROMER, J.

Jennings v. Ward, *commented on*.

Biggs v. Hoddinott (1898) 67 L. J. Ch. 540;
[1898] 2 Ch. 307.—C.A. (*post*, col. 1851).

Broad v. Selfe and **Jennings v. Ward**,
referred to.

Browne v. Ryan (1900) [1901] 2 Ir. R. 653.—
C.A. (*post*, col. 1853); **Carritt v. Bradley**; [1901]
2 K. B. 550.—C.A. (*post*, col. 1855).

Broad v. Selfe, *distinguished*.

Maxwell v. Tipping [1903] 1 Ir. R. 498, 507.—
PORTER, M.R.

Potter v. Edwards (1857) 26 L. J. Ch. 468;
5 W. R. 407.—V.-C., *followed*.

Mainland v. Upjohn (1889) 41 Ch. D. 126
(*supra*); **Santley v. Wilde** [1899] 2 Ch. 474.—
C.A. (*post*, col. 1851).

Potter v. Edwards, *distinguished*.

Toomes v. Conset (1745) 3 Atk. 261.—L.C.,
applied.

Northampton (Marquis) v. Pollock (1890) 59
L. J. Ch. 745; 45 Ch. D. 190; 63 L. T. 136;
39 W. R. 166; 6 Times L. R. 427.—C.A.
BOWEN, L.J. *dissenting*; *affirmed*, *nom.* **Salt v.**
Northampton (Marquis) (1891) 61 L. J. Ch. 49;
[1892] A. C. 1; 65 L. T. 765; 40 W. R. 529.
—H.L. (E.). **LORD HANNEN** *dissenting*.

Field v. Hopkins (*supra*), *applied*.

Potter v. Edwards and **Salt v. Northampton**
(**Marquis**), *referred to*.

Mainland v. Upjohn (*supra*), *explained*.

Fyre v. Wynn-Mackenzie (1893) 63 L. J. Ch.
239; [1894] 1 Ch. 218; 8 R. 53; 69 L. T. 823;
42 W. R. 220.

KEKEWICH, J.—I have carefully considered
Kay, L.J.'s judgment [*Mainland v. Upjohn*],
and I am satisfied that he did not intend in the
slightest degree, to depart from the rule of
equity established by the authorities to which
I have referred, including *James v. Kerr*
(*supra*), which was decided by himself, and has
since been recognised by the H. L. in *Salt v.*
Northampton (Marquis). *Mainland v. Upjohn*
established what had already been decided by
Kindersley, V.-C. in *Potter v. Edwards*, that
where the initial transaction between mortgagor
and mortgagee amounts in fact to this—the
payment by the mortgagee of the whole amount
of the advance to the mortgagor, and the return
by the mortgagor of a certain part of it by way
of commission to the mortgagee (there being no
surprise or unfair dealing), the whole amount is
recoverable under the mortgage, and the com-
mission must not be deducted.—p. 241.

Field v. Hopkins, *referred to*.

Gray, *In re* (1900) 70 L. J. Ch. 133; [1901] 1 Ch. 239; 84 L. T. 24; 49 W. R. 298.—COZENS-HARDY, J.: Browne v. Ryan (1900) [1901] 2 Ir. R. 653, 677.—C.A. (*post*, col. 1853).

Salt v. Northampton (Marquis) (*supra*), *applied*.

Booth v. Salvation Army Building Association (1897) 14 Times L. R. 3.—KEKEWICH, J.

Mainland v. Upjohn (*supra*), *applied*.

Edwards' Estate, In re (1861) 11 Ir. Ch. R. 367.—HARGREAVE, J., *discussed*.

Biggs v. Hoddinott (1898) 67 L. J. Ch. 540; [1898] 2 Ch. 307; 79 L. T. 201; 47 W. R. 84.—C.A.

Biggs v. Hoddinott, *followed*.

Santley v. Wilde (1899) 68 L. J. Ch. 681; [1899] 2 Ch. 474; 81 L. T. 393; 48 W. R. 90.—C.A.: *reversing* [1899] 1 Ch. 747; 80 L. T. 154; 47 W. R. 297.—BYRNE, J.

Salt v. Northampton (Marquis) (*supra*), *followed*.

Mainland v. Upjohn, *commented on and distinguished*.

Biggs v. Hoddinott and Santley v. Wilde, *discussed*.

Rice v. Noakes & Co. (1900) 69 L. J. Ch. 635; [1900] 2 Ch. 445, 453; 82 L. T. 784; 48 W. R. 629.—C.A.: *affirming* (1899) 69 L. J. Ch. 43; [1900] 1 Ch. 213; 81 L. T. 482; 48 W. R. 110.—COZENS-HARDY, J.: C.A. *affirmed, nom.* Noakes & Co. v. Rice.—H.L. (E.) (*post*, col. 1853).

ALVERSTONE, M.R.—I will read the way in which the rule was expressed by a great common law judge (Bowen, L.J.) who, in the C. A., was the dissentient judge in *Salt v. Northampton (Marquis)*, but whose expression of the rule was approved by the H. L. He said: "Whenever a transaction is in reality one of mortgage, equity regards the mortgaged property as security only for money, and will permit of no attempt to clog, fetter or impede the borrower's right to redeem and to rescue what was, and still remains, in equity his own." I could not, of course, hope to express the proposition more clearly. I understand it to mean that the mortgagor is entitled to have back what he mortgaged, and that anything which would prevent his getting back what he mortgaged when the obligation as mortgagor is fulfilled will not be allowed to be good upon the ground that it fetters or impedes his right to redeem. . . . I think I may dismiss with a word *Mainland v. Upjohn*, as to which I will only say that I doubt whether in early days the stipulation supported in that case would have been held to be legal. Before the usury laws were abolished it certainly would not. *Mainland v. Upjohn* was a case in which the mortgagee obtained further advantages in the shape of commissions and bonuses out of the property or out of the dealings with the property which was mortgaged to him, and it is clearly distinguishable on the ground that it was a further money consideration in respect of the transactions of mortgage. *Biggs v. Hoddinott*, . . . it has been suggested, carried the matter further. I doubt myself whether it did. There the stipulation was that the money should not be called in for four or five years. . . . It was a reasonable bargain that there should be a term fixed within which the money should not be called in; and during that time it

was perfectly proper that the mortgagor should agree to purchase his beer from the mortgagee during the continuance of his mortgage; but if I have correctly stated the facts of the case and outlined the ground of the decision, it is obvious that it was not a contract which affected the property when redeemed, or which could in any way be said to clog the equity or to interfere with the rights of the mortgagor. . . . Speaking for myself, I do not know that I should have come to the same decision as that at which the C. A. arrived in *Santley v. Wilde* on the facts of that case without some difficulty, but for the purposes of to-day it is only important that we should see that we are not departing from the rule or from any material principle laid down in *Santley v. Wilde*, because of course it is binding upon us. . . . But when that judgment of the C. A. is understood, I do not think it either purported to infringe, or did infringe, in any way on the doctrine recognised by the House of Lords in *Salt v. Northampton (Marquis)*. The facts were that Miss Santley, who was going to open a theatre, by the terms of her mortgage agreed that she would pay the principal and interest back by instalments running over five years, and would give a certain share of the profits for the remaining five years, the total term being ten years. There is no doubt that the profits would issue, or might issue, out of the property after the time when the mortgage-money had been repaid; but it is clear that the C. A., as I read that judgment, considered that that was not in any way something which issued out of the equity of redemption, but they thought it was a term of the mortgage that the property should be mortgaged as security for the profits as well as for the 2,000l. . . . He [Cazens-Hardy, J.] refers to *Santley v. Wilde*, and says: "If I rightly understand the judgment of the C. A., it established that a mortgage of leasehold property, expressed to be a security for the due discharge of future recurring obligations, cannot be redeemed before those obligations have matured; even though the period covered by the obligations may or must exceed the duration of the lease. I do not think any other or larger principle can be extracted from that case." That is the learned judge's view of the principle of the decision in *Santley v. Wilde*, which I have endeavoured to express from my own point of view, in language of course somewhat different.—pp. 637—640.

RIGBY, L.J.—Without going into detail, I will only indicate the principles which I conceive to be underlying this and similar cases. I would say first that the maxim "Once a mortgage always a mortgage" has not been in any way infringed upon. Of course a maxim of that sort is a convenient thing to refer to, but it must be applied very carefully to the facts in each case. It came indirectly under review in *Salt v. Northampton (Marquis)*; and on reference to the report I venture to say that the only branch of that maxim which was under discussion really was whether there was "once a mortgage," and the majority of the House (Lord Hannon dissenting) came to the conclusion that, as regards the policy, it was *ab initio* a mortgage. The other half of the maxim, "always a mortgage," was taken for granted by everybody if the first half was established; and therefore I consider *Salt v. Northampton (Marquis)* is a clear recognition and undoubted enforcement of that maxim. There is another way of expressing the same

principle—namely, that you must not “clog the equity of redemption.” . . . Now if—and I do not entertain a doubt about it—those maxims are still in force to their full extent, it would be idle to urge that the equity of redemption is not clogged if the property is taken back as a tied house when it was mortgaged as a free house.—p. 640.

COLLINS, L.J.—The doctrine as to collateral advantage which was considered both in *Santley v. Wilde* and *Biggs v. Hoddinott* appears to me not to be very relevant to the decision in this case, nor to impair in the slightest degree the principles stated by Cozens-Hardy, J.—p. 641.

Mainland v. Upjohn (*supra*), referred to.
Carritt v. Bradley (*post*, col. 1855).

Rice v. Noakes & Co., (*supra*), discussed.
Gilligan and Nugent v. National Bank [1901] 2 Ir. R. 513, 530.—Q.B.D.

Salt v. Northampton (Marquis); Biggs v. Hoddinott; and **Santley v. Wilde**, (*supra*) discussed.

Rice v. Noakes & Co., applied.
Browne v. Ryan (1900) [1901] 2 Ir. R. 653, 678.—C.A.; reversing Q.B.D.; **ANDREWS, J.** dissenting.

Santley v. Wilde, commented on.

Browne v. Ryan and **Biggs v. Hoddinott**, approved.

Salt v. Northampton (Marquis), referred to.
Noakes & Co. v. Rice (1901) 71 L. J. Ch. 139; [1902] A. C. 24; 86 L. T. 62; 50 W. R. 305; 66 J. P. 147—H.L. (E.); affirming S. C. *nom.* *Rice v. Noakes & Co.*—C.A. (*supra*).

HALSBURY, L.C., after referring to Lord Lindley's judgment in *Santley v. Wilde*, continued: I cite that case because it appears to me that that lays down the rule; and the differences which are supposed to prevail from time to time appear to me to be only differences of fact, or of the modes in which the various Courts have regarded the fact, as to whether a case came within that rule or not. But I do not believe that there is any portion of that which Lord Lindley laid down in the case which I have cited that has been the subject of doubt or difficulty in any Court whatever. I find that the same question has arisen, and has been very learnedly discussed, in the Irish Courts lately in *Browne v. Ryan*, and certainly that case is extremely relevant to the question which this House is now discussing, because, in truth, it arose upon what practically are the same facts as in this case, and the learned judges in the C. A. have arrived at the same conclusion as that at which I invite this House to arrive. Fitzgibbon, L.J., in his judgment, and also Holmes, L.J., in referring to the case which I have just cited, appear to consider that that case is inconsistent with the rule which they themselves lay down. I confess I am unable to find any inconsistency.—p. 141.

LORD MACNAGHTEN.—There [*Browne v. Ryan*] a farmer mortgaged his holding to secure 200*l.* and interest; and as part of the mortgage transaction it was stipulated that the mortgagor should sell his holding within twelve months, employ the mortgagee as the auctioneer at a certain commission, and pay him the like commission if the conduct of the sale was given to any one else. The C. A. held, and in my opinion rightly held, that the stipulation had no effect after

redemption. The judgments of the learned judges in the C. A. seem to me, if I may venture to say so, to contain a very clear exposition of the law. They had occasion to consider the judgment of the English C. A. in *Santley v. Wilde*, and they expressed their disapproval of the conclusion at which the English C. A. arrived. Speaking for myself, with all deference to Lord Lindley, I cannot help sharing that view. I do not in the least dissent from the propositions laid down by Lord Lindley, taking them separately. But the transaction in that case seems to me to have been nothing more than an ordinary mortgage to secure an advance of money, with a superadded obligation offending against the settled principles of equity in that it rendered redemption impossible. . . . Nor can I agree with the President of the Probate Division, who seems to have thought that *Santley v. Wilde* was covered by the decision in *Biggs v. Hoddinott*—a decision to which, as it seems to me, no objection can be taken.—p. 143.

LORD DAVEY.—In *Salt v. Northampton (Marquis)* the question was whether a certain life policy, the premiums on which were charged against the mortgagor, was comprised in the mortgage security. That question having been decided in the affirmative, it was declared to be redeemable, notwithstanding an express provision to the contrary contained in the deed. . . . I do not dissent from the opinion expressed by Lord Lindley when M.R. in *Santley v. Wilde*. . . . I confess I should have decided *Santley v. Wilde* differently from the way in which it was dealt with in the C. A. After the payment of principal and interest and everything which had become payable up to the date of redemption, the property in that case remained charged with the payment to the mortgagee of one third share of the profits, and the stipulation to that effect should, I think, have been held to be a clog or fetter on the right to redeem. . . . I only desire to add that, with Lord Macnaghten, I cannot assent altogether to the assumption made by Cozens-Hardy, J. that the covenant constituted, or might constitute, a good charge upon the property by virtue of the operation of the doctrine in *Tulk v. Moshay* [(1848) 18 L. J. Ch. 83; 2 Ph. 774. See “LANDLORD AND TENANT”]. I should hesitate some time before I assented to that proposition, but it is perfectly immaterial for the decision in the present case, because, as I have already said, I think that the covenant did not continue after the redemption, and that the mere attempt to make it a charge on the property would render it void.—pp. 144, 145.

LORD LINDLEY.—I regard the mortgage-deed in this case as another unsuccessful attempt to lay a new burden on land not warranted by law or by the doctrine laid down in *Tulk v. Moshay*, which has often lately been relied upon as going much further than it does. The conclusion thus arrived at is not inconsistent with *Santley v. Wilde*, on which the appellants so strongly rely. Some of this House think that case went too far. I do not think so myself; but I will not trouble to consider its details, which were complicated. The principle on which the C. A. decided that case was, I still think, sound. Whether it was properly applied in that case is now of no importance. I believe the true principle applicable to these cases to be that expounded by the C. A. in *Biggs v. Hoddinott* and *Santley v. Wilde*. That principle is perfectly consistent with a real

pledge and with the maxim, "Once a mortgage always a mortgage." . . . I am satisfied that the C. A. [*Browne v. Ryan*] did not go too far in holding that the plaintiff's action for damages could not be sustained.—p. 145.

Biggs v. Hoddinott, *applied*.

Santley v. Wilde and Rice v. Noakes & Co. (*supra*), *referred to*.

Carritt v. Bradley (1901) 70 L. J. K. B. 832; [1901] 2 K. B. 550, 557; 49 W. R. 593.—C.A.

Noakes & Co. v. Rice, *applied*.

Jarrah Timber and Wood Paving Corporation v. Samuel (1902) 71 L. J. Ch. 688; [1902] 2 Ch. 479; 87 L. T. 44; 50 W. R. 601.—**KEKEWICH, J.**; *affirmed* (1903) 72 L. J. Ch. 262; [1903] 2 Ch. 1; 88 L. T. 106; 51 W. R. 439; 10 Manson 296.—C.A.

Browne v. Ryan (*supra*, col. 1853), *applied*.

Carritt v. Bradley (*supra*), *reversed*.

Bradley v. Carritt (1903) 72 L. J. K. B. 471; [1903] A. C. 253; 88 L. T. 633; 51 W. R. 636.—H.L. (E.).

Browne v. Ryan, Noakes & Co. v. Rice and Biggs v. Hoddinott, *distinguished*.

Maxwell v. Tipping [1903] 1 Ir. R. 498, 506.—PORTER, M.R.

Rushout v. Turner (1857) 5 W. R. 670.—WOOD, V.-C., *referred to*.

Wall v. Cockerell (1860) 29 L. J. Ch. 816; 6 Jur. (N.S.) 768; 8 W. R. 411.—**BOMILEY, M.R.**; *reversed*, 30 L. J. Ch. 417; 3 De G. F. & J. 737; 7 Jur. (N.S.) 29; 3 L. T. 490.—L.C.; *latter decision reversed*, (1863) 32 L. J. Ch. 276; 10 H. L. Cas. 229; 1 N. R.; 9 Jur. (N.S.) 447; 8 L. T. 1; 11 W. R. 442.—H.L. (E.).

Wall v. Cockerell and Coupe v. Collyer (1890) 62 L. T. 927.—**KAY, J.**, *distinguished*.

London Freehold and Leasehold Property Co. v. Saffield (Baron) (1897) 66 L. J. Ch. 790; [1897] 2 Ch. 608; 77 L. T. 445; 46 W. R. 102.—C.A.; *affirming* **KEKEWICH, J.**.

LINDLEY, M.R.—In *Wall v. Cockerell* there was no authority to borrow on the security of the impeached deed; there was no relation of banker and manager on the one side and customer on the other; there was no money of the mortgagees in the hands of the agents of the mortgagor; there was no credit in account. Moreover, the mortgagor was induced to execute the mortgage by misrepresentation. Lord (Helm)ford distinctly said so, and Lord Westbury merely said it was not necessary to put the case so high. In *Coupe v. Collyer* the impeached deed was held to be only an escrow; there was there no relation of banker and customer, and the mortgagees never placed money in the hands of the mortgagor's solicitor for investment.—p. 794.

2. PARTICULAR MORTGAGES AND INCUMBRANCES.

Chapman v. Chapman (1851) 20 L. J. Ch. 465; 13 Beav. 308; 15 Jur. 265.—M.R.

Observed on, **Burgess v. Moxon** (1856) 2 Jur. (N.S.) 1059.—**STUART, V.-C.**; *applied*, **Dixon v. Muckleston** (1872) 42 L. J. Ch. 210; L. R. 8 Ch. 155, 162; 27 L. T. 804; 21 W. R. 178.—L.C.; **McMahon, In re, McMahon v. McMahon** (1886) 55 L. T. 763.—**CHITTY, J.**

M'Auley v. Clarendon (1858) Dru. Cas. temp. Nap. 433.—L.C. and L.J., *approved*.

Eyre v. M'Dowell (1861) 9 H. L. Cas. 619.—H.L.

Eyre v. M'Dowell and General Horticultural Co., In re, Whitehouse, Ex parte (1886) 55 L. J. Ch. 608; 32 Ch. D. 512; 54 L. T. 898; 31 W. R. 681.—**CHITTY, J.**, *principle applied*.

Barclay v. Consolidated Bank (1886) 34 Ch. D. 536, 546; 55 L. T. 635; 35 W. R. 106.—**STIRLING, J.**; *affirmed on this point*, (1888) 57 L. J. Ch. 468; 38 Ch. D. 238; 59 L. T. 419; 36 W. R. 745.—C.A. **COTTON, LINDLEY and BOWEN, L.JJ.**

Eyre v. M'Dowell, *distinguished*.

Johnson v. Lowry [1900] 1 Ir. R. 316.—C.A.

Eyre v. M'Dowell, *explained*.

Tevlin v. Gilsenan (1901) [1902] 1 Ir. R. 514.—C.A.; *reversing* [1901] 1 Ir. R. 429.—V.-C.

O'BRIEN, C.J.—It seems to me that the result of the decision in *Eyre v. M'Dowell* is that a statutory mortgage under the Judgment Mortgage Act attaches upon the entire beneficial interest of the debtor in the lands at the time of the recovery of the judgment: in other words, that it operates as an innocent conveyance. The judgment mortgage takes out of the debtor everything that remains in him, or that he could assign.—p. 522.

Turner v. Dickenson (1835) 3 Cl. & F. 593; **S. C. nom. Fournier v. Paine**, 29 Bligh (N.S.) 282. H.L. (E.).—**LORD BROUGHAM**.

Russel v. Russel (1783) 1 Bro. C. C. 269.—L.C.

Disapproved, but followed, **Haigh, Ex parte** (1805) 11 Ves. 403; 8 R. R. 189.—L.C.; *commented on*, **Kensington, Ex parte** (1813) 2 V. & B. 79.—L.C. (*post*); **Hooper, Ex parte** (1815) 19 Ves. 477; 1 Meriv. 7; 2 Rose 328; 13 R. R. 244.—L.C.; *applied*, **Parker v. Housefield** (*post*); *discussed*, **Carey v. Doyme** (1856) 5 Ir. Ch. R. 104.—M.R.; **Gilligan and Nugent v. National Bank** [1901] 2 Ir. R. 513, 527.—Q.B.D.

Birch v. Ellames (1794) 2 Anstr. 427.—EX.;

Wright, Ex parte (1812) 19 Ves. 255.

—L.C.; and **Newton v. Aldous** (1804) 2

Myl. & K. 421.—L.C.; *applied*.

Parker v. Housefield (1834) 4 L. J. Ch. 57; 2 Myl. & K. 419.—**PEPYS, M.R.**

Newton v. Aldous, *referred to*.

Haigh, Ex parte (1805) 11 Ves. 403; 8 R. R. 189.—L.C., *explained*.

Carey v. Doyme (1856) 5 Ir. Ch. R. 104.—**CUSACK-SMITH, M.R.**

Langston, Ex parte (1810) 17 Ves. 227; 11

R. R. 66.—L.C., *applied*.

Devitt v. Kearney (*post*); **McMahon, In re** (*supra*, col. 1856).

Hooper, Ex parte (1815) 19 Ves. 477; 1

Meriv. 7; 2 Rose 328; 13 R. R. 244.—

L.C., *referred to*.

Kensington, Ex parte (1813—1815) 2 V. & B. 79; G. Cooper 66; 2 Rose 138; 13 R. R.

32.—L.C.; and **James v. Rice** (1854) 23

L. J. Ch. 819; 5 De G. M. & G. 461; 18

Jur. 818; 2 W. R. 542.—L.J., *applied*.

Devitt v. Kearney (1883) 11 L. R. Ir. 225.—**CHATTEERTON, V.-C.**

Chissum v. Dewes (1828) 5 Russ. 29; 29

R. R. 10.—M.R., *followed*.

Tipping v. Power (1842) 11 L. J. Ch. 257; 1 Hare 405; 6 Jur. 434.—**WIGHAM, V.-C.**;

King v. Midland Ry. (1868) 17 W. R. 113.—
GIFFARD, V.-C. Pile v. Pile, Lambton, Ex parte
(1876) 45 L. J. Ch. 841; 3 Ch. D. 36, 39; 35
L. T. 18; 24 W. R. 750, 1003.—HALL, V.-C. and C.A.

Chissum v. Dewes, Rutter v. Daniel (1882)
46 L. T. 684; 30 W. R. 724.—FRY, J.
(*affirmed*, 30 W. R. 801.—C.A.); and
Worters, In re, Oakes, Ex parte (1841)
10 L. J. Bk. 69; 2 M. D. & De G. 234;
5 Jur. 757.—SIR J. CROSS, *followed*.
O'Brien, In re (1883) 11 L. R. Ir. 213.—
MILLER J.

**Chissum v. Dewes, and Pile v. Pile, Lambton,
Ex parte** (*supra*), *discussed*.
South City Market Co., In re, Bergin, Ex parte
(1884) 13 L. R. Ir. 245.—V.-C.

**Chissum v. Dewes, Rutter v. Daniel, and
O'Brien, In re, applied.**
Brennan v. Dorney (1886) 21 L. R. Ir. 353,
363.—V.-C.; *reversed* (1887), C.A.

Brennan v. Dorney, distinguished.
**Chissum v. Dewes, Rutter v. Daniel, and
O'Brien, In re, discussed.**
Kelly v. Montague (1892) 29 L. R. Ir. 429, 440.
—C.A.; *reversing* PORTER, M.R.

Rutter v. Daniel, referred to.
West London Syndicate v. Inland Revenue
Commissioners (1898) 67 L. J. Q. B. 956; [1898]
2 Q. B. 507; 79 L. T. 289; 47 W. R. 125.—C.A.

**Chissum v. Dewes, referred to, on question of
retainer.**
Rhoades, In re, Rhoades, Ex parte [1899] 1
Q. B. 908.—WRIGHT, J.; *affirmed*, [1899] 2 Q. B.
347; 68 L. J. Q. B. 804; 80 L. T. 742; 47 W. R.
561; 6 Manson 277.—C.A.

Ashton v. Dalton (1846) 2 Coll. C. C. 565;
10 Jur. 451.—KNIGHT-BRUCE, V.-C.,
referred to.

Carey v. Doyné (1856) 5 Ir. Ch. R. 104.—M.R.;
Mellersh v. Brown (1890) 60 L. J. Ch. 48; 45
Ch. D. 225; 63 L. T. 189; 38 W. R. 732.—KAY, J.

Twynam v. Hudson, 8 Jur. (N.S.) 476; 10
W. R. 321.—STUART, V.-C.; *reversed*, (1862) 31
L. J. Ch. 577; 8 Jur. (N.S.) 685; 10 W. R. 653.
—WESTBURY, L.C.

Langridge v. Payne (1862) 2 J. & H. 423;
7 L. T. 23; 10 W. R. 726.—WOOD, V.-C.,
commented on.

Taaffe's Estate, In re (1864) 14 Ir. Ch. R. 347.
—HARGREAVE, J.

Langridge v. Payne, observed on.
Taaffe's Estate, In re, referred to.
Keene v. Biscoe (1878) 8 Ch. D. 201; 47 L. J.
Ch. 644; 38 L. T. 286; 26 W. R. 552.

FRY, J.—That case [*Langridge v. Payne*] is
one which I cannot help regretting to find re-
ported, because the judgment does not tell the
reader upon what principle it proceeded, and it
is merely a judgment restraining an ejectment
until the hearing. The case was this: there was
an agreement in writing that the mortgagee
would not call in the money for two years, the
mortgagor fulfilling the covenants. The mort-
gagor forgot to pay the interest, and the mort-
gagee gave him notice that in consequence of his
failure to pay interest the mortgagee would not
be bound as to the two years, but would exercise
his discretion, and the latter requested payment
of the interest due and the costs. The interest

and costs were paid, and then the mortgagee
issued a writ in ejectment. He was restrained
until the hearing. Now, the V.-C. might have
thought that the notice was a conditional
demand, and that the mortgagee, in fact, said:
"If you make this payment, I will for the pre-
sent waive my right;" and if that was so, there
was ground for the injunction. It is worthy of
note that when that case was called to the atten-
tion of the judge of the Landed Estates Court in
Ireland, *Taaffe's Estate, In re*, he spoke in very
strong terms, and said that the case would be
overruled, and that he could not conjecture the
ground of the doctrine on which it was decided.
In other words, he thought it a mere determina-
tion on the balance of convenience till the hearing,
and not on any doctrine. There is no principle
in *Langridge v. Payne* inconsistent with my
decision.—p. 203.

3. INTEREST.

Parker v. Butcher (1867) 36 L. J. Ch. 552;
L. R. 3 Eq. 762.—M.R.; and **Provident
Permanent Building Society v. Greenhill**
(1878) 9 Ch. D. 122; 38 L. T. 140; 27
W. R. 110.—BACON, V.-C., *referred to*.

Clarkson v. Henderson (1880) 49 L. J. Ch.
289; 14 Ch. D. 348; 43 L. T. 29; 28 W. R. 907.
—HALL, V.-C.

**Clarkson v. Henderson and Provident, &c.
Building Society v. Greenhill, applied.**
Middlesborough Building Society, In re (1884)
54 L. J. Ch. 592; 51 L. T. 743; 49 J. P. 278.—
KAY, J.

Clarkson v. Henderson, referred to.
Mainland v. Upjohn (1889) 58 L. J. Ch. 361;
41 Ch. D. 126, 142; 60 L. T. 614; 37 W. R. 411.
—KAY, J.

Carey v. Doyné (1856) 5 Ir. Ch. R. 104.—
M.R., *followed*.
Kerr's Policy, In re (1869) 38 L. J. Ch. 539;
L. R. 8 Eq. 331; 17 W. R. 989.—JAMES, V.-C.

Kerr's Policy, In re, applied.
Lippard v. Ricketts (1872) 41 L. J. Ch. 595;
L. R. 14 Eq. 291; 20 W. R. 898.—BACON, V.-C.;
Sadler v. Worley (1894) 63 L. J. Ch. 551; [1894]
2 Ch. 170; 8 L. 194; 70 L. T. 494; 42 W. R.
476.—KEKEWICH, J.

Gregory v. Pilkington, 25 L. J. Ch. 737.—
KINDERSLEY, V.-C.; *reversed*, (1857) 26 L. J. Ch.
177; 8 De G. M. & G. 616; 5 W. R. 57.—
KNIGHT BRUCE and TURNER, L.JJ.

Roberts, In re, Goodchap v. Roberts (1880)
14 Ch. D. 49; 42 L. T. 666; 28 W. R. 870.
—C.A., *referred to*.

Furber, Ex parte, King, In re (1881) 17
Ch. D. 191, 196; 44 L. T. 319; 29 W. R. 524.—
BACON, C.J.; **Frisby, In re, Allison v. Frisby**
(1889) 59 L. J. Ch. 94; 43 Ch. D. 106, 114; 61
L. T. 632; 38 W. R. 65.—C.A.; **Mellersh v.
Brown** (1890) 45 Ch. D. 225, 230 (*supra*,
col. 1857).

Smith v. Hill (1878) 47 L. J. Ch. 788; 9
Ch. D. 143; 38 L. T. 638; 26 W. R. 878.
—HALL, V.-C., *discussed*.
Mellersh v. Brown (*supra*).

Price v. G. W. Ry. (1847) 16 L. J. Ex. 87;
16 M. & W. 244; 4 Railw. Cas. 707.—EX.;
and **Morgan v. Jones** (1853) 22 L. J. Ex.
232; 8 Ex. 620.—EX., *referred to*.
Gordillo v. Weguelin (1877) 46 L. J. Ch. 691;

5 Ch. D. 287, 303; 26 L. T. 206; 25 W. R. 620.—C.A.

Agriculturist Cattle Insurance Co., In re, Hughes, Ex parte (1872) 4 Ch. D. 34, n.—L.J., *distinguished*.

European Central Ry., In re, Oriental Financial Corporation, Ex parte (1876) 4 Ch. D. 33; 46 L. J. Ch. 57; 35 L. T. 583; 25 W. R. 92.—V.-C.; *affirmed*, C.A.

BACON, V.-C.—The decision there . . . proceeded on the ground of a special agreement, the like of which does not exist in the case before me.—p. 35.

European Central Ry., In re, Oriental Financial Corporation, Ex parte, distinguished.

Popple v. Sylvester (1882) 22 Ch. D. 98; 52 L. J. Ch. 54; 47 L. T. 329; 31 W. R. 116.

FRY, J.—In the *European Central Ry.*, the covenant being to pay the principal sum with interest "until repayment thereof," the Court held that these words meant "until the day fixed for payment." And therefore they held that there was no covenant to pay beyond the day fixed for repayment of the principal. Here I have held that there is an express covenant to continue the payment of interest so long as the security should continue.—p. 100. *And see Roberts, In re* (*supra*, col. 1858).

European Central Ry., In re, and Hughes, Ex parte, distinguished.

Economic Life Assurance Society v. Usborne [1902] A. C. 147.—H.L. (IR.) (*post*).

European Central Ry., In re, referred to. Popple v. Sylvester, distinguished.

Fewings, Ex parte, Sneyd, In re (1883) 25 Ch. D. 338; 53 L. J. Ch. 545; 50 L. T. 109; 32 W. R. 352.—C.A.; *reversing* S. C. *nom.* Oxford (Bishop). **Ex parte, Sneyd, In re**, 52 L. J. Ch. 724; 48 L. T. 616; 31 W. R. 675.—BACON, V.-C.

COTTON, L.J.—The covenant there [*Popple v. Sylvester*] was entirely different from the covenant in the present case. The covenant there was to pay interest at 7 per cent. so long as any money should remain due on the security of the deed, and, assuming that decision to have been right, that it remained in force after judgment had been recovered for the principal debt, in my opinion it does not control the present case, where the claim is one of debt, not a claim in an action for redemption or foreclosure.—p. 350.

LINDLEY, L.J.—When we look at the authorities, it appears to me that this case is much more closely within *European Central Ry., In re*, than *Popple v. Sylvester*, in which the language of the Court pointed to money remaining due on the security of the deed. Here the language is entirely different.—p. 354.

Fewings, Ex parte, Sneyd, In re, followed.

Popple v. Sylvester, distinguished.

Arbuthnot v. Bunsilall (1890) 62 L. T. 234.—STIRLING, J.

Popple v. Sylvester, followed.

Arbuthnot v. Bunsilall, commented on.

Lowry v. Williams (1894) [1895] 1 Ir. R. 274.—C.A.

Popple v. Sylvester; Fewings, Ex parte, and Lowry v. Williams, distinguished.

Economic Life Assurance Society v. Usborne (1901) 71 L. J. P. C. 34; [1902] A. C. 147, 151;

85 L. T. 587.—H.L. (IR.): *reversing* S. C. *nom.* **Usborne v. Limerick Market Trustees** (1899) [1900] 1 Ir. R. 85.—C.A.

Fewings, Ex parte, referred to on question of costs.

Wales v. Carr (1902) 71 L. J. Ch. 483; [1902] 1 Ch. 860; 86 L. T. 288; 50 W. R. 313.—FARWELL, J.

Chesterfield (Lord) v. Cromwell (Lady) (1699—1701) 1 Eq. Cas. Abr. 287, *discussed*. **Cottrell v. Finney** (1874) 43 L. J. Ch. 562; 1 L. R. 9 Ch. 541, 548; 30 L. T. 773.—L.J.J.

Stains v. Banks (1863) 9 Jur. (N.S.) 1049.—V.-C.; *reversed*, Reg. Lib. 7 B. 1863, 1761, *considered*.

Union Bank of London v. Ingram (1880) 16 Ch. D. 53; 50 L. J. Ch. 74; 43 L. T. 659; 29 W. R. 209; 45 J. P. 255.

JESSEL, M.R.—Then I am referred to *Stains v. Banks*, which I should have felt great trouble in dealing with, had I not been counsel in the case, and so recollected it; for there Stuart, V.-C., decided two things; first, that a mortgagee who took possession of two farms comprised in separate mortgages was in the same position as if he had been paid his interest on the day fixed, and was therefore not entitled to charge the higher rate of interest; and in the next place, because the mortgagee did not collect the rents himself but employed an agent to do so at a commission, the V.-C. held that the mortgagee was not justified in employing an agent, and accordingly disallowed the commission. I happened to recollect that that decision was appealed from, and accordingly I sent for the Registrar's book, when I found that the decision was reversed, and that the mortgagee was allowed a higher rate of interest and the whole of his claim for commission paid to his receiver.—p. 57.

Union Bank v. Ingram, followed.

Bright v. Campbell (1889) 41 Ch. D. 388; 60 L. T. 731; 37 W. R. 745.—KAY, J.

Matson v. Swift (1841) 5 Jur. 645.—M.R., *distinguished*.

Moss, In re, Levy v. Scwell (1885) 55 L. J. Ch. 87; 31 Ch. D. 90; 54 L. T. 49; 34 W. R. 59.—PEARSON, J.

Letts v. Hutchins (1871) L. R. 13 Eq. 176.—WICKENS, V.-C., *explained*.

Smith v. Smith (1891) 60 L. J. Ch. 694; [1891] 3 Ch. 550; 65 L. T. 334; 40 W. R. 32.—ROMER, J.

Smith v. Smith, approved.

Bartlett v. Franklin (1867) 36 L. J. Ch. 671; 17 L. T. 100; 15 W. R. 1077.—MALINS, V.-C., *discussed*.

Fitzgerald's Trustee v. Mellersh (1892) 61 L. J. Ch. 231; [1892] 1 Ch. 385; 66 L. T. 178; 40 W. R. 251.—CHITTY, J. *See judgment*.

Letts v. Hutchins (*supra*) and **Smith v. Smith, referred to.**

Bovill v. Endle (1896) 65 L. J. Ch. 542; [1896] 1 Ch. 648; 44 W. R. 523.

KEKEWICH, J.—It appears from the cases that if the mortgagee takes proceedings in Court to recover his mortgage money from the mortgagor, or, if he is dead, from his estate, then he, the mortgagee, cannot refuse a tender of his principal, interest and costs on the ground that he

is entitled to six months' notice. . . . This was decided . . . in *Letts v. Hutchins*, which was cited in *Smith v. Smith*, where Romer, J. considered that the ground of Wickens, V.-C.'s judgment was that the mortgagee had taken steps to compel payment of the debt, and was therefore not entitled to six months' interest in lieu of notice.—p. 543.

4. ASSIGNMENT AND TRANSFER.

Porter v. Hubbard (or Hobart) (1672) 2 Ch. Rep. 85; 3 Ch. Rep. 78, *commented on*, Anon. (1674) 1 Ch. Cas. 258.

Goodtitle v. Morgan (1787) 1 Term Rep. 755.—K.B., *overruled*.

Bailey v. Fermor (1821) 9 Price 262; 23 R. R. 666.—EX.

Goodtitle v. Morgan, *followed*.

Salter v. Kidley (1688) 1 Show. 59.—K.B., *referred to*.

Right v. Jefferys v. Bucknell (1831) 2 B. & Ad. 278; 9 L. J. (o.s.) K. B. 304; 36 R. R. 563.—K.B.

Matthews v. Walwyn (or Wallwyn) (1798)

4 Ves. 118.—L.C.; and **Williams v. Sorrell** (1799) 4 Ves. 389.—L.C.

Applied, **Norrish v. Marshall** (1821) 5 Madd. 475.—V.-C., *considered* **Dixon v. Winch** (*post*). And see **Wheatley v. Bastow** (1855) 24 L. J. Ch. 727; 7 De G. M. & G. 261; 3 Eq. R. 865; 1 Jur. (N.S.) 1124; 3 W. R. 540.—L.J.; and **Turner v. Smith** [1901] 1 Ch. 213, 219 (*post*, col. 1862).

Norrish v. Marshall, *followed*.

Clarke's Estate, In re (1877) 1 L. R. Ir. 4.—FLANAGAN, J.

Norrish v. Marshall, *explained*.

Bickerton v. Walker (1885) 55 L. J. Ch. 227; 31 Ch. D. 151; 53 L. T. 731; 34 W. R. 141.—C.A.

FRY, L.J.—That case only deals with subsequent transactions between the mortgagor and mortgagee, the mortgagor not knowing of the transfer.—p. 154.

Norrish v. Marshall, and Southampton's (Lord) Estate, In re, Allen v. Southampton (Lord), Banfather's Claims (1880) 50 L. J. Ch. 218; 16 Ch. D. 178; 43 L. T. 687; 29 W. R. 231.—MALINS, V.-C., *considered*.

Dixon v. Winch (1899) 68 L. J. Ch. 572; 81 L. T. 111; 47 W. R. 620; and (1900) 69 L. J. Ch. 465; [1900] 1 Ch. 736, 742; 82 L. T. 437; 48 W. R. 612.—C.A.; V. WILLIAMS, L.J. *doubting*; *affirming on different grounds*, COZENS-HARDY, J.

COZENS-HARDY, J.—It is well settled that, where a mortgage is transferred without the privity of the mortgagor, the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer: *Matthews v. Walwyn* (*supra*). It is also settled that payments of interest or payments on account and capital made by the mortgagor to the mortgagee after, but without the knowledge of, a transfer must, in the absence of collusion, be allowed to the mortgagor as against the transferee: *Williams v. Sorrell* (*supra*). This doctrine has been extended to the case where the whole of the mortgage debt is, under similar circumstances, paid off: see *Norrish v. Marshall*, and *Southampton's (Lord) Estate, In re*.

Apart from these authorities I should have thought it reasonable to hold that, where the mortgagor, being entitled on payment off of the mortgage to the actual custody of the mortgage deed and other documents of title which in fact are in the possession of the transferee, chooses to pay the mortgagee without asking for the deeds, he ought not to be allowed as against the transferee to justify such payment. I should have thought that this negligence on the part of the mortgagor was far greater than the negligence of the transferee in omitting to give notice of the transfer. But I am asked to apply the principle to a case where the money which is said to have been paid by Winch to Dent in satisfaction of the mortgage was part of the purchase-money procured by the solemn statement in the conveyance by Winch and by Dent that there was not any mortgage, and that there never had been any mortgage. I decline thus to extend the doctrine.—p. 575.

Dixon v. Winch, *statement of law adopted*.

Norrish v. Marshall, *principle applied*.

Turner v. Smith (1900) 70 L. J. Ch. 144; [1901] 1 Ch. 213; 83 L. T. 704; 49 W. R. 186.—BYRNE, J.

Teevan v. Smith (1882) 51 L. J. Ch. 621;

20 Ch. D. 724; 47 L. T. 208; 30 W. R. 716.—C.A. *referred to*.

Alderson v. Elgey (1884) 26 Ch. D. 567, 572; 50 L. T. 505; 32 W. R. 632.—CHITTY, J.

Teevan v. Smith, *explained and not applied*.

Kinnaird v. Trollope (1888) 39 Ch. D. 636; 57 L. J. Ch. 905; 59 L. T. 433; 37 W. R. 234.

STIRLING, J.—To my mind, the decision in *Teevan v. Smith* depended on facts and principles totally different from those with which I am now dealing. There a mortgagor having made first and second mortgages, tendered to the first mortgagee the amount due on his mortgage, and then claimed under sect. 15 of the Conveyancing Act a transfer to his own nominee of the mortgage debt and security. It was held that he was not entitled to do so, to the prejudice of the second mortgagee.—p. 646.

Teevan v. Smith, *referred to*.

Biggs v. Hodkinott [1898] 2 Ch. 307, 311.—ROMER, J. (*affirmed* C.A., *supra*, col. 1851); **Rice v. Noakes** (1899) 69 L. J. Ch. 43; [1900] 1 Ch. 213; 81 L. T. 482; 48 W. R. 110.—COZENS-HARDY, J.; *affirmed*, C.A. and H.L. (*see supra*, col. 1851); **Corbett v. National Provident Institution** (1900) 17 Times L. R. 5.—PHILLIMORE, J.; **Browne v. Ryan** (1900) [1901] 2 Ir. R. 653, 679.—C.A.

Trevivan v. Lawrance (1704) 1 Salk. 276;

S. C. *nom.* **Trevivan v. Laurence**, 2

Ld. Rayn. 1036.—Q.B., *referred to*.

Doe d. Downe (Lord) v. Thompson (1847) 9 Q. B. 1037; 11 Jur. 1007.—Q.B.

Doe d. Downe (Lord) v. Thompson, *distinguished*.

Hassard v. Fowler (1892) 32 L. R. Ir. 49.—Q.B.D.

Richardson, In re, Shillito v. Hobson (1885)

55 L. J. Ch. 741; 30 Ch. D. 396; 53 L. T. 746; 34 W. R. 286.—C.A., *followed*.

Hancock, In re, Hancock v. Berrey (1888) 57 L. J. Ch. 793; 59 L. T. 197; 36 W. R. 710.—KAY, J.

Richardson, In re, discussed.

Gilligan and Nugent v. National Bank [1901] 2 Ir. R. 512.—Q.B.D.; De Verges v. Sandeman, Clark & Co. (1902) 71 L. J. Ch. 328; [1902] 1 Ch. 579; 86 L. T. 269; 50 W. R. 404.—C.A. V. WILLIAMS, L.J. *dissenting*.

Jones v. Gibbons (1804) 9 Ves. 407; 7 R. R. 247.—M.R.

Considered, Gardner v. Lachlan (1838) 8 L. J. Ch. 82; 4 Myl. & Cr. 129; 2 Jur. 412, 1056.—L.C.: *followed*, Mackay, Ex parte (1841) 1 M. D. & D. 550.—SIR J. CROSS; Barnett, Ex parte (1845) 1 De G. 194.—C.J.; *referred to*, Cooke v. Hemming (1868) 37 L. J. C. P. 179; L. R. 3 C. P. 334, 346; 18 L. T. 772; 16 W. R. 903.—C.P.; *approved*, Southampton's (Lord) Estate, In re (1880) 50 L. J. Ch. 218; 16 Ch. D. 178, 186 (*supra*, col. 1861); *discussed*, Richards, In re, Humber v. Richards (1890) 59 L. J. Ch. 728; 45 Ch. D. 589, 596; 63 L. T. 451; 39 W. R. 186.—STIRLING, J.; Taylor v. London and County Banking Co. (1901) 70 L. J. Ch. 477; [1901] 2 Ch. 231; 84 L. T. 397; 49 W. R. 451.—C.A.

5. MANAGEMENT AND ACCOUNT.

Chambers v. Goldwin (1801—1804) 5 Ves. 834; 9 Ves. 254; 7 R. R. 181.—M.R. and L.C.

Referred to, Forrest v. Elwes (1816) 2 Meriv. 68.—L.C.; *applied*, Norrish v. Marshall (1821) 5 Mackl. 475.—V.-C.

Chambers v. Goldwin, not applied.

Bunbury v. Winter (1820) 1 J. & W. 255; 21 R. R. 159.—L.C., *applied*.

Sayers v. Whitfield (1829) 1 Knapp, P. C. 133, 141.—P.C.

Chambers v. Goldwin, Bunbury v. Winter, Cox v. Champneys (1822) Jacob 576; 23 R. R. 145.—L.C.; and **Sayers v. Whitfield, discussed.**

Leith v. Irvine (1833) 1 Myl. & K. 277; 36 R. R. 319.—BROUGHAN, L.C.

Chambers v. Goldwin, referred to.

Bunbury v. Winter, commented on.

Faulkner v. Daniel (1843) 3 Hare 199, 218.—WIGRAM, V.-C.

Chambers v. Goldwin.

Principle explained, Robertson v. Norris (1858) 1 Giff. 421; 4 Jur. (N.S.) 155.—STUART, V.-C.; *applied*, M'Kinley's Estate, In re (1873) Ir. R. 7 Eq. 467, 471.—FLANAGAN, J.; *discussed*, Eyre v. Hughes (1876) 45 L. J. Ch. 395; 2 Ch. D. 148, 161; 34 L. T. 211; 24 W. R. 597.—BACON, V.-C.; Ward v. Sharp (1884) 53 L. J. Ch. 313; 50 L. T. 557; 32 W. R. 584.—NORTH, J.; *applied*, Mainland v. Upjohn (1889) 58 L. J. Ch. 361; 41 Ch. D. 126, 137; 60 L. T. 614; 37 W. R. 411.—KAY, J.; *referred to*, Browne v. Ryan (1900) [1901] 2 Ir. R. 653.—C.A.

M'Kinley's Estate, In re (*supra*), *distinguished*.

Maxwell v. Tipping [1903] 1 Ir. R. 498, 511.—PORTER, M.R.

Leith v. Irvine (*supra*), *applied*.

Faulkner v. Daniel (*supra*): Comyns v. Comyns (1871) Ir. R. 5 Eq. 593.—SULLIVAN, M.R.

Wilkinson v. Hall (1837) 6 L. J. C. P. 82; 3 Bing. (N.C.) 508; 3 Hedges 56.—C.P., *referred to*.

Doe d. Roylance v. Lightfoot (1841) 11 L. J. Ex. 151; 8 M. & W. 553; 5 Jur. 966.—EX.

Wilkinson v. Hall, applied.

Doe d. Roylance v. Lightfoot, approved.

Wheeler v. Montefiore (1841) 11 L. J. Q. B. 34; 2 Q. B. 133; 1 G. & D. 493; 6 Jur. 299.—DENMAN, C.J., *explained*.

Doe d. Parsley v. Day (1841) 12 L. J. Q. B. 86; 2 Q. B. 147; 2 G. & D. 757; 6 Jur. 913.

DENMAN, C.J. (for the Court).—*Wheeler v. Montefiore* was also much pressed upon us. That was a mortgage deed by way of lease for years, as was the case here with respect to part of the premises; and also an assignment of personal property as a security. The action was trespass against a sheriff, for breaking and entering the plaintiff's house, and taking his goods. The true ground of that decision was, that a lessee for years, before entry, cannot maintain trespass as to the goods; and that, by the deed, the plaintiff was not to have possession until the day of payment, which had not then arrived. Some expressions are used in the judgment as to the construction of the deed; but the real ground of the decision was as above stated.—p. 88.

Wilkinson v. Hall, dictum applied.

Duxbury v. Sandiford (1898) 80 L. T. 552.—C.A. A. L. SMITH, RIGBY and COLLINS, L.JJ.

Doe v. Lightfoot (*supra*), *applied*.

Reg. v. Champneys (1871) 40 L. J. C. P. 95; L. R. 6 C. P. 384, 396; 24 L. T. 181; 19 W. R. 386.—C.P.: Hemming v. Blanton (1873) 42 L. J. C. P. 158; 21 W. R. 636.—C.P.: Bellis's Trusts, In re (1877) 46 L. J. Ch. 333; 5 Ch. D. 504, 509; 36 L. T. 644; 25 W. R. 456.—JESSEL, M.R.

Davis v. May (1815) 19 Ves. 383; G. Cooper 238.—M.R.; and **Fulthorpe v. Foster** (1687) 1 Vern. 476.—M.R., *discussed*.

Donovan v. Fricker (1821) Jacob 165.—PLUMER, M.R.

Davis v. May.

Followed, Latter v. Dashwood (1834) 3 L. J. C. P. 149; 6 Sim. 462; 33 R. R. 149.—V.-C.; *referred to*, Thorneycroft v. Crockett (1848) 2 H. L. Cas. 231, 256.—H.L. (E.). L.C.

Mitford v. Featherstonhaugh (1752) 2 Ves. sen. 445.—L.C., *principle applied*.

Robertson v. Norris (1859) 5 Jur. (N.S.) 1238; 1 L. T. 123.—STUART, V.-C.

Mure, Ex parte (1788) 2 Cox 63; 24 R. R. 241.—L.C., *followed*.

Williams v. Price (1824) 1 Sim. & S. 581; 2 L. J. (O.S.) Ch. 105; 24 R. R. 238.—LEACH, M.R.

Williams v. Price and Kensington (Lord) v. Bouverie (1855) 24 L. J. Ch. 269; 7 De G. M. & G. 134; 1 Jur. (N.S.) 579.

L.JJ.; *reversing* (1854) 19 Beav. 39.—M.R.; L.JJ. *reversed*, (1859) 29 L. J. Ch. 537; 7 H. L. Cas. 557; 6 Jur. (N.S.) 105.—H.L. (E.); LORDS CRANWORTH and WENSLEYDALE *dissenting, applied*.

Mayer v. Murray (1878) 47 L. J. Ch. 605; 8 Ch. D. 424, 428; 26 W. R. 690.—JESSEL, M.R.

Kensington (Lord) v. Bouverie, *referred to*.
Heales v. M'Murray (1856) 23 Beav. 401.
 —ROMILLY, M.R., *distinguished*.
Noyes v. Pollock (1886) 55 L. J. Ch. 513; 32 Ch. D. 53, 63; 54 L. T. 473; 34 W. R. 383.—C.A.

Neesom v. Clarkson (1842) 12 L. J. Ch. 99; 2 Hare 163; 6 Jur. 1055.—WIGRAM, V.-C.; S. C. (1838) C. P. Cooper.—L.C.; and (1845) 4 Hare 97; 9 Jur. 82.—V.-C., *observed upon*.

Parkinson v. Hanbury (1867) 36 L. J. Ch. 292; L. R. 2 H. L. 1, 18; 16 L. T. 243; 15 W. R. 642.—H.L. (E.).

LORD WESTBURY.—*Neesom v. Clarkson* arose under these peculiar circumstances. A man had contracted to purchase a fee simple. He died before he had paid the money; he made his widow his universal legatee and devisee. The equitable estate which he, therefore, acquired by virtue of that contract, passed, under his will, to his widow. His widow married again, and her second husband, supposing himself to be entitled, paid the purchase-money under that contract. He then mortgaged the estate, the estate being one to which he was entitled only *jure uxoris*, save in respect of the lien he had on it by having paid the purchase-money. He mortgaged it and then conveyed it absolutely to a purchaser, in whose purchase deed, however, there were recitals stating, clearly and distinctly, in what character the vendor, that is to say, the second husband, had acquired an interest in the estate. The widow died, and the second husband died; and on the death of the widow, there being no child of her marriage with her second husband, the estate of course descended to the heir-at-law. The heir-at-law filed a bill for the redemption of the property, and it was held by the V.-C. (unquestionably a strong decision) that the recitals in the purchase deed gave distinct notice to the purchaser from the second husband that all his interest in the estate ceased upon the death of the wife, and that all that he could become entitled to was a claim in respect of the money which his vendor had paid on the original purchase. He, however, claimed to continue in possession; he was in possession, and he claimed to continue so. It was held that he had no title to the possession, save in respect of his lien for the purchase-money; and then, certainly by a very strong stretch of the authority of the Court and of the principle, it was held, that, as his purchase deed gave him a most distinct notice of the determination of the title of his vendor, and that he himself had no other claim than in respect of that sum of money which had been paid, his subsequent receipts must be referred to the only interest he had and, accordingly, he was charged with an account directed with wilful default. That approaches very nearly to the present case in favour of the appellant, but certainly stops somewhat short of it, and is distinguishable from it (though, if it were not distinguishable, I confess I should not have been disposed to recommend your lordships to follow that authority), because in the case then before the V.-C. there was nothing to set aside; and it was held that the conveyance, upon the very face of it, was pregnant with information to the party that he had no title whatever, save in respect of his lien for the purchase-money. In the present case there was a question to be determined at the hearing; the

question was this: whether the power of sale given to Chambers, which in its terms, required notice to be given to the personal representatives of Parkinson, could nevertheless be operative, there being no such personal representative. It was held that it could not, and that the power did not arise, and that the conveyance therefore must be set aside.—p. 299.

Parkinson v. Hanbury.

Not applied, **Comyns v. Comyns** (1871) Ir. R. 5 Eq. 583.—SULLIVAN, M.R.: *distinguished*. **M'Kinley's Estate**, In re (1873) Ir. R. 7 Eq. 467.—FLANAGAN, J.

Comyns v. Comyns, referred to.

Browne v. Ryan (1900) [1901] 2 Ir. R. 653.—C.A.

Dobson v. Land (1850) 19 L. J. Ch. 484; 8 Hare 216; 4 De G. & Sm. 575; 14 Jur. 288.—V.-C.

Applied, **Kirkwood v. Thompson** (1865) 34 L. J. Ch. 305; 2 H. & M. 392; 11 Jur. (N.S.) 385.—WOOD, V.-C.; *affirmed*, L.C. (*see post*, col. 1935); *referred to*, **Banner v. Berridge** (1881) 50 L. J. Ch. 630; 18 Ch. D. 254, 265; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. C. 420.—KAY, J.; **White v. City of London Brewery Co.** (1888) 58 L. J. Ch. 98; 39 Ch. D. 559, 564; 60 L. T. 19; 36 W. R. 881.—NORTH, J. (*affirmed*) (1889) 58 L. J. Ch. 855; 42 Ch. D. 237; 61 L. T. 741; 38 W. R. 82; 5 T. L. R. 553.—C.A.).

Incorporated Society v. Richards (1841) 1

Dr. & War. 258; 1 Con. & L. 58; 4 Ir. Eq. R. 177.—SUGDEN, L.C., *approved and followed*.

Nelson v. Booth (1858) 27 L. J. Ch. 782; 3 De G. & J. 119; 5 Jur. (N.S.) 28; 6 W. R. 845.—L.J., *distinguished*.

National Bank of Australasia v. United Hand in Hand and Band of Hope, &c. Co. (1879) 40 L. T. 697; 4 App. Cas. 391, 402; 27 W. R. 889.—P.C.

Nelson v. Booth, law adhered to.

Carter v. James (1881) 29 W. R. 437.—MALINS, V.-C. *And see* **Foster v. Foster** (1867) 37 L. J. Ch. 168; L. R. 3 Ch. 330, 334; 17 L. T. 403; 16 W. R. 238.—ROLY, C.J.

Shephard v. Elliot (1819) 4 Madd. 254;

20 R. R. 296.—V.-C., *applied*.
Carter v. James (*supra*).

Quarrell v. Beckford (1816) 1 Madd. 269; 16 R. R. 214.—V.-C., *applied*.

Wilson v. Metcalfe (1826) 1 Russ. 530; 25 R. R. 128.—M.R.; **Krech v. Park** (1875) 44 L. J. Ch. 286; L. R. 10 Ch. 334, 339; 33 L. T. 83; 23 W. R. 475.—L.J.; **Charles v. Jones** (1887) 56 L. J. Ch. 745; 35 Ch. D. 544, 550; 56 L. T. 848; 35 W. R. 645.—KAY, J.

Wilson v. Metcalfe (*supra*), *followed as to annual rests*.

Ashworth v. Lord (1887) 57 L. J. Ch. 230; 36 Ch. D. 545; 58 L. T. 18; 36 W. R. 446.—NORTH, J.

Keech v. Hall (1778) 1 Dougl. 21.—MANSFIELD, C.J., *referred to*.

Moss v. Gallimore (1779) 1 Dougl. 279.—K.B.: **Evans v. Elliot** (1838) 9 A. & E. 342 (*post*); **Brown v. Storey** (1840) 9 L. J. C. P. 225; 1 Man. & G. 117, 126; 1 Scott (N.B.) 9; 4 Jur. 319.—C.P.; **Thorp v. Facey** (1866) 39 L. J. C. P. 349; 1 H. & R. 678; 12 Jur. (N.S.) 741.—C.P.;

Stranks v. St. John (1867) 36 L. J. C. P. 118; L. R. 2 C. P. 376, 380; 16 L. T. 283; 15 W. R. 678.—C.P.; Gibbs v. Cruikshank (1873) 42 L. J. C. P. 273; L. R. 8 C. P. 454, 461; 28 L. T. 735; 21 W. R. 734.—C.P.; Lows v. Telford (1876) 45 L. J. Ex. 613; 1 App. Cas. 414, 425; 35 L. T. 69.—H.L. (E.); Heath v. Pugh (1881) 50 L. J. Q. B. 473; 6 Q. B. D. 345, 359; 44 L. T. 327; 29 W. R. 904.—C.A. (affirmed, 51 L. J. Q. B. 367; 7 App. Cas. 235; 46 L. T. 321; 30 W. R. 553.—H.L. (E.)); Kearsley v. Phillips (1883) 52 L. J. Q. B. 581; 11 Q. B. D. 621; 49 L. T. 435; 31 W. R. 909.—C.A.; Corbett v. Plowden (1884) 54 L. J. Ch. 109; 25 Ch. D. 678; 50 L. T. 740; 32 W. R. 667.—C.A.; *considered and explained*, Tarn v. Turner (1888) 57 L. J. Ch. 1085; 39 Ch. D. 456; 59 L. T. 742; 37 W. R. 276.—KEKEWICH, J. and C.A.

Doe d. Whitaker v. Hales (1831) 7 Bing. 322; 5 M. & P. 132; 9 L. J. (O.S.) C. P. 110; 33 R. R. 483.—C.P., *approved*.
Evans v. Elliot (1838) 8 L. J. Q. B. 51; 9 A. & E. 342; 1 P. & D. 256.—Q.B.

Doe d. Smith v. Webber (1834) 3 L. J. K. B. 148; 1 A. & E. 119; 3 N. & M. 746.—K.B., *applied*.
Whale v. Hitchcock (1876) 34 L. T. 136.—Q.B.D.

Johnson v. Jones (1839) 8 L. J. Q. B. 124; 9 A. & E. 809; 1 P. & D. 641.—Q.B.
Referred to, Boodle v. Cambell (1844) 13 L. J. C. P. 142; 7 Man. & G. 386; 8 Scott (N.R.) 104; 2 D. & L. 66; 8 Jur. 475.—C.P.; *approved and followed*, Underhay v. Read (*post*).

Brown v. Storey (*supra*), *approved*.
Evans v. Elliot (*supra*), *distinguished*.
Underhay v. Read (1887) 59 L. J. Q. B. 129; 20 Q. B. D. 209; 58 L. T. 457; 36 W. R. 298.—MANISTY and CHARLES, JJ.; *affirmed*, C.A.

Evans v. Elliot, *approved*.
Brown v. Storey, *doubted*.
Underhay v. Read, *discussed*.
Partington v. Woodcock (1837) 4 L. J. K. B. 239; 6 A. & E. 690.—K.B., *referred to*.
Towerson v. Jackson (1891) 61 L. J. Q. B. 36; [1891] 2 Q. B. 484; 65 L. T. 332; 40 W. R. 37; 56 J. P. 21.—C.A.

Hickman v. Machin (1859) 28 L. J. Ex. 310; 4 H. & N. 716; 5 Jur. (N.S.) 576.—EX.; and Boodle v. Cambell (*supra*), *referred to*.
Underhay v. Read (1887) 20 Q. B. D. 209, 220.—C.A. (*supra*).

Bagnall v. Villar (1879) 48 L. J. Ch. 695; 12 Ch. D. 812; 28 W. R. 242.—HALL, V.-C., *applied*.
Gordon, In re, Official Receiver, Ex parte (1889) 61 L. T. 299.—Q.B.D.

Roach v. Wadham (1805) 6 East 289; 2 Smith 376.—K.B.
Not applied, Spoor v. Green (1874) 43 L. J. Ch. 57; L. R. 9 Ex. 99, 113; 30 L. T. 393; 22 W. R. 517.—EX.; *approved and applied*, John Brothers Abergarw Brewery Co. v. Holmes (1899) 69 L. J. Ch. 149; [1900] 1 Ch. 188; 81 L. T. 771; 48 W. R. 236; 64 J. P. 153.—KEKEWICH, J.

Smith v. Phillips (1837) 6 L. J. Ch. 253; 1 Keen 694.—M.R., *observed on*.
O'Loughlin v. Fitzgerald (1873) Ir. R. 7 Eq. 483.—CHATTEBTON, V.-C.

Smith v. Phillips and O'Loughlin v. Fitzgerald, *discussed*.
Hassard v. Fowler (1892) 32 L. R. Ir. 49, 59.—Q.B.D.

Moss v. Gallimore (1779) 1 Dougl. 279.—K.B., *referred to*.
Wilson, Ex parte (1813) 2 V. & B. 252; 1 Rose 444; 13 R. R. 75.—L.C.; Trent v. Hunt (*post*); Delaney v. Fox (*post*); Heath v. Pugh (1881) 6 Q. B. D. 345, 359.—C.A. (*supra*, col. 1867).

Wilson, Ex parte (*supra*), *applied*.
Clarendon (Earl) v. Barham (1842) 1 Y. & C. C. C. 688; 6 Jur. 962.—V.-C.

Doe d. Marriott v. Edwards (1834) 5 B. & Ad. 1065; 6 C. & P. 208; 3 N. & M. 193.—K.B., *referred to*.
Trent v. Hunt (1853) 22 L. J. Ex. 318; 9 Ex. 14; 17 Jur. 899; 1 W. R. 481.—EX.

Poole Corporation v. Whitt (1846) 16 L. J. Ex. 229; 15 M. & W. 571.—EX., *referred to*.
Delaney v. Fox (1857) 26 L. J. C. P. 248; 2 C. B. (N.S.) 774.—C.P.

Trent v. Hunt.
Referred to, Jolly v. Arbuthnot (1859) 28 L. J. Ch. 547; 4 De G. & J. 224; 5 Jur. (N.S.) 689; 7 W. R. 532.—CHELMSFORD, L.C.; *applied*, Snell v. Finch (1863) 32 L. J. C. P. 117; 13 C. B. (N.S.) 651; 9 Jur. (N.S.) 333; 7 L. T. 747; 11 W. R. 341.—C.P.

Trent v. Hunt and Snell v. Finch, *approved*.
Christchurch, Oxford (Dean) v. Buckingham (Duke) (1864) 33 L. J. C. P. 322; 17 C. B. (N.S.) 391; 10 Jur. (N.S.) 749; 10 L. T. 575; 12 W. R. 986.—C.P.

Trent v. Hunt, Delaney v. Fox (*supra*), and Snell v. Finch, *applied*.
Christchurch, Oxford (Dean) v. Buckingham (Duke), *referred to*.
Reece v. Strousberg (1885) 54 L. T. 133; 50 J. P. 292.—HUDDLESTON, B. and A. L. SMITH, J.

Trent v. Hunt and Ward v. Shew (1833) 2 L. J. C. P. 58; 9 Bing. 608; 2 M. & Scott 756.—C.P., *referred to*.
Woolston v. Ross (1900) 69 L. J. Ch. 363; [1900] 1 Ch. 788; 82 L. T. 21; 48 W. R. 556; 64 J. P. 264.—COZENS-HARDY, J.

Thornercroft v. Crockett (1848) 16 Sim. 445; 12 Jur. 1081.—V.-C., *followed*.
Hood v. Easton (1856) 2 Giff. 692; 2 Jur. (N.S.) 729; 4 W. R. 575.—STUART, V.-C.

Sandon v. Hooper (1843) 12 L. J. Ch. 309; 6 Beav. 246.—M.R.; *varied*, (1844) 14 L. J. Ch. 120.—L.C.
Referred to, Pelly v. Wathen (1849) 18 L. J. Ch. 281; 7 Hare 351; 14 Jur. 9.—WIGRAM, V.-C.; *applied*, Tipton Green Colliery Co. v. Tipton Moat Colliery Co. (1877) 47 L. J. Ch. 152; 7 Ch. D. 192; 26 W. R. 348.—JESSEL, M.R.

Sandon v. Hooper, *commented on*.
Shepard v. Jones (1882) 21 Ch. D. 469; 47 L. T. 604; 31 W. R. 308.—C.A.
JESSEL, M.R.—There is another observation I wish to make on the supposed necessity of notice, and there are some words in the judgment of Lord Langdale in *Sandon v. Hooper* which I have always declined to read literally, and which do not appear to me to be warranted by the

judgment of Lord Lyndhurst. That is, as to notice. I am by no means prepared to say that Lord Langdale did not mean exactly what I am going to say: I rather think he did: but it was imperfectly expressed either by himself or by the reporter. As I understand it, notice is not necessary if the improvement is a reasonable one, and produces a benefit. The mortgagee cannot be deprived of that benefit because he did not tell the mortgagor of it. If on the other hand it is an unreasonable one, and produces no advantage, I do not see why the mortgagor should be charged with it because the mortgagee gives him notice of it. He could not prevent it, the mortgagee being in possession. That being so, it seems to me that the real doctrine as to notice is, that where the mortgagee gives the mortgagor notice of the expenditure, and the mortgagor agree to it, then of course it is unnecessary for the mortgagee to show that the expenditure was reasonable. It is a contract. If the mortgagor does not actually agree to it, but does such acts as in the view of a Court of law amount to tacit consent, or, as it is sometimes called, "acquiescence," that will also put the mortgagee in an equally advantageous position. But if the mortgagor simply does nothing, it appears to me that notice cannot affect the rights of the parties either way. I think that is the true explanation of what was intended by Lord Langdale in *Sandon v. Hooper*, and I think that is the real view of the law on the subject.—p. 479.

Shepard v. Jones and Sandon v. Hooper (*supra*), *applied*.

Bright v. Campbell (1885) 54 L. J. Ch. 1077; 53 L. T. 428.—C.A.

Shepard v. Jones, followed.

Henderson v. Astwood [1894] A. C. 150, 163; 6 R. 450.—P.C.

Henderson v. Astwood, applied.

De Verges v. Saundeman, Clark & Co. (1902) 71 L. J. Ch. 328; [1902] 1 Ch. 579, 597; 86 L. T. 269; 50 W. R. 404.—C.A.

Matthison v. Clarke (1854) 24 L. J. Ch. 202; 3 Drew. 3; 18 Jur. 1020; 3 Eq. R. 127; 3 W. R. 2.—KINDERSLEY, V.-C., *discussed*.

Farther v. Cobb (1887) 56 L. J. Q. B. 273; 18 Q. B. D. 494, 509; 56 L. T. 689; 35 W. R. 398.—C.A.; Doody, In re, Fisher v. Doody, Hilbert v. Lloyd (1892) 62 L. J. Ch. 14; [1893] 1 Ch. 129, 135; 2 R. 166, n.; 67 L. T. 650; 41 W. R. 49.—STIRLING, J.; *affirmed*, C.A.

Langstaffe v. Fenwick (1805) 10 Ves. 405; 8 R. R. S.—M.R.

Not applied, Sayers v. Whitfield (1829) 1 Knapp, P. C. 133, 141.—P.C. (*supra*, col. 1863); *referred to*, Barrett v. Hartley (1866) L. R. 2 Eq. 789, 797; 12 Jur. (N.S.) 426; 14 L. T. 474; 14 W. R. 684.—STUART, V.-C.; *distinguished*, Maxwell v. Tipping [1903] 1 Ir. R. 498, 512.—PORTER, M.R.

Barrett v. Hartley.

Considered, James v. Kerr (1889) 58 L. J. Ch. 365; 40 Ch. D. 449, 459; 60 L. T. 212; 37 W. R. 279; 53 J. P. 628.—KAY, J.; *not applied*, Mainland v. Upjohn (1889) 58 L. J. Ch. 361; 41 Ch. D. 126, 145; 60 L. T. 614; 37 W. R.

411.—KAY, J.; *referred to*, Rae v. Joyce (1892) 29 L. R. Ir. 500.—C.A.

Davis v. Dendy (1818) 3 Madd. 170; 18 R. R. 209.—V.-C., *referred to*.

Nicholson v. Tutin (1857) 3 K. & J. 159; 3 Jur. (N.S.) 235.—WOOD, V.-C.

Nicholson v. Tutin and Eales v. Cumberland Black Lead Mine (1861) 30 L. J. Ex. 141; 6 H. & N. 481; 7 Jur. (N.S.) 169; 3 L. T. 861.—EX., *principle applied*.

Kavanagh v. Workingman's Benefit Building Society (1895) [1896] 1 Ir. R. 56.—C.A.

6. PRIORITY OF ESTATES, DEBTS AND INCUMBRANCES.

Casberd (or Ward) v. Att-Gen. (1819) 6 Price 411; Daniell 238; 20 L. R. 671.—EX.

Explained, Whitworth v. Gaugain (1841) 10 L. J. Ch. 317; Cr. & Ph. 325; 5 Jur. 523.—L.C.; *referred to*, Whitworth v. Gaugain (1844) 3 Hare 416 (*post*).

Whitworth v. Gaugain, explained.

Langton v. Horton (1842) 11 L. J. Ch. 299; 1 Hare 549; 6 Jur. 910.—WIGRAM, V.-C.

Langton v. Horton, confirmed.

Rolleston v. Morton (1842) 1 Dr. & War. 171; 1 Con. & L. 252; 4 Ir. Eq. R. 149.—L.C., *referred to*.

Whitworth v. Gaugain (1844) 13 L. J. Ch. 288; 3 Hare 416.—WIGRAM, V.-C.; *affirmed*, (1846) 15 L. J. Ch. 433; 1 Ph. 728; 10 Jur. 531.—LYNDHURST, L.C.

Rolleston v. Morton, referred to.

Henry v. Smith (1842) 2 Dr. & War. 381; 1 Con. & L. 506; 4 Ir. Eq. R. 502.—L.C.; Lake's Trusts, In re (1890) 63 L. T. 416.—STIRLING, J.

Whitworth v. Gaugain.

Approved, Abbott v. Stratton (1846) 9 Ir. Eq. R. 233; 3 Jo. & Lat. 605.—L.C.; *discussed*, Beavan v. Oxford (Earl) (1856) 25 L. J. Ch. 299; 6 De G. M. & G. 507, 528; 2 Jur. (N.S.) 121; 4 W. R. 275.—L.C. and L.J.; Benham v. Keane (1861) 31 L. J. Ch. 129; 1 J. & H. 685.—WOOD, V.-C.; (*affirmed*, 3 De G. F. & J. 318; 6 Jur. (N.S.) 604; 5 L. T. 439; 10 W. R. 67.—L.J.); *explained and applied*, Contes's Case, Blakely Ordnance Co., In re (1876) 46 L. J. Ch. 367, 371; 35 L. T. 617; 25 W. R. 111.—MALINS, V.-C.; *adopted*, Bell, In re, Carter v. Studden (1886) 54 L. T. 370; 34 W. R. 363.—KAY, J.; *applied*, Badley v. Consolidated Bank (1886) 34 Ch. D. 536, 546; 55 L. T. 635; 35 W. R. 106.—STIRLING, J. (*affirmed* on this point, (1888) 57 L. J. Ch. 468; 38 Ch. D. 238; 59 L. T. 419; 36 W. R. 745.—C.A.); *referred to*, Jones v. Barnett (1899) 68 L. J. Ch. 244; [1899] 1 Ch. 611, 620; 80 L. T. 408; 47 W. R. 493.—ROMER, J. (*affirmed*, (1900) 69 L. J. Ch. 242; [1900] 1 Ch. 370; 82 L. T. 37; 48 W. R. 278.—G.A.).

Waldron v. Sloper (1852) 1 Drew. 193.—KINDERSLEY, V.-C.; and **Rice v. Rice** (1854) 23 L. J. Ch. 289; 2 Drew. 73; 2 Eq. R. 341; 2 W. R. 139.—V.-C., *distinguished*.

Cory v. Eyre (1863) 1 De G. J. & S. 119.—KNIGHT BRUCE and TURNER, L.JJ.

Rice v. Rice, *approved*.

Waldron v. Sloper, *referred to*.

Layard v. Maud (1867) 36 L. J. Ch. 669; L. R. 4 Eq. 897, 404; 16 L. T. 618; 15 W. R. 897.—MALINS, V.-C.

Waldron v. Sloper, *applied*.

Barnes v. Pinkney (1867) 36 L. J. Ch. 815.—ROMILLY, M.R.

Rice v. Rice, *applied*.

Cory v. Eyre (*supra*), *discussed*.

Waldron v. Sloper, *referred to*.

Hunter v. Walters (1870) L. R. 11 Eq. 292, 312; 24 L. T. 276.—MALINS, V.-C.; *affirmed* C.A. (*post*, col. 1876).

Cory v. Eyre, *discussed*.

Dixon v. Muckleston (1872) 42 L. J. Ch. 210; L. R. 8 Ch. 155; 27 L. T. 804; 21 W. R. 178.—SELBORNE, L.C.

Rice v. Rice and Waldron v. Sloper, *distinguished*. *And see* col. 1872.

Cory v. Eyre, *principle applied*.

Shropshire Union Rys. and Canal Co. v. Reg. (1875) 45 L. J. Q. B. 31; L. R. 7 H. L. 496, 510; 32 L. T. 283; 23 W. R. 709.—H.L. (E.); *reversing* S. C. *nom.* Reg. (or Robson) v. Shropshire, &c., Co. (1873) 42 L. J. Q. B. 193; L. R. 8 Q. B. 420; 21 W. R. 953.—EX. CH.

CATRNS, L.C.—The case would be entirely different if any misstatement had been made by the railway company, if anything had been said by the railway company to Mr. Robson, or if anything had been placed by them on the face of any document which would have stated something which was not the case, upon the faith of which Mr. Robson would have acted. That was the question which came before the Court in *Rice v. Rice* . . . which appears to have been an authority acted upon by the Court of Exchequer Chamber. . . . *Waldron v. Sloper* . . . is a case also entirely separate and distinct from the present. There the incumbrancer, who had no interest whatever as a mortgagee except by the delivery to him, and the retainer by him, of the title deeds of the property, chose to give up those title deeds. It is true that he gave them up upon an allegation that they were wanted for a temporary purpose, but in place of asking for them again, and of regaining the possession of them when that temporary purpose was satisfied, he allowed them to remain in the hands of the mortgagor for a number of years—I think for three or four years—and during that space of time during which he was virtually leaving his security in the possession of another, that other, by the possession of the title deeds, was enabled to create a fresh equitable interest which was held in consequence of the laches of the first mortgagee to have priority over the first. Neither of these cases has, as it appears to me, any application to the present.—p. 41.

Rice v. Rice, *applied*.

Ortigosa v. Brown (1878) 47 L. J. Ch. 168, 174; 38 L. T. 145.—HALL, V.-C.

Rice v. Rice, *referred to*.

Spencer v. Clarke (1878) 47 L. J. Ch. 692; 9 Ch. D. 137, 142; 27 W. R. 133.—HALL, V.-C.

Cory v. Eyre, *applied*. *And see* col. 1872.

Bradley v. Riches (1878) 47 L. J. Ch. 811; 9 Ch. D. 189, 192; 38 L. T. 810; 26 W. R. 910.—FRY, J.

O.C.

Rice v. Rice, *discussed*.

Cave (or Chaplin) v. Cave (1880) 49 L. J. Ch. 505; 15 Ch. D. 639, 648; 42 L. T. 730; 23 W. R. 793.—FRY, J.

Rice v. Rice, *distinguished*.

Kettlewell v. Watson (1882) 51 L. J. Ch. 281; 21 Ch. D. 685; 46 L. T. 83; 30 W. R. 402.—FRY, J. On appeal (1884) 53 L. J. Ch. 717; 26 Ch. D. 501; 51 L. T. 135; 32 W. R. 865.—C.A.

Rice v. Rice, *applied*.

Bickerton v. Walker (1885) 55 L. J. Ch. 227; 31 Ch. D. 151, 159; 53 L. T. 731; 34 W. R. 141.—C.A. SIR J. HANNEN, BOWEN and FRY, L.JJ.

Rice v. Rice and Cory v. Eyre (*supra*), *followed*.

Waldron v. Sloper (*supra*), *distinguished*.

Vernon, Ewens & Co., In re (1886) 33 Ch. D. 402; 56 L. J. Ch. 12; 55 L. T. 416; 35 W. R. 225.—C.A.; *affirming* 32 Ch. D. 165; 54 L. T. 365; 34 W. R. 606.—BACON, V.-C.

COTTON, L.J.—Then there was *Waldron v. Sloper*; and that is the case which may be said to be most like the present; but what was it? *Waldron* had an equitable security which was the first incumbrance on the property, and he put the deeds, not into the hands of a person who owed any duty to him, but into the hands of his mortgagor, and then that mortgagor kept them, without any inquiry from *Waldron*, and dealt with the property on the footing that he was entitled to the deeds. In my opinion that is an entirely different case from one in which a person lets his solicitor have his deeds in his hands, or trusts to his solicitor when the solicitor has undertaken a duty for him, and has, as in this case, made himself a trustee of that which he ought to have acquired in the name of his client, but has in fact acquired in his own name.—p. 409.

Cory v. Eyre, *discussed*.

Sloane's Estate, In re [1895] 1 Ir. R. 154 (*post*).

Waldron v. Sloper, *referred to*.

Cory v. Eyre, *principle applied*.

Taylor v. London and County Banking Co. [1901] 2 Ch. 231, 261 (*see post*, col. 1875).

Rice v. Rice, *discussed*.

Ffrench's Estate, In re (1887) 21 L. R. Ir. 283, 292.—C.A.

Rice v. Rice, *principle applied*.

Farrand v. Yorkshire Banking Co. (1888) 40 Ch. D. 182, 190 (*post*, col. 1873).

Rice v. Rice, *referred to*.

Union Bank of London v. Kent (1888) 57 L. J. Ch. 1022; 39 Ch. D. 238, 245; 59 L. T. 714; 37 W. R. 364.—C.A.

Rice v. Rice, *referred to*.

Carritt v. Real and Personal, &c., Co. (1889) 42 Ch. D. 263, 271 (*post*, col. 1875); Roche's Estate, In re (1890) 25 L. R. Ir. 58, 78, 290.—MONROE, J. and C.A.; Eyton, In re, Bartlett v. Charles (1890) 59 L. J. Ch. 733; 45 Ch. D. 458, 463; 63 L. T. 336; 39 W. R. 135.—CHITTY, J.

Rice v. Rice, *applied*.

Kelly v. Munster and Leinster Bank (1891) 29 L. R. Ir. 19, 54.—C.A.; *reversing* PORTER, M.R.

Rice v. Rice, *discussed*.

Sloane's Estate, In re (1894) [1895] 1 Ir. R. 146, 167.—MONROE, J.; Castell and Brown, Ltd., In re, Roper v. Castell and Brown, Ltd. (1898)

67 L. J. Ch. 169; [1898] 1 Ch. 315, 318; 78 L. T. 109; 46 W. R. 248.—ROMER, J.

Rice v. Rice and Castell and Brown, Ltd., In re, Roper v. Castell and Brown, Ltd. (*supra*), *applied*.

Bank of Ireland v. Cogry Spinning Co. (1898) [1900] 1 Ir. 219, 229.—PORTER, M.R.

Rice v. Rice, *referred to*.

Rimmer v. Webster (1902) 71 L. J. Ch. 561; [1902] 2 Ch. 163, 173 (*post*, col. 1876).

Lloyd's Banking Co. v. Jones (1885) 54 L. J. Ch. 931; 29 Ch. D. 221; 52 L. T. 469; 33 W. R. 781.—PEARSON, J.

Referred to, Farrand v. Yorkshire Banking Co. (1888) 58 L. J. Ch. 238; 40 Ch. D. 182, 189; 60 L. T. 669; 37 W. R. 318.—NORTH, J.: *commented on*, Castell and Brown, Ltd., In re, Roper v. Castell and Brown, Ltd. [1898] 1 Ch. 315, 319 (*supra*, col. 1872); *discussed*, Bank of Ireland v. Cogry Spinning Co. (1898) [1900] 1 Ir. 219, 237.—PORTER, M.R.

Ffrench's Estate, In re (1887) 21 L. R. Ir. 283.—C.A.; *reversing* MONROE, J.

Explained, Roche's Estate, In re (1890) 25 L. R. Ir. 284, 293.—C.A.; *applied*, Sloane's Estate, In re (1894) [1895] 1 Ir. R. 146, 160.—MONROE, J.

Ffrench's Estate, In re, *dictum of* FITZ-GIBBON, L.J. *approved*.

Bank of Ireland v. Cogry Spinning Co. (1898) [1900] 1 Ir. R. 219, 236.—PORTER, M.R.

Perry-Herrick v. Attwood (1857) 27 L. J. Ch. 121; 2 De G. & J. 21.—CHELMSFORD, L.C.; *affirming* 25 Beav. 205; 4 Jur. (N.S.) 101; 6 W. R. 204.—M.R.

Referred to, Lloyd v. Attwood (1859) 29 L. J. Ch. 97, 109; 3 De G. & J. 614, 644; 5 Jur. (N.S.) 1322.—L.J.J.: *distinguished*, Cory v. Eyre (1863) 1 De G. J. & S. 149.—L.J.J. (*supra*, col. 1870); *applied*, Jones v. Rhind (1869) 17 W. R. 1091.—JAMES, V.-C.; Briggs v. Jones (1870) L. R. 10 Eq. 92, 98; 22 L. T. 212.—ROMILLY, M.R.; *discussed*, Hunter v. Walters (1870) L. R. 11 Eq. 292, 318 (*supra*, col. 1871); *not applied*, Fox v. Hawks (1879) 49 L. J. Ch. 579; 13 Ch. D. 822, 834; 42 L. T. 622; 28 W. R. 656.—BACON, V.-C.

Perry-Herrick v. Attwood, *explained*.

Clarke v. Palmer (1882) 21 Ch. D. 124; 51 L. J. Ch. 634; 48 L. T. 857.

HALL, V.-C.—I think the principle there [*Perry-Herrick v. Attwood*] laid down is that it is not merely the incumbrancer who gets possession of the deeds who obtains the better equity. That is the first point to consider. That is really an equity which the possessor of the deeds obtains as against the legal owner, and he individually by obtaining the deeds gets a better equity to postpone the legal owner, but I cannot dispose of the case upon that ground merely, without considering whether the postponement does not operate for the benefit of anybody else who, in fact, came in innocently, and in the belief that there was not in existence the first mortgage in point of date. Both parties believed that they were obtaining the deeds—the one from whom inquiry, in fact, was made, and the other who in reference to his security made the inquiry—he is now equally entitled to the benefit of the negligence on the part of the legal owner who did not obtain possession of the deeds: *i.e.*, the subsequent

incumbrancer having made inquiry into the matter, and having acted in the belief that the mortgagee who had got the first benefit of postponement by having obtained the deeds—he and anybody else who *bona fide* advanced his money founded on the like belief, and arising out of the transaction in regard to the deeds, and connected with it, is entitled to the same benefit on the like principle of equity. It seems to me that the decision in *Perry-Herrick v. Attwood* is not explainable with reference to the subsequent incumbrancer in that case, except on that principle.—p. 129.

Clarke v. Palmer and Perry-Herrick v. Attwood, *explained*.

Northern Counties of England Fire Insurance Co. v. Whipp (1884) 53 L. J. Ch. 629; 26 Ch. D. 482, 491; 51 L. T. 806; 32 W. R. 626.—C.A.

Clarke v. Palmer, *distinguished*.

Perry-Herrick v. Attwood, *referred to*.

Manners v. Mow (1885) 54 L. J. Ch. 909; 29 Ch. D. 725, 728; 53 L. T. 84.—NORTH, J.

Perry-Herrick v. Attwood, *distinguished*.

National Provincial Bank of England v. Jackson (1886) 33 Ch. D. 1, 11; 55 L. T. 458; 34 W. R. 597.—C.A.

Perry-Herrick v. Attwood, *approved*.

Brocklesby v. Temperance Permanent Building Society (1895) 64 L. J. Ch. 433; [1895] A. C. 173; 11 R. 159; 73 L. T. 477; 43 W. R. 606; 59 J. P. 676.—H.L. (E.).

Perry-Herrick v. Attwood, *applied*.

Lloyd's Bank v. Bullock (1896) 65 L. J. Ch. 680; [1896] 2 Ch. 192 (*post*, col. 1875).

Perry-Herrick v. Attwood, *referred to*.

Brown v. Stedman (1896) 44 W. R. 458.—CHITTY, J.

Perry-Herrick v. Attwood, *principle applied*.

Clarke v. Palmer (*supra*), *referred to*.

Castell and Brown, Ltd., In re, Roper v. Castell and Brown, Ltd. (1898) 67 L. J. Ch. 169; [1898] 1 Ch. 315, 322 (*see supra*, col. 1872).

Perry-Herrick v. Attwood, *referred to*.

Rimmer v. Webster (1901) 71 L. J. Ch. 561; [1902] 2 Ch. 163 (*post*, col. 1876).

Shropshire Union Rys. and Canal Co. v. Reg.

(1875) 45 L. J. Q. B. 31; L. R. 7 H. L. 496; 32 L. T. 283; 23 W. R. 709.—H.L. (E.); *reversing*, S. C. *nom. Reg. (or Robson) v. Shropshire Union Rys. and Canal Co.* (1873) 42 L. J. Q. B. 193; L. R. 8 Q. B. 420; 21 W. R. 953.—EX. CH.

Applied, Ortigosa v. Brown (1878) 47 L. J. Ch. 168, 172; 38 L. T. 145.—HALL, V.-C.; *explained*, Bradley v. Liches (1878) 47 L. J. Ch. 811; 9 Ch. D. 189, 193; 38 L. T. 810; 26 W. R. 910.—FRY, J.; *referred to*, Société Générale de Paris v. Walker (1885) 55 L. J. Q. B. 169; 11 App. Cas. 20, 29; 54 L. T. 389; 34 W. R. 662.—H.L. (E.); *followed*, Vernon Ewens & Co., In re (1886); 33 Ch. D. 402, 410.—C.A. (*post*, col. 1876).

Shropshire Union Rys. and Canal Co. v. Reg., *referred to*.

Reg. v. Lambourn Valley Ry. (1888) 58 L. J. Q. B. 136; 22 Q. B. D. 463, 468; 60 L. T. 54; 53 J. P. 248.—Q.B.D.; Roots v. Williamson (1888) 57 L. J. Ch. 995; 38 Ch. D. 485, 491; 58 L. T. 802; 36 W. R. 758.—STIRLING, J.; Union Bank of London v. Kent (1888) 57 L. J. Ch. 1022; 39 Ch. D. 238, 247; 59 L. T. 714; 37 W. R. 364.—C.A.

Shropshire Union Rys. and Canal Co. v. Reg.,
discussed and applied.

Carritt v. Real and Personal Advance Co. (1889) 58 L. J. Ch. 688; 42 Ch. D. 263, 270; 61 L. T. 163; 37 W. R. 677.—CHITTY, J. *And see post*, col. 1876.

Shropshire Union Rys. and Canal Co. v. Reg.
and Carritt v. Real and Personal Advance Co., *referred to.*

Richards, In re, Humber v. Richards (1890) 59 L. J. Ch. 728; 45 Ch. D. 589, 594; 63 L. T. 451; 39 W. R. 186.—STIRLING, J.

Shropshire Union Rys. and Canal Co. v. Reg.,
explained.

Kelly v. Munster and Leinster Bank (1891) 29 L. R. Ir. 19, 37.—C.A.

Shropshire Union Rys. and Canal Co. v. Reg.,
referred to.

Powell v. London and Provincial Bank (1893) 62 L. J. Ch. 795; [1893] 1 Ch. 610, 614; 68 L. T. 386.—WRIGHT, J.; *affirmed*, 62 L. J. Ch. 795; [1893] 2 Ch. 555; 2 L. 482; 69 L. T. 421; 41 W. R. 545.—C.A.

Shropshire Union Rys. and Canal Co. v. Reg.,
approved.

Ward v. Duncombe (1893) 62 L. J. Ch. 881; [1893] A. C. 369.—H. L. (E.) (*post*, col. 1877).

Shropshire Union Rys. and Canal Co. v. Reg.,
distinguished.

Lloyd's Bank v. Bullock (1896) 65 L. J. Ch. 680; [1896] 2 Ch. 192; 74 L. T. 687; 44 W. R. 633.

CHITTY, J.—That case is distinguishable. As between himself and the equitable owner the trustee there had no authority whatever to deal with the trust property. Here the testator, the author of the trust, has confided to Newbrook authority to sell the property and to give a receipt for the purchase money. Newbrook was acting within the scope of his authority. The essential part of the breach of trust was the giving of the receipt without in fact receiving the purchase money. The circumstances appear to me to bring the case within the range of the authority of *Perry-Herrick v. Attwood* (col. 1873), recently approved of by the House of Lords in *Brooklesby v. Temperance Permanent Building Society* (*supra*, col. 1874). For the purpose now under consideration, I am unable to see any material distinction between agency and trust. Furthermore Lord Romilly's decision in *Worthington v. German* [(1867) 16 W. R. 187] substantially covers the present case, and is in favour of the plaintiffs.—p. 681.

Shropshire Union Rys. and Canal Co. v. Reg.
and Carritt v. Real and Personal Advance Co. (*supra*), *applied.*

Taylor v. London and County Banking Co.; London and County Banking Co. v. Nixon (1901) 70 L. J. Ch. 477; [1901] 2 Ch. 231, 261; 84 L. T. 397; 49 W. R. 451.—C.A.

STIRLING, L. J.—The leading authorities on this point appear to be *Cory v. Eyre* (*supra*, col. 1870), *Shropshire Union Rys. Co. and Canal Co. v. Reg.*, and *Vernon Ewens & Co., In re* (*post*, col. 1876), before the C. A. This last case in some of its features bears a resemblance to the present. A client left in the hands of his solicitors 11,000*l.* for investment. The solicitors represented that this sum was invested on mortgage of certain specified property, and the

client made no further inquiry. The solicitors were in fact the holders of a mortgage for 55,000*l.* on the specified property, and afterwards dealt with the mortgage by giving it up in exchange for other property in which they acquired an equity of redemption; and this equitable interest they subsequently sold. It was held that the solicitors must be treated as having become trustees for their client of 11,000*l.* out of the 55,000*l.* secured by the mortgage, and having as against the client dealt improperly with this mortgage; and consequently that the latter was entitled to a charge on the substituted property. It was further held that the client was entitled to enforce this charge against the purchasers. Cotton, L. J. makes these remarks: "Then there was a case of *Waldron v. Sloper* (*supra*, col. 1870): and that is the case which may be said to be most like the present; but what was it? Waldron had an equitable security which was the first incumbrance on the property, and he puts the deeds, not into the hands of a person who owed any duty to him, but into the hands of his mortgagor, and then that mortgagor kept them, without any inquiry from Waldron, and dealt with the property on the footing that he was entitled to the deeds. In my opinion that is an entirely different case from one in which a person lets his solicitor have his deeds in his hands, or trusts to his solicitor when the solicitor has undertaken a duty for him, and has, as in this case, made himself a trustee of that which he ought to have acquired in the name of his client, but has in fact acquired in his own name;" and his lordship also says, "it is not a sufficient ground for postponing the client, for whom the solicitor had become a trustee, simply because the client had not made inquiry as to how the solicitor had performed his duty." The principle was applied by Chitty, J. in *Carritt v. Real and Personal Advance Co.*—a strong case. I think that it must also be applied here.—p. 487.

Shropshire Union Rys. and Canal Co. v. Reg.
and Carritt v. Real and Personal Advance Co., *principle explained.*

Rimmer v. Webster (1902) 71 L. J. Ch. 561; [1902] 2 Ch. 163, 169; 86 L. T. 491; 50 W. R. 517.—FARWELL, J. *See judgment at length. And see* *Sloane's Estate, In re* (1894) [1895] 1 Ir. R. 146, 157.—MONROE, J.

Hunter v. Walters (1871) 41 L. J. Ch. 175;
L. R. 7 Ch. 75; 25 L. T. 765; 20 W. R. 218.—L. C. and L. J.; *affirming* S. C. (*supra*, col. 1871).

Referred to, Ortigosa v. Brown (*supra*, col. 1874); *followed, Vernon Ewens & Co., In re* (1886) 56 L. J. Ch. 12; 33 Ch. D. 402, 409; 56 L. T. 416; 35 W. R. 225.—C.A.; *discussed, Onward Building Society v. Smithson* (1892) 62 L. J. Ch. 138; [1893] 1 Ch. 1, 10; 2 R. 106; 68 L. T. 125; 41 W. R. 53.—C.A.; *applied, Lloyd's Bank v. Bullock* (1896) 65 L. J. Ch. 680; [1896] 2 Ch. 192 (*supra*, col. 1875); *considered, King v. Smith* (1900) 69 L. J. Ch. 598; [1900] 2 Ch. 425, 428; 82 L. T. 815.—FARWELL, J.

Vernon Ewens & Co., In re (*supra*), *applied.*

Hartopp v. Huskisson (1886) 75 L. T. 775.—KEKEWICH, J.; *Taylor v. London and County Banking Co.* (*supra*, col. 1875). *And see* *Sloane's Estate, In re* (*supra*).

Foster v. Blackstone (1833) 2 L. J. Ch. 84;
1 Myl. & K. 297.—LEACH, M. R. *affirmed*

nom. **Foster v. Cockerell** (1835) 9 Bligh (N.S.) 332; 3 Cl. & F. 456; 39 R. R. 24.—H.L. (E.); *explained*.

Wiltshire v. Rabbits (1844) 13 L. J. Ch. 284; 14 Sim. 76; 8 Jur. 769.—SHADWELL, V.-C.

Foster v. Blackstone (or **Cockerell**), *referred to*.
Rooper v. Harrison (1855) 2 K. & J. 86.—WOOD, V.-C. *And see post*.

Foster v. Cockerell, *principle applied*.
Wiltshire v. Rabbits, *referred to*.
Lee v. Howlett (1856) 2 K. & J. 531; 4 W. R. 406.—WOOD, V.-C. *And see post*.

Wiltshire v. Rabbits, *observed on*.
Consolidated Investment and Insurance Co. v. Riley (1859) 1 Giff. 371; 29 L. J. Ch. 123; 5 Jur. (N.S.) 1283; 8 W. R. 102.

STUART, V.-C.—The only doubt I have felt arises from the decision in *Wiltshire v. Rabbits*. But in *Foster v. Blackstone* (*supra*) the H. L. decided that money to be produced by the sale of land is within the doctrine of notice. *Wiltshire v. Rabbits* cannot easily be reconciled with *Foster v. Blackstone*.—p. 375.

Wiltshire v. Rabbits.
Not applied, Roche's Estate, In re (1890) 25 L. R. Ir. 284, 294.—C.A.; *examined*, Ward v. Duncombe (1893) 62 L. J. Ch. 881; [1893] A. C. 369.—H.L. (E.) (*post*).

Rooper v. Harrison (*supra*), *applied*.
Thorpe v. Holdsworth (1868) 38 L. J. Ch. 194; L. R. 7 Eq. 139, 146; 17 W. R. 394.—GIFFARD, V.-C.

Wiltshire v. Rabbits and **Rooper v. Harrison**, *referred to*.

Taylor v. London and County Banking Co. (1901) 70 L. J. Ch. 477; [1901] 2 Ch. 231.—C.A. (*post*, col. 1889).

Lee v. Howlett and **Foster v. Cockerell** (*supra*), *followed*.
Hughes' Trusts, In re (1864) 33 L. J. Ch. 725; 2 H. & M. 89; 10 Jur. (N.S.) 900; 12 W. R. 1025.—WOOD, V.-C.

Foster v. Cockerell and **Lee v. Howlett**, *referred to*.
Arden v. Arden (1885) 54 L. J. Ch. 655; 29 Ch. D. 702, 707; 52 L. T. 610; 33 W. R. 593.—KAY, J.

Foster v. Blackstone (*supra*) and **Lee v. Howlett**, *referred to*.
Richards, In re, **Humbar v. Richards** (1890) 59 L. J. Ch. 728; 45 Ch. D. 589, 597; 63 L. T. 451; 39 W. R. 186.—STIRLING, J.

Lee v. Howlett, *not applied*.
Roche's Estate, In re (1890) 25 L. R. Ir. 58, 75, 284.—MUNROE, J.; *affirmed*, C.A.

Foster v. Cockerell and **Lee v. Howlett**, *applied*.

Wyatt, In re, **White v. Ellis** (1891) 61 L. J. Ch. 178; [1892] 1 Ch. 188; 65 L. T. 214, 841; 40 W. R. 177.—STIRLING, J.; *affirmed*, C.A.; and H.L., *nom.* **Ward v. Duncombe** (*post*).

Foster v. Blackstone and **Foster v. Cockerell**, *discussed*.
Ward v. Duncombe (1893) 62 L. J. Ch. 881; [1893] A. C. 369; 1 R. 224; 69 L. T. 121; 42 W. R. 59.—H.L. (E.).

Foster v. Cockerell, *referred to*.
Ward v. Duncombe, *discussed*.
Wasdale, In re, **Brittin v. Partridge** (1898)

68 L. J. Ch. 117; [1899] 1 Ch. 163; 79 L. T. 520; 47 W. R. 169.—STIRLING, J.

Ward v. Duncombe.
Referred to, **Freeman v. Laing** (1899) 68 L. J. Ch. 586; [1899] 2 Ch. 355; 81 L. T. 167; 48 W. R. 9.—BYRNE, J.; **Lloyd's Bank v. Pearson** (1901) 70 L. J. Ch. 422; [1901] 1 Ch. 865; 84 L. T. 314.—COZENS-HARDY, J.; *applied*, **Marchant v. Morton Down & Co.** (1901) 70 L. J. K. B. 820; [1901] 2 K. B. 829; 85 L. T. 169.—CHANNELL, J.

Smith v. Smith (1833) 3 L. J. Ex. 42; 2 Cr. & M. 231; 4 Tyrw. 52.—EX., *adopted*.
Willes v. Greenhill (1861) 31 L. J. Ch. 1; 4 De G. F. & J. 147; 7 Jur. (N.S.) 1134; 5 L. T. 336; 10 W. R. 33.—L.C.; *affirming* (1860) 29 Beav. 376, 387.—M.R.

Willes v. Greenhill (M.R.), *applied*.
Newman v. Newman (1885) 54 L. J. Ch. 508; 28 Ch. D. 674, 679; 52 L. T. 422; 33 W. R. 505.—NORTH, J.

Smith v. Smith and **Willes v. Greenhill**, *discussed*.
Wyatt, In re, **White v. Ellis** [1892] 1 Ch. 188.—STIRLING, J. (*supra*, col. 1877).

Smith v. Smith, *commented on*.
Willes v. Greenhill and **Jones v. Jones** (1838) 3 Russ. 1.—SHADWELL, V.-C., *examined*.
Ward v. Duncombe (1893) 62 L. J. Ch. 881; [1893] A. C. 369.—H.L. (E.) (*supra*, col. 1877).

Willes v. Greenhill.
Explained, **Lloyd's Bank v. Pearson** [1901] 1 Ch. 865 (*post*, col. 1879); *referred to*, **Phillips' Trusts**, In re (1902) 72 L. J. Ch. 94; [1903] 1 Ch. 183; 88 L. T. 9.—KEKEWICH, J.

Lloyd v. Banks (1868) 37 L. J. Ch. 881; L. R. 3 Ch. 488; 16 W. R. 998.—CAIRNS, L.C. *reversing* 36 L. J. Ch. 751; L. R. 4 Eq. 222.—ROMILLY, M.R., *applied*.

Brown's Trusts, In re (1867) 37 L. J. Ch. 171; L. R. 5 Eq. 88.—MALINS, V.-C.; **Saffron Walden Building Society v. Rayner** (1879) 10 Ch. D. 696, 703.—BACON, V.-C.; *reversed*, C.A. (*post*, col. 1879).

Lloyd v. Banks.
Referred to, **Arden v. Arden** (*supra*, col. 1877); *principle applied*, **Wyatt**, In re, **White v. Ellis**; [1892] 1 Ch. 188.—STIRLING, J. (*supra*, col. 1877).

Lloyd v. Banks, *applied*.
Jones v. Farrell (1857) 1 De G. & J. 208; 3 Jur. (N.S.) 751.—L.J., *referred to*.
Bence v. Shcarnan (1898) 67 L. J. Ch. 513; [1898] 2 Ch. 582; 78 L. T. 804.—C.A.

Browne v. Savage (1859) 4 Drew. 635; 5 Jur. (N.S.) 1020; 7 W. R. 571.—V.-C., *approved*.

Willes v. Greenhill (1860) 29 Beav. 376.—ROMILLY, M.R. (*supra*, col. 1877).

Browne v. Savage, *upheld* (and note upon it in Sugden's Vendors and Purchasers, 14th ed. p. 379, *corrected*).

Newman v. Newman (1885) 28 Ch. D. 674; 54 L. J. Ch. 598; 52 L. T. 422; 33 W. R. 505.

NORTH, J.—Some little doubt has been thrown upon that case [*Browne v. Savage*] by the remark of Lord St. Leonards in a note to Vendors and Purchasers [14th ed. p. 379]. He says: "There is a mistake in the dates; they do not agree with the priorities ordered." But I have looked very carefully at the case, and it

seems to me that the note by Lord St. Leonards is inaccurate, and he seems to have confused the notices and to have thought that the notice given by the second trustee to the third on the 30th July, 1858, was the ruling notice, whereas the true ruling notice as regards the mortgage of 1858 by Savage to the second trustee was not of that date, but was the assignment itself, which was dated the 29th of March, 1858. It seems to me that the decision of Kindersley, V.-C. was quite accurate, and that the priorities were given according to what he decided to be the right order of the notices.—p. 680.

Browne v. Savage, discussed.

Low v. Bouverie [1891] 3 Ch. 82; 60 L. J. Ch. 594; 65 L. T. 533; 40 W. R. 50.—C.A.

LINDLEY, L.J.—In *Browne v. Savage*, Kindersley, V.-C. said that trustees "must, for their own security, give correct information when inquiry is made of them, whether they have had notice of any prior assignments affecting their trust property." Mr. Lewin in his well-known work (*Lewin on Trusts*, 8th ed. p. 704), refers to that case as an authority for the proposition that trustees are bound to answer such inquiries. But when this opinion is examined it can scarcely be supported, and if such a doctrine were logically carried out it would impose very serious duties upon trustees.—p. 99.

Browne v. Savage, discussed and followed.

Lloyd's Bank v. Pearson (1901) 70 L. J. Ch. 422; [1901] 1 Ch. 865; 84 L. T. 314.—COZENS-HARDY, J. See judgment at length.

Saffron Walden Building Society v. Rayner

(1880) 49 L. J. Ch. 469; 14 Ch. D. 406; 43 L. T. 3; 28 W. R. 681.—C.A.; reversing 48 L. J. Ch. 402; 10 Ch. D. 696; 27 W. R. 449.—BACON, V.-C., referred to.

Whittingstall v. King (1882) 46 L. T. 520.—HALL, V.-C.; *Hester v. Hester* (1887) 56 L. J. Ch. 247; 34 Ch. D. 607, 616; 55 L. T. 862; 35 W. R. 233; 51 J. P. 438.—C.A.; *Kellock*, in re (1887) 56 L. T. 887; 35 W. R. 695.—STIRLING, J.; *Lloyd's Bank v. Pearson* (1901) 70 L. J. Ch. 422; [1901] 1 Ch. 865 (*supra*).

Saffron Walden Building Society v. Rayner, not applied.

Rowland v. Chapman (1901) 17 Times L. R. 669.—BUCKLEY, J.

Parker v. Clarke (1861) 30 Beav. 54.—ROMILLY, M.R., held overruled.

Bickerton v. Walker (1885) 55 L. J. Ch. 227; 31 Ch. D. 151; 53 L. T. 731; 34 W. R. 141.—C.A. SIR J. HANNEN, BOWEN and FRY, L.JJ., referred to.

French v. Hope (1887) 56 L. J. Ch. 363; 56 L. T. 57.

KEKEWICH, J.—I cannot see why the argument of Mr. Lloyd in that case did not prevail. The report of the case is not satisfactory, and I think I must hold that *Parker v. Clarke* is overruled by the decision of the C. A. in *Bickerton v. Walker*. We have the distinction here that the plaintiff gave this deed to Hope in order that money might be raised on it.—p. 364.

Bickerton v. Walker, principle applied.

Lloyd's Bank v. Bullock (1896) 65 L. J. Ch. 680; [1896] 2 Ch. 192 (*supra*, col. 1875).

Bickerton v. Walker, approved but not applied.

Hill v. Caillovel (1748) 1 Ves. sen. 122.—L.C., referred to.

Gwelo (Matabeleland) Exploration and Development Co., In re, Williamson's Claim (1900) [1901] 1 Ir. R. 38, 52, 58.—C.A. WALKER and HOLMES, L.JJ.; reversing PORTER, M.R.

S. E. Ry. v. Jortin (1858) 27 L. J. Ch. 145; 6 H. L. Cas. 425; 4 Jur. (N.S.) 467.—H.L. (E.); reversing S. C. nom. *Jortin v. S. E. Ry.*, 24 L. J. Ch. 343; 6 De G. M. & G. 270; 1 Jur. (N.S.) 433.—L.JJ.; and 2 Sm. & G. 48; 18 Jur. 325.—V.-C., referred to.

Southern Ry., In re, Robson, Ex parte (1885) 17 L. R. Ir. 121.—C.A.; reversing PORTER, M.R.

Jortin v. S. E. Ry., applied.

Burdett, in re, *Byrne, Ex parte* (1888) 57 L. J. Q. B. 263; 20 Q. B. D. 310, 314; 58 L. T. 708; 36 W. R. 345; 5 Morrell 32.—C.A.

Peter v. Russell, Thatched House Tavern Case (1716) 1 Eq. Cas. Abr. 421; 2 Vern. 726.—L.C., discussed.

Beckett v. Cordley (*post*); *Evans v. Bicknell* (*post*); *Layard v. Maud* (1867) 36 L. J. Ch. 669; L. R. 4 Eq. 397, 406; 16 L. T. 618; 15 W. R. 897.—MALINS, V.-C.; *Northern Counties of England Fire Insurance Co. v. Whipp* (1884) 53 L. J. Ch. 629; 26 Ch. D. 482, 488.—C.A. (*post*, col. 1885).

Beckett v. Cordley (1784) 1 Bro. C. C. 357.—L.C., discussed.

Evans v. Bicknell (1801) 6 Ves. 174; 5 R. R. 245.—L.C.; *Martinez v. Cooper* (1826) 2 Russ. 198; 26 R. R. 49.—L.C.; *Layard v. Maud* (*supra*).

Martinez v. Cooper, not applied.

Hewitt v. Loosemore (1851) 21 L. J. Ch. 69; 9 Hare 449.—V.-C. (*see post*, col. 1882).

Martinez v. Cooper, applied.

National Bank of Australasia v. United Hand-in-Hand and Band of Hope Co. (1879) 4 App. Cas. 391, 400; 40 L. T. 697; 27 W. R. 889.—P.C.

Beckett v. Cordley and Martinez v. Cooper, referred to.

Northern Counties of England Fire Insurance Co. v. Whipp (1884) 53 L. J. Ch. 629; 26 Ch. D. 482, 490.—C.A. (*see post*, col. 1885).

Saunders v. Dehew (1692) 2 Vern. 271; S.C. nom. *Sanders v. Deligne*, 2 Freeman. 123.—L.C.C., approved.

Allen v. Knight (1846) 15 L. J. Ch. 430; 5 Hare 272.—WIGRAM, V.-C.; affirmed, (1847) 16 L. J. Ch. 370; 11 Jur. 527.—COTTENHAM, L.C.

Allen v. Knight, approved but distinguished.

Worthington v. Morgan (1849) 18 L. J. Ch. 233; 16 Sim. 547; 13 Jur. 316.—V.-C.

Allen v. Knight, referred to.

Hewitt v. Loosemore (1851) 21 L. J. Ch. 69; 9 Hare 449.—V.-C. (*see post*, col. 1882).

Saunders v. Dehew and Allen v. Knight, discussed. (And see col. 1881.)

Carter v. Carter (1857) 27 L. J. Ch. 74; 3 K. & J. 617, 641; 4 Jur. (N.S.) 63.—WOOD, V.-C.; *Bates v. Johnson* (1859) 28 L. J. Ch. 509; Johns. 304, 316; 5 Jur. (N.S.) 842; 7 W. R. 512.—WOOD, V.-C.

Allen v. Knight, discussed.

Hunter v. Walters (1870) L. R. 11 Eq. 292, 318; 24 L. T. 276.—MALINS, V.-C. (*affirmed*, C.A., *supra*, col. 1876).

Saunders v. Dehew and Allen v. Knight (*supra*), *followed*.

Mumford v. Stohwasser (1874) 43 L. J. Ch. 694; L. R. 18 Eq. 556, 563; 30 L. T. 859; 22 W. R. 833.—JESSEL, M.R.

Saunders v. Dehew, referred to.

Bailey v. Barnes (1893) 63 L. J. Ch. 73; [1894] 1 Ch. 25, 37; 7 R. 9; 69 L. T. 542; 42 W. R. 66.—C.A.

Saunders v. Dehew and Allen v. Knight, discussed.

Taylor v. London and County Banking Co. (1901) 70 L. J. Ch. 477; [1901] 2 Ch. 231; 84 L. T. 397; 49 W. R. 451.—C.A.

STIRLING, L.J.—A legal mortgagee who makes an advance without notice of a prior equitable title is a purchaser for value without notice. From such a purchaser a Court of equity takes away nothing which he has honestly acquired. —*Pitcher v. Rawlins* ((1872) 41 L. J. Ch. 485; L. R. 7 Ch. 259) and *Heath v. Crealock* (*post*, col. 1883). Further, an equitable mortgagee who has made an advance without notice of a prior equitable title may gain priority by getting in the legal title, unless there are circumstances which make it inequitable for him so to do. One case that falls within this exception is where the mortgagee has notice that the legal title at the time when it is so got in is held on an express trust in favour of persons who assert a claim to the property.—*Saunders v. Dehew, Allen v. Knight, Sharples v. Adams* (*post*), and *Taylor v. Russell* (*post*, col. 1888).—p. 485.

Sharples v. Adams (1863) 32 Beav. 213; 8 L. T. 138; 11 W. R. 450.—M.R., *considered*.

Maxfield v. Burton (1873) L. R. 17 Eq. 15; 43 L. J. Ch. 46; 29 L. T. 571; 22 W. R. 148.

JESSEL, M.R.—There is no doubt that you cannot gain priority by obtaining the legal estate from a trustee who commits a breach of trust in transferring it to you; but *Sharples v. Adams* seems to go beyond that, for Lord Romilly says, "If the owner in fee simple, having the legal estate, creates an equitable charge in favour of A., and afterwards a second equitable charge in favour of B., and then a third equitable charge in favour of C., I apprehend that he cannot alter these equities by transferring the legal estate to any one of them, and the fact of the transfer of the legal estate to C., the owner of the third equitable charge, would not affect the rights of the first or second" (p. 17). . . . I wish to state so distinctly, because I am not quite sure that, without further authority, I should go quite so far as my predecessor did in the case of the illustration he gave in *Sharples v. Adams*.—p. 19.

Sharples v. Adams, referred to.

Taylor v. London and County Banking Co. [1901] 2 Ch. 231, 256 (*supra*).

Maxfield v. Burton, applied.

Spencer v. Clarke (1878) 47 L. J. Ch. 692; 9 Ch. D. 137, 141; 27 W. R. 133.—HALL, V.-C.

Maxfield v. Burton, distinguished; dictum of JESSEL, M.R. commented on.

Garnham v. Skipper (1885) 34 W. R. 135; 55 L. J. Ch. 263; 53 L. T. 940; 2 Times L. R. 64.

NORTH, J.—But what is here contended for is not the *ratio decidendi* of that case [*Maxfield v. Burton*], but the language of Sir George Jessel. His lordship, after putting the case upon con-

structive notice, continued: This is his language:—"I prefer to decide the case upon that ground, but I do not think I should be at liberty to disregard the fact that there was in this case a contract to convey for value, as well as a deposit, and I should not be the first to hold that a man who had entered into such a contract could subsequently, at his option, squeeze out the person who was entitled to the benefit of that contract, by conveying the legal estate to a person with whom he has entered into a subsequent contract for value, even although that person should be a purchaser without notice. If it were necessary to resort to that, I should decide in favour of the plaintiffs, even on that ground." Now, I take it that it is clearly settled that if the owner of an estate makes an equitable mortgage in favour of one person, and subsequently makes a legal mortgage in favour of another person, without notice, then the latter is to be preferred. It is certainly somewhat startling to find that the late M.R. has said anything at variance with that. But I think, upon examining the facts of the case, an explanation of his language will appear. He is dealing with the case of a person who has created a first equitable charge, and then has created a second equitable charge, and has afterwards conveyed the legal estate to the second mortgagee without any consideration, and his observations must be confined to that case alone. It is clear that this was his meaning, from what he said in the subsequent case of *Mumford v. Stohwasser* (*post*, col. 1889), Sir G. Jessel's language in that case clearly shows that in his earlier decision he was referring to the case where no value was given for the legal estate.—p. 136.

Maxfield v. Burton, referred to.

Oliver v. Hinton (1898) 68 L. J. Ch. 94.—ROMER, J.; *affirmed*, C.A. (*post*, col. 1883).

Spencer v. Clarke (*supra*), *distinguished*.

Malet's Trusts, *In re*, Lewis, *Ex parte* (1886) 17 L. R. Ir. 424.—CHATTEBTON, V.-C.

Hiern v. Mill (1806) 13 Ves. 114; 9 R. R. 149.—L.C., *applied*.

Dryden v. Frost (1838) 8 L. J. Ch. 235; 3 Myl. & Cr. 670.—COTTENHAM, L.C.

Hewitt v. Loosemore (1851) 21 L. J. Ch. 69; 9 Hare 449; 15 Jur. 1097.—V.-C., *considered and followed*.

Espin v. Pemberton (1859) 28 L. J. Ch. 311; 3 De G. & J. 547; 5 Jur. (N.S.) 157; 7 W. R. 221.—L.C.; *affirming* 4 Drew. 333.—KINDERSLEY, V.-C.

CHELMSFORD, L.C.—*Hewitt v. Loosemore* is a clear and distinct authority. It is said that Sir G. Turner, then V.-C., in that case laid down a new doctrine when he held, that where a *bond fide* inquiry is made for the deeds, and a reasonable excuse is given for their not being forthcoming, there is no ground for imputing knowledge which a further and fuller inquiry might have imported; and this decision was said not to have given satisfaction to the profession. But it would appear that Sir G. Turner founded himself on a long course of prior authorities, examined them all with his usual care, and arrived at his conclusion only after the most full and careful examination. I think that judgment is consonant with the prior decisions, which will govern me in this case.—p. 314.

Hewitt v. Loosemore, adhered to.
Atterbury v. Wallis (1856) 25 L. J. Ch. 792; 8 De G. M. & G. 454; 2 Jur. (N.S.) 117; 4 W. R. 734.—L.JJ.

Hewitt v. Loosemore, referred to.
Carter v. Carter (1857) 27 L. J. Ch. 74; 3 K. & J. 618, 647; 4 Jur. (N.S.) 63.—WOOD, V.-C.

Hewitt v. Loosemore, not applied.
Hunt v. Elmes (1861) 30 L. J. Ch. 255; 2 De G. F. & J. 578, 588.—L.JJ. (post).

Hewitt v. Loosemore, applied.
Wormald v. Maitland (1866) 35 L. J. Ch. 69, 74; 12 L. T. 535; 13 W. R. 832.—STUART, V.-C.; Sharpe v. Foy (1868) L. R. 4 Ch. 35, 41; 17 W. R. 65.—L.JJ.; Ratcliffe v. Barnard (1871) 40 L. J. Ch. 777; L. R. 6 Ch. 652, 655; 19 W. R. 764.—L.JJ.; affirming 24 L. T. 215.—ROMILLY, M.R.

Hewitt v. Loosemore, discussed.
Dixon v. Muckleston (1872) L. R. 8 Ch. 155, 161.—L.C. (post, col. 1885); Agra Bank v. Barry (1874) L. R. 7 H. L. 135, 154.—H.L. (IR.); Northern Counties, &c. Insurance Co. v. Whipp (1884) 26 Ch. D. 482, 492 (post); Manners v. Mew (1885) 29 Ch. D. 725, 729 (post).

Hewitt v. Loosemore, applied.
Brown v. Stedman (1896) 44 W. R. 458.—CHITTY, J.; Dixon v. Winch (1899) 68 L. J. Ch. 572; 81 L. T. 111; 47 W. R. 620.—COZENS-HARDY, J.; affirmed, C.A. (supra, col. 1861). And see Oliver v. Hinton [1899] 2 Ch. 264, 274 (post).

Hunt v. Elmes (1861) 30 L. J. Ch. 255; 2 De G. F. & J. 578; 7 Jur. (N.S.) 200; 3 L. T. 796; 9 W. R. 362.—L.JJ., discussed.
Cory v. Eyre (1863) 1 De G. J. & S. 149.—L.JJ.; Hunter v. Walters (1870) L. R. 11 Eq. 292, 318; 24 L. T. 276.—MALINS, V.-C.; affirmed, C.A. (supra, col. 1876); Ratcliffe v. Barnard (1871) L. R. 6 Ch. 652 (supra); Dixon v. Muckleston (1872) L. R. 8 Ch. 155, 161 (post, col. 1885).

Hunt v. Elmes, applied.
Heath v. Cralock (1875) 44 L. J. Ch. 157; L. R. 10 Ch. 22, 32; 31 L. T. 650; 23 W. R. 95.—C.A. CATRINS, L.C., JAMES and MELLISH, L.JJ.

Ratcliffe v. Barnard (supra), referred to.
Kettlewell v. Watson (1882) 51 L. J. Ch. 281; 21 Ch. D. 685, 706; 46 L. T. 83; 30 W. R. 402.—FRY, J.

Hunt v. Elmes and Ratcliffe v. Barnard, referred to.
Northern Counties, &c., Insurance Co. v. Whipp (1884) 53 L. J. Ch. 629; 26 Ch. D. 482, 491.—C.A. (post, col. 1885); Manners v. Mew (1885) 54 L. J. Ch. 909; 29 Ch. D. 725, 731; 53 L. T. 84.—NORTH, J.

Hunt v. Elmes, applied.
Richards, In re, Humber v. Richards (1890) 45 Ch. D. 589, 595 (post, col. 1885).

Ratcliffe v. Barnard, dictum dissented from.

Hunt v. Elmes, approved.
Oliver v. Hinton (1899) 68 L. J. Ch. 583; [1899] 2 Ch. 264, 274; 81 L. T. 212; 48 W. R. 3.—C.A.

LINDLEY, M.R.—The decision of James, L.J. in *Ratcliffe v. Barnard* was right, but he went too far when he said that the negligence must be such as to lead the Court to conclude that the person was an accomplice in a fraud. I do not agree with that, but it is another thing if a

person is so careless as not to be entitled to be treated as a *bona fide* purchaser for value without notice. The case on which James, L.J. relied in support of his dictum is *Hunt v. Elmes*. Turner, L.J. there states the principle more circumspectly. He says a legal mortgagee cannot be postponed by reason of his not having possession of the title deeds, unless there has been fraud or gross and wilful negligence on his part. I can go with him, but I cannot go so far as James, L.J. It is not right to say that the legal owner must be guilty of fraud or negligence amounting to fraud to be postponed. It is sufficient if his negligence is so gross as to make it unjust to prefer him to the other person.—p. 585.

Hughes' Trusts, In re (1864) 33 L. J. Ch. 725; 2 H. & M. 89; 10 Jur. (N.S.) 900; 12 W. R. 1025.—WOOD, V.-C.

Discussed, Cooke v. Hemming (1868) 37 L. J. C. P. 179; L. R. 3 C. P. 334, 344; 18 L. T. 772; 16 W. R. 903.—C.P.; Daniel v. Freeman (1876) Ir. R. 11 Eq. 233, 250.—M.R. (reversed, (1877) Ir. R. 11 Eq. 638.—C.A.; applied, Roche's Estate, In re (1890) 25 L. R. Ir. 284, 292.—C.A.; Richards, In re, Humber v. Richards (1890) 45 Ch. D. 589, 597 (post, col. 1885); Baldwin's Estate, In re (1902) [1903] 1 Ir. R. 338, 342.—C.A.

Richards, In re, Humber v. Richards.
Referred to, Sloane's Estate, In re (1894) [1895] 1 Ir. R. 146, 158.—MONROE, J.; followed, Hopkins v. Hemsworth (1898) 67 L. J. Ch. 526; [1898] 2 Ch. 347; 78 L. T. 832; 47 W. R. 26.—KEKEWICH, J.

Colyer v. Finch (1856) 26 L. J. Ch. 65; 5 H. L. Cas. 905; 3 Jur. (N.S.) 25.—H.L. (R.); affirming S.C. *Finch v. Shaw*, 19 Beav. 500.—M.R.; and Farrow v. Rees (1840) 4 Beav. 18; 4 Jur. 1028.—M.R., referred to.
Carter v. Carter (1857) 27 L. J. Ch. 74; 3 K. & J. 617, 646; 4 Jur. (N.S.) 67.—WOOD, V.-C.

Colyer v. Finch and Roberts v. Croft (1857) 27 L. J. Ch. 220; 2 De G. & J. 1; 6 W. R. 144.—L.C., followed.
Hunt v. Elmes (1861) 2 De G. F. & J. 578, 588.—L.JJ. (supra, col. 1883).

Roberts v. Croft, discussed and not applied.
Stackhouse v. Jersey (Countess) (1861) 30 L. J. Ch. 461; 1 J. & H. 421; 7 Jur. (N.S.) 359; 4 L. T. 204; 9 W. R. 453.—WOOD, V.-C.

Colyer v. Finch, referred to.
Phillips v. Phillips (1862) 31 L. J. Ch. 321; 4 De G. F. & J. 208, 216; 8 Jur. (N.S.) 145; 5 L. T. 655; 10 W. R. 236.—WESTBURY, L.C.

Roberts v. Croft, explained.
Layard v. Maud (1867) 36 L. J. Ch. 669; L. R. 4 Eq. 397, 405; 16 L. T. 618; 15 W. R. 897.—MALINS, V.-C.

Colyer v. Finch, applied.
Roberts v. Croft, discussed.

Thorpe v. Holdsworth (1868) 38 L. J. Ch. 194; L. R. 7 Eq. 139, 146; 17 W. R. 394.—GIFFARD, V.-C.

Colyer v. Finch.
Applied, Wilkinson v. Castle (1868) 37 L. J. Ch. 467.—STUART, V.-C. (affirmed, (1870) 39 L. J. Ch. 843; L. R. 5 Ch. 534; 18 W. R. 586.—C.A.); Hunter v. Walters (1870) L. R. 11 Eq. 292, 314 (supra, col. 1883); discussed, Dixon v. Muckleston (1872) L. R. 8 Ch. 155.—L.C. (post, col. 1885); applied, Heath v. Cralock (1873) 43 L. J. Ch.

169; L. R. 18 Eq. 215, 239; 29 L. T. 763.—**BACON, V.-C.** (affirmed, C.A., *supra*, col. 1883); **Corser v. Cartwright** (1875) 45 L. J. Ch. 605; L. R. 7 H. L. 731, 736.—**H.L. (E.)**; **Heath v. Pugh** (1881) 50 L. J. Q. B. 473; 6 Q. B. D. 345, 358; 44 L. T. 327; 29 W. R. 904.—C.A. (affirmed, H.L., *supra*, col. 1867); *referred to*, **Hawthorne**. In re. **Graham v. Massey** (1883) 52 L. J. Ch. 750; 23 Ch. D. 743, 748; 48 L. T. 701; 32 W. R. 147.—**KAY, J.**

Colyer v. Finch and Roberts v. Croft (*supra*). *Explained*, **Northern Counties, &c., Insurance Co. v. Whipp** (1884) 26 Ch. D. 482, 491.—C.A. (*post*); *referred to*, **Manners v. Mew** (1885) 29 Ch. D. 725, 728 (*supra*, col. 1883).

Roberts v. Croft, distinguished.
Roche's Estate, In re (1890) 25 L. R. Ir. 284, 289.—C.A.

Dixon v. Muckleston (1872) 42 L. J. Ch. 210; L. R. 8 Ch. 155; 27 L. T. 804; 21 W. R., 178.—**SELBORNE, L.C.**; *varying* 26 L. T. 652; 20 W. R. 619.—**M.R.**

Referred to, **McMahon**, In re (1886) 55 L. T. 763.—**CHITTY, J.**; *applied*, **Richards**, In re. **Humber v. Richards** (1890) 59 L. J. Ch. 728; 45 Ch. D. 589, 595; 63 L. T. 451; 39 W. R. 186.—**STIRLING, J.**; *explained and approved*, **Kelly v. Munster and Leinster Bank** (1891) 29 L. R. Ir. 19, 42.—C.A.

Wormald v. Maitland (1866) 35 L. J. Ch. 69; 12 L. T. 535; 13 W. R. 832.—**STUART, V.-C.**, *followed*.

Allen's Estates, In re (1867) Ir. R. 1 Eq. 455.—**LYNCH, J.**

Wormald v. Maitland, questioned.
Allen's Estates, In re, referred to.
Agra Bank v. Barry (1874) L. R. 7 H. L. 135.—**H.L. (IR.)**; *affirming* Ir. R. 6 Eq. 128.—C.A.
CAIRNS, L.C.—With regard to that case [**Wormald v. Maitland**] I can only say, that if it is to be held as deciding, that in a register country, with such a statute as exists in Ireland, the mere circumstance that, on the occasion of a marriage, the abstract of title to the property settled was not examined on behalf of the lady about to be married, and on behalf of the children who might be born, the mere fact that there was not this examination would postpone the registered settlement—if that is the effect of the decision I am unable, my lords, to say that that is a decision which commends itself to my judgment. It appears that in **Allen's Estates, In re**, which was decided in Ireland, the learned judge in the Landed Estates Court founded his decision upon **Wormald v. Maitland**; but it appears from what was said in the present case by **Christian, L.J.**, that at the time the learned judge of the Landed Estates Court so decided, he was not aware that the then L.C. of Ireland (**Brewster, L.C.**) had [in **Russell v. Cusheil**, **Madden on Registration**] decided in opposition to the view expressed in **Wormald v. Maitland**. I cannot take, therefore, that case as an authority governing or affecting the present case; and that case being removed out of the way, there is absolutely no authority that I am aware of in support of the proposition of the appellants.—p. 149.

Agra Bank v. Barry, applied.
Northern Counties of England Fire Insurance Co. v. Whipp (1884) 53 L. J. Ch. 629; 26 Ch. D. 482, 493; 51 L. T. 806; 32 W. R. 626.—C.A.

Agra Bank v. Barry, not applied.
Kettlewell v. Watson (1884) 26 Ch. D. 501; 53 L. J. Ch. 717; 51 L. T. 135; 32 W. R. 865.—C.A.
LINDLEY, L.J. (for self, **BAGGALLAY** and **COTTON, L.JJ.**).—**Agra Bank v. Barry** is a valuable authority to show that a purchaser of land in a register country is not bound to inquire about deeds and documents, memorials of which have not been registered, and of which he has no notice. But that case has really no bearing on the present, and the reasoning of the noble lords who decided it has no application to transactions memorials of which are not required to be made or registered.—p. 507.

Agra Bank v. Barry, referred to.
Manners v. Mew (1885) 29 Ch. D. 725, 729 (*post*); **Roche's Estate**, In re (1890) 25 L. R. Ir. 284, 293.—C.A.; **Kelly v. Munster and Leinster Bank** (1891) 29 L. R. Ir. 19.—C.A.

Agra Bank v. Barry, applied.
Hall's Estate, In re (1893) 31 L. R. Ir. 416, 426.—**MONROE, J.**

Agra Bank v. Barry, distinguished.
Oliver v. Hinton (1898) 68 L. J. Ch. 94; [1899] 2 Ch. 264, 270.—**ROMER, J.** (*see post*).

Agra Bank v. Barry, referred to.
Stevenson's Estate, In re (1901) [1902] 1 Ir. R. 23, 41.—C.A.; **WALKER, L.J.** *dissenting*; *reversed* H.L. (*see post*, col. 1891).

Northern Counties of England Fire Insurance Co. v. Whipp (*supra*, col. 1885).
Referred to, **Whitehead**, In re (1885) 54 L. J. Ch. 796; 28 Ch. D. 614; 52 L. T. 703; 33 W. R. 601.—C.A.; *followed*, **Manners v. Mew** (1885) 54 L. J. Ch. 909; 29 Ch. D. 725; 53 L. T. 84.—**NORTH, J.**

Northern Counties of England Fire Insurance Co. v. Whipp, explained and not applied.

National Provincial Bank of England v. Jackson (1886) 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597.—C.A. (*see post*).

Northern Counties of England Fire Insurance Co. v. Whipp, distinguished.
Farrand v. Yorkshire Banking Co. (1888) 58 L. J. Ch. 238; 40 Ch. D. 182; 60 L. T. 669; 37 W. R. 318.—**NORTH, J.**

Northern Counties of England Fire Insurance Co. v. Whipp, referred to.
Kelly v. Munster and Leinster Bank (1891) 29 L. R. Ir. 19.—C.A.

Northern Counties of England Fire Insurance Co. v. Whipp, applied.
Garside v. Liverpool Ry. Permanent Benefit Building Society (1897) 13 Times L. R. 189.—C.A.

Northern Counties of England Fire Insurance Co. v. Whipp, distinguished.
Oliver v. Hinton (1898) 68 L. J. Ch. 94; [1899] 2 Ch. 264, 270; *affirmed*, C.A. *See post*, col. 1894.

ROMER, J.—In **Northern Counties of England Fire Insurance Co. v. Whipp**, the Court was not considering, and had not to deal with, a case like that before me, and **Fry, L.J.**, in delivering the judgment of the Court, naturally did not in his classification of decisions deal in terms with such a case. And **Agra Bank v. Barry** (*supra*, col. 1885) turned on the fact that it concerned an estate in Ireland, which is a register country.—p. 96.

Northern Counties of England Fire Insurance Co. v. Whipp, referred to.

Castell and Brown, Ltd., In re, Roper v. Castell and Brown, Ltd., [1898] 1 Ch. 315, 323; —ROMER, J. (post); Taylor v. London and County Banking Co. (1901) 70 L. J. Ch. 477; [1901] 2 Ch. 231, 259.—C.A. (see post, col. 1888).

Kettlewell v. Watson (1884) 53 L. J. Ch. 717; 26 Ch. D. 501; 51 L. T. 135; 32 W. R. 865.—C.A.; *varying* (1882) 51 L. J. Ch. 281; 21 Ch. D. 685; 46 L. T. 83; 30 W. R. 401.—FRY, J., *explained*.

National Provincial Bank of England v. Jackson (1886) 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597.—C.A.

COTTON, L.J.—I do not think that the question of what constitutes constructive notice arises here, and with regard to *Kettlewell v. Watson*, I will only say that the Court was there dealing with the question of what was necessary to enable the legal estate to be postponed to an equitable claim, and in the later case of *Northern Counties Fire Ins. Co. v. Whipp* (supra, col. 1885), Fry, L.J., himself distinctly recognised the distinction between the case of a contest between equities and one between an equitable title and the legal estate. He says: "The question is not what circumstances may as between two equities give priority to the one over the other, but what circumstances justify the Court in depriving a legal mortgagee of the benefit of the legal estate." And the judgment in *Kettlewell v. Watson* is to the same effect.—p. 12.

LINDLEY and LOPES, L.JJ. to the same effect.

National Provincial Bank of England v. Jackson, adopted.

Farrand v. Yorkshire Banking Co. (1888) 58 L. J. Ch. 238; 40 Ch. D. 182, 189; 60 L. T. 669; 37 W. R. 318.—NORTH, J.

Farrand v. Yorkshire Banking Co., principle applied.

Taylor v. London and County Banking Co. (1901) 70 L. J. Ch. 477; [1901] 2 Ch. 231, 260.—C.A. (post, col. 1888).

Briggs v. Jones (1870) L. R. 10 Eq. 92; 22 L. T. 212.—ROMFELY, M.R.

Applied, Lambert's Estate, In re (1883) 11 L. R. Ir. 534, 545.—ORMSBY, J.; *referred to*, Northern Counties, &c., Insurance Co. v. Whipp (1884) 26 Ch. D. 482, 493.—C.A. (supra, col. 1885).

Briggs v. Jones, distinguished.

Cooper, In re, Cooper v. Vesey (1882) 51 L. J. Ch. 862; 20 Ch. D. 611; 47 L. T. 89; 30 W. R. 648.—C.A., *followed*.

Manners v. Mew (1885) 54 L. J. Ch. 909; 29 Ch. D. 725, 731; 53 L. T. 84.—NORTH, J. See judgment at length.

Briggs v. Jones, principle applied.

Castell and Brown, Ltd., In re, Roper v. Castell and Brown, Ltd. (1898) 67 L. J. Ch. 169; [1898] 1 Ch. 315, 322; 78 L. T. 109; 46 W. R. 248.—ROMER, J.

Harpham v. Shacklock (1881) 19 Ch. D. 207; 45 L. T. 569; 30 W. R. 49.—C.A., *referred to*.

Cooper, In re, Cooper v. Vesey (1882) 20 Ch. D. 611, 635.—C.A. (supra); French's Estate, In re (1887) 21 L. R. Ir. 283, 307.—C.A.

Harpham v. Shacklock, applied.

Richards, In re, Humber v. Richards (1890)

59 L. J. Ch. 728; 45 Ch. D. 589, 594; 63 L. T. 451; 39 W. R. 186.—STIRLING, J.

Harpham v. Shacklock, explained.

Taylor v. Russell (1890) 60 L. J. Ch. 1; [1891] 1 Ch. 8; 63 L. T. 593; 39 W. R. 81.—C.A.; *reversing* 59 L. J. Ch. 756; 62 L. T. 922; 38 W. R. 668.—KAY, J.

Harpham v. Shacklock, referred to.

Taylor v. Russell (1892) 61 L. J. Ch. 657; [1892] A. C. 244; 66 L. T. 565; 41 W. R. 43.—H. L. (E.); *affirming* S.C., supra.

Taylor v. Russell and Harpham v. Shacklock, discussed.

Powell v. London and Provincial Bank (1893) [1893] 1 Ch. 610, 616; 68 L. T. 386.—WRIGHT, J.; *affirmed*, 62 L. J. Ch. 795; [1893] 2 Ch. 555; 2 R. 482; 69 L. T. 421; 41 W. R. 545.—C.A.

Taylor v. Russell, referred to.

London and County Banking Co. v. Goddard (1897) 66 L. J. Ch. 261; [1897] 1 Ch. 642, 650; 76 L. T. 277; 45 W. R. 310.—NORTH, J.

Taylor v. Russell, discussed.

London and County Banking Co. v. Goddard, referred to.

Taylor v. London and County Banking Co. (1901) 70 L. J. Ch. 477; [1901] 2 Ch. 231, 260; 84 L. T. 397; 49 W. R. 451.—C.A.

STIRLING, L.J.—The rules which govern the postponement of a prior legal estate to a subsequent equitable estate were in the year 1884 laid down by Fry, L.J., in delivering the judgment of the C. A. in *Northern Counties of England Fire Insce. Co. v. Whipp* (supra, col. 1885). In 1890 Kay, J., in *Taylor v. Russell*, carefully considered the law with respect to the postponement of a prior to a subsequent equitable interest, and came to the conclusion that the same rules as those laid down in *Northern Counties of England Fire Insce. Co. v. Whipp* applied to the case before him. On appeal, his lordship's decision was reversed on another ground, and the C. A. declined to consider any question as to the relative equities which arose under the circumstances of the case. In the H. L. the decision of the C. A. was affirmed on the same ground; but Lord Macnaghten, in advising the House, took occasion to remark that he was not satisfied of the correctness of the view taken by Kay, J. I am not aware that the precise point considered by the learned judge has since arisen for decision; and if it were necessary to decide it in the present case I should think it my duty to examine with the utmost care his judgment in *Taylor v. Russell*, and the authorities relied on by him. I think, however, that on the present occasion such an examination may be dispensed with.—p. 487.

Stanhope v. Verney (Earl) (1761) 2 Eden 81.—L.C., *explained*.

Willmot v. Pike (1845) 14 L. J. Ch. 469; 5 Hare 14; 9 Jur. 839.—WIGRAM, V.-C.

Stanhope v. Verney (Earl), distinguished.

Cory v. Eyre (1863) 1 De G. J. & S. 149.—KNIGHT BRUCE and TURNER, L.JJ.

Stanhope v. Verney, referred to.

Keate v. Phillips (1881) 50 L. J. Ch. 664; 18 Ch. D. 560; 44 L. T. 731; 29 W. R. 710.—BACON, V.-C.; Taylor v. London and County Banking Co. (1901) 70 L. J. Ch. 477; [1901] 2 Ch. 231.—C.A. (post, col. 1889).

Willoughby v. Willoughby (1756) 1 Term Rep. 763; 1 R. R. 397, *discussed*.
Maundrell v. Maundrell (1804—1805) 10 Ves. 246, 260; 7 R. R. 393.—ELDON, L.C.

Maundrell v. Maundrell, *discussed*.
 Knott, Ex parte (1806) 11 Ves. 609, 613; 8 R. R. 254.—L.C.

Willoughby v. Willoughby and Maundrell v. Maundrell, *discussed*.
 Cholmondeley (Marquis) v. Clinton (Lord) (1820) 2 J. & W. 1, 159.—M.R. (*affirmed* H.L. (R.), *post*, col. 1909).

Willoughby v. Willoughby (*supra*).
Discussed, Sharples v. Adams (1863) 32 Beav. 213.—M.R. (*supra*, col. 1881); Friend v. Buckley (1870) 39 L. J. Q. B. 90; L. R. 5 Q. B. 213; 10 B. & S. 973; 23 L. T. 170; 18 W. R. 680.—EX. CH.; Pilcher v. Rawlins (1870) L. R. 11 Eq. 53, 61.—M.R. (*affirmed*, *post*).

Maundrell v. Maundrell (*supra*).
Referred to, Tunstall v. Trappes (1829) 3 Sim. 286, 300.—V.-C.; *discussed*, Wilmot v. Pike (1845) 14 L. J. Ch. 469; 5 Hare 14; 9 Jur. 839.—WIGRAM, V.-C.; Carter v. Carter (1857) 3 K. & J. 617; 27 L. J. Ch. 74; 4 Jur. (N.S.) 63.—WOOD, V.-C.; Bates v. Johnson (1859) 28 L. J. Ch. 509; Johns. 304, 316; 5 Jur. (N.S.) 842; 7 W. R. 512.—WOOD, V.-C.; Pilcher v. Rawlins (1872) 41 L. J. Ch. 485; L. R. 7 Ch. 259, 267; 25 L. T. 921; 20 W. R. 281.—L.C. and L.J.; Spencer v. Clarke (1878) 47 L. J. Ch. 692; 9 Ch. D. 137, 142; 27 W. R. 133.—HALL, V.-C.; Taylor v. Russell (1890) 60 L. J. Ch. 1; [1891] 1 Ch. 8; 63 L. T. 593; 39 W. R. 81.—C.A.

Wilmot v. Pike (*supra*), *referred to*.
 Daniel v. Freeman (1876) Ir. R. 11 Eq. 233, 248.—M.R. (*see post*, col. 1890).

Wilkes v. Bodington (1707) 2 Vern. 599.—L.C.; **Maundrell v. Maundrell and Wilmot v. Pike**, *principle stated*.

Taylor v. London and County Banking Co. (1901) 70 L. J. Ch. 477; [1901] 2 Ch. 231; 84 L. T. 397; 49 W. R. 451.—C.A.

STIRLING, J.—Now a purchaser for value without notice is entitled to the benefit of a legal title, not merely where he has actually got it in, but where he has a better title or right to call for it. This rule is laid down in *Wilkes v. Bodington*. It has accordingly been held that if a purchaser for value takes an equitable title only, or omits to get in an outstanding legal title, and a subsequent purchaser for value without notice procures, at the time of his purchase, the person in whom the legal title is vested to declare himself a trustee for him, or even to join as party in a conveyance of the equitable interest (although he may not formally convey or declare a trust of the legal estate), still the subsequent purchaser gains priority—see *Wilkes v. Bodington*, *Maundrell v. Maundrell*, *Stanhope v. Verney* (*supra*, col. 1888), *Wilmot v. Pike* and *Roper v. Harrison* ((1855) 2 K. & J. 86 (*supra*, col. 1877)).—p. 488.

Mumford v. Stohwasser (1874) 43 L. J. Ch. 694; L. R. 8 Eq. 556; 30 L. T. 859; 22 W. R. 833.—JENSEN, M.R.

Applied, Ortigosa v. Brown (1878) 47 L. J. Ch. 168, 172; 38 L. T. 145.—HALL, V.-C.; *referred to*, Gurnham v. Skipper (1885) 55 L. J. Ch. 263; 53 L. T. 940; 34 W. R. 135; 2 Times L. R. 64.—NORTH, J.; *considered*, Union Bank of London v. Kent (1888) 57 L. J. Ch. 1022; 39 Ch. D. 238,

241.—C.A.; *not applied*, Powell v. London and Provincial Bank (1893) 62 L. J. Ch. 795; [1893] 1 Ch. 610; 68 L. T. 386.—WRIGHT, J. (*affirmed* C.A. *supra*, col. 1875); *discussed*, Bailey v. Barnes (1893) 63 L. J. Ch. 73; [1894] 1 Ch. 25; 7 R. 9; 69 L. T. 542; 42 W. R. 66.—C.A.; *dictum disapproved*, Hunt v. Luck (1901) 70 L. J. Ch. 30; [1901] 1 Ch. 45; 83 L. T. 479; 49 W. R. 155.—FARWELL, J.; and (1902) 71 L. J. Ch. 239; [1902] 1 Ch. 428; 86 L. T. 68; 50 W. R. 291.—C.A.

Credland v. Potter (1874) 44 L. J. Ch. 169; L. R. 10 Ch. 8; 31 L. T. 522; 23 W. R. 36.—C.A.

Discussed, Kinnaird v. Trollope (1889) 58 L. J. Ch. 556; 42 Ch. D. 610, 619; 60 L. T. 892.—STIRLING, J.; *distinguished*, O'Byrne's Estate, In re (1885) 15 L. R. Ir. 189, 373.—FLANAGAN, J.; and C.A.; Rodger v. Harrison (1892) 62 L. J. Q. B. 213; [1893] 1 Q. B. 161; 4 R. 171; 68 L. T. 66; 41 W. R. 291.—C.A.; *referred to*, Calcott and Elvin's Contract, In re (1898) 67 L. J. Ch. 553; [1898] 2 Ch. 460; 78 L. T. 826; 46 W. R. 673; 5 Manson 208.—C.A.; Stevenson's Estate, In re (1901) [1902] 1 Ir. R. 23.—C.A. WALKER, L.J., *dissenting* (reversed, *post*, col. 1892); Fullerton v. Bank of Ireland (col. 1892).

Malcolm v. Charlesworth (1836) 1 Keen 63; S. C. nom. **Wilkinson v. Charlesworth**, 5 L. J. Ch. 172.—M.R., *observed on*.
 Gardiner v. Blesington (1850) 1 Ir. Ch. R. 64.—M.R.

Malcolm v. Charlesworth and Gardiner v. Blesington, *referred to*.

Daniel v. Freeman (1876) Ir. R. 11 Eq. 233, 248.—M.R.; (*order discharged*, (1877) Ir. R. 11 Eq. 638.—C.A.).

Daniel v. Freeman, *discussed*.
 Roche's Estate, In re (1890) 25 L. R. Ir. 281, 292.—C.A.

Malcolm v. Charlesworth, *approved*.
 Arden v. Arden (1885) 29 Ch. D. 702; 54 L. J. Ch. 655; 52 L. T. 610; 33 W. R. 593.

KAY, J.—In *Malcolm v. Charlesworth* a legacy charged by the will upon land in Yorkshire having been assigned, it was held that such assignment did not affect the land within the meaning of the Yorkshire Registry Act, but was an assignment of the money charged upon the land, and of the money only. It is said, however, in argument, that this case is not law. It is cited by Lord St. Leonards (Vendors and Purchasers (11th ed., p. 973; 14th ed., p. 727)), without disapproval, and also in Dart (5th ed., p. 681). I am not informed that it has ever been dissented from, and therefore I could not disregard it if I disagreed with the decision, which I do not.—p. 707.

Malcolm v. Charlesworth and Arden v. Arden, *distinguished*.

Hall's Estate, In re (1893) 31 L. R. Ir. 416.
 MONROE, J.—The charge was there [*Malcolm v. Charlesworth*] already, and the deed merely operated to transfer the money from one person to another. In *Arden v. Arden* lands were assigned to trustees in trust, to sell and distribute the proceeds among certain persons named. One of the persons entitled to a distributive share of the fund executed a mortgage of such share, and it was held that the Registry Act of Middlesex did not apply to such a deed. The deed did not purport in any way to affect the lands. The

trustees had full power of sale, and it was only when the lands were actually sold, and the proceeds realised, that the mortgage was to be satisfied. Those cases are entirely distinct from the present, where an owner purports to charge the lands themselves.—p. 430.

Wright v. Stanfield (or **Stanfield**) (1858) 28 L. J. Ch. 188; 27 Beav. 8; 5 Jur. (N.S.) 5.—**ROMILLY, M.R.**, *distinguished*.
Moore v. Culverhouse (1860) 29 L. J. Ch. 419; 27 Beav. 639; 6 Jur. (N.S.) 115.—**ROMILLY, M.R.**

Moore v. Culverhouse, *followed*.
Sumpter v. Cooper (1831) 2 B. & Ad. 223; 9 L. J. (O.S.) K. B. 226; 36 R. R. 552.—**K.B.**, *distinguished*.
Neve v. Pennell, **Hunt v. Neve** (1863) 33 L. J. Ch. 19; 2 H. & M. 170; 9 L. T. 285; 11 W. R. 986.—**WOOD, V.-C.**

Moore v. Culverhouse, *followed*.
Wright v. Stanfield, *held overruled*.
Sumpter v. Cooper, *commented on*.
Neve v. Pennell, *approved*.
Wight's (or **Wright's**) Mortgage Trusts, In re (1873) 43 L. J. Ch. 66; L. R. 16 Eq. 41, 47; 28 L. T. 491; 21 W. R. 667.

MALINS, V.-C.—In **Sumpter v. Cooper** the Court of Q. B. held that the Statute of Anne [9 Anne, c. 18] referred only to the registration of instruments under seal; but that is not the construction put upon the Act by this Court. . . . I confess I am somewhat surprised at the conclusion which the M.R. seems to have come to in that case [**Wright v. Stanfield**], a conclusion in my mind contrary to the rules of the Court; but I am relieved from any difficulty by . . . **Moore v. Culverhouse**, where his lordship came to a different conclusion, and held that an unregistered equitable charge on the equity of redemption of a property in Middlesex must be postponed to a subsequent registered mortgage of the same property. I do not think that these two cases can stand together, and I am of opinion that **Moore v. Culverhouse** overruled **Wright v. Stanfield**. This appears to have been the view taken by **Wood, V.-C.**, in **Neve v. Pennell**.—p. 69.

Sumpter v. Cooper.
Applied, **Burke's Estate**, In re (1881) 9 L. R. Ir. 24.—**C.A.**; **Kettlewell v. Watson** (1884) 53 L. J. Ch. 717; 26 Ch. D. 501, 507; 51 L. T. 135; 32 W. R. 865.—**C.A.**; *referred to*, **Stephens' Estate**, In re (1875) 1r. R. 10 Eq. 282.—**ORMSBY, J.**; **French's Estate**, In re (*post*); **Battison v. Hobson** (1896) 65 L. J. Ch. 695; [1896] 2 Ch. 403, 411; 74 L. T. 689; 44 W. R. 615.—**STIRLING, J.**

Neve v. Pennell (*supra*), *referred to*.
Pledge v. White [1896] A. C. 187, 195; 65 L. J. Ch. 449; 74 L. T. 323; 44 W. R. 589.—**H.L. (K.)**.

Burke's Estate, In re (1881) 9 L. R. Ir. 24.—**C.A.**; *reversing* 7 L. R. Ir. 57.—**FLANAGAN, J.**

Discussed, **French's Estate**, In re (1887) 21 L. R. Ir. 283, 300, 323.—**C.A.**; **Roche's Estate**, In re (1890) 25 L. R. Ir. 58, 78, 284, 289.—**MUNROE, J.**, and **C.A.**; **Sloane's Estate**, In re (1894) [1895] 1 Ir. R. 146, 167.—**MONROE, J.**; *applied*, **Stevenson's Estate**, In re (1901) [1902] 1 Ir. R. 23, 40.—**C.A.** **WALKER, L.J.** *dissenting*; *referred to*, **Chapman v. Browne** (1902) 71 L. J. Ch. 465; [1902] 1 Ch. 785, 804; 86 L. T. 744.—**C.A.**; *commented on*, **Fullerton v. Bank of Ireland** [1903] A. C. 309, 311, 314 (*post*).

Stevenson's Estate, In re (*supra*) *reversed*, *nom.* **Fullerton v. Bank of Ireland** (1903) 72 L. J. P. C. 79; [1903] A. C. 309; 89 L. T. 79.—**H.L. (IR.)**.

Head v. Egerton (1734) 3 P. Wms. 279.—**L.C.**

Commented on, **Kensington**. Ex parte (1813) 2 V. & B. 79; G. Cooper 66; 2 Rose 138; 13 R. R. 32.—**L.C.**; *distinguished*, **Harrington v. Price** (1832) 3 B. & Ad. 170, 174; S. C. *nom.* **Harrington v. Glenn**, 1 L. J. K. B. 122; 37 R. R. 374.—**K.B.**

Head v. Egerton and Harrington v. Price or **Harrington v. Glenn**, *discussed*.
Blunden v. Desart (1842) 2 Dr. & War. 405; 5 Ir. Eq. R. 221; 2 Con. & L. 111.—**SUGDEN, L.C.**

Head v. Egerton, *followed*.
Thorpe v. Holdsworth (1868) 38 L. J. Ch. 194; L. R. 7 Eq. 139, 147; 17 W. R. 394.—**GIFFARD, V.-C.**

Head v. Egerton, *referred to*.
Hunter v. Walters (1870) L. R. 11 Eq. 292, 318; 24 L. T. 276.—**MALINS, V.-C.**; *affirmed*, **C.A.** (*supra*, col. 1876).

Head v. Egerton, *considered*.
Morecock v. Dickens (1768) Amb. 678.—**L.C.**, *followed*.

Russell Road Purchase Moneys, In re (1871) L. R. 12 Eq. 78; 40 L. J. Ch. 673; 23 L. T. 839; 19 W. R. 520; *compromised on appeal*, 24 L. T. 139; 19 W. R. 706.—**L.JJ.**

MALINS, V.-C.—**Head v. Egerton**, which has been called a landmark of the law, determined that where one man has the legal estate but not the title deeds, and the other the title deeds but not the legal estate, the Court will not assist either party. This case was followed in **Thorpe v. Holdsworth** (*supra*).—p. 81.

Head v. Egerton, *referred to*.
Heath v. Crealock (1873) 43 L. J. Ch. 169; L. R. 18 Eq. 215, 238.—**BACON, V.-C.** (*supra*, col. 1884); **Manners v. Mew** (*post*).

Wiseman v. Westland (1826) 1 Y. & J. 117; 30 R. R. 765.—**C.B.**, *distinguished*.
Newton v. Beck (1858) 27 L. J. Ex. 272; 3 H. & N. 220; 4 Jur. (N.S.) 340; 6 W. R. 443.—**EX.**

Newton v. Beck, *approved and applied*.
Manners v. Mew (1885) 54 L. J. Ch. 909; 29 Ch. D. 725, 732; 53 L. T. 84.—**NORTH, J.**

Wallwyn v. Lee (1802) 9 Ves. 24; 7 R. R. 142.—**L.C.**, *followed*.

Smith v. Chichester (1842) 2 Dr. & War. 393; 4 Ir. Eq. R. 380; 1 Con. & L. 486.—**L.C.**, *approved*.

Joyce v. De Moleyns (1846) 2 Jo. & Lat. 374; 8 Ir. Eq. R. 215.—**SUGDEN, L.C.**

Smith v. Chichester, *referred to*.
Newton v. Newton (col. 1893); **Stannard's Estate**, In re [1897] 1 Ir. R. 415, 418.—**ROSS, J.**

Joyce v. De Moleyns, *discussed*.
Wallwyn v. Lee, *distinguished*.
Frazer v. Jones (1848) 17 L. J. Ch. 353; 12 Jur. 443.—**COTTENHAM, L.C.**; *affirming with a variation* 5 Hare 475.—**WIGRAM, V.-C.**

Wallwyn v. Lee and Joyce v. De Moleyns *applied*. *And see post*, col. 1893.
Att.-Gen. v. Wilkins (1853) 22 L. J. Ch. 830; 17 Beav. 285, 292; 17 Jur. 885; 1 W. R. 472.—**M.R.**

Joyce v. De Moleyns (*supra*), *commented on*.
Frazer v. Jones (*supra*), *discussed*.
Stackhouse v. Jersey (1861) 30 L. J. Ch. 421;
 1 J. & H. 721; 7 Jur. (N.S.) 359; 4 L. T. 204;
 9 W. R. 453.—WOOD, V.-C.

Frazer v. Jones, *referred to*.
Thorpe v. Holdsworth (1868) L. R. 7 Eq. 139,
 147.—V.-C. (*post*).

Wallwyn v. Lee (col. 1892), *explained*.
Phillips v. Phillips (1861) 31 L. J. Ch. 321; 3
 Giff. 200.—STUART, V.-C.; *affirmed*, 4 De G.
 F. & J. 208; 8 Jur. (N.S.) 145; 5 L. T. 655; 10
 W. R. 236.—WESTBURY, L.C.

Wallwyn v. Lee and Joyce v. De Moleyns,
considered.

Newton v. Newton (1868) 38 L. J. Ch. 145;
 L. R. 4 Ch. 143; 19 L. T. 588; 17 W. R. 238.—
 C.A.; *reversing* 37 L. J. Ch. 705; L. R. 6 Eq.
 135.—ROMILLY, M.R.

[N.B.—The C. A. arrived at a different con-
 clusion on the evidence, but approved the M.R.'s
 statement of the law.]

HATHERLEY, L.C. (for self and SELWYN, L.J.).
 —We think it right to observe that in *Wallwyn*
v. Lee the sole object of the suit was the recovery
 of the title deeds; and the Court there refused to
 give assistance against a purchaser for valuable
 consideration without notice. Lord Eldon referred
 to the principle that this Court will not stir against
 a purchaser for valuable consideration without
 notice. There appears to us to be a material dis-
 tinction between such a case as *Wallwyn v. Lee*,
 and cases in which, either in consequence of
 the fund being in Court, as in *Stackhouse v.*
Jersey (Countess) (*post*), or, in consequence of
 the legal estate being outstanding in a trustee,
 and the beneficial interest being claimed by
 several adverse but equally innocent purchasers
 for value without notice, the Court is called upon
 to declare and does declare the right to the fund
 or estate in question. In such cases the Court is
 necessarily called upon to make, and does make,
 a decree against some one or more of such pur-
 chasers for value; but as in the language of
 Lord St. Leonards in *Smith v. Chichester*, "it is
 clearly settled that the right to the estate confers
 the right to the possession of the title deeds,"
 such a decree would be obviously incomplete in
 a material particular if, while declaring the
 plaintiff to be absolutely entitled to the whole
 beneficial interest in the estate, it left the title
 deeds in the possession of one of the defendants,
 claiming to hold them under an adverse title
 which the same decree declared to have no valid
 foundation. In *Joyce v. De Moleyns*, Lord St.
 Leonards expressly states that the very point
 which he was then called upon to decide in that
 case had been decided in *Wallwyn v. Lee*, and in
 the same judgment he mentions and recognises
Smith v. Chichester (*supra*, col. 1892), to which
 we have already referred.—p. 150.

Wallwyn v. Lee and Joyce v. De Moleyns,
followed.

Thorpe v. Holdsworth (1868) 38 L. J. Ch. 194;
 L. R. 7 Eq. 139, 148; 17 W. R. 394.—GIFFARD, V.-C.

Joyce v. De Moleyns, *discussed*.
Heath v. Crealock (1873) L. R. 18 Eq. 215,
 238 (*supra*, col. 1892).

Wallwyn v. Lee and Joyce v. De Moleyns,
explained.

Ind, Coope & Co. v. Emmerson (1887) 12

App. Cas. 300; 56 L. J. Ch. 989; 56 L. T. 778;
 36 W. R. 243.—H.L. (E).

EARL OF SELBORNE.—The case of *Wallwyn v.*
Lee, before Lord Eldon, was that of a plea
 (which was allowed) to relief as well as dis-
 covery; and that of *Joyce v. De Moleyns*, before
 Lord St. Leonards, was also one in which the
 defence (which prevailed) was to the whole suit.
 —p. 307.

Stackhouse v. Jersey (Countess) (1861) 30
 L. J. Ch. 421; 1 J. & H. 721; 7 Jur. (N.S.)
 359; 4 L. T. 204; 9 W. R. 453.—WOOD, V.-C.

Distinguished, **Layard v. Maud** (1867) 36
 L. J. Ch. 669; L. R. 4 Eq. 397, 405; 16 L. T.
 618; 15 W. R. 897.—MALINS, V.-C.; *referred to*,
Newton v. Newton (1868) 38 L. J. Ch. 145;
 L. R. 4 Ch. 143.—C.A. (*supra*, col. 1892); **Thorpe**
v. Holdsworth (*supra*); *applied*, **Tabor v.**
Cunningham (1875) 24 W. R. 153.—HALL, V.-C.;
Connolly v. Munster Bank (1887) 19 L. R.
 Ir. 119.—CHATTERTON, V.-C.

Layard v. Maud (1867) 36 L. J. Ch. 669;
 L. R. 4 Eq. 397; 16 L. T. 618; 15 W. R.
 897.—MALINS, V.-C., *explained*.

Thorpe v. Holdsworth (1868) 38 L. J. Ch. 194;
 L. R. 7 Eq. 139; 17 W. R. 394.—GIFFARD, V.-C.

Layard v. Maud, *confirmed*.
Hunter v. Walters (1870) L. R. 11 Eq. 292,
 316 (*supra*, col. 1892).

Thorpe v. Holdsworth, *referred to*.
Heath v. Crealock (1873) L. R. 18 Eq. 215,
 239 (*supra*, col. 1892).

Layard v. Maud, *referred to*.
Spencer v. Clarke (1878) 47 L. J. Ch. 692;
 9 Ch. D. 137, 142; 27 W. R. 133.—HALL, V.-C.

Layard v. Maud, *distinguished*.
Thorpe v. Holdsworth, *referred to*.
Union Bank of London v. Kent (1888) 57
 57 L. J. Ch. 1022; 39 Ch. D. 238, 246.—C.A.

Union Bank of London v. Kent, *referred to*.
Sloane's Estate, In re (1894) [1895] 1 Ir. R.
 146, 157.—MONROE, J.; **Taylor v. London and**
County Banking Co. (1901) 70 L. J. Ch. 477;
 [1901] 2 Ch. 231; 84 L. T. 397; 49 W. R.
 451.—C.A.; **Stevenson's Estate**, In re (1901)
 [1902] 1 Ir. R. 23, 30.—MEREDITH, J. (reversed,
 C.A.); **WALKER, L.J.** *dissenting*; C.A. reversed,
 H.L.—See *supra*, col. 1892).

Worthington v. Morgan (1849) 18 L. J.
 Ch. 233; 16 Sim. 547; 13 Jur. 316.—
 SHADWELL, V.-C., *discussed*.

Hewitt v. Loosmore (1851) 21 L. J. Ch. 69;
 9 Hare 449; 15 Jur. 1097.—WIGRAM, V.-C.;
Hunter v. Walters (1870) L. R. 11 Eq. 292, 315
 (*supra*, col. 1892); **Franklin v. Howes** (1871) 24
 L. T. 348; 19 W. R. 581.—STUART, V.-C.

Worthington v. Morgan, *explained*.
Northern Counties of England Fire Insurance
Co. v. Whipp (1884) 26 Ch. D. 482; 53 L. J.
 Ch. 629; 51 L. T. 806; 32 W. R. 626.—C.A.

FRY, L.J.—The question there was whether
 there was a purchase for value.—p. 485.

Worthington v. Morgan, *referred to*.
Oliver v. Hinton (1898) 68 L. J. Ch. 94.—
ROMER, J.; *affirmed*, 68 L. J. Ch. 583; [1899]
 2 Ch. 264, 269; 81 L. T. 212; 48 W. R. 3.—C.A.

Buller v. Plunkett (1861) 30 L. J. Ch. 641;
 1 J. & H. 441; 7 Jur. (N.S.) 873; 4 L. T. 737;
 9 W. R. 190.—WOOD, V.-C., *followed*.

Webster v. Webster (1862) 31 L. J. Ch. 655;
 31 Beav. 393.—ROMILLY, M.R.

Buller v. Plunkett and Webster v. Webster, *followed*.
Somerset v. Cox (1864) 33 L. J. Ch. 490; 33 Beav. 634, 639; 10 Jur. (N.S.) 351; 10 L. T. 181; 12 W. R. 590.—ROMILLY, M.R.

Buller v. Plunkett, *explained and distinguished*.
Marchant v. Morton Down & Co. [1901] 2 K. B. 829 (*post*).

Somerset v. Cox.
Referred to, *Roxburghe v. Cox* (1881) 50 L. J. Ch. 772; 17 Ch. D. 520, 527; 45 L. T. 225; 30 W. R. 74.—C.A.; *Cousins' Trusts*, *In re* (1886) 55 L. J. Ch. 662; 31 Ch. D. 671, 675; 54 L. T. 376; 34 W. R. 393.—CHITTY, J.; *applied*, *Blake v. Halse* (1892) 8 Times L. R. 789.—CHITTY, J.

Addison v. Cox (1872) 42 L. J. Ch. 291; L. R. 8 Ch. 76; 28 L. T. 45; 21 W. R. 180.—SELBORNE, L.C., *not applied*.
Johnstone v. Cox (1880) 50 L. J. Ch. 216; 16 Ch. D. 571, 575; 43 L. T. 690.—BACON, V.-C. (*affirmed as to priority, but varied as to costs*, (1881) 19 Ch. D. 17; 45 L. T. 657; 30 W. R. 114.—C.A.).

Johnstone v. Cox (C.A.), *distinguished on the question of costs*.
Butcher v. Pooler (1883) 52 L. J. Ch. 930; 24 Ch. D. 273, 279; 49 L. T. 573.—C.A.
Johnstone v. Cox, *explained and distinguished*.
Marchant v. Morton Down & Co. (1901) 70 L. J. K. B. 820; [1901] 2 K. B. 829; 85 L. T. 169.—CHANNELL, J.

7. TACKING.

Heams v. Bance (1748) 3 Atk. 630.—L.C., *followed*.
Adams v. Claxton (1801) 6 Ves. 226; 5 R. R. 263.—M.R.

Heams v. Bance, Adams v. Claxton and Irby v. Irby (1855) 22 Beav. 217.—M.R., *distinguished*.

Pile v. Pile (1875) 23 W. R. 440.—HALL, V.-C.
Barnett v. Weston (1806) 12 Ves. 130; 8 R. R. 319.—M.R., *referred to*.
Northern Counties, &c., Insurance Co. v. Whipp (1884) 26 Ch. D. 482, 491 (*supra*, col. 1894).

Belchier v. Butler (1760) 1 Eden 529.—L.K.; *affirmed nom.* **Belchier v. Renforth** (1764); 5 Bro. P. C. 292.—H.L. (E.), *followed*.
Robinson v. Davison (1778) 1 Bro. C. C. 63.—L.C.; *Peacock v. Burt* (1834) 4 L. J. Ch. 33.—PEPYS, M.R.

Belchier v. Renforth and Robinson v. Davison, *referred to*.
Russell Road Purchase Monneys, In re (1871) L. R. 12 Eq. 78, 85.—V.-C. (*supra*, col. 1892).

Robinson v. Davison, *referred to*.
Bailey v. Barnes (1893) 63 L. J. Ch. 73; [1894] 1 Ch. 25; 7 R. 9; 69 L. T. 542; 42 W. R. 66.—C.A.

Spencer v. Pearson (1857) 24 Beav. 266.—M.R., *applied*.
Ledbrook v. Passman (1888) 57 L. J. Ch. 855; 59 L. T. 306.—STIRLING, J.

Gordon v. Graham (1716) 2 Eq. Cas. Abr. 598, pl. 16; 7 Vin. Abr. 52, pl. 3.—L.C., *questioned*.
Blunden v. Desart (1842) 2 Dr. & War. 405;

5 Ir. Eq. R. 221; 2 Con. & L. 111.—SUGDEN, L.C.; *Shaw v. Neale* (1858) 27 L. J. Ch. 444; 6 H. L. Cas. 581; 4 Jur. (N.S.) 695; 6 W. R. 635.—H.L. (E.).

Gordon v. Graham, *overruled*.
Hopkinson v. Rolt (1861) 9 H. L. C. 514; 34 L. J. Ch. 468; 5 L. T. 90; 9 W. R. 900.—H.L. (E.); *CRANWORTH, L.C. dissenting; affirming* *S. C. nom.* *Rolt v. Hopkinson* (1859) 28 L. J. Ch. 41; 3 De G. & J. 177.—L.C., and 25 Beav. 461; 4 Jur. (N.S.) 919.—M.R.

CAMPBELL, L.C. (after considering *Gordon v. Graham* at length).—A mistaken notion had got abroad that *Gordon v. Graham* had been expressly overruled by the H. L. in *Shaw v. Neale* (*supra*), the *ratio decidendi* there steering quite clear of this question. But I am of opinion that the doctrine supposed to have been laid down in *Gordon v. Graham* is not sound, and that it ought now to be overruled by your lordships.—p. 470.

LORD CRANWORTH dissented.
 [The proposition overruled is as follows:—“That a first mortgagee, with a mortgage covering future advances, has priority, not only for what may be due to him at the time of a second mortgage, but also for advances made by him after notice of such second mortgage.”]

Gordon v. Graham.
Not law, *Menzies v. Lightfoot* (1871) L. R. 11 Eq. 459, 464.—M.R. (*post*); *referred to*, *London and County Banking Co. v. Ratcliffe* (1881) 6 App. Cas. 722, 738 (*post*); *held overruled*, *Rearden v. Provincial Bank of Ireland* (*post*).

Hopkinson v. Rolt, *applied*.
Daun v. City of London Brewery Co. (1869) 38 L. J. Ch. 454; L. R. 8 Eq. 155; 20 L. T. 601.—JAMES, V.-C.

Hopkinson v. Rolt and Daun v. City of London Brewery Co., *applied*.
Menzies v. Lightfoot (1871) 40 L. J. Ch. 561; L. R. 11 Eq. 459, 465; 24 L. T. 695; 19 W. R. 578.—ROMILLY, M.R.

Hopkinson v. Rolt.
Considered, *Burgess v. Eve* (1872) 41 L. J. Ch. 515; L. R. 13 Eq. 450, 459; 26 L. T. 540; 20 W. R. 311.—MALINS, V.-C.; *referred to* (*on question of costs*), *Anderson v. Morice* (1876) 46 L. J. C. P. 11; 1 App. Cas. 713, 750; 35 L. T. 566; 25 W. R. 14.—H.L. (E.); *followed*, *London and County Banking Co. v. Ratcliffe* (1881) 51 L. J. Ch. 28; 6 App. Cas. 722, 726; 45 L. T. 322; 30 W. R. 109.—H.L. (E.).

Hopkinson v. Rolt and Daun v. City of London Brewery Co., *applied*.

Bradford Banking Co. v. Briggs & Co. (1885) 29 Ch. D. 149; 52 L. T. 643; 33 W. R. 730.—FIELD, J.; *affirmed*, (1886) 56 L. J. Ch. 364; 12 App. Cas. 29; 56 L. T. 62; 35 W. R. 521.—H.L. (E.). See “COMPANY,” *supra*, vol. i., col. 536.

[*Headnote*.—The articles of association of a company provided that the company should have a first and permanent lien and charge, available at law and in equity, on every share, for all debts due from the shareholder to the company. A shareholder deposited the certificates of his shares with his bankers as security for the balance then due from him to them on his current account, and notice of the deposit was given to the company:—Held, that *Hopkinson v. Rolt* applied, and that the company could not claim priority over the bankers in respect of moneys which

became due from the shareholder to the company after notice of the bankers' advance, but that the bankers were entitled to priority.]

Hopkinson v. Rolt (*supra*), *explained*.

O'Byrne's Estate, *In re* (1885) 15 L. R. Ir. 189, 373.—FLANAGAN, J.; and C.A.

Hopkinson v. Rolt, *principle followed*.

Union Bank of Scotland v. National Bank of Scotland (1886) 12 App. Cas. 53; 56 L. T. 208.—H.L. (SC.); *reversing* COURT OF SESSION.

Hopkinson v. Rolt, *referred to*.

Government of Newfoundland v. Newfoundland Ry. (1888) 57 L. J. P. C. 35; 13 App. Cas. 199, 212; 58 L. T. 285.—P.C.

Hopkinson v. Rolt and London and County Banking Co. v. Ratcliffe, *referred to*.

Parkinson v. Wakefield & Co. (1889) 5 Times L. R. 562.—POLLOCK, B. and MANISTY, J.

London and County Banking Co. v. Ratcliffe (*supra*, col. 1896), *principle applied*.

Glyn, Mills & Co. v. East and West India Dock Co. (1882) 52 L. J. Q. B. 146; 7 App. Cas. 591, 596; 47 L. T. 309; 31 W. R. 201; 4 Asp. M. C.—H.L. (B.).

Hopkinson v. Rolt and O'Byrne's Estate, In re (*supra*), *referred to*.

Keogh's Estate, *In re* [1895] 1 Ir. R. 201.—MONROE, J.

Hopkinson v. Rolt and Daun v. City of London Brewery Co. (*supra*), *referred to*.

Rearden v. Provincial Bank of Ireland [1896] 1 Ir. L. 532.—PORTER, M.R.; *affirmed*, C.A.

Hopkinson v. Rolt, *doctrine applied*.

West v. Williams (1898) 68 L. J. Ch. 127; [1899] 1 Ch. 132; 79 L. T. 575; 47 W. R. 308.—C.A.

CHITTY, L.J.—Where the mortgagee is seeking to tack his advances made after notice of a subsequent incumbrance, is the principle of *Hopkinson v. Rolt* excluded by the circumstance that the mortgagee has entered into a covenant to make the advances? In *Hopkinson v. Rolt* there was no such covenant, and the subsequent advances which the mortgagee was not allowed to tack were merely voluntary. In this respect the case before us differs. *Hopkinson v. Rolt* was considered by the H. L. in *Bradford Banking Co. v. Briggs* (*supra*, col. 1896), and in *Union Bank of Scotland v. National Bank of Scotland* (*supra*). In *Bradford Banking Co. v. Briggs*, a limited company had stipulated for a paramount lien on its shares for any moneys that might become due from the shareholder. The bank, with notice of this agreement for a lien, made advances on shares. The shareholder subsequently became indebted to the company, and the company claimed priority for these subsequent debts incurred after notice given by the bank of their security; and contended that the bank, knowing the terms on which the shares were issued and taking with notice, could not set up their charge as against the company. This contention was negatived by the H. L. The principle on which these decisions are founded appears to me to be that a mortgagee cannot obtain a charge on property which is no longer the mortgagor's to charge, and which the mortgagee knows at the time he makes his farther advance is no longer the property of the mortgagor. No charge arises for a further advance

until it is actually made. This principle is plain and simple, and based on natural justice and fair dealing. If this be the principle (which I think it is), the covenant to make further advances creates no difficulty—and for this reason: the covenant is to make the further advance on the security of the property, and, inasmuch as the mortgagor has by his own act deprived himself of the power to give the stipulated security, no action for damages would lie on the covenant. It is hardly necessary to add that no action lies for specific performance of any agreement to make a loan.—p. 132.

Brace v. Marlborough (Duchess) (1728)

2 P. Wms. 491; Mos. 50.—M.R., *referred to*. Knott, *Ex parte* (1806) 11 Ves. 609; 8 L. R. 254.—L.C.; White v. Peterborough (Bishop) (1821) Jacob 402; 19 R. R. 183.—M.R.

Brace v. Marlborough (Duchess), *applied*.

Peacock v. Burt (1834) 4 L. J. Ch. 33.—PEPYS, M.R.

Brace v. Marlborough (Duchess), *explained*.

Tipping v. Power (1842) 11 L. J. Ch. 257; 1 Hare 405; 6 Jur. 424.—WIGRAM, V.-C.

Brace v. Marlborough (Duchess), *referred to*.

Langton v. Horton (1842) 11 L. J. Ch. 299; 1 Hare 549; 6 Jur. 910.—WIGRAM, V.-C.; Whitworth v. Gaugain (1844) 13 L. J. Ch. 288; 3 Hare 416.—V.-C. (*affirmed*, (1846) 15 L. J. Ch. 433; 1 Ph. 728; 10 Jur. 531.—L.C.).

Brace v. Marlborough (Duchess) and Cator

v. Cooley (1785) 1 Cox 182.—L.C., *distinguished*.

Simmonds v. Pettit (1844) 8 Jur. 209.—SHADWELL, V.-C.

Brace v. Marlborough (Duchess), *applied*.

Armstrong v. Storer (1851) 14 Beav. 535.—M.R.; Macrae v. Ellerton (1858) 27 L. J. Ch. 777; 4 Jur. (N.S.) 967; 6 W. R. 851.—STUART, V.-C.

Brace v. Marlborough (Duchess), *discussed*.

Beavan v. Oxford (Earl) 25 L. J. Ch. 299; 6 De G. M. & G. 507, 518; 2 Jur. (N.S.) 121; 4 W. R. 275.—L.C. and L.J.; Phillips v. Phillips (1862) 31 L. J. Ch. 321; 4 De G. F. & J. 208, 216; 8 Jur. (N.S.) 145; 5 L. T. 655; 10 W. R. 236.—L.C.

Brace v. Marlborough (Duchess), *applied*.

Thorpe v. Holdsworth (1868) L. R. 7 Eq. 139, 146 (*supra*, col. 1893).

Brace v. Marlborough (Duchess), *still binding*.

Jennings v. Jordan (1881) 51 L. J. Ch. 129; 6 App. Cas. 698, 715.—H.L. (B.) (*post*, col. 1904).

Brace v. Marlborough (Duchess), *referred to*.

Atherley v. Barnett (or Burnett) (1885) 52 L. T. 736; 33 W. R. 779.—PEARSON, J.

Brace v. Marlborough (Duchess), *followed*.

Bailey v. Barnes (1893) 63 L. J. Ch. 73; [1894] 1 Ch. 25, 36; 7 R. 9; 69 L. T. 542; 42 W. R. 66.—C.A.

Marsh v. Lee (1670) 1 Ch. Cas. 162; 2

Ventr. 337, *referred to*.

Titley v. Davies (1743) 2 Y. & C. C. C. 399, n.; 15 Vin. Abr. 447, pl. 20; 2 Eq. Cas. Abr. 604.—HARDWICKE, L.C.

Marsh v. Lee, *commented on but followed*.

Bristol (Earl) v. Hungerford (1705) 2 Vern.

524.—L.K., *approved*.

Wortley v. Birkhead (1754) 2 Ves. sen. 571.—HARDWICKE, L.C.

Marsh v. Lee, *approved and applied*.
Peacock v. Burt (1834) 4 L. J. Ch. 33.—PEPPY, M.R.

Marsh v. Lee, *still binding*.

Wortley v. Birkhead (*supra*), *referred to*.
Jennings v. Jordan (1881) 51 L. J. Ch. 129; 6 App. Cas. 698, 714.—H.L. (E.) (*post*, col. 1904).

Marsh v. Lee, *referred to*.

Atherley v. Barnett (*supra*, col. 1898).

Mocatta v. Murgatroyd (1717) 1 P. Wms. 393.—L.C., *referred to*.

Beckett v. Cordley (1784) 1 Bro. C. C. 353.—EADON, L.C.; Plumb v. Fluitt (1791) 2 Anstr. 432, 440.—C.P.

Greswold v. Marsham (1685) 2 Ch. Cas. 170.—L.C.: and **Mocatta v. Murgatroyd**, *approved*.

Toulmin v. Steere (1817) 3 Meriv. 210, 224; 17 R. R. 67.—GRANT, M.R.

Mocatta v. Murgatroyd, *observed on and limited*.

Stevens v. Mid-Hants Ry. (1873) 42 L. J. Ch. 694; L. R. 8 Ch. 1064, 1069 (*post*, col. 1900).

Greswold v. Marsham, *commented on*.

Gokuldoss Gopaldoss v. Rambux Seochand (1884) L. R. 11 Ind. App. 126, 130.—P.C. (*post*, col. 1900).

Greswold v. Marsham and Mocatta v. Murgatroyd, *referred to*.

Adams v. Angell (1876) 5 Ch. D. 634, 641.—HALL, V.-C. (*post*, col. 1900).

Toulmin v. Steere (*supra*), *commented on*.

Gregg v. Arrott (1835) L.L. & G. 247.—SUGDEN, L.C.; Nixon v. Hamilton (1838) 1 Ir. Eq. R. 46.—L.C.; Watts v. Symes (1851) 21 L. J. Ch. 713; 1 De G. M. & G. 240; 16 Jur. 114.—L.J. (*reversing* 16 Sim. 640; 13 Jur. 245.—SHADWELL, V.-C.).

Watts v. Symes.

Applied, Neve v. Pennell (1863) 33 L. J. Ch. 19; 2 H. & M. 170 (*supra*, col. 1891); *referred to*, Adams v. Angell (*supra*); Gokuldoss Gopaldoss v. Rambux Seochand (*supra*).

Toulmin v. Steere and Parry v. Wright (1823) 1 Sim. & S. 369; 6 L. J. (O.S.) Ch. 174; 24 R. R. 191.—LEACH, V.-C.: *affirmed*, (1828) 5 Russ. 142.—LYNDHURST, L.C., *distinguished*.

Squire v. Ford (1851) 20 L. J. Ch. 308; 9 Harc 47, 60; 15 Jur. 619.—TURNER, V.-C.

Toulmin v. Steere and Parry v. Wright, *considered and not applied*.

Mackenzie v. Gordon (1839) 6 Cl. & F. 875.—H.L. (SC.), *applied*.

Walcott v. Gordon (1852) 3 Ir. Ch. R. 1.—BRADY, L.C.

Parry v. Wright.

Limited, Stevens v. Mid-Hants Ry. (*post*); *referred to*, Adams v. Angell (*post*); *distinguished*, Howard's Estate, *In re* (*post*, col. 1901).

Toulmin v. Steere, *distinguished*.

Otter v. Vaux (Lord) (1856) 26 L. J. Ch. 128; 6 De G. M. & G. 638; 3 Jur. (N.S.) 169; 5 W. R. 188.—GRANWORTH, L.C.; *affirming* 25 L. J. Ch. 734; 2 K. & J. 650.—WOOD, V.-C.

Otter v. Vaux (Lord); *referred to*, Adams v. Angell (*post*); *principle not applied*, Cork Harbour Docks Co., *In re* (*post*, col. 1900); *distinguished*,

Howard's Estate, *In re* (*post*, col. 1901); *discussed*, Hassard v. Fowler (*post*, col. 1901).

Toulmin v. Steere (*supra*), *referred to*.

Vane v. Vane (1872) L. R. 8 Ch. 392, n.; 27 L. T. 534; 21 W. R. 66.—MALINS, V.-C.; *affirmed*, (1873) 42 L. J. Ch. 299; L. R. 8 Ch. 383; 28 L. T. 320; 21 W. R. 252.—L.JJ.

Toulmin v. Steere, *commented on*.

Anderson v. Pignet (1872) 42 L. J. Ch. 310; L. R. 8 Ch. 180; 27 L. T. 740; 21 W. R. 150.—L.C. and L.JJ.; O'Loughlin v. Fitzgerald (1873) 1r. R. 7 Eq. 483.—CHATTERTON, V.-C.

Toulmin v. Steere, *observed on and limited*.

Stevens v. Mid-Hants Ry. (1873) 42 L. J. Ch. 694; L. R. 8 Ch. 1064, 1069; 29 L. T. 318; 21 W. R. 858.—JAMES and MELLISH, L.JJ.

Toulmin v. Steere, *applied*.

Gregg v. Arrott (*supra*, col. 1899). Squire v. Ford (*supra*, col. 1899), and Anderson v. Pignet (*supra*), *referred to*.

Adams v. Angell (1876) 46 L. J. Ch. 54; 5 Ch. D. 634, 641; 25 W. R. 139.—HALL, V.-C. (*affirmed* C.A., *post*).

Toulmin v. Steere, *limited*.

Adams v. Angell (1877) 5 Ch. D. 634; 46 L. J. Ch. 352; 36 L. T. 334.—C.A.

JESSEL, M.R.—As the present case is distinguishable from *Toulmin v. Steere* it is not necessary for us to consider whether that case is or is not binding on the C. A. The V.-C. rightly considered that it was binding upon him as a judge of first instance, and it ought perhaps to be held that it is binding on the C.A., and that only the H. L. has power to overrule it. On that point I will give no opinion. Assuming it, however, to be binding upon us, it amounts to no more than this, that in the case of a purchase from the owner of an equity of redemption, in which the purchase-money is partly applied in paying off incumbrances, the purchaser with notice, whether actual or constructive, of other incumbrances is not, in the absence of any contemporaneous expression of intention, entitled as against the other incumbrancers, of whose securities he has notice, to say afterwards that the incumbrances so paid off are not extinguished. It does not go beyond that, and there are several authorities which say that this doctrine is not to be carried further.—p. 645.

Adams v. Angell, *applied*.

Mohesh Lal v. Mohunt Bawan Das (1883) L. R. 10 Ind. App. 62, 70.—P.C.

Toulmin v. Steere, *not applied*.

Adams v. Angell, *referred to*.

Gokuldoss Gopaldoss v. Rambux Seochand (1884) L. R. 11 Ind. App. 126, 131.—P.C.

Mohesh Lal v. Mohunt Bawan Das and Gokuldoss Gopaldoss v. Rambux Seochand, *followed*.

Dinobundhu Shaw Chowdhry v. Jogmaya Dasi (1901) L. R. 29 Ind. App. 9, 16.—P.C.

Toulmin v. Steere, *principle not applied*.

Cork Harbour Docks Co., *In re* (1885) 17 L. R. 1r. 515.—C.A.; *reversing* FLANAGAN, J.; Navan and Kingscourt Ry., *In re* (1885) 17 L. R. 1r. 398, 419.—C.A. FITZGIBBON and BARRY, L.JJ. *dissenting*; *affirming* CHATTERTON, V.-C.

Adams v. Angell (*supra*), *referred to*.

Pridd, *In re*, Shackell v. Colnett (1891) 61

L. J. Ch. 9; [1891] 2 Ch. 135; 64 L. T. 768; 39 W. R. 471.—**STIRLING, J.**

Toulmin v. Steere (*supra*), distinguished.

Adams v. Angell (*supra*), referred to.

Howard's Estate, In re (1892) 29 L. R. Ir. 266.—**MONROE, J.**; affirmed, C.A.

Toulmin v. Steere, discussed.

Hassard v. Fowler (1892) 32 L. R. Ir. 49.—**Q.B.D.**

Adams v. Angell, followed.

Toulmin v. Steere, distinguished.

Thorne v. Cann (1894) 64 L. J. Ch. 1; [1895] A. C. 11; 11 R. 67; 71 L. T. 852.—**H.L. (E.)**.

Adams v. Angell, referred to.

Toulmin v. Steere, distinguished.

Liquidation Estates Purchase Co. v. Willoughby (1898) 67 L. J. Ch. 251; [1898] A. C. 321, 333; 78 L. T. 329.—**H.L. (E.)**; reversing (1896) 65 L. J. Ch. 486; [1896] 1 Ch. 726; 74 L. T. 228; 44 W. R. 612.—**C.A. KAY, L.J. dissenting.**

LORD HERSCHELL.—The L.J.J. thought that the intention of the parties to extinguish Norton's interest was to be found in the terms of the deed and the circumstances under which it was executed, and they rested their decision on the law laid down by Sir G. Jessel, M.R. in *Adams v. Angell*. In that case the learned judge stated the effect of the doctrine originally enunciated in *Toulmin v. Steere*, that where the purchaser of an estate pays off an incumbrance upon it, the incumbrance paid off is merged unless the contrary intention appears, and he pointed out its application in the case of an owner in fee or in tail, or of a purchaser. It is to be observed that the doctrine referred to is founded on the principle of merger. The assignment of an incumbrance to an owner or purchaser of an estate does not transfer any new estate, it only frees from the incumbrance an estate already vested in him, or about to be vested in him by conveyance. As Sir G. Jessel points out, the assignment to a purchaser of an estate, of an equitable charge upon it, really passes nothing. It may nevertheless be treated as remaining on foot for the purpose of protecting the purchaser against mesne incumbrances. In view of the nature of the interests assigned by Norton and Lord Windsor respectively, to which I have called attention, I find it difficult to understand how the doctrine of merger, on which *Toulmin v. Steere* rested, can have any application in the present case.—p. 257.

Thorne v. Cann (*supra*), referred to.

Godley's Estate, In re (1895) [1896] 1 Ir. R. 45, 50.—**MADDEN, J.**; *Thellusson v. Liddard* (1900) 69 L. J. Ch. 673; [1900] 2 Ch. 635, 643; 82 L. T. 753; 49 W. R. 10.—**STIRLING, J.**

Thorne v. Cann, applied.

Capital and Counties Bank v. Rhodes (1902) 71 L. J. Ch. 573; 87 L. T. 17.—**KEKEWICH, J.** and (1903) 72 L. J. Ch. 336; [1903] 1 Ch. 631, 651; 88 L. T. 255; 51 W. R. 470.—**C.A.**; reversing **KEKEWICH, J.**

8. CONSOLIDATION.

Pope v. Onslow (1692) 2 Vern. 286.—**M.R.**, not applied.

King, Ex parte (1750) 1 Atk. 300.—**L.C.**

Pope v. Onslow, explained.

Jones v. Smith (1794) 2 Ves. 372.—**M.R.**; reversed, 2 Ves. 380, n.—**H.L.**

King, Ex parte (*supra*), discussed.

Mills v. Jennings (1880) 49 L. J. Ch. 209; 13 Ch. D. 639, 646.—**C.A.** (*post*, col. 1904).

Pope v. Onslow, King, Ex parte, Willie v.

Lugg (1761) 2 Eden 78.—**L.C.**; **Jones v.**

Smith and Ireson v. Denn (1796) 2 Cox

425; 2 L. R. 97.—**M.R.**, discussed.

Jennings v. Jordan (1881) 51 L. J. Ch. 129; 6 App. Cas. 698, 715.—**H.L. (E.)** (*post*, col. 1904).

Bovey v. Skipwith (1671) 1 Ch. Cas. 201.

Followed, **Vint v. Padgett** (1859) 28 L. J. Ch. 21; 2 De G. & J. 611; 4 Jur. (N.S.) 1122; 6 W. R. 641.—**L.J.J.**; explained, **Pledge v. White** (1896) 65 L. J. Ch. 449; [1896] A. C. 187.—**H.L. (E.)** (*post*, col. 1906).

Titley v. Davies (1743) 2 Y. & C. C. C.

399, n.; 15 Vin. Abr. 447, pl. 20; 2 Eq.

Cas. Abr. 604.—**L.C.**, discussed.

Bugden v. Bignold (1843) 2 Y. & C. C. C. 377.—**V.-C.**; **Vint v. Padgett** (*supra*).

Titley v. Davies, followed.

Vint v. Padgett (*supra*) and **Tassell v. Smith**

(1859) 27 L. J. Ch. 694; 2 De G. & J. 713;

4 Jur. (N.S.) 1090; 6 W. R. 803.—**L.J.J.**,

referred to. *And see post*, col. 1903.

White v. Hillacre (1839) 8 L. J. Ex. 65;

3 Y. & C. 597.—**ALDERSON, B.** (*and see*

cols. 1904, 1905); and **Edwards v. Martin**

(1858) 28 L. J. Ch. 49; 4 Jur. (N.S.) 1044; 7

W. R. 30.—**KINDERLEY, V.-C.**, observed on.

Bevor v. Luck, Bevor v. Lawson (1867), L. R.

4 Eq. 537; 36 L. J. Ch. 865; 15 W. R. 1221.

WOOD, V.-C.—The case of *White v. Hillacre* is no doubt one of some complexity; but the report of the judgment in that case is not given in such a manner as to show upon what the learned judge rested his decision. . . . There the mortgagor of one property devised the equity of redemption to A., and A. having another estate of his own, mortgaged that estate to B., who afterwards got the two estates united—that is not an authority which can be relied on for the distinction attempted to be made by Mr. Amphlett (p. 515). . . . The question as to purchasers has not been so common; but in this case, where the equity of redemption has been split into three or four portions by different conveyances, the decision in *Titley v. Davies* is a clear authority. Titley, the purchaser, was there let in before Davies, who was a subsequent mortgagee of the same equity of redemption, and successive redemptions were decreed. *Edwards v. Martin* occasioned me some difficulty, because in that instance there were several purchasers of the equity of redemption, and one decree of foreclosure was made against them all, leaving them to come in at Chambers and apply with respect to their rights. Mr. Leach has searched for the decrees in both these cases. That of *Titley v. Davies* he finds corresponds with the report. In *Edwards v. Martin*, *Titley v. Davies* was not cited. Mr. Leach says that he has no doubt the decree in *Edwards v. Martin* was penned by the V.-C. himself; and it has considerable weight in that respect. But then the V.-C. had not *Titley v. Davies* before him. Mr. Leach says he remembers the case, and made a note at the time, that the decree did not fully declare the rights of the parties, but left it to them to work out their rights in Chambers.—p. 549. *And see post*, cols. 1904, 1905.

Titley v. Davies (*supra*), explained.
Wellesley v. Mornington (Lord) (1869) 17 W. R. 355.—HATHERLEY, L.C.

Titley v. Davies, discussed and approved.
Jennings v. Jordan (1881) 51 L. J. Ch. 129; 6 App. Cas. 698, 702.—H.L. (E.) (*post*, col. 1904).

Titley v. Davies, distinguished.
Pledge v. White (1896) 65 L. J. Ch. 449; [1896] A. C. 187, 194.—H.L. (E.) (*post*, col. 1906).

Vint v. Padgett (*supra*, col. 1902).
Applied, Tennant v. Trenchard (1868) L. R. 4 Ch. 540 n.—GIFFARD, V.-C. (varied, (1869) 38 L. J. Ch. 169; L. R. 4 Ch. 537; 20 L. T. 856.—H.C.); explained, Wellesley v. Mornington (Lord) (*supra*); Baker v. Gray (1875) 1 Ch. D. 491; (*post*, col. 1904); distinguished, Harter v. Colman (1882) 19 Ch. D. 630 (*post*, col. 1905); doubted, Minter v. Carr [1894] 3 Ch. 498.—C.A. (*post*, col. 1905); followed, Pledge v. Carr [1894] 2 Ch. 328.—ROMER, J. (*post*, col. 1905); approved, Pledge v. White [1896] A. C. 187, 192.—H.L. (E.) (*post*, col. 1906).

Tassell v. Smith (*supra*, col. 1902).
Explained, Baker v. Gray (1875) 1 Ch. D. 491 (*post*); not followed, Mills v. Jennings (1880) 13 Ch. D. 639 (*post*, col. 1904); overruled, Jennings v. Jordan (1881) 6 App. Cas. 698 (*post*, col. 1904).

Edwards v. Martin (*supra*, col. 1902), followed.
Bartlett v. Rees (1871) 40 L. J. Ch. 599; L. R. 12 Eq. 395; 25 L. T. 373; 19 W. R. 1046.—ROMILLY, M.R.

Selby v. Pomfret (1861) 30 L. J. Ch. 770; 1 J. & H. 336.—WOOD, V.-C.; affirmed, 3 De G. F. & J. 595; 7 Jur. (N.S.) 835; 4 L. T. 314; 9 W. R. 398, 583.—CAMPBELL, L.C., explained.

Cummins v. Fletcher (1880) 14 Ch. D. 699; 49 L. J. Ch. 117, 563; 42 L. T. 859; 28 W. R. 272, 772.—C.A.; reversing (1879) 41 L. T. 546.—HALL, V.-C.

JAMES, L.J.—It seems to me that where a man has a legal right in property A., and an equity of redemption in property B. which is an insufficient security, and has no occasion, and never will have any occasion, to come to a Court of equity with respect to property A., the fact of the two properties being subject to two mortgages gives the Court no more power to take from him property A., than it has to take any other property belonging to him, for the purpose of satisfying the debt for which there is insufficient security. To suppose that that is what was laid down by Wood, V.-C., in *Selby v. Pomfret*, seems to me really to deal unfairly, if I may say so, with the language of the judge. The language of a judge is always to be construed with reference to the facts of the case before him. In that case, the learned judge was dealing with a case in which two estates had been reduced to the position of equities of redemption, and as the two estates had been reduced to the position of equities of redemption, the Court was right in saying that they must be consolidated. When a property is reduced to an equity of redemption, all the rights arising from that position follow; and the ground of the decision in *Selby v. Pomfret* was that the two properties at the time when the right of consolidation was supposed to have arisen had been reduced to the position of mere equities of redemption, having only an existence in the Court of Chancery.—p. 709.

O.C.

Selby v. Pomfret, referred to.

Raggett, In re, Williams, Ex parte (1880) 50 L. J. Ch. 187; 16 Ch. D. 117, 120; 44 L. T. 4; 29 W. R. 314.—C.A.; Pledge v. White [1896] A. C. 187, 194.—H.L. (E.) (*post*, col. 1906).

Cummins v. Fletcher (*supra*), referred to.

Harter v. Colman (1882) 19 Ch. D. 630 (*post*, col. 1905).

Raggett, In re, Williams, Ex parte, applied.

Banner v. Berridge (1881) 50 L. J. Ch. 630; 18 Ch. D. 254, 278; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. C. 420.—KAY, J.; Gregson, In re, Christison v. Bolam (1887) 57 L. J. Ch. 221; 36 Ch. D. 223; 57 L. T. 250; 35 W. R. 803.—NORTH, J.

Beevor v. Luck (*supra*, col. 1902).

Referred to, Wellesley v. Mornington (Lord) (1869) 17 W. R. 355.—L.C.; followed, Loveday v. Chapman (1875) 32 L. T. 689.—HALL, V.-C.

Beevor v. Luck, referred to.

Baker v. Gray (1875) 45 L. J. Ch. 465; 1 Ch. D. 491; 33 L. T. 721; 24 W. R. 171.—HALL, V.-C.

Baker v. Gray, referred to.

Beevor v. Luck, distinguished.

Mills v. Jennings (1880) 49 L. J. Ch. 209; 13 Ch. D. 639, 648; 42 L. T. 169; 28 W. R. 549.—C.A.

Beevor v. Luck, questioned.

Cummins v. Fletcher (1880) 14 Ch. D. 699 (*supra*, col. 1903).

Mills v. Jennings (*supra*), distinguished.

Anderson v. City Permanent Benefit Building Society (1881) 44 L. T. 641.

KAY, J.—I think it does follow from that case (*Mills v. Jennings*), that the society have here no right to consolidate derived from the ordinary rule of equity, but the mortgage in this case contained a covenant to observe all the rules of the society. [His lordship read rule 31.] That rule expressly gives the society power to consolidate in every case, and the effect of the covenant is the same as if the words of the rule were repeated in the mortgage. Now, it appears that Andrews, if he did not, as was alleged, but denied actually, prepare this mortgage, at least acted as Fraser's [the mortgagor's] solicitor in the matter, and witnessed the execution of the mortgage. It is clear, therefore, that he had notice of its contents. Andrews therefore took his mortgage with notice of this express covenant, that the society should have the right to consolidate. That fact seems to take the case out of the rule established by *Mills v. Jennings*.—p. 642.

Beevor v. Luck (*supra*), commented on.

White v. Hillacre (*supra*, col. 1902), approved.

Baker v. Gray (*supra*), distinguished.

Mills v. Jennings, affirmed.

Jennings v. Jordan (1881) 6 App. Cas. 698; 51 L. J. Ch. 129; 45 L. T. 593; 30 W. R. 369.—H.L. (E.).

SELBORNE, L.C.—I cannot regard *Tassell v. Smith* (col. 1902) as an authority which ought to be followed on this occasion, great as was the eminence of the judges who decided it (p. 702). . . . The case of *Baker v. Gray* . . . in which the decree provided for consolidation against one of the defendants, and refused it as against the others, was different from the present. There the right to consolidate was claimed by the mortgagee, who was plaintiff in the suit, against all

the defendants. It is clear that, in such a case, the decree might be, and ought to be, so made as to give the plaintiff what he was entitled to against each defendant.—p. 707.

LORD BLACKBURN.—And though I cannot doubt that the L.J.J. thought that the rule on which they acted in *Tissell v. Smith* was already established, and though it is reasonable to suppose that two judges who had such long and great experience in Courts of equity had grounds for so thinking, yet the discussion at your lordships' bar has convinced me that they made a mistake (p. 715). [His lordship dealt with the earlier cases and continued:] Notwithstanding the observations of Lord Hatherley in *Bevor v. Luck*, I must own that Alderson, B.'s judgment [in *White v. Hillacre*] has an appearance at least of good sense, and of furthering justice, or perhaps I should say of refusing to further injustice, that to my mind is very persuasive.—p. 718. **LORD WATSON** concurred.

White v. Hillacre, approved and followed.

Jennings v. Jordan (*supra*), observed on.

Bevor v. Luck, disapproved and not followed.

Mills v. Jennings (col. 1904), referred to.

Harter v. Colman (1882) 51 L. J. Ch. 481; 19 Ch. D. 630; 46 L. T. 154; 30 W. R. 484.—**FRY**, J.

Bevor v. Luck.

Considered, **Lewis v. Aberdare and Plymouth Co.** (1884) 53 L. J. Ch. 741; 50 L. T. 451.—**KAY**, J.; *commented on*, **Pledge v. White** [1896] A. C. 187, 195 (*post*); *disapproved*, **Riley v. Hall** (1898) 79 L. T. 241.—**STIRLING**, J.

White v. Hillacre.

Distinguished, **Pledge v. Carr** [1894] 2 Ch. 328 (*post*); *referred to*, **Pledge v. White** [1896] A. C. 187, 195 (*post*).

Jennings v. Jordan (*supra*), distinguished.

Atherley v. Barnett (or Burnett) (1885) 52 L. T. 736; 33 W. R. 779.—**PEARSON**, J.

Mills v. Jennings, Jennings v. Jordan, and

Harter v. Colman (*supra*), referred to.

Mutual Life Assurance Society v. Langley (1886) 32 Ch. D. 460, 470; 51 L. T. 326.—**C.A.**
GOTTON, BOWEN and FRY, L.J.J.

Jennings v. Jordan and Harter v. Colman, applied.

Bird v. Wenn (1886) 55 L. J. Ch. 722; 33 Ch. D. 215, 218; 54 L. T. 933; 34 W. R. 652.—**STIRLING**, J.

Jennings v. Jordan, referred to.

Gridliths v. Pound (1890) 59 L. J. Ch. 522; 45 Ch. D. 553, 560.—**STIRLING**, J.

Harter v. Colman, approved and applied.

Minter v. Carr [1894] 2 Ch. 321; 42 W. R. 619.—**ROMER**, J.; *affirmed*, (1894) 63 L. J. Ch. 705; [1894] 3 Ch. 498; 7 R. 558; 71 L. T. 526.—**C.A.**

Jennings v. Jordan, and Harter v. Colman, distinguished.

Tweedale v. Tweedale (1857) 23 Beav. 341.—**M.R.**, followed.

Pledge v. Carr (1894) 63 L. J. Ch. 651; [1894] 2 Ch. 328; 8 R. 253; 70 L. T. 586; 42 W. R. 620.—**ROMER**, J.; *affirmed*, 64 L. J. Ch. 51; [1895] 1 Ch. 51; 8 R. 255, n.; 71 L. T. 598; 43 W. R. 50.—**C.A.**

Jennings v. Jordan, form suggested by Lord Selborne followed.

Biddulph v. Biffiter Street Offices Co. (1895) 13 R. 572; 72 L. T. 834.—**NORTH**, J.

Tweedale v. Tweedale, approved.

Jennings v. Jordan, distinguished.

Harter v. Colman, referred to.

Pledge v. Carr (*supra*), affirmed.

Pledge v. White (1896) 65 L. J. Ch. 449; [1896] A. C. 187; 74 L. T. 323; 44 W. R. 589.—**H.L.** (Ex.).

LORD DAVEY.—**Romer**, J. . . . and the **C.A.** held that the case was governed by the decision . . . in *Vint v. Padgett* (col. 1902), which it was not competent for them to question, and accordingly decided in favour of the respondents. If *Vint v. Padgett* had been an isolated decision on a new point, then, notwithstanding the eminence of the learned judges who were parties to the decision, it may be that your lordships would probably be disposed to express your dissent from it . . . But it is obvious that the learned judges did not conceive themselves to be laying down new law. **Knight Bruce**, L.J. said that a long course and series of authorities binding on the Court precluded the possibility of their thinking that there was in the case more than one arguable question, if any—namely, as to the materiality of notice of a second mortgage to a transferee of prior mortgages—and **Turner**, L.J. said it was impossible to distinguish the case from *Bovey v. Shipwith* (*supra*, col. 1902)—a case decided in the reign of Charles II., to which I will presently refer—on any other ground than as to notice being material. In *Tweedale v. Tweedale*, decided in 1857, the year before *Vint v. Padgett*, the union of two mortgages made to different mortgagees took place after the assignment of the equity of redemption of both mortgaged properties. **Lord Romilly** held that the assignee could only stand in the position of the mortgagor, and be entitled to his rights only; and if the mortgagor could not have redeemed one property without the other, the assignee stood in no better or more favourable position, and was not entitled to redeem one without redeeming the other. Indeed, the contrary seems from the report to have been scarcely argued in that case . . . The old case of *Bovey v. Shipwith*, referred to by **Turner**, L.J., was a combined case of tacking (in the strict technical sense) and consolidation. There was—first, a mortgage with conveyance of the legal estate in two properties; secondly, an assignment of the equity of redemption in the two properties to a second mortgagee; thirdly, a third mortgage of one of the properties only without notice of the second mortgage. The third mortgagee bought and took a transfer of the first legal mortgage. It was held—first, that he might tack his equitable third mortgage to the first mortgage, so as to gain priority over the second mortgagee; and, secondly, that, having done so, he might consolidate his third mortgage (which was on one estate only) with the first mortgage on both estates and hold the two estates as against the second mortgagee until all that was due to him on both securities should be satisfied. *Tilley v. Davies* (*supra*, col. 1902), before **Lord Hardwicke**, may be distinguished on the ground that *Tilley*, the second equitable mortgagee of one of the estates, had before the assignment of the equity of

redemption in another estate to Peyton acquired a right to redeem Shephard, the first mortgagee on both estates, and thereby consolidate the two mortgages. It is not, therefore, in my opinion, a direct authority on the present case, in which the consolidation has taken place by purchase and transfer, and not by the exercise of an existing right to redeem. In *Selby v. Pomfret* (*supra*, col. 1903) . . . although the Lord Chancellor [Lord Campbell] uses the word "tack," it is apparent from the facts of the case which he was dealing with that he meant tacking in the sense of consolidation. The case of *Selby v. Pomfret* may, no doubt, be distinguished from the present one on the ground that the assignment of the equity of redemption was by operation of law; but if there was no existing right of consolidation at the date of the bankruptcy the distinction seems to me to be unsubstantial, because the assignees of the bankrupt take his property subject only to existing equities. The statutory *ius tertii* of the creditors may be considered as entitled to more consideration. In *Beeror v. Luck* (col. 1902) Lord Hatherley held that a mortgagee of one property might, as against the assignee of the equity of redemption of another property, consolidate with his mortgage a mortgage from the same mortgagor on that other property of which he had taken a transfer after the date of the assignment of the equity of redemption of the second property only, overruling *White v. Hillacre*. The extent to which the right of consolidation was carried in this case was criticised by Lord Selborne in this House in *Jennings v. Jordan*, and so far as it held that mortgages on two properties could be consolidated against the assignee of the equity of redemption of one property only, where the union of the two mortgages did not take place until after the separation of the equities of redemption, *Beeror v. Luck* must be held to be overruled. It was so considered by Fry, J. in *Harter v. Colman*. This case is free from any such difficulty. At the time when redemption is sought all the mortgages are presently redeemable by the same person. Pledge, the plaintiff in the action, became by one transaction the assignee of the entire equity of redemption of all the mortgages. . . . The actual point decided in *Jennings v. Jordan* was that a mortgagee could not as against the assignee of an equity of redemption of one property consolidate with his original mortgage a mortgage on another property created by the same mortgagor after the assignment of the equity of redemption. The contrary had been maintained by the plaintiff on what was probably a misunderstanding of *Tassell v. Smith* (col. 1902). . . . Lord Selborne expressed himself in the following words: ". . . I have much more difficulty in following or satisfactorily explaining the principle of some other authorities, such as *Beeror v. Luck*, which have held (contrary to the decision of Alderson, B. in *White v. Hillacre*) that a mortgagee's right to consolidate as against the purchaser of the equity of redemption of property mortgaged to him is capable of being enlarged, after the date of that purchase, by a transfer to the mortgagee of other mortgages which were then in other hands, and with the equity of redemptions of which (if there were no consolidation) the purchaser would have nothing to do." I understand Lord Selborne to be here speaking only of the case in which the equities of redemption

have become separated, and his observations have no reference to a case such as that now before the House, in which all the equities of redemption have been assigned to, and are now vested in, one person. I do not think that anything was said in this House in *Jennings v. Jordan* which throws any doubt or discredit on the decision in *Vint v. Pudgett* and the other cases to the same effect. At the time when this action was commenced the exact position contemplated by Lord Selborne had taken place—of all the mortgages being united in a single hand and redeemable by the same person. It appears from the facts of *Jennings v. Jordan*, stated in 49 L. J. Ch. 309; 13 Ch. D. 639, that the union of the mortgages which Jennings was held entitled to consolidate did not take place until after the settlement of the equity of redemption under which the respondent Jordan claimed. But, in my opinion, no reliance can be placed on that circumstance, as the facts show that it was a case of successive equities of redemption—one mortgage being on property A., and the other on property A. and B.—and not of consolidation simply. I mention this to avoid misapprehension.—pp. 450—454.

Jennings v. Jordan and Pledge v. White,
referred to.
Riley v. Hall (1898) 79 L. T. 244.—STIRLING, J.

9. MARSHALLING.

- Tweddell v. Tweddell** (1786) 2 Bro. C. C. 101, 151.—L.C., *explained*.
Woods v. Huntingford (1796) 3 Ves. 128.—M.R.
Tweddell v. Tweddell, *distinguished*.
Waring v. Ward (1802) 7 Ves. 332; 5 B. R. 134.—L.C.; **Barry v. Harding** (*post*).
Waring v. Ward, *approved*.
Jones v. Kearney (1841) 1 Dr. & War. 134; 1 Con. & L. 34; 4 Ir. Eq. R. 81.—SUGDEN, L.C.
Parsons v. Freeman (1751) Amb. 115.—L.C., *distinguished*.
Barry v. Harding (1844) 1 Jo. & Lat. 475; 7 Ir. Eq. R. 313.—SUGDEN, L.C.
Waring v. Ward, *referred to*.
Law Courts Chambers Co., In re (1889) 61 L. T. 669.—STIRLING, J.
Waring v. Ward, *applied*.
Bridgman v. Daw (1891) 40 W. R. 253.—NORTH, J.
Tweddell v. Tweddell and Woods v. Huntingford (*supra*), *referred to*.
Waring v. Ward and Crafts v. Tritton (1818) 8 Taunt. 365.—C.P., *dicta considered and followed*.
Adair v. Carlen (1892) 29 L. R. Ir. 469.—PORTER, M.R.
Waring v. Ward, *principle applied*.
Conolly v. Gorman (1897) [1898] 1 Ir. R. 20, 65.—C.A.
Bridgman v. Daw (*supra*), *principle applied*.
Dodson v. Downey (1901) 70 L. J. Ch. 854; [1901] 2 Ch. 620; 85 L. T. 273; 50 W. R. 57.—FARWELL, J.
Lanoy v. Athol (Duke) (1742) 2 Atk. 411.—L.C., *discussed*.
Sykes v. Meynal (1763) Dick. 368.—M.R.; **Averall v. Wade** (1835) Ll. & G. Sug. 252, 256.—L.C. *And see post*, col. 1909.

Lanoy v. Athol (Duke) (*supra*).
Distinguished, *Earnes v. Racster* (or *Rackster*) (1842) 11 L. J. Ch. 228; 1 Y. & C. C. C. 401; 6 Jur. 595.—V.-C.; *discussed*, *Bugden v. Bignold* (*post*); *Loosemore v. Knapman* (1853) 23 L. J. Ch. 174; Kay 123; 2 Eq. R. 710; 2 W. R. 664.—WOOD, V.-C.; (*Gibson v. Seagrim* (*post*); *approved*, *Flint v. Howard* (*post*).

Averall v. Wade (*supra*, col. 1908).
Discussed, *Ker v. Ker* (1869) Ir. R. 4 Eq. 15, 21.—L.C. and L.J.: *applied*, *Barker's Estate*, In re (1878) 3 L. R. Ir. 395, 402.—**FLANAGAN, J.**: *referred to*, *Dunlop*, In re. *Dunlop v. Dunlop* (1882) 21 Ch. D. 583, 592; 48 L. T. 89; 31 W. R. 211.—C.A.; *Flint v. Howard* (*post*); *Jones*, In re, *Farrington v. Forrester* (1893) 62 L. J. Ch. 996; [1893] 2 Ch. 461; 3 R. 498; 69 L. T. 45.—**NORTH, J.**; *Conolly v. Gorman* (1897) [1898] 1 Ir. R. 20, 68.—C.A.; *Fitzgerald v. Fitzgerald* [1902] 1 Ir. R. 477, 492.—C.A. *And see* *Lysaght's Estate*, In re (*post*).

Aldridge v. Forbes (1839) 9 L. J. Ch. 37; 4 Jur. 20.—L.C., *distinguished*.
Lysaght's Estate, In re (1902) [1903] 1 Ir. R. 235, 244.—**ROSS, J.**

Barnes v. Racster (*supra*), *referred to*.
Bugden v. Bignold (1843) 2 Y. & C. C. C. 377, 381.—V.-C.; *Gibson v. Seagrim* (1855) 24 L. J. Ch. 782; 20 Beav. 614, 619.—**M.R.**: *Rorke's Estate*, In re (1865) 15 Ir. Ch. R. 316.—**LONGFORD, J.**

Barnes v. Racster and Bugden v. Bignold, *considered*.
Mower's Trusts, In re (1869) L. R. 8 Eq. 110; 20 L. T. 838.—**ROMILLY, M.R.**

Barnes v. Racster, *principle applied*.
Wellesley v. Mornington (Lord) (1869) 17 W. R. 355.—**HATHERLEY, L.C.**; *Trumper v. Trumper* (1872) L. R. 14 Eq. 295; 41 L. J. Ch. 673.—**BACON, V.-C.** (*affirmed*), (1873) L. R. 8 Ch. 870; 42 L. J. Ch. 641; 29 L. T. 86; 21 W. R. 692.—**L.J.J.**

Barnes v. Racster and Bugden v. Bignold, *discussed and approved*.
Gibson v. Seagrim (*supra*), *referred to*.
Flint v. Howard (1893) 62 L. J. Ch. 804; [1893] 2 Ch. 54; 2 R. 386; 68 L. T. 390.—C.A.

Barnes v. Racster and Flint v. Howard, *applied*.
Baglioni v. Cavalli (1900) 83 L. T. 500; 49 W. R. 236.—**COZENS-HARDY, J.**

South v. Bloxam (1865) 34 L. J. Ch. 369; 2 H. & M. 457; 11 Jur. (N.S.) 319; 11 L. T. 264.—**WOOD, V.-C.**

Applied, *Toogood's Legacy Trusts*, In re (1889) 61 L. T. 19.—**CHITTY, J.**; *explained*, *Dixon v. Steel* (1901) 70 L. J. Ch. 794; [1901] 2 Ch. 602; 85 L. T. 404; 50 W. R. 132.—**COZENS-HARDY, J.**

10. PAYMENT OFF, RE-CONVEYANCE AND DEEDS.

Cholmondeley (Marquis) v. Clinton (Lord) (1820) 2 J. & W. 1, 182.—**M.R.**; *affirmed*, (1821) 4 Bligh. 1; 22 R. R. 83.—**H.L. (E.)**; **S. C.** (1817) 2 Meriv. 171; 16 R. R. 167.—**M.R.**

Commented on, *Boidell v. Golightly* (1842) 12 L. J. Ch. 187; 7 Jur. 53.—**SHADWELL, V.-C.**: *referred to*, *Christ's Hospital v. Grainger* (1849) 19 L. J. Ch. 33; 1 Mac. & G. 460; 1 H. & Tw. 533; 14 Jur. 339.—**L.C.**; *explained*, *Robertson*

v. Norris (1858) 1 Giff. 421; 4 Jur. (N.S.) 155.—**STUART, V.-C.**; *applied*, *Pearce v. Morris* (1869) 39 L. J. Ch. 342; L. R. 5 Ch. 227, 230.—**L.C.** (*see post*, col. 1914); *Warner v. Jacob* (1882) 51 L. J. Ch. 642; 20 Ch. D. 220; 46 L. T. 656; 30 W. R. 721.—**KAY, J.**

Cholmondeley (Marquis) v. Clinton (Lord), *explained*.

Magnus v. Queensland National Bank (1887) 36 Ch. D. 25; 56 L. J. Ch. 927; 57 L. T. 136; 35 W. R. 752; *affirmed*, (1888) 57 L. J. Ch. 413; 37 Ch. D. 466; 58 L. T. 248; 36 W. R. 577.—**C.A.**

KAY, J.—There can be no doubt that a mortgagee, after his debt is paid off, is in a fiduciary position towards the mortgagor with respect to the satisfied security. This was decided in *Cholmondeley v. Clinton*, where Sir T. Plumer says there is an implied trust "to surrender the estate to the person entitled to demand it"; and the doctrine has always since been recognised. It was followed in, amongst other cases, *Pearce v. Morris* (*supra*).—p. 32.

Cholmondeley (Marquis) v. Clinton (Lord), *referred to*.

Farrar v. Farrars, Ltd. (1888) 58 L. J. Ch. 185; 40 Ch. D. 395, 411; 60 L. T. 121; 37 W. R. 196.—**C.A.**

Cholmondeley (Marquis) v. Clinton (Lord), *applied*.

Bolton v. Salmon [1891] 2 Ch. 48; 60 L. J. Ch. 239; 64 L. T. 222; 39 W. R. 589.

CHITTY, J.—Where two different estates are mortgaged, the person entitled to redeem one estate cannot bring an action to redeem without making the person entitled to redeem the other estate a party (*see Cholmondeley v. Clinton*). For this purpose there is no difference between a mortgage of two different estates or two undivided shares of the same estate.—p. 52.

Postlethwaite v. Blythe (1818) 2 Swanst. 256; 3 Madd. 242.—**L.C.**; and **Gyles v. Hall** (1726) 2 P. Wms. 377.—**L.C.**, *referred to*.

Bank of New South Wales v. O'Connor (1889) 58 L. J. P. C. 82; 14 App. Cas. 273, 283; 60 L. T. 467; 38 W. R. 465; 5 T. L. R. 342.—**P.C.**

Gyles v. Hall and Garforth v. Bradley (1755) 2 Ves. sen. 678.—**L.C.**, *discussed*.

Kinnaird v. Trollope (1889) 58 L. J. Ch. 556; 42 Ch. D. 610, 616; 60 L. T. 892.—**STIRLING, J.**

Bank of New South Wales v. O'Connor, *discussed and applied*.

Gilligan v. National Bank [1901] 2 Ir. R. 513.—**Q.B.D.** *See judgments.*

Browne v. Lockhart (1840) 9 L. J. Ch. 167; 10 Sim. 420; 4 Jur. 167.—**V.-C.**, *discussed*.
Fitzgerald's Trustee v. Mellersh (1892) 61 L. J. Ch. 231; [1892] 1 Ch. 385; 66 L. T. 178; 40 W. R. 251.—**CHITTY, J.**

Matson v. Dennis (1864) 4 De G. J. & S. 345; 10 Jur. (N.S.) 461; 10 L. T. 391; 12 W. R. 596, 926.—**L.J.J.**, *referred to*.

Steeds v. Steeds (1889) 58 L. J. Q. B. 302; 22 Q. B. D. 537, 541; 60 L. T. 318; 37 W. R. 378.—**HUDDLESTON, B.** and **WILLS, J.**

Matson v. Dennis and Steeds v. Steeds, *explained*.

Powell v. Brodhurst (1901) 70 L. J. Ch. 587; [1901] 2 Ch. 160; 84 L. T. 620; 49 W. R. 532.—**FARWELL, J.**

Withington v. Tate (1869) L. R. 4 Ch. 288; 20 L. T. 637; 17 W. R. 559.—**HATHERLEY, L.C.**, *discussed and distinguished*.
Southampton's (Lord) Estate, In re, Allen v. Southampton (Lord), Banfather's Claim (1880) 50 L. J. Ch. 218; 16 Ch. D. 178, 187; 43 L. T. 687; 29 W. R. 231.—**MATINS, V.-C.**

Lambert v. Rogers (1817) 2 Meriv. 487; 16 R. R. 204.—**L.C.**, *distinguished*.
Taylor v. Rundell (1841) Cr. & Ph. 104; 11 Sim. 391; 4 Jur. 426.—**COTTENHAM, L.C.**

Eyre v. Burmester (1862) 10 H. L. Cas. 90; 8 Jur. (N.S.) 1109; 6 L. T. 838; 10 W. R. 587.—**H.L. (IR.)**; *reversing* 11 Ir. Ch. R. 1.—**C.A.**, *distinguished*.

Eyre v. Burmester (1864) 33 L. J. Ch. 652; 4 De G. J. & S. 435; 10 Jur. (N.S.) 687; 10 L. T. 673; 12 W. R. 993.—**L.C.**; *reversing* 10 Jur. (N.S.) 379; 10 L. T. 10; 12 W. R. 542.—**ROMILLY, M.R.**

WESTBURY, L.C.—In the former case between the parties to the present record, the House of Lords decided that the release dated October 5, 1855, which had been obtained by John Sadleir from the appellant, Mr. Eyre, by a gross fraud, was void as between Eyre and Sadleir, and that it had no operation in favour of the London and County Bank, by estopping Mr. Eyre from claiming the benefit of his security in priority to that of the bank. The M.R. appears to have thought that the decree made by him in the present case was a mere consequence of that decision, and that the plaintiff, Mr. Eyre, had a right to follow into the hands of the bank money paid to the bank by Sadleir, because that money was raised on the security of one of the estates charged with Mr. Eyre's prior incumbrance, although at the time when such money was borrowed by Sadleir and paid over to the bank the latter had no notice whatever of the fraud that had been practised on Mr. Eyre. No such consequence flows from the decision of the House of Lords or the principles on which it was founded. That House had not to consider the effect of any dealing subsequent to and on the faith of the release between Sadleir and a junction for valuable consideration without notice.—p. 656.

Eyre v. Burmester, distinguished.
Heath v. Crealock (1874) 44 L. J. Ch. 157; L. R. 10 Ch. 22, 34; 31 L. T. 650; 23 W. R. 95.—**L.J.**

Noel v. Bewley (1829) 3 Sim. 103.—**SHADWELL, V.-C.**, *disapproved*.
Smith v. Osborne (1857) 6 H. L. Cas. 375; 3 Jur. (N.S.) 1181; 6 W. R. 21.—**H.L. (IR.)**.

LORD WENSLEYDALE—*Noel v. Bewley* . . . appears, as I have said, to have weighed much with the L.C. of Ireland in inducing him to decide against the appellant, and undoubtedly it would, if properly decided, justify this decree. . . . The V.-C. then declared that the law was, that if a person had conveyed a defective title, and afterwards acquired a good one, the covenant would render that good title available to make the conveyance effectual. This, no doubt, was true, if the person had agreed to sell and convey an estate *absolutely* in the first instance; then, if he had no title at the time of the contract, and afterwards acquired one, he would be bound to make good his contract, and to convey it; but if he never covenanted abso-

lutely to convey, but only conditionally, and the condition was never fulfilled, he was under no such obligation. It was clearly a mistaken application on the part of the V.-C. of an established rule to a case to which it was not applicable, and in my judgment the case was on that account wrongly decided, and is of no authority.—p. 398.

Noel v. Bewley, followed.
Hoffe's Estate Act, 1885, In re (1900) 82 L. T. 556; 48 W. R. 507.—**KEKEWICH, J.**

Bourton v. Williams, L. R. 9 Eq. 297; 21 L. T. 781; 18 W. R. 515.—**STUART, V.-C.**; *reversed*, (1870) 39 L. J. Ch. 800; L. R. 5 Ch. 655; 18 W. R. 1089.—**L.C. and L.J.**

Heath v. Crealock (1874) 44 L. J. Ch. 157; L. R. 10 Ch. 22; 31 L. T. 650.—**C.A.**; *varying* 43 L. J. Ch. 169; L. R. 18 Eq. 215; 29 L. T. 763; 23 W. R. 95.—**BACON, V.-C.**

Referred to, Waldy v. Gray (1875) 44 L. J. Ch. 394; L. R. 20 Eq. 238, 254; 32 L. T. 531; 23 W. R. 676.—**BACON, V.-C.**; *applied*, *The Horlock* (1877) 47 L. J. Adm. 5; 2 P. D. 243, 249; 36 L. T. 622.—**STR. R. PHILLIMORE; Ortigosa v. Brown** (1878) 47 L. J. Ch. 168, 172; 38 L. T. 145.—**HALL, V.-C.**; *discussed*, *General Finance Mortgage and Discount Co. v. Liberator Building Society* (1878) 10 Ch. D. 15; 39 L. T. 600; 27 W. R. 210.—**JESSEL, M.R.**

Heath v. Crealock, referred to.
Morgan, In re, Pillgrem v. Pillgrem (1881) 50 L. J. Ch. 654; 18 Ch. D. 93, 102; 44 L. T. 796; 29 W. R. 733.—**FRY, J.** (*affirmed*, 50 L. J. Ch. 834; 45 L. T. 133.—**C.A.**); *Horton, In re, Horton v. Perks* (1884) 51 L. T. 420.—**KAY, J.**; *Manners v. Mew* (1885) 54 L. J. Ch. 909; 29 Ch. D. 725, 733; 53 L. T. 84.—**NORTH, J.**

Heath v. Crealock, applied.
Onward Building Society v. Smithson (1892); [1893] 1 Ch. 113; 41 W. R. 53.—**C.A.**

Heath v. Crealock, discussed.
Taylor v. London and County Banking Co. (1901) 70 L. J. Ch. 477; [1901] 2 Ch. 231, 256; 84 L. T. 397; 49 W. R. 451.—**C.A.**

Stokoe v. Robson (1814—15) 3 V. & B. 51; 19 Ves. 385.—**M.R.** (*see* 22 R. R. 233, n, 234, n.), *followed*.

Shelmardine v. Harrop (1821) 6 Madd. 39; 22 R. R. 232.—**LEACH, V.-C.**

Stokoe v. Robson and Smith v. Bicknell (1810) 3 V. & B. 51, n.—**M.R.**, *applied*.
Middleton (Lord) v. Eliot (1847) 15 Sim. 531 (*post*, col. 1913).

Stokoe v. Robson and Skelmardine v. Harrop, discussed.

Gilligan and Nugent v. National Bank [1901] 2 Ir. R. 513.—**Q.B.D.**

Hornby v. Matcham (1848) 17 L. J. Ch. 471; 16 Sim. 325; 12 Jur. 825.—**SHADWELL, V.-C.**, *followed*.

Smith v. Bicknell (*supra*); and **Jones v. Lewis** (1750—1) 2 Ves. sen. 240.—**L.C.**, *distinguished*.

Brown v. Sewell (1853) 22 L. J. Ch. 1063; 11 Hare 49; 17 Jur. 708.—**V.-C.** *And see post*, col. 1913.

Schoole v. Sall (1803) 1 Sch. & Lef. 176.—**REDESDALE, L.C.**, *referred to*.
Kinnaird v. Trollope (1888) 57 L. J. Ch. 905;

39 Ch. D. 636, 642 : 59 L. T. 433 ; 37 W. R. 234.
—STIRLING, J.

Jones v. Lewis (*supra*), *applied*.
Job v. Job (1877) 6 Ch. D. 562 ; 26 W. R. 206.
—JESSEL, M.R.

Jones v. Lewis, Schoole v. Sall, Brown v. Sewell, Smith v. Bicknell, and Hornby v. Matcham (*supra*), *discussed*.
Gilligan and Nugent v. National Bank [1901] 2 Ir. R. 513.—Q.B.D.

Midleton (Lord) v. Eliot (1847) 15 Sim. 531 ; 11 Jur. 742.—SHADWELL, V.-C., *followed*.
James v. Rumsey (1879) 11 Ch. D. 398 ; 48 L. J. Ch. 345 ; 27 W. R. 617.

HALL, V.-C.—It has been submitted that the loss of the deed was an innocent one on the part of the defendants, and that under such circumstances no indemnity could be required. I do not find that that is the result of the authorities. There may be some peculiarity in the settled practice of the Court in respect to the loss of title deeds as between mortgagor and mortgagee, making the case not exactly that of an ordinary liability of a bailee ; but it seems to me, looking at the authorities, that a mortgagor is, under such circumstances as exist in the present case, entitled to an indemnity. That seems to me to be a fair result of all the cases which have been referred to, and therefore the plaintiff was right in claiming an indemnity, and he was also, I think, right upon the decision of *Midleton (Lord) v. Eliot* in coming to the Court to have the matter sifted and inquired into, for the purpose of establishing his title and having it made clear, so that he might be able to deal with the property in future.—p. 403.

James v. Rumsey, *applied*.
Cardwell v. Matthews (1890) 62 L. T. 799.—NORTH, J.

Midleton (Lord) v. Eliot and James v. Rumsey, *discussed*.
Gilligan and Nugent v. National Bank [1901] 2 Ir. R. 513.—Q.B.D.

11. REDEMPTION.

Beynon v. Cook (1875) L. R. 10 Ch. 389, 391, n. ; 32 L. T. 353 ; 23 W. R. 531.—JESSEL, M.R. (*affirmed*, L.J.), *applied*.
Nevill v. Snelling (1880) 49 L. J. Ch. 777 ; 15 Ch. D. 679, 703 ; 43 L. T. 244 ; 29 W. R. 375.—DENMAN, J. ; **Srimati Kamini Soondari Chowdhurani v. Kali Prosunno Ghose** (1885) L. R. 12 Ind. App. 215.—P.C.

Beynon v. Cook, *referred to*.
Fry v. Lane, Fry, In re, Whittet v. Bush (1888) 58 L. J. Ch. 113 ; 40 Ch. D. 312, 320 ; 60 L. T. 12 ; 37 W. R. 135.—KAY, J.

Beynon v. Cook, *principle applied*.
Rae v. Joyce (1892) 29 L. R. Ir. 500, 509.—C.A.

Beynon v. Cook, *referred to*.
Seaton v. Lewis (1895) 11 Times L. R. 430.—C.A. LINDLEY, LOPES and KAY, L.JJ.

Ensworth v. Griffiths (1706) 5 Bro. P. C. 84 ; 15 Vin. Abr. 468 ; **Sevier v. Greenway** (1815) 19 Ves. 413.—M.R. ; and **Baker v. Wind** (1748) 1 Ves. sen. 168.—L.C., *distinguished*.
Williams v. Owen (1840) 12 L. J. Ch. 207 ; 5

Myl. & Cr. 303 ; 5 Jur. 114.—LYNDHURST, L.C. : *reversing* 9 L. J. Ch. 70 ; 10 Sim. 386.—V.-C.

Ensworth v. Griffiths, *discussed and applied*.
Sevier v. Greenway, *dictum followed*.
Williams v. Owen, *referred to*.

Gossip v. Wright (1863) 32 L. J. Ch. 648 ; 9 Jur. (N.S.) 592 ; 8 L. T. 627 ; 11 W. R. 632.—KINDERSLEY, V.-C.

Gossip v. Wright, *principle applied*.
Lisle v. Reeve (1901) 71 L. J. Ch. 42 ; [1902] 1 Ch. 53 ; 85 L. T. 464.—C.A. : *affirming on different grounds* (1900) 83 L. T. 731 ; 49 W. R. 188.—BUCKLEY, J.

Lisle v. Reeve, *discussed*.
Jarrah Timber and Wood Paving Corporation v. Samuel (1902) 71 L. J. Ch. 688 ; [1902] 2 Ch. 479 ; 87 L. T. 44 ; 50 W. R. 601 : *affirmed*, [1903] 2 Ch. 1 ; 72 L. J. Ch. 262 ; 88 L. T. 106 ; 51 W. R. 439 ; 10 Manson 296.—C.A.

KEKEWICH, J.—It may be that the contract means that the option of purchase shall not be exercisable after repayment of principal and interest. If the contract means this, the case would be brought within the doctrine laid down by Buckley, J. in *Lisle v. Reeve* : but in the first place, I do not myself think that this is the true meaning of the contract ; and secondly, having regard to what was said by the C. A. in the same case of *Lisle v. Reeve*, Buckley, J.'s doctrine cannot be regarded as sound.—p. 690.

Lisle v. Reeve (C.A.), *affirmed nom. Reeve v. Lisle* (1902) 71 L. J. Ch. 768 ; [1902] A. C. 461 ; 87 L. T. 308.—H.L. (E.).

Ravald v. Russell (1830) Younge, 9, 21 ; 34 R. R. 257.—EX.

Approved, **Raffety v. King** (1836) 6 L. J. Ch. 87 ; 1 Keen 601.—LANGDALE, M.R. : *referred to*.
Wicks v. Scrivens (*post*) : *followed*, **Prout v. Cook** (1896) 66 L. J. Ch. 24 ; [1896] 2 Ch. 808 : 75 L. T. 409 ; 45 W. R. 157.—NORTH, J.

Aynsley v. Reed (1754) 1 Dick. 249, *principle applied*.

Smith v. Green (1844) 1 Coll. C. C. 555.—KNIGHT BRUCE, V.-C., *referred to*.

Wicks v. Scrivens (1860) 1 J. & H. 215.—WOOD, V.-C.

Smith v. Green, Elisha v. Elisha, Seton on Decrees, 3rd ed. 475 ; and **Wicks v. Scrivens**, *referred to*.

James v. Biou (1818—9) 3 Swanst. 234 ; 19 R. R. 200, *explained*.

Pearce v. Morris (1869) 39 L. J. Ch. 342 ; L. R. 5 Ch. 227, 230 ; 22 L. T. 190 ; 19 W. R. 196.—L.C. ; *varying* 38 L. J. Ch. 566 ; L. R. 8 Eq. 217 ; 21 L. T. 287 ; 17 W. R. 1001.—M.R.

Pearce v. Morris, *followed*.
Hall v. Heward (1886) 32 Ch. D. 430 ; 55 L. J. Ch. 604 ; 54 L. T. 810 ; 34 W. R. 571.—C.A.

LOPES, L.J.—It was decided by **Pearce v. Morris** that a person having a partial interest in the equity of redemption is entitled to redeem the whole property, saving the rights of the other persons interested. It was attempted to distinguish that case on the ground that here the mortgagee is in possession, and would after transferring the security be liable to account for future rents. I agree with Cotton, L.J., that this continued liability exists only where the transfer is made voluntarily, and not where it is made under an order of the Court.—p. 437.

Pearce v. Morris, *referred to*.
Magnus v. Queensland National Bank (1887) 56 L. J. Ch. 927; 36 Ch. D. 25; 57 L. T. 136; 35 W. R. 752; 52 J. P. 246.—KAY, J.; *affirmed*, (1888) 57 L. J. Ch. 413; 37 Ch. D. 466; 58 L. T. 248; 36 W. R. 577.—C.A.

Pearce v. Morris, *considered and explained*.
Tarn v. Turner (1888) 57 L. J. Ch. 1085; 39 Ch. D. 456; 59 L. T. 742; 37 W. R. 276.—KEKEWICH, J.; and C.A.

Pearce v. Morris, *referred to*.
Kinnaird v. Trollope (1888) 57 L. J. Ch. 905; 39 Ch. D. 636, 645; 59 L. T. 433; 37 W. R. 234.—STIRLING, J.; **Corbett v. National Provident Institution** (1900) 17 Times L. R. 5.—PHILLIMORE, J.

Elmer v. Greasy (1873) 43 L. J. Ch. 166; L. R. 9 Ch. 69; 29 L. T. 632; 22 W. R. 141.—L.C. and L.JJ.

Applied, **Saull v. Browne** (1874) 43 L. J. Ch. 568; L. R. 9 Ch. 364, 368; 30 L. T. 697; 22 W. R. 427.—L.JJ.; **West of England, &c., Bank v. Nickolls** (1877) 6 Ch. D. 613.—MALINS, V.-C.; *referred to*, **Grumbrecht v. Parry** (1883) 49 L. T. 570; 32 W. R. 203.—Q.B.D.

Tubby v. Tubby (1845) 2 Coll. C. C. 136.—KINDERSLEY, V.-C., *applied*.
Catley v. Sampson (1864) 34 L. J. Ch. 96; 33 Beav. 561; 10 Jur. (N.S.) 993; 10 L. T. 519; 12 W. R. 927.—ROMILLY, M.R.

Catley v. Sampson, *distinguished*.
Hall v. Heward (1886) 55 L. J. Ch. 604; 32 Ch. D. 430; 54 L. T. 810; 34 W. R. 571.—C.A.

Hall v. Heward, *referred to*.
Kinnaird v. Trollope (1889) 58 L. J. Ch. 556; 42 Ch. D. 610, 619; 60 L. T. 892.—STIRLING, J.

Ford v. Olden (1867) 36 L. J. Ch. 651; L. R. 3 Eq. 461; 15 L. T. 558.—STUART, V.-C., *referred to*.

Kevans v. Joyce (1895) [1896] 1 Ir. R. 442.—MONROE, J.; and C.A.

Dalton v. Hayter (1844) 7 Beav. 313.—LANGDALE, M.R.

Dictum applied, **Inman v. Wearing** (1850) 3 De G. & Sm. 729.—KNIGHT BRUCE, V.-C.; *not applied*, **Nobbs v. Law Reversionary Interest Society** (1896) 65 L. J. Ch. 906; [1896] 2 Ch. 830; 75 L. T. 309.—KEKEWICH, J.

Inman v. Wearing.
Distinguished, **Knight v. Bowyer** (1858) 27 L. J. Ch. 520; 9 De G. & J. 421, 447; 4 Jur. (N.S.) 569; 6 W. R. 565.—L.JJ.; **National Bank of Australasia v. United Hand-in-Hand, &c. Co.** (*post*); *referred to*, **O'Keefe v. Walsh** [1903] 2 Ir. R. 681, 713.—K.B.D. (*affirmed*, C.A.).

Johnson v. Fesenmeyer (1858) 25 Beav. 88.—M.R.; *affirmed*, 3 De G. & J. 13.—L.C.

Referred to, **Foxley, Ex parte, Nurse**, in re (1868) L. R. 3 Ch. 515, 522; 18 L. T. 862; 16 W. R. 831.—L.JJ.; *applied*, **The Heart of Oak** (1869) 39 L. J. Adm. 15, 19; 21 L. T. 727.—SIR R. PHILLIMORE; **Smith v. Pilgrim** (1876) 2 Ch. D. 127, 134; 34 L. T. 408.—MALINS, V.-C.

Troughton v. Binkes (1801) 6 Ves. 574; 5 L. R. 101.—M.R., *applied*.

Gordon v. Horsfall (1846) 5 Moore P. C. 393; 11 Jur. 569.—P.C.; **Johnson v. Fesenmeyer**; and **Crenver &c. Mining Co.**

v. Willyams (1866) 35 Beav. 353.—M.R., *distinguished*.

National Bank of Australasia v. United Hand-in-Hand Band of Hope Co. (1879) 4 App. Cas. 391, 400; 40 L. T. 697; 27 W. R. 889.—P.C.

Johnson v. Fesenmeyer *not applied*.
Ward v. Sharp (1884) 53 L. J. Ch. 313, 320; 50 L. T. 557; 32 W. R. 584.—NORTH, J.

Butler v. Bernard (1673) Freem. Ch. Cas. 139; 1 Ch. Cas. 224.—L.K., *distinguished*.
Skeffington v. Budd (1842) 9 Cl. & F. 219; 6 Jur. 809.—H.L. (E.); *affirming* S. C. *nom.*
Skeffington v. Whitehurst (1838) 7 L. J. Ex. Eq. 65; 3 Y. & C. 1.—ALDERSON, B.

LORD CAMPBELL.—There it did not appear that the representative of the administrator might not have a claim on the estate equal to the value of the equity of redemption; he was no party before the Court, and the report in Freeman says the Court decreed the benefit of redemption to the executor of the first administrator, who had aliened the whole estate in law of the term, and was not possessed in *auter droit* of any part of the interest thereof, but in his own right; so that it seems to have been taken that the executor of the administrator, when a re-conveyance was executed to him, would not be accountable to the administrator *de bonis non*. But whether such executor must convey to the administrator *de bonis non*, I do not find that Lord Nottingham intimates any opinion that a bill to redeem may not be maintained by the administrator *de bonis non*, against the mortgagee.—p. 249.

Nouaille v. Greenwood (1822) T. & R. 26; 26 R. R. 174.—L.C., *applied*.

Dudson's Contract, In re (1878) 47 L. J. Ch. 632; 8 Ch. D. 628; 49 L. T. 182; 27 W. R. 179.—C.A. See "FINES AND RECOVERIES," vol. i. col. 1137.

Knight v. Marjoribanks (1849) 2 Mac. & G. 10; 2 H. & Tw. 308.—L.C.; *affirming* (1848) 11 Beav. 322; 13 Jur. 136.—LANGDALE, M.R., *discussed*.

Kirkwood v. Thompson (1865) 34 L. J. Ch. 305; 2 H. & M. 392; 11 Jur. (N.S.) 385; 13 W. R. 495.—WOOD, V.-C.; *affirmed*, 34 L. J. Ch. 501; 2 De G. J. & S. 613; 12 L. T. 111; 13 W. R. 1052.—CRANWORTH, L.C.

Knight v. Marjoribanks, *not applied*.
Rushbrook v. Lawrence (1869) L. R. 8 Eq. 25, 32; 21 L. T. 192; 17 W. R. 757.—ROMILLY, M.R.; *affirmed*, 39 L. J. Ch. 93; L. R. 5 Ch. 3; 21 L. T. 477; 18 W. R. 101.—L.C.

Knight v. Marjoribanks, *approved*.
Melbourne Banking Corporation v. Brougham (1882) 51 L. J. P. C. 65; 7 App. Cas. 307; 46 L. T. 603; 30 W. R. 925.—P.C.

Melbourne Banking Corporation v. Brougham, *applied*.

Mainland v. Upjohn (1889) 58 L. J. Ch. 361; 41 Ch. D. 126, 136; 60 L. T. 614; 37 W. R. 411.—KAY, J.

Brown v. Cole (1845) 14 L. J. Ch. 167; 14 Sim. 427; 9 Jur. 290.—SHADWELL, V.-C., *distinguished*.

Bovill v. Endle (1896) 65 L. J. Ch. 542; [1896] 1 Ch. 648; 44 W. R. 523.

KEKEWICH, J.—That case [*Brown v. Cole*] decides that the mortgagor cannot, before the time limited for payment to the mortgagee expires, either insist on acceptance of a tender

of the mortgage money or take proceedings to redeem. But that is because during that time the mortgage must remain as a security for the money advanced, and it is not competent for the mortgagee or the mortgagor to disturb that relation. But if the mortgagee himself disturbs that relation, as he has done here, though he has been led into doing so by the mortgagor absconding, he cannot insist on notice to pay off being served upon him.—p. 543.

Bovill v. Endle (*supra*), *principle applied*.

Wickens, Ex parte (1898) 67 L. J. Q. B. 397; [1898] 1 Q. B. 543, 548; 78 L. T. 213; 46 W. R. 385; 5 Manson 55.—C.A.

12. REMEDIES OF MORTGAGEE.

Bell, In re, **Jeffery v. Sayles** (1895) 65 L. J. Ch. 188; [1896] 1 Ch. 1; 73 L. T. 391; 44 W. R. 99.—C.A.

Approved, **Hockey v. Western** (1898) 67 L. J. Ch. 166; [1898] 1 Ch. 350; 78 L. T. 1; 46 W. R. 312.—C.A.; *discussed*, **Lloyd**, In re, **Lloyd v. Lloyd** (1902) 72 L. J. Ch. 78; [1903] 1 Ch. 385; 87 L. T. 541; 51 W. R. 177.—C.A.

Palmer v. Hendrie (1859) 27 Beav. 349; (1860) 28 Beav. 341.—M.R., *approved*.

Walker v. Jones (1866) 35 L. J. P. C. 30; L. R. 1 P. C. 50, 62; 12 Jur. (N.S.) 381; 14 L. T. 686; 14 W. R. 484.—P.C.

Walker v. Jones, *referred to*.

Oxford and Canterbury Hall Co., In re (1870) 39 L. J. Ch. 775; L. R. 5 Ch. 433, 436; 22 L. T. 226; 18 W. R. 793.—GIFFARD, L.J.

Palmer v. Hendrie and Walker v. Jones, *discussed*.

Rudge v. Richens (1873) 42 L. J. C. P. 127; L. R. 8 C. P. 358; 28 L. T. 537.—C.P., *referred to*.

Kinnaid v. Trollope (1888) 57 L. J. Ch. 905; 39 Ch. D. 636, 643; 59 L. T. 433; 37 W. R. 234.—STIRLING, J.

Chapman v. Beecham (1842) 12 L. J. Q. B. 42; 3 Q. B. 723; 3 G. & D. 71; 6 Jur. 968.—Q.B.; **Doe d. Snell v. Tom** (1843) 12 L. J. Q. B. 264; 4 Q. B. 615; 3 G. & D. 637; 7 Jur. 847.—Q.B.; and **Walker v. Giles** (1849) 18 L. J. C. P. 323; 6 C. B. 662; 13 Jur. 588.—C.P., *commented on*.

Pinhorn v. Sonster (or **Souster**) (1853) 22 L. J. Ex. 266; 8 Ex. 763; 16 Jur. (N.S.) 1001; 1 W. R. 336.—EX., *followed*.

Brown v. Metropolitan Counties Life Assurance Society (1859) 28 L. J. Q. B. 236; 1 El. & El. 832; 5 Jur. (N.S.) 1028.—Q.B.

Doe d. Snell v. Tom; **Pinhorn v. Sonster**; and **Doe d. Garrod v. Olley** (1840) 9 L. J. Q. B. 379; 12 A. & E. 481; 4 P. & D. 275; 4 Jur. 1084.—Q.B., *referred to*.

Jolly v. Arbuthnot (1859) 28 L. J. Ch. 547; 4 De G. & J. 224.—L.C. (*see post*, col. 1918).

Walker v. Giles, *questioned*.

Turner v. Barnes (1862) 2 B. & S. 435; 31 L. J. Q. B. 170; 9 Jur. (N.S.) 199; 10 W. R. 561.—Q.B. *And see post*, col. 1918.

CROMPTON, J.—If the ground of the decision in **Walker v. Giles** was that a power to remain in possession until default is inconsistent with a tenancy at the will of the other party, we should leave that question to be debated in a Court of error (p. 445). . . . In **Brown v. Metropolitan Counties &c. Society** (*supra*), we say, "**Walker v.**

Giles can only be supported, if at all, on the ground pointed out by Lord Wensleydale in **Pinhorn v. Souster**." I do not, however, put much weight upon that dictum, because I rather think it was my own expression, my impression at the time being that the authority of **Walker v. Giles** was very much shaken.—p. 447.

Walker v. Giles, *not applied*.

Harrison, Ex parte, **Betts**, In re (1881) 50 L. J. Ch. 832; 18 Ch. D. 127, 133 (*post*).

Pinhorn v. Souster (*supra*), *distinguished*.

Hampson v. Fellows (1868) L. R. 6 Eq. 575.—V.-C. (*post*); **Harrison**, Ex parte, **Betts**, In re (1881) 18 Ch. D. 127, 134.—C.A. (*post*).

Pinhorn v. Sonster, *followed*.

Kearsley v. Phillips (1883) 52 L. J. Q. B. 581; 11 Q. B. D. 621, 626.—C.A. (*post*, col. 1920).

West v. Fritche (1848) 18 L. J. Ex. 50; 3 Ex. 216.—EX., *referred to*.

Dancer v. Hastings (1826) 4 Bing. 2; 12 Moore 34; 5 L. J. (O.S.) C. P. 3; 29 R. R. 740.—C.P., *discussed and applied*.

Jolly v. Arbuthnot (1859) 28 L. J. Ch. 547; 4 De G. & J. 224; 5 Jur. (N.S.) 689; 7 W. R. 532.—CHELMSFORD, L.C.; *varying* 28 L. J. Ch. 274; 5 Jur. (N.S.) 80.—ROMILLY, M.R.

West v. Fritche and Dancer v. Hastings, *discussed*.

Morton v. Woods (1868—9) 37 L. J. Q. B. 242; 38 L. J. Q. B. 81; 9 B. & S. 632; L. R. 3 Q. B. 658; L. R. 4 Q. B. 293; 18 L. T. 791; 17 W. R. 414.—Q.B.; and EX. CH. *And see* col. 1919.

West v. Fritche, *distinguished*.

Turner v. Barnes (*supra*, col. 1917) and **Mumford v. Collier** (1890) 59 L. J. Q. B. 552; 25 Q. B. D. 279; 38 W. R. 716.—

COLERIDGE, C.J. and WILLS, J., *referred to*. **Scobie v. Collins** [1895] 1 Q. B. 375; 64 L. J. Q. B. 10; 15 R. 6; 71 L. T. 775.

V. WILLIAMS, J.—In **West v. Fritche** the interest was not paid as rent, and yet the Court held there was a tenancy; but the decision was based entirely on occupation by one who had executed a deed continuing an attornment clause. Here the suggested tenancy is by one who has not executed any attornment clause, and who has merely occupied and paid interest.—p. 377.

Jolly v. Arbuthnot (*supra*).

Distinguished, **Hampson v. Fellows** (1868) 37 L. J. Ch. 694; L. R. 6 Eq. 575; 19 L. T. 6.—**MALINS, V.-C.**; *applied*, **Morton v. Woods** (1869) L. R. 4 Q. B. 293, 303 (*supra*); *referred to*, **Roberts**, In re, **Hill**, Ex parte (1877) 46 L. J. Bk. 116; 6 Ch. D. 63, 69; 37 L. T. 46; 25 W. R. 784.—C.A.; **Threlfall**, In re (1880) 16 Ch. D. 274, 279.—**BACON, C.J.** (affirmed, C.A., *post*, col. 1920).

Jolly v. Arbuthnot, *applied*.

Kearsley v. Phillips (1883) 52 L. J. Q. B. 581; 11 Q. B. D. 621, 625.—C.A. (*post*, col. 1920).

Hampson v. Fellows (*supra*), *not applied*.

Harrison, Ex parte, **Betts**, In re (1881) 18 Ch. D. 127; 50 L. J. Ch. 832; S. C. *nom*. **Tempest**, Ex parte, **Betts**, In re, 44 L. T. 616; 29 W. R. 668.—C.J.; *affirmed*, 45 L. T. 290; 30 W. R. 38.—C.A.

BACON, C.J.—As to **Hampson v. Fellows** . . . I have not the facts so clearly before me that I

can express any opinion upon it. If the bill therealleged a case of fraud, a case of agreement between the parties not carried out by the deed, a demurrer to such bill might well be allowed, but, on the cause coming on to be heard, the alleged fraud would have to be investigated. Such a case has no application whatever to the case before me, and still less has *Walker v. Giles* (*supra*, col. 1917).—p. 133.

[The C.A. upheld the decision of Bacon, C.J., but did not refer to *Hampson v. Fellows*.]

Morton v. Woods (*supra*, col. 1918), *explained*.

Jackson, Ex parte, Bowes, In re (1880) 14 Ch. D. 725; 43 L. T. 272; 29 W. R. 253.—C.A.
BAGGALLAY, L.J.—Now *Morton v. Woods* has been referred to on behalf of the respondents, and the view presented by their counsel, as I understand it, is this: that it is quite immaterial what the amount of rent is which you place upon the premises by an attornment clause; you are at liberty to make it as unreal as you choose, to cover the whole principal and interest, if you think fit, and the Court will not interfere with it. But *Morton v. Woods* does not decide that. It decides that, as a general rule, an attornment clause is not in itself unlawful, provided it is real. The rent need not be limited to the amount of interest from time to time becoming due upon the mortgage debt. It is not introduced for that purpose alone, although it is one way of securing the interest. The measure of the real rent is the lettable value of the property, not the amount of the mortgage debt. In *Morton v. Woods* there was no suggestion that the rent fixed by the attornment clause was other than the real and proper rent, and, as I read the case, all that the Court decided was the general principle that effect will be given to attornment clauses when they are real and carry out the true intention of the parties to them, so far as that intention is limited to creating the relation of landlord and tenant in the proper sense.—p. 738.

Morton v. Woods, *explained and followed*.

Pannett, Ex parte, Kitchin, In re (1880) 16 Ch. D. 226; 50 L. J. Ch. 212; 44 L. T. 226; 29 W. R. 129.—C.A. *And see post*, col. 1922.

LUSH, L.J.—I would observe that *Morton v. Woods* governs the present case entirely, unless there is some distinction to be found on the ground that here the mortgagor had already attorned and agreed to stand in the relation of tenant to the first mortgagees. *Morton v. Woods*, I may also say, is supported by *Stockton Iron Furnace Co., In re* (*post*, col. 1920), in this Court, the decision in which is exactly on the same ground and to the same effect upon both points. Now, is there any distinction? Does the fact that the mortgagor had already agreed to stand in the relation of tenant to a first mortgagee disqualify him from creating the same relationship between himself and a second mortgagee? I cannot imagine any principle of law which would prevent a person, if he chooses to do so, from undertaking that relationship to two distinct persons. The object of each attornment is perfectly clear. It is to secure the interest payable on the mortgage debt, and if there is no distinction on that ground, then there is no distinction whatever between the present case and *Morton v. Woods* or *Stockton Iron Furnace Co., In re*.—p. 235.

Morton v. Woods, *explained*.

Threlfall, In re, Queen's Benefit Building Society, Ex parte (1880) 16 Ch. D. 274; 50 L. J. Ch. 318; 44 L. T. 74; 29 W. R. 128.—C.A.

LUSH, L.J.—Although in *Morton v. Woods* the expression "tenancy at will" was used by some of the judges while professing to describe the relation between the parties, yet it must not be taken as intended to be an exact legal definition of it, particularly when we consider the facts and arguments before them. In all cases the words of the judgment must be considered with reference to the arguments adduced. I am rather glad to see that I did not myself describe the tenancy as a tenancy at will. But the argument in that case was that the attornment was for ten years, and if so, void because not made by deed; and therefore the judges said that it was a tenancy at will, meaning a tenancy for an indefinite term not to exceed ten years, determinable at the will of the landlord. That is precisely like this case, a yearly tenancy with an express proviso for the determination of that tenancy at any time by will of the lessor.—p. 282.

Morton v. Woods, *applied*.

Kearsley v. Phillips (1883) 52 L. J. Q. B. 581; 11 Q. B. D. 621, 625; 49 L. T. 435; 31 W. R. 909.—C.A. BREET, M.R., LINDLEY and FRY, L.JJ.

Williams, Ex parte, Thompson, In re (1877)

47 L. J. Bk. 26; 7 Ch. D. 138; 37 L. T. 764; 26 W. R. 274.—C.A., *approved and distinguished*.

Stockton Iron Furnace Co., In re (1878) 10 Ch. D. 335; 48 L. J. Ch. 417; 40 L. T. 19; 27 W. R. 433.—C.A.; *reversing* BACON, v.-c.

BRAMWELL, L.J.—To my mind the difference between this case and *Williams, Ex parte*, is this, that in *Williams, Ex parte*, it was found, and, if I may add my concurrence to that case, it was rightly found, that the intention and object of the arrangement there was to commit what was called a fraud upon the bankruptcy law, by entering into stipulations which were not to be enforced except in the event of bankruptcy. Here, although no doubt the parties did not contemplate the mortgagees putting their right to the rent into operation, yet if there had been no liquidation the bankers would have made the distress which they have made, if for any other reason they had thought that their balance was ill-secured.—p. 358.

Williams, Ex parte, *followed*.

Jay, Ex parte, Harrison, In re (1880) 14 Ch. D. 19, 25; 42 L. T. 600; 28 W. R. 449.—C.A.

Stockton Iron Furnace Co., In re, *discussed*.

Bridgwater Engineering Co., In re (1879) 48 L. J. Ch. 389; 12 Ch. D. 181, 186.—HALL, v.-c.

Williams, Ex parte, and Stockton Iron Furnace Co., discussed.

Jackson, Ex parte, Bowes, In re (1880) 14 Ch. D. 725; 43 L. T. 272; 29 W. R. 253.—C.A.; *reversing* S. C. *nom.* Bank of Whitehaven, Ex parte, Bowes, In re, 42 L. T. 409; 28 W. R. 523.—BACON, C.J. *And see post*, col. 1921.

Stockton Iron Furnace Co., In re, *followed*.

Pannett, Ex parte, (1880) 50 L. J. Ch. 212; 16 Ch. D. 226, 235 (*supra*, col. 1919); Harrison, Ex parte, (1881) 50 L. J. Ch. 332; 18 Ch. D. 127, 133.—C.A. (*supra*, col. 1918).

Williams, Ex parte: Stockton Iron Furnace Co., In re; and Jackson, Ex parte, Bowes, In re (*supra*), *discussed*.

Voisey, *Ex parte*, Knight. In re (1882) 21 Ch. D. 442; 52 L. J. Ch. 121; 47 L. T. 362; 31 W. R. 19.—C.A.

BRETT, L.J.—Therefore, what we have to consider is this (and this is the real meaning of *Williams, Ex parte*)—at the time when the contract was made, was it made for the purpose of its being acted upon between the parties, whether there should be a bankruptcy or not, or, although in terms it appears to be made between the parties with the intention that it should be acted upon whether there is a bankruptcy or not, were their minds really then fixed upon this, that it was to be acted upon only if there should be a bankruptcy? In other words, they must have had bankruptcy in their contemplation at the time of making the contract, they must have contemplated evading or attempting to evade the fair distribution of the mortgagor's property in case of his bankruptcy. That seems to me to be the true proposition, and the true principle of law which is laid down in *Williams, Ex parte*. . . Now, *Williams, Ex parte*, and the other cases on the subject, afford some guidance as to what state of facts will bring a case within the principle, but they do not exclude other states of facts. Other facts may arise which would have the same effect, although they may not be the same as the facts of *Williams, Ex parte*. But *Williams, Ex parte*, and *Jackson, Ex parte*, show that, where the rent reserved, or that which is called rent, is so abnormal that you can gather from it alone that the parties must have known and intended that it should not be paid as a rent, that it never could be paid as a rent or distrained for as a rent (for there never could in ordinary contemplation be anything for which such an absurd amount could be realised), when you find such a state of facts, you infer from it (there being nothing to countervail it) that the parties never intended that the stipulation should be acted upon as fixing a rent to be paid by the one or to be distrained for by the other, that it was not a stipulation as to rent at all, but was merely a fiction, and that what was intended was only that, in case of the bankruptcy of the mortgagor the mortgagee should have the right to seize upon the goods which were then on the premises, not to seize on them if there were no bankruptcy, but only to seize upon them in case of bankruptcy. It seems to me that that is the true meaning of *Williams, Ex parte*, because in the *Stockton Case*, James, L.J., who had been a party to deciding *Williams, Ex parte*, seeing that words had then been used which might not properly and truly express the principle, that a "fair rent" had been spoken of, changes his proposition and says (p. 356), that the inference is to be drawn, not from what you might call a fair or an unfair rent, but from the rent being such an absurd amount as to show that an evasion of the bankruptcy laws was intended. It is true that Baggallay, L.J., in the subsequent case of *Jackson, Ex parte*, did use some expressions which would seem to take the proposition back to the terms used in *Williams, Ex parte*; but I do not think that he intended to alter the proposition as it was laid down in the *Stockton Case*, and certainly the other judges who sat with him used words which show that they

intended to lay down the proposition, not exactly in the terms used in *Williams, Ex parte*, but rather in those which James, L.J. used in the *Stockton Case*, and which have been adopted by the M.R. and the other judges who have sat in this Court.—p. 459.

And see *Stanley v. Grundy* (1883) 52 L. J. Ch. 248; 22 Ch. D. 478; 48 L. T. 606; 31 W. R. 315.—BACON, V.-C.

Stockton Iron Furnace Co., In re.

Not applied, Willis, In re (1888) 21 Q. B. D. 384, 389 (*post*); referred to, Green v. Marsh (1892) 61 L. J. Q. B. 442; [1892] 2 Q. B. 330; 66 L. T. 480; 40 W. R. 449; 56 J. P. 839; 8 Times L. R. 498.—C.A.

Jackson, Ex parte (*supra*), referred to.

Punnett, Ex parte, Kitchin, In re (1880) 50 L. J. Ch. 212; 44 L. T. 226; 29 W. R. 129.—C.A., not applied.

Willis, In re, Kennedy, *Ex parte* (1888) 57 L. J. Q. B. 634; 21 Q. B. D. 384, 389; 59 L. T. 749; 36 W. R. 793; 5 Morrell 189.—CAVE, J.; affirmed, C.A.; ESHER, M.R. doubting.

Punnett, Ex parte, Kitchin, In re, discussed.

Kelly v. Montague (1892) 29 L. R. Ir. 429.—C.A.; West London Syndicate v. Inland Revenue Commissioners (1898) 67 L. J. Q. B. 956; [1898] 2 Q. B. 507; 79 L. T. 289; 47 W. R. 125.—C.A. See "REVENUE."

Voisey Ex parte, Knight, In re (col. 1921).

Discussed, Isherwood, *Ex parte*, Knight, In re, (1882) 52 L. J. Ch. 370; 22 Ch. D. 384, 393; 48 L. T. 398; 31 W. R. 442.—C.A.; applied, Middlesborough Building Society, In re (1884) 54 L. J. Ch. 592; 51 L. T. 743; 49 J. P. 278.—KAY, J.: referred to, Lloyd v. Keys (1900) [1901] 2 Ir. R. 416.—Q.B.D.

13. FORECLOSURE.

Holmes v. Turner (1843) 7 Hare 367, n.—

v.-C.; and **Smeathman v. Bray** (1851) 15

Jur. 1051.—TURNER, V.-C., overruled.

Watts v. Symes (1851) 1 De G. M. & G. 240; 16 Jur. 114.—L.J.J.

Humble v. Bill (1703) 2 Ves. sen. 444; *re-*

versed, *nom.* **Savage v. Humble** (1703) 1 Bro. P. C. 71.—H.L.

Winchester (Bishop) v. Paine (1805) 11 Ves.

194; 8 R. R. 181.—M.R., considered.

Wigram v. Buckley (1894) 63 L. J. Ch. 689;

[1894] 3 Ch. 483; 7 R. 469; 71 L. T. 287; 43 W. R. 147.—C.A.

Clerkson v. Bowyer (1688) 2 Vern. 66.—L.C.,

referred to.

Loveridge, In re, Drayton v. Loveridge (1902)

71 L. J. Ch. 865; [1902] 2 Ch. 859; 87 L. T. 294.—BUCKLEY, J.

Pryce v. Bury (1853) 23 L. J. Ch. 676;

L. R. 16 Eq. 153, n.; 2 Drew. 11—41; 2 Eq.

R. 8; 17 Jur. 1173; 2 W. R. 6, 87.—KIN-

DERSEY, V.-C.; affirmed, (1854) 2 W. R.

216; 18 Jur. 967.—L.C. and L.J.J.

Followed, **James v. James** (1873) 42 L. J. Ch.

386; L. R. 16 Eq. 153; 21 W. R. 522.—JAMES,

L.J. (for v.-C.); **Backhouse v. Charlton** (*post*);

considered, National Provincial Bank of England

v. Games (1883—1886) 55 L. J. Ch. 576; 31

Ch. D. 582, 586; 53 L. T. 955; 54 L. T. 696; 34

W. R. 600.—PEARSON, J.; and C.A.

James v. James (*supra*).

Followed, Backhouse v. Charlton (1878) 8 Ch. D. 444, 450; 26 W. R. 504.—MALINS, V.-C.; *referred to*, Sadler v. Worley (*post*); Owen, *In re* (*post*).

Carter v. Wake (1877) 46 L. J. Ch. 841; 4 Ch. D. 605.—JESSEL, M.R., *not applied*.

General Credit and Discount Co. v. Gregg (1883) 22 Ch. D. 549 (*post*).

Carter v. Wake, *discussed*.

Tennant v. Trenchard (1869) 38 L. J. Ch. 169; L. R. 4 Ch. 537; 20 L. T. 856.—HATHERLEY, L.C., *distinguished*.

Sadler v. Worley (1894) 63 L. J. Ch. 551; [1894] 2 Ch. 170; 8 R. 194; 70 L. T. 494; 42 W. R. 476.—KEKEWICH, J.

Carter v. Wake: Boyle, Ex parte (1853) 22 L. J. Bk. 78; 3 De G. M. & G. 515; 17 Jur. 979.—L.J.J.; and **Tennant v. Trenchard**, *referred to*.

Owen, *In re* (1894) 63 L. J. Ch. 749; [1894] 3 Ch. 220; 8 R. 566; 71 L. T. 181; 43 W. R. 55.—STIRLING, J.

Carter v. Wake, *distinguished*.

Harrold v. Plenty (1901) 70 L. J. Ch. 562; [1901] 2 Ch. 314; 85 L. T. 45; 49 W. R. 646.

COZENS-HARDY, J.—A share is a chose in action. The certificates are merely evidence of title, and whatever may be the result of the deposit of a bearer bond, such as that which Sir G. Jessel dealt with in *Carter v. Wake*, I think I cannot treat the plaintiff as a mere pledgee. The deposit of the certificate by way of security for the debt which is admitted seems to me to amount to an equitable mortgage . . . The result is that the plaintiff is entitled to a judgment substantially in the form which would be given if, instead of certificates for shares, the documents had been title deeds of real estate or a policy of assurance.—Seton on Judgments (5th ed.) p. 1701.—p. 563.

Carter v. Wake, *applied*.

Gilligan and Nugent v. National Bank [1901] 2 Ir. R. 513.—Q.B.D. *And see* "BAILMENT," vol. i., col. 93.

Parker v. Housefield (1834) 4 L. J. Ch. 57; 2 Myl. & K. 419.—M.R.

Applied, Meller v. Woods (1836) 5 L. J. Ch. 109; 1 Keen 16.—LANGDALE, M.R.; Carey v. Doyne (1856) 5 Ir. Ch. R. 104.—GUSACK SMITH, M.R.; *referred to*, Owen, *In re* [1894] 3 Ch. 220 (*supra*).

Hancock v. Att.-Gen. (1864) 33 L. J. Ch. 661; 10 Jur. (N.S.) 557; 10 L. T. 222; 12 W. R. 569.—KINDERSLEY, V.-C., *followed*.

Bartlett v. Rees (*post*).

Bartlett v. Rees (1871) 40 L. J. Ch. 599; L. R. 12 Eq. 395; 25 L. T. 373; 19 W. R. 1046.—ROMILLY, M.R., *not followed*.

Loveday v. Chapman (1875) 32 L. T. 689.—HALL, V.-C.; Sweet v. Combley (1882) 25 Ch. D. 463, n.—FRY, J.

Bartlett v. Rees, *followed*.

General Credit and Discount Co. v. Glegg (1883) 52 L. J. Ch. 297; 22 Ch. D. 549; 48 L. T. 182; 31 W. R. 421.—BACON, V.-C.

Bartlett v. Rees and General Credit and Discount Co. v. Glegg, *followed*.

Smith v. Olding (1884) 54 L. J. Ch. 250; 25 Ch. D. 462; 32 W. R. 386.—PEARSON, J.

Smith v. Olding, *approved but not applied*.

Mutual Life Assurance Society v. Langley (1884) 53 L. J. Ch. 996; 26 Ch. D. 686; 51 L. T. 284; 32 W. R. 792.—PEARSON, J.

Bartlett v. Rees (*supra*), *followed*.

Platt v. Mendel (1884) 54 L. J. Ch. 1145; 27 Ch. D. 246; 51 L. T. 424; 32 W. R. 918.—CHITTY, J.

General Credit and Discount Co. v. Glegg (*supra*), *referred to*.

Mainland v. Upjohn (1889) 58 L. J. Ch. 361; 41 Ch. D. 126, 142; 60 L. T. 614; 37 W. R. 411.—KAY, J.; Sadler v. Worley [1894] 2 Ch. 170.—KEKEWICH, J. (*supra*, col. 1923).

Bartlett v. Rees, *followed*.**Platt v. Mendell**, *referred to*.

Doble v. Manley (1885) 54 L. J. Ch. 636; 28 Ch. D. 664; 52 L. T. 246; 33 W. R. 409.—CHITTY, J., *distinguished*.
Tufdnell v. Nicholls (1887) 56 L. T. 152.—NORTH, J.

Bartlett v. Rees, *followed*.

London and County Banking Co. v. Goddard (1897) 66 L. J. Ch. 261; [1897] 1 Ch. 642; 76 L. T. 277; 45 W. R. 310.—NORTH, J.

Doble v. Manley, *followed*.

Parry v. Parry, Seton on Decrees, 4th ed. p. 1146, *applied*.
Smithett v. Hesketh (1890) 59 L. J. Ch. 567; 44 Ch. D. 161, 164; 62 L. T. 802; 38 W. R. 698.—NORTH, J.

Constable v. Howick (1858) 5 Jur. (N.S.) 331; 7 W. R. 160.—WOOD, V.-C.

Explained, Prees v. Coke (1871) L. R. 6 Ch. 645, 650.—HATHERLEY, L.C.; *followed*, National Building Society v. Raper (1891) 61 L. J. Ch. 73; [1892] 1 Ch. 54; 65 L. T. 668; 40 W. R. 73.—CHITTY, J.

Piggin v. Cheetham (1842) 2 Hare 80.—WIGRAM, V.-C. *disapproved*.

Reeves v. Glastonbury Canal Co. (1844) 14 Sim. 351.—SHADWELL, V.-C.

Ford v. Wastell (1847) 16 L. J. Ch. 372; 6 Hare 229.—V.-C.; and (1848) 17 L. J. Ch. 368; 2 Ph. 591; 12 Jur. 404.—L.C., *discussed*.

Thornhill v. Manning (1851) 20 L. J. Ch. 604; 1 Sim. (N.S.) 451.—V.-C.; Prees v. Coke (*supra*).

Thornhill v. Manning, *referred to*.

Campbell v. Holyland (1877) 47 L. J. Ch. 145; 7 Ch. D. 166, 172; 38 L. T. 128; 26 W. R. 109.—JESSEL, M.R.

Campbell v. Holyland, *referred to*.

Platt v. Mendel (1884) 54 L. J. Ch. 1145; 27 Ch. D. 246; 51 L. T. 424; 32 W. R. 918.—CHITTY, J.

Thornhill v. Manning and Campbell v. Holyland, *discussed and not applied*.

Ingham v. Sutherland (1890) 63 L. T. 614.—STIRLING, J.

Campbell v. Holyland, *followed*.

Beaton v. Bolton, W. N. (1891) 30.—STIRLING, J.

Lechmere v. Clamp (1861) 30 L. J. Ch. 651; 31 Beav. 578; 7 L. T. 411; 9 W. R. 860.—ROMILLY, M.R., *followed*.

London Monetary Advance Co. v. Bean (1868) 18 L. T. 349.—MALINS, V.-C.

Bell v. Sunderland Building Society (1883) 53 L.J. Ch. 509; 24 Ch. D. 618; 49 L. T. 555.—**BACON, V.-C., applied.**
Iedbrook v. Passman (1888) 57 L. J. Ch. 855; 59 L. T. 306.—**STIRLING, J.**

Powis v. Mansfield (1836) 5 L. J. Ch. 297; 6 Sim. 637.—**SHADWELL, V.-C., overruled.**
Price v. Carver (1837) 3 Myl. & Cr. 157.—**COTTENHAM, L.C. See judgment.**

Price v. Carver, discussed.
Tuckley v. Thompson (1860) 29 L. J. Ch. 548; 1 J. & H. 126; 2 L. T. 565; 8 W. R. 302.—**WOOD, V.-C. And see post, col. 1947.**

Price v. Carver, followed.
Lees v. Fisher (1882) 22 Ch. D. 283; 31 W. R. 94.—**C.A., discussed.**

Foster v. Parker (1878) 8 Ch. D. 147.—**JESSIEL, M.R., distinguished.**
Mellor v. Porter (1883) 53 L. J. Ch. 178; 25 Ch. D. 158; 50 L. T. 49; 32 W. R. 271.—**KAY, J.**

Lees v. Fisher, W. N. (1880) 12.—**HALL, V.-C., approved.**

Farrer v. Lacy, Hartland & Co. (1885) 55 L. J. Ch. 149; 31 Ch. D. 42; 53 L. T. 515; 34 W. R. 22.—**C.A. (see form of judgment approved); affirming** (1883) 53 L. J. Ch. 569; 25 Ch. D. 636; 50 L. T. 121; 32 W. R. 196.—**NORTH, J.**

Farrer v. Lacy, Hartland & Co., rule applied.
Bissett v. Jones (1886) 55 L. J. Ch. 648; 32 Ch. D. 635; 54 L. T. 603; 34 W. R. 591.—**CHITTY, J.**

Farrer v. Lacy, form of order followed.
Instone v. Elmslie (1886) 54 L. T. 730.—**STIRLING, J.; Jones v. Harris** (1887) 55 L. T. 884; W. N. (1887) 10.—**STIRLING, J.; Faithfull v. Woodley** (1889) 59 L. J. Ch. 304; 43 Ch. D. 287; 61 L. T. 808; 38 W. R. 326.—**NORTH, J.**

Farrer v. Lacy, explained and applied.
Poulett (Earl) v. Hill (Viscount) (1892) 62 L. J. Ch. 466; [1893] 1 Ch. 277; 2 R. 288; 68 L. T. 476; 41 W. R. 503.—**C.A.**

Farrer v. Lacy, form in, followed.
Powell v. Brodhurst (1901) 70 L. J. Ch. 587; [1901] 2 Ch. 160, 168; 84 L. T. 620; 49 W. R. 532.—**PARWELL, J.**

Smith v. Davies (or Davies v. Smith) (1884) 54 L. J. Ch. 278; 28 Ch. D. 650; 52 L. T. 19; 33 W. R. 211.—**CHITTY, J., doubted.**

Blake v. Harvey (1885) 29 Ch. D. 827; 53 L. T. 541; 33 W. R. 602.—**C.A.**

Blake v. Harvey, observed on.
Bissett v. Jones (1886) 32 Ch. D. 635; 55 L. J. Ch. 648; 54 L. T. 603; 34 W. R. 591.

CHITTY, J.—The observations of Cotton, L.J. in *Blake v. Harvey* have thrown doubt on *Smith v. Davies (supra)*, and in deference to those observations I am not disposed in the present case to make a foreclosure order under XV. [R. S. C., 1883].—p. 636.

Hill v. Sidebottom (1882) 47 L. T. 224.—**FRY, J., followed.**

Bissett v. Jones, explained.
Imbert-Terry v. Carver (1887) 56 L. J. Ch. 716; 34 Ch. D. 506; 56 L. T. 91; 35 W. R. 328.—**NORTH, J.**

Hill v. Sidebottom and Imbert-Terry v. Carver, referred to.
Clarke v. Berger (1888) 36 W. R. 809.—**Q.B.D.**

Smith v. Davies (supra), followed.

Blake v. Harvey and Bisset v. Jones, referred to.

Dyott v. Nevill, W. N. (1887) 35.—**C.A., considered and applied by the C.A.**

Horton v. Bosson (1899) 80 L. T. 435.—**ROMER, J.; affirmed, C.A.**

Horton v. Bosson, applied.

Pepperell v. Hird (1902) 71 L. J. Ch. 282; [1902] 1 Ch. 477; 50 W. R. 491.—**BYRNE, J.**

Grundy v. Grice, Seton on Decrees, 4th ed. vol. ii. 1036 (Form No. 2), form modified.

Hunter v. Myatt (1884) 54 L. J. Ch. 615; 28 Ch. D. 181; 52 L. T. 509; 33 W. R. 411.—**PEARSON, J.**

Barber v. Jeckells (1893) Seton on Judgments, p. 2142, *form of order corrected.*

Simmons v. Blandy (1896) 66 L. J. Ch. 83; [1897] 1 Ch. 19; 75 L. T. 646; 45 W. R. 296.—**NORTH, J.**

Simmons v. Blandy, form of order followed.

London and County Banking Co. v. Goddard (1897) 66 L. J. Ch. 261; [1897] 1 Ch. 642; 76 L. T. 277; 45 W. R. 310.—**NORTH, J.**

Salt v. Edgar (1886) 54 L. T. 370; **S. C. nom.**

Salter v. Edgar, W. N. (1886) 47.—**CHITTY, J.; and Lacon v. Tyrrell, W. N.** (1887) 71.—**STIRLING, J., followed.**

Best v. Applegate (1887) 57 L. J. Ch. 506; 37 Ch. D. 42; 57 L. T. 599; 36 W. R. 397.—**NORTH, J.**

Williamson v. Burrage (1887) 56 L. T. 702.—**CHITTY, J.; and Salt v. Edgar, referred to.**

Keith v. Day (1888) 58 L. J. Ch. 118; 39 Ch. D. 452; 60 L. T. 126; 37 W. R. 242.—**C.A.**

Keith v. Day, applied.

Manchester and Liverpool Bank v. Parkinson (1889) 60 L. T. 258.—**KEKEWICH, J.**

Taylor v. Mostyn (1883) 53 L. J. Ch. 89; 25 Ch. D. 48; 49 L. T. 483; 32 W. R. 256.

—**C.A.; and Exchange and Hop Warehouses, Ltd. v. Land Financiers' Association** (1886) 56 L. J. Ch. 4; 34 Ch. D. 195; 55 L. T. 611; 35 W. R. 120.—**NORTH, J., applied.**

Stevens v. Theatres, Ltd. [1903] 1 Ch. 857, 860 (*post*, col. 1928).

Knowles v. Dibbs (1889) 60 L. T. 291; 37 W. R. 378.—**CHITTY, J., referred to and not applied.**

Sanguinetti v. Stuckey's Bank (1896) 65 L. J. Ch. 340; [1896] 1 Ch. 502; 74 L. T. 269; 44 W. R. 308.—**CHITTY, J.**

Pelly v. Wathen (1849) 18 L. J. Ch. 281; 7 Hare 351; 14 Jur. 9.—**WIGRAM, V.-C., affirmed.** (1851) 21 L. J. Ch. 105; 1 De G. M. & G. 16; 16 Jur. 47.—**L.J., followed.**

Hallett v. Furze (1885) 55 L. J. Ch. 226; 31 Ch. D. 312; 54 L. T. 12; 34 W. R. 225.—**KAY, J.**

14. SALE BY COURT.

Pain v. Smith (1833) 2 Myl. & K. 417.—**M.R., disapproved.**

Brocklehurst v. Jessop (1835) 7 Sim. 438.—**SHADWELL, V.-C.**

Pain v. Smith, Meller v. Woods (1836) 5 L. J. Ch. 109; 1 Keen 16.—**LANGDALE**, M.R.; **Footner v. Sturgis** (1852) 21 L. J. Ch. 741; 5 De G. & Sm. 736.—**PARKER**, V.-C.; and **Jones v. Bailey** (1853) 17 Beav. 582.—**ROMILLY**, M.R., *discussed*.
Tuckley v. Thompson (1860) 29 L. J. Ch. 548; 1 J. & H. 126; 2 L. T. 565; 8 W. R. 302.—**WOOD**, V.-C. (*see post*, col. 1947).

Sampson v. Pattison (1842) 1 Hare 533.—**WIGRAM**, V.-C.; and **Jenkin v. Bow** (1851) 5 De G. & Sm. 107.—**PARKER**, V.-C., *referred to*.

Owen, In re (1894) 63 L. J. Ch. 749; [1894] 3 Ch. 220; 8 R. 566; 71 L. T. 181; 43 W. R. 55.—**STIRLING**, J.; **Lloyd**, In re, **Lloyd v. Lloyd** (1902) 72 L. J. Ch. 78; [1903] 1 Ch. 385, 404; 87 L. T. 541; 51 W. R. 177.—C.A.

Davis v. Ashwin (1877) 47 L. J. Ch. 70; 26 W. R. 139.—**HALL**, V.-C., *not followed*.

London and County Banking Co. v. Dover (1879) 48 L. J. Ch. 336; 11 Ch. D. 204; 27 W. R. 749.—**JESSEL**, M.R.

London and County Banking Co. v. Dover, *explained*.

Woolley v. Colman (1882) 21 Ch. D. 169; 51 L. J. Ch. 854; 46 L. T. 737; 30 W. R. 769.

FRY, J.—That was only a decision that sect. 55 [15 & 16 Vict. c. 86] did not apply to a foreclosure action.—p. 172.

Girdlestone v. Lavender (1852) 9 Hare App. liii; 16 Jur. 1081.—V.-C., *distinguished*.

Union Bank of London v. Ingram (1882) 51 L. J. Ch. 508; 20 Ch. D. 463; 46 L. T. 507; 30 W. R. 375.—C.A.

Union Bank of London v. Ingram.

Applied, **Woolley v. Colman** (1882) 21 Ch. D. 169, 174 (*supra*); *approved*, **Western District Bank (or South Western District Bank) v. Turner** (1882) 47 L. T. 433; 31 W. R. 113.—**BACON**, V.-C.

Woolley v. Colman, *not followed*.

Davies v. Wright (1886) 32 Ch. D. 220.—**NORTH**, J.

Woolley v. Colman and Davies v. Wright, *considered*.

Brewer v. Square [1892] 2 Ch. 111; 61 L. J. Ch. 516; 66 L. T. 486; 40 W. R. 378.

KEKEWICH, J.—**Fry**, J., in **Woolley v. Colman**, a case which stands almost alone, and in which the conduct of the sale was allowed to the mortgagor, required him to give security for 150% to meet the costs of the sale; but **North**, J., in **Davies v. Wright**, expressed a different view from that, saying, "I do not, however, see any reason why a mortgagor who is going to sell himself, should give security for the costs of the sale. He will have to pay the costs, and the mortgagee's security will not be affected." That, no doubt, to a certain extent is true. . . . I think the mortgagor must provide 100% for the costs of the sale and other proper costs, p. 115.

Claire's Estate, In re (1889) 23 L. R. Ir. 281.—**MONROE**, J., *distinguished*.

Redington's Estate, In re (1889) 23 L. R. Ir. 503.—**MONROE**, J.

Wade v. Wilson (1882) 52 L. J. Ch. 399; 22 Ch. D. 235; 47 L. T. 696; 31 W. R. 237.—**FRY**, J.; and **Oldham v. Stringer** (1884)

51 L. T. 895; 33 W. R. 251.—**KAY**, J., *not followed*.

Green v. Biggs (1885) 52 L. T. 680.

KAY, J.—In **Oldham v. Stringer** the property was very small, and it would probably have proved an insufficient security. That was no doubt the reason why in that case I made an order for an immediate sale.—p. 681.

15. SALE UNDER POWER.

Boyd v. Petrie, 39 L. J. Ch. 412; L. R. 10 Eq. 482.—**ROMILLY**, M.R.; *reversed*, (1872) 41 L. J. Ch. 378; L. R. 7 Ch. 385; 26 L. T. 460; 20 W. R. 513.—**JAMES** and **MELLISH**, L.JJ.

Dicker v. Angerstein (1876) 45 L. J. Ch. 754; 3 Ch. D. 600; 24 W. R. 844.—**JESSEL**, M.R., *considered*.

Life Interest, &c. Securities Corporation v. Hand-in-Hand Fire and Life Insurance Society (1898) 67 L. J. Ch. 548; [1898] 2 Ch. 230; 78 L. T. 708; 46 W. R. 668.

STIRLING, J.—That was a case of a much wider power than that conferred by the Act [Conveyancing Act, 1881, s. 21, sub-s. 2]. . . . First of all, it applies to any sale purporting to have been made in pursuance of the power in that behalf, and next it provides that a purchaser under such a sale shall not be bound to inquire whether the power has arisen, or as to the propriety or expediency of the sale, and, notwithstanding any irregularity, the purchaser shall be protected; and thirdly, the mortgagor's remedy is in damages only. In that case the question arose not between a vendor and a purchaser, but between a purchaser and a mortgagor and his assign; and Sir G. Jessel, M.R. held that the purchaser had a good title, even though the whole of the mortgage-money had been paid when the power was purported to be exercised. . . . The M.R. did not decide that the purchaser could not have taken an objection or inquired whether the power had become exercisable.—p. 550.

Bridges v. Longman (1857) 24 Beav. 27.—M.R., *applied*.

Chawner's Trusts, In re (*post*); Att.-Gen. (Victoria) v. **Ettershank** (1875) 44 L. J. P. C. 65; L. R. 6 P. C. 354, 369; 24 W. R. 327.—P.C.

Clarke v. Royal Panopticon (1857) 27 L. J. Ch. 207; 4 Drew. 26; 3 Jur. (N.S.) 178; 5 W. R. 332.—**KINDERSLEY**, V.-C., *not followed*.

Cook v. Dawson (1861) 29 Beav. 123; 7 Jur. (N.S.) 130; 3 L. T. 801.—M.R.: *affirmed*, 30 L. J. Ch. 311, 359; 3 De G. F. & J. 127; 4 L. T. 226; 9 W. R. 305, 434.—L.JJ., *followed*.

Chawner's Trusts, In re (1869) L. R. 8 Eq. 569; 38 L. J. Ch. 726; 22 L. T. 262.

MALINS, V.-C.—I entirely agree with what the M.R. said in **Cook v. Dawson**, that a power to mortgage includes a power to give to a mortgagee all such remedies as are proper to be given to him, so as to mortgage the estate on the best terms, and one of these remedies is a power of sale.—p. 570.

Clarke v. Royal Panopticon (*supra*), *referred to*.

Stevens v. Theatres Ltd. (1903) 72 L. J. Ch. 764; [1903] 1 Ch. 837, 860; 88 L. T. 458; 51 W. R. 385.—**FARWELL**, J.

Hiatt v. Hillman (1871) 25 L. T. 55: 19 W. R. 694.—ROMILLY, M.R.

Referred to, Hodson and Howes' Contract, In re (1887) 56 L. J. Ch. 755; 35 Ch. D. 668; 56 L. T. 837; 35 W. R. 553.—NORTH, J.; and C.A.: *followed*, Solomon and Meagher, In re (1889) 58 L. J. Ch. 339; 40 Ch. D. 508; 60 L. T. 487; 37 W. R. 331.—NORTH, J.

Baldwyn v. Banister (1718) 3 P. Wms. 251, n.—M.R., *commented on*.

Parkinson v. Hanbury (1860) 1 Dr. & Sm. 143; 8 W. R. 575.—KINDERSLEY, V.-C.: *affirmed*, (1865) 2 De G. J. & S. 450; 11 L. T. 755; 13 W. R. 331.—L.JJ. and H.L. (*supra*, col. 1865), *referred to*.

Shaw v. Bunny (1865) 34 L. J. Ch. 257; 2 De G. J. & S. 468; 11 Jur. (N.S.) 99; 11 L. T. 645; 13 W. R. 374.—KNIGHT BRUCE, L.J.; TURNER, L.J. *doubting*; *affirming* M.R.

Shaw v. Bunny, *applied*.

Parkinson v. Hanbury, *not applied*.

Kirkwood v. Thompson (1865) 34 L. J. Ch. 305; 2 H. & M. 392; 11 Jur. (N.S.) 385.—WOOD, V.-C.: *affirmed*, 2 De G. J. & S. 613; 12 L. T. 811; 13 W. R. 1052.—CRANWORTH, L.C.

Shaw v. Bunny and Parkinson v. Hanbury, *not applied*.

Rajah Kishendatt Ram v. Rajah Muntaz Ali Khan (1879) L. R. 6 Ind. App. 145, 160.—P.C.

Parkinson v. Hanbury, *followed*.

Selwyn v. Garfit (1888) 38 Ch. D. 273; 57 L. J. Ch. 609; 59 L. T. 233; 36 W. R. 513.—C.A. COTTON, LINDLEY and BOWEN, L.JJ.

BOWEN, L.J.—In *Parkinson v. Hanbury* the purchaser not only knew that no notice had been given, but he knew that there could have been no waiver, because the mortgagor was dead and had no personal representative. But does that apply to a case where the notice might have been waived? I should like to consider that question further before deciding it. But that is not the case here.—p. 285.

Parkinson v. Hanbury, *distinguished*.

Hatten v. Russell (1888) 57 L. J. Ch. 425; 38 Ch. D. 334, 339; 58 L. T. 271; 36 W. R. 317.—KAY, J.

Selwyn v. Garfit, *considered*.

Thompson and Holt's Contract, In re (1890) 59 L. J. Ch. 651; 44 Ch. D. 492; 62 L. T. 651; 38 W. R. 524.—KEKEWICH, J.

Parkinson v. Hanbury and Selwyn v. Garfit, *not applied*.

Bailey v. Barnes (1893) 63 L. J. Ch. 73; [1894] 1 Ch. 25, 30; 7 R. 9; 69 L. T. 542; 42 W. R. 66.—STIRLING, J.: *affirmed*, C.A.

Cockburn v. Edwards (1881) 51 L. J. Ch. 46; 18 Ch. D. 449; 45 L. T. 500; 30 W. R. 446.—C.A.; *varying* 50 L. J. Ch. 181; 16 Ch. D. 393; 43 L. T. 755; 29 W. R. 136.—FRY, J., *followed*.

Cradick v. Rogers (1884) 53 L. J. Ch. 968; 51 L. T. 191.—NORTH, J.

Cockburn v. Edwards, *distinguished*.

Pooley's Trustee v. Whetham (1886) 33 Ch. D. 111; 55 L. J. Ch. 899; 55 L. T. 333; 34 W. R. 689.—C.A.

COTTON, L.J.—I quite adhere to the rule as laid down in *Cockburn v. Edwards*, that if a solicitor lends money to his client, he must take from him a security on that advance in the

ordinary terms, unless he points out to his client how far the terms on which he is willing to lend the money differ from those which are usually required by persons lending money; and if the transaction is ever impeached by the client to whom he lends the money, he must, in order to support it, show that he has given such advice to his client about the transaction as he would have given to a client borrowing money from a third party, or as any other solicitor not personally interested in the transaction would have given to the client. But this is a transaction entirely different from an ordinary loan of money, it is a transaction in which the question is, what terms can the client make with the solicitor? If there had been any real question whether Mr. Pooley understood the terms of this equitable security, the case would have been very different from that which we have to consider. Here, there being this note outstanding, which would become payable on the 11th July, power is given to the solicitor who holds the note, and who could instantly have sued, to sell and realise the security which he held. There is also a great difference between this case and *Cockburn v. Edwards* as regards the nature of the property. There the mortgage was on property as to which we know how it is usually dealt with. Here the property was of a very peculiar character. It was an interest in a railway burdened with a heavy debenture debt—the concern had previously become bankrupt, and, apparently, the interest of Mr. Pooley, if worth anything, was worth very little. Therefore it might be very reasonable that this not being an ordinary transaction there should be such a power as is here given to Mr. Kaye, Mr. Pooley not suggesting, as, indeed, he hardly could have done, that he did not understand the power of sale, though he probably did not know what the ordinary power of sale in an ordinary mortgage is. Then it is also to be observed that in an ordinary mortgage the terms usually are that the power of sale shall not be exercised unless the principal is wholly or in part unpaid six months after notice, or unless interest is in arrear for three months. Now, at the time when this power of sale was exercised, there really was three months' interest in arrear, because the 16l. 17s. 10d. was the interest on the debt due down to the 11th of July, and that had been in arrear for at least three months at the time this sale took place. In *Cockburn v. Edwards* the Court inquired whether the interest was in arrear, and only held the solicitor liable for the exercise of the power of sale because on the evidence before them they came to the conclusion that in fact he had been paid all the interest which was due by the receipt of rents which he had appropriated to payment of interest, so that the ordinary form of a power of sale would not have allowed the sale which in fact was made by him.—p. 122.

Cockburn v. Edwards, *followed*.

Bright v. Campbell (1889) 41 Ch. D. 388, 392; 60 L. T. 731; 37 W. R. 745.—KAY, J.

Hickson v. Darlow (1883) 52 L. J. Ch. 453; 23 Ch. D. 690; 48 L. T. 449; 31 W. R. 362, 417.—FRY, J. and C.A., *referred to*.

Blackburn Corporation v. Micklethwait (1886) 54 L. T. 539; 50 J. P. 550.—Q.B.D.: Brewer v. Square (1892) 61 L. J. Ch. 516; [1892] 2 Ch. 111; 66 L. T. 486; 40 W. R. 378.—KEKEWICH, J.;

- Athlumney (Lord), *In re*, Wilson, *Ex parte* (1898) 67 L. J. Q. B. 935; [1898] 2 Q. B. 547; 79 L. T. 303; 47 W. R. 144.—WRIGHT, J.
- Brown's Trust Estate, *In re*** (1862) 9 Jur. (N.S.) 349; 11 W. R. 19.—STUART, V.-C., *referred to*.
- Palmer's Will, *In re* (1872) 41 L. J. Ch. 511; L. R. 13 Eq. 408.—WICKENS, V.-C.
- Palmer's Will, *In re*, applied.**
Hirst's Mortgage, *In re* (1890) 60 L. J. Ch. 48; 45 Ch. D. 263; 63 L. T. 444; 38 W. R. 685.—NORTH, J.
- Beaumont's Trusts, *In re*** (1871) 40 L. J. Ch. 400; L. R. 12 Eq. 86; 19 W. R. 767.—MALINS, V.-C., *followed*.
- Wilkinson's Mortgaged Estates, *In re* (1872) 41 L. J. Ch. 392; L. R. 13 Eq. 634.—WICKENS, V.-C.
- Wilkinson's Mortgaged Estates, *In re*, dictum dissented from.**
Hirst's Mortgage, *In re* (1890) 60 L. J. Ch. 48; 45 Ch. D. 263; 63 L. T. 444; 38 W. R. 685.—NORTH, J.
- Tucker v. Wilson** (1714) 1 P. Wms. 261.—L.C.; *reversed nom.* **Wilson v. Tooker**, 5 Bro. P. C. 193.—H.L. (E.), *applied*.
- De Verges v. Sandeman Clark & Co. (1900) 70 L. J. Ch. 47; [1901] 1 Ch. 70; 83 L. T. 706; 49 W. R. 167.—FARWELL, J.; and (1902) 71 L. J. Ch. 328; [1902] 1 Ch. 579; 86 L. T. 269; 50 W. R. 404.—C.A.; V. WILLIAMS, L.J. *dissenting*.
- Major v. Ward** (1847) 5 Hare 598.—V.-C., *referred to*.
- Orme v. Wright** (1838) 3 Jur. 19.—LANGDALE, M.R.; and **Burnell, *Ex parte*, London, *In re*** (1843) 7 Jur. 116.—C.J., *rule in, not applied*.
- Farrar v. Farrars, Ltd. (1888) 40 Ch. D. 395, 412 (*post*, col. 1932).
- Downes v. Grazebrook** (1817) 3 Meriv. 200; 17 R. R. 62.—L.C.
- Discussed*, Knight v. Marjoribanks (1849) 2 Mac. & G. 10; 2 H. & Tw. 308.—L.C.; *principle explained*, Robertson v. Norris (1858) 1 Giff. 421, 424; 4 Jur. (N.S.) 155.—STUART, V.-C. (*affirmed*, 4 Jur. (N.S.) 443.—L.C.); *observed on*, Warner v. Jacob (*post*); *approved*, Farrar v. Farrars, Ltd. (1888) 40 Ch. D. 395, 409 (*post*, col. 1932); *referred to*, Hodson v. Deans [1903] 2 Ch. 647, 653 (*post*, col. 1932).
- Robertson v. Norris, *observed on*.**
Warner v. Jacob (1882) 51 L. J. Ch. 642; 20 Ch. D. 220; 46 L. T. 656; 30 W. R. 721; 46 J. P. 436.—KAY, J.
- Warner v. Jacob, *approved*.**
Robertson v. Norris, *disapproved*.
Martinson v. Clowes (1882) 21 Ch. D. 857; 51 L. J. Ch. 594; 46 L. T. 882; 30 W. R. 795; *affirmed*, (1885) 52 L. T. 706; 33 W. R. 555.—C.A. BAGGALLAY, BOWEN and FRY, L.JJ.
- NORTH, J.—The law as to the position of a mortgagee exercising a power of sale is, in my opinion, correctly laid down by Kay, J., in *Warner v. Jacob*. The language of Stuart, V.-C. in *Robertson v. Norris* no doubt goes considerably further in treating the mortgagee as a trustee; but that language goes beyond anything to be found in the cases relied upon as authorities for it, as was pointed out by the C. A. in the recent case of *Nash v. Eads* (25 Sol. J. 95).—p. 860.
- Robertson v. Norris, *referred to*.**
Pooley's Trustees v. Whetham (1886) 55 L. J. Ch. 899; 33 Ch. D. 111, 123; 55 L. T. 333; 34 W. R. 689.—C.A.; *White v. City of London Brewery Co.* (1888) 58 L. J. Ch. 98; 39 Ch. D. 559, 564; 60 L. T. 19; 36 W. R. 881.—NORTH, J. (*affirmed*, (1889) 58 L. J. Ch. 855; 42 Ch. D. 237; 38 W. R. 82; 5 T. L. R. 553.—C.A.).
- Robertson v. Norris and Martinson v. Clowes (*supra*), *approved*.**
Warner v. Jacob (*supra*), *referred to*.
Farrar v. Farrars, Ltd. (1888) 58 L. J. Ch. 185; 40 Ch. D. 395, 409; 60 L. T. 121; 37 W. R. 196.—C.A.
- Robertson v. Norris, *commented on*.**
Martinson v. Clowes, Warner v. Jacob and Nash v. Eads (*supra*, col. 1931), *approved*.
Farrar v. Farrars, Ltd., *referred to*.
Colson v. Williams (1889) 58 L. J. Ch. 539; 61 L. T. 71.—KEKEWICH, J.
- Martinson v. Clowes.**
Distinguished, Nutt v. Easton [1899] 1 Ch. 873 (*post*, col. 1933); *followed*, Hodson v. Deans (1903) 72 L. J. Ch. 751; [1903] 2 Ch. 647, 652; 89 L. T. 92; 52 W. R. 122.—JOYCE, J.
- Farrar v. Farrars, Ltd., *referred to*.**
Bailey v. Barnes (1893) 63 L. J. Ch. 73; [1894] 1 Ch. 25; 7 R. 9; 69 L. T. 542; 42 W. R. 66.—STIRLING, J.; *affirmed*, C.A.
- Warner v. Jacob, *applied*.**
Farrar v. Farrars, Ltd., *explained and applied*.
Van Horne v. Fonda (1821) 5 Johns. Ch. Rep. (N.Y.) 388, 407.—KENT, C., *not followed*.
- Kennedy v. De Trafford (1896) 65 L. J. Ch. 465; [1896] 1 Ch. 762; 74 L. T. 599; 44 W. R. 454.—C.A.; *reversing* V.-C. of Duchy of Lancaster; C.A. *affirmed*, (1897) 66 L. J. Ch. 413; [1897] A. C. 180; 76 L. T. 427; 45 W. R. 671.—H.L. (E.).
- LINDLEY, J.—The V.-C. begins his judgment by referring to *Warner v. Jacob* and *Farrar v. Farrars, Ltd.*, which contain the principles applicable to this case, and then he says: "Now in this case it is not suggested that the mortgagee did not act *bona fide*; and it is not suggested that there was any corruption or collusion on their part, or that the sale itself was at an under-value so gross as to be in itself evidence of fraud." If that is so, and I believe every word of it, upon what ground can the sale be set aside? He was led, and I think a little misled, by some language I used in *Farrar v. Farrars, Ltd.*. I there said: "If in exercise of his power he"—that is, the mortgagee—"acts *bona fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even though more might have been obtained for the property if the sale had been postponed." Now the V.-C. has come to the conclusion that reasonable precautions to obtain a proper price were not used. I find from my colleagues who took part in the judgment, and who approved of it, that the reason why those words were added was this: a mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right or proper, or legal, for him, either fraudulently or wilfully or recklessly, to sacrifice the property of the mortgagor—that is all. . . . With reference

to . . . *Van Horne v. Fonda*. all I can say is this: . . . I do not know how far the law of America and the law of England are allied in these matters. I do happen to know this—that, according to the law of America, it is much easier for one co-owner of real property to get a lien on the whole than it is in this country. Whether that affected the learned judge's view I do not know; but I am not prepared on the authority of that case to say that Dodson could be compelled, to account for the profit he may have made out of this sale.—p. 468.

Warner v. Jacob, Farrar v. Farrars, Ltd. and Kennedy v. De Trafford (*supra*), *referred to*.

Field v. Debenture Corporation (1896) 12 Times L. R. 469.—NORTH, J.

Farrar v. Farrars, Ltd. and Kennedy v. De Trafford, *considered and applied*.

Nutt v. Easton (1899) 68 L. J. Ch. 367; [1899] 1 Ch. 873, 877; 80 L. T. 353; 47 W. R. 430; *affirmed*, 69 L. J. Ch. 46; [1900] 1 Ch. 29; 81 L. T. 530.—C.A.

COZENS-HARDY, J.—In that case [*Martinson v. Clowes*, col. 1931] the solicitor had the conduct of the sale (p. 368). The C. A. in *Farrar v. Farrars, Ltd.* says this in the judgment of the present M.R.: "A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realise his security and to find a purchaser if he can, and if in exercise of his power he acts *bona fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed." Subsequently to that, in the H. L., the law is laid down even more strongly and more clearly by Lord Herschell in *Kennedy v. De Trafford*, where he says: "I am myself disposed to think that if a mortgagee in exercising his power of sale exercises it in good faith, without any intention of dealing unfairly by his mortgagor, it would be very difficult indeed, if not impossible, to establish that he has been guilty of any breach of duty towards the mortgagor." And he says further: "It is very difficult to define exhaustively all that would be included in the words 'good faith,' but I think it would be unreasonable to require the mortgagee to do more than exercise his power of sale in that fashion." Lord Macnaghten says this: "If a mortgagee selling under his power of sale in his mortgage takes pains to comply with the provisions of that power and acts in good faith, I do not think his conduct in regard to the sale can be impeached."—p. 369.

Spalding v. Thompson (1858) 26 Beav. 637.—M.R., *reconsidered and followed*.

Haselfoot's (or Haselfoot's) Estate, In re, Chauntler's Claim (1872) 41 L. J. Ch. 286; L. R. 13 Eq. 327; 26 L. T. 146.—ROMILLY, M.R.

Spalding v. Thompson and Haselfoot's (or Haselfoot's) Estate, In re, *applied*.

General Provident Assurance Co., In re, National Bank, Ex parte (1872) 41 L. J. Ch.

823; L. R. 14 Eq. 507, 516; 27 L. T. 433; 20 W. R. 939.—MALINS, V.-C.

Spalding v. Thompson, *followed*.

Jeyes v. Jeyes (1876) 45 L. J. Ch. 245; 34 L. T. 167.—BACON, V.-C.

Spalding v. Thompson: Haselfoot's Estate, In re; and General Provident Assurance Co., In re, National Bank, Ex parte, *not applied*.

Pile v. Pile (1875) 23 W. R. 440.—HALL, V.-C.

National Bank, Ex parte, *applied*.

General South American Co., In re (1876) 2 Ch. D. 337, 343; 34 L. T. 706; 24 W. R. 891.—MALINS, V.-C.; *affirmed*, C.A.

Spalding v. Thompson: Haselfoot's Estate, In re; and National Bank, Ex parte, *not followed*.

Talbot v. Frere (1878) 9 Ch. D. 568; 27 W. R. 148.

JESSEL, M.R.—Then, the argument being exhausted—or for lack of argument recourse is had to authority, and three cases have been cited. All I can say is, I do not understand them . . . The law had been perfectly well settled on all these points many many years before those cases were heard or thought of, and I do not think the judges who decided those cases intended to do more than to follow the rule of law already laid down, they did not intend to lay down new law.—p. 574.

Talbot v. Frere, *distinguished*.

Roxburghe v. Cox (1881) 17 Ch. D. 520; 50 L. J. Ch. 772; 45 L. T. 225; 30 W. R. 74.—C.A.

JAMES, L.J.—That was a case of trustee and *cestui que trust*. Nobody could sue at common law for the surplus proceeds of sale of the mortgaged estate. The present is a case of a common law demand for money had and received.—p. 525.

Roxburghe v. Cox, *applied*.

Johnstone v. Cox (1881) 19 Ch. D. 17, 20; 45 L. T. 657; 33 W. R. 114.—C.A.; *Webb v. Smith* (1885) 30 Ch. D. 192, 199; 53 L. T. 737.—C.A.

Talbot v. Frere, *followed*.

Spalding v. Thompson and Haselfoot's Estate, In re (*supra*), *distinguished*.

National Bank, Ex parte, *commented on*.

Roxburghe v. Cox, *referred to*.

Gregson, In re, Christison v. Bolam (1887) 36 Ch. D. 223; 57 L. T. 250; 35 W. R. 803.—NORTH, J.

Talbot v. Frere, *referred to*.

Hankey, In re, Smith v. Hankey (1899) 68 L. J. Ch. 242; [1899] 1 Ch. 541; 80 L. T. 47; 47 W. R. 444.—NORTH, J.

Peacock v. Burt (1834) 4 L. J. Ch. 33.—PEPPYS, M.R., *followed*.

Bates v. Johnson (1859) 28 L. J. Ch. 509; Johns. 304, 314; 5 Jur. (n.s.) 842.—WOOD, V.-C.

Peacock v. Burt, *not to be extended*.

Bates v. Johnson, *dictum questioned*.

West London Commercial Bank v. Reliance Permanent Building Society (1885) 29 Ch. D. 954; 54 L. J. Ch. 1081; 53 L. T. 442; 33 W. R. 916.

[WOOD, V.-C., says, in *Bates v. Johnson*, "If a second and a third mortgagee are both equally desirous of redeeming the first, the first mortgagee has it in his power, if he be so minded, to

give the preference to which of the two he pleases.”]

COTTON, L.J.—I should doubt that very much: the second mortgagee is prior to the third.—p. 960.

LINDLEY, L.J.—Another argument was addressed to us based upon *Peacock v. Burt* and that class of cases, which have established the law as stated by Cotton, L.J.: but in my opinion they are cases which certainly ought not to be extended. *Peacock v. Burt* looks very like a conspiracy between the first and third mortgagees to cheat the second, which cannot be right. That, however, is the aspect which many of the old cases on the subject bear; still, I am not at liberty to question those decisions, for although they are opposed to my ideas of morality, they are nevertheless law. However, I am not going to make them the pretext for doing general wrong.—p. 963.

Bates v. Johnson, *referred to*.

Bailey v. Barnes (1893) 63 L. J. Ch. 73; [1894] 1 Ch. 25, 37; 7 R. 9; 69 L. T. 542; 42 W. R. 66.—C.A.

West London Commercial Bank v. Reliance Building Society (col. 1934), *referred to*.

Corbett v. National Provident Institution (1900) 17 Times L. R. 5.—PHILLIMORE, J.

Kirkwood v. Thompson (1865) 34 L. J. Ch. 305, 501; 2 H. & M. 392; 11 Jur. (N.S.) 385.—WOOD, V.-C.; *affirmed*, 2 De G. J. & S. 613; 12 L. T. 611; 13 W. R. 1052.—CRANWORTH, L.C., *approved*.

Locking v. Parker (1873) 42 L. J. Ch. 257; L. R. 8 Ch. 30, 39; 27 L. T. 635; 21 W. R. 113.—L.J.J.; *reversing* 41 L. J. Ch. 544; 27 L. T. 29.—ROMILLY, M.R.

Kirkwood v. Thompson, *approved*.

Locking v. Parker, *explained*.

Alison, In re, *Johnson v. Mounsey* (1879) 11 Ch. D. 284; 40 L. T. 234; 27 W. R. 537.—C.A.; *reversing* MALINS, V.-C.

JESSEL, M.R. discussed *Locking v. Parker* and approved of *Kirkwood v. Thompson*.—p. 296.

BAGGALLAY, L.J.—The V.-C. fully recognised the law to be as it has just been stated by the M.R., but he founded his decision on certain passages which he found in the judgment of James, L.J., in *Locking v. Parker*; however, he does not seem to have adverted to the distinction that in that case the sale had been exercised as regards a sufficient portion of the estate to pay off the amount of principal money and interest before the period of twenty years had elapsed, and therefore before the time had arrived when the right of the mortgage was barred. What the L.J. said is this:—“In that case when the estate has been sold, there is an express trust of the surplus money for the mortgagor. If, then, there had been any allegation in this bill, or any evidence that there were any surplus moneys, the bill might have been sustained for those surplus moneys, but that is not the frame and intention of the bill.” But *dicta* and observations of this kind made by a judge in the course of a judgment must be read with reference to the particular circumstances of the case before him. In that case had there been any surplus moneys after satisfying the principal money and interest due, the mortgagees would doubtless have had to account, because the trust had arisen before the estate was barred, but the distinction

O.C.

between that case and the present is this, that in the present case the sale did not take place until after the estate had been barred.—p. 297.

Locking v. Parker and Alison, In re, *Johnson v. Mounsey*, *applied*.

Chapman v. Corpe (1879) 41 L. T. 22; 27 W. R. 781.—FRY, J.

Kirkwood v. Thompson (*supra*) and *Locking v. Parker*, *discussed*.

Banner v. Berridge (1881) 50 L. J. Ch. 630; 18 Ch. D. 254, 265; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. C. 420.—KAY, J.; *Warner v. Jacob* (*post*).

Locking v. Parker and Alison, In re, *explained and distinguished*.

Rochevoucauld v. Boustead (1896) 66 L. J. Ch. 74; [1897] 1 Ch. 196, 208; 75 L. T. 502; 45 W. R. 272.—C.A.

Locking v. Parker, *considered*.

Liquidation Estates Purchase Co. v. Willoughby (1898) 67 L. J. Ch. 251; [1898] A. C. 321, 339; 78 L. T. 329; 46 W. R. 539.—H.L. (E.).

Alison, In re.

Applied, *Sanders v. Sanders* (1881) 51 L. J. Ch. 276; 19 Ch. D. 373, 379; 45 L. T. 637; 30 W. R. 280.—C.A.; *referred to*, *Warner v. Jacob* (1882) 51 L. J. Ch. 642; 20 Ch. D. 220; 46 L. T. 656; 30 W. R. 721.—KAY, J.; *referred to*, *Loveridge*, In re, *Drayton v. Loveridge* (1902) 71 L. J. Ch. 865; [1902] 2 Ch. 859, 862; 87 L. T. 294.—BUCKLEY, J.

Tanner v. Heard (1857) 23 Beav. 555; 5 W. R. 420.—ROMILLY, M.R., *explained*.

Banner v. Berridge (1881) 50 L. J. Ch. 630; 18 Ch. D. 254, 261; 44 L. T. 680; 29 W. R. 844; 4 Asp. M. C. 420.

KAY, J.—But then I was referred to cases, of which I will mention one or two, to show that a mortgagee selling under that power became affected with an express trust. The first case I will notice was *Tanner v. Heard*. There I observe that the M.R., in his judgment, carefully puts the case, not on the ground of the defendant being mortgagee, but on a separate and distinct ground. He says, “The question in this case is as to costs, which are claimed by both sides.” It was only a question of costs. Then he says, “I am of opinion that this is not a case in which the principles which obtain in a suit between mortgagees are applicable; I think it distinguishable. It is a case of this description: The defendant was first mortgagee of a ship, the plaintiff was the second. The defendant, with the sanction and authority of the plaintiff, sold it at Amsterdam, and received the proceeds of the sale. Being entitled, in the first place, to the amount due on his mortgage and the expenses of the sale of the ship, and, there being a surplus, he was bound to account to the plaintiff in the character of trustee.” The M.R., if I understand him, carefully distinguishes the case from the ordinary case of a mortgagee selling, and holds that, because the ship was sold by arrangement between the two who were, both of them, interested in the property, the one who received the money was trustee of the surplus for the other. That, therefore, is no authority that a mortgagee selling a ship under the statutory power is a trustee.—p. 634. See judgment at length.

Banner v. Berridge (*supra*), *referred to*.
 Nugent v. Nugent (1884) 15 L. R. Ir. 321.—
 PORTER, M.R.; Firth v. Slingsby (1888) 58 L. T.
 481.—STIRLING, J.; Dooby v. Watson (1888) 57
 L. J. Ch. 865; 39 Ch. D. 178, 186; 58 L. T.
 943; 36 W. R. 764.—KEKEWICH, J.

Banner v. Berridge.

Applied, Soar v. Ashwell [1893] 2 Q. B. 390;
 4 R. 602; 69 L. T. 585; 42 W. R. 165.—C.A.;
referred to, Price v. Phillips (1895) 13 R. 191.—
 CHITTY, J.; *explained and distinguished*, Roche-
 foucauld v. Boustead (1896) 66 L. J. Ch. 74;
 [1897] 1 Ch. 196, 209; 75 L. T. 502; 45 W. R.
 272.—C.A.; *approved*, Friend, *In re*. Friend v.
 Young (1897) 66 L. J. Ch. 737; [1897] 2 Ch. 421,
 436; 77 L. T. 50; 46 W. R. 139.—STIRLING, J.

Davey v. Durrant (1857) 26 L. J. Ch. 830;
 1 De G. & J. 535.—L.J.J., *followed*.

Thurlow v. Mackeson (1868) 38 L. J. Q. B. 57;
 L. R. 4 Q. B. 97, 109; 19 L. T. 448; 17 W. R. 280.
 —LUSH and HANNEN, JJ.

Davey v. Durrant and Thurlow v. Mackeson,
followed.

Bettys v. Maynard (1883) 49 L. T. 389; 31
 W. R. 461.—C.A.

Davey v. Durrant, referred to.

Warner v. Jacob (*post*); Farrar v. Farrars,
 Ltd. (1888) 58 L. J. Ch. 185; 40 Ch. D. 395,
 406; 60 L. T. 121; 37 W. R. 196.—C.A.

Davey v. Durrant, explained.

Colson v. Williams (1889) 58 L. J. Ch. 539; 61
 L. T. 71.—KEKEWICH, J.

Chambers v. Waters (1829) 3 Sim. 42.—
 SHADWELL, V.-C.; S. C. on appeal, Coop. t.
 Brough. 91; *affirmed nom.* Waters v. Groom
 (1844) 11 Cl. & F. 634.—H.L. (E.).

Matthie v. Edwards (1846) 2 Coll. 465;
 10 Jur. 347.—V.-C.; *reversed nom.* Jones v.
 Matthie (1847) 16 L. J. Ch. 405; 11 Jur. 761.—L.C.

Jones v. Matthie, referred to.

Jacob v. Warner (*post*).

Adams v. Scott (1859) 7 W. R. 213.—
 WOOD, V.-C., *referred to*.

Jacob v. Warner (1882) 51 L. J. Ch. 642; 20
 Ch. D. 220; 46 L. T. 636; 30 W. R. 721.—
 KAY, J.; Stevens v. Theatres, Ltd. (1903) 72
 L. J. Ch. 764; [1903] 1 Ch. 857, 861; 88 L. T.
 458; 51 W. R. 585.—FARWELL, J.

16. RECEIVER.

Truman & Co. v. Redgrave (1881) 50 L. J. Ch.
 830; 18 Ch. D. 547; 45 L. T. 605; 30
 W. R. 421.—JESSEL, M.R.

Distinguished, Whitley v. Challis (1891) 61
 L. J. Ch. 307; [1892] 1 Ch. 64, 70; 65 L. T. 838;
 40 W. R. 291.—C.A.; *followed*, Grafton (Duke)
 v. Taylor (1891) 7 T. L. R. 588.—NORTH, J.

Whitley v. Challis.

Distinguished, County of Gloucester Bank v.
 Rudry Merthyr Steam, & Co. (1895) 64 L. J.
 Ch. 451; [1895] 1 Ch. 629; 12 R. 183; 72 L. T.
 375; 43 W. R. 486; 2 Manson 223.—C.A.;
referred to, Baglioni v. Cavalli (1900) 83 L. T.
 500; 49 W. R. 236.—COZENS-HARDY, J. *And see*
 "COMPANY," vol. I, col. 462.

Mason v. Westoby (1886) 55 L. J. Ch. 507;
 32 Ch. D. 206; 54 L. T. 526; 34 W. R.
 498.—BACON, V.-C., *discussed*.

Prytherch, *In re*, Prytherch v. Williams (1889)

59 L. J. Ch. 79; 42 Ch. D. 590, 601; 61 L. T.
 799; 38 W. R. 61.—NORTH, J.

Prytherch, In re, Prytherch v. Williams,
discussed.

County of Gloucester Bank v. Rudry Merthyr
 Steam, & Co. (1895) 12 R. 183.—C.A. S. C.
 (*supra*, col. 1937).

Wills v. Luff (1888) 57 L. J. Ch. 563; 38
 Ch. D. 197; 36 W. R. 571.—CHITTY, J.;
affirmed, W. N. (1888) 191.—C.A.

Distinguished, Manchester and Liverpool Bank
 v. Parkinson (1889) 60 L. T. 258.—KEKEWICH, J.;
referred to, Holmes v. Millage (1893) 62 L. J.
 Q. B. 380; [1893] 1 Q. B. 551; 4 R. 332; 68 L. T.
 205; 41 W. R. 354; 57 J. P. 551.—C.A.

Law v. Glenn (1867) L. R. 2 Ch. 634.—
 L.J.J., *principle applied*.

Hale, *In re*, Lilley v. Foad (1899) 79 L. T. 468.—
 BYRNE, J.; *affirmed*, 68 L. J. Ch. 517; [1899] 2
 Ch. 107; 80 L. T. 827; 47 W. R. 579.—C.A.

Cosgrave v. Gannon (1841) 3 Ir. Eq. R. 433;
 Fl. & K. 228.—M.R., *approved*.

Whaley v. Whaley (1847) 11 Ir. Eq. R. 276.—
 CUSACK SMITH, M.R.

Walker v. Bell (1816) 2 Madd. 21; 17 R. R.
 174.—V.-C.; and **Delany v. Mansfield** (1825)
 1 Hogan 234.—M.R., *approved*.

Thomas v. Brigstocke (1827) 4 Russ. 64; 28
 R. R. 4.—M.R.; *affirmed*, L.C.; **Gresley v.**
Adderley (1818) 1 Swanst. 573; 18 R. R.
 146.—L.C.; and **Brooks v. Greathed** (1820)
 1 J. & W. 176.—M.R., *not applied*.

Murtagh v. Tisdall (1839) 2 Ir. Eq. R. 41.—
 O'LOGHLEN, M.R.

Walker v. Bell and Delany v. Mansfield,
considered.

Morrogh v. Hoare (1842) 5 Ir. Eq. R. 195.—
 BLACKBURNE, M.R.

Walker v. Bell, explained and applied.

Tatham v. Parker (1853) 22 L. J. Ch. 903; 1
 Sm. & G. 506; 17 Jur. 929; 1 W. R. 491.—
 STUART, V.-C.

Delany v. Mansfield, not followed.

Walker v. Bell and Tatham v. Parker,
distinguished.

Bertie v. Abingdon (Lord) (1817) 3 Meriv.
 560; 16 R. R. 125.—M.R.; **Gresley v.**
Adderley; and **Thomas v. Brigstocke**, *dis-*
cussed.

Hoare, *In re*, Hoare v. Owen (1892) 61 L. J. Ch.
 541; [1892] 3 Ch. 94; 67 L. T. 45; 41 W. R.
 105.—STIRLING, J. *See judgment at length*.

Thomas v. Brigstocke, distinguished.

Hoare, In re, Hoare v. Owen, referred to.

Preston v. Tunbridge Wells Opera House, Ltd.
 (1903) 72 L. J. Ch. 774; [1903] 2 Ch. 323; 88
 L. T. 53.—FARWELL, J.

Jenner-Fust v. Needham (1886) 31 Ch. D.
 500; 54 L. T. 420; 34 W. R. 409.—PEAR-
 SON, J.

Not followed, Hoare v. Stephens (1886) 32
 Ch. D. 194; 55 L. J. Ch. 511; 54 L. T. 230;
 34 W. R. 410.—BACON, V.-C.; *followed*, Peat v.
 Nicholson (1886) 54 L. T. 569; 34 W. R. 451.—
 KAY, J.; *varied*, Jenner-Fust v. Needham (1886)
 55 L. J. Ch. 629; 32 Ch. D. 582; 55 L. T. 37; 34
 W. R. 709.—C.A.

Jenner-Fust v. Needham (C.A.), *distin-
guished*.

Coleman v. Llewellyn (1886) 56 L. J. Ch. 1;
34 Ch. D. 143; 55 L. T. 647; 35 W. R. 82.—
C.A.; **Ingham v. Sutherland** (1890) 63 L. T.
614.—KEKEWICH, J.

Ross Improvement Commissioners v. Usborne,
W. N. (1890) 92.—STIRLING, J., *not
followed*.

Jenner-Fust v. Needham and Hoare v. Stephens (*supra*), *referred to*.

National Building Society v. Raper (1891) 61
L. J. Ch. 73; [1892] 1 Ch. 54; 65 L. T. 668; 40
W. R. 73.—CHITTY, J.

Coleman v. Llewellyn, *followed*.

Smith v. Pearman (1888) 58 L. T. 720; 36
W. R. 681.—CHITTY, J.

Coleman v. Llewellyn, *not followed*.

Jenner-Fust v. Needham, *explained*.

Cheston v. Wells (1893) 3 R. 367; 62 L. J. Ch.
468; [1893] 2 Ch. 151; 68 L. T. 197; 41 W. R.
374.

NORTH, J.—In **Coleman v. Llewellyn** it was
pointed out by the C. A. that the proviso which
was there inserted in the order must have been
put in for some special reason by the judge,
which makes a broad distinction between that
case and **Jenner-Fust v. Needham**, which lays
down the general rule that in ordinary cases
where the receiver receives rents between the
date of the certificate and the day fixed for
redemption, those rents must be taken into
account, and a further time allowed for redemp-
tion.—p. 367.

Lewis v. Zouche (Lord) (1828) 2 Sim. 388.—

SHADWELL, V.-C., *not followed*.

Smith v. Effingham (Earl) (1844) 7 Beav. 357;
8 Jur. 479.—LANGDALE, M.R.

17. PARTIES.

Winchester (Bishop) v. Beaver (1797) 3 Ves.
314; 8 R. R. 132, n.—M.R., *discussed*.

Winchester (Bishop) v. Paine (1805) 11 Ves.
194; 8 R. R. 131.—M.R.; **Rolleston v. Morton**
(1842) 1 Dr. & War. 171; 1 Con. & L. 252; 4 Ir.
Eq. R. 149.—L.C.

Palk v. Clinton (Lord) (1805) 12 Ves. 48;
8 R. R. 283.—M.R., *applied*.

Cholmondeley (Marquis) v. Clinton (Lord)
(1820) 2 J. & W. 1.—PLUMER, M.R.; *affirmed*,
(1821) 4 Bligh 1; 22 R. R. 83.—H.L. (E.);
Thornycroft v. Crockett (1848) 2 H. L. Cas. 239,
255.—H.L. (E.).

Palk v. Clinton (Lord) and **Thornycroft v. Crockett**, *referred to*.

Jennings v. Jordan (1881) 51 L. J. Ch. 129;
6 App. Cas. 698, 705; 45 L. T. 593; 30 W. R. 369.
—H.L. (E.). See *supra*, col. 1904.

Fowler v. Wyatt (1857) 24 Beav. 232 [not
reported on the point dealt with below];
and **Adams v. Paynter** (1844) 14 L. J. Ch.
53; 1 Coll. C. C. 530; 8 Jur. 1063.—
KNIGHT BRUCE, V.-C., *discussed*.

Luke v. South Kensington Hotel Co. (1879)
11 Ch. D. 121; 48 L. J. Ch. 361; 40 L. T. 638;
27 W. R. 514.—C.A.; *reversing* (1877) 7 Ch.
D. 789; 47 L. J. Ch. 240.—FRY, J.

JESSEL, M.R.—It is very difficult to find
authorities exactly in point. I recollect one very

strongly in point. It was **Fowler v. Wyatt**, which
was a suit to set aside a release of an equity of
redemption and to redeem. Fowler became
bankrupt. He had two assignees, one the trade
assignee, and the other the official assignee.
The official assignee, being afraid of the cost of
the litigation, declined to join as plaintiff, and
the trade assignee alone revived. That was
objected to first at the Rolls, where the M.R.
overruled the objection on the ground that one
of two trustees acting in bankruptcy could
maintain a suit to redeem. It was appealed to
Lord Cranworth, then L.C., who affirmed the
decision, and the suit afterwards came on for
hearing. . . . Two trustees there [**Adams v. Paynter**]
filed a bill to foreclose. It was ob-
jected that the third trustee had not been dis-
charged and should have joined them. How?
The objection was that he was not made a
party, and the objection was allowed, and he
was made a party as defendant. They did not
add plaintiffs in those days, and therefore that
was considered sufficient. And on general
principles I cannot see why this should not be
done.—p. 126.

Luke v. South Kensington Hotel Co., *referred
to*.

Palmer v. Mallet (1887) 57 L. J. Ch. 226; 36
Ch. D. 411, 417; 58 L. J. 64; 36 W. R. 460.—
CHITTY, J. (*affirmed*, C.A.): **Webb v. Jonas** (1888)
57 L. J. Ch. 671; 39 Ch. D. 660, 668; 58 L. T.
882; 36 W. R. 666.—KEKEWICH, J.; **Continental
Oxygen Co.**, *In re* (*post*).

Drage v. Hartopp (1885) 54 L. J. Ch.

434; 28 Ch. D. 414; 51 L. T. 902; 33
W. R. 410.—PEARSON, J.; **Davenport v.**

James (1847) 7 Hare 249; 12 Jur. 827.—

WIGRAM, V.-C.; **Lowe v. Morgan** (1784)

1 Bro. C. C. 868.—L.C.; and **Palmer v.**

Carlisle (Earl) (1823) 1 Sim. & S. 423.—

LEACH, V.-C., *discussed*.

Continental Oxygen Co., *In re*, **Elias v. Con-
tinental Oxygen Co.** (1897) 66 L. J. Ch. 273;
[1897] 1 Ch. 511, 515; 76 L. T. 229; 45 W. R.
313.—KEKEWICH, J.

Goldsmid v. Stonehewer (1852) 22 L. J. Ch.

109; 9 Hare (App.) xxxviii.; 17 Jur. 199;

1 W. R. 91.—TURNER, V.-C., *distinguished*.

Mills v. Jennings (1880) 13 Ch. D. 639; 49
L. J. Ch. 209; 42 L. T. 169; 28 W. R. 549.—
C.A.; *affirmed, nom.* **Jennings v. Jordan**—H.L.
(*supra*, col. 1939).

COTTON, L.J.—Under Order XVI. rule 7 (Ord.
XVI. r. 8), (1883), trustees may, both as plain-
tiffs and defendants, sufficiently represent the
trust estate, without any of the parties ben-
eficially interested being before the Court, with
power, nevertheless, for the Court or a judge to
direct any of such last-mentioned persons to be
made parties. But this rule is in substance a
repetition of rule 9, sect. 42, of the Chancery Act,
1852; and it was argued that, in suits relating
to mortgagees, it had been held, as in **Goldsmid
v. Stonehewer**, that trustees did not sufficiently
represent their adult *cestuis que trust* unless it
was probable that the trustee, from being
executor or otherwise, had funds in hand suffi-
cient to enable him to redeem. But that case
was a suit for foreclosure, in which the trustee
was a defendant whom the plaintiff sought to
foreclose; and there is a reason in such a case
for not giving the plaintiff the relief he seeks

unless he brings before the Court all those interested in the equity of redemption who may probably have the means of redeeming the mortgage. Here the plaintiff-trustee is seeking to redeem, and the dismissal of his bill will be effectual in favour of the defendant Jennings, so as to prevent any further proceedings for redemption in respect of the property vested in the plaintiff as trustee.—p. 649.

Mills v. Jennings (*supra*), *discussed*.

Francis v. Harrison (1889) 59 L. J. Ch. 248; 43 Ch. D. 183; 61 L. T. 667; 38 W. R. 329.—NORTH, J.

Francis v. Harrison, *applied*.

Griffith v. Pound (1890) 45 Ch. D. 553, 557; 59 L. J. Ch. 522.—STIRLING, J.

Mills v. Jennings; Francis v. Harrison; and Griffith v. Pound, *approved and applied*.

Wavell v. Mitchell (1891) 64 L. T. 560.—KEKEWICH, J.

Wavell v. Mitchell, *explained*.

Mitchell, In re, Wavell v. Mitchell (1892) 65 L. T. 851.—KEKEWICH, J.

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Blakesley and Beswick, In re (1863) 32 Beav. 379; S. C. *nom.* **Blakeley, In re**, 9 Jur. (N.S.) 1265; 8 L. T. 343; 11 W. R. 656.—M.R.

Anon (1728) Mosely 45.—M.R., *commented on*.
Browne v. Lockhart (1840) 9 L. J. Ch. 167; 10 Sim. 420; 4 Jur. 167.—SHADWELL, V.-C.

Detillin v. Gale (1802) 7 Ves. 583; 6 R. R. 192.—L.C.; and **Taylor v. Baker** (1818) 5 Price 306; Daniell 71; 19 R. R. 625.—EX., *followed*.

Harvey v. Tebbutt (1820) 1 J. & W. 197; 21 R. R. 145.—FLUMER, M.R.

Detillin v. Gale, *discussed*.

Archdeacon v. Bowes (1824) 13 Price 353.—EX.; **Dryden v. Frost** (1838) 8 L. J. Ch. 235; 3 Myl. & Cr. 670; 2 Jur. 1030.—COTTENHAM, L.C.

Archdeacon v. Bowes, *distinguished*.

Snagg v. Frith (1846) 9 Ir. Eq. R. 285; S. C. *nom.* **Snagg v. Frizell**, 3 Jo. & Lat. 383.—L.C.

Dryden v. Frost (*supra*), *discussed*.

Hewitt v. Loosemore (1851) 21 L. J. Ch. 69; 9 Hare 449; 15 Jur. 1097.—TURNER, V.-C.

Ellison v. Wright (1827) 3 Russ. 458; 27 R. R. 108.—M.R.

Distinguished, **Peers v. Ceeley** (1852) 15 Beav. 209.—M.R.; *referred to*, **Wilkes v. Saunton** (*post*).

Dryden v. Frost, *referred to*.

Horlock v. Smith (1844) 1 Coll. C. C. 287, 298.—V.-C., *considered*.

Wilkes v. Saunton (1877) 7 Ch. D. 188; 47 L. J. Ch. 150.

JESSEL, M.R.—*Horlock v. Smith* was decided in 1844, before the order under which “just allowances” are now imported into every decree directing accounts. This case is not quite correctly stated in Seton [3rd ed., p. 381] for the decision clearly intimates that if “just allowances” had been mentioned in the decree the costs of the ejectment by the mortgagee, that is, the costs incurred by her in enforcing and in giving effect to her security, would have been allowed. Mr. Wigram, in his argument, states the law to be, that in an account between mortgagor and mortgagee, the mortgagee is entitled to all costs

incurred in fairly and reasonably maintaining his title at law; and in support of that proposition he cites *Dryden v. Frost* and *Ellison v. Wright* (*supra*). To that statement of the law Knight Bruce, V.-C. in reality assents, but under the particular circumstances of the case he declined to give the mortgagee the costs.—p. 190.

Ellison v. Wright, *approved*.

Dryden v. Frost, *referred to*.

Lewis v. John (1838) 7 L. J. Ch. 242; 9 Sim.

366.—SHADWELL, V.-C.; and **Merriman v.**

Bonney (1864) 12 W. R. 461.—KINDERS-

LEY, V.-C., *disapproved*.

National Provincial Bank of England v. Games (1886) 31 Ch. D. 582; 55 L. J. Ch. 576; 54 L. T. 696; 34 W. R. 600.—C.A.; *varying* 53 L. T. 955.—PEARSON, J.

COTTON, L.J.—As regards the authorities on this class of costs, I prefer *Ellison v. Wright* to *Lewis v. John* and *Merriman v. Bonney*, so far as the latter two cases throw doubt upon the first; and I am glad to find that in the note to Seton on Decrees [4th ed., p. 1059] the law is laid down in terms which are, I think, justified by the authorities:—“Both in foreclosure and redemption actions the mortgagee is entitled to the costs of suit, and also to all costs properly incurred by him in reference to the mortgaged property for its protection or preservation, recovery of the mortgage money, or otherwise relating to questions between him and the mortgagor, and to add the amount to the sum due to him on his security.”—p. 593.

Dryden v. Frost, *referred to*.

Wales v. Carr [1902] 1 Ch. 860 (col. 1944).

Wetherell v. Collins (1818) 3 Madd. 255; 18

R. R. 229.—V.-C., *principle applied*.

Bartle v. Wilkin (1836) 8 Sim. 238.—V.-C.; **Smith v. Chichester** (1842) 4 Ir. Eq. R. 580; 1 Con. & L. 486; 2 Dr. & War. 393.—L.C.; **Day v. Kelland** (*post*).

Bartle v. Wilkin, *applied*.

Smith v. Chichester (*supra*).

National Provincial Bank of England v.

Games (*supra*), *distinguished*.

Day v. Kelland (1900) 82 L. T. 142.—COZENS-HARDY, J.; *affirmed*, C.A. (*post*, col. 1943).

Hodges v. Croydon Canal Co. (1840) 3 Beav. 86.—M.R.

Distinguished, **Hughes v. Kelly** (1843) 5 Ir. Eq. R. 286; 3 Dr. & War. 482; 2 Con. & L. 223.—L.C.; *discussed*, **Kinnaird v. Trollope** (*post*).

Watts, In re, Smith v. Watts (1882) 22 Ch.

D. 5; 48 L. T. 167; 31 W. R. 262.—C.A.

JESSEL, M.R. and COTTON, L.J., *applied*.

Bird v. Wenn (1886) 55 L. J. Ch. 722; 33 Ch. D. 215, 219; 54 L. T. 933; 34 W. R. 652.—STIRLING, J.; **Ladbrook v. Passman** (1888) 57 L. J. Ch. 855; 59 L. T. 306.—STIRLING, J.

Watts, In re, *discussed*.

Kinnaird v. Trollope (1889) 58 L. J. Ch. 556; 42 Ch. D. 610, 619; 60 L. T. 892.—STIRLING, J.

Watts, In re, and Bird v. Wenn, *distinguished*.

Squire v. Pardoe (1891) 66 L. T. 243; 40 W. R. 100.—C.A. LINDLEY, BOWEN and FRY, L.JJ.

Watts, In re, *principle applied*.

Stone v. Lickorish (1891) 60 L. J. Ch. 289; [1891] 2 Ch. 363, 370; 64 L. T. 79; 39 W. R. 331.—STIRLING, J.

Watts, In re, distinguished.
Lloyd's Bank v. Princess Royal Colliery Co. (1900) 82 L. T. 559.

BYRNE, J.—*Watts, In re*, was a case between mortgagee and mortgagor, and was not, in my opinion, intended to lay down any general rule as to costs of adjournment different from that which has been, so far as I know, universally followed for many years.—p. 560.

Price v. M. Beth (1864) 33 L. J. Ch. 460; 10 Jur. (N.S.) 579; 10 L. T. 621; 12 W. R. 818.—STUART, V.-C., *followed*.

London Scottish Benefit Building Society v. Chorley (1884) 53 L. J. Q. B. 272; 12 Q. B. D. 452, 458; 50 L. T. 265; 32 W. R. 577.—Q.B.D.; *affirmed*, 53 L. J. Q. B. 551; 13 Q. B. D. 872; 51 L. T. 100; 32 W. R. 781.—C.A.

Price v. M. Beth, not followed.
Stone v. Lickorish (1891) 60 L. J. Ch. 289; [1891] 2 Ch. 363, 367.—STIRLING, J. (*supra*).

Sclater v. Cottam (1857) 3 Jur. (N.S.) 630; 5 W. R. 744.—KINDERSLEY, V.-C.; and **Taylor, In re** (1854) 23 L. J. Ch. 857; 18 Beav. 165; 18 Jur. 666; 2 W. R. 249.—M.R., *distinguished and not followed*.

Donaldson, *In re* (1884) 54 L. J. Ch. 151; 27 Ch. D. 544, 550; 51 L. T. 622.—BACON, V.-C.

Sclater v. Cottam, referred to.
Roberts, *In re* (1889) 59 L. J. Ch. 25; 43 Ch. D. 52.—KAY, J.

Sclater v. Cottam and Roberts, In re, approved.

Wallis, *In re*, Lickorish, *Ex parte* (1890) 59 L. J. Q. B. 500; 25 Q. B. D. 176, 180; 62 L. T. 674; 38 W. R. 482; 7 Morrell 148.—C.A.

Wallis, In re, Lickorish, Ex parte, and Sclater v. Cottam, principle applied.
Stone v. Lickorish [1891] 2 Ch. 363, 368 (*supra*).

Taylor, In re (supra); Sclater v. Cottam; Roberts, In re; and Wallis, In re, discussed.

Donaldson, In re, observed on.
Doody, *In re*, Fisher v. Doody; Hibbert v. Lloyd (1892) 62 L. J. Ch. 14; [1893] 1 Ch. 129, 135; 2 R. 166, n.; 67 L. T. 65; 41 W. R. 49.—STIRLING, J.; and C.A.

Roberts, In re, and Wallis, In re, applied.
Doody, In re, Fisher v. Doody, not applied.

Eyre v. Wynn-Mackenzie (1893) 63 L. J. Ch. 239; [1894] 1 Ch. 218, 226; 69 L. T. 823; 42 W. R. 220.—KEKEWICH, J. *See now* Mortgagees' Legal Costs Act, 1895 (58 & 59 Vict. c. 25), s. 2.

Eyre v. Wynn-Mackenzie (1895) 65 L. J. Ch. 194; [1896] 1 Ch. 135; 73 L. T. 571; 44 W. R. 273.—C.A., *followed*.

Day v. Kolland (1900) 70 L. J. Ch. 3; [1900] 2 Ch. 745; 83 L. T. 447; 49 W. R. 66.—C.A.; *affirming* 82 L. T. 142.—COZENS-HARDY, J.

Nicholson v. Jeyes (1853) 22 L. J. Ch. 833; 1 W. R. 278.—L.J., *referred to*.

Gray, *In re* (1900) 70 L. J. Ch. 133; [1901] 1 Ch. 239, 244; 84 L. T. 24; 49 W. R. 298.—COZENS-HARDY, J.; Wales v. Carr (*post*).

Firth, Ex parte, Cowburn, In re (1882) 51 L. J. Ch. 473; 19 Ch. D. 419; 45 L. T. 120; 30 W. R. 522.—C.A., *applied*.

Wyatt v. Cook (1868) 3 L. J. N. C. 217; W. N. (1868) 237.—L.C., *discussed*.

Wales v. Carr (1902) 71 L. J. Ch. 483; [1902]

1 Ch. 860; 86 L. T. 288; 50 W. R. 313.—FARWELL, J. *See judgment*.

Gregg v. Slater (1856) 25 L. J. Ch. 440; 22 Beav. 314; 2 Jur. (N.S.) 246; 4 W. R. 381.—M.R.

Applied, Field v. Hopkins (1890) 59 L. J. Ch. 174; 44 Ch. D. 524, 529.—KAY, J. (*affirmed*, 62 L. T. 774.—C.A.); *discussed*, Wales v. Carr (*supra*).

Blackford v. Davis (1869) L. R. 4 Ch. 304; 20 L. T. 199; 17 W. R. 336.—L.J., *applied*.

Rees v. Metropolitan Board of Works (1880) 49 L. J. Ch. 620; 14 Ch. D. 372; 42 L. T. 685; 28 W. R. 614.—FRY, J.

Cotterell v. Stratton (1872) 42 L. J. Ch. 417; L. R. 8 Ch. 295; 28 L. T. 218; 21 W. R. 234.—L.C. and L.J., *adhered to*.

Cotterell v. Finney (1874) 43 L. J. Ch. 562; L. R. 9 Ch. 541; 30 L. T. 773.—L.J.

Cotterell v. Stratton, followed.
Turner v. Hancock (1882) 51 L. J. Ch. 517; 20 Ch. D. 303; 46 L. T. 750; 30 W. R. 480.—C.A. *See* "Costs," vol. i., col. 742.

Cotterell v. Stratton, referred to.
Bank of New South Wales v. O'Connor (1889) 58 L. J. P. C. 82; 14 App. Cas. 273; 60 L. T. 467; 38 W. R. 465; 5 Times L. R. 342.—P.C.; Kinnaird v. Trollope (1889) 58 L. J. Ch. 556; 42 Ch. D. 610, 619; 60 L. T. 892.—STIRLING, J.

Cotterell v. Stratton, applied.
M'Donnell v. M'Mahon (1889) 23 L. R. Ir. 283.—MONROE, J.; Jones, *In re*, Christmas v. Jones (1897) 66 L. J. Ch. 439; [1897] 2 Ch. 190; 76 L. T. 454; 45 W. R. 593.—KEKEWICH, J.

Stephens, Ex parte, Stephens, In re (1834) 2 Mont. & Ayr. 31, *disapproved*.

Carr, *Ex parte*, Homann, *In re* (1879) 11 Ch. D. 62; 48 L. J. Bk. 69; 40 L. T. 299; 27 W. R. 435.

JAMES, L.J.—I think the registrar was right, and I concur in his conclusion that the costs of the action should be deducted from the value of the bank's security. It is said that this conclusion is adverse to the decision in *Stephens, Ex parte*, but the report of that case is contained in a very few lines; no facts are stated, and no argument and no reasons are given for the judgment. It cannot, therefore, have any weight as an authority. If necessary, I am prepared to say that I cannot follow it, for I cannot understand the principle on which it is founded. A mortgagee is entitled to deduct from the value of his security that which is in the nature of salvage money, his reasonable expenses of defending his title.—p. 65.

Clapham v. Andrews (1884) 53 L. J. Ch. 792; 27 Ch. D. 679; 51 L. T. 86; 33 W. R. 395.—PEARSON, J., *overruled*.

De Caux v. Skipper, Tee v. De Caux (1886) 31 Ch. D. 635; 54 L. T. 481; 34 W. R. 402.—C.A.; *reversing* PEARSON, J.

COTTON, L.J.—*Clapham v. Andrews* has been referred to, where there were two mortgages by one mortgagor, who was entitled under the provisions of the Conveyancing Act, 1881, to redeem the mortgaged properties separately. The learned judge thought the proper course was to make the whole of the costs chargeable against each estate. In my opinion, that view is erroneous, as it really amounts to a consolidation as

regards costs, although by legislative enactment the mortgagor is allowed to redeem separately.—p. 636. **BOWEN and FRY, L.JJ.** concurred.

Lippard v. Ricketts (1872) 41 L. J. Ch. 595; L. R. 14 Eq. 291; 20 W. R. 898.—**BACON, V.-C., considered.**
Eardley v. Knight (1889) 58 L. J. Ch. 622; 41 Ch. D. 537; 60 L. T. 780; 37 W. R. 704.—**KAY, J.**

Eardley v. Knight, referred to.
Lippard v. Ricketts, approved.
Drax, In re, Savile v. Drax (1903) 72 L. J. Ch. 505; [1903] 1 Ch. 781, 790; 88 L. T. 510; 51 W. R. 612.—**C.A.**

Wontner v. Wright (1829) 2 Sim. 543; 29 R. R. 166.—**V.-C., discussed.**
Tipping v. Power (1842) 11 L. J. Ch. 257; 1 Hare 405; 6 Jur. 434.—**WIGRAM, V.-C.**

Wontner v. Wright, applied.
Armstrong v. Storer (1851) 14 Beav. 535.—**ROMILLY, M.R.; Macrae v. Ellerton (post).**

Hutton v. Sealy (1858) 27 L. J. Ch. 263; 4 Jur. (N.S.) 450; 6 W. R. 350.—**STUART, V.-C., not applied.**

Clare v. Wood (1844) 4 Hare 81.—**V.-C., principle applied.**
Macrae v. Ellerton (1858) 27 L. J. Ch. 777; 4 Jur. (N.S.) 967; 6 W. R. 851.—**STUART, V.-C.**

Macrae v. Ellerton, not followed.
Wade v. Ward (1859) 29 L. J. Ch. 42; 4 Drew. 602; 7 W. R. 542.—**KINDERSLEY, V.-C.; Cutfield v. Richards** (1858) 26 Beav. 241.—**M.R.**

Macrae v. Ellerton, observed on.
Cook v. Hart (1871) 41 L. J. Ch. 143; L. R. 12 Eq. 459; 24 L. T. 779; 19 W. R. 947.

BACON, V.-C.—In *Macrae v. Ellerton*, Sir J. Stuart seems to have thought that there were circumstances which justified a departure from the general rule. It is very likely that if the same state of circumstances should arise again which existed there, the Court would pronounce exactly the same judgment as was delivered by the V.-C. But that decision, invading, as it was supposed to do the settled rule of the Court, was brought under the review successively of the M.R., Kindersley, V.-C. and the L.C. Not a shadow of doubt existed in the minds of any of the learned judges as to what the guiding principle of the Court in dealing with costs in cases of this kind is. The costs of a mortgagee are the costs of realising his security. He takes the costs of realising his security because he holds the property as a security for his debt; how upon principle the heir-at-law or devisee can interfere, I am at a loss to understand. The property is the property of the pledgee and the Court can take nothing from the estate until the mortgagee's claim is satisfied.—p. 144.

Wade v. Ward, Macrae v. Ellerton, and Cutfield v. Richards (supra), discussed.
Leonard v. Kellett (1891) 27 L. R. Ir. 418.—**CHATTERTON, V.-C. (see post, col. 1948).**

Croker v. Copley (1824) 2 Moll. 471.—**M.R., dictum not law.**

Ellis v. Molloy (1828) 1 Moll. 537.—**L.C., overruled.**

Joyce v. De Moleyns (1846) 3 Jo. & Lat. 698; 9 Ir. Eq. R. 576.—**SUGDEN, L.C.**

Kenebel v. Scafton (1807) 13 Ves. 370.—**L.C.; Upperton v. Harrison** (1835) 7 Sim. 444; 40 R. R. 175.—**V.-C.; and White v. Peterborough (Bishop)** (1821) Jacob. 402; 19 R. R. 183.—**M.R., discussed.**
Bennet v. Going (1828) 1 Moll. 529.—**L.C., approved and applied.**
Tipping v. Power (1842) 11 L. J. Ch. 257; 1 Hare 405; 6 Jur. 434.—**WIGRAM, V.-C.**

Kenebel v. Scafton, commented on.
Upperton v. Harrison and Aldridge v. Westbrook (1842) 5 Beav. 188.—**M.R., referred to.**
Hepworth v. Heslop (1844) 3 Hare 485; 9 Jur. 796.—**WIGRAM, V.-C.**

Kenebel v. Scafton, applied.
Hepworth v. Heslop, and White v. Peterborough (Bishop), explained and principles applied.

Armstrong v. Storer (1851) 14 Beav. 535.—**ROMILLY, M.R.**

White v. Peterborough (Bishop), explained and approved.

Kenebel v. Scafton, discussed.
Hepworth v. Heslop and Armstrong v. Storer, reconciled.

Ford v. Chesterfield (Earl) (1856) 21 Beav. 426. **ROMILLY, M.R.**—*Kenebel v. Scafton* is referred to as an authority for the proposition, that the costs of all the incumbrances are to be first paid. I am of opinion that it is no authority for that purpose. [His lordship then referred to *Hepworth v. Heslop* and continued:] I refer to that case for the purpose of showing that it is a mistake to suppose, that *Kenebel v. Scafton* establishes such a proposition as that which Mr. Daniell in his book [Daniell's Pract. (1st ed., vol. iii. pp. 18—62)] seems to have considered. Certainly that has not been the practice, as far as I am aware, either during my own practice at the bar or since I have had to administer justice from this seat. With respect to my decision in *Armstrong v. Storer*, it was distinct from, and is perfectly reconcilable with, *Hepworth v. Heslop*. In that case, the mortgagee might, if he had pleased, have enforced his mortgage; but, instead of that, he filed a bill for the administration of the estate. The consequence, I said, was, that as he had exercised his option and adopted that course, he must be held to have done so, knowing the usual rules of the Court, and that the costs of the administration of an estate must be paid in the first instance and before he was entitled to be paid his mortgage debt.—pp. 428, 429.

Hepworth v. Heslop, discussed.
Leonard v. Kellett (post, col. 1947).

Armstrong v. Storer and Ford v. Chesterfield (Earl), explained.

Wright v. Kirby (1857) 23 Beav. 463; 3 Jur. (N.S.) 851.—**ROMILLY, M.R. And see post.**

Armstrong v. Storer, distinguished.
Marine Mansions Co., In re (1867) 37 L. J. Ch. 113; L. R. 4 Eq. 601; 17 L. T. 50.—**WOOD, V.-C.; Oriental Hotels Co., In re Perry (or Terry) v. Oriental Hotels Co.** (1871) 40 L. J. Ch. 420; L. R. 12 Eq. 126, 133; 24 L. T. 495; 19 W. R. 767.—**WICKENS, V.-C.**

Pinchard v. Fellows (1874) 43 L. J. Ch. 227; L. R. 17 Eq. 421; 29 L. T. 882; 22 W. R. 612.—**BACON, V.-C.; Ford v.**

Chesterfield (Earl); White v. Gudgeon (1862) 30 Beav. 545.—M.R.; **Mackinlay, In re, Ward v. Mackinlay** (1864) 34 L. J. Ch. 52; 2 De G. J. & S. 358; 10 Jur. (N.S.) 1063; 11 L. T. 326; 13 W. R. 65.—L.J.J.; and **Spensley's Estate, In re, Harrison v. Spensley** (1872) 42 L. J. Ch. 21; L. R. 15 Eq. 16; 27 L. T. 600; 21 W. R. 95.—M.R., *discussed and propositions deduced*.
Leonard v. Kellett (1891) 27 L. R. Ir. 418.—CHATTERTON, V.-C.

Ford v. Chesterfield (Earl) and Wright v. Kirby (*supra*), *principle applied*.
Batten, Proffitt and Scott v. Dartmouth Harbour Commissioners (1890) 59 L. J. Ch. 700; 45 Ch. D. 612; 62 L. T. 861; 38 W. R. 603.—KEKEWICH, J.

Gurney v. Jackson (1852) 22 L. J. Ch. 417; 1 Sm. & G. 97; 17 Jur. 204; 1 W. R. 91.—STUART, V.-C., *discussed*.
Ford v. Chesterfield (Earl) (1853) 22 L. J. Ch. 630; 16 Beav. 516; 1 W. R. 217.—M.R.

Ford v. Chesterfield (Earl), *followed*.
Bellamy v. Brickenden (1858) 4 K. & J. 670.—WOOD, V.-C.; **Clarke v. Toleman** (*post*).

Davis v. Whitmore (1860) 28 Beav. 617; 6 Jur. (N.S.) 880; 8 W. R. 596.—M.R.
Distinguished, **Maxwell v. Wightwick** (1866) L. R. 3 Eq. 210; 15 W. R. 304.—WOOD, V.-C.; *not followed*, **Clarke v. Toleman** (1872) 42 L. J. Ch. 23; 27 L. T. 599; 21 W. R. 66.—ROMILLY, M.R.

Clarke v. Toleman, *followed*.
Day v. Guden (1876) 45 L. J. Ch. 263; 2 Ch. D. 209; 24 W. R. 425.—HALL, V.-C.; and **Greene v. Foster** (1882) 52 L. J. Ch. 470; 22 Ch. D. 566; 48 L. T. 411; 31 W. R. 485.—FRY, J., *distinguished*.
Lewin v. Jones (1884) 53 L. J. Ch. 1011; 51 L. T. 59.—NORTH, J.

Barry v. Wrey (1827) 3 Russ. 465; 27 R. R. 111.—M.R., *distinguished*.
Bartle v. Wilkin (1836) 8 Sim. 238.—V.-C.

Parker v. Watkins (1859) Johns. 133.—V.-C., *referred to*.
Kean, In re, Lumley v. Desborough (1871) 40 L. J. Ch. 617; L. R. 12 Eq. 115, 123; 24 L. T. 780; 19 W. R. 1025.—WICKENS, V.-C.

Tipping v. Power (1842) 11 L. J. Ch. 257; 1 Hare 405; 6 Jur. 434.—WIGRAM, V.-C., *referred to*.

Hepworth v. Heslop (1844) 3 Hare 485; 9 Jur. 796.—WIGRAM, V.-C.; **Tuckley v. Thompson** (1860) 29 L. J. Ch. 548; 1 J. & H. 126; 2 L. T. 565; 8 W. R. 302.—WOOD, V.-C. (*varied*, 3 L. T. 257.—L.J.J.).

Tipping v. Power, *followed*.
Henderson v. Dodds (1866) L. R. 2 Eq. 532; 14 L. T. 752; 14 W. R. 908.—KINDERSLEY, V.-C.; **Marine Mansions Co., In re** (1867) 37 L. J. Ch. 113; L. R. 4 Eq. 601; 17 L. T. 50.—WOOD, V.-C.

Tuckley v. Thompson (*supra*), *referred to*.
Oriental Hotels Co., In re (1871) L. R. 12 Eq. 126, 133 (*supra*, col. 1946).

Tipping v. Power and Tuckley v. Thompson, *discussed and propositions deduced*.
Leonard v. Kellett (*post*).

Dighton v. Withers (1862) 31 Beav. 423.—M.R.
Discussed, **Oriental Hotels Co., In re** (*supra*);

Leonard v. Kellett (1891) 27 L. R. Ir. 418.—CHATTERTON, V.-C.; *applied*, **Hilliard v. Moriarty** (*post*).

Johnston, In re, Millar v. Johnston (1886) 23 L. R. Ir. 50.—V.-C.; **Ross v. Ross** (1892) 29 L. R. Ir. 318.—V.-C.; and **Leonard v. Kellett**, *referred to*.
Hilliard v. Moriarty [1894] 1 Ir. R. 316.—C.A.

Hilliard v. Moriarty and Ross v. Ross, *discussed and distinguished*.
Cope v. Breslin (1900) [1901] 1 Ir. R. 466.—CHATTERTON, V.-C.

Hilliard v. Moriarty, *rule applied*.
Cope v. Breslin, *distinguished*.
M'Aloon v. M'Aloon [1901] 1 Ir. R. 470.

CHATTERTON, V.-C.—That case (*Hilliard v. Moriarty*) decided that a mere consent—much less a standing by on the part of a mortgagee—is not sufficient to deprive him of his ordinary rights, or to throw upon him the costs of a sale of the mortgaged premises . . . As regards *Cope v. Breslin*, it was there clearly shown that the mortgagees in that case deliberately consented to the sale in this Court; that they did so after consideration and discussion; and that a speedy sale was a matter of great importance to, and for the benefit of, all parties interested. It was also shown that the sale of the mortgaged premises together with the furniture brought in more than would have been realised if premises and furniture had been sold separately.—pp. 472, 473.

Simons v. McAdam (1868) 37 L. J. Ch. 751; L. R. 6 Eq. 324; 18 L. T. 678; 16 W. R. 963.—MALINS, V.-C.

Not followed, **Brown v. Rye** (1874) 43 L. J. Ch. 228; L. R. 17 Eq. 343; 29 L. T. 872.—JESSEL, M.R.; *followed*, **Crozier v. Dowsett** (1885) 55 L. J. Ch. 210; 31 Ch. D. 67; 53 L. T. 592; 34 W. R. 267.—BACON, V.-C.

Clark v. Wilmot (1841) 11 L. J. Ch. 16; 1 Y. & C. C. C. 53.—V.-C.; *reversed*, (1843) 13 L. J. Ch. 10.—L.C.

NATIONAL DEBT.

Ram, Ex parte (1837) 3 Myl. & C. 25; 1 Jur. 668.—L.C., *referred to*.
Bouts, Ex parte (1859) 28 L. J. Ch. 648; 5 Jur. (N.S.) 951; 7 W. R. 512.—STUART, V.-C.

Ram, Ex parte, *followed*.
Malony, In re (1860) 1 J. & H. 249; 7 Jur. (N.S.) 42; 3 L. T. 465; 9 W. R. 68.—WOOD, V.-C.

Ram, Ex parte, *distinguished*.
Ackland's Trusts, In re (1872) 26 L. T. 418.—MALINS, V.-C.

Ram, Ex parte, *explained and distinguished*.
Ashmead's Trusts, In re (1872) 42 L. J. Ch. 314; L. R. 8 Ch. 113; 28 L. T. 1; 21 W. R. 65.—L.J.J.

Northumberland (Duke) v. Percy (1892) 62 L. J. Ch. 331; [1893] 1 Ch. 298; 3 R. 156; 68 L. T. 46; 41 W. R. 597.—NORTH, J., *explanation adopted*.

Shepherd, In re, Churchill v. St. George's Hospital (1894) 64 L. J. Ch. 42; [1894] 3 Ch. 649; 8 R. 735; 71 L. T. 516; 43 W. R. 95.—KEKEWICH, J.

NE EXEAT REGNO.

- Ternegan v. Glass** (1746) AmbL 62; 3 Atk. 409; Dick. 107.—L.C., *overruled*.
- Pannell v. Tayler** (1823) Turn. & R. 96; 1 L. J. (O.S.) Ch. 139.
[*Headnote*.—A writ of *ne exeat regno* cannot be maintained against a *femme covert* administratrix, though her husband is out of the jurisdiction.]
But see **Moore v. Hudson** (1821) 6 Madd. 218.—V.C.
- Russell v. Asby** (1799) 5 Ves. 96.—L.C., *not followed*.
- Perry v. Dorset** (1871) 19 W. R. 1048.—ROMILLY, M.R.
- Whitehouse v. Partridge** (1818) 3 Swanst. 375; 19 R. R. 216.—L.C., *applied*.
- Sobey v. Sobey** (1872) 42 L. J. Ch. 271; L. R. 15 Eq. 200; 27 L. T. 808; 21 W. R. 309.—BACON, V.C.
- Whitehouse v. Partridge**, *approved*.
Sobey v. Sobey, *distinguished*.
- Colverson v. Bloomfield** (1885) 54 L. J. Ch. 817; 29 Ch. D. 341; 52 L. T. 478; 33 W. R. 889.—C.A. COTTON, BOWEN and FRY, L.JJ.
- Cazet de la Borde v. Othon** (1874) 23 W. R. 110.—MALINS, V.C., *followed*.
- Wyman v. Knight** (1888) 57 L. J. Ch. 886; 39 Ch. D. 165; 59 L. T. 164; 37 W. R. 76.—CHITTY, J.
- Flack v. Holm** (1820) 1 Jac. & W. 405; 21 R. R. 202.—L.C.; and **Jackson v. Petrie** (1804) 10 Ves. 164; 7 R. R. 368.—L.C., *adopted*.
- Thompson v. Smith** (1865) 34 L. J. Ch. 412; 11 Jur. (N.S.) 276; 12 L. T. 9; 13 W. R. 422.—M.R.
- Drover v. Beyer** (1879) 49 L. J. Ch. 37; 13 Ch. D. 242; 41 L. T. 393; 28 W. R. 110.—M.R.; *affirmed*, C.A.; *observed upon and followed*.
- Hands v. Hands** (1881) 43 L. T. 750.—JESSEL, M.R.
- Sharp v. Taylor** (1840) 11 Sim. 50.—V.C.; *distinguished*.
- Collinson v. —** (1811) 18 Ves. 353, 355; 11 R. R. 212.—L.C., *observation applied*.
- Barned v. Laing** (1843) 12 L. J. Ch. 377; 13 Sim. 255; 6 Jur. 1050; 7 Jur. 383.—L.C.

NEGLIGENCE.

1. NATURE OF ACT.
2. RELATIONSHIP OF PARTIES.
3. ACTIONS FOR NEGLIGENCE.

1. NATURE OF ACT.

In General.

- Skinner v. L. B. & S. C. Ry.** (1850) 5 Ex. 787; 15 Jur. 299.—EX., *referred to*.
- Bird v. G. N. Ry.** (1858) 28 L. J. Ex. 3.—EX., and **G. W. Ry. of Canada v. Braid** (1863) 1 Moore P. C. (N.S.) 101; E.N. R. 527; 9 Jur. (N.S.) 339; 8 L. T. 31; 11 W. R. 444.—P.C.
- Skinner v. L. B. & S. C. Ry.** and **Bird v. G. N. Ry.** (*supra*), *referred to*.
- Redhead v. Midland Ry.** (1867) 36 L. J. Q. B.

181; L. R. 2 Q. B. 412, 427.—Q.B.; *affirmed*, (1869) 38 L. J. Q. B. 169; L. R. 4 Q. B. 379; 9 B. & S. 519; 17 W. R. 737.—EX. CH.

Byrne v. Boadle (1863) 33 L. J. Ex. 13; 2 H. & C. 722; 33 L. J. Ex. 13; 9 L. T. 450; 12 W. R. 279.—EX., *followed*.

Briggs v. Oliver (1866) 35 L. J. Ex. 163; 4 H. & C. 403; 14 L. T. 412; 14 W. R. 658.—EX.

Byrne v. Boadle, *adopted*.
Smith v. G. E. Ry. (1866) 36 L. J. C. P. 22; L. R. 2 C. P. 4; 15 L. T. 246; 15 W. R. 131.—C.P. *See* "CARRIER," vol. i., col. 282.

Scott v. London and St. Katharine's Dock Co. (1865) 34 L. J. Ex. 220; 3 H. & C. 596; 11 Jur. (N.S.) 204; 13 L. T. 148; 13 W. R. 410.—EX. CH., *distinguished*, *but principle applied*.

Higgs v. Maynard (1866) 1 H. & R. 581; 12 Jur. (N.S.) 705; 14 L. T. 332; 14 W. R. 610.—C.P.

Scott v. London and St. Katharine's Dock Co., *followed*.

Briggs v. Oliver (1866) 35 L. J. Ex. 163; 4 H. & C. 403; 14 L. T. 412; 14 W. R. 658.—EX.

Scott v. London and St. Katharine's Dock Co., *adopted*.

Smith v. G. E. Ry. (1866) 36 L. J. C. P. 22; L. R. 2 C. P. 4; 15 L. T. 246; 15 W. R. 131.—C.P.

Scott v. London and St. Katharine's Dock Co., *distinguished*.

Moffatt v. Bateman (1869) L. R. 3 P. C. 115; 22 L. T. 140; 6 Moore P. C. (N.S.) 369.—P.C.; **Bridges v. North London Ry.** (1871) L. R. 6 Q. B. 377, 391; 24 L. T. 835.—EX. CH.; *reversed*, H.L. (E.) (*infra*, col. 1957); **Manzoni v. Douglas** (1880) 50 L. J. Q. B. 289; 6 Q. B. D. 145; 29 W. R. 425; 45 J. P. 391.—C.P.D.; and **Crisp v. Thomas** (1890) 63 L. T. 756; 55 J. P. 261.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Thorogood v. Bryan (1849) 8 C. B. 115; 18 L. J. C. P. 336.—C.P., *doubted*.

Waite v. N. E. Ry. (1860) 1 El. Bl. & El. 728; 28 L. J. Q. B. 258; 5 Jur. (N.S.) 936; 7 W. R. 311.—EX. CH.

Thorogood v. Bryan, *not followed*.

The Milan (1861) 1 Lush. 388; 31 L. J. Adm. 105; 5 L. T. 590.—ADM.

DR. LUSHINGTON.—With due respect to the judges who decided that case, I do not consider that it is necessary for me to dissect that judgment; but I decline to be bound by it, because it is a single case; because I know, upon inquiry, that it has been doubted by high authority; because it appears to me not reconcilable with other principles laid down at common law; and lastly, because it is directly against *Hay v. Le Neve* (2 Shaw's Scotch Appeals, 405), and the ordinary practice of the Court of Admiralty; for if, by the practice of the Court of Admiralty, the owner of a delinquent ship, where both ships are to blame, may recover one-half of his loss, *a fortiori* the innocent owner of the cargo cannot be deprived of a like remedy.

Thorogood v. Bryan, *approved*.
Armstrong v. Lancashire and Yorkshire Ry. (1875) 44 L. J. Ex. 89; L. R. 10 Ex. 47; 33 L. T. 228; 23 W. R. 295.—EX.

Thorogood v. Bryan, not applied.

Spaight v. Tedcastle (1881) 6 App. Cas. 217; 44 L. T. 589; 29 W. R. 761.—H.L. (E.); *Chartered Mercantile Bank of India v. Netherlands, &c., Navigation Co.* (1883) 52 L. J. Q. B. 220; 10 Q. B. D. 521, 545; 48 L. T. 546; 31 W. R. 445.—C.A.; *The Sara* (1887) 56 L. J. P. 160; 12 P. D. 158; 57 L. T. 328; 35 W. R. 826.—C.A.; reversed, H.L. (E.).

Thorogood v. Bryan and Armstrong v. Lancashire and Yorkshire Ry., overruled.

Mills v. Armstrong, The Bernina (1888) 57 L. J. P. 65; 13 App. Cas. 1; 58 L. T. 423; 36 W. R. 870; 6 Asp. M. C. 257; 52 J. P. 212.—H.L. (E.). LORDS HERSCHELL, BRAMWELL, WATSON and MACNAGHTEN.

LORD HERSCHELL.—This case (*Thorogood v. Bryan*) was decided as long ago as 1849, and has been followed in some other cases; but though it was early subjected to adverse criticism, it has never come for revision before a Court of appeal until the present occasion. [After stating the conclusion arrived at in that case he continued:] It is necessary to examine carefully the reasoning by which this conclusion was arrived at. Coltman, J. said, "It appears to me that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants, that if any injury results from their negligence, he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is travelling, that want of care of the driver will be a defence to the driver of the carriage which directly caused the injury." Maule J. and Vaughan Williams, J. also dwelt upon this view of the identification of the passenger with the driver of the vehicle in which he is being carried. The former thus expressed himself: "I incline to think that, for this purpose, the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased." Vaughan Williams, J. said, "I think the passenger must for this purpose be considered as identified with the person having the management of the omnibus he was conveyed by."

With the utmost respect for these eminent judges, I must say that I am unable to comprehend this doctrine of identification upon which they lay so much stress. In what sense is the passenger by a public stage coach, because he avails himself of the accommodation afforded by it, identified with the driver? The learned judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that the passenger is so far identified with the driver that the negligence of the latter would render the former liable to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger from recovering against the driver's master; though if "negligence of the owner's servants is to be considered negligence of the passenger," or if he "must be considered a party to their negligence," it is not easy to see why it should not be a bar to such an action. In short, as far as I can see, the identification appears to be effective only to the extent of enabling another person whose servants have

been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was, whether the contributory negligence of the driver of the vehicle was a defence as against the passenger when suing another wrongdoer. To say that it is a defence because the passenger is identified with the driver appears to me to beg the question, when it is not suggested that the identification results from any recognised principles of law, or has any other effect than to furnish that defence, the validity of which was the very point in issue. Two persons may no doubt be so bound together by the legal relation in which they stand to each other, that the acts of one may be regarded by the law as the acts of the other. But the relation between the passenger in a public vehicle, and the driver of it, certainly is not such as to fall within any of the recognised categories in which the act of one man is treated in law as the act of another.

I pass now to the other reasons given for the judgment in *Thorogood v. Bryan*. Maule, J. says: "On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, whom by his servant the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. But, as regards the present plaintiff, he is not altogether without fault; he chose his own conveyance, and must take the consequences of any default on the part of the driver whom he thought fit to trust."

I confess I cannot concur in this reasoning. I do not think it well founded either in law or in fact. What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter? And is it any more reasonable to hold him so affected because he chose the mode of conveyance—that is to say, drove in an omnibus rather than walked, or took the first omnibus that passed him instead of waiting for another? And when it is attempted to apply this reasoning to passengers travelling in steamships or on railways the unreasonableness of such a doctrine is even more glaring.

The only other reason given is contained in the judgment of Creswell, J. in these words: "If the driver of the omnibus the deceased was in had by his negligence or want of due care and skill contributed to an injury from a collision, his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position." Surely, with deference, the reason for the difference lies on the very surface. If the master in such a case could maintain no action, it is because there existed between him and the driver the relation of master and servant. It is clear that if his driver's negligence alone had caused the collision, he would have been liable to an action for the injury resulting from it to third parties. The learned judge would, I imagine, in that case have seen a reason why a passenger in the omnibus stood in a better position than the master of the driver. I have now dealt with all the reasons on which the judgment in *Thorogood v. Bryan* was founded, and I entirely agree with the

learned judges in the Court below in thinking them inconclusive and unsatisfactory.

I will not detain your lordships further on this part of the case, beyond saying that I concur with the judgments of the learned judges in the Court below, and specially with the very exhaustive judgment of the M.R., Lord Esher.

It was suggested, in the course of the argument, that *Thorogood v. Bryan* might be supported on the ground that the allegation that the negligence which caused the injury was the defendant's was not proved, inasmuch as it was the defendant's negligence in conjunction with that of the driver of the other omnibus. It may be that, as a pleading point, this would have been good. It is not necessary to express an opinion whether it would or not. I do not think it would have been a defence on the merits if the facts had been properly averred. If, by a collision between two vehicles, a person unconnected with either vehicle were injured, the owner of neither vehicle, when sued, could maintain as a defence, "I am not guilty, because but for the negligence of another person the accident would not have happened." And I do not see how this defence is any more available as against a person being carried in one of the vehicles, unless the reasoning in *Thorogood v. Bryan* be well founded.—pp. 67, 68, 69, 70.

[See the opinion of Lord Bramwell, which was not delivered in Court, at p. 70.]

Waite v. N. E. Ry. (1860) 28 L. J. Q. B. 258; 1 El. Bl. & El. 728; 5 Jur. (N.S.) 936; 7 W. R. 311.—EX. CH.

Distinguished, *Rooth v. N. E. Ry.* (1867) L. R. 2 Ex. 173, 180; 36 L. J. Ex. 83; 15 L. T. 624; 15 W. R. 695.—EX. CH. *applied*, *Armstrong v. L. & Y. Ry.* (1875) 44 L. J. Ex. 89; L. R. 10 Ex. 47, 53; 33 L. T. 228; 23 W. R. 295.—EX.; *considered*, *The Bernina* (1888) 57 L. J. P. 65; 13 App. Cas. 1, 10; 58 L. T. 423; 36 W. R. 870; 52 J. P. 212.—H.L. (E.).

The Bernina (1886) 55 L. J. P. 21; 11 P. D. 31; 54 L. T. 499; 34 W. R. 595.—BUTT, J.; *reversed*, (1887) 56 L. J. P. 17; 12 P. D. 58; 56 L. T. 258; 35 W. R. 314; 6 Asp. M. C. 75.—C.A. *ESHER, M.R., LINDLEY and LOPES, L.J.J.; the latter decision affirmed* *non*, *Mills v. Armstrong*, *The Bernina* (1888) 57 L. J. P. 65; 13 App. Cas. 1; 58 L. T. 423; 36 W. R. 870; 6 Asp. M. C. 257; 52 J. P. 212.—H.L. (E.). LORDS *HERSCHELL, BRAMWELL, WATSON and MACNAGHTEN*.

The Bernina, distinguished.

The Sara (1887) 56 L. J. P. 160; 12 P. D. 158; 57 L. T. 328; 35 W. R. 826.—C.A.; *reversed*, *H.L. (E.)*.

The Bernina, applied.

Mathews v. London Street Tramways Co. (1888) 58 L. J. Q. B. 12; 60 L. T. 47; 52 J. P. 774.—*POLLOCK, B. and MANISTY, J.*

The Bernina, distinguished.

The Englishman and The Australia (1894) 63 L. J. P. 133; [1894] P. 239; 6 R. 743; 70 L. T. 846; 43 W. R. 62.—*JEUNE, P.*

Radley v. L. & N. W. Ry., 43 L. J. Ex. 73; L. R. 9 Ex. 71; *reversed*, (1875) 44 L. J. Ex. 73; L. R. 10 Ex. 100; 33 L. T. 209; *the latter decision reversed*, (1876) 46 L. J. Ex. 573; 1 App. Cas. 754; 35 L. T. 637; 25 W. R. 147.

Radley v. L. & N. W. Ry.

Dicta questioned, *The Vera Cruz* (1884) 53 L. J. P. 33; 9 P. D. 89; 51 L. T. 104; 32 W. R. 783.—*BUTT, J.; applied*, *The Bernina*, 1887.—C.A. (*see supra*); *referred to*, *Delany v. Dublin United Tramways Co.* (1892) 30 L. R. Ir. 725.—C.A.; *applied*, *The Sans Pareil* (1900) 69 L. J. P. 127; [1900] P. 267; 82 L. T. 606; 9 Asp. M. C. 78.—C.A. *SMITH, WILLIAMS and ROMER, L.J.J.*

Murgatroyd v. Blackburn Tramway Co. (1887) 3 Times L. R. 180, 451.—C.A., *referred to*.

Delany v. Dublin United Tramways Co. (1892) 30 L. R. Ir. 725.—C.A.

Bridge v. Grand Junction Ry. (1838) 3 M. & W. 244.—EX., *approved and followed*. *Thorogood v. Bryan* (1849) 18 L. J. C. P. 336; 8 C. B. 115.—C.P.

Bridge v. Grand Junction Ry., applied.

Dimes v. Petley (1850) 19 L. J. Q. B. 449; 15 Q. B. 276; 14 Jur. 1132.—Q.B.; *Tuff v. Warman* (1858) 27 L. J. C. P. 322; 5 C. B. (N.S.) 573; 5 Jur. (N.S.) 222; 6 W. R. 693.—EX. CH.; *Armstrong v. L. & Y. Ry.* (1875) 44 L. J. Ex. 89; L. R. 10 Ex. 47; 33 L. T. 228; 23 W. R. 295.—EX.

Bridge v. Grand Junction Ry., explained.

The Vera Cruz (1884) 53 L. J. P. 33; 9 P. D. 88, 94; 51 L. T. 104; 32 W. R. 783; 5 Asp. M. C. 254.—*BUTT, J.*

Bridge v. Grand Junction Ry., referred to.

Mills v. Armstrong, *The Bernina* (1888) 51 L. J. P. 65; 13 App. Cas. 1; 58 L. T. 423; 36 W. R. 870; 6 Asp. M. C. 257; 52 J. P. 212.—H.L. (E.).

Davies v. Mann (1842) 12 L. J. Ex. 10; 10 M. & W. 546; 6 Jur. 954.—EX., *applied*. *Dimes v. Petley* (1850) 19 L. J. Q. B. 449; 15 Q. B. 276; 14 Jur. 1132.—Q.B.

Davies v. Mann, principle applied.

Tuff v. Warman (1858) 27 L. J. C. P. 322; 5 C. B. (N.S.) 573; 5 Jur. (N.S.) 222; 6 W. R. 693.—EX. CH.

Davies v. Mann, approved.

Radley v. L. & N. W. Ry. (1876) 25 W. R. 147; 46 L. J. Ex. 573; 1 App. Cas. 754; 35 L. T. 637.—H.L. (E.).

LORD PENZANCE.—The rule has been applied in *Davies v. Mann* and *Tuff v. Warman*, and in many other cases, and there is no question about it.—p. 148.

Davies v. Mann, followed.

Cayzer v. Carron Co. (1884) 9 App. Cas. 873; 54 L. J. Adm. 18; 52 L. T. 361; 33 W. R. 281; 5 Asp. M. C. 371.—H.L. (E.).

Davies v. Mann, explained.

The Vera Cruz (1884) 53 L. J. P. 33; 9 P. D. 88, 94; 51 L. T. 104; 32 W. R. 783; 5 Asp. M. C. 254.—*BUTT, J.*

Davies v. Mann, applied.

The Bernina (1887).—C.A. (*supra*, col. 1953). and *Lee v. Nixey* (1890) 63 L. T. 285; 54 J. P. 807.—Q.B.D.

Davies v. Mann, proposition applied.

The Altair (1897) 66 L. J. Adm. 42; [1897] P. 105; 76 L. T. 263; 45 W. R. 622; 8 Asp. M. C. 224.—*BARNES, J.*

Tuff v. Warman (1858) 27 L. J. C. P. 322; 5 C. B. (N.S.) 573; 5 Jur. (N.S.) 222; 6 W. R. 693.—EX. CH., *considered and followed*.

Walton v. L. B. & S. C. Ry. (1866) 1 H. & R. 424; 14 L. T. 253; 14 W. R. 395.—C.P.

Tuff v. Warman, *approved*.

Radley v. L. & N. W. Ry. (1876) 46 L. J. Ex. 573; 1 App. Cas. 754; 35 L. T. 637; 25 W. R. 147.—H.L. (R.).

Tuff v. Warman, *observations disapproved*.

The Vera Cruz (1884) 53 L. J. P. 33; 9 P. D. 88; 51 L. T. 104; 32 W. R. 783; 5 Asp. M. C. 254.—BUTT, J.

Tuff v. Warman, *observed upon and applied*.

The Bernina (1887).—C.A. (*supra*, col. 1953).

Doyle v. Kinahan (1869) Ir. R. 4 C. L. 150; 17 W. R. 679.—EX.

Referred to, **Maingay v. Lewis** (1870) Ir. R. 5 C. L. 229.—EX. CH.; *adopted*, **McDonnell v. G. S. & W. Ry.** (1888) 24 L. R. 1r. 369.—EX. D.

Clayards v. Dethick (1848) 12 Q. B. 439.—Q.B., *distrusted*.

Lax v. Darlington Corporation (1879) 5 Ex. D. 28; 49 L. J. Ex. 105; 41 L. T. 489; 28 W. R. 221.—C.A.

Clayards v. Dethick, *questioned*.

McMahon v. Field (1881) 50 L. J. Q. B. 552; 7 Q. B. D. 591; 45 L. T. 381; 46 J. P. 245.—C.A.; *reversing* 29 W. R. 472.

BRAMWELL, L.J.—The case is somewhat like that of *Clayards v. Dethick*, where a cabman attempted to bring his horse out of his mews across the outlet of which a trench had been dug by the commissioners of sewers, and in doing so, the horse fell into the trench and was killed, and it was decided that the fact that the cabman incurred some danger in his attempt did not disentitle him to recover. I may observe, however, that I do not think that that case was rightly decided, for it is not because the plaintiff chose to incur a risk that he behaved reasonably in the way he acted. . . . In *Hobbs v. L. & S. W. Ry.* (*post*) it was said that the damage to the wife was a secondary consequence of the breach of contract and too remote; and, by way of illustration, the case was given of a person walking home in the dark who took a false step which resulted in a fall and a broken limb: but I must say I do not see why a passenger who, by the default of the railway company was obliged to walk home in the dark might not recover in respect of such damage, it being an event which might not unreasonably be expected to occur.

Clayards v. Dethick, *referred to*.

Thomas v. Quartermaine (1886) 55 L. J. Q. B. 439; 17 Q. B. D. 414; 55 L. T. 360; 34 W. R. 741.—WILLS and GRANTHAM, JJ.; *affirmed*, C.A. (*ante*, col. 1723).

Mangan v. Atterton (1866) 53 L. J. Ex. 161; 4 H. & C. 388; L. R. 1 Ex. 239; 14 L. T. 411; 14 W. R. 771.—EX., *commented on*.

Clark v. Chambers (1878) 47 L. J. Q. B. 427; 3 Q. B. D. 327; 38 L. T. 454; 26 W. R. 613.

COCKBURN, C.J. (for the Court).—The case of *Mangan v. Atterton* was cited before us as a

strong authority in favour of the defendant. The defendant had there exposed in a public market place a machine for crushing oil cake without its being thrown out of gear or the handle being fastened, or any person having the care of it: the plaintiff, a boy of four years of age, returning from school with his brother, a boy of seven, and some other boys, stopped at the machine. One of the boys began to turn the handle; the plaintiff, at the suggestion of his brother, placed his hand on the cogs of the wheels, and the machine being set in motion, three of his fingers were crushed. It was held by the Court of Exchequer that the defendant was not liable—first, because there was no negligence on the part of the defendant, or if there was such negligence it was too remote; secondly, because the injury was caused by the act of the boy who turned the handle, and of the plaintiff himself, who was a trespasser. With the latter ground of the decision we have in the present case nothing to do: otherwise we should have to consider whether it should prevail against the cases cited with which it is obviously in conflict. If the decision as to negligence is in conflict with our judgment in this case, we can only say we do not acquiesce in it. It appears to us that a man who leaves in a public place, along which persons, and amongst them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorised act of another may be necessary to realise the mischief to which the unlawful act or negligence of the defendant has given occasion. But be this as it may, the case cannot govern the present. For the decision proceeded expressly on the ground that there had been no default in the defendant; here it cannot be disputed that the act of the defendant was unlawful.

Lynch v. Nurdin (1841) 10 L. J. Q. B. 73; 1 Q. B. 29; 4 P. & D. 672; 5 Jur. 797.—Q.B., *distinguished*.

Lygo v. Newbold (1854) 9 Ex. 302; 2 C. L. R. 449; 23 L. J. Ex. 108; 2 W. R. 158.—EX.

Lynch v. Nurdin, *distinguished*.

Casswell v. Worth (1856) 5 El. & Bl. 849; 25 L. J. Q. B. 121; 2 Jur. (N.S.) 116; 4 W. R. 231.—Q.B.

COLERIDGE, J.—*Lynch v. Nurdin* does not apply to the present case; here the plaintiff was actually and directly the cause of his own injury.—p. 856.

Lynch v. Nurdin, *referred to*.

Degg v. Midland Ry. (1857) 26 L. J. Ex. 171; 1 H. & N. 773; 3 Jur. (N.S.) 395; 5 W. R. 364.—EX.

Lynch v. Nurdin, *discussed and applied*.

Clark v. Chambers (1878).—Q.B.D. (*supra*).

Lynch v. Nurdin, *adopted*.

Engelhart v. Farrant (1896) 66 L. J. Q. B. 122; [1897] 1 Q. B. 210; 75 L. T. 617; 45 W. R. 179.—C.A.

Lynch v. Nurdin (*supra*), *followed*.

Harrold v. Whitney (1898) 67 L. J. Q. B. 771; [1898] 2 Q. B. 320; 78 L. T. 788; 46 W. R. 642.—C.A. SMITH, RIGBY and WILLIAMS, L.JJ.

Lynch v. Nurdin, *applied*.

McDowall v. G. W. Ry. (1902) 71 L. J. K. B. 330; [1902] 1 K. B. 618; 86 L. T. 558.—KENNEDY, J.

Clark v. Chambers (1878) 47 L. J. Q. B. 427; 3 Q. B. D. 327; 38 L. T. 454; 26 W. R. 613.—Q.B.D., *adopted*.

The Bernina (1887).—C.A. (*supra*, col. 1953).

Clark v. Chambers and Engelhart v. Farrant (*supra*), *applied*.

McDowall v. G. W. Ry. (1902) 71 L. J. K. B. 330; [1902] 1 K. B. 618; 86 L. T. 558.—KENNEDY, J.

Management of Railway.

Skelton v. L. & N. W. Ry. (1867) 36 L. J. C. P. 249; L. R. 2 C. P. 631; 16 L. T. 563; 15 W. R. 925.—C.P., *applied*.

Dublin, &c., Ry. v. Slattery (1878).—H.L. (IR.) (*infra*); Coyle v. G. N. Ry. of Ireland (1887) 20 L. R. Ir. 409.—EX. D.

Bridges v. North London Ry. (1874) 43 L. J. Q. B. 151; L. R. 7 H. L. 213; 30 L. T. 844; 23 W. R. 62.—H.L. (E.), *applied*.

Woodley v. Metropolitan Ry. (1877) 46 L. J. Ex. 521; 2 Ex. D. 384; 36 L. T. 419.—C.A.

Bridges v. North London Ry. and Robson v. N. E. Ry. (1876) 46 L. J. Q. B. 50; 2 Q. B. D. 85; 35 L. T. 535; 25 W. R. 418.—C.A., *explained*.

Watkins v. G. W. Ry. (1877) 46 L. J. C. P. 817; 37 L. T. 193; 25 W. R. 905.—LOPES and DENMAN, JJ.

Bridges v. North London Ry. and Dublin, Wicklow and Wexford Ry. v. Slattery (1878) 3 App. Cas. 1155; 39 L. T. 365; 27 W. R. 191.—H.L. (IR.), *applied*.

Clarke v. Midland Ry. (1880) 43 L. T. 381.—STEPHEN, J.

Dublin, Wicklow and Wexford Ry. v. Slattery, *applied*.

Smith v. S. E. Ry. (1895) 65 L. J. Q. B. 219; [1895] 1 Q. B. 178; 73 L. T. 614; 44 W. R. 291; 60 J. P. 148.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Wakelin v. L. & S. W. Ry. (1886) 56 L. J. Q. B. 229; 12 App. Cas. 41; 55 L. T. 709; 35 W. R. 141; 51 J. P. 404.—H.L. (E.), *not applied*.

Smith v. S. E. Ry. (1895) 65 L. J. Q. B. 219; [1895] 1 Q. B. 178; 73 L. T. 614; 44 W. R. 291; 60 J. P. 148.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Cliff v. Midland Ry. (1870) L. R. 5 Q. B. 258; 22 L. T. 382; 18 W. R. 456.—Q.B., *approved*.

Ellis v. G. W. Ry. (1874) 43 L. J. C. P. 304; L. R. 9 C. P. 551; 30 L. T. 874.—EX. CH.

Cliff v. Midland Ry., *applied*.

Clarke v. Midland Ry. (1880) 43 L. T. 381.—STEPHEN, J.

Ellis v. G. W. Ry., *referred to*.

Woodley v. Metropolitan Ry. (1877) 46 L. J. Ex. 521; 2 Ex. D. 384; 36 L. T. 419.—C.A.; Dublin, W. & W. Ry. v. Slattery (1878) 3 App. Cas. 1155; 1209; 39 L. T. 365; 27 W. R. 191.—H.L. (IR.).

Ellis v. G. W. Ry., *applied*.

Clarke v. Midland Ry. (1880) 43 L. T. 381.—STEPHEN, J.

Daniel v. Metropolitan Ry. (1871) 40 L. J.

C. P. 121; L. R. 5 H. L. 45; 24 L. T. 815; 20 W. R. 37.—H.L. (E.), *dictum applied*.

Williams v. G. W. Ry. (1874) 43 L. J. Ex. 105; L. R. 9 Ex. 157; 31 L. T. 124; 22 W. R. 531.—EX.

Holmes v. N. E. Ry. (1871) 40 L. J. Ex. 121; L. R. 6 Ex. 123; 24 L. T. 69.—EX. CH.; *affirming* 17 W. R. 800, *followed*.

Wright v. L. & N. W. Ry. (1876) 45 L. J. Q. B. 570; 1 Q. B. D. 252; 33 L. T. 830.—C.A.

Holmes v. N. E. Ry., *observations adopted*.

Batchelor v. Fortescue (1883) 11 Q. B. D. 474; 49 L. T. 644.—C.A.

Holmes v. N. E. Ry., *considered*.

Marney v. Scott (1899) 68 L. J. Q. B. 736; [1899] 1 Q. B. 986; 47 W. R. 666.

BIGHAM, J.—The same rule of law was acted upon in the case of *Holmes v. N. E. Ry.* Mr. Cyril Dodd suggested that the rule was extended in that case and that the duty was held to be something greater than the duty to use reasonable care. He suggested that it was there held that the defendant was liable as if he warranted the safety of the premises in all cases except that of a latent danger which was not discoverable by ordinary care. But an examination of the judgments (and I refer particularly to the judgment of Cleasby, B.) shows that the same measure of liability was applied as in *Undermaur v. Dames* (L. R. 1 C. P. 274). Moreover the real point under discussion in that case was whether the plaintiff was a mere licensee, or was in the position of a person invited to go on the premises upon the business of himself and the defendants; the other point as to the measure of liability only arose incidentally.

Batchelor v. Fortescue (1883) 11 Q. B. D. 474; 49 L. T. 644.—C.A.

Applied, Tolhausen v. Davics (1888) 57 L. J. Q. B. 395; 59 L. T. 436; 52 J. P. 804.—Q.B.D.; *affirmed*, 58 L. J. Q. B. 99.—C.A.

Toomey v. L. B. & S. C. Ry. (1857) 27 L. J. C. P. 39; 3 C. B. (N.S.) 146; 6 W. R. 44.—C.P., *adopted*.

Cotton v. Wood (1860) 29 L. J. C. P. 333; 8 C. B. (N.S.) 568; 7 Jur. (N.S.) 168.—C.P.; Smith v. G. E. Ry. (1866) 36 L. J. C. P. 22; L. R. 2 C. P. 4; 15 L. T. 246; 15 W. R. 131.—C.P.; Ryder v. Wombwell (1868) 38 L. J. Ex. 8; L. R. 4 Ex. 32; 39; 19 L. T. 491; 17 W. R. 167.—EX. CH.; Gee v. Metropolitan Ry. (1873) 42 L. J. Q. B. 105; L. R. 8 Q. B. 161; 177; 28 L. T. 282; 21 W. R. 584.—EX. CH.; Dublin, &c., Ry. v. Slattery (1878) 3 App. Cas. 1155; 1171; 39 L. T. 365; 27

W. R. 191.—H.L. (TR.); Hall v. Jupe (1880) 49 L. J. C. P. 721, 729; 43 L. T. 411.—C.P.

Cotton v. Wood and Hammack v. White (1862) 31 L. J. C. P. 129; 11 C. B. (N.S.) 588; 8 Jur. (N.S.) 796; 5 L. T. 676; 10 W. R. 230.—C.P., *adopted*.

Smith v. G. E. Ry. (1866) 36 L. J. C. P. 22; L. R. 2 C. P. 4; 15 L. T. 246; 15 W. R. 131.—C.P.; Allen v. New Gas Co. (1876) 45 L. J. Ex. 668; 1 Ex. D. 251, 255; 34 L. T. 541.—EX. D.; Manzoni v. Douglas (1880) 50 L. J. Q. B. 289; 6 Q. B. D. 145, 153; 29 W. R. 425; 45 J. P. 391.—C.P.D.

Driving Carriages and Horses.

Mann v. Ward (1892) 8 Times L. R. 699.—C.A., *explained and held inapplicable*.

Illidge v. Goodwin (1831) 5 Car. & P. 190, *dictum adopted*.

Engelhart v. Farrant (1896) 66 L. J. Q. B. 122; [1897] 1 Q. B. 240; 75 L. T. 617; 45 W. R. 179.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

Illidge v. Goodwin, *considered*.

Powell v. McGlynn [1902] 2 Ir. R. 154.—K.B.D. and C.A.

Moffatt v. Bateman (1869) L. R. 3 P. C. 115; 22 L. T. 140; 6 Moore P. C. (N.S.) 369.—P.C., *distinguished*.

Coughlin v. Gillison (1898) 68 L. J. Q. B. 147; [1899] 1 Q. B. 145; 79 L. T. 627; 47 W. R. 113.—SMITH, RIGBY and COLLINS, L.JJ.

COLLINS, L.J.—That case belongs to the class of bailments of which the case of carriers is an example. The plaintiff had intrusted himself to the defendant to be carried, and there was a clear duty on the part of the bailee towards the bailor not to be guilty of gross negligence causing injury to him. That case can have no application to the present one, where the defendants were not bailees but lenders [of an engine whose boiler was defective and exploded, injuring the borrowers].

Sharp v. Grey (1833) 9 Bing. 457; 2 M. & Scott, 621.—C.P.

Distinguished, *Heulhead v. Midland Ry.* (1869) 38 L. J. Q. B. 169; L. R. 4 Q. B. 379, 387; 9 B. & S. 519; 20 L. T. 628; 17 W. R. 737.—EX. CH.; *applied*, *Francis v. Cockrell* (1870) L. R. 5 Q. B. 501, 512; 39 L. J. Q. B. 291; 10 B. & S. 850; 23 L. T. 466; 18 W. R. 1205.—EX. CH.; *Hyman v. Nye* (1881) 6 Q. B. D. 685; 44 L. T. 919; 45 J. P. 554.—Q.B.D.

Cox v. Burbidge (1863) 32 L. J. C. P. 89; 13 C. B. (N.S.) 430; 9 Jur. (N.S.) 970; 11 W. R. 435.—C.P.

Approved and adopted, *Fletcher v. Rylands* (1866) 35 L. J. Ex. 154; L. R. 1 Ex. 265, 281; 4 H. & C. 263; 12 Jur. (N.S.) 603; 14 W. R. 799.—EX. CH.; *affirmed*, H.L. (E.); *discussed*, *Child v. Hearn* (1874) 43 L. J. Ex. 100; L. R. 9 Ex. 176; 22 W. R. 864.—EX.

Abbott v. Freeman, 34 L. T. 544.—EX. D.; *reversed*, (1876) 35 L. T. 783.—C.A.

• *Escape of Injurious Matter.*

Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine's

Dock Co. (1878) 9 Ch. D. 503; 39 L. T. 433; 27 W. R. 267.—C.A., *followed*.

Dixon v. M. B. W. (1881) 50 L. J. Q. B. 772; 7 Q. B. D. 418; 45 L. T. 312; 30 W. R. 83; 46 J. P. 4.—COLERIDGE, C.J.; *Hurt v. Victoria Graving Dock Co.* (1882) 47 L. T. 378.—FIELD, J.

Carstairs v. Taylor (1871) 40 L. J. Ex. 129; L. R. 6 Ex. 217; 19 W. R. 723.—EX., *distinguished*.

Ross v. Fedden (1872) 41 L. J. Q. B. 270; L. R. 7 Q. B. 661; 26 L. T. 966.—Q.B.

Carstairs v. Taylor and Ross v. Fedden, *distinguished*.

Humphreys v. Cousins (1877) 46 L. J. C. P. 433; 2 C. P. D. 239; 36 L. T. 180; 25 W. R. 371.—C.P.D.

Wilson v. Newberry (1871) 41 L. J. Q. B. 31; L. R. 7 Q. B. 31; 25 L. T. 695; 20 W. R. 111.—Q.B.

Distinguished, *Firth v. Bowling Iron Co.* (1878) 47 L. J. C. P. 358; 3 C. P. D. 254; 38 L. T. 568; 26 W. R. 558.—C.P.D.; *observed upon and dictum adopted*, *Crowhurst v. Amersham Burial Board* (1878) 48 L. J. Ex. 109; 4 Ex. D. 5; 39 L. T. 355; 27 W. R. 95.—EX. D.; *referred to*, *Ponting v. Noakes* (1894).—CHARLES and COLLINS, JJ. (*infra*).

Lawrence v. Jenkins (1873) 42 L. J. Q. B. 147; L. R. 8 Q. B. 274; 28 L. T. 406.—Q.B., *distinguished*.

Crowhurst v. Amersham Burial Board (1878) 48 L. J. Ex. 109; 4 Ex. D. 5; 39 L. T. 355; 27 W. R. 95.—EX. D.

Lawrence v. Jenkins, *applied*.

Corry v. G. W. Ry. (1880) 50 L. J. Q. B. 313; 6 Q. B. D. 237.—C.P.D.; *affirmed*, C.A.

Firth v. Bowling Iron Works Co. (1878) 47 L. J. C. P. 358; 3 C. P. D. 254; 38 L. T. 568; 26 W. R. 558.—C.P.D., *distinguished*.

Crowhurst v. Amersham Burial Board (1878) 48 L. J. Ex. 109; 4 Ex. D. 5; 39 L. T. 355; 27 W. R. 95.—EX. D.

Firth v. Bowling Iron Works Co., *applied*.

Hawken v. Shearer (1887) 56 L. J. Q. B. 284, 286.—Q.B.D.

Firth v. Bowling Iron Co. and Crowhurst v. Amersham Burial Board (*supra*), *referred to*.

Ponting v. Noakes (1894) 63 L. J. Q. B. 549; [1894] 2 Q. B. 281; 10 R. 265; 70 L. T. 842; 42 W. R. 506; 58 J. P. 558.—CHARLES and COLLINS, JJ.

Lee v. Riley (1865) 34 L. J. C. P. 212; 18 C. B. (N.S.) 722; 11 Jur. (N.S.) 822; 12 L. T. 388; 13 W. R. 51.—C.P.; and **Star v. Rookesby** (1710) 1 Salk. 335, *followed*.

Ellis v. Loftus Iron Co. (1874) 44 L. J. C. P. 24; L. R. 10 C. P. 10; 31 L. T. 483; 23 W. R. 246.—C.P.

Lee v. Riley, *discussed*.

Child v. Hearn (1874) 43 L. J. Ex. 100; L. R. 9 Ex. 176; 22 W. R. 864.—EX.; and **Smith v. Cook** (1875) 45 L. J. Q. B. 122; 1 Q. B. D. 79; 33 L. T. 722; 24 W. R. 206.—Q.B.D.

Parry v. Smith (1879) 48 L. J. C. P. 731; 4 C. P. D. 325; 41 L. T. 93; 27 W. R. 801.—**LOPES, J., approved but not applied.**
Cunnington v. G. N. Ry. (1883) 49 L. T. 392; 48 J. P. 134.—C.A.

Removing Premises and Land.

Wyatt v. Harrison (1832) 3 B. & Ad. 871; 1 L. J. K. B. 237, *observed upon.*
Bibby v. Carter (1859) 4 H. & N. 153; 28 L. J. Ex. 182; 7 W. R. 193.—EX.

Wyatt v. Harrison, applied.

Dalton v. Angus (1881) 50 L. J. Q. B. 689; 6 App. Cas. 740; 44 L. T. 844; 30 W. R. 191.—H.L. (E.).

Dodd v. Holme (1834) 1 A. & E. 493; 3 N. & M. 739.—Q.B., *adopted.*
Gayford v. Nicholls (1854) 23 L. J. Ex. 205; 9 Ex. 702; 2 C. L. R. 1060; 2 W. R. 453.—EX.

Dodd v. Holme, commented upon.

The Submarine Telegraph Co. v. Dickson (1864) 15 C. B. (N.S.) 759; 33 L. J. C. P. 139; 10 Jur. (N.S.) 211; 10 L. T. 32; 12 W. R. 384.—C.P.
WILLIAMS, J.—That case is somewhat qualified by **Trower v. Chadwick** (3 N. C. 334; 3 Scott 699); in error, **Chadwick v. Trower** (6 N. C. 1; 8 Scott, 1).—p. 768.

Dodd v. Holme, referred to.

Dalton v. Angus (1881).—H.L. (E.) (*supra*).

Peppin v. Shepherd (1822) 11 Price 400, *approved.*
Gladwell v. Steggall (1839) 8 L. J. C. P. 361; 5 Bing. (N.C.) 733; 8 Scott 60.—C.P.

Peppin v. Shepherd, distinguished.

Longmeid v. Holliday (1851) 20 L. J. Ex. 430; 6 Ex. 761.—EX.

Gladwell v. Steggall (1839) 8 L. J. C. P. 361; 5 Bing. (N.C.) 733; 8 Scott 60.—C.P.
Followed, Storey v. Richardson (1839) 9 L. J. C. P. 43; 6 Bing. (N.C.) 123; 8 Scott 291; 4 Jur. 26.—C.P.; *distinguished, Longmeid v. Holliday* (1851).—EX. (*supra*).

Bibby v. Carter (1859) 28 L. J. Ex. 182; 4 H. & N. 153; 7 W. R. 193.—EX., *applied.*
Richards v. Jenkins (1868) 18 L. T. 437; 17 W. R. 30.—EX.

Smith v. Thackerah (1866) 35 L. J. C. P. 276; L. R. 1 C. P. 564; 12 Jur. (N.S.) 545; 14 L. T. 761; 14 W. R. 832; 1 H. & R. 615.
Not applied, Richards v. Jenkins (1868) 18 L. T. 437; 17 W. R. 30.—EX.; *referred to, Att.-Gen. v. Conduit Colliery Co.* (1894) 64 L. J. Q. B. 207; [1895] 1 Q. B. 301; 71 L. T. 771; 43 W. R. 366; 59 J. P. 70; 15 R. 267.—Q.B.D.

Dangerous Chattels.

Langridge v. Levy (1837) 6 L. J. Ex. 137; 2 M. & W. 337.—EX.; *affirmed nom. Levy v. Langridge* (1838) 7 L. J. Ex. 387;

4 M. & W. 337; 1 H. & H. 325.—EX., *not applied.*
Winterbottom v. Wright (1842) 11 L. J. Ex. 415; 10 M. & W. 109.—EX.

Langridge v. Levy, distinguished.

Longmeid v. Holliday (1851) 20 L. J. Ex. 430; 6 Ex. 761.—EX.

Langridge v. Levy, commented on and distinguished.

Winterbottom v. Wright (supra), approved and distinguished.

Blackmore v. Bristol and Exeter Ry. (1858) 27 L. J. Q. B. 167; 8 El. & Bl. 1035; 4 Jur. (N.S.) 657; 6 W. R. 336.—Q.B.

Langridge v. Levy and Winterbottom v. Wright, observations adopted.

Alton v. Midland Ry. (1865) 34 L. J. C. P. 292; 19 C. B. (N.S.) 213; 11 Jur. (N.S.) 672; 12 L. T. 703; 13 W. R. 918.—C.P.

Langridge v. Levy, not applied.

Winterbottom v. Wright, applied.

Collis v. Selden (1868) 37 L. J. C. P. 233; L. R. 3 C. P. 495; 16 W. R. 1170.—C.P.

Langridge v. Levy.

Commented on, George v. Skivington (1869) 39 L. J. Ex. 8; L. R. 5 Ex. 1; 21 L. T. 495; 18 W. R. 118.—EX.; *applied, Swift v. Winterbotham* (1873) 42 L. J. Q. B. 111; L. R. 8 Q. B. 244, 252; 28 L. T. 339.—Q.B.; **Peek v. Gurney** (1873) 43 L. J. Ch. 19; L. R. 6 H. L. 377, 412; 22 W. R. 29.—H.L. (E.); *explained, Cattle v. Stockton Waterworks* (1875) 44 L. J. Q. B. 139; L. R. 10 Q. B. 453; 33 L. T. 475.—Q.B.; *considered, Hosegood v. Bull* (1876) 36 L. T. 617.—EX. D.

Langridge v. Levy, questioned.

Winterbottom v. Wright, discussed.

Heaven v. Pender (1883) 11 Q. B. D. 503; 52 L. J. Q. B. 702; 49 L. T. 357; 47 J. P. 709.—C.A.

BRETT, M.R.—*Langridge v. Levy* is not an easy case to act upon. It is not, it cannot be, accurately reported; the declaration is set out; the evidence is assumed to be reported; the questions left to the jury are stated. And then it is said that a motion is made to enter a non-suit in pursuance of leave reserved on particular grounds. These grounds do not raise the question of fraud at all, but only the question of remoteness. And, although the question of fraud seems in a sense to have been left to the jury, yet no question was, according to the report, left to them as to whether the plaintiff acted on the faith of the fraudulent misrepresentation, which is, nevertheless, a necessary question in a case of fraudulent misrepresentation. The report of the argument makes the object of the argument depend entirely upon an assumed motion to arrest the judgment, which raises always a discussion depending entirely on the form of the declaration and the effect on it of a verdict, in respect of which it is assumed that all questions were left to the jury. If this was the point taken, the report of the evidence and of the questions left to the jury is idle! The case was decided on the ground of a fraudulent misrepresentation as stated in the declaration. It is inferred that the defendant intended the representation to be communicated to the son. Why he should have such an intention, in

fact, it seems difficult to understand. His immediate object must have been to induce the father to buy and pay for the gun. It must have been wholly indifferent to him whether after the sale and payment the gun would be used or not by the son. I cannot hesitate to say that in my opinion the case is a wholly unsatisfactory case to act on as an authority.—p. 511.

Langridge v. Levy, limited.

Winterbottom v. Wright, followed.

Earl v. Lubbock (1904) 74 L. J. K. B. 121, 124; [1905] 1 K. B. 293.—K.B.D.; *affirmed*, C.A.

Dangerous Premises.

Lax v. Darlington Corporation (1879) 49

L. J. Ex. 105; 5 Ex. D. 28; 41 L. T. 489; 28 W. R. 221.—C.A., *referred to*.

Thomas v. Quartermaine (1887) 56 L. J. Q. B. 340; 18 Q. B. D. 685; 57 L. T. 537; 35 W. R. 555; 51 J. P. 516.—C.A.; and Yarmouth v. France (1887) 19 Q. B. D. 656.—C.A.

Gallagher v. Humphrey (1862) 10 W. R.

654; 6 L. T. 684.—Q.B., *dictum of CROMPTON, J. doubted*.

Murley v. Grove (1882) 46 J. P. 360.—MATHEW and CAVE, JJ.

CAVE, J. said, referring to the *dictum* of Crompton, J. in the above case, where he is reported to have said, "I think, too, that it is doubtful whether even the fact that the injured person was present unlawfully, would excuse negligence," that he could not think that Crompton, J. had been correctly reported.

Corby v. Hill (1858) 27 L. J. C. P. 318; 4

C. B. (N.S.) 556; 4 Jur. (N.S.) 512; 6 W. R. 575.—C.P., *distinguished*.

Hounsell v. Smith (1860) 29 L. J. C. P. 203; 7 C. B. (N.S.) 731; 6 Jur. (N.S.) 897; 1 L. T. 440; 8 W. R. 277.—C.P.; *finding adopted*, Pickard v. Smith (1861) 10 C. B. (N.S.) 470; 4 L. T. 470.—C.P.; *referred to*, Bolch v. Smith (1862) 31 L. J. Ex. 201; 7 H. & N. 736; 8 Jur. (N.S.) 197; 6 L. T. 158; 10 W. R. 387.—EX.; *distinguished*, Castle v. Parker (1868) 18 L. T. 367.—EX.

Corby v. Hill and Bolch v. Smith (*supra*), *referred to*.

Watkins v. G. W. Ry. (1877) 46 L. J. C. P. 817; 37 L. T. 193; 25 W. R. 905.—LOPES and DENMAN, JJ.

Corby v. Hill and Bolch v. Smith, followed.

White v. France (1877) 46 L. J. C. P. 823; 2 C. P. D. 308; 25 W. R. 878; and *see* Dublin, &c., Ry. v. Slattery (1878) 3 App. Cas. 1155, 1206; 39 L. T. 365; 27 W. R. 191.—H.L. (18.).

Corby v. Hill and Bolch v. Smith, principle applied.

Burchell v. Hickisson (1880) 50 L. J. Q. B. 101.—LINDLEY and LOPES, JJ.

Corby v. Hill.

Considered, Heaven v. Pender (1883) 52 L. J. Q. B. 702; 11 Q. B. D. 503; 49 L. T. 357; 47 J. P. 709.—C.A.; *applied*, Tolhausen v. Davies (1888) 57 L. J. Q. B. 395; 59 L. T. 436; 52 J. P. 804.—Q.B.D.; *affirmed*, 58 L. J. Q. B. 99.—C.A.

Jones v. Boyce (1816) 1 Stark. 493; 18 R. R. 812.

Followed, Wilson v. Newport Dock Co. (1866) 35 L. J. Ex. 97; L. R. 1 Ex. 177; 4 H. & C. 232; 14 L. T. 230.—EX.; *rule applied*, Adams v. L. & Y. Ry. (1869).—C.P. (*infra*); *observations adopted*, The George and Richard (1871) L. R. 3 Adm. 466; 24 L. T. 717.—ADM.; *approved*, The City of Lincoln (1889) 59 L. J. P. 1; 15 P. D. 15; 62 L. T. 49; 38 W. R. 345.—C.A.; *explained*, Wilkinson v. Downton (1897).—WRIGHT, J. (*infra*).

Adams v. Lancashire and Yorkshire Ry.

(1869) 38 L. J. C. P. 277; L. R. 4 C. P. 739, 742; 20 L. T. 850; 17 W. R. 884.—C.P.

Observations adopted, The George and Richard (1871) L. R. 3 Adm. 466; 24 L. T. 717.—ADM.; *questioned, but rule adopted*, Gee v. Metropolitan Ry. (1873) 42 L. J. Q. B. 105; L. R. 8 Q. B. 161.—EX. CH.; Robson v. N. E. Ry. (1875) 44 L. J. Q. B. 112; L. R. 10 Q. B. 271; 32 L. T. 551.—Q.B.; (*affirmed*, C.A., *ante*, vol. i., col. 288); *approved*, Lee v. Nixey (1890) 63 L. T. 285; 54 J. P. 807.—CAVE, SMITH and WILLIAMS, JJ.

Harris v. Mobbs (1878) 3 Ex. D. 268; 39

L. T. 164; 27 W. R. 154.—DENMAN, J.; and **Wilkins v. Day** (1883) 12 Q. B. D. 110; 49 L. T. 399; 32 W. R. 123; 48 J. P. 6.—GROVE and MATHEW, JJ., *explained*.

Wilkinson v. Downton (1897) 66 L. J. Q. B. 493; [1897] 2 Q. B. 57; 76 L. T. 493; 45 W. R. 525.—WRIGHT, J.

WRIGHT, J.—Some English decisions—such as *Jones v. Boyce* ((1816) 1 Stark. 493); *Wilkins v. Day*; *Harris v. Mobbs*—are cited in *Deven on Negligence* as inconsistent with the decision in *Victorian Railway Commissioners v. Coultas* (13 App. Cas. 222). But I think that those cases are to be explained on a different ground, namely, that the damage which immediately resulted from the act of the passenger or of the horse, was really the result, not of that act, but of a fright which rendered that act involuntary, and which therefore ought to be regarded as itself the direct and immediate cause of the damage.

Coupland v. Hardingham (1813) 3 Camp.

398; 14 R. R. 764; and **Jarvis v. Dean** (1826) 11 Moore, 354; 3 Bing. 447; 4 L. J. (o.s.) C. P. 144, *explained and applied*.

Barnes v. Ward (1850) 19 L. J. C. P. 195; 9 C. B. 392; 2 Car. & K. 661; 14 Jur. 344.—C.P.

Coupland v. Hardingham, observed upon.

Cornwell v. Metropolitan Sewers Commissioners (1855) 10 Ex. 771; 3 C. L. R. 417.—EX.

Coupland v. Hardingham, considered and questioned.

Jarvis v. Dean (*supra*), *considered*.

Fisher v. Prowse (1862) 31 L. J. Q. B. 212; 2 B. & S. 770; 8 Jur. (N.S.) 1208; 6 L. T. 711.—Q.B.

Blyth v. Topham (1606) Cro. Jac. 158;

1 Rol. Abr. 88, *distinguished*.

Barnes v. Ward (1850) 19 L. J. C. P. 195; 9 C. B. 392; 2 Car. & K. 661; 14 Jur. 344.—C.P.

Blyth v. Topham (*supra*), *followed*.

Barnes v. Ward, *explained and not applied*.

Hardcastle v. South Yorkshire Ry. (1859) 28 L. J. Ex. 139; 4 H. & N. 67; 5 Jur. (N.S.) 150; 7 W. R. 326.—EX.

Blyth v. Topham, *approved*.

Barnes v. Ward, *not applied*.

Hounsell v. Smyth (1860) 29 L. J. C. P. 203; 7 C. B. (N.S.) 731; 6 Jur. (N.S.) 897; 1 L. T. 440; 8 W. R. 277.

Barnes v. Ward, *applied*.

Fisher v. Prowse (1862) 31 L. J. Q. B. 212; 2 B. & S. 770; 8 Jur. (N.S.) 1208; 6 L. T. 711.—Q.B.; **Robbins v. Jones** (1863) 33 L. J. C. P. 1; 15 C. B. (N.S.) 221; 10 Jur. (N.S.) 239; 9 L. T. 523; 12 W. R. 248.—C.P.; **Hadley v. Taylor** (1865) L. R. 1 C. P. 53; 11 Jur. (N.S.) 979; 13 L. T. 368; 14 W. R. 59.—C.P.; **Orr-Ewing v. Colquhoun** (1877) 2 App. Cas. 839, 864.—H.L. (SC.).

Barnes v. Ward, *considered*.

Wright v. Midland Ry (1884) 51 L. T. 539.—FIELD, MANISTY and LOPES, JJ.; *reversed*, W. N. (1885) 39.—C.A.

Barnes v. Ward, *followed*.

Silverton v. Marriott (1888) 59 L. T. 61; 52 J. P. 677.—FIELD and WILLS, JJ.

Barnes v. Ward. *See*

Pointing v. Noakes (1894).—CHARLES and COLLINS, JJ. (*supra*, col. 1960).

Hounsell v. Smyth (1860) 29 L. J. C. P. 203;

7 C. B. (N.S.) 731; 6 Jur. (N.S.) 897; 1 L. T. 440; 8 W. R. 277.—C.P.; and **Hardcastle v. South Yorkshire Ry.** (1859) 28 L. J. Ex. 139; 4 H. & N. 67; 5 Jur. (N.S.) 150; 7 W. R. 326.—EX., *followed*.

Binks v. South Yorkshire Ry. (1862) 32 L. J. Q. B. 26; 3 B. & S. 244, 350; 7 L. T. 350; 11 W. R. 66.—Q.B.

Hardcastle v. South Yorkshire Ry., *adopted*.

Pearson v. Cox (1877) 2 C. P. D. 369; 36 L. T. 495.—C.A.

Miller v. Hancock [1893] 2 Q. B. 177; 4

L. 478; 69 L. T. 214; 41 W. R. 578; 57 J. P. 758.—C.A., *distinguished*.

Hopkins v. G. E. Ry. (1895) 60 J. P. 86.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

2. RELATIONSHIP OF PARTIES.

Visitors and Licensees.

Pickard v. Smith (1861) 10 C. B. (N.S.) 470;

4 L. T. 470.—C.P., *adopted*.

Gray v. Pullen (1864) 5 B. & S. 970; 34 L. J. Q. B. 265; 11 L. T. 569; 13 W. R. 257.—EX. CH.

Pickard v. Smith, *distinguished*.

Welfare v. L. B. & S. C. Ry. (1869) 38 L. J. Q. B. 241; L. R. 4 Q. B. 693; 20 L. T. 743; 17 W. R. 1065.—Q.B.

Pickard v. Smith, *followed*.

John v. Bacon (1870) 39 L. J. C. P. 365;

L. R. 5 C. P. 437; 22 L. T. 477; 18 W. R. 894.—C.P.

Pickard v. Smith, *considered and applied*.

Bower v. Peate (1876) 45 L. J. Q. B. 446; 1 Q. B. D. 321; 35 L. T. 321.—Q.B.

Pickard v. Smith, *dictum observed upon*.

Whiteley v. Popper (1876) 2 Q. B. D. 276; 46 L. J. Q. B. 436; 36 L. T. 588; 25 W. R. 607.—Q.B.D.

MELLOR, J.—The *dictum* of Williams, J. is no doubt entitled to very great respect, but it is to be observed that the judgment in the case of *Pickard v. Smith* merely decides that the occupier was responsible; we do not say that there was not abundant justification for that decision, and there is no expression in the judgment itself which at all conflicts with our decision [holding the master liable].—p. 278.

FIELD, J.—The only difficulty is that created by the supposed *dictum* of Williams, J. in *Pickard v. Smith*. But there is really nothing in the judgment in that case, or the reasoning on which it is founded, which conflicts with our present decision.—p. 279.

Pickard v. Smith, *adopted*.

Dalton v. Angus (1881) 50 L. J. Q. B. 689; 6 App. Cas. 740, 829; 44 L. T. 844; 30 W. R. 191.—H.L. (E.); and **Hughes v. Percival** (1883) 52 L. J. Q. B. 719; 8 App. Cas. 443; 49 L. T. 189; 31 W. R. 725; 47 J. P. 772.—H.L. (E.).

Pickard v. Smith, *followed*.

Penny v. Wimbledon Urban Council (1899) 68 L. J. Q. B. 704; [1899] 2 Q. B. 72; 80 L. T. 615; 47 W. R. 565; 63 J. P. 406.—C.A. SMITH, WILLIAMS and ROMER, L.JJ.; and *see* **The Shark** (1900) 69 L. J. P. 41; [1900] P. 105; 82 L. T. 42; 48 W. R. 279; 9 Asp. M. C. 50.—C.A.

Collis v. Selden (1868) 37 L. J. C. P. 233;

L. R. 3 C. P. 495; 16 W. R. 1170.—C.P., *referred to*.

Parry v. Smith (1879) 48 L. J. C. P. 731; 4 C. P. D. 325; 41 L. T. 93; 27 W. R. 801.—LOPES, J.

Collis v. Selden, *considered*.

Heaven v. Pender (1883) 52 L. J. Q. B. 702; 11 Q. B. D. 503, 513; 49 L. T. 357; 47 J. P. 709.—C.A.

Collis v. Selden, *distinguished*.

Elliott v. Hall (*or* **Nailstone Colliery Co.**) (1885) 54 L. J. Q. B. 518; 15 Q. B. D. 315; 34 W. R. 16.—GROVE and SMITH, JJ.

GROVE, J.—This is not the mere case of a person lawfully coming into premises for the purposes of business, but the defendant must have known that the plaintiff must necessarily get into the truck for the purpose of unloading the coal. The only case that seems somewhat in defendant's favour is *Collis v. Selden*, where it was alleged that the defendant improperly and negligently hung a chandelier in a public-house. . . . It seems to me that the (latter) case was really decided on the ground of the uncertainty of the declaration as to the relation between the plaintiff and the defendant. I must say I should myself have felt some difficulty in coming to the same conclusion as the Court came to in that case.

But I do not think that the case is really an authority which bears upon the circumstances of the present case.

Collis v. Selden, *not applied*.

Thruswell v. Handyside (1888) 57 L. J. Q. B. 347; 20 Q. B. D. 359; 58 L. T. 344; 52 J. P. 279.—HAWKINS and GRANTHAM, JJ.

Southcote v. Stanley (1856) 1 H. & N. 247; 25 L. J. Ex. 339.—EX., *distinguished*.

Tebbutt v. Bristol and Exeter Ry. (1870) 40 L. J. Q. B. 73; L. R. 6 Q. B. 73; 23 L. T. 772; 19 W. R. 383.—Q.B.

Southcote v. Stanley, *commented on*.

Watling v. Oastler (1871) L. R. 6 Ex. 73; 40 L. J. Ex. 43; 23 L. T. 815; 19 W. R. 388.—EX.

Southcote v. Stanley.

Distinguished, Sandys v. Florence (1878) 47 L. J. C. P. 598.—C.P.D.; *applied*, Tolhausen v. Davies (1888) 57 L. J. Q. B. 396; 59 L. T. 436; 52 J. P. 804.—Q.B.D. (affirmed, 58 L. J. Q. B. 98.—C.A.).

Wilkinson v. Fairrie (1862) 1 H. & C. 633; 32 L. J. Ex. 73; 9 Jur. (N.S.) 280; 7 L. T. 599.—EX., *commented on*.

Indermaur v. Dames (1867) 16 L. T. 293; 35 L. J. C. P. 184; L. R. 1 C. P. 274.—C.P.; on appeal, 36 L. J. C. P. 181; L. R. 2 C. P. 311; 16 L. T. 293; 15 W. R. 434.—EX. CH.

BLACKBURN, J.—I always thought that the decision in *Wilkinson v. Fairrie* could only be supported on the ground that the plaintiff chose to go wandering about in the dark, looking for the defendant's foreman, in a way that the defendant could not expect him to go, and he was to all intents a volunteer.—p. 294.

Wilkinson v. Fairrie, *overruled*.

Paddock v. N. E. Ry. (1868) 18 L. T. 60.—EX. CH.

Indermaur v. Dames (1867) 36 L. J. C. P. 181; L. R. 2 C. P. 311; 16 L. T. 293; 15 W. R. 434.—EX. CH., *distinguished*.

Brooks v. Courtney (1869) 20 L. T. 440.—Q.B. LUSH, J.—There the plaintiff was exposed to a danger he had no right to expect. Here the plaintiff was well aware of the danger.—p. 441.

Indermaur v. Dames, *applied*.

John v. Bacon (1870) 39 L. J. C. P. 365; L. R. 5 C. P. 437; 22 L. T. 477; 18 W. R. 894.—C.P.; King v. G. W. Ry. (1871) 24 L. T. 583.—C.P.; Manchester, S. & L. Ry. v. Woodcock (1871) 25 L. T. 335.—Q.B.

Indermaur v. Dames, *referred to*.

Woodley v. Metropolitan Ry. (1877) 46 L. J. Ex. 521; 2 Ex. D. 384; 36 L. T. 419.—C.A.; Watkins v. G. W. Ry. (1877) 46 L. J. C. P. 817; 37 L. T. 193; 25 W. R. 905.—LOPES and DENMAN, JJ.

Indermaur v. Dames, *followed*.

White v. France (1877) 46 L. J. C. P. 823; 2 C. P. D. 308; 25 W. R. 878.—C.P.D.

Indermaur v. Dames, *applied*.

Burchell v. Rickisson (1880) 50 L. J. Q. B. 101.—LINDLEY and LOPES, JJ.; Heaven v. Pender (1883)—C.A. (*infra*); and Batchelor v. Fortescue (1883) 11 Q. B. D. 474; 49 L. T. 644.—Q.B.D. (affirmed, C.A.); Elliott v. Hall (*or* Nail-

stone Colliery Co.) (1885) 54 L. J. Q. B. 518; 15 Q. B. D. 315; 34 W. R. 16.—GROVE and SMITH, JJ.

Indermaur v. Dames, *dictum referred to*.

Thomas v. Quartermaine (1887) 56 L. J. Q. B. 340; 18 Q. B. D. 685; 57 L. T. 537; 35 W. R. 555; 51 J. P. 516.—C.A. BOWEN and FRY, L.JJ.; ESHER, M.R., *dissenting*.

Indermaur v. Dames, *considered and not applied*.

O'Sullivan v. O'Connor (1887—8) 22 L. R. Ir. 467, 472.—Q.B.D. (*affirmed*, C.A.).

Indermaur v. Dames, *considered*.

Marney v. Scott (1899) 68 L. J. Q. B. 736; [1899] 1 Q. B. 986; 47 W. R. 666.—BIGHAM, J.

Smith v. London and St. Katharine Docks Co.

(1868) 37 L. J. C. P. 117; L. R. 3 C. P. 326; 18 L. T. 403; 16 W. R. 728.—C.P., *followed*.

King v. G. W. Ry. (1871) 24 L. T. 583.—C.P.; Heaven v. Pender (1883)—C.A. (*infra*).

Smith v. London and St. Katharine Docks Co., *distinguished*.

O'Neil v. Everest (1892) 61 L. J. Q. B. 453; 66 L. T. 396; 7 Asp. M. C. 163; 56 J. P. 612.—C.A. (See extract, *infra*.)

Smith v. London and St. Katharine Docks Co., *applied*.

Miller v. Hancock (1893) [1893] 2 Q. B. 177; 4 R. 478; 69 L. T. 214; 41 W. R. 578; 57 J. P. 758.—C.A. ESHER, M.R., BOWEN and KAY, L.JJ.

Heaven v. Pender, 51 L. J. Q. B. 465; 9 Q. B. D. 302; 47 L. T. 163; 30 W. R. 749.—FIELD and CAVE, JJ.; *reversed*, (1883) 52 L. J. Q. B. 702; 11 Q. B. D. 503; 49 L. T. 357; 47 J. P. 709.—C.A. BRETT, M.R., COTTON and BOWEN, L.JJ.

Heaven v. Pender, *applied*.

Elliott v. Hall (*or* Nailstone Colliery Co.) (1885) 54 L. J. Q. B. 518; 15 Q. B. D. 315; 34 W. R. 16.—GROVE and SMITH, JJ.; Thruswell v. Handyside (1888) 57 L. J. Q. B. 347; 20 Q. B. D. 359, 363; 58 L. T. 344; 52 J. P. 279.—Q.B.D.; Cann v. Willson (1888) 57 L. J. Ch. 1034; 39 Ch. D. 39; 59 L. T. 723; 37 W. R. 23.—CHITTY, J. (*but this case has been overruled, see infra*, col. 1976).

Heaven v. Pender, *distinguished*.

O'Neil v. Everest (1892) 61 L. J. Q. B. 453; 66 L. T. 396; 7 Asp. M. C. 163; 56 J. P. 612.—C.A. LORD HERSCHELL, LINDLEY and KAY, L.JJ.

LORD HERSCHELL.—In both those cases [*Smith v. London and St. Katharine Docks Co.* and *Heaven v. Pender*] there was a concealed danger, which could not have been avoided by the persons using the premises. I will assume that if the barge had been in a condition inherently dangerous, this case would have come within those authorities, and that an action would lie. But in the present case there is certainly no concealment about the danger which is said to exist. The negligence which is alleged is not providing the barge with a cover for the hatchway.—p. 455.

Heaven v. Pender, *distinguished*.

Le Lievre v. Gould (1893) 62 L. J. Q. B. 353; [1893] 1 Q. B. 491; 4 R. 274; 68 L. T. 626; 41 W. R. 468; 57 J. P. 484.—C.A. See extract, *infra*, col. 1976.

Heaven v. Pender, explained.

Hopkins v. G. E. Ry. (1895) 60 J. P. 86.—
C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Heaven v. Pender, distinguished.

Caledonian Railway v. Mulholland (1897) 67 L. J. P. C. 1; [1898] A. C. 216; 77 L. T. 570; 46 W. R. 236.—H.L. (SC.).

LORD HERSCHELL.—I am quite unable to see that that case has any application to the present case at all. This wagon, at the time it was being used, was being used on a new journey initiated by the Glasgow and S. W. Railway for their purposes, and there was nothing in it which can be said to be comparable to a trap created by or permitted to exist by the Caledonian Co., into which they invited and led the deceased man to come. Therefore *Heaven v. Pender* seems to me entirely without application to the present case; and, as I have said, I am quite unable to see any duty resting upon the Caledonian Co. to the deceased man, a breach of which has cost the loss of his life, and consequently a right of action in the plaintiff.—p. 4.

Heaven v. Pender.

Referred to, Marney v. Scott (1899) 68 L. J. Q. B. 736; [1899] 1 Q. B. 986; 47 W. R. 666.—BIGHAM, J.; *discussed and applied*, Macdonald v. Wyllie (1898) 1 Fraser 339.—CT. OF SESS.; *adopted*, Milburn v. Jamaica Fruit. &c., Co. (1900) 69 L. J. Q. B. 860; [1900] 2 Q. B. 540, 550; 83 L. T. 321; 5 Com. Cas. 346.—C.A.; *discussed*, Earl v. Lubbock (1904) 74 L. J. K. B. 121; [1905] 1 K. B. 253; 91 L. T. 830; 53 W. R. 145.—C.A.; *and* Traill v. Aktieselskabet Dalbeattie (1904) 6 Fraser 798.—CT. OF SESS.

Lygo v. Newbold (1854) 32 L. J. Ex. 108; 9 Ex. 302; 2 C. L. R. 449; 2 W. R. 158.—EX., *observations adopted*.

Harris v. Perry (1903) 72 L. J. K. B. 725; [1903] 2 K. B. 219; 89 L. T. 174.—C.A.

Gautret v. Egerton (1867) 36 L. J. C. P. 191; L. R. 2 C. P. 371; 16 L. T. 17; 15 W. R. 638.—C.P.

Discussed and distinguished, Bulman v. The Furness Ry. (1875) 32 L. T. 430.—EX.; Sandys v. Florence (1878) 47 L. J. C. P. 598.—C.P.D.; *considered and applied*, Heaven v. Pender (1883) C.A. (*supra*); *referred to*, Harris v. Perry (1903) 72 L. J. K. B. 725; [1903] 2 K. B. 219, 225; 89 L. T. 174.—C.A.

Where Contractor Employed.

Butler v. Hunter (1862) 7 H. & N. 826; 31 L. J. Ex. 214; 10 W. R. 214.—EX., *disapproved*.

Hughes v. Percival (1883) 8 App. Cas. 443; 52 L. J. Q. B. 719; 49 L. T. 189; 31 W. R. 725.—H.L. (E.).

LORD BLACKBURN.—I do not think the case of *Butler v. Hunter* is consistent with my view of the law. I do not know whether the Court of Exchequer meant to deny that such a duty was cast upon the defendant in that case, or meant to say that he might escape liability by employing a contractor. If either was meant by the Court of Exchequer, I am obliged to differ from them.—p. 447.

Butler v. Hunter.

Referred to, Lemaître v. Davis (1881) 51 L. J. Ch. 173; 19 Ch. D. 281, 292; 46 L. T. 407; 30 W. R. 360; *applied*, Kiddle v. Lovett (1885) 16 Q. B. D. 605, 611; 34 W. R. 518.—DENMAN, J.

Francis v. Cockrell (1870) 39 L. J. Q. B. 291; L. R. 5 Q. B. 501; 10 B. & S. 850; 23 L. T. 466; 18 W. R. 1205.—EX. CH., *explained and applied*.

John v. Bacon (1870) 39 L. J. C. P. 365; L. R. 5 C. P. 437; 22 L. T. 477; 18 W. R. 894.—C.P.

Francis v. Cockrell, distinguished.

Carstairs v. Taylor (1871) 40 L. J. Ex. 129; L. R. 6 Ex. 217; 19 W. R. 723.—EX.

KELLY, C.B.—*Francis v. Cockrell* only shows that where a chattel is supplied on hire for a consideration there is an implied undertaking that it is reasonably fit for the purpose for which it is supplied. Here there is no doubt that the lower floor let to the plaintiffs was fit for the purpose for which it was hired.—p. 130.

Francis v. Cockerell, discussed.

Wright v. Midland Ry. (1873) 42 L. J. Ex. 189; L. R. 8 Ex. 137; 29 L. T. 436; 21 W. R. 460.—EX.

Francis v. Cockrell, explained.

Searle v. Laverick (1874) 43 L. J. Q. B. 43; L. R. 9 Q. B. 122; 30 L. T. 89; 22 W. R. 367.—Q.B. (*see judgment*); Kopitoff v. Wilson (1876) 45 L. J. Q. B. 436; 1 Q. B. D. 377; 34 L. T. 677; 24 W. R. 706.—Q.B.D.

Francis v. Cockrell, not followed: observations disapproved.

Randall v. Newson (1877) 46 L. J. Q. B. 259; 2 Q. B. D. 102; 36 L. T. 164; 35 W. R. 313.—C.A.

MELLISH, L.J. (for the Court).—*Francis v. Cockrell* is based upon *Readhead v. Midland Ry.* (*post*, cols. 2667—8), and is therefore of itself no more a binding authority on us in this case than the other. It is true, however, that the Lord Chief Baron, going further than the doubt expressed by M. Smith, J., does recognise the limitation [that the article is reasonably fit for the purpose intended] as applicable to contracts of purchase and sale. But the statement of the learned judge was not necessary, and therefore is not binding, though, of course, inviting a careful consideration. After such consideration, for the reasons before given, we are of opinion that the undertaking of the present defendant was not restricted by the limitation applied to the contract of carriage in *Readhead v. Midland Ry.*—p. 264.

Francis v. Cockrell, opinion adopted.

Hyman v. Nye (1881) 6 Q. B. D. 685; 44 L. T. 919; 45 J. P. 554.—Q.B.D.

Francis v. Cockrell, considered and headnote questioned.

Marney v. Scott (1899) 68 L. J. Q. B. 736; [1899] 1 Q. B. 986; 47 W. R. 666.—BIGHAM, J.

Hole v. Sittingbourne Ry. (1861) 30 L. J. Ex. 81; 6 H. & N. 488; 3 L. T. 750; 9 W. R. 274.—EX.

Adopted, Butler v. Hunter (1862) 31 L. J. Ex. 214; 7 H. & N. 826; 10 W. R. 214.—EX.;

Gray v. Pullen (1864) 34 L. J. Q. B. 265; 5 B. & S. 970; 11 L. T. 569; 13 W. R. 257.—EX. CH.; Dalton v. Angus (1881) 50 L. J. Q. B. 689; 6 App. Cas. 740, 829; 44 L. T. 844; 30 W. R. 191; 46 J. P. 132.—H.L. (E.); *considered and applied*, Maxwell v. British Thomson Houston Co. (1902) 18 Times L. R. 278.—C.A.

Knight v. Fox (1850) 20 L. J. Ex. 9; 5 Ex. 721; 14 Jur. 963.—EX., *followed*.
Overton v. Freeman (1852) 21 L. J. C. P. 52; 3 Car. & K. 49; 11 C. B. 867; 16 Jur. 65.—C.P.

Knight v. Fox and Overton v. Freeman, *followed*.
Peachey v. Rowland (1853) 13 C. B. 182; 22 L. J. C. P. 81; 17 Jur. 764.—C.P.

Reedie v. L. & N. W. Ry. (1849) 20 L. J. Ex. 65; 4 Ex. 244; 6 Railw. Cas. 184.—EX.
Distinguished, Jones v. Liverpool Corporation (1885) 54 L. J. Q. B. 345; 14 Q. B. D. 890, 893; 33 W. R. 551; 49 J. P. 311.—Q.B.D.; *applied*, The Bernind (1887).—C.A. (*ante*, col. 1953).

Reedie v. L. & N. W. Ry. and Steel v. S. E. Ry. (1855) 16 C. B. 550.—C.B., *distinguished and approved*.
Hardacre v. Idle District Council (1896) 65 L. J. Q. B. 363; [1896] 1 Q. B. 335; 74 L. T. 69; 44 W. R. 323; 60 J. P. 196.—C.A. LINDLEY, SMITH and RIGBY, L.JJ.

Reedie v. L. & N. W. Ry., *discussed*.
Greenwell v. Low Beechburn Colliery Co. (1897) 66 L. J. Q. B. 643; [1897] 2 Q. B. 165; 76 L. T. 759.—BRUCE, J.

Pearson v. Cox (1877) 2 C. P. D. 369; 36 L. T. 495.—C.A., *applied*.
Watkins v. G. W. Ry. (1877) 46 L. J. C. P. 817, 821; 37 L. T. 193; 25 W. R. 509.—C.P.D.

Rapson v. Cubitt (1842) 11 L. J. Ex. 271; 9 M. & W. 710; Car. & M. 64; 6 Jur. 606.—EX., *referred to*.
Parry v. Smith (1879) 48 L. J. C. P. 731; 4 C. P. D. 325; 41 L. T. 93; 27 W. R. 801.—LOPES, J.

Boulton v. Crowther (1824) 2 B. & C. 703; 4 D. & R. 195; 2 L. J. (o.s.) K. B. 139.—K.B., *distinguished*.
Att.-Gen. v. Colney Hatch Lunatic Asylum (1868) 38 L. J. Ch. 265; L. R. 4 Ch. 146; 19 L. T. 708; 17 W. R. 240.—L.C. and L.J.

Boulton v. Crowther, *adopted*.
Nutter v. Accrington Local Board (1878) 48 L. J. Q. B. 487; 4 Q. B. D. 375; 40 L. T. 802.—C.A.; *affirmed*, (1880) 43 L. T. 710.—H.L. (E.).

Boulton v. Crowther, *referred to*.
East Fremantle Corporation v. Annois (1901) 71 L. J. P. C. 39; [1902] A. C. 213; 85 L. T. 732.—C.A.

Persons with Statutory Powers.

Duncan v. Findlater (1839) 6 Cl. & F. 894.—H.L. (SC.), *distinguished*.
Southampton and Itchen Roads Co. v. South-

ampton Local Board (1858) 28 L. J. Q. B. 41; 8 El. & Bl. 801; 6 W. R. 223.—Q.B.

Duncan v. Findlater, *discussed and dicta denied*.

Mersey Docks Trustees v. Gibbs (1864) 35 L. J. Ex. 225; 11 H. L. Cas. 486; L. R. 1 H. L. 93; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.—H.L. (E.). *See extract, infra*.

Duncan v. Findlater, *discussed*.
Harris v. G. W. Ry. (1876) 45 L. J. Q. B. 729; 1 Q. B. D. 515; 34 L. T. 647; 25 W. R. 63.—Q.B.D.

Duncan v. Findlater, *dictum referred to*.
Wheeler v. Public Works Commissioners (1901) [1903] 2 Ir. R. 202, 256.—C.A.

Metcalf v. Hetherington (1855) 24 L. J. Ex. 314; 11 Ex. 257; 5 H. & N. 719.—EX., *discussed*.

Gibbs v. Liverpool Docks Trustees (1858) 27 L. J. Ex. 321; 3 H. & N. 164; 4 Jur. (N.S.) 636.—EX. CH.; *reversing* 26 L. J. Ex. 109; 1 H. & N. 439.—EX.

Metcalf v. Hetherington, *referred to*.
Ruck v. Williams (1858) 27 L. J. Ex. 357; 3 H. & N. 308; 6 W. R. 622.—EX.

Metcalf v. Hetherington, *held overruled*.
Whitehouse v. Fellowes (1861) 10 C. B. (N.S.) 765; 30 L. J. C. P. 305; 4 L. T. 177; 9 W. R. 557.—C.P.

WILLES, J.—*Metcalf v. Hetherington* received a fatal blow in *Gibbs v. Liverpool Docks Trustees* (3 H. & N. 164).—p. 777.

Metcalf v. Hetherington, *observed upon*.
Brownlow v. Metropolitan Board of Works (1862) 13 C. B. (N.S.) 768; 31 L. J. C. P. 140; 8 Jur. (N.S.) 891; 6 L. T. 187; 10 W. R. 384.—C.P.; *affirmed*, (1864) 16 C. B. (N.S.) 546; 33 L. J. C. P. 233; 12 W. R. 871.—EX. CH.

WILLIAMS, J.—That case is certainly inconsistent with *Gibbs v. Liverpool Docks Trustees* (3 H. & N. 164).—p. 784.

Metcalf v. Hetherington, *observed upon*.
Mersey Docks Trustees v. Gibbs (1866) L. R. 1 H. L. 93; 35 L. J. Ex. 225; 11 H. L. Cas. 486; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.—H.L. (E.).

BLACKBURN, J. (for the consulted Judges).—With the greatest respect for those who joined in that decision [*Metcalf v. Hetherington*] we think it was erroneous.—p. 120.

[LORD WENSLEYDALE would have been disposed to abide by *Metcalf v. Hetherington* had he not thought the question decided in an opposite sense by *Mersey Docks, &c. v. Cameron and Jones v. Mersey Docks, &c.* (11 H. L. C. 443). LORD WESTBURY did not specially mention the case, but expressed a general concurrence on points of law with Blackburn, J.]

[With respect to the case of *Duncan v. Findlater* (*supra*), which had been impugned by Blackburn, J.]

LORD WESTBURY.—I think it desirable to say a few words with reference to the difficulty felt by the learned judges in consequence of certain observations that fell from Lord Chancellor Cottenham, and which are reported in the case

of *Duncan v. Findlater*. I can well divine what was at that time passing in the mind of Lord Cottenham. He seems to have thought that if persons constituting a corporation are trustees of property for the direct benefit of certain individuals, and there is no other than corporate property,—and, if in their capacity as trustees an act is done, by order of the corporation, which amounts to a tort or trespass, and gives a right of action and a right to damages to any private individual, a Court of equity would not permit an execution to issue, on any judgment that might be recovered, against the property of the corporation, seeing that it is property held upon trust for certain beneficiaries, and that the corporation, as trustees, have no interest therein. . . . Those observations of Lord Cottenham which directly tend to this conclusion—that the corporation in the case supposed would not be amenable, nor would the corporate property be liable, but that the party injured would be obliged to have resort to the individual members who directed the act to be done—would, if they were recognised as the law, undoubtedly lead to very great evil and injury. My lords, I confine my observations to the case of a remedy sought for a wrongful act, because your lordships are very well aware that the rule has been well established that, if in the case of contract entered into with a corporation created by Act of Parliament, the contract is made by the corporation *ultra vires* of the corporation, the party may not be entitled to recover under that contract. That may be a very convenient rule, and it is not at all affected by the considerations we are now dealing with. But with regard to the observations attributed to the noble and learned Chancellor, Lord Cottenham, I conceive that they ought not to be taken or regarded as establishing any rule that at all interferes with the decision at which your lordships have arrived in the case now before you.—p. 126.

Southampton and Itchen Roads Co. v. Southampton Local Board (1858) 28 L. J. Q. B. 41; 8 El. & Bl. 801; 6 W. R. 223.—Q.B.

Observations applied, **Mersey Docks Trustees v. Gibbs** (1866) 35 L. J. Ex. 225; L. R. 1 H. L. 93; 11 H. L. Cas. 486; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.—H.L. (E.); *explained and applied*, *Reg. v. Selby Dam Commissioners* (1892).—C.A. (*infra*, col. 1974); *approved and applied*, *Bostock v. Ramsey Urban Council* (1900) 64 L. J. Q. B. 945; [1900] 2 Q. B. 616, 624; 83 L. T. 358; 64 J. P. 660.—C.A.

Mersey Docks Trustees v. Gibbs (1866) 35 L. J. Ex. 225; L. R. 1 H. L. 93; 11 H. L. Cas. 486; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.—H.L. (E.); *applied*.

Coe v. Wise (1866) L. R. 1 Q. B. 711; 7 B. & S. 831; 14 L. T. 891; 14 W. R. 865.—EX. CH.; *reversing* 33 L. J. Q. B. 281; 5 B. & S. 440.—Q.B.

Mersey Docks Trustees v. Gibbs, applied.

Worral Waterworks Co. v. Lloyd (1866) L. R. 1 C. P. 719.—C.P.

Mersey Docks Trustees v. Gibbs, principle applied.

Campbell v. Hornsby (1873) Ir. R. 7 C. L. 540.—EX. CH.

Mersey Docks Trustees v. Gibbs, dicta applied.

Att.-Gen. v. Colney Hatch Lunatic Asylum (1868) 38 L. J. Ch. 265; L. R. 4 Ch. 146; 19 L. T. 708; 17 W. R. 240.—L.C. and L.J.

Mersey Docks Trustees v. Gibbs, followed.

Winch v. Thames Commissioners (1874) 43 L. J. C. P. 167; L. R. 9 C. P. 378; 31 L. T. 128; 22 W. R. 879.—EX. CH.

Mersey Docks Trustees v. Gibbs, explained and not applied.

Forbes v. Lee Conservancy Board (1879) 48 L. J. Ex. 402; 4 Ex. D. 116, 123; 28 W. R. 688.—POLLOCK, B.

Mersey Docks Trustees v. Gibbs, approved and applied.

Reg. v. Williams (1884) 9 App. Cas. 418; 53 L. J. P. C. 64; 51 L. T. 546.—P.C.

[*Headnote*.—Where the executive government possessed the control and management of a tidal harbour, with authority to remove obstructions in it, and the public had a right to navigate therein, subject to the harbour regulations and without payment of harbour dues, the staiths and wharves belonging to the executive government which received wharfage and tonnage dues in respect of vessels using them:—Held, that there was a duty imposed by law upon the executive government to take reasonable care that vessels using the staiths in the ordinary manner might do so without damage to the vessels. Reasonable care is not shown when after notice of danger at a particular spot no inquiry is made as to its existence and extent, and no warning is given. The principle of liability for negligence established by *Parnaby v. Lancaster Canal Co.* and *Mersey Dock Trustees v. Gibbs*, approved of and applied to the executive government in the above circumstances, which were distinguishable in respect of non-receipt of harbour dues, notwithstanding the Crown Suits Act, 1881, sect. 37.]

Mersey Docks Trustees v. Gibbs, applied.

Last v. London Assurance (1885) 55 L. J. Q. B. 92; 10 App. Cas. 438, 444; 53 L. T. 634; 34 W. R. 233.—H.L. (E.); *Lowther v. Curwen* (1887) 58 L. T. 168, 172.—KAY, J.

Mersey Docks Trustees v. Gibbs.

Distinguished, *The Moorcock* (1889) 58 L. J. Ad. 73; 14 P. D. 64, 69; 60 L. T. 654; 37 W. R. 439.—C.A.; *dictum adopted*, *New York Life Insurance Co. v. Styles* (1889) 59 L. J. Q. B. 291; 14 App. Cas. 381, 389; 61 L. T. 201.—H.L. (E.).

Mersey Docks Trustees v. Gibbs, approved.

Gibraltar Sanitary Commissioners v. Orfila (1890) 59 L. J. P. C. 95; 15 App. Cas. 400; 63 L. T. 58.—P.C. LORD WATSON, SIR BARNES PEACOCK, and SIR R. COUCH.

Mersey Docks Trustees v. Gibbs, explained and applied.

Reg. v. Selby Dam Drainage Commissioners (1892) 61 L. J. Q. B. 372; [1892] 1 Q. B. 348; 66 L. T. 17; 56 J. P. 356.—C.A. ESHER, M.R. and FRY, L.J.

Mersey Docks Trustees v. Gibbs.

Considered and distinguished, *Dunbar v. Ardee Union* (1896) [1897] 2 Q. B. 76.—C.A.; *Taff Vale Ry. v. Amalgamated Society* (1900) [1901] 1 Q. B. 170, 176; 83 L. T. 474; 49 W. R. 101;

64 J. P. 788.—C.A. (reversed, H.L. (E.)); *applied*, Wheeler v. Public Works Commissioners (1901) [1903] 2 Ir. R. 202.—C.A.

Ruck v. Williams (1858) 3 H. & N. 308; 27 L. J. Ex. 357, 361; 6 W. R. 622.—EX. *Discussed*, Great Western Ry. of Canada v. Braid (1863) 1 Moore P. C. (N.S.) 101; 1 N. R. 527; 9 Jur. (N.S.) 339; 8 L. T. 31; 11 W. R. 144.—P.C.; *adopted*, Mersey Docks Trustees v. Gibbs (1866)—H.L. (E.) (*supra*); *observation adopted*, Stretton's Derby Brewery Co. v. Derby Corporation (1893) 63 L. J. Ch. 135; [1894] 1 Ch. 431; 8 L. 608; 69 L. T. 791; 42 W. R. 583.—ROMER, J.: *applied*, Taff Vale Ry. v. Amalgamated Society of Railway Servants [1901] A. C. 426, 432.—FARWELL, J. (reversed, C.A., but restored, H.L. (E.)).

Allen v. Hayward (1845) 15 L. J. Q. B. 99; 7 Q. B. 960; 4 Railw. Cas. 104; 10 Jur. 92.—Q.B., *followed*.
Reedie v. L. & N. W. Ry. (1849) 20 L. J. Ex. 65; 4 Ex. 244; 6 Railw. Cas. 184.—EX.

Gray v. Pullen, 32 L. J. Q. B. 169; 11 W. R. 616; 8 L. T. 201.—Q.B.; *reversed*, (1864) 5 B. & S. 970; 34 L. J. Q. B. 265; 11 L. T. 569; 13 W. R. 257.—EX. CH.

Gray v. Pullen, *questioned*.
Wilson v. Merry (1868) L. R. 1 H. L. (Sc.) 326; 19 L. T. 30.—H.L. (Sc.)

Gray v. Pullen, *considered and applied*.
Bower v. Peate (1876) 45 L. J. Q. B. 446; 1 Q. B. D. 321; 35 L. T. 321.—Q.B.D.; **Smith v. West Derby Local Board** (1878) 47 L. J. C. P. 607; 3 C. P. D. 423; 38 L. T. 716; 27 W. R. 137.—C.P.D.

Gray v. Pullen, *not applied*.
Barham v. Ipswich Dock Commissioners (1885) 54 L. T. 23, 26.—HUDDLESTON, B.

Gray v. Pullen, *discussed and applied*.
Groves v. Wimborne (Lord) 67 L. J. Q. B. 862; [1898] 2 Q. B. 402; 79 L. T. 284; 47 W. R. 87.—C.A.

Hardaker v. Idle District Council, 59 J. P. 808.—WRIGHT, J.; *reversed*, (1896) 65 L. J. Q. B. 363; [1896] 1 Q. B. 335; 74 L. T. 69; 44 W. R. 323; 60 J. P. 196.—C.A.

Hardaker v. Idle District Council, *applied*.
Groves v. Wimborne (1898)—C.A. (*supra*); **Jordeson v. Sutton, & Gas Co.** (1898) 67 L. J. Ch. 666; [1898] 2 Ch. 614, 627; 79 L. T. 478.—NORTH, J. (affirmed, C.A.); **Penny v. Wimbledon Urban Council** (1899) 68 L. J. Q. B. 704; [1899] 2 Q. B. 72; 80 L. T. 615; 47 W. R. 565; 63 J. P. 406.—C.A.

Hardaker v. Idle District Council and Penny v. Wimbledon Urban Council (*supra*), *followed*.
The Snark (1900) 69 L. J. P. 41; [1900] P. 105; 82 L. T. 42; 48 W. R. 279; 8 Asp. M. C. 50.—C.A. SMITH, RIGBY and COLLINS, L.JJ.

In other Cases.

George v. Skivington (1869) 39 L. J. Ex. 8; L. R. 5 Ex. 1; 21 L. T. 495; 18 W. R. 118.—EX., *observations adopted*.
Francis v. Cockerell (1870) 39 L. J. Q. B. 291;

L. R. 5 Q. B. 501; 10 B. & S. 850; 23 L. T. 466; 18 W. R. 1205.—EX. CH.

George v. Skivington.

Approved, but distinguished, Cunningham v. G. N. Ry. (1883) 49 L. T. 392, 393; 48 J. P. 134.—C.A.; *considered*, Heaven v. Pender (1883) 52 L. J. Q. B. 702; 11 Q. B. D. 503, 512; 49 L. T. 357; 47 J. P. 709.—C.A.

George v. Skivington, followed.

Cann v. Willson (1888) 57 L. J. Ch. 1034; 39 Ch. D. 39; 59 L. T. 723; 37 W. R. 23.—CHITTY, J. *But see infra*.

Cann v. Willson (1888) 57 L. J. Ch. 1034; 39 Ch. D. 39; 59 L. T. 723; 37 W. R. 23.—CHITTY, J., *doubted*.

Scholes v. Brook, 63 L. T. 837.—ROMER, J.; *affirmed*, (1891) 64 L. T. 674.—C.A.

Cann v. Willson, overruled.

Scholes v. Brook, *approved*.
Le Lievre v. Gould (1893) 62 L. J. Q. B. 353; [1893] 1 Q. B. 491; 4 R. 274; 68 L. T. 626; 41 W. R. 468; 57 J. P. 484.—C.A.

BOWEN, L.J.—On this point the plaintiffs relied upon *Cann v. Willson*, which if it is good law, is in their favour. It is, therefore, necessary to refer to *Derry v. Peek* (*ante*, vol. i., col. 403), which, in my judgment, has overruled *Cann v. Willson*. . . . The first thing . . . that *Derry v. Peek* decided was that a plaintiff cannot succeed in an action of fraud without proving that the defendant was fraudulent, and that negligence does not of itself, in the absence of dishonesty, amount to fraud.

But *Derry v. Peek* decided something further. It decided that, in such cases as the present, there is no duty enforceable in law to be careful. Negligent misrepresentation does not amount to deceit, and only gives rise to a cause of action if there is a duty upon the defendant to be careful; and in *Derry v. Peek* the H. L. said that the circumstances raised no such duty. Is there such a duty upon the defendant here? It was sought to invoke the authority of *Cann v. Willson* to persuade us that there was such a duty. The law of England might, of course, be that such a duty was imposed in such cases; but the question is what the law is. It is said that *Heaven v. Pender* and cases of that class show that the defendant had a duty to the plaintiff. But it is useless for us to embark upon the consideration of cases decided upon totally different circumstances. It is perfectly plain that the owner of a chattel, such as a horse or a gun of such a character that if it is used carelessly it will be likely to injure a third person who is near, is bound to be careful in the use of it. The owner of premises is in the same position. If he knows that they are in a dangerous condition, and that people are coming there to work by his permission and invitation, he must take reasonable care to protect them. That is so because he has the conduct and control of the premises. *Heaven v. Pender* is an instance of this latter class of case, but it has nothing to do with the present case. It could only have a bearing upon it if it decided that a person making a certificate is liable, if it is not true, to any person he may have reason to suppose is likely to act upon it. But the law of England does not regard a certificate as a gun or other dangerous instrument,

and does not, in the absence of contract and of fraud, hold a man responsible for drawing a document carelessly. In *Cunn v. Willson*, owing to a misapprehension of *Heaven v. Pender*, it was held that such a duty existed. But when *Scholes v. Brook* (63 Law Times, 837) came before Romer, J., that learned judge, after his attention had been called to the decision of the H. L. in *Derry v. Peek*, said: "Cases have been cited which, it is said, establish such a liability. But, apart from *Cunn v. Willson*, it appears to me that the authorities may be divided into two classes. One of those classes is when one person invites another to come upon his premises, in which case the person giving the invitation must use reasonable care to ensure that the condition of the premises does not subject the person invited to danger. Another class is where a person becomes liable for using or leaving about in such a way as to cause danger an instrument which is dangerous in itself. Beyond those two classes I am not aware, for the moment, of any circumstances under which a person can be held liable in a case such as that which has been argued before me. But the present case falls within neither of those two classes. An invitation to advance money or take shares on a valuation, or on a prospectus, does not, I think, come within the first class, nor can a valuation or a prospectus be considered a dangerous instrument within the meaning of that term as used above by me; and, that being so, I think that, if the plaintiff had not established a contract, this action must have failed, unless I followed *Cunn v. Willson*; but with reference to that case, after the speeches of the learned lords in *Derry v. Peek*, I find a difficulty in following it, and I think the case would not have been decided as it was after the judgment of the H. L., which, by implication, negatives the existence of any such general rule as laid down in *Cunn v. Willson*." It is obvious from this that Romer, J. took exactly the same view of *Heaven v. Pender* as we are now doing.—pp. 356, 357, 358.

Le Lievre v. Gould (1893) 62 L. J. Q. B. 353; [1893] 1 Q. B. 491; 4 R. 274; 68 L. T. 626; 41 W. R. 468; 57 J. P. 484.—C.A., *commented on*.

Petrie v. Owners of S.S. Rostrevor [1898] 2 Ir. R. 556.—ASHBOURNE, L.C., FITZGIBBON and HOLMES, L.JJ.

Le Lievre v. Gould, *distinguished*.

Pritty v. Child (1902) 71 L. J. K. B. 512.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Le Lievre v. Gould, *observations applied*.

O'Gorman v. O'Gorman (1902) [1903] 2 Ir. R. 573, 584.—K.B.D.

3. ACTIONS FOR NEGLIGENCE.

Read v. G. E. Ry. (1868) 37 L. J. Q. B. 278; L. R. 3 Q. B. 554; 18 L. T. 822; 16 W. R. 1040; 9 B. & S. 714.—Q.B., *followed*.

Griffiths v. Dudley (Earl) (1882) 51 L. J. Q. B. 543; 9 Q. B. D. 357; 47 L. T. 10; 30 W. R. 797; 46 J. P. 711.—FIELD and CAVE, JJ.

Armstrong v. S. E. Ry. (1847) 11 Jur. 758.—

PARKE, B., *dicta approved and adopted*.

Bowley v. L. & N. W. Ry. (1873) 42 L. J. Ex.

153; L. R. 8 Ex. 221, 230; 29 L. T. 180; 21 W. R. 869.—EX. CH.

Osborn v. Gillett (1873) 42 L. J. Ex. 53; L. R. 8 Ex. 88; 28 L. T. 197; 21 W. R. 409.—EX., *followed*.

Appleby v. Franklin (1885) 55 L. J. Q. B. 129; 17 Q. B. D. 93; 54 L. T. 135; 34 W. R. 231; 50 J. P. 359.—Q.B.D.

Franklin v. S. E. Ry. (1858) 3 H. & N. 211; 4 Jur. (N.S.) 565; 6 W. R. 573.—EX., *applied*.

Dalton v. S. E. Ry. (1858) 27 L. J. C. P. 227; 4 C. B. (N.S.) 296; 4 Jur. (N.S.) 711; 6 W. R. 574.—C.P.

Franklin v. S. E. Ry. and Dalton v. S. E. Ry., *commented on*.

Pym v. G. N. Ry. (1863) 32 L. J. Q. B. 377; 4 B. & S. 396; 10 Jur. (N.S.) 199; 11 W. R. 922.—EX. CH.; *affirming* 6 L. T. 537.—Q.B.

Franklin v. S. E. Ry., *distinguished*.

Sykes v. N. E. Ry. (1875) 44 L. J. C. P. 191; 32 L. T. 199; 23 W. R. 473.—C.P.

Franklin v. S. E. Ry. and Dalton v. S. E. Ry., *observations adopted*.

Wolfe v. G. N. Ry. of Ireland (1890) 26 L. R. Ir. 548.—C.A.

Johnston v. G. N. Ry. of Ireland (1887) 20 L. R. Ir. 4.—EX. D., *considered*.

Steele v. G. N. Ry. of Ireland (1890) 26 L. R. Ir. 96.—C.A.

Duckworth v. Johnson (1859) 4 H. & N. 653; 29 L. J. Ex. 25; 5 Jur. (N.S.) 630; 7 W. R. 655.—EX., *disapproved*.

Condon v. G. S. & W. Ry. (1865) 16 Ir. C. L. R. 415.—EX., *referred to*.

Hull v. G. N. Ry. (1890) 26 L. R. Ir. 289.—EX. D.

Duckworth v. Johnson; Condon v. G. S. & W. Ry., and Hull v. G. N. Ry. of Ireland (*supra*), *discussed*.

Wolfe v. G. N. Ry. of Ireland (1890) 26 L. R. Ir. 548.—C.A.

Blake v. Midland Ry. (1852) 18 Q. B. 93; 21 L. J. Q. B. 233; 16 Jur. 562.—Q.B., *observations adopted*.

The George and Richard (1871) L. R. 3 Adm. 466; 24 L. T. 717.—ADM. *And see* S. C. 20 W. R. 246.

Blake v. Midland Ry., *approved*.

Rowley v. L. & N. W. Ry. (1873) 42 L. J. Ex. 153; L. R. 8 Ex. 221; 29 L. T. 180; 21 W. R. 869.—EX. CH.

Blake v. Midland Ry., *observations applied*.

Kenrick v. Lawrence (1890) 25 Q. B. D. 99, 105; 38 W. R. 779.—WILLS, J.

Hicks v. Newport, Abergavenny and Hereford Ry. (1857) 4 B. & S. 403, n.—LORD CAMPBELL, *approved*.

Bradburn v. G. W. Ry. (1874) 44 L. J. Ex. 9; L. R. 10 Ex. 1; 31 L. T. 464; 23 W. R. 48.—EX.; *Grand Trunk Ry. of Canada v. Jennings* (1888) 58 L. J. P. C. 1; 13 App. Cas. 800; 59 L. T. 679; 37 W. R. 403.—P.C.

Bradburn v. G. W. Ry., applied.
Jebsen v. East and West India Dock Co. (1875)
 44 L. J. C. P. 181; L. R. 10 C. P. 300; 32 L. T.
 321; 23 W. R. 624.—C.P.

Hicks v. Newport, Abergavenny and Hereford Ry., approved.

Bradburn v. G. W. Ry. (supra), principle applied.

The Marpessa (1891) [1891] P. 403.—
 JEUNE, P.

Leggott v. G. N. Ry. (1876) 45 L. J. Q. B.
 557; 1 Q. B. D. 599; 35 L. T. 334; 24
 W. R. 784.—Q.B.D., *considered*.
Pulling v. G. E. Ry. (1882) 51 L. J. Q. B. 453;
 9 Q. B. D. 110, 112; 30 W. R. 798; 46 J. P. 617.
 —Q.B.D.

Adam v. British and Foreign Steamship Co.
 (1898) 67 L. J. Q. B. 844; [1898] 2 Q. B.
 430; 79 L. T. 31.—DARLING, J., *dissented*
from.
Davidsson v. Hill (1901) 70 L. J. K. B. 788;
 [1901] 2 K. B. 606; 85 L. T. 118; 49 W. R.
 630.—KENNEDY and PHILLIMORE, JJ.

PHILLIMORE, J.—That decision is in point,
 and if we decide now in favour of the plaintiff
 we must disagree with it. It rests mainly, I
 think, upon the principle that Acts of Parlia-
 ment are to be deemed not to apply to non-resi-
 dent aliens unless the Court is compelled so to
 apply them. There are a number of decisions
 upon the construction of the Merchant Shipping
 Act, 1854, which set forth this principle as
 applicable to the construction of statutes impos-
 ing a burden upon a foreigner. Perhaps the
 strongest of these is *Cope v. Doherty* (2 De
 G. & J. 614). But even in this case the reserva-
 tion of Knight Bruce, L.J. would make me
 pause. On the other hand, where it is a case of
 giving a remedy to a foreigner, the decision of
 Dr. Lushington in *The Milford*, and the con-
 stant practice which has followed upon that
 decision, is the other way. This latter position
 is, I think, sound.

Emblen v. Myers (1860) 6 H. & N. 54; 30
 L. J. Ex. 71; 2 L. T. 774; 8 W. R. 665.
 —EX.

Adopted, *Bell v. Midland Ry.* (1861) 30 L. J.
 C. P. 273; 10 C. B. (N.S.) 287; 7 Jur. (N.S.) 1200;
 4 L. T. 293; 9 W. R. 612.—C.P.; *applied*,
Thompson v. Hill (1870) L. R. 5 C. P. 564, 567;
 39 L. J. C. P. 264; 22 L. T. 820; 18 W. R.
 1074.—C.P.

NEGOTIABLE INSTRUMENT.

Lang v. Smyth (1831) 9 L. J. (O.S.) C. P.
 91; 7 Bing. 284; 5 M. & P. 78, *opinion*
adopted.
Goodwin v. Robarts (1876).—H.L. (E.) (*infra*).

Lang v. Smyth, applicable.
Picker v. London and County Banking Co.
 (1887) 56 L. J. Q. B. 299; 18 Q. B. D. 515; 35
 W. R. 469.—C.A. ESHER, M.R., BOWEN and
 FRY, L.JJ.

Crouch v. Crédit Foncier of England (1873)
 42 L. J. Q. B. 182; L. R. 8 Q. B. 374;
 29 L. T. 259; 21 W. R. 946.—Q.B., *distin-*
guished.

Goodwin v. Robarts (1876) 45 L. J. Ex. 748;
 1 App. Cas. 476; 35 L. T. 179; 24 W. R. 987.—
 H.L. (E.).

LORD SELBORNE.—The scrip in this case is not
 one of those contracts in writing which have their
 nature, incidents, and effects defined and regu-
 lated by British law, so that a judge in a British
 Court is bound without evidence to know whether
 (and how if at all) they are legally transferable,
 and to reject any evidence of a customary mode
 of transfer at variance with the law. It is not
 like the iron scrip which was the subject of Lord
 Cranworth's remarks in *Dixon v. Bozill* (3 Macq.
 H. L. 1), nor like the bonds in *Crouch v. Crédit*
Foncier. The Court of Q. B., in deciding that
 case, relied upon the distinction between English
 instruments made by an English company in
 England, and a public debt created by a foreign
 or colonial government, the title to portions of
 which is by them made to depend on the posses-
 sion of bonds, expressed to be transferable to the
 bearer or holder, on which there cannot properly
 be said to be any right of action at all, though
 the holder has a claim on a foreign government.
 The Russian and Australian scrip now before
 your Lordships belongs, in my judgment, to the
 latter and not to the former category. . . . I
 desire to express my entire agreement with what
 was said by the late M.R. (Lord Romilly) in *Smith*
v. Weggelin (*ante*, vol. i., col. 1366). . . . I agree
 with Bramwell, B. in thinking that, under these
 circumstances, there is no substantial difference
 between the present case and *Gorgier v. Miville*
 (*post*, col. 2548).—p. 751.

CAIRNS, L.C. and LORD HATHERLEY approved
 of *Gorgier v. Miville*.

Crouch v. Crédit Foncier of England, observa-
tions applied.

Twycross v. Dreyfus (1877) 46 L. J. Ch. 510,
 512; 5 Ch. D. 605, 611; 36 L. T. 752.—HALL,
 v.-c. (affirmed, C.A.); and *Mortgage Insurance*
Corporation v. Inland Revenue Commissioners
 (1888) 57 L. J. Q. B. 630; 21 Q. B. D. 352, 356;
 36 W. R. 833.—C.A.

Crouch v. Crédit Foncier of England, applied.
London and County Banking Co. v. London
and River Plate Bank (1888) 57 L. J. Q. B. 601;
 21 Q. B. D. 535; 61 L. T. 37; 37 W. R. 89.—
 C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.

Crouch v. Crédit Foncier of England, dis-
tinguished.

Venables v. Baring Brothers (1892) 61 L. J.
 Ch. 609; [1892] 3 Ch. 527; 67 L. T. 110; 40
 W. R. 699.—KEKEWICH, J.

Crouch v. Crédit Foncier of England, dis-
cussed and questioned.
Bechuanaland Exploration Co. v. London
Trading Bank (1898) 67 L. J. Q. B. 986; [1898]
 2 Q. B. 658; 79 L. T. 270.

KENNEDY, J. [after discussing at length *Crouch*
v. Crédit Foncier of England and *Goodwin v.*
Robarts, continued:] It appears to me that upon
 the vital question of the effect of modern mer-
 cantile usage, such as I think has been sufficiently
 proved in the present case, it is impossible to
 treat the reasoning of the Court of Queen's

Bench in *Crouch v. Crédit Foncier of England* and the reasoning of the Exchequer Chamber in *Goodwin v. Roberts* as capable of reconciliation. I read the judgment of the Exchequer Chamber in the latter case as plainly disapproving of this reasoning in the judgment on the earlier case. It cannot, I think, be maintained that the reasoning of the judgment upon this question of the effect of modern mercantile usage in *Goodwin v. Roberts* was unnecessary to the decision. Nor, I think, can it be maintained that the two judgments are capable of reconciliation upon the ground that the instrument in question in the earlier case was an English instrument, and the instrument in the latter case was, though issued by a London agent, to all intents and purposes the scrip of a foreign government. . . . Lastly, in the case of *Rumball v. Metropolitan Bank*, a Divisional Court of the Queen's Bench Division in the year 1887 treated *Goodwin v. Roberts* as decisive of an action in which a similar question arose upon an English instrument—a scrip certificate to bearer issued by an English joint stock company. The case was argued upon a special case. The case stated a usage among bankers, discounters, money lenders, and on the Stock Exchange for many years, to treat such scrip certificates as negotiable instruments transferable by mere delivery. The Court, it may be noted, consisted of Cockburn, C.J. and Mellor, J., the former being the judge who had delivered the judgment of the Exchequer Chamber in *Goodwin v. Roberts*, and the other one of the judges who took part in the decision of that case. It is impossible to suppose that they were not fully aware of all that could possibly be held to distinguish (if anything could) the two decisions, and *Crouch v. Crédit Foncier of England* was cited to them in argument. But in their considered judgment they held the matter of the effect of usage in conferring negotiability upon an English instrument, although not negotiable either by statute or by the “ancient mercantile law,” as settled by the judgment of the Exchequer Chamber in *Goodwin v. Roberts*; while they also held upon the facts in the case before them that the second ground of decision adopted by the House of Lords in *Goodwin v. Roberts*—the ground of estoppel—applied to the case before them. . . . It appears to me that, having regard to the decisions of the Exchequer Chamber in *Goodwin v. Roberts* and *Rumball v. Metropolitan Bank*, if I have come, as I have, to the conclusion that there has been a sufficient proof of a mercantile usage to treat the debentures in question in this case as negotiable, I cannot refuse to follow these decisions, which, for the reasons I have felt myself bound to state at length, appear to me practically to overrule the decision in *Crouch v. Crédit Foncier of England* and to govern this case.—p. 994.

Goodwin v. Roberts (1875) 44 L. J. Ex. 57; L. R. 10 Ex. 76; 32 L. T. 200; 23 W. R. 342.—EX.; affirmed, (1875) 44 L. J. Ex. 157; L. R. 10 Ex. 350.—EX. CH.; the latter decision affirmed, (1876) 45 L. J. Ex. 748; 1 App. Cas. 476; 35 L. T. 179; 24 W. R. 987.—H.L. (E.).

Goodwin v. Roberts (*supra*, in H.L.), followed.

Rumball v. Metropolitan Bank (1877) 46 L. J. Q. B. 346; 2 Q. B. D. 194; 36 L. T. 240; 25 W. R. 366.—Q.B.D.

Goodwin v. Roberts, distinguished.

France v. Clark (1884) 53 L. J. Ch. 585; 26 Ch. D. 257; 50 L. T. 1; 32 W. R. 466.—C.A. SELBORNE, L.C., COTTON and LINDLEY, L.JJ.

Goodwin v. Roberts, distinguished.

Fine Art Society v. Union Bank (1886) 17 Q. B. D. 705; 56 L. J. Q. B. 70; 55 L. T. 536; 35 W. R. 114; 51 J. P. 69.—C.A.

ESHER, M.R.—But it was suggested that these documents [post-office orders] had been treated as between the post office, and bankers and parties presenting them through bankers, as if they were negotiable instruments, though, in fact, they are not, so that the doctrine applied in *Goodwin v. Roberts* was applicable. But that decision was upon a special case, in which there was a statement to the effect that the documents there in question had been treated as negotiable instruments by all parties dealing with the same, by bankers and mercantile men, both in this country, and all over Europe, for more than fifty years. It was held upon that statement in the Courts below, and ultimately in the House of Lords, that for the purposes of the question at issue the documents must be treated as if they were negotiable instruments, and so, if there had been a conversion, it was one of which advantage could not be taken. I do not think it can be said that the documents here in question have obtained the same position as that of the documents in *Goodwin v. Roberts*. It seems clear that they have not been treated as negotiable instruments by the general practice in England. I do not think it is shown that bankers or merchants or the post office have, for all purposes and with regard to all persons, so treated them. They have none of the attributes of negotiable instruments. It is urged that the doctrine of estoppel, as stated in *Goodwin v. Roberts*, ought to be applied to this case. The House of Lords there said that, even if the instruments were not negotiable, the mode in which they had been treated both here and abroad was such that it must be taken that the plaintiff was aware of it, and that in handing them over to another person, he put it in his power to hand them over as negotiable instruments. I think that the proposition, as there stated, was only stated as applicable to the facts of the special case, which contained a statement that the form of instrument then in question had been treated as a negotiable instrument by the mercantile world, and by all parties dealing with it, both in this country and abroad. It does not seem to me that there is anything in this case upon which such an estoppel could be founded by the plaintiffs. . . . For these reasons, I think the case falls within the ordinary rules as to conversion, and not within the doctrine of *Goodwin v. Roberts*.—p. 710.

Goodwin v. Roberts, held applicable.

Picker v. London and County Banking Co. (1887) 56 L. J. Q. B. 299; 18 Q. B. D. 515; 35 W. R. 469.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

Goodwin v. Roberts, distinguished.

Colonial Bank v. Hepworth (1887) 56 L. J. Ch. 1089; 38 Ch. D. 36, 53; 57 L. T. 148; 36 W. R. 259.—CHITTY, J.; and **London and County Banking Co. v. London and River Plate Bank** (1887) 20 Q. B. D. 232, 241.—MANISTY, J. (affirmed, C.A.).

Goodwin v. Robarts, applied.

Sheffield (Earl) v. London Joint Stock Bank (1888) 57 L. J. Ch. 986; 13 App. Cas. 333; 58 L. T. 735; 37 W. R. 33.—H.L. (E.). LORDS HALSBURY, L.C., WATSON, BRAMWELL and MACNAGHTEN.

Goodwin v. Robarts, inapplicable.

Colonial Bank v. Gady (1890) 60 L. J. Ch. 131; 15 App. Cas. 267; 63 L. T. 27; 39 W. R. 17.—H.L. (E.). LORDS HALSBURY, L.C., WATSON, BRAMWELL, HERSCHELL and MORRIS.

Goodwin v. Robarts, applied.

Hone v. Boyle (1891) 27 L. R. Ir. 137.—C.A.; and London Joint Stock Bank v. Simmons (1892) 61 L. J. Ch. 723; [1892] A. C. 201; 66 L. T. 625; 41 W. R. 108.—H.L. (E.).

Goodwin v. Robarts, discussed.

Collis v. Hibernian Bank (1893) 31 L. R. Ir. 621.—C.A.; reversing M.R.

Goodwin v. Robarts and Rumball v. Metropolitan Bank (1877) 46 L. J. Q. B. 346; 2 Q. B. D. 194; 36 L. T. 240; 25 W. R. 366.—Q.B.D., followed.

Bechuanaland Exploration Co. v. London Trading Bank (1898) 67 L. J. Q. B. 986; [1898] 2 Q. B. 658; 79 L. T. 270.—KENNEDY, J. See extract, *supra*, cols. 1980, 1981.

Hone v. Boyle (1891) 27 L. R. Ir. 137.—C.A. See

Collis v. Hibernian Bank (1893) 31 L. R. Ir. 261, 299.—C.A.

Bechuanaland Exploration Co. v. London Trading Bank, approved and followed.

Edelstein v. Schuler (1902) 71 L. J. K. B. 572; [1902] 2 K. B. 144; 87 L. T. 204; 50 W. R. 493; 7 Com. Cas. 172.—BIGHAM, J.

Pickier v. London and County Banking Co. (1887) 56 L. J. Q. B. 299; 18 Q. B. D. 515; 35 W. R. 469.—C.A., adopted.

Williams v. Colonial Bank (1888) 57 L. J. Ch. 826; 38 Ch. D. 388; 59 L. T. 643; 36 W. R. 625.—C.A. COTTON, LINDLEY and ROWEN, L.JJ.

Pickier v. London and County Banking Co., applied.

Venables v. Baring (1892) 61 L. J. Ch. 609; [1892] 3 Ch. 527, 538; 67 L. T. 110; 40 W. R. 699.—KEKEWICH, J.; and Bechuanaland Exploration Co. v. London Trading Bank (1898) 67 L. J. Q. B. 986; [1898] 2 Q. B. 658, 676; 79 L. T. 270.—KENNEDY, J.

NOTICE.**Forbes (Lord) v. Deniston (1722) 1 Ves. sen. 67; 4 Bro. P. C. 189.—H.L. (IR.), commented on.**

Le Neve v. Le Neve (1748) 3 Atk. 646; Ambl. 436; 1 Ves. sen. 64.—HARDWICKE, L.C.

Forbes (Lord) v. Deniston; Hine v. Dodd (1741) 2 Atk. 275.—L.C.; and Sheldon v. Cox (1764) Ambl. 624; 2 Eden. 224, discussed.

Bushell v. Bushell (1803) 1 Sch. & Lef. 90; 9 R. R. 21.—L.C. See *now* 54 & 55 Vict. c. 66, s. 19.

Hine v. Dodd, referred to.

Crofton v. Ormsby (1806) 2 Sch. & Lef. 583; 9 R. R. 107.—L.C.; Jones v. Smith (1841) 11 L. J. Ch. 83; 1 Hare 43; 6 Jur. 8.—WIGRAM, v.-c. (*affirmed*, *post*, col. 1988); Benham v. Keane (1861) 1 J. & H. 685 (*post*); Wornald v. Maitland (1866) 35 L. J. Ch. 69, 74; 12 L. T. 535; 13 W. R. 832.—STUART, v.-c.

Hine v. Dodd, discussed.

Rolland v. Hart (1871) L. R. 6 Ch. 678 (*post*, col. 1990); Lee v. Clutton (1875) 45 L. J. Ch. 43.—M.R. (*post*, col. 1987).

Sheldon v. Cox (supra).

Referred to, Dryden v. Frost (*post*); *applied*, Majoribanks v. Hovenden (1843) Dru. 11, 18; 6 Ir. Eq. R. 238.—L.C.; *discussed*, Rolland v. Hart (1871) L. R. 6 Ch. 678 (*post*, col. 1990).

Davis v. Strathmore (Earl) (1810) 16 Ves. 419.—L.C., applied.

Tunstall v. Trappes (1829) 3 Sim. 286.—WIGRAM, v.-c.

Davis v. Strathmore (Earl), referred to.

Skeeles v. Shearly (1836) 8 Sim. 153.—v.-c. (*see post*); Benham v. Keane (1861) 3 De G. F. & J. 318, 331 (*post*, col. 1985).

Davis v. Strathmore (Earl), explained.

Greaves v. Toftfield (1880) 50 L. J. Ch. 118; 14 Ch. D. 563, 571 (*post*, col. 1985).

Le Neve v. Le Neve (supra), referred to.

Bushell v. Bushell (*supra*); Dunbar v. Tredennick (1813) 2 Ball & B. 304, 319.—L.C.

Le Neve v. Le Neve, explained.

Toulmin v. Steere (1817) 3 Meriv. 210; 17 R. R. 67.—GRANT, M.R.

Le Neve v. Le Neve, applied.

Tunstall v. Trappes (*supra*).

Le Neve v. Le Neve.

Referred to, Skeeles v. Shearly (1836) 8 Sim. 153.—v.-c. (*affirmed*, (1837) 7 L. J. Ch. 3; 3 Myl. & Cr. 112; 1 Jur. 888.—L.C.); Nixon v. Hamilton (1838) 3 Dr. & Wal. 364; 1 Ir. Eq. R. 46.—L.C.; Dryden v. Frost (1838) 8 L. J. Ch. 235; 3 Myl. & Cr. 670; 2 Jur. 1030.—L.C.; *not applied*, Thompson v. Simpson (1841) 1 Dr. & War. 459, 487.—L.C.

Tunstall v. Trappes (supra), distinguished.

Neate v. Marlborough (Duke) (1838) 3 Myl. & Cr. 407.—COTTENHAM, L.C.

Le Neve v. Le Neve, referred to.

Finch v. Winchelsea (Earl) (1715) 1 P. Wms. 277.—L.C.; Westbrook v. Blythe (1854) 23 L. J. Q. B. 386; 3 El. & Bl. 737; 2 C. L. R. 1660; 1 Jur. (N.S.) 85; 2 W. R. 490.—Q.B.; and Hughes v. Lumley (1854) 24 L. J. Q. B. 57; 4 El. & Bl. 274; 3 C. L. R. 242; 1 Jur. (N.S.) 422; 3 W. R. 109.—Q.B. *discussed*.

Benham v. Keane (1861) 31 L. J. Ch. 129; 1 J. & H. 685; 7 Jur. (N.S.) 196.—WOOD, v.-c.; *affirmed (post)*.

Le Neve v. Le Neve; Tunstall v. Trappes (supra); Robinson v. Woodward (1851) 4

De G. & Sm. 562.—KNIGHT BRUCE, v.-c.;

and **Johnson v. Holdsworth** (1850) 20 L. J. Ch. 63; 1 Sim. (N.S.) 106; 15 Jur. 31.—**CRANWORTH, v.-c.**, *referred to*.
Benham v. Keane (1861) 31 L. J. Ch. 129; 3 De G. F. & J. 318, 331; 8 Jur. (N.S.) 604; 5 L. T. 439; 10 W. R. 67.—**L.J.J.**

Le Neve v. Le Neve; Jolland v. Stainbridge (1797) 3 Ves. 478; 4 R. R. 64.—**M.R.**; and **Bushell v. Bushell** (*supra*, col. 1983), *discussed*.

Rolland v. Hart (1871) 40 L. J. Ch. 701; L. R. 6 Ch. 678, 683.—**L.C.** *See post*, col. 1990.

Le Neve v. Le Neve.

Referred to, **Vane v. Vane** (1872) L. R. 8 Ch. 392, n.; 27 L. T. 534; 21 W. R. 66.—**MALINS, v.-c.** (affirmed, (1873) 42 L. J. Ch. 299; L. R. 8 Ch. 383; 28 L. T. 320; 21 W. R. 252.—**L.J.J.**); *explained*, **Agra Bank v. Barry** (1874) L. R. 7 H. L. 135, 156.—**H.L. (IR.)**; *applied*, **Bradley v. Riches** (1878) 47 L. J. Ch. 811; 9 Ch. D. 189, 196; 38 L. T. 810; 26 W. R. 910.—**FRY, J.**

Le Neve v. Le Neve, explained.

Greaves v. Toftild (1880) 14 Ch. D. 563; 50 L. J. Ch. 118; 43 L. T. 100; 21 W. R. 840.—**C.A.**; *reversing* **JESSEL, M.R.**

JAMES, L.J.—In *Le Neve v. Le Neve*, which turned upon the Middlesex Registry Act, Lord Hardwicke came to the conclusion that the protection which was meant to be afforded was a protection against secret incumbrances, and that it never could have been the intention of the legislature to put a man who had knowledge of a conveyance in the position of a man who was liable to be defrauded or injured by the existence of some secret dealings with the land. From that time, whatever expressions of doubt may have been used as to some of the language in the decisions, that has been the universal course of decision. In **Davis v. Strathmore (Earl)** (*supra*, col. 1984), Lord Eldon expresses the principle of the decisions in very clear language to the effect that those statutes did not affect or take away the jurisdiction of Courts of equity to enforce equitable rights depending upon contract, and in the case of contracts relating to land, as in all other contracts, equity enforced them, not only as against the man who entered into them, but as against his heirs, and against volunteers under him, and as against persons who took his estate with notice of the contract, or trust, or obligation, with which he had bound his estate. Lord Eldon pointed out in that case that there was no altering the language of the Acts of Parliament, there was no dealing with or in any way repealing the Acts directly or indirectly, but giving the Acts their full force, that is to say, leaving the estate to go in priority to the man who had registered, still if that man had notice of anything by which his vendor or his grantor had bound himself, he was bound by it.—p. 571.

Le Neve v. Le Neve, discussed.

Kettlewell v. Watson (1882) 51 L. J. Ch. 281; 21 Ch. D. 685, 705; 46 L. T. 83; 30 W. R. 402.—**FRY, J.** (varied, (1884) 53 L. J. Ch. 717; 26 Ch. D. 501; 51 L. T. 135; 32 W. R. 865.—**C.A.**); **Northern Counties of England Fire Insurance Co. v. Whipp** (1884) 53 L. J. Ch. 629; 26 Ch. D. 482, 487; 51 L. T. 806; 32 W. R. 626.—**C.A.**; **Manners v. Mew** (1885) 54 L. J. Ch. 909; 29 Ch. D. 725, 728; 53 L. T. 84.—**NORTH, J.**

Le Neve v. Le Neve, applied.

Weir, In re, Hollingworth v. Willing (1888) 58 L. T. 792, 795.—**CHITTY, J.**

Le Neve v. Le Neve, 2 Tudor's Leading Cases, 6th ed., p. 26, note to, at p. 56, approved.

English and Scottish Mercantile Investment Co. v. Brunton (1892) 62 L. J. Q. B. 136; [1892] 2 Q. B. 700; 4 R. 58; 67 L. T. 406; 41 W. R. 133.—**C.A.** **ESHER, M.R., BOWEN and KAY, L.J.J.**

Le Neve v. Le Neve, referred to.

Battison v. Hobson (1896) 65 L. J. Ch. 695; [1896] 2 Ch. 403; 74 L. T. 689; 44 W. R. 615.—**STIRLING, J.**

Le Neve v. Le Neve, applied.

New Ixion Tyre and Cycle Co. v. Spilsbury [1898] 2 Ch. 484; 67 L. J. Ch. 557; 79 L. T. 229.—**C.A.**; *affirming* 46 W. R. 567.—**KEKEWICH, J.**
CHITTY, L.J.—We are only applying here the well-known doctrine of *Le Neve v. Le Neve*—that the Court will not, as Lord Hardwicke said, allow a person to take advantage of the legal form appointed in the Act of Parliament to protect himself against the person who had prior equities of which he had actual notice.—p. 489.

Benham v. Keane (1861) 31 L. J. Ch. 129; 1 J. & H. 685; 7 Jur. (N.S.) 196.—**WOOD, v.-c.**, *affirmed*, 3 De G. F. & J. 318; 8 Jur. (N.S.) 604; 5 L. T. 439; 10 W. R. 67.—**L.J.J.**

Referred to, **Rolland v. Hart** (1871) 40 L. J. Ch. 701; L. R. 6 Ch. 678.—**L.C.** (*see post*, col. 1990); **Wyatt, In re, White v. Ellis** (1891) 61 L. J. Ch. 178; [1892] 1 Ch. 188; 65 L. T. 841; 40 W. R. 177.—**C.A.**; *not applied*, **Taylor v. London and County Banking Co.** (1901) 70 L. J. Ch. 477; [1902] 2 Ch. 231; 84 L. T. 397; 49 W. R. 451.—**C.A.**

Wyatt v. Barwell (1815) 19 Ves. 435; 13 R. R. 236.—**M.R.**

Explained and not applied, **Thompson v. Simpson** (1841) 1 Dr. & War. 459, 475.—**L.C.**; *referred to*, **Wormald v. Maitland** (1866) 35 L. J. Ch. 694; 12 L. T. 535; 13 W. R. 832.—**STUART, v.-c.**; **Chadwick v. Turner** (1866) L. R. 1 Ch. 310, 319; 35 L. J. Ch. 349; 12 Jur. (N.S.) 339; 14 L. T. 86; 14 W. R. 491.—**L.J.J.**; **Rolland v. Hart** (1871) 40 L. J. Ch. 701; L. R. 6 Ch. 678.—**L.C.** (*post*, col. 1990).

Wyatt v. Barwell and Chadwick v. Turner, discussed.

Lee v. Clutton (1875) 45 L. J. Ch. 43 (*post*, col. 1987).

Mountford v. Scott (1818) 3 Madd. 34; 18 R. R. 189.—**v.-c.**; *affirmed*, (1823) T. & R. 274; 24 R. R. 55.—**L.C.**, *referred to*.

Kennedy v. Green (1834) 3 Myl. & K. 699; 38 R. R. 69.—**BROUGHAM, L.C.**; **Hargreaves v. Rothwell** (1836) 5 L. J. Ch. 118; 1 Keen 154.—**LANGDALE, M.R.**; **Nixon v. Hamilton** (1838) 1 Ir. Eq. R. 46; 2 Dr. & Wal. 364.—**L.C.**; **Perkins v. Bradley** (1842) 1 Hare 219, 230.—**WIGRAM, v.-c.**

Mountford v. Scott, Hargreaves v. Rothwell, and Perkins v. Bradley, referred to.

Fuller v. Benett (1843) 12 L. J. Ch. 355; 2 Hare 394, 403; 7 Jur. 1056.—**v.-c.**

Mountford v. Scott; Hargreaves v. Rothwell and Fuller v. Benett, referred to.

Bulpett v. Sturges (1870) 22 L. T. 739; 18 W. R. 796.—ROMILLY, M.R.

Hargreaves v. Rothwell, referred to.

Cousins, In re (1886) 55 L. J. Ch. 662; 31 Ch. D. 671, 676; 54 L. T. 376; 34 W. R. 393.—CHITTY, J.

Brotherton v. Hatt (1706) 2 Vern. 574.—L.K.

Referred to, Fuller v. Benett (*supra*); Bulpett v. Sturges (*supra*); *applied*, Kettlewell v. Watson (1882) 21 Ch. D. 685, 708.—FRY, J. See *supra*, col. 1985.

Worsley v. Scarborough (Earl) (1746) 3 Atk. 392.—L.C.

Adopted, Bellamy v. Sabine (1857) 26 L. J. Ch. 797; 1 De G. & J. 566; 3 Jur. (N.S.) 943; 6 W. R. 1.—L.C. and L.J.; *considered*, Price v. Price (1887) 56 L. J. Ch. 530; 35 Ch. D. 297, 301; 56 L. T. 842; 35 W. R. 386.—KAY, J.

Kennedy v. Green (1834) 3 Myl. & K. 699; 38 R. R. 69.—BROUGHAM, L.C.

Commented on, Marjoribanks v. Hovenden (1843) Dru. 11, 19; 6 Ir. Eq. R. 238.—L.C.; *referred to*, Fuller v. Benett (1843) 2 Hare 304, 405 (*supra*, col. 1986); *not applied*, Jones v. Smith (1843) 12 L. J. Ch. 381; 1 Ph. 244; 7 Jur. 431.—L.C.; Hewitt v. Loosemore (1851) 21 L. J. Ch. 69; 9 Hare 449; 15 Jur. 1097.—TURNER, V.-C.

Kennedy v. Green, commented on.

Greenslade v. Dare (1855) 24 L. J. Ch. 490; 20 Beav. 284; 1 Jur. (N.S.) 294; 3 W. R. 220.—ROMILLY, M.R.

Kennedy v. Green, distinguished.

Atterbury v. Wallis (1856) 25 L. J. Ch. 792; 8 De G. M. & G. 454, 464; 2 Jur. (N.S.) 1177; 4 W. R. 734.—L.J.; Jones v. Williams (1857) 24 Beav. 47, 62; 3 Jur. (N.S.) 1066; 5 W. R. 775.—M.R.; Willes v. Greenhill (1860) 29 Beav. 387.—M.R. *And see* "MORTGAGE" (*supra*, col. 1878).

Kennedy v. Green, applied.

Ogilvie v. Jeaffreson (1860) 2 Giff. 353, 376; 6 Jur. (N.S.) 970; 8 W. R. 745.—STUART, V.-C.

Kennedy v. Green.

Explained, Thompson v. Cartwright (1863) 33 Beav. 178.—M.R. (affirmed, 33 L. J. Ch. 234; 2 De G. J. & S. 10; 3 N. R. 144; 9 Jur. (N.S.) 1215; 9 L. T. 431; 12 W. R. 116.—L.J.); *applied*, European Bank, In re, Oriental Commercial Bank, Ex parte (1870) 39 L. J. Ch. 588; L. R. 5 Ch. 358, 362; 22 L. T. 422; 18 W. R. 474.—GIFFARD, L.J.

Kennedy v. Green and Atterbury v. Wallis (*supra*), discussed.

Rolland v. Hart (1871) 40 L. J. Ch. 701; L. R. 6 Ch. 678.—L.C. See *post*, col. 1990.

Kennedy v. Green.

Not applied, Hunter v. Walters (1871) 41 L. J. Ch. 175; L. R. 7 Ch. 75, 81; 25 L. T. 765; 20 W. R. 218.—L.C. and L.J.; *referred to*, Agra Bank v. Barry (1874) L. R. 7 H. L. 135, 149.—H.L. (IR.); Lee v. Clutton (1875) 45 L. J. Ch. 43; 33 L. T. 717; 24 W. R. 106.—JESSEL, M.R. (affirmed, 46 L. J. Ch. 48; 35 L. T. 84; 24 W. R. 942.—C.A.).

Kennedy v. Green, applied.

Atterbury v. Wallis, discussed.

Waldy v. Gray (1875) 44 L. J. Ch. 394; L. R. 20 Eq. 238, 251; 32 L. T. 531; 23 W. R. 676.—BACON, V.-C.

Kennedy v. Green, not applied.

Kettlewell v. Watson (1882) 21 Ch. D. 685; 51 L. J. Ch. 281; 46 L. T. 83; 30 W. R. 402. *And see supra*, col. 1985.

FRY, J.—After I left the Court the day before yesterday, it occurred to me that there was one point in the argument to which I had not sufficiently referred in my judgment. I mean the argument that the doctrine of *Kennedy v. Green* applied, and that Richardson and Watson were parties to such a scheme of fraud as to repel the presumption of their communicating the plaintiffs' lien to those persons who employed them. It was pressed upon me that there was a course of dealing by them which led to the suppression of their knowledge of the lien, that they persuaded the various purchasers to employ their solicitors, and that they themselves executed conveyances containing a covenant that the land was free from incumbrances. With regard to the last point it must be borne in mind that Richardson and Watson were not solicitors, and, although it was highly improper for them to enter into such a covenant while the lien existed, yet it was not fraudulent if they at the same time communicated the existence of the lien to the purchasers. And that is the very point under inquiry. With regard to the argument that they had a scheme for preventing the disclosure of the lien, I cannot come to that conclusion for this reason, that, although in many cases the purchasers employed them as their general agents, in other cases the purchasers did not, and Richardson and Watson appear to have made no objection to the employment of independent solicitors whenever the purchasers wished it. In several cases the independent solicitors obtained knowledge of the lien, and Richardson and Watson had no difficulty in making arrangements with the plaintiffs by which the lien was in effect released. That being so, I cannot conclude that Richardson and Watson were engaged in a scheme of fraud, and therefore, in my opinion, the doctrine in *Kennedy v. Green* does not apply.—p. 715.

Kennedy v. Green, explained and applied.

Mount Morgan (West) Gold Mine, In re, West, Ex parte (1887) 56 L. T. 622.—KAY, J.

Jones v. Smith (1841) 11 L. J. Ch. 83; 1

Hare 43; 6 Jur. 8.—V.-C.; *affirmed*, (1843) 12 L. J. Ch. 381; 1 Ph. 244; 7 Jur. 431.—L.C., *explained and applied*.

West v. Reid (1843) 12 L. J. Ch. 245; 2 Hare 249; 7 Jur. 147.—WIGRAM, V.-C.

Jones v. Smith, referred to.

Rooke v. Kensington (Lord) (1856) 25 L. J. Ch. 795; 2 K. & J. 753; 2 Jur. (N.S.) 755; 4 W. R. 829.—WOOD, V.-C.

Jones v. Smith, approved.

Jones v. Williams (1857) 24 Beav. 47, 62 (*supra*, col. 1987).

Jones v. Smith.

Followed, Dawson v. Prince (1857) 27 L. J. Ch.

169; 2 De G. & J. 41, 50; 4 Jur. (N.S.) 497; 6 W. R. 171.—**L.J.J.** (reversing 26 L. J. Ch. 849; 3 Jur. (N.S.) 902.—**M.R.**); *Cox v. Coventon* (1862) 31 Beav. 378.—**M.R.**; *referred to*, *Brown v. Tanner* (1868) 37 L. J. Ch. 923; L. R. 3 Ch. 597, 602; 18 L. T. 624; 16 W. R. 882.—**L.J.J.**; *distinguished*, *Turton v. Meacham* (1869) 19 L. T. 760; 17 W. R. 429.—**STUART, V.-C.**

Jones v. Smith (*supra*), *referred to*.

Machryde v. Eykyn (1871) 24 L. T. 461.—**MALINS, V.-C.** (affirmed, 25 L. T. 192.—**L.J.J.**); *Shaw v. Foster* (1872) 42 L. J. Ch. 49; L. R. 5 H. L. 321, 336; 27 L. T. 281; 20 W. R. 907.—**H.L. (B.)**; *Carroll v. Kcayes* (1873) Ir. R. 8 Eq. 97, 132.—**C.A.**; *Agra Bank v. Barry* (1874) L. R. 7 H. L. 135, 149.—**H.L. (IR.)**.

Jones v. Smith.

Applied, *The Emilian Marie* (1875) 44 L. J. Adm. 9, 15; 32 L. T. 435; 2 Asp. M. C. 514.—**SIR R. PHILLIMORE**; *referred to*, *Lee v. Clutton* (1875) 45 L. J. Ch. 43 (*supra*, col. 1987); *Patman v. Harland* (1881) 50 L. J. Ch. 642; 17 Ch. D. 353, 357; 44 L. T. 728; 29 W. R. 707.—**JESSEL, M.R.**; *Williams v. Williams* (1881) 17 Ch. D. 437, 442; 44 L. T. 573.—**KAY, J.**

Jones v. Smith and Dawson v. Prince (*supra*, col. 1988), *dismissed*.

Lloyd's Banking Co. v. Jones (1885) 29 Ch. D. 221; 54 L. J. Ch. 931; 52 L. T. 469; 33 W. R. 781.

PEARSON, J.—In *West v. Reid* (*supra*), *Wigram, V.-C.*, referring to *Jones v. Smith*, said: "There is nothing in the fact of marriage which raised a legal presumption or inference that [money belonging to a married woman] was settled;" and in *Dawson v. Prince* it was doubted by *Knight Bruce and Turner, L.J.J.* whether the fact that a bill was made payable to the order of a married woman was notice that it related to her separate estate.—p. 226.

Jones v. Smith.

Applied, *Mount Morgan (West) Gold Mine, In re* (*supra*, col. 1988); *not applied*, *Connolly v. Munster Bank* (1887) 19 L. R. Ir. 119, 128.—**CHATTEKTON, V.-C.**; *approved*, *English and Scottish Mercantile Investment Co. v. Brunton* (1892) 62 L. J. Q. B. 136; [1892] 2 Q. B. 700, 710; 4 L. 58; 67 L. T. 406; 41 W. R. 133.—**C.A.**; *referred to*, *Bailey v. Barnes* (1893) 63 L. J. Ch. 73; [1894] 1 Ch. 25, 35.—**C.A. (post, col. 1991)**; *Fitzgerald v. McCowan* (1897) [1898] 2 Ir. R. 1, 12.—**Q.B.D.**; *Oliver v. Hinton* (1898—1899) 68 L. J. Ch. 94, 583; [1899] 2 Ch. 264, 269; 79 L. T. 729; 81 L. T. 212; 48 W. R. 3.—**ROMER, J.** (affirmed, **C.A.**); *applied*, *Alms Corn Charity, In re, Charity Commissioners v. Bode* (1901) 71 L. J. Ch. 76; [1901] 2 Ch. 750, 762; 85 L. T. 533.—**STIRLING, J.**; *considered*, *Valletort Sanitary Steam Laundry Co., In re, Ward v. Valletort, &c., Laundry Co.* (1903) 72 L. J. Ch. 674; [1903] 2 Ch. 654, 659; 89 L. T. 60.—**EADY, J.**

Ware v. Egmont (Lord) (1854) 24 L. J. Ch. 361; 4 De G. M. & G. 460; 1 Jur. (N.S.) 97; 3 Eq. R. 1; 3 W. R. 48.—**CRANWORTH, L.J.**; *reversing* 23 L. J. Ch. 499; 18 Jur. 371; 2 W. R. 126.—**STUART, V.-C.**; and **Stocks v. Dobson** (1853) 22 L. J. Ch. 584; 4 De G. M. & G. 11; 17 Jur. 539.—**L.J.J.**, *distinguished*.

Atterbury v. Wallis (1856) 25 L. J. Ch. 792;

8 De G. M. & G. 454, 467; 2 Jur. (N.S.) 1177; 4 W. R. 734.—**L.J.J.**

Ware v. Egmont (Lord), *followed*.

Jones v. Williams (1857) 24 Beav. 47, 59 (*supra*, col. 1987); *Dawson v. Prince* (1857) 2 De G. & J. 41, 50.—**L.J.J.** (*supra*, col. 1988); *Machryde v. Eykyn* (1871) 24 L. T. 461 (*supra*).

Ware v. Egmont (Lord), *referred to*.

Banco de Lima v. Anglo-Peruvian Bank (1878) 8 Ch. D. 160, 175; 38 L. T. 130.—**MALINS, V.-C.**

Ware v. Egmont (Lord).

Applied, *Hall & Co., In re* (1887) 57 L. J. Ch. 288; 37 Ch. D. 712, 720; 58 L. T. 156.—**STIRLING, J.**; *English and Scottish Mercantile Investment Co. v. Brunton* [1892] 2 Q. B. 1, 10; 66 L. T. 767.—**CHARLES, J.** (affirmed, **C.A.**, *supra*, col. 1989); *approved*, *Bailey v. Barnes* (1893) 63 L. J. Ch. 73; [1894] 1 Ch. 25, 31; 7 L. 9; 69 L. T. 542; 42 W. R. 66.—**STIRLING, J.** and **C.A.**; *referred to*, *Fitzgerald v. McCowan* (1897) [1898] 2 Ir. R. 1.—**Q.B.D.**; *Molyneux v. Hawtreay* (1903) 72 L. J. K. B. 873; [1903] 2 K. B. 487, 493; 89 L. T. 350; 52 W. R. 23.—**C.A.**

Rolland v. Hart (1871) 40 L. J. Ch. 701; L. R. 6 Ch. 678; 25 L. T. 191; 19 W. R. 962.—**L.C.**; *reversing* 40 L. J. Ch. 345; 24 L. T. 250; 19 W. R. 557.—**M.R.**, *referred to*.

Lee v. Clutton (1875) 45 L. J. Ch. 43 (*supra*, col. 1987); *Bradley v. Riches* (1878) 47 L. J. Ch. 811; 9 Ch. D. 189, 196; 38 L. T. 810; 26 W. R. 910.—**FRY, J.**; *Cave v. Cave* (*post*).

Rolland v. Hart, *explained*.

Bradley v. Riches, *distinguished*.

Southampton's (Lord) *Estate, In re, Roper's Claim* (1880) 50 L. J. Ch. 155; 43 L. T. 625; 29 W. R. 210.—**MALINS, V.-C.**

Espin v. Pemberton (1859) 28 L. J. Ch. 311; 3 De G. & J. 547; 5 Jur. (N.S.) 157; 7 W. R. 221.—**L.C.**; and **Thompson v. Cartwright** (1863) 33 L. J. Ch. 234; 33 Beav. 178.—**M.R.** (affirmed, **L.J.J.**, *supra*, col. 1987), *considered*.

Cave (or Chaplin) v. Cave (1880) 13 Ch. D. 639; 49 L. J. Ch. 505; 42 L. T. 730; 28 W. R. 793.

FRY, J.—The doctrine applicable to the question has been commonly called that of constructive notice. Lord Chelmsford, in *Espin v. Pemberton*, considered that to be an inaccurate description, and thought that the expression "imputed notice" was the correct one. It is not very material to consider which of the two terms is the more accurate, because there is undoubtedly an exception to the construction or imputation of notice from the agent to the principal, that exception arising in the case of such conduct by the agent as raises a conclusive presumption that he would not communicate the fact in controversy. This exception has been put in two ways. In the very well-known case of *Rolland v. Hart* (*supra*), Lord Hatherley put it substantially in this way, that you must look at the circumstances of the case, and inquire whether the Court can see that the solicitor intended a fraud, which would require the suppression of the knowledge of the incumbrance from the person upon whom he was committing the fraud. In *Thompson v. Cartwright*, the late M.R. put it

rather differently, and it would appear that in his view you must inquire whether there are such circumstances in the case, independently of the fact under inquiry, as to raise an inevitable conclusion that the notice had not been communicated.—p. 643.

Espin v. Pemberton, applied.

Manners v. Mew (1885) 54 L. J. Ch. 909; 29 Ch. D. 725, 731; 53 L. T. 84.—NORTH, J.; *Brown v. Stedman* (1896) 44 W. R. 458.—CHITTY, J.

Cave (or Chaplin) v. Cave (supra).

Distinguished, *French's Estate*, In re (1887) 21 L. R. Ir. 283, 290.—C.A.; *discussed*, *Sloane's Estate*, In re (1894) [1895] 1 Ir. R. 146, 153.—MONROE, J.

Bailey v. Barnes (1893) 63 L. J. Ch. 73; [1894] 1 Ch. 25; 7 R. 9; 69 L. T. 542; 42 W. R. 66.—C.A., *referred to*.

Life Interest and Reversionary Securities Corporation v. Hand-in-Hand Fire and Life Insurance Society (1898) 67 L. J. Ch. 548; [1898] 2 Ch. 230, 238; 78 L. T. 708; 46 W. R. 668.—STIRLING, J.; *Freeman v. Laing* (1899) 68 L. J. Ch. 586; [1899] 2 Ch. 355, 360; 81 L. T. 167; 48 W. R. 9.—BYRNE, J.; *Hunt v. Luck* (1900) 70 L. J. Ch. 31; [1901] 1 Ch. 45, 53; 83 L. T. 479; 49 W. R. 155.—FARWELL, J.; (affirmed, (1902) 71 L. J. Ch. 239; [1902] 1 Ch. 428; 86 L. T. 68; 50 W. R. 291.—C.A.); *Handman and Wilcox's Contract*, In re (1902) 71 L. J. Ch. 263; [1902] 1 Ch. 599, 603; 86 L. T. 246.—C.A.

Bailey v. Barnes, applied.

Taylor v. London and County Banking Co.; *London and County Banking Co. v. Nixon* [1901] 2 Ch. 231, 259.—C.A. (*post*).

Boursot v. Savage (1866) 35 L. J. Ch. 627; L. R. 2 Eq. 134; 14 L. T. 299; 14 W. R. 565.—KINDERSLEY, V.-C., *referred to*.

Halifax Sugar Refining Co., In re (1890) 7 Times L. R. 163.—STIRLING, J.; *affirmed*, (1891) 7 Times L. R. 293.—C.A.

Freeman v. Laing (1899) 68 L. J. Ch. 586; [1899] 2 Ch. 355; 81 L. T. 167; 48 W. R. 9.—BYRNE, J.; and *Boursot v. Savage*, *distinguished*.

Taylor v. London and County Banking Co. (1901) 70 L. J. Ch. 477; [1901] 2 Ch. 231, 259; 84 L. T. 397; 49 W. R. 451.—C.A.

STIRLING, L.J.—As to the former [*Freeman v. Laing*], it seems sufficient to say that it was decided on the law relating to tacking, and the learned judge expressly states that no question arose as to the effect of a purchase for value without notice; and it may for the present purpose be left out of consideration. As to the latter [*Boursot v. Savage*], I do not doubt that it was correctly decided according to the law as it stood in 1866; but the Conveyancing Act, 1882, has introduced very considerable modifications to which the Court is now bound to give effect.—p. 486.

Freeman v. Laing, observations applied.

Phillips' Trusts, In re (1902) 72 L. J. Ch. 94; [1903] 1 Ch. 183, 187; 88 L. T. 9.—KEKEWICH, J.

NUISANCE.

1. WHAT AMOUNTS TO. *
2. PROCEEDINGS IN RESPECT OF.

1. WHAT AMOUNTS TO.

Noxious trades or things.

Rex v. Cross (1826) 2 Car. & P. 483; 31 R. R. 684. *Compare*

St. Helen's Smelting Co. v. Tipping (1865) 11 H. L. Cas. 642; 35 L. J. Q. B. 66; 11 Jur. (N.S.) 785; 12 L. T. 776; 13 W. R. 1083.—H.L. (E.).

Grafton (Duke) v. Hilliard (1736) cited 18 Ves. 219; 1 Ambl. 160, n., *explained and distinguished*.

Walter v. Selfe (1851) 4 De G. & S. 315; 20 L. J. Ch. 433; 15 Jur. 416.—KNIGHT BRUCE, V.-C. *But see* *Hole v. Barlow* (*infra*).

Hole v. Barlow (1858) 4 C. B. (N.S.) 334; 27 L. J. C. P. 207; 4 Jur. (N.S.) 1019; 6 W. R. 619.—C.P., *held inapplicable*.

Stockport Waterworks Co. v. Potter (1861) 31 L. J. Ex. 9; 7 H. & N. 160; 7 Jur. (N.S.) 880.—EX.

Hole v. Barlow, overruled.

Bamford v. Turnley (1862) 3 B. & S. 66 31 L. J. Q. B. 286; 9 Jur. (N.S.) 377; 10 W. R. 803.—EX. CH.

WILLIAMS, J. (for the Court).—The question for our consideration seems to be, whether the case of *Hole v. Barlow* was well decided, and we are of opinion that it was not (p. 74). [The learned judge then discussed *Hole v. Barlow* at great length.] . . . We are, however, of opinion that the decision in that case was wrong.—p. 78.

Hole v. Barlow, observed upon.

Beardmore v. Tredwell (1862) 31 L. J. Ch. 892; 3 Giff. 683; 9 Jur. (N.S.) 272; 7 L. T. 207.—STUART, V.-C.

Hole v. Barlow and Bamford v. Turnley (*supra*), *referred to*.

Wanstead Local Board v. Hill (1862) 13 C. B. (N.S.) 479; 32 L. J. M. C. 135; 9 Jur. (N.S.) 972; 7 L. T. 744; 11 W. R. 363.—C.P.

Hole v. Barlow, discussed.

Bamford v. Turnley, applied.

Cavey v. Lidbetter (1863) 32 L. J. C. P. 104; 13 C. B. (N.S.) 470.—C.P.

Hole v. Barlow and Bamford v. Turnley *discussed*.

Luscombe v. Steer (1867) 17 L. T. 229; 15 W. R. 1191.—ROLT, L.J.

Hole v. Barlow, held overruled.

Shott's Iron Co. v. Inglis (1882) 7 App. Cas. 518, 528.—H.L. (SC.).

Bamford v. Turnley, adopted.

Fleming v. Hislop (1886) 11 App. Cas. 686, 697.—H.L. (SC.).

Hole v. Barlow and Bamford v. Turnley, *discussed*.

Reinhardt v. Mentasti (1889) 58 L. J. Ch. 787;

42 Ch. D. 685; 61 L. T. 328; 38 W. R. 10.—**KEKEWICH, J.**

Bamford v. Turnley, considered.

Lyons v. Wilkins (1898) 68 L. J. Ch. 146; [1899] 1 Ch. 255; 79 L. T. 709; 47 W. R. 291; 63 J. P. 339.—C.A.; Att.-Gen. v. Cole (1900) 70 L. J. Ch. 148; [1901] 1 Ch. 205; 83 L. T. 725; 65 J. P. 88.—**KEKEWICH, J.**

Bamford v. Turnley, applied.

Colwell v. St. Pancras Borough Council (1904) 73 L. J. Ch. 275; [1904] 1 Ch. 707; 90 L. T. 153; 52 W. R. 523.—**JOYCE, J.**

Crump v. Lambert (1867) L. R. 3 Eq. 409; 15 L. T. 600; 17 L. T. 133; 15 W. R. 417.—**M.R. (affirmed, L.C.).**

Adopted, Roskell v. Whitworth (1871) 19 W. R. 804.—**BACON, V.-C.**; and Chibnall v. Paul (1881) 29 W. R. 536.—**KAY, J.**; *considered*, Lyons v. Wilkins (1898).—C.A. (*supra*).

Walstead Local Board v. Hill (1862) 32 L. J. M. C. 135; 13 C. B. (N.S.) 479; 9 Jur. (N.S.) 972; 7 L. T. 744; 11 W. R. 368.—C.P., *dicta adopted*.

Braintree Local Board v. Boyton (1885) 52 L. T. 99; 48 J. P. 582.—**DAY and SMITH, JJ.** *And see* Pembroke v. Warren [1896] 1 Ir. R. 76, 130, 136.—C.A.; **FITZGIBBON, L.J.** *dissenting*.

St. Helen's Smelting Co. v. Tipping (1866) 35 L. J. Q. B. 66; 11 H. L. Cas. 642; 11 Jur. (N.S.) 785; 12 L. T. 776; 13 W. R. 1083.—**H.L. (E.).**

Applied, Smith v. Thackeray (1866) 35 L. J. C. P. 276; L. R. 1 C. P. 564; 12 Jur. (N.S.) 545; 14 L. T. 761; 14 W. R. 832; 1 H. & R. 615.—C.P.; Dent v. Auction Mart Co. (1866) 35 L. J. Ch. 555; L. R. 2 Eq. 238; 12 Jur. (N.S.) 447; 14 L. T. 827; 14 W. R. 709.—V.-C.; **Crump v. Lambert** (1867).—**M.R. (supra)**; **Crossley v. Lightowler** (1867) 36 L. J. Ch. 584; L. R. 2 Ch. 478; 16 L. T. 438; 15 W. R. 801.—L.C.; **Luscombe v. Steer** (1867) 17 L. T. 229; 15 W. R. 1191.—**ROLT, L.J.**; **Cooke v. Forbes** (1867) 37 L. J. Ch. 178; L. R. 5 Eq. 166; 17 L. T. 371.—**WOOD, V.-C.**; **Gaunt v. Fynney** (1872) 42 L. J. Ch. 122; L. R. 8 Ch. 8; 27 L. T. 569; 21 W. R. 129.—L.C.; **Salvin v. North Brancepeth Coal Co.** (1874) 44 L. J. Ch. 149; L. R. 9 Ch. 705; 31 L. T. 154; 22 W. R. 904.—**L.J.J.**; **Blair v. Deakin** (1887) 57 L. T. 522; 52 J. P. 327.—**KAY, J.**; **Pembroke v. Warren** [1896] 1 Ir. R. 76, 113.—C.A.

Crossley v. Lightowler (1867) 36 L. J. Ch. 584; L. R. 2 Ch. 478; 16 L. T. 438; 15 W. R. 801.—L.C.

Applied, **Wheeldon v. Burrows** (1879) 48 L. J. Ch. 853; 12 Ch. D. 31; 41 L. T. 327; 28 W. R. 196.—C.A.; *referred to*, **Mouson v. Boehm** (1884) 53 L. J. Ch. 932; 26 Ch. D. 398, 405; 50 L. T. 784; 32 W. R. 612.—**CHITTY, J.**; *applied*, **Blair v. Deakin** (1887) 57 L. T. 522; 52 J. P. 327.—**KAY, J.**; *dictum considered*, **Union Lighterage Co. v. London Graving Dock Co.** (1902) 71 L. J. Ch. 791; [1902] 2 Ch. 557, 567; 87 L. T. 381.—C.A.

Walter v. Selfe (1851) 20 L. J. Ch. 433; 4 De G. & S. 315; 15 Jur. 416.—V.-C.

Referred to, **Luscombe v. Steer** (1867) 17 L. T. 229; 15 W. R. 1191.—**ROLT, L.J.**; *commented upon*, **Goose v. Bedford** (1873) 21 W. R. 449;

followed, **Fleming v. Hislop** (1886) 11 App. Cas. 686.—**H.L. (SC.)**; **Winter v. Baker** (1886) 3 T. L. R. 569.—**KEKEWICH, J.**; *dicta adopted*, **Tod-Heatley v. Benham** (1888) 58 L. J. Ch. 83; 40 Ch. D. 80; 60 L. T. 241; 37 W. R. 38.—C.A.; *followed*, **Ridge v. Midland Ry.** (1888) 53 J. P. 55.—**Q.B.D.**; *applied*, **Reinhardt v. Mentasti** (1889) 58 L. J. Ch. 787; 42 Ch. D. 685, 689; 61 L. T. 328; 38 W. R. 10.—**KEKEWICH, J.**; *considered*, **Lyons v. Wilkins** (1898) 68 L. J. Ch. 146; [1899] 1 Ch. 255; 79 L. T. 709; 47 W. R. 291; 63 J. P. 339.—C.A.; *applied*, **Pembroke v. Warren** [1896] 1 Ir. R. 76, 134—140.—C.A.; and **Spruzen v. Dossett** (1896) 12 Times L. R. 246.—**STIRLING, J.**

Trafford v. Rex (1832) 8 Bing. 204.—**EX. CH.**; and **Walter v. Selfe** (1851) 4 De G. & S. 315; 20 L. J. Ch. 433; 15 Jur. 416.—V.-C., *followed*.

Ridge v. Midland Ry. (1888) 53 J. P. 55.—**COLERIDGE, C.J.** and **GRANTHAM, J.**

Gaunt v. Fynney (1872) 42 L. J. Ch. 122; L. R. 8 Ch. 8; 27 L. T. 569; 21 W. R. 129.—L.C., *followed*.

Rogers v. G. N. Ry. (1889) 53 J. P. 484.—**MANISTY, J.**

Gaunt v. Fynney, discussed.

Reinhardt v. Mentasti (1889) 58 L. J. Ch. 787; 42 Ch. D. 685; 61 L. T. 328; 38 W. R. 10.—**KEKEWICH, J.**

Gaunt v. Fynney, observations applied.

Gosnell v. Airedale Bread Co. (1894) 10 Times L. R. 661.—**STIRLING, J.**

Ball v. Ray (1873) L. R. 8 Ch. 467; 28 L. T. 346; 21 W. R. 282.—L.C. and **L.J.J.**, *followed*.

Broder v. Saillard (1876) 45 L. J. Ch. 414; 2 Ch. D. 692; 24 W. R. 1011.—**JESSEL, M.R.**

Ball v. Ray, dicta applied.

Reinhardt v. Mentasti (1889) 58 L. J. Ch. 787, 789; 42 Ch. D. 685, 690; 61 L. T. 328; 38 W. R. 10.—**KEKEWICH, J.**, *dicta dissented from*.

Sanders-Clark v. Grosvenor Mansions Co. (1900) 69 L. J. Ch. 579; [1900] 2 Ch. 373; 82 L. T. 758; 48 W. R. 570.

BUCKLEY, J.—I only refer to that case [*Reinhardt v. Mentasti*] for the purpose of saying that I prefer to guide myself by the judgment of Lord Selborne [in *Ball v. Ray*] to the effect that the Court must have regard to whether the defendant is using his property reasonably or not. If he is using it reasonably, there is nothing which at law can be considered a nuisance; but if he is not using it reasonably, but is using it for purposes for which the building was not constructed, then the plaintiff is entitled to relief.—p. 581.

Ball v. Ray, considered.

Reinhardt v. Mentasti, explained.

Att.-Gen. v. Cole (1900) 70 L. J. Ch. 148; [1901] 1 Ch. 205; 83 L. T. 725; 65 J. P. 88.—**KEKEWICH, J.**

Broder v. Saillard (1876) 45 L. J. Ch. 414; 2 Ch. D. 692; 24 W. R. 1011.—L.C. and **L.J.J.**, *adopted*.

Humphreys v. Cousins (1877) 46 L. J. C. P.

438; 2 C. P. D. 239; 36 L. T. 180; 25 W. R. 371.—C.P.D.; *Hurdman v. N. E. Ry.* (1878) 47 L. J. C. P. 368; 3 C. P. D. 168; 38 L. T. 339; 26 W. R. 489.—C.A.

Broder v. Saillard, followed.

Reinhardt v. Mentasti (1889) 58 L. J. Ch. 187; 42 Ch. D. 685; 61 L. T. 328; 38 W. R. 70.—KEKEWICH, J.

Broder v. Saillard, considered.

Lyons v. Wilkins (1898) 68 L. J. Ch. 146; [1899] 1 Ch. 255; 79 L. T. 709; 47 W. R. 291; 63 J. P. 339.—C.A.

Broder v. Saillard, applied.

Colwell v. St. Pancras Borough Council (1904) 73 L. J. Ch. 275; [1904] 1 Ch. 707; 90 L. T. 153; 52 W. R. 523.—JOYCE, J.

Baxendale v. M'Murray (1867) L. R. 2 Ch. 790; 16 W. R. 32.—L.J.J., *distinguished.*

Clarke v. Somersetsire Drainage Commissioners (1888) 57 L. J. M. C. 96; 59 L. T. 670; 36 W. R. 890.—FIELD and WILLS, J.J.

Winter v. Baker (1886) 3 Times L. R.—KEKEWICH, J., *referred to.*

Jenkins v. Jackson (1889) 58 L. J. Ch. 124; 40 Ch. D. 71; 60 L. T. 105; 37 W. R. 253.—KEKEWICH, J.

Jenkins v. Jackson, considered.

Barber v. Penley (1893) 62 L. J. Ch. 623; [1893] 2 Ch. 447; 3 R. 489; 68 L. T. 662.—NORTH, J. *And see Jaeger v. Mansions Consolidated* (1902) 19 Times L. R. 114.—BUCKLEY, J.

Baines v. Baker (1752) Amb. 158; S. C. nom. Anon., 3 Atk. 750.

Commented on, Soltan v. De Held (1851) 21 L. J. Ch. 153; 2 Sim. (N.S.) 133; 16 Jur. 326.—KINDERSLEY, V.-C.; *considered and distinguished, Vernon v. St. James, Westminster, Vestry* (1880) 50 L. J. Ch. 81; 16 Ch. D. 449, 470; 44 L. T. 229; 29 W. R. 222.—C.A.; *referred to, Metropolitan Asylum District v. Hill* (1881) 50 L. J. Q. B. 353; 6 App. Cas. 193; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664.—H.L. (E.); *dictum disapproved, Essex v. Acton Local Board* (1889) 58 L. J. Q. B. 594; 14 App. Cas. 153, 161; 61 L. T. 1; 53 J. P. 756.—H.L. (E.); *considered, Att.-Gen. v. Manchester Corporation* (1898) 62 L. J. Ch. 459; [1893] 2 Ch. 87; 3 R. 427; 68 L. T. 608; 41 W. R. 459; 57 J. P. 343.—CHITTY, J.

Att.-Gen. v. Manchester Corporation (1898)

62 L. J. Ch. 459; [1893] 2 Ch. 87; 3 R. 427; 68 L. T. 608; 41 W. R. 459.—CHITTY, J., *applied.*
Pethick v. Plymouth Corporation (1893) 8 R. 107; 70 L. T. 304; 42 W. R. 246; 58 J. P. 476.—CHITTY, J.

Kirkheaton Local Board v. Ainley (1892) 61

L. J. Q. B. 812; [1892] 2 Q. B. 274; 67 L. T. 209; 41 W. R. 99.—C.A., *referred to.*
Derbyshire County Council, In re [1896] 2 Q. B. 297, 299.—C.A.

Dunning v. Grosvenor Dairies (1900) W. N.

265.—JOYCE, J.; and *Carr & Co. v. Bath Gas Light and Coke Co.* (1899) (1900) W. N. 265, n, *not followed.*
Chester (Dean) v. Smelting Corporation (1901) 85 L. T. 67; (1901) W. N. 179.—FARWELL, J.

Soltan v. De Held (1851) 21 L. J. Ch. 153; 2 Sim. (N.S.) 133; 16 Jur. 326.—V.-C.

Applied, Walker v. Brewster (1867) 37 L. J. Ch. 33; L. R. 5 Eq. 25, 34; 17 L. T. 135; 16 W. R. 59.—WOOD, V.-C.; *distinguished, Att.-Gen. v. Cambridge Commissioners' Gas Co.* (1868) 38 L. J. Ch. 94; L. R. 4 Ch. 71, 81; 19 L. T. 508; 17 W. R. 145.—L.J.J.; *explained, Harrison v. Good* (1871) 40 L. J. Ch. 294; L. R. 11 Eq. 338; 24 L. T. 263; 19 W. R. 346.—V.-C.; *adopted, Roskell v. Whitworth* (1871) 19 W. R. 804.—BACON, V.-C.; *referred to, Gaunt v. Fynney* (1872) 42 L. J. Ch. 122; L. R. 8 Ch. 8; 27 L. T. 569; 21 W. R. 129.—L.C.; *adopted, Smith v. Wilson* [1903] 2 Ir. R. 45, 72.—K.B.D.

Inchbald v. Robinson (1869) L. R. 4 Ch.

388; 20 L. T. 259; 17 W. R. 459.—L.J.J., *applied.*
Dewar v. City and Suburban Racecourse Co. [1899] 1 Ir. R. 345, 351.—V.-C.

Rex v. Moore (1832) 3 B. & Ad. 184; 1 L. J.

M. C. 30.—K.B.
Applied, Walker v. Brewster (1867) 37 L. J. Ch. 33; L. R. 5 Eq. 25; 17 L. T. 135; 16 W. R. 59.—WOOD, V.-C.; *distinguished, Inchbald v. Robinson* (1869) L. R. 4 Ch. 388; 20 L. T. 259; 17 W. R. 459.—L.J.J.; *applied, Haigh v. Sheffield Town Council* (1874) 44 L. J. M. C. 17; L. R. 10 Q. B. 102; 31 L. T. 536; 23 W. R. 547.—Q.B.; *observations adopted, Bellamy v. Wells* (1890) 60 L. J. Ch. 156; 63 L. T. 635; 39 W. R. 158.—ROMER, J.; and *Whitney v. Moignard* (1890) 59 L. J. Q. B. 324; 24 Q. B. D. 630.—Q.B.D.; *considered, Barber v. Penley* (1893) 62 L. J. Ch. 623; [1893] 2 Ch. 447; 3 R. 489; 68 L. T. 662.—NORTH, J.; and *Chase v. L. C. C.* (1898) 14 Times L. R. 177.—STIRLING, J.; *applied, Dewar v. City and Suburban Racecourse Co.* [1899] 1 Ir. R. 345, 350.—V.-C.

Rex v. Carlile (1834) 6 Car. & P. 636; and

Bellamy v. Wells, considered.
Barber v. Penley (1893) 62 L. J. Ch. 623; [1893] 2 Ch. 447; 3 R. 489; 68 L. T. 662.—NORTH, J.

Barber v. Penley, followed.

Wagstaff v. Edison, &c., Phonograph Corporation (1893) 10 Times L. R. 80.—STIRLING, J.

Barber v. Penley, distinguished.

Germaine v. London Exhibitions, Ltd. (1896) 75 L. T. 101.—KEKEWICH, J.

Walker v. Brewster (1867) 37 L. J. Ch. 33;

L. R. 5 Eq. 25; 17 L. T. 135; 16 W. R. 59.—V.-C.
Observed upon, Inchbald v. Robinson (1869) L. R. 4 Ch. 388; 20 L. T. 259; 17 W. R. 459.—L.J.J.; *considered, Barber v. Penley* (1893) 62 L. J. Ch. 623; [1893] 2 Ch. 447; 3 R. 489; 68 L. T. 662.—NORTH, J.; *applied, Dewar v. City and Suburban Racecourse Co.* [1899] 1 Ir. R. 345, 351.—V.-C.

Brock v. Copeland (1794) 1 Esp. 203; 5

R. R. 730, *distinguished.*
Bird v. Holbrook (1828) 4 Bing. 628; 1 M. & P. 607; 6 L. J. (O.S.) C. P. 146; 29 R. R. 657.—C.P.

Mumford v. Oxford, Worcester and Wolver-

hampton Ry. (1856) 1 H. & N. 34; 25 L. J. Ex. 265.—EX.
Applied, Mott v. Shoolbred (1875) 44 L. J.

Ch. 380; L. R. 20 Eq. 22; 23 W. R. 545.—M.R.; and *Rust v. Victoria Graving Dock Co.* (1887) 36 Ch. D. 113, 135; 56 L. T. 216; 35 W. R. 673.—C.A.

Simpson v. Savage (1856) 1 C. B. (N.S.) 347; 26 L. J. C. P. 50; 3 Jur. (N.S.) 161; 5 W. R. 147.—C.P.

Considered and applied, *Mott v. Shoolbred* (1875) 44 L. J. Ch. 380; L. R. 20 Eq. 22; 23 W. R. 545.—M.R.; *Jones v. Chappell* (1875) 44 L. J. Ch. 658; L. R. 20 Eq. 539.—M.R.; *Rust v. Victoria Graving Dock Co.* (1887) 36 Ch. D. 113, 135; 56 L. T. 216; 35 W. R. 673.—C.A.; and *Mayfair Property Co. v. Johnston* (1894) 63 L. J. Ch. 399; [1894] 1 Ch. 508; 8 R. 781; 70 L. T. 485.—NORTH, J.

Hawley v. Steele (1877) 46 L. J. Ch. 782; 6 Ch. D. 521; 37 L. T. 625.—M.R., *distinguished*.

Hill v. Metropolitan Asylum District (1879) 48 L. J. Q. B. 562; 4 Q. B. D. 433; 40 L. T. 491; *affirmed, infra*, col. 1998.

POLLOCK, B.—My attention was particularly called . . . to the judgment of the Master of the Rolls in the case of *Hawley v. Steele*, declining to grant an injunction on motion to restrain a general in her Majesty's army and the officers under his command from causing or permitting rifle practice on a common in close proximity to the plaintiff's house, which, as he alleged, was a serious nuisance and occasioned damage to his property. The principle upon which the injunction was refused has no doubt a material bearing upon the present case, and I in no way differ from what was there stated by the Master of the Rolls. But I cannot follow the course of the argument by which it is submitted, that any true analogy exists between the case of lands vested in the Secretary of State for War "for the purpose of the defence of the realm," and a power given to acquire or build an asylum for sick paupers. In the first case it would be extremely difficult to contemplate the use of land for military purposes which does not carry with it the right to fire guns. In the present case I cannot, upon the materials presented to me, draw the inference that an asylum for sick paupers, including those suffering from small-pox, cannot be maintained without the creation of a nuisance.

Att.-Gen. v. Colney Hatch Lunatic Asylum (1868) 38 L. J. Ch. 265; L. R. 4 Ch. 146; 19 L. T. 708; 17 W. R. 240.—L.C. and L.J.

Not applied, *Att.-Gen. v. Birmingham Corporation* (1871) 24 L. T. 224; 19 W. R. 561.—V.C.; *referred to*, *Att.-Gen. v. Dorking Guardians* (1882) 51 L. J. Ch. 585; 20 Ch. D. 595; 46 L. T. 573; 30 W. R. 579.—C.A.; *adopted*, *Islington Vestry v. Hornsey Urban Council* (1900) 69 L. J. Ch. 324; [1900] 1 Ch. 695, 707; 82 L. T. 580; 48 W. R. 401.—C.A.

Att.-Gen. v. Leeds Corporation (1870) 39 L. J. Ch. 711; L. R. 5 Ch. 583; 19 W. R. 19.—L.C. and L.J.; *affirming* 22 L. T. 330.—V.C.

Not applied, *Att.-Gen. v. Birmingham Corporation* (1871) 24 L. T. 224; 19 W. R. 561.—V.C.; *applied*, *Smith v. Smith* (1875) 44 L. J. Ch. 630; L. R. 20 Eq. 500; 32 L. T. 787; 23 W. R. 771; *Lea Conservancy Board v.*

Hertford Corporation (1884) 1 Cab. & E. 299.—WILLIAMS, J.

Att.-Gen. v. Leeds Corporation, *followed*.

Jordeson v. Sutton, Southcoates and Drypool Gas Co. (1899) 68 L. J. Ch. 457; [1899] 2 Ch. 217; 80 L. T. 815; 63 J. P. 692.—C.A. *See extract, infra*, col. 1999.

Harrison v. Southwark and Vauxhall Waterworks Co. (1891) 60 L. J. Ch. 630; [1891] 2 Ch. 409; 64 L. T. 864.—WILLIAMS, J., *distinguished*.

Colwell v. St. Pancras Borough Council (1904) 73 L. J. Ch. 275; [1904] 1 Ch. 707; 90 L. T. 153; 52 W. R. 523; 68 J. P. 286.—JOYCE, J.

Hill v. Metropolitan Asylum District (1879) 48 L. J. Q. B. 562; 4 Q. B. D. 433; 40 L. T. 491.—POLLOCK, B.; *affirmed*, (1879) 49 L. J. Q. B. 228; 42 L. T. 212.—C.A.; *the latter decision affirmed, nom.* **Metropolitan Asylum District v. Hill** (1881) 50 L. J. Q. B. 353; 6 App. Cas. 193; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664.—H.L. (E.).

Metropolitan Asylum District v. Hill (*supra*), *principle applied*.

Lea Conservancy Board v. Hertford Corporation (1884) 1 Cab. & E. 299.—WILLIAMS, J.; *Gas Light and Coke Co. v. St. Mary Abbott's* (1885) 54 L. J. Q. B. 414; 15 Q. B. D. 1; 53 L. T. 457; 33 W. R. 892; 49 J. P. 469.—C.A.

Metropolitan Asylum District v. Hill, *distinguished*.

L. B. & S. C. Ry. v. Truman (1886) 55 L. J. Ch. 354; 11 App. Cas. 45; 54 L. T. 250; 34 W. R. 657.—H.L. (E.); *reversing* S. C. *nom.* *Truman v. L. B. & S. C. Ry.* (1885) 29 Ch. D. 89; 52 L. T. 522; 33 W. R. 762.—C.A.; *which had affirmed* (1884) 23 Ch. D. 423; 50 L. T. 89; 32 W. R. 364.—NORTH, J.

LORD SELBORNE.—I doubt much whether the order now under appeal would have been made if it had not been supposed in the Courts below that the principle of your lordships' decision in *Metropolitan Asylum District v. Hill* was applicable to the case of all land purchased otherwise than under compulsory powers, or within prescribed and definite local limits. With that opinion I am unable to agree.—p. 57.

L. B. & S. C. Ry. v. Truman, *principle applied*.

Molloy v. Gray (1889) 24 L. R. Ir. 258, 281.—EX. D.

Metropolitan Asylum District v. Hill and L. B. & S. C. Ry. v. Truman (*supra*), *applied*.

National Telephone Co. v. Baker (1893) 62 L. J. Ch. 699; [1893] 2 Ch. 186; 3 R. 318; 68 L. T. 283; 57 J. P. 373.—KEKEWICH, J.

Metropolitan Asylum District v. Hill, *discussed and applied*.

L. B. & S. C. Ry. v. Truman, *distinguished*.

Jordeson v. Sutton, Southcoates and Drypool Gas Co. (1898) 67 L. J. Ch. 666; [1898] 2 Ch. 614; 79 L. T. 478; 47 W. R. 222; 63 J. P. 137.—NORTH, J.; *affirmed*, (1899) 68 L. J. Ch. 457; [1899] 2 Ch. 217; 80 L. T. 815; 63 J. P. 692.—C.A.

LINDLEY, M.R.—Sect. 9 of the Gasworks Clauses Consolidation Act, 1871 [which provides that nothing in the Act shall exonerate the undertakers from proceedings for nuisance], is

clear and unambiguous. This section is made applicable to the defendant company and to the works complained of by sects. 2 and 3 of their special Act of 1873. This section is, in my opinion, conclusive against the defendants. If they could show any enactment expressly or by necessary implication authorising them in terms to erect a gasometer at the place where this is, and of the dimensions desired by them, or any express or necessarily implied authority to cut through the stratum of running silt, and if they could show that it was impossible to exercise those clearly conferred powers without creating damage to their neighbours, the decision in *London, Brighton and South Coast Ry. v. Truman* would protect them. But the statutes which we have to consider fall far short of what is necessary to exclude the application of sect. 9 of the Act of 1871. Upon this part of the case the decision of *Att.-Gen. v. Leeds Corporation* is very instructive. It was there in vain contended that an enactment similar to that contained in sect. 9 was inapplicable, because what was authorised could not be done without causing a nuisance to other people. The answer was that there was nothing to show that Parliament knew that such was the case, and nothing which clearly authorised the acts of the defendants even if they occasioned a nuisance.—p. 464.

[For *Metropolitan Asylum District v. Hill*, see judgment of North, J.]

Metropolitan Asylum District v. Hill, *approved*.

L. B. and S. C. Ry. v. Truman, *distinguished*. Canadian Pacific Ry. v. Parke (1899) 68 L. J. P. C. 89; [1899] A. C. 535; 81 L. T. 127; 48 W. R. 118.—P.C.

Metropolitan Asylum District v. Hill, *inapplicable*.

L. B. & S. C. Ry. v. Truman, *referred to*. Goldberg v. Liverpool Corporation (1900) 82 L. T. 362.—C.A.

Metropolitan Asylum District v. Hill, *explained*.

L. B. & S. C. Ry. v. Truman, *referred to*. East Fremantle Corporation v. Annois (1901) 71 L. J. P. C. 39; [1902] A. C. 213; 85 L. T. 732.—P.C.

Metropolitan Asylum District v. Hill, *applied*.

Alliance, &c. Gas Co. v. Dublin County Council [1901] 1 Ir. R. 492, 504.—M.R.; *affirmed*, C.A.

L. B. & S. C. Ry. v. Truman, *observations applied*.

Rattee v. Norwich Electric Tramway Co. (1902) 18 Times L. R. 562.—C.A.; *and see* Ned's Point Battery, *In re* (1901) [1903] 2 Ir. 192, 198.—K.B.D.

Metropolitan Asylum District v. Hill, *discussed*.

Att.-Gen. v. Nottingham Corporation (1904) 73 L. J. Ch. 512; [1904] 1 Ch. 673, 682; 90 L. T. 308; 52 W. R. 281; 68 J. P. 125.—FARWELL, J.

Powell v. Fall (1880) 49 L. J. Q. B. 428; 5 Q. B. D. 597; 43 L. T. 562.—C.A., *distinguished*.

The European (1885) 54 L. J. P. 61; 10 P. D. 99; 52 L. T. 868; 33 W. R. 937; 5 Asp. M. C. 417.—ADM.

O.C.

Powell v. Fall and Galer v. Rawson (1889) 6 Times L. R. 17, *followed*.

Bantwick v. Rogers (1891) 7 T. L. R. 512.—Q.B.D.; Jeffery v. St. Pancras Vestry (1894) 63 L. J. Q. B. 618; 10 R. 554.—CHARLES and COLLINS, JJ.; and Armagh Union v. Bell (1899) [1900] 2 Ir. R. 371.—Q.B.D.; *affirmed*, C.A.

Armagh Union v. Bell, *applied*.

Alliance, &c. Gas Co. v. Dublin County Council (1900) [1901] 1 Ir. R. 492, 505.—M.R.; *affirmed*, C.A.

Withington Local Board v. Manchester Corporation (1893) 62 L. J. Ch. 393; [1893] 2 Ch. 19; 68 L. T. 330.—C.A. *See* Pembroke (Earl) v. Warren [1896] 1 Ir. R. 76.—C.A.

Pembroke (Earl) v. Warren, *approved, but not applied*.

Shaftesbury v. Wallace [1897] 1 Ir. R. 381.—V.-C.

Dangerous Materials, Spring Guns, &c.

Reg. v. Lister (1857) 1 Dears. & B. C. C. 209; 26 L. J. M. C. 196; 3 Jur. (N.S.) 570; 5 W. R. 626; 7 Cox C. C. 342.—C.C.R., *applied*.

Hepburn v. Lordan (1865) 34 L. J. Ch. 293; 2 H. & M. 345; 11 Jur. (N.S.) 132; 13 W. R. 368.—WOOD, V.-C.; S. C., on appeal, 11 Jur. (N.S.) 254; 13 W. R. 1004.—L.J.; M'Murray v. Cadwell (1889) 6 Times L. R. 76.—KEKEWICH, J.; and Essex v. Acton Local Board (1889) 58 L. J. Q. B. 594; 14 App. Cas. 153, 161; 61 L. T. 1; 53 J. P. 756.—H.L. (B.).

Hepburn v. Lordan (*supra*).

Distinguished, Cooke v. Forbes (1867) 37 L. J. Ch. 178; L. R. 5 Eq. 166; 17 L. T. 371.—WOOD, V.-C.; *followed*, M'Murray v. Cadwell (1889) 6 Times L. R. 76.—KEKEWICH, J.

Bird v. Holbrook (1828) 4 Bing. 628; 1 M. & P. 607; 6 L. J. (O.S.) C. P. 146; 29 R. R. 657.—C.P., *approved*.

Lynch v. Nurdin (1841) 10 L. J. Q. B. 73; 1 Q. B. 29; 4 P. & D. 672; 5 Jur. 797.

Bird v. Holbrook, *questioned*.

Jordin v. Crump (1841) 8 M. & W. 782; 11 L. J. Ex. 74; 5 Jur. 1113.—EX.

Bird v. Holbrook, *applied*.

Jordin v. Crump, *distinguished*.

Barnes v. Ward (1850) 19 L. J. C. P. 195; 2 C. B. 392; 2 Car. & K. 661; 14 Jur. 334.—C.P.

Bird v. Holbrook, *doubted*.

Degg v. Midland Ry. (1857) 26 L. J. Ex. 171; 1 H. & N. 773; 3 Jur. (N.S.) 395; 5 W. R. 364.—EX.

BRAMWELL, B.—I have a very great doubt whether that case can be supported.—p. 172.

Bird v. Holbrook, *applied*.

Jordin v. Crump, *distinguished*.

Clark v. Chambers (1878) 47 L. J. Q. B. 427; 3 Q. B. D. 327; 38 L. T. 454; 26 W. R. 613.—Q.B.D.

Bird v. Holbrook, *distinguished*.

Jordin v. Crump, *approved*.

Ponting v. Noakes (1894) 63 L. J. Q. B. 549; [1894] 2 Q. B. 281; 10 R. 265; 70 L. T. 842; 42 W. R. 506; 58 J. P. 559.—CHARLES and COLLINS, JJ.

Deane v. Clayton (1817) 7 Taunt. 489, 533; 2 Marsh. 577; 1 Moore 203; 18 R. R. 553.—C.P., *approved*.
Townsend v. Wathen (1808) 9 East 277; 9 R. R. 553.—K.B., *distinguished*.
Ponting v. Noakes (1894) 63 L. J. Q. B. 549; [1894] 2 Q. B. 281; 10 R. 265; 70 L. T. 842; 42 W. R. 506; 58 J. P. 559.—CHARLES and COLLINS, JJ.

On Highways, Docks, &c.

Reg. v. Longton Gas Co. (1860) 29 L. J. M. C. 118; 2 El. & El. 651; 6 Jur. (N.S.) 601; 2 L. T. 14; 8 W. R. 293; 8 Cox C. C. 317.—Q.B.
Distinguished, **Att.-Gen. v. Cambridge Consumers' Gas Co.** (1868) 38 L. J. Ch. 94; L. R. 4 Ch. 71, 80; 19 L. T. 508; 17 W. R. 145.—L.J.J.; *followed*, **Preston Corporation v. Fullwood Local Board** (1885) 53 L. T. 718; 34 W. R. 196; 50 J. P. 228.—NORTH, J.

Rex v. Russell (1805) 6 East 427; 2 Smith 424; 8 R. R. 506, *applied*.
Harris v. Mobbs (1878) 3 Ex. D. 268; 29 L. T. 164; 27 W. R. 154.—EX. D.; and **Att.-Gen. v. Brighton and Hove Co-operative Supply Association** (1900) 69 L. J. Ch. 204; [1900] 1 Ch. 276; 81 L. T. 762; 48 W. R. 314.—C.A.

Rex v. Cross (1812) 3 Camp. 224; 13 R. R. 794; and **Rex v. Jones** (1812) 3 Camp. 230; 13 R. R. 797, *applied*.
Wilkins v. Day (1883) 12 Q. B. D. 110; 49 L. T. 399; 32 W. R. 123.—Q.B.D.

Rex v. Cross and Rex v. Jones, *considered*.
Barber v. Penley (1893) 62 L. J. Ch. 623; [1893] 2 Ch. 447; 3 R. 489; 68 L. T. 662.—NORTH, J.

Rex v. Cross and Rex v. Jones, *applied*.
Att.-Gen. v. Brighton and Hove Co-operative Supply Association (1900) 69 L. J. Ch. 204; [1900] 1 Ch. 276; 81 L. T. 762; 48 W. R. 314.—C.A.

Att.-Gen. v. Cleaver (1811) 18 Ves. 211; *explained and not applied*.
Soltan v. De Held (1851) 21 L. J. Ch. 153; 2 Sim. (N.S.) 133; 16 Jur. 326.—KINDERSLEY, V.-C.

2. PROCEEDINGS IN RESPECT OF.

Fay v. Prentice (1835) 1 C. B. 828; 14 L. J. C. P. 298; 9 Jur. 877.—C.P., *referred to*.
Brunsdon v. Humphrey (1884) 53 L. J. Q. B. 476; 14 Q. B. D. 141, 150; 51 L. T. 529.—C.A.; and **Lemmon v. Webb** (1894).—C.A. (*infra*).

Jones v. Williams (1843) 11 M. & W. 176; 12 L. J. Ex. 249.—EX., *considered and distinguished*.

Lemmon v. Webb (1894) 63 L. J. Ch. 570; [1894] 3 Ch. 1; 7 R. 275; 70 L. T. 712; 58 J. P. 716.—C.A.; *affirmed*, 64 L. J. Ch. 205; [1895] A. C. 1; 11 R. 116; 71 L. T. 647; 59 J. P. 564.—H.L. (E.).

Norris v. Barnes (1872) 41 L. J. Q. B. 154; L. R. 7 Q. B. 537; 26 L. T. 622; 20 W. R. 703.—Q.B., *considered and applied*.

Rye Union v. Payne (1875) 44 L. J. M. C. 148; 32 L. T. 757; 23 W. R. 692.—Q.B.

Brown v. Bussell (1868) 37 L. J. M. C. 65; L. R. 3 Q. B. 251; 9 B. & S. 1; 16 W. R. 511.—Q.B.

Dictum applied, **Riddell v. Spear** (1879) 40 L. T. 130.—Q.B.D.; *applied*, **St. Helen's Chemical Co. v. St. Helen's Corporation** (1876) 45 L. J. M. C. 150; 1 Ex. D. 196; 34 L. T. 397.—EX. D.; *distinguished*, **Wycombe Rural Sanitary Authority v. Parsons** (1894) 64 L. J. M. C. 22; [1894] 2 Q. B. 780; 10 R. 426; 71 L. T. 428; 58 J. P. 765.—MATHEW and LAWRENCE, JJ.

Reg. v. Stephens (1866) 7 B. & S. 710; L. R. 1 Q. B. 702; 12 Jur. (N.S.) 961; 14 L. T. 593; 14 W. R. 859.—Q.B.

Distinguished, **Reg. v. Holbrook** (1878) 48 L. J. Q. B. 113; 4 Q. B. D. 42, 51; 39 L. T. 536; 27 W. R. 313.—Q.B.D.; *considered*, **Chisholm v. Doulton** (1889) 53 L. J. M. C. 133; 22 Q. B. D. 736; 60 L. T. 966; 37 W. R. 749; 53 J. P. 550.—Q.B.D.; *applied*, **Coppen v. Moore** (1898) 67 L. J. Q. B. 689; [1898] 2 Q. B. 306, 312; 78 L. T. 520; 46 W. R. 620.—Q.B.D.

Ellis v. Sheffield Gas Consumers' Co. (1853) 23 L. J. Q. B. 42; 2 El. & Bl. 767; 2 C. L. R. 249; 18 Jur. 146; 2 W. R. 19.—Q.B., *inapplicable*.

Sadler v. Henlock (1855) 24 L. J. Q. B. 138; 4 El. & Bl. 570; 3 C. L. R. 760; 1 Jur. (N.S.) 677; 3 W. R. 181.—Q.B.

Ellis v. Sheffield Gas Consumers' Co., *applied*.
Hole v. Sittingbourne and Sheerness Ry. (1861) 30 L. J. Ex. 81; 6 H. & N. 488; 3 L. T. 750; 9 W. R. 274.—EX.

Rex v. Neville (1792) 1 Peake N. P. 91; 3 R. R. 662.—K.B., *dissented from*.

Reg. v. Fairlie (1857) 8 El. & Bl. 486; 4 Jur. (N.S.) 300; 6 W. R. 56; 8 Cox C. C. 66.

CAMPBELL, C.J.—Any deliberate decision by Lord Kenyon must always be treated with great deference; but I cannot assent to what he is reported to have decided in *Rex v. Neville*. It would lead to the infringement of every principle.

Benjamin v. Storr (1874) 43 L. J. C. P. 162; L. R. 9 C. P. 400; 30 L. T. 362; 22 W. R. 631.—C.P., *explained*.

Fritz v. Hobson (1880) 49 L. J. Ch. 321; 14 Ch. D. 542; 42 L. T. 225; 28 W. R. 459.—FRY, J.

Benjamin v. Storr, *applied*.
Barber v. Penley (1893) 62 L. J. Ch. 623; [1893] 2 Ch. 447; 3 R. 489; 68 L. T. 662.—NORTH, J.; **Martin v. L. C. C.** (1898) 79 L. T. 170.—KENNEDY, J.; *affirmed*, (1899) 80 L. T. 866.—C.A.; **Boyce v. Paddington Borough Council** (1902) 72 L. J. Ch. 28; [1903] 1 Ch. 109, 114; 87 L. T. 564; 51 W. R. 109; 67 J. P. 23.—BUCKLEY, J. (*affirmed*, C.A.); and **Smith v. Wilson** (1902) 72 L. T. 45, 51.—K.B.D.

Fritz v. Hobson (1880) 49 L. J. Ch. 321; 14 Ch. D. 542; 42 L. T. 225; 28 W. R. 459.—FRY, J.

Dictum discussed and not applied, **Penrice v. Williams** (1883) 52 L. J. Ch. 593; 23 Ch. D. 353; 48 L. T. 868; 31 W. R. 496.—CHITTY, J.; *distinguished*, **Landrock v. Metropolitan District Ry.** (1886) 2 Times L. R. 532.—HUDDLESTON, B.; *approved*, **Chapman v. Auckland Union** (1889) 58 L. J. Q. B. 504; 23 Q. B. D. 294; 61 L. T.

446; 53 J. P. 820.—C.A.; *referred to*, Dreyfus v. Peruvian Guano Co. (1889) 43 Ch. D. 316, 335; 62 L. T. 518.—C.A.; *distinguished*, Martin v. L. C. C. (1898) 79 L. T. 170.—KENNEDY, J.; *applied*, Chessum v. Gordon (1901) 70 L. J. K.B. 394; [1901] 1 Q. B. 694, 699; 84 L. T. 137; 49 W. R. 309.—C.A.; Chaplin v. Westminster Borough (1901) 70 L. J. Ch. 679; [1901] 2 Ch. 329; 85 L. T. 88; 49 W. R. 586; 65 J. P. 661.—BUCKLEY, J.: Boyce v. Paddington Borough Council (1902).—BUCKLEY, J. (*supra*, col. 2002); and Smith v. Wilson [1903] 2 Ir. R. 45, 51.—K.B.D.

Sampson v. Smith (1838) 7 L. J. Ch. 260; 8 Sim. 272; 2 Jur. 563.—V.-C., *adopted*.

London Association of Shipowners v. London and India Docks Joint Committee (1892) 62 L. J. Ch. 294; [1892] 3 Ch. 242; 2 R. 23; 67 L. T. 238; 7 Asp. M. C. 195.—C.A. LINDLEY, BOWEN and KAY, L.JJ.

Rich v. Basterfield (1847) 16 L. J. C. P. 273; 4 C. B. 783; 2 Car. & K. 257; 11 Jur. 696.—C.P.

Referred to, Readie v. L. & N. W. Ry. (1849) 20 L. J. Ex. 65; 4 Ex. 244; 6 Railw. Cas. 184.—EX.; *distinguished*, Brown v. Russell (1868) 37 L. J. M. C. 65; L. R. 3 Q. B. 251, 261; 9 B. & S. 1; 16 W. R. 511.—Q.B.; *referred to*, White v. Jameson (1874) L. R. 18 Eq. 303; 22 W. R. 761.—JESSEL, M.R.; *commented on*, Harris v. James (1876) 45 L. J. Q. B. 545; 35 L. T. 240.—Q.B.; *referred to*, Winter v. Baker (1886) 3 T. L. R. 569.—KEKEWICH, J.; *observations applied*, Hall v. Norfolk (Duke) 69 L. J. Ch. 571; [1900] 2 Ch. 493, 500; 82 L. T. 836; 48 W. R. 565.—KEKEWICH, J.

Harris v. James (1876) 45 L. J. Q. B. 545; 35 L. T. 240.—Q.B., *applied*.

Phillips v. Thomas (1890) 62 L. T. 793.—CHITTY, J.

Reg. v. Watson (1703) 2 Lord Raym. 856, *adopted*.

Tarry v. Ashton (1876) 45 L. J. Q. B. 260; 1 Q. B. D. 314; 34 L. T. 97; 24 W. R. 581.—Q.B.D.

Tarry v. Ashton.

Considered and applied, Bower v. Peate (1876) 45 L. J. Q. B. 446; 1 Q. B. D. 321; 35 L. T. 321.—Q.B.D.; *adopted*, Dalton v. Angus (1881) 50 L. J. Q. B. 689; 6 App. Cas. 740, 829; 44 L. T. 844; 30 W. R. 191.—H.L. (E.); *recognised*, Hughes v. Percival (1882) 52 L. J. Q. B. 719; 8 App. Cas. 443; 49 L. T. 189; 31 W. R. 725.—H.L. (E.); *distinguished*, Ivay v. Hedges (1882) 9 Q. B. D. 80.—COLERIDGE, C.J. and GROVE, J.; The European (1883) 54 L. J. P. 61; 10 P. D. 99; 52 P. T. 868; 33 W. R. 937; 5 Asp. M. C. 417.—ADM.; and Kiddle v. Lovett (1885) 16 Q. B. D. 605; 34 W. R. 518.—DENMAN, J.; *followed*, Silverton v. Marriott (1888) 59 L. T. 61; 52 J. P. 677.—FIELD and WILLS, JJ.

Tenant v. Goldwin (1704) 1 Salk. 21, 360; 2 Lord Raym. 1089.—Q.B.

Distinguished, Russell v. Shenton (1842) 11 L. J. Q. B. 289; 3 Q. B. 449; 2 G. & D. 573; 6 Jur. 1059.—Q.B.; *followed*, Hodgkinson v. Ennor (1863) 4 B. & S. 229; 32 L. J. Q. B. 231; 9 Jur. (N.S.) 1152; 8 L. T. 451; 11 W. R. 775.—Q.B.; *distinguished*, Wilson v. Newberry (1871) 41 L. J. Q. B. 31;

L. R. 7 Q. B. 31; 25 L. T. 695; 20 W. R. 111.—Q.B.; *dictum applied*, Ellis v. Manchester Carriage Co. (1876) 2 C. P. D. 13; 35 L. T. 476; 25 W. R. 229.—DENMAN, J.; *inapplicable*, Humphries v. Cousins (1877) 46 L. J. C. P. 438; 2 C. P. D. 239; 36 L. T. 180; 25 W. R. 371.—C.P.D.; *applied*, Crowhurst v. Amersham Burial Board (1878) 48 L. J. Ex. 109, 111; 4 Ex. D. 5, 11; 39 L. T. 355; 27 W. R. 95.—EX. D.; *adopted*, Wheeldon v. Burrows (1879) 48 L. J. Ch. 853; 12 Ch. D. 31, 50; 41 L. T. 327; 28 W. R. 196.—C.A.; *approved*, Snow v. Whitehead (1884) 53 L. J. Ch. 885; 27 Ch. D. 588; 51 L. T. 253; 33 W. R. 128.—KAY, J.; *adopted*, Ballard v. Tomlinson (1885) 54 L. J. Ch. 454; 29 Ch. D. 115; 52 L. T. 942; 33 W. R. 533; 49 J. P. 692.—C.A.; *referred to*, Ponting v. Noakes (1894) 63 L. J. Q. B. 549; [1894] 2 Q. B. 281; 10 R. 265; 70 L. T. 842; 42 W. R. 506; 58 J. P. 558.—CHARLES and COLLINS, JJ.

Thorpe v. Brumfitt (1873) L. R. 8 Ch. 650.—L.JJ., *applied*.

Blair v. Deakin (1887) 57 L. T. 522; 52 J. P. 327.—KAY, J.; Lambton v. Mellish (1894) 63 L. J. Ch. 929; [1894] 3 Ch. 163; 8 R. 807; 71 L. T. 385; 43 W. R. 5; 58 J. P. 335.—CHITTY, J.

Thorpe v. Brumfitt, *distinguished*.

Sadler v. G. W. Ry. (1895) 65 L. J. Q. B. 26; [1895] 2 Q. B. 688; 73 L. T. 385; 44 W. R. 50; 60 J. P. 37.—C.A.

Reg. v. Watts (1703) 1 Salk. 357; and **Reg. v. Bradford Navigation Co.** (1865) 6 B. & S. 631; 34 L. J. Q. B. 191; 11 Jur. (N.S.) 769; 13 W. R. 892.—Q.B., *applied*.

Att.-Gen. v. Tod Heatley (1897) 66 L. J. Ch. 275; [1897] 1 Ch. 560; 76 L. T. 174; 45 W. R. 394.—C.A.; *reversing* 61 J. P. 24.

Nuneaton Local Board v. General Sewage Co. (1875) 44 L. J. Ch. 561; L. R. 20 Eq. 127, 135.—BACON, V.-C., *discussed and distinguished*.

Wallasey Local Board v. Gracey (1887) 56 L. J. Ch. 739; 36 Ch. D. 593, 598; 57 L. T. 51; 35 W. R. 694; 51 J. P. 740.—STIRLING, J.

St. Helen's Chemical Co. v. St. Helen's Corporation (1876) 45 L. J. M. C. 150; 1 Ex. D. 190, 202; 34 L. T. 397.—EX. D.

Distinguished, Molloy v. Gray (1889) 24 L. R. Ir. 258, 270.—EX. D.; *adopted*, **Att.-Gen. v. Scott** (1904) [1905] 2 K. B. 160.—JELF, J.; *affirmed*, C.A.

Att.-Gen. v. Sheffield Gas Consumers' Co. (1853) 22 L. J. Ch. 811; 3 De G. M. & G. 304; 17 Jur. 677; 1 W. R. 185.—L.C. and L.JJ.

Distinguished, Biddulph v. St. George's, Hanover Square, Vestry (1863) 3 De G. J. & S. 493; 33 L. J. Ch. 411; 9 Jur. (N.S.) 953; 8 L. T. 558; 11 W. R. 739.—L.JJ.; *principle adhered to*, Swaine v. G. N. Ry. (1864) 33 L. J. Ch. 399; 4 De G. J. & S. 211; 3 N. R. 399; 10 Jur. (N.S.) 191; 9 L. T. 745; 12 W. R. 391.—L.JJ.; *referred to*, **Att.-Gen. v. Kingston-upon-Thames Corporation** (1865) 34 L. J. Ch. 481; 11 Jur. (N.S.) 596; 12 L. T. 665; 13 W. R. 888.—WOOD, V.-C.; *applied*, **Sutton v. S. E. Ry.** (1865) 35 L. J. Ex. 38; L. R. 1 Ex. 32; 4 H. & C. 325; 13 L. T. 438.—EX.; *opinion adhered to*,

Goldsmid v. Tunbridge Wells Improvement Commissioners (1866) 35 L. J. Ch. 382; L. R. 1 Ch. 349; 12 Jur. (N.S.) 308; 14 L. T. 154; 14 W. R. 562.—L.J.J.; *referred to*, **Luscombe v. Steer** (1867) 17 L. T. 229; 15 W. R. 1191.—L.J.; *discussed and doctrine applied*, **Cooke v. Forbes** (1867) 37 L. J. Ch. 178; L. R. 5 Eq. 166; 17 L. T. 371.—WOOD, V.-C.; *followed*, **Att.-Gen. v. Cambridge Gas Consumers' Co.** (1868) 38 L. J. Ch. 94; L. R. 4 Ch. 71; 19 L. T. 508; 17 W. R. 145.—L.J.J.; *not applied*, **Smith v. Midland Ry.** (1877) 37 L. T. 224; 25 W. R. 861.—BACON, V.-C.; *applied*, **Preston Corporation v. Fullwood Local Board** (1885) 53 L. T. 718; 34 W. R. 196; 50 J. P. 228.—NORTH, J.; *referred to*, **Reinhardt v. Mentasti** (1889) 58 L. J. Ch. 787; 42 Ch. D. 685; 61 L. T. 328; 38 W. R. 10.—KEKEWICH, J.; *applied*, **Att.-Gen. v. Brighton and Hove Co-operative Supply Association** (1900) 69 L. J. Ch. 204; [1900] 1 Ch. 276; 81 L. T. 762; 48 W. R. 314.—C.A.

Att.-Gen. v. Cambridge Gas Consumers' Co., L. R. 6 Eq. 282; 16 W. R. 1007.—V.-C.; *reversed*, (1868) 38 L. J. Ch. 94; L. R. 4 Ch. 71; 19 L. T. 508; 17 W. R. 145.—L.J.J.

Att.-Gen. v. Cambridge Gas Consumers' Co. *Not applied*, **Padsey Coal Gas Co. v. Bradford Corporation** (1873) 42 L. J. Ch. 293; L. R. 15 Eq. 167; 28 L. T. 11; 21 W. R. 286.—MALINS, V.-C.; *applied*, **Preston Corporation v. Fullwood Local Board** (1885) 53 L. T. 718; 34 W. R. 196; 50 J. P. 228.—NORTH, J.; **Att.-Gen. v. Preston Corporation** (1896) 13 Times L. R. 14.—STIRLING, J.

Att.-Gen. v. Birmingham Corporation (1858) 4 K. & J. 528.—WOOD, V.-C.; and **Goldsmid v. Tunbridge Wells Improvement Commissioners** (1866) L. R. 1 Ch. 349; 12 Jur. (N.S.) 308; 14 L. T. 154; 14 W. R. 562.—L.J.J., *applied*.
Lillywhite v. Trimmer (1867) 36 L. J. Ch. 525; 16 L. T. 318; 16 W. R. 763.—V.-C.

Att.-Gen. v. Birmingham Corporation and Goldsmid v. Tunbridge Wells Improvement Commissioners, *followed*.

Att.-Gen. v. Colney Hatch Lunatic Asylum (1868) 38 L. J. Ch. 265; L. R. 4 Ch. 146; 19 L. T. 708; 17 W. R. 240.—L.C. and L.J.; *and see* **Att.-Gen. v. Gee** (1870) L. R. 10 Eq. 131.—MALINS, V.-C.; and **Att.-Gen. v. Basingstoke** (1876) 45 L. J. Ch. 726.—HALL, V.-C.

Goldsmid v. Tunbridge Wells Improvement Commissioners, *explained*.

Glossop v. Heston and Isleworth Local Board (1879) 49 L. J. Ch. 89; 12 Ch. D. 102; 40 L. T. 736; 28 W. R. 111.—C.A.

Att.-Gen. v. Birmingham Corporation and Goldsmid v. Tunbridge Wells Improvement Commissioners, *distinguished*.

Att.-Gen. v. Dorking Guardians (1882) 51 L. J. Ch. 585; 20 Ch. D. 595, 610; 46 L. T. 573; 30 W. R. 579.—C.A.; and **Islington Vestry v. Hornsey Urban Council** (1900) 69 L. J. Ch. 324; [1900] 1 Ch. 695; 82 L. T. 580.—C.A.

Salvin v. North Brancepeth Coal Co. (1874) 44 L. J. Ch. 149; L. R. 9 Ch. 705; 31 L. T. 154; 22 W. R. 904.—L.J.J., *observed upon*.

Shotts Iron Co. v. Inglis (1882) 7 App. Cas. 518.—H.L. (SC.).

Salvin v. North Brancepeth Coal Co., *applied*.
Fletcher v. Bealey (1885) 54 L. J. Ch. 424; 28 Ch. D. 688; 52 L. T. 541; 33 W. R. 745.

PEARSON, J.—Again, in **Salvin v. North Brancepeth Coal Co.**, which was a case of alleged injury to trees and grounds generally by fumes from a chemical factory, and which both **Jessel, M.R.** and the Court of Appeal considered was not made out by the evidence, **Mellish, L.J.** said: "... I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say that it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt, that if the remedy is delayed, the damage will be suffered, I think it must be shown that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a *quia timet* action."—p. 696.

Salvin v. North Brancepeth Coal Co. and Fletcher v. Bealey, *referred to*.
M'Murray v. Cadwell (1889) 6 Times L. R. 76.—KEKEWICH, J.

M'Murray v. Cadwell (1889) 6 Times L. R. 76.—KEKEWICH, J., *followed*.

Savory and Moore v. London Electric Supply Corporation (1891) 8 Times L. R. 192.—KEKEWICH, J.

Crowder v. Tinkler (1816) 19 Ves. 617; 13 R. R. 267.—L.C.

Not applied, **Thorne v. Taw Vale Ry.** (1850) 13 Beav. 10.—M.R.; *explained and distinguished*, **Soltan v. De Held** (1851) 21 L. J. Ch. 153; 2 Sim. (N.S.) 133; 16 Jur. 326.—KINDERSLEY, V.-C.; *referred to*, **Hepburn v. Lordan** (1865) 34 L. J. Ch. 293; 2 H. & M. 345; 11 Jur. (N.S.) 132; 13 W. R. 368.—WOOD, V.-C. S. C. on appeal, 11 Jur. (N.S.) 254; 13 W. R. 1004.—L.J.; *referred to*, **Cooke v. Forbes** (1867) 37 L. J. Ch. 178; L. R. 5 Eq. 166; 17 L. T. 371.—WOOD, V.-C.; *applied*, **M'Murray v. Cadwell** (1889) 6 Times L. R. 76.—KEKEWICH, J.; *dicta adopted*, **Att.-Gen. v. Manchester Corporation** (1893) 62 L. J. Ch. 459; [1893] 2 Ch. 87; 3 R. 427; 68 L. T. 608; 41 W. R. 459; 57 J. P. 343.—CHITTY, J.

Hudson v. Maddison (1841) 11 L. J. Ch. 55; 12 Sim. 416; 5 Jur. 1194.—V.-C.; *explained and distinguished*.
Soltan v. De Held (1851) 21 L. J. Ch. 153; 2 Sim. (N.S.) 133; 16 Jur. 326.—V.-C.

Att.-Gen. v. Kingston-on-Thames Corporation (1865) 11 Jur. (N.S.) 596; 12 L. T. 665; 13 W. R. 888.—WOOD, V.-C., *considered*.

Fletcher v. Bealey (1885) 54 L. J. Ch. 424; 28 Ch. D. 688; 52 L. T. 541; 33 W. R. 745.
PEARSON, J.—In **Att.-Gen. v. Corporation of Kingston** an information had been filed against the corporation of Kingston, because they were proceeding to pour a large quantity of sewage into the river Thames. They were connecting their own system of drainage with a new main sewer, in such a way as greatly to enlarge the quantity of sewage coming into the river Thames.

After discussing the Act of Parliament under which the corporation had power to do this, and concluding that, if they did create a nuisance, they were not justified by the Acts under which they were incorporated, Wood, V.-C. said, "It remained then to be considered whether there was evidence of an actual nuisance committed, or evidence of the extreme probability of a nuisance, if that which was being done was allowed to continue. The difficulty in the way of the plaintiffs was, that it was necessary for them to establish the existence of an actual immediate nuisance, and not a mere *quia timet* case of injury a hundred years hence, when chemical contrivances might have been discovered for preventing the evil."

Att.-Gen. v. Kingston-on-Thames Corporation, adopted.

Att.-Gen. v. Manchester Corporation (1893) 62 L. J. Ch. 459; [1893] 2 Ch. 87; 3 R. 427; 68 L. T. 608; 41 W. R. 459; 57 J. P. 343.—CHITTY, J.

Fleet v. Metropolitan Asylums Board (1886)
2 Times L. R. 361, 362.—C.A., *dicta*
adopted.

Bendelow v. Wortley Union (1887) 57 L. J. Ch. 762; 57 L. T. 849; 36 W. R. 168.—STIRLING, J.: Att.-Gen. v. Manchester Corporation (1893) 62 L. J. Ch. 459; [1893] 2 Ch. 87; 3 R. 427; 68 L. T. 608; 41 W. R. 459; 57 J. P. 343.—CHITTY, J.: Att.-Gen. v. Nottingham Corporation (1904) 73 L. J. Ch. 512; [1904] 1 Ch. 673; 90 L. T. 308; 52 W. R. 281; 68 J. P. 125.—FAIRWELL, J.

Eaden v. Firth (1863) 1 H. & M. 573.—
V.-C. *commented on.*

Inchbald v. Robinson (1869) 17 W. R. 272.—MALINS, V.-C.; *affirmed*, L. R. 4 Ch. 388; 21 L. T. 259; 17 W. R. 459.—L.J.

MALINS, V.-C.—I confess I do not quite understand the case of *Eaden v. Firth*, which is opposed to every other decision of Lord Hatherley, and to the practice of Lord Hatherley himself, and I must therefore conclude that it proceeded upon some special circumstance which does not appear.—p. 273.

Eaden v. Firth, commented upon.

Bareham v. Hall (1870) 22 L. T. 116.—STUART, V.-C.

Eaden v. Firth, distinguished.

Roskell v. Whitworth (1870) 39 L. J. Ch. 765; L. R. 5 Ch. 459; 23 L. T. 179; 18 W. R. 682.—GIFFARD, L.J.

OUTLAWRY.

Att.-Gen. v. Richards (1845) 8 Beav. 380.
—M.R., *distinguished.*

Taylor v. Wemyss (1869) L. R. 8 Eq. 512; 20 L. T. 599; 17 W. R. 639.—V.-C.

Bryan v. Wagstaff (1826) 4 L. J. (o.s.)
K. B. 173; 8 D. & R. 208; 5 B. & C. 314;
S. C., R. & M. 329; 2 Car. & P. 125,
referred to.

Beauleok v. Hook (1851) 20 L. J. Q. B. 485.—Q.B.

Loukes v. Holbeach (1827) 6 L. J. (o.s.)
O. P. 37; 4 Bing. 419; 1 M. & P. 126.—

C.P.; and **Aldridge v. Buller (1837) 6**
L. J. Ex. 151; 2 M. & W. 412; 5 D. P. C.
733; M. & H. 94; 1 Jur. 385.—EX.,
overruled by implication.

Hawkins v. Hall (1839) 8 L. J. Ch. 225; 4
Myl. & C. 280; 3 Jur. 282.—M.R.; *affirmed*, L.C.

Loukes v. Holbeach, Aldridge v. Buller and
Hawkins v. Hall, considered.

Walker v. Thellusson (1842) 1 D. (N.S.) 578;
6 Jur. 345.—Q.B.

Loukes v. Holbeach, Aldridge v. Buller and
Hawkins v. Hall, referred to.

Burn (or Byrne) v. Manning (1842) 12 L. J.
Q. B. 4; 2 D. (N.S.) 403; 7 Jur. 88.—BAIL CT.

Aldridge v. Buller and Walker v. Thellusson,
explained.

Davis v. Trevannion (1845) 14 L. J. Q. B. 138;
2 D. & L. 743; 9 Jur. 492.—BAIL CT.

PARLIAMENT.

Ashby v. White (1703) 2 Ld. Raym. 938; 3
lb. 320; Salk. 19; 14 Howell St. Tr. 695;
1 Smith L. C. (10th ed.) 231.

Distinguished, Reg. v. Paty (1703) 2 Ld. Raym.
1105.—Q.B.; *commented on*, Cullen v. Morris
(1819) 2 Stark. 577; 20 R. B. 742.—K.B.; *dis-*
cussed, Embrey v. Owen (1851) 20 L. J. Ex.
212; 6 Ex. 353; 15 Jur. 633.—EX.; *referred to*,
Nicklin v. Williams (1854) 23 L. J. Ex. 335;
10 Ex. 259; 2 C. L. R. 1304.—EX.; *considered*,
Tozer v. Child (1857) 26 L. J. Q. B. 151; 7
El. & Bl. 377; 3 Jur. (N.S.) 409; 5 W. R. 287.—
EX. CH.; *distinguished*, Smith v. Thackerah
(1866) 35 L. J. C. P. 276; L. R. 1 C. P. 564; 14
L. T. 761; 14 W. R. 832.—EX.; *applied*, Fotherby
v. Metropolitan Ry. (1866) 36 L. J. C. P. 88;
L. R. 2 C. P. 188; 15 L. T. 243; 15 W. R. 112.—
C.P.; *referred to*, Metropolitan Board of Works
v. McCarthy (1874) 43 L. J. C. P. 385; L. R.
7 H. L. 243; 31 L. T. 182; 23 W. R. 115.—
H.L. (E.); *not applied*, Wood v. Wood (1874) 43
L. J. Ex. 153; L. R. 9 Ex. 190; 30 L. T. 815; 22
W. R. 709.—EX.; *referred to*, Dalton v. Angus
(1881) 50 L. J. Q. B. 689; 6 App. Cas. 740; 44
L. T. 844; 30 W. R. 191.—POLLOCK, B.; *con-*
sidered and applied, Bowen v. Hall (1881) 50
L. J. Q. B. 305; 6 Q. B. D. 333; 44 L. T. 75; 29
W. R. 367; 45 J. P. 373.—C.A.; *applied*, Brad-
laugh v. Erskine (1883) 47 L. T. 618; 31 W. R.
365.—FIELD, J.; *referred to*, The Bernina (1887)
56 L. J. P. 17; 12 P. D. 58, 70; 56 L. T. 258;
35 W. R. 314.—C.A. (affirmed, H.L. (E.)); *referred*
to, Ratcliffe v. Evans (1892) 61 L. J. Q. B. 535;
[1892] 2 Q. B. 524; 66 L. T. 794; 40 W. R.
578; 56 J. P. 837.—C.A.; *commented on*, Chaffers
v. Goldsmid (1893) 63 L. J. Q. B. 59; [1894] 1
Q. B. 186; 10 R. 19; 70 L. T. 24; 42 W. R.
239; 58 J. P. 212.—WILLS and GRANTHAM, JJ.

Cullen v. Morris (1819) 2 Stark. 577; 20
R. B. 742, *inapplicable.*

Rex v. Ford (1835) 2 A. & E. 588.—K.B.

Cullen v. Morris and Drew v. Cotton, 2
Luder's Election Cases, 245, *applied.*

Tozer v. Child (1857) 7 El. & Bl. 377; 26
L. J. Q. B. 151; 3 Jur. (N.S.) 409; 5 W. R. 237.
—EX. CH.

Middlesex (Sheriff), In re (1840) 11 A. & E. 273.—Q.B., *considered and applied*.
Howard v. Gossett (1845) 14 L. J. Q. B. 367; 10 Q. B. 359.—Q.B.: *reversed nom.* Gossett v. Howard (1847) 16 L. J. Q. B. 345; 10 Q. B. 411; 11 Jur. 750.—EX. CH.

Rex v. Wright (1799) 8 Term Rep. 293.—K.B.

Questioned, but dictum applied, Wason v. Walter (1868) 38 L. J. Q. B. 34; L. R. 4 Q. B. 73; 19 L. T. 409; 17 W. R. 169.—Q.B.; *dictum applied*, Allbutt v. General Medical Council (1889) 58 L. J. Q. B. 606; 23 Q. B. D. 400; 61 L. T. 585; 37 W. R. 771.—C.A.

Burdett v. Abbot (1817) 5 Dow. 165; 14 East 1, 154; 4 Taunt. 401; 12 R. R. 450; and **Stockdale v. Hansard** (1839) 8 L. J. Q. B. 294; 9 A. & E. 1; 2 P. & D. 1; 3 Jur. 905; 3 St. Tr. (N.S.) 723.—Q.B., *considered and applied*.

~~Howard v. Gossett~~ (*supra*).

Stockdale v. Hansard.

Considered, Wason v. Walter (1868) 38 L. J. Q. B. 73; L. R. 4 Q. B. 73; 8 B. & S. 671; 19 L. T. 409; 17 W. R. 169.—Q.B.; *distinguished*, Henwood v. Harrison (1872) 41 L. J. C. P. 206; L. R. 7 C. P. 606; 26 L. T. 938; 20 W. R. 1000.—C.P.

Burdett v. Abbot, *applied*.

Stockdale v. Hansard, *considered*.

Bradlaugh v. Erskine (1883) 47 L. T. 618; 31 W. R. 365.—FIELD, J.

Burdett v. Abbot and Stockdale v. Hansard, *considered*.

Bradlaugh v. Gossett (1884) 53 L. J. Q. B. 209; 12 Q. B. D. 271; 50 L. T. 620; 32 W. R. 552.—Q.B.

Burdett v. Abbot (1811), *discussed*.

Harvey v. Harvey (1884) 26 Ch. D. 614; 33 W. R. 76; 48 J. P. 468.—CHITTY, J.

Burdett v. Abbot and Stockdale v. Hansard, *discussed and applied*.

Dillon v. Balfour (1887) 20 L. R. Ir. 600, 611.—EX. D.

Gossett v. Howard (1847) 16 L. J. Q. B. 345; 10 Q. B. 411; 11 Jur. 750.—EX. CH.

Applied, **Bradlaugh v. Erskine** (1883) 47 L. T. 618; 31 W. R. 365.—FIELD, J.; *inapplicable*, **Dale's Case** (1881) 50 L. J. Q. B. 234, 255; 6 Q. B. D. 376, 416.—Q.B.D. (*affirmed*, C.A.).

Gossett v. Howard, *applied*.

Dillon v. Balfour (1887) 20 L. R. Ir. 600, 613.—EX. D.; **Mayo Presentment, In re** [1898] 2 Ir. R. 719, 750.—Q.B.D.

Jay v. Topham (1689) 14 East 102, n.; 12 St. Tr. 822.—K.B., *discussed*.

Stockdale v. Hansard (*supra*); **Dillon v. Balfour** (1887) 20 L. R. Ir. 600.—EX. D.

Long Wellesley's Case, Wellesley v. Beaufort (Duke) (1831) 2 Russ. & My. 639.—L.C.

Referred to, **Reg. v. Castro, Onslow and Whalley's Case** (1873) L. R. 9 Q. B. 219; 28 L. T. 222; 12 Cox C. C. 371.—Q.B.; *discussed*, **Freston, In re** (1888) 52 L. J. Q. B. 545; 11 Q. B. D. 545; 49 L. T. 290; 31 W. R. 804.—C.A.; *rule applied*, **Armstrong, In re, Lindsay,**

Ex parte (1891) [1892] 1 Q. B. 327; 65 L. T. 464; 40 W. R. 159; 17 Cox C. C. 349; 8 Morrell 271.—VAUGHAN WILLIAMS, J.

Goudy v. Duncombe (1847) 1 Ex. 430; 5 D. & L. 209; 17 L. J. Ex. 76.—EX., *followed*.

Anglo-French Co-operative Society, In re (1880) 49 L. J. Ch. 388; 14 Ch. D. 533; 28 W. R. 580.

Edwards v. Grand Junction Ry. (1836) 6 L. J. Ch. 47; 7 Sim. 337; 1 Myl. & Cr. 650; 1 Railw. Cas. 173.—L.C., *distinguished*.

Aldred v. North Midland Ry. (1839) 1 Railw. Cas. 404; 3 Jur. 244.—V.-C.; **Gooday v. Colchester Ry.** (1852) 17 Beav. 132.—M.R.

Edwards v. Grand Junction Ry. and Petre (Lord) v. Eastern Counties Ry. (1838) 1 Railw. Cas. 462.—L.C. and V.-C., *explained*.

Lindsay (Earl) v. G. N. Ry. (1853) 22 L. J. Ch. 995; 10 Hare 665; 17 Jur. 522; 1 W. R. 257.—WOOD, V.-C.

Edwards v. Grand Junction Ry. and Petre (Lord) v. Eastern Counties Ry. (1838) 1 Railw. Cas. 462, *impugned*.

Preston v. Liverpool, Manchester and Newcastle Ry. (1856) 5 H. L. Cas. 605; 25 L. J. Ch. 421; 2 Jur. (N.S.) 241; 4 W. R. 383.—H.L.(E.).

[Their lordships (LORDS CRANWORTH, L.C. and BROUGHAM), although they held that it was not necessary to pronounce a final opinion on the authority of these cases, yet expressed grave doubts as to the correctness of the doctrine there acted upon by Lord Cottenham, that a contract entered into by the projectors of a railway must necessarily bind the railway company when constituted; in other words, that the railway company, being the successors of the projectors, must take existence subject to the burdens contracted for by those who were the promoters of it, and to whom it owed its existence.]

Edwards v. Grand Junction Ry. and Petre (Lord) v. Eastern Counties Ry., *impugned*.

Stanley v. Chester and Birkenhead Ry. (1838) 3 Myl. & Cr. 773; 1 Railw. Cas. 58.—L.C., *disapproved*.

Caledonian and Dumbartonshire Junction Ry. v. Helensburgh Harbour (Trustees) (1856) 2 Macq. H. L. 391; 2 Jur. (N.S.) 695; 4 W. R. 671.

[LORDS CRANWORTH, L.C. and BROUGHAM held that the doctrine of the above cases rested on no sound principle and might lead, as in *Lord Petre's Case* he thought it did lead, to great injustice. Their lordships, however, thinking the present case distinguishable, did not expressly decide whether they should still adhere to Lord Cottenham's decisions, or depart from them.]

Edwards v. Grand Junction Ry.; Stanley v. Chester and Birkenhead Ry. and Petre (Lord) v. Eastern Counties Ry., *held overruled*.

Shrewsbury (Earl) v. North Staffordshire Ry. (1865) 35 L. J. Ch. 156; L. R. 1 Eq. 593; 12 Jur. (N.S.) 63; 13 L. T. 648; 14 W. R. 220.—V.-C.

Edwards v. Grand Junction Ry., *not applied*.

Cutbill v. Shropshire Rys. (1891) 7 Times L. R. 381.—STIRLING, J.

- Preston v. Liverpool, Manchester and Newcastle Ry.** (1856) 5 H. L. Cas. 605; 25 L. J. Ch. 421; 2 Jur. (N.S.) 241; 4 W. R. 383.—H.L. (E.), *inapplicable*.
- Caledonian, &c., Ry. v. Helensburgh Harbour Trustees** (1856) 2 Macq. H. L. 391; 2 Jur. (N.S.) 695; 4 W. R. 671.—H.L. (SC.).
- Preston v. Liverpool, &c., Ry., and Caledonian, &c., Ry. v. Helensburgh Harbour Trustees, applied.**
- Shrewsbury (Earl) v. North Staffordshire Ry.** (1865) 35 L. J. Ch. 156; L. R. 1 Eq. 593; 12 Jur. (N.S.) 63; 13 L. T. 648; 14 W. R. 220.—V.-C.
- Preston v. Liverpool, &c., Ry., and Shrewsbury (Earl) v. N. Staffordshire Ry., considered.**
- Taylor v. Chichester, &c., Ry.** (1867) 36 L. J. Ex. 201; L. R. 2 Ex. 356; 16 L. T. 703.—EX. CH. (*reversed*, H.L.).
- Preston v. Liverpool, &c., Ry.; Caledonian, &c., Ry. v. Helensburgh Harbour Trustees; and Shrewsbury (Earl) v. N. Staffordshire Ry., applied.**
- Mann v. Edinburgh Northern Tramways Co.** (1892) 62 L. J. P. C. 74; [1893] A. C. 69; 68 L. T. 96; 57 J. P. 245.—H.L. (SC.).
- Stockton and Hartlepool Ry. v. Leeds and Thirsk Ry.** (1848) 2 Ph. 666; 5 Railw. Cas. 695; 12 Jur. 735.—L.C., *distinguished*.
- Lancaster and Carlisle Ry. v. L. & N. W. Ry.** (1856) 25 L. J. Ch. 223; 2 K. & J. 293; 4 W. R. 220.—WOOD, V.-C.
- Att.-Gen. v. Manchester and Leeds Ry.** (1838-9) 1 Railw. Cas. 436.—V.-C. and L.C.; and **Lancaster and Carlisle Ry. v. L. & N. W. Ry., considered.**
- Steele v. North Metropolitan Ry.** (1867) 36 L. J. Ch. 540; L. R. 2 Ch. 237; 16 L. T. 192; 15 W. R. 597.—L.C.
- Att.-Gen. v. Manchester and Leeds Ry. and Lancaster and Carlisle Ry. v. L. & N. W. Ry., followed.**
- Hartridge, Ex parte, L. C. & D. Ry., In re** (1869) L. R. 5 Ch. 671; 20 L. T. 718; 17 W. R. 946.—L.JJ.
- Lancaster and Carlisle Ry. v. L. & N. W. Ry., explained and applied.**
- Winsford Local Board v. Cheshire Lines** (1890) 59 L. J. Q. B. 372; 24 Q. B. D. 456; 62 L. T. 268; 38 W. R. 511.—RY. AND CAN. COMM.
- Mallet v. Hanly, 56 L. T. 493.—DENMAN and HAWKINS, JJ.; reversed, (1886) 56 L. J. Q. B. 136; 18 Q. B. D. 303; 57 L. T. 913; 35 W. R. 201; 51 J. P. 692.—C.A.**
- Swansea Canal Navigation Co. v. G. W. Ry.** (1868) 37 L. J. Ch. 238; L. R. 5 Eq. 444; 18 L. T. 78; 16 W. R. 1034.—V.-C., *observed upon*.
- Mallet v. Hanly** (1886) 56 L. J. Q. B. 136; 18 Q. B. D. 303; 57 L. T. 913; 35 W. R. 201; 51 J. P. 692.—C.A.
- Pudsey Coal Gas Co. v. Bradford Corporation** (1873) 42 L. J. Ch. 293; L. R. 15 Eq. 167; 28 L. T. 11; 21 W. R. 286.—V.-C., *applied*.
- Preston Corporation v. Fullwood Local Board** (1885) 53 L. T. 718; 34 W. R. 196; 50 J. P. 228.—NORTH, J.
- G. N. Ry., Ex parte** (1870) L. R. 9 Eq. 274.—M.R., *not followed*.
- Southwold Ry., In re** (1876) 45 L. J. Ch. 800; 1 Ch. D. 697; 24 W. R. 293; 34 L. T. 56.—HALL, V.-C.
- West Riding and Lancashire Rys. Undertaking, In re** (1876) 34 L. T. 168; 24 W. R. 357.—V.-C., *reconsidered and not sustained*.
- Bolton Junction Ry. Co., Ex parte** (1876) 24 W. R. 451.
- BACON, V.-C. intimated that his attention had been called to the various Acts of Parliament and Orders which had reference to the question, and that he found that the brokerage or investments by the Court does not go to the Paymaster-General's broker, who is paid a fixed salary, but into the Consolidated Fund. Under these circumstances he could not make the order asked for, nor could his own order in *In re The West Riding and Lancashire Railways Undertaking* be sustained.
- Carden v. General Cemetery Co.** (1839) 8 L. J. C. P. 163; 5 Bing. (N.C.) 253; 7 Scott 97; 7 D. P. C. 275.—C.P.
- Applied, Campion v. King** (1841) 6 Jur. 35.—Q.B.; *discussed and not applied* (1862) 31 L. J. C. P. 217; 11 C. B. (N.S.) 744.—C.P.; *adopted*, **Scott v. Elbury** (1867) 36 L. J. C. P. 161; L. R. 2 C. P. 255.—C.P.; and **Lee v. Bude and Torrington Ry.** (1871) 40 L. J. C. P. 285; L. R. 6 C. P. 576.—C.P.; *discussed and applied*, **Kensington Station Act, In re** (1875).—V.-C. (*infra*); *distinguished*, **Skegness, &c., Tramways Co., In re** (1888).—C.A. (*infra*).
- Wyatt v. Metropolitan Board of Works** (1862) 31 L. J. C. P. 217; 11 C. B. (N.S.) 744.—C.P.
- Applied, Edinburgh Northern Tramways v. Mann** (1896) 23 Rettie 1056, 1065.—CT. OF SESS.; and **Muir v. Forman's Trustees** (1903) 5 Fraser 546, 577.—CT. OF SESS.
- And see "COMPANY" (supra, vol. i., col. 599).*
- Kensington Station Act, In re** (1875) L. R. 20 Eq. 197; 32 L. T. 183; 23 W. R. 463.—V.-C.
- Considered and applied, Birmingham, &c., Ry., In re* (1885) 54 L. J. Ch. 580; 28 Ch. D. 652; 52 L. T. 729; 33 W. R. 517.—CHITTY, J.; *considered and not applied, Skegness, &c., Tramways Co., In re* (1888) 58 L. J. Ch. 737; 41 Ch. D. 215; 60 L. T. 406; 37 W. R. 225.—C.A.
- Skegness Tramways Co., In re, Hanly, Ex parte** (1889) 58 L. J. Ch. 737; 41 Ch. D. 215; 60 L. T. 406; 37 W. R. 225; 1 Meg. 127.—C.A.
- Followed, Manchester, Middleton and District Tramways Co., In re* (1893) 62 L. J. Ch. 752; [1893] 2 Ch. 638; 3 R. 533; 68 L. T. 820; 41 W. R. 631.—KEKEWICH, J.; *applied, Edinburgh Northern Tramways Co. v. Mann* (1896) 23 Rettie 1056, 1065.—CT. OF SESS.; *distinguished, Muir v. Forman's Trustees* (1903) 5 Fraser 546, 577.—CT. OF SESS.
- And see "COMPANY" (supra, vol. i., col. 599).*
- Guest v. Poole and Bournemouth Ry.** (1870) 39 L. J. C. P. 329; L. R. 5 C. P. 553; 22 L. T. 589; 18 W. R. 836.—C.P., *approved*.
- G. W. Ry. v. Swindon, &c., Ry.** (1884) 53 L. J. Ch. 1075; 9 App. Cas. 787, 807; 51 L. T. 798; 32

W. R. 957.—H.L. (E.); Uxbridge and Rickmansworth Ry., In re (1890) 59 L. J. Ch. 409; 43 Ch. D. 586; 62 L. T. 347; 38 W. R. 644.—C.A.

Bradford Tramways Co., In re, 2 Ch. D. 373; 34 L. T. 478; 24 W. R. 815.—v.-c.; *reversed*, (1876) 46 L. J. Ch. 89; 4 Ch. D. 18; 35 L. T. 827; 25 W. R. 88.—C.A.

Bradford Tramways Co., In re, dicta applied.
Lowestoft, Yarmouth and Southwold Tramways Co., In re (1877) 46 L. J. Ch. 393; 6 Ch. D. 484; 36 L. T. 578; 25 W. R. 525.—JESSEL, M.R.

Bradford Tramways Co., In re, and Lowestoft, Yarmouth and Southwold Tramways Co., In re, followed.

Birmingham and Lichfield Junction Ry., In re (1885) 54 L. J. Ch. 580; 28 Ch. D. 652; 52 L. T. 729; 33 W. R. 517.

CHITTY, J.—It was argued . . . that that decision [*Lowestoft, &c. Co.*] turned on the fact that the parliamentary agent there was also a promoter, but the Master of the Rolls did not refer to that circumstance in his judgment, and the fact mentioned in the report that a member of his firm was one of the promoters would not have been sufficient of itself to make him a promoter. . . . The decision of Malins, V.-C., in *Kensington Station Act, In re (supra)*, in which he allowed the parliamentary agent's claim, turned upon sect. 5 of the Abandonment of Railways Act, 1869, and the question whether he was a promoter.

Lowestoft, Yarmouth and Southwold Tramways Co., In re, referred to.

Colchester Tramways Co., In re (1892) 62 L. J. Ch. 243; [1893] 1 Ch. 309; 3 R. 168; 67 L. T. 846; 41 W. R. 169.—NORTE, J.

Bradford Tramways Co., In re, and Lowestoft, Yarmouth and Southwold Tramways Co., observed upon.

Bradford and District Tramways Co., Ex parte (1893) 62 L. J. Ch. 668; [1893] 3 Ch. 463; 3 R. 640; 69 L. T. 131.—STIRLING, J.

Bradford Tramways Co., In re, and Lowestoft, Yarmouth, and Southwold Tramways Co., In re, not applied.

Muir v. Forman's Trustees (1903) 5 Fraser, 546, 568.—CT. OF SESS.

Potteries, Shrewsbury and North Wales Ry., In re (1883) 53 L. J. Ch. 556; 25 Ch. D. 251; 50 L. T. 104; 32 W. R. 300.—C.A., *considered*.

Ruthin Ry., In re, Hughes' Trustee, Ex parte (1886) 56 L. J. Ch. 30; 32 Ch. D. 438; 55 L. T. 237; 34 W. R. 581.—C.A. COTTON and LINDLEY, L.J.; LOPES, L.J. *dissenting*.

Harris v. Mountjoy (Lord) (1586—7) 2 Leon. 173.—C.P., *commented on*.

Newcastle (Duke), In re, Morris, Ex parte (1869) L. R. 5 Ch. 172; 21 L. T. 380; 18 W. R. 79.—L.J.

Wiltes Peerage Case (1869) L. R. 4 H. L. 126.—H.L. (E.), *applied*.

Buckhurst Peerage Case (1876) 2 App. Cas. 1, 21.—H.L. (E.).

PARTITION.

Abel v. Heathcote (1793) 4 Bro. C. C. 278; 2 Vcs. 98; 2 R. R. 171.—L.C., *observed on*.
M'Queen v. Farquhar (1805) 11 Vcs. 467; 8 R. R. 212.—ELDON, L.C.

Abel v. Heathcote and M'Queen v. Farquhar, commented on.

Att.-Gen. v. Hamilton (1816) 1 Madd. 214; 16 R. R. 208.—PLUMER, v.-c.; Doe d. Knight v. Spencer (1848) 2 Ex. 752.—EX.

Abel v. Heathcote, referred to.

M'Queen v. Farquhar and Att.-Gen. v. Hamilton, applied.

Brassey v. Chalmers (1852) 16 Beav. 223.—M.R.; *affirmed*, (1853) 4 De G. M. & G. 528.—L.JJ.

M'Queen v. Farquhar, referred to.

Domville v. Lamb (1853) 1 W. R. 246.—WOOD, v.-c.

Abel v. Heathcote; M'Queen v. Farquhar; Att.-Gen. v. Hamilton; and Doe d. Knight v. Spencer (supra), discussed.

Bradshaw v. Fane (1856) 25 L. J. Ch. 413; 3 Drew. 534; 2 Jur. (N.S.) 247; 4 W. R. 422.—KINDERSLEY, v.-c.

Abel v. Heathcote, followed.

M'Queen v. Farquhar; Att.-Gen. v. Hamilton; Doe v. Spencer; and Bradshaw v. Fane, discussed.

Sheppard's Touchstone, p. 292, *dictum* that "joint tenants, tenants in common, and coparceners, cannot exchange the lands they do so hold with another before they have made partition," *held overruled*.

Frith and Osborne, In re (1876) 45 L. J. Ch. 780; 3 Ch. D. 618; 35 L. T. 146; 24 W. R. 1061.

JESSEL, M.R.—**Abel v. Heathcote** is the first case to which I need refer. The best report of it is in Brown. . . . Though the Lords Commissioners doubted and differed, when the case came before Lord Loughborough, he laid down the general proposition that the ordinary power of sale and exchange would authorise a partition. It was not until *M'Queen v. Farquhar* that there was any doubt about that. Lord Eldon says: ". . . I doubt, whether the language I hear and have read, that a power of exchange is well executed by a partition, is authorised by anything in that decision. Exchange and partition are very different. According to Sheppard's Touchstone and other old books—whether he had looked at them I do not know—the only old book referred to in the Touchstone is Perkins—'you cannot exchange, until there has been a partition. There is infinite difficulty in saying, a partition under the execution of a power by a tenant for life with those who have the inheritance in the other moiety can be called an exchange.'" If that means anything, it means this, that having legal uses to deal with, the act must be good at law if good at all. Exchange is different from partition, and you cannot exchange until after partition. That is the ground of Lord Eldon's doubt. Of course, after that decision, the point was considered and was treated by Sir T. Plumer in *Att.-Gen. v. Hamilton* as too doubtful for a title depending on it to be forced on a purchaser. The next case . . . is *Doe v. Spencer*. . . . The point arose directly, and the question was one of common law, whether there is any substantial difference, as was put in the

Touchstone, between exchange and partition. The decision was, that as regards tenants in common at all events . . . there is no ground for the assertion. I may observe that Mr. Preston, in his valuable edition of the Touchstone, puts in brackets, after the *dictum*, "Where is the objection to such an exchange of an undivided moiety?" He could not find any objection. But whatever the authority that the Touchstone, standing alone, might be of as a recognised text book, it is overruled by *Doe v. Spencer*. . . That is an express decision (of course I must not go further than the decision), that a power of exchange, where an undivided moiety is settled, does enable you to make a partition by exchanging with the owner of the other undivided moiety. The only other case which I need cite is *Bradshaw v. Fane*. The question there arose on title. . . Kindersley, V.-C. . . winds up, by stating his opinion really to be in favour of the power of exchange, including power to partition; but he says that it is so doubtful upon the authorities that he would not decide the abstract proposition in order to force the title upon an unwilling purchaser. He did decide the case upon another point, namely, the wording of the power, and on that he decided that the title was good. That is the state of the authorities. Lord St. Leonards says that the point wants a decision to make it quite clear, and I am willing to give that decision (supposing the doubt is not already taken away by the decision of the Court of Exchequer, followed by Kindersley, V.-C.). I hold that the passage in the Touchstone is not good law, and that there can be such an exchange. And if you can have such an exchange, why cannot there be an exchange of an undivided moiety in Whiteacre for another undivided moiety in Blackacre? I decide that there can be such an exchange. There is a conflict between what the judges said in *Doe v. Spencer*, and what the V.-C. intimated his opinion to be in *Bradshaw v. Fane*. It is not necessary for me to decide that question. If I had to decide it, I should feel inclined to follow the decision of the V.-C.: for if it can be done as between two, I do not see why it cannot be done as between three.—pp. 782—785.

Brassey v. Chalmers (*supra*, col. 2014), *discussed*.

Bradshaw v. Fane (*supra*, col. 2014).

Brassey v. Chalmers, *applied*.

Devitt v. Kearney (1883) 11 L. R. Ir. 225.—CHATTERTON, V.-C.; *varied*, C.A. See "EXECUTOR AND ADMINISTRATOR" (vol. i., col. 1104).

Bolton v. Bolton (1868) L. R. 7 Eq. 298, n.; 19 L. T. 298.—L.J.J.; and **Slade v. Barlow** (1869) 38 L. J. Ch. 369; L. R. 7 Eq. 296; 20 L. T. 10; 17 W. R. 866.—V.-C., *observed on*.

Giffard v. Williams (1869) 38 L. J. Ch. 597, 601; L. R. 8 Eq. 494; 21 L. T. 575; 18 W. R. 56.—STUART, V.-C.

Bolton v. Bolton and Slade v. Barlow, *applied*.
Ward v. Ward (1869) 21 L. T. 699; 18 W. R. 87.—MALINS, V.-C.

Giffard v. Williams, *reversed*.

Slade v. Barlow, *order followed*.

Giffard v. Williams (1870) 39 L. J. Ch. 735;

L. R. 5 Ch. 546; 21 L. T. 575; 18 W. R. 776.—L.C. and L.J.

Cartwright v. Pultney (or *Pulteney*) (1742)

2 Atk. 380.—L.C., *referred to*.

Parker v. Gerard (1754) Ambl. 236.—M.R.

Cartwright v. Pultney and Wills v. Slade,

(1801) 6 Ves. 498.—L.C., *referred to*.

Baring v. Nash (1813) 1 V. & B. 551.—V.-C.

Baring v. Nash, Parker v. Gerard and

Cartwright v. Pultney, *referred to*.

Giffard v. Williams, (1869) L. R. 8 Eq. 494 (*supra*, col. 2015).

Parker v. Gerard; Warner v. Baines (1750)

Ambl. 589.—L.C.; **Baring v. Nash**; and

Griffies v. Griffies (1863) 8 L. T. 758;

11 W. R. 943.—KINDERSLEY, V.-C.,

applied.

Mayfair Property Co. v. Johnston (1894) 63 L. J. Ch. 399; [1894] 1 Ch. 508, 513; 8 B. 731; 70 L. T. 485.—NORTH, J.

Griffies v. Griffies, *discussed*.

Jones, In re, Farrington v. Forrester (1893) 62 L. J. Ch. 996; [1893] 2 Ch. 461, 477; 3 R. 498; 69 L. T. 45.—NORTH, J.

Teall v. Watts (1871) 40 L. J. Ch. 176;

L. R. 11 Eq. 213; 23 L. T. 884; 19 W. L.

317.—M.R., *followed*.

Aston v. Meredith (1870) 40 L. J. Ch. 241;

L. R. 11 Eq. 601; 24 L. T. 128.—BACON,

V.-C., *not followed*.

Holland v. Holland (1872) 41 L. J. Ch. 220; L. R. 13 Eq. 406; 26 L. T. 17; 20 W. R. 290.—WICKENS, V.-C.

Standering v. Hall, (1879) 48 L. J. Ch.

382; 11 Ch. D. 652; 27 W. R. 749.—

JESSEL, M.R., *followed*.

Robins's Estate, In re (1879) 27 W. R. 706.—HALL, V.-C.

Pares, In re, Lillingston v. Pares (1879) 12

Ch. D. 333; 41 L. T. 574; 28 W. R. 193.—

C.A., *applied*.

Att.-Gen. v. Ailesbury (Marquess) (1885) 54 L. J. Q. B. 324; 14 Q. B. D. 895, 901; 52 L. T. 809; 33 W. R. 731.—Q.B.D.; *reversed*, C.A., *but restored*. H.L. See "LUNATIC" (*supra*, col. 1679).

Pares, In re, *order followed*.

Caswell v. Sheen (1893) 69 L. T. 854.—NORTH, J.

Platt v. Platt (1880) 28 W. R. 533.—

MALINS, V.-C., *not followed*.

Rimington v. Hartley (1880) 14 Ch. D. 630; 43 L. T. 15; 29 W. R. 42.

JESSEL, M.R.—If sect. 6 of the Partition Act, 1876, is to be read *reddendo singula singulis*, as stated by the learned V.-C. in *Platt v. Platt*, then the words "person of unsound mind" do not include, as they ought to do, a person of unsound mind not so found, for the request is to be made only by the "committee in lunacy." Now, how does a person under disability sue, or how is he sued? By his next friend or guardian *ad litem*. If he is an infant, who is the "person authorised to act" on his behalf? It must be the person who is authorised to act on his behalf in the action, that is, his next friend or guardian *ad litem*. The request must be made by a person before the Court in the action; but, according to the V.-C.'s view, it may be made by a person who is not before the Court. Take the case of

an infant having a living father. He can have no guardian to act on his behalf in an action but a guardian *ad litem*. But in this case, in nineteenth of the actions under the Partition Acts, if, as the V.-C. says, the word "guardian" in the section means only a testamentary guardian, or a guardian appointed by the Court, then the father, who is the guardian by law, is omitted altogether. What does the word "guardian," standing alone, generally mean? I suppose guardian of the person. An infant may have several guardians: he may have a guardian of the person, or a guardian in socage, or in gavelkind, or, if he has a copyhold estate, a guardian according to the custom of the manor. But I suppose "guardian" of an infant means guardian of the person. . . . In my opinion, the section means that the request is to be made by the person authorised in the action to act on behalf of the person under disability, that is, the next friend or guardian *ad litem*. That makes the section complete.—p. 631.

Rimington v. Hartley (*supra*), referred to.

Crookes v. Whitworth (1878) 10 Ch. D. 289;

39 L. T. 348; 27 W. R. 149; and **Shaw,**

In re, Topham v. Burgoyne (1879) 49 L. J. Ch. 213; 41 L. T. 670.—V.-C., not followed.

Wallace v. Greenwood (1880) 50 L. J. Ch. 289; 16 Ch. D. 362; 43 L. T. 720.

JESSEL, M.R.—I must say I should not have found any difficulty in this case, had it not been for two decisions of Bacon, V.-C. Those decisions do not appear to me to be quite consistent, and with great respect I do not think they are right. In **Crookes v. Whitworth** the V.-C. decided that in a partition action a request for sale by a married woman might be made by her counsel authorised to act on her behalf—that is, without her separate examination. In **Shaw, In re**, he held that in a similar action, a married woman's election to take her share (though under 200*l.*) of the proceeds of sale of real estate, as personalty could only be taken by her separate examination.—p. 290.

Wallace v. Greenwood, dictum approved.

Hyett v. Meakin (1884) 53 L. J. Ch. 241; 25 Ch. D. 735, 741; 50 L. T. 54; 32 W. R. 513.

KAY, J.—In **Wallace v. Greenwood** the late M. R. said: "Where the Court has power to sell an infant's real estate, and orders it to be sold, the order operates as a conversion, and the estate then becomes personalty." I respectfully say that I agree with that dictum.—p. 245.

And see **Beamish's Estate, In re** (1891) 27 L. R. Ir. 326.—MONROE, J.; **Henry's Estate, In re** (1893) 31 L. R. Ir. 158, 166.—MONROE, J.; and **Hall's Estate, In re** (1893) 31 L. R. Ir. 416.—MONROE, J.; and "CONVERSION AND RECONVERSION" (vol. i., col. 677).

Wallace v. Greenwood, discussed.

Haward (or Howard) v. Jalland (1891) 26 L. J. N. C. 187; W. N. (1891) 210.—

KEKEWICH, J., examined and approved.

Norton, In re, Norton v. Norton (1899) 69 L. J. Ch. 31; [1900] 1 Ch. 101; 81 L. T. 724; 48 W. R. 140.

BYRNE, J.—Two questions were argued before me, the broader one being whether or not a sale ordered by the Court under the provisions of the Partition Acts of 1868 and 1876, upon a request for sale made on the part of an infant by his

next friend, effects an out-and-out conversion of his real estate, or whether, in the event of his death under the age of twenty-one, there is an equity for reconversion on the part of his heir. It is clear that but for sect. 6 of the Act of 1876 such an equity would exist (see **Foster v. Foster** (1875) 45 L. J. Ch. 301; 1 Ch. D. 588; 24 W. R. 185), and I doubt whether Sir G. Jessel in **Wallace v. Greenwood** meant to maintain that such an equity for reconversion on the part of the heir would be lost simply by reason of the sale having been made at the request of the infant. For a sale, upon request being made, takes place under a special statute, and is subject to statutory incidents, among which is included a provision for reinvestment of the proceeds of sale in real estate, until such time as the infant, being of full age, could ask for payment as to a person absolutely entitled. **Haward v. Jalland** was also referred to, and I have been furnished with office copies of the judgment and orders made in that case. [His lordship discussed them and continued.] This case appears to me to be an authority for saying that where an infant by next friend is one of several plaintiffs by counsel requesting a sale, and a sale is ordered upon such request, the proceeds of the infant's share ought to be earmarked as real estate. In the present case, however, it does not appear to me to be necessary to decide whether **Haward v. Jalland** is reconcilable with some of the observations in **Wallace v. Greenwood**.—p. 34.

Ferguson v. Benyon (1886) 17 L. R. Ir. 212.

—CHATTERTON, V.-C., referred to.

Beamish's Estate, In re (1891) 27 L. R. Ir. 326, 330.—MONROE, J.; **Henry's Estate, In re** (1893) 31 L. R. Ir. 158, 167.—MONROE, J.; **Hall's Estate, In re** (*post*).

Beamish's Estate, In re, and Henry's Estate, In re, explained and applied.

Hall's Estate, In re (1893) 31 L. R. Ir. 416, 427.—MONROE, J.

Dracup, In re, Field v. Dracup (1893) 63

L. J. Ch. 238; [1894] 1 Ch. 59; 8 R. 98; 69 L. T. 858; 42 W. R. 264.—NORTH, J., followed.

Goodenough, In re, Marland v. Williams (1895) 65 L. J. Ch. 71; [1895] 2 Ch. 537; 13 R. 454; 73 L. T. 152; 44 W. R. 44.—KEKEWICH, J. [This case is not referred to in the L. R.]

Pennington v. Dalbiae (1870) 18 W. R. 684.

—MALINS, V.-C., not followed.

Verrall v. Cathcart (1879) 27 W. R. 645.—HALL, V.-C.

Pitt v. White (1887) 56 L. T. 650.—KAY, J., followed.

Stedman, In re, Coombe v. Vincent (1888) 58 L. T. 709.—KAY, J.

Stedman, In re, distinguished.

Hawkins v. Herbert (1889) 60 L. T. 142.—CHITTY, J.

Stedman, In re, explained.

Hawkins v. Herbert, followed.

Wood v. Gregory (1889) 59 L. J. Ch. 232; 43 Ch. D. 82; 62 L. T. 179; 38 W. R. 226.

NORTH, J.—I cannot accept **Stedman, In re**, as an authority that, in all partition actions, the title to the property is to be proved in Court instead of directing an inquiry in chambers. This may be a very proper course to adopt in

simple cases, and especially when the value of the property is but small: and I have myself followed that course.—p. 232.

[*Hawkins v. Herbert* is only referred to in the Law Times Reports.]

Willis v. Willis (1889) 38 W. R. 7.—CHITTY, J., *followed*.

Crook v. Crook, W. N. (1890) 26.—CHITTY, J.

Pemberton v. Barnes (1871) 40 L. J. Ch. 675; L. R. 6 Ch. 685; 25 L. T. 577; 19 W. R. 988.—HATHERLEY, L.C.; *reversing* MALINS, V.-C.

Dictum dissented from, **Drinkwater v. Ratcliffe** (1875) 44 L. J. Ch. 605; L. R. 20 Eq. 528; 33 L. T. 417; 24 W. R. 25.—JESSEL, M.R.; *applied*, **Saxton v. Bartley** (1879) 48 L. J. Ch. 519; 27 W. R. 615.—BACON, V.-C.; *not followed*, **Pitt v. Jones** (1880) 5 App. Cas. 651 (*see post*); *referred to*, **Whitwell's Estate**, *In re* (*post*, col. 2020).

Williams v. Games (1875) 44 L. J. Ch. 245; L. R. 10 Ch. 204; 32 L. T. 414; 23 W. R. 779.—L.J., *applied*.

Drinkwater v. Ratcliffe (*supra*); **Roughton v. Gibson** (1877) 46 L. J. Ch. 366; 36 L. T. 93; 25 W. R. 269.—BACON, V.-C.

Drinkwater v. Ratcliffe, *referred to*.

Rowe v. Gray (1876) 46 L. J. Ch. 279; 5 Ch. D. 263; 25 W. R. 250.—HALL, V.-C.

Williams v. Games; and Drinkwater v. Ratcliffe, *followed*.

Pitt v. Jones (1880) 5 App. Cas. 651; 49 L. J. Ch. 795; 43 L. T. 385; 29 W. R. 33.—H.L. (E.); *affirming* S. C. *nom.* **Gilbert v. Smith** (1879) 48 L. J. Ch. 352; 11 Ch. D. 78; 40 L. T. 635; 27 W. R. 719.—C.A., *which reversed* (1878) 8 Ch. D. 548; 38 L. T. 706; 26 W. R. 905.—MALINS, V.-C.

LORD BLACKBURN.—I see that in this case Malins, V.-C. says he still thinks the view he took [in *Pemberton v. Barnes*, *supra*] of the construction of that section [Partition Act, 1868, s. 4], preferable to that put upon it by the L.C. I cannot agree with him; but the L.C. (Lord Hatherley) did express an opinion that the 5th section was applicable to proceedings under the 3rd and 4th sections, and was intended to give the Court a discretionary power to prevent a sale under these sections if the opposing party was willing to bind himself to take the applicant's share at a valuation; and this is contrary to the opinion I have just expressed. I think if this had been intended it would have been properly expressed in the form of a proviso on the 3rd and 4th sections, and not by a fresh substantive enactment; and it would have been properly expressed by saying that the Court *shall not* direct a sale if the other parties undertake, &c., and not by saying that the Court *may* direct a sale, *unless*, &c. But I cannot think it was intended; a sale by valuation is a very different thing from an open sale, and I do not see why a party should be forced to sell his property at a valuation; and I think that the words used here give him an option to accept such a valuation, if offered to him, but do not compel him to do so.—p. 660.

LORD WATSON to the same effect.

LORD HATHERLEY dissented.

Williams v. Games, *not applied*.

Richardson v. Feary (*post*, col. 2020).

Drinkwater v. Ratcliffe (*supra*), *referred to*. **Whitwell's Estate**, *In re* (1887) 19 L. R. Ir. 45.—MONROE, J.; **Richardson v. Feary** (*post*).

Gilbert v. Smith (*supra*), *referred to*.

Evans v. Evans (1883) 52 L. J. Ch. 304; 48 L. T. 567; 31 W. R. 495.—KAY, J.; **Dyer**, *In re*, **Dyer v. Paynter** (1885) 54 L. J. Ch. 1183; 53 L. T. 744; 33 W. R. 806.—C.A.

Pitt v. Jones (*supra*), *discussed*.

Richardson v. Feary (1888) 57 L. J. Ch. 1049; 39 Ch. D. 45; 59 L. T. 165; 36 W. R. 807.—NORTH, J.

Pitt v. Jones, *applied*.

The Hereward [1895] P. 284; 64 L. J. Adm. 87; 11 R. 798; 72 L. T. 903; 44 W. R. 288; 8 Asp. M. C. 22.

BRUCE, J.—In order to guide me in the exercise of my discretion, I have tried to find some analogy in other branches of the law. I do not mean to say that the case of the sale of real property is in all respects similar to the case of the sale of ships; but there is some analogy. In *Pitt v. Jones* a sale of real property was directed by the C. A. and sanctioned by the H. L., on the ground that it was for the general interest, on the application of only three-sixteenths of the owners.—p. 236.

Pitt v. Jones, *referred to*.

Morant v. Godden (1902) 18 T. L. R. 421.—K.B.D.

Wilkinson v. Joberns (1873) 42 L. J. Ch. 663; L. R. 16 Eq. 14; 28 L. T. 724; 21 W. R. 644.—SELBORNE, L.C. (for M.R.), *referred to*.

Rowe v. Gray (1876) 46 L. J. Ch. 279; 5 Ch. D. 263; 24 W. R. 250.—HALL, V.-C.; **Whitwell's Estate**, *In re* (*post*); **Belcher v. Williams** (1890) 45 Ch. D. 510, 514; 63 L. T. 673; 39 W. R. 266.—NORTH, J.

Rowe v. Gray (*supra*), *referred to*.

Whitwell's Estate, *In re* (1887) 19 L. R. Ir. 45.—MONROE, J.

Hardiman, *In re*, **Pragnell v. Batten** (1880) 50 L. J. Ch. 272; 16 Ch. D. 360; 43 L. T. 749; 29 W. R. 495.—JESSEL, M.R., *form of order adopted*.

Waite v. Bingley (1882) 51 L. J. Ch. 651; 21 Ch. D. 674, 683; 30 W. R. 698.—HALL, V.-C.

[The M.R. in *Hardiman*, *In re*, considered that the prefatory opinion in *Seton on Decrees* (4th ed. p. 1005), Form 3, was wrong, and directed it to be omitted from the minutes of order.]

Wheeler v. Horne (1740) Willes 208.—C.P.; and **Sturton v. Richardson** (1844) 13 L. J. Ex. 281; 13 M. & W. 17; 2 D. & L. 182; 8 Jur. 476.—EX., *referred to*.

Henderson v. Eason (1861) 21 L. J. Q. B. 82; 17 Q. B. 701, 718; 16 Jur. 518.—EX. CH.

Henderson v. Eason, *referred to*.

Hill v. Hickin (1897) 66 L. J. Ch. 717; [1897] 2 Ch. 579; 77 L. T. 127; 46 W. R. 137.—STIRLING, J.

Turner v. Morgan (1803) 8 Ves. 143.—L.C., *applied*.

Ames v. Comyns (1867) 17 L. T. 163; 16 W. R.

74.—**STUART, V.-C.**; *Mayfair Property Co. v. Johnston* [1894] 1 Ch. 508, 514 (*supra*, col. 2016).

Turner v. Morgan, *referred to*.
Hill v. Hickin (*post*, col. 2022).

Swan v. Swan (1820) 8 Price 518; 22 R. R. 770.—*EX.*; and **Hamilton v. Denny** (1809) 1 Ball & B. 199; 12 R. R. 14.—*L.C.*, *commented on*.

Leslie, In re, Leslie v. French (1883) 23 Ch. D. 552; 52 L. J. Ch. 762; 48 L. T. 564; 31 W. R. 561.
FRY, L.J. (adopted by **PEARSON, J.**).—In *Swan v. Swan*, the Court of *EX.*, sitting as a Court of equity, refused to grant partition to one co-tenant, except upon the terms of his allowing a lien for the expenditure of his co-tenant in permanent improvements. But it appears doubtful how far this case has been generally followed; and it does not appear to me to be consistent with the opinion expressed by Lord Romilly, *M.R.*, in *Teasdale v. Sanderson* (*post*). . . . There [*Hamilton v. Denny*] a lease had been made to A. and B. as joint tenants. B. had settled his moiety of the property. A. had made a payment of the renewal fines, and he was held to be entitled to a lien on B.'s settled share. The decision was placed upon two grounds. It was said to be like the case of payments by a mortgagee, and it was said that the payments by A. were entitled to the same benefit as if they had been payments made by a trustee. It is, perhaps, not perfectly easy to see the strict analogy between these two cases and the case then before the Court. But, in my view, these two authorities are not sufficient to establish any such general proposition as that the right to contribution creates any lien on the property in respect of which the expenditure has been made, and they certainly are insufficient to support the plaintiff's case. For in both those cases the submission to a lien was required from the plaintiff as a term of other relief which he sought, whilst in the case now before me the plaintiff is affirmatively asserting his right.—p. 564.

Swan v. Swan, *followed*.

Gibbs v. Haydon (1882) 47 L. T. 184; 30 W. R. 726.—*FRY, J.*, *applied*.

Sinclair v. James (1894) 63 L. J. Ch. 873; [1894] 3 Ch. 554; 8 R. 637; 71 L. T. 483.—*NORTH, J.*

Swan v. Swan, *referred to*.
Hill v. Hickin (*post*, col. 2022).

Teasdale v. Sanderson (1843) 33 Beav. 534.—*M.R.*, *referred to*.

Leslie, In re, Leslie v. French (*supra*).

Teasdale v. Sanderson; Leigh v. Dickeson (1884) 54 L. J. Q. B. 18; 15 Q. B. D. 60; 52 L. T. 790; 38 W. R. 538.—*C.A.*; **Parker v. Trigg**, *W. N.* (1874) 27.—*BACON, V.-C.*; and **Watson v. Gass** (1882) 51 L. J. Ch. 480; 45 L. T. 582; 30 W. R. 286.—*FRY, J.*, *discussed*.

Jones, In re, Farrington v. Forrester (1893) 62 L. J. Ch. 996; [1893] 2 Ch. 461, 477; 3 R. 498; 69 L. T. 45.—*NORTH, J.*

Parker v. Trigg and Watson v. Gass, *followed*.
Kenrick v. Mountstephen (*post*, col. 2022).

Jones, In re, Farrington v. Forrester (*supra*), *principle applied*.
Cook's Mortgage, In re, Lawledge v. Tyndall

(1896) 65 L. J. Ch. 654; [1896] 1 Ch. 923; 74 L. T. 652; 44 W. R. 646.—*NORTH, J.*

Jones, In re, and Cook's Mortgage, In re, Lawledge v. Tyndall, *referred to*.

Leigh v. Dickeson (*supra*), *discussed*.

Heckles v. Heckles, *W. N.* (1892) 188.—*STIRLING, J.*, *commented on*.

Hill v. Hickin (1897) 66 L. J. Ch. 717; [1897] 2 Ch. 579; 77 L. T. 127; 46 W. R. 137.

STIRLING, J.—The only cases to which I was referred in argument are, first of all, *Graham v. Cole* (unreported), the judgment in which is given in Seton on Judgments and Orders (5th ed.), p. 1541, Form 19. . . . As to that case we know nothing of the facts, and I think that the order must have been made under special circumstances. The other is a decision of my own, *Heckles v. Heckles*. . . . That dealt with the case not of a legal mortgage, but of an equitable mortgage, and there may be a difference between the case of an equitable mortgage and a legal mortgage, but upon further consideration I am not sure that that case is not wrong.—p. 718.

Leigh v. Dickeson, *explained*.

Bonner v. Tottenham and Edmonton Permanent Investment Building Society (1898) 68 L. J. Q. B. 114; [1899] 1 Q. B. 161, 175; 79 L. T. 611; 47 W. R. 161.—*C.A.*

Leigh v. Dickeson; Jones, In re; and Cook's Mortgage, In re, *followed*.

Williams v. Williams (1899) 68 L. J. Ch. 528; 81 L. T. 163.—*KEKEWICH, J.*, *form approved in, followed*.

Kenrick v. Mountstephen (1899) 48 W. R. 141.—*COZENS-HARDY, J.*

[*NOTE*.—*Williams v. Williams* was one of several actions for partition of different properties in which improvements had been generally effected by the defendants or their predecessors in title. Kekewich, J., in lieu of the form of inquiry given in Seton on Decrees (5th ed.), p. 1563, directed the following account and inquiry to be inserted in the judgments in the several actions—viz.: "an account of the moneys, if any, expended by the defendant or his predecessors in title in permanent improvements to the said hereditaments since" [the date of the party's title accruing], "and an inquiry as to the extent to which the present value of such hereditaments had been increased for such expenditure."]

Osborn v. Osborn (1868) 37 L. J. Ch. 656; L. R. 6 Eq. 338; 18 L. T. 678.—*MALINS, V.-C.*, *followed*.

Miller v. Marriott (1868) L. R. 7 Eq. 1; 19 L. T. 304; 17 W. R. 41.—*ROMILLY, M.R.*

Cannon v. Johnson (1870) 40 L. J. Ch. 46; L. R. 11 Eq. 90; 23 L. T. 583; 19 W. R. 175.—*M.R.*, *followed*.

Ball v. Kemp-Welch (1880) 49 L. J. Ch. 528; 14 Ch. D. 512; 43 L. T. 116.—*JESSEL, M.R.*

Osborn v. Osborn; Miller v. Marriott; Cannon v. Johnson; and Ball v. Kemp-Welch, *referred to*.

Belcher v. Williams (*post*, col. 2023).

Leach v. Westall (1869) 17 W. R. 313.—*MALINS, V.-C.*; **Simpson v. Ritchie** (1873) 42 L. J. Ch. 543; L. R. 16 Eq. 103; 23 L. T. 548; 21 W. R. 666.—

SELBORNE, L.C. (for M.R.); and **Landell v. Baker** (1868) L. R. 6 Eq. 268.—ROMILLY, M.R., *referred to*.
Jennings v. Foster, W. N. (1884) 200.—PEARSON, J., *commented on*.
Belcher v. Williams (1890) 45 Ch. D. 510; 63 L. T. 673; 39 W. R. 266.—NORTH, J.

Mildmay v. Quicke (1877) 46 L. J. Ch. 667; 6 Ch. D. 553; 25 W. R. 778.—JESSEL, M.R. *Approved*, **Belcher v. Williams** (*supra*); *distinguished*, **Henry's Estate**, In re (1893) 33 L. R. Ir. 158, 166.—MONROE, J.; *referred to*, **Morgan**, In re, **Smith v. May** (1900) 69 L. J. Ch. 735; [1900] 2 Ch. 474, 478; 48 W. R. 670.—STIRLING, J.

Mildmay v. Quicke (1875) L. R. 20 Eq. 537.—JESSEL, M.R., *followed*.
Senior v. Hereford (1876) 4 Ch. D. 494; 25 W. R. 223.—WOOD, V.-C.

Belcher v. Williams (*supra*).
Applied, **Hawkes v. Hawkes** (1890) 63 L. T. 488.—KEKEWICH, J.; *not followed*, **Clatton v. Banks** (1893) 62 L. J. Ch. 600; [1893] 2 Ch. 221, 224; 3 R. 413; 68 L. T. 245; 41 W. R. 429.—KEKEWICH, J.; *dissented from*, **Vase**, In re (*post*).

Catton v. Banks, *followed*.
Ansell v. Rolfe, W. N. (1896) 9.—CHITTY, J.

Ansell v. Rolfe and Catton v. Banks, *followed*.
Vase, In re, **Langrish v. Vase** (1901) 84 L. T. 761.—COZENS-HARDY, J.

Young v. Young (1870) L. R. 13 Eq. 175, n.—MALINS, V.-C., *followed*.
France v. France (1871) 41 L. J. Ch. 150; L. R. 13 Eq. 173; 25 L. T. 785; 20 W. R. 230.—WICKENS, V.-C.

Young v. Young and France v. France, *form of decree not adopted*.
Davey v. Wietlisbach (1873) L. R. 15 Eq. 269.—WICKENS, V.-C.

PARTNERSHIP.

1. THE CONTRACT OF PARTNERSHIP.
2. RIGHTS AND OBLIGATIONS OF PARTNERS *inter se*.
3. RIGHTS AND OBLIGATIONS OF PARTNERS AND THIRD PARTIES.
4. PARTNERSHIP PROPERTY.
5. PROFITS AND LOSSES.
6. RETIREMENT OR DEATH OF PARTNER.
7. DISSOLUTION OF PARTNERSHIP.
8. ACTIONS BY AND AGAINST PARTNERS.

1. THE CONTRACT OF PARTNERSHIP.

Crawshay v. Maule (1818) 1 Swanst. 495, 1 Wils. 181.—J.C.; and **Jefferys v. Smith** (1820) 1 Jac. & W. 298; 21 R. R. 175.—J.C., *discussed*.
Frapp v. Chard Ry. (1853) 11 Hare, 241; 1 Eq. R. 503; 22 L. J. Ch. 1084; 17 Jur. 887; 1 W. R. 477.—WOOD, V.-C.

Hulton, In re, Hulton v. Lister, 61 L. T. 467.—NORTH, J.; *reversed*, (1890) 62 L. T. 200.—C.A. COTTON, LINDLEY and LOFES, L.JJ.

Kay v. Johnston (1856) 21 Beav. 536.—M.R., *referred to*.
Leslie, In re, **Leslie v. French** (1883) 52 L. J. Ch. 762; 23 Ch. D. 552; 48 L. T. 564; 31 W. R. 561.—FRY, L.J.; *adopted by* PEARSON, J.

Warner v. Smith, 9 Jur. (N.S.) 169; 11 W. R. 203.—V.-C.; *reversed*, (1863) 32 L. J. Ch. 573; 1 De G. J. & S. 337; 8 L. T. 221; 11 W. R. 392.—L.JJ.

Smith v. Watson (1824) 2 B. & C. 401; 3 D. & R. 751; 2 L. J. (O.S.) K. B. 53.—K.B., *not followed*.

Reynolds v. Bowley (1867) 36 L. J. Q. B. 247; L. R. 2 Q. B. 474; 16 L. T. 532; 15 W. R. 813.—EX. CH. (*see extract, ante*, vol. i, col. 144).

Smith v. Watson and Reid v. Hollingshead (1825) 4 B. & C. 867, 878; 7 D. & R. 444.—K.B., *adopted*.

Alfaro v. De la Torre (1876) 34 L. T. 122; 24 W. R. 510.—JESSEL, M.R.

Owen v. Body (1836) 5 L. J. K. B. 191; 5 A. & E. 28; 2 H. & W. 31; 6 N. & M. 448.—K.B., *distinguished*.

Janes v. Whitbread (1851) 20 L. J. C. P. 217; 11 C. B. 406.—C.P.

Owen v. Body, observed upon.
Coate v. Williams (1852) 21 L. J. Ex. 116; 7 Ex. 205.—EX.

Owen v. Body, explained and not applied.
Stanton Iron Co., In re (1855) 25 L. J. Ch. 142; 21 Beav. 164; 2 Jur. (N.S.) 130; 4 W. R. 159.—M.R.

Owen v. Body, observed upon.
Hickman v. Cox (1857) 3 C. B. (N.S.) 523; 18 C. B. 617.—EX. CH.
CHROMPTON, J.—I, like my brother Martin, have always felt very much puzzled by **Owen v. Body**.—p. 528.

Owen v. Body, explained and distinguished.
Mason v. Briton Medical Life Association (1888) 4 Times L. R. 755.—C.A.

Janes v. Whitbread (1851) 20 L. J. C. P. 217; 11 C. B. 406.—C.P., *followed*.
Coate v. Williams (1852) 21 L. J. Ex. 116; 7 Ex. 205.—EX.

Janes v. Whitbread, observed upon.
Cox (or Wheatcroft) v. Hickman (1860) 9 C. B. (N.S.) 47; 8 H. L. Cas. 268; 30 L. J. C. P. 125; 7 Jur. (N.S.) 105; 8 W. R. 754.—H.L. (E.).

Grace v. Smith (1775) 2 W. Bl. 998.—C.P.
Followed, **Waugh v. Carver** (1793) 2 H. Bl. 235.—C.P.; *dicta not adopted*, **Hickman v. Cox** (1857).—EX. CH. (*infra*, col. 2026); and **Bullen v. Sharp** (1865).—EX. CH. (*infra*, col. 2027); *dicta disapproved*, **Mollwo v. Court of Wards** (1872) L. R. 4 P. C. 419, 434.—P.C. (*see extract, infra*, col. 2026); *considered and applied*, **Holme v. Hammond** (1872) 41 L. J. Ex. 157; L. R. 7 Ex. 218; 20 W. R. 747.—EX.; and *see* **Badeley v. Consolidated Bank** (1886) 34 Ch. D. 536, 552.—STIRLING, J. (*reversed in part*, C.A., *infra*, col. 2029).

Waugh v. Carver (1793) 2 H. Bl. 235, 246, *adopted*.

Bond v. Pittard (1838) 7 L. J. Ex. 78; 3 M. & W. 357; 1 H. & H. 82; 2 Jur. 183.—EX.; **Stanton Iron Co., In re** (1855) 25 L. J. Ch. 142; 21 Beav. 164; 2 Jur. (N.S.) 130; 4 W. R. 159.—M.R.: *principle applied*, **Brett v. Beckwith** (1856) 26 L. J. Ch. 130; 3 Jur. (N.S.) 31; 5 W. R. 112.—M.R.: *distinguished*, **Cox v. Hickman** (1860) 8 H. L. Cas. 268, 303.—H.L. (E.) (*infra*, col. 2026).

Waugh v. Carver, questioned.

Bullen v. Sharp (1865) 35 L. J. C. P. 105; L. R. 1 C. P. 86, 112; 1 H. & R. 117; 12 Jur. (N.S.) 247; 14 L. T. 72; 14 W. R. 338.—EX. CH.

LORD BLACKBURN.—I think that the *ratio decidendi* (of **Cox v. Hickman**, *infra*) is that the proposition laid down in **Waugh v. Carver**, viz., that the participation in the profits of a business, does of itself, by operation of law, constitute a partnership, is not a correct statement of the law of England, but that the true question is, as stated by Lord Cranworth, whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being, in the language of Lord Wensleydale, whether it is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business.

Waugh v. Carver.

Explained, **Holme v. Hammond** (1872) 41 L. J. Ex. 157; L. R. 7 Ex. 218, 226; 20 W. R. 747.—EX.; *disapproved*, **Mollwo v. Court of Wards** (1872) L. R. 4 P. C. 419, 433.—P.C. (extract, *infra*); *commented upon*, **Pooley v. Driver** (1876).—JESSEL, M.R. (*infra*, col. 2028).

Waugh v. Carver, held to be qualified.

Howard, In re, Tennant, Ex parte (1877) 6 Ch. D. 303; 37 L. T. 284; 25 W. R. 854.—C.A. COTTON, L.J.—It is impossible to say that the rule laid down in **Waugh v. Carver** is now unqualified law. Lord Blackburn, in **Bullen v. Sharp** (*supra*), clearly refers to it as qualified. . . . Certainly, the Master of the Rolls does not in any way dissent from the proposition of law so laid down, because he quotes, with approval, the authority of Lindley, J., stating the rule in substantially the same way. The Master of the Rolls, in **Pooley v. Driver**, says:—"I may cite further from p. 35 of the third edition of Mr. Lindley's book, considering that learned gentleman is now a judge, the conclusion that he comes to as to the effect of **Cox v. Hickman**—'that, *prima facie*, the relation of principal and agent is constituted by an agreement entitling one person to share the profits made by another to an indefinite extent; but that this inference is displaced if it appears from the whole agreement that no partnership or agency was really intended.'"—p. 315.

Waugh v. Carver, questioned.

Badeley v. Consolidated Bank (1888) 57 L. J. Ch. 468; 38 Ch. D. 238; 59 L. T. 419; 36 W. R. 745.—C.A.; *reversing in part* 34 Ch. D. 536; 55 L. T. 635; 35 W. R. 106.—STIRLING, J. COTTON, L.J.—It is impossible to say that the rule laid down in that case is now unqualified law.

Waugh v. Carver, referred to.

Adam v. Newbigging (1888) 57 L. J. Ch. 1066; 13 App. Cas. 303, 316; 59 L. T. 267; 37 W. R. 97.—H.L. (E.).

Gilpin v. Enderbey (1822) 5 B. & Ald. 954.—EX. CH.

Commented upon, **Brophy v. Holmes** (1828) 2 Molloy 1, 8.—L.C. (IR.); *adopted*, **Bond v. Pittard** (1838) 7 L. J. Ex. 78; 3 M. & W. 357; H. & H. 82; 2 Jur. 183.—EX.

Hickman v. Cox (1857) 27 L. J. C. P. 129; 18 C. B. 617; 3 C. B. (N.S.) 523.—EX. CH.; *reversed sub nom. Cox (or Wheatecroft) v. Hickman* (1860) 30 L. J. C. P. 125; 8 H. L. Cas. 268; 9 C. B. (N.S.) 47; 7 Jur. (N.S.) 105; 8 W. R. 754.—H.L. (E.).

Cox v. Hickman (1860) 30 L. J. C. P. 125; 8 H. L. Cas. 268; 9 C. B. (N.S.) 47; 7 Jur. (N.S.) 105; 8 W. R. 754.—H.L. (E.), *followed*.

English and Irish Church and University Assurance Society, *In re* (1863) 2 N. R. 107; 1 H. & M. 85; 11 W. R. 681.—WOOD, V.-C.

Cox v. Hickman, explained.

Shaw v. Galt (1864) 16 Ir. C. L. R. 357.—Q.B.

Cox v. Hickman, fully considered.

Bullen v. Sharp (1865) 35 L. J. C. P. 105; L. R. 1 C. P. 86; 1 H. & R. 117; 12 Jur. (N.S.) 247; 14 L. T. 72; 14 W. R. 338.—EX. CH.

Cox v. Hickman, observations adopted.

Sawyer v. Goodwin (1867) 36 L. J. Ch. 578; 15 W. R. 1008.—STUART, V.-C.

Cox v. Hickman, acted upon.

Mollwo v. Court of Wards (1872) L. R. 4 P. C. 419.—P.C.

SIR MONTAGUE SMITH (for their lordships).—It may be that **Waugh v. Carver** (*supra*) [where it was held that participation in net profits made the participant liable as a partner to third parties] and others of the former cases, were rightly decided on their own facts; but the judgment in **Cox v. Hickman** had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. It appears to be now established that, although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such perception alone, it may, as a presumption, not of law, but of fact, be inferred; yet, that whether that relation does or does not exist must depend on the real intention and contract of the parties.—p. 433.

Cox v. Hickman, applied.

Noakes v. Barlow (1872) 26 L. T. 136; 20 W. R. 386.—EX. CH.; **Holme v. Hammond** (1872) 41 L. J. Ex. 157; L. R. 7 Ex. 218; 20 W. R. 747.—EX.; **Ross v. Parkyn** (1875) 44 L. J. Ch. 610; L. R. 20 Eq. 331; 24 W. R. 5.—JESSEL, M.R.

Cox v. Hickman, followed.

Pooley v. Driver (1876) 5 Ch. D. 458; 46 L. J. Ch. 466; 36 L. T. 79; 25 W. R. 162.

JESSEL, M.R.—It is hardly necessary to refer to any of the other authorities on the point, because these two authorities [the above case and *Mollwo v. Court of Wards* (*infra*)] settle the law, and, as far as I am concerned, put an end to all discussion.—p. 480.

Cox v. Hickman, explained.

Howard, *In re Tennant*, *Ex parte* (1877).—C.A. (*supra*); and Megevand, *In re Delhasse*, *Ex parte* (1878).—C.A. (*infra*, col. 2029); and see Murray v. Scott (1884) 9 App. Cas. 519, 547.—H.L. (E.).

Cox v. Hickman, applied.

Badeley v. Consolidated Bank (1888) 57 L. J. Ch. 468; 38 Ch. D. 238; 59 L. T. 419; 36 W. R. 745.—C.A.; Adam v. Newbigging (1889) 57 L. J. Ch. 1066; 13 App. Cas. 308, 316; 59 L. T. 267; 37 W. R. 97.—H.L. (E.); King v. Whichelow (1895) 64 L. J. Q. B. 801.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

Cox v. Hickman, considered and followed.

Gosling v. Gaskell (1897) 66 L. J. Q. B. 848; [1897] A. C. 575; 77 L. T. 314; 46 W. R. 208.—H.L. (E.); Tuohy v. G. S. W. Ry. [1898] 2 Ir. R. 789, 796.—Q.B.D.

Cox v. Hickman, observed upon.

McCosh v. Brown (1899) 1 Fraser H. L. 52.—H.L. (SG.).

Bullen v. Sharp, 34 L. J. C. P. 174; 18 C. B. (N.S.) 614; 11 Jur. (N.S.) 506; 13 W. R. 685; 12 L. T. 310.—C.P.; reversed (1865) 35 L. J. C. P. 105; L. R. 1 C. P. 86; 1 H. & R. 117; 12 Jur. (N.S.) 247; 14 L. T. 72; 14 W. R. 338.—EX. CH.

Bullen v. Sharp, inapplicable.

Easterbrook v. Barker (1870) 40 L. J. C. P. 17; L. R. 6 C. P. 1, 11; 23 L. T. 535; 19 W. R. 208.—C.P.

Bullen v. Sharp, applied.

Mollwo v. Court of Wards (1872) L. R. 4 P. C. 419.—P.C. (see extract, *supra*, col. 2026); Noakes v. Barlow (1872) 26 L. T. 136; 20 W. R. 386.—EX. CH.; Holme v. Hammond (1872) 41 L. J. Ex. 157; L. R. 7 Ex. 218; 20 W. R. 747.—EX.; Ross v. Parkyns (1875) 44 L. J. Ch. 610; L. R. 20 Eq. 331; 24 W. R. 5.—M.R.

Bullen v. Sharp, referred to.

Howard, *In re Tennant*, *Ex parte* (1877).—C.A. (*infra*, col. 2028).

Bullen v. Sharp, applied.

Badeley v. Consolidated Bank (1888) 57 L. J. Ch. 468; 38 Ch. D. 238; 59 L. T. 419; 36 W. R. 745.—C.A. COTTON, LINDLEY and BOWEN, L.JJ.

English and Irish Church and University Assurance Society, In re (1863) 1 H. & M. 85; 8 L. T. 724; 11 W. R. 681.—WOOD, V.-C.; and Shaw v. Galt (1864) 16 Ir. C. L. R. 357.—V.-C., applied.

Holme v. Hammond (1872) 41 L. J. Ex. 157; L. R. 7 Ex. 218; 20 W. R. 747.—EX.; Pooley v. Driver (1876).—JESSEL, M.R. (*infra*).

Mollwo v. Court of Wards (1872) L. R. 4 P. C. 419.—P.C.

Referred to, Ross v. Parkyns (1875) 44 L. J. Ch. 610; L. R. 20 Eq. 331.—JESSEL, M.R.; followed, Pooley v. Driver (1876) 46 L. J. Ch. 466; 5 Ch. D. 458; 36 L. T. 79; 25 W. R. 162.—JESSEL, M.R. (see extract, *supra*, cols. 2026, 2027); considered, Frowde v. Williams (1886) 56 L. J. Q. B. 62; 56 L. T. 441.—DENMAN and HAWKINS, JJ.; principle applied, Badeley v. Consolidated Bank (1888) 57 L. J. Ch. 468; 38 Ch. D. 238; 59 L. T. 419; 36 W. R. 745.—C.A.

Mollwo v. Court of Wards, referred to.

Adam v. Newbigging (1888) 57 L. J. Ch. 1066; 13 App. Cas. 308, 316; 59 L. T. 267; 37 W. R. 97.—H.L. (E.).

Mollwo v. Court of Wards, applied.

King v. Whichelow (1895) 64 L. J. Q. B. 801.—C.A.

Mollwo v. Court of Wards, discussed and followed.

Gosling v. Gaskell (1897) 66 L. J. Q. B. 848; [1897] A. C. 575; 77 L. T. 314; 46 W. R. 208.—H.L. (E.).

Mollwo v. Court of Wards, explained and distinguished.

Stewart v. Buchanan (1903) 6 F. 15, 22.—CT. OF SESS.

Pooley v. Driver (1876) 46 L. J. Ch. 466; 5 Ch. D. 458; 36 L. T. 79; 25 W. R. 162.

—M.R., discussed.

Howard, *In re Tennant*, *Ex parte* (1877) 64 L. J. Ch. 610; 37 L. T. 284; 25 W. R. 854.—C.A. (see extract, *supra*).

Pooley v. Driver, followed.

Megevand, *In re Delhasse*, *Ex parte* (1877) 7 Ch. D. 511; 38 L. T. 106; 26 W. R. 338.—C.A. BACON, C.J. and C.A.

Pooley v. Driver, inapplicable.

Howard, *In re Tennant*, *Ex parte* (*supra*), followed.
Meyer v. Schacher (1878) 38 L. T. 97.—BACON, V.-C.; and see Aktie Bolaget Bruk (1887) 3 Times L. R. 517.—C.A.

Pooley v. Driver.

Dictum considered, Norfolk v. Arbuthnot (1880) 50 L. J. Q. B. 384; 6 Q. B. D. 279; 29 W. R. 337.—C.P.D.; inapplicable, Walker v. Hirsch (1884) 54 L. J. Ch. 315; 27 Ch. D. 460, 469; 51 L. T. 581; 32 W. R. 992.—C.A.; considered, Frowde v. Williams (1886) 56 L. J. Q. B. 62; 56 L. T. 441.—DENMAN and HAWKINS, JJ.

Pooley v. Driver, adopted.

Howard, *In re Tennant*, *Ex parte*, distinguished.

Badeley v. Consolidated Bank (1888) 57 L. J. Ch. 468; 38 Ch. D. 238; 59 L. T. 419; 36 W. R. 745.—C.A.

Pooley v. Driver and Howard, In re, Tennant, Ex parte, referred to.

Adam v. Newbigging (1888) 57 L. J. Ch. 1066; 13 App. Cas. 308, 316; 59 L. T. 267; 37 W. R. 97.—H.L. (E.).

Pooley v. Driver (*supra*), *applied*.

White v. Churchyard (1887) 3 Times L. R. 428.—A. L. SMITH, J.

Megevand, In re, Delhasse, Ex parte (1877) 7 Ch. D. 511; 38 L. T. 106; 26 W. R. 338.—C.A.

Observed upon, **Frowde v. Williams** (1886) 56 L. J. Q. B. 62; 56 L. T. 441.—DENMAN and HAWKINS, JJ.: *distinguished*, **Radley v. Consolidated Bank** (1886)—C.A. (*infra*); *referred to*, **Adam v. Newbigging** (1888) 57 L. J. Ch. 1066; 13 App. Cas. 308, 316; 59 L. T. 267; 37 W. R. 97.—H.L. (B.): *distinguished*, **Aktie Bolaget Iggesunds Brnk** (1887) 3 T. L. R. 517.—C.A.; *observed upon*, **King v. Whichelow** (1895) 64 L. J. Q. B. 801.—C.A.

Radley v. Consolidated Bank (1888) 57 L. J. Ch. 468; 38 Ch. D. 238; 59 L. T. 419; 36 W. R. 745.—C.A., *considered*.

Davis v. Davis (1893) [1894] 1 Ch. 393; 63 L. J. Ch. 219; 8 R. 133; 70 L. T. 265; 42 W. R. 312.

NORTH, J.—Adopting, then, the rule of law which was laid down before the Act [the Partnership Act, 1890, in **Radley v. Consolidated Bank**], and which seems to me to be precisely what is intended by sect. 2, sub-sect. 3 of the Act, the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in it, and, if the matter stops there, it is evidence upon which the Court must act. But, if there are other circumstances to be considered, they ought to be considered fairly together; not holding that a partnership is proved by the receipt of a share of profits, unless it is rebutted by something else; but taking all the circumstances together, not attaching undue weight to any of them, but drawing an inference from the whole.—p. 399.

Radley v. Consolidated Bank.

Distinguished and observations applied, **King v. Whichelow** (1895) 64 L. J. Q. B. 801.—C.A.; *commented upon and distinguished*, **Stewart v. Buchanan** (1903) 6 F. 15, 22.—CT. OF SESS.: *applied*, **Anglescy (Marquis) In re** (1903), 72 L. J. Ch. 782; [1903] 2 Ch. 727, 732; 89 L. T. 584; 32 W. R. 124.—SWINFEN EADY, J.

Pawsey v. Armstrong (1881) 50 L. J. Ch. 688; 18 Ch. D. 698; 30 W. R. 469.—KAY, J., *questioned*.

Walker v. Hirsch (1884) 27 Ch. D. 460; 54 L. J. Ch. 315; 51 L. T. 581; 32 W. R. 992.—C.A.

COTTON, L.J.—Then there was another case relied upon, the case of **Pawsey v. Armstrong**. Now, undoubtedly, if that case is to be considered as binding, it would go far to support the plaintiff's contention, because there, as I understand, Kay, J. did lay down that if there was an agreement to share profits and losses, whatever the intention of the parties as expressed in the agreement might be, that of necessity imposed upon them the position of partners with the consequential right of each member of the partnership to have on the dissolution a share in the assets and profits arising upon the sale of those assets. In my opinion, that is not right as between the parties themselves. Whether they be

said to be partners in the sense of sharing profits or anything else, you must look for the rights which they have as between themselves to be the fair construction of the contract. But Kay, J. laid down, that if they do share profits and losses, whether they intend to be partners or not, they are partners; and, as I understand it, even if they express by their contract that they do not intend to be so. I dissent from that, and I mention it because hereafter probably it may be said, if I do not mention it, that the Court, when that was quoted, and much relied upon, did not express any dissent, and so therefore it may be assumed that the Court approved of it. Therefore I think it right to give my opinion upon that case.—p. 469.

Wilson v. Whitehead (1842) 10 M. & W. 503; 12 L. J. Ex. 43.—EX., *questioned*.

Kilshaw v. Jukes (1863) 3 B. & S. 871; 32 L. J. Q. B. 217; 9 Jur. (N.S.) 1231; 8 L. T. 387; 11 W. R. 690.—Q.B.

WIGHTMAN, J.—The case of **Wilson v. Whitehead** appears to me to be of very questionable authority. The Court gives no reasons for refusing the rule except such as may be collected from observations in the course of the argument of the counsel, who moved unsuccessfully for a rule. From them it may be collected that the Court was much influenced by a supposed analogy between the case before them and that of stage-coach proprietors, where each horses the coach with his own horses for one or more stages, in which case the proprietors of the coach are not jointly liable for provender supplied to the horses of each, as decided in **Barton v. Hanson** (2 Taunt. 49), an analogy quite inapplicable to the present case, and, as it seems to me, to the case then before the Court.—p. 871.

Robinson v. Anderson (1855) 20 Beav. 98; 7 De G. M. & G. 239. *See* **Warner v. Smith** (1862) 11 W. R. 203.—V.C.

Hesketh v. Blanchard (1803) 4 East 144 *followed*.

Stocker v. Brocklebank (1851) 20 L. J. Ch. 401; 3 Mac. & G. 250; 15 Jur. 591.—L.C.

Ramsden, In re, Macarthur, Ex parte (1871) 40 L. J. Bk. 86; 19 W. R. 821.—V.C., *overruled*.

Loneragan, In re, Shiel, Ex parte (1877) 46 L. J. Bk. 62; 4 Ch. D. 789; 36 L. T. 270; 25 W. R. 420.—C.A.

[Held by the C. A. (Jessel, M.R., James, L.J., and Baggallay, J.A.) that the effect of sect. 5 of the Partnership Law Amendment Act, 1865, was not to postpone the mortgage to the other creditors in respect of his mortgage security, as was expressly decided in **Ex parte Macarthur**.]

Tew, In re, Mills, Ex parte (1873) L. R. 8 Ch. 569; 28 L. T. 606; 21 W. R. 557.—L.J., *followed*.

Taylor, Ex parte, Grason, In re (1879) 12 Ch. D. 366; 41 L. T. 6; 28 W. R. 205.—BACON, C.J. and C.A.

Tew, In re, Mills, Ex parte, followed.

Stone's Trusts, In re (1886) 55 L. T. 256; 55 L. J. Ch. 795; 33 Ch. D. 541; 35 W. R. 54.—KAY, J.

Grason, In re, Taylor, Ex parte (1879) 12 Ch. D. 366; 41 L. T. 6; 28 W. R. 205.—L.J., *applied*.
Genese, In re, District Bank of London, Ex parte (1885) 55 L. J. Q. B. 118; 16 Q. B. D. 700; 34 W. R. 79.—CAVE, J.

Tew, In re, Mills, Ex parte, and Grason, In re, Taylor, Ex parte, applied.
Hildesheim, In re, Smith, Ex parte (1893).—C.A. (*infra*); and **Mason, In re, Bing, Ex parte** [1898] 68 L. J. Q. B. 466; [1899] 1 Q. B. 810; 80 L. T. 92; 47 W. R. 270.—WRIGHT, J.

Stone's Trusts, In re (1886) 55 L. J. Ch. 795; 33 Ch. D. 541; 55 L. T. 256; 35 W. R. 54.—KAY, J., *followed*.
Hildesheim, In re, Smith, Ex parte (1893) [1893] 2 Q. B. 357; 4 R. 543; 69 L. T. 550; 42 W. R. 138; 10 Morrell 238.—C.A.; *reversing* 69 L. T. 294.

Rawlins v. Wickham (1858) 28 L. J. Ch. 188; 3 De G. & J. 304; 5 Jur. (N.S.) 278; 7 W. R. 145.—L.J.J., *distinguished*.
Peek v. Gurney (1873) L. R. 6 H. L. 377, 394.—H.L. (E.).

Rawlins v. Wickham, considered.
Hart v. Swaine (1877) 7 Ch. D. 42.—FRY, J.

Rawlins v. Wickham, applied.
Edwick v. Hawkes (or Edridge v. Hawker) (1881) 50 L. J. Ch. 577; 18 Ch. D. 199; 45 L. T. 168; 29 W. R. 913.—FRY, J.; **Redgrave v. Hurd** (1881) 51 L. J. Ch. 113; 20 Ch. D. 1, 23; 45 L. T. 485; 30 W. R. 251.—C.A.; and **Mathias v. Yetts** (1882) 46 L. T. 497, 504.—C.A.

Rawlins v. Wickham, considered.
Joliffe v. Baker (1883) 52 L. J. Q. B. 609; 11 Q. B. D. 255; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.—W. WILLIAMS and CAVE, JJ.

Rawlins v. Wickham, discussed.
Newbigging v. Adam (1887) 56 L. J. Ch. 275; 34 Ch. D. 582; 55 L. T. 794; 35 W. R. 597.—C.A. COTTON, BOWEN and FRY, L.J.J.; *affirmed nom.* **Adam v. Newbigging** (1888) 57 L. J. Ch. 1066; 13 App. Cas. 308; 59 L. T. 267; 37 W. R. 97.—H.L. (E.).

BOWEN, L.J.—In that case, one of three partners having retired, the remaining partners introduced the plaintiff into the firm, and he, under his contract with them, took upon himself to share with them the liabilities which otherwise they would have borne in their entirety. That was a burden which he took under the contract, and in virtue of the contract. It seems to me, therefore, that upon this principle indemnity was rightly decreed as regards the liabilities of the new firm.

Rawlins v. Wickham, followed.
Betjemann v. Betjemann (1895) 64 L. J. Ch. 641; [1895] 2 Ch. 474; 12 R. 455; 73 L. T. 2; 44 W. R. 182.—C.A.

Rawlins v. Wickham, distinguished.
Lagunas Nitrate Co. v. Lagunas Syndicate (1898, 1899) 68 L. J. Ch. 699; [1899] 2 Ch. 392, 417; 81 L. T. 334; 48 W. R. 74.—ROMER, J.; *affirmed*, C.A.

Dry v. Boswell (1808) 1 Camp. 329.—K.B.; and **Benjamin v. Porteus** (1796) 2 H. Bl. 590, *adopted*.
Pott v. Eyton (1846) 15 L. J. C. P. 257; 3 C. B. 32.—C.P.

O.C.

Benjamin v. Porteus, considered and not applied.
Nevill, In re, White, Ex parte (1871) 40 L. J. Bk. 73; L. R. 6 Ch. 397; 24 L. T. 45; 19 W. R. 488.—L.J.J.

Stocker v. Brockelbank (1851) 20 L. J. Ch. 401; 3 Mac. & G. 250; 15 Jur. 591.—L.C.
Distinguished, **Lumley v. Wagner** (1852) 21 L. J. Ch. 898; 1 De G. M. & G. 604; 16 Jur. 871.—L.C.; *explained*, **Harrington v. Churchward** (1860) 29 L. J. Ch. 521; 6 Jur. (N.S.) 576; 8 W. R. 302.—WOOD, V.-C.

Stocker v. Brockelbank, distinguished.
Moore v. Davis (1879) 11 Ch. D. 261; 27 W. R. 335.—HALL, V.-C.

Price v. Groom (1848) 17 L. J. Ex. 346; 2 Ex. 542.—EX., *commented upon*.
Whiteley, In re, Smith, Ex parte (1892) 67 L. T. 69.—C.A.

Armstrong v. Lewis (1834) 2 Cr. & M. 274; 3 L. J. Ex. 359.—EX., *applied*.
Ritchie v. Smith (1848) 6 C. B. 462; 18 L. J. C. P. 9; 13 Jur. 63.—C.P.

Geddes v. Wallace (1820) 2 Bli. 270.—H.L. (SC.), *cited*.
England v. Curling (1844) 8 Beav. 129, 133.—M.R.

Geddes v. Wallace, inapplicable.
Austen v. Boys (1858) 27 L. J. Ch. 714; 2 De G. & J. 626; 4 Jur. (N.S.) 719; 6 W. R. 792.—L.C.

Lovegrove v. Nelson (1834) 3 L. J. Ch. 108; 3 Myl. & K. 1.—M.R., *dicta applied*.
Byrne v. Reid (1902).—C.A. *See infra*.

England v. Curling (1844) 8 Beav. 129.—M.R., *explained*.
Sichel v. Mosenthal (1862) 30 Beav. 371; 31 L. J. Ch. 386; 8 Jur. (N.S.) 275; 5 L. T. 784; 10 W. R. 283.—M.R.

England v. Curling, distinguished.
Scott v. Rayment (1868) 38 L. J. Ch. 48; L. R. 7 Eq. 112.

GIFFARD, V.-C.—As a general rule the Court will not decree specific performance of an agreement to enter into partnership. In *England v. Curling* there had been part performance, and it was essential to justice that the terms of the agreement which had been partially performed should be ascertained and fixed by a deed.—p. 49.

England v. Curling, applied.
Crowley v. O'Sullivan [1900] 2 Ir. R. 478, 487.—Q.B.D.; **Byrne v. Reid** (1902) 71 L. J. Ch. 830; [1902] 2 Ch. 735; 87 L. T. 507; 51 W. R. 52.—C.A.

2. RIGHTS AND OBLIGATIONS OF PARTNERS INTER SE.

Coventry v. Barclay, 33 Beav. 1; 2 N. R. 375; 8 L. T. 754; 11 W. R. 892.—M.R.; *affirmed in part, reversed in part*, (1863) 3 De G. J. & S. 320; 3 N. R. 324; 9 Jur. (N.S.) 1331; 9 L. T. 496; 12 W. R. 500.—L.C., *referred to*.

Barber, In re and Ex parte (1870) L. R. 5 Ch. 687; 23 L. T. 230; 18 W. R. 940.—L.J.

Coventry v. Barclay, adopted.
Vyse v. Foster (1874) 44 L. J. Ch. 37; L. R. 7 H. L. 318, 345; 31 L. T. 177; 23 W. R. 355.—H.L. (E.).

- Essex v. Essex** (1855) 20 Beav. 442.—M.R., *followed*.
- Cockson v. Cockson** (1837) 8 Sim. 529; 6 L. J. Ch. 337; 1 Jur. 621.—V.-C., *not followed*.
- Cox v. Willoughby** (1886) 13 Ch. D. 863; 49 L. J. Ch. 237; 42 L. T. 125; 28 W. R. 503.
- FRY, J.—No doubt the case of *Cockson v. Cockson*, is, to some extent, at variance with this conclusion. But, in my view, that case is not consistent with *Essex v. Essex*, and, if I must judge between the two, I prefer the latter.—p. 871.
- Neilson v. Mossend Iron Co.** (1886) 11 App. Cas. 298.—H.L. (SC.); **Cox v. Willoughby** (*supra*); and **Yates v. Finn** (1880) 49 L. J. Ch. 188; 13 Ch. D. 839; 28 W. R. 387.—HALL, V.-C., *discussed*.
- Daw v. Herring** (1891) 61 L. J. Ch. 5; [1892] 1 Ch. 284; 65 L. T. 782; 40 W. R. 61.—STIRLING, J.
- Neilson v. Mossend Iron Co., Cox v. Willoughby, and Daw v. Herring** (*supra*), *applied*.
- Brooks v. Brooks** (1901) 85 L. T. 453.—FARWELL, J.
- Downs v. Collins** (1848) 6 Hare 418.—V.-C., *full wtd.*
- Lancaster v. Allsup** (1887) 57 L. T. 53.—STIRLING, J.
- Somerville v. Mackay** (1810) 16 Ves. 382.—L.C., *distinguished*.
- Dean v. McDowell** (1878) 47 L. J. Ch. 537; 8 Ch. D. 345; 38 L. T. 862; 26 W. R. 486.—C.A.
- THESTER, L.J.—The second principle which is to be collected from the cases is, that a partner is not to derive any exclusive advantage by engaging in transactions in rivalry with the firm. That principle is illustrated by the case of *Somerville v. Mackay*, if that case is to be treated as a decision at all upon the point, because there the partnership being mainly founded for the purpose of supplying goods in Russia to a firm of Anderson & Co., the defendant himself had during the period of the partnership been supplying goods of the same character to the same firm.—p. 511.
- Hedley v. Bainbridge** (1842) 11 L. J. Q. B. 293; 3 Q. B. 316; 2 G. & D. 488.—Q.B. *Followed*, **Forster v. Mackreth** (1867) 36 L. J. Ex. 94; 1 L. R. 2 Ex. 163; 16 L. T. 23; 15 W. R. 747.—EX.; *approved*, **Garland v. Jacomb** (1873) L. R. 8 Ex. 216.—EX. CH.
- Harrison v. Jackson** (1797) 7 Term Rep. 207; 4 R. R. 422.—K.B., *referred to*.
- Tomlinson v. Broadsmith** (1896) 65 L. J. Q. B. 308; [1896] 1 Q. B. 386; 74 L. T. 265; 44 W. R. 471.—C.A.
- Harrison v. Jackson**, *applied*.
- Marchant v. Morton** (1901) 70 L. J. K. B. 820; [1901] 2 K. B. 829; 85 L. T. 169.—CHANNELL, J.
- Morley v. Strombom** (1802) 3 Bos. & P. 254.—C.P.; and **Goldsmith v. Levy** (1812) 4 Taunt. 299.—C.P., *referred to*.
- Tomlinson v. Broadsmith** (1896).—C.A. (*supra*).
- Duncan v. Lowndes** (1813) 3 Camp. 478; 14 R. R. 815; and **Hasleham v. Young** (1844) 13 L. J. Q. B. 205; 5 Q. B. 833; D. & M. 700; 8 Jur. 338.—Q.B., *considered and applied*.
- Brettel v. Williams** (1843) 19 L. J. Ex. 121; 4 Ex. 623.—EX.
- Blisset v. Daniel** (1853) 10 Hare 493; 1 Eq. R. 484; 18 Jur. 122; 1 W. R. 529.—V.-C., *applied*.
- Herey v. Birch** (1804) 9 Ves. 357, 360.—L.C., *not applied*.
- Allhusen v. Borries** (1867) 15 W. R. 739.—MALINS, V.-C.
- Blisset v. Daniel**, *followed*.
- Wood v. Wood** (1874) 43 L. J. Ex. 153; L. R. 9 Ex. 190; 30 L. T. 815; 22 W. R. 709.—EX.
- Blisset v. Daniel and Wood v. Wood**, *distinguished*.
- Cooper v. Page** (1876) 34 L. T. 90.—V.-C.
- Blisset v. Daniel**, *distinguished*.
- Steuart v. Gladstone** (1878) 38 L. T. 557; 47 L. J. Ch. 423; 26 W. R. 657.—FRY, J.; *reversed on another point*, (1879) 10 Ch. D. 626; 40 L. T. 145; 27 W. R. 512.—C.A.
- FRY, J.—It is said that the case of *Blisset v. Daniel* decides that where articles of partnership contain a clause for expulsion, and where that clause has become inoperative by reason of the accounts not being taken in the manner contemplated by that clause, the machinery is gone, and with the extinction of the machinery the clause itself is extinguished. I need not say again that, if the case decided that, I should follow it implicitly. It does not appear to me that it does. In that case the clause of expulsion was one giving the power of immediate expulsion, the accounts upon which it was to operate were past accounts; the machinery, therefore, was of a kind which must exist then if at all; it was not future, and the Court there held that, the machinery not existing at the time, the expulsion clause itself could not possibly have been put in force, that there was a condition *sine qua non* to the giving of notice which did not exist.—p. 563.
- Blisset v. Daniel and Wood v. Wood** (*supra*), *distinguished and dicta approved*.
- Russell v. Russell** (1880) 14 Ch. D. 471; 49 L. J. Ch. 268; 42 L. T. 112.
- JESSEL, M.R.—Now one must consider what *Wood v. Wood* was, to show how different it is from this case. *Wood v. Wood* was in effect this: There was a rule which allowed a committee of a mutual insurance society to expel a member, and the ground was "that if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have full power to exclude such member." . . . No one could suppose it was to be left to the caprice of the members of the committee to stigmatise as dishonourable or dishonest any member of the society; of course it was not. It was intended that they should be satisfied by something like reasonable evidence that his conduct was unworthy. Therefore, in construing the rule, the Court of Exchequer came to the conclusion, and if I may so think, rightly came to the conclusion, that it was a case in which the committee ought not to have decided until after inquiry. That case, therefore, has no bearing upon the question as regards the partnership right to give notice to

one partner to dissolve. It is a case of a totally different kind.

As regards *Blisset v. Daniel*, that was a very peculiar case. The case was this: A majority of partners, consisting of two-thirds, wished to expel a partner, and nothing more, but if they did expel him, the other partners had a right to buy up his shares in a particular way by valuation. All the Vice-Chancellor decided was this, that in a case of that kind they had no right to expel merely for the purpose of buying up the shares, and that it was not a fair and *bona fide* exercise of the power. . . . How that case applies to the case of a single partner I do not well understand. In the case of several partners it may well be that it is a thing to be considered, but if it is a single partner, it is plain that neither *Blisset v. Daniel* nor *Wood v. Wood* has any application, because the moment you give the power to a single partner in terms which show that he is to be the sole judge for himself, not to acquire a benefit, but to dissolve the partnership, then he may exercise that discretion capriciously, and there is no obligation upon him to act as a tribunal, or to state the grounds on which he decides for himself. —p. 478.

Bell, In re, Peacock, Ex parte (1825) 2 Glyn. & J. 27.—L.C., *followed*.
Bowden, *Ex parte* (1832) 1 L. J. Rk. 37; 1 Deac. & C. 135.—C.J.

Bell, In re, Peacock, Ex parte, explained.
Plummer, *In re* (1841) 1 Ph. 56.
LYNDHURST, L.C.—In administration under bankruptcy the joint estates and separate estates are considered as distinct estates; and accordingly it has been held, that a joint creditor, having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security; on the ground that it is a different estate. That was the principle upon which *Ex parte Peacock* proceeded.—p. 60.

Bell, In re, Peacock, Ex parte, explained.
Rofe and Bank of Australasia v. Flower (1866) 35 L. J. P. C. 13; L. R. 1 P. C. 27; 12 Jur. (N.S.) 345; 14 L. T. 144; 14 W. R. 773.—P.C.
LORD CHELMSFORD (for the Court).—It was asserted, indeed, in argument, that the rule that the security to be deducted must be upon the same estate as that against which the proof is directed, was not laid down as a general rule by Lord Eldon in *Ex parte Peacock*. This, however, was not the opinion of Lord Lyndhurst (in *Ex parte Plummer, supra*).—p. 15.

Bell, In re, Peacock, Ex parte, referred to.
Turner, *In re, West Riding Union Banking Co., Ex parte* (1881); 19 Ch. D. 105, 113; 45 L. T. 546; 30 W. R. 239.—C.A.

Rofe and Bank of Australasia v. Flower.
Distinguished, Commercial Bank Corporation of India, &c., *In re* (1868) 82 L. T. 668; 16 W. R. 958.—L.J.; *approved*, Smith, Knight & Co., *In re* (1869) L. R. 4 Ch. 662; 20 L. T. 835; 17 W. R. 833.—L.J.; *not applied*, Sugg & Co. v. Hill (Lord) (1893) 10 Times L. R. 126.—KENNEDY, J.; *affirmed*, (1894) 10 Times L. R. 288.—C.A.

Brown v. De Tastet (1821) Jac. 284; 23 R. R. 59.—L.C., *inapplicable*.
Vyse v. Foster (1874) 44 L. J. Ch. 37; L. R. 7 H. L. 318; 31 L. T. 177; 23 W. R. 355.—H.L. (E.).

CAIRNS, L.C.—I have not been able to find any case, for I put aside the case of *Brown v. De Tastet* by reason of the great peculiarity of the facts of that case—I repeat, I have not been able to find any case where one surviving partner, being an executor, has been made answerable for the whole of the profits made in the trade by the employment or the capital of the testator, those profits being received, not merely by the executor, but by other partners not brought before the Court, nor subjected to any liability under the decree.—p. 46.

Brown v. De Tastet, principle adopted.
Edinburgh (Provost) v. Lord Advocate (1879) 4 App. Cas. 823.—H.L. (SC.).

Brown v. De Tastet and Bray v. Fromont (1821) 6 Madd. 5; 22 R. R. 224.—V.-C., *applied*.

Cassels v. Stewart (1881) 6 App. Cas. 64; 29 W. R. 636.—H.L. (SC.).

Yonge, Ex parte (1814) 3 V. & B. 31.
Distinguished, Cross v. Cheshire (1851) 21 L. J. Ex. 3; 7 Ex. 43; 15 Jur. 993.—EX.; *dictum approved*, Duncan v. North and South Wales Bank (1880) 50 L. J. Ch. 355; 6 App. Cas. 1. 14; 43 L. T. 706; 29 W. R. 763.—H.L. (E.).

Venning v. Leckie (1810) 13 East 7; 12 R. R. 292, *distinguished*.
Sharpe v. Cummings (1844) 14 L. J. Q. B. 10; 2 D. & L. 504; 9 Jur. 68.—BAIL CT.

Edgar (or Edgar) v. Knapp (1843) 6 Scott N. R. 707; 5 Man. & G. 753; 1 D. & L. 73.—C.P., *distinguished*.
Tharpe v. Stallwood (1843) 12 L. J. C. P. 241; 5 Man. & G. 760; 6 Scott N. R. 715.—C.P.

Holmes v. Higgins (1822) 1 L. J. (O.S.) K. B. 47; 1 B. & C. 74; 2 D. & R. 196.—K.B., *principle applied*.
Lucas v. Beach (1840) 1 Man. & G. 417; 1 Scott N. R. 350; 4 Jur. 631.—C.P.

Pritchard v. Draper (1831) 1 Russ. & M. 191; Tambl. 332.—M.R.; *reversed*, 1 Russ. & M. 197.—L.C.; *the latter decision affirmed nom.* Nottidge v. Pritchard (1834).—H.L. (*infra*).

Nottidge v. Pritchard (1834) 2 Cl. & F. 379; 8 Bli. (N.S.) 493.—H.L. (E.), *adopted*.
Piercy v. Fynney (1871) 40 L. J. Ch. 404; L. R. 12 Eq. 69; 19 W. R. 710.—MALINS, V.-C.

Walton v. Butler (1861) 29 Beav. 428.—M.R., *referred to*.
Hancock v. Heaton (1874) 22 W. R. 680; 30 L. T. 592.—MALINS, V.-C.; *affirmed*, 22 W. R. 784.

Burton v. Wookey (1822) 6 Madd. 367; 23 R. R. 249, *applied*.
Dean v. MacDowell (1878) 47 L. J. Ch. 537; 8 Ch. D. 345; 38 L. T. 862; 26 W. R. 486.—C.A.

Lodge and Fendal, In re (1790) 1 Ves. 166.—L.C., *considered and distinguished*.
Read v. Bailey (1877) 47 L. J. Ch. 161; 3 App. Cas. 94; 37 L. T. 510; 26 W. R. 223.—H.L. (E.).

LORD BLACKBURN.—The facts are but obscurely stated, but I collect that in that case the dormant partner had, by deed, given the acting partner who carried on the business the amplest authority to invest the money in any

way he pleased, and he pleased to invest it by lending it to himself, to pay his private debts. That was a very wrong thing indeed; it was as Lord Eldon afterwards expressed it, an abuse of his authority—a most improper use of his authority—but he did act upon the authority. I think this is the conclusion to which Lord Thurlow came. As soon as it appeared that the partnership had authorised the partner to lend the money of the firm—not merely given him an ostensible authority to deal with the money so that it would be good as to third persons, but had actually given him an authority to lend the money, though he abused that authority, still the debt arose by a contract made with the authority of the firm, and therefore it did not come within this exception, it came within the rule.

Flavell, In re, Murray v. Flavell (1883) 53 L. J. Ch. 185; 25 Ch. D. 89; 32 W. R. 102.—C.A., *principle applied*.

Davies, In re, Davies v. Davies (1892) 61 L. J. Ch. 595; [1892] 3 Ch. 63; 67 L. T. 548; 41 W. R. 13.—NORTH, J.

Flavell, In re, Murray v. Flavell, discussed. **Ehrmann v. Ehrmann** (1894) 43 W. R. 125.

STIRLING, J.—Now, no doubt the L.J. (Cotton, L.J. in the above case) appears to indicate his opinion to be that neither partner could release the other from this covenant; but it is to be observed that the L.J. abstains from saying that the contract could not be put an end to by the parties. I apprehend that the L.J. means that the parties could not have put an end to the covenant in question without determining the contract of partnership altogether. **Lindley, L.J.** says nothing which gives rise to any difficulty.—p. 126.

Flavell, In re, Murray v. Flavell, applied.

Drumie v. Davies [1899] 1 Ir. R. 183.—C.A. **FITZGIBBON, L.J.**—It appears to me that without overruling *Murray v. Flavell* it is impossible not to make the defendant responsible for carrying out the terms upon which he got the business.—p. 189.

Redmayne v. Forster (1866) 35 L. J. Ch. 847; L. R. 2 Eq. 467, 478; 14 W. R. 825.—M.R., *applied*.

Whetham v. Davey (1885) 30 Ch. D. 574; 53 L. T. 501; 33 W. R. 925.—NORTH, J.

Kelly v. Hutton (1868) 37 L. J. Ch. 917; L. R. 3 Ch. 703; 16 W. R. 1182.—L.JJ.

Principle adopted, **Bradbury v. Beeton** (1869) 39 L. J. Ch. 57; 21 L. T. 323; 18 W. R. 33.—**MALINS, V.-C.**; *applied*, **Walter v. Emmott** (1885) 54 L. J. Ch. 1059, 1062; 53 L. T. 437.—**PEARSON, J.**; *affirmed*, C.A.

Kelly v. Hutton and Whetham v. Davey (*supra*), *inapplicable*.

Watts v. Driscoll (1900) 70 L. J. Ch. 157; [1901] 1 Ch. 294; 84 L. T. 97; 49 W. R. 146.—C.A.

WILLIAMS, L.J.—In my judgment, what was done here was not something done by the partners in the course of their relation as partners.

Batard v. Hawes (1853) 22 L. J. Q. B. 443; 2 El. & Bl. 287; 3 Car. & K. 277; 17 Jur. 1154; 1 W. R. 387.—Q.B., *adopted*.

Mackreth v. Walmsley (1884) 51 L. T. 19; 32 W. R. 819.—**KAY, J.**, and **Fitzgerald v. McCowan** (1897) [1898] 2 Ir. R. 1.—Q.B.D.

Croskill v. Bower (1863) 32 Beav. 86; 32 L. J. Ch. 540; 8 L. T. 135.—M.R., *applied*.

Barfield v. Loughborough (1872) 42 L. J. Ch. 179; L. R. 8 Ch. 1, 7; 27 L. T. 499; 21 W. R. 86.—**SELBORNE, L.C.**; and **Daniell v. Sinclair** (1881) 6 App. Cas. 181, 184; 50 L. J. P. C. 50; 44 L. T. 257; 29 W. R. 569.—C.A. (N.Z.); *affirmed*, P.C.

Borron, In re, Broadbent, Ex parte (1834) 3 L. J. Bk. 95; 1 Mont. & Ayr. 635; 4 Deac. & C. 3.—C.J.; and **Bentley v. Bates** (1840) 4 Y. & C. Ex. 182; 9 L. J. Ex. Eq. 30; 4 Jur. 552, *distinguished and observations disapproved*.

Dodds v. Preston (1888) 59 L. T. 718.—C.A. **COTTON, L.J.**—The cases which were relied upon as showing that there is no dissolution of a partnership to work a mine when there is a bankruptcy of one of the partners, in my opinion do not lead to any such result. . . . That case [*Borron, In re, Broadbent, Ex parte*], in my opinion does not in any way support the proposition which has been contended for here. The Chief Judge does express an opinion that partnership to work mines in real estate must be considered as like other partnerships, and he declines to interfere; but that is because in such a case he could not grant a sale of that which was the subject of an equitable mortgage under the common order. . . . *Bentley v. Bates* is only a decision that the mortgagee of a share of one of the tenants in common may maintain a bill for an account against the mortgagor and his co-tenants which could not be done in an ordinary partnership. That was a decision on demurrer, and there are expressions of opinion by the judge who decided that case which favour the view; but the question really did not arise in that case, and, although the learned judge does so state, yet, in my opinion, the reasons which he gives for distinguishing a partnership in a mine from other partnerships, though true in fact, are very insufficient reasons for coming to any such conclusion as that at which he arrives.—p. 719.

Newland v. Champion (1748) 1 Ves. sen. 105, *considered*.

Law v. Law (1845) 2 Coll. 41; 14 L. J. Ch. 313; 9 Jur. 745.—V.-C.; *affirmed*, 16 L. J. Ch. 375; 11 Jur. 463.—L.C.

Jackson v. Sedgwick (1818) 1 Swanst. 460; 1 Wils. Ch. 297; 18 L. R. 109.—L.C., *considered*.

Blisset v. Daniel (1853) 10 Hare 493; 1 Eq. R. 484; 18 Jur. 122; 1 W. R. 529.—V.-C.

Ambler v. Bolton (1872) 41 L. J. Ch. 783; L. R. 14 Eq. 427; 20 W. R. 934.—M.R., *distinguished*.

McClean v. Kenward (1874) 43 L. J. Ch. 323; L. R. 9 Ch. 336; 30 L. T. 186; 22 W. R. 382.—L.JJ.

MELLISH, L.J.—There there was a sort of running contract with the Postmaster-General for carrying the mails, which was liable to be terminated at a particular time, or which might last for a further time if both parties were willing; and it is obvious that in that sort of case there is a continuing contract where the consideration can be measured, and you can say what the profits for a particular time would be. In that sort of contract, then, the question was whether the survivor of two partners who had become interested in the contract was entitled to determine it, and he said that he was at liberty to go on with it or to determine it as he liked. It might be in a case of that kind that the most convenient way of judging of the rights of the deceased partner was to make a valuation of what in fact was his share of the goodwill of the contract. But where the contract is one for performing one specific work, I cannot see how it will be ascertained what the profits will be except by letting the contract be carried out, and then finding out what the profits actually are.—p. 328.

Bury v. Allen (1845) 1 Coll. 589.—V.-C., *applied*.

Burdon v. Barkus (1862) 31 L. J. Ch. 521; 4 De G. F. & J. 42; 8 Jur. (N.S.) 656; 7 L. T. 116.—L.JJ.

Bury v. Allen, *referred to*.

Atwood v. Maude (1868) L. R. 3 Ch. 369; 16 W. R. 665.—L.C. and L.J.

Akhurst v. Jackson (1818) 1 Swanst. 85.—M.R., *applied*.

Burdon v. Barkus (1862) 31 L. J. Ch. 521; 4 De G. F. & J. 42; 31 L. J. Ch. 521; 8 Jur. (N.S.) 656; 7 L. T. 116.—L.JJ.

Akhurst v. Jackson, *distinguished*.

Atwood v. Maude (1868) L. R. 3 Ch. 369; 16 W. R. 665.—L.C. and L.J.

Featherstonhaugh v. Turner (1858) 28 L. J. Ch. 812; 25 Beav. 382.—M.R., *considered and applied*.

Burdon v. Barkus (1862).—L.JJ. (*supra*); and **Rooke v. Nisbet** (1881) 50 L. J. Ch. 588, 590; 29 W. R. 842.—KAY, J.

Hills v. M'Rae (1851) 20 L. J. Ch. 533; 9 Hare 297; 15 Jur. 766.—V.-C., *approved and applied*.

Hodgson, In re, Beckett v. Ramsdale (1885) 55 L. J. Ch. 241; 31 Ch. D. 177; 54 L. T. 222; 34 W. R. 127.—C.A.; *referred to*, **Barnard, In re, Edwards v. Barnard** (1886) 55 L. J. Ch. 935; 32 Ch. D. 447; 55 L. T. 40; 34 W. R. 782.—C.A.; *followed*, **Blyth v. Fladgate** (1890) 60 L. J. Ch. 66; [1901] 1 Ch. 337; 63 L. T. 546; 39 W. R. 422.—STIRLING, J.

Harrison v. Armitage (1819) 4 Madd. 148; 20 R. R. 284.—V.-C., *overruled*.

Loscombe v. Russell (1830) 4 Sim. 8.—V.-C.

SHADWELL, V.-C.—With respect to the law of this Court upon this subject, there is no instance of an account being decreed of the profits of a partnership, on a bill which does not pray a dissolution, but contemplates the subsistence of the partnership. The opinion of Lord Eldon upon this subject has been, from time to time,

expressed both before and since the decision of **Harrison v. Armitage**.—p. 10.

Goodman v. Whitcomb (1820) 1 Jac. & W. 589, 592.—L.C., *principle applied*.

Anderson v. Anderson (1857) 25 Beav. 190.—M.R.

Loscombe v. Russell (1830) 4 Sim. 8, 11.—V.-C.

Questioned, **Walworth v. Holt** (1841) 10 L. J. Ch. 138; 4 Myl. & C. 619.—L.C.; *principle applied*, **Anderson v. Anderson** (1857) 25 Beav. 190.—M.R.

Rackstraw v. Imber (1816) Holt 368.—C.P., *disapproved*.

Fromont v. Coupland (1824) 2 Bing. 170; 9 Moore 319; 1 Car. & P. 275; 3 L. J. (O.S.) C. P. 237; 27 R. R. 575.—C.P.

PARK, J.—In **Foster v. Allanson** (2 T. R. 479) he (Buller, J.) said there must not only be a final settlement of the account, but also a promise to pay; in **Moravia v. Levy** (2 T. R. 483, n.) there was an express promise; and, though in **Rackstraw v. Imber**, Gibbs, C.J. is reported to have holden that a promise was not necessary, that is a *nisi prius* decision which cannot outweigh the authority of the two others.—p. 172.

Foster v. Allanson (1788) 2 Term Rep. 479, *questioned*.

Green v. Beesley (1835) 2 Bing. N. C. 108; 2 Scott 164; 1 Hodges 199; 4 L. J. C. P. 299.—C.P.

PARK, J.—That decision was considered at the time a great novelty in principle.—p. 112.

Austin v. Jackson, 11 Ch. D. 942, n., *approved and followed*.

Potter v. Jackson (1880) 13 Ch. D. 845; 49 L. J. Ch. 232; 42 L. T. 294; 28 W. R. 411.—V.-C.

Potter v. Jackson, *followed*.

Rosher v. Crannis (1890) 63 L. T. 272.—CHITTY, J.

Walworth v. Holt (1840) 10 L. J. Ch. 138; 4 Myl. & C. 619.—L.C., *considered*.

Hall v. Hall (1850) 20 L. J. Ch. 585; 3 Mac. & G. 79; 15 Jur. 368.—L.C.

Marshall v. Coleman (1820) 2 Jac. & W. 266; 22 R. R. 116.—L.C.; and **Fairthorne v. Weston** (1844) 13 L. J. Ch. 263; 3 Hare 387; 8 Jur. 353.—V.-C., *considered and applied*.

Watney v. Trist (1876) 45 L. J. Ch. 412.—HALL, V.-C.

Bevan v. Webb [1901] 1 Ch. 724.—JOYCE, J.; *reversed*, (1901) 70 L. J. Ch. 536; [1901] 2 Ch. 59; 84 L. T. 609; 49 W. R. 548.—C.A.

Bond v. Milbourn (1871) 20 W. R. 197.—

BACON, V.-C., *explained and distinguished*. **Rooke v. Nisbet** (1881) 53 L. J. Ch. 588, 590; 29 W. R. 842.—KAY, J.

Bond v. Milbourn, *followed*.

Yates v. Cousins (1889) 60 L. T. 535.—KAY, J.

Astle v. Wright (1856) 25 L. J. Ch. 864; 23 Beav. 77; 2 Jur. (N.S.) 849; 4 W. R. 764.—M.R., *distinguished*.

Lee v. Page (1861) 30 L. J. Ch. 857; 7 Jur. (N.S.) 768; 9 W. R. 754.—V.-C. (*and see post*).

Astle v. Wright (*supra*), *observed upon*.
Atwood v. Maude (1868) L. R. 3 Ch. 369; 16 W. R. 665.—L.C. and L.J.

Lee v. Page (1861) 30 L. J. Ch. 857; 7 Jur. (N.S.) 768; 9 W. R. 754.—V.-C., *observed upon*.

Atwood v. Maude (1868) L. R. 3 Ch. 369; 16 W. R. 665.—L.C. and L.J.

Lee v. Page and Atwood v. Maude, *commented on*.

Wilson v. Johnstone (1873) 42 L. J. Ch. 668; L. R. 16 Eq. 606; 29 L. T. 93.—WICKENS, V.-C.

Atwood v. Maude, *referred to*.
Rooke v. Nisbett (1881) 50 L. J. Ch. 588, 590; 29 W. R. 842.—KAY, J.

Tattersall v. Groote (1800) 2 Bos. & P. 181; 14 R. R. 8, *explained and distinguished*.

Belfield v. Bourne (1893) 63 L. J. Ch. 104; [1894] 1 Ch. 521; 8 R. 61; 69 L. T. 786; 42 W. R. 189.

STIRLING, J.—It seems to me that the decision in *Tattersall v. Groote* does not stand in the way of the conclusion at which I have arrived, viz., that the arbitrators [appointed under an arbitration clause in partnership articles] may take all the circumstances of the case into consideration, and, if they award a dissolution, may say what portion of the premium is to be returned.

Plews v. Baker (1874) 43 L. J. Ch. 212; L. R. 16 Eq. 564.—BACON, V.-C.

Distinguished, **Law v. Garrett** (1878) 8 Ch. D. 26, 32; 38 L. T. 3; 26 W. R. 426.—BACON, V.-C. [affirmed, C.A.]; *applied*, **Compagnie du Senegal v. Woods** (1883) 53 L. J. Ch. 166, 168; 49 L. T. 527; 32 W. R. 111.—KAY, J.

Plews v. Baker, *distinguished*.
Joplin v. Postlethwaite (1889) 61 L. T. 629.—C.A. COTTON, BOWEN and FRY, L.JJ.

COTTON, L.J.—The case which has been cited of *Plews v. Baker* . . . was very different from the present. I do not go so far as to lay down that whenever a dissolution of partnership is prayed for in an action, then the action cannot be stayed. But in this case I think that the Court is the proper tribunal to determine the matters in dispute.—p. 632.

3. RIGHTS AND OBLIGATIONS OF PARTNERS AND THIRD PARTIES.

Dickinson v. Valpy (1829) 10 B. & C. 128; 5 M. & Ry. 126; 8 L. J. (O.S.) K. B. 51.—K.B., *followed*.

Garland v. Jacob (1873) 28 L. T. 877; L. R. 8 Ex. 216; 21 W. R. 868.—EX. CH.

BLACKBURN, J. (for Exchequer Chamber).—The authority of one partner to bind the firm is thus stated by Park, J. in *Dickinson v. Valpy* (at p. 140). "Now, undoubtedly, if there is a complete partnership between two or more persons, one partner does not communicate to the other, standing in the relation of complete partners, all authorities necessary for carrying on the partnership, and all authorities usually exercised by partners in the course of that dealing in which they are engaged": and from this it follows that, where the course of dealing is such as to make it the usual course to draw and indorse bills in the name of the firm, each partner has authority to do so for partnership purposes. But the business of attorneys is not

such as to render it either necessary or usual to draw and indorse bills in the name of the firm, and therefore a member of a firm of attorneys has not, as such, authority to bind his firm, either by drawing or by indorsing bills.—p. 880.

Dickinson v. Valpy, *dictum applied*.
Farquharson Brothers v. King (1902) 71 L. J. K. B. 667; [1902] A. C. 325, 341; 86 L. T. 810; 51 W. R. 94.—H.L. (E.).

Stanton Iron Co., In re (1855) 25 L. J. Ch. 142; 21 Beav. 164; 2 Jur. (N.S.) 130; 4 W. R. 159.—ROMILLY, M.R., *commented on*.

Moore v. Rawlings (1859) 28 L. J. C. P. 247; 6 C. B. (N.S.) 289; 5 Jur. (N.S.) 941.

WILLES, J.—The decision of the Master of the Rolls in *Stanton Ironworks Company, In re*, seems to be quite contrary to that of this Court in *Hickman v. Cox*. 27 L. J. C. P. 129, which case was affirmed in the Ex. Ch.—p. 253.

Guidon v. Robson (1809) 2 Camp. 302; 11 R. R. 713.—K.B., *limited*.

Spurr v. Cass (1870) 39 L. J. Q. B. 249; L. R. 5 Q. B. 656; 23 L. T. 409.—Q.B.

BLACKBURN, J.—The case of *Guidon v. Robson* . . . was an action upon a bill of exchange, and Lord Ellenborough must be taken to have ruled with reference to that fact. Now bills of exchange and promissory notes are exceptions to the rule that an undisclosed principal can sue upon contracts entered into with his agent or agents, as they stand upon the law merchant.—p. 251.

Greenslade v. Dower (1828) 6 L. J. (O.S.) K. B. 155; 7 B. & C. 635; 1 M. & Ry. 640; 31 R. R. 272.—K.B., *adopted*.

Fisher v. Taylor (1842) 2 Hare 218, 230.—V.-C.

Brown v. Kidger (1858) 28 L. J. Ex. 66; 3 H. & N. 853.—EX., *referred to*.

Jacobs v. Morris (1902) 71 L. J. Ch. 363; [1902] 1 Ch. 816; 86 L. T. 275; 50 W. R. 371.—C.A.

South Carolina Bank v. Case (1828) 8 B. & C. 427; 2 M. & Ry. 459; 6 L. J. (O.S.) K. B. 364.—K.B., *questioned*.

Adanson Fibre Co., In re, *Miles's Claim* (1874) 31 L. T. 9; 43 L. J. Ch. 732; L. R. 9 Ch. 635; 22 W. R. 889.—L.J.: *reversing* 30 L. T. 776.—V.-C.

MELLISH, L.J.—The case of *The South Carolina Bank v. Case* has, no doubt, been very considerably questioned by some judges since. . . . [In that case] the Court of King's Bench gave an opinion to the Court of Chancery that, under all the circumstances of that particular case, the firm in England was bound by the bills drawn in the individual name of the partner in America, on the ground that that was to be treated, notwithstanding the articles of partnership, as the name of the firm, for the purposes of the business in America. In the other case of *Nicholson v. Rickitts*, Crompton, J. says (at p. 527): "My only difficulty arose from the decision in *The South Carolina Bank v. Case*. But I think if that case is to be regarded as law, it must be on the grounds pointed out by Bayley, B., in *Smith v. Craven*, 1 C. & J. 500, 507. Rightly or wrongly, the Court there assumed that the facts showed an authority from the partners in England to the partner in America to bind the whole firm by contracts made by him there in his own name; that he was, in fact, a

mere branch-house abroad of the house in this country." From the mode in which Crompton, J. states that, it is tolerably clear that he did not himself agree with the inference which the Court drew from all the facts in the case of *The South Carolina Bank v. Case*. He seems to have thought that it ought to have been determined upon what was the real agreement made by the partners *inter se*. However that may be, I am of opinion that this case of *Nicholson v. Ricketts* is a direct authority upon the question that is now before us.—p. 11.

South Carolina Bank v. Case, commented on and distinguished.

Yorkshire Banking Co. v. Beatson (1879) 48 L. J. C. P. 428; 4 C. P. D. 204; 40 L. T. 654; 27 W. R. 911.—C.P.D.; affirmed, (1880) 49 L. J. C. P. 389; 5 C. P. D. 109; 42 L. T. 435; 28 W. R. 879.—C.A.

Kirk v. Blurton (1841) 12 L. J. Ex. 117; 9 M. & W. 284.—EX.

Distinguished, *Norton v. Seymour* (1847) 16 L. J. C. P. 100; 3 C. B. 792; 11 Jur. 312.—C.P.; *Adanson v. Fibre Co.* In re, Miles' Claim (1874) L. R. 9 Ch. 635, 640, n.; 30 L. T. 776.—MALINS, V.-C. (reversed, L.J.J.); and *Odell v. Cormack* (1887) 19 Q. B. D. 223.—HAWKINS, J.

Nicholson v. Ricketts (1860) 2 El. & El. 497, 527; 29 L. J. Q. B. 55; 6 Jur. (N.S.) 422; 1 L. T. 514; 8 W. R. 211.—Q.B.

Followed, *Adanson v. Fibre Co.* In re, Miles' Claim (1874) 43 L. J. Ch. 732; L. R. 9 Ch. 635; 31 L. T. 9; 22 W. R. 889.—L.J.J. (*see extract, supra*); *distinguished*, *Yorkshire Banking Co. v. Beatson* (1880).—C.A. (*supra*).

Stephens v. Reynolds (1860) 29 L. J. Ex. 278; 5 H. & N. 513; 2 F. & F. 147; 2 L. T. 222.—EX., *commented on and distinguished*.

Yorkshire Banking Co. v. Beatson (1879).—C.P.D. and C.A. (*supra*).

Emly v. Lye (1812) 15 East 7; 13 R. R. 347.

Approved but not applied, *Evans v. Whyte* (1829) 7 L. J. (O.S.) C. P. 205; 5 Bing. 485; 2 M. & P. 130; M. & M. 468.—C.P.; *distinguished*, *Yorkshire Banking Co. v. Beatson* (1880).—C.A. (*supra*).

Furze v. Sharwood (1842) 11 L. J. Q. B. 119; 2 Q. B. 388; 2 G. & D. 116; 6 Jur. 554.—Q.B.; and **Vere v. Ashby** (1829) 10 B. & C. 288; 8 L. J. (O.S.) K. B. 57.—K.B., *distinguished*.

Yorkshire Banking Co. v. Beatson (1879) 48 L. J. C. P. 428; 4 C. P. D. 204; 40 L. T. 654; 27 W. R. 911.—DENMAN and LOPEZ, JJ.

Vere v. Ashby, adopted.

Keighley v. Durant (1901) 70 L. J. K. B. 662; [1901] A. C. 240, 254; 84 L. T. 777.—H.L. (E.).

Bottomley v. Nuttall (1858) 28 L. J. C. P. 110; 5 C. B. (N.S.) 122; 5 Jur. (N.S.) 315.—C.P., *applied*.

Keay v. Fenwick (1876) 1 C. P. D. 745, 756.—C.A.

Bottomley v. Nuttall, referred to.

Scarfe v. Jardine (1882) 51 L. J. Q. B. 612; 7 App. Cas. 345; 47 L. T. 258; 30 W. R. 893.—H.L. (E.).

Musgrave v. Drake (1843) 13 L. J. Q. B. 16;

5 Q. B. 185; D. & M. 347; 7 Jur. 1015.—Q.B., *discussed*.

Hogg v. Skeene (1865) 18 C. B. (N.S.) 426; 34 L. J. C. P. 153; 11 Jur. (N.S.) 244; 11 L. T. 708; 13 W. R. 383.—C.P.

ERLE, C.J.—I think myself the effect of that judgment was only a point of pleading, and that it does not invalidate the widely-applicable rule, that if a bill be tainted with fraud or illegality in its inception, the holder must prove that he or some one under whom he claims gave value for it.

Lloyd v. Freshfield (1826) 2 Car. & P. 325; 9 D. & R. 19.—K.B., *discussed*.

Okell v. Eaton (1874) 31 L. T. 380.—Q.B.

BLACKBURN, J.—Mr. Russell appears to have gone to the jury on the ground that Miss Okell never spoke to Eaton on the subject of the loan, and to have urged, not that her silence was evidence of *mala fides* or of knowledge of the misapplication of the money, but that it was negligence, and the jury found that it was; but this does not entitle the defendants to the verdict, for where it is within the scope of the purposes of the partnership to borrow money, one partner has authority to borrow on behalf of the partnership, and no duty is cast upon the person advancing the money to make any further inquiries. The case of *Lloyd v. Freshfield* is no authority for anything of the kind for there the advance was made to the defendant Kaye on his own cheque, and the money was paid by him to the credit of his account at his private banker's, who was not the banker of the firm. The report of the motion for a new trial, in Carrington and Layne, is not very intelligible, and it differs from the report of the same case in Dowling and Ryland, in which the expressions attributed to Bayley, J. do not appear.—p. 331.

Chuck v. Freen (1828) 1 M. & M. 259.—K.B., *explained and distinguished*.

Laurence, In re, M'Kenna, Ex parte (1861) 30 L. J. Bk. 20; 7 Jur. (N.S.) 588; 4 L. T. 164; 9 W. R. 490.—L.C. and L.J.J.

Butchart v. Dresser (1853) 4 De G. M. & G. 542; 10 Hare 433; 1 W. R. 178.—V.-C., *applied*.

Clough, In re, Bradford Banking Co. v. Cure (1885) 55 L. J. Ch. 77; 31 Ch. D. 324; 53 L. T. 716; 34 W. R. 96.—NORTH, J.

Sandilands v. Marsh (1819) 2 B. & Ald. 673.—K.B., *applied*.

Brettel v. Williams (1849) 19 L. J. Ex. 121; 4 Ex. 623.—EX.

Dundonald (Lord) v. Masterman (1869) 38 L. J. Ch. 350; L. R. 7 Eq. 504; 20 L. T. 271; 17 W. R. 548.—V.-C., *distinguished*.

Plumer v. Gregory (1874) 43 L. J. Ch. 616; L. R. 18 Eq. 621; 31 L. T. 17.—MALINS, V.-C.

Dundonald (Lord) v. Masterman, referred to.

Clether v. Twisden (1883) 24 Ch. D. 731; 49 L. T. 633; 32 W. R. 198.—DENMAN, J.; reversed in C.A., *see infra*.

Harman v. Johnson (1853) 2 E. & B. 61; 22 L. J. Q. B. 297; 3 Car. & K. 272; 17 Jur. 1099; 1 W. R. 326.—Q.B.; and

Dundonald (Lord) v. Masterman, considered.

Cleather v. Twisden (1884) 28 Ch. D. 340; 54 L. J. Ch. 408; 52 L. T. 330; 33 W. R. 435.—C.A.

BAGGALLAY, L.J.—There is no difficulty as to the law. The cases mainly relied on were *Harman v. Johnson* and *Earl of Dundonald v. Masterman*. In *Harman v. Johnson*, which was cited by the appellant, the law is stated as follows:—I read from the marginal note, "The receipt of money by one of a firm of attorneys from a client, professedly on behalf of the firm, for the general purpose of investing it as soon as he can meet with a good security, is not an act within the scope of the ordinary business of an attorney, so as, without further proof of authority from his partners, to render them liable to account for the money so deposited; such a transaction being part of the business of a scrivener, and attorneys, as such, not necessarily being scriveners." But though the law may be so stated, no one will deny that a course of conduct may be pursued which may convert the act of a partner, for which the other members of the firm would not be otherwise liable, into one for which they will be responsible. The other case, on which the respondents relied, was one in which that principle was acknowledged, namely, *Earl of Dundonald v. Masterman*, the headnote of which is as follows: "Money received by one member of a firm of solicitors in the course of the management and settlement of the affairs of a client of the firm, is money paid to the firm in the course of their professional business: and consequently the members of the firm are liable to make good any loss occasioned by the negligence or dishonesty of their partner by whom such money was received." In that case, the plaintiff being under pecuniary pressure, employed the firm in reference to arranging his affairs, and the particular sum received by the partner was received by him in the performance of the duties for which the firm was engaged.—p. 346.

Cleather v. Twisden, 53 L. J. Ch. 365; 24 Ch. D. 731; 49 L. T. 633; 32 W. R. 198.—DENMAN, J.; *reversed on the facts*, (1885) 54 L. J. Ch. 408; 28 Ch. D. 340; 52 L. T. 330; 33 W. R. 435.—C.A.

Cleather v. Twisden, *distinguished*.

Rhodes v. Moules (1894) 64 L. J. Ch. 122; [1895] 1 Ch. 236; 12 R. 6; 71 L. T. 599; 43 W. R. 99.—C.A.

SMITH, L.J. [after contrasting the facts of the two cases].—That these constitute radical differences between the two cases cannot be denied, and in my judgment *Cleather v. Twisden*, which the learned judges who decided it in this Court declared to be a case upon the border line, by no means governs the present. . . . It is clear from the last passage in the judgment of Fry, L.J. in *Cleather v. Twisden* that the learned judge, even upon the facts proved in that case, was of opinion that if the bonds had been deposited with Parker upon firm's business, the firm would have been responsible.—pp. 129, 130.

Brydges v. Branfill (1842) 12 Sim. 369; 11 L. J. Ch. 249; 6 Jur. 310.—V.C.

Referred to, Howard v. Shrewsbury (1867) 36 L. J. Ch. 283, 288; L. R. 3 Eq. 218, 230; 15 W. R. 301.—ROMILLY, M.R.; *referred to*, Fadelle v. Bernard (1871) 19 W. R. 555.—M.R.; *applied*, Phosphate Sewage Co. v. Hartmont, 5 Ch. D. 394, 443.—MALINS, V.-C. (affirmed, C.A.); *discussed and applied*, Marsh v. Joseph (1896) 66 L. J. Ch.

128; [1897] 1 Ch. 213; 75 L. T. 558; 45 W. R. 209.—C.A.

Sadler v. Lee (1843) 6 Beav. 324; 12 L. J. Ch. 407; 7 Jur. 476.—M.R.

Referred to, St. Aubyn v. Smart (1867) L. R. 5 Eq. 183; 17 L. T. 439; 16 W. R. 394.—MALINS, V.-C. (affirmed, C.A.); *applied*, Moore v. Knight (1890) 60 L. J. Ch. 271; [1891] 1 Ch. 547; 63 L. T. 831; 39 W. R. 312.—STIRLING, J.

Blair v. Bromley (1846) 16 L. J. Ch. 105; 5 Hare 542; 11 Jur. 115.—V.-C.; *affirmed*, (1847) 16 L. J. Ch. 495; 2 Ph. 354; 11 Jur. 617.—L.C.

Blair v. Bromley, *distinguished*.

Coomer v. Bromley (1852) 5 De G. & Sm. 532; 16 Jur. 609.—V.-C.

Blair v. Bromley, *applied*.

St. Aubyn v. Smart (1867) L. R. 5 Eq. 183, 186; 17 L. T. 439; 16 W. R. 394.—MALINS, V.-C.; Sawyer v. Goodwin (1867) 36 L. J. Ch. 578, 581; 15 W. R. 1008.—STUART, V.-C.; Alliance Bank v. Tucker (1867) 17 L. T. 13.—C.P.; Ramshire v. Bolton (1869) 38 L. J. Ch. 594; L. R. 8 Eq. 294, 300; 21 L. T. 51; 17 W. R. 986.—MALINS, V.-C.

Blair v. Bromley, *discussed and not applied*.

Mare v. Lewis (1869) Ir. R. 4 Eq. 219, 239.—V.-C.

Blair v. Bromley, *applied*.

Phosphate Sewage Co. v. Hartmont (1877) 5 Ch. D. 394, 443; 45 L. J. Ch. 465; 34 L. T. 154.—MALINS, V.-C. (affirmed, C.A.); and James, Ex parte (1883) 49 L. T. 530; 48 J. P. 54.—KAY, J.

Coomer v. Bromley (1852) 5 De G. & Sm. 532; 16 Jur. 609.—V.-C., *distinguished*.

St. Aubyn v. Smart (1867) L. R. 5 Eq. 183, 185; 17 L. T. 439; 16 W. R. 394.—MALINS, V.-C.

Atkinson v. Mackreth (1866) 35 L. J. Ch. 624; L. R. 2 Eq. 570; 14 L. T. 722; 14 W. R. 883.—M.R., *considered*.

Plumer v. Gregory (1874) L. R. 18 Eq. 621; 43 L. J. Ch. 616; 31 L. T. 17.

MALINS, V.-C.—I am of opinion, with great respect for the late Master of the Rolls, that either the decision of *Atkinson v. Mackreth* must be considered to have proceeded upon its special circumstances, or it cannot be brought within the settled rules of the Court. In my opinion, where there is a joint and several liability, all or any of the parties liable may be sued without joining the remainder. So it was decided, as I consider, positively, in *Gray v. Lewis* (L. R. 18 Eq. 526), but inferentially also in *St. Aubyn v. Smart* (L. R. 5 Eq. 183; *Ibid.* 3 Ch. 646), where a fund had been misapplied by one of two solicitors carrying on business in partnership, and in a suit against the other partner alone he was made liable to repay it.—p. 627.

Atkinson v. Mackreth, *applied*.

St. Aubyn v. Smart (1867) L. R. 5 Eq. 183, 186; 17 L. T. 439; 16 W. R. 394.—MALINS, V.-C.

St. Aubyn v. Smart (1867) L. R. 5 Eq. 183; 17 L. T. 439; 16 W. R. 394.—MALINS, V.-C.; *affirmed*, (1868) L. R. 3 Ch. 646; 19 L. T. 192; 16 W. R. 1095.—L.JJ.

St. Aubyn v. Smart, *applied*.

Dundonald (Earl) v. Masterman (1869).—V.-C. (*supra*, col. 2044); Ramshire v. Bolton (1869) 38 L. J. Ch. 594; L. R. 8 Eq. 294; 21 L. T. 51; 17 W. R. 986.—MALINS, V.-C.; Plumer v. Gregory

(1874) 43 L. J. Ch. 616; L. R. 18 Eq. 621; 31 L. T. 17.—**MALINS, v. C.**; Phosphate Sewage Co. v. Hartmont (1877) 45 L. J. Ch. 465; 5 Ch. D. 394, 443; 34 L. T. 154.—**MALINS, v. C.**; affirmed, C.A.

St. Aubyn v. Smart, distinguished.

Hughes v. Twisden (1886) 55 L. J. Ch. 481; 54 L. T. 570; 34 W. R. 498.—**NORTH, J.**

Plumer v. Gregory (1874) 43 L. J. Ch. 616; L. R. 18 Eq. 621; 31 L. T. 80.—**MALINS, v. C.**, referred to.

Phosphate Sewage Co. v. Hartmont (1877) 45 L. J. Ch. 465; 5 Ch. D. 394, 443; 34 L. T. 154.—**MALINS, v. C.** (affirmed, C.A.); Cleather v. Twisden (1883).—**DENMAN, J.** (see *supra*, col. 2045); and Hughes v. Twisden (1886).—**NORTH, J. (supra).**

Hamper, Ex parte (1811) 17 Ves. 403; 11 R. R. 115.—**L.C.**

Adopted and dictum observed upon, Pott v. Eyton (1846) 15 L. J. C. P. 257; 3 C. B. 32.—**C.P.**; referred to, Bullen v. Sharp (1865).—**EX. CH. (supra, col. 2027)**; Mollwo v. Court of Wards (1872).—**P.C. (supra, col. 2027)**; and Pooley v. Driver (1876).—**M.R. (supra, col. 2028).**

Swan v. Steele (1806) 7 East 210; 3 Smith 199; 8 R. R. 618.—**K.B., distinguished.**
Yorkshire Banking Co. v. Beatson (1879) 48 L. J. C. P. 428; 4 C. P. D. 204; 40 L. T. 654; 27 W. R. 911.—**C.P.D.**; and S. C. affirmed, (1880) 49 L. J. C. P. 380; 5 C. P. D. 109; 42 L. T. 455; 28 W. R. 879.—**C.A.**

Sumner v. Powell (1816) 2 Mer. 30.—**M.R.**; affirmed, T. v. R. 423.—**L.C.**, held inapplicable.

Beresford v. Browning (1875).—**C.A. (infra).**

Wilmer v. Currey (1848) 2 De G. & Sm. 347; 12 Jur. 847.—**V.C.**, considered.

Beresford v. Browning (1875) 1 Ch. D. 30; 45 L. J. Ch. 36; 33 L. T. 524; 24 W. R. 120.—**C.A.**
BAGGALLAY, J.A.—It appears to me that the authorities cited by the counsel for the appellant only establish the proposition that, where a liability arises from the instrument only, the extent of the obligation must be measured by the terms of the instrument only, and *Wilmer v. Currey* is not inconsistent with this view.—p. 37.

4. PARTNERSHIP PROPERTY.

Lomax, In re, Bauerman, Ex parte (1838) 3 Denc. 476; Mont. & C. 569.—**BK.**; and **Krauss, In re, Birley, Ex parte** (1841) 1 Mont. D. & D. 387; 2 Mont. D. & D. 354.—**BK.**, distinguished.

Lodge v. Pritchard (1863) 32 L. J. Ch. 775; 2 N. R. 537; 1 De G. J. & S. 610; 9 L. T. 107; 11 W. R. 1086.—**L.JJ.**

Whitmore v. Mason (1861) 31 L. J. Ch. 433; 2 Johns. & H. 204; 8 Jur. (N.S.) 278; 5 L. T. 631; 10 W. R. 168.—**V.C.**

Dictum approved, Mackintosh v. Pogose (1895) 64 L. J. Ch. 274; [1895] 1 Ch. 505; 72 L. T. 251; 43 W. R. 247.—**STIRLING, J.**; followed, Borland's Trustee v. Steel (1900) 70 L. J. Ch. 51; [1901] 1 Ch. 279; 49 W. R. 120.—**FARWELL, J.**

Melior, In re, Butcher, Ex parte (1880) 13 Ch. D. 465; 42 L. T. 299; 28 W. R. 484.—**C.A.**, distinguished.

Devitt v. Kearney (1883) 11 L. R. Ir. 225.—**V.C.**

Gray v. Chiswell (1803) 9 Ves. 118; 7 R. R. 151.—**L.C.**, approved and applied.

Lodge v. Pritchard (1863) 32 L. J. Ch. 775; 2 N. R. 537; 1 De G. J. & S. 610; 9 L. T. 107; 11 W. R. 1086.—**L.JJ.**

Gray v. Chiswell and Kendall, Ex parte (1811) 17 Ves. 514, 518; 1 Rose 71; 11 R. R. 122.—**L.C.**, referred to.

Kendall v. Hamilton (1879) 48 L. J. C. P. 705; 4 App. Cas. 504; 41 L. T. 418; 28 W. R. 97.—**H.L. (E.).**

Williams, Ex parte (1805) 11 Ves. 3; 8 R. R. 62.—**L.C.**, principle adopted.

Edwards Wood, In re, Mayon, Ex parte (1865) 34 L. J. Bk. 25; 4 De G. J. & S. 664; 6 N. R. 8; 11 Jur. (N.S.) 433; 12 L. T. 254; 13 W. R. 629.—**L.C.**; referred to, Kendall v. Hamilton (1879) 48 L. J. C. P. 705; 4 App. Cas. 504; 41 L. T. 418; 28 W. R. 97.—**H.L. (E.).**

Brewster's Assignees, Ex parte (1853) 22 L. J. Bk. 62.—**L.JJ.**; **Johnston, In re, Cooper, Ex parte** (1840) 10 L. J. Bk. 11; 1 Mont. D. & D. 358; 5 Jur. 10, explained. **Graham v. McCulloch** (1875) L. R. 20 Eq. 397; 32 L. T. 748; 23 W. R. 786.—**V.C.**

Houghton v. Houghton (1841) 10 L. J. Ch. 310; 11 Sim. 491; 5 Jur. 528.—**V.C.**, observed upon.
Davies v. Games (1879) 12 Ch. D. 813; 28 W. R. 16.—**V.C.**

Waterer v. Waterer (1873) L. R. 15 Eq. 402; 21 W. R. 508.—**L.JJ.**, for V.C.

Observed upon, Davies v. Games (1879) 12 Ch. D. 813; 28 W. R. 16.—**V.C.**; observed on and distinguished, Murtagh v. Costello (1881) 7 L. R. Ir. 428.—**V.C.**; considered and applied, Att.-Gen. v. Hubbuck (1883) 52 L. J. Q. B. 464, 472; 10 Q. B. D. 488, 501; 48 L. T. 608.—**Q.B.D.**; affirmed, C.A.

Streatfield, In re, City Bank, Ex parte (1860) 3 L. T. 792.—**BK.**; reversed nom. Streatfield (or Laurence), In re, M'Kenna, Ex parte (1861) 30 L. J. Bk. 20; 3 De G. J. & S. 629; 7 Jur. (N.S.) 588; 4 L. T. 164; 9 W. R. 490.—**C.A.**

Darby v. Darby (1856) 25 L. J. Ch. 371; 3 Drew. 495; 2 Jur. (N.S.) 271; 4 W. R. 413.—**V.C.**

Distinguished, Steward v. Blakeway (1869) L. R. 4 Ch. 603.—**L.JJ.**; observations applied, Forbes v. Steven (1878) 39 L. J. Ch. 485; L. R. 10 Eq. 178; 22 L. T. 703; 18 W. R. 686.—**JAMES, v. C.**; adopted, Att.-Gen. v. Hubbuck (1884) 53 L. J. Q. B. 146; 13 Q. B. D. 275, 289; 50 L. T. 374.—**C.A.**; principle applied, Hulton, In re (1890) 62 L. T. 200.—**C.A.**

Steward v. Blakeway (1869) L. R. 4 Ch. 603.—**L.JJ.**, distinguished.

Att.-Gen. v. Hubbuck (1883) 10 Q. B. D. 488; 52 L. J. Q. B. 464; 48 L. T. 608.—**Q.B.D.**; affirmed, C.A.

Steward v. Blakeway, distinguished.

Hulton, In re, Hulton v. Lister (1890) 62 L. T. 200.—**C.A.**

COTTON, L.J.—In *Steward v. Blakeway* it was held that, although part of the property was used for the purpose of the partnership, yet it was not to be considered as converted from real estate into personal estate. . . . They agreed to hold it as real estate in which they were to be

co-owners, not to hold it as part of their joint stock to be sold when the partnership was put an end to and had to be wound-up. In my opinion, therefore, that case cannot prevent the consequences of what I think is the true inference to be drawn from the evidence we have before us.—p. 203.

Jeffereys v. Small (1683) 1 Vernon 217; and **Lake v. Craddock** (1732) 3 P. Wms. 158.—L.C., *considered*.

Dale v. Hamilton (1846) 16 L. J. Ch. 126; 5 Hare 369; 11 Jur. 163.—V.C.: S. C. *on appeal*, (1847) 16 L. J. Ch. 397; 2 Ph. 266; 11 Jur. 574.—L.C.

Webster v. Webster (1791) 3 Swanst. 490, n.—L.C.

Referred to, **Friend v. Young** (1897) 66 L. J. Ch. 737; [1897] 2 Ch. 421; 77 L. T. 50; 46 W. R. 139.—STIRLING, J.; *explained*, **David and Matthews**, *In re* (1899) 68 L. J. Ch. 185; [1899] 1 Ch. 378; 80 L. T. 75; 47 W. R. 313.—ROMER, J.

Banks v. Gibson (1865) 34 L. J. Ch. 591; 34 Beav. 566; 13 W. R. 1012.—M.R. *Distinguished*, **Scott v. Rowland** (1872) 26 L. T. 391; 20 W. R. 508.—V.C.: and **Levy v. Walker** (1879) 48 L. J. Ch. 273; 10 Ch. D. 436; 39 L. T. 654; 27 W. R. 370.—HALL, V.-C. (reversed, C.A.): *applied*, **Chappell v. Griffith** (1885) 53 L. T. 459; 50 J. P. 86.—KAY, J.; *distinguished*, **David and Matthews**, *In re* (1899) 68 L. J. Ch. 185; [1899] 1 Ch. 378; 80 L. T. 75; 47 W. R. 313.—ROMER, J. See "GOODWILL."

Banks v. Gibson, *considered*.

Burchell v. Wilde (1900) 69 L. J. Ch. 314; [1900] 1 Ch. 551; 82 L. T. 576; 48 W. R. 491.—C.A. LINDLEY, M.R., RIGBY and WILLIAMS, L.JJ. LINDLEY, M.R.—But if you come to the conclusion (about which there can be no doubt) that the goodwill, apart from the benefit of the firm name, as to which nothing is said, was not to be sold, but was to be divided between the partners, what is the result? It appears to me to follow that each partner could use the name of the old firm. They had become tenants in common of that asset, and each partner was entitled to enjoy that asset . . . I cannot see any legal answer to this position, and this I think explains the decision of Lord Romilly, M.R., in **Banks v. Gibson**, and clearly distinguishes the present case from **Gray v. Smith** (*infra*, col. 2050) and the other cases which have been cited.

Levy v. Walker (1879) 48 L. J. Ch. 273; 10 Ch. D. 436; 39 L. T. 654; 27 W. R. 370.—C.A.

Applied, **Chappell v. Griffith** (1885) 53 L. T. 459; 50 J. P. 86.—KAY, J.; *distinguished*, **Chatteris v. Isaacson** (1887) 57 L. T. 177.—KEKEWICH, J.; *dicta adopted*, **Bodega Co. v. Owens** (1889) 23 L. R. Ir. 371, 384.—V.C.

Levy v. Walker, *distinguished*.

Gray v. Smith (1889) 59 L. J. Ch. 145; 43 Ch. D. 208; 62 L. T. 335; 38 W. R. 310.—C.A. COTTON, BOWEN and FREY, L.JJ.

COTTON, L.J.—**Levy v. Walker** does not apply to the present case. There Levy could not have been subjected to any liability by the continued use of the name of the old firm—it did not include his name; moreover, there was in that case an

assignment in express terms of the goodwill and business, whereas here the only agreement is that Bennett will withdraw from the partnership.—pp. 147, 148.

Levy v. Walker, *discussed*.

Thynne v. Shove (1890) 59 L. J. Ch. 599; 43 Ch. D. 577; 62 L. T. 803; 38 W. R. 667.—STIRLING, J.

Levy v. Walker, *referred to*.

David and Matthews, *In re* (1899) 68 L. J. Ch. 185; [1899] 1 Ch. 378; 80 L. T. 75; 47 W. R. 313.—ROMER, J.

Gray v. Smith (1889) 59 L. J. Ch. 145; 43 Ch. D. 208; 62 L. T. 335; 38 W. R. 310.—C.A., *discussed*.

Thynne v. Shove (1890) 59 L. J. Ch. 599; 43 Ch. D. 577; 62 L. T. 803; 38 W. R. 667.—STIRLING, J.

Gray v. Smith, *distinguished*.

Jennings v. Jennings (1898) 67 L. J. Ch. 190; [1898] 1 Ch. 378; 77 L. T. 786; 46 W. R. 314.—STIRLING, J. See "GOODWILL."

Gray v. Smith, *distinguished*.

Burchell v. Wilde (1900) 69 L. J. Ch. 314; [1900] 1 Ch. 551; 82 L. T. 576; 48 W. R. 491.—C.A. LINDLEY, M.R., RIGBY and WILLIAMS, L.JJ. See extract, *supra*, col. 2049.

Gray v. Smith, *referred to*.

De Nichols, *In re* (1900) 69 L. J. Ch. 680; [1900] 2 Ch. 410; 82 L. T. 840; 48 W. R. 602.—KEKEWICH, J.

David and Matthews, *In re* (1899) 68 L. J. Ch. 185; [1899] 1 Ch. 378; 80 L. T. 75; 47 W. R. 313.—ROMER, J., *applied*.

Gillingham v. Beddow (1900) 69 L. J. Ch. 527; [1900] 2 Ch. 242; 82 L. T. 791; 64 J. P. 617.—COZENS-HARDY, J.; and **Leas Hotel Co.**, *In re* (1902) 71 L. J. Ch. 294; [1902] 1 Ch. 332; 86 L. T. 182; 50 W. R. 409.—KEKEWICH, J.

Burchell v. Wilde, *applied*.

Townsend v. Jarman (1900) 69 L. J. Ch. 823; [1900] 2 Ch. 698; 83 L. T. 366; 49 W. R. 158.—FARWELL, J.

Burchell v. Wilde, *referred to*.

Walter v. Ashton (1902) 71 L. J. Ch. 839; [1902] 2 Ch. 282; 87 L. T. 196; 51 W. R. 131.—BYRNE, J.

Dean v. MacDowell (1878) 47 L. J. Ch. 537; 8 Ch. D. 345; 38 L. T. 862; 26 W. R. 486.—C.A., *explained and followed*.

Aas v. Benham [1891] 2 Ch. 214; 65 L. T. 25.—C.A. LINDLEY, BOWEN and KAY, L.JJ.

Harvey v. Crickett (1816) 5 M. & S. 336; 17 R. R. 338, *explained*.

Woodbridge v. Swann (1833) 2 L. J. K. B. 132; 4 B. & Ad. 633; 1 N. & M. 725.—K.B.

Harvey v. Crickett and Woodbridge v. Swann, *considered*.

Buckley v. Barber (1851) 20 L. J. Ex. 114; 6 Ex. 164; 15 Jur. 63.—EX.

Boddam v. Ryley (1785) 1 Bro. C. C. 239; 2 Ib. 2.

Applied, **Fergusson v. Fyffe** (1840-1) 8 Cll. & F. 121.—H.L. (SC.); *referred to*, **Barfield v. Loughborough** (1872) 42 L. J. Ch. 179; 1 L. R. 8 Ch. 1; 27 L. T. 499; 41 W. R. 86.—L.C.

Pilling v. Pilling (1865) 3 D. J. & S. 162.—*L.J.J., questioned.*

Smith v. Donaldson, 2 Ct. of Sess. Cas. (3rd series) 86, *referred to.*

Barfield v. Loughborough (1872) L. R. 8 Ch. 1; 42 L. J. Ch. 179; 27 L. T. 499; 21 W. R. 86.

SELBORNE, L.C.—I should hold, therefore, on principle that no interest is, after dissolution, payable between partners merely on the ground that they have still remaining in the concern unequal shares of capital, on which during the continuance of the partnership they were entitled, either by express agreement, or by their course of dealing, to have interest credited either with or without rests. The authorities, with the one exception (*Pilling v. Pilling*), seem to me to be in accordance with this view. . . . If *Pilling v. Pilling*, decided in 1865, is not to be explained by any special circumstances, it seems right to observe that it was decided, in the first instance, by the judge whose later decision in *Watney v. Wells* was affirmed by Lord Chelmsford, and by the same Lords Justices who afterwards in 1866 decided *Wood v. Scoles*. In *Smith v. Donaldson* (2 Dec. in Court of Session, 3rd Series), the advances on which interest (with rests) was allowed were made to a dissolved partnership for the purpose of its liquidation; and a binding agreement for the allowance of such interest was held to be established.—p. 5.

Pilling v. Pilling, *principle applied.*

Bruner v. Moore (1903) 73 L. J. Ch. 377; [1904] 1 Ch. 305.—**FARWELL, J.**

Watney v. Wells (1867) 36 L. J. Ch. 861; L. R. 2 Ch. 250; 16 L. T. 248; 15 W. R. 621.—*L.C., applied.*

Dinham v. Bradford (1869) L. R. 5 Ch. 519.—*L.C.*; **Barfield v. Loughborough** (1872) 42 L. J. Ch. 179; L. R. 8 Ch. 1; 27 L. T. 499; 21 W. R. 86.—*L.C.* See extract, *supra*.

Watney v. Wells, *considered.*

Yates v. Finn (1880) 49 L. J. Ch. 188; 13 Ch. D. 839; 28 W. R. 387.

HALL, V.-C.—I should say with reference to *Watney v. Wells*, the arguments which were addressed to the Court in that case upon the state of the assets, were such as rather to show that it was thought not improbable that giving back to each partner his capital with its accumulations would or might pretty nearly exhaust the whole fund. It does not at all appear from the report whether the mode of division of the surplus profits was thought worth consideration. I do not think that I can regard that decision as a considered judgment at all upon that part of the case, or as standing in the way of the view which I think ought to be taken as to the principle to be adopted in a case like the present with reference to the division of profits in a business partnership carried on after the decease of one of the partners by the surviving partner.—p. 191.

Watney v. Wells, *referred to.*

Sheppard v. Scinde, &c., Ry. (1887) 56 L. J. Ch. 558; 56 L. T. 180; 35 W. R. 516.—**KEKEWICH, J.**; *affirmed, C.A.*

Barfield v. Loughborough (1872) 42 L. J. Ch. 179; L. R. 8 Ch. 1; 27 L. T. 499; 41 W. R. 86.—*L.C., inapplicable.*

Kelly v. Stevens (1886) 3 Times L. R. 189.—**CHITTY, J.**

5. PROFITS AND LOSSES.

Alston v. Sims (1855) 24 L. J. Ch. 553; 1 Jur. (N.S.) 438; 3 Eq. R. 334; 3 W. R. 451.—*V.-C., referred to.*

Collins v. Jackson (1862) 31 Beav. 645, 650.—*M.R.*

Wood v. Scoles (1866) 35 L. J. Ch. 547; L. R. 1 Ch. 389; 12 Jur. (N.S.) 555; 14 W. R. 621.—*L.J.J., explained.*

Nowell v. Nowell (1869) L. R. 7 Eq. 538.—**JAMES, V.-C.**

Wood v. Scoles, *applied.*

Barfield v. Loughborough (1872) 42 L. J. Ch. 179; L. R. 8 Ch. 1; 27 L. T. 499; 41 W. R. 86.—*L.C. (see extract, supra); applied.* **Aldridge, In re, Aldridge v. Aldridge** (1894) 63 L. J. Ch. 465; [1894] 2 Ch. 97; 8 R. 189; 70 L. T. 724; 42 W. R. 409.—**NORTH, J.**

Johnston v. Moore (1858) 27 L. J. Ch. 453; 4 Jur. (N.S.) 356; 6 W. R. 490.—*V.-C., followed but commented upon.*

Ibbotson v. Elam (1865) L. R. 1 Eq. 188; 14 W. R. 241.—*M.R.*

Johnston v. Moore and Ibbotson v. Elam, *not applied.*

Cooper v. Taroche (1869) 38 L. J. Ch. 591.—**MALINS, V.-C.**

Johnston v. Moore, *commented upon.*

Ibbotson v. Elam (1865) L. R. 1 Eq. 188; 14 W. R. 241.—*M.R., principle adopted.*

Browne v. Collins (1871) L. R. 12 Eq. 586.—**WICKENS, V.-C.**

Ibbotson v. Elam, *followed.*

Lambert v. Lambert (1874) 29 L. T. 878; 43 L. J. Ch. 106; 22 W. R. 359.—*V.-C.*

Johnston v. Moore, *explained.*

Rowls v. Bebb (1900) 69 L. J. Ch. 562; [1900] 2 Ch. 107, 120; 82 L. T. 633; 48 W. R. 562.—*C.A.*

Straker v. Wilson, 39 L. J. Ch. 463; 18 W. R. 643.—*V.-C.; reversed.* (1871) 40 L. J. Ch. 630; L. R. 6 Ch. 503; 24 L. T. 763; 19 W. R. 761.—*L.C.*

Willet v. Blandford (1842) 1 Hare 253; 11 L. J. Ch. 182; 6 Jur. 274.—*V.-C.*

Approved and applied, **Simpson v. Chapman** (1853) 4 De G. M. & G. 154, 171.—*L.J.J.*; *inapplicable*, **Vyse v. Foster** (1874) 44 L. J. Ch. 37, 48; L. R. 7 H. L. 318, 337; 31 L. T. 177; 23 W. R. 1355.—*H.L. (E.); observations considered*, **Yates v. Finn** (1880) 49 L. J. Ch. 188; 13 Ch. D. 839; 28 W. R. 387.—**HALL, V.-C.**

6. RETIREMENT OR DEATH OF PARTNER.

Troughton v. Hunter (1854) 18 Beav. 470.—*M.R., followed.*

Hendry v. Turner (1886) 55 L. J. Ch. 562; 32 Ch. D. 355; 54 L. T. 292; 34 W. R. 513.—**KAY, J.**

David v. Ellice (1826) 4 L. J. (o.s.) K. B. 125; 5 B. & C. 196; 7 D. & R. 690; 1

Car. & P. 368; 29 R. R. 216.—K.B., *questioned*.

Thompson v. Percival (1834) 5 B. & Ad. 925; 3 N. & M. 167; 3 L. J. K. R. 98.—K.B.

DENMAN, C.J. (for the Court).—In *David v. Ellice* no bill of exchange was given, and that decision, on consideration, is not altogether satisfactory to us. We cannot but think that there was abundant evidence to go to a jury (and upon which the Court might have decided), of the payment of the old debt by Inglis, Ellice & Co., to the plaintiff, and a new loan to the new firm; which might have been as well effected by a transfer of account by mutual consent as by actual payment of money.—p. 933.

David v. Ellice, *considered*.

Blair v. Bromley (1846) 16 L. J. Ch. 495; 2 Ph. 354; 11 Jur. 617.—V.-C.

Thompson v. Percival (1834) 3 L. J. K. R. 98; 5 B. & Ad. 925; 3 N. & M. 167.—K.B.

Considered, Blair v. Bromley (1846) 16 L. J. Ch. 495; 2 Ph. 354; 11 Jur. 617.—V.-C.; *applied*, Lyth v. Ault (1852) 7 Ex. 669; 21 L. J. Ex. 217.—EX.; *considered*, Maingay v. Lewis (1870) 1r. R. 5 C. L. 229.—EX. CH.; *distinguished*, Head, In re (1893) 63 L. J. Ch. 549; [1893] 3 Ch. 426; 70 L. T. 608; 42 W. R. 419.—CHITTY, J.

Harris v. Farwell (1851) 15 Beav. 31.—M.R., *distinguished*.

Bilborough v. Holmes (1876) 46 L. J. Ch. 446; 5 Ch. D. 255; 53 L. T. 75; 25 W. R. 297.

HALL, V.-C.—Moreover the proof in the bankruptcy was solely against the estates of Woodhead and Joseph Holmes, and was not, as in *Harris v. Farwell*, "for money had and received to and for the use of" the creditors, but was for "money lent and advanced" to the bankrupt. This is in my opinion quite sufficient to show, without any renewal of the deposit notes, an acceptance of the liability of the bankrupts, and a release of the former members of the firm. This distinguishes the case from *Harris v. Farwell*.—p. 448.

Bilborough v. Holmes, *referred to*.

Scarff v. Jardine (1882) 51 L. J. Q. B. 612; 7 App. Cas. 345; 47 L. T. 258; 30 W. R. 893.—H.L. (E.).

Harris v. Farwell and Bilborough v. Holmes, *referred to*.

Rouse v. Bradford Banking Co. (1894) 63 L. J. Ch. 337; [1894] 2 Ch. 32, 54; 7 R. 127; 70 L. T. 427.—C.A.; *affirmed*, 63 L. J. Ch. 890; [1894] A. C. 586; 6 R. 349; 71 L. T. 522; 43 W. R. 78.—H.L. (E.).

Hart v. Alexander (1837) 6 L. J. Ex. 129; 2 M. & W. 484; 7 Car. & P. 746; M. & H. 63.—EX.

Adopted, Maxted v. Paine (1871) 40 L. J. Ex. 57; L. R. 6 Ex. 132, 157; 24 L. T. 149; 19 W. R. 527.—EX. CH.; *referred to*, Rouse v. Bradford Banking Co. (*supra*, in C.A.).

Pettyt v. Janeson (1819) 6 Madd. 146; 22 R. R. 259.—V.-C., *followed*.

Hunter v. Dowling (1893) 62 L. J. Ch. 617; [1893] 3 Ch. 212; 2 R. 608; 68 L. T. 780; 42 W. R. 107.—C.A. BOWEN, LOPES and KAY, L.JJ.

Elliot v. Brown (1791) 3 Swanst. 489, n., *considered*.

Dale v. Hamilton (1846) 16 L. J. Ch. 126; 5 Hare 369; 11 Jur. 163.—V.-C.; S. C. *on appeal*, (1847) 16 L. J. Ch. 397; 2 Ph. 266; 11 Jur. 374.—L.-C.

Liverpool Borough Bank v. Walker (1859) 4 De G. & J. 24.—L.JJ.; and **Jacomb v. Harwood** (1751) 2 Ves. sen. 265, *distinguished*.

Kendall v. Hamilton (1878) 47 L. J. C. P. 665; 3 C. P. D. 403; 39 L. T. 250.—C.A.; *affirmed*, (1879) 48 L. J. C. P. 705; 4 App. Cas. 504; 41 L. T. 418; 28 W. R. 97.—H.L. (E.).

THESEMER, L.J.—It is unnecessary to go through the numerous cases which were cited during the argument, but it will be right to refer to the cases of *The Liverpool Borough Bank v. Walker*, and *Jacomb v. Harwood*, as in those cases judgments recovered against some of several partners were held not to be a bar to proceedings in equity against the estate of a deceased partner. But in each of those cases the judgment was not recovered until after the death of the partner against whose estate the creditor was seeking relief; and the cases in which relief has been given in equity against the estate of a deceased partner, certainly establish that from and after his death his estate is subject to a separate or several liability.

Liverpool Borough Bank v. Walker and Jacomb v. Harwood. *See*

Hodgson, In re, Beckett v. Ramsdale (1885) 55 L. J. Ch. 241; 31 Ch. D. 177; 54 L. T. 222; 34 W. R. 127.—C.A.

Devaynes v. Noble, Slesch's Case (1816) 1 Mer. 529, 539.—L.C.

Applied, Wilkinson v. Henderson (1833).—M.R. (*infra*); Bower v. Société des Affréteurs (1867) 17 L. T. 490, 494.—V.-C.; Beresford v. Browning (1875) L. R. 20 Eq. 564, 573.—M.R. (*affirmed*, C.A.); *dicta considered*, Kendall v. Hamilton (1878) 3 C. P. D. 403, 407.—C.A. (*affirmed*, H.L. (E.)); *applied*, Hallett's Estate, In re (1880) 13 Ch. D. 656, 735.—C.A.; *referred to*, Rouse v. Bradford Banking Co. (1894) 63 L. J. Ch. 337; [1894] 2 Ch. 32, 54.—C.A. (*affirmed*, H.L.); and see Friend v. Young (1897) 66 L. J. Ch. 737; [1897] 2 Ch. 421, 427.—STIRLING, J.

Braithwaite v. Britain (1836) 1 Keen 206.—M.R.

Referred to, Way v. Bassett (1845) 15 L. J. Ch. 1; 5 Hare 55; 10 Jur. 89.—V.-C.; *distinguished*, Fordham v. Wallis (1853) 22 L. J. Ch. 548; 10 Hare 217; 17 Jur. 228; 1 W. R. 118.—TURNER, V.-C.

Wilkinson v. Henderson (1833) 2 L. J. Ch. 190; 1 Myl. & K. 582.—M.R.

Applied, Brown v. Weatherby (1841) 12 Sim. 6.—V.-C.; *referred to*, Way v. Bassett (1845) 15 L. J. Ch. 1; 5 Hare 55; 10 Jur. 89.—V.-C.; *considered*, Brown v. Gordon (1852) 22 L. J. Ch. 65; 16 Beav. 302; 1 W. R. 2.—M.R.; *adopted*, Brett v. Beckwith (1856) 26 L. J. Ch. 130; 3 Jur. (N.S.) 31; 5 W. R. 112.—M.R.; and Bower v. Société des Affréteurs (1867) 17 L. T. 490.—MALINS, V.-C.; *principle not applied*, Kendall v. Hamilton (1878) 47 L. J. C. P. 665; 3 C. P. D. 403; 39 L. T. 250.—C.A. (*affirmed*, H.L. (E.)); *referred to*, McRae,

In re (1883) 53 L. J. Ch. 1132; 25 Ch. D. 16; 49 L. T. 544; 32 W. R. 304.—KAY, J. (affirmed. C.A.); *followed*, Doetsch. In re, Matheson v. Ludwig (1896) 65 L. J. Ch. 855; [1896] 2 Ch. 836; 75 L. T. 69; 45 W. R. 57.—ROMER, J.

Winter v. Innes (1838) 4 Myl. & Cr. 101; 2 Jur. 981.—L.C.

Referred to, Way v. Bassett (1845) 15 L. J. Ch. 1; 5 Hare 55; 10 Jur. 89.—V.C.; *considered*, Brown v. Gordon (1852) 22 L. J. Ch. 65; 16 Beav. 302; 1 W. R. 2.—M.R.; *distinguished*, Fordham v. Wallis (1853) 22 L. J. Ch. 548; 10 Hare 217; 17 Jur. 228; 1 W. R. 118.—TURNER, V.C.; *applied*, Smith, In re, Gibson, Ex parte (1869) L. R. 4 Ch. 662; 20 L. T. 835; 17 W. R. 833.—L.JJ.; *referred to*, Maingay v. Lewis (1870) Ir. R. 5 C. L. 229.—EX. CH.

Way v. Bassett (1845) 15 L. J. Ch. 1; 5 Hare 55; 10 Jur. 89.—V.C., *considered and not applied*.

Brown v. Gordon (1852) 22 L. J. Ch. 65; 16 Beav. 302; 1 W. R. 2.—M.R.

Headnote.—A creditor of a banking firm held to have accepted the surviving partners as his debtors, and to have lost by sixteen years' delay and his conduct the benefit of a trust contained in the will of the deceased partner for payment of his debts out of his real estate.

Head, In re, Head v. Head, 63 L. J. Ch. 35; [1893] 3 Ch. 426; 3 R. 712; 69 L. T. 753; 42 W. R. 55.—CHITTY, J., *distinguished and not applied*.

Head, In re, Head v. Head (1894) 63 L. J. Ch. 549; [1894] 2 Ch. 236; 7 R. 167; 70 L. T. 608; 42 W. R. 419.—C.A. LINDLEY, LOPES and KAY, L.JJ.

Crawshay v. Collins (1808) 15 Ves. 218; 10 R. R. 61.—L.C., *referred to*.

Vyse v. Foster (1874) L. R. 7 H. L. 318, 338; 44 L. J. Ch. 37; 31 L. T. 177; 23 W. R. 355.—H.L. (E.).

Crawshay v. Collins (1820) 1 Jac. & W. 267, 278; 21 R. R. 168.—L.C., *explained and applied*.

Willett v. Blandford (1842) 11 L. J. Ch. 182; 1 Hare 253, 269; 6 Jur. 274.—V.C.

Cook v. Collingridge (1823) 1 L. J. (O.S.) Ch. 74; Jac. 607; 23 R. R. 155, 767.—L.C.

Applied, Willett v. Blandford (1842) 11 L. J. Ch. 182; 1 Hare 253; 6 Jur. 274.—V.C.; *observed upon*, Travis v. Milne (1851) 20 L. J. Ch. 665; 9 Hare 141.—V.C.; *distinguished*, Vyse v. Foster (1874) 44 L. J. Ch. 37; L. R. 7 H. L. 318; 31 L. T. 177; 23 W. R. 355.—H.L. (E.); *applied*, De Cordova v. De Cordova (1879) 4 App. Cas. 692; 41 L. T. 43.—P.C.; *distinguished*, Norrington, In re, Brindley v. Partridge (1879) 13 Ch. D. 654, 662; 28 W. R. 711.—BACON, V.C., (compromised, C.A.)

Smith v. De Silva (1776) Cowp. 469.—K.B., *discussed*.

Holderness v. Shackles (1828) 7 L. J. (O.S.) K. B. 80; 8 B. & C. 618; 3 M. & Ry. 25.—K.B.

7. DISSOLUTION OF PARTNERSHIP.

Featherstonhaugh v. Fenwick (1810) 17 Ves. 298; 11 R. R. 77.—M.R.

Adopted, Willett v. Blandford (1842) 11 L. J. Ch. 182; 1 Hare 253; 6 Jur. 274.—V.C.; *considered*, Blisset v. Daniel (1853) 10 Hare 493; 1 Eq. R. 484; 18 Jur. 122; 1 W. R. 529.—V.C.; *approved but distinguished*, Cassels v. Stewart (1881) 6 App. Cas. 64; 29 W. R. 636.—H.L. (SC.); *adopted*, Neilson v. Mossend Iron Co. (1886) 11 App. Cas. 298, 312.—H.L. (SC.); *observations applied*, Biss, In re, Biss v. Biss (1903) 72 L. J. Ch. 473; [1903] 2 Ch. 40, 57; 88 L. T. 403; 51 W. R. 504.—C.A.

Parsons v. Hayward (1862) 31 L. J. Ch. 666; 4 De G. F. & J. 474; 8 Jur. (N.S.) 924; 6 L. T. 628; 10 W. R. 654.—L.C., *referred to*.

Barfield v. Loughborough (1872) 42 L. J. Ch. 179; L. R. 8 Ch. 1, 5; 27 L. T. 499; 21 W. R. 86.—L.C.

Fox v. Hanbury (1776) Cowp. 445.—K.B., *explained*.

Fraser v. Kershaw (1856) 25 L. J. Ch. 445; 2 K. & J. 496; 2 Jur. (N.S.) 880; 4 W. R. 431.—WOOD, V.C.

Harrison v. Tennant (1856) 21 Beav. 482, 493.—M.R., *observations not applied*.

Leary v. Shout (1864) 33 Beav. 582.—M.R.

Anon. (1855) 2 K. & J. 441.—WOOD, V.C., *considered*.

Helmere v. Smith (1886, 1887) 35 Ch. D. 436, 442; 56 L. T. 535; 36 W. R. 3.—BACON, V.C.; *affirmed in C.A.*

Anon., *dictum followed*.

J. v. S. (1894) 63 L. J. Ch. 615; [1894] 3 Ch. 72; 8 R. 436; 70 L. T. 757; 42 W. R. 617.—STIRLING, J.

Besch v. Frolich (1842) 12 L. J. Ch. 118; 1 Ph. 172; 7 Jur. 78.—L.C., *followed*.

Murtagh v. Costello (1881) 7 L. R. Ir. 428.—V.C.; Lyon v. Tweddell (1881) 17 Ch. D. 529; 50 L. J. Ch. 571; 44 L. T. 785; 29 W. R. 689; 45 J. P. 680.—C.A.

Besch v. Frolich, *adopted*.

Helmere v. Smith (1886, 1887) 35 Ch. D. 436, 443; 56 L. T. 535; 36 W. R. 3.—BACON, V.C.; *affirmed in C.A.*

Land Credit Co. of Ireland, In re, Weikersheim's Case (1873) 42 L. J. Ch. 435; L. R. 8 Ch. 831; 28 L. T. 653; 21 W. R. 612.—L.JJ., *explained*.

Niemann v. Niemann (1889) 59 L. J. Ch. 220; 43 Ch. D. 198; 62 L. T. 339; 38 W. R. 258.—C.A. COTTON, BOWEN and FRY, L.JJ.

COTTON, L.J.—I refer to it [the above case] merely because it was quoted as sanctioned by the opinion of Lindley, L.J. in his book on Partnership (5th ed. p. 141). . . . When one looks at the case one finds this, that the judges who decided it decided that in the business of bankers it was so ordinary to take shares in companies as a security for a debt that it was part of the implied contract between them; but then James, L.J. points out that in fact all the partners assented to this being done. I rather

think that Lord Justice Lindley's statement here has been a little misunderstood. . . . I cannot think that he intended to lay down as a general rule of law that that could be done which was done in *Weikert's Case*, on the ground that the judges held in that case that a partner in a bank would have that implied authority, though they really decided it on the ground that in that particular case the partners had known and assented to what was done.—p. 224.

Ault v. Goodrich (1828) 4 Russ. 430; 28 R. R. 151.—M.R., *referred to*.

Tatam v. Williams (1844) 3 Hare 347, 358.—V.-C.

Ault v. Goodrich, *followed*.

Way v. Bassett (1845) 15 L. J. Ch. 1; 5 Hare 55; 10 Jur. 89.—V.-C.

Ault v. Goodrich, *considered and applied*.

Butchart v. Dresser (1853) 4 De G. M. & G. 452; 10 Hare 453; 1 W. R. 178.—V.-C.

Glass v. Marshall, 33 W. R. 409; *followed*, **Page v. Slade** (1885) 54 L. J. Ch. 1131; 52 L. T. 961; 33 W. R. 701.—CHITTY, J.

Hoey v. McEwan (1867) 5 Ct. of Sess. Cas. (3rd series) 814.—CT. OF SESS. (SC.), *adopted*.

Bruce v. Calder (1895) 64 L. J. Q. B. 582; [1895] 2 Q. B. 253; 14 R. 473; 72 L. T. 829; 59 J. P. 693.—C.A. LOPES and RIGBY, L.J.J.; ESKER, M.R. *dissenting*.

Usher v. Dauncey (1814) 4 Camp. 97; 15 R. R. 729.—K.B., *applied*.

Carter v. White (1882) 51 L. J. Ch. 465; 20 Ch. D. 225; 46 L. T. 223.—KAY, J.; *affirmed*, C.A.

Lodge v. Dicus (1820) 3 B. & Ald. 611; 22 R. R. 497.—K.B.

Explained, **Thompson v. Percival** (1834) 3 L. J. K. B. 98; 5 B. & Ad. 925; 3 N. & M. 167.—K.B.: *distinguished*, **Lyth v. Ault** (1852) 21 L. J. Ex. 217; 7 Ex. 669.—EX.

Saltoun v. Houston (1824) 1 Bing. 433; 2 L. J. (o.s.) C. P. 93; 25 R. R. 665.—C.P.

Considered, **Asplin v. Austin** (1844) 13 L. J. Q. B. 155; 5 Q. B. 671; 8 Jur. 355.—Q.B.: *adopted*, **Jackson v. N. E. Ry** (1877) 47 L. J. Ch. 303; 7 Ch. D. 573, 583; 37 L. T. 664; 26 W. R. 513.—MALINS, V.-C.

Bedford v. Deakin (1818) 2 B. & Ald. 210; 2 Stark. 178.—K.B., *referred to*.

Maingay v. Lewis (1870) Ir. R. 5 C. L. 229.—EX. CH.

8. ACTIONS BY AND AGAINST PARTNERS.

Young v. Hunter (1812) 4 Taunt. 582; 16 East 252; 2 Rose 120; 13 R. R. 696, *not applied*.

Cottray v. Fennell (1830) 8 L. J. (o.s.) K. B. 302; 10 B. & C. 671.—K.B.

Lucas v. De la Cour (1813) 1 M. & S. 249; 14 R. R. 426.—K.B., *applied*.

Skinner v. Stocks (1821) 4 B. & Ald. 437; 23 R. R. 337.—K.B., *distinguished*.

Humble v. Hunter (1848) 17 L. J. Q. B. 350; 12 Q. B. 310.—Q.B.

Byers v. Dohey (1789) 1 H. Bl. 236.—C.P., *distinguished*.

Fell v. Goslin (1852) 21 L. J. Ex. 145; 7 Ex. 185.—EX.

Rice v. Shute (1770) 2 W. Bl. 695; 5 Burr. 2611.—K.B., *discussed*.

Evans v. Lewis (1794) 1 Wm. Saund. 291 (*d*).—EX., *referred to*.

Kendall v. Hamilton (1879) 48 L. J. C. P. 705; 4 App. Cas. 504; 41 L. T. 418; 28 W. R. 97.—H.L. (E.).

Spalding v. Mure (1795) 6 Term Rep. 363, *overruled*.

Richards v. Heather (1817) 1 B. & Ald. 29.

BAYLEY, J.—I think that the plaintiff is entitled to recover both sums and that the doctrine in *Spalding v. Mure* cannot be supported.—p. 34.

ABBOTT, C.J. to the same effect.

Dubois v. Ludert (1814) 5 Taunt. 609; 1 Marsh. 246, *overruled*.

Mullett v. Hook (1827) M. & M. 88; 31 R. R. 716.

TENTERDEN, C.J.—Though I entertain the highest respect for the learned person who pronounced that decision in the case of *Dubois v. Ludert*, I cannot help thinking that the case has been disregarded, if not authoritatively overruled; and I cannot accede to the doctrine contained in it.—p. 89.

Young, In re and Ex parte (1881) 51 L. J. Ch. 141; 19 Ch. D. 124; 45 L. T. 493; 30 W. R. 330.—C.A., *distinguished*.

Jackson v. Litchfield (1882) 51 L. J. Q. B. 327; 8 Q. B. D. 474; 46 L. T. 518; 30 W. R. 531.—C.A. BRETT and HOLKER, L.J.J.

BRETT, L.J.—The only question here is whether judgment can be entered; and as the question of issuing execution does not arise, *Ex parte Young* is not applicable.—p. 329.

Young, In re and Ex parte, *considered*.

Davis v. Morris (1883) 52 L. J. Q. B. 401; 10 Q. B. D. 436; 31 W. R. 749.—WILLIAMS, J.

Young, In re and Ex parte, *referred to*.

Munster v. Raiton (1883) 52 L. J. Q. B. 409; 11 Q. B. D. 435; 48 L. T. 624; 31 W. R. 880.—C.A.; and **Shepherd v. Hirsch** (1890) 59 L. J. Ch. 819; 45 Ch. D. 231; 63 L. T. 335; 38 W. R. 745.—CHITTY, J.

Young, In re and Ex parte, *adopted*.

Ellis v. Wadson (1899) 68 L. J. Q. B. 604; [1899] 1 Q. B. 714, 718; 80 L. T. 508; 47 W. R. 420.—C.A.

Jackson v. Litchfield (1882) 51 L. J. Q. B. 327; 8 Q. B. D. 474; 46 L. T. 518; 30 W. R. 531.—C.A., *distinguished*.

Clark v. Cullen (1882) 9 Q. B. D. 355; 47 L. T. 307.—POLLOCK, B. and MATHEW, J.

POLLOCK, B.—In that case James Litchfield was admittedly a member of the firm, but in the

present case there is no such admission by the defendants, who are entitled to defend the action on the judgment on the ground that they are not members.—p. 356.

Jackson v. Litchfield, *questioned but followed*.

Davis v. Morris (1883) 52 L. J. Q. B. 401; 10 Q. B. D. 436.—Q.B.D.; Adam v. Townend (1884) 14 Q. B. D. 103.—Q.B.D.

Hammond v. Messenger (1838) 7 L. J. Ch. 310; 9 Sim. 327; 2 Jur. 655.—v.-c., *distinguished*.

Wilson v. Short (1848) 17 L. J. Ch. 289; 6 Hare 366; 12 Jur. 301.—v.-c.; Sanders v. Dublin United Tramways Co. (1883) 12 L. R. Ir. 206.—Q.B.; *affirmed*, 12 Ib. 424.—C.A.

Cooke v. Seeley (1848) 17 L. J. Ex. 286; 2 Ex. 746.—EX., *referred to*.

Alliance Bank v. Kearsley (1871) 40 L. J. C. P. 249; L. R. 6 C. P. 433; 24 L. T. 552; 19 W. R. 822.—C.P.

Mountsashell (Earl) v. Barber (1853) 23 L. J. C. P. 43; 14 C. B. 53; 2 C. L. R. 60; 2 W. R. 96.—C.P., *distinguished*.

Whillier v. Roberts (1873) 28 L. T. 668.—EX.

Davies v. Andre (1890) 59 L. J. Q. B. 233; 24 Q. B. D. 598; 63 L. T. 151; 38 W. R. 437.—C.A.

Referred to, Alden v. Beckley (1890) 25 Q. B. D. 543; 63 L. T. 282; 39 W. R. 8.—Q.B.D.; *applied*, Cullimore v. Savage South Africa [1903] 2 Ir. R. 589, 640.—C.A.

PATENT.

1. TO WHOM GRANTED.
2. FOR WHAT GRANTED.
3. LETTERS PATENT.
4. SPECIFICATION.
5. INFRINGEMENT.
6. CONFIRMATION, RENEWAL AND EXTENSION.
7. ASSIGNMENT AND LICENCE.
8. PATENT AGENTS.

1. TO WHOM GRANTED.

Clothworkers of Ipswich Case (1614) Godb. 252; 1 Roll. 4.—K.B.; and **Darcy v. Allin**, Noy 173, *explained and not applied*.

Marsden v. Saville Street Foundry (1878) 3 Ex. D. 203; 39 L. T. 97; 26 W. R. 784.—EX. D.

Crane v. Price (1842) 1 Web. Pat. Cas. 393, *commented upon but principle approved*.

Murray v. Clayton (1872) L. R. 7 Ch. 570; 20 W. R. 649.—L.J. *And see* Clark v. Adie (1877).—H.L. (E.) (*infra*, col. 2064).

Mathers v. Green, 34 Beav. 170; 34 L. J. Ch. 298; 12 L. T. 66; 13 W. R. 421.—M.R.; *reversed*, (1865) 35 L. J. Ch. 1; L. R. 1 Ch. 29; 11 Jur. (N.S.) 845; 13 L. T. 420; 14 W. R. 17.—L.C.

Mathers v. Green (1865) 35 L. J. Ch. 1; L. R. 1 Ch. 29; 11 Jur. (N.S.) 845; 13 L. T. 420; 14 W. R. 17.—L.C., *approved*.
Steers v. Rogers (1893) 62 L. J. Ch. 671; [1893] A. C. 232; 1 R. 173; 68 L. T. 726.—H.L. (E.)

2. FOR WHAT GRANTED.

Harwood v. G. N. Ry., 29 L. J. Q. B. 193; 2 B. & S. 194; 6 Jur. (N.S.) 993.—Q.B.; *reversed*, (1862) 31 L. J. Q. B. 198; 2 B. & S. 222; 6 L. T. 190; 8 Jur. (N.S.) 1126.—EX. CH.; *the latter decision affirmed*, (1865) 35 L. J. Q. B. 27; 11 H. L. Cas. 654; 12 L. T. 771; 14 W. R. 1.—H.L. (E.).

Harwood v. G. N. Ry. (*supra*, in H.L.), *followed*.

Jordan v. Moore (1866) 35 L. J. C. P. 268; L. R. 1 C. P. 624, 635; 12 Jur. (N.S.) 766; 14 W. R. 769.—C.P.; Penn v. Bibby (1866) 36 L. J. Ch. 455; L. R. 2 Ch. 127, 136; 15 L. T. 399; 15 W. R. 208.—L.C.

Harwood v. G. N. Ry., *distinguished*.

Pirrie v. York Street Flax Co. [1894] 1 Ir. 417, 429; 11 R. P. C. 429.—C.A.

Harwood v. G. N. Ry., *adopted*.

Brooks v. Lamplugh (1898) 16 Rep. Pat. Cas. 41, 48.—H.L. (E.); Case v. Cressy (1900) 17 Rep. Pat. Cas. 255, 261.—BUCKLEY, J.; and Lane Fox v. Kensington and Knightsbridge Electric Ry. (1892) [1892] 3 Ch. 424; 67 L. T. 440.—C.A.

Brooke v. Aston, 27 L. J. Q. B. 145; 8 El. & Bl. 478; 4 Jur. (N.S.) 279; 6 W. R. 42.—Q.B.; *affirmed*, (1859) 28 L. J. Q. B. 175; 5 Jur. (N.S.) 1025.—EX. CH., *limited*.
Young v. Fernie (1864) 4 Giff. 577; 10 Jur. (N.S.) 926; 10 L. T. 861; 12 W. R. 901.—v.-c.

Young v. Fernie, *applied*.

Bareham v. Hall (1870) 22 L. T. 116.—STUART, v.-c.; *and see* Roskell v. Whitworth (1870) 39 L. J. Ch. 765; L. R. 5 Ch. 459, 464; 23 L. T. 179; 18 W. R. 682.—L.J.

Seed v. Higgins, 27 L. J. Q. B. 148; 8 El. & Bl. 755; 4 Jur. (N.S.) 258.—Q.B.; *reversed on other grounds*, (1858) 27 L. J. Q. B. 411; 8 El. & Bl. 773; 5 Jur. (N.S.) 540.—EX. CH.; *the latter decision affirmed*, (1860) 30 L. J. Q. B. 314; 8 H. L. Cas. 550; 6 Jur. (N.S.) 1261; 3 L. T. 101.—H.L. (E.).

Seed v. Higgins (*supra*, in H.L.), *considered and followed*.

Curtis v. Platt (1863) 35 L. J. Ch. 852; 3 Ch. D. 136, n.—WOOD, v.-c.

Seed v. Higgins, *followed*.

Daw v. Eley (1867) 36 L. J. Ch. 482; L. R. 3 Eq. 493; 15 L. T. 559.

WOOD, v.-c. [who held that, although the patent included matters some of which were new and some old, it might be upheld by limiting the claim (as in *Seed v. Higgins*) to the particular combination in the particular manner described in the specification.] *And see infra*.

Seed v. Higgins (*supra*), *considered*.

Clark v. Adie (1877) 46 L. J. Ch. 585; 2 App. Cas. 315; 36 L. T. 923.—H.L. (E.); *affirming* 23 W. R. 898.—L.JJ.

Harmar v. Playne (1809) 11 East 101: Davies' Patent Cases 311; 14 Ves. 133, *commented on*.

Foxwell v. Bostock (1864) 4 De G. J. & S. 298; 10 L. T. 144; 12 W. R. 723.

WESTBURY, L.C.—It was said by Lord Ellenborough in this case, that the object of requiring a specification to be enrolled seemed to be, to enable persons of reasonable intelligence and skill in the subject-matter to tell from the inspection of the specification itself what the invention was for which the patent was granted. It is true that the case of *Harmar v. Playne* was held to be an exception to this rule, but *exceptio probat regulam*. In that case a patent was taken out for a machine; the inventor afterwards discovered an improvement, and took out a second patent for an improved machine, and in the specification of that second patent he described the whole machine, without distinguishing the improvement, and the objection was that the specification was insufficient, and the patent bad; but inasmuch as in the second patent he had recited the first patent and the specification under it, it was held, that the recital being in immediate comparison with the new specification, furnished *in gremio* of the new patent the means of distinguishing the new from the old.—p. 312.

Harmar v. Playne, *approved*.

Parkes v. Stevens (1869) L. R. 5 Ch. 36; 22 L. T. 635; 18 W. R. 233.—L.C.

Lister v. Leather (1858) 27 L. J. Q. B. 295; 8 El. & Bl. 1004; 4 Jur. (N.S.) 947.—EX. CH., *observed upon*.

Parkes v. Stevens (1869) L. R. 5 Ch. 36; 22 L. T. 635; 18 W. R. 233.—L.C. *See extract, infra*.

Lister v. Leather, *explained*.

Clark v. Adie (1875) 45 L. J. Ch. 228; L. R. 10 Ch. 667; 23 W. R. 898.—L.JJ.; *affirmed*, (1877) 46 L. J. Ch. 585; 2 App. Cas. 315; 36 L. T. 923.—H.L. (E.).

JAMES, L.J. (for the Court).—I will state what we conceive to be the real principle which underlies the case of *Lister v. Leather*, and which reconciles it with the other cases, and with general principles and common sense. A patent for a new combination or arrangement is to be entitled to the same protection, and on the same principles, as every other patent. In fact every or almost every patent is a patent for a new combination. The patent is for the entire combination, but there is or may be an essence or substance of the invention underlying the mere accidents of form; and that invention, like every other invention, may be pirated by a theft in a disguised or mutilated form, and it will be in every case a question of fact whether the alleged piracy is the same in substance and effect, or is a substantially new or different combination.—p. 231.

Lister v. Leather, *distinguished and explained*.

Harrison v. Anderston Foundry Co. (1876) 1 App. Cas. 574.—H.L. (SC.).

Foxwell v. Bostock (1864) 4 De G. J. & S. 298; 10 L. T. 144; 12 W. R. 723.—L.C., *observed upon*.

Parkes v. Stevens (1869) L. R. 5 Ch. 36; 18 W. R. 233; 22 L. T. 635.

HATHERLEY, L.C.—Of course *Harmar v. Playne* was decided long before *Foxwell v. Bostock*, and it might be open to consideration whether different views prevailed in *Foxwell v. Bostock* from those which prevailed when *Harmar v. Playne* was decided; but I think there is so much good sense and justice in the doctrines established by *Harmar v. Playne* that it is not a case which ought to be easily impeached by a later decision (p. 37). It is said that, according to the doctrine of *Lister v. Leather* (*supra*), if there is a patent for a combination of parts free from the vice of mixing up old and new parts, so that a person cannot distinguish the one from the other, as was the case in *Foxwell v. Bostock*, then other makers are not entitled to take that which is new.—p. 38.

Foxwell v. Bostock, *considered*.

Murray v. Clayton (1872) L. R. 7 Ch. 570.—L.JJ.; *reversing* L. R. 7 Ch. 573, n.—V.-C.

JAMES, L.J.—Perhaps I ought, before parting with the case, to refer to the observations of the Vice-Chancellor (Bacon, V.-C., see p. 578, n.), that the plaintiff's specification is not sufficient upon the principles laid down by Lord Westbury in *Foxwell v. Bostock*. I had occasion to deal with an objection grounded on *Foxwell v. Bostock* in the case of *Parkes v. Stevens* (L. R. 8 Eq. 358), and I refer to what I said in that case, because I find it was in substance approved of and affirmed by the Lord Chancellor on appeal. I there said, . . . "After all, the question of sufficiency of specification is not a question of law, it is a question really of fact in each particular case. In this case I am of opinion that the patentee has a right to have his specification of 1865 read with his specification of 1862, and, reading them together, I do not think any maker of lamps would have any substantial difficulty in ascertaining what was claimed under the general description of the arrangement and combination of parts hereinbefore described and represented in the drawings annexed." Accordingly upon the issue of the validity of the patent, and the sufficiency of the specification, I found for the plaintiff, although I found for the defendant upon the question of infringement. Both sides appealed, and the present Lord Chancellor, in his judgment, says: "As to the validity of his second patent, which has been disputed, there is a clear line marking off the old from the new" (the objection was that the plaintiff had taken out two patents, each of them for improvements in the same direction, and in the same terms, and that he did not say which part was covered by the old as distinguished from the new), "in a manner which could not be mistaken by anybody properly understanding the English language, and no one would be obliged to have recourse to further investigation (which was the ground of the decision in *Foxwell v. Bostock*), in order to know what parts he might take, and what parts he might not take under each patent. I think, therefore, that there is no objection to the specification on that ground."—p. 585.

Foxwell v. Bostock, explained.

Harrison v. Anderston Foundry Co. (1876) 1 App. Cas. 574.—H.L. (SC.).

LORD CAIRNS.—The first is an objection said to be founded upon the case of *Foxwell v. Bostock* decided by the late Lord Westbury when Lord Chancellor. It is said to have been determined in that case that where there is a patent for a combination there must be a discovery or explanation of the novelty, and the specification must show what is the novelty, and what the merit of the invention. I cannot think that, as applied to a patent for a combination, this is, or was meant to be, the effect of the decision in *Foxwell v. Bostock*. If there is a patent for a combination, the combination itself is, *ex necessitate*, the novelty; and the combination is also the merit, if it be a merit, which remains to be proved by evidence. So also with regard to the discrimination between what is new and what is old. If it is clear that the claim is for a combination, and nothing but a combination, there is no infringement unless the whole combination is used, and it is in that way immaterial whether any or which of the parts are new.—p. 577.

Foxwell v. Bostock, considered.

Clark v. Adie (1877) 46 L. J. Ch. 585; 2 App. Cas. 315; 36 L. T. 923.—H.L. (E.); *affirming* 23 W. R. 898.—L.JJ.

Foxwell v. Bostock, explained.

Proctor v. Bennis (1887) 57 L. J. Ch. 11; 36 Ch. D. 740; 57 L. T. 662; 36 W. R. 456.—C.A.

COTTON, L.J.—What was relied on by the counsel for Bennis was the opinion expressed by Lord Westbury in *Foxwell v. Bostock*. But that must be read with the light thrown upon it by the option expressed in the House of Lords by Lord Cairns in *Harrison v. Anderston Foundry Co.*

Foxwell v. Bostock, discussed.

Perry v. Societe des Lunetiers (1896) 13 R. P. C. 664.—ROMER, J.; and Webb v. Kynoch (1898) 15 R. P. C. 541.—C.A. (IR.).

Curtis v. Platt (1866) 35 L. J. Ch. 852; 3 Ch. D. 136, n.; L. R. 1 H. L. 337.—H.L. (E.), *distinguished*.

Proctor v. Bennis (1887) 57 L. J. Ch. 11; 36 Ch. D. 740; 57 L. T. 662; 32 W. R. 456.—C.A.

COTTON, L.J.—... The principle which was contended for [as having been laid down in *Curtis v. Platt*] was this, that where there is a combination claimed for improvements in machinery, there you must hold the patentee strictly to the description which he gives of the particular means by which his invention is to be carried into effect, and that the doctrine of mechanical equivalents cannot apply in such a case, but you must hold him strictly to the particular mechanical means by which he proposes to carry out his invention. Now, in my opinion that case does not apply to this, because those observations were applied to a case where there was a machine which had been long in use for producing a certain result, and, therefore, there was no novelty at all in the result to be produced even in that machine, and the only novelty which there could be claimed would be the application and use of certain mechanical means in order to produce in a known machine the same result which in that known machine had been produced by other mechanical means. That to my mind distinguishes the case entirely

O.C.

from the present. . . Here the throwing coal on to the furnace by the intermittent radial action of a flap or door was new, and nothing of the kind had been done before.—pp. 19, 20.

Curtis v. Platt, applied.

Thomson v. Moore (1889) 23 L. R. Ir. 599.—C.A.

Curtis v. Platt, applied.

Siddell v. Vickers (1888) 39 Ch. D. 92, 98; 59 L. T. 575.—KEKEWICH, J.; *affirmed*, C.A. and H.L. (E.).

Parkes v. Stevens (1869) L. R. 5 Ch. 36; 22 L. T. 635; 18 W. R. 233.—L.C.

Observations adopted, Murray v. Clayton (1872) L. R. 7 Ch. 570, 585; 20 W. R. 649.—L.JJ.; *distinguished*, Harrison v. Anderston Foundry Co. (1876) 1 App. Cas. 574.—H.L. (SC.).

Clark v. Adie (1877) 46 L. J. Ch. 585; 2 App. Cas. 315; 36 L. T. 923.—H.L. (E.), *applied*.

Dudgeon v. Thomson (1877) 3 App. Cas. 34, 57.—H.L. (SC.); Proctor v. Bennis (1887) 57 L. J. Ch. 11; 36 Ch. D. 740, 764; 57 L. T. 662; 36 W. R. 456.—C.A.; Ellington v. Clark (1887) 58 L. T. 40.—KAY, J.; and Dunlop Pneumatic Tyre Co. v. Moseley (1903) [1904] 1 Ch. 164.—SWINFEN EADY, J. (*affirmed*, C.A.).

Proctor v. Bennis (1887) 57 L. J. Ch. 11; 36 Ch. D. 740; 57 L. T. 662; 32 W. R. 456.—C.A., *applied*.

Thomson v. Moore (1889) 23 L. R. Ir. 599.—C.A.

Badische Anilin und Soda Fabrik v. Levinstein, 52 L. J. Ch. 704; 24 Ch. D. 156; 48 L. T. 822.—PEARSON, J.; *reversed*, (1885) 29 Ch. D. 366; 53 L. T. 750; 31 W. R. 913.—C.A.; *the latter decision reversed*, (1887) 12 App. Cas. 710; 57 L. T. 853.—H.L. (E.).

Badische Anilin und Soda Fabrik v. Levinstein, applied.

Lane-Fox v. Kensington, &c., Co. [1892] 3 Ch. 424; 67 L. T. 440.—C.A.

Brown v. Annandale (1842) 8 Cl. & F. 437.—H.L. (SC.), *discussed and distinguished*.

Brown v. Kidston (1852) 14 Dunlop 826.—CT. OF SESS.

Brown v. Annandale, considered.

Rolls v. Isaacs (1881) 51 L. J. Ch. 170; 19 Ch. D. 268; 45 L. T. 704; 30 W. R. 243.—BACON, V.-C. *See judgment*.

Daw v. Eley (1867) 36 L. J. Ch. 482; L. R. 3 Eq. 496; 15 L. T. 559.—WOOD, V.-C., *referred to*.

Murray v. Clayton (1872) L. R. 7 Ch. 570; 20 W. R. 649.—L.JJ.

Daw v. Eley and Murray v. Clayton, acted upon.

Pneumatic Tyre Co. v. East London Rubber Co. (1896) 75 L. T. 488.—ROMER, J.

Fox, *Ex parte* (1812) 1 V. & B. 67.—L.C., *disapproved*.

Poupard v. Fardell (1869) 21 L. T. 696; 18 W. R. 127.

MALINS, V.-C.—The case relied on is *Ex parte Fox*, where Lord Eldon laid down the rule that the specification must be complied with, irrespective of the drawing; and if not the patent is bad. Now, of course I should be most reluctant to suppose that anything laid down by Lord Eldon was wrong, but I confess, although that

was the rule then, the great improvements of science since that time, as instanced by the inventions of locomotives, electric telegraphs, &c., have made it impossible that it can be now adhered to. Look at any of these modern inventions, they are utterly unintelligible, even to a skilful engineer, without the drawings; and, therefore it is not surprising that that rule can be no longer the law. A specification may consist of figures or one figure only; or it may consist of a description aided by the figure or figures. [The Vice-Chancellor then referred to Coryton on Patents, 140.] That rule, therefore, is no longer a rule, and a specification may be good although it consists of a drawing only.—p. 699.

Lewis v. Marling (1829) 8 L. J. (o.s.) K. B. 46; 10 B. & C. 22; 5 M. & Ry. 66; 4 Car. & P. 52.—K.B., *applied*.

Poupard v. Fardell (1869) 21 L. T. 696; 18 W. R. 127.—V.C. (*supra*).

Househill Co. v. Neilson (1843) 9 Cl. & F. 788; 2 Bell 1; 1 Web. Pat. Cas. 673.—H.L. (SC.), *commented on*.

Tangye v. Stott (1866) 14 W. R. 386.—V.C.; **Neilson v. Betts** (1871) 40 L. J. Ch. 317; L. R. 5 H. L. 1; 19 W. R. 1121.—H.L. (E.); **Plimpton v. Malcolmson** (1876) 45 L. J. Ch. 505; 3 Ch. D. 531, 557; 34 L. T. 340.—M.R.; **Badische Anilin und Soda Fabrik v. Levinstein** (1883) 52 L. J. Ch. 704; 24 Ch. D. 156; 48 L. T. 822; 31 W. R. 913.—C.A.; *affirmed*, 12 App. Cas. 710; 57 L. T. 853.—H.L. (E.); **Harris v. Rothwell** (1887) 56 L. J. Ch. 459; 35 Ch. D. 416, 429; 56 L. T. 552; 35 W. R. 581.—C.A.; **Morgan v. Windover** (1890) 7 Rep. Pat. Cas. 131, 133.—H.L. (E.).

Stead v. Williams (1844) 7 Man. & G. 818, 842; 8 Scott (N.R.) 440; 13 L. J. C. P. 218; 8 Jur. 930.—C.P., *adopted*.

Patterson v. Gas Light and Coke Co. (1877) 47 L. J. Ch. 402; 3 App. Cas. 239; 38 L. T. 303; 26 W. R. 422.—H.L. (E.).

Stead v. Williams and Patterson v. Gas Light and Coke Co., *approved*.

Harris v. Rothwell (1887) 56 L. J. Ch. 459; 35 Ch. D. 416; 56 L. T. 552; 35 W. R. 581.—C.A. *See extract, infra*, col. 2066.

Bush v. Fox (1856) 5 H. L. Cas. 707; 25 L. J. Ex. 251; 2 Jur. (N.S.) 1029; 4 W. R. 675.—H.L. (E.), *dictum disapproved*.

Hill v. Evans (1862) 8 Jur. (N.S.) 525; 4 De G. F. & J. 288; 31 L. J. Ch. 457; 6 L. T. 90. **WESTBURY, L.C.** observed that the observation made by Lord Cranworth in *Bush v. Fox*, "that it is the duty of the Court to compare the two specifications together," is an *obiter dictum*, and cannot be taken as a declaration of the law. (*See judgment at length*).

Bush v. Fox.

Referred to, **Betts v. Menzies** (1862) 31 L. J. Q. B. 233; 10 H. L. Cas. 118; 9 Jur. (N.S.) 29; 7 L. T. 110; 11 W. R. 1.—H.L. (E.); *adopted*, **Patterson v. Gas Light and Coke Co.** (1877) 47 L. J. Ch. 402; 3 App. Cas. 239; 38 L. T. 303; 26 W. R. 422.—H.L. (E.); *approved*, **Harris v. Rothwell** (1887) 56 L. J. Ch. 459; 35 Ch. D. 416; 56 L. T. 552; 35 W. R. 581.—C.A.

Hills v. Evans (1862) 31 L. J. Ch. 457; 4 De G. F. & J. 288; 8 Jur. (N.S.) 525; 6 L. T. 90.—L.C., *explained and approved*.

Neilson v. Betts (1871) 40 L. J. Ch. 317; L. R. 5 H. L. 1; 19 W. R. 1121.—H.L. (E.).

Hills v. Evans, applied.

Plimpton v. Malcolmson (1876) 45 L. J. Ch. 505; 3 Ch. D. 531; 34 L. T. 340.—JESSEL, M.R.

Hills v. Evans, considered.

Watson v. Holliday (1882) 51 L. J. Ch. 906; 20 Ch. D. 780; 46 L. T. 878.—KAY, J.; *affirmed*, C.A.

Hills v. Evans, applied.

Moseley v. Victoria Rubber Co. (1887) 57 L. T. 142, 146.—CHITTY, J.; and **Ellington v. Clark** (1887) 58 L. T. 40, 818.—KAY, J.; *reversed*, C.A.

Betts v. Menzies (1859) 1 El. & El. 990, 1020; 30 L. J. Q. B. 81.—EX. CH.; *reversed*, (1862) 10 H. L. Cas. 117; 31 L. J. Q. B. 233; 9 Jur. (N.S.) 29; 7 L. T. 110; 11 W. R. 1; 1 El. & El. 1039, n.—H.L. (E.).

Betts v. Menzies, referred to.

Neilson v. Betts (1871) 40 L. J. Ch. 317; L. R. 5 H. L. 1, 13; 19 W. R. 1121.—H.L. (E.).

Betts v. Menzies, adopted.

Patterson v. Gas Light and Coke Co. (1877) 47 L. J. Ch. 402; 3 App. Cas. 239; 38 L. T. 303; 26 W. R. 422.—H.L. (E.); **Plimpton v. Malcolmson** (1876) 45 L. J. Ch. 505; 3 Ch. D. 531; 34 L. T. 340.—M.R.

Betts v. Menzies, approved and followed.

Harris v. Rothwell (1887) 56 L. J. Ch. 459; 35 Ch. D. 416; 56 L. T. 552; 35 W. R. 581.—C.A. *See extract, infra*.

United Telephone Co. v. Harrison (1882)

51 L. J. Ch. 705; 21 Ch. D. 720; 46 L. T. 620; 30 W. R. 724.—FRY, J., *approved and followed*.

Harris v. Rothwell (1887) 56 L. J. Ch. 459; 35 Ch. D. 416; 56 L. T. 552; 35 W. R. 581.—C.A.; and **Siddell v. Vickers** (1888); 39 Ch. D. 92, 97.—KEBLEWICH, J.; *affirmed*, C.A. and H.L. (E.).

Lang v. Gisborne (1862) 31 L. J. Ch. 769;

31 Beav. 133; 8 Jur. (N.S.) 736; 6 L. T. 771; 10 W. R. 368.—M.R., *explained*.

Plimpton v. Malcolmson (1876) 45 L. J. Ch. 505; 3 Ch. D. 531; 34 L. T. 340.—JESSEL, M.R.

Lang v. Gisborne and Heurteloup's Patent

(1836) 1 Webst. Pat. Cas. 553.—P.C., *explained and applied*.

Harris v. Rothwell (1887) 56 L. J. Ch. 459; 35 Ch. D. 416; 56 L. T. 552; 35 W. R. 581.—C.A.

LINDLEY, L.J.—But the cases of *Patterson v. Gas Light Co.*, *Oxley v. Holden*, *Bush v. Fox*, and *Betts v. Menzies*, not to mention others, show that what is material in these cases is to consider what was disclosed to the public in the earlier specifications. In order to show that a patentee is not the true and first inventor of his patented invention, it is not necessary to show that he learned it from a prior publication existing in this country. It is sufficient to show that the invention was so described in some book or document published in this country, that some English people may be fairly supposed to have known of it. This is the result of *Househill Co. v. Neilson*, *Stead v. Williams*, and *Lang v. Gisborne*. *Plimpton v. Malcolmson* and *Plimpton v. Spiller* are not opposed to this view of the law, for in those cases there was evidence which satisfied the Court that the one copy in this country relied on as a prior publication had not in fact been laid before the public, and was not in fact known to exist. It is necessary next to consider the effect of any of these specifications

being in German and not in English. The fact that German is understood by many people in this country and that persons who can read and translate German can easily be found by those who want their assistance, must, I think, be treated as common knowledge and be judicially noticed, although not stated in the special case. . . . The fact that *Heurteloup's Patent* requires confirmation goes far to show that it would have been invalid unless confirmed under the provisions of the statute in question. Regarded from this point of view *Heurteloup's Patent*, so far as it goes, is in favour of the defendant, rather than of the plaintiffs. *Lang v. Gishorne* contains an emphatic expression of opinion by Lord Romilly to the effect that there is no distinction between a publication in this country of a description in the French language and a description in English. Some remarks made by Lord Brougham and Lord Campbell have been relied upon as inconsistent with Lord Romilly's view, but I do not so understand them. They merely go to show that a foreign publication not known in England will not invalidate a patent. —pp. 467, 468.

Betts v. Neilson, Betts v. De Vitre, 37 L. J. Ch. 325; L. R. 3 Ch. 429; 18 L. T. 165; 16 W. R. 520.—L.C.; *varied sub nom., Neilson v. Betts* (1871) 40 L. J. Ch. 317; L. R. 5 H. L. 1; 19 W. R. 1121.—H.L. (E.).

Neilson v. Betts (*supra*, in H.L.), *followed*.

De Vitre v. Betts (1873) 42 L. J. Ch. 841; L. R. 6 H. L. 319; 21 W. R. 705.—H.L. (E.).

LORD CHELMSFORD.—The case of *Neilson v. Betts* most undoubtedly decided the general principle that, upon a decree against a party for the infringement of a patent, the patentee is not entitled both to an account of profits and an inquiry into damages. That principle applies generally and without any distinction at all.

Neilson v. Betts, considered and followed.

Plimpton v. Malcolmson (1876) 45 L. J. Ch. 505; 3 Ch. D. 531; 34 L. T. 340.

JESSEL, M.R.—[At page 510 explains *Lang v. Gishorne* at length.] I should have thought independently of authority, that no prior description ought to invalidate a patent unless a person of ordinary skill in the particular trade could make the thing from the description. But it has been alleged that something less will do. As I read the authorities, that is not so. The question has been before the House of Lords in the case of *Neilson v. Betts* (*infra*), and the judgments of Lord Westbury and Lord Colonsay in that case both amount to this, that the description in the book must be equivalent to a specification. I may add that this is entirely in accordance with the case of *Hills v. Evans* (4 De Gex, F. & J. 288; 31 L. J. Ch. 357), and the case of *Betts v. Menzies* (10 H. L. Cas. 117; 31 L. J. Ch. 233), and even if I differed from them, which I do not, I should be bound by these decisions.—p. 512.

Neilson v. Betts, applied.

Plimpton v. Spiller (1877) 47 L. J. Ch. 211; 6 Ch. D. 412, 434; 37 L. T. 56; 26 W. R. 285.—C.A.; *Nobel's Explosives Co. v. Jones* (1882) 52 L. J. Ch. 339; 8 App. Cas. 5; 48 L. T. 490; 31 W. R. 388.—H.L. (E.); *Watson v. Holliday* (1882) 20 Ch. D. 780; 46 L. T. 878.—KAY, J. (*affirmed*, C.A.); and *Upmann v. Forester* (1883) 52 L. J. Ch. 946; 24 Ch. D. 231; 49 L. T. 122; 32 W. R. 28.—CHITTY, J.

Neilson v. Betts, referred to.

United Horse-Shoe and Nail Co. v. Stewart (1888) 13 App. Cas. 401; 59 L. T. 561.—H.L. (E.).

Neilson v. Betts, applied.

Gill v. Cutler (1895) 23 Rettie, 371, 378; 13 R. P. C. 125.—CT. OF SESS.; *Saccharin Corporation v. Chemicals, &c., Co.* (1900) 69 L. J. Ch. 520; [1900] 2 Ch. 556; 83 L. T. 206; 49 W. R. 1.—C.A.; *referred to*, *British Motor Syndicate v. Taylor* (1900) 70 L. J. Ch. 21; [1901] 1 Ch. 122; 83 L. T. 419; 49 W. R. 183.—C.A.

De Vitre v. Betts (1873) 42 L. J. Ch. 841; L. R. 6 H. L. 319; 21 W. R. 705.—H.L. (E.).

Considered, *Watson v. Holliday* (1882) 51 L. J. Ch. 906; 20 Ch. D. 780; 46 L. T. 878.—KAY, J.; *followed*, *United Horsenail Co. v. Stewart* (1886) 3 Rep. Pat. Cas. 139, 143.—CT. OF SESS.

Plimpton v. Malcolmson (1876) 45 L. J. Ch. 505; 3 Ch. D. 531; 34 L. T. 340.—M.R., *considered and approved*.

Plimpton v. Spiller (1877) 47 L. J. Ch. 211; 6 Ch. D. 412; 37 L. T. 56; 26 W. R. 285.—M.R.; *affirmed* in C.A.

Plimpton v. Malcolmson, dictum disapproved.

Otto v. Steel (1885) 31 Ch. D. 241; 55 L. J. Ch. 196; 54 L. T. 157; 34 W. R. 289.

PEARSON, J.—In *Plimpton v. Malcolmson*, Sir George Jessel, in commenting upon *Heurteloup's Patent*, says this in reference to a book relied upon in *Heurteloup's Patent* as an anticipation:—"I have no doubt that that book was in the British Museum catalogues. Of course I cannot say it was"—in this case it was proved that it was. "We know that after two years it would have been in the catalogue, and, in fact, long before; and there was nothing to show that it was not read or used, and in the absence of evidence to the contrary, the presumption was the other way," by which I understood Sir George Jessel to have said that, if there be a book in the British Museum, the presumption is that it has been read. I find it very difficult indeed to go along with Sir George Jessel in that presumption. I do not know the authority for it. He gives no authority for it. And the point was not raised by *Plimpton v. Malcolmson*, where there was no copy in the British Museum and no copy sufficiently published elsewhere.—p. 245.

Plimpton v. Malcolmson and Otto v. Steel, distinguished.

Harris v. Rothwell (1887) 56 L. J. Ch. 459; 35 Ch. D. 416; 56 L. T. 552; 35 W. R. 581.—C.A. See extract, *supra*, col. 2066.

Plimpton v. Malcolmson, considered.

Avery's Patent, In re (1887) 56 L. J. Ch. 586; 36 Ch. D. 307; 56 L. T. 324; 35 W. R. 541.—STIRLING, J.; *affirmed*, 56 L. J. Ch. 1007; 36 Ch. D. 307; 57 L. T. 506; 36 W. R. 249.—C.A. COTTON, BOWEN and FREY, L.JJ.

Plimpton v. Spiller (1877) 47 L. J. Ch. 211; 6 Ch. D. 412; 37 L. T. 56; 26 W. R. 285.—M.R. (*affirmed* in C.A.), *held applicable*.

United Telephone Co. v. Harrison (1882) 51 L. J. Ch. 705; 21 Ch. D. 720; 46 L. T. 620; 30 W. R. 724.—FRY, J.

Plimpton v. Spiller, distinguished.
Harris v. Rophwell (1887) 56 L. J. Ch. 459; 35 Ch. D. 416; 56 L. T. 552; 35 W. R. 581.—C.A.
See extract, supra, col. 2066.

Morgan v. Seaward (1837) 6 L. J. Ex. 153; 2 M. & W. 544; M. & H. 55; 1 Jur. 527.
 —EX., *approved and distinguished.*

Patterson v. Gas Light and Coke Co. (1877) 47 L. J. Ch. 402; 3 App. Cas. 239; 38 L. T. 303; 26 W. R. 482.—H.L. (E.).

British Tanning Co. v. Groth (1891) 60 L. J. Ch. 235; 64 L. T. 21; 8 Rep. Pat. Cas. 113.—ROMER, J., *opinion adopted.*

Acetylene Illuminating Co. v. United Alkali Co. (1902) 71 L. J. Ch. 301; [1902] 1 Ch. 494; 50 W. R. 361.—BUCKLEY, J.

3. LETTERS PATENT.

Heathorn's Patent, In re (1864) 10 Jur. (N.S.) 810; 10 L. T. 802; 12 W. R. 1068.—L.C., *overruled.*

Vincent's Patent, In re (1867) L. R. 2 Ch. 341; 15 W. R. 524.—CHELMSFORD, L.C.

Yates, Ex parte, (1869) L. R. 5 Ch. 1; 21 L. T. 663; 18 W. R. 1.—L.C., *followed.*

Manceaux, Ex parte, (1870) L. R. 5 Ch. 518; 18 W. R. 854.—L.C.

Manceaux, Ex parte, *principle adopted.*
Sheffield, Ex parte (1872) 42 L. J. Ch. 356; L. R. 8 Ch. 237; 21 W. R. 233.—L.C.

Dreschel v. Auer Incandescent Light Manufacturing Co. (1898) 6 Ex. C. R. 55; 28 Sup. C. R. 608, *considered.*

Dominion Cotton Mills Co. v. General Engineering Company of Ontario (1902) 71 L. J. P. C. 119; [1902] A. C. 570; 87 L. T. 186.—P.C.

Milligan v. Marsh (1856) 2 Jur. (N.S.) 1083.—V.-C.; and **Renard v. Levinstein** (1864) 10 L. T. 177.—L.J.J., *explained.*

Avery's Patent, In re (1887) 56 L. J. Ch. 586; 36 Ch. D. 307; 56 L. T. 324; 35 W. R. 541.—STIRLING, J.; *affirmed*, 56 L. J. Ch. 1007; 36 Ch. D. 307; 57 L. T. 506; 36 W. R. 249.—C.A.

Nickels v. Ross (1849) 8 C. B. 679.—C.P., *considered.*

Avery's Patent, In re (*supra*).

4. SPECIFICATION.

Penn v. Bibby (1866) 36 L. J. Ch. 455; L. R. 2 Ch. 127; 15 L. T. 399; 15 W. R. 208.—L.C., *applied.*

Ball v. Ray (1873) 30 L. T. 1; 22 W. R. 283.—L.C. and L.J.J.; and **Pirrie v. York Street Flax Spinning Co.** (1894) 11 R. P. C. 429, 449.—C.A. (Tr.).

Penn v. Bibby, commented on.

Shaw v. Barton (1895) 12 R. P. C. 282.—STIRLING, J.

Bates and Redgate's Patent, In re (1869) 38 L. J. Ch. 501; L. R. 4 Ch. 577; 21 L. T. 410; 17 W. R. 900.—L.C., *followed.*

Bailey's Patent, In re (1872) 42 L. J. Ch. 264; L. R. 8 Ch. 60; 27 L. T. 430; 21 W. R. 81.—L.C.

SELBORNE, L.C.—The case of *Bates and Redgate's Patent* proceeds, I think, on the very intelligible principle that the Crown cannot derogate from its own grant.—p. 265.

Bates and Redgate's Patent, In re, followed.

Henry's Patent, In re (1872) 42 L. J. Ch. 363; L. R. 8 Ch. 187; 21 W. R. 233.—SELBORNE, L.C.

Bates and Redgate's Patent, In re, followed but questioned.

Lee v. Walker (1872) 41 L. J. C. P. 91; L. R. 7 C. P. 121; 26 L. T. 70.—C.P.

Bates and Redgate's Patent, In re, questioned.

Dering's Patent, In re (1879) 13 Ch. D. 393; 42 L. T. 634; 28 W. R. 710.

CAIRNS, L.C.—I do not say that I wish to unsettle the decision in *Ex parte Bates and Redgate*, but I think that it is open to reconsideration (p. 393). . . . If this case were like the case of *Ex parte Bates and Redgate* I should certainly have hesitated for some time before I acted in opposition to that decision, considering the authority by whom that case was decided, and that that decision has been followed in subsequent cases. I may, however, state my objections to that decision, which I never could thoroughly understand. It has always seemed to me that if Parliament held out to inventors the advantage they should get from provisional protection, the inventor should have the enjoyment of that advantage for the six months granted to him. Parliament intended the six months to be for the completion of the invention, and for perfecting the specification, and never said that the applicant should be deprived of or lose that advantage by want of any due diligence on his part. The applicant was told that for six months he was to some extent secure. It always seemed to me that if a man applies on, say the 1st of May, for a patent, and another applies on, say the 1st of June, for a patent for the same thing, and the second applicant obtains the Great Seal first, it is very hard to deprive the applicant of the 1st of May of the benefit of his invention. It appears to me very like a breach of contract with the first inventor to give a subsequent applicant an advantage because the latter has outrun him, and a very hard thing upon him. However, the case before me is not like the case of *Ex parte Bates and Redgate*.—p. 395.

Stoner v. Todd (1876) 46 L. J. Ch. 32; 4 Ch. D. 58; 35 L. T. 661; 25 W. R. 38.

—M.R. *See*

United Telephone Co. v. Harrison (1882) 51 L. J. Ch. 705; 21 Ch. D. 720; 46 L. T. 620; 30 W. R. 724.—FRY, J.

Bailey v. Robertson (1878) 3 App. Cas. 1055; 38 L. T. 854; 27 W. R. 17.—H.L. (SC.). *See* **United Telephone Co. v. Harrison** (*supra*).

Bailey v. Robertson, dicta adopted.

Woodward v. Sansum (1887) 56 L. T. 247.—C.A.; and **Moseley v. Victoria Rubber Co.** (1887) 57 L. T. 142.—CHITTY, J.

Bailey v. Robertson, considered.

Siddell v. Vickers (1888) 39 Ch. D. 92, 98.—KEKEWICH, J.; *affirmed*, C.A. and H.L.

Bailey v. Robertson, applied.

Nuttall v. Hargreaves (1891) 61 L. J. Ch. 94; [1902] 1 Ch. 23; 65 L. T. 597; 40 W. R. 200.—C.A.

Vickers v. Siddell (1890) 60 L. J. Ch. 105; 15 App. Cas. 496; 63 L. T. 590; 39 W. R. 385.—H.L. (E.), *applied.*

Nuttall v. Hargreaves (1891) 61 L. J. Ch. 94;

[1892] 1 Ch. 23; 65 L. T. 597; 40 W. R. 200; 8 Rep. Pat. Cas. 273.—C.A.

LINDLEY, L.J.—In the face, therefore, of that 26th section [of the Patents, &c., Act, 1883] it appears to me that if upon the true construction of the two specifications [*i.e.*, the provisional and the complete specification] they are not for the same invention, the patent cannot be upheld, and that is the view taken by Lord Halsbury at all events in the case of *Vickers v. Siddell*. . . . That appears to me, I confess, to be the view which is most in accordance with the sections of the Act to which I have referred. It is a view in no way dissented from by the other learned law lords, although they abstain from expressing a positive opinion upon it. It is also quite consistent with the view taken by this Court in the same case when it was before the Court, because every member of the Court left that particular point of law open for further discussion. —p. 96.

Nuttall v. Hargreaves, distinguished.

Maudslough v. Morley (1895) 64 L. J. Ch. 245; 13 R. 323; 72 L. T. 106; 43 W. R. 266.—STIRLING, J.

Sharp's Patent, In re (1840) 10 L. J. Ch. 86; 3 Beav. 245.—M.R., *observed upon*.

Berdan's Patent, In re (1875) 44 L. J. Ch. 544; L. R. 20 Eq. 346; 23 W. R. 823.—JESSEL, M.R.

Singer v. Stassen (1884) 1 Rep. Pat. Cas. 121.—C.A., *referred to*.

Fusce Vesta Co. v. Bryant and May (1887) 56 L. J. Ch. 187; 34 Ch. D. 458; 56 L. T. 110; 35 W. R. 267.—KAY, J.

Singer v. Stassen, considered and applied.

Bray v. Gardner (1887) 56 L. J. Ch. 497; 34 Ch. D. 668; 56 L. T. 292; 35 W. R. 341.—C.A.

Singer v. Stassen, dictum not applied.

Woolfe's Patent, In re, Woolfe v. Automatic Picture Gallery (1902) 87 L. T. 95.—KEKEWICH, J.

Fusce Vesta Co. v. Bryant and May (1887)

56 L. J. Ch. 187; 34 Ch. D. 458; 56 L. T. 110; 35 W. R. 267.—KAY, J., *distinguished*.
Haslam Foundry and Engineering Co. v. Goodfellow (1887) 57 L. J. Ch. 245; 36 Ch. D. 118; 57 L. T. 788; 36 W. R. 391.

KAY, J.—This case differs from the *Fusce Vesta Case* in this respect, that in the *Fusce Vesta Case* very little had been done; but here I am told that the pleadings are completed, and that nothing remains but to prepare the evidence and bring the case on for trial.—p. 245.

[The motion was by the plaintiffs in an action for infringement for leave to amend their specification by striking out the second claim thereof; and the order made was as follows: Application granted. The plaintiffs to pay the costs of the application, and the costs of and occasioned by the disclaimer. The plaintiffs and defendants to be allowed to make all necessary amendments in their proceedings after disclaimer. The plaintiffs to undertake forthwith to amend their pleadings, confining the action to the specification as amended by the disclaimer, or to consent to the action being dismissed with costs. In the event of trial all other questions of costs reserved.]

Deeley's Patent, In re (1895) 64 L. J. Ch. 480; [1895] 1 Ch. 687; 72 L. T. 702.—C.A.; *varied nom.* **Deeley v. Perkes** (1896) 65 L. J. Ch. 912; [1896] A. C. 496; 75 L. T. 233.—H.L. (E.).

Moser v. Marsden (1895) 13 Rep. Pat. Cas. 24; 73 L. T. 667.—H.L. (E.); and **Deeley v. Perkes** (*supra*), *discussed*.

Dellwik's Patent, In re (1896) 65 L. J. Ch. 905; [1896] 2 Ch. 705.—CHITTY, J.

Deeley v. Perkes and Haslam Foundry and Engineering Co. v. Goodfellow (*supra*), *considered*.

Ludington Cigarette Machine Co. v. Baron Cigarette Machine Co. (1900) 69 L. J. Ch. 321; [1900] 1 Ch. 508; 82 L. T. 173; 48 W. R. 505.—C.A.

Headnote.—[In *Deeley v. Perkes* the patentee was put on terms not to bring any action in respect of the future user of machines already made in alleged infringement of the amended specification, not as common form, but on the special facts of the case.]

Deeley v. Perkes and Ludington Cigarette Co. v. Baron Cigarette Co., applied.

Geipel's Patent, In re (1903) 73 L. J. Ch. 47; [1903] 2 Ch. 715, 719; 89 L. T. 127; 52 W. R. 63.—BUCKLEY, J.

Gaulard and Gibbs' Patent, In re (1887) 57 L. J. Ch. 209; 5 Rep. Pat. Cas. 192.—KEKEWICH, J.; **Lang's Patent, In re** (1890) 7 Rep. Pat. Cas. 469, *discussed and distinguished*.

Owen's Patent, In re (1898) 68 L. J. Ch. 63; [1899] 1 Ch. 157; 79 L. T. 458; 47 W. R. 180.

STIRLING, J.—I was also referred to *Gaulard and Gibbs' Patent, In re*, in which an application was made for leave to amend by way of disclaimer—the disclaimer being really the excision of claim 3 of the specification; and upon that, in the same way as was allowed by the law officer in *Lang's Patent, In re*, certain portions of the body of the specification were allowed to be struck out or altered. These cases do not, in my opinion, help the present applicant [who desired an amendment by way of correction]. The very point, however, appears to have been present to the mind of Chitty, L.J. in *Yates v. Armstrong, Armstrong's Patent, In re* (*infra*). There, in dealing with an argument which had been addressed to the Court, he said: "The amendment that could be made, even if leave were granted, would merely be by way of disclaimer, that being clear under sect. 18 (and also under sect. 19), which uses the three terms, and shows that the term 'disclaimer,' which alone occurs in sect. 19, is so used advisedly." Therefore it appears to have been the opinion of the lord justice in that case that the word "disclaimer" in sect. 19 should not receive the extended meaning which is sought to be attached to it here, and that only an application for leave to amend by way of disclaimer ought to be granted. . . . That is the conclusion to which, independently of authority, I myself should have come.—p. 66.

Yates v. Armstrong, Armstrong's Patent, In re (1897) 77 L. T. 267; 14 Rep. Pat. Cas. 747.—CHITTY, J., *observations approved*.

Owen's Patent, In re (1898) 68 L. J. Ch. 63; [1899] 1 Ch. 157; 79 L. T. 458; 47 W. R. 180.—STIRLING, J. *See extract, supra*.

Perry v. Skinner (1837) 6 L. J. Ex. 124; 2 M. & W. 471; M. & H. 122; 1 Jur. 433.

—EX., *questioned*.

Reg. v. Mill (1850) 10 C. B. 379; 20 L. J. C. P. 16; 1 L. M. & P. 695; 15 Jur. 59.—C.P.

JERVIS, C.J.—What is the proper construction to be put upon the first section of the statute 5 & 6 Will. 4. c. 83. . . . But for the case of *Perry v. Skinner* I should have thought upon reading the clause in question, that the plain and obvious intention of the legislature was to allow a specification to be amended at any time by a disclaimer, and to provide, that, when such disclaimer should be perfected, due precautions being taken by the law officers of the crown, and such terms being imposed as they in their discretion shall think right, it should be deemed and taken to be, for all purposes, part of the original specification, except in the case of actions pending at the time of the filing of such disclaimer. If that be not the true meaning of the Act, it seems to me that the proviso "that no such disclaimer shall be receivable in evidence in any action or suit (save and except in any proceeding by *scire facias*) pending at the time when such disclaimer was inrolled." will be totally inoperative: because, if the construction put by the Court of Exchequer in *Perry v. Skinner*, upon the previous words be the correct one, then, inasmuch as the disclaimer is to be deemed and taken to be part of the letters patent, or of the specification, only "from thenceforth," that is, from the time of its inrolment, the proviso that it shall not be receivable in evidence in any action pending at the time of the inrolment, would be idle. I think, therefore, that, upon the true construction of the Act, the disclaimer is to be read as part of the specification, as from the time when the patent is granted. And I am warranted by my experience in these matters in saying, that no practical injustice or inconvenience can result from this construction.—p. 389.

Perry v. Skinner, *adopted*.

Woolfe v. Automatic Picture Gallery (1902) 72 L. J. Ch. 34; [1903] 1 Ch. 18; 87 L. T. 539.—C.A.; *affirming* 51 W. R. 121.—KEKEWICH, J.

5. INFRINGEMENT.

Heath v. Unwin, 12 C. B. 522; 16 Jur. 996.—EX. CH.; *reversed nom.* **Unwin v. Heath** (1855) 5 H. L. Cas. 505; 16 C. B. 713; 25 L. J. C. P. 8; 2 Web. P. C. 228, 236.—H.L. (E.).

Unwin v. Heath, *applied*.

Badische Anilin und Soda Fabrik v. Levinstein (1885) 29 Ch. D. 366, 398; 53 L. T. 750; 31 W. R. 913.—C.A.; *reversed* in H.L. (*see* col. 2061).

Unwin v. Heath, *distinguished*.

Incandescent Gas Light Co. v. De Mare Incandescent Gas Light System (1896) 13 Rep. Pat. Cas. 301.—WILLS, J.

Kelly v. Batchelar (1893) 10 Rep. Pat. Cas. 289.—NORTH, J., *distinguished*.

Dunlop Pneumatic Tyre Co. v. Neal (1899) 68 L. J. Ch. 378; [1899] 1 Ch. 807; 80 L. T. 746; 47 W. R. 632.

NORTH, J.—I think this case is distinct from *Kelly v. Batchelar*. I find from the report that

the conclusion I came to there was that the person who directed the ladder to be made had authority to give such instructions. In the present case I do not see that there was any such authority.—p. 378.

Elmslie v. Boursier (1869) 39 L. J. Ch. 328; L. R. 9 Eq. 217; 18 W. R. 665.—JAMES, V.-C., *adopted*.

Wright v. Hitchcock (1870) 39 L. J. Ex. 97; L. R. 5 Ex. 37.—EX.

Elmslie v. Boursier and Wright v. Hitchcock, *approved and followed*.

Von Heyden v. Neustadt (1880) 50 L. J. Ch. 126; 14 Ch. D. 230; 42 L. T. 300; 28 W. R. 496.—C.A.

Elmslie v. Boursier and Von Heyden v. Neustadt, *applied*.

Badische Anilin und Soda Fabrik v. Johnson (1897) 66 L. J. Ch. 497; [1897] 2 Ch. 322; 76 L. T. 434; 45 W. R. 481.—C.A.; *affirmed*, H.L. (E.), *infra*.

Elmslie v. Boursier and Von Heyden v. Neustadt, *held inapplicable*.

Saccharin Corporation v. Reitmeyer (1900) 69 L. J. Ch. 761; [1900] 2 Ch. 659; 83 L. T. 397.—COZENS-HARDY, J.

[The principle laid down in these cases that the importation into and sale in England of an article manufactured abroad according to a process patented by an English patent is an infringement of the patent, does not apply to a case where the defendant in an action for infringement has as commission agent entered into an agreement for delivery of the article at a foreign port, but has not himself either imported into or sold in England the infringing article. Such a defendant will not be deemed to have "exercised" the invention.]

Elmslie v. Boursier and Von Heyden v. Neustadt, *followed*.

Saccharin Corporation v. Anglo-Continental Chemical Works (1900) 70 L. J. Ch. 194; [1901] 1 Ch. 414; 48 W. R. 444.—BUCKLEY, J.

Sykes v. Howarth (1879) 48 L. J. Ch. 769; 12 Ch. D. 826; 41 L. T. 79.—FRY, J., *distinguished*.

Dunlop Pneumatic Tyre Co. v. Moseley (1904) 73 L. J. Ch. 417; [1904] 1 Ch. 612; 91 L. T. 40; 52 W. R. 454; 20 T. L. R. 314.—C.A.

Nobel's Explosives Company v. Jones, 49 L. J. Ch. 726; 42 L. T. 754; 28 W. R. 653.—V.-C.; *reversed*, (1881) 50 L. J. Ch. 582; 17 Ch. D. 721; 44 L. T. 593; 30 W. R. 294.—C.A.; *the latter decision affirmed*, (1882) 52 L. J. Ch. 339; 8 App. Cas. 5; 48 L. T. 490; 31 W. R. 388.—H.L. (E.).

Nobel's Explosives Co. v. Jones, *explained and distinguished*.

United Telephone Co. v. London and Globe Telephone Co. (1884) 53 L. J. Ch. 1158; 26 Ch. D. 766, 774; 51 L. T. 187; 32 W. R. 870.—BACON, V.-C.

Nobel's Explosives Co. v. Jones (*supra*, in C.A.), *dicta approved*.

Badische Anilin und Soda Fabrik v. Busse Chemical Works, Bindschedler (1897) 67 L. J. Ch. 141; [1898] A. C. 200; 77 L. T. 573; 46 W. R. 255.—H.L. (E.).

Badische Anilin und Soda Fabrik v. Basle Chemical Works. Bindschedler, considered.
British Motor Syndicate v. Taylor (1900) 70 L. J. Ch. 21; [1901] 1 Ch. 122; 83 L. T. 419; 49 W. R. 183.—C.A.

Minter v. Williams (1835) 5 L. J. K. B. 60; 4 A. & E. 251; 5 N. & M. 647; 1 H. & W. 585; 1 Web. Pat. Cas. 135.—K.B. See
Oxley v. Holden (1860) 30 L. J. C. P. 68; 8 C. B. (N.S.) 666, 704; 2 L. T. 464; 8 W. R. 626.—C.F.

Minter v. Williams, explained and distinguished.
United Telephone Co. v. London and Globe Telephone Co. (1884) 53 L. J. Ch. 1158; 26 Ch. D. 766, 774; 51 L. T. 187; 32 W. R. 870.—BACON, V.-C.

Minter v. Williams, commented on.
British Motor Syndicate v. Taylor (1900) 70 L. J. Ch. 21; [1901] 1 Ch. 122; 83 L. T. 419; 49 W. R. 183.—C.A.

Per ALVERSTONE, C.J.—It was not intended in the above case (*Minter v. Williams*) to lay down as a rule of law that the exposure for sale of a patented article by a person not having a licence from the owner of the patent could not be an infringement of the patent. If the decision could bear that construction it ought to be overruled.

Per WILLIAMS, L.J.—It was intended in that case to lay down the above rule, and the case was wrongly decided.

Oxley v. Holden (1860) 30 L. J. C. P. 68; 8 C. B. (N.S.) 666; 2 L. T. 464; 8 W. R. 626.—C.F., *approved*.

Harris v. Rothwell (1887) 56 L. J. Ch. 459; 35 Ch. D. 416; 56 L. T. 552; 35 W. R. 581.—C.A.

Oxley v. Holden, referred to.
British Motor Syndicate v. Taylor (1900) 70 L. J. Ch. 21; [1901] 1 Ch. 122; 83 L. T. 419; 49 W. R. 183.—C.A.

Incandescent Light Co. v. Brogden (1899) 16 Rep. Pat. Cas. 179.—KENNEDY, J., *applied*.

British Mutoscope and Biograph Co. v. Homer (1901) 70 L. J. Ch. 297; [1901] 1 Ch. 671; 84 L. T. 26; 49 W. R. 277.—FARWELL, J.

Caldwell v. Vanvliessen (1851) 21 L. J. Ch. 97; 9 Hare 415; 16 Jur. 115.—V.-C., *not applied*.

Betts v. Willmott (1871) L. R. 6 Ch. 239; 25 L. T. 188; 19 W. R. 369.—L.C.

Smith v. L. & S. W. Ry. (1854) Kay 408; 23 L. J. Ch. 562; 2 Eq. R. 428; 2 W. R. 310.—WOOD, V.-C.; and **Crosley v. Derby Gaslight Co.** (1838) 3 My. & Cr. 428, 431.—L.C., *observations applied*.

Price's Patent Candle Co. v. Bauwen's Patent Candle Co. (1858) 4 Kay & J. 727; 6 W. R. 318.—WOOD, V.-C.

Price's Patent Candle Co. v. Bauwen's Patent Candle Co., referred to.

Davenport v. Rylands (1865) 35 L. J. Ch. 204; L. R. 1 Eq. 302; 12 Jur. (N.S.) 71; 14 L. T. 53; 14 W. R. 243.—WOOD, V.-C.

Price's Patent Candle Co. v. Bauwen's Patent Candle Co., distinguished.
Betts v. Gallais (1870) L. R. 10 Eq. 392; 18 W. R. 945.—JAMES, V.-C.

Geary v. Norton (1846) 1 De G. & Sm. 9.—V.-C., *distinguished*.
Proctor v. Bayley (1889) 59 L. J. Ch. 12; 42 Ch. D. 390; 61 L. T. 752; 38 W. R. 100.—C.A.

Driffild and East Riding Linseed Cake Co. v. Waterloo Mills Co. (1886) 55 L. J. Ch. 391; 31 Ch. D. 638; 54 L. T. 210; 34 W. R. 360.—BACON, V.-C.; and **Combined Weighing and Advertising Co. v. Automatic Weighing Machine Co.** (1889) 58 L. J. Ch. 709; 42 Ch. D. 665; 61 L. T. 474.—KEKEWICH, J., *followed*.

Barrett v. Day (1890) 59 L. J. Ch. 464; 43 Ch. D. 435; 62 L. T. 597; 38 W. R. 362.—NORTH, J.

Driffild and East Riding Linseed Cake Co. v. Waterloo Mills Co.; and Combined Weighing and Advertising Co. v. Automatic Weighing Machine Co., approved.
Skinner v. Shew (1892) 62 L. J. Ch. 196; [1893] 1 Ch. 413; 2 R. 179; 67 L. T. 696; 41 W. R. 217.—C.A.

Proctor v. Bayley (1888) 59 L. J. Ch. 12; 42 Ch. D. 390; 61 L. T. 752; 38 W. R. 100.—C.A.

Adopted, Barrett v. Day (1890).—NORTH, J. (*supra*); *explained and distinguished*, **Werner Motors, Ltd. v. Gamage** (1903) [1904] 1 Ch. 264.—BYRNE, J.

Barrett v. Day (1890).—NORTH, J. (*supra*), *approved*.
Skinner v. Shew (1892).—C.A. (*supra*).

Skinner v. Shew (*supra*), *distinguished*.
Beven v. Welsbach Incandescent Gas Light Co. (1902) 20 R. P. C. 69, 73.—BYRNE, J.

Rollins v. Hinks (1872) 41 L. J. Ch. 358; L. R. 13 Eq. 355; 26 L. T. 56; 20 W. R. 287.—MALINS, V.-C. *followed*.
Axmann v. Lund (1874) 43 L. J. Ch. 655; L. R. 18 Eq. 330; 31 L. T. 119; 22 W. R. 789.—MALINS, V.-C.

Rollins v. Hinks and Axmann v. Lund, dissented from.
Hammersmith Skating Rink Co. v. Dublin Skating Rink Co. (1876) Ir. R. 10 Eq. 235.—CHATTEYTON, V.-C.

Rollins v. Hinks and Axmann v. Lund, considered.
Halsey v. Brotherhood (1880) 15 Ch. D. 514; 49 L. J. Ch. 786; 43 L. T. 366; 29 W. R. 9.—JESSEL, M.R.; *affirmed*. (18-1) 51 L. J. Ch. 233; 19 Ch. D. 386; 45 L. T. 640; 30 W. R. 279.—C.A.

JESSEL, M.R.—There are two cases before Vice-Chancellor Malins, which I am afraid have led to this action. The first is the case of *Rollins v. Hinks*. The Vice-Chancellor there lays down this proposition—that there is no presumption at law in favour of the validity of a patent. . . . I must first of all observe that *Wren v. Weild* (L. R. 4 Q. B. 730), was cited

before the Vice-Chancellor, and there the judges had held that that was not so, because they proceeded on the assumption that as the patent had not been set aside by *scire facias* it must be taken to be a good *bonâ fide* patent (p. 520). . . . The Vice-Chancellor's judgment is therefore founded on a proposition of law which I think is not sound. I have no doubt that a patent is *primâ facie* good as long as it stands, and the person who alleges it is not good must prove it. Then the Vice-Chancellor says:—"The rule is, that where letters patent have been recently granted, an injunction will not be granted till the right has been established." That is not quite correct either. . . . What the Vice-Chancellor said in *Asmann v. Lund* was this:—"The defendant declines to undertake to take proceedings at law to establish the validity of the patent, and I retain the opinion I expressed in *Rollins v. Hinks*—that, as he will not follow up the rights he asserts by proceeding to establish the validity of the patent, he ought to be restrained from circulating threats." But it does not appear to me that that is a ground for restraining the defendant. The question really is, whether the mere fact of a man threatening another that he will take proceedings for infringement is a ground for injunction, when he asserts there is an infringement. I think it is quite plain that it is not. The real point, I think, that the Vice-Chancellor intended to decide in *Asmann v. Lund* was that the assertion by the defendant of his rights was not *bonâ fide*.—p. 521.

Asmann v. Lund, considered.

Challender v. Royle (1887) 56 L. J. Ch. 995; 36 Ch. D. 425; 57 L. T. 734; 36 W. R. 357.—C.A.

Halsey v. Brotherhood (supra, col. 2076), explained.

Burnett v. Tak (or Tate) (1882) 45 L. T. 743.—KAY, J.

Halsey v. Brotherhood, approved.

Challender v. Royle (1887) 56 L. J. Ch. 995; 36 Ch. D. 425; 57 L. T. 734; 36 W. R. 357.—C.A.

Halsey v. Brotherhood, referred to.

Barrett v. Day (1890) 59 L. J. Ch. 464; 43 Ch. D. 435; 62 L. T. 597; 38 W. R. 362.—NORTH, J.; and Shinner v. Shew (1892) 62 L. J. Ch. 196; [1893] 1 Ch. 413; 67 L. T. 696; 41 W. R. 217.—C.A.

Halsey v. Brotherhood, applied.

Dipley v. Arthur (1900) 18 R. P. C. 82.—FARWELL, J.

Kurtz v. Spence (No. 1) (1886) 55 L. J. Ch. 919; 33 Ch. D. 579; 55 L. T. 317; 35 W. R. 26.—CHITTY, J., disapproved.

Challender v. Royle (1887) 56 L. J. Ch. 995; 36 Ch. D. 425; 57 L. T. 734; 36 W. R. 357.—C.A.

COTTON, L.J.—In my opinion where the words [of sect. 32 of the Patents Act, 1883] are, as I read them, that the Court must be satisfied "that the act complained of is not in fact an infringement of any legal right of the person making such threats," the question whether the patent of the person making the threats is a valid patent must come into consideration if the plaintiff in the action seeks it, because I cannot

see how, if a patent is invalid, there can be any act done in infringement of a legal right when the legal right depends only on the validity of that patent. I mention that because, as I understand, although the case is not before us on appeal, Chitty, J. [in *Kurtz v. Spence*] has intimated an opinion that the question of the validity of the patent could not come in question in an action like this. In my opinion—and I am bound to state it after the discussion we have had—it could, and in order that the Court may be satisfied whether there is or is not an infringement of any legal right, one of the questions must be, not only whether the instrument complained of is one which is an infringement of the patent if valid, but, if the plaintiff likes to raise the question, whether the patent is or is not valid.—pp. 1001, 1002.

Challender v. Royle, considered.

Kurtz v. Spence (No. 2) (1887) 57 L. J. Ch. 238; 58 L. T. 438.—KEKEWICH, J.

Challender v. Royle, applied.

Barrett v. Day (1890) 59 L. J. Ch. 464; 43 Ch. D. 435, 443; 62 L. T. 597; 38 W. R. 362.—NORTH, J.; and Colley v. Hart (1890) 59 L. J. Ch. 308; 44 Ch. D. 179; 62 L. T. 424; 38 W. R. 501.—NORTH, J.

Challender v. Royle, approved but qualified.

Johnson v. Edge (1892) 61 L. J. Ch. 262; [1892] 2 Ch. 1; 66 L. T. 44; 10 W. R. 437.—C.A. LINDLEY, LOPES and KAY, L.JJ.

LINDLEY, L.J.—We have read or had read to us, the judgment of Bowen, L.J. in that case, and, speaking subject to one qualification (which I will mention presently), it appears to me that the construction put by the learned judge on that section is right. I cannot suppose that the section prevents a patentee from saying that which the patent itself implies—that anybody infringing must expect legal proceedings to be taken against him. I do not think it can mean that. That is merely saying what everybody knows already. That is not a threat against anybody in particular. The Lord Justice went on to say as I understand him, that he doubted whether this section would apply unless there had been an actual infringement. I should like to qualify that a little by saying that I think, upon the true construction of this section, the section might apply to an intended infringement, provided that you could make out that the intended infringement, if carried out, would be an actual infringement.

Goulard v. Lindsay (1887) 56 L. T. 506.—

KAY, J., referred to.

Fenner v. Wilson (1893) 62 L. J. Ch. 984; [1893] 2 Ch. 656; 3 R. 629; 68 L. T. 748; 42 W. R. 57.—KEKEWICH, J.

Talbot v. La Roche (1854) 15 C. B. 310;

2 C. L. R. 886.—C.P.; and Needham v.

Oxley (1863) 1 H. & M. 248; 2 N. R.

267; 9 Jur. (N.S.) 598; 8 L. T. 532;

11 W. R. 745.—WOOD, V.-C., approved.

Ledgard v. Bull (1886) 11 App. Cas. 648.—P.C.

Benard v. Levinstein (1864) 13 W. R. 229;

11 L. T. 505.—WOOD, V.-C., distinguished.

Moss v. Malings (1886) 56 L. J. Ch. 126; 33 Ch. D. 603; 35 W. R. 165.

NORTH, J. distinguished *Renard v. Levinstein* upon the ground that in that case the defendant had made a case.

Penn v. Bibby (1866) L. R. 1 Eq. 548.—WOOD, V.-C., *referred to*.

Morgan v. Fuller (1866) L. R. 2 Eq. 297; 14 L. T. 353.—WOOD, V.-C.

Edison Telephone Co. v. India Rubber Co. (1881) 17 Ch. D. 137; 29 W. R. 496.—BACON, V.-C.

Followed, **Ehrlich v. Ihlee** (1887) 4 R. P. C. 115.—CHITTY, J.; *not applied*, **Pascall v. Toupe** (1890) 7 R. P. C. 125, 129.—KAY, J.; *followed*, **Morris v. Coventry Machinists Co.** (1891) 8 R. P. C. 353.—NORTH, J.; and **Salvo Laundry Co. v. Mackie** (1893) 10 R. P. C. 68.—WILLS, J.

Edison Telephone Co. v. India Rubber Co., *explained*.

Ehrlich v. Ihlee (*supra*), *distinguished*.

Wilson v. Wilson & Co. (1899) 16 R. P. C. 315.—C.A.

Holliday v. Heppenstall (1889) 58 L. J. Ch. 829; 41 Ch. D. 109; 61 L. T. 313; 37 W. R. 662.—COTTON and LINDLEY, L.J.J. *Applied*, **Phillips v. Ivel Cycle Co.** (1890) 62 L. T. 392.—KEKEWICH, J.; *distinguished*, **Nettlesolds v. Reynolds** (1891) 65 L. T. 699.—C.A.

Hull v. Bollard (1856) 1 H. & N. 134; 25 L. J. Ex. 304.—EX., *distinguished*.

Sykes v. Howarth (1879) 48 L. J. Ch. 769; 12 Ch. D. 826; 41 L. T. 79; 28 W. R. 215.—FRY, J.

Germ Milling Co. v. Robinson (1886) 55 L. T. 282; 3 Rep. Pat. Cas. 254.—STIRLING, J.; and **Albo-Carbon Light Co. v. Kidd** (1887) 4 Rep. Pat. Cas. 535.—KEKEWICH, J., *distinguished*.

Mandleberg v. Morley (1895) 64 L. J. Ch. 245; 13 R. 322; 72 L. T. 106; 43 W. R. 266.—STIRLING, J.

Longbottom v. Shaw (1889) 58 L. J. Ch. 734; 43 Ch. D. 46; 61 L. T. 325; 37 W. R. 792; 6 Rep. Pat. Cas. 143.—KAY, J., *applied*.

Mandleberg v. Morley (*supra*).

Mandleberg v. Morley, *followed*.

American Steel and Wire Co. v. Glover & Co. (1902) 50 W. R. 284.—FARWELL, J.

Nunn v. D'Albuquerque (1865) 34 Beav. 595.—M.R.

Distinguished, **Tonge v. Ward** (1869) 21 L. T. 480.—M.R.; *applied*, **Proctor v. Bayley** (1888) 42 Ch. D. 394, n.—V.-C.; *reversed*, C.A. (*supra*, col. 2076).

Trotman v. Wood (1864) 16 C. B. (N.S.) 479.—C.P., *observed upon*.

Adie v. Clark (1876) 3 Ch. D. 134; 24 W. R. 1007.—C.A.; *affirmed*, 46 L. J. Ch. 598; 2 App. Cas. 423; 37 L. T. 1; 25 W. R. 45.—H.L. (E.).

JAMES, L.J. (for the Court).—We are of opinion that the evidence [the specification of certain American patents] is clearly inadmissible for the purpose of construing the specification of the particular patent before us. The admissibility was put on some expressions in the judgment of the learned judges in the case of *Trotman v. Wood*, relating to Trotman's anchors. They are only *dicta*, because no such evidence was acted on in that case. It was never meant by the learned

judges, and it cannot be effectually contended that there is any principle to be applied to the construction of specifications which differs from that applicable to the construction of any written instrument whatever.—p. 142.

Galloway's Patent, In re (1843) 1 Webst. Pat. Cas. 724; 7 Jur. 453.—P.C., *explained*.

Penn v. Jack (1867) 37 L. J. Ch. 137; L. R. 5 Eq. 81; 17 L. T. 407; 16 W. R. 243.—WOOD, V.-C.

Penn v. Jack, *considered*.

Pneumatic Tyre Co. v. Puncture Proof Pneumatic Tyre Co. (1899) 16 Rep. Pat. Cas. 209.—C.A., *approved*.

British Motor Syndicate v. Taylor (1900) 70 L. J. Ch. 21; [1901] 1 Ch. 122; 83 L. T. 419; 49 W. R. 183.—C.A.

United Horse-Shoe and Nail Co. v. Stewart (1888) 13 App. Cas. 401; 59 L. T. 561.—H.L. (SC.), *commented upon and distinguished*.

American Braided Wire Co. v. Thomson (1890) 59 L. J. Ch. 425; 44 Ch. D. 274; 62 L. T. 616.—C.A. COTTON, LINDLEY and LOPES, L.J.J.; *reversing* 62 L. T. 64; 33 W. R. 329.—KEKEWICH, J.

COTTON, L.J.—As I have already stated, I think that Kekewich, J. misapplied that judgment [the judgment of Lord Macnaghten in the above case]. Lord Macnaghten was dealing with an entirely different case. He was not dealing with a case where the defendants were manufacturing an article which could only be made by the plaintiffs; but where they were manufacturing a thing which the plaintiffs had particular machinery for making; and there was in the market a competition of nails very similar to those which the plaintiffs made more cheaply by their machinery; and the defendants had been making a good many of these nails, and selling them, using the machinery for which the plaintiffs had a patent. But the plaintiffs had not merely followed the lead of the defendants in reducing their prices, they had always gone a little before the defendants in reducing their prices, and had reduced their prices below those at which the defendants were selling. . . . In my opinion therefore, that opinion was not one applicable to this case. There the plaintiffs were seeking to get as damages from the defendants the loss which they had sustained by their own action, which is entirely different from what was done here, because here it is found (and it was not so found by the Lord Ordinary in the case in question) that the plaintiffs would have sold all that had been sold at the original prices if it had not been for the wrongful acts of the defendants.—pp. 433, 434.

United Horse-Shoe and Nail Co. v. Stewart, *explained*.

British Motor Syndicate v. Taylor (1900) 70 L. J. Ch. 21; [1901] 1 Ch. 122; 83 L. T. 419; 49 W. R. 183.—C.A.

Powell v. Birmingham Vinegar Brewery Co. (1896) 14 Rep. Pat. Cas. 1.—C.A., *followed*.

Saccharin Corporation v. Chemicals and Drugs Co. (1900) 69 L. J. Ch. 820; [1900] 2 Ch. 556; 83 L. T. 206; 49 W. R. 1.—C.A.

Bovill v. Smith (1866) L. R. 2 Eq. 459.—V.-C., *not followed*.

Crossley v. Tomey (1876) 2 Ch. D. 533; 34 L. T. 476.—MALINS, V.-C.

Finnegan v. James (1874) 44 L. J. Ch. 185; L. R. 19 Eq. 72; 23 W. R. 373.—M.R., *followed*.
Crossley v. Tomey (1876).—V.C. (*supra*).

Finnegan v. James and Crossley v. Tomey, *followed*.
Birch v. Mather (1883) 52 L. J. Ch. 292; 22 Ch. D. 629; 31 W. R. 362.—CHITTY, J.

Finnegan v. James, *applied*.
Hayward v. Lely (1887) 56 L. T. 418, 419.—KAY, J.

Cropper v. Smith, 53 L. J. Ch. 891; 26 Ch. D. 700; 51 L. T. 729; 33 W. R. 60.—C.A.; *varied*, (1885) 55 L. J. Ch. 12; 10 App. Cas. 249; 53 L. T. 330; 33 W. R. 753.—H.L. (E.).

Cropper v. Smith (*supra*, in H.L.), *observed upon*.
Shoe Machinery Co. v. Cutlan (1895) 65 L. J. Ch. 44; [1896] 1 Ch. 108; 73 L. T. 419; 44 W. R. 92.—C.A. SMITH and RIGBY, L.JJ.

Cropper v. Smith, *observations adopted*.
Fisher v. Nation Newspaper Co. [1901] 2 Ir. R. 465, 485.—C.A.

Cropper v. Smith and Fisher v. Nation Newspaper Co., *referred to*.
Murphy v. Midland Great Western of Ireland Ry. [1903] 2 Ir. R. 5.—K.B.D.

Cropper v. Smith (No. 2) (1884) 54 L. J. Ch. 287; 28 Ch. D. 148; 52 L. T. 94; 33 W. R. 338.—CHITTY, J., *referred to*.
Hall, In re (1888) 57 L. J. Q. B. 494; 21 Q. B. D. 137; 59 L. T. 37; 36 W. R. 892.—Q.B.D.

De la Rue v. Dickinson (1857) 3 Kay & J. 388.—V.C. *See*
Elmer v. Creasy (1873) 43 L. J. Ch. 166; L. R. 9 Ch. 69, 73; 29 L. T. 632.—L.C. and L.JJ.; **Lea v. Saxby** (1875) 32 L. T. 731, 733.—EX.; **Ellington v. Clark** (1887) 58 L. T. 40, 41.—KAY, J.

De la Rue v. Dickinson, *distinguished*.
Ashworth v. Roberts (1890) 60 L. J. Ch. 27; 45 Ch. D. 623; 63 L. T. 160; 39 W. R. 170.—KEKEWICH, J.

Haslam v. Hall (1887) 5 Rep. Pat. Cas. 1, 27, 28. *See S. C. on appeal, nom. Haslam Foundry and Engineering Co. v. Hall* (1888) 57 L. J. Q. B. 352; 20 Q. B. D. 491; 59 L. T. 102; 36 W. R. 407.—C.A.

Haslam v. Hall (1887) 5 Rep. Pat. Cas. 1, 27, 28, *referred to*.
Badische Anilin und Soda Fabrik v. Société Chimique (1897) 14 Rep. Pat. Cas. 875, 892.

Haslam v. Hall, *not followed*.
Acetylene Illuminating Co. v. United Alkali Co. (1902) 71 L. J. Ch. 301; [1902] 1 Ch. 494; 50 W. R. 361.—BUCKLEY, J.

Automatic Weighing-Machine Co. v. Combined Weighing-Machine Co. (1889) 6 Rep. Pat. Cas. 475.—CHARLES, J., *followed*.

Saccharin Corporation v. Anglo-Continental Chemical Works (1901) 70 L. J. Ch. 194; [1901] 1 Ch. 414; 48 W. R. 444.—BUCKLEY, J.

Honiball v. Bloomer (1854) 24 L. J. Ex. 11; 10 Ex. 538; 3 C. L. R. 167; 1 Jur. (N.S.) 188; 3 W. R. 71.—EX., *not applied*.

Batley v. Kynock (1875) 44 L. J. Ch. 565; L. R. 20 Eq. 632; 33 L. T. 45.—V.C.

Honiball v. Bloomer, *observed upon*.
Parnell v. Mort (1885) 29 Ch. D. 325; 53 L. T. 186; 33 W. R. 481.—C.A.

COTTON, L.J.—That section (s. 43 of the Patent Law Amendment Act, 1852) is not in its terms binding in the Court of the County Palatine, but it is urged that it ought to be considered binding by way of analogy, when a Court of equity decides legal questions under Lord Cairns' Act or Sir John Rolfe's Act. **Honiball v. Bloomer** was relied on as deciding that, where there has been no such trial as to enable the judge to say that the objections are proved, the costs cannot be allowed. We need not determine whether that decision was right or wrong; we only say that we must not be considered as expressing our approval of it.—p. 328.

BOWEN, L.J.—I entertain some doubt as to **Honiball v. Bloomer**, but the point will probably never arise again.—p. 330.

Greaves v. Eastern Counties Ry. (1859) 28 L. J. Q. B. 290; 1 E. & E. 961; 7 W. R. 453.—Q.B.; and **Batley v. Kynock** (*supra*), *discussed*.

Middleton v. Bradley (1895) 64 L. J. Ch. 888; [1895] 2 Ch. 716; 13 R. 737; 73 L. T. 81; 43 W. R. 684.—STIRLING, J.

Middleton v. Bradley, *approved*.
Wilcox v. Janes (1897) 66 L. J. Ch. 525; [1897] 2 Ch. 71; 45 W. R. 474.—ROMER, J.

6. CONFIRMATION, RENEWAL AND EXTENSION.

Morgan's Patent, In re (1843) 1 Webst. Pat. Cas. 737.—P.C., *applied*.
Hopkinson's Patent, In re (1896) 66 L. J. P. C. 38; [1897] A. C. 249; 75 L. T. 462.—P.C.

Claridge's Patent, In re (1851) 7 Moo. P. C. 394; and **Norton's Patent, In re** (1863) 1 Moo. P. C. (N.S.) 339; 1 N. R. 557; 9 Jur. (N.S.) 419; 11 W. R. 720.—P.C., *followed*.

Bower-Barff Patent, In re (1895) [1895] A. C. 675; 73 L. T. 36; 11 R. 579; 12 Rep. Pat. Cas. 333.—P.C.

Claridge's Patent, In re, and Norton's Patent, In re, *applied*.
Hopkinson's Patent, In re (1896) 66 L. J. P. C. 38; [1897] A. C. 249; 75 L. T. 462.—P.C.

Betts' Patent, In re (1862) 1 Moore P. C. (N.S.) 49; 1 N. R. 137; 9 Jur. (N.S.) 137; 7 L. T. 577; 11 W. R. 221.—P.C., *followed*.

Poole's Patent, In re (1867) L. R. 1 P. C. 514, 518.—P.C.

Betts' Patent, In re, *approved of*.
Johnson's Patent, In re (1871) L. R. 4 P. C. 75; 8 Moore P. C. (N.S.) 232.—P.C.

Betts' Patent, In re, *applied*.
Winan's Patent, In re (1872) L. R. 4 P. C. 93; 8 Moore P. C. (N.S.) 306.—P.C.

Betts' Patent, In re, *followed*.
Blake's Patent, In re (1873) L. R. 4 P. C. 535, 537; 9 Moore P. C. (N.S.) 373.—P.C.

Betts' Patent, In re, *rule adopted*.
Adair's Patent, In re (1881) 6 App. Cas. 176, 179.—P.C.

Betts' Patent, In re, *applied*.
Wuterich's Patent, In re, (1903) 72 L. J. P. C. 60; [1903] A. C. 206; 85 L. T. 306.—P.C.

Poole's Patent, In re (1867) 4 Moore P. C. (N.S.) 452; L. R. 1 P. C. 514.—P.C., *observed upon*.

Johnson's Patent, In re (1871) L. R. 4 P. C. 75; 8 Moore P. C. (N.S.) 282.—P.C.

JAMES, L.J.—It was again suggested to their lordships that they ought not to take into consideration any of the profits made in America, and reference was made to *Poole's Patent*. Their lordships desire it to be understood that that case is not to be considered as laying down any general rule of law. . . . Their lordships are of opinion that where the question to be considered is, whether an invention has been sufficiently remunerative or not in taking into consideration the remuneration received, they must have regard to the remuneration which the invention has brought in to the patentee, or the person who claims the right of the patentee, whether it be in one country or another.—p. 82.

Poole's Patent, In re. *See*

Newton's Patent, In re (1884) 9 App. Cas. 592; 52 L. T. 329.—P.C.

Poole's Patent, In re. *See*

46 & 47 Vict. c. 57, s. 113.

Poole's Patent, In re. *See*

Pieper's Patent, In re (1895) 12 Rep. Pat. Cas. 293; 72 L. T. 782; 11 R. 581.—P.C.

Saxby's Patent, In re (1870) L. R. 3 P. C. 292; 7 Moore P. C. (N.S.) 82; 19 W. R. 513.—P.C., *approved*.

Clark's Patent, In re (1870) L. R. 3 P. C. 421; 7 Moore P. C. (N.S.) 255.—P.C.

JAMES, L.J. (for J.C.).—But their lordships have for their guidance principles laid down by their predecessors at this board, and they conceive it to be of vital importance in dealing with applications of this kind to adhere to any principle once clearly established. In a recent case (*Saxby's Patent*) it was laid down by this board in a judgment delivered by Lord Cairns thus:—"It is the habit of this tribunal to consider whether the invention brought before them is one of that high degree of merit which, if everything else were satisfactory, would entitle the patentee to a prolongation. But in the present case, as I have already stated, their lordships propose to deal with that which is at the very threshold of the case, the question of accounts. Now it is the duty of every patentee who comes for the prolongation of his patent to take upon himself the onus of satisfying this tribunal in a manner which admits of no controversy, what has been the amount of remuneration which, in every point of view, the invention has brought to him in order that their lordships may be able to come to a conclusion, whether that remuneration may fairly be considered a sufficient reward for his invention or not. It is not for this committee to send back the accounts for further particulars, nor to dissect the accounts for the purpose of surmising what might be their real outcome if they were differently cast. It is for the applicant to bring his accounts before the committee in a shape which will leave no doubt as to what the remuneration has been that he has received." Their lordships entirely concur in, and feel themselves bound by, this decision.—p. 425.

Saxby's Patent, In re, and Clark's Patent, In re, distinguished.

Houghton's Patent, In re (1871) L. R. 3 P. C. 461; 7 Moore P. C. (N.S.) 309.—P.C.

Saxby's Patent, In re, referred to.

Johnson's Patent, In re (1871) 8 Moore P. C. (N.S.) 282, 291; L. R. 4 P. C. 75, 82.—P.C.

Saxby's Patent, In re, referred to.

Wield's Patent (1871) 8 Moore P. C. (N.S.) 300; L. R. 4 P. C. 89, 91.—P.C.

Saxby's Patent, In re, applied.

Adair's Patent, In re (1881) 6 App. Cas. 176, 179.—P.C.

Saxby's Patent, In re. *See*

Thomas's Patent, In re (1892) 9 Rep. Pat. Cas. 367.—P.C.; **Clark's Patent, In re** (1899) 16 Rep. Pat. Cas. 433.—STIRLING, J.

Saxby's Patent, In re, followed.

Henderson's Patent, In re (1901) 70 L. J. P. C. 119; [1901] A. C. 616; 85 L. T. 358; 18 Rep. Pat. Cas. 449.—P.C.

Saxby's Patent, In re, applied.

Wuterich's Patent, In re (1903) 72 L. J. P. C. 60; [1903] A. C. 206; 88 L. T. 306.—P.C.

Johnson's Patent, In re (1871) 8 Moore P. C. (N.S.) 282; L. R. 4 P. C. 75.—P.C., *applied*.

Winan's Patent, In re (1872) 8 Moore P. C. (N.S.) 306; L. R. 4 P. C. 93.—P.C.

Johnson's Patent, In re, followed.

Blake's Patent, In re (1873) 9 Moore P. C. (N.S.) 373; L. R. 4 P. C. 535, 537.—P.C.

Winan's Patent, In re (1872) 8 Moore P. C. (N.S.) 306; L. R. 4 P. C. 93, *followed*.

Blake's Patent, In re (1873) 9 Moore P. C. (N.S.) 373; L. R. 4 P. C. 535.—P.C.

Semet and Solvay's Patent, In re (1894) 64 L. J. P. C. 41; [1895] A. C. 78; 71 L. T. 674; 11 R. 362.—P.C., *followed*.

Henderson's Patent, In re (1901) 70 L. J. P. C. 119; [1901] A. C. 616; 85 L. T. 358.—P.C.

Bower-Barff Patent, In re [1895] A. C. 675; 11 R. 579; 73 L. T. 36.—P.C., *applied*.

Hopkinson's Patent, In re (1896) 66 L. J. P. C. 38; [1897] A. C. 249; 75 L. T. 462.—P.C.

Bower-Barff Patent, In re, followed.

Henderson's Patent, In re (1901) 70 L. J. P. C. 119; [1901] A. C. 616; 85 L. T. 358.—P.C.

Hopkinson's Patent, In re (1896) 66 L. J. P. C. 38; [1897] A. C. 249; 75 L. T. 462.—P.C., *followed*.

Henderson's Patent, In re (1901) 70 L. J. P. C. 119; [1901] A. C. 616; 85 L. T. 358.—P.C.

Henderson's Patent, In re, applied.

Wuterich's Patent, In re (1903) 72 L. J. P. C. 60; [1903] A. C. 206; 88 L. T. 306.—P.C.

Brandon's Patent, In re (1884) 53 L. J. P. C. 84; 9 App. Cas. 589.—P.C.; and **Jabloch-koff's Patent** (1891) 60 L. J. P. C. 61; [1891] A. C. 293; 65 L. T. 5.—P.C., *distinguished*.

Marshall's Patent (1891) [1891] A. C. 430.—P.C. LORDS WATSON, HOBHOUSE, MACNAGHTEN

and HANNEN, SIR RICHARD COUCH and LORD SHAND.

LORD WATSON.—The petitioner in this case referred to and relied on the judgment of this board in *Brandon's Patent* as an authority in his favour to this extent, that his patent is not within the provisions of the recent Act of 1883, and that he has the right to apply for a renewal which is conferred upon patentees by older legislation. In no other respect is this case on all fours with *Brandon's Case*: it differs from that case and *Jabluchkoff's Patent* in this respect, that in those cases the patentee was in a position to prosecute his application with effect before the patent expired. That result in the circumstances of the present case is plainly impossible, because the petition was presented to the registrar on the very day on which the patent came to its natural end.—pp. 430, 431.

7. ASSIGNMENT AND LICENCE.

National Society for the Distribution of Electricity v. Gibbs (1899) 68 L. J. Ch. 503; [1899] 2 Ch. 289; 80 L. T. 524; 47 W. R. 518.—**COZENS-HARDY, J.**; *reversed*, (1900) 69 L. J. Ch. 457; [1900] 2 Ch. 280; 82 L. T. 443; 48 W. R. 499.—**C.A.** **LINDLEY, M.R., RIGBY and COLLINS, L.JJ.**

Betts v. Willmot (1871) L. R. 6 Ch. 239; 25 L. T. 188; 19 W. R. 369.—**L.C.**, *distinguished*.

Société Anonyme des Manufactures de Glaces v. Tilghman's Patent Sand Blast Company (1883) 25 Ch. D. 1; 53 L. J. Ch. 1; 49 L. T. 451; 32 W. R. 71.—**C.A.** **COTTON and LINDLEY, L.JJ.**

COTTON, L.J.—A case was referred to which it was said Pearson, J. would have acted upon but for the point which was relied on, viz., that in respect of the Belgian patent the defendants were agents only, whereas they were owners of the English patent. That was the case of *Betts v. Willmot*, which I think would not be an authority for what the plaintiffs are here contending for. In that case the owners of the English and foreign patents had sold abroad things manufactured in a foreign country. In my opinion the licence to use a patented invention under a foreign patent stands in a very different position from the sale of an article manufactured under either a foreign or an English patent. When an article is sold without any restriction on the buyer, whether it is manufactured under one or the other patent, that, in my opinion, as against the vendor gives the purchaser an absolute right to deal with that which he so buys in any way he thinks fit, and of course that includes selling in any country where there is a patent in the possession of and owned by the vendor. Here, as is pointed out, it is simply a licence to manufacture.—p. 9.

Ward v. Livesey (1888) 5 Rep. Pat. Cas. 102, *discussed*.

Guyot v. Thomson (1894) 64 L. J. Ch. 32; [1894] 3 Ch. 388; 8 L. 810, 814, n.; 71 L. T. 124, 416.—**ROMER, J.**; *affirmed*, **C.A.**

ROMER, J., on its being pointed out in argument that in *Ward v. Livesey* it was held that a licence under seal was forfeited on breach of the terms on which it was granted, asked how he could say that the licence in the case before him

was revocable when a lump sum had been paid down for the exclusive use of the patented invention, and it was held both by him and by the C.A. that the licence was not revocable at the will of the patentee.

8. PATENT AGENTS.

Institute of Patent Agents v. Lockwood (1894) 63 L. J. P. C. 74; [1894] A. C. 347; 6 R. 219; 71 L. T. 205.—**H.L.** (SC.), *applied*.

Starey v. Graham (1899) 68 L. J. Q. B. 257; [1899] 1 Q. B. 406; 80 L. T. 185; 47 W. R. 392.—**LAWRANCE and CHANNELL, JJ.**

Institute of Patent Agents v. Lockwood, *explained*.

Reg. v. Pharmaceutical Society [1899] 2 Ir. R. 140.—**Q.B.D.**

Institute of Patent Agents v. Lockwood, *discussed*.

Stevens v. Chown (1901) 70 L. J. Ch. 571; [1901] 1 Ch. 894, 908; 84 L. T. 796; 49 W. R. 460; 65 J. P. 470.—**FARWELL, J.**

Institute of Patent Agents v. Lockwood, *inapplicable*.

Rex v. Pettitt (1901) [1902] 2 Ir. R. 17.—**K.B.D.**

Institute of Patent Agents v. Lockwood, *followed*.

Devonport Corporation v. Tozer (1902) 71 L. J. Ch. 754; [1902] 2 Ch. 182; 86 L. T. 612.—**JOYCE, J.**

PAYMENT.

Pritchard v. Hitchcock (1843) 6 M. & G. 151; 12 L. J. C. P. 322; 6 Scott (N.R.) 851.—**C.P.**, *applied*.

Aiken v. Short (1856) 1 H. & N. 210; 25 L. J. Ex. 321; 4 W. R. 645.—**EX.**

Pritchard v. Hitchcock, *referred to*.

Newington v. Levy (1870) 39 L. J. C. P. 384; L. R. 5 C. P. 607, 612; 23 L. T. 70.—**C.P.**; *affirmed*, 40 L. J. C. P. 29; L. R. 6 C. P. 180; 23 L. T. 595; 19 W. R. 473.—**EX. CH.**

Pritchard v. Hitchcock, *applied*.

Petty v. Cooke (1871) 40 L. J. Q. B. 281; L. R. 6 Q. B. 790, 795; 25 L. T. 90; 19 W. R. 1112.—**Q.B.**

Ridley v. Tindall (1837) 7 A. & E. 134.—**K.B.**, *distinguished*.

Bonzi v. Stewart (1842) 11 L. J. C. P. 228; 4 Man. & G. 295; 5 Scott (N.R.) 1.—**C.P.**

Kearslake v. Morgan (1793) 5 Term Rep. 513.—**K.B.**, *approved*.

Price v. Price (1847) 16 L. J. Ex. 99; 16 M. & W. 232; 4 D. & L. 537.—**EX.**

Mercer v. Cheese (1842) 12 L. J. C. P. 56; 4 Man. & G. 804; 5 Scott (N.R.) 664; 2 D. (N.S.) 619.—**C.P.**, *not followed*.

Price v. Price (1847) 16 L. J. Ex. 99; 16 M. & W. 232; 4 D. & L. 537.—**EX.**

Price v. Price, followed.

National Savings Bank Association v. Tranah (1867) 36 L. J. C. P. 260; L. R. 2 C. P. 556; 16 L. T. 592; 15 W. R. 1015.—C.P.

Ford v. Beech (1848) 17 L. J. Q. B. 114; 11 Q. B. 852; 12 Jur. 310.—EX. CH., *disapproved*.

Belshaw v. Bush (1852) 22 L. J. C. P. 24; 11 C. B. 191; 17 Jur. 67.—C.P.

Ford v. Beech, commented on.

Bottomley v. Nuttall (1858) 28 L. J. C. P. 110; 4 C. B. (N.S.) 122; 5 Jur. (N.S.) 315.—C.P.

Ford v. Beech, dictum applied.

Coddington v. Paleologo (1867) 36 L. J. Ex. 73, 76; L. R. 2 Ex. 193, 198; 15 L. T. 581; 15 W. R. 961.—EX.

Ford v. Beech, distinguished.

Newington v. Levy (1870) 39 L. J. C. P. 384; L. R. 5 C. P. 607; 23 L. T. 70.—C.P.; *affirmed* in EX. CH. (*supra*, col. 2086).

Ford v. Beech, inapplicable.

Slater v. Jones (1873) 42 L. J. Ex. 122; L. R. 8 Ex. 186; 29 L. T. 56; 21 W. R. 815.—EX.

Belshaw v. Bush (1852) 22 L. J. C. P. 24; 11 C. B. 191; 17 Jur. 67.—C.P., *considered*.

Bottomley v. Nuttall (1858) 4 C. B. (N.S.) 122; 28 L. J. C. P. 110; 5 Jur. (N.S.) 315.—C.P.

Belshaw v. Bush, distinguished.

Rowe, *In re* (1904) 73 L. J. K. B. 594; [1904] 2 K. B. 483; 91 L. T. 220; 52 W. R. 628.—C.A.

Miller v. Race (1758) 1 Burr. 452.—K.B.

Adopted, Lichfield Union v. Greene (1857) 26 L. J. Ex. 140; 1 H. & N. 884; 3 Jur. (N.S.) 247; 5 W. R. 370.—EX.; *considered*, Moss v. Hancock (1899) 68 L. J. Q. B. 637; [1899] 2 Q. B. 111; 80 L. T. 693; 47 W. R. 698.—Q.B.D.

Camidge v. Allenby (1827) 5 L. J. (O.S.) K. B. 95; 6 B. & C. 373; 9 D. & R. 391; 30 R. R. 358.—K.B., *observations adopted*.

Lichfield Union v. Greene (1857) 26 L. J. Ex. 140; 1 H. & N. 884; 3 Jur. (N.S.) 247; 5 W. R. 370.—EX.

Camidge v. Allenby, distinguished.

Leeds Bank v. Walker (1883) 52 L. J. Q. B. 590; 11 Q. B. D. 84; 47 J. P. 502.—DENMAN, J.

Smith v. Mercer (1867) 37 L. J. Ex. 24; L. R. 3 Ex. 51; 17 L. T. 317.—EX., *followed*.

British and American Steam Navigation Co., *In re*, Pearce, *Ex parte* (1869) L. R. 3 Eq. 506; 17 W. R. 1077.—V.-C.

Smith v. Mercer, distinguished.

Leeds Bank v. Walker (1883) 52 L. J. Q. B. 590, 593; 11 Q. B. D. 84, 89; 47 J. P. 502.—DENMAN, J.

Pollard v. Bank of England (1871) 40 L. J. Q. B. 233; L. R. 6 Q. B. 623; 25 L. T. 415; 19 W. R. 1168.—Q.B., *distinguished*.

Deutsche Bank v. Beriro (1895) 73 L. T. 669; 1 Com. Cas. 255.—C.A.

Hough v. May (1836) 5 L. J. K. B. 186; 4 A. & E. 954; 6 N. & M. 535; 2 H. & W. 33.—K.B., *distinguished*.

Stewart v. Cawse (1859) 28 L. J. C. P. 193; 5 C. B. (N.S.) 737; 5 Jur. (N.S.) 650; 7 W. R. 187.—C.P.

Hough v. May and Gordon v. Strange (1847) 1 Ex. 477; 11 Jur. 1019.—EX., *distinguished*.

Caine v. Coulson (1863) 32 L. J. Ex. 97; 1 H. & C. 764; 7 L. T. 636; 11 W. R. 239.—EX.

Warwicke v. Noakes (1791) 1 Peake 98; and **Norman v. Ricketts** (1886) 2 Times L. R. 607.—HUDDLESTONE, B.; 3 Times L. R. 182.—C.A., *distinguished*.

Pennington v. Crossley (1897) 77 L. T. 43.—C.A.

Beaumont v. Greathead (1846) 15 L. J. C. P. 130; 3 D. & L. 631; 2 C. B. 494.—C.P., *followed*.

Thame v. Boast (1848) 17 L. J. Q. B. 339; 12 Q. B. 808; 12 Jur. 1024.—Q.B.

Beaumont v. Greathead and Thame v. Boast, distinguished.

Goodwin v. Cremer (1852) 22 L. J. Q. B. 30; 18 Q. B. 757; 17 Jur. 2.—Q.B.

Beaumont v. Greathead, opinion adopted.

Tetley v. Wanless (1867) 36 L. J. Ex. 153; L. R. 2 Ex. 275, 280; 16 L. T. 601; 15 W. R. 356.—EX. CH.

Farley v. Turner (1857) 26 L. J. Ch. 710; 3 Jur. (N.S.) 532; 5 W. R. 666.—V.-C., *distinguished*.

Barned's Banking Co., *In re*, Massey, *Ex parte* (1870) 39 L. J. Ch. 635; 22 L. T. 853; 18 W. R. 818.—M.R.

Williams v. Everett (1811) 14 East 582, 587, n. (a); 13 R. R. 315.—K.B.

Distinguished, Fruhling v. Schroeder (1835) 4 L. J. C. P. 169.—C.P.; *principle applied*, Robbins v. Fennell (1847) 17 L. J. Q. B. 77; 11 Q. B. 248; 12 Jur. 157.—Q.B.

Williams v. Everett, discussed.

Liversidge v. Broadbent (1859) 28 L. J. Ex. 332; 4 H. & N. 603; 7 W. R. 615.—EX.

Williams v. Everett, discussed and not applied.

Collins v. Brook (1860) 29 L. J. Ex. 255; 5 H. & N. 700; 6 Jur. (N.S.) 999; 2 L. T. 774; 8 W. R. 474.—EX. CH.

Williams v. Everett, referred to.

Fleet v. Perrins (1868) 37 L. J. Q. B. 233; L. R. 3 Q. B. 536; 9 B. & S. 575; 19 L. T. 147.—Q.B. (*affirmed*, EX. CH.); and Rustomjee v. Reg. (1876) 45 L. J. Q. B. 249; 1 Q. B. D. 487; 34 L. T. 278.—Q.B.D. (*affirmed*, C.A.).

Williams v. Everett, distinguished.

New Zealand Land Co. v. Ruston (1880) 5 Q. B. D. 474, 480.—FIELD, J.

Goddard v. Hodges (1832) 1 Cr. & M. 33; 3 Tyr. 239; 2 L. J. Ex. 20.—EX., *principle applied*.

Lucas v. Beach (1840) 1 Man. & G. 417; 1 Scott (N.R.) 350; 4 Jur. 631.—C.P.

Devaynes v. Noble (Clayton's Case) (1816)

1 Mer. 572; 15 R. R. 161.—M.R., *distinguished*.
 Simson v. Ingham (1823) 1 L. J. (o.s.) K. B. 234; 2 B. & C. 65; 3 D. & R. 249; 26 R. R. 273.—K.B.

Clayton's Case, adopted.

Williams v. Rawlinson (1825) 3 L. J. (o.s.) C. P. 164; 3 Bing. 71; 10 Moore 362; R. & M. 233; 28 R. R. 584.—C.P.; Peniberton v. Onkes (1827) 6 L. J. (o.s.) Ch. 35; 4 Russ. 154.—L.C.; Sterndale v. Hankinson (1827) 1 Sim. 393; 27 R. R. 210.—V.-C.

Clayton's Case, extended to Scotland.

Spiers v. Houston (1829) 4 Bli. (N.R.) 515.—H.L. (SC.).

Clayton's Case, applied.

Toulmin v. Copland (1836) 3 Y. & Coll. 625.—EX. [affirmed *nom.* Copland v. Toulmin (1840) West 164; 7 Cl. & F. 350.—H.L. (E.)]; Royal Bank of Scotland v. Christie (1841) 8 Cl. & F. 214, 228.—H.L. (SC.); Henniker v. Wigg (1843).—Q.B. (*infra*, col. 2093).

Clayton's Case, applied.

Pennell v. Deffell (1853) 4 De G. M. & G. 373; 23 L. J. Ch. 115; 18 Jur. 273; 1 W. R. 499.—L.J.; Merriman v. Ward (1860) 1 J. & H. 371.—WOOD, V.-C.; Siebel v. Springfield (1863) 9 L. T. 324; 12 W. R. 73.—Q.B.

Clayton's Case, referred to.

Boys, In re, Eedes v. Boys (1870) 39 L. J. Ch. 655; L. R. 10 Eq. 467.—M.R.

Clayton's Case, not applied.

Thompson v. Hudson (1871) L. R. 6 Ch. 320, 328; 24 L. T. 301; 19 W. R. 645.—L.J.; *reversing* 40 L. J. Ch. 28.—M.R.

Clayton's Case, applied.

Devonport and South Devon Steam Flour Mill Co., In re, Bateman's Case (1873) 42 L. J. Ch. 577.—WICKENS, V.-C.

Clayton's Case, limited.

City Discount Co. v. McLean (1874) 43 L. J. C. P. 344; L. R. 9 C. P. 692; 30 L. T. 883.—EX. CH.

Clayton's Case, rule in, held inapplicable.

Lacey v. Hill, Lency v. Hill (1876) 4 Ch. D. 537.—C.A.; S. C. *affirmed nom.* Read v. Bailey (1877) 47 L. J. Ch. 161; 3 App. Cas. 94; 37 L. T. 510; 26 W. R. 223.—H.L. (E.).

JAMES, L.J.—I am of opinion that *Clayton's Case* cannot be applied to fraudulent items.

MELLISH, L.J.—Suppose a partner fraudulently draws out 20,000*l.*, and then draws out nearly 10,000*l.*, more, which he enters in the books, so that it is a simple overdrawing without fraud. He then pays in 30,000*l.* It is contended that he has repaid the 20,000*l.*, and that unless he makes further fraudulent overdrawings there is no right of proof against his separate estate. But suppose he openly draws 30,000*l.* out again, the firm is cheated of the 20,000*l.* just as much as if he had never paid in the 30,000*l.* I am of opinion, therefore, that *Clayton's Case* cannot be applied to fraudulent debts of this nature.—p. 554.

Clayton's Case, considered.

Smith, Ex parte, Hamilton, In re (1877) 25 W. R. 760.—BK.

Clayton's Case, applied.

Kinnaird v. Webster (1878) 48 L. J. Ch. 348; 10 Ch. D. 139; 39 L. T. 494; 27 W. R. 212.—BACON, V.-C.; Taurine Co., In re, Anning's Claim (1878) 38 L. T. 53.—BACON, V.-C.; Browning v. Baldwin (1879) 40 L. T. 248, 249; 27 W. R. 644.—BACON, V.-C.

Clayton's Case, held inapplicable.

Hallett's Estate, In re, Knatchbull v. Hallett (1880) 49 L. J. Ch. 415; 13 Ch. D. 696; 42 L. T. 421; 28 W. R. 732.—C.A.; THESIGER, L.J. *dissenting*.

Clayton's Case, referred to.

Mawson, In re, Harlecastle, Ex parte (1881) 44 L. T. 523, 524.—BK.

Clayton's Case, applied.

Gallagher v. Ferris (1881) 7 L. R. Ir. 489, 496.—V.-C.

Clayton's Case, recognised.

Louden and County Banking Co. v. Ratcliffe (1881) 51 L. J. Ch. 28; 6 App. Cas. 722; 45 L. T. 322; 30 W. R. 109.—H.L. (E.).

Clayton's Case, held inapplicable.

Blackburn Building Society v. Cunliffe (1882) 22 Ch. D. 61; 31 W. R. 98.—C.A.; *affirmed*, (1884) 9 App. Cas. 857.—H.L. (E.).

Clayton's Case, explained.

Sherry, In re, London and County Banking Co. v. Terry (1884) 25 Ch. D. 692; 53 L. J. Ch. 404; 50 L. T. 227; 32 W. R. 394.—C.A.

SALBORNE, L.C.—The principle of *Clayton's Case*, and of the other cases which deal with the same subject, is this, that where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he *prima facie* appropriates them to that account, and the effect of that is, that the payments are *de facto* appropriated according to the priority in order of the entries on the one side and on the other of that account.—p. 702.

Clayton's Case, referred to.

Companies Acts, In re, Watson, Ex parte (1888) 21 Q. B. D. 307.—CAVE and WILLS, JJ.

Clayton's Case, distinguished.

Hancock v. Smith (1889) 58 L. J. Ch. 725; 41 Ch. D. 456; 61 L. T. 341.—C.A.; *reversing* 37 W. R. 459.—NORTH, J.

HALSBURY, L.C.—The rule in *Clayton's Case* is a very sound rule in cases such as that in which it was first applied, but here the circumstances are entirely different. The whole fund here consists of money not borrowed by the defendant from his clients, but received by him as agent for them, and therefore for the present purpose may be treated as trust money. Now as between *cestuis que trust* the rule is applicable, but it cannot be applied here, because no question arises between the different *cestuis que trust*. The question arises between them and a person who claims under a judgment against their trustee.

Clayton's Case, applied.

Parkinson v. Wakefield & Co. (1889) 5 Times L. R. 562.—POLLOCK, B. and MANISTY, J.

Clayton's Case, explained.

Miller, In re, Official Receiver Ex parte (1893) 62 L. J. Q. B. 324, 325; [1893] 1 Q. B. 327; 68 L. T. 867; 41 W. R. 243; 57 J. P. 469.—C.A.

Clayton's Case, not applied.

Wood, In re, Anderson v. City of London Mission (1894) 63 L. J. Ch. 772; [1894] 2 Ch. 577; 8 R. 817.—NORTH, J.

Clayton's Case, applied.

Stenning, In re, Wood v. Stenning [1895] 2 Ch. 433; 13 R. 807; 73 L. T. 207.—NORTH, J.

Clayton's Case, discussed and explained.

The Mecca (1897) 66 L. J. P. 86; [1897] A. C. 286; 46 L. T. 579; 572; 45 W. R. 667; 8 Asp. M. C. 266.—H.L. (E.); reversing C.A.; which affirmed BRUCE, J.

HALSBURY, L.C.—It is said that the account last referred to brings the question within the authority of *Clayton's Case*; and, in order to see whether this is so, it is necessary to consider what *Clayton's Case* was, and the reasons given by Sir W. Grant, who decided it. That learned judge says: Where an account current is kept between parties as a trading account, "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other." This rule, so formulated, has been adopted in all the Courts in Westminster Hall—see *Field v. Carr* (1828) 6 L. J. (O.S.) C. P. 203; 5 Bing. 13. It is to be remembered, however, that on more than one occasion it has been pointed out that this is not an invariable rule of law; but the circumstances of a case may afford ground for inferring that transactions of the parties were not so intended as to come under this general rule; . . . I think this case is not within the rule at all. This is not an account current; there is no setting one item against another; credit is given for the 900*l.* at the end of all the items. They are all separate transactions, and, although on one piece of paper, seem to represent only historically the transactions as they occurred. How the principle of Sir W. Grant's decision can apply to two transactions of identically the same date, I cannot understand. There is in respect of these items no earlier date—it is the mere fact that one precedes the other in its place on the paper. I think it would be extremely inconvenient in business to draw inferences from the shape or order of accounts, and I think would be an altogether novel application of a principle which has been established so long that I should feel great reluctance to engraft a new application upon it.—p. 88.

Clayton's Case, considered.

Mutton v. Peat (1899) 68 L. J. Ch. 668; [1899] 2 Ch. 556; 48 W. R. 62.—BYRNE, J.; reversed on the facts, (1900) 69 L. J. Ch. 484; [1900] 2 Ch. 79; 82 L. T. 440; 48 W. R. 486.—C.A.

Clayton's Case, distinguished.

Dougall v. Lornie (1899) 1 Fraser 1187.—CT. OF SESS.

Clayton's Case, applied.

Bank of N. S. W. v. Gouldburn Valley Butter Co. (1902) 71 L. J. P. C. 112; [1902] A. C. 543; 87 L. T. 88.—P.C.

Clayton's Case, inapplicable.

Smith v. Betty (1903) 72 L. J. K. B. 853; [1903] 2 K. B. 317; 89 L. T. 258; 52 W. R. 137.—C.A.; and Oatway, In re (1903) 72 L. J. Ch. 575; [1903] 2 Ch. 356; 88 L. T. 622.—JOYCE, J.

Kirby v. Marlborough (Duke) (1813) 2 M.

& S. 18; 14 R. R. 573; and *Williams v. Rawlinson* (1825) 3 L. J. (O.S.) C. P. 164; 3 Bing. 71; 10 Moore 362; R. & M. 233; 28 R. R. 584.—C.P., considered and applied.

Sherry, In re, London and County Banking Co. v. Terry (1884) 53 L. J. Ch. 404; 25 Ch. D. 692; 50 L. T. 227; 32 W. R. 394.—C.A.

Williams v. Rawlinson, inapplicable.

Boys, In re, Eedes v. Boys (1870) 39 L. J. Ch. 655; L. R. 10 Eq. 467, 470.—M.R.

Bodenham v. Purchas (1818) 2 B. & Ald. 39;

20 R. R. 342.—K.B., adopted.

Williams v. Rawlinson (1825) 3 L. J. (O.S.) C. P. 164; 3 Bing. 71; 10 Moore 362; R. & M. 233; 28 R. R. 584.—C.P.; and *Pemberton v. Oakes* (1827) 6 L. J. (O.S.) Ch. 35; 4 Russ. 154.—L.C.

Bodenham v. Purchas, limited.

Chitty v. Nash (1834) 2 D. P. C. 511.
TAUNTON, J.—The case of *Bodenham v. Purchas* was much narrowed by the case of *Simson v. Ingham* (2 B. & C. 65).—p. 515.

Bodenham v. Purchas, adopted.

Royal Bank of Scotland v. Christie (1841) 8 Cl. & F. 214.—H.L. (SC.); and *Henniker v. Wigg* (1843).—Q.B. (*infra*).

Bodenham v. Purchas, considered.

Strong v. Foster (1856) 25 L. J. C. P. 106; 17 C. B. 201; 4 W. R. 151.—C.P.

Bodenham v. Purchas, rule applied.

Siebel v. Springfield (1863) 9 L. T. 324; 12 W. R. 73.—Q.B.

Bodenham v. Purchas, approved.

City Discount Co. v. M'Lean (1874) 43 L. J. C. P. 344; L. R. 9 C. P. 692, 698; 30 L. T. 883.—EX. CH.

Bodenham v. Purchas, not applied.

Sherry, In re, London and County Banking Co. v. Terry (1884) 53 L. J. Ch. 404; 25 Ch. D. 692, 702; 50 L. T. 227; 32 W. R. 394.—C.A.

Simson v. Ingham (1823) 1 L. J. (O.S.) K. B.

234; 2 B. & C. 65; 3 D. & R. 249; 26 R. R. 273.—K.B., adopted.

Royal Bank of Scotland v. Christie (1841) 8 Cl. & F. 214.—H.L. (SC.); *Siebel v. Springfield* (1863) 9 L. T. 324; 12 W. R. 73.—Q.B.; *City Discount Co. v. M'Lean* (1874) 43 L. J. C. P. 344; L. R. 9 C. P. 692; 30 L. T. 883.—EX. CH.;

Hooper v. Keay (1875) 1 Q. B. D. 178; 34 L. T. 574; 24 W. R. 485.—Q.B.D.; Prince v. Oriental Bank (1878) 47 L. J. P. C. 42; 3 App. Cas. 325, 332; 38 L. T. 41; 26 W. R. 543.—P.C.; and Friend v. Young (1897) 66 L. J. Ch. 737; [1897] 2 Ch. 421, 437; 77 L. T. 50; 46 W. R. 139.—STIRLING, J.; and Smith v. Betty (1903) 72 L. J. K. B. 853; [1903] 2 K. B. 317; 89 L. T. 258; 52 W. R. 137.—C.A.

Henniker v. Wigg (1848) 4 Q. B. 792; D. & M. 160.—Q.B., *applied*.
Mosse v. Salt (1863) 32 Beav. 269; 32 L. J. Ch. 756.—M.R.

Henniker v. Wigg, *distinguished*.
Boys, In re, Eeles v. Boys (1870) 39 L. J. Ch. 655; 14 R. 10 Eq. 467.—M.R.

Henniker v. Wigg, *followed*.
City Discount Co. v. McLean (1874) L. R. 9 C. P. 692; 43 L. J. C. P. 344; 30 L. T. 833.—EX. CH.

BLACKBURN, J.—The true rule is that laid down in *Henniker v. Wigg*, which is that accounts rendered are evidence of the appropriation of payments to the earlier items, but that may be rebutted by evidence to the contrary.—p. 701.

Henniker v. Wigg, *explained*.
Hamilton, In re, Smith, Ex parte (1877) 25 W. R. 760, 761.—BK.

Henniker v. Wigg, *adopted*.
Hallett's Estate, In re, Knatchbull v. Hallett (1880) 49 L. J. Ch. 415, 434; 13 Ch. D. 696, 739; 42 L. T. 421; 28 W. R. 732.—C.A.; THESIGER, L.J. *dissenting*.

Henniker v. Wigg, *referred to*.
The Mecca (1897) 66 L. J. P. 86; [1897] A. C. 286, 295; 76 L. T. 579; 45 W. R. 667.—H.L. (E.).

Pennell v. Deffell (1853) 23 L. J. Ch. 115; 4 De G. M. & G. 372; 1 Eq. R. 579; 18 Jur. 273; 1 W. R. 499.—L.J.J. (*reversing M.R.*), *distinguished*.
Collinson v. Lister (1855) 23 L. J. Ch. 38; 7 De G. M. & G. 634; 2 Jur. (N.S.) 75; 4 W. R. 133.—L.J.J.

Pennell v. Deffell, *principle applied*.
Frith v. Cartland (1865) 34 L. J. Ch. 301; 2 H. & M. 417; 11 Jur. (N.S.) 238; 12 L. T. 175; 13 W. R. 493.—WOOD, V.-C.

Pennell v. Deffell, *followed*.
Brown v. Adams (1869) L. R. 4 Ch. 764; 39 L. J. Ch. 67; 21 L. T. 71; 17 W. R. 999.—GIFFARD, L.J.; *reversing JAMES, V.-C.*

GIFFARD, L.J.—H. had an account of his own at Messrs. D.'s, and this sum (5,000*l.*) was paid to his general account on the 29th October, 1868. After that the account goes on in the ordinary way of bankers' accounts; and supposing this sum of 5,000*l.* were not trust money, it is clear that it was drawn out again and again. It was argued that the case of *Pennell v. Deffell* does not decide that in such a case trust money is to be treated like an ordinary sum, and some observations of Knight Bruce, L.J. were referred to

as tending to prove that this case was like money placed by a trustee in a chest; but if we look at the words of the lords justices in that case, there can be no doubt as to the effect of the decision. There can be no question that at law, as between a banker and his customer, the debt is extinguished by the first payments made, and it would be an extraordinary thing if the debt could be in existence in equity when it is extinguished at law.—p. 766.

Pennell v. Deffell, *applied*.
European Bank, In re, Oriental Commercial Bank, Ex parte (1870) 39 L. J. Ch. 588, 590; L. R. 5 Ch. 358, 362; 22 L. T. 422; 18 W. R. 474.—GIFFARD, L.J.

Pennell v. Deffell, *adopted*.
G. E. Ry. v. Turner (1872) 42 L. J. Ch. 83; L. R. 8 Ch. 149, 153; 27 L. T. 697; 21 W. R. 163.—SELBORNE, L.C.

Pennell v. Deffell, *considered*.
Scheibler, In re, Cooper, Ex parte (1874) 31 L. T. 417, 420.—L.J.J.

Pennell v. Deffell, *referred to*.
Edinburgh Corporation v. Lord Advocate (1879) 4 App. Cas. 823, 835.—H.L. (SC.).

Pennell v. Deffell, *approved but not followed*.
West of England and South Wales District Bank, In re, Dale, Ex parte (1879) 48 L. J. Ch. 600; 11 Ch. D. 772; 40 L. T. 712; 27 W. R. 815.—FRY, J.

Pennell v. Deffell, *not followed on one point*.
Hallett's Estate, In re, Knatchbull v. Hallett (1879) 49 L. J. Ch. 415; 13 Ch. D. 696; 42 L. T. 421; 28 W. R. 732.—C.A.

JESSEL, M.R.—Now when we come to look at the case which was before Fry, J., the case of *Dale & Co., Ex parte*, we shall find him saying this: "Does it make any difference that instead of trustee and *cestui que trust* it is a case of fiduciary relationship? What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*. If that be a just description of the relationship, it would follow that wherever fiduciary relationship exists, and money coming from the trust lies in the hands of persons standing in that relationship, it can be followed and separated from any money of their own. That seems to be the logical result of *Pennell v. Deffell*." Up to that point I agree with every syllable, and I think it would be impossible to express the doctrine more clearly than it is there expressed by Fry, J. But now comes the unfortunate result, "but that result is opposed to the long line of authorities to which I have referred, and from which I do not feel myself justified upon any reasoning of my own in departing." So he here decided the case wrongly and against his own opinion and against the case of *Pennell v. Deffell* in deference to a long line of authorities. That being so, I feel bound to examine his supposed long line of authorities, which are not very numerous, and show that not one of them lends any support whatever to the doctrine or principle which he thinks is established by them.—p. 419. [His lordship considered in detail the cases

referred to and continued:] I think after those authorities it must now be considered settled that there is no distinction, and never was a distinction between a person occupying one fiduciary position or another fiduciary position as to the right of the beneficial owner to follow the trust fund, and that those cases which have been cited at law so far from establishing a distinction, establish the contrary, and that the mere error of supposing that equity could not follow or distinguish money in the cases supposed, if error it was, and perhaps it was not so originally . . . is attributable really to the fact that the judges who followed the earlier cases were not aware of what I may call the gradual refinement of the doctrine of equity.—p. 423.

Pennell v. Deffell, *referred to*.

Allcard v. Skinner (1887) 36 Ch. D. 145, 164; 56 L. T. 184; 35 W. R. 424.—**KEKEVICH, J.**; *affirmed*, 56 L. J. Ch. 1052; 36 Ch. D. 145; 57 L. T. 61; 36 W. R. 251.—**C.A. COTTON, LINDLEY, and BOWEN, L.JJ.**

Pennell v. Deffell, *referred to*.

Lyell v. Kennedy (1889) 14 App. Cas. 437.—**H.L. (E.). LORDS HALSBURY, L.C., SELBORNE, FITZGERALD, and MACNAGHTEN.**

Pennell v. Deffell, *applied*.

Bank of Ireland v. Cogry Spinning Co. (1899) [1900] 1 Ir. R. 219, 245.—**M.R.**

Thompson v. Hudson (1871) L. R. 6 Ch. 320;

24 L. T. 301; 19 W. R. 645.—**L.JJ., applied.**

Accidental Death Insurance Co., In re (1878) 47 L. J. Ch. 396; 7 Ch. D. 568; 26 W. R. 473.—**M.R.**

City Discount Co. v. McLean (1874) 43 L. J. C. P. 344; L. R. 9 C. P. 692; 30 L. T. 883.—**EX. CH., dictum adopted.**

Hooper v. Keay (1875) 1 Q. B. D. 178, 182; 34 L. T. 574; 24 W. R. 485.—**Q.B.D.**

City Discount Co. v. McLean, *explained*.

Hamilton, In re, Smith, Ex parte (1877) 25 W. R. 760, 761.—**BK.**

City Discount Co. v. McLean, *followed*.

Booth, In re, Browning v. Baldwin (1879) 40 L. T. 248; 27 W. R. 644.—**BACON, v.-c.**

City Discount Co. v. McLean, *adopted*.

Hallett's Estate, In re, Knatchbull v. Hallett (1880) 49 L. J. Ch. 415, 434; 13 Ch. D. 696, 739; 42 L. T. 421; 28 W. R. 732.—**C.A.; THESSIGER, L.J. dissenting.**

City Discount Co. v. McLean, *observations applied*.

The Mecca (1897) 66 L. J. P. 86; [1897] A. C. 286; 76 L. T. 579; 45 W. R. 667.—**H.L. (E.).**

Sherry, In re, London and County Banking

Co. v. Terry, 49 L. T. 556; 32 W. R. 270.—**BACON, v.-c.; reversed**, (1884) 25 Ch. D. 692; 53 L. J. Ch. 404; 50 L. T. 227; 32 W. R. 394.—**C.A. SELBORNE, L.C., COLERIDGE, C.J., and COTTON, L.JJ.**

Hancock v. Smith, 37 W. R. 459.—**NORTH, J.; reversed**, (1889) 58 L. J. Ch. 725; 41 Ch. D. 456; 61 L. T. 341.—**C.A. HALSBURY, L.C., COTTON and FRY, L.JJ.**

O.C.

Hancock v. Smith (*supra*, in C.A.), *distinguished*.

Stenning. In re, Wood v. Stenning (1895) [1895] 2 Ch. 433; 13 R. 807; 73 L. T. 207.

NORTH, J.—**Hancock v. Smith** was an entirely different case. There it was proved that all the moneys which had been paid into the stockbroker's banking account were moneys of his clients, and that he had paid to or for all his clients the moneys which he had received for them respectively, except in the case of the four clients who were claiming the balance at his banker's. That case was as different as possible from the present case, where it is proved that the claimant's money has been drawn out of the account. The claim must be disallowed.—p. 436.

Cuxon v. Chadley (1824) 3 B. & C. 591; 5 D. & R. 417; 3 L. J. (O.S.) K. B. 63.—**K.B., discussed.**

Liversidge v. Broadbent (1859) 28 L. J. Ex. 332; 4 H. & N. 603; 7 W. R. 615.—**EX. See headnote, infra.**

Walker v. Roston (1842) 11 L. J. Ex. 173; 9 M. & W. 411.—**EX., discussed.**

Liversidge v. Broadbent (1859) 28 L. J. Ex. 332; 4 H. & N. 603; 7 W. R. 615.—**EX. See headnote, infra.**

Walker v. Roston, *approved and adopted*.

Griffin v. Weatherby (1868) 37 L. J. Q. B. 280; L. R. 3 Q. B. 753; 9 B. & S. 726; 18 L. T. 881; 17 W. R. 8.—**Q.B.**

Walker v. Roston, *referred to*.

Greenway v. Atkinson (1881) 29 W. R. 560, 561.—**C.A. SELBORNE, L.C., BRAMWELL and BAGGALLAY, L.JJ.**

Hamilton v. Spottiswoode (1849) 18 L. J. Ex. 393; 4 Ex. 200.—**EX., distinguished.**

Liversidge v. Broadbent (1859) 28 L. J. Ex. 332; 4 H. & N. 603; 7 W. R. 615.—**EX.**

[*Headnote*.—The plaintiff, L., holding a dishonoured bill of C. for 60*l.*, and another bill for 53*l.* not due, applied, with C.'s consent, to the defendant B., who was indebted to C. in a larger amount, and the following document was thereupon prepared:—"I agree to authorise B. to pay L. or his order 113*l.*, the amount of two acceptances, towards my account with the above money. L.'s receipt to B. I acknowledge shall be binding between myself and B." This was signed by C., and the word "acknowledged" was then added by B. with his signature:—"Held that this amounted only to an authority by C. to B., and, there being no consideration moving from L., did not create a contract between L. and B. so as to give L. a right of action against B. for the 113*l.*"]

Hamilton v. Spottiswoode, *distinguished*.

Greenway v. Atkinson (1881) 29 W. R. 560, 561.—**C.A. SELBORNE, L.C., BRAMWELL and BAGGALLAY, L.JJ.**

Rose v. Rose (1756) Ambl. 331.—**L.C.; and Bennet, Ex parte** (1743) 2 Atk. 527.—**L.C., referred to.**

Thompson v. Hudson (1867) 36 L. J. Ch. 388,

403; L. R. 2 Ch. 275, 279; 16 L. T. 254; 15 W. R. 697.—L.Q. and L.J.; *reversed*, (1869) 38 L. J. Ch. 431; L. R. 4 H. L. 1.—H.L. (E.).

Mutton v. Peat (1899) 68 L. J. Ch. 668; [1899] 2 Ch. 556; 48 W. R. 62.—DYRNE, J.; *reversed*, (1900) 69 L. J. Ch. 484; [1900] 2 Ch. 79; 82 L. T. 440; 48 W. R. 486.—C.A. LINDLEY, M.R., RIGBY and COLLINS, L.JJ.

PEACE, BILL OF.

York Corporation v. Pilkington (1737) 1 Atk. 282 [*see* S. C., 2 Atk. 302; 9 Mod. 273; *ante*, vol. i., col. 1335], *followed*.
Smith v. Brownlow (Earl) (1870) L. R. 9 Eq. 241, 256; 21 L. T. 739; 18 W. R. 271.—M.R.

York Corporation v. Pilkington, *applied*.
Warwick v. Queen's College, Oxford (1870) 39 L. J. Ch. 636; L. R. 10 Eq. 105, 125.—M.R.; *affirmed*, (1871) 40 L. J. Ch. 780; L. R. 6 Ch. 716; 25 L. T. 254; 19 W. R. 1098.—L.C.

York Corporation v. Pilkington, *referred to*.
Betts v. Thompson (1870) L. R. 6 Ch. 735, n.—M.R.; *affirmed*, (1871) L. R. 6 Ch. 732; 25 L. T. 636; 19 W. R. 1100.—L.C.

York Corporation v. Pilkington, *distinguished*.
Att.-Gen. v. Barker (1872) 41 L. J. Ex. 57; L. R. 7 Ex. 177, 182; 26 L. T. 34; 20 W. R. 509.—IX.

York Corporation v. Pilkington, *referred to*.
Sewers Commissioners v. Gellatly (1876) 45 L. J. Ch. 788; 3 Ch. D. 610, 615; 24 W. R. 1059.—M.R.; and **Norwich Corporation v. Brown** (1883) 48 L. T. 898, 901.—CHITTY, J.

York Corporation v. Pilkington, *referred to*.
Grand Junction Waterworks Co. v. Hampton Urban Council (1898) 67 L. J. Ch. 603; [1898] 2 Ch. 331; 78 L. T. 673; 46 W. R. 644; 62 J. P. 566.—STIRLING, J.

York Corporation v. Pilkington, *distinguished*.
O'Keefe v. Walsh [1903] 2 Ir. R. 681, 716.—K.B.D. *affirmed*, C.A.

PENALTY.

Peachy v. Somerset (Duke) (1720) 1 Str. 447, *principle applied*.
Keating v. Sparrow, 1 Ball & B. 367.—L.C.; **Protector Endowment Loan Co. v. Grace** (1880) 49 L. J. Q. B. 812; 5 Q. B. D. 592, 595; 43 L. T. 561.—C.A. COCKBURN, C.J.; BAGGALLAY, BRAMWELL and BRETT, L.JJ.

Peachy v. Somerset (Duke), *dictum adopted*.
Dixon, In re (1900) 69 L. J. Ch. 609; [1900] 2 Ch. 561; 83 L. T. 129; 48 W. R. 665.—C.A.

Balf v. Peterson (1772) 2 Bro. P. C. 436; and **Huband v. Grattan** (1833) Alcock & Napier 38.—K.B. (IR.), *applied*.
Elphinstone (Lord) v. Monkland Iron and

Coal Co. (1886) 11 App. Cas. 332; 35 W. R. 17.—H.L. (SC.).

Astley v. Weldon (1801) 2 Bos. & P. 346; 5 R. R. 618, *adopted*.
Ranger v. G. W. Ry. (1854) 5 H. L. Cas. 72.—H.L. (E.).

Astley v. Weldon, *applied*.
Newman, In re, Capper, Ex parte (1876) 46 L. J. Bk. 57; 4 Ch. D. 724; 35 L. T. 718; 25 W. R. 244.—C.A.

Astley v. Weldon, *commented on*.
Wallis v. Smith (1882) 21 Ch. D. 243; 52 L. J. Ch. 145; 47 L. T. 389; 31 W. R. 214.—C.A. JESSEL, M.R., COTTON and LINDLEY, L.JJ.
JESSEL, M.R.—Now I have to consider (and I am afraid at some length) what the decisions are. I think they may be classed in this way. There is a series of decisions beginning—I do not say actually beginning, but beginning for this purpose—with **Astley v. Weldon**, which purports to be founded on older authority and ending with the case in the Appeal Court of *In re Newman* (*infra*, col. 2104), in which this has been determined—that where a sum of money is stated to be payable either by way of liquidated damages, or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, that is really as penalty, and you can only recover the actual damage, and the Court will not sever the stipulations. If any one of the stipulations is for the payment of the sum of money of less amount, then the proviso is bad. The ground of that doctrine I do not know. The ground stated by the judges in two or three of the cases is this—they say it was an extension to the common law of the well-known doctrine of equity. I do know a little of equity, but I am sorry to say I cannot assent to the accuracy of the statement that it is an extension to the common law of the well-known doctrine. However that is the ground put by the judges. Another ground may be put—I do not find it put anywhere, but it may be put—and there are some expressions which, though I do not say they amount to what I am about to say, tend that way; and that is the well-known doctrine, that in the construction of written instruments, you may depart from the written meaning of the words, if reading the words literally leads to an absurdity (p. 256). The next class of cases is this. It is a class of cases in which the amount of damages is not ascertainable *per se*, but in which the amount of damages for a breach of one or more of the stipulations either must be small, or will, in all human probability, be small—that is, where it is not absolutely necessary that they should be small; but it is so near to a necessity, having regard to the probabilities of the case, that the Court will presume it to be so. Then the question is, whether, in that class of cases, the same rule applies? Now, upon this, there is no decision. There are a great many *dicta* upon the question, and a great many *dicta* on each side. I do not think it necessary to express a final opinion in this case; but I do say this, that the Court is not bound by the *dicta* on either side, and the case is open to discussion. It is within the principle, if principle it be, of a larger sum being a penalty for non-payment of a smaller

sum: but at the same time it is also within another class of cases, to which I am now going to call attention. The class of cases to which I refer is that in which the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, but the stipulations may be of greater or less importance, or they may be of equal importance. There are *dicta* there which seem to say that if they vary much in importance the principle of which I have been speaking applies, but there is no decision. On the contrary, all the reported cases are decisions the other way; although the stipulations have varied in importance, the sum has always been treated as liquidated damages. I now come to the last class of cases. There is a class of cases relating to deposits. Where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all those cases the judges have held that this rule does not apply, and that the bargain of the parties is to be carried out. I think that exhausts the substance of the cases (p. 257). [The learned judge then discusses *Astley v. Weldon* at great length, and continues:] I have gone into that case rather minutely, because it is, I may say, the foundation of the subsequent cases on the subject. The next case, which is one of the greatest importance, is the case of *Kemble v. Farren* (*infra*, col. 2102), which has always been treated as a leading authority on the subject. I will not give a very positive opinion as to what the whole of that judgment means. I say so, because very eminent judges have taken very different views of the judgment, and therefore I suppose it is more ambiguous than it appears to me to be. But one thing is clear, that Tindal, C.J., in giving the opinion of the full Court, put an end, if I may say so, to any such doctrine as was shadowed forth by Heath, J. in the case I have just cited (p. 261). It appears to me that, rightly read, *Kemble v. Farren* does not go beyond *Astley v. Weldon*. I say so with some hesitation, because I know that there has been a difference between eminent judges as to whether or not the sentence I read about the breach of minute regulations (p. 148 of 6 Bing.) was not intended to apply to the whole of the judgment, and to say this, that where it is manifest that the damages must be minute, the same consideration applies as when the damages are ascertained at a certain sum (p. 262). There is a *dictum* of Coleridge, L.C.J. in *Magee v. Lazell* (*infra*, col. 2104). He says: "The general principle of law appears to me to be where a contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty." That is a *dictum* which is not supported by any decision, and it appears to me to be quite irreconcilable with principle. It is exactly opposed to what Tindal, C.J. says in *Kemble v. Farren*. The mere fact of the stipulations varying in importance cannot show that the parties did not fix a sum where the damage is not ascertainable; but I am bound to say that, though that is my opinion, and that I should have thought it was quite clear, I find that in the case of *In re Newman*, a decision of the Court of Appeal, that *dictum* is approved of. In the first place, James, L.J. says: "The authority of *Kemble v. Farren* cannot be considered

as having been in any degree nibbled away by those cases before Lord Wensleydale, which have been referred to, and which it is said show that the principle of *Kemble v. Farren* is to be confined to a case; in which, amongst other stipulations, there was one stipulation for the payment of a sum of money. That was not the *ratio decidendi* of *Kemble v. Farren*, in which it was laid down in broad terms that, wherever there is a sum mentioned at the end of a contract as damages for the non-performance of any of a great number of stipulations, there it must be treated as a penalty." With the greatest respect to James, L.J., it appears to me that the very contrary was laid down in express terms. There is some mistake about it, that is all I can say. Then he refers to the decision of Heath, J., in *Astley v. Weldon*, which was overruled, and which was obviously, in my opinion, wrong. As regards *Magee v. Lazell*, I have this observation to make—it was only a *dictum* during the argument of Coleridge, L.C.J. I distrust *dicta* in all cases, and especially *dicta* during argument. I must say, however, that in *In re Newman*, Bramwell, L.J. intimated his agreement with it, although, as I have already said, there is not only no decision to be found laying down such a doctrine, but it is really opposed to several judgments, including the two I have cited. Bramwell, L.J. himself refers to two cases—*Galsworthy v. Strutt* (*infra*, col. 2102) and *Athyns v. Kinnier* (*infra*, col. 2103)—which are decisions in favour of liquidated damages where there was more than one stipulation, so that we have not only *dicta* opposed to *dicta*, but we have decisions opposed to decisions.—p. 264.

LINDLEY, L.J.—But when I come to look at the cases I cannot find a single case in which the larger sum has been treated as penalty where there has been no smaller sum ascertainable as the amount of damages. The nearest approach to it is the case of *Betts v. Burch* (*infra*, col. 2103), and I shall refer to that because it was decided by Bramwell, L.J., whose familiarity with the subject is unquestionable. In order to understand *Betts v. Burch*, it is necessary to observe that the larger sum there, the 50*l.*, would have been payable, not only in the event of the non-payment of the whole, but on non-payment of the last pound of the price, and the judgment of Martin, B. proceeds entirely upon this.—p. 275.

Astley v. Weldon, principle applied.

Catton v. Bennett (1884) 51 L. T. 70.—KAY, J.

Astley v. Weldon, approved.

Elphinstone (Lord) v. Monkland Iron and Coal Co. (1886) 11 App. Cas. 332; 35 W. R. 17.—H.L. (SC.).

Astley v. Weldon dicta applied.

Law v. Redditch Local Board (1891) 61 L. J. Q. B. 172; [1892] 1 Q. B. 127; 66 L. T. 76; 56 J. P. 292.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Reilly v. Jones (1823) 1 Bing. 302; 8 Moore 244; 1 L. J. (O.S.) C. P. 105; 25 R. R. 640.—C.P., followed.

Lea v. Whitaker (1872) L. R. 8 C. P. 70; 27 L. T. 676; 21 W. R. 230.—C.P. *Ant. see post.*

Reilly v. Jones and Lea v. Whitaker (*supra*), *discussed*.

Magee v. Lavell (1874) L. R. 9 C. P. 107; 43 L. J. C. P. 131; 30 L. T. 169; 22 W. R. 334.—C.P.

COLERIDGE, C.J.—The judgment in *Reilly v. Jones* went to a very great extent on the doctrine that the use of the words "liquidated damages" was conclusive. That doctrine has clearly been overruled by *Kemble v. Farren* (6 Bing. 141), which is a leading authority on the subject. The general principle of law appears to be that where the contract contains a variety of stipulations of different degrees of importance, and one large sum is stated at the end to be paid on breach of performance of any of them, that must be considered as a penalty.—p. 111.

KEATING, J.—With regard to the second question, I desire to add a few words as to what passed in this Court in the case of *Lea v. Whitaker*. In that case reference was made to the case of *Reilly v. Jones*, and reliance has been placed on that decision in the present case. Now, it was pointed out by my lord during the argument, that one of the grounds on which *Reilly v. Jones* was decided was, that no case had been decided, in which, when the parties had used the expression "liquidated damages," the Court had held that a penalty was intended and that the subsequent decisions have not treated that consideration as conclusive. I no doubt referred to *Reilly v. Jones*, in the case of *Lea v. Whitaker* without making the requisite qualification with respect to it; but the ground on which the remaining members of the Court proceeded, though they cited *Reilly v. Jones*, was that established by the subsequent cases. The facts of *Lea v. Whitaker* pointed very strongly to the conclusion that the damages were liquidated, for there the sum of 40*l.* had actually been deposited in the hands of a stakeholder to be paid over to the party against whom a breach of the agreement should be committed, and the words were "either party failing, &c., shall forfeit to the other his deposit money as and for liquidated damages." The Court held the 40*l.* to be liquidated damages, not merely because the words "liquidated damages" were used, but from the nature of the case with respect to the deposit of the money, it being difficult to see how the stakeholder could apportion the sum in accordance with the damage sustained from the breach of any particular stipulation. It seems to me, therefore, that the case of *Lea v. Whitaker* was rightly decided.—p. 116.

Reilly v. Jones and Lea v. Whitaker. *See*

Wallis v. Smith (1882) 52 L. J. Ch. 145; 21 Ch. D. 243, 249; 47 L. T. 389; 31 W. R. 214.—C.A. JENSEN, M.R., COTTON and LINDLEY, L.JJ.

Davies v. Penton (1837) 5 L. J. (o.s.) K. B. 112; 6 B. & C. 216; 9 D. & R. 369; 30 R. R. 298.—K.B. *See*

Kemble v. Farren (1829) 7 L. J. (o.s.) C. P. 258; 6 Bing. 141; 3 M. & P. 425; 3 Car. & P. 623; 31 R. R. 366.—C.P.; *Magee v. Lavell* (1874) 43 L. J. C. P. 131; L. R. 9 C. P. 107; 30 L. T. 169; 22 W. R. 334.—C.P.; *Wallis v. Smith* (1882) 52 L. J. Ch. 145; 21 Ch. D. 243; 47 L. T. 389; 31 W. R. 214.—C.A.; *Elphinstone (Lord) v. Monkland Iron and Coal Co.* (1886) 11 App. Cas. 332; 35 W. R. 17.—H.L. (sc.); and *Willson v. Love* (1896) 65 L. J. Q. B. 474; [1896] 1 Q. B. 626; 74 L. T. 580; 44 W. R. 450.—C.A.

Kemble v. Farren (1829) 7 L. J. (o.s.) C. P. 258; 6 Bing. 141; 3 M. & P. 425; 3 Car. & P. 623; 31 R. R. 366.—C.P., *approved and followed*.

Horner v. Flintoff (1842) 11 L. J. Ex. 270; 9 M. & W. 678.—EX.

Kemble v. Farren, approved and followed.

Green v. Price (1845) 14 L. J. Ex. 105; 13 M. & W. 695; 9 Jur. 857.—EX.

Kemble v. Farren and Horner v. Flintoff (*supra*), *explained and approved*.

Galsworthy v. Strutt (1848) 17 L. J. Ex. 226; 1 Ex. 659.—EX.

Kemble v. Farren, considered and approved.

Atkins v. Kinnier (1850) 19 L. J. Ex. 132; 4 Ex. 776.—EX.

Kemble v. Farren, adopted.

Ranger v. G. W. Ry. (1854) 5 H. L. Cas. 72.—H.L. (E.).

Kemble v. Farren, referred to.

Reynolds v. Bridge (1856) 26 L. J. Q. B. 12; 6 Bl. & Bl. 528; 2 Jur. (N.S.) 1164; 4 W. R. 640.—Q.B.; *Reindel v. Schell* (1858) 27 L. J. C. P. 146; 4 C. B. (N.S.) 97; 4 Jur. (N.S.) 310.—C.P.

Kemble v. Farren, discussed.

Bonsall v. Byrne (1868) 16 W. R. 372.—EX. (IR.).

Kemble v. Farren, explained and distinguished.

Thompson v. Hudson (1869) 38 L. J. Ch. 431; L. R. 4 H. L. 1.—H.L. (E.); *reversing* 36 L. J. Ch. 388; 15 W. R. 697.—L.C. and L.J.

Kemble v. Farren, referred to.

Lea v. Whitaker (1873) L. R. 8 C. P. 70; 27 L. T. 676; 21 W. R. 230.—C.P.; *Magee v. Lavell* (1874) 43 L. J. C. P. 131; L. R. 9 C. P. 107; 30 L. T. 169; 22 W. R. 334.—C.P.

Kemble v. Farren, discussed.

Wallis v. Smith (1882) 52 L. J. Ch. 145; 21 Ch. D. 243; 47 L. T. 389; 31 W. R. 214.—C.A. *See extract, ante*, col. 2098.

Kemble v. Farren, applied.

Johnson v. Colquhoun (1883) 32 W. R. 124.—GROVE and MATHEW, JJ.

Kemble v. Farren, principle applied.

Catton v. Bennett (1884) 51 L. T. 70.—KAY, J.

Kemble v. Farren. See

Elphinstone (Lord) v. Monkland Iron and Coal Co. (1886) 11 App. Cas. 332; 35 W. R. 17.—H.L. (sc.).

Kemble v. Farren, distinguished.

Law v. Redditch Local Board (1891) 61 L. J. Q. B. 172; [1892] 1 Q. B. 127; 66 L. T. 76; 56 J. P. 292.—C.A. EMMER, M.R., LOPES and KAY, L.JJ.

Kemble v. Farren, discussed.

Willson v. Love (1896) 65 L. J. Q. B. 474; [1896] 1 Q. B. 626; 74 L. T. 580; 44 W. R. 450.—C.A.

Galsworthy v. Strutt (1848) 17 L. J. Ex. 226; 1 Ex. 659.—EX., *considered*.

Newman, In re, Capper, Ex parte (1876) 46 L. J. Bk. 57; 4 Ch. D. 724; 35 L. T. 718; 25 W. R. 244.—C.A. *And see supra*, col. 2100.

Atkyns v. Kinnier (1850) 19 L. J. Ex. 132; 4 Ex. 776.—EX., *followed*.
Reynolds v. Bridge (1856) 26 L. J. Q. B. 12; 6 El. & Bl. 528; 2 Jur. (N.S.) 1164; 4 W. R. 640.—Q.B.

Atkyns v. Kinnier, *discussed*.
Bonsall v. Byrne (1868) 16 W. R. 372.—EX. (IR.).

Atkyns v. Kinnier, *referred to*.
Moufflet v. Cole (1872) 42 L. J. Ex. 8; L. R. 8 Ex. 32; 27 L. T. 678; 21 W. R. 175.—EX. CH.; **Wallis v. Smith** (1882) 52 L. J. Ch. 145; 21 Ch. D. 243; 47 L. T. 389; 31 W. R. 214.—C.A.
See extract, supra, col. 2098.

Reynolds v. Bridge (1856) 26 L. J. Q. B. 12; 6 El. & Bl. 528; 2 Jur. (N.S.) 1164; 4 W. R. 640.—Q.B., *observed upon*.

Mercer v. Irving (1858) 27 L. J. Q. B. 291; El. Bl. & El. 563; 5 Jur. (N.S.) 143; 6 W. R. 661.—Q.B.

Reynolds v. Bridge, *applied*.
Wallis v. Smith (1882) 52 L. J. Ch. 145; 21 Ch. D. 243; 47 L. T. 389; 31 W. R. 214.—C.A.

Betts v. Burch (1859) 28 L. J. Ex. 267; 4 H. & N. 506; 1 F. & F. 485; 7 W. R. 546.—EX., *approved but distinguished*.

Hinton v. Sparks (1868) 37 L. J. C. P. 81; L. R. 3 C. P. 161; 17 L. T. 600; 16 W. R. 360.—C.P.; *and see* **Lea v. Whitaker** (1872) L. R. 8 C. P. 70; 27 L. T. 676; 21 W. R. 230.—C.P.

Betts v. Burch, *considered*.
Newman, In re, Capper, Ex parte (1876) 46 L. J. Bk. 57; 4 Ch. D. 724; 35 L. T. 718; 25 W. R. 244.—C.A.

Betts v. Burch, *explained*.
Wallis v. Smith (1882) 52 L. J. Ch. 145; 21 Ch. D. 243; 47 L. T. 389; 31 W. R. 214.—C.A.
See extract, supra, col. 2098.

Betts v. Burch, *referred to*.
Catton v. Bennett (1884) 51 L. T. 70.—KAY, J.

Betts v. Burch, *approved*.
Elphinstone (Lord) v. Monkland Iron and Coal Co. (1886) 11 App. Cas. 332; 35 W. R. 17.—H.L. (SC.).

Thompson v. Hudson (1866) L. R. 2 Eq. 612.—M.R.; *affirmed*, (1867) L. R. 2 Ch. 255; 36 L. J. Ch. 388.—CHELMSFORD, L.C.; **TURNER, L.J.** *dissenting; the latter decision reversed*, (1869) 38 L. J. Ch. 431; L. R. 4 H. L. 1.—LORDS HATHERLEY, L.C., WESTBURY and COLONSAY.

Thompson v. Hudson, *referred to*.
Newman, In re, Capper, Ex parte (1876) 46 L. J. Bk. 57; 4 Ch. D. 724, 733; 35 L. T. 718; 25 W. R. 244.—C.A.

Thompson v. Hudson and Sterne v. Beck (1863) 32 L. J. Ch. 682; 1 De G. J. & S. 595; 2 N. R. 346; 8 L. T. 588; 11 W. R. 791.—L.J.J., *observed upon*.

Protector Endowment Loan Co. v. Grice (1880) 49 L. J. Q. B. 812; 5 Q. B. D. 592; 43 L. T. 564.—C.A. **COLERIDGE, C.J.**, **BAGGALLAY, BRAMWELL** and **BRETT, L.J.J.**

Wright v. Tracey (1873) Ir. R. 7 C. L. 134. —C.P., *disapproved*.

Willson v. Love (1896) 65 L. J. Q. B. 474; [1896] 1 Q. B. 626; 74 L. T. 580; 44 W. R. 450.—C.A. **ESHER, M.R.**, **SMITH** and **RIGBY, L.J.J.**

Magee v. Lavell (1874) 43 L. J. C. P. 131; L. R. 9 C. P. 107; 30 L. T. 169; 22 W. R. 334.—C.P., *considered*.

Newman, In re, Capper, Ex parte (1876) 46 L. J. Bk. 57; 4 Ch. D. 724; 35 L. T. 718; 25 W. R. 244.—C.A.

Magee v. Lavell, *distinguished*.
Scrutton v. Childs (1877) 36 L. T. 212.—Q.B.D.

Magee v. Lavell, *referred to*.
Wallis v. Smith (1882) 52 L. J. Ch. 145; 21 Ch. D. 243; 47 L. T. 389; 31 W. R. 214.—C.A.
See extract, supra, col. 2098.

Magee v. Lavell, *applied*.
Bonsall v. Byrne (1867) Ir. R. 1 C. L. 573.—EX., *observed upon*.

Browne v. Phillips (1882) 10 L. R. Ir. 212.—EX. D.; *and see* **Dickson v. Lough** (1886) 18 L. R. Ir. 518.—Q.B.D.

Newman, In re, Capper (or Odiham School Governors), Ex parte, 46 L. J. Bk. 6; 35 L. T. 558; 25 W. R. 100.—BACON, C.J.; *reversed*, (1876) 46 L. J. Bk. 57; 4 Ch. D. 724; 35 L. T. 718; 25 W. R. 244.—C.A.

Newman, In re, Capper, Ex parte, *considered*.

Wallis v. Smith (1882) 52 L. J. Ch. 145; 21 Ch. D. 243; 47 L. T. 389; 31 W. R. 214.—C.A.
See extract, supra, col. 2098.

Newman, In re, Capper, Ex parte, *principle applied*.
Catton v. Bennett (1884) 51 L. T. 70.—KAY, J.

Newman, In re, Capper, Ex parte, *approved*.
Elphinstone (Lord) v. Monkland Iron and Coal Co. (1886) 11 App. Cas. 332; 35 W. R. 17.—H.L. (SC.).

Wallis v. Smith (1882) 52 L. J. Ch. 145; 21 Ch. D. 243; 47 L. T. 389; 31 W. R. 214.—C.A., *not applied*.

General Credit and Discount Co. v. Glegg (1883) 52 L. J. Ch. 297; 22 Ch. D. 549; 48 L. T. 182; 31 W. R. 421.—BACON, V.-C.; **Dickson v. Lough** (1886) 18 L. R. Ir. 518, 529.—Q.B.D.

Wallis v. Smith, *principle applied*.
Catton v. Bennett (1884) 51 L. T. 70.—KAY, J.; *and* **Barton v. Capewell Continental Patents Co.** (1893) 5 R. 374; 68 L. T. 857; 57 J. P. 712.—WILLS and CHARLES, JJ.

Wallis v. Smith, *referred to*.
Elphinstone (Lord) v. Monkland Iron and Coal Co. (*supra*), *dicta applied*.

Law v. Redditch Local Board (1891) 61 L. J. Q. B. 172; [1892] 1 Q. B. 127; 66 L. T. 76; 56 J. P. 292.—C.A. **ESHER, M.R.**, **LOPES** and **KAY, L.J.J.**

Wallis v. Smith, *approved*.
Elphinstone (Lord) v. Monkland Iron and Coal Co., *dicta applied*.

Willson v. Love (1896) 65 L. J. Q. B. 474; [1896] 1 Q. B. 626; 74 L. T. 580; 44 W. R. 450.—C.A. **ESHER, M.R.**, **SMITH** and **RIGBY, L.J.J.**

Wallis v. Smith and Elphinstone (Lord) v. Monkland Iron and Coal Co. *See* **Agricultural Holdings Act, 1900** (63 & 64 Vict. c. 50), s. 6.

Law v. Redditch Local Board (*supra*): **Willson v. Love** (*supra*); and **Strickland v. Williams** (1898) 68 L. J. Q. B. 241; [1899] 1 Q. B. 382; 80 L. T. 4.—C.A., *explained*.
White and Arthur, In re (1901) 84 L. T. 594.—KENNEDY and PHILLIMORE, JJ.

Crisdee v. Bolton (1827) 3 Car. & P. 240, *referred to*.
Sainter v. Ferguson (1849) 7 C. B. 716; 18 L. J. C. P. 217; 13 Jur. 828.—C.P.

WILDE, C.J.—The next question is whether the 500*l.* mentioned in the agreement is to be considered as liquidated damages or not. That is a question which has been sometimes left to the jury. That course was adopted by Best, C.J. in **Crisdee v. Bolton**. But it is now clearly settled, that, whether the sum mentioned in an agreement to be paid for a breach is to be treated as a penalty or as liquidated and ascertained damages is a question of law, to be decided by the judge upon a consideration of the whole instrument.—p. 727.

Dagenham (Thames) Dock Co., In re, Hulse, Ex parte (1873) 43 L. J. Ch. 261; L. R. 8 Ch. 1022; 21 W. R. 898.—L.J.J., *referred to*.

Cornwall v. Henson (1900) 69 L. J. Ch. 581; [1900] 2 Ch. 298; 82 L. T. 735; 49 W. R. 42.—C.A.; and **Dixon, In re, Heynes v. Dixon** (1900) 69 L. J. Ch. 609; [1900] 2 Ch. 561, 578; 83 L. T. 129; 48 W. R. 665.—C.A.

Sainter v. Ferguson (1849) 18 L. J. C. P. 217; 7 C. B. 716; 13 Jur. 828.—C.P., *followed*.

Carnes v. Nesbitt (1861) 31 L. J. Ex. 273; 7 H. & N. 158, 778; 4 L. T. 558; 9 W. R. 811.—EX.; and **Young v. Chalkley** (1867) 16 L. T. 286; 15 W. R. 743.—C.P.

Sainter v. Ferguson and Young v. Chalkley, *applied*.

General Accident Assurance Corporation v. Noel (1901) 71 L. J. K. B. 236; [1902] 1 K. B. 377; 86 L. T. 555; 50 W. R. 381.—WRIGHT, J.

Howard v. Woodward (1864) 34 L. J. Ch. 47; 5 N. R. 8; 10 Jur. (N.S.) 1123; 11 L. T. 414; 13 W. R. 132.—V.-C., *applied*.
London and Yorkshire Bank v. Pritt (1887) 56 L. J. Ch. 987; 57 L. T. 875; 36 W. R. 135.—CHITTY, J.; and **General Accident Assurance Corporation v. Noel** (1901) 71 L. J. K. B. 236; [1902] 1 K. B. 377; 86 L. T. 555; 50 W. R. 381.—WRIGHT, J.

Cole v. Sims (1854) 23 L. J. Ch. 258; 1 W. R. 151.—L.J.J., *commented on*.

General Accident Assurance Corporation v. Noel (1901) 71 L. J. K. B. 236; [1902] 1 K. B. 377; 86 L. T. 555; 50 W. R. 381.—WRIGHT, J.

Hixts' Case, 2 Rolle, Abr. 703, *disapproved*.

Lowe v. Peers (1768) 4 Burr. 2225; S. C. *nom.*
Low v. Pure, Lofft. 345; affirmed, **Wilmot's Notes**, 364.

LORD MANSFIELD.—It is impossible to support it, for it cannot be that a man should be *obliged to take less* than the liquidated sum, and the writ of error in that case was plainly brought by the defendant. Besides, the damage could never be taken advantage upon a writ of error. How could the *quantum* of damages found by the jury be the subject of a writ of error?—p. 2229.

Lowe v. Peers and Hurst v. Hurst (1849) 19 L. J. Ex. 410; 4 Ex. 571.—EX., *explained and distinguished*.

Leigh (or Legh) v. Lillie (1860) 30 L. J. Ex. 25; 6 H. & N. 165; 9 W. R. 55.—EX.

Rex v. Clark (1777) Cowp. 610, *principle applied*.

Reg. v. Littlechild, Reg. v. Heslop (1871) 40 L. J. M. C. 137; L. R. 6 Q. B. 293; 24 L. T. 233; 19 W. R. 748.—Q.B.

Rex v. Clark and Rex v. Hymen (1798) 7 Term Rep. 536; 4 R. R. 524.—K.B., *considered*.

Bradlaugh v. Clarke (1883) 52 L. J. Q. B. 505; 8 App. Cas. 354; 48 L. T. 681; 31 W. R. 677; 47 J. P. 405.—H.L. (E.).

Clarke v. Bradlaugh, 50 L. J. Q. B. 342; 7 Q. B. D. 88; 44 L. T. 667; 29 W. R. 516; 45 J. P. 484.—C.A.; *reversed nom.* **Bradlaugh v. Clarke** (1883) 52 L. J. Q. B. 505; 8 App. Cas. 354; 48 L. T. 681; 31 W. R. 677; 47 J. P. 405.—H.L. (E.).

Bradlaugh v. Clarke, referred to.
Bradlaugh v. Gossett (1884) 53 L. J. Q. B. 209; 12 Q. B. D. 271, 281; 50 L. T. 620; 32 W. R. 552.—COLERIDGE, C.J., STEPHEN and MATHEW, JJ.

Bradlaugh v. Clarke, explained.
Att.-Gen. v. Bradlaugh (1885) 54 L. J. Q. B. 205; 14 Q. B. D. 667; 52 L. T. 589; 33 W. R. 673; 49 J. P. 500.—C.A.; *affirming* 1 Cab. & E. 440.

Bradlaugh v. Clarke, discussed.
Dixon v. Farrer (1886) 17 Q. B. D. 658; 55 L. T. 438.—Q.B.D.; *affirmed*, C.A.

Bradlaugh v. Clarke, distinguished.
Kenealy v. O'Keeffe (1899) [1901] 2 Ir. R. 39.—PALLES, C.B., JOHNSON, GIBSON and KENNY, JJ.

Cole v. Coulton (1860) 2 El. & El. 695; 29 L. J. M. C. 125; 6 Jur. (N.S.) 698; 2 L. T. 216; 8 W. R. 412.—Q.B.

Referred to, **Jobson v. Henderson** (1900) 82 L. T. 260; 64 J. P. 425; 19 Cox C. C. 477.—Q.B.D.; *applied*, **Kenealy v. O'Keeffe** (1899) [1901] 2 Ir. R. 39.—K.B.D.

Rex v. Gorden (1769) 4 Burr. 2279.—K.B., *approved and followed*.

Reg. v. Hicks (1855) 24 L. J. M. C. 94; 4 El. & Bl. 633; 3 C. L. R. 833; 1 Jur. (N.S.) 654; 3 W. R. 208.—Q.B.

Rex v. Gorden and Reg. v. Hicks, followed.
Anderson v. Hamlin (1890) 59 L. J. M. C. 151; 25 Q. B. D. 221, 224; 63 L. T. 168; 17 Cox C. C. 129; 54 J. P. 757.—COLERIDGE, C.J. and MATHEW, J.

Rex v. Higginson (1761) 2 Burr. 1232, *adapted*.

Garrett v. Messenger (1867) 36 L. J. C. P. 337; L. R. 2 C. P. 583; 16 L. T. 414; 15 W. R. 864; 10 Cox C. C. 498.—C.P.

Marks v. Benjamin (1839) 9 L. J. M. C. 20; 5 M. & W. 565; 2 M. & R. 225; 3 Jur. 1194.—EX. See

Garret v. Messenger (1867).—C.P. (*supra*).

Marks v. Benjamin, followed.
Syers v. Conquest (1873) 28 L. T. 402.—Q.B.

Marks v. Benjamin and Garrett v. Messenger (*supra*), *distinguished*.

Milnes v. Bale (1875) 44 L. J. C. P. 336;

L. R. 10 C. P. 591; 33 L. T. 174; 23 W. R. 660.—C.P.

Beckford v. Hood (1798) 7 Term Rep. 620: 4 R. R. 527.—K.B.

Referred to. Goubaud v. Wallace (1877) 36 L. T. 704; 25 W. R. 604.—Q.B.D.; *distinguished*, Vallance v. Falle (1884) 53 L. J. Q. B. 459; 13 Q. B. D. 109; 51 L. T. 158; 32 W. R. 769; 5 Asp. M. C. 280; 48 J. P. 519.—Q.B.D.

Thibault v. Gibson (1843) 13 L. J. Ex. 2; 12 M. & W. 88.—EX.

Referred to. Flamanck v. Simpson (1866) L. R. 1 A. & F. 276.—ARCHES: *observations applied*, Rex v. James (1902) 71 L. J. K. B. 211; [1902] 1 K. B. 540.—C.C.R.

Davis (or **Davies**) v. **Thomas** (1831) 9 L. J. (o.s.) Ch. 232; 1 Russ. & My. 506; Tamil. 416; 32 R. R. 141.—L.C. *considered*.

Bastin v. Bidwell (1881) 18 Ch. D. 238; 44 L. T. 742.—KAY, J.

Girdlestone v. Brighton Aquarium Co. (1878) 3 Ex. D. 137; 38 L. T. 358.—EX. D. (*affirmed, infra*), *adopted*.

Todd v. Robinson (1884) 53 L. J. Q. B. 251; 12 Q. B. D. 530; 50 L. T. 298; 32 W. R. 838; 48 J. P. 694.—DAY AND SMITH, JJ.

Calehman v. Wright, Noy 118, *applied*.

Girdlestone v. Brighton Aquarium Co. (1878) 48 L. J. Ex. 373; 4 Ex. D. 107; 40 L. T. 473; 27 W. R. 523.—C.A.

Rex v. Amos (1819) 2 B. & Ald. 533; 21 R. R. 386.—K.B.; and **Reg. v. Dale** (1853) 22 L. J. M. C. 44; 1 Dears. C. C. 37; 17 Jur. 47; 6 Cox C. C. 93.—C.C.R., *applied*.

Reigate Corporation v. Hart (1868) 37 L. J. M. C. 70; L. R. 3 Q. B. R. 244; 9 B. & S. 129; 18 L. T. 237; 16 W. R. 896.—Q.B.

Rex v. Amos; Reg. v. Dale; and Reigate Corporation v. Hart, *applied*.

Winn v. Mossman (1869) 38 L. J. Ex. 200; L. R. 4 Ex. 292; 20 L. T. 672; 17 W. R. 924.—EX.; and **Rex v. Warwickshire JJ.** (1902) 71 L. J. K. B. 505; [1902] 2 K. B. 101; 86 L. T. 568; 66 J. P. 549.—K.B.D.

Lewis v. Swansea Corporation (1888) 4 Times L. R. 706.—C.A., *distinguished*.

Beaumont v. Huddersfield Corporation (1902) 1 L. G. R. 118; 67 J. P. 57.—C.A.

PERPETUITY.

1. THE RULE AGAINST, GENERALLY.
2. LIMITATIONS.
3. POWERS.
4. CHARITABLE TRUSTS.

1. THE RULE AGAINST, GENERALLY.

Howard v. Norfolk (Duke) (1681) 3 Ch. Cas. 1; Pollexf. 223; 2 Freeman 72.—L.C., *discussed*.

Stanley v. Leigh (1732) 2 P. Wms. 686.—JEKYLL, M.R.

Howard v. Norfolk (Duke), *applied*.

Jee v. Audley (1787) 1 Cox 324; 1 R. R. 46.—M.R.

Howard v. Norfolk (Duke), *approved*.

Long v. Blackall (1797) 7 Term Rep. 100; 4 R. R. 73.—K.B.; S. C., 3 Ves. 486.—L.C.

Howard v. Norfolk (Duke), *referred to*. **Dungannon (Lord) v. Smith** (1746) 12 Cl. & F. 546, 628; 10 Jur. 721.—H.L. (IR.).

Howard v. Norfolk (Duke), *approved*. **Cole v. Sewell** (1848) 2 H. L. Cas. 186, 232.—COTTENHAM, L.C.

Long v. Blackall (*supra*, col. 2107), *applied*. **Thelluson v. Woodford** (1799) 4 Ves. 227, 334.—M.R.; *affirmed*, H.L. (*post*).

Long v. Blackall, *explained*. **Thelluson v. Woodford** (1805) 11 Ves. 112; 8 R. R. 104.—H.L. (E.). ELDON, L.C.

Long v. Blackall, *referred to*. **Cadell v. Palmer**, 1 Cl. & F. 372, 422 (*post*).

Long v. Blackall, *app'ed*. **Wilmer's Trusts, In re, Moore v. Wingfield** (1903) 72 L. J. Ch. 378, 670; [1903] 1 Ch. 874; [1903] 2 Ch. 411; 88 L. T. 379; 89 L. T. 148; 51 W. R. 395, 609.—BUCKLEY, J. and C.A.

Thelluson v. Woodford (*supra*). *Referred to*, **Blackburn v. Stables** (1813—1814) 2 V. & B. 367; 13 R. R. 120.—M.R.; **Turvin (or Turwin) v. Newcome** (1856) 3 K. & J. 16; 3 Jur. (N.S.) 203; 5 W. R. 35.—WOOD, V.-C.; *applied*, **Wilmer's Trusts, In re** [1903] 1 Ch. 875, 885.—BUCKLEY, J. (*supra*).

Bengough v. Edridge (1827) 5 L. J. (o.s.) Ch. 113; 1 Sim. 173.—V.-C.; *affirmed nom.* **Cadell v. Palmer** (1833) 1 Cl. & F. 372; 7 Bligh (N.S.) 202.—H.L. (E.).

Lloyd v. Carew (1696) 1 Shower P. C. 137, *followed*.

Cadell v. Palmer, 1 Cl. & F. 372, 422 (*supra*).

Cadell v. Palmer, *explained and distinguished*.

Tollemache v. Coventry (Earl) (1834) 2 Cl. & F. 611, 623.—BROUGHAM, L.C.

Cadell v. Palmer, *referred to*. **Dungannon (Lord) v. Smith** (1846) 12 Cl. & F. 546, 629.—H.L. (IR.) (*supra*).

Cadell v. Palmer, *discussed and explained*. **Cole v. Sewell** (1848) 2 H. L. Cas. 186, 232.—COTTENHAM, L.C.

Cadell v. Palmer, *referred to*. **Stuart v. Cockerell** (1869) 38 L. J. Ch. 473; L. R. 7 Eq. 363, 369.—MALINS, V.-C.; *affirmed*, L.J.; *see post*, col. 2132.

Southampton (Lord) v. Hertford (Marquis) (1813) 2 V. & B. 54; 13 R. R. 18.—M.R.; and **Marshall v. Holloway** (1820) 2 Swanst. 432; 19 R. R. 94.—L.C., *discussed*.

Ker v. Dungannon (Lord) (1841) 1 Dr. & War. 509, 532; 1 Con. & L. 335; 4 Ir. Eq. R. 343.—SUGDEN, L.C.; **Browne v. Stoughton** (1846) 14 Sim. 369; S. C. *nom.* **Browne v. Houghton**, 15 L. J. Ch. 391; 10 Jur. 747.—SHADWELL, V.-C.; **Turvin v. Newcome** (1856) 3 K. & J. 16 (*supra*); **Christie v. Gosling** (1866) L. R. 1 H. L. 279, 298 (*post*, col. 2124).

Marshall v. Holloway, *discussed*. **Holloway v. Webber** (1868) L. R. 6 Eq. 523, 534 (*post*, col. 2124); **Martelli v. Holloway** (1872) 42 L. J. Ch. 26; L. R. 5 H. L. 532, 533.—H.L. (E.) (*post*, col. 2111).

Southampton (Lord) v. Hertford (Marquis) and **Marshall v. Holloway**, *referred to*. **Tewart v. Lawson** (1874) 43 L. J. Ch. 673;

L. R. 18 Eq. 490; 22 W. R. 822.—*HALL, V.-C.* : *Smith v. Cunningham* (1884) 13 L. R. Ir. 480, 488.—*V.-C.*

Walsh v. Secretary of State for India (1863) 32 L. J. Ch. 585; 10 H. L. Cas. 367; 2 N. R. 339; 9 Jur. (N.S.) 757; 8 L. T. 839; 11 W. R. 823.—*H.L. (E.)* : *reversing* 31 L. J. Ch. 217; 30 Beav. 312; 8 Jur. (N.S.) 26; 10 W. R. 141; 5 L. T. 536.—*M.R.*

Referred to, *Grant v. Secretary of State for India* (1877) 46 L. J. C. P. 681; 2 C. P. D. 445, 460; 37 L. T. 188; 25 W. R. 848.—*GROVE, J.*; *Borland's Trustee v. Steel Brothers & Co. (post)*.

Witham v. Vane (1883) *Challis on the Law of Real Property* (2nd ed.), App. V., p. 401.—*H.L. (E.)* (*reversing C.A.*, and *varying FRY, J.*), *discussed*.

Randell, In re. Randell v. Dixon (1888) 57 L. J. Ch. 899; 38 Ch. D. 213, 217; 58 L. T. 626; 36 W. R. 543.—*NORTH, J.*

Witham v. Vane, applied.

Borland's Trustee v. Steel Bros. & Co. (1900) 70 L. J. Ch. 51; [1901] 1 Ch. 279, 289; 49 W. R. 120; 17 T. L. R. 45.

FARWELL, J.—Now, in my opinion, the rule against perpetuity has no application whatever to personal contracts. If authority is necessary for that proposition, *Witham v. Vane* is a direct authority of the H. L.; and to my mind an even stronger case is that of *Walsh v. Secretary of State for India*. A stronger instance of the unlimited extent of personal liability could hardly be found; in that case the old East India Company entered into a contract, in 1770, with the first Lord Clive, to the effect—to put it shortly—that in the event of the company ceasing to be the possessors of the Bengal territories, they should repay to Lord Clive, his executors or administrators, several lacs of rupees, which had been transferred to them for certain particular purposes. The actual event did not happen till nearly a century later; and, as Lord Selborne pointed out in *Witham v. Vane*, the question of perpetuity was tentatively raised in the H. L.; but Lord Cairns, who was counsel in that case, refrained, with his usual discretion, from pressing it. I have said that the articles now under consideration are nothing more or less than a personal contract between Mr. Borland and the other shareholders in the company under sect. 16 of the Companies Act, 1862: Mr. Borland was one of the original shareholders, and he and his trustee in bankruptcy are bound by his own contract. . . . Mr. Borland cannot be heard to say that there is any repugnancy or perpetuity in the covenant he has entered into; and his trustee in bankruptcy stands in this respect in no better position than Mr. Borland himself. Counsel for the plaintiff attempted to apply the reasoning in *Gomm's Case (post)* to the present, and to argue that if the contract was merely personal it did not affect the trustee in bankruptcy, and that if it was an executory limitation it was void. But this is, in my opinion, unsound; the trustee is as much bound by these personal obligations of the bankrupt as the bankrupt himself, if he were not bankrupt, would be. p. 56.

L. & S. W. Ry. v. Gomm (1882) 51 L. J. Ch. 530; 20 Ch. D. 562; 46 L. T. 449; 30 W. R. 620.—*C.A.*, *applied*.

Dunn v. Flood (1883) 53 L. J. Ch. 537; 25

Ch. D. 629, 632; 49 L. T. 670; 32 W. R. 197.—*NORTH, J.* (*affirmed*, (1885) 54 L. J. Ch. 370; 28 Ch. D. 586; 52 L. T. 699; 33 W. R. 315.—*C.A.*); *Trevelyan v. Trevelyan* (1885) 53 L. T. 853.—*BACON, V.-C.*

L. & S. W. Ry. v. Gomm, explained.

MacKenzie v. Childers (1889) 59 L. J. Ch. 188; 43 Ch. D. 265; 62 L. T. 98; 38 W. R. 243.—*KAY, J.*

L. & S. W. Ry. v. Gomm, referred to.

Hargreaves, In re. Midgley v. Tatley (1890) 59 L. J. Ch. 384; 43 Ch. D. 401.—*C.A. (post, col. 2133)*; *Redington v. Browne* (1898) 32 L. R. Ir. 347, 358.—*BEWLEY, J.*; *Goodier v. Edmunds* (1893) 62 L. J. Ch. 649; [1893] 3 Ch. 455, 460.—*STIRLING, J.*

L. & S. W. Ry. v. Gomm, applied.

Manchester Ship Canal Co. v. Manchester Racecourse Co. (1900) 69 L. J. Ch. 850; [1900] 2 Ch. 352; 83 L. T. 274.—*FARWELL, J.*; *affirmed* (1901) 70 L. J. Ch. 468; [1901] 2 Ch. 37; 84 L. T. 436; 49 W. R. 418.—*C.A.*

L. & S. W. Ry. v. Gomm, observations applied.

Rogers v. Hosegood (1900) 69 L. J. Ch. 652; [1900] 2 Ch. 388, 394; 83 L. T. 186; 48 W. R. 659.—*C.A.*

L. & S. W. Ry. v. Gomm, reasoning in, not applied.

Borland's Trustee v. Steel Bros. & Co. (1900) [1901] 1 Ch. 279, 290. *See supra*, col. 2109.

L. & S. W. Ry. v. Gomm, applied.

Savill Bros., Ltd. v. Bethell (1901—2) 71 L. J. Ch. 632; [1902] 2 Ch. 523; 87 L. T. 191; 50 W. R. 580.—*BUCKLEY, J.*, and *C.A.*

Stanley v. Leigh (1732) 2 P. Wms. 686.—

M.R. and L.C., *discussed*.

Lincoln (Countess) v. Newcastle (Duke) (post); *Scarsdale (Lord) v. Curzon (post, col. 2111)*.

Gower v. Grosvenor (1740) 3 Barnard. 54; 5 Madd. 337.—*L.C.*

Distinguished, *Bridgewater (Duke) v. Egerton* (1751) 2 Ves. sen. 122.—*L.C.*; *discussed*, *Lincoln (Countess) v. Newcastle (Duke) (post)*; *Brouncker v. Bagot (post, col. 2111)*.

Gower v. Grosvenor.

Not followed, *Rowland v. Morgan* (1848) 2 Ph. 764 (col. 2111); *discussed*, *Scarsdale (Lord) v. Curzon* (1860) 1 J. & H. 40 (*post*, col. 2111); *Shelley v. Shelley* (1868) L. R. 6 Eq. 540, 546 (*post*, col. 2111); *Harrington (Countess) v. Harrington (Earl)* (1871) L. R. 5 H. L. 87, 107 (*post*, col. 2125).

Foley v. Burnell (1783) 1 Bro. C. C. 274.—

L.C.; *affirmed nom.* *Burnell v. Foley* (1785) 4 Bro. P. C. 319; *Romilly's Notes of Cases* 1.—*H.L. (E.)*; and *Vaughan v. Burslem* (1790) 3 Bro. C. C. 101.—*L.C.*, *discussed*.

Lincoln (Countess) v. Newcastle (Duke) (1806) 12 Ves. 217; 4 R. L. 31.—*H.L. (E.)*; *affirming with a variation* *S. C. nom. Newcastle (Duke) v. Lincoln (Countess)* (1797) 3 Ves. 387.—*L.C.*

Foley v. Burnell and Vaughan v. Burslem, applied.

Lincoln (Countess) v. Newcastle (Duke), referred to.

Stratford v. Powell (1807) 1 Ball & B. 1.—*L.C.*; *Carr v. Erroll (Lord)* (1808) 14 Ves. 478; 8 R. R. 394.—*M.R.*; *S. C. at law* (1805) 6 East 58; 2 Smith 575.—*K.B.* *And see post*, col. 2111.

Lincoln (Countess) v. Newcastle (Duke).

Commented on, Burrell v. Crutchley (1809) 15 Ves. 544.—L.C.; *explained*, Jervoise v. Northumberland (Duke) (1820) 1 J. & W. 559, 571; 21 R. R. 229.—L.C.

Foley v. Burnell and Vaughan v. Burslem,
referred to.

Brouncker v. Bagot (1816) 1 Meriv. 271; 19 Ves. 574.—GRANT, M.R.

Lincoln (Countess) v. Newcastle (Duke)
(supra), referred to.

Tollemache v. Coventry (Earl) (1834) 2 Cl. & F. 611; 8 Bligh (N.S.) 547.—H.L. (E.); Bankes v. Le Despencer (1840) 10 Sim. 576, 590; 9 L. J. Ch. 105; 4 Jur. 601.—V.-C.; Ibbetson v. Ibbetson (1840) 10 L. J. Ch. 49; 5 Myl. & Cr. 26.—L.C.

Carr v. Erroll (Lord) (supra), Foley v. Burnell, Vaughan v. Burslem, and Lincoln (Countess) v. Newcastle (Duke), discussed.

Potts v. Potts (1846) 3 Jo. & Lat. 353, 367; 9 Ir. Eq. R. 577.—SUGDEN, L.C.; *affirmed*, (1848) 1 H. L. Cas. 671.—H.L. (IR.). See col. 2113.

Foley v. Burnell, Vaughan v. Burslem, Lincoln (Countess) v. Newcastle (Duke), and Carr v. Erroll (Lord), principles applied.

Rowland v. Morgan (1848) 18 L. J. 78; 2 Ph. 764; 13 Jur. 23.—COTTENHAM, L.C.; *affirming* 6 Hare 463.—V.-C. *And see* col. 2113.

Foley v. Burnell, Vaughan v. Burslem, and Lincoln (Countess) v. Newcastle (Duke), discussed.

Cox v. Sutton (1856) 25 L. J. Ch. 845; 2 Jur. (N.S.) 733.—WOOD, V.-C. *And see* col. 2113.

Lincoln (Countess) v. Newcastle (Duke), distinguished.

Audsley v. Horn (1859) 29 L. J. Ch. 201; 1 De G. F. & J. 226, 239; 6 Jur. (N.S.) 205; 8 W. R. 150.—L.C.

Vaughan v. Burslem, Carr v. Erroll (Lord), Foley v. Burnell, and Lincoln (Countess) v. Newcastle (Duke), discussed.

Scarsdale (Lord) v. Curzon (1860) 29 L. J. Ch. 249; 1 J. & H. 40; 6 Jur. (N.S.) 209, 246.—WOOD, V.-C. *And see post*, col. 2113.

Foley v. Burnell and Vaughan v. Burslem, not applied.

Hogg v. Jones (1863) 32 L. J. Ch. 361; 32 Beav. 45; 1 N. R. 222; 9 Jur. (N.S.) 507; 8 L. T. 816.—ROMILLY, M.R.

Foley v. Burnell, applied.

Johnson's Trusts, *in re* (1866) L. R. 2 Eq. 716, 721; 12 Jur. (N.S.) 616.—WOOD, V.-C.

Foley v. Burnell, Vaughan v. Burslem, and Lincoln (Countess) v. Newcastle (Duke), discussed.

Shelley v. Shelley (1868) 37 L. J. Ch. 357; L. R. 6 Eq. 540, 546; 16 W. R. 1036.—WOOD, V.-C.

Lincoln (Countess) v. Newcastle (Duke), referred to.**Foley v. Burnell, adopted.**

Martelli v. Holloway (1872) 42 L. J. Ch. 26; L. R. 5 H. L. 532, 546.—H.L. (E.).

HATHERLEY, L.C.—The only remaining question would be in point of form, whether, as in the case of the decree in *Lincoln (Countess) v. Newcastle (Duke)* the Court should take any notice of the occurrence which has taken place since the original hearing, namely, the death of the tenant for life bringing the tenant in tail in remainder into actual possession. I

confess, my lords, that I do not think it necessary to do so. I think *Foley v. Burnell* is a decision expressly in point upon this subject, and that it is quite sufficient to enable us to read this clause as one in which the testator has used the expression "in possession," as meaning "entitled to a vested estate tail in the property," though it may be vested in remainder, and the party entitled may not be in actual possession, because in that case of *Foley v. Burnell* (and there never was a stronger case upon the subject), the L.C. relied upon the evidence of the intention to keep the real and personal estate together as long as possible, and yet held, that in reality that could not be effected under any possible mode of construction which could be arrived at under that will; and though there was a limitation to the father for life, and a direction that certain personal chattels (plate, I think, was the subject-matter) should go as heirlooms to the one who should take an estate tail in possession, it was held that the true effect of the expressions used in that will was, that an infant who took an absolute vested estate tail under the limitations of the will during the lifetime of the father, and then died during infancy (there being no provision there with respect to attaining the age of twenty-one), was entitled to the heirlooms, and those heirlooms did consequently vest in the infant, and in the event which happened, the father, being the administrator of the infant, became entitled to those heirlooms. No doubt the general intention of the will was to prevent it if possible; but, when fairly considered, there was no rule that the Court could devise that would effectuate the intention of the testator more completely, or, in fact, which would effectuate it at all. There were many other events which might have occurred which would have been equally embarrassing with reference to any construction to be given to the will. Therefore the Court held that what in reality the testator intended to do was this: he said: "When any person becomes actually entitled to the full benefit and complete interest in the real estate, the same person shall from that moment become entitled to the heirlooms," the distinction being not between the manual possession of the rents and profits and the holding of the estate in remainder, but between a vested interest and a contingent interest in the estate tail that was so limited. And in this case of *Marshall v. Holloway* (*supra*, col. 2108), Lord Eldon adverts in some measure to that distinction, and speaks of cases in which it has been held that the word "possession" is capable of a meaning which may not refer to the actual manual possession of the rents and profits. In fact, if that was contended for in the case of an outstanding lease, it would be difficult, or impossible, to hold that a person was entitled to possession in that sense, inasmuch as the tenants would have the possession, and the property would not be in that sense in possession of the person entitled, he would be in possession of the rents and profits, but not of the estate itself. But in *Foley v. Burnell* the difficulty really existed, and a construction had to be put in that case upon the whole intent and meaning of the will. And I think that that authority is strong enough to justify your lordships in arriving at the conclusion that the V.-C. was right in making the declaration even when the father was living, and holding that this gentleman was entitled to the absolute interest in the rents

and profits of the personal estate under the events which have happened.—p. 32.

Foley v. Burnell, *referred to*.

Angerstein, *In re* (*post*): Fitzgerald v. Ryan [1899] 2 Ir. R. 637, 641.—Q.B.D.

Foley v. Burnell, *rule in, applied*.

Pothergill's Estate, *In re* (*post*):

Potts v. Potts (*supra*, col. 2111), *discussed*.

Cox v. Sutton (1856) 25 L. J. Ch. 845; 2 Jur. (N.S.) 733.—V.-C.: Scarsdale (Lord) v. Curzon (1860) 29 L. J. Ch. 249; 1 J. & H. 40; 6 Jur. (N.S.) 209, 246.—V.-C.: Hogg v. Jones (1863) 32 Beav. 45 (*post*, col. 2114); Cornwallis, *In re* (1886) 32 Ch. D. 388, 394 (*post*, col. 2114); Pothergill's Estate, *In re* (1902) [1903] 1 Ch. 149, 156 (*post*).

Rowland v. Morgan (*supra*, col. 2111), *distinguished*.

Audsley v. Horn, (1859) 1 De G. F. & J. 226, 239 (*supra*, col. 2111).

Rowland v. Morgan, *discussed*.

Scarsdale (Lord) v. Curzon (*supra*): Shelley v. Shelley (1868) L. R. 6 Eq. 540, 546 (*supra*, col. 2111): Harrington (Countess) v. Harrington (Earl) (1871) 40 L. J. Ch. 716; L. R. 5 H. L. 87, 107.—H.L. (N.) (*post*, col. 2125).

Rowland v. Morgan, *applied*.

Johnston, *In re*, Cockerell v. Essex (Earl) (1884) 26 Ch. D. 538, 545 (*post*, col. 2125).

Scarsdale (Lord) v. Curzon (*supra*), *discussed*.

Hogg v. Jones (1863) 32 Beav. 45, 55 (*post*, col. 2114); Johnson's Trusts, *In re* (1866) L. R. 2 Eq. 716; 12 Jur. (N.S.) 616.—WOOD, V.-C.

Scarsdale (Lord) v. Curzon, *followed*.

Angerstein, *In re*, Angerstein v. Angerstein (1895) 65 L. J. Ch. 57; [1895] 2 Ch. 883; 73 L. T. 500; 44 W. R. 152.—KEKEWICH, J. [His lordship approved of the statement of the law in Theobald on Wills (4th ed.) p. 593.]

Scarsdale (Lord) v. Curzon, *referred to*.

Hill, *In re*, Hill v. Hill [1902] 1 Ch. 537, 541; 71 L. J. Ch. 222; 86 L. T. 146.—EADY, J.; *affirmed*, C.A. (*post*, col. 2118).

Scarsdale (Lord) v. Curzon and Angerstein,

In re, Angerstein v. Angerstein, *followed*.

Cox v. Sutton (*supra*, col. 2111) and **Martelli v. Holloway** (col. 2111), *referred to*.

Pothergill's Estate, *In re*, Price-Pothergill v. Price (1902) 72 L. J. Ch. 164; [1903] 1 Ch. 149, 154; 87 L. T. 677; 51 W. R. 203.

EADY, J.—Counsel for the plaintiffs . . . stated that, having regard to the expression "actual possession" contained in the will, he could not distinguish the present case from *Scarsdale (Lord) v. Curzon and Angerstein, In re*, and that as Sir Rose Price died in his mother's lifetime, and without ever having come into the actual possession of the estate, he could not contend that the specific chattels had become absolutely vested in him. . . . The general rule is that a gift of personalty to the persons for the time being entitled to real estate, so far as the rules of law and equity permit, vests absolutely not in a tenant for life of the real estate, but in the first tenant in tail at birth, whether he comes into possession or not—*Foley v. Burnell* (*supra*) and *Scarsdale (Lord) v. Curzon*. In *Cox v. Sutton*, Wood, V.-C. affirmed the general rule, in the clearest language, although in that case upon the special language of that will he was able to arrive (not

without difficulty) at the conclusion that the personalty was given as a contingent gift to a person who should answer a particular description at a particular date. If there be a direction that the personalty is not to vest in a tenant in tail dying under twenty-one, this will prevent the personalty from vesting in a tenant in tail by purchase dying an infant—*Christie v. Gosling* (col. 2124), *Harrington (Countess) v. Harrington (Earl)* (col. 2125) and *Martelli v. Holloway*. And if the gift of personal estate be to the person actually seized at the death of the tenant for life or to the person seized of the actual freehold, which is defined as freehold in possession, or there are other clear words referring to actual possession, a tenant in tail who dies before coming into possession is excluded—*Potts v. Potts* (col. 2111). In this case Lord St. Leonards said, "If a plain intention is expressed that no person shall take the chattels absolutely, who does not live to become entitled to the possession of the real estate, the Court must execute the intention." Upon a careful consideration of the will and codicil I am unable to find any such intention expressed in the case before me, and as was said by Lord St. Leonards in *Potts v. Potts*, "it is firmly settled that the Court will not introduce in such cases the restrictions which conveyancers know how to introduce with apt words." . . . Indeed, the present case appears to me to be a stronger one in favour of the first tenant in tail taking an absolute interest than *Martelli v. Holloway*. There, the will contained a proviso that the personal estate should absolutely belong to such persons, &c., as should first attain twenty-one and become entitled to an estate tail in possession in the real estate, and it was held that a person had become absolutely entitled to the personal estate, although he had only a vested estate tail in the real estate in remainder expectant on his father's life estate.—p. 166.

Hogg v. Jones (1863) 32 L. J. Ch. 361; 32

Beav. 45; 1 N. R. 222; 9 Jur. (N.S.) 507;

8 L. T. 816.—ROMILLY, M.L., *distinguished*.

Cresswell, *In re*, Parkin v. Cresswell (1883) 24 Ch. D. 102; 52 L. J. Ch. 798; 49 L. T. 590.

KAY, J.—A case of *Hogg v. Jones* was much relied on, in which the limitation was "to the person who for the time being shall be in the actual possession and enjoyment of my freehold estates under the limitations of my will." A tenant in tail came into existence, whose estate was liable to be defeated by the birth of a son of a preceding tenant for life. It never was so defeated; but it did not come into possession during his lifetime, for he died before that life estate determined, leaving a son who would have been heir in tail in possession if his father had not barred the estate tail. Lord Romilly held this son entitled to the heirlooms, and he used language which certainly intimated an opinion that his father could not be, because his estate was defeasible, though it was never in fact defeated. It is enough to say that the decision, which was upon the effect of the words "actual possession and enjoyment," does not affect this case.—p. 109.

Hogg v. Jones, *referred to*.

Cornwallis, *In re*, Cornwallis v. Wykeham-Martin (1886) 32 Ch. D. 388; 55 L. J. Ch. 716; 54 L. T. 844.

PEARSON, J.—I think the testatrix has, so to say, selected a *persona designata* to whom the

personal estate is to go over, *i.e.* the person who, if the limitations of the will had been undisturbed by any disentailing deed, would have been the next in succession to take the real estates. I am confirmed in this view by the decision of the H. L. in *Potts v. Potts* (*supra*, col. 2111) and that of Lord Romilly in *Hogg v. Jones*. But I wish to guard myself from saying that I agree with everything which Lord Romilly said in the latter case. My decision, however, does not conflict with his.—p. 394.

Curtis v. Lukin (1842) 11 L. J. Ch. 380; 5 Beav. 147; 6 Jur. 721.—M.R., *not applied*.
Odell v. Brown (1859) 28 L. J. Ch. 542; 4 De G. & J. 179, 186; 5 Jur. (N.S.) 635; 7 W. R. 472.—L.C. and L.JJ.

Curtis v. Lukin, *referred to*,
Wood v. Drew (1864) 33 Beav. 610, 614.—M.R.

Curtis v. Lukin, *referred to*.
Redington v. Browne (1893) 32 L. R. Ir. 347, 356.—BEWLEY, J.

Wood v. Drew, *discussed and distinguished*.
Wood, *In re*, **Tullett v. Colville** (1894) 63 L. J. Ch. 544; [1894] 2 Ch. 310, 316.—KEKEWICH, J.; *affirmed*, 63 L. J. Ch. 790; [1894] 3 Ch. 381; 7 R. 495; 71 L. T. 413.—C.A.

Gulliver v. Wickett (1745) 1 Wils. 105.—K.B., *explained*.
Thellusson v. Woodford (1805) 11 Ves. 112; 8 R. R. 104.—H.L. (E.). ELTON, L.C.

Gulliver v. Wickett, *considered*.
Doe d. Evers v. Challis (1859) 7 H. L. Cas. 531; 29 L. J. Q. B. 121; 5 Jur. (N.S.) 825; 7 W. R. 622.—H.L. (E.).

LORD CRANWORTH.—The case is not distinguishable in principle from *Gulliver v. Wickett*. There, it is true, the devise over, if there had been a child, was on an event not too remote, and which, therefore, might have taken effect. In that respect it differs from the present case; but the Court held that the devise in the event which did happen, of there being no child, took effect not as an executory devise, but as a contingent remainder. I state that, although I know that a very high authority, Mr. Fearn (9th ed., p. 396), says the contrary; but, looking at the case, I can come to no other conclusion.—p. 549.

Gulliver v. Wickett, *referred to*.
Eastwood v. Lockwood (1867) 36 L. J. Ch. 573; L. R. 3 Eq. 487, 492; 15 W. R. 611.—WOOD, V.-C.; **Martin**, *In re*, **Smith v. Martin** (1885) 54 L. J. Ch. 1071; 53 L. T. 34.—KAY, J.; **Burrows**, *In re*, **Cleghorn v. Burrows** (1895) 65 L. J. Ch. 52; [1895] 2 Ch. 497; 13 R. 689; 73 L. T. 148; 43 W. R. 683.—CHITTY, J.; **Hancock v. Watson** (1901) 71 L. J. Ch. 149; [1902] A. C. 14, 21.—H.L. (E.) (*post*, col. 2139).

Goodier v. Johnson (1881) 51 L. J. Ch. 369; 18 Ch. D. 441; 45 L. T. 515.—C.A.; *varying* HALL, V.-C., *dictum adopted*.

Goodier v. Edmunds (1893) 62 L. J. Ch. 649; [1893] 3 Ch. 455, 459.—STIRLING, J. *See judgment*.

Goodier v. Johnson, *applied*.
Appleby, *In re* (1903) 72 L. J. Ch. 332; [1903] 1 Ch. 563, 570 (*post*, col. 2116).

Goodier v. Edmunds, *approved*.
Daveron, *In re*, **Bowen v. Churchill** (1893) 63 L. J. Ch. 54; [1893] 3 Ch. 421; 3 R. 685; 69 L. T. 752; 42 W. R. 24.—CHITTY, J.

Goodier v. Edmunds and Daveron, *In re*, **Bowen v. Churchill**, *considered*.

Wood, *In re*, **Tullett v. Colville** (1894) 63 L. J. Ch. 544; [1894] 2 Ch. 310.—KEKEWICH, J.; *affirmed*, 63 L. J. Ch. 790; [1894] 3 Ch. 381; 7 R. 495; 71 L. T. 413.—C.A.

Goodier v. Edmunds, *distinguished*.

Douglas & Powell's Contract, *In re* [1902] 2 Ch. 296; 71 L. J. Ch. 850.

BYRNE, J.—In that case the trust for sale did not arise under the terms of the will until after the legal period, and it does not seem to me to bear upon the present case, where there is an immediate trust for sale, and the parties to take under the will are all lives in being at its date.—p. 313.

Daveron, *In re*, *applied*.

Goodier v. Edmunds, *dictum adopted*.

Appleby, *In re*, **Walker v. Lever**, and **Walker v. Nisbet** (1903) 72 L. J. Ch. 332; [1903] 1 Ch. 563, 570; 88 L. T. 219; 51 W. R. 455.—C.A.

Dawson, *In re*, **Johnston v. Hill** (1888) 57 L. J. Ch. 1061; 39 Ch. D. 155; 57 L. T. 725; 37 W. R. 51.—CHITTY, J., *referred to*.
Wood, *In re*, **Tullett v. Colville** (1894) 63 L. J. Ch. 790; [1894] 3 Ch. 381, 385; 7 R. 495; 71 L. T. 413.—C.A.

[Theobald on Wills (3rd ed.), p. 401, approved by Lindley, L.J.]

Dawson, *In re*, **Johnston v. Hill**, *not applied*.

Lowman, *In re*, **Devenish v. Pester** [1895] 64 L. J. Ch. 567; [1895] 3 Ch. 348, 366; 12 R. 362; 72 L. T. 816.—C.A.; *reversing* KEKEWICH, J.

Dawson, *In re*, **Johnston v. Hill**, *followed*.

Lowman, *In re*, **Devenish v. Pester**, *explained and distinguished*.

Hocking, *In re*, **Mitchell v. Loe** (1898) 67 L. J. Ch. 662; [1898] 2 Ch. 567; 79 L. T. 164; 47 W. R. 114.—C.A.; *varying* KEKEWICH, J.

LINDLEY, M.R.—In *Lowman*, *In re*, a fund was limited in the events which happened to the first and other sons of the testator's niece Ellen, with remainder to the first and other sons of his niece Flora. Ellen was seventy and a spinster. Her possible son was the only person who stood in the way of Flora's son. The Court ordered the fund to be paid to Flora's second son, the eldest having died before he obtained a vested interest. The Court deprived no living person of a possible interest, nor has it ever done so that I know of.—p. 664.

CHITTY, L.J.—I agree with the law as stated by the M.R., and I think that *Jee v. Audley* (*post*, col. 2121), when considered, is an authority for the propositions which he has laid down. It is quite true that *Jee v. Audley* was a case in which the doctrine of perpetuity came into question; but it appears to me to apply to a limitation such as we have now under consideration.—p. 665. *See judgments at length*.

Lowman, *In re*, *referred to*.

Carter, *In re*, **Dodds v. Pearson** (1900) 69 L. J. Ch. 426; [1900] 1 Ch. 801; 82 L. T. 526; 48 W. R. 555.—COZENS-HARDY, J.

Proctor v. Bath and Wells (Bishop) (1794)

2 H. Bl. 358.—K.B., *distinguished*.
Tollemache v. Coventry (Earl) (1834) 2 Cl. & F. 611, 623.—H.L. (E.). *And see post*, col. 2117.

Proctor v. Bath and Wells (Bishop) (*supra*), *referred to*.

Ker v. Dungannon (Lord) (1841) 1 Dr. & W. 509, 539; 4 Ir. Eq. R. 343; 1 Con. & L. 335.—SUGDEN, L.C.: Massey v. Barton (1841) 7 Ir. Eq. R. 95.—M.R.; Dungannon (Lord) v. Smith (1846) 12 Cl. & F. 546, 632; 10 Jur. 721.—H.L. (IR.): Catlin v. Brown (1853) 11 Hare 377; 1 Eq. R. 550; 1 W. R. 533.—WIGRAM, V.-C.

Proctor v. Bath and Wells (Bishop), *distinguished and not applied*.

Doe d. Evers v. Challis (1859) 29 L. J. Q. B. 121; 7 H. L. (as. 531, 555; 5 Jur. (N.S.) 825; 7 W. R. 622.—H.L. (B.) (*see post*, col. 2137).

Proctor v. Bath and Wells (Bishop), *discussed and approved*.

Hancock v. Watson (1901) 71 L. J. Ch. 149; [1902] A. C. 14, 19; 85 L. T. 729; 50 W. R. 321.—H.L. (B.) (*post*, col. 2139).

Longhead d. Hopkins v. Phelps (1770) 2 W. Bl. 704.—K.B., *rule applied*.

Minter v. Wraith (1842) 13 Sim. 52, 62.—V.-C.; Goring v. Howard (1848) 18 L. J. Ch. 105; 16 Sim. 395, 402.—V.-C.

Longhead v. Phelps, *discussed and approved*. Hancock v. Watson (*supra*).**Goring v. Howard**, *referred to*.

Doe d. Evers v. Challis (*supra*).

Humberston v. Humberston (1716) 1 P. Wms. 332; 2 Vern. 738; Pre. Ch. 455; Gilb. Eq. R. 128.—L.C., *not applied*.

Mortimer v. West (1828) 2 Sim. 274, 282; 29 R. R. 104.—SHADWELL, V.-C.

Humberston v. Humberston, *referred to*.

Vanderplank v. King (1843) 12 L. J. Ch. 497; 3 Hare 118; 7 Jur. 548.—WIGRAM, V.-C.; Williams v. Teale (1847) 6 Hare 239.—WIGRAM, V.-C.; Lyddon v. Ellison (1854) 19 Beav. 565, 573; 18 Jur. 1066.—ROMILLY, M.R.

Humberston v. Humberston, *applied*.

Parfitt v. Hember (1867) L. R. 4 Eq. 443.

ROMILLY, M.R.—I think the doctrine of *cy-près* established by *Humberston v. Humberston*, is not a doctrine to be confined to cases where the testator has made a will of an executory character, and has imposed on the Court, or on persons surviving them, the duty of carrying his general intention into effect by framing a settlement for that purpose; but that this doctrine is a rule of construction, and that, when the Court finds that the object expressed by the testator is to give to A. an estate for life, to A.'s eldest son another estate for life, and to his eldest son, a third estate for life, and so on, the Court will carry that intention into effect as nearly as it can, by giving A. an estate for life, and to his eldest son, if unborn at the death of the testator, an estate in tail male, or, if he be alive at the death of the testator, an estate for life, with a remainder to his eldest son in tail male. It is obvious that if no tenant in tail executes a disentailing deed, this accurately effects the intention of the testator from generation after generation. It is true that the law, as incidental to an estate tail, allows any one of the tenants in tail in possession to defeat that intention by disentailing the estate, but this circumstance does not appear to me to affect the reasoning which entitles the Court to do what, as far as can be allowed, effects the intention of the testator. In the case I have supposed, A.'s son or grandson would, if I held

that he was only to take a life estate, enjoy the estate for life, and then it would go to the testator's heir-at-law; but if the construction I support applies, he still enjoys the estate for life, and if he does not act to destroy the entail, the estate goes to his son in like manner; but even if he does any act to destroy the entail, the probability is that he re-settles the property in a manner more nearly resembling the wishes of the testator than any other construction would admit of. This seems to me to be the rule of construction adopted in *Vanderplank v. King* (*post*, col. 2135) and also in *Montpeuny v. Dering* (*post*, col. 2137). Though this rule of construction may be called technical, still it is a very reasonable one, as it prevents intestacy and executes the testator's intention as nearly as the law will allow.—p. 446.

Humberston v. Humberston, *considered*.

Thompson v. Thompson (1870) 18 W. R. 1136.—CHATTERTON, V.-C.

Humberston v. Humberston, *not applied*.

Juttendromohun Tagore v. Ganendromohun Tagore (1872) L. R. 5 Ind. App. Suppl. 77.—P.C.

Parfitt v. Hember (*supra*), *referred to*.

Hampton v. Holman (1877) 46 L. J. Ch. 248; 5 Ch. D. 183, 191; 36 L. T. 287; 25 W. R. 459.—JESSEL, M.R.

Parfitt v. Hember and Humberston v.**Humberston**, *distinguished*.

Richardson, In re, Parry v. Holmes (1903) 73 L. J. Ch. 153; [1904] 1 Ch. 332, 341; 91 L. T. 169.—BUCKLEY, J.

2. LIMITATIONS.

Deerhurst (Lord) v. St. Albans (Duke) (1820) 5 Madd. 232; 21 R. R. 292.—V.-C.; (1831) 1 L. J. Ch. 25; 2 Russ. & M. 702.—L.C.; *reversed nom.* **Tollemache v. Coventry (Earl)** (1834) 2 Cl. & F. 611; 8 Bligh (N.S.) 547; 37 R. R. 260.—H.L. BROUGHAM, L.C.

Tollemache v. Coventry (Earl), *commented on*.

Ker v. Dungannon (Lord) (1841) 1 Dr. & War. 509, 536; 4 Ir. Eq. R. 343; 1 Con. & L. 335.—L.C.; Dungannon (Lord) v. Smith (1846) 12 Cl. & F. 546; 10 Jur. 721.—H.L. (IR.).

Tollemache v. Coventry (Earl).

Discussed, Rowland v. Morgan (1848) 18 L. J. Ch. 78; 2 Ph. 764; 13 Jur. 23.—L.C.; *commented on*, Shelley v. Shelley (1868) 37 L. J. Ch. 357; L. R. 6 Eq. 540, 547; 16 W. R. 1036.—WOOD, V.-C.; *referred to*, Montagu v. Inchiquin (Lord) (1875) 32 L. T. 427; 23 W. R. 592.—HALL, V.-C.

Tollemache v. Coventry and Ker v. Dungannon (Lord) (*supra*), *applied*.

Roberts, In re, Repington v. Roberts-Gawen (1881) 50 L. J. Ch. 265; 19 Ch. D. 520; 44 L. T. 300.—HALL, V.-C.; *reversed on the construction of the will* (*see post*, col. 2140).

Tollemache v. Coventry (Earl), *referred to*.

Exmouth (Viscount), In re, Exmouth (Viscount) v. Fracl (1883) 52 L. J. Ch. 420; 23 Ch. D. 158, 163; 48 L. T. 422; 31 W. R. 545.—FRY, J.; Johnston, In re, Cockereil v. Essex (Earl) (1884) 53 L. J. Ch. 645; 26 Ch. D. 538, 547.—CHITTY, J. (*post*, col. 2125).

Tollemache v. Coventry (Earl), *applied*.**Ker v. Dungannon (Lord)**, *referred to*.

Hill (Viscountess). In re, Hill (Viscount) v.

Hill (1902) 71 L. J. Ch. 417; [1902] 1 Ch. 807; 86 L. T. 336; 50 W. R. 434.—C.A.

V. WILLIAMS, L.J.—It seems to me that the case is really concluded by *Tollemache v. Corentry (Earl)*. The words in that case were almost identical with the words in the present case. In that case a life estate was given first to the widow, and named only son of the testator. In the present case, a life estate is given to the named son of the testatrix, and in each case there is what I will call the heirloom clause: disposing of the heirlooms after the termination of the life estate. In *Tollemache v. Corentry (Earl)* there were alive at the date of the will and of the death of the testator a son who took a life estate, and living grandsons who might succeed to the title; and in the present case there were likewise a son, Rowland Clegg Hill, the third viscount, who took a life estate, and living grandsons who might succeed to the title; and in my judgment the H. L. did, in *Tollemache v. Corentry (Earl)*, decide that the third Lord Vere—that is to say, the first taken under the description “such person as shall from time to time be Lord Vere”—took the heirlooms in that case absolutely. I know that this has been doubted by some of the judges who wrote opinions in *Dungannon (Lord) v. Smith (post)*, col. 2120; but, for reasons which I will give presently, I am of opinion that the H. L. did so decide, and did not, as has been suggested, merely negative the title of the fourth Lord Vere (p. 419). . . . I do not quite understand why Crosswell, J., in *Dungannon (Lord) v. Smith*, says that the whole of the reasoning of Lord Brougham in *Tollemache v. Corentry (Earl)* shows that the executory bequest after the death of the second Lord Vere was void because it possibly might not vest in due time, and that the decision, therefore, must be taken to have been, not that the bequest was good as to the third Lord Vere. I see nothing in the reasoning of Lord Brougham inconsistent with his adoption of the argument of Sir C. Pepys and Mr. Preston; and Lord St. Leonards, who, in his *Law of Property* (1st ed.), p. 334, seems to have doubted this himself in *Ker v. Dungannon (Lord)*, refers to the decision of the House in *Tollemache v. Corentry (Earl)* as having been to that effect. The decision in this sense seems to me to have been frequently recognised in later cases—see the decision of Mr. J. (afterwards L.J.) Fry, in *Esmonth (Viscount) v. Praed (supra)* and *Johnston, In re (supra)*. . . . Counsel for the appellant argued that that case [*Harrington v. Harrington* (col. 2123)] showed that the words “so far as the rules of law and equity permit” would justify the Court in holding that no Lord Hill could claim the jewellery absolutely so long as there were persons living at the date of the death of the testatrix who could succeed to the title. But that case turned upon a proviso preventing the personalty from vesting absolutely in a tenant in tail unless he should attain twenty-one, and it was contended that the proviso had the effect of carrying on to those who came next in remainder after the taker on the determination of the life estate so exposing itself to be rendered void as aiming at perpetuity; but the House held that the proviso was an essential part of the gift, and therefore controlled by the words in the disposition clause, “so far as the rules of law and equity permit.” The effect of this was to

limit the proviso so that it should only apply to tenants in tail who took by purchase, and consequently it could not be said that the proviso was void as aiming at perpetuity.—p. 420.

STIRLING, L.J. to the same effect on *Tollemache v. Corentry (Earl)*. COZENS-HARDY, L.J. concurred.

Mackworth v. Hinzman (1838) 5 L. J. Ch. 127; 2 Keen 658.—M.R., *discussed*.

Ker v. Dungannon (Lord) (1841) 1 Dr. & War. 509, 537.—L.C. (*supra*, col. 2118).

Mackworth v. Hinzman, *referred to*.

Rowland v. Morgan (1848) 18 L. J. Ch. 78; 2 Ph. 764; 13 Jur. 23.—COTTENHAM, L.C.

Ibbetson v. Ibbetson (1840) 10 L. J. Ch. 49; 5 Myl. & Cr. 26.—COTTENHAM, L.C.; *affirming* 10 Sim. 495.—V.-C., *discussed*.

Ker v. Dungannon (Lord) (*supra*).

Ibbetson v. Ibbetson, *discussed and applied*. *Dungannon (Lord) v. Smith* (1846) 12 Cl. & F. 546, 627 (*post*); *Jenkinson v. Harcourt* (1854) Kay 689.—WOOD, V.-C.

Bacon v. Proctor (1822) Turn. & R. 31; 23 R. R. 177.—GRAHAM, B., *referred to*. *Massy v. O'Dell* (1859) 10 Ir. Ch. R. 22.—M.R.; *Montagu v. Inchiquin (Lord)* (1875) 32 L. T. 427; 23 W. R. 592.—HALL, V.-C.

Dungannon (Lord) v. Smith (1846) 12 Cl. & F. 546; 10 Jur. 721.—H.L. (1R.); *affirming* **S. C. nom. Smith v. Dungannon (Lord)** (1842) 1 Fl. & K. 638; 1 Dr. & War. 543, n.—M.R., *applied*.

Greenwood v. Roberts (1851) 21 L. J. Ch. 262; 15 Beav. 92, 98.—M.R.

Dungannon (Lord) v. Smith, *not applied*.

Cattlin v. Brown (1853) 11 Hare 377; 1 Eq. R. 550; 1 W. R. 533.—WIGRAM, V.-C.

Dungannon (Lord) v. Smith, *applied*.

Merlin v. Blagrove (1858) 25 Beav. 125.—ROMILLY, M.R.

Dungannon (Lord) v. Smith, *approved but not applied*.

Christie v. Gosling (1866) 35 L. J. Ch. 667; L. R. 1 H. L. 279, 292; 15 L. T. 40.—H.L. (E.); LORD ST. LEONARDS *dissenting*.

Dungannon (Lord) v. Smith, *distinguished*.

Holloway v. Webber (1868) L. R. 6 Eq. 523, 533 (*post*, col. 2124).

Dungannon (Lord) v. Smith, *discussed*.

Harrington (Countess) v. Harrington (Earl) (1871) L. R. 5 H. L. 87, 105 (*post*, col. 2124).

Dungannon (Lord) v. Smith, *discussed*.

Pearks v. Moseley (1880) 50 L. J. Ch. 57; 5 App. Cas. 714, 729; 43 L. T. 449; 29 W. R. 1.—H.L. (E.) (*see post*, col. 2129).

Dungannon (Lord) v. Smith, *referred to*.

Dawson, In re Johnston v. Hill (1886) 57 L. J. Ch. 1061; 39 Ch. D. 155, 162; 59 L. T. 725; 37 W. R. 51.—CHITTY, J.

Dungannon (Lord) v. Smith, *not applied*.

Smithwick v. Hayden (1887) 19 L. R. Ir. 490, 498.—C.A.

Dungannon (Lord) v. Smith, *referred to*.

Wood, In re Tullett v. Colville (1894) 63 L. J. Ch. 790; [1894] 3 Ch. 381, 385; 7 R. 495; 71 L. T. 413.—C.A.

Dungannon (Lord) v. Smith (*supra*), *discussed and approved*.

Hancock v. Watson (1901) 71 L. J. Ch. 149; [1902] A. C. 14; 35 L. T. 729; 50 W. R. 321.—H.L. (E.) (*post*, col. 2139).

Dungannon (Lord) v. Smith, *discussed*.

Hill (Viscountess). In re, Hill (Viscount) v. Hill (1902) 71 L. J. Ch. 417; [1902] 1 Ch. 807.—C.A. (*supra*, col. 2118).

Jee (or Gee) v. Audley (1787) 1 Cox 324; 1 R. R. 46.—M.R., *approved*.

Routledge v. Dorril (1794) 2 Ves. 357, 363; 2 R. R. 250.—ARDEN, M.R.

Jee v. Audley, *followed*.

Leake v. Robinson (1817) 2 Meriv. 363; 16 R. R. 168.—GRANT, M.R.

Jee v. Audley, *discussed*.

Dungannon (Lord) v. Smith (1846) 12 Cl. & F. 546, 625; 10 Jur. 721.—H.L. (E.) (*supra*, col. 2120).

Jee v. Audley, *distinguished*.

Harvey v. Stracey (1852) 22 L. J. Ch. 23; 1 Drew. 73; 16 Jur. 771.

KINDERLEY, V.-C.—It does not appear to have been a case of an appointment under a power at all. Cox states it is a simple bequest of the testator's own property, but whether it was the case of an appointment or of a bequest, the limitation was held void, in *Jee v. Audley*, merely because the property was given to a class of persons who could not be, or at all events might not be, capable of being ascertained within the period of a life or lives in being at the death of the testator and twenty-one years after; in other words, it was void for remoteness.—p. 39.

Jee v. Audley, *discussed*.

Cattlin v. Brown (1853) 11 Hare 372, 377; 1 Eq. R. 550; 1 W. R. 553.—WIGRAM, V.-C.

Jee v. Audley, *followed*.

Sayer's Trusts, In re (1867) 36 L. J. Ch. 350; L. R. 6 Eq. 319; 16 L. T. 203; 15 W. R. 613.—MALINS, V.-C.

Jee v. Audley, *explained*.

Stuart v. Cockerell (1869) 38 L. J. Ch. 473; L. R. 7 Eq. 363, 367; *affirmed* (*post*, col. 2132).

MALINS, V.-C.—The case is in principle like *Jee v. Audley*, where the gift was if a person should die without issue then to the children of two living persons. A gift over on failure of issue would be void for remoteness as to mere personal property, but a gift over to children living would have been good if it had been to children living at the death of the testatrix, but as those persons might have had other children it was impossible to say that it meant children then living. The gift was held void for remoteness, and Lord Kenyon would not assume that the two aged persons might not have had other issue.—p. 475.

Jee v. Audley, *referred to*.

Bhoobun Mohini Debya v. Hurriah Chunder Chowdhry (1878) L. R. 5 Ind. App. 133, 146.—P.C.; Pearks v. Moseley (1880) 50 L. J. Ch. 57; 5 App. Cas. 714, 726; 43 L. T. 449; 29 W. R. 1.—H.L. (E.) (*see post*, col. 2129).

Jee v. Audley and Sayer's Trusts, In re (*supra*), *followed*.

Dawson, In re, Johnston v. Hill (1888) 57

L. J. Ch. 1061; 39 Ch. D. 155, 160; 59 L. T. 725; 37 W. R. 51.—CHITTY, J.

Jee v. Audley, *followed*.

Wood, In re, Tullett v. Colville (1894) 63 L. J. Ch. 544, 790; [1894] 3 Ch. 381; 7 R. 495; 71 L. T. 413.—C.A.; Hocking, In re, Michell v. Jee (1898) 67 L. J. Ch. 632; [1898] 2 Ch. 567, 571; 79 L. T. 164; 47 W. R. 114.—C.A. (*see supra*, col. 2116).

Jee v. Audley, *discussed*.

Hancock v. Watson (1901) 71 L. J. Ch. 149; [1902] A. C. 14; 35 L. T. 729; 50 W. R. 321.—H.L. (E.) (*see post*, col. 2140).

Jee v. Audley, *referred to*.

Bowles, In re, Amedroz v. Bowles (1902) 71 L. J. Ch. 822; [1902] 2 Ch. 650; 51 W. R. 124.—FARWELL, J.

Leake v. Robinson (1817) 2 Meriv. 363; 16

R. R. 168.—GRANT, M.R., *applied*.

Vawdry v. Geddes (1830) 1 Russ. & M. 203; Tambl. 361; 8 L. J. (O.S.) Ch. 63; 32 R. R. 196.—LEACH, M.R.

Leake v. Robinson, *referred to*.

Kevern v. Williams (1832) 5 Sim. 171.—V.-C.; Tollemache v. Coventry (Earl) (1834) 2 Cl. & F. 611.—H.L. (E.); LORD BROUGHAM.

Leake v. Robinson, *principle applied*.

Ker v. Dungannon (Lord) (1841) 1 Dr. & War. 509; 1 Con. & L. 335; 4 Ir. Eq. R. 343.—SUGDEN, L.C.

Leake v. Robinson, *discussed*.

Davies v. Fisher (1842) 11 L. J. Ch. 338; 5 Beav. 201; 6 Jur. 248.—LANGDALE, M.R.

Leake v. Robinson, *referred to*.

Vanderplank v. King (1843) 12 L. J. Ch. 497; 3 Hare 1, 13; 7 Jur. 548.—WIGRAM, V.-C.

Leake v. Robinson, *rule in, applied*.

Evans v. Jones (1846) 2 Coll. C. C. 516.—KNIGHT BRUCE, V.-C.

Leake v. Robinson, *referred to*.

Williams v. Teale (1847) 6 Hare 239.—WIGRAM, V.-C.

Leake v. Robinson, *rule in, applied*.

Blagrove v. Hancock (1848) 18 L. J. Ch. 20; 16 Sim. 371, 377; 12 Jur. 1081.—SHADWELL, V.-C.; Goring v. Howard (1848) 18 L. J. Ch. 105; 16 Sim. 395, 403.—V.-C.

Leake v. Robinson, *referred to*.

Boughton v. Boughton (1848) 1 H. L. Cas. 406, 433.—H.L. (E.); COTTENHAM, L.C.

Leake v. Robinson, *explained and applied*.

Greenwood v. Roberts (1851) 21 L. J. Ch. 262; 15 Beav. 92, 98.—ROMILLY, M.R.

Leake v. Robinson, *discussed*.

Cattlin v. Brown (1853) 11 Hare 372, 377; 1 Eq. R. 550; 1 W. R. 533.—V.-C.; Storrs v. Benbow (1853) 22 L. J. Ch. 823; 3 De G. M. & G. 390; 17 Jur. 821; 1 W. R. 115, 134, 420.—L.C.

Leake v. Robinson, *applied*.

Seaman v. Wood (1856) 22 Beav. 591, 595.—ROMILLY, M.R.

Leake v. Robinson, *applied*.

Walker v. Mower (1852) 16 Beav. 365.—ROMILLY, M.R.; Merlin v. Blagrove (1854) 25 Beav. 125.—ROMILLY, M.R.

Leake v. Robinson, referred to.

Doe *d. Evers* *v.* Challis (1859) 29 L. J. Q. B. 121; 7 H. L. Cas. 531, 553; 5 Jur. (N.S.) 825; 7 W. R. 622.—H.L. (E.).

Leake v. Robinson, distinguished.

Wilkinson *v.* Duncan (1861) 30 L. J. Ch. 938; 30 Beav. 111; 7 Jur. (N.S.) 1182; 5 L. T. 161; 9 W. R. 915.—M.R. See judgment at length.

Leake v. Robinson, referred to.

Knapping *v.* Tomlinson (1864) 10 Jur. (N.S.) 626.—KINDERSLEY, V.-C.

Leake v. Robinson, applied.

Locke *v.* Lambe (1867) L. R. 4 Eq. 372; 16 L. T. 616; 15 W. R. 1016.—MALINS, V.-C.

Leake v. Robinson, referred to.

Merry *v.* Hill (1869) L. R. 8 Eq. 619, 624; S. C. *nom.* Merry *v.* Merry, 17 W. R. 985.—MALINS, V.-C.

Leake v. Robinson, applied.

Moseley's Trusts, *In re* (1871) 40 L. J. Ch. 275; L. R. 11 Eq. 499, 504; 24 L. T. 260; 19 W. R. 431.—MALINS, V.-C.; Hale *v.* Hale (1876) 3 Ch. D. 643; 35 L. T. 933; 24 W. R. 1065.—JESSEL, M.R.

Leake v. Robinson, referred to.

Bhoobun Mohini Debya *v.* Hurriah Chunder Chowdhury (1878) L. R. 5 Ind. App. 138, 146.—P.C.; Pearks *v.* Moseley (1880) 5 App. Cas. 714, 723.—H.L. (E.) (see *post*, col. 2129); Watson *v.* Young (1885) 28 Ch. D. 436, 442 (*post*, col. 2138).

Leake v. Robinson, rule in, not applied.

Bevan's Trusts, *In re* (1887) 34 Ch. D. 716; 56 L. J. Ch. 652; 56 L. T. 277; 35 W. R. 400.

KAY, J.—Am I bound to give a construction to this will which I am sure was not the meaning of the testatrix, and which will also produce the unfortunate result that the gift to the children must fail, whether they attain twenty-five or not, because it is void for remoteness? If there be any doubt about the construction, as Lord Selborne said in *Pearks v. Moseley* (*post*, col. 2128), this is a matter which may be taken into consideration. The argument is this: a canon of construction it is said was laid down in *Leake v. Robinson*—that where there is no gift, except a direction to pay as the objects attain twenty-five, the attainment of the age is of the essence of the gift, which must be read as a bequest to those only of the class who attain the specified age. A number of other cases were cited in which this rule was applied (p. 718). . . . There is ample authority, as I have shown for treating this case as an exception to the rule in *Leake v. Robinson*, by reason of the subject being a separated fund and the gift over being on the death of the tenant for life without leaving issue.—p. 720.

Leake v. Robinson, referred to.

Harvey, *In re*, Harvey *v.* Gillo (1893) 62 L. J. Ch. 328; [1893] 1 Ch. 567; 3 R. 247; 68 L. T. 562; 41 W. R. 293.—CHITTY, J.; Hancock *v.* Watson (1901) 71 L. J. Ch. 149; [1902] A. C. 14, 22 (see *post*, col. 2139).

Trafford v. Trafford (1746) 3 Atk. 347.—L.C., commented on.

Lincoln (Countess) *v.* Newcastle (Duke) (1806), 12 Ves. 217, 235; 4 R. R. 31.—H.L. (E.).

Trafford v. Trafford, applied.

Savile *v.* Scarborough (Earl) (1818) 1 Swanst. 537; 1 Wils. Ch. 239.—M.R.

Trafford v. Trafford, referred to.

Ibbetson *v.* Ibbetson (1840) 10 L. J. Ch. 49; 5 Myl. & Cr. 26.—COTTENHAM, L.C.

Taylor v. Biddall (1675) 2 Mod. 289.—C.P.; and Trafford v. Trafford, commented on and not applied.

Dungannon (Lord) *v.* Smith (1846) 12 Cl. & F. 546, 627; 10 Jur. 721.—H.L. (IR.). See *supra*, col. 2120.

Trafford v. Trafford, referred to.

Potts *v.* Potts (1846) 3 Jo. & Lat. 353; 9 Ir. Eq. R. 577.—SUGDEN, L.C.; affirmed, H.L. (see *supra*, col. 2111).

Trafford v. Trafford, not followed

Rowland *v.* Morgan (1848) 18 L. J. Ch. 78; 2 Ph. 764; 13 Jur. 23.—COTTENHAM, L.C.

Trafford v. Trafford, discussed.

Scarsdale (Lord) *v.* Curzon (1860) 29 L. J. Ch. 249; 1 J. & H. 40; 6 Jur. (N.S.) 209, 246.—WOOD, V.-C.

Trafford v. Trafford, referred to.

Harrington (Countess) *v.* Harrington (Earl) (1871) L. R. 5 H. L. 87, 107.—H.L. (E.) (*post*).

Gosling v. Gosling, 32 Beav. 58; 8 Jur. (N.S.)

1048; 7 L. T. 490.—M.R.; reversed, (1868) 32 L. J. Ch. 233; 1 De G. J. & S. 1; 1 N. R. 36; 9 Jur. (N.S.) 109; 7 L. T. 579; 11 W. R. 97.—WESTBURY, L.C.; L.C. affirmed *nom.* Christie *v.* Gosling (1866) 35 L. J. Ch. 667; L. R. 1 H. L. 279; 15 L. T. 40.—H.L. (E.); LORD ST. LEONARDS dissenting.

Christie v. Gosling, referred to.

Burnell *v.* Firth (1867) 15 W. R. 546.—ROMILLY, M.R.

Christie v. Gosling, distinguished.

Harrington *v.* Harrington (1868) 37 L. J. Ch. 593; L. R. 3 Ch. 564, 571; 19 L. T. 38; 16 W. R. 742.—CAIRNS, L.C.; reversing MALINS, V.-C.

Christie v. Gosling, not applied.

Harrington (Countess) *v.* Harrington (Earl) (1871) 40 L. J. Ch. 716; L. R. 5 H. L. 87, 98.—H.L. (E.); affirming S. C., *supra*.

Christie v. Gosling, applied.

Holloway *v.* Webber; Holloway *v.* Holloway (1868) 37 L. J. Ch. 865; L. R. 6 Eq. 523, 532; 19 L. T. 514; 17 W. R. 94.—STUART, V.-C.; affirmed *nom.* Martelli *v.* Holloway (1872) 42 L. J. Ch. 26; L. R. 5 H. L. 532.—H.L. (E.), *supra*, col. 2111; Burton *v.* Newbery (1875) 45 L. J. Ch. 202; 1 Ch. D. 234, 241; 34 L. T. 15; 24 W. R. 388.—JESSEL, M.R.

Christie v. Gosling, referred to.

Cresswell, *In re*, Parkin *v.* Cresswell (1883) 52 L. J. Ch. 798; 24 Ch. D. 102, 108; 49 L. T. 590.—KAY, J.; Fothergill's Estate, *In re*, Price-Fothergill *v.* Price (1902) 72 L. J. Ch. 164; [1903] 1 Ch. 149, 156 (*supra*, col. 2113).

Shelley v. Shelley (1868) 37 L. J. Ch. 357;

L. R. 6 Eq. 540; 16 W. R. 1036.—V.-C., discussed.

Montague *v.* Inchiquin (Lord) (1875) 32 L. T. 427; 23 W. R. 592.—HALL, V.-C. And see *post*.

- Shelley v. Shelley**, *principle applied*.
Exmouth (Viscount), In re, Exmouth (Viscount) v. Praed (1883) 52 L. J. Ch. 420; 23 Ch. D. 158; 48 L. T. 422; 31 W. R. 545.—FRY, J.; and **Montagu v. Inchiquin (Lord)** (*supra*), *discussed and distinguished*.
Harrington (Countess) v. Harrington (Earl) (1871) 40 L. J. Ch. 716; L. R. 5 H. L. 87.—H. L. (E.) (*supra*, col. 2124), *referred to*.
Johnson (or Johnston), In re, Cockerell v. Essex (Earl) (1884) 53 L. J. Ch. 645; 26 Ch. D. 538, 546; 52 L. T. 44; 32 W. R. 634.—CHITTY, J.
- Shelley v. Shelley** (*supra*, col. 2124) and **Johnston (or Johnson), In re, Cockerell v. Essex (Earl)**, *referred to*.
Hill (Viscount) v. Hill (Viscountess) (1897) 66 L. J. Q. B. 329; [1897] 1 Q. B. 483, 496; 76 L. T. 103; 45 W. R. 371.—C.A.
- Exmouth (Viscount), In re, Exmouth (Viscount) v. Praed** (*supra*), *referred to*.
Jeffreys v. Jeffreys (1901) 84 L. T. 417.—FARWELL, J.
- Hill (Viscount) v. Hill (Viscountess)** and **Shelley v. Shelley**, *referred to*.
Hill, In re, Hill v. Hill [1902] 1 Ch. 537, 541; 71 L. J. Ch. 222; 86 L. T. 146.—EADY, J.; *affirmed, post*.
- Exmouth (Viscount), In re, and Johnston, In re, referred to.
Harrington (Countess) v. Harrington (Earl) (*supra*), *observed on*.
Hill (Viscountess), In re, Hill (Viscount) v. Hill (1902) 71 L. J. Ch. 417; [1902] 1 Ch. 807, 813; 86 L. T. 336; 50 W. R. 434.—C.A.**
- Harrington (Countess) v. Harrington (Earl)**, *referred to*.
Fothergill's Estate, In re, Price-Fothergill v. Price (1902) 72 L. J. Ch. 164; [1903] 1 Ch. 149, 156. (*See supra*, col. 2113.)
- Johnston, In re, and Harrington (Countess) v. Harrington (Earl)**, *referred to*.
Finch v. Chew's Contract, In re (1903) 72 L. J. Ch. 690; [1903] 2 Ch. 486, 493; 89 L. T. 162.—KEKEWICH, J.
- Bute (Marquis) v. Harman** (1846) 9 Beav. 320.—M.R., *marginal note corrected*.
Southern v. Wollaston (1852) 16 Beav. 166.—M.R. *And see Boreham v. Bignall* (1850) 8 Hare 131, 133 n. (d.).
- Blagrove v. Hancock** (1848) 18 L. J. Ch. 20; 16 Sim. 371; 12 Jur. 1081.—V.-C., *applied*.
Greenwood v. Roberts (1851) 21 L. J. Ch. 262; 15 Beav. 92.—ROMILLY, M.R.
- Blagrove v. Hancock**, *referred to*.
Abbiss v. Burney, Finch, In re (1881) 50 L. J. Ch. 348; 17 Ch. D. 211; 44 L. T. 267; 29 W. R. 449.—C.A.
- Boughton v. James** (1844) 1 Coll. C. C. 26; 8 Jur. 329.—KNIGHT BRUCE, V.-C.; *varied nom.* **Boughton v. Boughton** (1848) 1 H. L. Cas. 406.—COTTENHAM, L.C., *referred to*.
Greenwood v. Roberts (1851) 21 L. J. Ch. 262; 15 Beav. 92.—ROMILLY, M.R.
- Boughton v. James**, *applied*.
Roberts, In re, Repington v. Roberts-Gawin (1881) 50 L. J. Ch. 265; 19 Ch. D. 520; 44 L. T. 300.—HALL, V.-C. (*see post*, col. 2140); **Smith v. Cunningham** (1884) 13 L. R. Ir. 480, 488.—V.-C.
- Boughton v. James**, *referred to*.
Redington v. Browne (1893) 32 L. R. Ir. 347, 357.—BEWLEY, J.
- Boughton v. James**, *discussed*.
Wainwright v. Miller (1897) 66 L. J. Ch. 616; [1897] 2 Ch. 255, 260; 76 L. T. 718; 45 W. R. 652.—BYRNE, J. [His lordship approved of statement of law in **Lewis on Perpetuities**, p. 173.]
- Boughton v. James**, *approved*.
Wainwright v. Miller, *followed*.
Gage, In re, Hill v. Gage (1898) 67 L. J. Ch. 200; [1898] 1 Ch. 498; 78 L. T. 347; 46 W. R. 569.—KEKEWICH, J.
- Storrs v. Benbow** (1833) 2 L. J. Ch. 201; 2 Myl. & K. 46.—V.-C., *referred to*.
Gooch v. Gooch (1851) 21 L. J. Ch. 238; 14 Beav. 565, 576.—M.R.; *affirmed*, (1858) 22 L. J. Ch. 1089; 3 De G. M. & G. 366.—L.C.
- Storrs v. Benbow**, *discussed*.
Gooch v. Gooch, *referred to*.
Storrs v. Benbow (1853) 22 L. J. Ch. 823; 3 De G. M. & G. 390, 395; 17 Jur. 821; 1 W. R. 115, 134, 420.—CRANWORTH, L.C.
- Gooch v. Gooch; Storrs v. Benbow; and Dodd v. Wake** (1837) 8 Sim. 615.—V.-C., *discussed*.
Cattlin v. Brown (1853) 11 Hare 372, 377; 1 Eq. R. 550; 1 W. R. 533.—WIGRAM, V.-C.
- Gooch v. Gooch**, *referred to*.
Hampton v. Holman (1877) 46 L. J. Ch. 248; 5 Ch. D. 183, 189 (*see post*, col. 2135); **Dias v. De Livera** (1880) 49 L. J. P. C. 26; 5 App. Cas. 123, 132; 42 L. T. 267.—P.C.
- Cattlin v. Brown**, *applied*.
Storrs v. Benbow, 2 Myl. & K. 46 (*supra*), *distinguished*.
Merlin v. Blagrove (1858) 25 Beav. 125.—ROMILLY, M.R.
- Griffith v. Pownall** (1843) 13 Sim. 303.—V.-C., *approved and explained*.
Cattlin v. Brown, *approved*.
Webster v. Boddington (1858) 26 Beav. 128, 135.—ROMILLY, M.R. *And see* col. 2127.
- Cattlin v. Brown**, *approved*.
Wilkinson v. Duncan (1861) 30 L. J. Ch. 938; 30 Beav. 111.—M.R. (*post*, col. 2127).
- Cattlin v. Brown, Storrs v. Benbow, and Griffith v. Pownall**, *discussed*.
Knapping v. Tomlinson (1864) 34 L. J. Ch. 3.—V.-C. (*post*, col. 2127).
- Cattlin v. Brown and Storrs v. Benbow**, *referred to*.
Moseley's Trusts, In re (1871) 40 L. J. Ch. 275; L. R. 11 Eq. 490.—V.-C. (*post*, col. 2127).
- Cattlin v. Brown and Griffith v. Pownall**, *distinguished*.
Bentinek v. Portland (Duke) (1877) 47 L. J. Ch. 235; 7 Ch. D. 693.—FRY, J. (*post*, col. 2127).
- Storrs v. Benbow**, *referred to*.
Dias v. De Livera (1880) 49 L. J. P. C. 26; 5 App. Cas. 123; 42 L. T. 267.—P.C.
- Cattlin v. Brown**, *referred to*.
Pearks v. Moseley (1880) 50 L. J. Ch. 57; 5 App. Cas. 714.—H. L. (E.) (*post*, col. 2128).
- Griffith v. Pownall and Cattlin v. Brown**, *approved*.
Russell, In re, Dorrell v. Dorrell (1895) 64

L. J. Ch. 891; [1895] 2 Ch. 698; 12 R. 499; 73 L. T. 195; 44 W. R. 100.—C.A.

Arnold v. Congreve (1830) 1 Russ. & M. 209; Tamlyn 347; 8 L. J. (O.S.) Ch. 88 (*see* 31 R. R. 106).—M.R., *discussed*.

Knapping v. Tomlinson (1864).—V.-C. (*infra*).

Greenwood v. Roberts (1851) 21 L. J. Ch. 262; 15 Beav. 92.—ROMILLY, M.R.

Discussed, **Catlin v. Brown** (1853) 11 Hare 372.—V.-C. (*supra*); *confirmed and applied*, **Webster v. Boddington** (1858) 26 Beav. 128.—ROMILLY, M.R.

Webster v. Boddington and Greenwood v. Roberts, *referred to*.

Seaman v. Wood (1856) 22 Beav. 591.—M.R., *explained*.

Wilkinson v. Duncan (1861) 30 L. J. Ch. 938; 30 Beav. 111; 7 Jur. (N.S.) 1182; 5 L. T. 161; 9 W. R. 915.—ROMILLY, M.R.

Greenwood v. Roberts; Seaman v. Wood; Webster v. Boddington; and Wilkinson v. Duncan, *discussed*.

Knapping v. Tomlinson (1864) 34 L. J. Ch. 3; 10 Jur. (N.S.) 626; 10 L. T. 558; 12 W. R. 734.—KINDERSLEY, V.-C.

Wilkinson v. Duncan.

Applied, **Von Brockdorff v. Malcolm** (1885) 55 L. J. Ch. 121; 30 Ch. D. 172; 53 L. T. 263; 33 W. R. 934.—PEARSON, J.; *discussed*, **Hallinan's Trusts**, *In re* [1904] 1 Ir. R. 452, 458.—M.R.

Webster v. Boddington, *distinguished*.

Seaman v. Wood, *not followed*.

Moseley's Trusts, *In re* (1871) 40 L. J. Ch. 275; L. R. 11 Eq. 499; 24 L. T. 260; 19 W. R. 431.—MALINS, V.-C.

Seaman v. Wood, *followed*.

Moseley's Trusts, *In re*, *disapproved*.

Smith v. Smith (1870) L. R. 5 Ch. 342; 18 W. R. 742.—L.C. and L.J., *applied*.

Hale v. Hale (1876) 3 Ch. D. 643; 35 L. T. 933; 24 W. R. 1065.—JESSEL, M.R. (*see* col. 2128).

Seaman v. Wood, Smith v. Smith and Hale v. Hale, *followed*.

Knapping v. Tomlinson (*supra*), *distinguished*.

Bentinck v. Portland (Duke) (1877) 7 Ch. D. 693; 47 L. J. Ch. 235; 38 L. T. 58; 26 W. R. 278. *And see post*, col. 2128.

FRY, J.—It will be observed in all those cases [*Griffith v. Pownall* (*supra*), *Catlin v. Brown* (*supra*) and *Knapping v. Tomlinson*] the shares taken by the persons ascertained within the period were incapable of increment by anything that might happen to the other shares. That appears to me the solid ground of distinction between those cases and the present case. In those cases, in effect, the share was finally and absolutely ascertained; it was neither capable of diminution or of enlargement after the period allowed by law. No doubt it is quite true that the distinction on which I am relying is a fine distinction between a gift of separate shares together with an interest in other shares which interest might be void for violating the rule against perpetuities, on the one hand, and, on the other hand, of a share whose smallest amount may be ascertained within the lawful period, but whose maximum amount can only be ascertained beyond that period—nevertheless it appears to me to be a distinction which the cases compel me to draw.—p. 700.

O.C.

Knapping v. Tomlinson, *approved*.

Russell, *In re. Dorrell v. Dorrell* [1895] 2 Ch. 698, 703.—C.A. (*supra*, col. 2126).

Smith v. Smith (*supra*, col. 2127), *discussed*.

Picken v. Matthews (1878) 10 Ch. D. 264; 48 L. J. Ch. 150; 39 L. T. 351.

MALINS, V.-C.—In that case the gift to the class was clearly good, and I cannot see how it could be made bad, because, in the event of a possible substitution of issue, which did not occur, the substituted issue might not take vested interests within legal limits.—p. 266.

Moseley's Trusts, *In re* (*supra*, col. 2127), *approved, but not followed*.

Hale v. Hale (col. 2127) and **Smith v. Smith**, *disapproved, and followed*.

Moseley's Trusts, *In re* (1879) 11 Ch. D. 555; 41 L. T. 9.—C.A.; *affirming* JESSEL, M.R.; C.A. *affirmed nom.* **Pearks v. Moseley** (*post*).

JAMES, L.J.—This case comes before us under these circumstances. There was a decision by Malins, V.-C., upon a clause of the will, and a subsequent decision [*Hale v. Hale*] by the M.R., upon the same clause, entirely controverting the decision of the V.-C. The V.-C.'s decision is reported in *Moseley's Trusts, In re*, and I feel bound to say that I entirely go along with the reasoning by which he arrived at his conclusion in that case. . . . But unfortunately for the appellant, unfortunately for my view of what I think the rule of law might have been, the very same point arose and had to be considered by the same V.-C. upon a will reported in a case of *Smith v. Smith*, which, with every possible wish to distinguish, I have found myself utterly unable to distinguish in any circumstances whatever from the will before us. The V.-C. having so expressed his view upon exactly the same principle, as is clearly shown in that case of *Smith v. Smith*, that conclusion, that view, and the principle upon which and the reasoning upon which he arrived at it were brought before the C. A. . . . and the C. A. did determine that the view of the V.-C. was not to be sustained, and did reverse that decision. The M.R. felt that the decision of *Smith v. Smith* was binding upon him, as it was; and it really is not less binding upon us. It is not for us to say that the decision is erroneous.—p. 558.

Bentinck v. Portland (Duke) (*supra*, col. 2127), *referred to*.

Smith v. Smith and Hale v. Hale, *discussed and approved*.

Moseley's Trusts, *In re* [L. R. 11 Eq. 499], *dissented from*.

Pearks v. Moseley (1880) 5 App. Cas. 714; 50 L. J. Ch. 57; 43 L. T. 449; 29 W. R. 1.—H.L. (E.).

SELBORNE, L.C.—My lords, I find that the M.R. in *Hale v. Hale*, expressed an opinion upon the construction of this very will, with which I agree. He says (3 Ch. D., at p. 649): "As I read the gift, it was issue which should attain the age of twenty-one years. That was a part of the description of the issue, and, therefore, it was a mistake to say you could divide the number of shares into as many as there are children who are alive and children who died leaving issue. There is no gift to the issue as such—only to such as attain twenty-one." And he points out

that Malins, V.-C., in *Moseley's Trusts, In re*, which has been so frequently mentioned in the argument, made that mistake in the reasons which he gave for his decision. It does appear to me, though there may be some expressions in Malins, V.-C.'s judgment in *Moseley's Trusts, In re*, which may perhaps go farther, that the view which is most calculated to reconcile all parts of that judgment is, that he thought you could properly treat the whole class as necessarily ascertained within twenty-one years from the death of the testator, and the ulterior condition, that the issue should attain twenty-one, as something superadded, and not forming part of the description of the issue. If so, I cannot agree with that view of Malins, V.-C.; I am obliged to agree with the view of the M.R. (p. 721). . . . It may be that if *Jee v. Audley* (*supra*, col. 2121), *Leake v. Robinson* (*supra*, col. 2122), and a long series of cases which have followed them, had never been decided, the Courts might have reasonably wished, if they could, to find some means of modifying the application of the rule of remoteness, so as to preserve as much as possible the intention of testators, and sacrifice only, if they could discover it, the real excess. But . . . I apprehend that now no authority less than that of the legislature can alter it.—p. 726.

LORD PENZANCE examined and approved of *Smith v. Smith*, and continued: It was there said [*Dugannon (Lord) v. Smith* (*supra*, col. 2120)], that where a testator has made a general bequest embracing a great number of possible objects, there is no authority for holding that a Court can so mould it as to say that it is divisible into two classes, one embracing the lawful, and the other the unlawful objects of his bounty. Therefore, your lordships have a decision in your own House distinctly adopting the principle of *Leake v. Robinson*.—p. 729.

Pearks v. Moseley (*supra*), referred to.

Bevan's Trusts, *In re* (1887) 56 L. J. Ch. 652; 34 Ch. D. 716; 56 L. T. 277; 35 W. R. 400.—KAY, J. See *supra*, col. 2123.

Pearks v. Moseley, applied.

Wenmoth's Estate, *In re*, Wenmoth v. Wenmoth (1887) 37 Ch. D. 266; 57 L. J. Ch. 649; 57 L. T. 709; 36 W. R. 409.

CHITTY, J.—The general law on this point is stated by Lord Selborne in *Pearks v. Moseley*: "You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect."—p. 270.

Pearks v. Moseley, rule in, applied.

Mervin, *In re*, Mervin v. Crossman (1891) 60 L. J. Ch. 671; [1891] 3 Ch. 197; 65 L. T. 186; 39 W. R. 697.—STIRLING, J.

Pearks v. Moseley, referred to.

Harvey, *In re*, Harvey v. Gillow (1893) 62 L. J. Ch. 328; [1893] 1 Ch. 567; 3 R. 247; 68 L. T. 562; 41 W. R. 293.—CHITTY, J.; Lloyd Greame v. Atten-Gen. (1893) 10 Times L. R. 67.—STIRLING, J.

Pearks v. Moseley, rule in, applied.

Bowen, *In re*, Lloyd Phillips v. Davis (1893)

62 L. J. Ch. 681; [1893] 2 Ch. 491; 3 R. 529; 61 L. T. 789; 41 W. R. 535.—STIRLING, J.

Pearks v. Moseley, referred to.

Sanford, *In re*, Sanford v. Sanford (1901) 70 L. J. Ch. 591; [1901] 1 Ch. 939; 84 L. T. 456.—JOYCE, J.; Kingsbury v. Walter (1901) 70 L. J. Ch. 546; [1901] A. C. 187; 84 L. T. 697.—H.L. (E.); Hallinan's Trusts, *In re* [1904] 1 Ir. R. 452, 459.—M.R.

Porter v. Fox (1834) 6 Sim. 485; 38 R. R. 156.—SHADWELL, V.-C., observed on.

James R. Wynford (Lord) (1852) 22 L. J. Ch. 450; 1 Sm. & G. 40; 17 Jur. 17; 1 W. R. 61.—STUART, V.-C.

Porter v. Fox, distinguished.

Wilson v. Wilson (1858) 28 L. J. Ch. 95; 4 Jur. (N.S.) 1076; 7 W. R. 26.

WOOD, V.-C.—In *Porter v. Fox* and that class of cases the difficulty arose from the gift being to a class of persons some of whom could take and some could not, and the share of each could not be ascertained. But each child here forms a separate class, and the share of each is separate from the shares of the rest.—p. 96.

Porter v. Fox, referred to.

Featherstone's Trusts, *In re* (1882) 52 L. J. Ch. 75; 22 Ch. D. 111, 118; 47 L. T. 538; 31 W. R. 89.—KAY, J.

Wilson v. Wilson (*supra*), discussed.

Knapping v. Tomlinson (1864) 34 L. J. Ch. 3; 10 Jur. (N.S.) 626; 10 L. T. 558; 12 W. R. 784.—KINDERSLEY, V.-C.

Wilson v. Wilson, referred to.

Moseley's Trusts, *In re* (1871) 40 L. J. Ch. 275; L. R. 11 Eq. 499, 505; 24 L. T. 260; 19 W. R. 431.—MALINS, V.-C.

Wilson v. Wilson, followed.

Herbert v. Webster (1880) 49 L. J. Ch. 620; 15 Ch. D. 610.—HALL, V.-C. (*post*, col. 2134).

Wilson v. Wilson, approved.

Russell, *In re*, Dorrell v. Dorrell (1895) 64 L. J. Ch. 891; [1895] 2 Ch. 698.—G.A. (*supra*, col. 2126).

Kevern v. Williams (1832) 5 Sim. 171.—V.-C., approved.

Berkeley R. Swinburne (1848) 17 L. J. Ch. 416; 16 Sim. 275; 12 Jur. 571.—SHADWELL, V.-C.

Kevern v. Williams, referred to.

Emmet's Estate, *In re*, Emmet v. Emmet (1879-1880) 49 L. J. Ch. 21, 295; 13 Ch. D. 484, 489; 12 L. T. 4; 28 W. R. 301, 401.—HALL, V.-C. (affirmed, G.A.); Coppard's Estate, *In re*, Howlett v. Hodson (*post*); Mervin, *In re*, Mervin v. Crossman (1891) 60 L. J. Ch. 671; [1891] 3 Ch. 197 (*post*, col. 2131).

Elliott v. Elliott (1841) 10 L. J. Ch. 363; 12 Sim. 276.—V.-C., discussed.

Mainwaring v. Beevor (1849) 19 L. J. Ch. 396; 8 Hare 44; 14 Jur. 58.—WIGRAM, V.-C.

Elliott v. Elliott, followed.

Coppard's Estate, *In re*, Howlett v. Hodson

(1887) 35 Ch. D. 350; 56 L. J. Ch. 606; 56 L. T. 359; 35 W. R. 473.

STIRLING, J.—That case [*Elliott v. Elliott*] was decided in 1841 after argument, and though I have found no case since that time in which it has been followed, yet, upon the other hand, I have found none which can be said to be directly in conflict with it, or in which it has been dis-sented from, or even doubted. I also, upon examination of the cases, think that that case is not entirely isolated, for I find that *Kerern v. Williams* (*supra*) (which was approved of in *Berkeley v. Swinburne* (*supra*)), though it does not go the whole length of *Elliott v. Elliott*, tends in the same direction; therefore I think that, under the circumstances, if *Elliott v. Elliott* is to be set aside it is for the C. A. to do so, and not for me.—p. 354.

Elliott v. Elliott and Coppard's Estate, In re, explained and not applied.

Wenmoth's Estate, In re, Wenmoth v. Wenmoth (1887) 57 L. J. Ch. 649; 37 Ch. D. 266; 57 L. T. 709; 36 W. R. 409.—CHITTY, J.

Elliott v. Elliott and Coppard's Estate, In re, discussed and distinguished.

Mervin, In re, Mervin v. Crossman (1891) 60 L. J. Ch. 671; [1891] 3 Ch. 197; 65 L. T. 186; 39 W. R. 697.—STIRLING, J.

Coppard's Estate, In re, referred to.

Elliott v. Elliott, commented on and not applied.

Pilkington, In re, Pilkington v. Pilkington (1892) 29 L. R. Ir. 370.—PORTER, M.R.

Wenmoth's Estate, In re, Wenmoth v. Wenmoth (*supra*), distinguished.

Powell, In re, Crosland v. Holliday (1897) 67 L. J. Ch. 148; [1898] 1 Ch. 227; 77 L. T. 649; 46 W. R. 231.

KEKEWICH, J.—In *Wenmoth's Estate, In re*, I understand Chitty, J.—although, no doubt, he treated the two rules, as to some extent they must be treated, as both being instances of fixing the period of distribution—was only dealing with the second rule—that is to say, the rule which fixes the period of distribution at the time when the first child becomes entitled to receive his share. It is that rule to which he refers, and it is that rule which he declines to extend to a case where only income is given. He does not deal with the other rule; and I take leave to doubt whether it occurred to him to consider at all, in that case, whether it would be right to alter the rule in any way as regards children taking at the death of the testator without any words with regard to attaining majority or anything of the kind, because they only took income, or for any other reason. I do not read his judgment as being at all directed to such a case as the one before me; and it seems to me that this case must depend upon the ordinary application of the ordinary rule, and that the children living at the testator's death, and no others, can take.—p. 150.

Eales v. Conn (1830) 4 Sim. 65.—V.-C.; *affirmed*, (1831).—L.C., *approved*.

Case v. Drosier (1837) 6 L. J. Ch. 353; 2 Keen 764; 1 Jur. 352.—M.R.; *affirmed*, (1839) 5 Myl. & Cr. 246; 3 Jur. 1164.—L.C., *followed*.

Sykes v. Sykes (1871) 41 L. J. Ch. 25; L. R. 13 Eq. 56; 25 L. T. 560; 20 W. R. 90.

WICKENS, V.-C.—It seems to me, on consideration, that this case is undistinguishable in principle from that of *Case v. Drosier*. That case is one of the highest authority from the care with which it was argued, and the judges by whom it was decided. Now, it may be observed, that the construction assumed by both judges as the true construction of the limitation there, and by virtue of which it becomes applicable here, has been since established as the correct one by a decision of the H. L. in *Baker v. Tucker* [(1850) 3 H. L. C. 106; 14 Jur. 771.—H.L. (IR.).—p. 29.

Browne v. Stoughton (1846) 14 Sim. 369;

S.C. nom. Browne v. Houghton, 15 L. J. Ch. 391; 10 Jur. 747.—V.-C., *referred to*.

Turvin (or Turwin) v. Newcome (1856) 3 K. & J. 16; 3 Jur. (N.S.) 203; 5 W. R. 35.—WOOD, V.-C.

Case v. Drosier and Sykes v. Sykes (*supra*), *discussed and applied*.

Browne v. Stoughton, applied.

Cochrane v. Cochrane (1883) 11 L. R. Ir. 361, 367.—CHATTERTON, V.-C.

Cochrane v. Cochrane and Browne v. Stoughton, referred to.

Smith v. Cunningham (1884) 13 L. R. Ir. 480, 488.—V.-C.

Sykes v. Sykes, followed.

Cochrane v. Cochrane, Case v. Drosier and Browne v. Stoughton, principle not applied.

Longfield v. Bantry (1885) 15 L. R. Ir. 101.—CHATTERTON, V.-C.

Cochrane v. Cochrane, explained.

Trevelyan v. Trevelyan (1886) 53 L. T. 853.—BACON, V.-C.

Avern v. Lloyd (1868) 37 L. J. Ch. 489;

L. R. 5 Eq. 383; 18 L. T. 282; 16 W. R. 669.—STUART, V.-C.; and **Ashley v. Ashley** (1833) 3 L. J. Ch. 61; 6 Sim. 358.—SHADWELL, V.-C., *commented on*.

Stuart v. Cockerell (1869) 38 L. J. Ch. 473; L. R. 7 Eq. 363; *affirmed*, (1870) 39 L. J. Ch. 729; L. R. 5 Ch. 713; 23 L. T. 442; 18 W. R. 1057.—JAMES, L.J.

MALINS, V.-C.—But . . . *Avern v. Lloyd* is apparently applicable. . . The marginal note is this: "Bequest of personal estate to unborn issue as tenants for life"—that is, to all the children of A., who, as yet, had no children, "as tenants for life"—to that there could be no objection,—“and to the executors, administrators and assigns of the survivor of the unborn issue.” The V.-C. held that that gave an absolute interest to the survivor. Now, that may be reconciled by regarding the words “executors, administrators and assigns” following a gift of life estate as words of limitation. If the V.-C. construed it thus, that it was a gift to all the children for life with a limitation to one of them absolutely, it may possibly be reconciled. But if the V.-C. intended to decide that the vesting of any gift whatever can be postponed till after the expiration of lives not yet in being, then, with every respect for the V.-C., I must differ from his opinion, because nothing can be more clearly settled (it was finally settled by *Cudell v. Palmer* (*supra*, col. 2108)), that you may postpone the vesting of the estate, either to a person in existence upon an event which may never

happen or to a class of persons not yet in existence, but who may come into existence at any time within the life or lives in being and the period of twenty-one years in gross afterwards. But every gift which must not necessarily be ascertained within that period is void.—p. 476.

Avern v. Lloyd (*supra*), *referred to*.

Harvey, In re, *Peck v. Savory* (1888) 39 Ch. D. 289, 294; 60 L. T. 79.—NORTH, J.: *reversed* on construction of will, C.A. (*see post*).

Avern v. Lloyd, *overruled*.

Hargreaves. In re, *Midgley v. Tatley* (1890) 59 L. J. Ch. 384; 43 Ch. D. 401; 62 L. T. 473; 38 W. R. 470.—C.A.

COTTON, L.J.—*Avern v. Lloyd* is very like the present case, and Stuart, V.-C. there said there was no question as to the validity of the limitation of the life estates in remainder to the unborn issue male and female of the testator's brothers John and Francis. The unborn issue clearly took life estates share and share alike; and as to the limitation to the executors, administrators, and assigns of the survivor of his brothers or their issue, male and female, who should happen to be such survivor, he said that considering that that limitation must take effect in the lifetime of the unborn issue to whom a good estate for life was given so as to give him an absolute estate in possession when he became survivor, it was not easy to see on what ground it could be considered too remote. . . . But that decision is not consistent with the decision in *L. & S. W. Ry. v. Gomm* (*supra*, col. 2109), and, in my opinion, it is not consistent with the law, and therefore the decision is wrong.—p. 385.

[In the judgments of the C. A., as reported in the Law Reports and the Law Times no reference is made to *L. & S. W. Ry. v. Gomm*.]

Stuart v. Cockerell (*supra*, col. 2132), *referred to*.

Cunynghame's Settlement, In re (*post*, col. 2134); *Evans v. Walker* (1876) 3 Ch. D. 211; 25 W. R. 7.—MALINS, V.-C.

Stuart v. Cockerell, *applied*.

Brown and Sibby's Contract, In re (1876) 3 Ch. D. 156; 35 L. T. 305; 24 W. R. 782.—MALINS, V.-C.

Stuart v. Cockerell, *distinguished*.

Watson v. Young (1885) 28 Ch. D. 436; 54 L. J. Ch. 502; 33 W. R. 637.

PEARSON, J.—In *Stuart v. Cockerell* the gift over never had a chance of being good, even if it had been "in case there shall be no child," because there were children.—p. 441.

Stuart v. Cockerell, *referred to*.

Harvey, In re, *Peck v. Savory* (1888) 39 Ch. D. 289; 60 L. T. 79.—C.A.: *Wainwright v. Miller* (1897) 66 L. J. Ch. 616; [1897] 2 Ch. 255, 259; 76 L. T. 718; 45 W. R. 652.—BYRNE, J.

Thornton v. Bright (1836) 6 L. J. Ch. 121; 2 Myl. & Cr. 230.—L.C., *applied*.

Fry v. Capper (1853) Kay 163; 2 W. R. 136.—WOOD, V.-C.

Thornton v. Bright.

Discussed, *Ramsden v. Smith* (1854) 23 L. J. Ch. 757; 2 Drew. 298.—KINDERSLEY, V.-C.; *applied*, *Mainwaring's Settlement*, In re (1866) L. R. 2 Eq. 487, 496; 14 W. R. 887.—WOOD, V.-C.: *commented on*, *Cunynghame's Settlement*, In re

(*post*); *Ridley*, In re (1879) 11 Ch. D. 645, 650 (*post*); *approved*, *Cooper v. Laroche* (1881) 17 Ch. D. 368 (*post*).

Fry v. Capper (1853) Kay 163; 2 W. R. 136.—WOOD, V.-C., *approved*.

Teague's Settlement, In re (1870) L. R. 10 Eq. 564; 22 L. T. 742.—JAMES, V.-C.

Fry v. Capper, *commented on*.

Ridley, In re (1879) 11 Ch. D. 645, 650 (*post*).

Fry v. Capper, *followed*.

Shute v. Hogg (1888) 58 L. T. 546.—KAY, J.: *Whitby v. Mitchell* (1889) 59 L. J. Ch. 8; 42 Ch. D. 494, 502; 61 L. T. 353; 38 W. R. 5.—KAY, J.; *affirmed*, C.A. (*see post*, col. 2137).

Teague's Settlement, In re (*supra*).

Followed, *Cunynghame's Settlement*, In re (1871) 40 L. J. Ch. 247; L. R. 11 Eq. 324; 24 L. T. 124; 19 W. R. 381.—MALINS, V.-C.: *commented on*, *Ridley*, In re (1879) 11 Ch. D. 645, 650 (*post*).

Cunynghame's Settlement, In re.

Commented on, *Ridley*, In re (1879) 11 Ch. D. 645, 651 (*post*); *adhered to*, *Cooper v. Laroche* (1881) 17 Ch. D. 368, 372; 43 L. T. 794; 29 W. R. 438.—MALINS, V.-C.

Cooper v. Laroche, *disregarded*.

Dawson, In re, *Johnson v. Hill* (1888) 57 L. J. Ch. 1061; 39 Ch. D. 155; 59 L. T. 725; 37 W. R. 51.—CHITTY, J.

Armitage v. Coates (1865) 35 Beav. 1.—ROMILLY, M.R., *followed*.

Michael's Trusts, In re (1877) 46 L. J. Ch. 651.—HALL, V.-C.

Michael's Trusts, In re, *commented on*.

Armitage v. Coates, *referred to*.

Ridley, In re, *Buckton v. Hay* (1879) 48 L. J. Ch. 563; 11 Ch. D. 645, 652; 27 W. R. 527.—JESSEL, M.R.

Michael's Trusts, In re, *disapproved*.

Ridley, In re, *Buckton v. Hay*, *not followed*. *Herbert v. Webster* (1880) 15 Ch. D. 610; 49 L. J. Ch. 620. *And see post*, col. 2135.

HALL, V.-C.—The authorities differ upon the questions raised in this case. The decision of Wood, V.-C. [in *Wilson v. Wilson* (*supra*, col. 2130)] I consider to be an authority in favour of the restraint on anticipation, certainly as to those persons who were *in esse* at the date of the settlement or death of the testator. . . . I consider the decision ought to be followed, unless there be authorities subsequently to it which I must follow. The authorities which are subsequent are *Michael's Trusts*, In re, before me, and *Buckton v. Hay*, before the M.R. The case before me is very shortly reported. The point that some of the children were actually born before the testator died does not appear to have been drawn to the attention of the Court, and it is only by referring to the dates that I can collect how the facts stood, and then only by looking at the dates of the marriages and the date of the death of the testator. He died in 1854, and the child who applied to the Court was married in 1853, therefore before the death of the testator. She was living at the testator's death, and at the time when his will came into operation. It seems to me that the decision in that case is unsatisfactory. In *Buckton v. Hay* the M.R. appears to have thought that such trusts ought to be considered as outside the rules against remoteness, and not affected by them.—p. 612.

Ridley, In re, referred to.
Kirk v. Murphy (1892) 30 L. R. Ir. 508.—
MADDEN, J.

Herbert v. Webster (*supra*), *followed*.
Michael's Trusts, In re (*supra*, col. 2134), and
**Ridley, In re, not followed.
Ferneley's Trusts, In re (1902) 71 L. J. Ch.
422; [1902] 1 Ch. 543; 86 L. T. 413; 59 W. R.
346.**

SWINFEN EADY, J.—In *Herbert v. Webster*,
Hall, V.-C. had the decision of the M.R. in
Ridley, In re, before him, and nevertheless felt
himself at liberty to follow what appears to me
to be the sounder rule. I shall follow the deci-
sion of Hall, V.-C., and declare that the restraint
on anticipation is good and the mortgage void.—
p. 423.

Vanderplank v. King (1843) 12 L. J.
Ch. 497; 3 Hare 1; 7 Jur. 548.—V.-C.,
adhered to.

Hayes v. Hayes (1828) 4 Russ. 311; 6 L. J.
(O.S.) Ch. 141.—M.R., *not followed*.
Williams v. Teale (1847) 6 Hare 239.—
WIGRAM, V.-C.

**Vanderplank v. King, commented on and
distinguished.**
Monypenney v. Dering (1847) 17 L. T. Ex. 81;
16 M. & W. 418.—EX.

Hayes v. Hayes, disapproved.
Hampton v. Holman (1887) 46 L. J. Ch. 248;
5 Ch. D. 183. *See post*.

Vanderplank v. King, not applied.
Gooch v. Gooch (1851) 21 L. J. Ch. 238; 14
Beav. 565.—M.R.; *affirmed*, (1853) 3 De G. M.
& G. 366; 22 L. J. Ch. 1039.—GRANWORTH, L.C.

Vanderplank v. King, approved and applied.
Peyton v. Lambert (1858) 8 Ir. C. L. R. 485.—
Q.B.

Vanderplank v. King, distinguished.
Rabbeith v. Squire (1855) 24 L. J. Ch. 203; 19
Beav. 77.—ROMILLY, M.R.; *affirmed*, (1859) 28
L. J. Ch. 565; 4 De G. & J. 406; 1 Jur. (N.S.)
218; 7 W. R. 657.—CHILMSFORD, L.C.

Vanderplank v. King, referred to.
Parfitt v. Hember (1867) L. R. 4 Eq. 443, 447.—
ROMILLY, M.R. (*see* col. 2118); Hudson, In re,
Hudson v. Hudson (1882) 51 L. J. Ch. 455; 20
Ch. D. 406; 46 L. T. 93; 30 W. R. 487.—KAY, J.

Vanderplank v. King, approved.
Dawson, In re, Johnston v. Hill (1888) 57
L. J. Ch. 1061; 39 Ch. D. 155, 159 (*post*,
col. 2136).

Williams v. Teale (1847) 6 Hare 239.—V.-C.,
followed.
Southern v. Wollaston (1852) 22 L. J. Ch.
664; 16 Beav. 276; 1 W. R. 86.—ROMILLY, M.R.

Williams v. Teale, referred to.
Picken v. Matthews (1878) 48 L. J. Ch. 150;
10 Ch. D. 264; 39 L. T. 531.—MALINS, V.-C.

Williams v. Teale and Gooding v. Read
(1853) 4 De G. M. & G. 510.—L.J.;
affirming 21 Beav. 478.—M.R., *followed*.
Hampton v. Holman (1887) 5 Ch. D. 183;
46 L. J. Ch. 248; 36 L. T. 287; 25 W. R. 459.
JESSEL, M.R.—I must again express an opinion
similar to that I have already expressed, and say

that there [*Hayes v. Hayes* (*supra*, col. 2135)], the
judge made a slip, as all judges do at times. . . .
It was there held that you cannot limit to an
unborn child for life, unless the remainder, after
his death, vests in interest at the same time. It
never was law that the remainder must vest in
interest at the same time. You might always
give a life interest to an unborn person being
a child of a person in being, and it did not
matter what the gift over was after the death of
such unborn child; it did not affect his interest.
There must be some mistake in that decision;
at all events it has never been followed. As
I read the authorities, it has not only not
been followed but the contrary construction
has prevailed. Indeed the contrary has been
assumed, sometimes without contest, in some
reported cases, and, in order to show that that
is so, I may refer to *Gooch v. Gooch* (col. 2126).
There a gift to children for their lives was
assumed to include unborn children, and the
bill only asked that the substitutionary gift over
to their children might be declared void for
remoteness. In *Williams v. Teale* the decision
was exactly the reverse of that in *Hayes v.*
Hayes, and it is only necessary for me to read
the following portion of Sir J. Wigram's judg-
ment: "Upon another point I have also as
strong an opinion as is consistent with the
respect which is due to the decision of a very
eminent judge, with which it may possibly be
thought to conflict. I think that, under this
will, notwithstanding the decision in *Hayes v.*
Hayes, the limitation of the testator's property
to the unborn children of the testator's children
is not void for remoteness only because it is a
gift to persons who might be unborn at the
death of the testator." It is plain to my mind
that Sir J. Wigram's decision is in direct con-
flict with Sir J. Leach's. The next case—
which was a case before the C. A.—is *Gooding*
v. Read. . . . *Hayes v. Hayes* does not appear
to have been cited in that case; it is only
mentioned in the reporter's note. Now I take
it that both the cases to which I have referred
are not to be reconciled with *Hayes v. Hayes*;
at all events they differ from it so far as to leave
me at liberty now to say that *Hayes v. Hayes* is
not sound law; indeed, it appears that Sir J.
Leach himself was dissatisfied with his decision.
—p. 188.

**Williams v. Teale and Southern v. Wol-
laston** (*supra*, col. 2135), *approved*.
Dawson, In re, Johnston v. Hill (1888) 57 L. J.
Ch. 1061; 39 Ch. D. 155, 159; 59 L. T. 725; 37
W. R. 51.—CHITTY, J.

Gooding v. Read (*supra*) and **Watson, In re,
Cox v. Watson, W. N.** (1892) 192.—
CHITTY, J., *approved*.
Wise, In re, Jackson v. Parrott (1896) 65 L. J.
Ch. 281; [1897] 1 Ch. 281; 73 L. T. 743; 44
W. R. 310.—NORTH, J.

Picken v. Matthews (1878) 48 L. J. Ch. 150;
10 Ch. D. 264; 39 L. T. 531.—MALINS, V.-C.,
approved. *And see post*, col. 2137.
Moseley's Trusts, In re (1879) 11 Ch. D. 555,
559; 41 L. T. 9.—C.A. *See supra*, col. 2128.

Picken v. Matthews (*supra*), *distinguished*.
Whitten, In re, King v. Whitten (1890) 62 L. T.
391.—NORTH, J.

Picken v. Matthews (*supra*), referred to.
Mervin, In re, Mervin v. Crossman (1891) 60 L. J. Ch. 671; [1891] 3 Ch. 197; 65 L. T. 186; 39 W. R. 697.—STIRLING, J.

Monypenny v. Dering (1847) 17 L. J. Ex. 81; 16 M. & W. 418.—EX., *discussed*.
Monypenny v. Dering (1850) 20 L. J. Ch. 153; 7 Hare 568; 14 Jur. 1083; 15 Jur. 1050.—V.-C.; *affirmed* on different grounds, L.C. (*post*).

Monypenny v. Dering, referred to.
Parfitt v. Hember (1867) L. R. 4 Eq. 448, 447.—ROMILLY, M.R. (*see* col. 2118); Juttendromohan Tagore v. Ganendromohan Tagore (1872) L. R. Ind. App. Suppl., p. 77.—P.C.; Richardson, In re, Parry v. Holmes (1903) 73 L. J. Ch. 153; [1904] 1 Ch. 332, 340; 91 L. T. 169.—BUCKLEY, J.

Hay v. Coventry (Earl) (1789) 3 Term Rep. 83; 1 R. R. 652.—K.B.
Distinguished, Doe v. Martin (1790) 4 Term Rep. 39; 2 R. R. 324.—K.B.; *approved*, Whitby v. Mitchell (1890) 44 Ch. D. 85, 90 (*post*).

Beard v. Westcott (1822) T. & R. 25.—L.C.; S.C. at law (1813) 5 B. & Ald. 801; (1822), K.B.; 5 Taunt. 393.—C.P., referred to.
Boughton v. James (1844) 1 Coll. 26; 8 Jur. 329.—KINDERSLEY, V.-C. *See supra*, col. 2125.

Beard v. Westcott, *discussed and explained*.
Monypenny v. Dering (1852) 22 L. J. Ch. 313; 2 De G. M. & G. 145; 17 Jur. 467.—L.C.

Beard v. Westcott, referred to.
Abbott, In re, Peacock v. Frigout (*post*).

Monypenny v. Dering, principle applied.
Hodgson v. Halford (1879) 48 L. J. Ch. 548; 11 Ch. D. 959, 965; 27 W. R. 545.—HALL, V.-C.

Monypenny v. Dering, distinguished.
Roberts, In re, Repington v. Roberts-Gawen (1881) 19 Ch. D. 520, 526 (*post*, col. 2138).

Monypenny v. Dering, *discussed and approved*.
Whitby v. Mitchell (1890) 59 L. J. Ch. 485; 44 Ch. D. 85, 90; 62 L. T. 771; 38 W. R. 337.—C.A. [*See* the judgments approving the statement in the text-books (Williams on Real Property, 16th ed., p. 314; Fearn on Contingent Remainders, by Butler, 10th ed., vol. ii., p. 565, n.; Burton's Compendium, 7th ed., p. 255) that the old rule that there cannot, as regards real estate, be a possibility upon a possibility, is still in existence.]

Monypenny v. Dering, referred to.
Abbott, In re, Peacock v. Frigout (1892) 62 L. J. Ch. 46; [1893] 1 Ch. 54; 3 R. 72; 67 L. T. 794; 41 W. R. 154.—STIRLING, J.; Richardson, In re [1904] 1 Ch. 332, 346 (*supra*).

Doe d. Evers v. Challis (or **Evers v. Challis**) (1859) 29 L. J. Q. B. 121; 7 H. L. Cas. 531; 5 Jur. (N.S.) 825; 7 W. R. 622.—H.L. (E.); *reversing* S. C. *nom.* **Challis v. Doe d. Evers** (1852) 21 L. J. Q. B. 227; 18 Q. B. 231.—EX. CH.; *which had reversed* 20 L. J. Q. B. 113; 18 Q. B. 224.—Q.B., *discussed*.

Brookman v. Smith (1871) 40 L. J. Ex. 161; L. R. 6 Ex. 291, 299; 24 L. T. 625; 19 W. R. 1029.—EX.; *affirmed*, (1872) 41 L. J. Ex. 114; L. R. 7 Ex. 271; 26 L. T. 974; 20 W. R. 906.—EX. CH.

Doe d. Evers v. Challis, principle applied.
Hodgson v. Halford (1879) 48 L. J. Ch. 548; 11 Ch. D. 959, 965; 27 W. R. 545.—HALL, V.-C.

Doe d. Evers v. Challis, distinguished.
Roberts, In re, Repington v. Roberts-Gawen (1881) 19 Ch. D. 520; 50 L. J. Ch. 265; 44 L. T. 300.—V.-C.; *varied* (*post*, col. 2140).

HALL, V.-C.—The case is not like **Monypenny v. Dering** (*supra*, col. 2137), in which there was an alternative gift expressed to take effect in case there should be a failure of persons to take, or in case no person should come into existence who could take. There are no words here which will include that, nor any words which as a matter of construction can be said to express that, as there were in **Doe v. Challis**.—p. 526.

Evers v. Challis, explained and followed.
Watson v. Young (1885) 28 Ch. D. 436; 54 L. J. Ch. 502; 33 W. R. 637.

PEARSON, J.—It was urged that the decision in **Evers v. Challis** depended on the fact that it related to a contingent remainder. I cannot see that it did. For the purpose of considering whether the clause contained terms which were divisible, it was wholly immaterial whether there was a contingent remainder or not. And, whatever may have been the rule in former days, still less can it be of importance now, when the legislature has, by the Act of 40 & 41 Vict. c. 33, carefully provided against the failure of a contingent remainder by the failure of a prior particular estate, by enacting that whenever that is likely to happen the contingent remainder is to be treated as an executory devise.—p. 444.

Evers v. Challis and Watson v. Young, applied.

Harvey, In re, Peek v. Savory (1888) 39 Ch. D. 289, 294; 60 L. T. 79.—NORTH, J.; *reversed* on construction of will, C.A.

Watson v. Young, referred to.
Evers v. Challis and Harvey, In re, Peek v. Savory, *discussed and not applied*.
Bence, In re, Smith v. Bence (1891) 64 L. T. 282.—KEKEWICH, J.; *affirmed* (*post*).

Evers v. Challis, *discussed*.
Watson v. Young, commented on.
Miles v. Harford (1879) 12 Ch. D. 691; 41 L. T. 378.—JESSEL, M.R., referred to.
Bence, In re, Smith v. Bence (1891) 60 L. J. Ch. 636; [1891] 3 Ch. 242; 65 L. T. 530.—C.A.

Watson v. Young, *discussed and explained*.
Knapp's Settlement, In re, Knapp v. Vassall (1894) 64 L. J. Ch. 112; [1895] 1 Ch. 91, 97; 13 R. 147; 71 L. T. 625; 43 W. R. 279.—NORTH, J.

Watson v. Young, followed.
Stephens, In re, Kilby v. Betts (1903) 73 L. J. Ch. 3; [1904] 1 Ch. 322, 329; 52 W. R. 89.—BUCKLEY, J.

Evers v. Challis, *discussed and not applied*.
Harvey, In re, Peek v. Savory and Bence, In re, Smith v. Bence, applied.
Hancock, In re, Watson v. Watson (1900) 70 L. J. Ch. 114; [1901] 1 Ch. 482; 84 L. T. 163.—BYRNE, J.; *affirmed*, C.A.

Evers v. Challis, distinguished.

Hancock v. Watson (1901) 71 L. J. Ch. 149; [1902] A. C. 11, 20; 85 L. T. 729; 50 W. R. 321.—H.L. (E.); affirming S. C. nom. Hancock, In re, Watson v. Watson (*supra*).

LORD DAVEY.—But the same argument which has been pressed upon this House was addressed to the Court of C. P. more than a hundred years ago and overruled. In *Proctor v. Bath and Wells (Bishop)* (*supra*, col. 2116), decided in the year 1794, an advowson was devised to the first or other son of Thomas Proctor that should be bred a clergyman and be in holy orders, but in case Proctor should have no such son, to one Moore in fee. There being no particular estate to support the devise as a contingent remainder, it could take effect only as an executory devise. Proctor died without having had a son, and Moore thereupon claimed to present. It was argued that the limitations in the will were alternate: if Proctor should have a son in holy orders Moore was excluded, and if he had no son he could take. It was replied that in truth there was but one contingency on which the devise to Moore was limited, and the case was distinguished from a case of *Longhead v. Phelps* (*supra*, col. 2117) where two contingencies were expressed in the disjunctive, the first of which was good. The Court of C. P. was very clearly of opinion that the first devise to the son of Thomas Proctor was void from the uncertainty when such a son, if he had any, might take orders, and that the devise over to Moore, as it depended on the same event, was also void, for the words of the will would not admit of the contingency being divided. . . . The appellants, however, rely on another case in this House—of *Evers v. Challis*. On a superficial view of this case it appears to lend some support to their argument, but on a careful examination it will be found to have been decided on a totally different point, which has no application to the present case. The will in *Evers v. Challis* contained a very complicated series of devises of a freehold estate. It is sufficient for the present purpose to say that there was a devise to the testator's daughter Ann for life, with remainder to her children, if sons living to attain twenty-three, and if daughters living to attain twenty-one, with a gift over under which the appellant claimed, Ann having died childless. As an executory devise, the gift over was admittedly too remote, but it was argued that it took effect immediately on Ann's death as a contingent remainder. It is a familiar principle of English real property law that if a devise can take effect as a remainder it shall do so, and it was accordingly held in this House that the gift over, in the event which had happened, operated, and took effect as a contingent remainder, and the question of remoteness therefore did not affect it. That this was the point decided is clear from the opinion of the judges who were called in to assist this House, delivered by Wightman, J., as well as from the judgments delivered by the noble and learned lords who heard the case. Wightman, J. said: "No case or authority has been cited to show that where a devise over includes two contingencies, which are in their nature divisible, and one of which can operate as a remainder, they may not be divided though included in one expression: and our opinion does not at all conflict with the authority of *Proctor v. Bath*

and *Wells (Bishop)* and *Jee v. Audley* (*supra*, col. 2121), in neither of which cases was it possible for the limitation over to operate as a remainder." Lord Cranworth said: "I think that the gift to the children of John and Sarah on the death of Ann without issue in 1847 took effect as a contingent remainder and not as an executory devise, and so was good: because when the particular estate determined, the contingency on which the remainder was to take effect had happened." And he supports his opinion by reference to a case of *Gulliver v. Wickett* (*supra*, col. 2115), which he discussed at some length. Lord Brougham said: "As to the cases, of which there are several, I need not go into them. One of them is *Proctor v. Bath and Wells (Bishop)*. In that case there was no particular estate to support the contingent remainder, and it was clearly an executory devise." On these grounds this House reversed the decision of the Ex. Ch., and restored that of the Q. B. It is apparent that the authority of *Proctor v. Bath and Wells (Bishop)* is untouched by anything decided or said in *Evers v. Challis*. . . . Some minds may be disposed to sympathise with Sir W. Grant, when he says, in *Leake v. Robinson* (*supra*, col. 2122): "Perhaps it might have been as well if the Courts had originally held an executory devise transgressing the allowed limits to be void only for the excess, where the excess could, as in this case if it can, be clearly ascertained." But the law is what it is.—pp. 152, 153.

Roberts, In re, Repington v. Roberts-Gawen

(1881) 19 Ch. D. 520; 45 L. T. 450.—C.A.; partly affirming and partly reversing 50 L. J. Ch. 265; 44 L. T. 300.—HALL, V.-C., referred to.
Wood, In re, Tullett v. Colville (1894) 63 L. J. Ch. 790; [1894] 3 Ch. 381; 7 R. 495; 71 L. T. 413.—C.A.

Roberts, In re, Repington v. Roberts-Gawen, adopted.

Manchester Ship Canal Co. v. Manchester Racecourse Co. (1900) 69 L. J. Ch. 850; [1900] 2 Ch. 352, 360; 83 L. T. 274.—FARWELL, J.; affirmed, (1901) 70 L. J. Ch. 468; [1901] 2 Ch. 37; 84 L. T. 436; 49 W. R. 418.—C.A.

Cooke v. Cooke (1887) 38 Ch. D. 202; 59

L. T. 693; 36 W. R. 756.—approved.
Hancock, In re, Watson v. Watson (1900) 70 L. J. Ch. 114; [1901] 1 Ch. 482.—C.A. (*supra*, col. 2139).

Whitby v. Mitchell (1889) 59 L. J. Ch. 8;

42 Ch. D. 494; 61 L. T. 353; 38 W. R. 5.
—KAY, J.; affirmed (*post*), referred to.
Frost, In re, Frost v. Frost (1889) 50 L. J. Ch. 118; 43 Ch. D. 246, 252; 62 L. T. 25; 38 W. R. 264.—KAY, J.

Whitby v. Mitchell (1890) 59 L. J. Ch.

485; 44 Ch. D. 85; 62 L. T. 771; 38 W. R. 337.—C.A., referred to.
Bowles, In re, Amedroz v. Bowles (1902) 71 L. J. Ch. 822; [1902] 2 Ch. 650; 51 W. R. 124.—FARWELL, J.

Chapman v. Brown (1765) 3 Burr. 1626.—

L.C., applied. And see *post*, col. 2141.
Robinson v. Hardcastle (1788) 2 Term Rep. 241; 1 R. R. 467.—K.B.

Chapman v. Brown (*supra*), *discussed*.
Routledge v. Dorril (1794) 2 Ves. 357; 2 R. R. 250.—ARDEN, M.R.

Chapman v. Brown, *referred to*.
Fry v. Capper (1853) Kay 163; 2 W. R. 136.
 —WOOD, V.-C.

Burley v. Evelyn (1848) 16 Sim. 290; 12 Jur. 712.—V.-C., *referred to*.
Bence, in re, *Smith v. Bence* (1891) 60 L. J. Ch. 636; [1891] 3 Ch. 242, 250; 65 L. T. 530.—C.A. LINDLEY, BOWEN and FRY, L.JJ.

3. POWERS.

Warren's Trusts, In re (1884) 53 L. J. Ch. 787; 26 Ch. D. 208; 50 L. T. 454; 32 W. R. 641.—PEARSON, J., *commented on*.
Wheatley, in re, *Smith v. Spence* (1884) 54 L. J. Ch. 201; 27 Ch. D. 606, 611; 51 L. T. 681; 33 W. R. 275.—CHITTY, J.

Warren's Trusts, In re, *discussed and distinguished*.
Brooksbank, in re, *Beaucherk v. James* (1886) 56 L. J. Ch. 82; 34 Ch. D. 160, 165; 55 L. T. 593; 35 W. R. 101.—KAY, J.

Warren's Trusts, In re, *approved and followed*.
Handcock's Trusts, in re (1888) 23 L. R. Ir. 34, 41.—C.A.

Warren's Trusts, In re, *followed*.
Birks, in re, *Kenyon v. Birks* (1899) 68 L. J. Ch. 319; [1899] 1 Ch. 703, 710; 80 L. T. 257; 47 W. R. 374.—KEKEWICH, J. (*reversed*, 69 L. J. Ch. 124; [1900] 1 Ch. 417; 81 L. T. 741.—C.A.).

Warren's Trusts, In re, *commented on*.
Bradshaw, in re, *Bradshaw v. Bradshaw* (1902) 71 L. J. Ch. 230; [1902] 1 Ch. 436; 85 L. T. 253.—KEKEWICH, J.

Phipson v. Turner (1838) 9 Sim. 227; 2 Jur. 414.—SHADWELL, V.-C., *distinguished*.
Jebb v. Tugwell (1855) 24 L. J. Ch. 433; 20 Beav. 84; 1 Jur. (N.S.) 460.—ROMILLY, M.R.; *reversed*, 25 L. J. Ch. 109; 7 De G. M. & G. 663; 2 Jur. (N.S.) 54; 4 W. R. 157.—L.JJ.

Phipson v. Turner, *approved*.
Slark v. Dakyns (1874) 44 L. J. Ch. 205; L. R. 10 Ch. 85, 40; 31 L. T. 712; 23 W. R. 118; *affirming* (1873) L. R. 15 Eq. 307; 42 L. J. Ch. 524.—ROMILLY, M.R.

CAIRNS, L.C.—It would be a serious thing now to disturb. . . *Phipson v. Turner*, which had been followed in more than one case, and had been acted upon by the long practice of conveyancers, and also approved by Lord St. Leonards in his well-known treatise on Powers.—p. 206. JAMES and MELLISH, L.JJ. concurred.

Powell's Trusts, In re (1869) 39 L. J. Ch. 188; 18 W. R. 228.—V.-C., *dissented from*.
Rous v. Jackson (1885) 29 Ch. D. 521; 54 L. J. Ch. 732; 52 L. T. 733; 33 W. R. 773.

CHITTY, J.—On the part of the representatives of the husband it is argued that the trusts of the will and settlement of even date are to be incor-

porated with and read as part of the settlement of 1800, and that then, according to the decision of James, V.-C. in *Powell's Trusts, In re*, they are invalid, as contravening the rule against perpetuities; that is so, and the question, therefore, arises whether the decision in *Powell's Trusts, In re* is consistent with the course of authorities. James, V.-C. in that case decided that such a general testamentary power of appointment given to a married woman is not equivalent to ownership, so that as regards the rule against perpetuities the interest arising under the execution of the power by her will must be considered as created under the deed or will conferring the power. This decision is reported in the Law Journal reports, and also in the Weekly Reporter, but it is not reported in the Law Reports, but I am not entitled to say on that account that it is not properly reported, or an authority to which I need pay no attention. The case is reported, and I must attend to it and deal with it as best I can. I think the V.-C. in that case fell into an error. I can find no distinction between the case of capacity to alienate existing by reason of a general power and general capacity to alienate property. For the purposes of the power, the person exercising it, whether a man or a married woman, stands in exactly the same position with reference to the disposition purported to be made under the power. Mr. Butler and Lord St. Leonards both treat a general power of appointment as outside the rule against perpetuities. Lord St. Leonards in his work on Powers, says (8th ed. p. 394): "A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases." He draws no distinction between a power exercisable by deed or will or by will only, and it appears to me to make no difference by what instrument the power is made exercisable. Lord St. Leonards also says (*ib.*, p. 395): "Therefore, whatever estates may be created by a man seized in fee may equally be created under a general power of appointment; and the period for the commencement of the limitations in point of perpetuity, is the time of the execution of the power, and not of the creation of it." He goes on to quote Mr. Powell's note to Fearn's Executory Devises (p. 5) in favour of the contrary opinion, and in the result states that there appears to be no solid principle upon which the distinction taken by Mr. Powell can be supported, because the question whether the limitations are good does not depend on the fact that the donee of the power has also the fee in default of appointment, and that you can create the same estates and limitations under a general power of appointment as you can where you have the fee. There are remarks of other text-writers to the same effect, and I refer particularly to those of Mr. Butler, who says that this proposition is established "after a series of cases." Butler's Coke upon Littleton, 272 a. I think, therefore, there must be some error, some slip in the decision of James, V.-C. in *Powell's Trusts, In re*, and that the case was wrongly decided, and consequently that I must treat a *feme covert* as capable of creating the same limitations under a general power of appointment as she could under a will of her separate estate.—pp. 525—527.

Powell's Trusts, In re, dissented from.

Rous v. Jackson, approved and followed.

Flower, In re, *Edmonds v. Edmonds* (1885) 55 L. J. Ch. 200; 53 L. T. 717; 34 W. R. 149.

NORTH, J.—I shall follow that decision [*Rous v. Jackson*], as the observations of Lord St. Leonards in his work on Powers (8th ed. p. 394) seem to be exactly in point and to bear out that judgment. I may add that, apart from that decision, and if I had to decide the question now for the first time, without the assistance of any previous decision on the point, I should decide as Chitty, J. did, and not as was decided in *Powell's Trusts, In re*.—p. 202.

Powell's Trusts, In re, referred to.

Rous v. Jackson and Flower, In re, Edmonds v. Edmonds, approved.

Stuart v. Babington (1891) 27 L. R. Ir. 551.
CHATTERTON, V.-C.—In the conflict between *Powell's Trusts, In re*, and *Rous v. Jackson* and *Flower, In re*, I will not (as I might) content myself with saying that I follow the later cases; for in my opinion there is a discrepancy between those cases which cannot be got over by any process of subtle reasoning, one eminent judge having decided one way, and two equally eminent judges having decided in the opposite way, so that I think I must deal with this case on the principles which seem to me to apply. I have carefully considered *Rous v. Jackson* and *Flower, In re*, and my opinion entirely coincides with those of Chitty, J. and North, J. And I say this at the peril of, in their company, differing from such an eminent judge as James, V.-C.—p. 536.

Ellicombe v. Gompertz (1837) 3 Myl. & Cr. 127.—**COTTENHAM, L.C., applied.**

Hamilton v. West (1846) 10 Ir. Eq. R. 75, 92.—**M.R.**

Ellicombe v. Gompertz, explained.

Boughton v. Boughton (1848) 1 H. L. Cas. 406.—**H.L. (E.). COTTENHAM, L.C.**

Ellicombe v. Gompertz, principle explained but not applied.

Jenkins v. Hughes (1860) 30 L. J. Ch. 870; 8 H. L. Cas. 571, 593; 6 Jur. (N.S.) 1043; 8 W. R. 667.—**H.L. (E.).**

Ellicombe v. Gompertz, principle applied.

Hutchinson v. Tottenham [1898] 1 Ir. R. 403, 420.—**CHATTERTON, V.-C.**

4. CHARITABLE TRUSTS.

Christ's Hospital v. Grainger (1849) 19 L. J. Ch. 33; 1 Mac. & G. 460; 1 Hall & Tw. 533; 14 Jur. 339.—**L.C., followed.**

Tyler, In re, Tyler v. Tyler (1891) 60 L. J. Ch. 686; [1891] 3 Ch. 252; 65 L. T. 367; 40 W. R. 7.—**C.A. LINDLEY, FRY and LOPES, L.JJ.**

Christ's Hospital v. Grainger and Tyler, In re, Tyler v. Tyler, distinguished.

Randell, In re, Randell v. Dixon (1888) 57 L. J. Ch. 899; 38 Ch. D. 213; 58 L. T. 626; 36 W. R. 543.—**NORTH, J., referred to.**

Bowen, In re, Lloyd Phillips v. Davis (1893) 62 L. J. Ch. 681; [1893] 2 Ch. 491; 3 R. 529; 61 L. T. 789; 41 W. R. 535.

STIRLING, J.—It has been decided that the rule against perpetuities has no application to the transfer in a certain event of property from one charity to another: *Christ's Hospital v.*

Grainger and Tyler, In re, Tyler v. Tyler. The principle of those decisions, however, does not extend, in my opinion, to cases where—first, an immediate gift in favour of private individuals is followed by an executory gift in favour of charity: or, secondly, an immediate gift in favour of charity is followed by an executory gift in favour of private individuals. Of the former class of cases *Selborne, L.C.*, giving the judgment of the C. A. in *Chamberlayne v. Brockett* [(1872) 42 L. J. Ch. 368; L. R. 8 Ch. 206. See "CHARITY," vol. i., col. 327], says: "If the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*." The second class of cases does not seem to have fallen under the consideration of any Court in this country; but the Supreme Court of Massachusetts has in *Brattle Square Church v. Grant*, 3 Gray 142, and *Theological Education Society v. Att.-Gen.*, 21 Lathrop. 285, held that the rule against perpetuities applies to them. For the knowledge of these decisions I am indebted to the very learned and able treatise of Professor J. C. Gray on the Rule against Perpetuities, p. 363, sect. 593, to which I was referred in argument. On the other hand, as property may be given to a charity in perpetuity, it may be given for a shorter period, however long; and the interest undisposed of, even if it cannot be the subject of a direct executory gift, may be left to devolve as the law prescribes. Of this an example is to be found in *Randell, In re, Randell v. Dixon*.—p. 683.

Tyler, In re, Tyler v. Tyler, referred to.

Roche v. McDermott [1901] 1 Ir. R. 394, 400.—**PORTER, M.R.**

POLICE.

Rex v. Hope Mansell (Inhabitants) (1783) Cald. 252, *applied.*

Reg. v. Booth (1848) 18 L. J. M. C. 25; 12 Q. B. 884; 3 New Sess. Cas. 203; 13 Jur. 6.—**Q.B.**

Underhill v. Witts (1800) 3 Esp. 56: **Rex v.**

Adlard (1825) 7 D. & R. 340; 4 B. & C. 772.—**K.B.:** and **Rex v. Clarke** (1787) 1 Term Rep. 679.—**K.B., observed upon.**

Reg. v. Booth (1848) 18 L. J. M. C. 25; 12 Q. B. 884; 3 New Sess. Cas. 203; 13 Jur. 6.—**Q.B.**

Galliard v. Laxton (1862) 31 L. J. M. C. 123; 2 B. & S. 363; 8 Jur. (N.S.) 642; 5 L. T. 835; 10 W. R. 353; 9 Cox C. C. 127.—**Q.B., followed.**

Reg. v. Chapman (1871) 12 Cox C. C. 4.—**HANNEN, J.**

Galliard v. Laxton, explained and applied.

Reg. v. Chapman, applied.

Codd v. Cobe (1876) 45 L. J. M. C. 101; 1 Ex. D. 352; 34 L. T. 453; 12 Cox C. C. 202.—**EX. D.**

Entick v. Carrington (1765) 19 Howell St. Tr. 1029; 2 Wils. 275.—C.P.; *referred to*.

Dillon v. O'Brien (1887) 2 L. R. Ir. 300; 16 Cox C. C. 245.—EX. CH.; and **Jones v. German** (1896) 65 L. J. M. C. 212; [1896] 2 Q. B. 418; 75 L. T. 161; 45 W. R. 112.—RUSSELL, C.J. [*affirmed*, C.A.].

Crozier v. Cundey (1827) 6 B. & C. 232; 9 D. & R. 224; 5 L. J. (o.s.) M. C. 50; 30 R. R. 311.—K.B.; **Rex v. Barnett** (1829) 3 Car. & P. 600; and **Reg. v. Frost** (1839) 9 Car. & P. 129, 131, *adopted*.

Dillon v. O'Brien (1887) 2 L. R. Ir. 300; 16 Cox C. C. 245.—EX. CH.

Cole v. Hindson (1795) 6 Term Rep. 234.—K.B.; and **Shadgett v. Clipson** (1807) 8 East 328.—K.B., *adopted*.

Hoye v. Bush (1840) 10 L. J. M. C. 168; 2 Scott N. R. 86; 1 Man. & G. 775.—C.P.

Money v. Leach (1765) 1 W. Bl. 555, *dictum adopted*.

Hoye v. Bush (1840) 10 L. J. M. C. 168; 2 Scott N. R. 86; 1 Man. & G. 774.—C.P.

Money v. Leach and Hoye v. Bush, *applied*.

Dillon v. O'Brien (1887) 2 L. R. Ir. 300; 16 Cox C. C. 245.—EX. CH.

Price v. Messenger (1800) 2 Bos. & P. 158.—C.P.

Observations adopted, **Atkins v. Kilby** (1840) 9 L. J. M. C. 52; 11 A. & E. 777; 4 P. & D. 145.—Q.B.; *distinguished*, **Hoye v. Bush** (1840) 10 L. J. M. C. 168; 2 Scott N. R. 86; 1 Man. & G. 775.—C.P.

Clarke v. Davey (1820). 4 Moore 465.—P.C., *impugned*.

Webb v. Fairman (1838) 7 L. J. Ex. 140; 3 M. & W. 473; 6 D. P. C. 549.—EX.

Lancaster v. Walsh (1838) 4 M. & W. 16; 1 H. & H. 258.—EX., *adopted*.

Lockhart v. Barnard (1845) 15 L. J. Ex. 1; 14 M. & W. 674; 9 Jur. 929.—EX.; **Thatcher v. England** (1846) 15 L. J. C. P. 241; 3 C. B. 254; 10 Jur. 597.—C.P.

Lancaster v. Walsh, *dicta adopted*.

Thatcher v. England, *distinguished and dicta adopted*.

Bent v. Wakefield and Barnsley Union Bank (1878) 4 C. P. D. 1; 39 L. T. 576; 27 W. R. 168; 14 Cox C. C. 208.—C.P.D.

England v. Davidson (1840) 11 A. & E. 856; 3 P. & D. 594; 4 Jur. 1032.—Q.B., *distinguished but principle applied*.

Bent v. Wakefield and Barnsley Union Bank (1878) 4 C. P. D. 1; 39 L. T. 576; 27 W. R. 168; 14 Cox C. C. 208.—C.P.D.

Smith v. Moore (1845) 1 C. B. 438; 9 Jur. 352.—C.P.

Adopted, **Neville v. Kelly** (1862) 32 L. J. C. P. 118; 12 C. B. (N.S.) 740; 10 W. R. 697.—C.P.; *distinguished*, **Bent v. Wakefield and Barnsley Union Bank** (1878) 4 C. P. D. 1; 39 L. T. 576; 27 W. R. 168; 14 Cox C. C. 208.—C.P.D.

Rex v. Bird (1819) 2 B. & Ald. 522.—K.B.; and **Rex v. Seville** (1821) 5 B. & Ald. 180.—K.B., *distinguished*.

Reg. v. Chelmsford Churchwardens (1843) 12 L. J. M. C. 139; 5 Q. B. 66; 3 G. & D. 357; 7 Jur. 879.—Q.B.

Hobson v. Kingston-upon-Hull Corporation (1855) 24 L. J. Q. B. 251; 4 El. & Bl. 986; 1 Jur. (N.S.) 892; 3 W. R. 405.—Q.B., *distinguished*.

Reg. v. Metropolitan Police (Receiver) (1863) 33 L. J. Q. B. 52; 4 B. & S. 593; 9 L. T. 375; 12 W. R. 74.—Q.B.

Upperton v. Ridley (1901) 70 L. J. K. B. 249; [1901] 1 K. B. 384; 84 L. T. 18; 49 W. R. 340; 65 J. P. 231.—C.A., *followed*.

Goodwin v. Sheffield Corporation (1902) 71 L. J. K. B. 492; [1902] 1 K. B. 629; 86 L. T. 682; 66 J. P. 533.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Upperton v. Ridley, *affirmed*, (1903) 73 L. J. K. B. 535; [1903] A. C. 281; 88 L. T. 642; 67 J. P. 349.—H.L. (E.)

POOR LAW.

1. AUTHORITIES.
2. PARISHES AND EXTRA PAROCHIAL PLACES.
3. PARISH PROPERTY.
4. SETTLEMENT.
5. REMOVAL.
6. RELIEF AND MAINTENANCE.
7. PAUPER LUNATICS.

1. AUTHORITIES.

Reg. v. Poor Law Commissioners, St. Pancras Union, In re (1837) 6 A. & E. 1; 1 N. & P. 371; 6 L. J. M. C. 41.—Q.B.; and **Reg. v. Poor Law Commissioners, Whitechapel Union, In re** (1837) 6 A. & E. 34; 2 N. & P. 8; 6 L. J. M. C. 114.—Q.B., *explained and not applied*.

Reg. v. Poor Law Commissioners, Holborn Union, In re (1838) 6 A. & E. 56; 3 N. & P. 77; 7 L. J. M. C. 33.—Q.B.

Reg. v. Poor Law Commissioners, Strand Union, In re (1839) 9 A. & E. 901; 2 P. & D. 326, n.—Q.B., *adopted*.

Reg. v. Greene (1852) 21 L. J. M. C. 137; 17 Q. B. 793; 16 Jur. 663.—Q.B.

Reg. v. Poor Law Commissioners, Cambridge Union, In re (1839) 9 A. & E. 911; 2 P. & D. 323; 8 L. J. M. C. 77; 3 Jur. 723.—Q.B., *distinguished*.

Reg. v. Braintree Union (1841) 10 L. J. M. C. 76; 1 Q. B. 130; 4 P. & D. 593; 3 Jur. 265.—Q.B.

Reg. v. Poor Law Commissioners, Cambridge Union, In re, *adopted*.

Reg. v. Greene (1852) 21 L. J. M. C. 137; 17 Q. B. 793; 16 Jur. 663.—Q.B.

Reg. v. Poor Law Commissioners, Allstonefield Incorporation, In re (1840) 11 A. & E. 558; 3 P. & D. 39; 9 L. J. M. C. 33.—Q.B., *referred to*.

Reg. v. Robinson (1851) 17 Q. B. 466.—Q.B.

Reg. v. Braintree Union (*supra*), *followed*.

Molyneux, Ex parte (1863) 7 L. T. 599; 11 W. R. 233.—Q.B.

Reg. v. Braintree Union, *referred to*.

Reg. v. Haslehurst (1884) 53 L. J. M. C. 127; 13 Q. B. D. 253; 51 L. T. 95; 32 W. R. 877; 48 J. P. 774.—STEPHEN and W. WILLIAMS, JJ.

Reg. v. Bristol (Governors and Guardians) (1849) 18 L. J. M. C. 132; 13 Jur. 809.—Q.B., *observation adopted*.
Bristol Incorporation v. Barton Regis Union (1891) 66 L. T. 190.—MATHEW and SMITH, JJ.

Rex v. Dursley (Churchwardens) (1836) 5 A. & E. 10; 2 H. & W. 9; 6 N. & M. 333; 5 L. J. M. C. 137.—K.B., *observed upon*.
Hill v. Clonmell Union (1896) [1897] 1 Ir. R. 272.—M.R.

London Union v. Acocks (1860) 8 C. B. (N.S.) 760; 8 W. R. 608.—C.P., *followed*.
Caistor Union v. North Kelsey Overseers (1890) 59 L. J. M. C. 102; 62 L. T. 731.—Q.B.D.

Waddington v. London Union, El. Bl. & El. 370; 28 L. J. M. C. 113.—Q.B.; *reversed*, (1858) El. Bl. & El. 391; 28 L. J. M. C. 121; 6 W. R. 599.—EX. CH.

Waddington v. London Union (*supra*, in EX. CH.), *referred to*.

Hale v. City of London Union (1859) 29 L. J. M. C. 5; 6 C. B. (N.S.) 863; 6 Jur. (N.S.) 74.—Q.B.; **Saul v. Wigan Sanitary Authority** (1886) 56 L. T. 438; 35 W. R. 252; 51 J. P. 406.—DENMAN and HAWKINS, JJ.; **Tynemouth Guardians v. Backworth Overseers** (1888) 57 L. J. M. C. 56.—FIELD, J.

Waddington v. London Union, discussed.
Reg. v. Leigh Rural Council (1898) 67 L. J. Q. B. 562; [1898] 1 Q. B. 836; 78 L. T. 604; 46 W. R. 471; 62 J. P. 355.—C.A.
 COLLINS, L.J.—It no doubt does appear that Mr. Baron Watson, in delivering the judgment of the Ex. Ch. [in the above case], did suggest that, even if a judgment had been obtained against the guardians, the Court could not have granted a *mandamus* to compel the making of a rate to satisfy it, because such a rate would have been illegal. But it is obvious that that observation is only a *dictum*, because in that case no judgment had been obtained.—p. 567.

Waddington v. London Union, referred to.
Att.-Gen. v. Merthyr Tydfil Union (1900) 69 L. J. Ch. 299; [1900] 1 Ch. 516; 82 L. T. 662.—C.A.

West Derby Union v. Metropolitan Life Assurance Society (1896) 66 L. J. Ch. 58; 75 L. T. 412; 45 W. R. 90; 60 J. P. 809.—NORTH, J.; *reversed*, (1897) 66 L. J. Ch. 199; [1897] 1 Ch. 335; 76 L. T. 73; 45 W. R. 388.—C.A. SMITH, L.J. *dissenting*; the latter decision *affirmed*, (1897) 66 L. J. Ch. 726; [1897] A. C. 647; 77 L. T. 284; 61 J. P. 820.—H.L. (E.).

West Derby Union v. Metropolitan Life Assurance Society, referred to.
Sheffield Corporation v. Sheffield Electric Light Co. (1897) 67 L. J. Ch. 113; [1898] 1 Ch. 203; 77 L. T. 616; 46 W. R. 485; 62 J. P. 87.—NORTH, J.

Haigh v. North Brierley Union (1858) 28 L. J. Q. B. 62; 1 El. Bl. & El. 873; 5 Jur. (N.S.) 511; 6 W. R. 679.—Q.B.

Not applied, **Sutton v. Spectacle Makers Co.** (1864) 10 L. T. 411.—Q.B.; *discussed*, **Hunt v. Wimbledon Local Board** (1878) 4 C. P. D. 48; 48 L. J. C. P. 207; 40 L. T. 115; 27 W. R. 123.—C.A. (*see* extract, *ante*, col. 716).

West Ham Union v. St. Matthew, Bethnal Green (1896) 65 L. J. M. C. 201; [1896]

A. C. 477; 75 L. T. 286; 60 J. P. 740.—H.L. (E.), *followed*.
M. S. & L. Ry. v. Doncaster Union (1896) 66 L. J. Q. B. 75; [1897] 1 Q. B. 117; 75 L. T. 472.—C.A.

Smart v. West Ham Union (1856) 25 L. J. Ex. 210; 11 Ex. 867; 4 W. R. 301.—EX. CH., *referred to*.

Hunt v. Wimbledon Local Board (1878) 47 L. J. C. P. 540; 3 C. P. D. 208. 214.—LINDLEY, J. [affirmed, C.A.]: **Young v. Leamington Corporation** (1883) 52 L. J. Q. B. 713; 8 App. Cas. 517, 525.—H.L. (E.); and **Lawford v. Billericay Rural Council** (1903) 72 L. J. K. B. 554; [1903] 1 K. B. 772.—C.A.

Att.-Gen. v. Wilkinson (1859) 29 L. J. Ch. 41.—L.J.J., *explained*.
Worral Waterworks Co. v. Lloyd (1866) L. R. 1 C. P. 719.—C.P.

WILLES, J.—**Att.-Gen. v. Wilkinson** before the L.J.J. was a very peculiar case; there, there was an express prohibition against retrospective rates, and, moreover, the Court only continued the injunction against the levy till the hearing of the case, which in fact never took place.—p. 721.

Brennan v. Limerick Union (1878) 2 L. R. Ir. 42.—Q.B.D., *adopted*.
Dunbar v. Ardee Union (1896) [1897] 2 Q. B. 76.—C.A.

Proctor v. Manwaring (1819) 3 B. & Ald. 145.—K.B.; and **Henderson v. Sherborne** (1837) 6 L. J. M. C. 28; 2 M. & W. 236.—EX., *considered*.

Robinson v. Emerson (1866) 4 H. & C. 352; 12 Jur. (N.S.) 378; 14 L. T. 291; 14 W. R. 658.—EX.

Greenhow v. Parker (1861) 31 L. J. Ex. 4; 6 H. & N. 882; 9 W. R. 578.—EX., *followed*.

Davies v. Harvey (1874) L. R. 9 Q. B. 433; 43 L. J. M. C. 121; 30 L. T. 629; 22 W. R. 733.—Q.B.

Rex v. Horton (1786) 1 Term Rep. 374.—K.B.; and **Rex v. Salop JJ.** (1832) 1 L. J. M. C. 85; 3 B. & Ad. 910.—K.B., *followed*.
Reg. v. Worcestershire JJ. (1840) 9 L. J. M. C. 81; 11 A. & E. 28; 3 P. & D. 465.—Q.B.

Rex v. Loxdale (1758) 1 Burr. 445.—K.B., *principle applied*.

Howard v. Bodington (1877) 2 P. D. 203.—ARCHES; and **Stoomvaart Maatschappij Nederland v. P. & O. S.N. Co.** (1882) 52 L. J. Adm. 1; 7 App. Cas. 795.—H.L. (E.).

Rex v. Nantwich (1812) 16 East 228, *distinguished*.

Rex v. Yorkshire North Riding JJ. (1837) 6 L. J. M. C. 110; 6 A. & E. 863; 2 N. & P. 103.—K.B.

Rex v. Butler (1768) 1 W. Bl. 649.—K.B., *questioned*.

Reg. v. Preston (1848) 18 L. J. M. C. 10; 12 Q. B. 891; 3 New Sess. Cas. 313; 13 Jur. 7.—Q.B.

Skingley v. Surridge (1843) 12 L. J. M. C. 122; 11 M. & W. 503; 7 Jur. 773.—EX., *applied*.

Points v. Attwood (1848) 18 L. J. C. P. 19; 6 C. B. 38; 13 Jur. 83; 2 Lutw. Reg. Cas. 117.—C.P.; **Reg. v. Salop JJ.** (1864) 11 L. T. 416.—

Q.B. : *Reg. v. Shepley* (1888) 58 L. J. M. C. 6; 22 Q. B. D. 96; 59 L. T. 696; 37 W. R. 27; 53 J. P. 261.—COLERIDGE, C.J. and GRANTHAM, J.

Reg. v. Watts (1837) 7 A. & E. 461; 2 N. & P. 367; 7 L. J. M. C. 72.—K.B., *adapted*.

Points v. Attwood (1848) 18 L. J. C. P. 19; 6 C. B. 38; 13 Jur. 83; 2 Lutw. Reg. Cas. 117.—C.P.; and *Baker v. Locke* (1864) 34 L. J. C. P. 49; 18 C. B. (N.S.) 52; 1 H. & P. 137; 11 Jur. (N.S.) 65; 11 L. T. 567; 13 W. R. 258.—C.P.; and *Reg. v. Smallman* (1896) 66 L. J. Q. B. 82; [1897] 1 Q. B. 4; 75 L. T. 394; 45 W. R. 249.—C.C.R.

Points v. Attwood (*supra*), *adapted*.

Baker v. Locke (1864) 34 L. J. C. P. 49; 18 C. B. (N.S.) 52; 1 H. & P. 137; 11 Jur. (N.S.) 65; 11 L. T. 567; 13 W. R. 258.—C.P.

Reg. v. Shepley (1888) 58 L. J. M. C. 6; 22 Q. B. D. 96; 59 L. T. 696; 37 W. R. 27; 53 J. P. 261.—Q.B.D., *followed*.

Underwood v. Jones (1891) 60 L. J. M. C. 58; 64 L. T. 144; 55 J. P. 296.—POLLOCK, B. and CHARLES, J.

Reg. v. Gloucestershire JJ. (1839) 8 L. J. M. C. 108; 1 B. & Ad. 1.—K.B.; and

Reg. v. Kent JJ. (1841) 11 L. J. M. C. 26; 2 Q. B. 686.—Q.B., *applied*.

Reg. v. Surrey JJ. (1846) 15 L. J. M. C. 46; 2 New Sess. Cas. 245; 3 D. & L. 573; 1 B. C. Rep. 12; 10 Jur. 410.—BAILEY, CT.

Chambers v. Jones (1850) 19 L. J. Ex. 239; 5 Ex. 229.—EX., *approved*.

Penfold v. West (1854) 9 L. T. 650; 12 W. R. 340.—Q.B.

Reg. v. Hunt (1856) 6 E. & B. 408.—Q.B., *referred to*.

Southampton Union v. Bell (1888) 21 Q. B. D. 297; 59 L. T. 181; 36 W. R. 924; 52 J. P. 567.—MANISTY and STEPHEN, JJ.

Reg. v. Gwyer (1834) 4 L. J. M. C. 39; 2 A. & E. 216; 4 N. & M. 158.—K.B.; and

Reg. v. G. W. Ry. (1849) 18 L. J. M. C. 145; 13 Q. B. 327; 13 Jur. 652.—Q.B., *distinguished*.

Reg. v. Street (1852) 22 L. J. M. C. 29; 18 Q. B. 682; 16 Jur. 1085.—Q.B.

COLERIDGE, J.—*Reg. v. Gwyer* was decided on an entirely different Act of Parliament; and in *Reg. v. G. W. Ry.* there was actual misconduct on the part of the overseers.—p. 31.

2. PARISHES AND EXTRA-PAROCHIAL PLACES.

Sharpley v. Mablethorpe Overseers (1854) 24 L. J. M. C. 35; 3 S. C. nom. **Reg. v. Sharpley**, 3 El. & Bl. 906; 18 Jur. 835; 2 W. R. 533.—Q.B., *dictum adopted*.

Reg. v. Watson (1868) 37 L. J. M. C. 153; 1 L. R. 3 Q. B. 762; 9 B. & S. 219; 18 L. T. 556; 16 W. R. 977.—Q.B.

Rex v. Newell (1791) 4 Term Rep. 266.—K.B.; and **Bastock v. Ridgway** (1836) 5 L. J. K. B. 139; 6 B. & C. 496.—K.B., *approved and applied*.

Price v. Quarrell (1842) 11 L. J. M. C. 131; 12 A. & E. 784; 2 G. & D. 632.—K.B.

Rex v. Newell; Bastock v. Ridgway, and **Price v. Quarrell**, *applied*.

Reg. v. Clayton (1849) 18 L. J. M. C. 129; 13 Q. B. 354; 3 New Sess. Cas. 494; 13 Jur. 406.—Q.B.

3. PARISH PROPERTY.

Reg. v. Local Government Board, 82 L. T. 385; 64 J. P. 516.—BIGHAM and CHANNELL, JJ.; *reversed*, (1900) 70 L. J. K. B. 272; [1901] 1 K. B. 210; 83 L. T. 648; 49 W. R. 226; 65 J. P. 36.—C.A.

Doe d. Jackson v. Hiley (1830) 8 L. J. (O.S.) M. C. 105; 10 B. & C. 885; 5 M. & Ry. 706.—K.B., *distinguished*.

Allason v. Stark (1838) 8 L. J. M. C. 13; 9 A. & E. 255; 1 P. & D. 183.—Q.B.

Doe d. Jackson v. Hiley.

Approved. *Alderman v. Neate* (1839) 8 L. J. Ex. 89; 4 M. & W. 704.—EX.; *referred to*, *Gouldsworth v. Knights* (1843) 12 L. J. Ex. 282; 11 M. & W. 337.—EX.; *followed*, *Rumball v. Munt* (1846) 15 L. J. Q. B. 180; 8 Q. B. 382; 10 Jur. 539.—Q.B.

Doe d. Jackson v. Hiley, considered.

St. Nicholas, Deptford, Overseers v. Skotchley (1847) 17 L. J. M. C. 17; 8 Q. B. 394; 12 Jur. 38.—Q.B.

Doe d. Jackson v. Hiley, referred to.

Haigh v. West (1893) 62 L. J. Q. B. 532; [1893] 2 Q. B. 19; 69 L. T. 165; 57 J. P. 358.—C.A.

Doe d. Higgs v. Terry (1835) 5 L. J. M. C. 27; 4 A. & E. 274.—K.B., *distinguished*.

Allason v. Stark (1838) 8 L. J. M. C. 13; 9 A. & E. 255; 1 P. & D. 183.—Q.B.

Doe d. Higgs v. Terry, followed.

Rumball v. Munt (1846) 15 L. J. Q. B. 180; 8 Q. B. 382; 10 Jur. 539.—Q.B.

Doe d. Higgs v. Terry, considered.

St. Nicholas, Deptford, Overseers v. Skotchley (1847) 17 L. J. M. C. 17; 8 Q. B. 394; 12 Jur. 38.—Q.B.

Doe d. Higgs v. Terry, applied.

Haigh v. West (1893).—C.A. (*supra*).

Allason v. Stark (1838) 8 L. J. M. C. 13; 9 A. & E. 255; 1 P. & D. 183.—Q.B., *referred to*.

Gouldsworth v. Knights (1843) 12 L. J. Ex. 282; 11 M. & W. 337.—EX.

Allason v. Stark, considered.

St. Nicholas, Deptford, Overseers v. Skotchley (1847) 17 L. J. M. C. 17; 8 Q. B. 394; 12 Jur. 38.—Q.B.

Alderman v. Neate (1839) 8 L. J. Ex. 89; 4 M. & W. 704.—EX., *referred to*.

Gouldsworth v. Knights (1843) 12 L. J. Ex. 282; 11 M. & W. 337.—EX.

Alderman v. Neate, followed.

Rumball v. Munt (1846) 15 L. J. Q. B. 180; 8 Q. B. 382; 10 Jur. 539.—Q.B.

Alderman v. Neate and Rumball v. Munt, considered.

St. Nicholas, Deptford, Overseers v. Skotchley (1847) 17 L. J. M. C. 17; 8 Q. B. 394; 12 Jur. 38.—Q.B.

Reg. v. Bolton (1841) 1 Q. B. 66; 4 P. & D. 679; 5 Jur. 1154.—Q.B., *referred to*.
Vaughan, Ex parte (1866) 36 L. J. M. C. 17; L. R. 2 Q. B. 114; 7 B. & S. 902; 15 L. T. 277; 15 W. R. 198.—Q.B.; *London Corporation v. Cox* (1867) 36 L. J. Ex. 225; L. R. 2 H. L. 239, 263; 16 W. R. 44.—H.L. (E.); *Revell v. Blake* (1872) 41 L. J. C. P. 129; L. R. 7 C. P. 300, 311; 26 L. T. 578; 20 W. R. 756.—C.P.; *Lovesy v. Stallard* (1874) 30 L. T. 792, 794.—C.P.; *Colonial Bank of Australasia v. Willan* (1874) 43 L. J. P. C. 39; L. R. 5 P. C. 417, 443; 30 L. T. 237; 22 W. R. 516.—P.C.; *Usill v. Hales* (1878) 47 L. J. C. P. 323; 3 C. P. D. 319, 324; 38 L. T. 65; 14 Cox C. C. 61.—C.P.D.; *Wake, Ex parte* (1883) 11 Q. B. D. 291, 298.—Q.B.D.; *Reg. v. Whitfield* (1885) 54 L. J. M. C. 113; 15 Q. B. D. 122, 144; 53 L. T. 96.—C.A.; *Huxley v. West London Extension Ry.* (1886) 17 Q. B. D. 373, 378.—Q.B.D., *affirmed*, 58 L. J. Q. B. 305; 14 App. Cas. 26.—H.L. (E.); *Authers (or Anthers), In re and Ex parte* (1889) 58 L. J. M. C. 62, 67; 22 Q. B. D. 345; 60 L. T. 454; 37 W. R. 320; 16 Cox C. C. 588; 53 J. P. 116.—Q.B.D.; *Reg. v. Farmer* (1891) 61 L. J. M. C. 65; [1892] 1 Q. B. 637; 65 L. T. 736; 40 W. R. 228; 56 J. P. 341.—C.A.; and *Rex v. Income Tax Commissioners* (1901) 70 L. J. K. B. 1010; [1901] 2 K. B. 879; 85 L. T. 503; 65 J. P. 724.—C.A.

4. SETTLEMENT.

Reg. v. Elvet (1859) 2 El. & El. 266; 29 L. J. M. C. 17; 7 W. R. 586; 5 Jur. (N.S.) 1350.—Q.B., *approved*.
Highworth Union v. Westbury Union (1889) 59 L. J. M. C. 29; 14 App. Cas. 465; 61 L. T. 733; 38 W. R. 295; 53 J. P. 580.—H.L. (E.).
Reigate Union v. Croydon Union (1889) 59 L. J. M. C. 29; 14 App. Cas. 465, 479; 61 L. T. 733; 38 W. R. 295; 53 J. P. 580.—H.L. (E.).
Reg. v. Elvet, distinguished.
West Ham Union v. St. Matthew, Bethnal Green (1894) 63 L. J. M. C. 97; [1894] A. C. 230; 6 R. 111; 70 L. T. 818; 42 W. R. 573; 58 J. P. 493.—H.L. (E.).
Reg. v. Elvet, followed.
West Ham Union v. Holbeach Union (1903) 72 L. J. K. B. 801; [1903] 2 K. B. 627; 52 W. R. 30; 67 J. P. 346.—K.B.D.

Reg. v. Ipswich Union (1877) 46 L. J. M. C. 207; 2 Q. B. D. 269; 36 L. T. 317; 25 W. R. 511.—Q.B.D., *distinguished*.
Westbury-on-Severn v. Barrow-in-Furness (1878) 47 L. J. M. C. 79; 3 Ex. D. 88, 93; 38 L. T. 315; 26 W. R. 372.—EX. D.

CLEASBY, B. [after observing that the Court of Q. B. in the above case had held that sect. 34 of 39 & 40 Vict. c. 61, was retrospective, continued:] We are not dealing with the 34th but the 35th section, and there is some difference in the language. Without questioning the decision upon the 34th section, we are compelled to say that in construing the 35th we must give effect to the 36th. The 36th section enacts that the provisions as to settlement (including necessarily the 35th section) shall not take effect where there has been an order of removal, &c., which is as much as saying that they shall take effect and replace the old law in general, but not where the old law has been acted on. It would be giving no effect to the 36th section to hold otherwise.—p. 80.

Reg. v. Ipswich Union, applied.
Tenterden Union v. St. Mary, Islington, Union (1878) 47 L. J. M. C. 81; 38 L. T. 485.—C.P.D.

Reg. v. Ipswich Union, followed.
Reg. v. Abergavenny Union (1880) 50 L. J. M. C. 1; 6 Q. B. D. 31, 33; 43 L. T. 602; 29 W. R. 303; 45 J. P. 205.—Q.B.D.; and *Sunderland Union v. Sussex Clerk of Peace* (1881) 15 L. J. M. C. 33; L. R. 8 Q. B. D. 99; 46 L. T. 98; 30 W. R. 337; 46 J. P. 375.

Reg. v. Ipswich Union, referred to.
Brighton Guardians v. Strand Union (1891) 60 L. J. M. C. 105; [1891] 2 Q. B. 156; 64 L. T. 722.—C.A.

Dorchester Union v. Weymouth Union (1885) 55 L. J. M. C. 44; 16 Q. B. D. 41; 54 L. T. 52; 50 J. P. 310.—Q.B.D., *approved*.
St. Olave's, Rotherhithe, Union v. Canterbury Union (1897) 66 L. J. Q. B. 471; [1897] 1 Q. B. 682; 76 L. T. 517; 45 W. R. 529; 61 J. P. 371.—C.A.

Highworth Union v. Westbury-on-Severn Union (1888) 57 L. J. M. C. 33; 20 Q. B. D. 597; 58 L. T. 839; 36 W. R. 422; 52 J. P. 325.—C.A.; *reversed*, (1889) 59 L. J. M. C. 29; 14 App. Cas. 465; 61 L. T. 733; 38 W. R. 295; 53 J. P. 580.—H.L. (E.).

Highworth Union v. Westbury-on-Severn Union (*supra*, in C.A.), *followed*.
Dorchester Union v. Poplar Union (1888) 57 L. J. M. C. 78; 21 Q. B. D. 88; 59 L. T. 687; 36 W. R. 706; 52 J. P. 435.—C.A.

Highworth Union v. Westbury-on-Severn Union (*supra*, in H.L.), *referred to*.
West Ham Union v. St. Matthew, Bethnal Green (1892).—C.A. (*infra*); and *Llanelli Union v. Neath Union* (1893) 62 L. J. M. C. 112; [1893] 2 Q. B. 38; 69 L. T. 194.—Q.B.D.

Reg. v. Leeds Union (1879) 48 L. J. M. C. 129; 4 Q. B. D. 323; 40 L. T. 521; 27 W. R. 708.—Q.B.D., *followed*.

Salford Union v. Manchester Overseers (1882) 52 L. J. M. C. 34; 10 Q. B. D. 172; 48 L. T. 119; 31 W. R. 380; 47 J. P. 419.—Q.B.D.; and *West Ham Union v. St. Matthew, Bethnal Green* (1892).—C.A. (*infra*, col. 2153).

Reg. v. Leeds Union, disapproved.
West Ham Union v. St. Matthew, Bethnal Green (1894) 63 L. J. M. C. 97; [1894] A. C. 230; 6 R. 111; 70 L. T. 818; 42 W. R. 573; 58 J. P. 493.—H.L. (E.).

LORD HALSBURY.—It [the above case] appears to have been decided under two misapprehensions or serious errors in the reasoning. One was in supposing that the constructive residence with the parent had anything to do with the question before the Court. It had nothing whatever to do with it. . . . Another error was in supposing that the language of the proviso can be construed in reference to the supposed policy of the enactment to prevent the separation of families. Now it is to be observed that the separation of families is undoubtedly one of the objects which the statute sought to prevent; but it apparently was not brought to the attention of the Court that that object was effected by a specific provision (*viz.*, sect. 3).—p. 103.

West Ham Union v. St. Matthew, Bethnal Green (1892) 62 L. J. M. C. 9; [1892] 2 Q. B. 676; 4 L. 70; 67 L. T. 465; 41 W. R. 182; 57 J. P. 230.—C.A.; *reversed*, (1894) 63 L. J. M. C. 97; [1894] A. C. 230; 6 R. 111; 70 L. T. 818; 42 W. R. 578; 58 J. P. 493.—H.L. (E.).

West Ham Union v. St. Matthew, Bethnal Green [1894] A. C. 230, 242, n.

As to costs, see now Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), s. 2 (3).

West Ham Union v. St. Matthew, Bethnal Green (*supra*, in H.L.), *referred to*.

St. Olave's Union v. Canterbury Union [1897] 1 Q. B. 438.—Q.B.D. (affirmed, C.A., *supra*, col. 2152).

Brampton Union v. Carlisle Union (1878) 47 L. J. M. C. 114; 3 Q. B. D. 479; 38 L. T. 714; 26 W. R. 776.—Q.B.D., *followed*.

Reg. v. Abergavenny Union (1880) 50 L. J. M. C. 1; 6 Q. B. D. 31; 43 L. T. 602; 44 J. P. 780.—MANISTY and BOWEN, JJ.

Reg. v. Maidstone Union (1879) 49 L. J. M. C. 25; 5 Q. B. D. 31; 28 W. R. 183.—Q.B.D., *distinguished*.

Reg. v. Cookham Union (1882) 9 Q. B. D. 522; 47 J. P. 116.—FIELD and CAVE, JJ.

CAVE, J.—In *Reg. v. Maidstone Union* the husband did not absent himself from the conjugal home, but turned his wife out because she had committed adultery, and refused to receive her back; and the Court held that there had been such a desertion of her by him as to bring the case within 24 & 25 Vict. c. 55, s. 3. There we are asked to go further, and to say that where the wife departs from the conjugal home of her own free will, and remains absent for six years, living a life of profligacy in the meantime, the husband is guilty of deserting his wife.—p. 530.

Rex v. Ditchingham (1792) 4 Term Rep. 769.—K.B., *marginal note corrected*.

Woodstock Union v. Shipton-on-Stour Union (1892) 62 L. J. M. C. 43; 5 R. 67; 68 L. T. 449; 57 J. P. 167.—MATHEW and BRUCE, JJ.

Rex v. Ribchester (1818) 2 M. & S. 135.—K.B., *distinguished*.

Rex v. Ilkeston (1825) 4 B. & C. 64; 6 D. & R. 64.—K.B., *applied*.

Reg. v. Barton-upon-Irwell (1863) 32 L. J. M. C. 102; 3 B. & S. 604; 9 Jur. (N.S.) 795; 7 L. T. 853.—Q.B.

Rex v. Arnesby (1820) 3 B. & Ald. 584.—K.B., *followed*.

St. Nicholas, Rochester v. St. Botolph, Bishopsgate (1862) 31 L. J. M. C. 258; 12 C. B. (N.S.) 645; 9 Jur. (N.S.) 101; 6 L. T. 495.—EX.

Rex v. Crediton (1831) 2 B. & Ald. 493; 9 L. J. (O.S.) M. C. 89.—K.B., *followed*.

Rex v. Burbach (1813) 1 M. & S. 370.—K.B., *overruled*.

Rex v. Newtown (1834) 3 N. & M. 306; 1 A. & E. 238; 3 L. J. M. C. 79.—K.B.

PATTERSON, J.—I cannot distinguish this case from *Rex v. Crediton*, and I feel bound to decide it by that authority. I confess also that I cannot distinguish it from *Rex v. Burbach*, but I

must take it that *Rex v. Crediton* overruled *Rex v. Burbach*. Lord Ellenborough, in *Rex v. Bilborough* (1 B. & A. 115), made a distinction between that case and *Rex v. Burbach*. . . . But I am quite unable to reconcile the two cases.—p. 311.

Rex v. Morton (1815) 4 M. & S. 48.—K.B., *distinguished*.

Rex v. Denio (1827) 7 B. & C. 620; 1 M. & R. 294.—K.B.

Rex v. Morton, *principle applied*.

Reg. v. Kenilworth (1845) 14 L. J. M. C. 160; 7 Q. B. 642; 2 New Sess. Cas. 66; 9 Jur. 598.—Q.B.

By Payment of Rent and Rates.

Rex v. Herstmonceux (1827) 7 B. & C. 551; 1 M. & R. 426; 6 L. J. (O.S.) M. C. 35.—K.B., *followed*.

Willesden Overseers v. Paddington Overseers (1863) 3 B. & S. 593; 32 L. J. M. C. 109; 9 Jur. (N.S.) 874; 7 L. T. 784; 11 W. R. 425.—Q.B.

Rex v. Herstmonceux, *applied*.

Reg. v. St. Giles, Cripplegate (1863) 4 B. & S. 509; 33 L. J. M. C. 3; 10 Jur. (N.S.) 205; 9 L. T. 411; 12 W. R. 125.—Q.B.; and **Hastings Union v. St. James, Clerkenwell** (1865) 35 L. J. M. C. 65; L. R. 1 Q. B. 38; 6 B. & S. 914; 11 Jur. (N.S.) 977; 13 L. T. 362; 14 W. R. 175.—Q.B.

Rex v. Herstmonceux, *inapplicable*.

Reg. v. Norwich Incorporation (1874) 30 L. T. 704.—Q.B.

Willesden Overseers v. Paddington Overseers (*supra*) and **Reg. v. St. Giles, Cripplegate** (*supra*), *followed*.

Hastings Union v. St. James, Clerkenwell (1865) 6 B. & S. 914; 35 L. J. M. C. 65; L. R. 1 Q. B. 38; 11 Jur. (N.S.) 977; 13 L. T. 362; 14 W. R. 175.—Q.B.

Hastings Union v. St. James, Clerkenwell, *inapplicable*.

Reg. v. Norwich Incorporation (1874) 30 L. T. 704.—Q.B.

Rex v. Bridgewater (1790) 3 Term Rep. 550.—K.B., *overruled*.

Reg. v. Bengeworth Inhabitants (1854) 23 L. J. M. C. 124; 3 El. & Bl. 637; 2 C. L. R. 1540; 18 Jur. 402; 2 W. R. 420.—Q.B.

CROMPTON, J.—In *Rex v. Bridgewater* there must have been an authority to the friend to pay inferred by the Sessions, otherwise no action for money paid would lie.

CAMPBELL, C.J.—If that case is not so explained, I am of opinion that it is not law.—p. 125.

Rex v. Islington (1801) 1 East 283; and **Rex v. Penryn** (1816) 5 M. & S. 443, *held overruled*.

Rex v. Penryn (1832) 4 B. & Ad. 224; 1 N. & M. 74; 2 L. J. M. C. 14.—K.B.

DENMAN, C.J.—The judgments which have been relied upon in *Rex v. Islington* and *Rex v. Penryn* were considered with due respect and attention, and overruled in the case of *Rex v. St. Pancras* (2 B. & C. 123).

- Rex v. Coppull** (1801) 2 East 25, *distinguished*.
Reg. v. Llanfeathly (1853) 23 L. J. M. C. 33; 2 El. & Bl. 940; 2 C. L. R. 230; 17 Jur. 1123; 2 W. R. 61.—Q.B.
- Rex v. Weobly** (1801) 2 East 68, *followed*.
Reg. v. South Kilvington (1843) 13 L. J. M. C. 3; 5 Q. B. 216; 3 G. & D. 157; 7 Jur. 1108.—Q.B.
- Rex v. Bramley** (1735) Bur. Set. Cas. 75.—K.B., *followed*.
Rex v. Axmouth (1807) 8 East 383.—K.B.
- Rex v. Bramley**, *approved but distinguished*.
Rex v. Christchurch, London (1828) 7 L. J. (o.s.) M. C. 24; 8 B. & C. 660.—K.B.
- Rex v. Bramley**, *commented upon*.
St. George's, Hanover Square v. Cambridge Union (1867) 37 L. J. M. C. 17; L. R. 3 Q. B. 1; 8 B. & S. 764; 17 L. T. 142; 16 W. R. 77.—Q.B.
- Rex v. Bramley**, *dictum adopted*.
Reg. (or Exeter Union) v. St. Thomas Union (1870) 39 L. J. M. C. 83; L. R. 5 Q. B. 371; 22 L. T. 379; S. C. *nom.* **Reg. v. Exeter Union**, 18 W. R. 997.—Q.B.
- Rex v. Axmouth** (1807) 8 East 383.—K.B., *approved*.
Rex v. Christchurch, London (1828) 7 L. J. (o.s.) M. C. 24; 8 B. & C. 660.—K.B.
- Rex v. Axmouth and Rex v. Christchurch, London**, *applied*.
St. George's, Hanover Square v. Cambridge Union (1867) 37 L. J. M. C. 17; L. R. 3 Q. B. 1; 8 B. & S. 764; 17 L. T. 142; 16 W. R. 77.—Q.B.
- Rex v. Axmouth**, *referred to*.
Reg. v. Christchurch, London, *distinguished*.
Reg. (or Exeter Union) v. St. Thomas Union (1870) 39 L. J. M. C. 83; L. R. 5 Q. B. 371; 22 L. T. 379; 18 W. R. 997.—Q.B.
- Everton v. South Stoneham (or Reg. v. Everton)** (1860) 29 L. J. M. C. 165; 2 El. & Bl. 771; 6 Jur. (N.S.) 606; 2 L. T. 231; 8 W. R. 523.—Q.B., *applied*.
Reg. v. St. Thomas Union (1870) 39 L. J. M. C. 83; S. C. *nom.* **Exeter Union v. St. Thomas Union**, L. R. 5 Q. B. 371; 22 L. T. 379; 18 W. R. 997.—Q.B.
- Reg. v. St. Lawrence, Appleby** (1845) 14 L. J. M. C. 56; 6 Q. B. 842; D. & M. 394; 1 New Sess. Cas. 485; 9 Jur. 249.—Q.B., *adopted*.
Reg. v. Hushwaite (1852) 21 L. J. M. C. 189; 18 Q. B. 447; 16 Jur. 1068.—Q.B.
- Reg. v. Hushwaite**, *distinguished*.
Reg. v. St. Anne, Westminster (1860) 29 L. J. M. C. 78; 2 El. & Bl. 485; 6 Jur. (N.S.) 249; 1 L. T. 367; 8 W. R. 180.—Q.B.
- Reg. v. Hulme** (1843) 12 L. J. M. C. 100; 4 Q. B. 538; 2 G. & D. 682; 7 Jur. 464.—Q.B.; and **Reg. v. St. Marylebone** (1850) 19 L. J. M. C. 201; 15 Q. B. 399; 4 New Sess. Cas. 199; 14 Jur. 833.—Q.B., *distinguished*.
Reg. v. St. Anne (Westminster) (1860) 29 L. J. M. C. 78; 2 El. & Bl. 485; 6 Jur. (N.S.) 249; 1 L. T. 367; 8 W. R. 180.—Q.B.
- Rex v. Ringstead** (1827) 7 B. & C. 607.—K.B.;
Reg. v. Ditcheat (1829) 7 L. J. (o.s.) M. C. 110; 9 B. & C. 176; 4 M. & Ry. 151.—K.B.; and **Reg. v. Stoke Damerel** (1837) 6 L. J. M. C. 55; 6 A. & E. 308; 1 N. & P. 453.—K.B., *considered*.
Reg. v. Westbury-on-Trym (1857) 26 L. J. M. C. 76; 7 El. & Bl. 444; 3 Jur. (N.S.) 690; 5 W. R. 374.—Q.B.
- Reg. v. Birmingham Churchwardens** (1861) 31 L. J. M. C. 63; 1 B. & S. 763; 8 Jur. (N.S.) 37; 5 L. T. 309; 10 W. R. 41.—Q.B., *followed*.
Reg. v. Exeter Governors and Guardians (1869) 38 L. J. M. C. 126; L. R. 4 Q. B. 341, 344; 10 B. & S. 433; 20 L. T. 693; 17 W. R. 850.—Q.B.
- Rex v. Stansfield** (1743) Bur. Set. Cas. 205.—K.B., *disapproved*.
Rex v. Great Driffield (1828) 8 B. & C. 684; 7 L. J. (o.s.) M. C. 36.—K.B.
- BAYLEY, J. (for the Court).—The first case of a purchase for money by a certificated man is *The King v. Stansfield*, where a purchase by the pauper for 47*l.* paid by him of a leasehold estate in the certificated township, was held to gain him a settlement. It is material to look at the language used by the Court in their judgment. [His lordship then quoted part of the judgment of Lee, L.C.J., p. 692, and after referring to the subsequent cases of *Rex v. Deddington* (Burr. S. C. 220); *Rex v. Cold Ashton* (Burr. S. C. 444); *Rex v. Long Wittingham* (2 Bott 531, Mich. Term, 24 Geo. 3); and *Rex v. Warblington* (1 T. R. 241), proceeded:] We do not feel ourselves bound by these decisions to put a construction upon the statute at variance with the plain and ordinary meaning of its words. It is clear that these decisions have proceeded in part upon a misapprehension of the precise point decided in the case of *Burclear v. Eastwoodhay* (Burr. S. C. 221; 1 Str. 163). The other reasons assigned in giving these judgments do not appear to us satisfactory.—p. 695.
- Wendron Overseers v. Stithians Overseers** (1854) 24 L. J. M. C. 1; 4 El. & Bl. 147; 3 C. L. R. 12; 1 Jur. (N.S.) 207; 3 W. R. 16.—Q.B., *distinguished*.
Reg. v. Belford Overseers (1863) 32 L. J. M. C. 156; 3 B. & S. 662; 1 N. R. 476; 7 L. T. 785.—Q.B.
- Rex v. Great Glenn, Leicester** (1833) 2 L. J. M. C. 69; 5 B. & Ad. 188; 2 N. & M. 91.—K.B., *considered*.
Reg. v. Halifax (1855) 24 L. J. M. C. 65; 4 El. & Bl. 647; 3 C. L. R. 843; 1 Jur. (N.S.) 181; 3 W. R. 239.—Q.B.
- Rex v. Thruscross** (1834) 3 L. J. M. C. 83; 1 A. & E. 126; 3 N. & M. 284.—K.B., *referred to*.
Reg. v. St. Mary, Castlegate (1852) 21 L. J. M. C. 106; 16 Jur. 363.—Q.B.
- Reg. v. Hendon** (1842) 12 L. J. M. C. 3; 2 Q. B. 455.—Q.B., *distinguished*.
Reg. v. Llansaintffraid Glan Conway (1853) 23 L. J. M. C. 5; 2 El. & Bl. 803; 2 C. L. R. 219; 17 Jur. 1101; 2 W. R. 20.—Q.B.

Rex v. Chadderton (1801) 2 East 27; and
Rex v. Chatham (1807) 8 East 498, *considered and applied*.
Reg. v. St. Giles-in-the-Fields (1844) 13 L. J. M. C. 89; 5 Q. B. 872; D. & M. 110; 1 New Sess. Cas. 137; 8 Jur. 467.—Q.B.

Reg. v. Crondall (1847) 16 L. J. M. C. 175; 10 Q. B. 812.—Q.B., *applied*.
Reg. v. Wigan (1849) 19 L. J. M. C. 18; 14 Q. B. 287; 3 New Sess. Cas. 670; 13 Jur. 1052.—Q.B.

Derivative Settlement.

Great Yarmouth v. London City (Clerk of the Peace) (1878) 47 L. J. M. C. 61; 3 Q. B. D. 232; 37 L. T. 712; 26 W. R. 283.—Q.B.D., *distinguished*.

Westbury-on-Severn Union v. Barrow-in-Furness Overseers (1878) 47 L. J. M. C. 79; 3 Ex. D. 88; 38 L. T. 815; 26 W. R. 372.—Q.B.

Great Yarmouth v. London City (Clerk of the Peace), *observed upon*.
Tenterden Union v. St. Mary, Islington (1878) 47 L. J. M. C. 81, 83; 38 L. T. 485.—Q.B.D.

Great Yarmouth v. London City (Clerk of the Peace), *applied*.
Madeley Union (or Reg.) v. Bridgnorth Union (1882) 52 L. J. M. C. 17; 9 Q. B. D. 765, 776.—FIELD and CAVE, JJ.; *affirmed*, (1883) 52 L. J. M. C. 71; 11 Q. B. D. 314.—C.A. BRETT, COTTON and BOWEN, L.JJ.

Great Yarmouth v. London City (Clerk of the Peace), *referred to*.
Reg. v. St. Marylebone Union (1884) 53 L. J. M. C. 88; 13 Q. B. D. 15, 19.—Q.B.D.; *affirmed*, 53 L. J. M. C. 38; 13 Q. B. D. 22.—C.A.

Westbury-on-Severn Union v. Barrow-in-Furness Overseers (1878) 47 L. J. M. C. 79; 3 Ex. D. 88; 38 L. T. 315; 26 W. R. 372.—Q.B., *distinguished*.
Tenterden Union v. St. Mary, Islington, Union (1878) 47 L. J. M. C. 81; 38 L. T. 485.—C.P.D.

Westbury-on-Severn Union v. Barrow-in-Furness Overseers, *followed*.
Hereford Union v. Warwick Union (1879) 48 L. J. M. C. 111.—FIELD and MANISTY, JJ.

Westbury-on-Severn Union v. Barrow-in-Furness Overseers. *See*
Madeley Union (or Reg.) v. Bridgnorth Union (1882) 52 L. J. M. C. 17; 9 Q. B. D. 765, 778.—FIELD and CAVE, JJ.; *affirmed*, (1883) 52 L. J. M. C. 71; 11 Q. B. D. 314.—C.A.

Westbury-on-Severn Union v. Barrow-in-Furness Overseers, *followed*.
Bath Union v. Berwick-upon-Tweed Union (1892) 61 L. J. M. C. 137; [1892] 1 Q. B. 731; 66 L. T. 258; 40 W. R. 414; 56 J. P. 296.—WRIGHT and LAWRENCE, JJ.

Keynsham Union v. Bedminster Union (1878) 47 L. J. M. C. 73; 3 Q. B. D. 344; 38 L. T. 507; 26 W. R. 591.—Q.B.D., *adopted*.
Madeley Union (or Reg.) v. Bridgnorth Union (1882) 52 L. J. M. C. 17; 9 Q. B. D. 765, 777.—FIELD and CAVE, JJ.; *affirmed*, C.A. (*supra*).

Keynsham Union v. Bedminster Union, *confirmed*.
Llanelli Union v. Neath Union (1893) 62 L. J. M. C. 112; [1893] 2 Q. B. 38; 69 L. T. 194; 57 J. P. 694.—POLLOCK, B. and KENNEDY, J.

Woodstock Union v. St. Pancras Overseers (1878) 48 L. J. M. C. 1; 4 Q. B. D. 1; 39 L. T. 256; 27 W. R. 229.—Q.B.D., *not applied*.
Hereford Union v. Warwick Union (1879) 48 L. J. M. C. 111.—FIELD and MANISTY, JJ.

Woodstock Union v. St. Pancras Overseers, *approved*.
Madeley Union (or Reg.) v. Bridgnorth Union (1882) 52 L. J. M. C. 17; 9 Q. B. D. 765, 779.—FIELD and CAVE, JJ.; *affirmed (supra, col. 2157)*.

Manchester Overseers v. St. Pancras Union (1879) 4 Q. B. D. 409; 41 L. T. 218; 27 W. R. 885.—Q.B.D., *approved and followed*.
Fulham Union (or Reg.) v. Portsea Union (1881) 50 L. J. M. C. 144; 7 Q. B. D. 384.—POLLOCK, B. and MANISTY, J.

Manchester Overseers v. St. Pancras Union, *applied*.
Madeley Union (or Reg.) v. Bridgnorth Union (1882) 52 L. J. M. C. 17; 9 Q. B. D. 765, 779.—FIELD and CAVE, JJ.; *affirmed*, C.A. (*supra, col. 2157*).

Manchester Overseers v. St. Pancras Union, *referred to*.
Salford Union v. Manchester Overseers (1882) 52 L. J. M. C. 34; 10 Q. B. D. 172, 177; 48 L. T. 119; 31 W. R. 380; 47 J. P. 419.—Q.B.D.

Manchester Overseers v. St. Pancras Union, *referred to*.
Marylebone Union v. Wycombe Union (or Reg. v. Marylebone Union) (1884) 53 L. J. M. C. 88; 13 Q. B. D. 15, 18.—Q.B.D.; *affirmed*, C.A. (*infra*).

Hollingsbourne Union v. West Ham Union (1881) 50 L. J. M. C. 74; 6 Q. B. D. 580; 44 L. T. 520; 29 W. R. 629; 45 J. P. 634.—Q.B.D., *referred to*.
Reg. v. Portsea Union (1881) 50 L. J. M. C. 144; 7 Q. B. D. 384, 387.—POLLOCK, B. and MANISTY, J.

Hollingsbourne Union v. West Ham Union, *commented on*.
Madeley Union (or Reg.) v. Bridgnorth Union (1882) 52 L. J. M. C. 17; 9 Q. B. D. 765; 47 L. T. 301; 31 W. R. 429.—FIELD and CAVE, JJ.; *affirmed*, C.A. (*supra, col. 2157*).

Hollingsbourne Union v. West Ham Union, *referred to*.
Reg. v. Marylebone Union (1884) 13 Q. B. D. 15, 18; 49 L. T. 59.—W. WILLIAMS and SMITH, JJ.; *affirmed*, 53 L. J. M. C. 38; 13 Q. B. D. 22; 50 L. T. 442.—C.A. BRETT, M.R., BOWEN and FRY, L.JJ.

Hollingsbourne Union v. West Ham Union, *approved*.
Reigate Union v. Croydon Union (1889) 59 L. J. M. C. 29; 14 App. Cas. 465, 490; 61 L. T. 733; 38 W. R. 295; 53 J. P. 580.—H.L. (E.).

Madeley Union (or Reg.) v. Bridgnorth Union (1883) 52 L. J. M. C. 71; 11 Q. B. D. 314; 48 L. T. 690; 31 W. R. 928.—C.A., *referred to*.

Reg. v. Preston (or Garstang) Union (1883) 52 L. J. M. C. 97, 98; 11 Q. B. D. 113, 116; 49 L. T. 104.—**POLLOCK, B.** and **NORTH, J.**; **Marylebone Union v. Wycombe Union (or Reg. v. Marylebone Union)** (1884) 53 L. J. M. C. 88; 13 Q. B. D. 15, 18; 49 L. T. 59.—**Q.B.D.**: *affirmed*, 53 L. J. M. C. 38; 13 Q. B. D. 22; 50 L. T. 442.—C.A.; **Edmonton Union v. St. Mary, Islington** (1885) 54 L. J. M. C. 146; 15 Q. B. D. 339.—C.A.

Madeley Union (or Reg.) v. Bridgnorth Union, *applied*.

Maidstone Union v. Holborn Union (1886) 56 L. J. M. C. 91; 17 Q. B. D. 817; 51 J. P. 54.—**MATHEW and SMITH, JJ.**

Madeley Union (or Reg.) v. Bridgnorth Union, *followed*.

St. Pancras Guardians v. Norwich Guardians (1887) 56 L. J. M. C. 37; 18 Q. B. D. 521; 56 L. T. 311; 35 W. R. 547; 51 J. P. 343.—**DENMAN and MATHEW, JJ.**

Madeley Union (or Reg.) v. Bridgnorth Union, *explained*.

Dorchester Union v. Poplar Union (1888) 57 L. J. M. C. 78; 21 Q. B. D. 88, 92; 59 L. T. 687; 36 W. R. 706; 52 J. P. 435.—C.A.

ESHER, M.R.—There are observations in that case which may be treated in one of two ways—if they are treated as made with regard to the whole section, then they were not necessary for the decision of the case; but it is not fair to so treat them; the Court was there using language with regard to each case mentioned in the section, and none of the language used either by myself or Cotton, L.J. is contrary to this—that the last part of the first clause of sect. 35 applies to the case of a person who is over sixteen at the time when he or she is to be removed, but who has not acquired any settlement other than that which he or she had when the age of sixteen was attained—that is, the settlement of the father or widowed mother.—p. 80.

Madeley Union (or Reg.) v. Bridgnorth Union, *disapproved*.

Reigate Union v. Croydon Union (1889) 59 L. J. M. C. 29; 14 App. Cas. 465, 488; 61 L. T. 733; 38 W. R. 295; 63 J. P. 580.—**H.L. (E.)**; and see **Llanelli Union v. Neath Union** (1893) 62 L. J. M. C. 112; [1893] 2 Q. B. 38.—**Q.B.D.**

Liverpool Union v. Portsea Union (1884) 53 L. J. M. C. 58; 12 Q. B. D. 303; 50 L. T. 296; 32 W. R. 494; 48 J. P. 406.—**Q.B.D.**, *observations applied*.

Reg. (or Headington Union) v. St. Olave's Union (1884) 53 L. J. M. C. 91; 13 Q. B. D. 293; 50 L. T. 444; 32 W. R. 738; 48 J. P. 647.—C.A. **BRETT, M.R.**, **BOWEN** and **FRY, L.JJ.**

Liverpool Union v. Portsea Union, *distinguished*.

Edmonton Union v. St. Mary, Islington, Union (1885) 15 Q. B. D. 95, 101; 53 L. T. 327; 49 J. P. 804.—**Q.B.D.**; *affirmed*, 54 L. J. M. C. 146; 15 Q. B. D. 339.—C.A.

O.C.

Marylebone Union v. Wycombe Union (or Reg. v. Marylebone Union) (1884) 53 L. J. M. C. 88; 13 Q. B. D. 15; 50 L. T. 442; 48 J. P. 366.—C.A., *approved*.

Northwich Union v. St. Pancras Union (1888) 58 L. J. M. C. 73; 22 Q. B. D. 164; 60 L. T. 444; 37 W. R. 206; 53 J. P. 196.—C.A. **COTTON, LINDLEY** and **BOWEN, L.JJ.**

Edmonton Union (or Reg.) v. St. Mary, Islington (1885) 54 L. J. M. C. 146; 15 Q. B. D. 339.—C.A., *applied*.

Maidstone Union v. Holborn Union (1886) 56 L. J. M. C. 91; 17 Q. B. D. 817; 51 J. P. 54.—**MATHEW and SMITH, JJ.**

Edmonton Union (or Reg.) v. St. Mary, Islington, *overruled*.

Dorchester Union v. Poplar Union (1888) 57 L. J. M. C. 78; 21 Q. B. D. 88; 59 L. T. 687; 36 W. R. 706; 52 J. P. 435.—C.A. **ESHER, M.R.**, **LINDLEY** and **LOPES, L.JJ.**

ESHER, M.R.—The case here is that of a person who had a settlement—namely, her father's—when she attained the age of sixteen, and who, it is said, retains that settlement until she acquires another. Here she has not acquired another, and she therefore retains that settlement which she had at the moment when her case is to be considered—that is, when the removal is to take place. The only case which is really contrary to that view is *The Islington Case*. I protest that *The Bridgnorth Case* (*supra*) is not; there are observations in that case which may be treated in one of two ways—if they are treated as made with regard to the whole section, then they were not necessary for the decision of the case; but it is not fair to so treat them; the Court was there using language with regard to each case mentioned in the section, and none of the language used either by myself or Cotton, L.J. is contrary to this—that the last part of the first clause of sect. 35 applies to the case of a person who is over sixteen at the time when he or she is to be removed, but who has not acquired any settlement other than that which he or she had when the age of sixteen was attained—that is, the settlement of the father or widowed mother. *The Islington Case* in the Divisional Court, is the only decision which is contrary to that; but it was affirmed by the C. A. upon the understanding that it was the same as *The Bridgnorth Case*. In my opinion *The Bridgnorth Case* was rightly decided, and is not in conflict with the present case. The decision of the C. A. in *The Islington Case* was right if taken upon the assumption that the case was the same as *The Bridgnorth Case*; but if it is to be dealt with as affirming the decision of the Divisional Court upon a ground other than what I have stated, then the decision of the C. A. was wrong. We have, however, now got *The Highworth Case* [reversed in **H.L. (ante, col. 2152)**], and the C. A. being in the position of having two conflicting decisions must differ from one of them, and must, I think, adopt that decision which they think right. In my opinion *The Highworth Case* was rightly decided, and is a case in which infinite care was taken, and one which makes the law simple.—p. 80.

ESHER, M.R., at the conclusion of the judgments: It must be understood from what has been said that we think the decision of the Divisional Court in *The Islington Case* was wrong.—p. 82.

Maidstone Union v. Holborn Union (1886) 56 L. J. M. C. 91; 17 Q. B. D. 817; 51 J. P. 54.—Q.B.D., *approved and followed*.
Kingsbridge Union v. East Stonehouse Union (1887) 56 L. J. M. C. 83; 18 Q. B. D. 528; 56 L. T. 333; 35 W. R. 580; 51 J. P. 470.—DAY and WILLS, JJ.

Maidstone Union v. Holborn Union and Kingsbridge Union v. East Stonehouse Union, *discussed and approved*.
Croydon Union v. Reigate Union (1887) 56 L. J. M. C. 93; 19 Q. B. D. 385; 57 L. T. 917; 35 W. R. 824; 51 J. P. 724.—C.A.; *reversed (infra)*.

Croydon Union v. Reigate Union (1887) 56 L. J. M. C. 93; 19 Q. B. D. 385; 57 L. T. 917; 35 W. R. 824; 51 J. P. 724.—C.A. ESHER, M.R. and FRY, L.J.; *reversed nom. Reigate Union v. Croydon Union* (1889) 59 L. J. M. C. 29; 14 App. Cas. 465; 61 L. T. 733; 38 W. R. 295; 53 J. P. 580.—H.L. (E.).

Reigate Union v. Croydon Union (*supra*, in H.L.), *followed*.
West Derby Union v. Atcham Union (1889) 59 L. J. M. C. 17; 24 Q. B. D. 117; 38 W. R. 361; 54 J. P. 485.—C.A.; **Manchester Overseers v. Ormskirk Union** (1890) 59 L. J. M. C. 103; 24 Q. B. D. 678; 62 L. T. 661; 38 W. R. 778; 54 J. P. 487.—COLERIDGE, C.J. and MATHEW, J.; **West Ham Union v. St. Giles Union** (1890) 59 L. J. M. C. 144; 25 Q. B. D. 272; 63 L. T. 496; 38 W. R. 736; 54 J. P. 520.—COLERIDGE, C.J. and WILLS, J.

Reigate Union v. Croydon Union, *considered*.
Llanelly Union v. Neath Union (1893) 62 L. J. M. C. 112; [1893] 2 Q. B. 38; 69 L. T. 194; 57 J. P. 694.—POLLOCK, B. and KENNEDY, J.

Reigate Union v. Croydon Union, *opinion adhered to*.
Plymouth Union v. Axminster Union (1898) 67 L. J. Q. B. 871; [1898] A. C. 586; 79 L. T. 4.—H.L. (E.); *and see* **West Ham Union v. Holbeach Union** (1903) 72 L. J. K. B. 801; [1903] 2 K. B. 627.—K.B.D.

Honiton v. St. Mary Axe, 2 Salk. 535, *overruled*.
Rex v. Lubbenham (1791) 4 Term Rep. 251.—K.B.

Rex v. Roach (1795) 6 Term Rep. 247; 3 R. R. 169.—K.B., *considered*.
Reg. v. Lytchet Matravers (1827) 6 L. J. (O.S.) M. C. 11; 7 B. & C. 226; 1 M. & Ry. 25.—K.B.

Rex v. Wilmington (1822) 5 B. & Ald. 525; 1 D. & R. 140.—K.B., *followed*.
Reg. v. Scammonden (1846) 15 L. J. M. C. 30; 8 Q. B. 351; 2 New Sess. Cas. 189; 10 Jur. 110.—Q.B.

Rex v. Rotherfield Greys (1823) 1 B. & C. 345; 2 D. & R. 628.—K.B., *distinguished*.
Rex v. Lytchet Matravers (1827) 6 L. J. (O.S.) M. C. 11; 7 B. & C. 226; 1 M. & Ry. 25.—K.B.

Rex v. Walthamstow Inhabitants (1837) 6 L. J. M. C. 52; 6 A. & E. 301.—Q.B., *confirmed*.
Llanelly Union v. Neath Union (1893) 62 L. J. M. C. 112; [1893] 2 Q. B. 38; 69 L. T. 194; 57 J. P. 694.—POLLOCK, B. and KENNEDY, J.

Reg. v. St. Mary, Newington (1843) 12 L. J. M. C. 68; 4 Q. B. 581; 2 G. & D. 626; 7 Jur. 440.—Q.B., *adopted*.
Madeley Union (or Reg.) v. Bridgnorth Union (1882) 52 L. J. M. C. 17; 9 Q. B. D. 765, 775.—Q.B.D.; *affirmed*, C.A. (*supra*, col. 2159); **Salford Union v. Manchester Overseers** (1882) 52 L. J. M. C. 34; 10 Q. B. D. 172, 177; 48 L. T. 119; 31 W. R. 380; 47 J. P. 419.—Q.B.D.; **Reigate Union v. Croydon Union** (1889) 59 L. J. M. C. 29; 14 App. Cas. 465, 483; 61 L. T. 733; 38 W. R. 295; 53 J. P. 580.—H.L. (E.); **Highworth and Swindon Union v. Westbury-on-Severn Union** (1889) 59 L. J. M. C. 29; 14 App. Cas. 465; 61 L. T. 733; 38 W. R. 295; 53 J. P. 580.—H.L. (E.); *and* **Llanelly Union v. Neath Union** (1893) 62 L. J. M. C. 112; [1893] 2 Q. B. 38; 69 L. T. 194; 57 J. P. 694.—Q.B.D.

Reg. (or Bodenham) v. St. Andrews, Worcester (1853) 22 L. J. M. C. 39; 1 El. & Bl. 465; 17 Jur. 206; 1 W. R. 129.—Q.B., *approved*.
Reg. v. Sutton-le-Brilles (1856) 25 L. J. M. C. 57; 5 El. & Bl. 814; 2 Jur. (N.S.) 210; 4 W. R. 206.—Q.B.

Reg. (or Bodenham) v. St. Andrews, Worcester, *See*
Madeley Union (or Reg.) v. Bridgnorth Guardians (1882) 52 L. J. M. C. 17; 9 Q. B. D. 765, 775.—Q.B.D.; *affirmed*, C.A. (*supra*, col. 2159); *and* **Salford Union v. Manchester Overseers** (1882) 52 L. J. M. C. 34; 10 Q. B. D. 172, 177; 48 L. T. 119; 31 W. R. 380; 47 J. P. 419.—Q.B.D.

Reg. (or Bodenham) v. St. Andrews, Worcester, *approved*.
Northwich Union v. St. Pancras Union (1888) 58 L. J. M. C. 73; 22 Q. B. D. 164; 60 L. T. 444; 37 W. R. 206; 53 J. P. 196.—C.A. COTTON, LINDLEY, and BOWEN, L.JJ.

Reg. (or Bodenham) v. St. Andrews, Worcester, *adopted*.
Highworth and Swindon Union v. Westbury-on-Severn Union (1889) 59 L. J. M. C. 29; 14 App. Cas. 465; 61 L. T. 733; 38 W. R. 295; 53 J. P. 580.—H.L. (E.).

Reg. (or Bodenham) v. St. Andrews, Worcester, *referred to*.
Reigate Union v. Croydon Union (1889) 59 L. J. M. C. 29; 14 App. Cas. 465, 483; 61 L. T. 733; 38 W. R. 295; 53 J. P. 580.—H.L. (E.).

Reg. v. Preston (1840) 10 L. J. M. C. 23; 12 A. & E. 822; 4 P. & D. 509.—Q.B., *followed*.
Reg. v. Newchurch (1862) 32 L. J. M. C. 19; 3 B. & S. 107; 9 Jur. (N.S.) 536; 7 L. T. 271; 11 W. R. 24.—Q.B.

5. REMOVAL.

Rex v. St. James, Bury St. Edmunds (1808) 10 East 25, *adopted*.
Tomlinson v. Buntall (1826) 5 L. J. (O.S.) M. C. 7; 5 B. & C. 738; 8 D. & R. 493; 29 R. R. 375.—K.B.

Reg. v. St. James, Bury St. Edmunds, *adopted*.
Reg. v. St. Paul's, Covent Garden (1846) 16 L. J. M. C. 11; 7 Q. B. 533; 2 New Sess. Cas. 508; 10 Jur. 1081.—Q.B.

Rex v. St. James, Bury St. Edmunds and Rex v. St. Lawrence, Ludlow (1821) 4 B. & Ald. 660; 23 R. R. 435.—K.B., *approved*.
Reg. v. Cuckfield (1855) 25 L. J. M. C. 4; 5 El. & Bl. 523; 1 Jur. (N.S.) 1047; 4 W. R. 11.—Q.B.

Rex v. Eltham (1804) 5 East 113; and **Reg. v. Stogumber Inhabitants** (1839) 8 L. J. M. C. 20; 9 A. & E. 622; 1 P. & D. 409; 2 W. W. & H. 95.—K.B., *observed upon*.
Reg. v. Preston (or Garstang) Union (1883) 52 L. J. M. C. 97; 11 Q. B. D. 113; 49 L. T. 104.—POLLOCK, B. and NORTH, J.

Reg. v. Combs (1853) 25 L. J. M. C. 59; 5 El. & Bl. 892; 2 Jur. (N.S.) 255; 4 W. R. 243.—K.B., *followed*.
Reg. v. St. Clement Danes (1862) 32 L. J. M. C. 25; 3 B. & S. 143; 9 Jur. (N.S.) 437; 7 L. T. 324; 11 W. R. 63.—Q.B.

Rex v. Cottingham (1827) 7 B. & C. 615; 1 M. & Ry. 439.—K.B., *recognised*.
Reg. v. All Saints, Derby (1849) 19 L. J. M. C. 14; 14 Q. B. 207; 3 New Sess. Cas. 653, 858; 13 Jur. 1100.—Q.B.; **Reg. v. St. Marylebone** (1851) 20 L. J. M. C. 61; 16 Q. B. 352; 15 Jur. 245.—Q.B.; **Much Hoole Overseers v. Preston Overseers** (1851) 21 L. J. M. C. 1; 17 Q. B. 548; 15 Jur. 1152.—Q.B.

Rex v. Cottingham and Reg. v. All Saints, Derby, considered and applied.
Poor Law Commissioners for Ireland v. Liverpool Vestry (1869) 39 L. J. M. C. 25; L. R. 5 Q. B. 79; 10 B. & S. 921; 21 L. T. 636; 18 W. R. 376.—Q.B.

Reg. v. St. Giles, Cripplegate (1851) 21 L. J. M. C. 26; 17 Q. B. 636; 15 Jur. 1152.—Q.B., *followed*.
Reg. v. Newchurch (1862) 32 L. J. M. C. 19; 3 B. & S. 107; 9 Jur. (N.S.) 536; 7 L. T. 271; 11 W. R. 24.—Q.B.

Reg. v. St. Giles, Cripplegate, adopted.
Poor Law Commissioners for Ireland v. Liverpool Vestry (*supra*).

Reg. v. Brighthelmstone (1854) 24 L. J. M. C. 41.—Q.B., *applied*.
Reg. v. East Stonehouse (1855) 24 L. J. M. C. 121; 4 El. & Bl. 901; 3 C. L. R. 855; 1 Jur. (N.S.) 573; 3 W. R. 375.—Q.B.

Rex v. Oakmere (1822) 5 B. & Ald. 775.—K.B., *considered*.
Reg. v. Tipton (1842) 11 L. J. M. C. 89; 3 Q. B. 215; 2 G. & D. 92; 6 Jur. 760.—Q.B.

Rex v. Oakmere and Reg. v. Hunnington (1843) 5 Q. B. 273; 13 L. J. M. C. 24.—Q.B., *distinguished*.
Reg. v. St. Martin (New Sarum) (1846) 15 L. J. M. C. 123; 9 Q. B. 241; 2 New Sess. Cas. 416; 10 Jur. 594.—Q.B.

Rex v. Oldbury (1835) 4 A. & E. 167.—K.B., *considered*.
Reg. v. Tipton (1842) 11 L. J. M. C. 89; 3 Q. B. 215; 2 G. & D. 92; 6 Jur. 760.—Q.B.

Rex v. Oldbury, applied.
Stourbridge v. Droitwich (1871) 40 L. J. M. C. 186; L. R. 6 Q. B. 769, 775; 25 L. T. 411.—Q.B.

Reg. v. Tipton (1842) 11 L. J. M. C. 89; 3 Q. B. 215; 2 G. & D. 92; 6 Jur. 760.—Q.B., *distinguished*.
Reg. v. St. Martin (New Sarum) (1846) 15 L. J. M. C. 123; 9 Q. B. 241; 2 New Sess. Cas. 416; 10 Jur. 594.—Q.B.

Reg. v. Tipton, followed but disapproved.
Stourbridge Union v. Droitwich Union (1871) 40 L. J. M. C. 186; L. R. 6 Q. B. 769; 25 L. T. 411.

BLACKBURN, J.—We find that from *Reg. v. Tipton* to *Reg. v. St. Martin's, New Sarum* (9 Q. B. 241), on four occasions when the present question has come before the Court the judges have always held according to the decision in the present case. I quite agree with my lord that they were originally mistaken: but I also think we ought not lightly to upset their judgments. I say that for this reason, viz., that when a case does not go to a Court of Appeal, and we are quite sure that there has been a mistake, we are not bound to follow on in error, but when the matter is not an important point affecting people in general, then *communis error facit jus* is a maxim which we should apply, unless we see distinctly that the decided cases were founded in mistake, and that the reversal of them would be the greater benefit though unsettling the law.

Reg. v. Tipton, followed.
St. Saviour's Union v. Dorking Union (1898) 67 L. J. Q. B. 408; [1898] 1 Q. B. 594; 78 L. T. 29; 46 W. R. 309; 62 J. P. 308.—C.A. LINDLEY, M.R., RIGBY and WILLIAMS, L.JJ.

Reg. v. Tipton and St. Saviour's Union v. Dorking Union, distinguished.
West Ham Union v. L. C. C. (1901) 70 L. J. K. B. 503; [1901] 1 K. B. 720; 84 L. T. 471; 49 W. R. 443; 65 J. P. 358.—DARLING and CHANNELL, JJ.; *affirmed*, C.A. (*see infra*).

Reg. v. Tipton and St. Saviour's Union v. Dorking Union, distinguished.
West Ham Union v. L. C. C. (1902) 71 L. J. K. B. 299; [1902] 1 K. B. 562; 86 L. T. 134; 50 W. R. 275; 66 J. P. 356.—C.A. COLLINS, M.R., ROMER and MATHEW, L.JJ.

ROMER, L.J.—*Reg. v. Tipton Inhabitants* has been followed by a long series of cases ending with *St. Saviour's Union v. Dorking Union* and cannot now be disregarded by the Court. But those cases are not in themselves wholly satisfactory, and the principle upon which they were decided ought not to be extended to other cases, where the facts are substantially different. . . . It seems to me that when *Reg. v. Tipton Inhabitants* is looked at, it will be found that the ground of the decision was that the original parish had ceased to exist. This, in my opinion, does not apply to the present case.—p. 302.

Reg. v. St. Martin, New Sarum (1846) 15 L. J. M. C. 123; 9 Q. B. 241; 2 New Sess. Cas. 416; 10 Jur. 594.—Q.B., *followed but disapproved*.
Stourbridge v. Droitwich (1871) 40 L. J. M. C. 186; L. R. 6 Q. B. 769, 775; 25 L. T. 411.—Q.B.

Reg. v. St. Martin, New Sarum, followed.
West Ham Union v. L. C. C. (1901) 70 L. J. K. B. 503; [1901] 1 K. B. 720; 84 L. T. 471; 49 W. R. 443; 65 J. P. 358.—DARLING and CHANNELL, JJ.; *affirmed*, H.L. (*supra*).

Reg. v. St. Martin, New Sarum, applied.
West Ham Union v. L. C. C. (1902) 71 L. J. K. B. 299; [1902] 1 K. B. 562; 86 L. T. 134; 50 W. R. 275; 66 J. P. 356.—C.A.

Stourbridge Union v. Droitwich Union (1871) 40 L. J. M. C. 186; L. R. 6 Q. B. 769; 25 L. T. 411.—Q.B., *observed upon*.
St. Saviour's Union v. Dorking Union (1898) 67 L. J. Q. B. 408; [1898] 1 Q. B. 594; 78 L. T. 29; 46 W. R. 309; 62 J. P. 308.—C.A.

West Ham Union v. L.C.C. (1902).—C.A. (*supra*), *discussed and applied*.
Bootle Union v. Whitehaven Union (1903) 72 L. J. Ch. 582; [1903] 2 Ch. 142; 89 L. T. 237; 51 W. R. 550; 67 J. P. 325.—BYRNE, J.

Reg. v. Great Salkeld (1864) 33 L. J. M. C. 185.—Q.B., *held superseded*.
Reg. v. Bolton-le-Sands (1865) 35 L. J. M. C. 54; 12 Jur. (N.S.) 371; 13 L. T. 523; 14 W. R. 177.—Q.B.

Reg. v. Glossop (1848) 17 L. J. M. C. 171; 12 Q. B. 117; 3 New Sess. Cas. 256; 12 Jur. 1071.—Q.B., *not applied*.
Reg. v. Chedgrave (1849) 19 L. J. M. C. 54; 12 Q. B. 206; 4 New Sess. Cas. 69; 14 Jur. 266.—Q.B.

Reg. v. Glossop, distinguished.
Reg. v. Cudham (1859) 28 L. J. M. C. 105; 1 El. & El. 409; 5 Jur. (N.S.) 269; 7 W. R. 161.—Q.B.

Reg. v. Glossop, adopted.
Reg. v. St. George-in-the-East (1870) 39 L. J. M. C. 90; L. R. 5 Q. B. 364; 22 L. T. 440; 18 W. R. 787.—Q.B.

Reg. v. Glossop, adopted.
Medway Union v. Bedminster Union (1888) 57 L. J. M. C. 129; 21 Q. B. D. 278, 281; 61 L. T. 35; 36 W. R. 351; 52 J. P. 788.—C.A. **ESHER, M.R. and LINDLEY, L.J.; LOPES, L.J. dissenting: affirmed.** (1889) 59 L. J. M. C. 29; 14 App. Cas. 465; 61 L. T. 733; 38 W. R. 295; 53 J. P. 580.—H.L. (E.).

Reg. v. St. George-in-the-East (1870) 39 L. J. M. C. 90; L. R. 5 Q. B. 364; 22 L. T. 440; 18 W. R. 787.—Q.B., *adopted*.
Reg. v. St. Olave's Union (1873) 43 L. J. M. C. 15; L. R. 9 Q. B. 38; 29 L. T. 426; 22 W. R. 75.—Q.B.; and **Medway Union v. Bedminster Union** (1888).—C.A. (*supra*).

Reg. v. Worcester Union (1874) 43 L. J. M. C. 102; L. R. 9 Q. B. 340; 30 L. T. 357; 22 W. R. 572.—Q.B., *applied*.
Manchester Overseers v. Ormskirk Union (1886) 16 Q. B. D. 723; 54 L. T. 573; 34 W. R. 533; 50 J. P. 518.—MATHEW and SMITH, JJ.

Reg. v. Gomersal (1848) 17 L. J. M. C. 163; 12 Q. B. 76; 3 New Sess. Cas. 284.—Q.B., *not applied*.
Reg. v. Pott Shrigley (1848) 18 L. J. M. C. 33; 12 Q. B. 143; 3 New Sess. Cas. 317; 13 Jur. 60.—Q.B.

Reg. v. Salford (1848) 17 L. J. M. C. 170; 12 Q. B. 106.—Q.B., *applied*.
Reg. v. Pott Shrigley (*supra*).

Reg. v. Salford, impugned.
Hartfield v. Rotherfield (or **Reg. v. Hartfield**) (1852) 17 Q. B. 746; 21 L. J. M. C. 65; 16 Jur. 244.—Q.B.

CAMPBELL, C.J. (for the Court).—With one exception the decisions upon this statute are all reconcilable with the view we now take of it. That exception is **Reg. v. Salford**. There the pauper had been residing in the parish of Salford thirteen years preceding the date of the order of removal, except some months during which he was in the house of correction in another parish, under sentence for a misdemeanor; and it was held that this imprisonment should be included in the computation in considering whether he had resided in Salford five years next before the application for the warrant, so as to render him removable. On further consideration of the statute, we think that sufficient effect was not given in that case to the words "for all purposes," and its authority is already considerably shaken by the consequent decision in **Reg. v. Holbeck** (16 Q. B. 404).—p. 763. (*Overruled, infra.*)

Reg. v. Salford, explained.
Reg. v. Holbeck Overseers (1851) 20 L. J. M. C. 107; 16 Q. B. 404; 15 Jur. 271.—Q.B.

Reg. v. Pott Shrigley (1848) 18 L. J. M. C. 33; 12 Q. B. 143; 3 New Sess. Cas. 317; 13 Jur. 60.—Q.B., *explained*.
Reg. v. Holbeck Overseers (1851) 20 L. J. M. C. 107; 16 Q. B. 404; 15 Jur. 271.—Q.B.

Reg. v. Pott Shrigley, adopted.
Reg. v. Llanelly (1851) 20 L. J. M. C. 179; 17 Q. B. 40; 15 Jur. 510.—Q.B.

Reg. v. Pott Shrigley, distinguished.
Reg. v. Potterhanworth (1858) 28 L. J. M. C. 56; 1 El. & El. 262; 4 Jur. (N.S.) 1277; 7 W. R. 106.—Q.B.

Reg. v. Pott Shrigley, considered.
West Ham Union v. St. Matthew, Bethnal Green (1894) 63 L. J. M. C. 97; [1894] A. C. 230; 6 R. 111; 70 L. T. 818; 42 W. R. 573; 58 J. P. 493.—H.L. (E.).

Hartfield v. Rotherfield (or **Reg. v. Hartfield**) (1852) 17 Q. B. 746; 21 L. J. M. C. 65; 16 Jur. 244.—Q.B., *overruled*.
St. Olave's, Rotherhithe, Union v. Canterbury Union (1897) 66 L. J. Q. B. 471; [1897] 1 Q. B. 682; 76 L. T. 517; 45 W. R. 529; 61 J. P. 371.—C.A. **ESHER, M.R., LOPES and CHITTY, L.JJ.**

LORD ESHER, M.R.—This case depends upon the true construction of sect. 34 of the Divided Parishes Act, 1876, and of sect. 1 of the Poor Removal Act, 1846. . . . It is said that the clause [in the latter section] "or as a patient in a hospital" must be read as meaning "provided that the time during which such person shall be confined in a hospital compulsorily shall be excluded in the computation of time"; and the counsel for the Canterbury Union say that it can be shown that a person can be confined in a hospital compulsorily. . . . There is no statute or law in England which permits any person to confine a sick man in a hospital. The truth is that the word "confined" is not applicable to the clause "or as a patient in a hospital" at all. The word which is applicable to that clause is the word "reside," and the clause then reads

"or shall reside as a patient in a hospital." It is said that *Reg. v. Hartfield*, in which Lord Campbell delivered the judgment of the Court of Queen's Bench, placed a different construction upon the section. Even if that be so, I think the reasoning of the judgments in *Dorchester Union v. Weymouth Union* is preferable, and that it is impossible for us to differ from it.—p. 475.

Reg. v. Halifax (1848) 17 L. J. M. C. 158; 12 Q. B. 111; 3 New Sess. Cas. 268; 12 Jur. 789.—Q.B.; and **Reg. v. Seend** (1848) 18 L. J. M. C. 12; 12 Q. B. 133; 3 New Sess. Cas. 276; 12 Jur. 939.—Q.B., *followed*.
Reg. v. Caldecote (1851) 20 L. J. M. C. 187; 17 Q. B. 52; 15 Jur. 537.—Q.B.

Reg. v. Stapleton (1853) 22 L. J. M. C. 102; 1 El. & Bl. 766; 17 Jur. 549.—Q.B., *not applied*.
Reg. v. East Stonehouse (1855) 24 L. J. M. C. 121; 4 El. & Bl. 901; 3 C. L. R. 855; 1 Jur. (N.S.) 573; 3 W. R. 375.—Q.B.

Reg. v. Stapleton, *dictum adopted*.
Wellington Overseers v. Whitechurch Overseers (1863) 32 L. J. M. C. 189; 4 B. & S. 100; 10 Jur. (N.S.) 37; 8 L. T. 456; 11 W. R. 828.—Q.B.

Reg. v. Stapleton, *distinguished*.
Manchester Overseers v. Ormskirk Union (1886) 16 Q. B. D. 723; 54 L. T. 573; 34 W. R. 533; 50 J. P. 518.—MATHEW and SMITH, JJ.

Reg. v. Birmingham Churchwardens (1846) 15 L. J. M. C. 65; 8 Q. B. 410.—Q.B., *adopted*.

Reg. v. Watford (1846) 16 L. J. M. C. 1; 9 Q. B. 626; 2 New Sess. Cas. 460; 10 Jur. 1053.—Q.B.

Reg. v. Bedingham (1844) 13 L. J. M. C. 75; 5 Q. B. 653; D. & M. 98.—Q.B., *distinguished*.
Reg. v. Widecombe (1847) 16 L. J. M. C. 44; 9 Q. B. 394; 2 New Sess. Cas. 539; 11 Jur. 227.—Q.B.

Reg. v. Stockton (1845) 14 L. J. M. C. 123; 7 Q. B. 520; 1 New Sess. Cas. 16; 9 Jur. 532.—Q.B., *distinguished*.

Reg. v. Newton Ferrers (1846) 9 Q. B. 32.—Q.B.; and **Jones v. Johnson** (1850) 20 L. J. M. C. 11; 5 Ex. 862.—EX.

Reg. v. St. Paul's, Covent Garden (1846) 16 L. J. M. C. 11; 7 Q. B. 232; 2 New Sess. Cas. 508; 10 Jur. 1081.—Q.B., *discussed*.

Headington Union v. Ipswich Union (1890) 59 L. J. M. C. 92; 25 Q. B. D. 143; 62 L. T. 786; 38 W. R. 586; 54 J. P. 516.—C.A. **ESHER, M.R., FRY and LOPES, L.JJ.**

ESHER, M.R.—In the case referred to no settlement was stated, and all that the Court there held was that from the particular circumstances of the case it was difficult to say whether the parish intended to rely upon a birth settlement or some other settlement, and it was therefore decided that the examination was insufficient in that it was too loose. That case, therefore, does not substantiate the argument which was founded upon it. In the present case, however, the settlement which is relied upon is plainly stated.—p. 95.

Rex v. Chagford (1821) 4 B. & Ald. 235.—K.B., *applied*.
Reg. v. Chedgrave (1849) 19 L. J. M. C. 54; 12 Q. B. 206; 4 New Sess. Cas. 69; 14 Jur. 266.—Q.B.

Weston-Rivers v. St. Peter's, Marlborough (1695) 2 Salk. 492; S. C. *nom. Rex v. Wootton-Rivers*, 5 Mod. 149.—K.B., *adopted*.

Reg. v. Colbeck (1840) 9 L. J. M. C. 61; 12 A. & E. 161; 3 P. & D. 488.—Q.B.

Reg. v. Denbighshire JJ. (1831) 9 L. J. (O.S.) M. C. 109; 1 B. & Ad. 616.—K.B., *distinguished*.

Reg. v. Colbeck (1840) 9 L. J. M. C. 61; 12 A. & E. 161; 3 P. & D. 488.—Q.B.

Reg. v. Denbighshire JJ., *applied*.

Reg. v. Colbeck, *commented upon*.
Reg. v. Westmoreland JJ. (1843) 12 L. J. M. C. 113; 1 D. & L. 178; 7 Jur. 898.—Q.B.

Reg. v. Sevenoaks (1845) 14 L. J. M. C. 92; 7 Q. B. 136; 1 New Sess. Cas. 595; 9 Jur. 489.—Q.B.; and **Reg. v. Surrey JJ.** (1845) 15 L. J. M. C. 1; 2 New Sess. Cas. 155; 3 D. & L. 343; 10 Jur. 72.—Q.B., *adopted*.

Reg. v. Peterborough JJ. (1857) 26 L. J. M. C. 153; 7 El. & Bl. 643; 3 Jur. (N.S.) 887; 5 W. R. 565.—Q.B.

Reg. v. Sevenoaks and Reg. v. Surrey JJ., *considered and adopted*.
Reg. v. Yorkshire (W.R.) JJ. (1858) 27 L. J. M. C. 269; El. Bl. & El. 713; 5 Jur. (N.S.) 17; 6 W. R. 681.—Q.B.

Reg. v. Sevenoaks, *observations adopted*.
Liverpool United Gas Co. v. Everton Overseers (1871) 40 L. J. M. C. 104; L. R. 6 C. P. 414, 422; 23 L. T. 813; 19 W. R. 412.—C.P.

Reg. v. Liverpool (Recorder) (1850) 15 Q. B. 1070.—Q.B., *followed*.

Reg. v. Buckinghamshire JJ. (1854) 24 L. J. M. C. 15, n.; 4 El. & Bl. 259, n.; 3 C. L. R. 32; 18 Jur. 1079; 3 W. R. 63.—Q.B.

Reg. v. Liverpool (Recorder), *distinguished*.
Reg. v. Salop JJ. (1854) 24 L. J. M. C. 14; 4 El. & Bl. 257; 3 C. L. R. 102; 18 Jur. 1080.—Q.B.

Reg. v. Liverpool (Recorder), *applied*.
Reg. v. Leeds (Recorder) (1861) 30 L. J. M. C. 86; 3 El. & Bl. 561; 7 Jur. (N.S.) 210; 3 L. T. 699; 9 W. R. 270.—Q.B.

Reg. v. Salop JJ. (1837) 6 D. P. C. 28.—Q.B., *adopted*.

Reg. v. Yorkshire (W.R.) JJ. (1844) 14 L. J. M. C. 11; 2 D. & L. 488; 1 New Sess. Cas. 445; 9 Jur. 13.—BAIL CT.

Reg. v. Salop JJ. and Reg. v. Yorkshire (W.R.) JJ., *discussed*.

Reg. v. Leeds (Recorder) (1847) 16 L. J. M. C. 153; 8 Q. B. 623; 11 Jur. 817; S. C. *nom. Leeds Overseers*, Ex parte, 2 New Sess. Cas. 595.—Q.B.

Reg. v. Middlesex JJ. (1840) 9 D. P. C. 163.—Q.B., *adopted*.

Reg. v. Yorkshire (W.R.) JJ. (1844) 14 L. J. M. C. 11; 2 D. & L. 488; 1 New Sess. Cas. 445; 9 Jur. 13.—BAIL CT.

Reg. v. Middlesex JJ., applied.

Reg. v. Macclesfield (1849) 19 L. J. M. C. 38; 13 Q. B. 881; 4 New Sess. Cas. 56; 13 Jur. 1048.—Q.B.

Rex v. Suffolk JJ. (1835) 5 L. J. M. C. 3; 4 A. & E. 819.—K.B.; and **Reg. v. Suffolk JJ.** (1847) 16 L. J. M. C. 36; 4 D. & L. 628; 1 B. C. Rep. 296; 11 Jur. 288.—Q.B., *overruled*.

Reg. v. Sussex JJ. (1865) 34 L. J. M. C. 69; 4 B. & S. 966; 11 Jur. (N.S.) 801; 11 L. T. 740; 13 W. R. 471.—EX. CH.

Reg. v. Sussex JJ., 31 L. J. M. C. 193; 2 B. & S. 664; 6 L. T. 422.—Q.B.; *reversed*, (1865) 34 L. J. M. C. 69; 4 B. & S. 966; 11 Jur. (N.S.) 301; 11 L. T. 740; 13 W. R. 471.—EX. CH.

Reg. v. Sussex JJ. (*supra*, in EX. CH.), *considered*.

Reg. v. Derbyshire JJ. (1871) 25 L. T. 161; 19 W. R. 876.—BAIL CT.

Reg. v. Sussex JJ., referred to.

Reg. v. Lancashire JJ. (1876) 34 L. T. 124, 125.—Q.B.D.; Reg. v. Surrey JJ. (1880) 6 Q. B. D. 100, 107.—Q.B.D.

Rex v. Holbeach (1836) 6 L. J. M. C. 5; 5 A. & E. 685.—K.B., *approved*.

Reg. v. Whitley Upper (1839) 9 L. J. M. C. 12; 11 A. & E. 90; 3 P. & D. 81.—Q.B.

Rex v. Kimbolton (1837) 6 L. J. M. C. 90; 6 A. & E. 603; 1 N. & P. 606.—K.B., *applied*.

Reg. v. Oundle (1842) 11 L. J. M. C. 79; 3 Q. B. 353; 2 G. & D. 77; 6 Jur. 533.—Q.B.

Rex v. Kimbolton, dictum commented on.

Reg. v. Middlesex JJ. (1850) 20 L. J. M. C. 42; 4 New Sess. Cas. 302; 1 L. M. & P. 621.—BAIL CT.

Reg. v. Derbyshire (1838) 7 L. J. M. C. 91; 6 A. & E. 612, n. (b.); 3 N. & P. 591; 1 W. W. & H. 365.—Q.B., *distinguished*.

Reg. v. Arlecdon (1839) 9 L. J. M. C. 9; 11 A. & E. 87; 3 P. & D. 93; 4 Jur. 7.—Q.B.

Reg. v. Derbyshire, followed.

Reg. v. Kendal (1859) 28 L. J. M. C. 110; 1 EL. & EL. 492; 5 Jur. (N.S.) 545; 7 W. R. 191.—Q.B.

Reg. v. Arlecdon (1839) 9 L. J. M. C. 9; 11 A. & E. 87; 3 P. & D. 93; 4 Jur. 7.—Q.B., *distinguished*.

Reg. v. Kendal (1859) 28 L. J. M. C. 110; 1 EL. & EL. 492; 5 Jur. (N.S.) 545; 7 W. R. 191.—Q.B.

Reg. v. Kendal (1859) EL. & EL. 492; 28 L. J. M. C. 110; 5 Jur. (N.S.) 545; 7 W. R. 191.—Q.B., *corrected*.

Reg. v. Cambridge (University) (1861) 1 EL. BL. & EL. 61; 7 Jur. (N.S.) 1073.—Q.B.

CROMPTON, J.—In this case I am reported to have said: "If the case had really been entered upon, it could not have been adjourned, any more than a cause at *nisi prius*, on the ground of the absence of a material witness." I ought rather to have said that it could not be adjourned except for strong and peculiar reasons.—p. 65.

Rex v. Wick St. Lawrence (1833) 3 L. J. M. C. 12; 5 B. & Ad. 526; 2 N. & M. 289.—K.B., *referred to*.

Reg. v. Great Bolton Inhabitants (1845) 14 L. J. M. C. 122; 7 Q. B. 370.—Q.B.

Rex v. Wick St. Lawrence, explained.

Reg. v. St. Anne's, Westminster (1847) 16 L. J. M. C. 41; 9 Q. B. 878; 2 New Sess. Cas. 525; 11 Jur. 229.—Q.B.

Reg. v. Wick St. Lawrence, approved and applied.

Heston Overseers v. St. Bride's Overseers (1853) 22 L. J. M. C. 65; 1 EL. & BL. 583; 17 Jur. 757.—Q.B.

Reg. v. Stoke Bliss (1844) 13 L. J. M. C. 151; 6 Q. B. 158.—Q.B., *distinguished*.

Reg. v. Over (1849) 19 L. J. M. C. 57; 14 Q. B. 425; 4 New Sess. Cas. 77; 8 Jur. 197.—Q.B.

Reg. v. Wye (1838) 7 L. J. M. C. 18; 7 A. & E. 761; 3 N. & P. 6.—Q.B., *adopted*.

Reg. v. Hartington Middle Quarter (1855) 24 L. J. M. C. 98; 4 EL. & BL. 780; 3 C. L. R. 554; 1 Jur. (N.S.) 586; 3 W. R. 285.—Q.B.

Reg. v. Wye, referred to.

De Mora v. Concha (1885) 29 Ch. D. 281, 301.—C.A.

Brampton Union v. Carlisle Union (or **Reg. v. Brampton Union**) (1878) 47 L. J. M. C. 114; 3 Q. B. D. 479; 38 L. T. 714; 26 W. R. 776.—Q.B.D., *followed*.

Reg. v. Abergavenny Union (1880) 6 Q. B. D. 31; 50 L. J. M. C. 1; 43 L. T. 602; 29 W. R. 303; 45 J. P. 205.—Q.B.D.

Reg. v. Glamorganshire JJ. (1849) 18 L. J. M. C. 118; 13 Q. B. 561.—Q.B., *followed*.

Reg. v. St. Peter, Barton-upon-Humber (1851) 21 L. J. M. C. 23; 17 Q. B. 630; 15 Jur. 1153.—Q.B.

Reg. v. Glamorganshire JJ., followed.

Reg. v. Newport Union (1864) 33 L. J. M. C. 155; 10 Jur. (N.S.) 516; 10 L. T. 384.—BAIL CT.

Rex v. Eriswell (1790) 3 Term Rep. 707.—K.B., *overruled*.

Rex v. Ferry Frystone (1801) 2 East 53.—K.B. KENYON, C.J.—The point upon which the Court were divided in opinion, in the case of *The King v. Eriswell*, has been since considered to be so clear against the admissibility of the evidence, either as to the hearsay of the pauper or his examination in writing, that it was abandoned by the counsel at the bar in the case of *The King v. Newnham Courtney* (1 East's Rep. 373) without argument. It is true there was no evidence there that the pauper, whose examination had been admitted in evidence, was dead; but our opinion against the general doctrine laid down by the two judges who supported the reception of the evidence in the former case was pretty broadly hinted. And, to be sure, that point may now be considered to be at rest.—p. 54.

Rex v. Eriswell, dictum adopted.

Haines v. Guthrie (1884) 53 L. J. Q. B. 521; 13 Q. B. D. 818, 822, 831; 51 L. T. 645; 33 W. R. 99; 48 J. P. 756.—C.A.

Rex v. Knappoft (1824) 4 D. & R. 469; 2 B. & C. 833.—K.B.; and **Reg. v. Sowe** (1843) 12 L. J. Q. B. 128; 4 Q. B. 93; 2 G. & D. 537.—Q.B., *considered*.

Reg. v. Hartington Middle Quarter (1855) 24 L. J. M. C. 98; 4 EL. & BL. 780; 3 C. L. R. 554; 1 Jur. (N.S.) 586; 3 W. R. 285.—Q.B.

6. RELIEF AND MAINTENANCE.

Att.-Gen. v. Merthyr Tydfil Union (1899) 80 L. T. 618; 63 J. P. 536.—*REMER, J.*: *reversed*. (1900) 69 L. J. Ch. 299; [1900] 1 Ch. 516; 82 L. T. 662; 48 W. R. 403; 64 J. P. 276.—*C.A.* LINDLEY, M.R., RIGBY and WILLIAMS, L.JJ.

Reg. v. St. Mary, Whitechapel (1848) 17 L. J. M. C. 172.—*Q.B.*, *followed*.
Salford Overseers v. Manchester Overseers (1863) 32 L. J. M. C. 107; 3 B. & S. 599; 9 Jur. (N.S.) 821; 7 L. T. 823.—*Q.B.*

Dinning v. South Shields Union, 53 L. J. M. C. 56; 12 Q. B. D. 61; 49 L. T. 679; 32 W. R. 317.—*STEPHEN and MATHEW, JJ.*: *reversed*, (1884) 53 L. J. M. C. 90; 13 Q. B. D. 25; 50 L. T. 446; 43 J. P. 708.—*C.A.*

Doe d. Fleming v. Fleming (1827) 5 L. J. (o.s.) P. C. 169; 4 King. 266; 12 Moore 500; 29 R. R. 562.—*K.B.*, *followed*.
Lyle v. Ellwood (1874) 44 L. J. Ch. 164; L. R. 19 Eq. 98, 107; 23 W. R. 157.—*HALL, V.-C.*

Doe d. Fleming v. Fleming and Collins v. Bishop (1878) 48 L. J. Ch. 31.—*MALINS, V.-C.*, *applied*.
Elliott v. Totnes Union (1892) 57 J. P. 151.—*BRUCE and KENNEDY, JJ.*

Lamb v. Bunce (1815) 4 M. & S. 275; 16 R. R. 470.—*K.B.*; and **Gent v. Tomkins** (1822) 1 D. & R. 541; 5 B. & C. 746, n.—*K.B.*, *considered*.
Tomlinson v. Rentall (1826) 5 L. J. (o.s.) M. C. 7; 5 B. & C. 738; 8 D. & R. 493; 29 R. R. 375.—*K.B.*

Rex v. Flintan (1830) 9 L. J. (o.s.) M. C. 33; 1 B. & Ad. 227.—*K.B.*, *distinguished*.
Thomas v. Al-op (1870) 39 L. J. M. C. 43; L. R. 5 Q. B. 151; 21 L. T. 715; 18 W. R. 454.—*Q.B.*

Rex v. Flintan, followed.
Culley v. Charman (1881) 50 L. J. M. C. 111; 7 Q. B. D. 89; 45 L. T. 28; 29 W. R. 803; 45 J. P. 768.—*Q.B.D.*

Rex v. Flintan, referred to.
Wilson v. Glossop (1887) 56 L. J. Q. B. 434; 19 Q. B. D. 379, 383; 36 W. R. 77; 51 J. P. 805.—*MATHEW and CAVE, JJ.*; *affirmed*, (1888) 57 L. J. Q. B. 161; 20 Q. B. D. 354; 58 L. T. 707; 36 W. R. 296; 52 J. P. 246.—*C.A.*

Rex v. Flintan, adapted.
Stimpson v. Wood (1888) 57 L. J. Q. B. 484, 485; 59 L. T. 218; 36 W. R. 734; 52 J. P. 822.—*MANISTY and STEPHEN, JJ.*

Rex v. Flintan, distinguished.
Jones v. Davies (1900) 70 L. J. K. B. 38; [1901] 1 K. B. 118; 83 L. T. 412; 49 W. R. 136.—*Q.B.D.*

7. PAUPER LUNATICS.

Knowles v. Trafford, 26 L. J. M. C. 51; 7 El. & Bl. 144; 3 Jur. (N.S.) 383.—*Q.B.*; *reversed*, (1857) 26 L. J. M. C. 188; 7 El. & Bl. 144, 152; 3 Jur. (N.S.) 1018; 29 L. T. (o.s.) 248; 5 W. R. 741.—*EX. CH.*

Reg. v. Caernarvon Union (1849) 3 New Sess. Cas. 703.—*Q.B.*; and **Reg. v. Rhyddlan** (1850) 19 L. J. M. C. 110; 14 Q. B. 327.—*Q.B.*, *observations applied*.

Faversham Union v. Isle of Thanet Union (1862) 31 L. J. M. C. 116; 2 B. & S. 275.—*Q.B.*

Reg. v. Minster (1850) 20 L. J. M. C. 48; 14 Q. B. 349.—*Q.B.*, *applied*.

Reg. v. Crediton (1858) 27 L. J. M. C. 265; 1 El. & Bl. 231; 4 Jur. (N.S.) 921; 6 W. R. 511.—*Q.B.*: **Faversham Union v. Isle of Thanet Union** (1862) 31 L. J. M. C. 116; 2 B. & S. 275.—*Q.B.*

Reg. v. Crediton (1858) 27 L. J. M. C. 265; 1 El. & Bl. 231; 4 Jur. (N.S.) 926; 6 W. R. 517.—*Q.B.*, *observation explained*.

Faversham Union v. Thanet Union (1862) 31 L. J. M. C. 116; 2 B. & S. 275.—*Q.B.*

Reg. v. St. Mary Arches, Exeter (1862) 31 L. J. M. C. 77; 1 B. & S. 830; 8 Jur. (N.S.) 457; 5 L. T. 627; 10 W. R. 268.—*Q.B.*, *inapplicable*.

Salford Union v. Manchester Overseers (1882) 52 L. J. M. C. 34; 10 Q. B. D. 172, 175; 48 L. T. 119; 31 W. R. 380; 47 J. P. 419.—*HAWKINS and W. WILLIAMS, JJ.*

Reg. v. St. Mary Arches, Exeter, referred to.
Mitford Union v. Wayland Union (or Wa. land Union v. Mitford Union) (1830) 59 L. J. M. C. 86; 25 Q. B. D. 164; 63 L. T. 299; 33 W. R. 632; 54 J. P. 757.—*C.A.*; and *see* **West Ham Union v. St. Matthew, Bethnal Green** [1892].—*C.A.*; *reversed*, H.L. (*ante*, col. 2153).

Reg. v. Glossop (1866) 35 L. J. M. C. 148; L. R. 1 Q. B. 227; 13 L. T. 672; 14 W. R. 329.—*Q.B.*, *distinguished*.

Reg. v. Abingdon Union (1870) 39 L. J. M. C. 153; L. R. 5 Q. B. 406; 22 L. T. 603; 18 W. R. 981.—*Q.B.*

Reg. v. Glossop, observation explained.
Guildford Union v. St. Olave's Union (1872) 23 L. T. 803.—*Q.B.*

Reg. v. Glossop, explained.
Reg. v. St. Ives (1872) 41 L. J. M. C. 94; L. R. 7 Q. B. 467; 26 L. T. 303; 20 W. R. 657.

BLACKBURN, J.—In **Guildford v. St. Olave's Union** (25 L. T. 803) I explained what I said in **Reg. v. Glossop**. I never intended to say that having a residence to return to was necessary (p. 469). In the language I am reported to have used in **Reg. v. Glossop**, and in **Reg. v. Stourbridge** (34 L. J. M. C. 179), I never meant that the having a dwelling-house to return to was essential and necessary to show an intention to return so as to prevent a break of residence. If I used that language—which very possibly I did—I did not accurately express what I meant, and what I understand to be the law. Whether a person has a house or not to return to is only one element in considering the intention to return.—p. 470.

Reg. v. Glossop, observation adopted.
Reg. v. Stepney Union (1884) 54 L. J. M. C. 12, 14; 52 L. T. 953; 49 J. P. 164.—*C.A.*

Reg. v. Glossop, applied.
Holborn Union v. Chertsey Union (1884) 14 Q. B. D. 289.—*Q.B.D.* (reversed, 15 Q. B. D. 76.—*C.A.*); and **Cambridge Union v. Edmonton Union** (1900) 69 L. J. Q. B. 584; [1900] 2 Q. B. 111.—*Q.B.D.*

Reg. v. Stourbridge Union (1865) 34 L. J. M. C. 179; 11 Jur. (N.S.) 799; 12 L. T. 512; 13 W. R. 836.—Q.B., *referred to*.
Reg. v. St. Ives (1872) 41 L. J. M. C. 94; L. R. 7 Q. B. 467.—Q.B. (*see extract, supra*).

Reg. v. Whitby Union (1870) 39 L. J. M. C. 97; L. R. 5 Q. B. 325; 22 L. T. 336; 18 W. R. 785.—Q.B., *inapplicable*.
Hendon Union v. Hampstead Union (1893) 62 L. J. M. C. 170.—CAVE and WRIGHT, JJ.

Reg. v. Warwickshire JJ. (1859) 28 L. J. M. C. 249; 5 Jur. (N.S.) 1292; 7 W. R. 529.—Q.B., *applied*.
Reg. v. Kent JJ. (1856) 35 L. J. M. C. 201; 7 B. & S. 394; L. R. 1 Q. B. 385; 14 L. T. 331; 14 W. R. 635.—Q.B.

Reg. v. St. Leonard, Shoreditch (1865) 35 L. J. M. C. 48; L. R. 1 Q. B. 21; 6 B. & S. 784; 12 Jur. (N.S.) 292; 13 L. T. 278; 14 W. R. 55.—Q.B., *explained and distinguished*.

Reg. v. Glossop Union (1866) 35 L. J. M. C. 148; L. R. 1 Q. B. 227; 13 L. T. 672; 14 W. R. 329.—Q.B.; **Reg. (or Merthyr Union) v. Stepney Union** (1884) 54 L. J. M. C. 12; 52 L. T. 959; 49 J. P. 164.—C.A.

Reg. v. Bramley (1861) 31 L. J. M. C. 11; 1 B. & S. 732; 8 Jur. (N.S.) 209; 10 W. R. 42.—Q.B., *overruled*.

Leatham v. Bolton-le-Sands Union (1865) 35 L. J. M. C. 62; 6 B. & S. 547; 13 L. T. 218; 13 W. R. 85.—EX. CH.

[Where a pauper lunatic's settlement is in a parish, part of a Gilbert Union, an order of maintenance under 16 & 17 Vict. c. 97, s. 97, should be made on the guardians of the parish and not on the guardians of the union; and *Reg. v. Bramley* to the contrary, overruled in *Leatham v. Bolton-le-Sands*.]

Finch v. York Union Guardians (1876) 35 L. T. 360.—Q.B.D., *referred to*.
Suffolk County Lunatic Asylum v. Stow Union (1897) 76 L. T. 494; 45 W. R. 620; 61 J. P. 238.—HAWKINS and WRIGHT, JJ.

Upfull's Trust, In re (1851) 3 Mac. & G. 281; 21 L. J. Ch. 119.—L.C., *applied*.
Buckley's Trust, In re (1860) Johns. 700.—WOOD, V.-C.

Upfull's Trust, distinguished.
Harris, In re (1880) 49 L. J. Ch. 327.—C.A. COTTON, L.J.

Upfull's Trust and Buckley's Trusts, In re (*supra*), *referred to*.
Newbegin's Estate, In re, Eggleton v. Newbegin (1887) 56 L. J. Ch. 907; 36 Ch. D. 477; 57 L. T. 390; 36 W. R. 69.—CHITTY, J.

Marman's Trusts, In re (1878) 8 Ch. D. 256; 38 L. T. 797; 26 W. R. 621.—C.A., *applied*.
Harris, In re (1880) 49 L. J. Ch. 327.—C.A. COTTON, L.J.; **Webster, In re, Derby Union v. Sharratt** (1884) 54 L. J. Ch. 276; 27 Ch. D. 710; 51 L. T. 319.—BACON, V.-C.

Webster, In re, Derby Union v. Sharratt, approved.
Newbegin's Estate, In re, Eggleton v. Newbegin (1887) 56 L. J. Ch. 907; 36 Ch. D. 477; 57 L. T. 390; 36 W. R. 69.—CHITTY, J.

Newbegin's Estate, In re, Eggleton v. Newbegin (or **Newbiggin's Estate, In re, Eggleton v. Newbiggin**), *discussed*.
Winkle v. Bailey (1896) 66 L. J. Ch. 181; [1897] 1 Ch. 123; 77 L. T. 577; 61 J. P. 135.—NORTH, J.

Newbegin's Estate, In re, Eggleton v. Newbegin, followed.

Watson, In re, Stamford Union v. Bartlett (1898) 68 L. J. Ch. 21; [1899] 1 Ch. 72; 79 L. T. 462; 47 W. R. 359.—STIRLING, J.

[*Held*, following *Newbegin, In re*, that maintenance of a pauper lunatic in an asylum by the guardians of the parish to which he is chargeable, constitutes a debt of the lunatic to the guardians; that in an action by the guardians against his personal representatives for arrears of maintenance, the Statute of Limitations may be set up; and that arrears of maintenance from a date six years prior to the commencement of the action only are recoverable.]

Howlett v. Maidstone Corporation (1891) 60 L. J. Q. B. 570; [1891] 2 Q. B. 110; 65 L. T. 448; 40 W. R. 116; 55 J. P. 549.—C.A. *See Lunacy Act, 1890* (53 Vict. c. 5), s. 342.

Reg. v. Stepney Union (1874) 43 L. J. M. C. 145; L. R. 9 Q. B. 338; 30 L. T. 808; 12 Cox C. C. 631.—Q.B., *considered*.

Barton Regis Union v. Berkshire (Clerk of the Peace) (1878) 48 L. J. M. C. 51; 4 Q. B. D. 37; 39 L. T. 445; 27 W. R. 362; 14 Cox C. C. 173.—Q.B.D.

Reg. v. Maulden (1828) 6 L. J. (O.S.) M. C. 76; 3 B. & C. 78.—K.B., *considered*.

Bradford Union v. Wiltshire (Clerk of the Peace) (1868) 37 L. J. M. C. 129; L. R. 3 Q. B. 604; 18 L. T. 514; 16 W. R. 1197.—Q.B.

PORTION.

1. INTEREST.
2. RAISING.
3. ADEMPMENT AND SATISFACTION.

1. INTEREST.

Hall v. Carter (1742) 2 Atk. 354.—L.C.
Referred to, **Lyddon v. Lyddon** (1808) 14 Ves. 558.—M.R.; *distinguished*, **Annaly's Estate, In re** (1889) 23 L. R. Ir. 481.—MONROE, J.

Butler v. Duncomb (1718) 1 P. Wms. 448; 2 Vern. 760; 10 Mod. 432.—L.C., *discussed*.
Worsley v. Granville (Earl) (1751) 2 Ves. sen. 331.—L.C.; **Codrington v. Foley (Lord)** (1801) 6 Ves. 364; 5 R. R. 332.—L.C.

Butler v. Duncomb, distinguished.
Greaves' Settled Estates, In re, Jones v. Greaves [1900] 2 Ch. 683; 69 L. J. Ch. 596; 82 L. T. 799.

[*Argument*.—In *Butler v. Duncomb* it was held that a portion, though vested, did not carry interest before the time for payment.]

FARWELL, J.—In that case the term had not commenced to run. Here it has. That seems the distinction between the two cases.—p. 685.

[His lordship also approved and adopted the proposition as to interest stated in *Lewin on Trusts*, 10th ed. p. 472.]

Lyddon v. Lyddon (1808) 14 Ves. 558.—M.R., *approved and applied*.

Codrington v. Foley (Lord) (1801) 6 Ves. 364; 5 R. R. 332.—L.C., *applied*.

Milltown (Earl) v. Trench (1837) 4 Cl. & F. 276; 11 Bligh (N.S.) 1.—H.L. (IR.).

Lyddon v. Lyddon, *distinguished*.

Codrington v. Foley (Lord) and Milltown (Earl) v. Trench, *approved*.

Massey v. Lloyd (1863) 10 H. L. Cas. 248; 9 Jur. (N.S.) 391; 8 L. T. 129; 11 W. R. 484.—H.L. (IR.); *reversing* S.C. *nom.* Lloyd v. Massey, 10 Ir. Eq. R. 240.—L.C. and L.J.

Codrington v. Foley (Lord), *referred to*.

Lawton v. Ford (1866) L. R. 2 Eq. 97, 105; 14 L. T. 320; 14 W. R. 575.—STUART, V.-C.

Boycot v. Cotton (1738) 1 Atk. 552.—L.C., *discussed*.

Henty v. Wrey (1882) 53 L. J. Ch. 667; 21 C. D. 332, 356; 47 L. T. 231; 30 W. R. 850.—C.A.

Boycot v. Cotton and Lewis v. Freke (1794) 2 Ves. 507; 2 R. R. 301.—L.C., *distinguished*.

Young v. Waterpark (Lord) (1842) 11 L. J. Ch. 367; 13 Sim. 199; 6 Jur. 656.—V.-C., *commented on* (and see *supra*, col. 1612).

Balfour v. Cooper (1883) 23 Ch. D. 472; 52 L. J. Ch. 495; 48 L. T. 323; 31 W. R. 569.—C.A.; *reversing* PEARSON, J.

BAGGALLAY, L.J.—*Boycot v. Cotton and Lewis v. Freke* . . . establish this, . . . that the donee of a power to charge has a right to fix the rate of interest; but they were cases in which there was a donee of the power who had the right of directing whether the charge should be raised, or to what extent it should be raised. If you examine *Lewis v. Freke* closely, it will be found, and particularly from a passage in Lord Eldon's judgment, that the rule, that a donee of a power to charge has a right to fix the rate of interest, does not apply to a case where the trustees have a trust vested in them to raise a specific sum of money, and the only power given to anybody in connection with the money so raised, is to state in what proportion the money is to be divided between the parties, and at what time it shall be payable. Lord Eldon used this expression about the middle of his judgment (p. 512): "If the party entitled to charge or to give interest from the time the fund is to be productive, fixes the rate, the Court cannot control it or diminish it, if he gives more than 4 per cent., or increase it, if he gives less than legal interest. Therefore the course of this Court obtains only where no rate is specified by him who has a right to fix the sum and any rate of interest he thinks proper, not exceeding legal interest." . . . *Young v. Waterpark (Lord)* has been quoted as an authority that the rate of interest should in the present case be 4 per cent., as being the rate of interest according to the *lex fori*. The last edition of Mr. Lewin's book [7th ed. p. 376] brings the cases down to a recent period, viz., 1879; it was published after his death. I gather from it that he did not regard *Young v. Waterpark (Lord)* as the case of an Irish estate being dealt with in England, and therefore giving effect to the law of the *forum*, and not to the law of the country where the property was situate; but as a case in which

the property was dealt with as English property. In that case there was both English and Irish land, and it would have been almost impossible for the Court to direct a sum of money to be raised out of English and Irish property together, and to direct that on so much as was raised out of English property 4 per cent. should be paid, and on so much as was raised out of Irish property, 5 per cent. That would have led to confusion. The English Court was dealing with the property. . . . With reference to *Young v. Waterpark (Lord)*, I desire to add that, unless the decision can be explained in the manner I have stated, it is, in my opinion, at variance with the recognised line of authority.—pp. 477, 478.

LINDLEY, L.J. to the same effect.

Balfour v. Cooper.

Followed, *Annaly's Estate*, In re (1889) 23 L. R. Ir. 481.—MONROE, J.; *referred to*, *Drax*, In re *Savile v. Drax* (1903) 72 L. J. Ch. 505; [1903] 1 Ch. 781, 796; 88 L. T. 510; 51 W. R. 612.—C.A.

2. RAISING.

Gerrard v. Gerrard (1703) 2 Vern. 458.—L.K., *followed*.

Corbet v. Maidwell (or Maydwell) (1711) 1 Salk. 159; 2 Vern. 640.—L.C.

Gerrard v. Gerrard and Greaves v. Maddison (1682) T. Jones 201.—K.B., *discussed*.

Butler v. Duncomb (1718) 1 P. Wms. 448; 2 Vern. 760; 10 Mod. 432.—L.C.

Greaves v. Maddison, *commented on*.

Corbet v. Maidwell, *referred to*.

Beresby v. Newland (1722) 2 P. Wms. 101.—L.C.; **Codrington v. Foley (Lord)** (*supra*, col. 2175).

Corbet v. Maidwell, *commented on*.

Worsley v. Granville (Earl) (1751) 2 Ves. sen. 331.—L.C.

Stuart v. Castlestuart (Earl) (1858) 8 Ir. Ch. R. 408.—M.R., *followed*.

Coffin v. Cooper (1865) 34 L. J. Ch. 629; 2 Dr. & Sm. 365; 5 N. R. 459; 12 L. T. 106; 13 W. R. 571.—KINDERSLEY, V.-C.

Sleethman v. Magrath (1858) 8 Ir. Ch. R. 207.—L.C.; L.J. *dissenting*; and **Beresby v. Newland** (*supra*), *referred to*.

Dunne's Trusts, In re (1880) 5 L. R. Ir. 76.—C.A. [Sugden on Powers (8th ed. p. 454) *approved*.]

Edwards v. Freeman (1727) 2 P. Wms. 435.—L.C. and JUDGES, *referred to*.

Boyd v. Boyd (1867) 36 L. J. Ch. 877; L. R. 4 Eq. 305.—WOOD, V.-C.; **Taylor v. Taylor** (1875) 44 L. J. Ch. 718; L. R. 20 Eq. 155.—JESSEL, M.R.; **Blockley**, In re **Blockley v. Blockley** (1885) 54 L. J. Ch. 722; 29 Ch. D. 250; 33 W. R. 777.—PEARSON, J.

Armstrong v. Armstrong (1874) 43 L. J. Ch. 719; L. R. 18 Eq. 541.—JESSEL, M.R., *discussed and approved*.

Nightingale v. Reynolds (1902) 71 L. J. Ch. 586; [1902] 2 Ch. 117; 86 L. T. 703.—KECKWICH, J.; *affirmed*, (1903) 72 L. J. Ch. 564; [1903] 2 Ch. 236; 88 L. T. 654; 52 W. R. 1.—C.A.

Head v. Massey (1824) 2 Moll. 467.—L.C., *not law*.
Hughes v. Nash (1841) 3 Ir. Eq. R. 495.—EX.

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Farnham v. Phillips (1741) 2 Atk. 215.—L.C., *referred to*.
Pym v. Lockyer (1841) 10 L. J. Ch. 153; 5 Myl. & Cr. 29; 5 Jur. 620.—COTTENHAM, L.C.

Freemantle v. Bankes (1799) 5 Ves. 79.—L.C., *discussed*.
Hall v. Hill (1841) 1 Dr. & War. 94; 1 Con. & L. 120; 4 Ir. Eq. R. 27.—SUGDEN, L.C.

Freemantle v. Bankes and Farnham v. Phillips, *questioned*.
Montefiore v. Guedalla (1859) 6 Jur. (N.S.) 329; 29 L. J. Ch. 65; 1 De G. F. & J. 93; 6 Jur. (N.S.) 329; 1 L. T. 251; 8 W. R. 53.—L.C. and L.J.

TURNER, L.J.—Of the two cases of *Freemantle v. Bankes* and *Farnham v. Phillips*, it appeared that the former was heard as a short cause, and the latter could hardly be considered of much authority, for Lord Hardwicke himself expressed doubts as to the correctness of the doctrine there laid down.—p. 67.

Farnham v. Phillips and Freemantle v. Bankes, *approved*.
Meinertzen v. Walters (1872) L. R. 7 Ch. 670, 674.—L.J.J. (*post*, col. 2186).

Farnham v. Phillips, *referred to*.
Leighton v. Leighton (1874) 43 L. J. Ch. 594; L. R. 18 Eq. 458, 469; 22 W. R. 727.—HALL, V.-C.

Wood v. Briant (1742) 2 Atk. 521.—L.C.; **Seed v. Bradford** (1750) 1 Ves. sen. 501.—M.R.; and **Chave v. Farrant** (1810) 18 Ves. 8; 11 R. R. 133.—M.R., *explained*.
Plunkett v. Lewis (1844) 13 L. J. Ch. 295; 3 Hare 316; 8 Jur. 682.—WIGRAM, V.-C.

Wood v. Briant, *approved and applied*.
Seed v. Bradford and Chave v. Farrant, *referred to*.
Hayes v. Garvey (1845) 2 Jo. & Lat. 268; 8 Ir. Eq. R. 90.—SUGDEN, L.C.

Wood v. Briant, *applied*.
Martin v. Dale (1884) 15 L. R. Ir. 345.—M.R.

Plunkett v. Lewis, *rule applied*.

Chave v. Farrant, *referred to*.

Lawes, In re, Lawes v. Lawes (1881) 20 Ch. D. 81; 45 L. T. 453; 30 W. R. 33; *affirmed*, C.A.

FRY, J.—In that case [*Plunkett v. Lewis*] Wigram, V.-C. considered elaborately the authorities bearing upon this particular question, and he laid down the rule in these terms: "Where a debt exists from a parent to a child, the advance made upon the child's marriage, or upon some other occasion, of a portion equal to or exceeding the debt, in the parent's lifetime, shall *prima facie* be considered a satisfaction." The presumption, therefore, arises the moment I find that the portion is equal to or exceeding the debt. . . I find that a covenant by a father to pay a sum of money was, in *Chave v. Farrant*, considered to extinguish a present liability by him to pay the amount, and yet it is impossible not to see that the right of immediate payment in cash is a different thing from the covenant which was contained in the marriage settlement.—pp. 84, 85.

Chave v. Farrant and Plunkett v. Lewis, *applied*.
Martin v. Dale (1884) 15 L. R. Ir. 345.—PORTER, M.R.

Baugh v. Read (1790) 3 Bro. C. C. 191; 1 Ves. 257.—L.C., *discussed*.
Platt v. Platt (1830) 3 Sim. 503; 30 R. R. 197.—V.-C., *applied*.

Wharton v. Durham (Lord) (1836) 6 L. J. Ch. 15; 3 Cl. & F. 146; 10 Bligh (N.S.) 526.—H.L. (E.); *reversing* S. C. *nom.* Durham (Earl) v. Wharton: (1834) 3 Myl. & K. 472; 39 R. R. 18.—L.C.: and (1832) 5 Sim. 297.—V.-C.

Baugh v. Read, *commented on*.
Leighton v. Leighton (1874) 43 L. J. Ch. 594; L. R. 18 Eq. 458, 471; 22 W. R. 727.—HALL, V.-C.

Wharton v. Durham (Lord) (*supra*), *approved*.

Powys v. Mansfield (Lord) (1836) 7 L. J. Ch. 9; 3 Myl. & Cr. 359, 374; 1 Jur. 861.—L.C.

Wharton v. Durham (Lord), *discussed*.
Plunkett v. Lewis (*supra*, col. 2177); **Kippen v. Darley** (1858) 3 Macq. 203.—H.L. (SC.); LORD CRANWORTH *dissenting*; **Dawson v. Dawson** (1867) L. R. 4 Eq. 504, 515.—WOOD, V.-C.

Wharton v. Durham (Lord), *distinguished*.
Chichester (Lord) v. Coventry (1867) L. R. 2 H. L. 71, 83 (*post*, col. 2179).

Thynne (Lady) v. Glengall (Earl) (1848) 2 H. L. Cas. 131; 12 Jur. 805.—H.L. (E.): *affirming* S. C. *nom.* Glengall (Earl) v. Barnard (1836) 6 L. J. Ch. 25; 1 Keen 769.—M.R., *distinguished*.
Chichester (Lord) v. Coventry (1867) L. R. 2 H. L. 71, 83 (*post*, col. 2179).

Hall v. Hill (1841) 1 Dr. & War. 94; 1 Con. & L. 120; 4 Ir. Eq. R. 27.—L.C.
Applied, **Palmer (or Benham) v. Newell** (1855) 24 L. J. Ch. 424; 20 Beav. 32.—M.R. (*affirmed*, (1856) 25 L. J. Ch. 461; 2 Jur. (N.S.) 268; 4 W. R. 346.—L.J.J.); *approved*, **Chichester** (Lord) v. Coventry (1867) L. R. 2 H. L. 71, 94 (*post*, col. 2179); *discussed*, **Thompson v. Durra** (1873) 42 L. J. Ch. 827; L. R. 16 Eq. 592, 602.—WICKENS, V.-C.; *referred to*, **Tussaud's Estate, In re** (1878) 9 Ch. D. 363, 374.—C.A. (*post*, col. 2181).

Thynne (Lady) v. Glengall (Earl), *applied*.
Montefiore v. Guedalla (1859) 29 L. J. Ch. 65; 1 De G. F. & J. 93.—C.A. (*post*, col. 2186).

Thynne (Lady) v. Glengall (Earl), *discussed*.
Campbell v. Campbell (1866) 35 L. J. Ch. 241; L. R. 1 Eq. 383; 12 Jur. (N.S.) 118; 13 L. T. 667; 14 W. R. 327.—WOOD, V.-C. (*see post*, col. 2181); **Dawson v. Dawson** (1867) L. R. 4 Eq. 504, 512.—WOOD, V.-C.

Thynne (Lady) v. Glengall (Earl), *referred to*.
Battersby's Estate, In re (1887) 19 L. R. Ir. 359.—MONROE, J.

Thynne (Lady) v. Glengall (Earl), *applied*.
Nevin v. Drydale (1867) 36 L. J. Ch. 662; L. R. 4 Eq. 517; 15 W. R. 980.—WOOD, V.-C.; **Russell v. St. Aubyn** (1876) 46 L. J. Ch. 641; 2 Ch. D. 398, 405; 35 L. T. 395.—BACON, V.-C.

Kippen v. Darley (1858) 3 Macq. 208.—H.L. (SC.); LORD CRANWORTH *dissenting*. *Referred to*, **Campbell v. Campbell** (*supra*): **Chichester (Lord) v. Coventry** (1867) L. R. 2 H. L. 71, 98 (*post*); *followed*, **Johnstone v. Haviland** [1896] A. C. 95; 23 *Rettie* 7.—H.L. (SC.) (*see post*, col. 2191).

Coventry v. Chichester (1864) 33 L. J. Ch. 361; 2 H. & M. 149; 3 N. R. 666; 10 Jur. (N.S.) 435; 11 L. T. 103; 12 W. R. 664.—WOOD, V.-C.; *affirmed*, 33 L. J. Ch. 676; 2 De G. J. & S. 336; 4 N. R. 535; 10 Jur. (N.S.) 896; 11 L. T. 171; 12 W. R. 1126.—TURNER, L.J. *dissenting, reversed*.
Chichester (Lord) v. Coventry (1867) 36 L. J. Ch. 673; L. R. 2 H. L. 71; 17 L. T. 35; 15 W. R. 849.—H.L. (E.).

Chichester (Lord) v. Coventry. *Considered*, **Dawson v. Dawson** (1867) L. R. 4 Eq. 504, 509.—WOOD, V.-C.; *referred to*, **Paget v. Grenfell** (1868) 37 L. J. Ch. 833; L. R. 6 Eq. 7.—ROMILLY, M.R.; *Cooper v. Macdonald* (1873) 42 L. J. Ch. 533; L. R. 16 Eq. 258, 267; 28 L. T. 693.—SELBORNE, L.C. for M.R.: *explained but not applied*, **Atkinson v. Littlewood** (1874) L. R. 18 Eq. 595, 604; 31 L. T. 225.—MALINS, V.-C.: *applied*, **Smyth v. Johnston** (1875) 31 L. T. 876.—HALL, V.-C.: *distinguished*, **Russell v. St. Aubyn** (1876) 2 Ch. D. 398, 404 (*supra*, col. 2178); **Bennett v. Houldsworth** (1877) 46 L. J. Ch. 646; 6 Ch. D. 671, 678; 36 L. T. 648.—BACON, V.-C.: **Tussaud's Estate**, *In re* (1878) 9 Ch. D. 363, 367.—C.A. (*post*, col. 2181).

Chichester (Lord) v. Coventry, distinguished. **Montagu v. Sandwich** (Earl) (1886) 32 Ch. D. 525; 55 L. J. Ch. 925; 54 L. T. 502.—C.A.; *reversing on this point* PEARSON, J.

COTTON, L.J.—Great reliance was placed upon the judgment of the H. L. in **Chichester (Lord) v. Coventry**, where it was said that the circumstances of the gift to the daughter were analogous to the condition "subject to the charges and incumbrances thereon" in this case. But the decision there was different. In that case the gift by will was of a share in a division of residue, and after payment thereof of all debts, and their lordships relied upon this, that the provision made for the daughter was a debt, and that the debts were all to be paid before the residue was divided, and accordingly that the shares of the ultimate residue could not be given on an implied condition that the daughter should give up the claim to her debt. And I doubt whether if there had not been the direction to pay debts before the gift of the residue they would have come to that conclusion. The L.C., Lord Chelmsford, in his judgment recognises the rule to which I have referred, and says:—"In determining in any particular case whether a gift by a parent, or a person *in loco parentis*, is intended to be in addition to, or in substitution for, a prior gift by the same person, it must always be borne in mind that there is a presumption, or, as Lord Eldon expressed it in *Pye, &c. parte* (col. 2185), 'a sort of feeling upon what is called a leaning against double portions.'" Then he quotes Sir J. Leach [*Weall v. Rice* (col. 2191)]:—"This presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two provisions. Where the

two provisions are of the same nature, or there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where the two provisions are of a different nature, the two instruments afford intrinsic evidence in favour of a double provision." Then Lord Cranworth says:—"Neither party in the argument of this case disputed the rule acted on in Courts of equity, that there is a presumption against double portions. I have more than once had occasion to express my opinion that this is a useful rule, carrying generally into effect the intention of parents and others making provision for those for whom they are bound to provide." So both of their lordships fully recognise this rule, although they do perhaps use expressions more easily departing from it than other judges have done; and there are undoubtedly circumstances in that case very different and stronger than such slight evidence of intention as is shown by the words in this case "subject to the charges and incumbrances thereon." As there is this rule against double portions, and we cannot put an end to it, it is much better that the rule, if a bad one—Lord Cranworth says it is a good one—should be put an end to by legislative enactment or otherwise, than that we should reduce it to nothing by departing from it on such very slight grounds as exist in the present will; and it will be remembered that Turner, L.J., whose decision in **Coventry v. Chichester** (col. 2179) was affirmed by the H. L., said that there must be strong evidence upon the instrument to enable the child to get the double portion.—p. 537.

BOWEN, L.J. to the same effect.

FRY, L.J. (*dissenting*).—The particular way in which the presumption against double portions applies to a case like the present, is by the implication or introduction by presumption of a condition, which is of course not expressed, that the legacy given by the will shall be taken in satisfaction of the covenant. That was plainly expressed in the judgment of the C. A., delivered by Cotton, L.J. in **Tussaud v. Tussaud** (*post*, col. 2181), in which he says this: "Where the obligation is earlier in date than the will, the testator, when he makes his will, is under a liability which he cannot revoke or avoid. He can only put an end to it by payment, or by making a gift with the condition, express or implied, that the legatees shall take the gift made by the will in satisfaction of their claim under the previous obligation." It has accordingly been held by the H. L., in **Chichester (Lord) v. Coventry**, that, in the case of the satisfaction of the portion previously secured by a will, slighter circumstances are adequate to repel the presumption against double portions than they are in the case in which the gift by way of settlement follows the will.—p. 546.

Chichester (Lord) v. Coventry, referred to. **Battersby's Estate, In re** (1887) 19 L. R. Ir. 359.—MONROE, J.

Chichester (Lord) v. Coventry, discussed. **Horlock v. Wiggins** (1888) 58 L. J. Ch. 46; 39 Ch. D. 142; 59 L. T. 710; *affirmed*, C.A.
KEKEWICH, J.—**Chichester v. Coventry** called particular attention to the great weight to be given to a direction for payment of debts coming before a gift which might be taken to be a gift in satisfaction of a liability.—p. 144.

Campbell v. Campbell (*supra*, col. 2178), *explained*.
McCarogher v. Whieldon (1867) 36 L. J. Ch. 196; L. R. 3 Eq. 236, 243; 15 W. R. 296.—ROMILLY, M.R.

Campbell v. Campbell and McCarogher v. Whieldon, *explained*.
Fairer v. Park (1876) 45 L. J. Ch. 760; 3 Ch. D. 309; 35 L. T. 27.—HALL, V.-C.

McCarogher v. Whieldon, *explained*.
Tussaud's Estate, In re, **Tussaud v. Tussaud** (1878) 9 Ch. D. 363; 47 L. J. Ch. 849; 39 L. T. 113; 26 W. R. 874.—C.A.: *reversing* JESSEL, M.R. COTTON, L.J. (for self, JAMES and BRETT, L.JJ.).—There are very few cases in which a gift by will has been held a satisfaction of a previous liability, in which the persons interested under the will have not included all interested under the previous settlement. **McCarogher v. Whieldon** was, however, such a case. But the decision in that case cannot be considered as proceeding on a principle inconsistent with our present decision. There, by the settlement, the testator had covenanted to leave one-fifth of his residuary estate to trustees for his son for life, then for his intended wife for life, and afterwards for their children; and all that the M.R. in that case decided was that an absolute bequest to the son of one-fifth of the testator's estate, was a satisfaction of the life interest which the son took under the father's covenant in one-fifth of his estate.—p. 380.

McCarogher v. Whieldon, *followed*.
Carter v. Silber (1891) 60 L. J. Ch. 716; [1891] 3 Ch. 553; 65 L. T. 51; 39 W. R. 552.—ROMER, J.; *reversed*, C.A. See "ELECTION," vol. i., col. 966.

Tussaud's Estate, In re (*supra*), *referred to*.
Wheatley, In re, **Smith v. Spence** (1884) 54 L. J. Ch. 201; 27 Ch. D. 606, 613; 51 L. T. 681; 33 W. R. 275.—CHITTY, J.: **Queade's Trusts**, In re (1885) 54 L. J. Ch. 786, 791; 53 L. T. 74; 33 W. R. 816.—CHITTY, J.: **Montagu v. Sandwich** (Earl) (1886) 32 Ch. D. 525, 546 (*supra*, col. 2180).

Montague v. Montague (1852) 15 Beav. 565.—M.R., *referred to*.
Bristol (Marquis), In re, **Grey** (Earl) v. **Grey** (1897) 66 L. J. Ch. 446; [1897] 1 Ch. 946; 76 L. T. 757; 45 W. R. 552.—ROMER, J.

Montague v. Montague, *explained*.
Ashton, In re, **Ingram v. Papillon** (1897) 66 L. J. Ch. 731; [1897] 2 Ch. 574; 77 L. T. 49; 46 W. R. 138: *reversed on the facts*, 67 L. J. Ch. 84; [1898] 1 Ch. 142; 77 L. T. 582; 46 W. R. 231.—C.A.

STIRLING, J.—The rule against double portions is generally stated to apply to provisions made by a parent or person *in loco parentis*; but in all the cases, so far as they have been brought to my attention, the parent referred to is the father. [His lordship discussed **Powys v. Mansfield** (*post*, col. 2182), and continued:] In **Montague v. Montague** the rule against double portions was held applicable to appointments made in exercise of a special power. It appears, however, that the appointor was the father of the appointees, and that the appointed funds consisted of sums made chargeable by way of portions for younger children on estates settled by himself on his

marriage. The appointed funds therefore were "portions" in the strictest sense.—p. 734.

Montague v. Montague and Bristol (Marquis), In re, **Grey** (Earl) v. **Grey** (*supra*), *distinguished*.

Hutchinson v. Tottenham [1898] 1 Ir. R. 403. CHATTERTON, V.-C.—It is a very different case from **Montague v. Montague**, where there were two separate settlements, each with its own hotch-pot clause applying to the property thereby settled. The fact that these funds came from different parties is, in my opinion, in itself immaterial. There seems to have been a plain intention that this single hotch-pot clause should apply to all the funds without distinction. In **Grey** (Earl) v. **Grey** there was no such indication of intention, and the question was whether a hotch-pot clause was incorporated by a general reference to the trusts, powers, provisos, and agreements expressed in reference to another and distinct fund.—p. 422.

Powys v. Mansfield (Lord) (1836) 7 L. J. Ch. 9; 3 Myl. & Cr. 359; 1 Jur. 861.—L.C.; *varying* 5 L. J. Ch. 153; 6 Sim. 528.—SHADWELL, V.-C., *applied*.

Pym v. Lockyer (1841) 10 L. J. Ch. 153; 5 Myl. & Cr. 29; 5 Jur. 620.—L.C.; **Montague v. Montague** (1852) 15 Beav. 565.—M.R.

Powys v. Mansfield (Lord), *referred to*.
Lyndon v. Ellison (1854) 19 Beav. 565; 18 Jur. 106.—M.R.: **Kippin v. Darley** (1858) 3 Macq. 203.—H.L. (SC.) (*see supra*, col. 2179).

Powys v. Mansfield (Lord), *approved*.
Hopwood v. Hopwood (1859) 29 L. J. Ch. 747; 7 H. L. Cas. 728, 747.—H.L. (C.) (*post*, col. 2192).

Powys v. Mansfield (Lord), *referred to*.
Ravenscroft v. Jones (1864) 33 L. J. Ch. 482; 4 De G. J. & S. 224; 9 L. T. 818; 12 W. R. 362.—L.JJ.: **Campbell v. Campbell** (1866) 35 L. J. Ch. 241; L. R. 1 Eq. 333; 12 Jur. (N.S.) 118; 13 L. T. 667; 14 W. R. 327.—WOOD, V.-C.; **Sayre v. Hughes** (1868) 37 L. J. Ch. 401; L. R. 5 Eq. 376; 18 L. T. 347; 16 W. R. 662.—STUART, V.-C.; **Bennet v. Bennet** (1879) 10 Ch. D. 474; 40 L. T. 378; 27 W. R. 573.—JESSEL, M.R.; **Griffith v. Bourke** (1887) 21 L. R. Ir. 92.—PORTER, M.R.

Powys v. Mansfield (Lord), *referred to*.
Hamlet, In re, **Stephen v. Cunningham** (1888) 38 Ch. D. 183; 57 L. J. Ch. 1007; 58 L. T. 614; 36 W. R. 568; *affirmed*, 58 L. J. Ch. 242; 39 Ch. D. 426; 59 L. T. 745; 37 W. R. 245.—C.A. COTTON, FRY and LOPES, L.JJ.

KAY, J.—In **Pye, Ex parte** (*post*, col. 2185). Lord Eldon defines "*locus parentis*" as being "the situation of the person described as the lawful father of that child." This definition, which is little more than a literal translation, is adopted by Lord Cottenham in **Powys v. Mansfield** (Lord); and in **Pym v. Lockyer** (*post*), the same learned judge said that, for the purpose of the rule against double portions, whether the donor had assumed the office of a parent may be proved by extrinsic evidence, such as the general conduct of the donor towards the children, or by intrinsic evidence from the nature and terms of the gift.—p. 190.

Powys v. Mansfield (Lord), *discussed*.
Ashton, In re [1897] 2 Ch. 574 (col. 2181).

Pym v. Lockyer (1841) 10 L. J. Ch. 153; 5 Myl. & Cr. 29; 5 Jur. 620.—COTTENHAM, L.C.; *reversing* 8 L. J. Ch. 362; 5 Jur. 34.—SHADWELL, V.-C., *discussed*.
Kippen v. Darley (1858) 3 Macq. 203.—H.L. (sc.) (*see supra*, col. 2179).

Pym v. Lockyer, *referred to*.
Hopwood v. Hopwood (1859) 7 H. L. Cas. 728, 746.—H.L. (E.) (*post*, col. 2192).

Pym v. Lockyer, *discussed*.
Leighton v. Leighton (1874) 43 L. J. Ch. 594; L. R. 18 Eq. 458, 468; 22 W. R. 727.—HALL, V.-C.; **Fowkes v. Pascoe** (1875) L. R. 10 Ch. 343, 350.—L.J.J. (*post*).

Pym v. Lockyer, *explained and applied*.
Pollock, In re, Pollock v. Worrall (1885) 28 Ch. D. 532; 54 L. J. Ch. 489; 52 L. T. 718.—C.A.

SELBORNE, L.C.—When a testator gives a legacy to a child, or to any other person towards whom he has taken on himself parental obligations, and afterwards makes a gift or enters into a binding contract in his lifetime in favour of the same legatee, then (unless there be distinctions between the nature and conditions of the two gifts, of a kind not in this case material) there is a presumption *prima facie* that both gifts were made to fulfil the same natural or moral obligation of providing for the legatee; and consequently that the gift *inter vivos* is either wholly or in part a substitution for, or an "ademption" of, the legacy. This presumption has in some cases of that class (*see particularly Hopwood v. Hopwood* (*post*, col. 2192), been carried to a great length. It was at one time thought, that the ademption in such a case would be (*prima facie*) total, although the amount of the subsequent advancement might be less than that of the legacy. But in **Pym v. Lockyer**, in which the doctrine was carefully examined and explained by Lord Cottenham, that learned judge corrected this error, and the rule established by **Pym v. Lockyer** is, that when the donor is a parent, or in *loco parentis*, and when the amount of the subsequent gift is less than that of the legacy, the mere presumption does not go beyond an ademption *pro tanto*.—p. 556.

Pym v. Lockyer, *referred to*.
Hamlet, In re (1888) 38 Ch. D. 183, 190; 57 L. J. Ch. 1007 (*supra*, col. 2182).

Pym v. Lockyer, *doctrine applied*.
Lacon, In re, Lacon v. Lacon (1891) 60 L. J. Ch. 403; [1891] 2 Ch. 482; 64 L. T. 429; 39 W. R. 514.—C.A.; *reversing* ROMER, J.

Fowkes v. Pascoe (1875) 44 L. J. Ch. 367; L. R. 10 Ch. 343; 32 L. T. 545; 23 W. R. 538.—L.J.J.; *varying* JESSEL, M.R., *applied*.
Marshal v. Crutwell (1875) L. R. 20 Eq. 328; 44 L. J. Ch. 504.—JESSEL, M.R.; **Eykyn's Trusts, In re** (1877) 6 Ch. D. 115, 121; 37 L. T. 261.—MALINS, V.-C.; **Orme, In re, Evans v. Maxwell** (1883) 50 L. T. 51.—KAY, J.

Fowkes v. Pascoe, *explained*.
Harnett, In re, Leahy v. O'Grady (1886) 17 L. R. Ir. 543.—CHATTERTON, V.-C.

Fewkes v. Pascoe, *referred to*.
Lacon, In re, Lacon v. Lacon (*supra*), *applied*.
Scott, In re, Langton v. Scott (1902) 72 L. J. Ch. 20; [1903] 1 Ch. 1, 11.—C.A. (*post*, col. 2184).

Holmes v. Holmes (1783) 1 Bro. C. C. 555; 1 Cox 39; 1 R. R. 2.—L.C., *referred to*.
Pym v. Lockyer (1841) 10 L. J. Ch. 153; 5 Myl. & Cr. 29; 5 Jur. 620.—COTTENHAM, L.C.

Holmes v. Holmes and Bengough v. Walker (1808) 15 Ves. 507; 10 R. R. 106.—M.R., *discussed*.
Chichester (Lord) v. Coventry (1867) L. R. 2 H. L. 71, 96.—H.L. (E.) (*supra*, col. 2179).

Holmes v. Holmes and Bengough v. Walker, *considered*.

Lawes, In re, Lawes v. Lawes (1881) 20 Ch. D. 81; 45 L. T. 453; 30 W. R. 33.—C.A.

JESSEL, M.R.—It is said that that case [**Holmes v. Holmes**] decided that a share in stock-in-trade was not a satisfaction of a pecuniary legacy, and, taking the report as it stands, it is impossible to say that it was not so decided. Still, I am not prepared to say that even a share in a stock-in-trade, if declared to be taken at a specific value, would not be a satisfaction of a portion; but I cannot discover from the report, which is very brief, what the facts really were. In that case a father by will gave his son 500*l.*, and afterwards took him into partnership, the stock being by the deed of partnership declared to be 3,000*l.*, to be brought in equally by the partners, and they were to be equally entitled to the profits. It is stated that "the father brought in the whole capital, and it was understood by the whole family that he meant to give his son the half of the stock," but it is not clearly stated whether this was actually done. Nor again does it appear that the stock was actually worth as much as 3,000*l.*, or what it was worth, at the time of the execution of the articles. We have not sufficient information about the circumstances to make that case a guide to us in the present case. The other case is **Bengough v. Walker**. I agree that some of the criticisms on it made by the counsel for the appellant were well founded, and the report is certainly not quite satisfactory, but I think we can find out what Sir W. Grant really meant. A father gave to his child a share of a mill, and directed it to be made up to the value of 10,000*l.*, and it was held that that was a satisfaction of a portion of 2,000*l.* The question argued was whether a share of a mill could be a satisfaction of a legacy, because a legacy must be satisfied by something of the same kind. . . . The true meaning of that is [*viz.*, what Sir W. Grant says on p. 514], that where a testator gives to a child a beneficial lease or share of works, or any other thing, and says nothing about the value, he is not to be taken to be giving it in satisfaction of a pecuniary bequest; but where he does refer to the value, the presumption of satisfaction may arise. And when he gives it as being of larger amount than the legacy and the legatee takes it, he takes it at the estimated amount, and in that case it makes no difference, whether the testator directs the thing to be sold and gives him the proceeds, or directs the thing to be taken as a specific amount. In either case he shows his intention to give a definite amount.—p. 88. *And see post*, col. 2185.

Bengough v. Walker; Lawes, In re, and Holmes v. Holmes (*supra*), *discussed*.
Vickers, In re, **Vickers v. Vickers** (1888) 37 Ch. D. 525; 57 L. J. Ch. 738; 58 L. T. 920; 36 W. R. 545.

NORTH, J.—I see nothing in the nature of the property given to prevent the rule against double portions applying, and the gift of the business to both or either of the sons being a satisfaction *pro tanto* of his or their share in the residue. Three cases cited seem to be in point, and two of them, *Bengough v. Walker*, and *Lawes, In re*, show that there is nothing in the nature of the property to rebut the presumption against double portions. The third and older case, *Holmes v. Holmes*, seems to have been, and was, recognised in *Lawes, In re*, as a special case depending on special circumstances; but in both the other cases it was recognised that a share in a business is a thing capable of being taken in satisfaction of a gift of personal estate. In *Bengough v. Walker*, which was a case of satisfaction, not ademption, the thing given by will was a share in powder mills.—p. 532. [His lordship discussed these cases at length.]

Holmes v. Holmes, *rule in, approved*.

Lawes, In re, and Bengough v. Walker, *considered*.

Vickers, In re, *observations dissented from*.

Jacques, In re, **Hodgson v. Braisby** (1902) 72 L. J. Ch. 197; [1903] 1 Ch. 267; 88 L. T. 210; 51 W. R. 229.—C.A.

Hartop v. Whitmore (1720) 1 P. Wms. 681.

—L.C., *approved*.

Platt v. Platt (1830) 3 Sim. 503; 30 R. R. 197. —SHADWELL, V.-C.

Hartop v. Whitmore and Clarke v. Burgoine (1767) 1 Dick. 353.—L.C., *reports commented on*.

Pym v. Lockyer (1841) 10 L. J. Ch. 153; 5 Myl. & Cr. 29; 5 Jur. 620.—L.C.

Ravenscroft v. Jones (1864) 33 L. J. Ch. 482; 4 De G. J. & S. 224; 9 L. T. 818; 12 W. R. 362.—L.JJ.

Referred to, **Dawson v. Dawson** (1867) L. R. 4 Eq. 504, 516.—WOOD, V.-C.; *observations applied*, **Scott, In re**, **Langton v. Scott** (1902) 72 L. J. Ch. 20; [1903] 1 Ch. 1; 87 L. T. 574; 51 W. R. 182.—C.A.

Grave v. Salisbury (Earl) (1784) 1 Bro. C. C. 425.—L.C., *referred to*.

Bengough v. Walker (1808) 15 Ves. 507; 10 R. R. 106.—GRANT, M.R.

Grave v. Salisbury (Lord), and **Powel v. Cleaver** (1789) 2 Bro. C. C. 499.—L.C.

Discussed, **Pye, Ex parte**, (*post*); *distinguished*, **Pym v. Lockyer** (1841) 5 Myl. & Cr. 29.—L.C. (*supra*).

Powel v. Cleaver, *referred to*.

Andrews v. Salt (1873) L. R. 8 Ch. 622, 640; 28 L. T. 686; 21 W. R. 616.—L.JJ.

Pye, Ex parte, **Dubost, Ex parte** (1811) 18 Ves. 140; 11 R. R. 173.—L.C., *definition in, adopted*.

Powys v. Mansfield (Lord) (1836) 7 L. J. Ch. 9; 8 Myl. & Cr. 359, 367; 1 Jur. 861.—L.C.

Pye, Ex parte, *referred to*.

Pym v. Lockyer (*supra*); **Parnell v. Hingston** (1856) 3 Sm. & G. 337; 2 Jur. (N.S.) 854; 4 W. R. 794.—WOOD, V.-C.; **Chichester (Lord) v. Coventry** (1867) L. R. 2 H. L. 71, 83.—H.L. (E.) (*supra*, col. 2179); **Bennet v. Bennet** (1879) 10 Ch. D. 474; 40 L. T. 378; 27 W. R. 573.—JESSEL, M.R.; **Montagu v. Sandwich (Earl)** (1886) 32 Ch. D. 525, 537 (*supra*, col. 2179); **Harding v. Harding** (1886) 55 L. J. Q. B. 462; 17 Q. B. D. 142; 34 W. R. 775.—Q.B.D.

Pye, Ex parte, *definition in, discussed*.

Hamlet, In re (1888) 38 Ch. D. 183, 190 (*supra*, col. 2182).

Pye, Ex parte, *referred to*.

Lacon, In re. [1891] 2 Ch. 482.—C.A. (*supra*, col. 2183); **Jacques, In re** (*supra*, col. 2185).

Montefiore v. Guedalla (1859) 29 L. J. Ch. 65; 1 De G. F. & J. 93; 6 Jur. (N.S.) 329; 1 L. T. 251; 8 W. R. 53.—L.C. and L.JJ., *distinguished*.

Meinertzen v. Walters (1872) L. R. 7 Ch. 670; 41 L. J. Ch. 801; 27 L. T. 326; 20 W. R. 918.

JAMES, L.J.—The origin of the rule as applied to legacies is this, that where a father makes a provision for his children leaving them legacies, and afterwards gives a portion to one of those children, it is supposed from what is known to be the ordinary intention of testators, that he did not intend to make any real difference between his children, and that the child advanced in his lifetime, takes the advance *pro tanto* by way of ademption. No doubt that has been necessarily applied to the advantage of residuary legatees, because where the legacy fails, or is satisfied, or is adeemed from the very nature of the case, the residuary legatee who takes his chance gets the benefit of that as he would the burden of any diminution. That is the state of the law with regard to legacies. It is true the rule was applied to a share in a residue in the case of *Montefiore v. Guedalla*, which was a case in which I observe that Knight Bruce, L.J. expressed great doubt as to the law, but he was satisfied in concurring in the decision, because the common sense of the thing was in favour of the decision in that particular case. But what was done in *Montefiore v. Guedalla*, in my view of it, was not an application of any such view as is here contended for, but was an application of the general principle which was supposed to underlie the rule, and of which the rule was only an application and an illustration. The principle is, that it must be presumed that a father intends equality between the children; and, if he leaves the residue to the children, and afterwards makes an advance to one of the children, the general rule is, that such advance must be brought into hotch-pot, so that the disposition of his fortune, by which he intended to introduce equality among his children, may not be altered.—p. 672.

Montefiore v. Guedalla and Meinertzen v. Walters, *referred to*.

Fowkes v. Pascoe (1875) 44 L. J. Ch. 367; L. R. 10 Ch. 343, 351; 32 L. T. 545; 23 W. R. 538.—JAMES and MELLISH, L.JJ.

Meinertzen v. Walters, *doctrine applied*.

Stewart, In re, **Stewart v. Stewart** (1880) 49 L. J. Ch. 769; 15 Ch. D. 539, 547; 43 L. T. 370; 29 W. R. 275.—JESSEL, M.R.

Meinertzen v. Walters, *commented on.*

Limpus v. Arnold (1884) 15 Q. B. D. 300; 54 L. J. Q. B. 85; 33 W. R. 537.—C.A. BRETT, M.R. and LINDLEY, L.J.; COTTON, L.J. *dissenting*. BRETT, M.R.—In *Meinertzen v. Walters* the contention of the appellant (the testator's widow) was outrageous, as was pointed out by James L.J.: in *Stewart v. Stewart* (*supra*) it does not appear that the will contained any provision equivalent to the bequest to the widow in the present case.—p. 301.

Meinertzen v. Walters, *principle explained.*

Stephens v. Stephens (1886) 19 L. R. Ir. 190.—CHATTERTON, V.-C.

Pole v. Somers (Lord) (1801) 6 Ves. 309.—L.C., *referred to.*

Monck v. Monck (Lord) (1810) 1 Ball & B. 298; 12 R. R. 33.—MANNERS, L.C.

Pole v. Somers (Lord) and Hinchcliffe v. Hinchcliffe (1797) 3 Ves. 516; 4 R. R. 89.—M.R.

Explained and applied, *Weall v. Rice* (1831) 2 Russ. & M. 251, 263; 9 L. J. (o.s.) Ch. 16; 34 R. R. 83.—M.R.; *discussed*, *Hall v. Hill* (1841) 1 Dr. & War. 94; 1 Con. & L. 120; 4 Ir. Eq. R. 27.—SUGDEN, L.C.

Davis v. Chambers, 2 Jur. (N.S.) 1158; 5 W. R. 39.—STUART, V.-C.; *reversed*, (1857) 3 Jur. (N.S.) 297; 5 W. R. 245.—L.C.

Bethell v. Abraham (1874) 3 Ch. D. 590, n.—JESSEL, M.R.; *affirmed*, 31 L. T. 112; 22 W. R. 745.—L.J., *referred to.*

Mayd v. Field (1876) 45 L. J. Ch. 699; 3 Ch. D. 587; 34 L. T. 614; 24 W. R. 660.—JESSEL, M.R.; *Att.-Gen. v. Murray* (1887) 20 L. R. Ir. 124.—C.A.; *reversing* EX. D.

Richman (or Rickman) v. Morgan (1779) 1 Bro. C. C. 63; (1788) 2 Bro. C. C. 394.—L.C., *discussed.*

Thynne (Lady) v. Glengall (Earl) (1848) 2 H. L. Cas. 131; 12 Jur. 805.—H.L. (E.); *Cooper v. Cooper* (1873) L. R. 8 Ch. 813, 825 (*post*).

Twisden v. Twisden (1804) 9 Ves. 413; 7 R. R. 254.—L.C., *considered.***Leake v. Leake** (1805) 10 Ves. 477; 11 R. R. 245, n.—L.C.; **Onslow v. Michell** (1812) 18 Ves. 490; 11 R. R. 340.—M.R.; and **Golding (or Goolding) v. Haverfield** (1824) 13 Price 593; McClell. 345.—EX., *commented on adversely.*

Cooper v. Cooper (1873) 43 L. J. Ch. 158; L. R. 8 Ch. 813; 29 L. T. 321; 21 W. R. 921.—C.A.; *partly affirming* 28 L. T. 87; 21 W. R. 501.—JESSEL, M.R.

SELBORNE, L.C.—The other cases [of this class] upon which decisions have been given or opinions expressed, have been cases in which—I am speaking of the strongest of them—you have such words as “give or advance,” “give or settle,” which were words that in some of those cases were taken to include what I will admit they might, by possibility in some contexts mean, execute in the lifetime of an instrument which will operate when it comes into operation as a settlement or as a gift. And Sir W. Grant, in *Onslow v. Michell*, laid no inconsiderable stress upon the force which he thought in that respect

might be ascribed to the words “give and settle,” which you have not in this instrument. The same, or similar words, also occurred, I will not say in every one of the cases which have been cited before us, but in almost all of them, and in all those upon which material stress was laid, particularly *Golding v. Haverfield*, in the Court of Ex. and in the original case, which in other respects also was distinguishable, of *Richman v. Morgan* (*supra*). In that state of things I think we should be extending much further than they have ever yet been carried, and to a case in which the natural and proper meaning of the words used would make it unfit to apply them, even if they were right, authorities which, when examined, are in themselves almost remarkable examples of the extraordinary manner in which the use of precedents in the Courts of this country causes the Courts, first of all, to slide into manifest error, and afterwards to follow that error upon the notion that they are bound by it. The history of the doctrine relied upon as being now established by the authorities is this. In *Richman v. Morgan*, before Lord Thurlow, there were words which said that if, during a man's life, or at his death, he should do a certain thing, it should have a certain effect; the word “give” being there used, and not “advance” or “pay.” It was perfectly manifest that in that case what was done by the will took effect at the testator's death, and was within the plain words of the instrument, and nothing was decided in that case or even said, as far as I can see, which would lead you to anything farther. Then came *Twisden v. Twisden*, in 1804 before Lord Eldon, in which *Richman v. Morgan* was referred to, and Lord Eldon, evidently to my mind, expressed on the whole an opinion to the effect that, notwithstanding what had been suggested tentatively in the argument, and not confidently at all on this subject, the natural interpretation of these words was the right one, and that a thing was not to be held to be done during the lifetime of a man which only took effect after his death. Lord Eldon there said (at p. 426): “If the law is that what is to be taken under a will is not an advancement in the life of the party, it is very difficult to say that what is taken under an intestacy shall be an advancement. And though it is true the will must be made in the life, it is equally true nothing is advanced or given to the party to take till after the death.” The expression of opinion, as far as it goes, is this, that he first concludes that what is taken under a will is not an advancement in the life of the party, and then says that *a fortiori* what is taken by way of intestacy is not an advancement in the life of the party, which is the particular point decided in that case. Then came *Leake v. Leake* in the very next year, before Lord Eldon, and in that case Sir S. Romilly and other counsel for the plaintiffs, who were interested in contending that there was no satisfaction, said that they did not mean to argue it. The words are: “The plaintiffs cannot contend that a provision by will must not be considered a provision given in the lifetime of the testator after *Richman v. Morgan*, and *Twisden v. Twisden*, though if that distinction can be maintained, two of these children, G. and A., had not being advanced in the life of their father, and have no provision except by the will.” And then they went on with other arguments, which prevailed in the result, and upon which, for reasons which I do not

feel called upon to attempt to explain, they preferred to rely. But the only thing that is material for us, that those eminent and learned counsel said they could not contend that a provision by will must not be considered as if it were given in the lifetime of the testator after *Rickman v. Morgan* and *Twisden v. Twisden*. We have referred to *Rickman v. Morgan* and *Twisden v. Twisden*, and we find in those cases no warrant whatever for that proposition. Then Lord Eldon, in *Leake v. Leake*, the matter not having been argued before him, and having the year before expressed a different opinion in *Twisden v. Twisden*, is reported to have said (at p. 489): "It is truly said that a provision by will is to be considered an advancement in the lifetime to the party. That has been repeatedly decided, and is not to be disturbed." It had been so put before him by counsel, but the matter had not been argued, and I suppose even Lord Eldon was capable, when counsel treated a thing as not arguable, but as decided, of placing confidence in that statement. The learned reporter has been unable to find anything but *Rickman v. Morgan*, and *Twisden v. Twisden*, to support that doctrine, and it is a very remarkable thing that, when Lord Eldon came to deliver his final opinion in that very case, he used language which draws the distinction, for he says (at p. 492): "My opinion, rather than a judgment, upon this case is, that, according to the real intention and legal effect of all the instruments, money advanced by the father, as preferment in marriage, or on any other occasion, is an advancement within the proviso; that the devise and bequest of the real and personal estate is not in this case an advancement in the life of the father." . . . He had determined expressly, as I understand him, that of two constructions which were possible—that narrower construction being one, and a wider construction which would take in an advancement not only upon marriage, which must be in the lifetime of the father, but upon any other occasion—the larger was to be preferred, and so it had been argued before him; and he found that an intention that the provision actually made by will should not be taken in satisfaction of the portion was in that case sufficiently manifested. It was not therefore in any way whatever, in any point of view, a necessary ingredient in the judgment that Lord Eldon should entertain or express the opinion he did on that particular point. Sir W. Grant examined the matter afterwards in *Ouslow v. Mitchell*, in which, as I have said, he relied on the words "give and settle," and said he could find no foundation for the doctrine except those two cases of *Rickman v. Morgan* and *Twisden v. Twisden*, which, however, evidently were not authorities for it; but Sir W. Grant said that he thought it was involved in the decision [in *Leake v. Leake*] not adverting to the fact that it was not necessary in that case that the advancement, in order to be a satisfaction, should have been made on the occasion of the marriage in the lifetime of the father, because the settlement contained the important additional words "or otherwise provided for." The particular decision, after all, of Sir W. Grant, is rested on the force of the words, "settle and give." *Golding v. Haverfield* is also rested on similar words, and, I must say, upon a somewhat exaggerated weight given, not merely to the extra-judicial dictum of Lord Eldon [in *Leake v. Leake*], but to the fact that the counsel for

the plaintiff in that case did not argue the point.—p. 161.

Folkes v. Western (1804) 9 Ves. 456; 7 R. R. 271.—M.R., *approved*.

Noel v. Walsingham (Lord) (1824) 2 Sim. & S. 99; 3 L. J. (O.S.) Ch. 12; 23 R. R. 164.—V.-C.

Folkes v. Western, *referred to*.

Bray v. Bree (1834) 2 Cl. & F. 453.—H.L. (E.).

Folkes v. Western, *followed*.

Noel v. Walsingham (Lord), *referred to*.

Brownlow v. Meath (Earl) (1840) 2 Dr. & Wal. 674; 2 Ir. Eq. R. 383.—SUGDEN, L.C.

Folkes v. Western, *commented on*.

Douglas v. Willes (1849) 7 Hare 318.—WIGRAM, V.-C.

Folkes v. Western, *upheld*.

Lee v. Head (1855) 1 K. & J. 620; 24 L. J. Ch. 569; 3 Eq. R. 1046; 1 Jur. (N.S.) 722; 3 W. R. 591.

WOOD, V.-C.—Whatever might have been the result of my consideration of *Folkes v. Western*, it would have been difficult for me to depart from the view taken of that decision by Wigram, V.-C., in *Douglas v. Willes* (*supra*), that, as the point was decided so long ago by Sir W. Grant, and the decision has been sanctioned in *Noel v. Walsingham* (Lord) (*supra*), it would be improper for me, even if I differed from it on principle, to do more than indicate my dissent, and leave it to be considered by a higher tribunal. But I cannot come to the conclusion that the decision in *Folkes v. Western* is wrong in principle, although perhaps some of the reasons given for the decision may not satisfy my judgment, if I may say so with great submission with respect to a case decided by so great an authority as Sir W. Grant.—p. 630.

Folkes v. Western and *Lee v. Head*, *not applied*.

Foster v. Cautley (1855) 6 De G. M. & G. 55; 2 Jur. (N.S.) 25.—CRANWORTH, L.C.

Folkes v. Western, *approved*.

Lee v. Head, *followed*.

Noblett v. Litchfield (1858) 7 Ir. Ch. R. 575.—L.C.

Lee v. Head and *Noblett v. Litchfield*, *principle explained*.

Ford v. Tynte (1864) 2 H. & M. 324.—WOOD, V.-C.

Lee v. Head and *Ford v. Tynte*, *applied*.

King v. King (1884) 13 L. R. Ir. 531.—CHATTERTON, V.-C.

Douglas v. Willes (*supra*); **Samuel v. Ward** (1856) 22 Beav. 347; 2 Jur. (N.S.) 962; 4

W. R. 540.—M.R.: **Noel v. Walsingham** (Lord) (*supra*); and **Medcalf v. Ives** (1737) 1 Atk. 63.—L.C., *discussed*.

Cox v. Belitha (1725) 2 P. Wms. 272; 2 Wils. 272.—L.C.C.; **Tomkyns v. Ladbroke** (1755) 2 Vcs. sen. 591.—L.C.; and **Garon v. Trippet** (1753) Ambbl. 189, *referred to*.

Noblett v. Litchfield (1858) 7 Ir. Ch. R. 575.—NAPIER, L.C.

Douglas v. Willes and **Samuel v. Ward**, *discussed*.

Bannatyne v. Ferguson (1895) [1896] 1 Ir. R. 149.—C.A.

- Rosewell v. Bennett** (1744) 3 Atk. 77.—L.C., *referred to*.
- Monck v. Monck** (Lord) (1810) 1 Ball & B. 298; 12 R. R. 33.—MANNERS, L.C.
- Rosewell v. Bennett and Biggleston v. Grubb** (1740) 2 Atk. 48.—L.C., *discussed*.
- Hall v. Hill** (1841) 1 Dr. & War. 94; 1 Con. & L. 120; 4 Ir. Eq. R. 27.—SUGDEN, L.C.
- Ellison v. Cookson** (1790) 1 Ves. 100; 2 Cox 220; 3 Bro. C. C. 61.—L.C.; S. C., 2 Bro. C. C. 306.—M.R.; and **Debeze v. Mann** (1787) 2 Bro. C. C. 165, 519; 1 Cox 346; 1 R. R. 57.—L.C., *discussed*.
- Trimmer v. Bayne** (1802) 7 Ves. 508; 6 R. R. 173.—ELDON, L.C.
- Debeze v. Mann.**
Followed, **Robinson v. Whitley** (1804) 9 Ves. 577.—M.R.; **Wallace v. Pomfret** (1805) 11 Ves. 542; 8 R. R. 241.—L.C.; **Monck v. Monck** (Lord) (*supra*); *discussed*, **Hall v. Hill** (*supra*); **Ferris v. Goodburn** (1858) 27 L. J. Ch. 574; 4 Jur. (N.S.) 847; 6 W. R. 485.—WOOD, V.-C.
- Shudal v. Jekyll** (1742) 2 Atk. 516.—L.C.
Followed, **Wallace v. Pomfret** (*supra*); *discussed*, **Hall v. Hill** (*supra*); **Pym v. Lockyer** (*post*).
- Robinson v. Whitley** (*supra*), *discussed*.
Pym v. Lockyer (1841) 10 L. J. Ch. 153; 5 Myl. & Cr. 29; 5 Jur. 620.—COTTENHAM, L.C.
- Robinson v. Whitley and Hartopp v. Hartopp** (1810) 17 Ves. 184; 11 R. R. 48.—M.R., *referred to*.
- Leighton v. Leighton** (1874) 43 L. J. Ch. 594; L. R. 18 Eq. 458, 469; 22 W. R. 727.—HALL, V.-C.
- Booker v. Allen** (1831) 2 Russ. & M. 270; 9 L. J. (O.S.) Ch. 30; 34 R. R. 91.—M.R., *followed*.
- Roome v. Roome** (1744) 3 Atk. 181.—M.R. for L.C., *explained*.
- Powys v. Mansfield** (Lord) (1836) 7 L. J. Ch. 9; 3 Myl. & Cr. 359, 376; 1 Jur. 861.—L.C.
- Booker v. Allen; Weall v. Rice** (1831) 2 Russ. & M. 251; 9 L. J. (O.S.) Ch. 116; 34 R. R. 83.—M.R.; and **Lloyd v. Harvey** (1832) 2 Russ. & M. 310.—M.R., *disapproved*.
- Hall v. Hill** (1841) 1 Dr. & War. 94; 1 Con. & L. 120; 4 Ir. Eq. R. 27.—SUGDEN, L.C.
- Weall v. Rice, discussed.**
Thynne v. Gleugall (Earl) (1848) 2 H. L. Cas. 131 (*supra*, col. 2178); **Chichester** (Lord) v. **Coventry** (1867) L. R. 2 H. L. 71, 83 (*supra*, col. 2179); **Russell v. St. Aubyn** (1876) 2 Ch. D. 398, 405 (*supra*, col. 2178); **Tussaud's Estate**, *In re*, **Tussaud v. Tussaud** (1878) 9 Ch. D. 363, 368.—C.A. (*supra*, col. 2181); **Battersby's Estate**, *In re* (1887) 19 L. R. 1r. 359.—MONROE, J.
- Weall v. Rice, referred to.**
Johnstone v. Haviland [1896] A. C. 95; 23 Rettie 7.—H.L. (SC.).
- HALSBURY, L.C.**—The English law, of course, is now established, as Lord Wensleydale said in **Kippen v. Darley** (*supra*, col. 2178): "The rule is now by a long course of decisions firmly and fully established and cannot be disputed." He adds, what I entirely concur with, "and any comment upon it would now be worse than useless." But after the decision of **Kippen v. Darley** it is no longer competent to your lordships to assume
- O.C.
- that the rule of law—the presumption arising from what are called double portions—is applicable to the law of Scotland. That was a decision upon that very question in this House. . . . Now, although the two sets of provisions are very different, both in their application and in the decisions upon them, there is one observation which was made by Sir J. Leach with reference to the English rule which is, to my mind, applicable to the Scottish rule. Sir J. Leach said, in **Weall v. Rice**: "It is not possible to define what are to be considered as slight differences between two provisions." "Slight differences," he adds—and one cannot help observing that after the learned judge had said it is not possible to define, he begins with something like a definition—"are such as, in the opinion of the judge, leave the two provisions substantially of the same nature; and every judge must decide that question"—of what are slight differences—"for himself." My lords, I believe that to be perfectly true as applicable to the construction of the instrument now under your lordships' consideration, and although I propose to mention one or two differences between the two provisions, I protest against anybody hereafter arguing from the particular provisions to which I refer that I am laying down, or affecting to lay down, any general proposition which governs other instruments.—p. 100.
- Trimmer v. Bayne** (1802) 7 Ves. 508; 6 R. R. 173.—L.C., *discussed*.
Monck v. Monck (Lord) (*supra*, col. 2191); **Wharton v. Durham** (Lord) (1836) 3 Cl. & F. 146.—H.L. (E.) (*supra*, col. 2178).
- Trimmer v. Bayne, followed.**
Powys v. Mansfield (Lord) (*supra*, col. 2191).
- Trimmer v. Bayne, referred to.**
Hall v. Hill (*supra*, col. 2191); **Pym v. Lockyer** (*supra*, col. 2191).
- Trimmer v. Bayne, applied.**
Dawson v. Dawson (1867) L. R. 4 Eq. 504, 514.—WOOD, V.-C.; **Cooper v. Macdonald** (1873) L. R. 16 Eq. 258, 268 (*supra*, col. 2179); **Stevenson v. Masson** (1873) 43 L. J. Ch. 134; L. R. 17 Eq. 78, 84; 22 W. R. 150.—BACON, V.-C.
- Trimmer v. Bayne, discussed.**
Leighton v. Leighton (*supra*, col. 2191).
- Trimmer v. Bayne, referred to.**
Griffith v. Bourke (1837) 21 L. R. Ir. 92.—PORTER, M.R.
- Upton v. Prince** (1735) Cas. t. Talb. 71.—L.C., *referred to*.
Taylor v. Cartwright (1872) 41 L. J. Ch. 529; L. R. 14 Eq. 167, 176; 26 L. T. 571; 20 W. R. 603.—WICKENS, V.-C.
- Upton v. Prince, distinguished.**
Peacock, In re (1872) L. R. 14 Eq. 236; 27 L. T. 472.—MALINS, V.-C.
- Upton v. Prince, applied.**
Hopwood v. Hopwood (1859) 29 L. J. Ch. 747; 7 H. L. Cas. 728, 741; 5 Jur. (N.S.) 897.—H.L. (E.); *reversing* (1857) 26 L. J. Ch. 292; 3 Jur. (N.S.) 549; 5 W. R. 331.—KNIGHT BRUCE, L.J.; **TURNER, L.J. doubting**; and (1856) 22 Beav. 488; 2 Jur. (N.S.) 747.—M.R. See *post*, col. 2193.

Hopwood v. Hopwood (*supra*), referred to.
Pollock, In re, **Pollock v. Worrall** (1885) 54 L. J. Ch. 489; 28 Ch. D. 552; 52 L. T. 718.—C.A. (*see supra*, col. 2183).

POWERS.

1. CREATION.
2. DELEGATION.
3. EXTINGUISHMENT AND SUSPENSION.
4. LAPSE AND INTERESTS UNDISPOSED OF.
5. EXECUTION IN GENERAL.
6. WHO MAY EXECUTE.
7. EXECUTION BY WHAT INSTRUMENT OR ACT.
8. EXECUTION BY DEVISE OR BEQUEST.
9. EXTENT OF EXECUTION.
10. DEFECTIVE AND NON-EXECUTION.
11. EXCLUSIVE AND ILLUSORY APPOINTMENTS.
12. FRAUDULENT APPOINTMENTS.
13. EXCESSIVE EXECUTION.
14. LIMITED POWERS.
15. POWERS OF REVOCATION AND NEW APPOINTMENT.
16. POWERS OF CHARGING AND JOINTURE.
17. POWERS OF SALE AND MORTGAGE.
18. POWER OF LEASING.

1. CREATION.

Cooke v. Briscoe (1838) 1 Dr. & Wal. 596.—PLUNKET, L.C., *considered*.
Peover v. Hassall (1861) 30 L. J. Ch. 314; 1 J. & H. 341, 348; 7 Jur. (N.S.) 406; 4 L. T. 118; 9 W. R. 399.—WOOD, V.-C. *See judgment at length*.

Peover v. Hassall, *explained and distinguished*.
Minton v. Kirwood (1868) 37 L. J. Ch. 606; 1 R. 3 Ch. 614; 18 L. T. 781; 16 W. R. 991.—WOOD and SELWYN, L.JJ.

Gould v. Gould (1856) 25 L. J. Ch. 642; 2 Jur. (N.S.) 484; 4 W. L. 516.—STUART, V.-C., *distinguished*.
Wood v. Wood (1870) 39 L. J. Ch. 790; 1 R. 10 Eq. 220; 23 L. T. 295.

ROMILLY, M.R.—The question here is whether the general power could be exercised during coverture. I think it could. The general rule is that a general power is not to be cut down to a limited one, except by something in the settlement showing a clear intention that it is to be cut down. In *Bristow v. Warde* (1794) 2 Ves. 336; *post*, col. 2264 and *Gould v. Gould* it was considered that there was sufficient to show such an intention. Here I think there is an indication of a contrary one.—p. 791.

Robinson v. Dugate (1690) 2 Vern. 181.—M.L., *commented on*.
Hansen v. Miller (1844) 9 Jur. 209.—SHADWELL, V.-C.; *re-argued and affirmed*, 9 Jur. 352.—V.-C.

Robinson v. Dugate, *commented on*.
Hixon v. Oliver (1806) 13 Ves. 108; 9 R. R. 148.—L.C., *distinguished*.
Buckland v. Barton (1793) 2 H. Bl. 136.—C.P., *referred to*.
Bai Motivahoo v. Bai Mamooobai (1897) L. R. 24 Ind. App. 93, 103.—P.C. LORDS WATSON, HOBHOUSE, DAVEY and SIR R. COUCH.

Forbes v. Ball (1817) 3 Meriv. 437.—M.R., *discussed*.
Lownds v. Lownds (1827) 1 Y. & J. 445.—ALEXANDER, C.B.

Forbes v. Ball, *discussed*.
Davies v. Thorns (1849) 18 L. J. Ch. 212; 3 De G. & Sm. 347; 13 Jur. 383.—KNIGHT BRUCE, V.-C.

Forbes v. Ball, *followed*.
Brierley, In re, **Brierley v. Brierley** (1894) 12 R. 55; 43 W. R. 36.—C.A. HERSCHELL, L.C., LINDLEY and DAVEY, L.JJ.

Forbes v. Ball, *explained*.
Weekes' Settlement, In re (1897) 66 L. J. (Ch. 179; [1897] 1 Ch. 289; 76 L. T. 112; 45 W. R. 265.—ROMER, J.
 [His lordship said that that case was decided on the ground that the words in the will raised a trust for the wife's relations.]

Forbes v. Ball, *discussed and not applied*.
Hall, In re, **Sheil v. Clark** [1899] 1 Ir. R. 308, 314.—PORTER, M.R.

Hales v. Margerum (1796) 3 Ves. 299.—M.R., *explained*.
Hawthorn v. Sheddon (1856) 25 L. J. Ch. 833; 3 Sm. & G. 293; 2 Jur. (N.S.) 749.

STUART, V.-C.—The principle of the decision in that case was, that the property passed, not by the execution of the power at all, for it was held that there was no power, but as an estate, and the words supposed to create a power were a mere qualification of an estate, introduced in order to exclude the marital right.—p. 837.

Mortlock's Trust, In re (1857) 26 L. J. Ch. 671; 3 K. & J. 456; 5 W. R. 748.—WOOD, V.-C., *discussed and not followed*.
Freeland v. Pearson (1867) 36 L. J. Ch. 374; 1 L. R. 3 Eq. 658, 662; 15 W. R. 419.—ROMILLY, M.R.

Mortlock's Trust, In re, *followed*.
Humble v. Bowman (1877) 47 L. J. Ch. 64.—HALL, V.-C.

Mortlock's Trust, In re, *referred to*.
Long v. Lane (1885) 17 L. R. Ir. 11, 23.—PORTER, M.R.; *affirmed*, (1886).—C.A.

Mortlock's Trust, In re, *distinguished*.
Smith v. Smith (1887) 19 L. R. Ir. 514, 526.—PORTER, M.R.

Mortlock's Trust, In re, *discussed*.
Parnell v. Boyd (1895) [1896] 2 Ir. R. 571, 586.—Q.B.D. (*see judgment of JOHNSON, J., dissenting from the majority on the question of construction*); Q.B.D. *affirmed*, (1896).—C.A. ASHBOURNE, L.C., FITZGIBBON, BARRY and WALKER, L.JJ.

Mortlock's Trust, In re, *referred to*.
Bai Motivahoo v. Bai Mamooobai (1897) L. R. 24 Ind. App. 93, 103.—P.C.

Weale v. Ollive (1863) 32 Beav. 421.—M.R.: and **Southouse v. Bate** (1851) 16 Beav. 132.—M.R., *referred to*.
Long v. Lane (1885) 17 L. R. Ir. 11, 23.—PORTER, M.R.; *affirmed*, (1886).—C.A.
Tomlinson v. Dighton (1711) 1 P. Wms. 149.—PARKER, C.J., *distinguished*.
Doc d. Thorley v. Thorley (1809) 10 East 438; 10 R. R. 352.—K.B.
Tomlinson v. Dighton, distinguished.
Freeland v. Pearson (1867) 36 L. J. Ch. 374; L. R. 3 Eq. 658, 662; 15 W. R. 419.
ROMILLY, M.R.—In **Tomlinson v. Dighton** the case was this: John Tomlinson, seised in fee of the land in question, devises the premises to his wife Margaret for her life, and then to be at her disposal, provided it be to any of her children if living: if not, to any of his kindred that his wife should please. That is perfectly different from the words here, which are, "at her decease to make a distribution and disposal." There the property was to be at her disposal any way, and not merely at her decease.—p. 375.
Tomlinson v. Dighton, discussed.
Freeland v. Pearson, disapproved.
Humble v. Bowman (1877) 47 L. J. Ch. 62.—HALL, V.-C.
Barford v. Street (1809) 16 Ves. 135.—M.R., *explained*.
Hughes v. Wells (1852) 9 Harc 749, 768; 16 Jur. 927.—V.-C.
Barford v. Street, distinguished.
Smith v. Smith (1887) 19 L. R. Ir. 514, 523.—PORTER, M.R.
Howorth v. Dewell (1860) 29 Beav. 18; 6 Jur. (N.S.) 1360; 9 W. R. 27.—M.R., *applied*.
Lambe v. Eames (1870) 40 L. J. Ch. 15; L. R. 10 Eq. 271.—MALINS, V.-C.; *affirmed*, (1871) 40 L. J. Ch. 477; L. R. 6 Ch. 597; 25 L. T. 175; 19 W. R. 659.—L.JJ.
Howorth v. Dewell, referred to.
Ahearne v. Ahearne (1881) 9 L. R. Ir. 144, 148.—PORTER, M.R.
Howorth v. Dewell, referred to.
Long v. Lane (1885) 17 L. R. Ir. 11, 23.—PORTER, M.R.; *affirmed*, (1886).—C.A.
Howorth v. Dewell, distinguished.
Smith v. Smith (1887) 19 L. R. Ir. 514, 526.—PORTER, M.R.
Archibald v. Wright (1838) 7 L. J. Ch. 120; 9 Sim. 161; 2 Jur. 759.—V.-C., *referred to*.
Humble v. Bowman (1877) 47 L. J. Ch. 62.—HALL, V.-C.
Archibald v. Wright, reasoning in, applied.
Flower, In re, Edmonds v. Edmonds (1885) 55 L. J. Ch. 200; 53 L. T. 717; 34 W. R. 149.—NORTH, J.
Wallis v. Taylor (1836) 6 L. J. Ch. 68; 8 Sim. 241.—V.-C., *principle not applied*.
Johnson v. Routh (1857) 27 L. J. Ch. 305; 3 Jur. (N.S.) 1048; 6 W. R. 6.—KINDERSLEY, V.-C.
Harding v. Glyn (1739) 1 Atk. 469; 5 Ves. 501; 4 R. R. 334, 338.—M.R., *explained*.
Brown v. Higgs (1803) 8 Ves. 561, 570; 4 R. R. 323.—ELDON, L.C.

Harding v. Glyn, discussed.
Mahon v. Savage (1803) 1 Sch. & Lef. 111.—REDESDALE, L.C.

Harding v. Glyn, applied.
Birch v. Wade (1814) 3 V. & B. 198; 13 R. R. 181.—GRANT, M.R.

Harding v. Glyn, explained.
Burrough v. Philcox (1840) 5 Myl. & Cr. 72; 5 Jur. 453.

COTTENHAM, L.C.—**Harding v. Glyn** was a case in which there was a gift to the donee of the power, of the property itself, with a desire as to the mode of disposing of it, amounting to a trust; but that declaration of trust only ascertained the class amongst which it was to be exercised; it was "amongst such of my own relations as she shall think most deserving and approve of."—p. 91.

Harding v. Glyn, referred to.
Salisbury v. Denton (1857) 3 K. & J. 529; 3 Jur. (N.S.) 740.—WOOD, V.-C.

Harding v. Glyn, referred to.
Bernard v. Minshall (1859) 28 L. J. Ch. 649; Johns. 276; 5 Jur. (N.S.) 931.—WOOD, V.-C.

Harding v. Glyn, discussed.
Bond, In re, Cole v. Hawes (1876) 46 L. J. Ch. 488; 4 Ch. D. 238; 25 W. R. 95.—HALL, V.-C.

Harding v. Glyn, referred to.
Wilson v. Luguild (1883) 53 L. J. Ch. 52; 24 Ch. D. 244, 249; 49 L. T. 124; 31 W. R. 945.—CHITTY, J. (*see post*, col. 2272); Stanger, *In re, Moorsom v. Tate* (1891) 60 L. J. Ch. 326; 64 L. T. 693; 39 W. R. 455.—CHITTY, J.: Brierley, *In re, Brierley v. Brierley* (1894) 8 R. 55; 43 W. R. 36.—C.A.

Harding v. Glyn, discussed.
Deakin, In re, Starkey v. Eyres (1894) 63 L. J. Ch. 779; [1894] 3 Ch. 565, 576; 8 R. 702; 43 W. R. 70.—STIRLING, J.

Harding v. Glyn, referred to.
Hall, In re, Sheil v. Clark [1899] 1 Ir. R. 308, 314.—M.R.

Harding v. Glyn, applied.
Patterson, In re, Dunlop v. Greer (1898) [1899] 1 Ir. R. 324, 335.—PORTER, M.R.

Robinson v. Smith (1821) 6 Madd. 194.—V.-C., *discussed*.
Moore v. Ffoliot (1887) 19 L. R. Ir. 499, 506.—PORTER, M.R.

2. DELEGATION.

Ingram v. Ingram (1740) 2 Atk. 88.—L.C., *referred to*.

Carr v. Atkinson (1872) 41 L. J. Ch. 785; L. R. 14 Eq. 397; 26 L. T. 680; 20 W. R. 620.—M.R., *followed*.

Williamson v. Farnell (or Farwell) (1887) 56 L. J. Ch. 645; 35 Ch. D. 128, 136; 56 L. T. 824; 36 W. R. 37.—NORTH, J. [*See judgment at length, in which his lordship comments on and explains the observations in Sugden on Powers* (8th ed. p. 815, pl. 36)].

3. EXTINGUISHMENT AND SUSPENSION.

Walker v. Armstrong (1856) 25 L. J. Ch. 402; 21 Beav. 284; 2 Jur. (N.S.) 221; 4 W. R. 280.—M.R.; *see S. C. on appeal*, 25

L. J. Ch. 738; 8 De G. M. & G. 531; 2 Jur. (N.S.) 959; 4 W. R. 770.—L.J., *explained*.
 Cowper v. Mantell (No. 1) (1856) 22 Beav. 223; 2 Jur. (N.S.) 475; 4 W. R. 500.
 ROMILLY, M.R.—In *Walker v. Armstrong* I had to consider whether a will could operate as the execution of a power not in existence at the date of the will, but with the strongest desire to come to that conclusion and though great injustice was the consequence, I came to the conclusion that it could not so operate.—p. 229.
Walker v. Armstrong, explained.
 Rake v. Hooper (1900) 83 L. T. 669.—KEKEWICH, J.
Walker v. Armstrong and Cowper v. Mantell (No. 1), *referred to*.
 Hayes, In re, Turnbull v. Hayes (1901) 70 L. J. Ch. 770; [1901] 2 Ch. 529, 533; 85 L. T. 85; 49 W. R. 659.—C.A.
Weller v. Ker (1866) L. R. 1 H. L. Sc. 11; 15 L. T. 97.—H.L. (SC.), *referred to*.
 Chambers v. Smith (1878) 3 App. Cas. 795, 816.—H.L. (SC.).
Weller v. Ker, applied.
 Eyre, In re, Eyre v. Eyre (1883) 49 L. T. 259.—KAY, J.; Saul v. Pattinson (1886) 55 L. J. Ch. 831; 54 L. T. 670; 34 W. R. 561.—PEARSON, J.
Eyre, In re, Eyre v. Eyre and Saul v. Pattinson, distinguished.
 Somes, In re, Somes v. Somes (1896) 65 L. J. Ch. 262; [1896] 1 Ch. 250, 255; 74 L. T. 49; 44 W. R. 236.
 CHITTY, J.—Those [*Eyre, In re, and Saul v. Pattinson*] were both cases of trustees who held a power coupled with a duty, and a fiduciary power in the full sense of the term; and it was held that neither before nor after the passing of the Conveyancing Act, 1881, s. 52, were trustees justified in getting rid of such a trust. I have nothing to say as to those decisions, except that they have no application to the present case.—p. 264.
Doe d. Coleman v. Britain (1818) 2 B. & Ald. 93.—K.B., *discussed*.
 Langton v. Horton (1842) 11 L. J. Ch. 299; 1 Hare 549, 563; 6 Jur. 910.—WIGRAM, V.-C.
Doe d. Coleman v. Britain, applied.
 Sprague, In re, Miley v. Cape (1880) 43 L. T. 236.—MALINS, V.-C.
West v. Berney (1819) 1 Russ. & M. 431; 32 Il. R. 237.—M.R.
Confirmed, Bickley v. Guest (1831) 1 Russ. & M. 440.—M.R.; *applied, Shirley v. Fisher* (1882) 47 L. T. 109.—BACON, V.-C.
Badham v. Mee (1831) 7 Bing. 695; 1 Moore & S. 14; 9 L. J. (O.S.) C. P. 213.—C.P.; *confirmed, (1832) 2 L. J. Ch. 4; 1 Myl. & K. 32.—V.-C., overruled.*
 Jones v. Winwood (1838) 3 M. & W. 653; 7 L. J. Ex. 225.—EX.
 ALDERSON, B. (for the Court).—We cannot adopt the principle laid down by Sir J. Leach, in affirming the certificate sent by the Court of C. P. in *Badham v. Mee*.—p. 676.
Badham v. Mee, discussed.
 Hole v. Escott (1838) 8 L. J. Ch. 83; 4 Myl. & Cr. 187; 2 Jur. 1059.—COTTENHAM, L.C.
Badham v. Mee, questioned.
 Jones v. Winwood (1841) 10 L. J. Ch. 165; 10 Sim. 150; 5 Jur. 190.—SHADWELL, V.-C.

Badham v. Mee, applied.
 Sprague, In re, Miley v. Cape (1880) 43 L. T. 236.—MALINS, V.-C.
Badham v. Mee, discussed.
 Cooper, In re, Cooper v. Slight (1884) 27 Ch. D. 565; 51 L. T. 113; 32 W. R. 1015.—KAY, J.
Cooper, In re, Cooper v. Slight, distinguished.
 Lambert's Estate, In re (1900) [1901] 1 Ir. R. 12, 30.—ROSS, J.; *reversed, C.A. (post)*.
Hole v. Escott (1838) 8 L. J. Ch. 83; 4 Myl. & Cr. 187; 2 Jur. 1059.—L.C.; *varying 2 Keen 444.—M.R., discussed.*
 Minchin v. Minchin (1853) 3 Ir. Ch. R. 167.—CUSACK SMITH, M.R.
Hole v. Escott, not applied.
 Lee v. Olding (1856) 25 L. J. Ch. 580; 2 Jur. (N.S.) 850; 4 W. R. 398.—STUART, V.-C.
Hole v. Escott, discussed and distinguished.
 Jakeman's Trusts, In re (1883) 52 L. J. Ch. 363; 23 Ch. D. 344, 351.—CHITTY, J.
Hole v. Escott, discussed.
 Cooper, In re, Cooper v. Slight (1884) 27 Ch. D. 565.—KAY, J. (*supra*).
Hole v. Escott and Jones v. Winwood (1838) 7 L. J. Ex. 225; 3 M. & W. 653.—EX. (*confirmed, (1841) 10 L. J. Ch. 165; 10 Sim. 150; 5 Jur. 190.—V.-C., applied.*
 Beddingfield and Herring's Contract, In re (1893) 62 L. J. Ch. 430; [1893] 2 Ch. 332; 3 R. 483; 68 L. T. 634; 41 W. R. 413.—NORTH, J. See judgment at length.
Hole v. Escott, approved and applied.
 Lambert's Estate, In re [1901] 1 Ir. R. 12, 261.—C.A.; *reversing ROSS, J.*
Parsons v. Parsons (1744) 9 Mod. 464.—L.C., *approved but distinguished.*
 Haswell v. Haswell (1860) 30 L. J. Ch. 97; 2 De G. F. & J. 456, 461; 6 Jur. (N.S.) 188, 1223; 3 L. T. 393; 9 W. R. 129.—CAMPBELL, L.C.
Parsons v. Parsons, Followed, Stone's Estate, In re (post); approved, Dunne's Trusts, In re (1880) 5 L. R. Ir. 76, 83.—C.A.
Haswell v. Haswell (supra), explained.
 Wickham v. Wing (1865) 34 L. J. Ch. 425; 2 H. & M. 436; 6 N. R. 21; 11 Jur. (N.S.) 424; 13 L. T. 37; 13 W. R. 650.—WOOD, V.-C.
Haswell v. Haswell, not applied.
 Stone's Estate, In re (1869) Ir. R. 3 Eq. 621.—LYNCH, J.; *affirmed, C.A.*
Haswell v. Haswell, considered.
Wickham v. Wing and Stone's Estate, In re, referred to.
 Aylwin's Trusts, In re (1873) 42 L. J. Ch. 745; L. R. 16 Eq. 585; 28 L. T. 865; 21 W. R. 864.
 WICKENS, V.-C.—I think that consistently with *Haswell v. Haswell*, as explained by Lord Hatherley in *Wickham v. Wing*, and in *Stone's Estate, In re*, the power given by this will, which is a power to direct the payments of the rents of leaseholds as received, and which so far resembles *Wickham v. Wing* more nearly than *Haswell v. Haswell*, may be considered as unaffected by the insolvency, and that it is therefore a subsisting power.—p. 747.

Haswell v. Haswell, *commented on and explained*.

Wickham v. Wing, *referred to*.

Coleman v. Seymour (1748—1749) 1 Ves. sen. 209.—L.C., *approved*.

Dunne's Trusts, *In re* (1880) 5 L. R. Ir. 76, 83.—C.A. BALL, L.C., DEASY and FITZGIBBON, L.JJ.

Haswell v. Haswell, *applied*.

Kelly's Settlement, *In re*, **West v. Turner** (1888) 59 L. T. 494.—CHITTY, J.

Cunynghame v. Thurlow (1832) 1 Russ. & M. 436, n.; 32 R. R. 242.—V.-C., *approved*.

Little, *In re*, **Harrison v. Harrison** (1889) 58 L. J. Ch. 233; 40 Ch. D. 418; 60 L. T. 246; 37 W. R. 289.—C.A. *And see post*, col. 2200.

Cunynghame v. Thurlow, *not followed*.

Smith v. Houblon (1859) 26 Beav. 482.—M.R., *followed*.

Little, *In re*, **Harrison v. Harrison**, *referred to*.

Radcliffe, *In re*, **Radcliffe v. Bewes** (1891) 61 L. J. Ch. 186; [1892] 1 Ch. 227, 232; 66 L. T. 363; 40 W. R. 323.—C.A.; *reversing* 60 L. J. Ch. 436; [1891] 2 Ch. 662; 64 L. T. 386; 39 W. R. 457.—NORTH, J.

Smith v. Houblon, *followed*.

Cunynghame v. Thurlow, *referred to*.

Radcliffe, *In re*, **Radcliffe v. Bewes**, *explained and applied*.

Somes, *In re*, **Somes v. Somes** (1896) 65 L. J. Ch. 262; [1896] 1 Ch. 250; 74 L. T. 49; 44 W. R. 266.

CHITTY, J.—In that case [*Smith v. Houblon*] the father had an exclusive power of appointment amongst children over a fund which, in default of appointment, was limited to them equally; and as representative of a deceased son he was, in default of appointment, beneficially entitled to one-third of the fund, and he assigned the one-third to his mortgagees, and released the power. Lord Romilly held that the power had been effectually destroyed. The very same objection arose in that case as was suggested here—namely, that the person releasing the power was thereby acquiring a personal benefit. If, therefore, the same rules were to be applied to releases of powers and the exercise of powers, *Smith v. Houblon* was wrongly decided. But that case has been considered by the C. A. in *Radcliffe, In re*, and the Court followed it, and declined to follow the decision of Shadwell, V.-C., in *Cunynghame v. Thurlow*. In *Radcliffe, In re*, the father was entitled to his deceased son's reversionary interest in the fund as his administrator; and although it appears from the report that a point was raised as to the father's life interest and the son's reversion being held by the father in different rights, there were, as I am now informed by Mr. Byrne and Mr. Farwell, who were counsel in *Radcliffe, In re*, substantially no debts for the son's administrator to pay. It was therefore plain that the father was augmenting the beneficial interest he took under the settlement. That appears to me to be by itself a sufficient authority binding me to hold that the fact that the release by a father in a case like this will benefit himself is not a ground for saying that the release is void.—p. 264.

Radcliffe, In re, *referred to*.

Att.-Gen. v. Beech (1898) 67 L. J. Q. B. 585; [1898] 2 Q. B. 147, 153; 78 L. T. 584; 46 W. R.

435; 62 J. P. 371.—C.A.: affirmed, H.L. See "REVENUE."

Cunynghame v. Thurlow, *commented on*.

Radcliffe, In re, *referred to*.

Selot's Trust, *In re* (1902) 71 L. J. Ch. 192; [1902] 1 Ch. 483, 493.

FARWELL, J.—It is true that in *Cunynghame v. Thurlow*, in a case in which a father, who was an executor of his dead child, partially released his power of appointment in order to entitle himself to payment of a share of certain trust funds, Shadwell, V.-C. viewed his conduct with such reprobation as to say that it disentitled him to the payment he desired. This case, however, was subject to observation by the C. A. in *Radcliffe, In re*, and the Court, in my opinion, has no jurisdiction to refuse payment out to a man of that which is his own property.—p. 194.

Brown v. Nisbett (1750) 1 Cox 13.—L.C., *observed on*.

Webster v. Boddington (1848) 16 Sim. 177.

SHADWELL, V.-C.—The judgment attributed to the L.C. in the case cited is not very intelligible; but the effect of it seems to be that, after the husband and wife had exercised the power, jointly, it could not be exercised by the survivor of them. That case, therefore, has no application to the present.—p. 177.

Simpson v. Paul (1761) 2 Eden 34.—L.C., *dissented from*.

Mapleton v. Mapleton (1859) 4 Drew. 515; 28 L. J. Ch. 785; 7 W. R. 468.

KINDERSLEY, V.-C.—Certainly, in *Simpson v. Paul*, Lord Northington does seem to hold that, as a general proposition, the exercise of a primary power to a partial extent does preclude any exercise of the secondary power. But Lord St. Leonards has expressed his opinion very strongly that the view of Lord Northington is wrong (see Sugden on Powers, 6th ed. vol. ii. pp. 218, 235); and I think I am justified in adopting the view of Lord St. Leonards, that the partial execution of a primary power does not exclude the exercise of a secondary power.—p. 519.

Digges' Case (1598—1600) 1 Co. Rep. 173, *referred to*.

Simpson v. Paul (*supra*).

Leicester's (Earl) Case (1676) 1 Vent. 278.

—K.B.; **Kibbet v. Lee** (1620) Hob. 312.—C.P.; and **Digges' Case**, *approved*.

Whelan v. Palmer (1888) 39 Ch. D. 648; 57 L. J. Ch. 784; 58 L. T. 937; 36 W. R. 587.

KEKEWICH, J.—Several cases were referred to which are quoted by Lord St. Leonards in his work on Powers [Sugden on Powers, 8th ed. ch. vii. s. 9], as laying down the rule about which I apprehend there is really no doubt. One is *Leicester's (Earl) Case*, which cited *Kibbet v. Lee*, and is therefore valuable as containing that quotation as a matter of authority, "that if a deed of revocation had been made" (in that case it was a deed of revocation), "and the party had declared it should not take place until 100*l.* paid, there the operation of it would have been in suspense until the 100*l.* paid, and then it would have been sufficient." And in harmony with that, we find the second resolution in *Digges' Case*. There, again, it was a power of revocation: it was resolved that "where the revocation is to be made by deed indented to be enrolled, it is as much as to say by deed indented and

enrolled, for no revocation shall be in the same case until the deed be enrolled, for if it should be a revocation before the enrolment, then per adventure the deed would never be enrolled, which would be against the words and intents of the parties."—p. 657.

4. LAPSE AND INTERESTS UNDISPOSED OF.

Hardwick v. Thurston (1828) 6 L. J. (O.S.) Ch. 124; 4 Russ. 380; 28 R. R. 130.—M.R., *followed*.

Baker v. Hanbury (1827) 3 Russ. 340; 27 R. R. 85.—LYNDHURST, L.C.; *affirming* 1 L. J. (O.S.) Ch. 78.—M.R., *observed on*.
Edwards v. Saloway (1848) 17 L. J. Ch. 329; 2 De G. & Sm. 248; 12 Jur. 493.—KNIGHT BRUCE, V.-C.; and 2 Ph. 625.—COTTENHAM, L.C.

Oke v. Heath (1748) 1 Ves. sen. 135.—L.C.
Referred to, **Rasum v. Appleford** (1840) 10 L. J. (Ch. 81; 5 Myl. & Cr. 56.—L.C.; *Harries' Trusts*, in re (1859) Johns. 199, 205.—WOOD, V.-C.; *explained*, **Cowper v. Mantell** (No. 1) (1856) 22 Beav. 223; 2 Jur. (N.S.) 475; 4 W. R. 500.—M.R.; *applied*, **Meredith's Trusts**, in re (1876) 3 Ch. D. 757, 762; 25 W. R. 107.—BACON, V.-C.

Oke v. Heath, *referred to*.
Moses, in re, **Beddington v. Beddington** (1901) 71 L. J. Ch. 101; [1902] 1 Ch. 100, 115; 85 L. T. 596.—C.A.; *affirmed*, 72 L. J. Ch. 155; [1903] A. C. 13; 87 L. T. 658; 51 W. R. 383.—H. L. (L.).

V. WILLIAMS, L.J.—When a power is executed by will, although the legatee will take under the authority of the power, yet he does not take under the power solely and exclusively, but under it and the will conjointly. The will so made is to be construed and considered as all other wills—**Oke v. Heath** and **Williams** on **Executors**, 9th ed. pp. 1079, 1820. It is therefore ambulatory, revocable, and incomplete till the death of the testator; consequently no person can take under it who does not survive him—see **Williams** on **Executors**, 9th ed. p. 1079.—p. 106.

Oke v. Heath, *applied*.
Marten, in re, **Shaw v. Marten** (1901) 71 L. J. Ch. 203; [1902] 1 Ch. 314, 321; 85 L. T. 704; 50 W. R. 209.—C.A. **ROMER** and **COZENS-HARDY**, L.J.J.; V. WILLIAMS, L.J. *dissenting*; *reversing* **BYRNE**, J.

COZENS-HARDY, L.J.—When, however, I once arrive at the conclusion that the ultimate clause is a true residuary clause, it must be taken to operate upon everything which may have failed to take effect under the previous appointment—**Oke v. Heath**; and it makes no difference that the appointee in both cases is the same person.—p. 208.

Wilkinson v. Schneider, Le Blanc, in re (1870) 39 L. J. Ch. 410; L. R. 9 Eq. 423.—JAMES, V.-C., *applied*.
Davies' Trusts, in re (1871) 41 L. J. Ch. 97; L. R. 13 Eq. 163 (*post*, col. 2202).

Wilkinson v. Schneider, *not applied*.
De Lusi's Trusts, in re (1879) 3 L. R. Ir. 232, 239.—CHATTERTON, V.-C.

Wilkinson v. Schneider, *confirmed*.
Van Hagen, in re, **Sperling v. Rochfort** (1880) 50 L. J. Ch. 1; 16 Ch. D. 18, 26 (*post*, col. 2202).

Wilkinson v. Schneider, *principle explained and approved*.

Rous v. Jackson (1885) 29 Ch. D. 521; 54 L. J. Ch. 732; 52 L. T. 733; 33 W. R. 773.

CHITTY, J.—The principle laid down in **Wilkinson v. Schneider** is firmly established, that under a general testamentary power of appointment such as this the trustees of the settlement creating the power are bound to hand over the trust funds in their hands to the persons named by the donee of the power, and therefore the trusts in default of appointment cannot arise. In the case of the exercise of such a power by a man the rule is clear. In the case of a married woman, which is the case before me, the late M.R. has decided in **Pinède's Settlement, In re (post)**, that the married woman can make the fund her own by exercising the power.—p. 525.

Wilkinson v. Schneider, *referred to*.
Elen, in re, **Thomas v. McKechnie** (1893) 68 L. T. 816.—STIRLING, J. See *post*, col. 2205.

Chamberlain v. Hutchinson (1856) 22 Beav. 444.—M.R., *applied*.
Att.-Gen. v. Brackenbury (1863) 32 L. J. Ex. 108; 1 H. & C. 782, 795; 9 Jur. (N.S.) 257; 8 L. T. 822; 11 W. R. 380.—EX.

Chamberlain v. Hutchinson and Lefevre v. Freeland (1857) 24 Beav. 403.—M.R., *distinguished*.
Hoare v. Osborne (1864) 33 L. J. Ch. 586; 10 Jur. (N.S.) 694; 10 L. T. 258; 12 W. R. 661.—KINDERSLEY, V.-C.

Chamberlain v. Hutchinson, *referred to*.
Brickenden v. Williams (1869) 38 L. J. Ch. 222; L. R. 7 Eq. 310, 315; 17 W. R. 441.—JAMES, V.-C.

Chamberlain v. Hutchinson, *distinguished*.
Bristow v. Skirrow (1870) 39 L. J. Ch. 840; L. R. 10 Eq. 1; 22 L. T. 642; 18 W. R. 719.—ROMILLY, M.R.

Chamberlain v. Hutchinson, *applied*.
Davies' Trusts, in re (1871) 41 L. J. Ch. 97; L. R. 13 Eq. 163; 25 L. T. 785; 20 W. R. 165.—WICKENS, V.-C. *And see post*, cols. 2203, 2204.

Hoare v. Osborne (*supra*).
Discussed, **De Lusi's Trusts**, in re (*post*); *disapproved*, **Willoughby Osborne v. Holyoake** (*post*, col. 2203); *referred to*, **Coxen v. Rowland** (*post*, col. 2203).

Davies' Trusts, in re, *followed*.
Brickenden v. Williams (*supra*), *discussed and not applied*.
Bristow v. Skirrow (*supra*), *observed on*.
De Lusi's Trusts, in re (1879) 3 L. R. Ir. 232, 238.—CHATTERTON, V.-C. *And see post*, col. 2204.

Brickenden v. Williams, *followed*.
De Lusi's Trusts, in re, *approved*.
Pinède's Settlement, in re (1879) 48 L. J. Ch. 741; 12 Ch. D. 667; 41 L. T. 579; 28 W. R. 178.—JESSEL, M.R.

Brickenden v. Williams, *confirmed*.
De Lusi's Trusts, in re, *approved*.
Van Hagen, in re, **Sperling v. Rochfort** (1880) 50 L. J. Ch. 1; 16 Ch. D. 18, 26; 44 L. T. 161; 29 W. R. 84.—C.A.; *reversing* **MALINS**, V.-C. *And see post*, col. 2203.

Davies' Trusts, in re (*supra*), *considered*.
Pinède's Settlement, in re; **Van Hagen**, in

re, *Sperling v. Rochfort*; and *De Lusi's Trusts*, *In re*, referred to.

Ickeringill's Estate, *In re*, *Hinsley v. Ickeringill* (1881) 50 L. J. Ch. 164; 17 Ch. D. 151, 155; 29 W. R. 500.—HALL, V.-C.

De Lusi's Trusts, *In re*, and *Pinède's Settlement*, *In re*, referred to.

Willoughby Osborne v. Holyoake (1882) 52 L. J. Ch. 331; 22 Ch. D. 238; 48 L. T. 152; 31 W. R. 236.—FRY, J.

Pinède's Settlement, *In re*, referred to.

Rous v. Jackson (1885) 54 L. J. Ch. 732; 29 Ch. D. 521, 525 (*supra*, col. 2202).

Van Hagen, *In re* (*supra*), reasoning in, applied.

Scott, *In re*, *Scott v. Hanbury* (1890) 60 L. J. Ch. 461; [1891] 1 Ch. 298, 304; 63 L. T. 800; 39 W. R. 264.—NORTH, J.

Van Hagen, *In re*, referred to.

Elen, *In re*, *Thomas v. McKechnie* (1893) 68 L. T. 816.—STIRLING, J. (*post*, col. 2205).

De Lusi's Trusts, *In re*, applied.

Van Hagen, *In re*, *Pinède's Settlement*, *In re*, *Ickeringill's Estate*, *In re*, and *Willoughby Osborne v. Holyoake* (*supra*), discussed.

Coxen v. Rowland (1893) 63 L. J. Ch. 179; [1894] 1 Ch. 406; 8 R. 525; 70 L. T. 89; 42 W. R. 568.—STIRLING, J.

Van Hagen, *In re*, not applied.

De Lusi's Trusts, *In re* (*supra*), referred to.

Davies' Trusts, *In re* (col. 2202), followed.

Pinède's Settlement, *In re*; *Ickeringill's Estate*, *In re*; and *Coxen v. Rowland*, distinguished.

Boyd, *In re*, *Kelly v. Boyd* (1897) 66 L. J. Ch. 614; [1897] 2 Ch. 232; 77 L. T. 76; 45 W. R. 648.

ROMER, J.—*Pinède's Settlement*, *In re*, was a case where Sir G. Jessel, under circumstances referred to by him in his judgment, was able to ascertain that the testatrix intended to include in the gift of her residue both the residue of the appointed fund and any savings of her own property she might possess as one blended fund, and treated the appointed property as her own, and made it her own for all purposes. *Davies' Trusts*, *In re*, was cited, and in no way disapproved by the M.R.; on the contrary, he refers with approval to *De Lusi's Trusts*, *In re*, which followed *Davies' Trusts*, *In re*, as stating accurately the principle on which each case ultimately falls to be decided. *Ickeringill's Estate*, *In re*, decided by Hall, V.-C., was a peculiar case, and I think turned upon this—that the V.-C. thought, under the circumstances, concerning the devise of real estate to which he refers in his judgment, that the gift in the testatrix's will in that case was equivalent to an appointment and devise to her two sisters in trust, so as to make the question one of resulting trust, as in *Van Hagen*, *In re*. At least, that is what I gather from the judgment, especially from the observations at the bottom of p. 156 and top of p. 157 of the Law Reports (p. 365 in Law Journal Reports); but whether I am right in this or not, it is clear that the V.-C. distinguished the case before him from that of *Davies' Trusts*, *In re*, and cast no doubt upon the decision in the latter case. Lastly, in *Coxen v. Rowland* the decision of Stirling, J.

turned upon the words used by the testatrix, which indicated sufficiently her intention that the appointed property should be deemed hers for all purposes. As pointed out in that case, it is not essential in order that an appointed fund may be for all purposes taken out of the instrument creating the power, that there should be in the first instance an appointment to a trustee. Nor did Wickens, V.C. in *Davies' Trusts*, *In re*, express a contrary view, and the suggestion that the reasoning on which he decided that case has been since decided to be unsound appears to me to be unfounded.—p. 615.

Davies' Trusts, *In re*, and *Thurston*, *In re*,

Thurston v. Evans (1886) 55 L. J. Ch. 564; 32 Ch. D. 508; 54 L. T. 833; 34 W. R. 528.—CHITTY, J. (*and see post*), referred to and approved.

Power, *In re*, *Stone*, *In re*, *Acworth v. Stone* (1901) 70 L. J. Ch. 778; [1901] 2 Ch. 659, 665; 85 L. T. 400; 49 W. R. 678.—BYRNE, J.

Davies' Trusts, *In re*, and *De Lusi's Trusts*, *In re* (*supra*, col. 2202), considered.

Pinède's Settlement, *In re* (*supra*), principle applied.

Coxen v. Rowland, approved and applied.

Marten, *In re*, *Shaw v. Marten* (1901) 71 L. J. Ch. 203; [1902] 1 Ch. 314, 320; 85 L. T. 704; 50 W. R. 209.—C.A.; *V. WILLIAMS*, L.J. dissenting.

Davies' Trusts, *In re*, referred to.

Peacock's Settlement, *In re*, *Kelcey v. Harrison* (1902) 71 L. J. Ch. 325; [1902] 1 Ch. 552; 86 L. T. 414; 50 W. R. 473.—EADY, J.

Davies' Trusts, *In re*, and *Thurston*, *In re* (*supra*), referred to.

Fearnside's, *In re*, *Baines v. Chadwick* (1902) 72 L. J. Ch. 200; [1903] 1 Ch. 250; 88 L. T. 57; 51 W. R. 186.—EADY, J. *And see Boyd*, *In re*, *Kelly v. Boyd* (*supra*, col. 2203).

Falkner v. Butler (1765) Ambl. 514; *Moseley* 48.—M.R., discussed.

Easum v. Appleford (1840) 5 Myl. & Cr. 56 (*post*, col. 2204); *Carter v. Taggart* (1848) 16 Sim. 423.—V.-C.

Falkner v. Butler and *Carter v. Taggart*, applied.

Harries' Trust, *In re* (1859) Johns. 199, 206.—WOOD, V.-C.

Falkner v. Butler, applied.

Meredith's Trusts, *In re* (1876) 3 Ch. D. 757, 762; 25 W. R. 107.—BACON, V.-C.

Falkner v. Butler and *Carter v. Taggart*, discussed.

Champney v. Davy (1873) 11 Ch. D. 949; 48 L. J. Ch. 268; 40 L. T. 189; 27 W. R. 370.

HALL, V.-C.—In *Falkner v. Butler*, under a limited power of appointment, the donee appointed a sum to persons not objects of the power, and this sum was held to pass under the appointment of the residue, *i.e.*, it fell into the residue. . . . In *Carter v. Taggart*, the testatrix, exercising a power over a specified sum, gave part of it to a person who died before her, and gave all the rest and residue of the sum "after deducting therefrom the legacies above mentioned." The part which lapsed was held to fall into the residue. This decision, I think, turned upon the particular will, indicating (particularly by a life estate being given in part with

a direction that that part should fall into the residue) an intention that all should pass, subject only to the charge. . . . In *Easum v. Appleford* (*post*), which was a case of an appointment under a power, Lord Cottenham considered that the fund was a definite one, that the last disposition, though of "residue," was in substance to be read as if the amount had been inserted in the disposition. In *Harries' Trust, In re* (*post*), Wood, V.-C. held upon the whole instrument, that a lapsed share of a definite sum passed under an appointment of the residue of the moneys after deducting certain specified sums. He considered *Carter v. Tuggart* and *Falkner v. Butler* to apply, rather than *Easum v. Appleford*.—p. 957.

Easum v. Appleford (1840) 10 L. J. Ch. 81; 5 Myl. & Cr. 56.—COTTENHAM, L.C.; *affirming* (1839) 10 Sim. 274.—SHADWELL, V.-C., *discussed*.
Bernard v. Minshull (1849) 28 L. J. Ch. 649; Johns. 276; 5 Jur. (N.S.) 931.—WOOD, V.-C.

Easum v. Appleford, *referred to*.
Lefevre v. Freeland (1857) 24 Beav. 403.—ROMILLY, M.R.

Easum v. Appleford, *not applied*.
Harries' Trust (1859) Johns. 199, 204.—WOOD, V.-C.

Easum v. Appleford, *discussed*.
Brickenden v. Williams (1869) 38 L. J. Ch. 222; L. R. 7 Eq. 310, 315; 17 W. R. 441.—JAMES, V.-C.

Easum v. Appleford and Harries' Trust, In re, *applied*.
Swete v. Tindal (1874) 31 L. T. 223.—MALINS, V.-C.

Harries' Trust, *applied*.
Meredith's Trusts, In re (1876) 3 Ch. D. 757, 761; 25 W. R. 107.—BACON, V.-C.

Easum v. Appleford and Harries' Trust, In re, *discussed*.
Champney v. Davy (1879) 48 L. J. Ch. 268; 11 Ch. D. 949, 957; 40 L. T. 189; 27 W. R. 390.—MALL, V.-C. (*see supra*).

Easum v. Appleford, *distinguished*.
Elen, In re, Thomas v. McKechnie (1893) 68 L. T. 816.

STIRLING, J.—On behalf of the next of kin *Easum v. Appleford* has been relied on. As regards that case, it has been cited on behalf of persons claiming in default of appointment in nearly all the cases, of which *Wilkinson v. Schneider* (*supra*, col. 2201), and *Van Hagen, In re* (*supra*, col. 2202), are examples and without success. So far as the present case is concerned it does not apply, because when the date of the will is looked at, it appears that it was made in 1835, that is, before the Wills Act came into force. That circumstance, no doubt, explains a good deal of what was said in that case.—p. 817.

And see **Cruddas, In re, Smith, In re, Cruddas v. Smith** (1900) 69 L. J. Ch. 355; [1900] 1 Ch. 780; 82 L. T. 514.—C.A. LINDLEY, M.R. RIGBY and V. WILLIAMS, L.J.J.; *reversing* **KEKEWICH, J.**

Griffiths v. Gale (1844) 13 L. J. Ch. 286; 12 Sim. 327, 354; 8 Jur. 235.—SHADWELL, V.-C., *discussed and distinguished*.
Halsey v. Hales (1797) 7 Term Rep. 194.—K.B., *referred to*.
Eccles v. Cheyne (1836) 2 K. & J. 676.—WOOD, V.-C.

Griffiths v. Gale, *followed*.
Freeland v. Pearson (1867) 36 L. J. Ch. 374; L. R. 3 Eq. 658, 663; 15 W. R. 419.—ROMILLY, M.R.

Griffiths v. Gale, *approved*.
Eccles v. Cheyne (*supra*), *discussed*.
Freme v. Clement (1881) 50 L. J. Ch. 801; 18 Ch. D. 499; 44 L. T. 399; 30 W. R. 1.—JESSEL, M.R., *disapproved*.

Holyland v. Lewin (1884) 26 Ch. D. 266; 53 L. J. Ch. 530; 51 L. T. 14; 32 W. R. 443.—C.A.
SELBORNE, L.C. (for self, **COTTON** and **BAGGALLAY**).—Sir L. Shadwell in *Griffiths v. Gale* decided that this provision of the statute [1 Vict. c. 27, s. 33] did not extend to the case of an appointee under a limited power. That decision had the assent and approval of Lord St. Leonards, Sugden on Powers [6th ed., vol. i., p. 385], and also of Lord Hatherley in *Eccles v. Cheyne*. It was said, and truly, by Lord Hatherley, that some of the observations made by Sir L. Shadwell were inapplicable, if they were supposed to go beyond the case before him, and to extend to that of a general power. But we see no reason for supposing that the learned judge who decided *Griffiths v. Gale* had, when he made those observations, any other case in view than that which was before him of a limited power. If the reasons on which *Griffiths v. Gale* was decided had been in themselves unsatisfactory, there would still be great difficulty in disturbing what has been regarded as settled law for the last forty years, a law on which many titles may possibly depend. But we are ourselves satisfied with the reasons for that decision (p. 270). . . . The late M.R., indeed, in *Freme v. Clement*, a case decided on the 25th section of the Act [1 Vict. c. 26], seems to have thought it possible to collect from the general provisions of the Wills Act an intention to use those words in a *sensu primâ facie* inclusive of appointments under limited as well as general powers. We might have been doubtful of our own opinion if it were merely our own, when we found it opposed to that of so eminent a judge; but in this case all previous authority is in accordance with it.—p. 272.

Holyland v. Lewin, *observations applied*.
Harvey's Estate, In re, Harvey v. Gillow (1893). 62 L. J. Ch. 328; [1893] 1 Ch. 567; 3 R. 247; 68 L. T. 562; 41 W. R. 293.—CHITTY, J.

5. EXECUTION IN GENERAL.

Lee v. Olding (1856) 25 L. J. Ch. 580; 2 Jur. (N.S.) 850; 4 W. R. 398.—V.-C.; and **Frowd's Settlement, In re** (1864) 10 L. T. 367; 4 N. R. 54.—V.-C., *discussed*.
Vizard's Trusts, In re (1866) 35 L. J. Ch. 804; L. R. 1 Ch. 588; 12 Jur. (N.S.) 68; 14 W. R. 1000.—KNIGHT BRUCE and TURNER, L.J.J., *reluctantly followed*.
De Serre v. Clarke (1874) 43 L. J. Ch. 821; L. R. 18 Eq. 587, 592; 31 L. T. 161; 23 W. R. 3.—MALINS, V.-C.

Frowd's Settlement, In re ; Vizard's Trusts, In re ; and De Serre v. Clarke, discussed.

Sweetapple v. Horlock (1879) 11 Ch. D. 745 ; 48 L. J. Ch. 660 ; 41 L. T. 272 ; 27 W. R. 865.

JESSEL, M.R.—*Frowd's Settlement, In re*, does not bind me upon a question of real estate ; and I will say further that I should hold it not binding upon me upon a question of personal estate either, if I were at liberty to do so.—p. 751. [His lordship then discussed the other cases at length and continued:] The result, therefore, is a most singular state of authority. First, there is a decision of Stuart, V.-C. [*Lee v. Olding*], holding that the interest of the appointee was acquired under the appointment and not under the original settlement. Then there is a decision of Wood, V.-C. [*Frowd's Settlement, In re*], distinctly holding that the appointment did not divest the interest under the settlement. Then there is a decision of the C.A., affirming a second decision of Stuart, V.-C. [*Vizard's Trusts, In re*], on the distinct ground that the appointment conferred a new interest. Then there is a decision of Malins, V.-C. [*De Serre v. Clarke*], following the two decisions of Stuart, V.-C., not on principle, but because of the expression of opinion of Turner, L.J., though agreeing with the decision of Wood, V.-C.—p. 754.

Vizard's Trusts, In re, considered.

Maddy's Estate, In re, Maddy v. Maddy (*post*) ; Att.-Gen. v. Selborne (Earl) (*post*).

Sweetapple v. Horlock (*supra*), corrected and followed.

Jackson's Will, In re (1879) 49 L. J. Ch. 82 ; 13 Ch. D. 189 ; 41 L. T. 494 ; 28 W. R. 209.—JESSEL, M.R. See "SETTLEMENT," *post*.

Sweetapple v. Horlock, referred to.

Ware, In re, Cumberlege v. Cumberlege-Ware (1890) 59 L. J. Ch. 717 ; 45 Ch. D. 269, 273 ; 63 L. T. 52 ; 38 W. R. 747.—STIRLING, J.

Sweetapple v. Horlock, followed.

Lovett v. Lovett (1897) 67 L. J. Ch. 20 ; [1898] 1 Ch. 82 ; 77 L. T. 650 ; 46 W. R. 105.—ROMER, J.

Sweetapple v. Horlock and Lovett v. Lovett, considered.

Maddy's Estate, In re, Maddy v. Maddy [1901] 1 Ch. 820 ; 71 L. J. Ch. 18 ; 85 L. T. 341.—JOYCE, J.

Sweetapple v. Horlock, approved.

Att.-Gen. v. Selborne (Earl) (1901) 71 L. J. K. B. 289 ; [1902] 1 K. B. 388 ; 85 L. T. 714 ; 50 W. R. 210 ; 66 J. P. 132.—C.A.

STIRLING, L.J.—As a general rule, there can be no question that the exercise of a power of appointment divests the estates limited in default of appointment and creates new estates—see Farwell on Powers (2nd ed.), p. 276. Accordingly, where the same person took both under the appointment and in default of appointment, it was held by the C.A. in Chancery that the estate of the appointee is a new estate, provided it differs in *quantum* of interest from that conferred by the limitations in default of appointment—*Vizard's Trusts, In re* (*supra*, col. 2206)—the difference between the two interests being that under the appointment the appointee took absolutely, while in default of appointment he only took contingently. In *Sweetapple v. Horlock*, the M.R. (Sir G. Jessel) held, notwithstanding

some conflict of authority, that the appointee took a new estate, although the interest under the appointment did not differ from that which was conferred on him in default of appointment ; and this decision appears to be in strict accordance with principle.—p. 296.

Sweetapple v. Horlock and Lovett v. Lovett, referred to.

Walpole's Marriage Settlement, In re, Thomson v. Walpole (1903) 72 L. J. Ch. 522 ; [1903] 1 Ch. 928 ; 88 L. T. 419 ; 51 W. R. 587.—JOYCE, J.

Cox v. Chamberlain (1799) 4 Ves. 631 ; 4 R. R. 311.—M.R., referred to.

Moss v. Harter (1854) 2 Sm. & G. 458 ; 18 Jur. 973 ; 2 W. R. 540.—STUART, V.-C.

Thompson v. Towne (1695) Pre. Ch. 52 ; 2 Eq. Cas. Abr. 466.—L.K., followed.

Lassels v. Cornwallis (Lord) (*post*).

Thompson v. Towne, discussed.

Lawley, In re, Zaiser v. Lawley (1902) 71 L. J. Ch. 787 ; [1902] 2 Ch. 673 ; *affirmed*, C.A. and H.L. (see *post*, col. 2211).

JOYCE, J.—There [*Thompson v. Towne*] the testator at the time of his death, having a power of appointment by will over a sum of 500*l.*, exercised such power by his will in favour of legatees. Somers, L.K. decreed the 500*l.* to be assets to pay the debt of the plaintiff, a creditor, and it is stated in the report that on appeal to H. L. this decree was affirmed, but upon what precise ground does not appear. Where the power is to appoint by deed or will, the appointee under an appointment by deed for a good consideration takes in priority to creditors. Thus, for example, in *Lassels v. Cornwallis* (Lord) (*supra*), Lord Cornwallis in the settlement on his marriage reserved a power to charge an estate with any sum not exceeding 3,000*l.* for such purposes as he should think fit. Upon a sale he by deed appointed this 3,000*l.* to the purchaser as a collateral security for the enjoyment of his purchase, and if no incumbrance arose the appointment was to be void. No incumbrance having arisen, by will he bequeathed the 3,000*l.* Wright, L.K., following *Thompson v. Towne*, decreed the 3,000*l.* to be assets of Lord Cornwallis, and subject to the collateral security to be applicable in payment of debts. . . . So also in *Ewart v. Ewart* (*post*, col. 2209) Lord Hatherley, then V.-C., says, where a person has a general power of appointment, the subject of the power being liable to his debts, and he executed the power in favour of volunteers, the Court draws out from the volunteers so much as is necessary for satisfying the debts.—p. 788.

Shirley v. Ferrers (Lord) (1733) 7 Ves. 503, n., applied.

Bainton v. Ward (1741) 2 Atk. 172 ; 2 Ves. sen. 2 ; 7 Ves. 503, n.—HARDWICKE, L.C.

Shirley v. Ferrers (Lord) and Lassels v. Cornwallis (Lord) (1704) 2 Vern. 465 ; Pre. Ch. 232.—WRIGHT, L.K., discussed.

Townshend (Lord) v. Windham (1750) 2 Ves. sen. 1.—HARDWICKE, L.C.

Lassels v. Cornwallis (Lord), discussed.

Holmes v. Coghill (1802) 7 Ves. 499 ; 6 R. R. 166.—GRANT, M.R. ; (1806) 12 Ves. 206 ; 8 R. R. 323.—ERSKINE, L.C. And see *post*, col. 2209.

Shirley v. Ferrers (Lord) and Lassels v. Cornwallis (Lord) (*supra*), *discussed*.
Ewart v. Ewart (1853) 11 Hare 276; 1 Eq. R. 536; 17 Jur. 1022; 1 W. R. 466.—WIGRAM, V.-C.

Lassels v. Cornwallis (Lord), *referred to*.
 Lawley, In re, Zaizer v. Lawley [1902] 2 Ch. 673 (*supra*, col. 2208).

Ewart v. Ewart (*supra*), *discussed*.
Ramsden v. Smith (1854) 23 L. J. Ch. 757; 2 Drew. 298; 2 Eq. R. 660; 18 Jur. 566; 2 W. R. 433.—KINDERESLEY, V.-C.; **Carter v. Carter** (1869) 39 L. J. Ch. 268; L. R. 8 Eq. 551, 556; 21 L. T. 194.—MALINS, V.-C.; Lawley, In re (*supra*).

Bainton v. Ward (1741) 2 Atk. 172; 2 Ves. sen. 2; 7 Ves. 503. n.—L.C., *discussed*.
Holmes v. Coghill (1802) 7 Ves. 499; 6 R. R. 166.—GRANT, M.R.; (1806) 12 Ves. 206; 8 R. R. 323.—ERSKINE, L.C.

Bainton v. Ward, *discussed*.
Fleming v. Buchanan (1853) 3 De G. M. & G. 976; 22 L. J. Ch. 886.—L.JJ.

TURNER, L.J.—Property, whether personal or real, over which a testator has a general power is liable for his debts—as to the personal estate for all his debts, and as to the real estate at all events for his specialty debts, but such property is not the personal or real estate of the testator. The mode in which the Court dealt with a case of this description in *Bainton v. Ward*, as appears from the declaration in the decree in that case, which is set out in the note to *Holmes v. Coghill*, 7 Ves. 502 (*supra*), seems to me to show that personal estate, or real estate appointed by a testator, is to be applied only in aid of the assets which are really the property of the testator.—p. 979.

Bainton v. Ward, *discussed and not applied*.
 Roper, In re, Roper v. Doncaster (*post*).

Townshend (Lord) v. Windham (1750) 2 Ves. sen. 1.—L.C., *discussed*.
Holmes v. Coghill (1802) 7 Ves. 499; 6 R. R. 166.—M.R.; (1806) 12 Ves. 206; 8 R. R. 323.—ERSKINE, L.C.

Townshend (Lord) v. Windham, *referred to*.
Patch v. Shore (1863) 32 L. J. Ch. 185; 2 Dr. & Sm. 589; 1 N. R. 157; 9 Jur. (N.S.) 63; 7 L. T. 554; 11 W. R. 142.—KINDERESLEY, V.-C.

Townshend (Lord) v. Windham, *discussed and not applied*.
 Roper, In re, Roper v. Doncaster (1888) 39 Ch. D. 482; 58 L. J. Ch. 215; 59 L. T. 203; 36 W. R. 750.

KAY, J.—There is no doubt that, in case of a man who has a general power of appointment and exercises it by will in favour of volunteers, the property so appointed will be considered as assets for the payment of his debts. And this doctrine was applied by Lord Hardwicke, in *Townshend (Lord) v. Windham*, to the exercise of a general power even when exercised by deed so as to take effect on the death of the appointor; his lordship saying: "In respect of his creditors it must be considered as part of his estate at the time of his death; he having executed it so as to gain the interest to himself, and attempted to pass it at the same time to his daughter: the Court will not suffer it; saying he has been guilty of a fraud as to them being indebted at the time." This decision proceeded upon the statute 13 Eliz. c. 5. In *Holmes v. Coghill*

(*post*). Sir W. Grant treats the doctrine as settled, where the appointment by will has been actually made: and there is a note [7 Ves. 503] of the decree in *Bainton v. Ward* (2 Atk. 172, *see supra*, col. 2209), before Lord Hardwicke—a case in which such a power was exercised by will: and it was thereby declared that the fund appointed was to be considered part of the testator's personal estate liable to the satisfaction of his debts. But does this law apply to the case of a married woman?—p. 487. [His lordship held that it did not.]

Townshend (Lord) v. Windham, *referred to*.
 Power, In re, Stone, In re, Acworth v. Stone (1901) 70 L. J. Ch. 778; [1901] 2 Ch. 659; 85 L. T. 400; 49 W. R. 678.

BYRNE, J.—The rule is that property subject to general powers of appointment becomes assets for the payment of the appointor's debts, if the power is actually exercised in favour of volunteers; and Lord Hardwicke, in *Townshend (Lord) v. Windham*, points out that "If there is a power to execute by will or deed, though executed by will, it operates not as a will to that purpose, but as an appointment; not as an appointment of his own assets, but of the estate of another, and takes not place by force of the will."—p. 781.

Townshend (Lord) v. Windham, *discussed*.
 Dixon, In re, Penfold v. Dixon (1901) 71 L. J. Ch. 96; [1902] 1 Ch. 248; 85 L. T. 622; 50 W. R. 203.—BUCKLEY, J. *See* "REVENUE."

Holmes v. Coghill (1802) 7 Ves. 499; 6 R. R. 166.—M.R.; *affirmed*, (1806) 12 Ves. 206; 8 R. R. 323.—L.C., *explained and applied*.

Hixon v. Oliver (1806) 13 Ves. 108; 9 R. R. 148.—ERSKINE, L.C.

Holmes v. Coghill, *explained*.
 Ewart v. Ewart (1853) 11 Hare 276; 1 Eq. R. 536; 17 Jur. 1022; 1 W. R. 466.—WIGRAM, V.-C.

Holmes v. Coghill, *referred to*.
 Hope v. Hope (1854) 5 Giff. 13; 18 Jur. 823; 2 W. R. 674.—STUART, V.-C.

Holmes v. Coghill, *applied*.
 Cowper v. Mantell (No. 1) (1856) 22 Beav. 223; 2 Jur. (N.S.) 475; 4 W. R. 500.—ROMILLY, M.R.

Holmes v. Coghill, *referred to*.
 Jackson v. Crick (1871) 19 W. R. 547.—HATHERLEY, L.C.

Holmes v. Coghill, *discussed and not applied*.
 Roper, In re (*supra*, col. 2209).

Holmes v. Coghill, *referred to*.
 Ashby v. Costin (1888) 21 Q. B. D. 401; 57 L. J. Q. B. 491; 59 L. T. 224; 37 W. R. 140; 53 J. P. 69.—CAVE and GRANTHAM, JJ.

Fleming v. Buchanan (1853) 22 L. J. Ch. 886; 3 De G. M. & G. 976.—L.JJ., *referred to*.

Parkin, In re, Hill v. Schwarz (1892) 62 L. J. Ch. 55; [1892] 3 Ch. 510; 67 L. T. 77; 41 W. R. 120.—STIRLING, J.

Fleming v. Buchanan, *discussed*.
 Roper, In re, Roper v. Doncaster (*supra*, col. 2209), *dictum commented on*.

Lawley, In re, Zaizer v. Lawley (1902) 71 L. J. Ch. 787; [1902] 2 Ch. 673; *affirmed* (*post*).
 JOYCE, J.—Much reliance was placed by the

applicants upon the statement or *dictum* of Kay, J. in *Reaper, In re*. . . I do not think, however, that it was intended there to make any distinction, in the case of an appointment by will, between an appointment to volunteers and one to other persons. If it was, I think the statement is inaccurate or misleading.—p. 789.

And see "HUSBAND AND WIFE," vol. i. col. 1266.

Fleming v. Buchanan, discussed.

Newnham's Estate, In re (1881) 16 L. J. N. C. 58; W. N. (1881) 69.—HALL, V.-C., *discussed and distinguished*.

Lawley, *In re*, Zaiser v. Lawley (1902) 71 L. J. Ch. 895; [1902] 2 Ch. 799; 87 L. T. 536; 51 W. R. 150.—C.A.; *affirmed nom.* Beyfus v. Lawley (1903) 72 L. J. Ch. 781; [1903] A. C. 411; 89 L. T. 309.—H.L. (E.).

V. WILLIAMS, L.J.—Now in *Fleming v. Buchanan* Knight Bruce, L.J., in the passage cited by Joyce, J. in his judgment, says: "On whatever grounds it was originally so held, it is and has for a long time been the settled law of the country, that if a man having a power, and a power only, over personal estate to appoint it as he will, exercises the power by a testamentary appointment, the property becomes subject in a certain order and manner to the payment of his debts, whatever may be the intention or absence of intention on his part." Our attention was called to the fact that Knight Bruce, L.J. in this passage does not use the word "volunteer" at all, and it is suggested that the rule as laid down by the L.J. applies equally whether the person in whose favour the general power is exercised is a creditor or a volunteer. I sometimes doubt myself whether the L.J. did intend to lay down the rule as widely as this, and I am not sure that it would have been right so to do. It will be observed that the L.J. was dealing with a case in which the general power was exercised by testamentary appointment, and in which there was no suggestion of an antecedent charge, or of a covenant to exercise the power, and in which there is nothing to show that there was any power exercisable by deed as well as by will. Now if one applies the rule laid down by the L.J. to a case of the exercise by testamentary appointment of a power only exercisable by will, it does not seem to matter one bit whether we limit the rule as to the exercise of a general power of appointment making the subject of it assets for the payment of the appointor's debts to volunteers or do not do so, because in my opinion in such a case every one who takes under the will exercising the power necessarily takes as a volunteer.—p. 897.

STIRLING, L.J.—In that case [*Newnham's Estate, In re*] the testatrix, having a power of appointment by will, had induced the trustees of the will creating the power to pay over a portion of the fund to her in her lifetime, and she made a will by which she exercised her testamentary power of appointment by directing that the trustees should hold the fund upon trust to pay and indemnify themselves against the advances which had been made to her, and subject thereto upon trust for certain beneficiaries. After the death of the testatrix the general creditors contended that by appointing the fund she had made it available for payment of her debts, and that the trustees must make good the portions of the fund which they had

misapplied before they could prove against the estate for the advances. The V.-C. rejected that contention, saying that as the creditors of the donee of the power could not get at the property subject thereto except through the appointment, they could not take it without recognising the other acts of the testatrix. The report is a short one and the grounds for the decision are not clearly stated, but I apprehend that the V.-C. meant this: Suppose the creditors of the testatrix had asked for payment to themselves of the whole fund, the trustees who had made the advances would have a right to say, We have already paid a portion of the fund to the testatrix, and it is already part of her assets, and therefore you cannot call upon us to replace it. I think also that the general creditors would not stand in any better position than the executors through whom they claimed, and that the act of the appointor referred to by the V.-C. was the act of her taking possession in her life time of part of the fund subject to the power.—p. 898. COZENS-HARDY, L.J. concurred.

Jenney v. Andrews (1822) 6 Madd. 264; 23 L. R. 216.—V.-C., *explained*.

Williams v. Lomas (1852) 16 Beav. 1.—M.R.

Jenney v. Andrews, approved.

Vaughan v. Vanderstegen (1854) 23 L. J. Ch. 793; 2 Drew. 165, 363; 2 W. R. 599.—KINDERSLEY, V.-C.

Jenney v. Andrews, discussed.

Eddie v. Babington (1854) 3 Ir. Ch. R. 568, 574.—CUSACK SMITH, M.R.

Jenney v. Andrews, referred to.

Hobday v. Peters (No. 2) (1860) 29 L. J. Ch. 780; 28 Beav. 354.—M.R.; **Shattock v. Shattock** (1866) 35 L. J. Ch. 509; 35 Beav. 489; L. R. 2 Eq. 182, 188; 12 Jur. (N.S.) 405; 14 L. T. 452; 14 W. R. 600.—M.R.

Williams v. Lomas (1852) 16 Beav. 1.—M.R., *discussed*.

Eddie v. Babington (1854) 3 Ir. Ch. R. 568, 574.—M.R.

Williams v. Lomas and De Burgh Lawson, In re, De Burgh Lawson v. De Burgh Lawson (1889) 58 L. J. Ch. 561; 41 Ch. D. 568; 37 W. R. 797.—STIRLING, J., *explained and distinguished*.

Willett v. Finlay (1891) 29 L. R. Ir. 156, 172.—PORTER, M.R.; *affirmed*, p. 497.—C.A.

Borrowes' Estate, In re (1868) Ir. R. 2 Eq. 468.—LYNCH, J., *distinguished*.

Creagh's Estate, In re (1890) 25 L. R. Ir. 128.—MONROE, J.

Price v. Parker (1848) 17 L. J. Ch. 398; 16 Sim. 198.—V.-C., *principle explained*.

Trimmell v. Fell (1853) 22 L. J. Ch. 954; 16 Beav. 537.—ROMILLY, M.R. *And see post*, col. 2213.

Price v. Parker, distinguished and not applied.

Thomas v. Jones (1862) 31 L. J. Ch. 732; 2 J. & H. 475; 1 N. R. 138; 8 Jur. (N.S.) 1124; 7 L. T. 154; 10 W. R. 853.—WOOD, V.-C.; *affirmed*, 32 L. J. Ch. 139; 1 De G. J. & S. 63; 9 Jur. (N.S.) 161; 7 L. T. 610; 11 W. R. 242.—WESTBURY, L.C.

Price v. Parker (*supra*), *discussed*.
Noble v. Phelps (*or* Willock) (1871) 40 L. J. P. 60; L. R. 2 P. 276, 283; 25 L. T. 65; 19 W. R. 1115.—LORD PENZANCE.

Price v. Parker and Trimmell v. Fell (*supra*), *approved and applied*.
Noble v. Willock (1873) 42 L. J. Ch. 681; L. R. 8 Ch. 778, 782; 29 L. T. 194; 21 W. R. 711.—L.C. and L.J.; Willock v. Noble (1875) 44 L. J. Ch. 345; L. R. 7 H. L. 580, 590; 32 L. T. 419; 23 W. R. 809.—H.L. (E.).

Cave v. Cave (1856) 8 De G. M. & G. 131; 2 Jur. (N.S.) 295.—L.J., *approved*.
Blackburn, In re, Smiles v. Blackburn (1889) 59 L. J. Ch. 208; 43 Ch. D. 75; 38 W. R. 140.—NORTH, J.

Ruscombe v. Hare (1818) 6 Dow 1; 19 R. R. 1.—H.L., *discussed*.
Jackson v. Innes (*post*).

Ruscombe v. Hare, referred to.
Heather v. O'Neill (1858) 2 De G. & J. 399, 410 (*post*, col. 2214).

Ruscombe v. Hare, distinguished.
Atkinson v. Smith (*post*).

Jackson v. Innes (1819) 1 Bligh 104; 20 R. R. 45.—H.L. (E.), *explained*.
Martin v. Mitchell (1820) 2 J. & W. 413; 22 R. R. 184.—PLUMER, M.R.

Jackson v. Innes, referred to.
Plowden v. Hyde (1852) 21 L. J. Ch. 796; 2 De G. M. & G. 684, 737; 16 Jur. 823.—L.J.

Jackson v. Innes, discussed.
Whitbread v. Smith (1854) 23 L. J. Ch. 611; 3 De G. M. & G. 727 (*post*, col. 2214).

Jackson v. Innes, referred to.
Walker v. Armstrong (1856) 25 L. J. Ch. 402; 21 Beav. 305; 2 Jur. (N.S.) 221; 4 W. R. 280.—ROMILLY, M.R.

Jackson v. Innes, discussed.
Atkinson v. Smith (1858) 28 L. J. Ch. 2; 3 De G. & J. 186 (*post*, col. 2214).

Jackson v. Innes, explained.
Dawson v. Bank of Whitehaven (1877) 46 L. J. Ch. 884; 6 Ch. D. 218; 37 L. T. 64; 26 W. R. 34.—C.A. JESSEL, M.R., JAMES and COTTON, L.JJ. See "HUSBAND AND WIFE," vol. i, col. 1283.

Jackson v. Innes, principle not applied.
Jones v. Davies (1878) 8 Ch. D. 205; 47 L. J. Ch. 654; 38 L. T. 710; 26 W. R. 554.

FRY, J.—I am not convinced that Lord Redesdale's language or his meaning [in *Jackson v. Innes*] extends to the kind of case which is now before me, where the settlement was made subject to an absolute power of appointment in the husband and wife, giving them entire control over the property, and enabling them to do what they liked with it. . . . There is no ambiguity, according to my construction of the deed, and it is not therefore a case which comes within the principle laid down in *Jackson v. Innes*.—p. 215.

Jackson v. Innes, referred to.
Plomley v. Felton (1888) 58 L. J. P. C. 50; 14 App. Cas. 61, 66; 60 L. T. 193.—P.C.

Anson v. Lee (1831) 4 Sim. 364; 33 R. R. 122.—V.-C., *applied*.
Whitbread v. Smith (1853) 1 Drew. 531.—KINDERSLEY, V.-C. (*see post*).

Anson v. Lee, commented on.
Walker v. Armstrong (1856) 25 L. J. Ch. 402; 21 Beav. 305; 2 Jur. (N.S.) 221; 4 W. R. 280.—ROMILLY, M.R.

Anson v. Lee, referred to.
Plomley v. Felton (1888) 14 App. Cas. 61; 58 L. J. P. C. 50; 60 L. T. 193.—P.C.
LORD MACNAGHTEN.—That case is questioned in Sugden on Powers (7th ed. vol. i. p. 347).—p. 64.
See now Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 11.

Barnett v. Wilson (1843) 12 L. J. Ch. 428; 2 Y. & C. C. C. 407; 7 Jur. 563.—KNIGHT BRUCE, V.-C., *referred to*.
Whitbread v. Smith (1854) 23 L. J. Ch. 611; 3 De G. M. & G. 727, 740; 2 Eq. R. 377; 18 Jur. 475; 2 W. R. 177.—L.C. and L.J.; *reversing* 1 Drew. 531.—V.-C.

Whitbread v. Smith, referred to.
Heather v. O'Neill (1858) 27 L. J. Ch. 513; 2 De G. & J. 399, 409; 4 Jur. (N.S.) 557; 6 W. R. 484.—L.C. and L.J.; KNIGHT BRUCE, L.J. *dissenting*.

Heather v. O'Neill, referred to.
Atkinson v. Smith (1858) 28 L. J. Ch. 2; 3 De G. & J. 186; 4 Jur. (N.S.) 1160; 7 W. R. 42.—CHELMSFORD, L.C.

Heather v. O'Neill, principle not applied.
Jones v. Davies (1878) 8 Ch. D. 205, 213; 47 L. J. Ch. 654; 38 L. T. 710; 26 W. R. 554.—FRY, J.

Heather v. O'Neill and Plomley v. Felton (1888) 58 L. J. P. C. 50; 14 App. Cas. 61; 60 L. T. 193.—P.C., *observations applied*.

Edie v. Babington (1854) 3 Ir. Ch. R. 568.—M.R., *not applied*.

Byron's Settlement, In re (or Reynolds, In re), Williams v. Mitchell (1891) 60 L. J. Ch. 807; [1891] 3 Ch. 474; 65 L. T. 218; 40 W. R. 11.—KEKEWICH, J.

Philbrick's Settlement, In re (1865) 34 L. J. Ch. 368; 5 N. R. 502; 11 Jur. (N.S.) 558; 12 L. T. 261; 13 W. R. 570.—ROMILLY, M.R.; and **Hayes v. Oatley** (1872) 41 L. J. Ch. 510; L. R. 14 Eq. 1; 26 L. T. 26.—M.R., *followed*.

Hoskin's Trusts, In re (1877) 46 L. J. Ch. 274; 5 Ch. D. 229, 232; 35 L. T. 935.—MALINS, V.-C.; on appeal, 46 L. J. Ch. 817; 6 Ch. D. 281; 25 W. R. 779.—C.A.

Hayes v. Oatley, referred to.
Dixon, In re [1902] 1 Ch. 248, 257 (*post*).

Philbrick's Settlement, In re, and Hoskin's Trusts, In re, discussed.
Treasure, In re, Wild v. Stanham (1900) 69 L. J. Ch. 751; [1900] 2 Ch. 648; 83 L. T. 142; 48 W. R. 696.—KEKEWICH, J.; Moore, In re, Moore v. Moore (1901) 70 L. J. Ch. 321; [1901] 1 Ch. 691; 49 W. R. 373.—BUCKLEY, J. See judgment at length, and *see* "REVENUE."

Philbrick's Settlement, In re, applied.
Peacock's Settlement, In re (*post*).

Hoskin's Trusts, In re, discussed.
Power, In re, Stone, In re, Acworth v. Stone

(1901) 70 L. J. Ch. 778; [1901] 2 Ch. 659; 85 L. T. 400; 49 W. R. 678.

BYRNE, J.—Passing to *Hoskin's Trusts, In re*, I do not myself think that James, L.J., meant to express the opinion that the executor was entitled to receive the fund "as such," but that he must prove the will and constitute himself executor before he could ask to have the fund handed over. The production of probate would be necessary as proof of title on the part of the executor in his capacity as a person nominated to administer the fund and as showing an appointment,—p. 778.

Hoskin's Trusts, In re, referred to.

Dixon, *In re, Penfold v. Dixon* (1901) 71 L. J. Ch. 96; [1902] 1 Ch. 248, 257; 85 L. T. 622; 50 W. R. 203.—**BUCKLEY, J.**

Hoskin's Trusts, In re, applied.

Peacock's Settlement, *In re, Kelcey v. Harrison* (1902) 71 L. J. Ch. 552; [1902] 1 Ch. 552; 86 L. J. 414; 50 W. R. 473.

EADY, J.—It is settled by *Philbrick's Settlement, In re (supra)* and *Hoskin's Trusts, In re*, that where a married woman, or any other person having a general power of appointment over a fund of personality, makes an appointment of the fund by will and appoints an executor, such executor, after he has proved the will, is entitled to receive and give a valid discharge for the appointed fund. Counsel for the defendant did not dispute the authority of these cases, but contended that they only established the proposition that an executor was so entitled, and that an administrator with the will annexed stood in a different position. It was conceded that there was no authority which showed that such an administrator stood in any different position, and I am not aware of any principle which requires any distinction to be made.—p. 327.

Hoskin's Trusts, In re, referred to.

Fearnside, *In re, Baines v. Chadwick* (1902) 72 L. J. Ch. 200; [1903] 1 Ch. 250; 88 L. T. 57; 51 W. R. 186.—**EADY, J.**

Reid v. Shergold (1805) 10 Ves. 370.—L.C., *observations applied.*

Parkin, *In re, Hill v. Schwarz* (1892) 62 L. J. Ch. 55; [1892] 3 Ch. 510; 77 L. T. 77; 41 W. R. 120.—**STIRLING, J.**

Reid v. Shergold, discussed and applied.

Lawley, *In re, Zaiser v. Lawley* (1902) 71 L. J. Ch. 787, 895; [1902] 2 Ch. 673, 799; 87 L. T. 536; 51 W. R. 150.—**JOYCE, J.**; and C.A.

Merritt, In goods of (1858) 1 Sw. & Tr. 112;

29 L. J. P. 155; 4 Jur. (N.S.) 1192.—

SIR C. CRESSWELL, discussed.

Eustace, *In goods of* (1874) 43 L. J. P. 46; L. R. 3 P. 183; 30 L. T. 909; 22 W. R. 832.—**SIR J. HANNEN.**

Merritt, In goods of, and Joys, In goods of

(1860) 4 Sw. & Tr. 214; 30 L. J. P. 169.—

SIR C. CRESSWELL, considered.

Sotheran v. Dening (1881) 20 Ch. D. 99.—**JESSEL, M.R.**; *affirmed, C.A.*

Joys, In goods of, and Merritt, In goods of, questioned and not followed.

Harvey v. Harvey, (1875) 32 L. T. 141; 23 W. R. 478.—**V.-C.**, *approved and followed.*

Sotheran v. Dening, referred to.

Kingdon, *In re, Wilkins v. Pryer* (1886) 32 Ch. D. 604; 55 L. J. Ch. 598; 54 L. T. 753; 34 W. R. 634.

KAY, J.—There is another case . . . *Harvey v. Harvey*, which came before a learned judge very well versed indeed in real property law (Malins, V.-C.) and there the decision was exactly the other way. There the testator had made an appointment under a special power, then he made a will which contained a general clause of revocation, but he did not, according to the judgment of the learned judge, exercise the power; still he held, as I should certainly have held, in the absence of any authority to the contrary, that the words used effected a revocation of the previous testamentary appointment which preceded that will, although the will did not exercise the power by any provision contained in it. The effect was that the property comprised in the power went as in default of appointment, and the will was held to be operative only upon the other property of the testator.—p. 611.

Hughes v. Turner (1831) 4 Hagg. Ecc. 30;

Merritt, In goods of, and Joys, In goods of, disapproved.

Sotheran v. Dening and Kingdon, In re, Wilkins v. Pryer, approved.

Cadell v. Wilcocks (1897) 67 L. J. P. 8; [1898] P. 21; 78 L. T. 83; 46 W. R. 394.

JEUNE, P.—The opinion, indeed, of the delegates in *Hughes v. Turner*, if correctly reported, would appear to be to the effect that a clause of revocation *per se* does not revoke so much of an earlier will as purports to execute a power; and in *Merritt, In goods of*, and *Joy, In goods of*, Sir C. Cresswell expressed a similar opinion. It might be considered doubtful whether *Sotheran v. Dening*, in the C. A., overruled those authorities, because weight was given to the consideration which arose in that case, that by virtue of sect. 27. of the Wills Act, a general bequest operated on the subject matter of the power of appointment, and so strengthened the evidence in favour of an intention to revoke its previous execution. But in *Kingdon, In re*, the question of revocation by a general revocatory clause arose *simpliciter*, there being no subsequent provision relating to the subject matter of the power in question; and Kay, J., acting on the authority of *Sotheran v. Dening*, held that a will executing a power was revoked *in toto* by general words of revocation in a subsequent will. The effect of Kay, J.'s decision is, I venture to think, that on this point of law common sense at last prevailed.—p. 9.

Lisle v. Lisle (1781) 1 Bro. C. C. 533.—L.C., *referred to.*

West v. Ray (1854) 23 L. J. Ch. 447; Kay 385; 2 Eq. R. 431; 2 W. R. 319.—**WOOD, V.-C.**

Jackson v. Jackson (1843) Dru. 91.—L.C.

Referred to, Leigh's Trusts, In re, Bernard, Ex parte (1856) 6 Ir. Ch. R. 133.—L.C.; *distinguished, Carver v. Richards* (1859) 27 Beav. 488, 498 (*post*).

Farmer v. Martin (1828) 2 Sim. 502; 22 R. R. 151.—**V.-C.**

Not applied, Irwin v. Rogers (1848) 12 Ir. Eq. R. 159, 165.—L.C.; *explained, Carver v. Richards* (1859) 29 L. J. Ch. 169; 27 Beav. 488, 498; 5 Jur. (N.S.) 1412; 1 L. T. 257; 8 W. R. 157.—**M.R.** (affirmed, (1860) 29 L. J. Ch. 357; 1 De G. F. & J. 548; 6 Jur. (N.S.) 410; 2 L. T. 161; 8 W. R. 349.—**L.J.J.**): *referred to, Minchin v. Minchin* (1871) Ir. R. 5 Eq. 178, 187.—**M.R.** (affirmed, *ib.* 258.—L.C.; **L.J. dissenting**).

Carver v. Richards (*supra*).
Distinguished, Minchin v. Minchin (1871) Ir. R. 5 Eq. 258, 267.—L.C.; L.J. *dissenting*; *discussed*, Pennefather v. Pennefather (1873) Ir. R. 7 Eq. 300, 309.—C.A.; *applied*, Morgan v. Gronow (1873) 42 L. J. Ch. 410; L. R. 16 Eq. 1, 12; 28 L. T. 434.—L.C., for M.R.: *not applied*, L'Estrange v. L'Estrange (1890) 25 L. R. Ir. 399, 407.—M.R.

Morgan v. Gronow, *applied*.
 Annaly's Estate, In re (1889) 23 L. R. Ir. 481.—MONROE, J.

Morgan v. Gronow, *discussed*.
 Abbott, In re. Peacock v. Frigout (1892) 62 L. J. Ch. 46; [1893] 1 Ch. 54; 3 R. 72; 67 L. T. 794; 41 W. R. 154.—STIRLING, J.

Annaly's Estate, In re (*supra*), *applied*.
 Creagh's Estate, In re (1890) 25 L. R. Ir. 128.—MONROE, J.

G. WHO MAY EXECUTE.

Sutherland (Countess) v. Northmore (1729) 1 Dick. 56.—K.B. and L.C.; S. C. *nom*.
Sclater v. Travell, 3 Vin. Abr. 427, pl. 8.
Discussed, Minchin v. Minchin (1853) 3 Ir. Ch. R. 167.—M.R.; *applied*, Wandesford v. Carriek (1871) Ir. R. 5 Eq. 486, 495.—V.-C.

Wandesford v. Carriek, *distinguished*.
 Lambert's Estate, In re (1900) [1901] 1 Ir. R. 12, 27.—ROSS, J.; *reversed*, *Ib.* 261.—C.A.

King v. Bellord (1863) 32 L. J. Ch. 646: 1 H. & M. 343; 2 N. R. 442; 8 L. T. 683; 11 W. R. 900.—WOOD, V.-C., *discussed*.

Cardross's Settlement, In re (1878) 47 L. J. Ch. 327; 7 Ch. D. 728; 38 L. T. 778; 26 W. R. 389.—JESSEL, M.R. [His lordship discussed and approved the proposition laid down in Preston on Abstracts (p. 326), and cited in Sugden on Powers (8th ed., p. 911), as to the exercise of a power by an infant.]

King v. Bellord and Cardross's Settlement, In re, *referred to*.
 D'Angibau, In re. Andrews v. Andrews (1879—1880) 49 L. J. Ch. 756; 15 Ch. D. 228, 233; 43 L. T. 135; 28 W. R. 930.—JESSEL, M.R.; *affirmed*, C.A. *And see* "INFANT," vol. i., col. 1296.

Cardross's Settlement, In re, *commented on*.
 Newcastle's (Duke) Estates, In re (1883) 52 L. J. Ch. 645; 24 Ch. D. 129; 48 L. T. 779; 31 W. R. 782.

PEARSON, J.—I do not think that *Cardross's Settlement*, In re, has been acceded to. There is a case of *D'Angibau*, In re (*supra*), where Cotton, L.J. did not agree with it. His lordship seemed to think that such a power could only be exercised by an infant where there was a manifest intention that it should be exercised.—p. 136.

Lovell v. Knight (1829) 3 Sim. 275; 8 L. J. (o.s.) Ch. 44.—V.-C.; *affirmed*, (1831) 1 L. J. Ch. 47.—L.C., *followed*.

Lemprière v. Valpy (1832) 5 Sim. 108.—SHADWELL, V.-C.; **Evans v. Evans** (1856) 26 L. J. Ch. 193; 23 Beav. 1; 3 Jur. (N.S.) 7; 5 W. R. 169.—M.R.

Lovell v. Knight, *referred to*.
Shelford v. Acland (1856) 26 L. J. Ch. 144; 23 Beav. 10 (*post*, col. 2218); **Humphery v. Humphery** (1877) 36 L. T. 91.—MALINS, V.-C.

Evans v. Evans (*supra*), *distinguished*.
Curteis v. Kenrick (1840) 9 Sim. 443.—

SHADWELL, V.-C.; and **Churchill v. Dibben** (1787) 2 Lord Kenyon 68; cited 2 Eden 252; 9 Sim. 447, n., *followed*.
Shelford v. Acland (1856) 26 L. J. Ch. 144; 23 Beav. 10; 3 Jur. (N.S.) 8; 5 W. R. 170.—M.R. *And see* Harvey v. Stracey (1852) 22 L. J. Ch. 23; 1 Drew. 73; 16 Jur. 771.—KINDERSLEY, V.-C.

Evans v. Evans, *referred to*.
Att.-Gen. v. Wilkinson (1866) L. R. 2 Eq. 816; 12 Jur. (N.S.) 593; 14 L. T. 725; 14 W. R. 910.—STUART, V.-C., *distinguished*.
Humphery v. Humphery (1877) 36 L. T. 91.—MALINS, V.-C.

Shelford v. Acland (*supra*), *referred to*.
Hurlstone v. Ashton (1865) 11 Jur. (N.S.) 725.—WOOD, V.-C.

Shelford v. Acland, *considered*.
Herdman's Trusts, In re (1893) 31 L. R. Ir. 87.
 PORTER, M.R.—It is said, it must be assumed that if a married woman having a power of appointment makes a will, that is only consistent with an intention to exercise the power. *Shelford v. Acland* is like this case in that respect; for though the M.R. there refers to the Wills Act (1 Vict. c. 26, s. 27), the power being a general one, yet he did not decide the case on that ground, but on the ground that the will must be taken to be an execution of the power, as, if it were not so considered, the words of it would leave nothing to operate upon. That case is not in conflict with *Jones v. Tucker* ((1817) 2 Meriv. 533, *post*, col. 2223); *Davies v. Thorns* ((1849) 2 De G. & Sm. 347, *post*, col. 2223), and the other cases cited by Mr. Kenny, as they are not cases of wills of married women.—p. 93.

7. EXECUTION BY WHAT INSTRUMENT OR ACT.

Allen v. Papworth (1748) 1 Ves. sen. 163.—L.C. (*and see* 4 Ves. 138, n.), *referred to*.
Gilchrist, Ex parte, Armstrong, In re (1886) 55 L. J. Q. B. 578; 17 Q. B. D. 521, 534; 55 L. T. 538; 34 W. R. 709; 3 Morrell 193; 51 J. P. 252.—C.A. **ESHER, M.R., BOWEN and FRY, L.JJ.** *See* "HUSBAND AND WIFE," vol. i., col. 1263.

Jackson v. Jackson (1793) 4 Bro. C. C. 462.—M.R., *applied*.
Affleck v. Affleck (1857) 26 L. J. Ch. 358; 3 Sm. & G. 394; 3 Jur. (N.S.) 326; 5 W. R. 425.—STUART, V.-C.

Jackson v. Jackson, *discussed*.
Lambert's Estate, In re [1901] 1 Ir. R. 261, 264.—C.A.

Affleck v. Affleck, *confirmed*.
Johnson v. Touchet (1867) 37 L. J. Ch. 25; 17 L. T. 191; 16 W. R. 71.—STUART, V.-C.

Affleck v. Affleck, *distinguished*.
Anstis, In re. **Chetwynd v. Morgan** (1886) 31 Ch. D. 596; 54 L. T. 742; 34 W. R. 483.—C.A.

LINDLEY, L.J.—*Affleck v. Affleck* was referred to for the purpose of showing that a covenant to exercise a power would be treated as a defective execution of it. But in that case the person seeking the benefit of that doctrine was the person who had, so to say, bargained for the covenant, and for whose benefit it had been entered into. The appellant here is in no such position.—p. 607.

Affleck v. Affleck and Johnson v. Touchet (*supra*), *discussed*.

Lambert's Estate, In re [1901] 1 Ir. R. 261, 264.—C.A.

Wade v. Paget (1784) 1 Bro. C. C. 364; 1 Cox 74.—L.C.

Discussed, Irwin v. Rogers (1848) 12 Ir. Eq. R. 159.—L.C.; *applied*, Morgan, In re (1857) 7 Ir. Ch. R. 18, 51.—P.C. (IR.); *referred to*, Carver v. Richards (1859) 27 Beav. 488, 496.—M.R.; *distinguished*, Minchin v. Minchin (1871) Ir. R. 5 Eq. 178, 187.—M.R. (affirmed, *ib.* 258.—L.C.; L.J. dissenting); *not applied*, L'Estrange v. L'Estrange (1890) 25 L. R. Ir. 399, 407.—M.R.

Marjoribanks v. Hovenend (1848) Dr. 11; 6 Ir. Eq. R. 238.—L.C.

Referred to, Ogilvie v. Jeaffreson (1860) 29 L. J. Ch. 905; 2 Giff. 353, 377.—STUART, V.-C.; *observations applied*, Hunter v. Walters (1870) L. R. 11 Eq. 292, 315; 24 L. T. 276.—MALINS, V.-C. (affirmed, (1871) 41 L. J. Ch. 175; L. R. 7 Ch. 75; 25 L. T. 785; 20 W. R. 218.—L.C. and L.J.).

Buckell v. Blenkhorn (1846) 5 Hare 131.—V.-C., *referred to*.
Irwin v. Rogers (*supra*).

Buckell v. Blenkhorn, *considered*.

Collard v. Sampson (1853) 22 L. J. Ch. 729; 4 De G. M. & G. 224; 17 Jur. 641.—L.J.; *reversing* 17 Beav. 513; 1 Eq. R. 262.—M.R.

TURNER, L.J.—Great reliance was placed in the course of the argument upon *Buckell v. Blenkhorn*, but I confess that the reasoning in that case does not to my mind appear so satisfactory as to warrant me in saying that the law upon the point can be considered as settled by it. . . . I do not intimate any opinion as to the correctness of the conclusion come to in that case, but I venture to think that the reasoning upon which the judgment in it is founded is not such as to settle the question so as to bind the Court by that decision, whenever the same question should again arise before it. To assume that a power to appoint by will is the same thing and identical with a power to appoint by "writing" is, in truth, to assume the whole question upon the construction of the Act of Parliament—a question, as it seems to me, of a very doubtful description, having regard to the interpretation clause of the Act.—p. 731.

Buckell v. Blenkhorn, *not followed*.

Collard v. Sampson, *discussed*.

West v. Ray (1854) 23 L. J. Ch. 447; Kay 385; 2 Eq. R. 431; 2 W. R. 319.—WOOD, V.-C.

Buckell v. Blenkhorn, *overruled*.

Taylor v. Meads (1865) 34 L. J. Ch. 203; 4 De G. J. & S. 597; 5 N. R. 348; 11 Jur. (N.S.) 166; 12 L. T. 6; 13 W. R. 394.—L.C.

WESTBURY, L.C.—The difficulty, as is usual, does not arise from any uncertainty as to the principle, but from the reports of conflicting and inconsistent decisions which are now the fruitful cause of litigation. The decision on this point by Wigram, V.-C. in *Buckell v. Blenkhorn*, followed by the M.R. in *Collard v. Sampson*, has, I think, been in effect overruled by the L.J. in the latter case, on appeal, and by Wood, V.-C. in *West v. Ray* (*supra*). The decision of the M.R. on this point must, therefore, be reversed.—p. 207. See vol. i., col. 1256.

Collard v. Sampson, *referred to*.

Mullings v. Trinder (1870) L. R. 10 Eq. 449;

39 L. J. Ch. 833; 23 L. T. 580; 18 W. R. 1186.—ROMILLY, M.R.

Buckell v. Blenkhorn, *explained*.

Smith v. Adkins (1872) 41 L. J. Ch. 629; L. R. 14 Eq. 402; 27 L. J. 90; 20 W. R. 717.

ROMILLY, M.R.—What Sir J. Wigram decided in *Buckell v. Blenkhorn* was this, that such a power [to appoint by an instrument in writing with formalities] being exercisable by a will with formalities, was a power of appointment by will, and might therefore under the Wills Act be exercised by a will without the formalities. That doctrine has since been shaken.—p. 630.

Davies v. Huguenin (1863) 32 L. J. Ch. 417; 1 H. & M. 730; 2 N. R. 101; 8 L. T. 443; 11 W. R. 1040.—WOOD, V.-C., *followed*.

Coffin v. Cooper (1865) 34 L. J. Ch. 629; 2 Dr. & Sm. 365; 5 N. R. 459; 12 L. T. 106; 13 W. R. 571.—KINDERSLEY, V.-C. And see Wood v. Wood (1867) L. R. 4 Eq. 48; 15 W. R. 389.—ROMILLY, M.R.

Coffin v. Cooper, *followed*.

Davies v. Huguenin, *commented on*.
Palmer v. Locke (*post*).

Davies v. Huguenin, *explained*.

Henty v. Wrey (1882) 53 L. J. Ch. 667; 21 Ch. D. 332, 357; 47 L. T. 231; 30 W. R. 850.—C.A.

Coffin v. Cooper and Davies v. Huguenin, *referred to*.
Bradshaw, In re, Bradshaw v. Bradshaw [1902] 1 Ch. 436, 448 (*post*).

Thacker v. Key (1869) L. R. 8 Eq. 408.—

JAMES, V.-C.; and **Bulteel v. Plummer** (1870) 39 L. J. Ch. 805; L. R. 6 Ch. 160; 23 L. T. 753; 18 W. R. 1091.—L.C. and L.J.; *reversing* L. R. 8 Eq. 585; 22 L. T. 152; 17 W. R. 1058.—MALINS, V.-C., *approved*.

Palmer v. Locke (1880) 15 Ch. D. 294; 50 L. J. Ch. 113; 43 L. T. 454; 28 W. R. 926.—C.A.

BRETT, L.J.—I should have thought it very dangerous, unless there were some principle very clearly outraged, to overrule the decision of *Coffin v. Cooper* (*supra*), which was decided so long ago, and which has probably been acted upon; but I confess that it seems to me that, according to principle, *Coffin v. Cooper* was right. . . . But I must confess that I agree entirely with the view taken by James, L.J. in *Thacker v. Key*, that such a covenant as is here in question, and as was in question in *Coffin v. Cooper*, is a wholly void covenant, and that no remedy could be had upon that covenant against the covenantor (p. 300). . . . As to *Davies v. Huguenin* (*supra*), which was referred to in the judgment of Kindersley, V.-C., I confess that as stated by him I have some difficulty in saying that I could entirely agree with what was held in *Davies v. Huguenin*; but it seems to me that even if *Davies v. Huguenin* are held to be wrong that would have no effect upon the decision in this case.—p. 302.

COTTON, L.J.—We have the decision of *Coffin v. Cooper*, before Kindersley, V.-C., carefully considered, where throwing aside what would be pushing the doctrine to an extreme, he gave effect to the appointment, and held it not to be bad. We have also the same point decided in the C. A. in *Bulteel v. Plummer*.—p. 305.

Thacker v. Key, *discussed*.

Bannatyne v. Ferguson (1895) [1896] 1 Ir. R. 149.—C.A.

Bulfeel v. Plummer, Thacker v. Key, and Palmer v. Locke (*supra*), *discussed*.
Bradshaw, In re, Bradshaw v. Bradshaw (1902) 71 L. J. Ch. 230; [1902] 1 Ch. 436. 449; 86 L. T. 253.—**KEKEWICH, J.** See judgment at length.

Wright v. Wakeford (1811) 4 Taunt. 213; 17 Ves. 454.—**L.C.** (*see* 15 R. R. 363, n.), *discussed and distinguished*.

Doe d. Mansfield v. Peach (1814) 2 M. & S. 576; 15 R. R. 361.—**K.B.**: **Wright v. Barlow** (1815) 3 M. & S. 512; 16 R. R. 339.—**K.B.**; and **Doe v. Pearce** (1815) 6 Taunt. 402; 2 Marsh. 102.—**C.P.** (*see* 16 R. R. 634 n.), *discussed*.

Stanhope v. Keir (1824) 2 Sim. & S. 37; 2 L. J. (O.S.) Ch. 166.—**V.-C.**; and **Buller v. Burt** (1829) 6 N. & M. 281, n.; 4 A. & E. 15.—**M.R.**, *referred to*.

Burdett v. Spilsbury (1843) 10 Cl. & F. 340.—**H.L. (E.)**; *reversing* S. C. *nom.* **Doe d. Spilsbury v. Burdett** (1839) 9 A. & E. 936; 1 P. & D. 670.—**EX. CH.**; and *affirming* (1835) 4 A. & E. 1; 6 N. & M. 259.—**K.B.**

Wright v. Wakeford, *held overruled*.

Doe d. Spilsbury v. Burdett, *discussed*.

Ward v. Swift (1832) 1 Cr. & M. 171.—**EX.**; and **Simeon v. Simeon** (1831) 4 Sim. 555.—**V.-C.**, *approved*.

Vincent v. Nodor and Man (Bishop) (1850) 19 L. J. Ex. 366; 5 Ex. 683.—**EX.**; S. C. (1851) 20 L. J. Ch. 433; 4 De G. & Sm. 294; 15 Jur. 365.—**KNIGHT BRUCE, V.-C.**

Burdett v. Spilsbury, *referred to*.

Roberts v. Phillips (1855) 24 L. J. Q. B. 171; 4 El. & Bl. 450; 3 C. L. R. 513; 1 Jur. (N.S.) 444.—**Q.B.**

Wagstaff v. Wagstaff (1724) 2 P. Wms. 258.—**L.C.**, *discussed*.

Atkinson v. Smith (1858) 28 L. J. Ch. 2; 3 De G. & J. 186; 4 Jur. (N.S.) 1160; 7 W. R. 42.—**CHELMSFORD, L.C.**

Sanders v. Franks (1817) 2 Madd. 147; 17 R. R. 202.—**M.R.**, *not applied*.

Wellman v. Bowring (1830) 3 Sim. 328.—**V.-C.**

Sanders v. Franks, *referred to*.

Marshall v. Collett (1835) 1 Y. & C. 232.—**C.B.**

Sanders v. Franks, *not applied*.

Johnson v. Routh (1857) 27 L. J. Ch. 305; 3 Jur. (N.S.) 1048; 6 W. R. 6.—**KINDERSLEY, V.-C.**

MacKinley v. Sison (1837) 8 Sim. 561; 1 Jur. 558.—**V.-C.**, *commented on*.

Innes v. Sayer (1851) 21 L. J. Ch. 190; 3 Mac. & G. 606; 16 Jur. 21.—**TRURO, L.C.**

MacKinley v. Sison, *discussed*.

Peover v. Hassall (1861) 30 L. J. Ch. 314; 1 J. & H. 341; 7 Jur. (N.S.) 406; 4 L. T. 113; 9 W. R. 399.—**WOOD, V.-C.**

8. EXECUTION BY DEVISE OR BEQUEST.

Swinburne, In re, Swinburne v. Pitt (1884) 54 L. J. Ch. 229; 27 Ch. D. 696; 33 W. R. 394.—**PEARSON, J.**, *observed on*.

Cotton, In re (1888) 58 L. J. Ch. 174; 40 Ch. D. 41 (*post*, col. 2222).

Swinburne, In re, *followed*.

Boyd, In re, Nield v. Boyd (1890) 63 L. T. 92.—**STIRLING, J.**

Swinburne, In re, *referred to*.

Milner, In re, Milner v. Bray (1899) 68 L. J.

Ch. 255; [1899] 1 Ch. 563; 80 L. T. 151; 47 W. R. 369.—**STIRLING, J.** (*post*, col. 2238).

Swinburne, In re, *followed*.

Mayhew, In re, Spencer v. Cutbush (1901) 70 L. J. Ch. 428; [1901] 1 Ch. 677; 84 L. T. 761; 49 W. R. 330.—**FARWELL, J.**

Swinburne, In re, *referred to*.

Sykes v. Carroll (1902) [1903] 1 Ir. R. 17, 23.—**PORTER, M.R.**

Cotton, In re, Wood v. Cotton (1888) 58 L. J. Ch. 174; 40 Ch. D. 41; 37 W. R. 232.—**NORTH, J.**, *distinguished*.

Blackburn, In re, Smiles v. Blackburn (1889) 43 Ch. D. 75; 59 L. J. Ch. 208; 38 W. R. 140.

NORTH, J.—That case stands on an entirely different footing; there were provisions in the will in that case as to payment of debts and otherwise (especially a direction as to maintenance) that precluded me from finding sufficient indication of intention to exercise the power.—p. 79.

Cotton, In re, *considered*.

Denton, In re, Bannerman v. Toosey (1890) 63 L. T. 105.—**NORTH, J.**

Cotton, In re, *referred to*.

Milner, In re (*supra*, col. 2221).

Cotton, In re, *followed*.

Sykes v. Carroll (*supra*).

Standen v. Standen (1795) 2 Ves. 589.—

L.C.; *affirmed nom.* **Standen v. Macnab** (1797) 6 Bro. P. C. 193.—**H.L.**

Explained, **Bullock v. Fladgate** (1813) 1 V. & B. 471, 478; 12 R. R. 270.—**M.R.**; *applied*, **Lewis v. Lewellyn** (1823) T. & R. 104; 23 R. R. 201.—**BEST, J.**, for **M.R.**: *discussed*, **Miller v. Travers** (1832) 1 L. J. C. P. 157; 9 Bing. 244, 251; 1 M. & Scott 342; 34 R. R. 703.—**C.P.**; *not applied*, **Lovell v. Knight**, 3 Sim. 275 (*post*).

Webb v. Honnor (1820) 1 J. & W. 352; 21 R. R. 180.—**M.R.**, *applied*.

Lovell v. Knight (1829) 3 Sim. 275; 8 L. J. (O.S.) 44.—**SHADWELL, V.-C.**; *affirmed*, (1831) 1 L. J. Ch. 47.—**BROUGHAM, L.C.**

Webb v. Honnor, *referred to*.

Walker v. Mackie (1827) 4 Russ. 76.—**M.R.**, *commented on*.

Hughes v. Turner (1835) 4 L. J. Ch. 141; 3 Myl. & K. 666, 697; 41 R. R. 171.—**PEPYS, M.R.**

Webb v. Honnor, *discussed*.

Innes v. Sayer (1851) 21 L. J. Ch. 190; 3 Mac. & G. 606; 16 Jur. 21.—**TRURO, L.C.**

Webb v. Honnor, *referred to*.

Walker v. Mackie, *applied*.

David's Trusts, In re (1859) 29 L. J. Ch. 116; **Johns**. 495; 6 Jur. (N.S.) 94; 1 L. T. 130; 8 W. R. 39.—**WOOD, V.-C.**

Webb v. Honnor, *referred to*.

Huddleston, In re, Faà Di Bruno v. Eyston [1894] 3 Ch. 595 (*post*, col. 2224).

Andrews v. Emmot (1788) 2 Bro. C. C. 297.

—**L.C.**, *referred to*.

Nannock v. Horton (1802) 7 Ves. 391.—**ELDON, L.C.**

Andrews v. Emmot.

Discussed, **Jones v. Tucker** (1817) 2 Meriv. 533.—**M.R.**; **Innes v. Sayer** (1851) 3 Mac. & G. 606 (*post*, col. 2224); *commented on*, **Morgan, In re** (1857) 7 Ir. C. R. 18, 55.—**P.C. (IR.)**; *applied*, **Pennefather v. Pennefather** (1873) Ir. R. 7 Eq. 300, 309.—**C.A.**

Andrews v. Emmot, *referred to*.
Peirce v. McNeale (*post*); *Huddleston*, *In re*,
Faà Di Bruno v. Eyston (*post*, col. 2224).

Nannock v. Horton (1802) 7 Ves. 391.—L.C.,
referred to.
Jones v. Tucker (1817) 2 Meriv. 533.—M.R.

Nannock v. Horton, *not applied*.
Cuthbert v. Purrier (1822) Jacob 415; 23
 R. R. 104.—PLUMER, M.R.

Nannock v. Horton, *discussed*.
Innes v. Sayer (1851) 3 Mac. & G. 606 (*post*,
 col. 2224); *Mills*, *In re* (1886) 34 Ch. D. 186,
 190 (*post*, col. 2224).

Nannock v. Horton, *referred to*.
Jodrell, *In re*, *Jodrell v. Seale* (1889) 44 Ch. D.
 590; 61 L. T. 677; 38 W. R. 267; *reversed* on
 construction of will, (1890) 59 L. J. Ch. 538; 63
 L. T. 15; 38 W. R. 721.—C.A. C.A. *affirmed nom.*
Seale-Hayne v. Jodrell (1891) 61 L. J. Ch. 70;
 [1891] A. C. 304; 65 L. T. 57.—H.L. (E.).

STIRLING, J.—First, a question was raised as
 to the meaning of the word "transmissible." I
 think it means "capable of transmission after
 death." No clearer illustration of the meaning
 of the word could be found than in the language
 of Lord Eldon in *Nannock v. Horton*, where he
 spoke of an annuity not being transmissible, but
 ceasing with the annuitant.—p. 601.

[There was no appeal on this point.]

Nannock v. Horton, *referred to*.
Peirce v. McNeale (1893) [1894] 1 Ir. R. 118,
 134; *Huddleston*, *In re* [1894] 3 Ch. 595, 602
 (*post*, col. 2224).

Jones v. Tucker (1817) 2 Meriv. 533.—M.R.,
approved.

Jones v. Curry (*or Currey*) (1818) 1 Swanst. 66;
 1 Wils. Ch. 24.—M.R.

Jones v. Tucker, *approved and applied*.
Roake v. Denn (1830) 4 Bligh (N.S.), 1, 18; 6
 Bing. 475.—H.L. (E.) (*post*, col. 2224).

Jones v. Tucker, *discussed*.
Lownds v. Lownds (1827) 1 Y. & J. 445.—
 C.B., *referred to*.

Davies v. Thorns (1849) 18 L. J. Ch. 212; 3
 De G. & Sm. 347 (*post*).

Jones v. Tucker, *discussed*.
Innes v. Sayer (1851) 21 L. J. Ch. 190; 3
 Mac. & G. 606; 16 Jur. 21.—TRURO, L.C.

Jones v. Tucker, *applied*.
Russell v. Russell (1861) 12 Ir. Ch. R. 377,
 388.—M.R.

Jones v. Tucker, *referred to*.
Mills, *In re*, *Mills v. Mills* (1886) 56 L. J. Ch.
 118; 34 Ch. D. 186, 190 (*post*, col. 2224).

Jones v. Tucker, *distinguished*.
Herdman's Trusts, *In re* (*post*).

Davies v. Thorns (1849) 18 L. J. Ch. 212;
 3 De G. & Sm. 347; 13 Jur. 383.—KNIGHT
 BRUCE, V.-C., *applied*.
Russell v. Russell (1861).—M.R. (*supra*).

Davies v. Thorns, *distinguished*.
Herdman's Trusts, *In re* (1893) 31 L. R. Ir. 87,
 93.—PORTER, M.R. See *supra*, col. 2218.

Herdman's Trusts, *In re*, *not applied*.
Peirce v. McNeale (1893) [1894] 1 Ir. R. 118,
 130.—M.R.

O.C.

Jones v. Curry (*or Currey*) (1818) 1 Swanst.
 66; 1 Wils. Ch. 24.—M.R., *applied*.
Lovell v. Knight (1829) 3 Sim. 275; 8 L. J.
 (O.S.) Ch. 44.—SHADWELL, V.-C.; *affirmed*,
 (1831) 1 L. J. Ch. 47.—L.C.

Jones v. Curry.
Referred to, *Innes v. Sayer* (*post*); *Mills*, *In*
re (*post*); *applied*. *Evans v. Evans* (1856) 26
 L. J. Ch. 193; 23 Beav. 1; 3 Jur. (N.S.) 7; 5
 W. R. 169.—M.R.

Innes v. Sayer (1851) 21 L. J. Ch. 190;
 3 Mac. & G. 606; 16 Jur. 21.—TRURO,
 L.C.; *affirming* (1849) 18 L. J. Ch. 274;
 7 Hare 377; 13 Jur. 402.—WIGRAM, V.-C.

Discussed, *Minchin v. Minchin* (1871) Ir. R.
 5 Eq. 258, 264; 19 W. R. 993.—L.C.; *Pennefather*
v. Pennefather (1873) Ir. R. 7 Eq. 300, 310.—
 C.A.; *Peirce v. McNeale* (1893) [1894] 1 Ir. R.
 118, 134.—M.R.; *followed*, *Huddleston*, *In re*,
 [1894] 3 Ch. 595 (*post*); *not applied*, *Carey*, *In*
re, *Mitchell v. Ewing* (1899) [1901] 1 Ir. R. 81,
 100.—M.R.

Bennett v. Aburrow (1803) 8 Ves. 609; 7
 R. R. 131.—M.R.; and **Roake v. Denn**
 (1830) 4 Bligh (N.S.) 1; 6 Bing. 475; 1
 Dow & Cl. 437.—H.L. (E.); *affirming*
S. C. nom. Denn d. Nowell v. Roake (1826)
 5 B. & C. 720; 8 D. & L. 514; 4 L. J.
 (O.S.) K. B. 271.—K.B.; which had
 reversed **S. C. nom. Doe v. Roake**, 2
 Bing. 497; 10 Moore 113; 3 L. J. (O.S.)
 C. P. 82; 33 R. R. 1.—C.P., *discussed*.

Doe d. Hellings v. Bird (1809) 11 East 49.—
 K.B., *referred to*.

Mills, *In re*, *Mills v. Mills* (1886) 34 Ch. D.
 186; 56 L. J. Ch. 118; 55 L. T. 665; 35 W. R.
 133.

KAY, J.—It is purely a question of intention.
 Did the testator intend to exercise his power?
Bennett v. Aburrow; *Denn v. Roake*. The
 intention of a testator can only be inferred from
 the words of his will, and from the circumstances
 which, at the time of executing it, were known
 to him, and which the Court, putting itself in
 his place, is bound to regard. . . . *Doe v. Bird*
 shows that such indications ought to be regarded.
 —p. 191. And see *Irwin v. Rogers* (1848) 12
 Ir. Eq. R. 159, 164.—L.C.; *Morgan*, *In re* (1857)
 7 Ir. Ch. R. 18. 49.—P.C. (IR.); and *Pennefather*
v. Pennefather (*supra*).

Mills, *In re*, **Mills v. Mills**, *approved*.
Esther Williams, *In re*, *Foulkes v. Williams*
 (1889) 58 L. J. Ch. 451; 42 Ch. D. 93; 61 L. T.
 58.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

Mills, *In re*; **Esther Williams**, *In re*; and
Huddleston, *In re*, **Faà Di Bruno v. Eyston**
 (1894) 64 L. J. Ch. 157; [1894] 3 Ch. 595;
 8 R. 462; 43 W. R. 139.—KEKEWICH, J.,
not applied.

Milner, *In re*, *Milner v. Bray* (1899) 68 L. J.
 Ch. 255; [1899] 1 Ch. 563; 80 L. T. 151; 47
 W. R. 369.—STIRLING, J. See *post*, col. 2238.

Esther Williams, *In re*, *referred to*.
Hayes, *In re*, *Turnbull v. Hayes* (1900) 69
 L. J. Ch. 691; [1900] 2 Ch. 332; 83 L. T. 152;
 49 W. R. 21.—BYRNE, J. See *post*, col. 2227.

Stillman v. Weedon (1848) 18 L. J. Ch. 46;
 16 Sim. 26; 12 Jur. 992.—V.-C.
Distinguished, *Cowper v. Mantell* (No. 1) (1856)
 22 Beav. 223; 2 Jur. (N.S.) 475; 4 W. R. 500.—
 M.R.; *referred to*, *Cofield v. Pollard* (1857) 3

Jur. (N.S.) 1203; 5 W. R. 774.—STUART, V.-C.
And see *post*, col. 2225.

Stillman v. Weedon (*supra*).

Applied, Thomas v. Jones (1862) 2 J. & H. 475, 481.—V.-C. (affirmed, L.C., *post*); *not followed*, Elgood v. Cole (1869) 21 L. T. 80; 17 W. R. 953.—ROMILLY, M.R.

Stillman v. Weedon; Cofield v. Pollard (*supra*, col. 2224); and **Patch v. Shore** (1857) 32 L. J. Ch. 185; 2 Dr. & Sm. 589; 1 N. R. 157; 9 Jur. (N.S.) 63; 7 L. T. 554; 11 W. R. 142.—KINDERSLEY, V.-C., *distinguished*.

Ruding's Settlement, In re (1872) L. R. 14 Eq. 266, 273 (*post*).

Stillman v. Weedon, *commented on*.

Doyle v. Coyle (1894) [1895] 1 Ir. R. 205, 212.—PORTER, M.R.; Hayes, *In re* [1900] 2 Ch. 352 (*post*, col. 2227).

Pettinger v. Ambler (1866) 35 L. J. Ch. 389; 38 Beav. 321; L. R. 1 Eq. 510; 14 L. T. 118.—ROMILLY, M.R., *distinguished*.

Hodsdon v. Dancer (1868) 16 W. R. 1101.—ROMILLY, M.R.

Hodsdon v. Dancer, *distinguished*.

Ruding's Settlement, In re (1872) L. R. 14 Eq. 266, 273 (*post*).

Lewis v. Lewellyn (1823) T. & R. 104; 23 R. R. 201.—BEST, J., for M.R.: and **Napier v. Napier** (1826) 1 Sim. 28; 5 L. J. (O.S.) Ch. 66; 27 R. R. 144.—SHADWELL, V.-C., *applied*.

Hughes v. Turner (1835) 4 L. J. Ch. 141; 3 Myl. & K. 666, 696.—PEPYS, M.R.

Lewis v. Lewellyn, Napier v. Napier, and Hughes v. Turner, *discussed*.

Innes v. Sayer (1851) 21 L. J. Ch. 190; 3 Mac. & G. 606; 16 Jur. 21.—TRURO, L.C.

Hughes v. Turner; Lane v. Wilkins (1808) 10 East 241.—K.B.; and **Powell v. Loxdale** (1819) 2 B. & Ald. 291.—K.B., *referred to*.

Hope v. Hope (1854) 5 Giff. 13; 18 Jur. 823; 2 W. R. 674.—STUART, V.-C.

Hughes v. Turner.

Referred to, Minchin v. Minchin (1871) Ir. R. 5 Eq. 258, 265; 19 W. R. 993.—L.C., L.J. *dissenting*; *not applied*, Peirce v. McNeale (1893) [1894] 1 Ir. R. 118, 133.—M.R.

Thomas v. Jones (1862) 31 L. J. Ch. 732; 32 L. J. Ch. 139; 1 De G. J. & S. 63; 1 N. R. 138; 8 Jur. (N.S.) 1124; 9 Jur. (N.S.) 161; 2 J. & H. 475; 7 L. T. 610; 11 W. R. 242.—WOOD, V.-C., and L.C., *considered*.

Noble v. Phelps (1871) 41 L. J. P. 60; L. R. 2 P. 276, 283; 25 L. T. 65; 19 W. R. 1115.—LORD PENZANCE.

Thomas v. Jones.

Distinguished, **Ruding's Settlement, In re** (1872) 41 L. J. Ch. 665; L. R. 14 Eq. 266; 20 W. R. 936.—MALINS, V.-C.; *discussed*, **Noble v. Willock** (1873) 42 L. J. Ch. 681; L. R. 8 Ch. 778, 793; 29 L. T. 194; 21 W. R. 711.—L.C. and L.J.; **Willock v. Noble** (1875) 44 L. J. Ch. 345; L. R. 7 H. L. 580, 590; 32 L. T. 419; 23 W. R. 809.—H.L. (E.); *not applied*, **Moynan v. Moynan** (1878) 1 L. R. Ir. 382, 386.—M.R.

Ruding's Settlement, In re (*supra*), *discussed*.

Clark's Estate, In re, Maddick v. Marks (1879) 49 L. J. Ch. 205; 14 Ch. D. 422; 43

L. T. 40; 28 W. R. 342.—BACON, V.-C; *affirmed*, C.A. (*post*, col. 2228).

Thomas v. Jones, *approved*.

Ruding's Settlement, In re, *dissented from*.

Boyes v. Cook (1880) 14 Ch. D. 53; 49 L. J. Ch. 350; 42 L. T. 556; 28 W. R. 754.—C.A.; *reversing* MALINS, V.-C.

JAMES, L.J.—Notwithstanding . . . **Ruding's Settlement, In re**—which case, as at present advised, I find it very difficult to distinguish from the present, and if it be necessary to overrule that decision, it must be overruled on the principle I am about to enunciate—I am of opinion that the decision appealed from cannot be sustained. The 24th section of the Wills Act enacts that every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will: and then the 27th section says, that a general devise or bequest of real or personal estate shall be construed to include any real or personal estate which the testator may have power to appoint in any manner he may think proper, and shall operate as an execution of such power unless a contrary intention shall appear by the will. Taking these two sections together, it is clear that a will containing a general devise or bequest, and made before the creation of a general power to appoint by will, and remaining unrevoked until the testator's death, is a good execution of the power. In fact a general power of appointment really confers on the donee of the power the entire beneficial interest in the property subject to the power, and enables him to dispose of it as he pleases. In **Ruding's Settlement, In re**, the V.-C. held that the surrounding circumstances could be looked at in construing the will. But when it is said that surrounding circumstances may be looked at, that only means that the circumstances existing at the time when the testator made his will may be looked at. You may place yourself, so to speak, in his armchair, and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention. But to look at a settlement subsequently executed is not to look at the surrounding circumstances which existed when the will was made.—p. 55.

BRETT, L.J.—It appears to me that **Thomas v. Jones** rightly decided the meaning of the Act of Parliament, and laid down a general rule which should be followed in all cases. I confess I cannot follow the reasoning of the V.-C. in **Ruding's Settlement, In re**.—p. 56.

COTTON, L.J. to the same effect.

Boyes v. Cook, *considered*.

Hernando, In re, Hernando v. Sawtell (1884) 53 L. J. Ch. 865; 27 Ch. D. 234; 51 L. T. 117; 33 W. R. 252.—PEARSON, J.

Boyes v. Cook, *approved*.

Airey v. Bower (1887) 56 L. J. Ch. 742; 12 App. Cas. 263; 56 L. T. 409; 35 W. R. 657.—H.L. (E.).

HALSBURY, L.C.—Looking at the course of decisions, not only in **Boyes v. Cook**, but in earlier cases, and having regard to the learned judges who have decided substantially the point which is before us, I should hesitate very long before coming to a conclusion different to that which they have arrived at.—p. 744.

LORD HERSCHELL to the same effect.

LORD MACNAGHTEN.—This case is perhaps distinguishable from *Boyes v. Cook*; the words of futurity are more emphatic; but I think it would be very unfortunate if at this date the beneficial effects of the Wills Act were frittered away by such nice distinctions as that.—p. 745.

Boyes v. Cook and Airey v. Bower, referred to.

Marsh, in re, *Mason v. Thorne* (1888) 57 L. J. Ch. 639; 88 Ch. D. 630; 59 L. T. 575; 37 W. R. 10.—NORTH, J.

Boyes v. Cook and Airey v. Bower, discussed.

Wells, in re, *Hardisty v. Wells* (1889) 58 L. J. Ch. 835; 42 Ch. D. 646, 656; 61 L. T. 588; 38 W. R. 229.—STIRLING, J.

Airey v. Bower, referred to.

Wells, in re, *Hardisty v. Wells, dictum approved.*

Doyle v. Coyle (1894) [1895] 1 Ir. R. 205, 212.—M.R.

Airey v. Bower; Boyes v. Cook; Wells, in re, Hardisty v. Wells; and Doyle v. Coyle, referred to.

Hayes, in re, *Turnbull v. Hayes* (1900) 69 L. J. Ch. 691; [1900] 2 Ch. 332; 83 L. T. 152; 49 W. R. 21; *affirmed*, (1901) 70 L. J. Ch. 770; [1901] 2 Ch. 529; 85 L. T. 85; 49 W. R. 659.—C.A. RIGBY, COLLINS and ROMER, L.JJ.

BYRNE, J.—It is clear upon the authorities that sect. 27 of the Wills Act applies to general and not to special powers of appointment—see *Airey v. Bower*, *Boyes v. Cook* and *Esther Williams, in re, Foulkes v. Williams* (*supra*, col. 2224). So far as the reasoning of the V.-C. in *Stillman v. Weedon* (*supra*, col. 2224) is founded upon the application of sect. 27 of the Act, such reasoning must be disregarded in view of later decisions. It is also clear that the combined effect of sects. 24 and 27 of the Act is to enable a general power of appointment by will to be well executed by a will executed prior to the date of the instrument creating the power. Unless *Stillman v. Weedon* is to be read as an authority to the contrary, I have been unable to find any case in which it has been decided that a special power of appointment by will can be well executed by a will dated prior to the creation of the power by virtue of sect. 24 of the Act; and the opinion of Stirling, J. in *Wells, in re, Hardisty v. Wells*, and the actual decision of the M.R. in Ireland in *Doyle v. Coyle*, are distinctly opposed to any such conclusion. *Stillman v. Weedon* may, I think, perhaps be reconciled with the last-mentioned cases either upon the ground that, if specific property, the subject of the power, be referred to in the will, sect. 24 of the Act applies, because that property may then be said to be comprised in the will, or (to use the interpretative words of Turner, L.J. in *Langdale (Lady) v. Briggs* ((1856) 26 L. J. Ch. 27; 8 De G. M. & G. 391; 2 Jur. (N.S.) 982; 4 W. R. 783), "so far as the will comprises dispositions of real and personal estate" within the meaning of the section, or upon the ground that, independently of the Act, if specific personal property, the subject of the special power, be dealt with by the testator, he must be deemed to have intended to exercise the only power enabling him to deal with it, although such power be created subsequent to the will. I am not certain

as to the precise view taken by Lord St. Leonards in Sugden on Powers (8th ed.), p. 307, sect. 49, where he deals with *Stillman v. Weedon*. Be this as it may, having regard to the opinions of Stirling, J. and of the M.R. in Ireland in the cases I have mentioned, I do not think that I ought to deal with the present case (there being no specific description of or reference to the property in question) upon the footing that, not being within sect. 27, sect. 24 of the Wills Act applies. . . . I should like to mention that in some of the text-books the actual discussion and decision in *Stillman v. Weedon* has been treated as though it were only in reference to a general power. It is, however, clear to my mind that, rightly or wrongly, the V.-C. considered both sects. 24 and 27 to relate to special powers, and that he was actually dealing with a case of special power.—p. 693.

Pidgely v. Pidgely (1844) 1 Coll. C. C. 255; 8 Jur. 529.—V.-C., *followed*.

Maunsell v. Maunsell (1871) 24 L. T. 698; 19 W. R. 1003.—WICKENS, V.-C.

Pidgely v. Pidgely, followed.

Swinburne, in re, *Swinburne v. Pitt* (1884) 54 L. J. Ch. 229; 27 Ch. D. 696, 702; 33 W. R. 394.—PEARSON, J.

Pidgely v. Pidgely, referred to.

Milner, in re, *Milner v. Bray* (1899) 68 L. J. Ch. 255; [1899] 1 Ch. 563; 80 L. T. 151; 47 W. R. 369.—STIRLING, J. *See post*, col. 2238.

Moss v. Harter (1854) 2 Sm. & G. 458; 18 Jur. 973; 2 W. R. 540.—STUART, V.-C., *referred to*.

Ruding's Settlement, in re (1872) 41 L. J. Ch. 665; L. R. 14 Eq. 266, 274; 20 W. R. 936.—MALINS, V.-C.

Moss v. Harter, observed on.

Clark's Estate, in re, *Maddick v. Marks* (1880) 14 Ch. 422; 49 L. J. Ch. 586; 43 L. T. 40; 28 W. R. 753.—C.A.

[Counsel had read, as a comment on *Moss v. Harter*, the following passage from Sugden on Powers (8th ed. p. 306):—"Where the property is, as in this case, settled by the testator himself upon others, in default of any appointment by him under his power it would seem to require some indication of an intention by him to defeat his settlement in order to hold a general gift in his will, which can be satisfied by other property, to be an execution of his power."]

COTTON, L.J.—With respect to the extract that has been read from Lord St. Leonards' Treatise on Powers, I do not quite understand whether it is a statement of his own opinion, or merely a comment on the effect of *Moss v. Harter*. But if it is to be taken as an expression of his opinion that, in the case of a power of appointment in a settlement created by the testator himself, an indication of his intention to defeat his settlement must be shown, that appears to me to contradict the words of the statute, and I should hesitate to act, even upon Lord St. Leonards' authority, against the expressed intention of the legislature.—p. 431. THESIGER, L.J. concurred.

JAMES, L.J.—I wish to add, with reference to what has been said by Cotton, L.J., that if Lord St. Leonards is to be understood as saying that the Act is to receive a different interpretation as regards a power in a settlement created by the testator from that which it would receive in

other cases, I do not agree with his opinion.—
p. 26. *And see post*, col. 2229.

Moss v. Harter (*supra*), *discussed*.

Clark's Estate, In re, Maddick v. Marks
(*supra*), *referred to*.

Phillips v. Cayley (1889) 58 L. J. Ch. 569; 43
Ch. D. 222, 227 (*post*).

Clark's Estate, In re, Maddick v. Marks,
applied.

Marsh, In re, Mason v. Thorne (1888) 57 L. J.
Ch. 639; 38 Ch. D. 630; 59 L. T. 595; 37 W. R.
10.—NORTH, J.

Marsh, In re, Mason v. Thorne, distinguished.
Phillips, In re, Robinson v. Burke (1889) 58
L. J. Ch. 448; 41 Ch. D. 417; 60 L. T. 808;
37 W. R. 504.—CHITTY, J.

Marsh, In re, disapproved.

Phillips, In re, Robinson v. Burke, approved.

Phillips v. Cayley (1889) 58 L. J. Ch. 569;
59 L. J. Ch. 177; 43 Ch. D. 222, 227; 61 L. T.
195; 62 L. T. 86; 38 W. R. 241.—KEKE-
WICH, J.; *affirmed*, C.A.

Marsh, In re, not followed.

Phillips, In re, and Phillips v. Cayley,
referred to.

Tarrant's Trust, In re (1889) 58 L. J. Ch. 780.
—CHITTY, J.

Phillips v. Cayley, applied.

Davies, In re, Davies v. Davies (1892) 61 L. J.
Ch. 595; [1892] 3 Ch. 63; 67 L. T. 548; 41
W. R. 13.—NORTH, J.

Jones, In re, Greene v. Gordon (1886) 56 L. J.
Ch. 58; 34 Ch. D. 65; 55 L. T. 597;
35 W. R. 74.—KAY, J., *referred to*.
Gibbes' Settlement, In re, White v. Randolph
(1887) 57 L. J. Ch. 757; 37 Ch. D. 143;
58 L. T. 11; 36 W. R. 429.—NORTH, J.

Jones, In re, Greene v. Gordon, distinguished
and observed on.
Wallinger's Estate, In re [1898] 1 Ir. R. 139.
—C.A.

Spooner's Trust, In re (1851) 21 L. J. Ch. 151;
2 Sim. (N.S.) 129.—KINDERSLEY, V.-C.,
applied.
Gale v. Gale (1856) 21 Beav. 349; 4 W. R. 277.
—ROMILLY, M.R.

Spooner's Trust, In re, discussed.

Hawthorn v. Sheddon (1856) 25 L. J. Ch. 833;
3 Sim. & G. 293; 2 Jur. (N.S.) 749.

STUART, V.-C.—It was decided in *Spooner's*
Trust, In re, that the words, "I constitute A. B.
my residuary legatee," are a sufficient gift of the
personal estate to operate as an appointment,
under s. 27 of the new Wills Act, of all the
personal estate over which the testatrix had a
general power of appointment.—p. 836.

Spooner's Trust, In re, followed.

Elen, In re, Thomas v. McKechie (1893)
68 L. T. 416.—STIRLING, J.

Hawthorn v. Sheddon (1856) 25 L. J.
Ch. 833; 3 Sim. & G. 293; 2 Jur. (N.S.) 749.
—V.-C., *referred to*. *And see* col. 2230.
Shelford v. Acland (1856) 26 L. J. Ch. 144;
23 Beav. 10; 3 Jur. (N.S.) 8; 5 W. R. 170.—
ROMILLY, M.R.

Hawthorn v. Sheddon, observed on.

Hurlstone v. Ashton (1865) 11 Jur. (N.S.) 725.
WOOD, V.-C.—I was surprised, however, to find

the decision of *Hawthorn v. Sheddon*, and also to
find it approved by Lord St. Leonards in his
book on Powers, p. 310, 8th ed.; and I should
have had great difficulty in deciding this case if
it had been on all fours with that one. But there
the gifts were all pecuniary, while here there is a
gift of Indian stock, and the case is, therefore,
not so strong, though there is an appointment of
executors. And in *Shelford v. Acland* (*supra*),
a doubt is expressed whether the words of the
7 Will. 4 & 1 Vict. c. 27, s. 27, go to the full
extent which Stuart, V.-C., seemed to think they
did in *Hawthorn v. Sheddon*. Here I am asked
to say that a gift of Indian stock ought to be
considered an appointment of a sum of Con-
solidated Bank Annuities. No doubt, if you
describe the fund in a manner applicable to pass
it, it will do so, but if you give a sum of 1,000*l.*,
that gift will not pass leaseholds.—p. 726.

Hurlstone v. Ashton, distinguished.

Wilday v. Barnett (1868) L. R. 6 Eq. 193;
16 W. R. 961.—ROMILLY, M.R.

Hawthorn v. Sheddon (*supra*), *approved*.

Wilday v. Barnett, applied.

Wilkinson, In re (1869) L. R. 4 Ch. 587;
17 W. R. 839.—SELWYN and GIFFORD, L.JJ.

Wilkinson, In re, applied.

Davies' Trusts, In re (1871) 41 L. J. Ch. 97;
L. R. 13 Eq. 163; 25 L. T. 785; 20 W. R. 165.—
WICKENS, V.-C.

Lake v. Currie (1852) 4 De G. M. & G. 536;
16 Jur. 1027.—L.C. and L.JJ., *explained*
and distinguished.

Esther Williams, In re, Foulkes v. Williams
(1889) 58 L. J. Ch. 451; 42 Ch. D. 93; 61 L. T. 58.
—C.A. COTTON, LINDLEY and LOPES, L.JJ.

Lake v. Currie, discussed.

Byron's Settlement, In re (or **Reynolds,**
In re, Williams v. Mitchell (1891) 60 L. J.
Ch. 807; [1891] 3 Ch. 474; 65 L. T. 218;
40 W. R. 11.—KEKEWICH, J., *statement in*,
approved.

Wallinger's Estate, In re [1898] 1 Ir. R. 139.—
C.A. ASHBOURNE, L.C., FITZGIBBON, WALKER
and HOLMES, L.JJ.

Cooper v. Martin (1867) L. R. 3 Ch. 47.—
CAIRNS, L.J. and ROLT, J.; *affirming, on*
different grounds, L. R. 3 Ch. 50, n.; 12
Jur. (N.S.) 887; 15 L. T. 268; 15 W. R. 5.—
STUART, V.-C., *applied*.

Potts v. Britton (1871) L. R. 11 Eq. 433;
24 L. T. 409; 19 W. R. 651.—ROMILLY, M.R.

Cooper v. Martin, referred to.

Wells, In re, Hardisty v. Wells (1889) 58 L. J.
Ch. 835; 42 Ch. D. 646, 655; 61 L. T. 588; 38
W. R. 229.—STIRLING, J.

Cooper v. Martin, referred to.

Parkin, In re, Hill v. Schwarz (1892) 62 L. J.
Ch. 55; [1892] 3 Ch. 510, 517; 67 L. T. 77;
41 W. R. 120.—STIRLING, J.

Cooper v. Martin, distinguished and dictum
discussed.

Moses, In re, Beddington v. Beddington (1901)
71 L. J. Ch. 101; [1902] 1 Ch. 100; 85 L. T. 596.
—C.A. *See post*, col. 2232.

Cooper v. Martin, referred to.

Lawley, In re, Zaiser v. Lawley (1902) 71 L. J.
Ch.; [1902] 2 Ch. 673.—JOYCE, J.; *affirmed*,
C.A. (*supra*, col. 2211).

Gale v. Gale (1856) 21 Beav. 349; 4 W. R. 277.—M.R., *dissented from*.
Johnstone's Settlement, In re (1880) 49 L. J. Ch. 596; 14 Ch. D. 162, 166; 28 W. R. 593.—MALINS, V.-C.

Gale v. Gale, followed.

Johnstone's Settlement, In re, distinguished.

Blake v. Blake (1880) 15 Ch. D. 481; 49 L. J. Ch. 393; 42 L. T. 724; 28 W. R. 647.

JESSEL, M.R.—If I entertained a very strong and clear opinion that the decision in *Gale v. Gale* was erroneous, it is possible that I might make use of the observations of Lord St. Leonards and Malins, V.-C., to aid me in differing from the decision in that case, although it is dated so long ago as the year 1856; but I cannot say that I do entertain such a strong and clear opinion. I should have had very great difficulty in deciding this case if it had come before me unprejudiced by authority; but where I find a case which is in point, and which has got into all the text-books, I am not at liberty to treat it as an authority of no weight. *Gale v. Gale* is commented upon only in one of the text-books—no doubt a book of very great authority—but in a way which does not apply to the case before me. Lord St. Leonards says of that decision [Sugden on Powers, 8th ed. p. 308]: "This appears to be a narrow construction of the Act." Now, that refers to sect. 23 of the Wills Act. I am by no means prepared to agree that it was a narrow construction. I understand the 23rd section of the Act to refer to an interest remaining in the property, and I see in the note to the last edition of Mr. Shelford's book [Shelford's Real Property Statutes, 8th ed. p. 520] several authorities are quoted which show that that is the meaning of the section. There it is said, "This clause of the Act applies to cases where testators, after having devised their estates, make conveyances of them which are to have the same effect as fines or recoveries, or where they mortgage the devised estates in fee and afterwards take a reconveyance of them to themselves and a trustee to bar dower, but it does not apply to cases where the thing meant to be given is gone." I take it that is the true view of the 23rd section. I can therefore derive no assistance from it as regards this particular testamentary appointment, because here the property is gone.—p. 487. . . . I may mention, and perhaps I should say, that the case before Malins, V.-C. [*Johnstone's Settlement, In re*] appears, to my mind, to be wholly distinguishable, as I read it, and there was no absolute necessity for him to differ from *Gale v. Gale*. Whether the V.-C.'s decision can or cannot be supported it is not for me to say.—p. 489.

Gale v. Gale and Blake v. Blake, distinguished.

Johnstone's Settlement, In re, followed.

Willett v. Finlay (1891) 29 L. R. 1r. 156.—PORTER, M.R.; *affirmed, ib.* 497.—C.A.

Gale v. Gale, Blake v. Blake; Johnstone's Settlement, In re.—M.R.; and Collinson v. Collinson (1857) 24 Beav. 269, *considered and explained.*

Dowsett, In re, Dowsett v. Meakin (1900) 70 L. J. Ch. 149; [1901] 1 Ch. 398; 49 W. R. 268.—FARWELL, J.

Blake v. Blake and Gale v. Gale, principle applied.

Johnstone's Settlement, In re, discussed.

Willett v. Finlay (*supra*), *explained.*

Dowsett, In re, Dowsett v. Meakin, approved.

Moses, *In re, Beddington v. Beddington* (1901) 71 L. J. Ch. 101; [1902] 1 Ch. 100; 85 L. T. 596.—C.A.; *affirming* BYRNE, J.; *affirmed, nom.* *Beddington v. Baumann* (*post*, col. 2234).

V. WILLIAMS, L.J.—I think that *Blake v. Blake* and the other cases decided on the construction of wills purporting to exercise a general power, and the effect of an alteration of the character of the settled property after the making of the will, apply just as much to the exercise of a special power as of a general power. . . . Then come the *dicta* of Lord Cairns and Lord St. Leonards. I will deal first with the *dictum* of Lord Cairns in *Cooper v. Martin* (*supra*, col. 2230). He said, "I should have had no doubt, speaking with great respect of the contrary view which the V.-C. appears to have entertained, that the appointment of Pain's Hill, *eo nomine*, in the will would have been a revocation *pro tanto* of the appointment in the deed of the 5th April previous, and would have carried the proceeds of the sale of Pain's Hill, if, under the trust for pre-emption by the younger brothers or otherwise, it should become necessary to sell it." It will be seen, however, that there the power of appointment was a power to appoint a fund amongst certain of her children in such shares as the donee of the power should by deed or will appoint, of which fund the proceeds of sale of Pain's Hill formed a part. Then, by will, the donee of the power, the testator's widow, appointed the Pain's Hill estate by name to her eldest son. It seems plain from this that Lord Cairns did not mean by the quoted passage to say that, under a power to appoint real estate, an appointment of a specific real estate would carry the proceeds of that estate, if the estate should happen to be sold between the date of the will of the donee of the power and the death of the testator. I do not, therefore, think that the *dictum* of Lord Cairns assists us in the decision of the present case. Then as to the passage from [Sugden on Powers (8th ed. p. 308)]. He begins by criticising *Gale v. Gale*, on the ground that it is based on too narrow a construction of sect. 27 of the Wills Act. If he meant that an appointment of a specified real estate would in all cases carry the proceeds, even though invested in the purchase of some other estate, *Moor v. Raisbeck* ((1841) 12 Sim. 123) would seem to be a clear authority to the contrary, and it is quoted by Mr. Shelford—Real Property Statutes (8th ed. p. 520; 9th ed. p. 421)—as the authority for the passage in his book, which Sir G. Jessel cites with approval in *Blake v. Blake*. Then follows a passage in which Lord St. Leonards certainly does seem to say as a matter of construction that where property, the subject of the power of appointment, is vested in trustees who have a power of sale, subject to the consent of the donee of the power of appointment, which power they exercise after the date of the will exercising the power of appointment, the appointment would not be defeated by the change in the character of the estate. He says (ch. vii. sect. 7, par. 50): "Supposing a personal fund to be settled on a marriage, in like manner as the real estate was in *Gale v. Gale*, and there was a power in the settlement

to vary the securities, it could hardly be held that an appointment by will, of the fund in its then present state, would be defeated by a variation in the investment of it, under the power for that purpose, subsequently to the will." Sir G. Jessel, in *Blake v. Blake*, did not agree with this view. He thought that the fact of the sale, being with the consent of the donee of the power, made the sale have the same effect as a sale of his own land would have, and he declined to read the gift of the land as a gift of the proceeds. It is true that both in *Gale v. Gale* and *Blake v. Blake* the power of appointment was general, and the sale was with the consent of the donee of the power; and these facts certainly make the case very like the case of a devise of the property of the testator, and a subsequent sale of the same land by the testator. . . . I do not say that *Johnstone's Settlement, In re*, is bad law. It is not necessary to do so. It does not really touch the present case. That was a case of mere construction, in which the surrounding circumstances were different from those of the present case.—pp. 107—108.

ROMER, L.J.—The reasoning of Sir G. Jessel, M.R., in *Blake v. Blake*, where he deals with *Gale v. Gale*, though those were cases of general powers, appears to me to apply to the present case, and with reference to the criticism on *Gale v. Gale* by Lord St. Leonards in his work on Powers, I may observe that he himself relies on the intention of the testator. He says (8th ed. p. 308), "The testator did not intend his legatees to take the settled estate itself, but the produce of it, and that was precisely the condition in which the settled property stood at his death." But that was begging the whole question. If the intention of the testator was to appoint the proceeds of the sale of the estate, I know of no reason why that intention should not be given effect to. But of course that intention must appear from the will itself, regard of course being had to the instrument creating the power, so that again one is brought back to the point as to whether from the will you can gather that the testator has appointed the proceeds. No doubt, in many cases, though an appointment may be of a property by a particular description, there may be sufficient in the will to show that the testator meant to appoint, and has really appointed, whatever represented that property at the time of his death. It is, in my opinion, only on this ground, if at all, that the decision of Malins, V.-C. in *Johnstone's Settlement, In re*, can be supported, and this was, I think, the ground on which *Willet v. Finlay* was decided. In that case the power was to appoint by will a settled fund of 1,000*l.*, which was at the date of the will invested on loan to a Mr. Fitzpatrick on mortgage. The will, which was of an informal character, appointed the 1,000*l.* by the description of "the 1,000*l.* Mr. Fitzpatrick has," and I gather that the Court in effect held that the intention sufficiently appeared to appoint the 1,000*l.* as a fund, and that the reference to Mr. Fitzpatrick was descriptive only of the then condition of the fund, and that it was not in essence merely an appointment of a debt, which would *prima facie* be adeemed by being paid off. With regard to the observation of Lord Cairns in *Cooper v. Martin*, which is of course of great weight, I think it is fully explained by the fact that the power there was in terms to appoint the pro-

ceeds of sale of an estate devised in trust for sale, and an appointment of the estate under such a power could only operate on the estate through the proceeds. Lastly, I may say that I agree with the excellent judgment of Farwell, J. in *Dowsett, In re*.—p. 109.

COZENS-HARDY, L.J.—I put aside cases where a testator has exercised a general power, such as *Gale v. Gale* and *Blake v. Blake*. They may be considered as equivalent to dispositions of a man's own property, and therefore distinguishable. . . . No general principle was laid down by Lord Cairns [in *Cooper v. Martin*]. So far as I am aware, the precise question has never arisen for decision until the recent case of *Dowsett, In re*, where Farwell, J. decided that, for the purposes of ademption, there was no difference between a special and a general power, and that the doctrine applies to both alike. I agree with Farwell, J.'s view, which seems to me to be consistent with general principles.—p. 111.

Moses, *In re, Beddington v. Beddington* (*supra*, col. 2232), *affirmed*.

Gale v. Gale, Blake v. Blake and Dowsett, *In re* (*supra*, col. 2231), *approved*.

Beddington v. Baumann (1902) 72 L. J. Ch. 155; [1903] A. C. 13; 87 L. T. 658; 51 W. R. 383.—H.L. (E.).

Ames v. Cadogan (1879) 48 L. J. Ch. 762; 12 Ch. D. 868; 41 L. T. 211; 27 W. R. 905.—FRY, J., *commented on*.

Von Brockdorff v. Malcolm (1885) 30 Ch. D. 172; 55 L. J. Ch. 121; 53 L. T. 263; 33 W. R. 934.

PEARSON, J.—I start . . . with the proposition that the testator undoubtedly meant to exercise whatever power he had. It is said that the word "beneficial" limits the exercise, and no doubt Mr. Cozens-Hardy is quite right in saying that, in *Ames v. Cadogan*, Fry, J. did put such a construction upon the word "beneficial." I do not wish to shrink from a case which seems to stand in my way, and to show that the word "beneficial" means beneficial to the person exercising the power. With all respect to that very learned judge I confess that I am not disposed to think that you can limit the word "beneficial" in every case in that way. I am far from thinking or suggesting that he was not perfectly right in so limiting the word in that case, and if his observations had been limited to the construction of the word "beneficial" in that particular will, I do not know that any doubt could have been raised as to his *dietum*, and the only doubt which I venture to hazard as to the correctness of the opinion of so learned a judge is this, that the word "beneficial" need not always necessarily have that meaning. To my mind the use of the word "beneficial" in our language is exceedingly inaccurate, and I think it is as frequently used in the active as in the reflective sense.—p. 180.

Ames v. Cadogan, *referred to*.

Denton, *In re*, Baurnerman v. Toosey (1890) 63 L. T. 105.—NORTH, J.

Von Brockdorff v. Malcolm (*supra*), *applied*.

Cotton, *In re*, Wood v. Cotton (1888) 58 L. J. Ch. 174; 40 Ch. D. 41; 37 W. R. 232.—NORTH, J.

Von Brockdorff v. Malcolm, *rule applied*.

Milner, *In re*, Bray v. Milner (1899) 68 L. J. Ch. 255; [1899] 1 Ch. 563; 80 L. T. 151; 47 W. R. 369.

STIRLING, J.—The rule applicable to cases of this sort is thus stated by Pearson, J., in *Von Brockdorff v. Malcolm*, in a passage cited with approval by North, J., in *Cotton, In re (supra)*: "The simple question is, whether I can find in the will itself such an indication of an intention to exercise the power as that I ought to hold that the power has been exercised. It is a question of intention, and a question of intention only. There being various indications in the will, some one way, and some the other, the question I have to decide as well as I can is, on which side does the balance weigh most strongly? When you have put the one against the other, to which side ought you rather to incline in order to determine what is the real truth of the case with regard to the intention of a man of whose intention you know nothing except what you find in his will?"—p. 257.

Von Brockdorff v. Malcolm, discussed.

Sykes v. Carroll (1902) [1903] 1 Ir. R. 17, 22.—M.R.; *Hallinan's Trusts, In re* [1904] 1 Ir. R. 452, 459.—M.R.

Bailey v. Lloyd (1829) 5 Russ. 330; 7 L. J. (o.s.) Ch. 98; 29 R. R. 30.—M.R., referred to. *Houston v. Barry* (1843) 5 Ir. Eq. R. 294.—EX. EQ.

Bailey v. Lloyd, followed.
Banks v. Banks (1843) 17 Beav. 352; 1 W. R. 511.—ROMILLY, M.R.

Bailey v. Lloyd, distinguished.
Hope v. Hope (1854) 5 Giff. 13; 18 Jur. 823; 2 W. R. 674.—STUART, V.-C.

Bailey v. Lloyd, followed.
Cowx v. Foster (1860) 29 L. J. Ch. 886; 1 J. & H. 30; 6 Jur. (N.S.) 1051; 2 L. T. 797.—WOOD, V.-C.

Bailey v. Lloyd, explained.
Graham v. Wickham (1863) 32 L. J. Ch. 639; 1 De G. J. & S. 474, 485; 2 N. R. 410; 9 Jur. (N.S.) 702; 8 L. T. 679; 11 W. R. 1009.—L.J.
TURNER, L.J.—What was said by Sir J. Leach in that case may well have meant, and, as I think, really meant, no more than this, that so much of the fund, subject to the power, as would satisfy the covenant in the daughter's settlement, so far as it applied to that fund, might well be appointed to her.—p. 643.

Bailey v. Lloyd, followed.
Maunsell v. Maunsell (1871) 24 L. T. 698; 19 W. R. 1003.—WICKENS, V.-C.

Bailey v. Lloyd, referred to.
Richardson's Trusts, In re (1886) 17 L. R. Ir. 436.—CHATTERTON, V.-C.; *Denton, In re, Bannerman v. Toosey* (1890) 63 L. T. 105.—NORTH, J.

Banks v. Banks (1853) 17 Beav. 352; 1 W. R. 511.—M.R., followed.
Maunsell v. Maunsell (1871) 24 L. T. 698; 19 W. R. 1003.—WICKENS, V.-C.

Banks v. Banks, referred to.
Milner, In re, Milner v. Bray (1899) 68 L. J. Ch. 255; [1899] 1 Ch. 563 (post, col. 2238).

Clogstoun v. Walcott (1843) 13 Sim. 523; 7 Jur. 616.—V.-C., referred to.
Elliott v. Elliott (1846) 15 L. J. Ch. 393; 15 Sim. 321; 10 Jur. 730.—SHADWELL, V.-C.

Clogstoun v. Walcott, not followed.

Cowx v. Foster (1860) 29 L. J. Ch. 886; 1 J. & H. 30; 6 Jur. (N.S.) 1051; 2 L. T. 797.—V.-C., followed.
Ferrier v. Jay (1870) 39 L. J. Ch. 686; L. R. 10 Eq. 550; 23 L. T. 302; 18 W. R. 1130.—MALINS, V.-C. And see post.

Clogstoun v. Walcott, disapproved.

Cowx v. Foster, followed.
Maunsell v. Maunsell (1871) 24 L. T. 698; 19 W. R. 1003.—WICKENS, V.-C.

Clogstoun v. Walcott, not followed.

Hope v. Hope (1854) 5 Giff. 13; 18 Jur. 823; 2 W. R. 74.—V.-C., discussed.
Teape's Trusts, In re (1873) L. R. 16 Eq. 442; 43 L. J. Ch. 87; 28 L. T. 799; 21 W. R. 780.

SELBORNE, L.C.—I think all the authorities are consistent with this view of the case, except *Clogstoun v. Walcott*. But I do not think that case can be reconciled with *Elliott v. Elliott (supra)*, or with *Cowx v. Foster (supra)*, to say nothing of *Ferrier v. Jay (supra)*; so that case creates no difficulty. There is still less difficulty from *Hope v. Hope*, for, though there were some words in the judgment that went beyond what was needed for the decision of that case, yet there were sufficient grounds for the decision there arrived at, without affecting the principle on which the present case is to be decided.—p. 446.

Hope v. Hope, referred to.

Blackburn, In re, Smiles v. Blackburn (1889) 59 L. J. Ch. 208; 43 Ch. D. 75; 38 W. R. 140.—NORTH, J.

Ferrier v. Jay (supra), explained.

Cowx v. Foster (supra), referred to.
Busk v. Aldam (1874) L. R. 19 Eq. 16; 44 L. J. Ch. 119; 31 L. T. 370; 23 W. R. 21.

MALINS, V.-C.—What I decided in *Ferrier v. Jay* was, that where there was a general and special power, and an appointment was made of both funds together to trustees in trust to pay debts and to apply the residue for the objects of the special power, the appointment must be read *reddendo singula singulis*, and the fund coming under the general power applied in the first instance to the purposes to which the fund subject to the special power was not applicable. I agreed with the decision in *Cowx v. Foster*, that the circumstance of directing debts to be paid only meant that they were to be paid out of the particular portion of the mixed fund which could be so applied. I did also in that case undoubtedly say that the second trustees were the most fit persons to have charge of the fund; but I did not say that where it was a mere question which of two sets of trustees should hold a particular fund, the Court would necessarily hand it over to the second set in point of date.—p. 20.

Cowx v. Foster and Ferrier v. Jay, explained and followed.
Thornton v. Thornton (1875) L. R. 20 Eq. 599, 603.—MALINS, V.-C.
And see post, cols. 2237—2239.

Cowx v. Foster, discussed.
Ferrier v. Jay and Busk v. Aldam (supra), observed on.
Scotney v. Lomer (1885) 29 Ch. D. 535, 544; 54 L. J. Ch. 538; 52 L. T. 747; 33 W. R. 633; affirmed.—C.A. (post, col. 2237).

NORTH, J.—There were two recent cases cited . . . *Ferrier v. Jay* and *Busk v. Aldam*. Now, as regards the first case, there were two points; one was whether a general gift of all the real and personal estate which the testatrix had power to appoint to trustees to pay debts, and then to divide the residue between the objects of a special power, passed to persons who were objects of the special power, and it was held that it did, following *Cowx v. Foster*. A second point was raised by the special case there, namely, who in that case were the proper trustees to hold the fund for the objects in whose favour the appointment was exercised beneficially. There were two sets of trustees, the trustees of the original will, and the trustees of the will exercising the power. The case was a special case. Nothing was said against the competency of either set of trustees; but inasmuch as there was a question which of the two sets of trustees ought to hold the fund, the question was put to the Court: Who were the trustees to carry out the trust of the appointed fund? The point was submitted. It was not argued. Neither side wished to hold the fund, but would rather leave it to the other, and all that was required was, that a direction of the Court should be given who should have the fund. The V.-C. said: "Upon the question as to which trustees are to carry out the trusts of the appointed fund, I must again follow the decision in *Cowx v. Foster*, and direct that the trustees of Mary Ferrier's will are the proper persons." Now as regards that, the point did not arise in *Cowx v. Foster*. There were not two sets of trustees in that case. It was not following that case to say that the trustees of the second will should have the fund. In *Busk v. Aldam*, Malins, V.-C., referring to *Ferrier v. Jay*, said: "I did also in that case undoubtedly say that the second trustees were the most fit persons to have charge of the fund." But the V.-C. there was under a misapprehension. That was not what he had said, and he put it on a case which did not decide the point. It was simply a question which set of trustees should hold the fund. Neither set of trustees cared so long as they were told by the authority of the judge which it ought to be, either one set or the other. That, therefore, is not a decision which assists me in any way on this occasion.—p. 544.

Cowx v. Foster (*supra*, col. 2236), referred to. Richardson's Trusts, *In re* (1886) 17 L. R. Ir. 436.—CHATTERTON, V.-C.

Busk v. Aldam (*supra*, col. 2236), recognised. Scotney v. Lomer (1886) 31 Ch. D. 380; 55 L. J. Ch. 443; 54 L. T. 194; 34 W. R. 407.—C.A., affirming S. C., *supra*.

COTTON, L.J.—North, J. decided this case on this ground, that the trustees appointed by Mrs. Sowden were entitled as a matter of law to receive the fund from the trustees of the original settlement, and, under the power given by Mrs. Sowden's will, to give a good receipt for it. I do not think it necessary, under the circumstances of this case, to decide that question. Certainly, I express no opinion in any way at variance with what is possibly the only decision on that point, namely, *Busk v. Aldam*, which was before Malins, V.-C.—p. 386.

BOWEN, L.J., to the same effect. FRY, L.J., concurred.

Cowx v. Foster, Ferrier v. Jay, and Thornton v. Thornton (col. 2236), referred to.

Denton, *In re*, Baumerman v. Toosey (1890) 53 L. T. 105.—NORTH, J.: Peirce v. McNeale (1893) [1894] 1 Ir. R. 118, 128.—M.R.

Busk v. Aldam (*supra*), followed.

Tysen, *In re*, Knight Bruce v. Butterworth (1893) 63 L. J. Ch. 114; [1894] 1 Ch. 56; 8 R. 22; 69 L. T. 689; 42 W. R. 172.

NORTH, J.—Having regard to what was said concerning *Busk v. Aldam* by the C. A. in *Scotney v. Lomer* (*supra*), I must follow *Busk v. Aldam* if it applies to the present case. I think it clearly does apply.—p. 115.

Cowx v. Foster, followed.

Busk v. Aldam, explained.

Paget, *In re*, Mellor, *In re*, Mellor v. Mellor (1898) 67 L. J. Ch. 151; [1898] 1 Ch. 290; 78 L. T. 72; 46 W. R. 328.

KEKEWICH, J.—*Busk v. Aldam* only comes to this, that where an appointment of a fund has been made under a power in a settlement to the trustees of another settlement for the benefit of children taking under that settlement, such children being objects of the power, it does not follow as a matter of course that the trustees of the subsidiary settlement are entitled to receive the fund from the trustees of the original settlement, but that the trustees of that settlement are bound to retain the fund and make the distribution themselves; and that the question who are the parties to distribute the fund depends upon the intention of the instrument creating the power; and if you find that there is an intention that the trustees of that instrument shall distribute the fund, that intention shall prevail.—p. 153. And see *post*, col. 2261.

Cowx v. Foster, Ferrier v. Jay, Thornton v. Thornton (*supra*, col. 2236), and **Price v. Price** (1882) 46 L. T. 228.—FRY, J., referred to.

Milner, *In re*, Milner v. Bray (1899) 68 L. J. Ch. 255; [1899] 1 Ch. 563; 80 L. T. 151; 47 W. R. 369.

STIRLING, J.—It is stated, and for the present purpose I assume, that this power was the only testamentary power to which the testatrix was entitled. This is a circumstance which has in many cases been held to afford evidence of considerable cogency of an intention to exercise such a power; see *Pidgely v. Pidgely* (*supra*, col. 2228), *Banks v. Banks* (*supra*, col. 2235), *Teape's Trusts*, *In re* (*post*, col. 2239), and *Swinburne, In re* (*supra*, col. 2221). It was contended that evidence of the fact was inadmissible, regard being had to the decisions in *Mills, In re* (*supra*, col. 2224), *Williams, In re* (*supra*, col. 2224), and *Huddleston, In re* (*supra*, col. 2224), but all of them are directed to a different point, and were not intended, so far as I can see, to overrule the series of cases just referred to, not one of which is mentioned in the judgments of any one of the learned judges by whom those decisions were given. . . . I may state, however, that where a will is found containing a general expression of intention to execute any disposing power to which the testator may be entitled, the Court has repeatedly refused to infer the contrary intention from such circumstances as a direction to pay debts or funeral expenses, or legacies, or bequests in favour of persons not objects of the power. As to this, in addition to the cases already mentioned, I may cite *Cowx v. Foster*,

Errier v. Jay, Thornton v. Thornton, and Price v. Price. Cotton, In re (supra, col. 2222), is the strongest case in which, in recent times at all events, the contrary intention has been held to be sufficiently indicated.—p. 257.

Cowx v. Foster, referred to.

Sykes v. Carroll (1902) [1903] 1 Ir. R. 17.—M.R.; *Redgate, In re, Marsh v. Redgate* (1902) 72 L. J. Ch. 204; [1903] 1 Ch. 356; 51 W. R. 216.—BUCKLEY, J.

Teape's Trusts, In re (1873) 43 L. J. Ch. 87; L. R. 16 Eq. 442; 28 L. T. 799; 21 W. R. 78.—L.C., *explained and followed*.
Thornton v. Thornton (1875) L. R. 20 Eq. 599, 603.—MALINS, V.-C.

Teape's Trusts, In re, distinguished.

Richardson's Trusts, In re (1886) 17 L. R. Ir. 436.—CHATTERTON, V.-C.

Teape's Trusts, In re, not applied.

Cotton, In re, Wood v. Cotton (1888) 58 L. J. Ch. 74; 40 Ch. D. 41; 37 W. R. 232.—NORTH, J.

Teape's Trusts, In re, referred to.

Denton, In re, Bannerman v. Toosey (1890) 63 L. T. 105.—NORTH, J.; *Peirce v. McNeale* (1893) [1894] 1 Ir. R. 118, 128.—M.R.; *Milner, In re, Milner v. Bray* (1899) [1899] 1 Ch. 563 (see *supra*, col. 2238).

Teape's Trusts, In re, followed.

Mayhew, In re, Spencer v. Cutbush (1901) 70 L. J. Ch. 428; [1901] 1 Ch. 677 (*post*).

Richardson's Trusts, In re (1886) 17 L. R. Ir. 436.—V.-C.; *distinguished*, *Cobden v. Bagwell* (1886) 19 L. R. Ir. 150, 174.—M.R.

Richardson's Trusts, In re, dictum questioned.

Mayhew, In re, Spencer v. Cutbush [1901] 1 Ch. 677; 70 L. J. Ch. 428; 84 L. T. 761; 49 W. R. 330.

FARWELL, J.—My only ground for hesitation is an expression of opinion by Chatterton, V.-C., in *Richardson's Trusts, In re*. It is not a decision on the point. The words of disposition in that case were, "I give, devise, bequeath, and appoint," and the testatrix had a general power. Chatterton, V.-C., held that the word "appoint" was satisfied by applying it to the general power, but in the course of his judgment he said: "The argument on one side turns only on the use of the word appoint; that on the other, on the insufficiency of this without more to indicate the intention, and also on the description of the subject of gift as 'all my real and personal estate and effects of every kind.' Property which was not that of the testatrix, but over which she had a special power of appointment, cannot, without the aid of a strong context, be held to be described by these words. No such context exists here except merely the word 'appoint'; and even if the testatrix had no general power of appointment, I think that I should go beyond any decided cases, and beyond the principle on which those cases proceed, if I were to hold that this was sufficient." This *dictum* should probably be read with reference to the will before Chatterton, V.-C. If it was intended as a general *dictum*, so as to be applicable to the will before me, I respectfully dissent from it. In the present case I think the context shows that the word "appoint" refers to the special power, which is therefore duly exercised.—p. 680.

Richardson's Trusts, In re, explained.

Sykes v. Carroll (*post*).

Milner, In re, Milner v. Bray (*supra*, col. 2238). *referred to*.

Hayes, In re, Turnbull v. Hayes (1901) 70 L. J. Ch. 770; [1901] 2 Ch. 529, 533; 85 L. T. 85; 49 W. R. 659.—C.A.

Mayhew, In re, Spencer v. Cutbush (*supra*).

Milner, In re, and Cooke v. Cunliffe (1851) 17 Q. B. 245.—Q.B., *followed*.

Sykes v. Carroll (1902) [1903] 1 Ir. R. 17, 21.—PORTER, M.R.

Mayhew, In re, Spencer v. Cutbush, discussed and principle applied.

Kent v. Kent (1902) 71 L. J. P. 50; [1902] P. 108; 86 L. T. 536.—JEUNE, P. See judgment at length.

9. EXTENT OF EXECUTION.

Trollope v. Routledge (1847) 1 De G. & Sm. 662; 11 Jur. 1002.—KNIGHT BRUCE, V.-C., *followed*.

Moore v. Dixon (1880) 49 L. J. Ch. 807; 15 Ch. D. 566; 29 W. R. 12.—MALINS, V.-C.

Trollope v. Routledge, referred to.

Stokes v. Bridgman (1878) 47 L. J. Ch. 759.—HALL, V.-C., *followed*.

Gilbert v. Whitfield (1882) 52 L. J. Ch. 210; 48 L. T. 383.—KAY, J. See judgment at length.

Stokes v. Bridgman, Trollope v. Routledge and Eales v. Drake (1875) 45 L. J. Ch. 51; 1 Ch. D. 217; 24 W. R. 184.—JESSEL, M.R., *explained*.

Wilson v. Kenrick (1885) 31 Ch. D. 658; 55 L. J. Ch. 525; 54 L. T. 461.

CHITTY, J.—Where under a like power [to appoint a definite fund among special objects] several sums are appointed by successive independent deeds, there *prima facie* the sums or parts appointed, not being aliquot parts, have priority according to the dates of the deeds. This principle was acted upon by Hall, V.-C. in *Stokes v. Bridgman*, and by Knight Bruce, V.-C. in *Trollope v. Routledge*; and it was assumed in *Eales v. Drake* by Jessel, M.R.; who, in his judgment, speaks of the fund over which the power subsisted as being only 7,000*l.*, treating the 3,000*l.* appointed by the prior deed as unquestionably having priority over the 7,000*l.*, the residue of the original 10,000*l.*—p. 662.

Trollope v. Routledge, applied.

Annaly's Estate, In re (1889) 23 L. R. Ir. 481.—MONROE, J.

Trollope v. Routledge, discussed and followed.

Moore v. Dixon (*supra*) and **Shaw, In re, Tuckett v. Shaw** (1894) 64 L. J. Ch. 283; [1895] 1 Ch. 343; 13 R. 135; 71 L. T. 873; 43 W. R. 315.—NORTH, J., *considered*.

Saunders, In re, Saunders v. Gore (1897) 67 L. J. Ch. 55; [1898] 1 Ch. 17; 77 L. T. 450; 46 W. R. 180.—C.A.; *reversing* 66 L. J. Ch. 503; [1897] 1 Ch. 888; 45 W. R. 456.—STIRLING, J., *rule referred to in, applied*.

Chisholm, In re, Goddard v. Brodie (1902) 71 L. J. Ch. 289; [1902] 1 Ch. 457; 86 L. T. 183.

KEKEWICH, J.—In *Trollope v. Routledge* . . . there had been considerable argument and many points raised respecting appointments, and when they were all settled counsel for one of the incumbancers contended that, as there was a fair question raised by the language of the deeds, the costs ought to come out of the unappointed par

of the fund, by analogy to the case of a will, where the costs arising from difficulties of construction fall upon the residuary estate. That was the sole point raised. Here you have a dispute about an appointed fund. Part of it remains unappointed and therefore must be treated as if it were residue of an estate. The V.-C. said that, as he believed, the rule had not been applied to appointments, and directed the costs to be apportioned according to the amounts of the appointed and unappointed parts of the fund, and to be borne by those parts respectively according to their amounts. He simply did not apply the rule prevailing in the administration of estates which he was asked to apply. . . . That helps me very little. The V.-C. considered that that was an equitable way of distributing the costs, but I do not think that he lays down any rule. . . . In the case [*Moore v. Dixon*] there was a usual power of appointment and exercised in favour of children unequally, but the hotchpot clause came in, and so there was not very much difference in the result. Then there was an action to administer the trusts of the settlement—that was an administration expense purely—and the V.-C. was asked to determine, and he gave some care to the determination of the question of how those costs were to be borne, and he decided that they were to be borne rateably by all the funds. He not only decides it, but he certainly treats himself as deciding it, on authority, including *Trollope v. Routledge*. He is referring to that case when he says, "That is, therefore, a clear decision on the subject, and it seems to have been followed ever since, and to have become an established rule." I have reasons for doubting whether it can be regarded as a clear decision on the subject, but Malins, V.-C. treated it so, and said that it had "become an established rule." . . . Then the matter came before North, J. in another form in *Shaw, In re*. There there was estate duty, or rather account duty, and there were successive appointments of a specific amount, and then the residue appointed by will. Questions arose there as to the account duty. The learned judge decided that the costs should be borne rateably. There again he did not decide it as a question in his discretion at all. *Trollope v. Routledge* was cited to him, and not referred to in his judgment; but he says at the end: "But I am very glad to find that there is authority that the costs should be borne rateably." He, therefore, seems to have agreed with Malins, V.-C. that that was an authority on the point; and notwithstanding what occurs to me, looking at *Trollope v. Routledge*, when I find two learned judges saying that it is an authority, I think it must be regarded as such; and if it were not an authority at the moment it was made so by their adoption. Then in *Saunders, In re*, Chitty, L.J. certainly states the general rule in perfectly clear terms: "In the case of an appointment, if there are no words to the contrary,"—he is distinguishing appointment from legacy—"all the appointees have, according to the general rule, to bear rateably the expenses of the trustees in relation to the administration of the fund, including its distribution."—pp. 292, 293.

Wilson v. Piggott (1794) 2 Ves. 351; 2 R. R. 246.—M.R. and **Fortescue v. Gregor** (1800) 5 Ves. 553.—L.C., *discussed*.
Alloway v. Alloway (1843) 4 Dr. & War. 380; 2 Cou. & L. 517.—SUGDEN, L.C.

Fortescue v. Gregor and Alloway v. Alloway, *distinguished*.

Wombwell v. Hanrott (1851) 20 L. J. Ch. 581; 14 Beav. 143.—M.R. *And see* **Close v. Coote** (*post*).

Wilson v. Piggott, *rule in, explained*.

Fortescue v. Gregor and Wombwell v. Hanrott, *approved*.

Foster v. Cantley (1856) 6 De G. M. & G. 55; 2 Jur. (N.S.) 25.—L.C., *varying* 1 Jur. (N.S.) 202.—STUART, V.-C.

CRANWORTH, L.C.—At the conclusion of the argument I expressed myself as concurring in the view taken by the V.-C. of the general rule as established by the authorities, to the effect that *prima facie* an appointee is presumed to take a share in the unappointed fund. That is laid down in *Wilson v. Piggott*, and clearly elucidated by the M.R. in *Wombwell v. Hanrott*.—p. 66.

Wilson v. Piggott.

Referred to, **Leigh's Trusts, In re** (1856) 6 Ir. Ch. R. 133.—L.C.; **Bulfeel v. Plummer** (1869) L. R. 8 Eq. 585, 593 (*see supra*, col. 2220); *distinguished*, **Minchin v. Minchin** (1871) Ir. R. 5 Eq. 258, 267; 19 W. R. 993.—L.C., *dissenting*; **Peunefather v. Pennefather** (1873) Ir. R. 7 Eq. 300, 315.—C.A.; *applied*, **Close v. Coote** (1880) 7 L. R. Ir. 564, 577.—C.A.; *not applied*, **L'Estrange v. L'Estrange** (1890) 25 L. R. Ir. 399, 407.—M.R.

Foster v. Cantley (*supra*)

Referred to, **Clune v. Apjohn** (1866) 17 Ir. Ch. R. 25, 35.—M.R.; **Armstrong v. Lynn** (1875) Ir. R. 9 Eq. 186, 198.—M.R.

Clune v. Apjohn, *applied*.

Armstrong v. Lynn (*supra*)

Armstrong v. Lynn and Clune v. Apjohn, *explained*.

Close v. Coote (1880) 7 L. R. Ir. 564, 578.—C.A., O'HAGAN, L.C., *dissenting*.

Allingham v. Allingham (1843) 4 Dr. & War. 380.—L.C. and **Walmsley v. Vaughan**

(1857) 26 L. J. Ch. 503; 1 De G. & J. 114; 3 Jur. (N.S.) 497; 5 W. R. 549.—

CRANWORTH, L.C., *referred to*.

Noblett v. Litchfield (1858) 7 Ir. Ch. R. 547.—L.C. *And see* **Armstrong v. Lynn** (*supra*) and **Close v. Coote** (*supra*).

10. DEFECTIVE AND NON- EXECUTION.

Clere's Case (1599) 6 Co. Rep. 17, b.

Approved, **Buckland v. Barton** (1793) 2 H. Bl. 136.—C.P.; *discussed*, **Maundrell v. Maundrell** (1804—5) 10 Ves. 246; 7 R. R. 393.—L.C.; *approved and applied*, **Honke v. Denn** (1830) 4 Bligh. (N.S.) 1.—H.L. (E.) (*supra*, col. 2224); *referred to*, **Morgan, In re** (1857) 7 Ir. Ch. R. 18, 56.—T.C. (IR.).

MacAdam v. Logan (1791) 3 Bro. C. C. 310.

—L.C., *discussed*.

Minchin v. Minchin (1853) 3 Ir. Ch. R. 167.—M.R.; **Thomas v. Jones** (1862) 32 L. J. Ch. 139; 1 De G. J. & S. 63, 78 (*supra*, col. 2225).

Moodie v. Reid (1816—17) 1 Madd. 516; 2 Madd. 156; 7 Taunt. 355; 16 R. R. 257.

—V.-C. and C.P., *referred to*.

Burdett v. Spilsbury (1843) 10 Cl. & F. 340.—H.L. (E.) (*see supra*, col. 2221); **Hughes v. Wells** (1852) 9 Hare 749; 16 Jur. 927.—WIGRAM, V.-C.

Wilkes v. Holmes (1752) 9 Mod. 483.—L.C. and **Lucena v. Lucena** (1842) 5 Beav. 249.—M.R., *referred to*.

Kennard v. Kennard (1872) 42 L. J. Ch. 280; L. R. 8 Ch. 227; 28 L. T. 83; 21 W. R. 206.—L.J.J., *observed on*.

Kirwan's Trusts, In re (1883) 25 Ch. D. 373; 52 L. J. Ch. 952; 49 L. T. 292.

KAY, J.—It is clear that an appointment before the Wills Act, although purporting to be by will, if not made with the formalities then required to make a perfect will, and not made with the formalities required by the terms of the power, would yet be aided in equity, if it were in favour of a child. For that I need only refer to *Wilkes v. Holmes*, and the later case of *Lucena v. Lucena* (p. 379). . . . I must read this decision [*Kennard v. Kennard*] as meaning not that the memorandum being considered to be a testamentary document was in equity turned into a deed, but that the Court did not consider that the document was testamentary, but treated it as a mere memorandum, which might, by aid of the Court of equity, be turned into a deed, by supplying the defective execution.—p. 380.

D'Huart v. Harkness (1865) 34 L. J. Ch. 311; 34 Beav. 324; 5 N. R. 440; 11 Jur. (N.S.) 683; 13 W. R. 518.—ROMILLY, M.R., *observations applied*.

Huber, *In goods of* (1896) 65 L. J. P. 119; [1896] P. 209, 213; 75 L. T. 453.—JEUNE, P.

D'Huart v. Harkness, *considered*.

Kirwan's Trusts, In re (*supra*), *followed*.

Hummel v. Hummel (1898) 67 L. J. Ch. 363; [1898] 1 Ch. 642; 78 L. T. 518; 46 W. R. 507.

KEKEWICH, J.—The document . . . is, I will assume, . . . a valid will according to the law of France; but it is not a will that could, under the provisions of the Wills Act, be proved in this country. The question is, can it operate as an exercise of a general power of appointment by will? As to that the decision of Kay, J., *Kirwan's Trusts, In re*, is conclusive that it cannot, even if it had been a will that could be admitted to probate in this country under the Wills Act, 1861 (24 & 25 Vict. c. 114). Is that decision inconsistent with *D'Huart v. Harkness*, where Sir J. Romilly, M.R., decided that a power to appoint "by a will duly executed" is well exercised by a will good according to the law of the country of the domicile of the donee of the power, though ill executed according to the law of England? That case, as already mentioned, was not referred to in *Kirwan's Trusts, In re*, but the latter is cited in a note on p. 308 of *Wms. on Executors*, vol. i. (9th ed.) as the authority for the proposition that in the case of a will which is only valid by reason of the Wills Act, 1861, sects. 9 and 10 of the Wills Act, 1837, must be complied with. That appears to me to form the distinction between the two cases.—p. 364.

D'Huart v. Harkness, *approved and followed*.

Kirwan's Trusts, In re, and **Hummel v. Hummel**, *discussed and distinguished*.

Price, In re, Tomlin v. Latter (1900) 69 L. J. Ch. 225; [1900] 1 Ch. 442; 82 L. T. 79; 48 W. R. 373.—STIRLING, J.

D'Huart v. Harkness and Kirwan's Trusts, In re, *referred to*.

Price, In re, Tomlin v. Latter, *approved*.

Pouey v. Hordern (1900) 69 L. J. Ch. 231; [1900] 1 Ch. 492; 82 L. T. 51.—FARWELL, J.

D'Huart v. Harkness, *distinguished*.

Price, In re, and Kirwan's Trusts, In re, *considered*.

Barretto v. Young (1900) 69 L. J. Ch. 605; [1900] 2 Ch. 339; 83 L. T. 154.

BYRNE, J.—The provisions of ss. 9 and 10 of the Wills Act, 1837, have no application to wills of persons not domiciled in England. This was decided by Stirling, J. in *Price, In re*, where he cites Dicey's Conflict of Laws, p. 684, and *Bremer v. Freeman* (1857) 10 Moore P. C. 306, 359; and although in that case Stirling, J. does not, I think, agree with what was said by Kay, J. in *Kirwan's Trusts, In re*, in reference to the application of the negative words in sect. 10 of the Wills Act to the case before him, he at the same time points out that the decision in *Kirwan's Trusts, In re*, may be rested on three grounds—"First, the power was required to be executed by an instrument in a special form which the instrument said to be an execution of the power did not satisfy. Secondly, the Wills Act had no application, inasmuch as the testator was domiciled abroad; and although the instrument was not invalidated by the prohibitory portion of sect. 10, it did not derive validity from the enabling portion of that section. In any case the instrument did not satisfy the requirements of the Wills Act. Thirdly, although the instrument was valid by Lord Kingsdown's Act, still, as was pointed out by Kay, J., that statute does not contain any enactment dealing with wills made in exercise of powers." The power is not framed as in *D'Huart v. Harkness*, so as to be exercisable by the donee by his last will and testament "in writing duly executed," but requires execution with special formalities which have not been observed. . . . It appears to me that following the reasoning of Stirling, J. . . . and of Kay, J., in *Kirwan's Trusts, In re*, apart from the special point in which Stirling, J. does not agree with it, I must hold in the case of the donee being a foreigner, that it is not enough where special formalities are required by the instrument creating the power that the instrument should be a will according to the law of domicile, but that in cases where the provisions of the Wills Act do not apply such will must comply with the terms of the power.—p. 606.

Price, In re, *distinguished*.

D'Este Settlement, In re, Poulter v. D'Este [1903] 1 Ch. 898, 904; 72 L. J. Ch. 305; 88 L. T. 384; 51 W. R. 552.—BUCKLEY, J.

Hernando, In re, Hernando v. Sawtell (1884)

53 L. J. Ch. 865; 27 Ch. D. 284; 51 L. T. 117; 33 W. R. 252.—PEARSON, J., *discussed*.

Mégret, In re, Tweddie v. Maunier (1901) 70 L. J. Ch. 451; [1901] 1 Ch. 547; 84 L. T. 192.—COZENS HARDY, J.

George v. Milbanke (1803) 9 Ves. 190; 7 R. R.

157.—L.C., *observed on*. *And see* col. 2245.

Daubeny v. Cockburn (1816) 1 Meriv. 626; 15 R. R. 174.—GRANT, M.R.

George v. Milbanke and Doe d. Wigan v.

Jones (1830) 10 B. & C. 459; 5 Man. & R. 563; 8 L. J. (O.S.) K. B. 214; 34 R. R. 485.—K.B., *referred to*.

Skeels v. Shearly (1837) 7 L. J. Ch. 3; 3 Myl. & Cr. 112; 1 Jur. 888.—L.C.

George v. Milbanke, *referred to*.
Aldborough (Earl) v. Trye (1840) 7 Cl. & F. 436; West 221.—H.L. (E.).

George v. Milbanke (*supra*), *applied*.
Martyn v. M'Namara (1843) 4 Dr. & War. 411; 2 Con. & L. 541.—L.C.

George v. Milbanke, *applied*.
East India Co. v. Clavel (1714) Pre. Ch. 377; Gilb. 37.—L.C., *observed on*.
Payne v. Mortimer (1859) 28 L. J. Ch. 716; 4 De G. & J. 447; 5 Jur. (N.S.) 749; 7 W. R. 646.—KNIGHT BRUCE and TURNER, L.JJ.

George v. Milbanke, *referred to*.
Clarke v. Willott (1872) 41 L. J. Ex. 197; L. R. 7 Ex. 313, 317; 21 W. R. 73.—EX.

George v. Milbanke, *applied*.
Judd v. Green (1875) 45 L. J. Ch. 108; 33 L. T. 597.—BACON, V.-C.

George v. Milbanke, *discussed*.
Payne v. Mortimer, *considered*.
Halifax Joint Stock Banking Co. v. Gledhill (1890) 60 L. J. Ch. 181; [1891] 1 Ch. 31; 63 L. T. 623; 39 W. R. 104.—KAY, J.

Skeels v. Shearly (*supra*, col. 2244), *discussed*.
Langton v. Horton (1842) 11 L. J. Ch. 299; 1 Hare 549, 563; 6 Jur. 910.—V.-C.

Att.-Gen. v. Rye (1703) 2 Vern. 453.—L.K. and **Att.-Gen. v. Burdet** (1717) 2 Vern. 755.—M.R., *discussed and not applied*.
Carey, In re, Mitchell v. Ewing (1899) [1901] 1 Ir. R. 81.—PORTER, M.R.

Hughes v. Wells (1852) 9 Hare 749; 16 Jur. 927.—V.-C., *dissented from*.
Vaughan v. Vanderstegen (1854) 23 L. J. Ch. 793; 2 Drew. 363; 2 W. R. 599.—KINDERSLEY, V.-C.

Hughes v. Wells, *explained*.
Johnson v. Gallagher (1861) 30 L. J. Ch. 298; 3 De G. & J. 494; 7 Jur. (N.S.) 273; 4 L. T. 72; 9 W. R. 506.—L.JJ.

Hughes v. Wells, *referred to*.
Harvey's Estate, In re, Godfrey v. Harben (1879) 49 L. J. Ch. 3; 13 Ch. D. 216, 221; 28 W. R. 73.—HALL, V.-C.; Gilchrist, Ex parte, Armstrong, In re (1886) 55 L. J. Q. B. 578; 17 Q. B. D. 521, 534; 55 L. T. 538; 34 W. R. 709; 3 Morrell 193; 57 J. P. 292.—C.A. *And see* "HUSBAND AND WIFE," vol. i., col. 1263.

Hughes v. Wells, *discussed*.
Smith v. Smith (1887) 19 L. R. Ir. 514, 524.—PORTER, M.R.; Willett v. Finlay (1891) 29 L. R. Ir. 156.—PORTER, M.R.

Daniel v. Arkwright (1864) 2 H. & M. 95; 4 N. R. 418; 10 Jur. (N.S.) 764; 11 L. T. 18.—WOOD, V.-C., *referred to*.

Bonhote v. Henderson (1895) 64 L. J. Ch. 556; [1895] 1 Ch. 742; 13 R. 523; 72 L. T. 556; 43 W. R. 502.—KEKEWICH, J.; *affirmed*, [1895] 2 Ch. 202; 13 R. 529, n.; 72 L. T. 814; 43 W. R. 580.—C.A. LINDLEY, LOPES and KAY, L.JJ.

Daniel v. Arkwright, *discussed*.
Rake v. Hooper (1901) 83 L. T. 669.—KEKEWICH, J.

11. EXCLUSIVE AND ILLUSORY APPOINTMENTS.

Maddison v. Andrew (1747) 1 Ves. Sen. 57.—L.C., *applied*.
Wilson v. Piggott (1794) 2 Ves. 351; 2 R. R. 246. ARDEN, M.R.—*Maddison v. Andrew* has com-

pletely decided that partial appointments may be made.—p. 354.

Maddison v. Andrew, *discussed*.
Reade v. Reade (1801) 5 Ves. 744.—L.C.; Kemp v. Kemp (1801) 5 Ves. 849; 5 R. R. 182.—M.R.; Vane v. Dungannon (Lord) (1804) 2 Sch. & Lef. 117, 124; 9 R. R. 63.—L.C.

Maddison v. Andrew, *referred to*.
M'Ghie v. M'Ghie (1817) 2 Madd. 368.—M.R.; Thornton v. Bright (1836) 6 L. J. Ch. 121; 2 Myl. & Cr. 230.—COTTENHAM, L.C.

Maddison v. Andrew, *explained and applied*.
Fordyce v. Bridges (1848) 17 L. J. Ch. 185; 2 Ph. 497; 2 C. P. Cooper 326.

COTTENHAM, L.C.—The equality adopted by the Court is confined to the unappointed fund: it is acting on the general intent as to such fund, to benefit the different clauses, the particular object of selection amongst them being defeated by the non-execution of the power. This is precisely what occurred in *Maddison v. Andrew* where there had been a valid, but an unequal appointment of a part of the fund, and as to another part there was an invalid appointment to another party. Lord HARDYCKE said the unappointed fund should be equally divided amongst the objects of the appointment, without regard to the share they had received from the valid appointment. Many cases establishing the same rule are referred to by Sir E. Sugden, in his second volume on Powers, 238.—p. 189.

Maddison v. Andrew, *doctrine applied*.
Morgan, In re, (1857) 7 Ir. Ch. R. (1875) P.C. (IR.); Butler v. Gray. 1869. 18, 52.—291; L. R. 5 Ch. 26, 309. L. J. Ch. HATHERLEY, L.C.

Young v. Waterpark (Lo Ch. 367; 13 Sim. 202; 11 L. J. 778.—*discussed*.

Minchin v. Minchin (*post*, col. 2245).
Plummer (1870) 39 L. J. Ch. 8, 160 (*supra*, col. 2220).

Civil or Bevil v. Rich (1677) 14 Af. Cas. 30.—L.C., *applied*.

McGibbon v. Abbott (1885) 10 App. Cas. 653; 54 L. J. P. C. 39; 54 L. T. 138.—P.C.

SIR B. PEACOCK.—In Sugden on Powers it is said, "In many cases an exclusive appointment may be authorised by the apparent intention of the donor, although no words of exclusion are expressly used. Thus, he says, in *Bevil v. Rich*, the testator gave all the rest of his estate to A. B. in trust, 'to give my children and grandchildren according to their demerits.' A. B. gave the estate to one, excluding the rest. Lord Nottingham refused to set aside the appointment, as the children were to come in by the act of the devisee, and he was to give or distribute according to their demerits, therefore he was to judge." So in the present case John was charged with the fiduciary substitution and was to decide.—p. 661.

Garthwaite v. Robinson (1827) 2 Sim. 43; 29 R. R. 54.—V.-C., *disapproved*.

Stolworthy v. Saneroft (1864) 33 L. J. Ch. 708; 10 Jur. (N.S.) 762; 10 L. T. 223; 12 W. R. 635.—V.-C., *questioned*.

Veale's Trusts, In re (1876) 4 Ch. D. 61; *affirmed* (1877) 5 Ch. D. 622; 46 L. J. Ch. 799; 36 L. T. 634.—C.A.

JESSEL, M.R.—Mr. Farwell [Farwell on

Powers, p. 294] says: "Each case must depend on the intention expressed in the particular instrument creating the power; no general rule can be laid down, except perhaps that the words 'all and every' are mandatory, and make it necessary that each object should have a share [5 Ves. 857], and that 'such' authorises exclusion, unless a contrary intention appear." I have doubt that is the law.—p. 64. . . . With regard to *Garthwaite v. Robinson*, decided by Shadwell, V.-C., I must confess that I should not have decided that case in the same way that he did. It was decided as a pure and simple question of the construction of a will. The will there was different from the will now before me, and no general rule of law was laid down. I must say that the V.-C. came to the conclusion he did for reasons which I am unable to appreciate. It cannot be expected that the minds of any two judges will always adopt the same view of the construction of particular words used by a testator, and therefore a decision on the mere meaning of such words is of little value. Words which strike one mind as of great importance do not strike another mind in the same way, and possibly the V.-C. attached greater weight to particular words than I should have done. In that case the power was to appoint among the testator's "present or future grandchildren or their respective issue," and the V.-C. held that the power had been badly executed on account of the exclusion of the children of a deceased grandchild, who were living at the donee's death. I should be entirely unable, on that will, to arrive at that conclusion, and if I had to construe the same words I should feel myself at liberty, according to the rule laid down by the H. L. in *Jenkins v. Hughes* (1860) 8 H. L. C. 571—that one judge is not bound to follow the decisions of another on questions of mere verbal interpretation—to decline following the decision. Moreover, the point as to the effect of a power to appoint among issue indefinitely was not argued. The other case which was cited, *Stolworthy v. Saneroff*, before Kindersley, V.-C., requires more serious consideration; for, first, the case is more like this, and, secondly, a similar point was argued. Whether or not I should have arrived at the same conclusion as the V.-C. I cannot say, but the point was not quite missed at all events. There the testator gave an estate to trustees in trust for A. for life, and after her decease, "in case she should leave issue, upon trust to dispose of his said estate in such manner, amongst such issue," as A. should by deed or will appoint, and it was held that an appointment by A. among some only of her issue living at her death was bad. Now the peculiarity of that case was that the power was to be exercised by A. "in case she should leave issue." It therefore involved the absurdity that the power could not be exercised except upon her death. And if "issue" meant issue indefinitely, it involved the further absurdity that the donee, if the power was non-exclusive, was bound to appoint to issue born after her death. But, even supposing the objects of the power were restricted to issue born in the lifetime of the donee, how could she ascertain while *in articulo mortis* how many grandchildren or great-grandchildren she had at that moment, and then exercise her power? for if the power was non-exclusive, she must have appointed to every one of her issue who might be living at the actual moment of

her death. But these considerations were not pressed on the V.-C. He says, in his judgment, "It is contended that if the objects of the power are confined to issue living at the death, it was absurd to give a power by deed as well as by will, because if there was a partial exercise of the power by deed in favour of one object, raising the question of exclusive appointment in the lifetime of the donee, then, if that person died before the donee, the appointment would fail, as that person would not be an object of the power. I agree in the justice of that observation, but I am at a loss to see why that is more absurd than that the power was not to arise unless she left issue living at her death." That is, the V.-C. gets rid of one absurdity by showing another absurdity; but that is no answer. I cannot regard that case as an authority for the construction of the particular instrument before me, which differs in form from that before the V.-C. No general law was there laid down, unless it was this, that whenever a testator is so absurd as to give a power of appointment in case the donee of the power leaves issue, to be exercised in favour of such issue, the power must be considered as a non-exclusive power exercisable in favour of every one of the issue which may happen to be in existence at the death of the donee.—p. 68.

Veale's Trusts, In re, referred to.

Swift v. Huntley v. Gregson (1786) 1 Term Rep. 432.—K.B., followed.
Chamberlain v. Napier (1880) 15 Ch. D. 614;
 49 L. J. Ch. 628; 29 W. R. 194.

HALL, V.-C.—Then as to the question whether the power of appointment is an exclusive one or not. . . . I will do what the M.R., in *Veale's Trusts, In re*, said was the proper thing to do: try to find out the meaning of the words according to their ordinary use. . . . Here the form is "for such child," in the singular, "or children," not "and children," as was the case in *Swift v. Gregson*, in which, although the words were "such child and children," the Court held that the power was exclusive. It was stated that the decision there had been questioned by Lord St. Leonards [Sugden on Powers (8th ed., pp. 445, 446)]. If it has been it may be distinguished, because the conjunctive "and" was used, and it may be said that the donee of the power was not entitled to choose one child out of many. But there is that decision before me, and according to the ordinary and fair construction of the words, I consider that the case is in itself quite enough to lead me, and indeed to require me, to hold that this is an exclusive power. I may just refer to the cases as classified by Mr. Farwell, and say that the classification has been accepted and adopted by the M.R., and that I am very willing to recognise and adopt it as well.—p. 634.

Lloyd v. Laver (1845) 14 Sim. 647.—V.-C., discussed.

Minchin v. Minchin (1853) 3 Ir. Ch. R. 167.—
 CUSACK SMITH, M.R. And see col. 2249.

Minchin v. Minchin, dictum disapproved.

Capon's Trusts, In re (1879) 10 Ch. D. 484;
 48 L. J. Ch. 355; 27 W. R. 376.

[The dictum of the M.R. in *Ireland v. Minchin v. Minchin* was to the effect that an appointment under a non-exclusive power to all or some of the objects, with a gift over, in case any of them should die under age, or before marriage under age, of the share to the other

object, is not valid under the Illusory Appointments Act (11 Geo. 4 & 1 Will. 4. c. 46).]

JESSEL, M.R.—In my opinion this *dictum* of the M.R. in Ireland is not good law.—p. 485.

Minchin v. Minchin (*supra*), *disapproved*.

Capon's Trusts, In re (*supra*), *approved*.

Crofton's Trusts, In re (1881) 7 L. R. Jr. 279.

CHATTERTON, V.-C.—I should have great hesitation in following that opinion, in which I am unable to concur, even if there were no authority to the contrary: but I am glad to be supported in the view I take by the decision of Sir G. Jessel, M.R., in *Capon's Trusts, In re. Minchin v. Minchin* was considered as of doubtful authority by Lord St. Leonards, in his book on Powers. [Sugden on Powers (8th ed. p. 450).]—p. 284.

Minchin v. Minchin, referred to.

Minchin v. Minchin (1871) Ir. R. 5 Eq. 178, 184; 15 W. R. 993.—M.R.; *affirmed*, Ir. R. 5 Eq. 258.—L.C., L.J. dissenting.

Minchin v. Minchin (1871), *not applied*.

L'Estrange v. L'Estrange (1890) 25 L. R. Ir. 399, 407.—M.R.

Kemp v. Kemp (1801) 5 Ves. 849; 5 R. R. 182.—M.R., *explained and not applied*.

Mocatta v. Lousada (1806) 12 Ves. 123.—GRANT, M.R.

Kemp v. Kemp, referred to.

Butcher v. Butcher (1812) 1 V. & B. 79; 12 R. R. 193.—L.C.; *Minchin v. Minchin* (1853) 3 Ir. Ch. R. 167.—M.R.

Kemp v. Kemp, discussed.

McGibbon v. Abbott (1885) 10 App. Cas. 653; 54 L. J. P. C. 39; 54 L. T. 138.—P.C.

SIR B. PEACOCK for the Court.—The Courts in Lower Canada are not bound by the current of decisions in England, as the Judges in England before 1874, and Lord Alvanley in *Kemp v. Kemp*, considered themselves to be bound in deciding whether a power was exclusive or non-exclusive. Even in England those decisions had caused so much inconvenience that it was found necessary to resort to legislation upon the subject, and the law was amended by Act 37 & 38 Vict. c. 37.—p. 662.

Burrell v. Burrell (1768) Ambl. 660.—L.C., *considered*.

Kemp v. Kemp (1801) 5 Ves. 849; 5 R. R. 182.—ARDEN, M.R.

Burrell v. Burrell, referred to.

McGibbon v. Abbott (1885) 54 L. J. P. C. 39; 10 App. Cas. 653; 54 L. T. 138.—P.C. (*supra*).

Butcher v. Butcher (1804) 9 Ves. 382.—M.R., *adhered to*.

Mocatta v. Lousada (1806) 12 Ves. 123.—GRANT, M.R.

Butcher v. Butcher, approved.

Fowler v. Hunter (1829) 3 Y. & J. 506, 514.—C.B.

Mocatta v. Lousada; Dyke v. Sylvester (1806) 12 Ves. 126.—M.R.; and **Bax v. Whitbread** (1804-8) 10 Ves. 31; 16 Ves.

15.—M.R. and L.C., *referred to*.

Butcher v. Butcher (1812) 1 V. & B. 79; 12 R. R. 193.—ELDON, L.C.; *affirming* S.C. (*supra*).

Pocklington v. Bayne (1785) 1 Bro. C. C. 450.—L.C., *referred to*.

Kemp v. Kemp (1801) 5 Ves. 849; 5 R. R. 182.—M.R.; *Butcher v. Butcher* (1812) 1 V. & B. 79; 12 R. R. 193.—L.C.

David's Trusts, In re (1859) 29 L. J. Ch. 116; Johns. 495; 6 Jur. (N.S.) 94; 1 L. T. 130; 8 W. R. 39.—WOOD, V.-C., *distinguished*.

Freeland v. Pearson (1867) 36 L. J. Ch. 394; L. R. 3 Eq. 658; 15 W. R. 419.—ROMILLY, M.R.

David's Trusts, In re, discussed.

Humble v. Bowman (1877) 47 L. J. Ch. 64.—HALL, V.-C.

Alexander v. Alexander (1755) 2 Ves. sen. 640.—M.R., *discussed*.

Robinson v. Hardcastle (1788) 2 Term Rep. 241; 1 R. R. 467.—K.B.

Alexander v. Alexander and Adams v. Adams (1777) Cowp. 651.—K.B., *distinguished*.

Haydon v. Wilshire (1789) 3 Term Rep. 372.—K.B.

Alexander v. Alexander, considered.

Kemp v. Kemp (1801) 5 Ves. 849; 5 R. R. 182.—ARDEN, M.R.

Alexander v. Alexander, referred to.

Bray v. Bree (1834) 2 Cl. & F. 453.—H.L. (E.).

Alexander v. Alexander, explained.

Thornton v. Bright (1836) 6 L. J. Ch. 121; 2 Myl. & Cr. 230.—COTTENHAM, L.C.

Alexander v. Alexander, discussed.

Alloway v. Alloway (1843) 4 Dr. & War. 380.—SUGDEN, L.C.

Alexander v. Alexander, discussed.

Kerr's Trusts, In re, (1877) 4 Ch. D. 600; 46 L. J. Ch. 287; 36 L. T. 356; 25 W. R. 390.

JESSEL, M.R.—*Alexander v. Alexander* is not quite in point. There were various questions in that case, but the actual decision was, that under the particular circumstances, the son was entitled to the whole of the appointed fund. Sir T. Clarke read the will as if the words were, "to my son Francis and his wife and children, if they shall by law be capable." In saying that the reasoning was "very artificial" and "not satisfactory," Lord St. Leonards [Sugden on Powers (8th ed., pp. 504, 505)] means to say it was unsound reasoning, and I agree with him. The M.R. had no right to put into the will the words he did. The decision in effect was, that although there was no possibility of ascertaining what shares the appointees were intended to take, yet the one object of the power took the whole. That decision has been overruled by later authorities [Oswald interposed this observation:—But Sir T. Clarke expressly follows the principle laid down in *Humphrey v. Tayleur*, Ambl. 136.] What he says in *Alexander v. Alexander* is a mere *dictum*, and it is difficult to support a *dictum* when the decision is gone. With great deference to Sir T. Clarke, I do not see what *Humphrey v. Tayleur* had to do with the case before him. *Humphrey v. Tayleur* does not appear to have been decided on general law, but on the words of the codicil. Lord Hardwicke treats the codicil as if it had the effect of erasing the name of one of the original appointees.—p. 602.

Alexander v. Alexander, applied.

Perkins, In re, Perkins v. Bagot (1892) 62 L. J. Ch. 531; [1893] 1 Ch. 283; 67 L. T. 743; 41 W. R. 170.—NORTH, J.

Perkins, In re, Perkins v. Bagot, distinguished and not applied.

Bristol (Marquis), In re, Grey (Earl) v. Grey (1897) 66 L. J. Ch. 446; [1897] 1 Ch. 946; 45 W. R. 552.—ROMER, J.

12. FRAUDULENT APPOINTMENTS.

Hodgson v. Halford (1879) 48 L. J. Ch. 548; 11 Ch. D. 959; 27 W. R. 545.—**HALL, V.-C.**, *followed*.

D'Abbadie v. Bizoin (1871) Ir. R. 5 Eq. 205.—**SULLIVAN, M.R.**, *not followed*.

Wainwright v. Miller (1897) 66 L. J. Ch. 616; [1897] 2 Ch. 255; 76 L. T. 718; 45 W. R. 652.

BYRNE, J.—I am asked to say that it [*Hodgson v. Halford*] is inconsistent with the authority of *D'Abbadie v. Bizoin*, which was cited before Hall, V.-C., although he does not expressly deal with it in his judgment. It is sufficient for me to say that the circumstances in *D'Abbadie v. Bizoin* were very much more removed from the circumstances in the present case than the circumstances in *Hodgson v. Halford*, and I consider that the latter case is an authority which I ought to follow. Accordingly I hold that this is not a case of a fraud on the power.—p. 617.

Askham v. Barker (1850) 22 L. J. Ch. 769; 17 Beav. 37; 12 Beav. 499.—**M.R.**, S. C. (1853) 1 W. R. 279.—**M.R.**, *distinguished*.

Rowley v. Rowley (1854) 23 L. J. Ch. 275; Kay. 242; 2 Eq. R. 241; 18 Jur. 306.—**WOOD, V.-C.**: *Carver v. Richards* (1859) 29 L. J. Ch. 169; 27 Beav. 488, 497 (*supra*, col. 2216).

Daubeny v. Cockburn (1816) 1 Meriv. 626; 15 R. R. 174.—**M.R.**

Discussed, **Askham v. Barker** (1853) 17 Beav. 37, 54 (*supra*); *distinguished*, **Rowley v. Rowley** (*supra*).

Scroggs v. Scroggs (1755) Amb. 272.—**L.C.**; and **Daubeny v. Cockburn**, *discussed*.

Topham v. Portland (Duke) (1863) 1 De G. J. & S. 517; 32 L. J. Ch. 257; 1 N. R. 496; 8 L. T. 180; 11 W. R. 507.—**L.J.**, (*see post*, col. 2252).

TURNER, L.J.—In that case [*Scroggs v. Scroggs*] the consent of a trustee was necessary to the exercise of a power, and the donee of the power procured the trustee's consent by a false representation, to which the appointee does not appear to have been in any way a party; yet the Court set aside the appointment (p. 570). . . . His honour [in the Court below] however has held this appointment to be bad as to the whole of the 16,000*l.* upon the general rule, that where an appointment is made for a bad purpose, the bad purpose affects the whole appointment, and his honour has relied upon *Daubeny v. Cockburn* in support of this view. That this general rule is correct when applied to cases in which the evidence does not enable the Court to distinguish what is attributable to an authorised from what is attributable to an unauthorised purpose, I feel no doubt; but if the evidence enables the Court to make this distinction, the foundation on which the rule rests, the impossibility of distinguishing what is attributable to one purpose from what is attributable to another, wholly fails; and the general rule therefore cannot, as it seems to me, apply. Sir W. Grant has, I think, in *Daubeny v. Cockburn*, pointed to this view; for he said that he could not collect from the evidence, that but for the assent of the daughter, any appointment would have been executed in her favour.—p. 571. And see *Viant v. Cooper* (*post*, col. 2252).

Daubeny v. Cockburn, *discussed*.

Whelan v. Palmer (1888) 57 L. J. Ch. 784; 39 Ch. D. 648, 553; 58 L. T. 937; 36 W. R. 587.—**KEKEWICH, J.** *See post*, col. 2279.

Daubeny v. Cockburn, *referred to*.

Lawley, in re. **Zaiser v. Lawley** (1902) 71 L. J. Ch. 787; [1902] 2 Ch. 673.—**JOYCE, J.**: *affirmed*, C.A. and H.L. (*see supra*, col. 2211).

Topham v. Portland (Duke) (1863) 32 L. J. Ch. 257; 1 De G. J. & S. 517; 1 N. R. 496; 8 L. T. 180; 11 W. R. 507.—**L.J.**; *reversing* (1862) 32 L. J. Ch. 81; 31 Beav. 525; 8 Jur. (N.S.) 1083; 7 L. T. 11.—**M.R.**; **L.J.**, *affirmed non*. **Portland (Duke) v. Topham** (*post*, col. 2253), *discussed*.

Preston v. Preston (1869) 21 L. T. 346.—**ROMILLY, M.R.**

Topham v. Portland (Duke), *discussed*.

Topham v. Portland (Duke) (1869) 39 L. J. Ch. 259; L. R. 5 Ch. 40, 57; 22 L. T. 847; 18 W. R. 235.—**HATHERLEY, L.C.** and **GIFFARD, L.J.**

Topham v. Portland (Duke) 32 L. J. Ch. 257, *referred to*.

Cooper v. Cooper (1870) 39 L. J. Ch. 240; L. R. 5 Ch. 203, 212; 22 L. T. 1; 18 W. R. 299.—**HATHERLEY, L.C.**

Topham v. Portland (Duke) 32 L. J. Ch. 257, *discussed*.

Huish's Charity, in re (1870) 39 L. J. Ch. 499; L. R. 10 Eq. 5; 22 L. T. 565; 18 W. R. 817.

ROMILLY, M.R.—**Turner, L.J.** lately in *Topham v. Portland (Duke)*, drew some nice distinction between the intent of the appointor and his motives, but this appears to me to be a very thin distinction, and as a general rule I do not find any case, unless *Topham v. Portland (Duke)* be one, where the execution of a power has been set aside, which has been literally performed, and under which the appointor has not obtained some exclusive benefit for himself not contemplated by the instrument creating the power.—p. 500.

Topham v. Portland (Duke) 32 L. J. Ch. 257, *reasoning applied*.

D'Abbadie v. Bizoin (1871) Ir. R. 5 Eq. 205.—**SULLIVAN, M.R.**

Topham v. Portland (Duke) 32 L. J. Ch. 257, *discussed and applied*.

Whelan v. Palmer (1888) 39 Ch. D. 648; 57 L. J. Ch. 784; 58 L. T. 937; 36 W. R. 587.

KEKEWICH, J.—I have nothing to do with motives; they are a dangerous subject with which to treat at all. But I am entitled to look at the purpose, the intention with which a deed is executed. That is the foundation of the judgment of **Turner, L.J.** in *Topham v. Portland (Duke)*, which is exhaustive of the whole of this branch of law. You look not at the motive, but at the intention. If you find that the intention or the purpose is fraudulent, that is to say, not honestly in exercise of the power, then you will set aside that exercise, because it is not honest, that is to say, not according to the intention of the parties.—p. 658.

Topham v. Portland (Duke) 32 L. J. Ch. 257, *applied*.

Viant v. Cooper (1897) 76 L. T. 763.—**STIRLING, J.**

Topham v. Portland (Duke) (1869) 39 L. J. Ch. 259; L. R. 5 Ch. 40; 22 L. T. 847; 18 W. R. 235.—**L.C.** and **L.J.**, *applied*.

MacKechnie v. Marjoribanks (1870) 39 L. J. Ch. 604; 22 L. T. 841; 18 W. R. 933.—**JAMES, V.-C.**

Topham v. Portland (Duke) (*supra*), distinguished and not applied.

Roach v. Trood (1876) 3 Ch. D. 429; 34 L. T. 105; 24 W. R. 803.—C.A.

BAGGALLAY, J.A. (for self, JAMES and MEL-
LISH, L.J.J.).—*Topham v. Portland (Duke)* . . .
was decided both by James, V.-C. and the C. A.
on similar grounds. As was observed by Lord
Hatherley in the course of his judgment, a former
appointment had been set aside on the ground
that the appointee was a mere instrument for
effecting the purpose of the donee of the power,
which was foreign to that which was the true
purpose of the power, and that while he gave
implicit credence to the statements of both the
appointor and appointee that the absolute
appointment in favour of the latter had been
made without any agreement between them, he
inferred from all the evidence before him, and
particularly from that of the appointee herself,
that she was still under the same influence, and
would still be a passive instrument to effect the
purposes of the appointor.—p. 442.

Portland (Duke) v. Topham (1865) 34 L. J.
Ch. 113; 11 H. L. Cas. 32; 10 Jur. (N.S.)
501; 10 L. T. 355; 12 W. R. 697.—
H.L. (E.); affirming, with a variation, S. C.
nom. **Topham v. Portland (Duke)** (*supra*,
col. 2252), discussed.

Topham v. Portland (Duke) (1869) 39 L. J. Ch.
259; L. R. 5 Ch. 40; 22 L. T. 847; 18 W. R.
235.—HATHERLEY, L.C. and GIFFARD, L.J.

Portland (Duke) v. Topham, referred to.

Thacker v. Key (1869) L. R. 8 Eq. 408, 415.—
JAMES, V.-C.

Portland (Duke) v. Topham, principles
applied.

D'Abbadie v. Bizoin (1871) Ir. R. 5 Eq. 205.
—SULLIVAN, M.R.

Portland (Duke) v. Topham, explained.

Palmer v. Locke (1880) 15 Ch. D. 294; 50
L. J. Ch. 113; 43 L. T. 454; 28 W. R. 926.—
C.A. JAMES, BRETT and COTTON, L.J.J.

JAMES, L.J.—It has been decided in various
cases that such a power as this could be released,
because, although in some sense it is fiduciary,
it is fiduciary only to this extent, that the donee
of the power cannot use it for any corrupt pur-
pose, cannot use it for any purpose of benefiting
himself or oppressing anybody else. This was so
decided in *Portland (Duke) v. Topham*.—p. 299.

Portland (Duke) v. Topham, discussed.

Molynaux v. Fletcher (1898) 67 L. J. Q. B.
392; [1898] 1 Q. B. 648; 78 L. T. 111; 46
W. R. 576.

KENNEDY, J.—The law was laid down in *Port-
land (Duke) v. Topham* that a person having a
limited power must exercise it without any
ulterior object. He must act in good faith and
with a single view to the real purpose and object
of the power. This is shown also in *Humphrey
v. Oliver* (*post*).—p. 396.

Humphrey v. Oliver (1859) 28 L. J. Ch. 406;
5 Jur. (N.S.) 946; 7 W. R. 334.—L.J.J.;
reversing 5 Jur. (N.S.) 111.—M.R., dis-
cussed.

Shirley v. Fisher (1882) 47 L. T. 109, 111.—
BACON, V.-C.; *Molynaux v. Fletcher* (*supra*).

Fearon v. Desbrisay (1851) 21 L. J. Ch. 505;
14 Beav. 635.—M.R.

Discussed, *Domville v. Lamb* (1853) 1 W. R.

246.—WOOD, V.-C.; distinguished. *Beere v. Hoff-
mister* (1856) 26 L. J. Ch. 177; 23 Beav. 101;
3 Jur. (N.S.) 78.—M.R.

M'Queen v. Farquhar (1805) 11 Ves. 467; 8
R. R. 212.—L.C.

Referred to, *Edgeworth v. Edgeworth* (1829)
Beat. 328.—HART, L.C.: applied. *Butcher v.
Jackson* (1845) 14 Sim. 444.—V.-C.; *Cockcroft v.
Sutcliffe* (1856) 25 L. J. Ch. 313; 2 Jur. (N.S.)
323; 5 W. R. 340.—WOOD, V.-C.

**M'Queen v. Farquhar and Cockcroft v. Sut-
cliffe**, followed.

Huish's Charity. In re (1870) 22 L. T. 565; 39
L. J. Ch. 499; L. R. 10 Eq. 5; 18 W. R. 817.

ROMILLY, M.R.—To hold the deed to be void
would be what I fear is too much the tendency
of technical rules; it would be to strain a rule,
intended for the purpose of benefiting the objects
of the power, to a rigid exactness which inflicts
a plain and manifest injury on them. This
appears to me to be the evil attempted to be
avoided by Lord Eldon in *M'Queen v. Farquhar*,
and also in *Cockcroft v. Sutcliffe*, which is a still
stronger case, and which appears to me to be a
most valuable decision. There a tenant for life
with a power of appointment among his children
appointed to two of them, and then joined with
them in a mortgage, the money being expressed
to be advanced to all three, and it was held by
Lord Hatherley, then Wood, V.-C., that this was
no fraud on the power of appointment. I adopt
that case in its fullest extent. The meaning and
the good sense of the rule appear to be that if
the appointor either directly or indirectly obtains
any exclusive advantage for himself, and that to
obtain this advantage is the object and the reason
of its being made, then the appointment is bad;
but that if the whole transaction taken together
shows no such object, but only shows an inten-
tion to improve the whole subject-matter of the
appointment for the benefit of all the objects of
the power, then the exercise of the power is not
fraudulent or void, although by the force of cir-
cumstances such improvement cannot be bestowed
on the property which is the subject of the
appointment without the appointor to some
extent participating therein.—p. 566.

M'Queen v. Farquhar, discussed.

Henty v. Wrey (1882) 53 L. J. Ch. 667; 21
Ch. D. 332, 343.—C.A. (*see post*, cols. 2256, 2257).

Tucker v. Sanger or Tucker (1824) M'Cle.
424; 13 Price 607.—C.B.

Principle approved, *Cutten v. Sanger* (1828)
2 Y. & J. 459, 466.—C.B.; commented on, *Man v.
Ricketts* (1844) 13 L. J. Ch. 194; 7 Beav. 93;
8 Jur. 159.—M.R.

Tucker v. Sanger, observed on.

Birley v. Birley (1858) 25 Beav. 299; 27 L. J.
Ch. 569; 4 Jur. (N.S.) 315; 6 W. R. 400.

ROMILLY, M.R.—It is obvious that *Tucker v.
Sanger* must have created considerable difference
of opinion, for we find the L.C.B. afterwards
insisting on the correctness of the decision, which
he would not have done, unless it had been ques-
tioned. Lord St. Leonards (2 Sug. Powers, 282)
considered the case as one of great difficulty,
having regard to the earlier cases. Looking at
the cases which Alexander, C.B. considered as
stronger than and fully warranting his decision,
viz., *Routledge v. Dorvil* (col. 2265), and that class,
they simply lay down the proposition, that when

the donee of a power intends to appoint and the appointee intends to settle the property, the whole may be effected by one deed or one instrument, and the appointment and settlement may be made simultaneously; but if the reason of the appointment being made to the appointee arises from a previous contract with the donee of the power to appoint to persons, not objects of the power, I find no previous case which amounts to a decision that such an appointment can be supported in this Court. . . . I do not therefore consider *Tucker v. Sanger* as altering the law on this subject, it is a mere question of evidence. But if it is contended that that case establishes the proposition, that no bargain between the appointee and the donee of a power, by which the appointee gets the absolute appointment by agreement with the appointor, for the purpose of providing for persons not objects of the power, and to whom the donee could not have given it directly, is invalid, provided no direct pecuniary benefit arises to the donee, then I dissent from this view of the law: but I do not understand that any such proposition is intended to be established by the L.C.B. in that case.—pp. 307, 308.

Birley v. Birley, *referred to*.

Turner's Settled Estates. In re (1884) 54 L. J. Ch. 690; 28 Ch. D. 205, 217.—C.A. (see col. 2260).

Wellesley v. Mornington (Earl) (1855) 2 K. & J. 143; 1 Jur. (N.S.) 202.—v.-c., *referred to*.

Marsden's Trust, In re (1859) 28 L. J. Ch. 906; 4 Drew. 594; 5 Jur. (N.S.) 590; 7 W. R. 520.—KINDERSLEY, v.-c.

Beere v. Hoffmister (1856) 26 L. J. Ch. 177; 23 Beav. 101; 3 Jur. (N.S.) 78.—ROMILLY, M.R.; and **Wellesley v. Mornington (Earl)**, *discussed*.

Roach v. Trood (1876) 3 Ch. D. 429, 440; 34 L. T. 105; 24 W. R. 803.—C.A.

Beere v. Hoffmister and Wellesley v. Mornington (Earl), *discussed*.

Henty v. Wrey (1882) 53 L. J. Ch. 667; 21 Ch. D. 332, 354.—C.A. (*post*, col. 2256).

Marsden's Trust, In re (*supra*), *referred to*.

Topham v. Portland (Duke) (1869) 39 L. J. Ch. 259; L. R. 5 Ch. 40, 57; 22 L. T. 847; 18 W. R. 235.—HATHERLEY, L.C. and GIFFARD, L.J.

Marsden's Trust, In re, *not applied*.

Roach v. Trood (1876) 3 Ch. D. 429; 34 L. T. 105; 24 W. R. 803.—C.A.

Marsden's Trust, In re, *explained*.

Crawshay, In re, *Crawshay v. Crawshay* (1890) 43 Ch. D. 615; 59 L. J. Ch. 395; 62 L. T. 489; 38 W. R. 600.

NORTH, J.—In *Marsden's Trust, In re*, the facts were very peculiar, and it has been treated by other judges as a somewhat exceptional case, and I think it is so for this reason. There a mother, who had under a settlement a power of appointment among children, desired to make a provision for the father out of the settled fund, his circumstances being such that she thought he ought to be assisted in that way. This intention was openly discussed. The father was not an object of the power, and therefore he could not take any part of the settled fund under an appointment. A solicitor was consulted, and he advised that an appointment could not be made

O.C.

to the father, and that project thereupon dropped. An arrangement was then made between the father and the mother that the whole fund should be appointed by the mother to the eldest child, a daughter, who was at that time an infant, and who did not require any immediate provision to be made for her, with this object, that, when the mother was dead, the father might tell the daughter that the whole fund had been appointed to her, under an arrangement between her father and mother, with the object of enabling the daughter to provide for her father. One cannot help seeing what an influence would have been brought to bear on the daughter when the father told her that, and that it would be practically impossible that she should resist doing that which it was the intention of her father and mother that she should do, and the doing of which under the influence thus exercised upon her would be an entire perversion and misapplication of the fund—taking it away from the persons in whose favour it ought to have been appointed, and giving it to a stranger. If an appointment of that kind is obtained by means of undue influence, of course it cannot stand, and that is shown by the later cases which have been referred to. That, I think, is the true explanation of *Marsden's Trust, In re*, and I do not think that case is in any way inconsistent with the law as stated in *Pryor v. Pryor* (2 De G. J. & S. 205, *post*, col. 2259). The same conclusion is, I think, to be drawn from *Roach v. Trood* (*supra*).—p. 626.

Hinchinbroke (Lord) v. Seymour (1784) 1

Bro. C. C. 395.—L.C.

Explained, *McQueen v. Farquhar* (1805) 11 Ves. 467; 8 R. R. 212.—L.C.; *Queensberry (or Queensbury) Case* (1819) 1 Bligh 339; 20 R. R. 61.—L.C.: *discussed*, *Edgeworth v. Edgeworth* (1829) Beat. 328.—HART, L.C.; *Keily v. Keily* (1843) 2 Con. & L. 334; 2 Dr. & War. 38.—SUGDEN, L.C.

Hinchinbroke (Lord) v. Seymour; Edgeworth v. Edgeworth (*supra*); and *Gee v. Gurney*, (1846) 2 Coll. 486; 10 Jur. 367.—v.-c., *distinguished*.

Butcher v. Jackson (1845) 14 Sim. 444.—v.-c., *discussed*.

Domville v. Lamb (1853) 1 W. R. 246.—WOOD, v.-c.

Hinchinbroke (Lord) v. Seymour, *explained*.

Wellesley v. Mornington (Earl) (1855) 2 K. & J. 143; 1 Jur. (N.S.) 202.—WOOD, v.-c.

Hinchinbroke (Lord) v. Seymour, considered. Queensberry Case, Edgeworth v. Edgeworth, and Keily v. Keily (*supra*), *discussed*.

Henty v. Wrey (1882) 21 Ch. D. 332; 53 L. J. Ch. 667; 47 L. T. 231; 30 W. R. 350.—C.A.; *reversing* 19 Ch. D. 492; 51 L. J. Ch. 422; 45 L. T. 752; 30 W. R. 317.—KAY, J.

JESSEL, M.R.—Now when a rule of law which is against principle is alleged to be established, there are two points to be considered, first of all, was any such rule of law ever laid down by any judge? That is the first point to be decided; and secondly, if it was so laid down, has it passed into a binding rule of law?—that is, has it been so recognised and dealt with by subsequent judges as to prevent a judge of a tribunal of co-ordinate jurisdiction from saying that the decision is contrary to the course of law, and is not binding upon him? As regards the first point,

as I have already said, if I look at *Hinchinbroke (Lord) v. Seymour* as reported, I cannot find that any such rule of law as is alleged was laid down in it. I now go to another point. Did Lord Thurlow ever decide *Hinchinbroke (Lord) v. Seymour* in the way appearing in the report? I have come to the conclusion that he did not: that the report is an imperfect and incorrect report, and that the real point decided was that the appointment was in fraud of the power. There is evidence as to this which, to my mind, is quite satisfactory, though I am bound to admit that judges have differed in opinion as to the ground on which the case was decided. In the first place, I must state what the case was, for I sent for the record and read it (p. 340). . . . Now as to the evidence which has satisfied me as to the ground of the decision. The first thing is the statement by Lord Eldon in *M. Queen v. Farquhar* (*supra*, col. 2254). In 1784, when *Hinchinbroke (Lord) v. Seymour* was decided, Lord Eldon was at the Chancery bar, and I may mention that there were very few gentlemen practising at the Chancery bar in those days, and very few causes in which they could practise. . . . I sent for a law list to see whether Sir Anthony Hart was at the bar at that time, and I found, rather to my surprise, that the whole bar of England in 1783 (there is no list for 1784) was under 300, practising and non-practising, and therefore one may imagine the small number there were at the Chancery bar, and how very unlikely it is that Lord Eldon had not personal knowledge of what occurred. I am satisfied that he had, and that when he states what occurred he states it of his own knowledge. That being so, he tells us this, at p. 479: "It is truly said, this Court will not permit a party to execute a power for his own benefit. In *Lord Sandwich's Case*" (Lord Hinchinbroke became Lord Sandwich in 1792, and consequently Lord Eldon in 1805 correctly speaks of him as Lord Sandwich) "a father having a power of appointment, and thinking one of his children was in consumption, appointed in favour of that child. And the Court was of opinion that the purpose was to take the chance of getting the money as administrator of that child." Speaking for myself, I prefer Lord Eldon's statement in 1805 as to what the judgment of Lord Thurlow was, to a report in Brown, if I must choose between the two. But Lord Eldon mentioned it again in the *Queensberry Case*. . . . Therefore we have Lord Eldon for the second time stating that the decision was that the appointment was a fraud on the power, and stating in particular that the child was in a consumption. In the first case he said that the father thought so, and in the second case he said that it was so (p. 343). [The M.R. then discussed *Edgeworth v. Edgeworth*, in which a different view of *Hinchinbroke (Lord) v. Seymour* was taken, and continued:] I shall not read the passages on the subject in his [Lord St. Leonards'] book on Powers. They are not as distinct as might be, but if he had said nothing else on the subject I should have thought, notwithstanding a note to one of the passages, that he took the view that Brown's report was correct, and that the case was decided upon some general principle applicable to powers and not on the ground of the fraud on the power. But we have a case before him which is twice reported, *Keily v. Keily*. I would mention that where there is a distinction

between those reports I always prefer Connor and Lawson. There is no substantial distinction between them in this case, though there is a slight difference. We have here a very carefully considered judgment, in which Lord St. Leonards states his view of *Hinchinbroke (Lord) v. Seymour* in clear, distinct, and unmistakable terms; and of course an opinion given in a judgment after argument is to be preferred to a note in a text-book. In both reports he distinctly treats the case as decided on the ground that the appointment was a fraud on the power. . . . Lord Hatherley there [*Wellesley v. Mornington (Earl)* (*supra*)] considers the case and states that Lord Thurlow does not put his decision upon the ground of fraud. He therefore thought that the report of Lord Thurlow's judgment in Brown was right. It does not appear that his attention was called to the *Queensberry Case*, and all I can say is that he adopts the view of Sir Anthony Hart and does not adopt the view of Lord St. Leonards, if *Keily v. Keily* was called to his attention, which I do not think that it was.—p. 347. [His lordship then referred to Chance on Powers, p. 141, pl. 369, and p. 463, pl. 1298, and Farwell on Powers, p. 326, and pointed out that *Hinchinbroke (Lord) v. Seymour* was by both authors treated as decided on the ground of fraud in the exercise of the power.]

LINDLEY, L.J., who concurred, also discussed the cases referred to by the M.R. as well as other cases dealing with the question whether portions were raisable or not. HOLKER, L.J. concurred.

Henty v. Wrey (*supra*), applied.

De Hoghton, In re, *De Hoghton v. De Hoghton* (1896) 65 L. J. Ch. 667; [1896] 2 Ch. 385; 74 L. T. 613; 44 W. R. 635.—STIRLING, J.

Cunninghame v. Anstruther (1872) L. R. 2

H. L. Sc. 223.—referred to.
McGibbon v. Abbott (1885) 54 L. J. P. C. 39; 10 App. Cas. 653, 660; 54 L. T. 138.—P.C.

Salmon v. Gibbes (1849) 18 L. J. Ch. 177; 3

De G. & Sm. 343; 13 Jur. 855.—KNIGHT BRUCE, V.-C., distinguished.

Topham v. Portland (Duke) (1863) 1 De G. J. & S. 517; 32 L. J. Ch. 257; 1 N. R. 496; 8 L. T. 180; 11 W. R. 507.—L.J.

KNIGHT BRUCE, L.J.—In *Salmon v. Gibbes* the condition was subsequent.—p. 558.

White v. St. Barbe (1813) 1 V. & B. 399;

15 R. R. 246.—M.R.; and *Langston v. Blackmore* (1755) Amb. 289.—L.C., applied.

Tucker v. Sanger (1824) 13 Price 607; *M'Cle.* 424, 439.—EX. EQ.

Langston v. Blackmore (*and see post*,

col. 2259), and *White v. St. Barbe*, discussed.

Cutten v. Sanger (1828) 2 Y. & J. 459, 466.—ALEXANDER, C.B.

White v. St. Barbe, referred to.

Gosset's Settlement, In re (1854) 19 Beav. 529.—M.R.; *Wright v. Goff* (1856) 22 Beav. 207; 25 L. J. Ch. 803; 2 Jur. (N.S.) 481; 4 W. R. 522.—M.B.

White v. St. Barbe, applied.

Fitzroy v. Richmond (Duke) (1859) 28 L. J. Ch. 752; 27 Beav. 190; 5 Jur. (N.S.) 971.—ROMILLY, M.R.

White v. St. Barbe, *approved and followed*. Pocock's Policy. In re (1871) 40 L. J. Ch. 681. L. R. 6 Ch. 445, 453; 25 L. T. 233; 19 W. R. 801. —JAMES and MELLISH, L.JJ.

White v. St. Barbe, *discussed*. Cuninghame v. Anstruther (1872) L. R. 2 H. L. Sc. 223, 234.

Langston v. Blackmore (*supra*, col. 2258) and **White v. St. Barbe**, *principle not applied*.

Morgan v. Gronow (1873) 42 L. J. Ch. 410; L. R. 16 Eq. 1, 10; 28 L. T. 434.

SELBORNE, L.C. (for M.R.).—I cannot accede to the view that the principle of *White v. St. Barbe* and *Langston v. Blackmore*, in which dispositions void as appointments were held good as re-settlements by the appointee, touch such a case as this. *Langston v. Blackmore* is only an example of the same principle as *White v. St. Barbe*.—p. 414.

Langston v. Blackmore and Fitzroy v. Richmond (Duke) (*supra*, col. 2258), *referred to*. Turner's Settled Estates, In re (*post*).

Wright v. Goff (1856) 25 L. J. Ch. 803; 22 Beav. 207; 2 Jur. (N.S.) 481; 4 W. R. 522.—M.R.; **Roach v. Trood** (1876) 3 Ch. D. 429; 34 L. T. 105; 24 W. R. 803.—C.A.; *reversing* (1874) 31 L. T. 666.—MALINS v.-c.; **Cooper v. Cooper** (1869) 38 L. J. Ch. 622; L. R. 8 Eq. 312; 21 L. T. 197; 17 W. R. 1007.—JAMES, v.-c.; *affirmed*, (1870) 39 L. J. Ch. 240; L. R. 5 Ch. 203; 22 L. T. 1; 18 W. R. 299.—HATHERLEY, L.C.; and **Pryor v. Pryor** (1864) 33 L. J. Ch. 441; 2 De G. J. & S. 205; 4 N. R. 440; 10 Jur. (N.S.) 603; 10 L. T. 360; 12 W. R. 781.—L.JJ., *discussed*. Turner's Settled Estates, In re (1884) 28 Ch. D. 205; 54 L. J. Ch. 690; 52 L. T. 70; 33 W. R. 265.—C.A.

FRY, L.J. (for self and BOWEN, L.J.).—It appears to us to be plain that the mere conferring of a benefit upon a person not an object of the power will not avoid the exercise of the power, if made with the approbation of the real objects of the power: *see* Sugden on Powers [8th ed. p. 670]; or even if made with the approval of the person who would take under an exercise in favour of the object of the power, as in the case where an appointment was made to a married daughter, and she and her husband re-settled it, giving benefits, not only to their children, but to a stranger to the family: *Wright v. Goff*; or where the appointment was made upon the usual terms of a marriage settlement on the occasion of the marriage of an infant daughter: *Fitzroy v. Richmond (Duke)* (*supra*). It appears to us to be further plain that the mere existence of an antecedent contract between the donee of the power and the appointee for a re-settlement conferring benefits on a stranger is not enough to invalidate the appointment. In *Langston v. Blackmore* (Ambl. 288, *supra*, col. 2258), decided by Lord Hardwicke in 1755, there was a distinct bargain between the father and the eldest son as to the whole transaction, the eldest son agreeing to pay 80*l.* to his father, and 50*l.* to a younger brother, and the father giving up a life-interest in a moiety of the property which was then appointed by the father upon the usual trusts of a marriage settle-

ment on his eldest son: and in like manner in the recent case of *Roach v. Trood* there was a bargain in fact between the father and the son, acceded to by the son before the appointment could take effect. Again, in *Cooper v. Cooper* James, V.-C. said: "Taking the whole thing together the bargain is this: 'I will appoint to you 5,000*l.* out of the settled fund, provided you will enter into a bargain with me that if I pay down directly 5,000*l.* more, you will give me a contingent reversion in the first sum,'" and the V.-C. then proceeded to consider the character of the bargain thus entered into. But if the Court finds not only that there was an antecedent contract, but that that contract was the *causa sine qua non* of the appointment, or, to use the language of Lord Romilly in *Birley v. Birley* (25 Beav. 307, *supra*, col. 2254), "the reason of the appointment being made to the appointee," or, to use the language of Knight Bruce, L.J. in *Pryor v. Pryor*, "if the just result of the evidence is that the appointment would not have been made but for the bargain," then the case is different, and the appointment is bad.—p. 216.

BAGGALLAY, L.J. concurred in the judgment.

Pryor v. Pryor, *statement of law approved*.

Roach v. Trood, *referred to*.

Crawshay, In re, *Crawshay v. Crawshay* (1890) 43 Ch. D. 615, 625; 59 L. J. Ch. 395.—NORTH, J. *See supra*, col. 2256.

13. EXCESSIVE EXECUTION.

Thwaytes v. Dye (1688) 2 Vern. 80; 2 Eq. Cas. Abr. 669.—L.C.

Discussed, *Alexander v. Alexander* (1755) 2 Ves. sen. 640.—M.R.; *applied*, *Middleton v. Pryor* (1760) Ambl.—M.R.; *explained*, *Dowglass v. Waddell* (*post*); *referred to*, *Redgate*, In re, *Marsh v. Redgate* (1902) 72 L. J. Ch. 204; [1903] 1 Ch. 356; 51 W. R. 216.—BUCKLEY, J.

Long v. Long (1800) 5 Ves. 445; 5 R. R. 101.—L.C., *explained*.

Jeaffreson's Trusts, In re (1866) 35 L. J. Ch. 622; L. R. 2 Eq. 276; 12 Jur. (N.S.) 660; 14 W. R. 759.—WOOD, v.-c., *approved*.

Dowglass v. Waddell (1886) 17 L. R. Ir. 384, 395.—CHATERTON, v.-c.

Jeaffreson's Trusts, In re, *discussed*.

Champney v. Davy (1879) 11 Ch. D. 949; 48 L. J. Ch. 268; 40 L. T. 189; 27 W. R. 370.

HALL, v.-c.—In *Jeaffreson's Trusts, In re*, which was a case of the execution of a power, the donee appointed 100*l.* part of the fund, to a person not an object of the power, and appointed the balance of the fund, after payment of certain other sums well appointed, which sums she described as 260*l.*, to pay her own debts (which was an invalid direction), and "should any surplus remain," he gave it to an object of the power. Here there were two invalid gifts; the latter was held to fall into the ultimate surplus, the former was held to pass as unappointed. That decision as regards the 100*l.* followed *Esauum v. Appleford* (5 Myl. & Cr. 56, *supra*, col. 2205), the 100*l.* not becoming part of and passing with the balance, because that was defined as 260*l.* That case, therefore, is not an authority in favour of the general residuary legatee in the present case.—p. 958.

Roberts v. Dixall (1738) 2 Eq. Cas. Abr. 668, pl. 19; **Walpole v. Conway** (Lord) (1740) Barnard. 156.—L.C.; and **Sir W.**

Davies' Case, 5 Vin. Abr. 292, pl. 38, referred to.
Douglas v. Willes (1849) 7 Hare 318.—WIGRAM, V.-C.

Roberts v. Dixall (*supra*), explained.
Dowglass v. Waddell (1886) 17 L. R. Ir. 384.—CHATTERTON, V.-C.

Walpole v. Conway (Lord) (*supra*), referred to.
Heron v. Stokes (1842) 4 Ir. Eq. R. 284; 2 Dr. & War. 89; 1 Con. & L. 270.—L.C. (affirmed with a variation, *nom. Stokes v. Heron* (1845) 12 Cl. & F. 161; 9 Jur. 563.—H.L. (IR.)).

Sir W. Davies' Case and Walpole v. Conway (Lord), referred to.

Roberts v. Dixall, discussed.
Bannatyne v. Ferguson (1895) [1896] 1 Ir. R. 144.—C.A.

Kenworthy v. Bate (1802) 6 Ves. 793; 6 R. R. 46.—M.R., discussed.
Thornton v. Bright (1836) 2 Myl. & Cr. 230 (*post*).

Kenworthy v. Bate, referred to.
Cowx v. Foster (1860) 29 L. J. Ch. 886; 1 J. & H. 30; 6 Jur. (N.S.) 1051; 2 L. T. 797.—WOOD, V.-C. See *supra*, col. 2236.

Kenworthy v. Bate, followed.
Webb v. Sadler (1872) L. R. 14 Eq. 533, 539. See *post*, col. 2263.

Kenworthy v. Bate, distinguished.
Burk v. Aldam (1874) L. R. 19 Eq. 16, 20 (*post*, col. 2262).

Kenworthy v. Bate, discussed.
Scotney v. Lomer (1885) 54 L. J. Ch. 558; 29 Ch. D. 535, 543.—NORTH, J. See *post*, col. 2262.

Kenworthy v. Bate, explained.
Dowglass v. Waddell (1886) 17 L. R. Ir. 384.—CHATTERTON, V.-C. (*supra*).

Kenworthy v. Bate, followed.
Paget, In re, Mellor, In re, Mellor v. Mellor (1898) 67 L. J. Ch. 151; [1898] 1 Ch. 290; 78 L. T. 72; 46 W. R. 328.

KEKEWICH, J.—In *Kenworthy v. Bate* the question was whether a power of appointing real estate to uses was well executed by a devise to trustees to sell, and an appointment of the money produced by the sale; and it was held that it was. And in *Cowx v. Foster* (*supra*), where the power was to appoint "to such uses upon and for such trusts" as the tenant for life should by deed or will appoint, Wood, V.-C. held that the appointment to trustees for the benefit of persons who were objects of the power was a good appointment, and that the case before him was a stronger one in favour of the conclusion at which he had arrived than *Kenworthy v. Bate*.—p. 153.

Kenworthy v. Bate, principle applied.
Redgate, In re, Marsh v. Redgate (1902) 72 L. J. Ch. 204; [1903] 1 Ch. 356; 51 W. R. 216.—BUCKLEY, J.

Line v. Hall (1873) 43 L. J. Ch. 107; 29 L. T. 568; 22 W. R. 124.—JESSEL, M.R., applied.

Finch and Chew's Contract, In re (1903) 72 L. J. Ch. 690; [1903] 2 Ch. 486; 89 L. T. 162. KEKEWICH, J.

Hervey v. Hervey (1739) 1 Atk. 561.—L.C.; and **Churchman v. Harvey** (1757) Amb. 335.—L.C.C., explained.

Thornton v. Bright (1836) 6 L. J. Ch. 121; 2 Myl. & Cr. 230.—COTTENHAM, L.C.

Thornton v. Bright, referred to.
Butcher v. Butcher (1851) 14 Beav. 222.—ROMILLY, M.R.

Thornton v. Bright, applied.
Ewart v. Ewart (1853) 11 Hare 276; 1 Eq. R. 536; 17 Jur. 1022.—TURNER, V.-C.

Thornton v. Bright, referred to.
Portadown, &c., Ry., In re, Young, Ex parte (1867) Ir. R. 1 Eq. 293; 15 W. R. 979.—M.R.

Thornton v. Bright and Fowler v. Cohn (1856) 21 Beav. 360; 2 Jur. (N.S.) 315; 4 W. R. 412.—M.R., discussed.
Pocock's Policy, In re (1871) L. R. 6 Ch. 451, n.—MALINS, V.-C.; affirmed on different grounds, 40 L. J. Ch. 681; L. R. 6 Ch. 445; 25 L. T. 233; 19 W. R. 801.—L.JJ.

Thornton v. Bright, explained.
Trollope v. Linton (1823) 1 Sim. & S. 477; 2 L. J. (O.S.) Ch. 3; 24 R. R. 211.—V.-C.; and **Fowler v. Cohn**, distinguished.
Busk v. Aldam (1874) 44 L. J. Ch. 119; L. R. 19 Eq. 16, 20; 31 L. T. 370; 23 W. R. 21.—MALINS, V.-C.

Thornton v. Bright, referred to.
D'Estampes' Settlement, In re, D'Estampes v. Crowe (1884) 53 L. J. Ch. 1117; 51 L. T. 502; 32 W. R. 978.—KAY, J.

Trollope v. Linton, Thornton v. Bright and Fowler v. Cohn, discussed.

Scotney v. Lomer (1885) 54 L. J. Ch. 558; 29 Ch. D. 535, 543; 52 L. T. 747; 33 W. R. 633.—NORTH, J.; affirmed on different grounds, (1886) 55 L. J. Ch. 443; 31 Ch. D. 380; 54 L. T. 194; 34 W. R. 407.—C.A.

Fowler v. Cohn, referred to.
Redgate, In re, Marsh v. Redgate (1902) 72 L. J. Ch. 204; [1903] 1 Ch. 356; 51 W. R. 216.—BUCKLEY, J.

Crompe v. Barrow (1799) 4 Ves. 681; 4 R. R. 318.—M.R., referred to.
Brudenell v. Elwes (1801) 1 East 442, 449.—K.B.; S. C. (1802) 7 Ves. 382; 6 R. R. 310.—ELDON, L.C.

Crompe v. Barrow, discussed.
Thornton v. Bright (1836) 2 Myl. & Cr. 230; 6 L. J. Ch. 121.

COTTENHAM, L.C.—In *Crompe v. Barrow* the subject of the power was leasehold property in trust. It is, however, an authority, that an appointment to the separate use of a married woman is a good appointment under a less extensive power than this.—p. 254.

Crompe v. Barrow, discussed and applied.
Williamson v. Farnell (or Farwell) (1887) 56 L. J. Ch. 645; 35 Ch. D. 128, 133; 56 L. T. 824; 36 W. R. 37.—NORTH, J. See judgment at length.

Crompe v. Barrow, distinguished and not applied.
Warrand's Trustees v. Warrand (1901) 3 Fraser 369.—CT. OF SESS.

Churchill v. Churchill (1867) 3 L. J. Ch. 92; L. R. 5 Eq. 44; 16 W. R. 182.—ROMILLY, M.R., referred to.
Cooper v. Cooper (1874) L. R. 7 H. L. 53, 78; 30 L. T. 409; 22 W. R. 713.—H.L. (E.).

Churchill v. Churchill, discussed.

Roach v. Trood (1876) 3 Ch. D. 429; 34 L. T. 105; 24 W. R. 803.—C.A.

BAGGALLAY, J.A.—In *Churchill v. Churchill* a father, having a power of appointment among his children, by his will appointed the fund over which he had the power to his three daughters equally, and gave his residuary estate to the same three daughters equally, and then directed that the share to which each daughter was entitled, as well under the appointment as under the residuary gift, should be held in trust for the daughter for life, with remainder to her children, and in that case the appointment was held to give the daughters an absolute interest in the appointed fund.—p. 444.

Churchill v. Churchill, applied.

Warrant's Trustees v. Warrant (1901) 3 Fraser 369.—CT. OF SESS.

Sadler v. Pratt (1833) 5 Sim. 632; 35 R. R. 192.—SHADWELL, V.-C.

Followed, Chambers, In re (1847) 11 Ir. Eq. R. 518.—M.R.; *discussed*, Harvey v. Stracey (1852) 1 Drew. 73 (*post*); *applied*, Watt v. Greyke (1856) 26 L. J. Ch. 211; 3 Sm. & G. 362; 3 Jur. (N.S.) 56.—STUART, V.-C.; Morgan, In re (1857) 7 Ir. Ch. R. 18, 52.—P.C. (IR.).

Sadler v. Pratt, distinguished.

Topham v. Portland (Duke) (1863) 32 L. J. Ch. 257; 1 De G. J. & S. 517; 1 N. R. 496; 8 L. T. 180; 11 W. R. 507.—L.J.

TURNER, L.J.—There was in that case an absolute appointment to each child, and the condition was distinct from and independent of the appointment.—p. 268.

Sadler v. Pratt, applied.

Farncombe's Trusts, In re (1878) 47 L. J. Ch. 328; 9 Ch. D. 652, 657.—HALL, V.-C.

Sadler v. Pratt and Watt v. Greyke (supra), distinguished.

Perkins, In re, Perkins v. Bagot (1892) 62 L. J. Ch. 531; [1893] 1 Ch. 283; 3 R. 40; 67 L. T. 743; 41 W. R. 170.—NORTH, J.

Harvey v. Stracey (1852) 22 L. J. Ch. 23; 1 Drew. 73; 16 Jur. 771.—KINDERSLEY, V.-C., *referred to*.

Churchill v. Churchill (1867) L. R. 5 Eq. 44, 48 (*supra*, col. 2262); Minchin v. Minchin (1871) Ir. R. 5 Eq. 258, 265.—L.C.; L.J. *dissenting*.

Harvey v. Stracey, followed.

Farncombe's Trusts, In re (1878) 47 L. J. Ch. 328; 9 Ch. D. 652, 657.—HALL, V.-C.

Harvey v. Stracey, referred to.

Peirce v. McNeale (1893) [1894] 1 Ir. R. 118, 128.—M.R.

Webb v. Sadler (1873) 42 L. J. Ch. 498; L. R. 8 Ch. 419; 28 L. T. 388; 21 W. R. 394.—C.A.; *varying* (1872) 42 L. J. Ch. 103; L. R. 14 Eq. 533; 20 W. R. 740.—BACON, V.-C., *referred to*.

Clay, In re, Clay v. Clay (1885) 54 L. J. Ch. 618; 52 L. T. 641.—C.A.; *affirming* 32 W. R. 516.—CHITTY, J.

Webb v. Sadler, applied.

Scotney v. Lomer (1885) 54 L. J. Ch. 558; 29 Ch. D. 535, 441.—NORTH, J. *See supra*, col. 2262.

Webb v. Sadler, referred to.

Thompson, In re, Machell v. Newman (1886) 55 L. T. 85.—KAY, J.

Webb v. Sadler, observations applied.

Williamson v. Faruell (or Farwell) (1887) 56 L. J. Ch. 645; 35 Ch. D. 128, 140; 56 L. T. 824; 36 W. R. 37.—NORTH, J. *See judgment at length*.

Webb v. Sadler, discussed.

Abbott, In re, Peacock v. Frigour (1892) 62 L. J. Ch. 46; [1893] 1 Ch. 54 (*post*, col. 2265).

Kampf v. Jones (1837) 7 L. J. Ch. 63; 2

Keen 756; 1 Jur. 814.—M.R., *discussed*. Lassence v. Tierney (1849) 1 Mac. & G. 551; 2 Hall & Tw. 115; 14 Jur. 182.—L.C.

Kampf v. Jones, followed.

Harvey v. Stracey (1852) 22 L. J. Ch. 23; 1 Drew. 73; 16 Jur. 771.—KINDERSLEY, V.-C.

Kampf v. Jones, referred to.

Churchill v. Churchill (1867) L. R. 5 Eq. 44, 48; 16 W. R. 182.—ROMILLY, M.R.

Kampf v. Jones, applied.

Dowglass v. Waddell (1886) 17 L. R. Ir. 384, 396.—CHATTERTON, V.-C.

Kampf v. Jones, referred to.

Cooke v. Cooke (1887) 38 L. J. Ch. 202, 208; 59 L. T. 693; 36 W. R. 756.—NORTH, J.

Bristow v. Warde (1794) 2 Ves. 336; 2 R. R. 235.—L.C., *applied*.

Wilson v. Piggott (1794) 2 Ves. 351; 2 R. R. 246.—ARDEN, M.R.

Bristow v. Warde, referred to.

Routledge v. Dorril (1794) 2 Ves. 357; 2 R. R. 250.—ARDEN, M.R.

Bristow v. Warde, followed.

Smith v. Camelford (Lord) (1795) 2 Ves. 698; 3 R. R. 36.—LOUGHBOROUGH, L.C.

Bristow v. Warde, referred to.

Vanderzee v. Aclon (1799) 4 Ves. 771, 785.—M.R.; Butcher v. Butcher (1812) 1 V. & B. 79; 12 R. R. 193.—L.C.

Bristow v. Warde, not applied.

Mackinlay v. Sison (1837) 8 Sim. 561.—V.-C.

Bristow v. Warde, discussed.

Leigh's Trusts, In re (1856) 6 Ir. Ch. R. 133.—L.C.; Peover v. Hassell (1861) 30 L. J. Ch. 314; 1 J. & H. 341, 346; 7 Jur. (N.S.) 406; 4 L. T. 113; 9 W. R. 399.—WOOD, V.-C.

Bristow v. Warde, explained.

Minton v. Kirkwood (1868) L. R. 3 Ch. 614; 37 L. J. Ch. 606; 18 L. T. 781; 16 W. R. 991.

WOOD, L.J.—Every case of course must turn upon its own facts, though there may be a general principle to be extracted from it. The decision in *Bristow v. Warde* turned peculiarly upon the actual circumstances of that case, as I had occasion to observe in *Peover v. Hassell* (*supra*), founding myself upon Lord St. Leonards' observations, which of course was more satisfactory to me, than simply standing on my own judgment. It was considered by that noble and learned lord, and I concurred in holding, that *Bristow v. Warde* is not a case which can be considered as laying down the general principle, that in a marriage settlement you are to restrict the words of a general power in the manner in which they were there restricted. There they were restricted on account of the peculiar words used which do not occur in the present case.—p. 618. SELWYN, L.J. concurred.

Bristow v. Warde, not followed.

Wood v. Wood (1870) 39 L. J. Ch. 790; L. R.

10 Eq. 220, 221; 23 L. T. 295; 18 W. R. 419.—
ROMILLY, M.R. *See supra*, col. 2193.

Vanderzee v. Aelom (1799) 4 Ves. 771.—M.R.
Referred to, **Butcher v. Butcher** (1812) 1 V. & B. 79; 12 R. R. 193.—L.C.; *applied*, **Heron v. Stokes** (1842) 4 Ir. Eq. R. 284; 2 Dr. & War. 89; 1 Con. & L. 270.—L.C.; varied *nom.* **Stokes v. Heron** (1845) 12 Cl. & F. 161; 9 Jur. 563.—H.L. (IR.); *discussed*, **Minchin v. Minchin** (1853) 3 Ir. Ch. R. 167.—M.R.

Bray v. Hammersley (1830) 3 Sim. 513; 37 R. R. 172.—V.-C. *affirmed nom.* **Bray v. Bree** (1834) 2 Cl. & F. 453; 8 Bligh (N.S.) 568.—H.L. (E.), *referred to*.

Phipson v. Turner (1838) 9 Sim. 227; 2 Jur. 414.—V.-C.; **Fry v. Capper** (1853) Kay 163, 170; 2 W. R. 186.—WOOD, V.-C.; **Neatherway v. Fry** (1853) 23 L. J. Ch. 222; Kay 172, 180.—WOOD, V.-C.; **Ewart v. Ewart** (1853) 11 Hare 276; 1 Eq. R. 536; 17 Jur. 1022; 1 W. R. 466.—V.-C.; **Teague's Settlement**, *In re* (1870) L. R. 10 Eq. 564; 569; 22 L. T. 742; 18 W. R. 752.—JAMES, V.-C.

Routledge v. Dorril (1794) 2 Ves. 357; 2 R. R. 250, *explained and distinguished*.
Crompton v. Barrow (1799) 4 Ves. 681; 4 R. R. 318.—M.R.

Routledge v. Dorril, *principle applied*.
White v. St. Darbe (1813) 1 V. & B. 399; 12 R. R. 246.—M.R.; **Tucker v. Sanger** (1824) 13 Price 607; M'Cle. 424, 439.—C.B.

Routledge v. Dorril, *discussed*.
Cutten v. Sanger (1828) 2 Y. & J. 459.—C.B.; **Stackpole v. Stackpole** (1843) 4 Dr. & War. 320, 349 (*post*, col. 2269).

Routledge v. Dorril, *distinguished*.
Harvey v. Stracey (1852) 22 L. J. Ch. 23; 1 Drew. 73; 16 Jur. 771.—KINDERSLEY, V.-C.

Routledge v. Dorril, *discussed*.
Gosset's Settlement, *In re* (1854) 19 Beav. 529.—M.R.; **Birley v. Birley** (1858) 27 L. J. C. P. 569; 25 Beav. 299; 4 Jur. (N.S.) 315; 6 W. R. 400.—M.R. *See supra*, col. 2254.

Routledge v. Dorril, *applied*.
Fitzroy v. Richmond (Duke) (1859) 28 L. J. Ch. 752; 27 Beav. 190; 5 Jur. (N.S.) 971.—M.R.

Routledge v. Dorril, *explained*.
Veale's Trusts, *In re* (1876) 4 Ch. D. 61; 35 L. T. 612; 25 W. R. 122.—M.R.; *affirmed*, (1877) 46 L. J. Ch. 799; 5 Ch. D. 622; 36 L. T. 634.—C.A.

JESSEL, M.R.—*Routledge v. Dorril* is commonly cited as an authority that where a power is unlimited as to its objects, yet, if the appointment is within the limits allowed by law, it is good, and the remarks of the M.R. are *dicta* in favour of that view.—p. 64.

Routledge v. Dorril, *referred to*.
Williamson v. Farwell (1887) 35 Ch. D. 128, 134 (*supra*, col. 2264); **Abbott**, *In re*, **Peacock v. Frigout** (1892) 62 L. J. Ch. 46; [1893] 1 Ch. 54; 3 R. 72; 67 L. T. 794; 41 W. R. 154.—STIRLING, J.

Routledge v. Dorril, *dictum approved*.
Bowles, *In re*, **Amedroz v. Bowles** (1902) 71 L. J. Ch. 822; [1902] 2 Ch. 650; 51 W. R. 124. FARWELL, J.

Massey v. Barton (1844) 7 Ir. Eq. R. 95.—M.R., *discussed*.
Hallinan's Trusts, *In re* [1904] 1 Ir. R. 452.—M.R.

Brown's Trusts, *In re* (1865) L. R. 1 Eq. 74.—WOOD, V.-C., *distinguished*.
Carr v. Atkinson (1872) 41 L. J. Ch. 785; L. R. 14 Eq. 397; 26 L. T. 680; 20 W. R. 620.—ROMILLY, M.R.

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Kennedy v. Kingston (1821) 2 J. & W. 431; 22 R. R. 197.—M.R., *discussed*.
Lees v. Mosley (1835) 5 L. J. Ex. Eq. 78; 1 Y. & C. 589, 601.—EX. EQ.; **Lambert v. Thwaites** (1866) 35 L. J. Ch. 406; L. R. 2 Eq. 151; 14 L. T. 159; 14 W. R. 532.—KINDERSLEY, V.-C.

Kennedy v. Kingston and Reid v. Reid (1858) 25 Beav. 469.—M.R., *followed*.
Freeland v. Pearson (1867) 36 L. J. Ch. 374; L. R. 3 Eq. 658; 15 W. R. 419.—ROMILLY, M.R.

Reid v. Reid, *applied*.
Swete v. Tindal (1874) 31 L. T. 223.—MALINS, V.-C.

Kennedy v. Kingston, *discussed*.
Humble v. Bowman (1877) 47 L. J. Ch. 62.—HALL, V.-C.; **Moore v. Ffolliot** (1887) 19 L. R. Ir. 499.—PORTER, M.R.

Doe d. Thorley v. Thorley (1809) 10 East 438; 10 R. R. 352.—K.B., *distinguished*.
Williams, *Ex parte* (1819) 1 J. & W. 89; 20 R. R. 231.—FLUMER, M.R.

Doe d. Thorley v. Thorley, *referred to*.
Humble v. Bowman (*supra*); **Moore v. Ffolliot** (1887) 19 L. R. Ir. 499.—PORTER, M.R.

Williams, *Ex parte* (*supra*), *considered*.
Stokes v. Heron (1845) 12 Cl. & F. 161, 182; 9 Jur. 563.—H.L. (IR.).

Williams, *Ex parte*, *distinguished*.
Freeland v. Pearson (1867) 36 L. J. Ch. 374; L. R. 3 Eq. 658, 662; 15 W. R. 419.—ROMILLY, M.R.

Williams, *Ex parte*, *discussed*.
Humble v. Bowman (*supra*).

Fox v. Gregg (Sugden on Powers, p. 946; Farwell on Powers, p. 410), *distinguished*.
Neatherway v. Fry (1853) 23 L. J. Ch. 222; Kay 172.

WOOD, V.-C.—The decision there was upon very different circumstances, and appeared to have proceeded on a ground which afforded a good foundation for it.—p. 225.

Fox v. Gregg, *distinguished*.
Veale's Trusts, *In re* (1876) 4 Ch. D. 61; 35 L. T. 612; 25 W. R. 122; *affirmed*, C.A. *See supra*, col. 2265.

JESSEL, M.R.—There, there was a substitutionary clause. Here there is not a word about substitution.—p. 63.

Hancock, *In re*, **Malcolm v. Burford-Hancock** (1896) 65 L. J. Ch. 690; [1896] 2 Ch. 173; 74 L. T. 658; 44 W. R. 545.—C.A.; *affirming* KEKEWICH, J., *applied*.

Foakes v. Jackson [1900] 69 L. J. Ch. 352; [1900] 1 Ch. 807; 83 L. T. 26; 48 W. R. 616.—FARWELL, J.

Hancock, In re, applied.

Lambert's Estate, In re [1901] 1 Ir. R. 261, 266.—C.A.

Pope v. Whitcombe (1810) 3 Mer. 689; 17 R. R. 171, 686.—GRANT, M.R., *report corrected and not followed.*

Finch v. Hollingsworth (1855) 25 L. J. Ch. 55; 21 Beav. 112; 3 Eq. R. 993; 1 Jur. (N.S.) 718; 3 W. R. 589.

ROMILLY, M.R.—**Pope v. Whitcombe**, as reported, is referred to in Williams on Executors [4th ed., vol. ii., p. 957], and Roper on Legacies [4th ed., pp. 106, 143, 150], and is treated as a binding authority; but in Sugden on Powers [6th ed., vol. ii., pp. 267, 650], it is pointed out that the decision was the reverse of what is reported: and upon a reference to the registrar's book, I find the statement there made to be strictly accurate, and that the decree there made is directly opposite to the statement in the report, the distribution made not being in favour of the next of kin at the testator's death, as stated in the report, but in favour of the persons who would have been the next of kin of the testator at the time of the death of the donee of the power: and the decree on further directions contains a declaration to that effect. . . . I, however, must follow the case as decided.—p. 57.

Pope v. Whitcombe, applied.

Finch v. Hollingsworth, referred to.

Lawlor v. Henderson (1876) Ir. R. 10 Eq. 150.—M.R.

Pope v. Whitcombe, referred to.

Dunlop v. Greer (1898) [1899] 1 Ir. R. 324.—PORTER, M.R.

Birch v. Wade (1814) 3 V. & B. 198; 13 R. R. 181.—M.R., *explained.*

Burrough v. Philcox (1840) 5 Myl. & Cr. 72. COTTENHAM, L.C.—In **Birch v. Wade** the property was given in trust, and the donee of the power was only tenant for life.—p. 95.

Birch v. Wade, followed.

Brierley, In re, Brierley v. Brierley (1894) 12 R. 55; 43 W. R. 36.—C.A.

Birch v. Wade, explained.

Weekes' Settlement, In re (1897) 66 L. J. Ch. 179; [1897] 1 Ch. 289; 76 L. T. 112; 45 W. R. 265.—ROMER, J.

[His lordship explained this case as one in which there was a trust for the wife's relations, the words "will and desire" being held to show an intention that the relations should take, a power of selection being left only to the wife.]

Birch v. Wade, referred to.

Hall, In re, Sheil v. Clark [1899] 1 Ir. R. 308.—PORTER, M.R.

Doyley v. Att.-Gen. (1735) 4 Viners' Abr. 485; S. C. *nom. Att.-Gen. v. Doyley*, 2 Eq. Cas. Abr. 195; 7 Ves. 158, n.—M.R., *approved.*

Fordyce v. Bridges (1848) 17 L. J. Ch. 185; 2 Ph. 497.—COTTENHAM, L.C.

Doyley v. Att.-Gen., followed.

Salisbury v. Denton (1857) 3 K. & J. 531; 3 Jur. (N.S.) 740; 5 W. R. 865.—WOOD, V.-C.

Att.-Gen. v. Doyley, distinguished.

Wilson v. Duguid (1883) 53 L. J. Ch. 52; 24 Ch. D. 244, 251; 49 L. T. 124; 31 W. R. 945.—CHITTY, J.

Att.-Gen. v. Doyley, applied.

Douglas, In re, Obert v. Barrow (1887) 56 L. J. Ch. 913; 35 L. J. Ch. 472, 488; 56 L. T. 786; 35 W. R. 740.—C.A.

Boyle v. Peterborough (Bishop) (1791) 1 Ves. 229; 3 Bro. C. C. 243; 2 R. R. 108.—L.C., *discussed and recognised.*

Butcher v. Butcher (1812) 1 V. & B. 89.—ELDON, L.C.: Vane v. Dugannon (Lord) (1804) 2 Sch. & Lef. 117, 124; 9 R. R. 63.—REDESDALE, L.C.; M'Ghie v. M'Ghie (1817) 2 Madd. 368.—PLUMER, V.-C.

Boyle v. Peterborough (Bishop), referred to. Noel v. Walsingham (Lord) (1824) 2 Sim. & S. 99; 3 L. J. (O.S.) Ch. 12; 25 R. R. 164.—V.-C.

Boyle v. Peterborough (Bishop), principle applied.

Houston v. Houston (1831) 4 Sim. 611.—SHADWELL, V.-C.: Bray v. Bree (1834) 2 Cl. & F. 453; 8 Bligh (N.S.) 568.—H.L. (E.).

Boyle v. Peterborough (Bishop), applied.

M'Ghie v. M'Ghie (*supra*), *approved.*

Ricketts v. Loftus (1811) 4 Y. & C. 519.—EX. EQ. *And see post.*

Boyle v. Peterborough (Bishop), referred to. Neatherway v. Fry (1853) 23 L. J. Ch. 222; Kay 172, 180.—WOOD, V.-C.

Boyle v. Peterborough (Bishop), applied.

Lee v. Head (1855) 24 L. J. Ch. 569; 1 K. & J. 620; 3 Eq. R. 1046; 1 Jur. (N.S.) 722; 3 W. R. 591.—WOOD, V.-C.

Boyle v. Peterborough (Bishop), explained.

Lee v. Olding (1856) 25 L. J. Ch. 580; 2 Jur. (N.S.) 850; 4 W. R. 398.—STUART, V.-C.

Boyle v. Peterborough (Bishop), referred to.

Joel v. Mills (1857) 3 K. & J. 458, 475.—WOOD, V.-C.

Boyle v. Peterborough (Bishop), applied.

Ricketts v. Loftus (*supra*), *referred to.*

Ware, In re, Cumberlege v. Cumberlege-Ware (1890) 59 L. J. Ch. 717; 45 Ch. D. 269; 63 L. T. 52; 38 W. R. 767.

STIRLING, J.—A distinction was sought to be drawn between the present case and those to which I have referred [*Boyle v. Peterborough (Bishop)* and *Ricketts v. Loftus*], on the ground that in them the gift was to a class, and in this it is to named individuals. But it is to be observed that no case has been cited in which a decision that the doctrine laid down in *Boyle v. Peterborough (Bishop)* does not apply to a case where the objects of the power are designated by name, and not simply described as a class. The doctrine has been applied in *Boyle v. Peterborough (Bishop)* to a gift to children as a class. It was extended, or perhaps I ought not to say extended, but applied in *Ricketts v. Loftus* to a gift where the objects of the power were all of them named, but described as the sons and daughters of a certain person by his wife; and I am asked at this time, after the passing of the Act of 1874 [37 & 38 Vict. c. 37], which abolished altogether the doctrine as to non-exclusive powers, not to extend it to a case where the persons who are the objects of the power are indicated by name, and not by description so as to constitute a class. I think I ought not to accede to that view. There is no authority that compels me to adopt that view, and it seems to me that it is inconsistent with the view which has been taken by

the profession, as indicated by the three text-writers who have been referred to in the course of the argument, namely, Mr. Jarman, Lord St. Leonards, and Mr. Farwell. [His lordship then referred to Jarman on Wills, 4th ed., vol. ii., p. 265; Sugden on Powers, 8th ed., pp. 421, 423, and Farwell on Powers, p. 134.]—p. 719.

Pitt v. Jackson (1786) 2 Bro. C. C. 51.—M.R. See *S. C. nom. Smith v. Camelford (Lord)* (1793-5) 2 Ves. 678; 3 R. R. 36.—L.C., *applied*.
Robinson v. Hardcastle (1788) 2 Term Rep 241; 1 R. R. 467.—K.B.

Pitt v. Jackson, distinguished.
Bristow v. Warde (1794) 2 Ves. 336; 2 R. R. 235.—L.C.

Pitt v. Jackson, discussed and limited.
Routledge v. Doril (1794) 2 Ves. 357; 2 R. R. 250.—M.R.; **Brudenell v. Elwes** (1801) 1 East 442, 449.—K.B.; (1802) 7 Ves. 382, 390; 6 R. R. 310.—L.C.

Pitt v. Jackson, applied.
Thornton v. Bright (1836) 6 L. J. Ch. 121; 2 Myl. & Cr. 230.—COTTENHAM, L.C.

Pitt v. Jackson, applied.
Vanderplank v. King (1843) 3 Hare 1; 12 L. J. Ch. 497; 7 Jur. 548.—WIGRAM, V.-C.

Pitt v. Jackson, followed.
Stackpoole v. Stackpoole (1843) 4 Dr. & War. 320, 330; 2 Con. & L. 506; 6 Ir. Eq. R. 18.—L.C.

Pitt v. Jackson, distinguished.
Monypenny v. Dering (1847) 17 L. J. Ex. 81; 16 M. & W. 418.—EX. See *supra*, col. 2137.

Pitt v. Jackson, referred to.
Douglas v. Willes (1849) 7 Hare 518.—WIGRAM, V.-C.

Pitt v. Jackson, discussed.
Monypenny v. Dering (1850) 20 L. J. Ch. 153; 7 Hare 568.—WIGRAM, V.-C.; affirmed on different grounds (*post*).

Pitt v. Jackson, observed on.
Monypenny v. Dering (1852) 22 L. J. Ch. 313; 2 De G. M. & G. 145; 17 Jur. 467.—ST. LEONARDS, L.C.

Pitt v. Jackson, explained.
Lee v. Head (1855) 24 L. J. Ch. 569; 1 K. & J. 620; 3 Eq. R. 1046; 1 Jur. (N.S.) 722; 3 W. R. 591.—WOOD, V.-C.

Pitt v. Jackson, discussed.
Juttendromohun Tagore v. Ganendromohun Tagore (1872) L. R. Ind. App. Supplement, p. 77.—P.C.

Nicholl v. Nicholl (1777) 2 W. Bl. 1159.—C.P., *referred to*.
Vanderplank v. King (*supra*); **Stackpoole v. Stackpoole** (*supra*).

Nicholl v. Nicholl, commented on and not applied.
Monypenny v. Dering (1847) 17 L. J. Ex. 81; 16 M. & W. 418.—EX.

Nicholl v. Nicholl, observed on.
Monypenny v. Dering (1852) 22 L. J. Ch. 313; 2 De G. M. & G. 145; 17 Jur. 467.—ST. LEONARDS, L.C.

Nicholl v. Nicholl, discussed.
Juttendromohun Tagore v. Ganendromohun Tagore (1872) L. R. Ind. App. Supplement, p. 77.—P.C.

Devonshire (Duke) v. Cavendish (1782) 2 Term Rep. 245.—K.B., *commented on*.
Crompe v. Barrow (1799) 4 Ves. 681; 4 R. R. 318.—M.R.

Woodcock v. Renneck (1841) 11 L. J. Ch. 110; 4 Beav. 190.—M.R.; *affirmed*, (1842) 1 Ph. 72; 6 Jur. 138.—L.C.; and **Winn v. Fenwick** (1849) 18 L. J. Ch. 337; 11 Beav. 438; 13 Jur. 996.—M.R., *observed on*.

Lambert v. Thwaites (1866) 35 L. J. Ch. 406; L. R. 2 Eq. 151, 158; 14 L. T. 159; 14 W. R. 532.—KINDERSLEY, V.-C.

Lambert v. Thwaites, principle applied.
Wilson v. Duguid (1883) 53 L. J. Ch. 52; 24 Ch. D. 244, 251; 49 L. T. 124; 31 W. R. 945.—CHITTY, J.

Longmore v. Broom (1802) 7 Ves. 124.—M.R., *discussed*.
Penny v. Turner (1848) 17 L. J. Ch. 133; 2 Ph. 493.—COTTENHAM, L.C.

Penny v. Turner, referred to.
Fordyce v. Bridges (1848) 17 L. J. Ch. 185; 2 Ph. 497; 2 C. P. Cooper 326.—COTTENHAM, L.C.; *reversing* 16 L. J. Ch. 81.—M.R.

Fordyce v. Bridges and Longmore v. Broom, applied.
Salisbury v. Denton (1857) 3 K. & J. 529; 3 Jur. (N.S.) 740; 5 W. R. 865.—WOOD, V.-C.

Penny v. Turner, discussed.
White's Trusts, In re (1860) Johns. 656.—WOOD, V.-C.

Walsh v. Wallinger (1830) 2 Russ. & M. 78; Tamlyn 425; 34 R. R. 23; 9 L. J. (O.S.) Ch. 7.—M.R., *discussed*.
Lambert v. Thwaites (1866) 35 L. J. Ch. 406; L. R. 2 Eq. 151, 155; 14 L. T. 159; 14 W. R. 532.—KINDERSLEY, V.-C.; **Moore v. Folliot** (1887) 19 L. R. Ir. 499, 504.—PORTER, M.R.

Witts v. Boddington (1790) 3 Bro. C. C. 95; 5 Ves. 503.—L.C., *explained*.
Burrough v. Philcox (1840) 5 Myl. & Cr. 72; 5 Jur. 453.—COTTENHAM, L.C.

Witts v. Boddington, explained.
Pocock v. Att.-Gen. (1876) 46 L. J. Ch. 795; 3 Ch. D. 342; 35 L. T. 575; 25 W. R. 277.—HALL, V.-C.; affirmed, C.A.

Witts v. Boddington, explained.
Weekes' Settlement, In re (1897) 66 L. J. Ch. 179; [1897] 1 Ch. 289; 76 L. T. 112; 45 W. R. 265.—ROMER, J.
 His lordship referred to **Witts v. Boddington** as a decision on a peculiar will where the power, as between the testator and the donee, was in the nature of a trust.—p. 181.

Robinson v. Hardcastle (1788) 2 Term Rep. 241, 781; 2 Bro. C. C. 23, 344; 1 R. R. 467.—K.B., *explained*.
Crompe v. Barrow (1799) 4 Ves. 681; 4 R. R. 318.—M.R. And see **Brudenell v. Elwes** (*supra*, col. 2269).

Robinson v. Hardecastle, referred to.
 Williamson v. Farwell (or Farnell) (1887) 56 L. J. Ch. 645; 35 Ch. D. 128, 134; 56 L. T. 824; 36 W. R. 37.—NORTH, J.

Robinson v. Hardecastle, referred to.
 Abbott, In re, Peacock v. Frigout (1892) 62 L. J. Ch. 46; [1893] 1 Ch. 51; 3 R. 72; 67 L. T. 794; 41 W. R. 154.—STIRLING, J.

Brown v. Higgs (1799—1803) 4 Ves. 708.—M.R.; 5 Ves. 495.—M.R.; 8 Ves. 561; 4 R. R. 323.—L.C.; affirmed, (1813) 18 Ves. 192.—H.L. (B.), applied.
 Birch v. Wade (1814) 3 V. & B. 198; 13 R. R. 181.—GRANT, M.R.

Brown v. Higgs, discussed and applied.
 Burrough v. Philcox (1840) 5 Myl. & Cr. 72; 5 Jur. 453.—COTTENHAM, L.C.

Brown v. Higgs, explained.
 Penny v. Turner (1848) 17 L. J. Ch. 133; 2 Ph. 493.—L.C.; Christ's Hospital v. Grainger (1849) 19 L. J. Ch. 33; 1 Mac. & G. 460; 1 Hall & Tw. 533; 14 Jur. 339.—L.C.

Brown v. Higgs, explained and distinguished.
 Cowper v. Mantell (No. 2) (1856) 22 Beav. 231.—ROMILLY, M.R.

Brown v. Higgs, not applied.
 Brook v. Brook (1856) 3 Sm. & G. 280.—STUART, V.-C.

Brown v. Higgs, referred to.
 Joel v. Mills (1857) 3 K. & J. 458, 474.—WOOD, V.-C.; Salusbury v. Denton (1857) 3 K. & J. 529; 3 Jur. (N.S.) 740; 5 W. R. 865.—WOOD, V.-C.; Bernard v. Minshall (1859) 28 L. J. Ch. 649; Johns. 276; 5 Jur. (N.S.) 931.—WOOD, V.-C.

Brown v. Higgs, applied.
 White's Trusts, In re (1860) Johns. 656.—WOOD, V.-C.

Brown v. Higgs, not applied.
 Goldring v. Inwood (1861) 3 Giff. 139; 8 Jur. (N.S.) 206; 5 L. T. 17.—STUART, V.-C.

Brown v. Higgs, referred to.
 Phene's Trust, In re (1868) L. R. 5 Eq. 346.—ROMILLY, M.R.

Brown v. Higgs, doctrine applied.
 Butler v. Gray (1869) 39 L. J. Ch. 291; L. R. 5 Ch. 26, 30; 18 W. R. 193.—L.C. See post, col. 2274.

Brown v. Higgs, applied.
 Carthew v. Enraght (1872) 26 L. T. 834; 20 W. R. 743.—WICKENS, V.-C.

Brown v. Higgs, applied.
 Pocock v. Att.-Gen. (1876) 46 L. J. Ch. 795; 3 Ch. D. 342, 348; 35 L. T. 575; 25 W. R. 277.—HALL, V.-C.; affirmed, C.A.

Brown v. Higgs, not applied.
 Porter v. Baddeley (1877) 5 Ch. D. 542.—HALL, V.-C.

Brown v. Higgs, distinguished.
 Sprague, In re, Milley v. Cape (1880) 43 L. T. 286.—MALINS, V.-C.

Brown v. Higgs, referred to.
 Ahearne v. Ahearne (1881) 9 L. R. Ir. 144.—PORTER, M.R.

Brown v. Higgs, discussed.
 Wilson v. Duguid (1883) 24 Ch. D. 244; 53 L. J. Ch. 52; 49 L. T. 121; 31 W. R. 945.
 CHITTY, J.—In *Brown v. Higgs* the provision was to apply the remainder of the rent "to such children of my nephew S. Brown as my said nephew J. Brown shall think most deserving, and that will make the best use of it, or, to the children of my nephew W. A. Brown, if any such there are or shall be." That case was twice argued before the then M.R., and he held that all the children of S. Brown and the children of his nephew W. A. Brown were entitled. He said [4 Ves. 719], "The fair construction is, that at all events the testator meant it to go to the children, and these words of appointment he used only to give a power to J. Brown to select some and exclude the others." That point came before Lord Eldon on appeal, and he observed at the end of his judgment [8 Ves. 576] that he entertained doubts on the construction of the instrument before him, and would never cease to entertain those doubts, still he affirmed the decree of the M.R., and that decree was also affirmed in the H. L. [18 Ves. 192]. It appears to me that that decision is in point. The reasoning which Lord Eldon applies in his judgment in *Brown v. Higgs* to *Harding v. Glynn* [1 Atk. 469, see *supra*, col. 2195] ought not in my opinion to be applied to the case before me.—p. 248.

Brown v. Higgs and Ahearne v. Ahearne (supra), discussed.
 Moore v. Ffolliot (1887) 19 L. R. Ir. 499, 502.—PORTER, M.R.

Brown v. Higgs, considered.
 Weekes' Settlement, In re (1897) 66 L. J. Ch. 179; [1897] 1 Ch. 289; 76 L. T. 112; 45 W. R. 265.—ROMER, J. See post, col. 2275.

Brown v. Higgs, applied.
 Patterson, In re, Dunlop v. Greer (1898) [1899] 1 Ir. R. 324, 336.—PORTER, M.R.

Brown v. Higgs, discussed.
 Hall, In re, Sheil v. Clark [1899] 1 Ir. R. 308, 313.—PORTER, M.R.

Goldring v. Inwood (1861) 3 Giff. 139; 8 Jur. (N.S.) 206; 5 L. T. 17.—STUART, V.-C., followed.
 Regan's Estate, In re (1898) 31 L. R. Ir. 246.—MONROE, J.

Casterton v. Sutherland (1804) 9 Ves. 445.—M.R., referred to.
 Alloway v. Alloway (1843) 4 Dr. & War. 380; 2 Con. & L. 509.—SUGDEN, L.C.

Casterton v. Sutherland, distinguished and not applied.
 Halfhead v. Shepherd (or Sheppard) (1859) 28 L. J. Q. B. 248; 1 El. & El. 918.—Q.B.

Casterton v. Sutherland and Brown v. Pocock (1833) 6 Sim. 257; 38 R. R. 107.—V.-C., discussed.
 Lambert v. Thwaites (1866) 35 L. J. Ch. 406; L. R. 2 Eq. 151, 156; 14 L. T. 159; 14 W. R. 532.—KINDERSLEY, V.-C.

Burrough v. Philcox (1840) 5 Myl. & Cr. 72; 5 Jur. 453.—L.C., *referred to*.
Penny v. Turner (1848) 17 L. J. Ch. 133; 2 Ph. 493.—COTTENHAM, L.C.

Burrough v. Philcox, *applied*.
Hutchinson v. Hutchinson (1850) 13 Ir. Eq. R. 332.—L.C.

Burrough v. Philcox, *explained and distinguished*.

Cowper v. Mantell (No. 2) (1856) 22 Beav. 231.—ROMILLY, M.R.

Burrough v. Philcox, *applied*.
White's Trusts, In re (1860) Johns. 656.—WOOD, V.-C.

Burrough v. Philcox, *discussed*.
Pocock v. Att.-Gen. (1876) 46 L. J. Ch. 795; 3 Ch. D. 342, 348; 35 L. T. 575; 25 W. R. 277.—HALL, V.-C.; affirmed, C.A.

Burrough v. Philcox, *applied*.
Ahearne v. Ahearne (1881) 9 L. R. Ir. 141, 149.—M.R.

Burrough v. Philcox, *discussed*.
Wilson v. Duguid (1883) 53 L. J. Ch. 52; 24 Ch. D. 244, 250; 49 L. T. 124; 31 W. R. 915.—CHITTY, J.; **Moore v. Ffolliot** (1887) 19 L. R. Ir. 499.—PORTER, M.R.

Burrough v. Philcox, *discussed*.
Weekes' Settlement, In re (1897) 66 L. J. Ch. 179; [1897] 1 Ch. 289; 76 L. T. 112; 45 W. R. 265.

ROMER, J.—Next comes *Burrough v. Philcox* on a very peculiar will. It directed that certain stock and real estate should remain unalienated until certain contingencies were completed, and then gave life interests to children with remainder to their issue, and declared that in default then the same should be disposed of as thereafter mentioned—namely, the survivor of two children to have power of disposal by will among a class mentioned. This was held to create a trust in favour of the class, subject to a power of selection and distribution in the surviving child. And why? Because, by the terms of his will, the testator intended and purported to dispose of the property absolutely, seeing that on the contingencies being completed he declared that the property should be “disposed of” as after mentioned.—p. 180.

Burrough v. Philcox, *referred to*.
Hall, In re, Sheil v. Clark [1899] 1 Ir. R. 308.—PORTER, M.R.

Bull v. Vardy (1791) 1 Ves. 270.—EX., *explained*.
Cowper v. Mantell (No. 2) (1856) 22 Beav. 231.—ROMILLY, M.R.

Bull v. Vardy, *distinguished*.
Brierley, In re, Brierley v. Brierley (1894) 12 R. 55; 43 W. R. 36.—C.A.

Salisbury v. Denton (1857) 26 L. J. Ch. 851; 3 K. & J. 529; 3 Jur. (N.S.) 740; 5 W. R. 865.—WOOD, V.-C., *referred to*.
Lambe v. Bames (1870) 40 L. J. Ch. 15; L. R. 10 Eq. 267, 273.—MALINS, V.-C.; affirmed, 40 L. J. Ch. 447; L. R. 6 Ch. 597; 25 L. T. 175; 19 W. R. 659.—L.JJ.

Salisbury v. Denton, *referred to*.
Wilson v. Duguid (1883) 53 L. J. Ch. 52; 24 Ch. D. 244, 251; 49 L. T. 124; 31 W. R. 945.—CHITTY, J.

Salisbury v. Denton, *followed*.
Brierley, In re, Brierley v. Brierley (1894) 12 R. 55; 43 W. R. 36.—C.A. **HERSCHELL, L.C.**, **LINDLEY** and **DAVEY, L.JJ.** See judgment of the L.C.

Healy v. Donnery (1853) 3 Ir. C. L. R. 213.—EX., *considered and distinguished*.
Ahearne v. Ahearne (1881) 9 L. R. Ir. 144, 148.—M.R.

Healy v. Donnery, *discussed*.
Moore v. Ffolliot (1887) 19 L. R. Ir. 499.—M.R.

Healy v. Donnery, *explained*.
Brierley, In re, Brierley v. Brierley (1894) 12 R. 55; 43 W. R. 36.—C.A., *referred to*.
Weekes' Settlement, In re (1897) 66 L. J. Ch. 179; [1897] 1 Ch. 289; 76 L. T. 112; 45 W. R. 265.

ROMER, J.—In *Healy v. Donnery* there was a gift of a freehold interest to a daughter for life, with power by deed or will to dispose of the same to and among her children, and no gift over in default of appointment. There was, indeed, a residuary gift, but that—as was pointed out by the C. A. in *Brierley, In re*—is not equivalent to a gift over in default of appointment for the purposes of the above proposition [that a gift in favour of the class is to be implied where the power is not exercised]. The case, therefore, was merely a devise for life with power by deed or will to appoint the remainder to and among the children, and that was held not to give an estate by implication to the children.—p. 180.

Healy v. Donnery, Weekes' Settlement, In re; Crossling v. Crossling (1794) 2 Cox 396; 2 R. R. 88.—EX., *referred to*.

Brierley, In re, Brierley v. Brierley, *discussed*.
Hall, In re, Sheil v. Clark [1899] 1 Ir. R. 308.—PORTER, M.R.

Brook v. Brook (1856) 3 Sm. & G. 280.—STUART, V.-C., *distinguished*.
Butler v. Gray (1869) 39 L. J. Ch. 291; L. R. 5 Ch. 26, 31; 18 W. R. 193.

HATHERLEY, L.C.—In that case there was a plain absolute gift to a lady for her separate use, and then a power to give among children by will, with no limitation over, and nothing at all pointing to a life interest in the property, but simply this power. The V.-C. held that the circumstances of the power being given did not bring the case within the doctrine of *Brown v. Higgs* (4 Ves. 717, *supra*, col. 2271), and that the power was there given, and would probably be given for the purpose of enabling the lady, when under coverture, to dispose by will of the property, and that the absolute right of the lady to the property was not thereby impeached. But here the case is different in two particulars, each of them of importance. First, the sum is to be invested; the dividends are to be paid to each of the children's own use during their respective lives, and if they leave a child or children born in wedlock, then the principal to be at the disposal of the parent by will to such child or children. Further, there is a gift over in the event of there being no child or children.—p. 293. •

Brook v. Brook, *applied*.
Lambe v. Bames (1870) 40 L. J. Ch. 15; L. R. 10 Eq. 267, 273.—MALINS, V.-C.; affirmed,

(1871) 40 L. J. Ch. 447; L. R. 6 Ch. 597; 25 L. T. 175; 19 W. R. 659.—L.J.J.

Brook v. Brook, referred to.

Ahearne v. Ahearne (1881) 9 L. R. Ir. 144, 149.—M.R.; Long v. Lane (1885) 17 L. R. Ir. 11.—PORTER, M.R. (affirmed, (1886).—C.A.); Martin v. Martin (1886) 19 L. R. Ir. 72.—CHATTERTON, V.-C.

Brook v. Brook, discussed.

Moore v. Ffolliot (1887) 19 L. R. Ir. 499.—M.R.

Brook v. Brook, distinguished.

Smith v. Smith (1887) 19 L. R. Ir. 514.—M.R.

Brook v. Brook, referred to.

Hall, In re, Sheil v. Clark [1899] 1 Ir. R. 308.—PORTER, M.R.

Phene's Trust, In re, (1868) L. R. 5 Eq. 346.

—ROMILLY, M.R., *distinguished*.

Armstrong v. Armstrong (1869) 38 L. J. Ch. 463; L. R. 7 Eq. 518, 522; 20 L. T. 776; 17 W. R. 570.—JAMES, V.-C.

Phene's Trust, In re, and White's Trusts, In re (1860) Johns. 656.—WOOD, V.-C., distinguished.

Wilson v. Duguid (1883) 24 Ch. D. 244; 53 L. J. Ch. 52; 49 L. T. 124; 31 W. R. 945.

CHITTY, J.—There are cases which are plainly distinguishable, such for instance as *Phene's Trust, In re*, before Sir J. Romilly, where on the true construction of the terms used, he considered that a personal enjoyment was intended by the persons who were the objects of the power, and that being so, he considered himself justified in holding that only those who were living at the time of the death of the donee of the power were entitled to the fund. And *White's Trust, In re*, before Lord Hatherley, is a case to be referred to the same principle.—p. 251.

White's Trusts, In re, discussed.

Stanger, In re, Moorsom v. Tate (1891) 60 L. J. Ch. 326; 64 L. T. 693; 39 W. R. 455.—CHITTY, J.; Weekes' Settlement, In re (*post*).

Caplin's Will, In re (1865) 34 L. J. Ch. 578;

2 Dr. & Sm. 527; 6 N. R. 517; 11 Jur. (N.S.) 383; 12 L. T. 526; 13 W. R. 646.—KINDERSLEY, V.-C., *applied*.

Coogan v. Hayden (1879) 4 L. R. Ir. 585, 592, —EX. D.

Caplin's Will, In re, and Butler v. Gray

(1869) 39 L. J. Ch. 291; L. R. 5 Ch. 26; 18 W. R. 193.—HATHERLEY, L.C.; *reversing* MALINS, V.-C., *discussed*.

Weekes' Settlement, In re (1897) 66 L. J. Ch. 179; [1897] 1 Ch. 289; 76 L. T. 112; 45 W. R. 265.

ROMER, J.—[His lordship referred to *Caplin's Will, In re*, as a gift to a class with a power of selection in the wife, and he said that the general statement in the judgment as to an implied trust went beyond the facts of the case, and must be considered with reference to the will then before the Court; to *White's Trust, In re (supra)*, as being a similar case, the general statement in the judgment as to the effect of *Brown v. Higgs (supra, col. 2271)* and *Burrough v. Philcox (supra, col. 2273)* being, in his lordship's opinion, too large, and meant doubtless to hold good only where the facts were similar—that is, where the Court could infer that the class was intended to

take, a power of selection being given to the donee; and to *Butler v. Gray* as a case where there was a sufficient indication that the class was to take.]

Halfhead v. Shepherd (or Sheppard, (1859)

28 L. J. Q. B. 248; 1 El. & El. 918.—Q.B.; and *Grace v. Wilson*, Sugden on Powers, 7th ed., vol. i., p. 257, 8th ed., vol. i., p. 210, *discussed*.

Moore v. Ffolliot (1887) 19 L. R. Ir. 499.—PORTER, M.R.

Moore v. Ffolliot and Wilson v. Duguid

(1883) 53 L. J. Ch. 52; 24 Ch. D. 244; 49 L. T. 124; 31 W. R. 945.—CHITTY, J., *referred to*.

Patterson, In re, Dunlop v. Greer (1898) [1899] 1 Ir. R. 324.—PORTER, M.R.

Marlborough (Duke) v. Godolphin (Lord)

(1750) 2 Ves. sen. 61.—L.C., *discussed*.

Brown v. Higgs (1800) 5 Ves. 495.—M.R.; (1803) 8 Ves. 561; 4 R. R. 323.—L.C.; Vane v. Dugannon (Lord) (1804) 2 Sch. & Lef. 117, 124; 9 R. R. 63.—L.C.

Marlborough (Duke) v. Godolphin (Lord),

commented on.

Burrough v. Philcox (1840) 5 Myl. & Cr. 72; 5 Jur. 453.—COTTENHAM, L.C.

Marlborough (Duke) v. Godolphin (Lord),

referred to.

Hutchinson v. Hutchinson (1850) 13 Ir. Eq. R. 332.—L.C.; Salusbury v. Denton (1857) 26 L. J. Ch. 851; 3 K. & J. 529; 3 Jur. (N.S.) 740; 5 W. R. 865.—WOOD, V.-C.

Marlborough (Duke) v. Godolphin (Lord),

not applied.

Caplin's Will, In re (1865) 34 L. J. Ch. 578; 2 Dr. & Sm. 527; 6 N. R. 517; 11 Jur. (N.S.) 383; 12 L. T. 526; 13 W. R. 646.—KINDERSLEY, V.-C.

Marlborough (Duke) v. Godolphin (Lord),

referred to.

Vizard's Trusts, In re (1866) 35 L. J. Ch. 804; L. R. 1 Ch. 588, 593; 12 Jur. (N.S.) 68; 14 W. R. 1000.—L.J.J.; Pocock v. Att.-Gen. (1876) 46 L. J. Ch. 795; 3 Ch. D. 342, 348; 35 L. T. 575; 25 W. R. 277.—HALL, V.-C. (affirmed, C.A.).

Marlborough (Duke) v. Godolphin (Lord),

commented on.

Wilson v. Duguid (1883) 24 Ch. D. 244; 53 L. J. Ch. 52; 49 L. T. 124; 31 W. R. 945.

CHITTY, J.—*Marlborough (Duke) v. Godolphin (Lord)*, though it is a decision of Lord Hardwicke, would not be followed in the present day.—p. 250.

Marlborough (Duke) v. Godolphin (Lord)

referred to.

Dowsett, In re, Dowsett v. Meakin (1900) 71 L. J. Ch. 149; [1901] 1 Ch. 398; 49 W. R. 268.—FARWELL, J.

Marlborough (Duke) v. Godolphin (Lord),

referred to.

Moses, In re, Beddington v. Beddington (1901) 71 L. J. Ch. 101; [1902] 1 Ch. 100; 85 L. T. 596.—C.A.; affirmed, H.L. See *supra*, col. 2234.

Pennefather v. Pennefather (1873) Ir. R. 7

Eq. 300.—C.A., *applied*.

L'Estrange v. L'Estrange (1890) 25 L. R. Ir. 399, 408.—M.R.

15. POWERS OF REVOCATION AND NEW APPOINTMENT.

Ward v. Lenthal (1667) *Siderin* 343; 2 *Keble* 269.—K.B.

Referred to, Sheffield v. Von Donop (1848) 17 L. J. Ch. 481; 7 Hare 42; 12 Jur. 672.—V.-C.; *distinguished, Montagu v. Kater* (1853) 22 L. J. Ex. 154; 8 Ex. 507.—EX.; *Evans v. Saunders* (1855).—L.JJ. (*post*); *Saunders v. Evans* (1861).—H.L. (*post*).

Hele v. Bond (1717) Pre. Ch. 174; 1 Eq. Cas. Abr. 312; Sugden on Powers, Append. No. 2. *distinguished*.

Evans v. Saunders (1855) 6 De G. M. & G. 654, 660 (*post*); *Saunders v. Evans* (1861) 8 H. L. Cas. 721, 730 (*post*).

Montagu v. Kater and Sheffield v. Von Donop (*supra*), *approved*.

Evans v. Saunders (1855) 24 L. J. Ch. 609; 6 De G. M. & G. 654, 660; 1 Jur. (N.S.) 265.—L.JJ.; reversing 22 L. J. Ch. 471, 1024; 1 Drew. 415, 654; 17 Jur. 338; 18 Jur. 256.—KIDDERSEY, V.-C.

Montagu v. Kater and Evans v. Saunders, *explained and not applied*.

Walker v. Armstrong (1856) 25 L. J. Ch. 402; 21 Beav. 305; 2 Jur. (N.S.) 959; 4 W. R. 770.—ROMILLY, M.R.

Montagu v. Kater and Sheffield v. Von Donop, *referred to*.

Evans v. Saunders, *affirmed*.

Saunders v. Evans (1861) 31 L. J. Ch. 233; 8 H. L. Cas. 721, 730, 742; 7 Jur. (N.S.) 1293; 5 L. T. 129; 9 W. R. 501.—H.L. (E.).

Fitzgerald v. Fauconberge (Lord) (1729—1730) *Fitz* 207; 6 Bro. P. C. 295.—L.C. and H.L., *referred to*.

Barnett v. Wilson (1843) 12 L. J. Ch. 428; 2 Y. & C. C. 497; 7 Jur. 593.—KNIGHT BRUCE, V.-C.; *Heather v. O'Neill* (1858) 27 L. J. Ch. 513; 2 De G. & J. 399; 4 Jur. (N.S.) 557; 6 W. R. 484.—C.A.; KNIGHT BRUCE, L.J. *dissenting*.

Irwin v. Rogers (1848) 12 Ir. Eq. R. 159.—L.C.

Applied, Morgan, In re (1857) 7 Ir. Ch. R. 18, 51.—P.C. (IR.); *distinguished, Minchin v. Minchin* (1871) Ir. R. 5 Eq. 178, 189.—M.R. (*affirmed*, Ib. 255.—L.J. *dissenting*).

Morgan, In re, *distinguished*.

Minchin v. Minchin (*supra*); *L'Estrange v. L'Estrange* (1890) 25 L. R. Ir. 399, 412.—M.R.

Pomfret v. Perring (1854) 24 L. J. Ch. 187; 5 De G. M. & G. 775; 3 Eq. R. 145; 1 Jur. (N.S.) 173; 3 W. R. 81.—L.JJ.; *varying* 18 Beav. 618.—M.R., *applied*.

Palmer v. Newell (1855) 20 Beav. 32; S. C. *nom.* *Benham v. Newell*, 24 L. J. Ch. 424; 3 W. R. 333.—ROMILLY, M.R.; *affirmed*, 25 L. J. Ch. 461; 8 De G. M. & G. 74; 2 Jur. (N.S.) 268; 4 W. R. 346.—L.JJ.

Pomfret v. Perring, *discussed*.

Bernard v. Minshall (1859) 28 L. J. Ch. 649; *Johns* 276; 5 Jur. (N.S.) 931.—WOOD, V.-C.

Pomfret v. Perring, *distinguished*.

Jones, In re, Greene v. Gordon (1886) 34 Ch. D. 65; 56 L. J. Ch. 58; 55 L. T. 597; 35 W. R. 74.

KAY, J.—Then . . . it was said that this power was like, and must be treated as, a power of revocation and new appointment, and *Pomfret v. Perring* was referred to, where it was held

that a general devise and bequest in exercise of any power whatsoever given to a testatrix by certain indentures or otherwise howsoever did not extend to property which the testatrix could not appoint without exercising a power of revocation. But it must be observed that in that case there was another power to which the appointment could apply, and if that had not been so, no doubt other considerations would have prevailed.—p. 68.

Pomfret v. Perring and Palmer (or *Benham*) v. *Newell* (*supra*, col. 2277), *approved*.

Charles v. Burke (1888) 43 Ch. D. 223, n.; 60 L. T. 380.—KAY, J.

Pomfret v. Perring, *discussed*.

Wells, In re, Hardisty v. Wells (1889) 58 L. J. Ch. 835; 42 Ch. D. 646, 654; 61 L. T. 588; 38 W. R. 229.—STIRLING, J.

Pomfret v. Perring, *considered*.

Palmer v. Newell, *followed*.

Brace, In re, Welch v. Colt [1891] 2 Ch. 671; 60 L. J. Ch. 505; 64 L. T. 525; 39 W. R. 508.

NORTH, J.—In *Pomfret v. Perring* the power was a special one, and that gives ground for an argument that that case is distinguishable from the present. But I think that the reasons given by the L.JJ. in that case are not addressed to a special power as distinguished from a general power, and the observations of Knight Bruce, L.J., and certainly the earlier observations of Turner, L.J., seem to me to go the whole length required. But, as far as I am concerned, the matter is settled, because not only was that view adopted by Sir J. Romilly, in *Palmer v. Newell* though it may be said that his observations amount rather to a *dictum* than to a decision binding upon me, but in the recent case of *Charles v. Burke* (*post*), Kay, J. actually decided the very point, and I cannot distinguish that case from the present. . . . But I follow it the more readily when, in my opinion, it is entirely in accordance both with principle and with my own view of the authorities.—p. 677.

Pomfret v. Perring, *principle applied*.

Wallinger's Estate, In re [1898] 1 Ir. R. 39.—C.A.

Charles v. Burke (*supra*), *followed*.

Phillips, In re, Robinson v. Burke (1889) 58 L. J. Ch. 448; 41 Ch. D. 417, 421; 60 L. T. 808; 37 W. R. 504.—CHITTY, J.; *Brace, In re* (*supra*); *Newman Hall, In re* (*post*).

Brace, In re, Welch v. Colt (*supra*), *followed*.

Newman Hall, In re, Rawlings v. Hall (1903) 19 T. L. R. 420.—EADY, J.

Duguid v. Fraser (1886) 55 L. J. Ch. 285;

31 Ch. D. 449; 54 L. T. 70; 34 W. R. 267.—KAY, J., *discussed and applied*.

Carey, In re, Mitchell v. Ewing (1899) [1901] 1 Ir. R. 81.—PORTER, M.R.

16. POWERS OF CHARGING AND JOINTURE.

Mildmay's Case (1584) 1 Co. Rep. 175 a, *discussed and explained*.

Peover v. Hassall (1861) 30 L. J. Ch. 314; 1 J. & H. 341; 7 Jur. (N.S.) 406; 4 L. T. 113; 9 W. R. 349.—WOOD, V.-C.

Wilson v. Halliley (1830) 1 Russ. & M. 590; 8 L. J. (o.s.) Ch. 171; 32 R. R. 286.—M.R., *applied*.

Wragg v. Morley (1866) 14 W. R. 949.—WOOD, V.-C.

Wilson v. Halliley and Trafford v. Ashton (1718) 1 P. Wms. 415.—L.C., *discussed*.
Metcalf v. Hutchinson (1875) 45 L. J. Ch. 210; 1 Ch. D. 591, 597.—JESSEL, M.R.

Trafford v. Ashton, *referred to*.
Drax, In re, Saville v. Drax (1908) 72 L. J. Ch. 505; [1903] 1 Ch. 781, 791; 88 L. T. 510; 51 W. R. 612.—C.A.

Simpson v. O'Sullivan (1840) 7 Cl. & F. 550; West 337.—H.L. (IR.), *applied*.
Craigh's Estate, In re (1890) 25 L. R. Ir. 128.—MONROE, J.

Jamieson v. Trevelyan (1854) 23 L. J. Ex. 281; 10 Ex. 269.—EX., *distinguished*.
De Hoghton, In re, De Hoghton v. De Hoghton (1896) 65 L. J. Ch. 667; [1896] 2 Ch. 385; 74 L. T. 613; 44 W. R. 635.

STIRLING, J.—In *Jamieson v. Trevelyan*, which was relied on for the applicants, it was held that the power of jointuring might be exercised by giving an estate to commence in the lifetime of the husband, but that case was a very remarkable one. . . . The ground on which it appears to me that the Court in that case came to the conclusion that the power was properly exercised by giving a jointure by a limitation of the rent-charge to commence at once in the lifetime of the husband was the peculiar language of the will which the Court had to construe.—p. 671.

Lane v. Page (1754) Ambl. 233.—L.C., *followed*.

Aleyn v. Belchier (1758) 1 Eden. 132.—L.C.

Lane v. Page and Aleyn v. Belchier, *discussed*.

Daubeny v. Cockburn (1816) 1 Meriv. 626; 15 R. R. 174 (*see supra*, col. 2251).

GRANT, M.R.—I thought so much respect due to the *dicta* imputed to Lord Hardwicke in *Lane v. Page*, as to pause upon the decision of a point, with regard to which he seemed to entertain an opinion different from that with which I was impressed. It seemed to me that those *dicta* could hardly be supposed to refer to a fraud in which the child had no concern, as such a case would have been irrelevant to that before him, where it was the wife's participation in the alleged fraud that could alone create a doubt whether her jointure could be affected. However, upon principle, I do not see how any part of a fraudulent agreement can be supported, except where some consideration has been given, that cannot be restored; and it has, consequently, become impossible to rescind the transaction *in toto*, and to replace the parties in the same situation. In *Lane v. Page* the subsequent marriage formed such a consideration on the part of the wife. In *Aleyn v. Belchier*, where the appointment was subsequent to the marriage, it could hardly be said to have been decided that the appointment was good in any part. For it appears by the registrar's book [Sugden on Powers, Appendix 677] that the bill contained a submission to pay the annuity to the wife, and only sought relief against the other objects of the appointment.—p. 643.

Arnold v. Hardwick (1835) 7 Sim. 343; 4 L. Ch. 152; 40 R. R. 159.—V.-C.; and

Lane v. Page, *referred to*.

Askham v. Barker (1853) 22 L. J. Ch. 769; 17 Beav. 37, 52; 1 W. R. 279.—M.R.

Lane v. Page, *applied*.

Rowley v. Rowley (1854) 23 L. J. Ch. 275; Kay 242; 2 Eq. R. 241; 18 Jur. 306.—V.-C., *discussed*.

Whelan v. Palmer (1888) 39 Ch. D. 648; 57 L. J. Ch. 784; 58 L. T. 937; 36 W. R. 587.

KEKEWICH, J.—In *Rowley v. Rowley*, Wood, V.-C., refers to the doctrine laid down by Lord St. Leonards in the 7th edition of his book on Powers [Sugden on Powers (8th ed., pp. 609—612)], that there is a distinction between a power of jointuring and a power of appointing to children, and after pointing out that the doctrine is open to the objection taken by Sir W. Grant in *Danbary v. Cockburn (supra)*, adds "it is now too late to have that principle as to jointures changed." After that statement of his views, and after so many years, it is not open to me to hold otherwise.—p. 651. And *see* judgment at length.

17. POWERS OF SALE AND MORTGAGE.

Ware v. Polhill (1805) 11 Ves. 257; 8 R. R. 144.—M.R., *distinguished*.

Southampton (Lord) v. Hertford (Marquis) (1813) 2 V. & B. 54; 13 R. R. 318.—M.R.

Ware v. Polhill, *referred to*.

Kerr v. Dungannon (Lord) (1841) 1 Dr. & War. 509; 1 Con. & L. 335; 4 Ir. Eq. R. 343.—SUGDEN, L.C.

Ware v. Polhill, *discussed*.

Ware v. Egmont (Lord) (1854) 24 L. J. Ch. 361; 4 De G. M. & G. 460; 1 Jur. (N.S.) 97; 3 Eq. R. 1; 3 W. R. 48.—CRANWORTH, L.C.

Ware v. Polhill, *discussed*.

Wolley v. Jenkins (1856) 26 L. J. Ch. 379; 23 Beav. 53, 62; 3 Jur. (N.S.) 21.—M.R.; *affirmed*, (1857) 3 Jur. (N.S.) 321.—L.C.

Ware v. Polhill, *observed on*.

Powis v. Capron (1830) 4 Sim. 138, n.—M.R.; and **Waring v. Coventry** (1833) 1 Myl. & K. 249; 36 R. R. 318.—M.R., *followed*.

Lantsbery v. Collier (1856) 25 L. J. Ch. 672; 2 K. & J. 709, 717; 4 W. R. 826.

WOOD, V.-C.—Now with regard to the first part of the doubt created by *Ware v. Polhill*, as far as the circumstances of that case were concerned, Lord St. Leonards has said, and it has been repeated since by other authors, that, in truth, the real question which has been supposed to have been decided there did not occur. Lord Eldon puts it as a ground of his decision that it might be a sound doctrine to hold that the power was void, because it might travel through centuries, but still it was by no means a necessary ground for that decision, inasmuch as the circumstances which happened there were these: leaseholds were settled as well as freeholds and copyholds, and the result of the events which happened was, that the leaseholds had become absolutely vested in an infant tenant in tail; and then the question was, whether, after the estate had thus become absolutely vested, the power could be exercised; and certainly there could be no doubt whatever, I think, that when what I may call the uses of the settlement and the purposes of the settlement are spent (and that seems to be the conclusion that Lord St. Leonards arrived at, and, I think, rightly arrived at, in his book), it is clear the power is no longer capable of being exercised; and although in the events which happened there would be a technical difficulty

with respect to the power being collateral, still in point of fact the Court would regard the purposes of the settlement as exhausted, and the power being only created for the purposes of the settlement, there would be an end to any exercise of the power which could operate in derogation of an absolute interest acquired by any party under trusts of the settlement. Now, the observations made by Lord St. Leonards on *Ware v. Polhill* are these: he says [2 Sugden on Powers, 7th ed. p. 468]: "The case was at first treated as an authority that the common power of sale and exchange was void, as too remote, if it were not expressly confined to lives in being and twenty-one years afterwards. But it is clear that Lord Eldon did not mean to impeach the validity of such powers. Such a power does not, like the power in *Ware v. Polhill*, operate to defeat the estate of the minor tenant in tail, but transfers it from one property to another. He is still tenant in tail; whereas in *Ware v. Polhill* the effect of a sale might be to defeat altogether the estate of the representative of a person who died entitled to a vested interest in the absolute property." Now, the case I have referred to before Sir J. Leach [*Powis v. Capron*] was followed by Shadwell, V.-C., and in various other cases which have succeeded it has been held clearly, that where an estate tail is created the power is valid; and the doctrine is extended a step further in *Boyce v. Hanning* (post. col. 2282).—p. 674.

Lantsbery v. Collier (*supra*), explained and not applied.

Peters v. Lewes and East Grinstead Ry. (1881) 50 L. J. Ch. 839; 18 Ch. D. 429, 434; 45 L. T. 234; 29 W. R. 875.—C.A.; *Sudeley* (Lord) and *Baines*, in re (1893) 63 L. J. Ch. 194; [1894] 1 Ch. 334, 339; 70 L. T. 549; 42 W. R. 231.—CHITTY, J.

Wolley v. Jenkins (1856) 23 Beav. 53; 26 L. J. Ch. 379; 3 Jur. (N.S.) 21.—ROMILLY, M.R.; affirmed, (1857) 3 Jur. (N.S.) 321.—CRANWORTH, L.C., discussed. *Vine v. Raleigh* (1838) 24 Ch. D. 238; 49 L. T. 440; 31 W. R. 855.

CHITTY, J.—The defendants have referred to *Wolley v. Jenkins*, and at p. 60 of the report, Sir J. Romilly is reported to have said: "Here the power is to be exercised only with the consent of the husband during his life, and after his death, or twenty-one years, with the consent of the person or persons for the time being entitled to the rents. Now this provision in the settlement, in my opinion, gives additional force to the argument against holding that the right to exercise this power is still subsisting. If it be still subsisting, who are the persons whose consents to exercise it are necessary? The settlement says they must be persons for the time being entitled to the receipt of the annual rents and profits of the hereditaments settled. This means the persons beneficially so entitled, and excludes mere trustees." That is relied upon as a general statement by Sir J. Romilly of what he considers to be the construction of the words "persons entitled to the receipt of the rents"—that it means "beneficially." Sir J. Romilly did not say that. He was referring to the case before him, and it is quite plain, when the power which is stated at p. 54 of the report is considered, that there was no other conclusion to which he could come, because the power was conferred on *Wolley* (who was the plaintiff in the case) as the

surviving trustee, and that power was only to be exercised with the consent in writing of the person for the time being entitled to the receipt of the annual rents and profits of the hereditaments. It must have been therefore persons other than the trustees, because although the exact position of *Wolley* himself under the settlement is not shown, he clearly was a trustee of this power, and he was to exercise the power with the consent of some other persons, namely, those entitled to the rents, and that must have been those beneficially entitled, otherwise the case would have no meaning. It appears to me, therefore, that is not a statement of a general principle, or in fact a statement of law, which binds me on the present occasion. I have no doubt Sir J. Romilly arrived at a right conclusion, but the case before me is quite different.—p. 242.

Boyce v. Hanning (1832) 1 L. J. Ex. 123; 2 Cr. & J. 334; 2 Tyrw. 327.—EX., followed. *Lantsbery v. Collier* (1856) 25 L. J. Ch. 672; 2 K. & J. 709; 4 W. R. 826. See col. 2281.

Long v. Rankin (1822) Sugden on Powers, 8th ed. p. 895, applied.

Walmsley v. Butterworth (1835) 4 L. J. Ch. 235.—M.R.; *Simpson v. Bathurst* (1869) L. R. 5 Ch. 193, 202; 22 L. T. 29; 18 W. R. 772.—L.C.; *Alexander v. Mills* (post); *Lonsdale* (Earl) v. *Crawford* (or *Lowther*) (1900) 69 L. J. Ch. 686; [1900] 2 Ch. 687, 695; 83 L. T. 312.—FARWELL, J.

Warburton v. Farn (1849) 18 L. J. Ch. 312; 16 Sim. 625; 13 Jur. 528.—V.-C.; **Holdsworth v. Goose** (1861) 30 L. J. Ch. 188; 29 Beav. 111; 7 Jur. (N.S.) 301; 4 L. T. 196; 9 W. R. 443.—M.R.; and **Eisdell v. Hammersley** (1862) 31 Beav. 255.—M.R., discussed and principle applied. *Alexander v. Mills* (1870) 40 L. J. Ch. 73; L. R. 6 Ch. 124, 134; 24 L. T. 206; 19 W. R. 310.—JAMES and MELLISH, L.JJ.

Warburton v. Farn, Holdsworth v. Goose, and Eisdell v. Hammersley, discussed. *Hardaker v. Moorhouse* (1884) 53 L. J. Ch. 713; 26 Ch. D. 417, 421; 50 L. T. 554; 32 W. R. 638.—NORTH, J.

Holdsworth v. Goose and Eisdell v. Hammersley, discussed. *Cooper*, in re, *Cooper v. Slight* (1884) 27 Ch. D. 565; 51 L. T. 113; 32 W. R. 1015.—KAY, J.

Warburton v. Farn, Eisdell v. Hammersley, Walmsley v. Butterworth (1835) 4 L. J. Ch. 253.—M.R.; and **Holdsworth v. Goose**, discussed.

Bedingfield and Herring, in re (1892) 62 L. J. Ch. 430; [1893] 2 Ch. 332; 3 R. 483; 68 L. T. 634; 41 W. R. 413.—NORTH, J.

Eisdell v. Hammersley, distinguished. *Lambert's Estate*, in re (1900) [1901] 1 Ir. R. 12, 29.—ROSS, J.; reversed, *Ibid.* 261.—C.A.

Vernon v. Manvers (Earl) (1862) 32 L. J. Ch. 244; 31 Beav. 617; 1 N. R. 117; 9 Jur. (N.S.) 9; 7 L. T. 553; 11 W. R. 133.—M.R., referred to.

Longfield v. Bantry (1885) 15 L. R. Ir. 101.—CHATTERTON, V.-C.

18. POWER OF LEASING.

Shannon v. Bradstreet (1803) 1 Sch. & Lef. 52; 9 R. R. 11.—L.C., approved. *Dowell v. Dew* (1843) 12 L. J. Ch. 158; 7 Jur. 117.—LYNDHURST, L.C.

Shannon v. Bradstreet, principle applied.

Affleck v. Affleck (1857) 26 L. J. Ch. 358; 3 Sm. & G. 394; 3 Jur. (N.S.) 326; 5 W. R. 425.—STUART, V.-C. And see *supra*, col. 2218.

Shannon v. Bradstreet, discussed.

Johnson v. Touchet (1867) 37 L. J. Ch. 25; 17 L. T. 191; 16 W. R. 71.—STUART, V.-C.: Gaslight and Coke Co. v. Towse (1887) 56 L. J. Ch. 889; 35 Ch. D. 519, 534; 56 L. T. 602.—KAY, J.: Lambert's Estate, In re [1901] 1 Ir. R. 261, 264.—C.A.

Doe d. Brownsmith v. Denny (1767) 2 Wills.

337; and **Roe d. Buxton v. Dunt (1767)** 2 Wills. 336.—K.B., *distinguished*.

Houston v. Houston (1831) 4 Sim. 611.—SHADWELL, V.-C.

Hurd v. Fletcher (1778) 1 Dougl. 43.—K.B., followed.

Evans v. Vaughan (1825) 4 B. & C. 261; 6 D. & R. 349; 3 L. J. K. B. (O.S.) 213; 28 R. R. 250.—K.B.

Hurd v. Fletcher and Evans v. Vaughan, referred to.

Steele v. Mitchell (1840) 2 Dr. & Wal. 568; 3 Ir. Eq. R. 1, 11; 56 R. R. 271.—L.C.

Bailey v. Tennant (1856) 11 Ex. 776.—EX., distinguished.

Annaly's Estate, In re (1889) 23 L. R. Ir. 481.—MONROE, J.

Taylor v. Stibbert (1794) 2 Ves. 437; 2 R. R. 278.—L.C., doubted on one point.

Crofton v. Ormsby (1806) 599; 2 Sch. & Lef. 583; 9 R. R. 107.—L.C.

Taylor v. Stibbert, referred to.

Dunbar v. Tredennick (1813) 2 Ball & B. 304, 319.—L.C.

Taylor v. Stibbert, applied.

Steel v. Mitchell (1840) 2 Dr. & Wal. 568; 3 Ir. Eq. R. 1, 11; 56 R. R. 271.—L.C.

Taylor v. Stibbert, referred to.

Harrison v. Duignan (1842) 2 Dr. & War. 295; 1 Con. & L. 376; 4 Ir. Eq. R. 562.—L.C.

Taylor v. Stibbert, principle not applied.

Stoughton v. Crosbie (1843) 5 Ir. Eq. R. 451, 464.—BRADY, L.C.

Taylor v. Stibbert, applied.**Stoughton v. Crosbie, discussed.**

Donegal (Marquis) v. Greg (1849) 13 Ir. Eq. R. 12, 41.—L.C.

Taylor v. Stibbert, approved.

Barnhart v. Greenshields (1853) 9 Moore P. C. 18.—P.C.

Taylor v. Stibbert, referred to.

Carroll v. Keayes (1873) Ir. R. 8 Eq. 97, 128.—M.R.; Phillips v. Miller (1875) 44 L. J. C. P. 265; L. R. 10 C. P. 420, 429; 32 L. T. 638; 23 W. R. 834.—EX. CH.; Cork Harbour Docks Co., In re (1886) 17 L. R. Ir. 515, 528.—C.A.; Hunt v. Luck (1900) 70 L. J. Ch. 30; [1901] 1 Ch. 45, 49; 83 L. T. 479; 49 W. R. 155.—FARWELL, J.

Rattle v. Popham (1722) 2 Strange. 992;

S. G. nom. Newport v. Savage (1736) Sug. on Powers (8th ed.), Appendix, p. 931.

Applied, Churchman v. Harvey (1757) Ambl. 336.—L.C.C.; *disapproved*, Zouch v. Woolston (1761) 2 Burr. 1136.—K.B.

Montgomery v. Charteris [Queensberry

Leases, (1817) 5 Dow 298, 344.—H.L. (SC.), test applied.

Chandler v. Bradley (1896) 66 L. J. Ch. 214; [1897] 1 Ch. 315, 324; 75 L. T. 581; 45 W. R. 296.—STIRLING, J.

Easton v. Pratt (1864) 33 L. J. Ex. 233;

10 Jur. (N.S.) 732; 9 L. T. 841; 12 W. R. 805.—EX. CH.; *reversing* 33 L. J. Ex. 31; 2 H. & C. 676; 9 Jur. (N.S.) 1345; 9 L. T. 342; 12 W. R. 33.—EX., *followed*.

Doe d. Dymoke v. Withers (1831) 1 L. J.

K. B. 38; 2 B. & Ad. 896.—K.B., *questioned*.

Truscott v. Diamond Rock Boring Co. (1882) 20 Ch. D. 251; 51 L. J. Ch. 259; 46 L. T. 7; 30 W. R. 277; 46 J. P. 486.—C.A.; *reversing* CHITTY, J.

JESSEL, M.R.—Two cases have been referred to in argument. One is *Doe v. Withers*, as to which I need not say whether all the *dicta* contained in it are good law. I am not satisfied that it ought to be followed, but it does not govern the present case, and it is, therefore, unnecessary to say whether it ought to be overruled. That will be open to the consideration of the C. A., if ever it becomes necessary to decide it. The other case, *Easton v. Pratt*, substantially governs the present case. The power there was not in the same terms as here, but the case was stronger against the validity of the lease, for the instrument authorized the granting leases at a rack-rent for terms not exceeding twenty-one years, and building or repairing leases for the term of sixty-one years. Here there is only one power, and if the purchaser's construction of it is correct it would be impossible ever to grant a lease of the property at all unless it was first allowed to get out of repair.—p. 256.

BRETT, L.J. to the same effect.

How v. Whitfield (1678) 1 Vent. 338;

T. Jones 110; 2 Show. 67.—K.B., *questioned*.

Douglas v. Lock (or Doe d. Douglas v. Lock) (1835) 2 A. & E. 705; 4 L. J. K. B. 113; 4 N. & M. 807.—K.B.

DENMAN, C.J. (for the Court).—There is, however, a case in Ventris's Reports, *How v. Whitfield*, which, if it were to be held as law, might seem to affect the generality of this proposition. A power given to the lessee and his assigns to let leases for twenty-one years, rendering the ancient rents, and the assignee made a lease of the lands *inter alia*, at the rent of six shillings a year, which was the ancient rent. As to reserving the rent *proinde*, the Court said that it might be intended that the *inter alia* comprehended nothing but such things out of which a rent could not be reserved; and then the six shillings was reserved only for the five acres. However, the *proinde* might be reasonably referred only to the five acres, and not to the *inter alia*, and that a distinct reservation of the six shillings might be for five acres. But in the report of the same case (Sir T. Jones, 110), it is said the Court thought this to be a good exception: and the defendant perceiving the opinion of the Court, as to the great point, consented, upon payment of costs, that judgment should be given for the plaintiff. The case is also reported in 2 Shower 57, where

it appears to have argued upon another point; and Jones and Penbertton, JJ. seemed to have entertained different opinions; and the case as reported in Ventris, it should seem, cannot be relied upon.—p. 749.

Doe d. Douglas v. Lock (*supra*). *referred to*. Donegal (Marquis) v. Greg (1849) 13 Ir. Eq. R. 12, 49.—L.C.: Reynolds v. Moore [1898] 2 Ir. R. 641, 649.—Q.B.D.: Thellusson v. Liddard (1900) 69 L. J. Ch. 673. [1900] 2 Ch. 635: 82 L. T. 739: 49 W. R. 10.—STIRLING, J.

Doe d. Bromley v. Bettison (1810) 12 East 305: 11 R. R. 385.—K.B.

Referred to. Dyas v. Cruise (1845) 2 Jo. & Lat. 460: 8 Ir. Eq. R. 407.—L.C.: *distinguished*, Yellowly v. Gower (1855) 24 L. J. Ex. 289; 11 Ex. 274, 294.—EX.

Doe d. Bromley v. Bettison, *discussed*.

Gas Light and Coke Co. v. Towse (1887) 35 Ch. D. 519: 56 L. J. Ch. 889: 56 L. T. 602.

KAY, J.—That was a case of ejectment, the ground of the action being that the lease was altogether void: but Lord Ellenborough did not so decide, and held that the insertion of a covenant of that kind [to renew the lease at all times during the life of the lessor] did not make the whole lease void, and that the covenant itself was not necessarily void; but that when the time to perform it came, unless it could be shown that the rent stipulated for was the best rent which could then be obtained, any lease granted under the covenant to renew would be bad. Now that same point arose in *Dowell v. Dew* (*post*).—p. 533.

Yellowly v. Gower (*supra*).

Followed, Davies v. Davies (1888) 57 L. J. Ch. 1093: 38 Ch. D. 499, 504: 58 L. T. 514: 36 W. R. 399.—KEKEWICH, J.: *discussed*, Cartwright, In re, Avis v. Newman (1889) 58 L. J. Ch. 590: 41 Ch. D. 532: 60 L. T. 891: 37 W. R. 612.—KAY, J.

Harnett v. Yeilding (1805) 2 Sch. & Lef. 549: 9 R. R. 98.—L.C.

Observed on, Thomas v. Dering (1837) 6 L. J. Ch. 267: 1 Keen 729: 1 Jur. 427.—M.R.: *referred to*, Graham v. Oliver (1840) 3 Beav. 124, 128.—M.R.: *explained and not applied*, Dowell v. Dew (1842) 12 L. J. Ch. 158: 1 Y. & C. C. C. 345.—KNIGHT BRUCE, V.-C. (affirmed, (1843) 7 Jur. 117.—L.C.): *commented on*, Dyas v. Cruise (1845) 2 Jo. & Lat. 460: 8 Ir. Eq. R. 407.—L.C.: *rule in, applied*, Lehmann v. McArthur (1868) 37 L. J. Ch. 625: L. R. 3 Ch. 496, 503: 18 L. T. 806: 16 W. R. 877.—L.JJ.

Harnett v. Yeilding, *referred to*.

Hilton v. Tipper (1868) 18 L. T. 626: 16 W. R. 888.—STUART, V.-C.

Harnett v. Yeilding, *commented on*.

Salamon v. Sopwith (1876) 35 L. T. 463.—MALINS, V.-C.: *reversed*, 35 L. T. 826.—C.A.

Harnett v. Yeilding, *referred to*.

Dunn v. Flood (1885) 28 Ch. D. 586: 54 L. J. Ch. 370: 52 L. T. 699: 33 W. R. 315.—C.A. BAGGALLAY, BOWEN and FRY, L.JJ.

Harnett v. Yeilding, *discussed*.

Gas Light and Coke Co. v. Towse (1887) 35 Ch. D. 519: 56 L. J. Ch. 889: 56 L. T. 602.

KAY, J.—There was [in *Harnett v. Yeilding*] a lease for twenty-one years made by a tenant for life—undoubtedly a lease under a power, although not expressly so stated in the report—containing a contract to renew that lease by granting a further lease for twenty-one years at any time during his life. Lord Redesdale thought the contract was bad (p. 532). [His lordship then discussed *Doe v. Bettison* (*supra*, col. 2285) and *Dowell v. Dew* (*supra*), and continued:] That being the state of the authorities, the point came before Lord St. Leonards himself, the highest possible authority on this question of powers, and he thus states the law in his Treatise on Powers (Sugden on Powers, 8th ed., pp. 787, 788, pl. 22, 23). He mentions *Doe v. Bettison*, and then he says: "The last case has been considered as at variance with the position laid down by Lord Redesdale in *Harnett v. Yeilding*, where the lessor covenanted by the old lease to execute a further lease for twenty-one years, at any time during his life, at the old rent, and Lord Redesdale thought that covenant objectionable. In a later case in Ireland, the Chancellor" (that was Lord St. Leonards himself) "observed that he could not entirely go along with Lord Redesdale in that proposition, for though it would be an objection if at the time when the contract is to be performed it is not the best rent, he did not see how it was an objection if at that time the old rent was the best rent. What harm was done in such a case when the new lease is within the power?" The case he refers to is *Dyas v. Cruise* (*supra*). The authorities therefore concur in establishing this proposition—that in a lease under a power a covenant to renew that lease at the expiration of the term is a good covenant, even though the first lease was for the full term authorised by the power: but that when the time for carrying that covenant into effect arrives by the expiration of the first lease, then it must be shown that the rent and covenants stipulated for are such as are the best rent and the proper covenants at that time.—p. 534.

Campbell v. Leach (1775) Amb. 740.—L.C., *referred to*.

Daly v. Beckett (1857) 24 Beav. 114: 3 Jur. (N.S.) 754: 5 W. R. 514.—M.R.

Sheehy v. Muskerrey (Lord) (1848) 1 H. L. Cas. 576: 7 Cl. & F. 1: MacL. & R. 493: LL & G. temp. Plunk. 588.—H.L. (IR.). COTTENHAM, L.C., *applied*.

Mostyn v. Lancaster; *Taylor v. Mostyn* (1883) 52 L. J. Ch. 848: 23 Ch. D. 583, 601: 48 L. T. 715: 31 W. R. 686.—C.A.

Jegon v. Vivian (1865) 35 L. J. C. P. 73: L. R. 1 C. P. 9: 12 Jur. (N.S.) 184: 14 W. R. 227.—C.P.: *reversed*, (1867) 36 L. J. C. P. 145: L. R. 2 C. P. 422: 15 W. R. 457.—EX. CH.: *the latter decision affirmed nom.* Vivian v. Jegon (1868) 37 L. J. C. P. 313: L. R. 3 H. L. 285: 19 L. T. 218.—H.L. (E.).

Jegon v. Vivian and Doe d. Sutton v. Harvey (1823) 1 B. & C. 426: 25 R. R. 444.—K.B., *referred to*.

Aldam's Settlement, In re (1902) 71 L. J. Ch. 532, 538: [1902] 2 Ch. 46: 86 L. T. 510: 50 W. R. 500.—C.A.: *reversing* BYRNE, J.

PRACTICE.

1. NOTICE OF ACTION.
2. PARTIES.
3. JOINDER OF CAUSES OF ACTION.
4. WRIT OF SUMMONS.
5. APPEARANCE.
6. JUDGMENT UNDER ORD. XIV.
7. DISCONTINUANCE AND WITHDRAWAL OF DEFENCE.
8. NOTICE CLAIMING CONTRIBUTION OR INDEMNITY.
9. PAYMENT INTO AND OUT OF COURT.
10. STAYING AND SETTING ASIDE PROCEEDINGS.
11. PARTICULARS.
12. SECURITY FOR COSTS.
13. TRANSFER OF ACTIONS.
14. CONSOLIDATION OF ACTIONS.
15. CUSTODY, ETC., OF PROPERTY.
16. MANDAMUS AND INJUNCTION.
17. TRIAL.
18. NEW TRIAL.
19. JUDGMENTS AND ORDERS.
20. SPECIAL CASE.
21. PETITIONS.
22. MOTIONS AND RULES.
23. SUMMONSES.
24. PROCEEDINGS IN DISTRICT REGISTRY.
25. PROCEEDINGS IN CHAMBERS.
26. FUNDS AND SECURITIES IN COURT.
27. RULES OF COURT.
28. COURT FEES.
29. TIME.
30. PLEADING.

1. NOTICE OF ACTION.

Hermann v. Seneschal (1862) 32 L. J. C. P. 43; 13 C. B. (N.S.) 392; 6 L. T. 646; 11 W. R. 184.—C.P., *followed*.

Roberts v. Orchard (1863) 33 L. J. Ex. 65; 2 H. & C. 769; 9 L. T. 727; 12 W. R. 253.—EX. CH.

Hermann v. Seneschal and Roberts v. Orchard, *explained*.

Leete v. Hart (1868) 37 L. J. C. P. 157; L. R. 3 C. P. 322; 16 W. R. 676; S. C. *nom.* Neate v. Hart, 18 L. T. 292.—C.P.

Hermann v. Seneschal and Roberts v. Orchard, *referred to*.

Chamberlain v. King (*or King v. Chamberlain*) (1871) 40 L. J. C. P. 273, 478; L. R. 6 C. P. 474; 24 L. T. 736; 19 W. R. 931.—C.P. *See post*, col. 2288.

Hermann v. Seneschal and Roberts v. Orchard, *explained*.

Judge v. Selmes (1871) 40 L. J. Q. B. 287; L. R. 6 Q. B. 724; 24 L. T. 905; 19 W. R. 1110.—Q.B.

Roberts v. Orchard, *referred to*.

O'Dea v. Hickman (1886) 18 L. R. Ir. 238.—Q.B.D.

Hermann v. Seneschal and Roberts v. Orchard, *distinguished*.

Reed v. Blisland School Board (1901) 17 Times L. R. 626.

WILLES, J. held that these cases were distinguishable, as the Public Authorities Protection Act, 1893, was very comprehensive.

O.C.

Read v. Coker (1853) 22 L. J. C. P. 201; 13 C. B. 850; 1 C. L. R. 746; 17 Jur. 190; 1 W. R. 413.—C.P.

Leete v. Hart (1868) 37 L. J. C. P. 157; L. R. 3 C. P. 322; 16 W. R. 676.—S. C. *nom.* Neate v. Hart, 18 L. T. 292.—C.P.

Leete v. Hart, *limited and explained*.

Chamberlain v. King (*or King v. Chamberlain*) (1871) L. R. 6 C. P. 474; 40 L. J. C. P. 273; 24 L. T. 736; 19 W. R. 931.

WILLES, J.—In the report of *Leete v. Hart*, a *semble* is introduced into the headnote "that even an honest belief would be insufficient, unless the defendant had reasonable grounds for such belief;" but the headnote of the reporter, as well as the judgments of the judges, must be taken with reference to the facts of that case. The decision in that case merely amounts to this: there must be facts on which a belief could be based. If it goes further it is in conflict with the decision of the Ex. Ch. in *Roberts v. Orchard*. It is clear from the judgments that there was not the slightest intention on the part of the judges in any way to deviate from the law as laid down in that case.—p. 478.

KEATING, J.—The judgments of the L.C.J., my brother M. Smith, and myself, all distinctly proceed on the ground that there were no facts in *Leete v. Hart* on which to ground a belief at all. The judgment of my brother Hyles contains expressions upon which the *semble* inserted in the head-note was probably based; but his judgment, like the others in the case, must be read in relation to the facts of the particular case, without straining the effect of particular expressions; and it is obvious, that so read it is quite consistent with the decisions in *Hermann v. Seneschal* and *Roberts v. Orchard* (*supra*).—p. 479.

Leete v. Hart, *explained*.

Judge v. Selmes (1871) 40 L. J. Q. B. 287; L. R. 6 Q. B. 724; 24 L. T. 905; 19 W. R. 1110.—Q.B.

Leete v. Hart and Chamberlain v. King *or King v. Chamberlain* (*supra*), *applied*.

Agnew v. Jobson (1877) 47 L. J. M. C. 67; 13 Cox, C. C. 625.

LOPES, J.—I am of opinion that the defendant Jobson was not entitled to notice of action. There was a total absence of any authority to do the act, and although he acted *bona fide*, believing he had authority, there was nothing on which to ground the belief; no knowledge of any fact such a belief might be based on. *Cook v. Leonard* (*post*, col. 2289), *Leete v. Hart* and *King v. Chamberlain* are strong authorities in favour of this view. It was said that *Leete v. Hart* was distinguished from the present case on the ground that the defendant in that case was a private individual, whereas the defendant Jobson was a magistrate, clothed with the general authority of his office. But I do not think that this makes any substantial difference, or destroys the effect of that and the other cases I have cited.—p. 68.

Chamberlain v. King (*supra*), *followed*.

Rochford v. Rynd (1881) 8 L. R. Ir. 204.—**PALLES, C.B.** and **FITZGERALD, B.**; affirmed, C.A.

Chamberlain v. King, *referred to*.

O'Dea v. Hickman (1886) 18 L. R. Ir. 238.—Q.B.D.

- Bird v. Gunston** (1785) 2 Chit. 459; 4 Dougl. 275.—K.B., and **Irving v. Wilson** (1791) 4 Term Rep. 485.—K.B., *principle applied*.
- Cook v. Leonard** (1827) 6 B. & C. 351; 9 D. & R. 339; 5 L. J. (O.S.) M. C. 99; 30 R. R. 348.—K.B.
- Irving v. Wilson**, *explained*.
Midland Ry. v. Withington Local Board (1883) 11 Q. B. D. 788; 52 L. J. Q. B. 689; 49 L. T. 489; 47 J. P. 789.—C.A.
- JESSEL, M.R.—The ground of the decision in that case was that the money was taken under circumstances rendering the whole transaction unlawful.—p. 791.
- Weller v. Toke** (1808) 9 East 364.—K.B., *principle applied*.
Cook v. Leonard (1827) 5 L. J. (O.S.) M. C. 99; 6 B. & C. 351; 9 D. & R. 339; 30 R. R. 348.—K.B.
- Cook v. Leonard**.
Questioned, Jones v. Gooday (1842) 11 L. J. Ex. 297; 9 M. & W. 736; 1 D. (N.S.) 914.—EX.; *approved*, Agnew v. Jobson (1877) 47 L. J. M. C. 67; 13 Cox C. C. 625.—LOPES, J. (*supra*, col. 2288).
- Hazeldine v. Grove** (1842) 12 L. J. M. C. 10; 3 Q. B. 997; 3 G. & D. 210; 7 Jur. 36.—Q.B., *followed*.
- Shatwell v. Hall** (1842) 12 L. J. Ex. 74; 10 M. & W. 523; 2 D. (N.S.) 567.—EX., *commented on*.
- Mellor v. Leather** (1853) 22 L. J. M. C. 77; 1 El. & Bl. 619; 17 Jur. 709.—Q.B.
- CAMPBELL, C.J. (for the Court).—If it should be found difficult to reconcile the judgment of the Ct. of Ex. in *Shatwell v. Hall* with that of the Ct. of Q. B. in *Hazeldine v. Grove*, we may observe that the judgment of the Ct. of Ex. was given upon refusing a rule when only one side had been heard, whilst the judgment of the Ct. of Q. B. was given after full argument by the counsel on both sides, and is, besides, posterior in point of date.—p. 80.
- [MARTIN, B., in *Bonnet v. Tottenham* (1853) 17 Jur. 510; 22 L. J. Ex. 281; 8 Ex. 884; 1 W. R. 372.—EX., thought that the decision of the Court on refusing rules was of more weight, for it shows that the Court thought the matter too clear for argument.]
- Palmer v. Grand Junction Ry.** (1839) 8 L. J. Ex. 29; 4 M. & W. 749; 7 D. P. C. 232; 1 H. & H. 489; 3 Jur. 559.—C.P., *applied and dictum discussed*.
- Carpue v. L. & B. Ry.** (1844) 13 L. J. Q. B. 133; 5 Q. B. 747; 8 Jur. 464; D. & M. 608; 3 Railw. Cas. 692.—Q.B.
- Palmer v. Grand Junction Ry. and Carpue v. L. & B. Ry.**, *distinguished*.
Kent v. G. W. Ry. (1846) 16 L. J. C. P. 72; 3 C. B. 714; 4 D. & L. 481; 4 Railw. Cas. 699.—C.P. *And see* "CARRIERS," vol. i., col. 282.
- Carpue v. L. & B. Ry.**
Referred to, G. W. Ry. of Canada v. Braid (1863) 1 Moore P. C. (N.S.) 101; 1 N. R. 527; 9 Jur. (N.S.) 339; 8 L. T. 31; 11 W. R. 444.—P.C.; *Readhead v. Midland Ry.* (1867) 36 L. J. Q. B. 181; L. R. 2 Q. B. 427.—Q.B.; BLACKBURN, J. *dissenting* (affirmed) (1869) 38 L. J. Q. B. 169; L. R. 4 Q. B. 379; 9 B. & S. 519; 20 L. T. 628; 17 W. R. 737.—EX. CH.; *Hanson v. Lancashire and Yorkshire Ry.* (1872) 20 W. R. 297.
- Kent v. G. W. Ry.** (1846) 16 L. J. C. P. 72; 3 C. B. 714; 4 D. & L. 481; 4 Railw. Cas. 699.—C.P., *discussed and distinguished*.
- Wallington v. Dale** (1851) 6 Ex. 284.—EX., *referred to*.
Garton v. G. W. Ry. (1859) 28 L. J. Q. B. 321; El. Bl. & El. 846; 5 Jur. (N.S.) 1244; 7 W. R. 478.—EX. CH.; *reversing* 28 L. J. Q. B. 103; El. Bl. & El. 837.—Q.B.
- Hughes v. Buckland** (1846) 15 L. J. Ex. 233; 15 M. & W. 346; 3 D. & L. 702; 10 Jur. 884.—EX.
Referred to, Braham v. Watkins (1846) 16 L. J. Ex. 9; 16 M. & W. 77; 4 D. & L. 42.—EX.; *applied*, Chamberlain v. King (1871) 40 L. J. C. P. 273; L. R. 6 C. P. 474 (*supra*, col. 2288); *referred to*, Neate v. Hart (1864) 18 L. T. 292.—C.P. *See supra*, col. 2288.
- Hughes v. Buckland and Spooner v. Juddow** (1850) 4 Moore Ind. App. 353; 6 Moore P. C. 257.—P.C., *not applied*.
Sinclair v. Broughton (1882) L. R. 9 Ind. App. 152; 47 L. T. 170.—P.C.
- Hughes v. Buckland**, *principle applied*.
Lea v. Facey (1887) 56 L. J. Q. B. 536; 19 Q. B. D. 352; 58 L. T. 32; 35 W. R. 721; 51 J. P. 756.—C.A. **ESHER, M.R., LINDLEY and LOPES, L.JJ.**
- Davis v. Curling** (1845) 15 L. J. Q. B. 56; 8 Q. B. 286; 10 Jur. 69.—Q.B.
Applied, Newton v. Ellis (1855) 24 L. J. Q. B. 337; 5 El. & Bl. 115; 1 Jur. (N.S.) 850; 3 W. R. 476.—Q.B.; *Wilson v. Halifax Corporation* (1868) 37 L. J. Ex. 44; L. R. 3 Ex. 114; 120; 17 L. T. 660; 16 W. R. 707.—EX.
- Davis v. Curling**, *discussed*.
Jolliffe v. Wallasey Local Board (1873) 43 L. J. C. P. 41; L. R. 9 C. P. 62, 81 (*post*, col. 2291).
- Wilson v. Halifax Corporation** (1868) 37 L. J. Ex. 44; L. R. 3 Ex. 114; 17 L. T. 660; 16 W. R. 707.—EX.
Referred to, Gibson v. Preston Corporation (1870) 39 L. J. Q. B. 131; L. R. 5 Q. B. 218, 223; 10 B. & S. 942; 22 L. T. 293; 18 W. R. 689.—Q.B.; *Jolliffe v. Wallasey Local Board* (1873) 43 L. J. C. P. 41; L. R. 9 C. P. 62, 81; 29 L. T. 582.—C.P. (*see post*, col. 2291); *applied*, Holland v. Northwich Highway Board (1876) 34 L. T. 137.—CLEASBY, B., GROVE and FIELD, JJ.
- Smith v. Hopper** (1847) 16 L. J. Q. B. 93; 9 Q. B. 1005; 11 Jur. 302.—Q.B., *commented on*.
Hardwick v. Moss (1861) 31 L. J. Ex. 205; 7 H. & N. 136; 7 Jur. (N.S.) 804; 4 L. T. 802.—EX.
- Hardwick v. Moss**.
Principle applied, Poulsum v. Thirst (1867) 36 L. J. C. P. 225; L. R. 2 C. P. 419; 16 L. T. 324; 15 W. R. 766.—C.P.; *explained*, Judge v. Selmes (or Selmes v. Judge) (1871) 40 L. J. Q. B. 287; L. R. 6 Q. B. 724; 24 L. T. 905; 19 W. R. 1110.—Q.B.

Newton v. Ellis (1835) 24 L. J. Q. B. 337; 5 El. & Bl. 115; 1 Jur. (N.S.) 850; 3 W. R. 476.—Q.B.

Not applied, **Williams v. Golding** (1865) 35 L. J. C. P. 1; L. R. 1 C. P. 69, 78; 11 Jur. (N.S.) 952; 1 H. & R. 18; 13 L. T. 291; 14 W. R. 60.—C.P.: *principle applied*, **Poulsum v. Thirst** (1867) 36 L. J. C. P. 225; L. R. 2 C. P. 449; 16 L. T. 324; 15 W. R. 766.—C.P.; *referred to*, **Jolliffe v. Wallasey Local Board** (1873) 43 L. J. C. P. 41; L. R. 9 C. P. 62, 81; 29 L. T. 582.—C.P. (*see post*).

Poulsum v. Thirst (1867) 36 L. J. C. P. 225; L. R. 2 C. P. 449; 16 L. T. 324; 15 W. R. 766.—C.P.

Followed, **Wilson v. Halifax Corporation** (1868) 37 L. J. Ex. 44; L. R. 3 Ex. 114, 120; 17 L. T. 660; 16 W. R. 707.—EX.; *discussed*, **Att.-Gen. v. Hackney Local Board** (1875) 44 L. J. Ch. 545; L. R. 20 Eq. 626, 630; 33 L. T. 244.—BACON, V.-C.

Judge v. Selmes (or **Selmes v. Judge**) (1871) 40 L. J. Q. B. 287; L. R. 6 Q. B. 724; 24 L. T. 905; 19 W. R. 1110.—Q.B., *adopted*. **Jolliffe v. Wallasey Local Board** (1873) 43 L. J. C. P. 41; L. R. 9 C. P. 62, 81; 29 L. T. 582.—C.P.

KEATING, J.—The only remaining objection urged against the defendant's right to notice of action is, that cases of non-feasance are not cases in which the protection of notice of action is given. That is not so; *Wilson v. Halifax Corporation* (*supra*, col. 2290), *Davis v. Curling* (*supra*, col. 2290), *Newton v. Ellis* (*supra*), and *Judge v. Selmes* establish that in cases which appear to be mere non-feasance the defendant is entitled to the protection of the Act.—p. 48.

BRETT, J. also discussed *Newton v. Ellis*, *Wilson v. Halifax Corporation* and *Davis v. Curling*.

Judge v. Selmes (or **Selmes v. Judge**), *followed*.

Midland Ry. v. Withington Local Board (1883) 52 L. J. Q. B. 689; 11 Q. B. D. 788; 49 L. T. 489; 47 J. P. 789.—C.A.

Jolliffe v. Wallasey Local Board (*supra*), *applied*.

Holland v. Northwich Highway Board (1876) 34 L. T. 137.—CLEASBY, B., GROVE and FIELD, JJ.

Jolliffe v. Wallasey Local Board, *discussed*. **Reg. v. Williams** (1884) 9 App. Cas. 418; 53 L. J. P. C. 64.—P.C.

SIR B. COUCH (for the Court).—In *Jolliffe v. Wallasey Local Board* it was held that an omission to do something which ought to be done in order to the complete performance of a duty imposed upon a public body under an Act of Parliament, or the continuing to leave any such duty unperformed, amounts to "an act done or intended to be done" within the meaning of a clause requiring a notice of action, and their lordships think that the negligence in this case to take reasonable care is a wrong done by or under the authority of the Executive Government.—p. 433.

Chapman v. Auckland Union (1889) 58 L. J. Q. B. 504; 23 Q. B. D. 294; 61 L. T. 446;

53 J. P. 820.—C.A. *See now* Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.

Elstob v. Wright (1851) 3 Car. & K. 31, *distinguished*.

Burton v. Le Gros (1864) 34 L. J. Q. B. 91; 13 W. R. 46; 11 L. T. 270.—Q.B.

COCKBURN, C.J.—The notice in *Elstob v. Wright* mentioned the wrong Court, which was clearly fatal, so that there was no necessity to give much consideration to the other points.—p. 92.

Martins v. Upcher (1842) 11 L. J. Q. B. 291; 3 Q. B. 662; 1 D. (N.S.) 555; 2 G. & D. 716; 6 Jur. 582.—Q.B., *distinguished*.

Macklen v. Kensington Vestry (1892) 61 L. J. Q. B. 527; [1892] 1 Q. B. 614; 66 L. T. 347; 40 W. R. 390; 56 J. P. 471.—DENMAN and CAVE, JJ.

Jones v. Bird (1822) 5 B. & Ald. 837; 1 D. & R. 49; 24 R. R. 579.—K.B., *referred to*.

Mersey Docks Trustees v. Gibbs (1866) L. R. 1 H. L. 93; 35 L. J. Ex. 225; 11 H. L. Cas. 686; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.—H.L. (E.). With the JUDGES. *See the opinion of the judges delivered by BLACKBURN, J., at p. 113.*

Jones v. Bird and Jones v. Nicholls (1844) 14 L. J. Ex. 42; 13 M. & W. 361; 2 D. & L. 425; 8 Jur. 989; 1 New Sess. Cas. 524.—EX., *observation adopted*.

Smith v. West Derby Local Board (1878) 3 C. P. D. 423; 47 L. J. C. P. 607; 38 L. T. 716; 27 W. R. 137.

GROVE, J.—In *Jones v. Bird*, Abbott, C.J. says: "I think the notice ought not to be construed with great strictness, its object being merely to inform the defendants substantially of the ground of complaint, but not of the mode or manner in which the injury has been sustained." And in *Jones v. Nicholls*, Pollock, C.B. says substantially the same.—p. 428. LINDLEY, J. concurred.

Jones v. Bird, *adopted*.

White v. Peto (1888) 58 L. T. 710.—KAY, J.

2. PARTIES.

Booth v. Briscoe (1877) 2 Q. B. D. 496; 25 W. R. 838.—C.A., *approved and followed*. **Gort (Viscount) v. Rowney** (1886) 55 L. J. Q. B. 541; 17 Q. B. D. 625; 54 L. T. 817; 34 W. R. 696.—C.A. *See* "COSTS," vol. i., col. 729.

BOWEN, L.J.—As to the question whether the plaintiffs here could properly have been joined in the first instance if the point had been taken in time, it is unnecessary for us to decide; but, as at present advised, I hesitate to accept the wider view of the construction of Ord. XVI., rule 1, taken by the M.R. I am not prepared to say that this rule gives unlimited power to plaintiffs to join any number of causes of action, whether separate or distinct, against a single defendant. It is to be observed that the rule is framed in a peculiar manner. It says: "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist," and I feel a difficulty in assuming that these words mean the same thing as if the rule had said "in whom any right to any relief is alleged

to exist." for I think so startling an alteration in the law would have been expressed in more apt words. I therefore do not wish to lay down that the rule goes to that extent. I am bound by *Booth v. Briscoe*, so far as it goes, but I do not think it goes to that extent. *Booth v. Briscoe* only decides that the action there could be justified within the rule. It was an action for a single libel brought by eight trustees of a charity, who were libelled in their conduct as such trustees, and all *Booth v. Briscoe* really decides is that the mere fact that each plaintiff who joined in the action might have brought a separate action, is not sufficient reason to prevent the plaintiffs joining in one action. I have not had the opportunity, nor the time, in the course of this argument, to consider all the different circumstances that might arise if there was an unlimited power in any number of plaintiffs, however separate and distinct their causes of action, to join themselves in a single writ, provided the defendant is the same, and throw upon the defendant the burden of striking the plaintiffs out. Therefore I do not feel sure that *Booth v. Briscoe* decides so much as my learned brother thinks that it decides. Here it is sufficient to say that I think, in the first place, the parties have treated the matter in a way which renders it impossible for the defendant now to contend that the plaintiffs were not properly suing under Order XVI. r. 1: and in the second place, the action, being one in which a single act is alleged to have damaged both the reversioner and the tenant in possession, may possibly fall within the precedent of *Booth v. Briscoe*.—p. 545.

ESTIER, M.R. also discussed and approved *Booth v. Briscoe*.

Booth v. Briscoe, distinguished.

Arnison v. Smith (No. 1) (1889) 58 L. J. Ch. 335; 40 Ch. D. 567; 60 L. T. 206; 37 W. R. 405.—C.A.

Booth v. Briscoe, discussed.

Sandes v. Wildsmith (1893) 62 L. J. Q. B. 404; [1893] 1 Q. B. 771; 69 L. T. 387.

WILLS, J.—I do not think the present case [in which one action was brought by two plaintiffs for distinct slanders] is covered by authority, for in *Gort (Viscount) v. Rowney* (*supra*), Esher, M.R. and Bowen, L.J. disagreed as to the effect of the decision in *Booth v. Briscoe*, and the question is therefore an open one. In *Booth v. Briscoe* eight co-trustees brought an action as plaintiffs for a single libel reflecting on them all, and the Court held that they were all rightly joined as plaintiffs; but that is not the same case as the present.—p. 405. LAWRENCE, J. concurred.

Booth v. Briscoe, discussed.

Hannay v. Smurthwaite (1893) 63 L. J. Q. B. 41; [1893] 2 Q. B. 412.—C.A.; BOWEN, L.J. dissenting. See the judgments at length.

Booth v. Briscoe, distinguished.

Smurthwaite v. Hannay & Co. (1894) 63 L. J. Q. B. 737; [1894] A. C. 494.—H.L. (E.) (*post*, col. 2294).

Booth v. Briscoe, doubted.

Carter v. Rigby & Co. (1896) 65 L. J. Q. B. 537; [1896] 2 Q. B. 113; 74 L. T. 744; 44 W. R. 566; 60 J. P. 581.—C.A.

Booth v. Briscoe, explained.

Peddie v. Kyle (1899) [1900] 2 Ir. R. 265.—Q.B.D.

Hannay v. Smurthwaite (1893) 63 L. J. Q. B. 41; [1893] 2 Q. B. 412; 4 R. 589; 69 L. T. 677; 42 W. R. 133; 7 Asp. M. C. 380.—C.A. ESHER, M.R. and KAY, L.J.; BOWEN, L.J. dissenting; reversed, *nom. Smurthwaite v. Hannay* (1894) 63 L. J. Q. B. 737; [1894] A. C. 494; 6 R. 299; 71 L. T. 157; 43 W. R. 113; 7 Asp. M. C. 485.—H.L. (E.).

Smurthwaite v. Hannay, followed.

Peninsular and Oriental Steam Navigation Co. v. Tsune Kijima (1895) 64 L. J. P. C. 146; [1895] A. C. 661; 11 R. 508; 73 L. T. 37; 8 Asp. M. C. 23.—P.C.

Smurthwaite v. Hannay, explained.

Sadler v. G. W. Ry. (1895) 65 L. J. Q. B. 26; [1895] 2 Q. B. 688; 73 L. T. 385; 44 W. R. 50.—C.A.; A. L. SMITH, L.J.; RIGBY, L.J. dissenting.—C.A. affirmed; (1896) 65 L. J. Q. B. 462; [1896] A. C. 450; 74 L. T. 561; 45 W. R. 51.—H.L. (E.).

A. L. SMITH, L.J.—As I read *Smurthwaite v. Hannay*, the question of the joinder of two plaintiffs equally applies to joinder of two defendants: and I agree with what Mr. Littleton said that *Smurthwaite v. Hannay* has decided that Ord. XVI. has relation to the joinder of parties and not to the joinder of causes of action. I differ from my brother Rigby in this case because he thinks that there is a joint cause of action against the two.—p. 27.

Smurthwaite v. Hannay, referred to.

Hunt v. Worsfold (1896) 65 L. J. Ch. 548; [1896] 2 Ch. 224; 74 L. T. 456; 44 W. R. 461.—NORTH, J.

Smurthwaite v. Hannay, distinguished.

The Maréchal Suchet (1896) 65 L. J. Adm. 94; [1896] P. 233; 74 L. T. 789; 45 W. R. 141; 8 Asp. M. C. 158.

BARNES, J. held that the practice which existed in the Admiralty Court before the Judicature Acts, permitting several plaintiffs to sue collectively, has not been affected by the Judicature Acts or the rules thereunder, and distinguished the above case on the ground that it had no application to Admiralty practice.

Smurthwaite v. Hannay, discussed and applied.

Carter v. Rigby & Co. (1896) 65 L. J. Q. B. 537; [1896] 2 Q. B. 113; 74 L. T. 744; 44 W. R. 566.—RUSSELL, C.J. and WRIGHT, J.; and C.A. See *post*, col. 2297.

Smurthwaite v. Hannay, discussed and explained.

Bennetts v. McIlwraith (1896) 65 L. J. Q. B. 632; [1896] 2 Q. B. 464; 75 L. T. 145; 45 W. R. 17; 8 Asp. M. C. 176.—C.A. A. L. SMITH and RIGBY, L.JJ.

Smurthwaite v. Hannay.

Referred to, Gower v. Couldridge (1898) 67 L. J. Q. B. 251; [1898] 1 Q. B. 348; 77 L. T. 707; 46 W. R. 214.—C.A. CHITTY and COLLINS, L.JJ.; discussed, *Stroud v. Lawson* (1898) 67

L. J. Q. B. 718; [1898] 2 Q. B. 44; 78 L. T. 729; 46 W. R. 626.—C.A. A. L. SMITH, CHITTY and V. WILLIAMS, L.J.; *referred to*, Dringbier v. Wood (1898) 68 L. J. Ch. 181; [1899] 1 Ch. 393; 79 L. T. 518; 47 W. R. 252; 6 Manson 76.—BYRNE, J. (*see post*, col. 2298); *discussed*, Oxford and Cambridge Universities v. Gill & Sons (1898) 68 L. J. Ch. 34; [1899] 1 Ch. 55; 79 L. T. 338.—STIRLING, J.: Thompson v. London County Council (1899) 68 L. J. Q. B. 625; [1899] 1 Q. B. 849; 80 L. T. 512; 47 W. R. 433.—C.A. (*see post*, col. 2300); *referred to*, Dawson v. Mc'Clelland [1899] 2 Ir. R. 486.—Q.B.D. and C.A.: *explained*, Peddie v. Kyle (1899) [1900] 2 Ir. R. 265.—Q.B.D.

Smurthwaite v. Hannay, referred to.

Subramania (N. A.) Tyrer v. King-Emperor (1901) L. R. 28 Ind. App. 257; 17 Times L. R. 736.—P.C.

Smurthwaite v. Hannay, distinguished.

The Assunta [1902] P. 150; 71 L. J. P. 75; 86 L. T. 660; 50 W. R. 544.

JEUNE, P.—This is a very different case from that of *Smurthwaite v. Hannay*. There persons were suing together who could not so sue. There was a very material matter involved, and there was much more than a mere irregularity; but having regard to the Admiralty practice in this Court, which, I think, is not abrogated, and having regard to the indorsement on the writ, I am of opinion that in the Admiralty Court, where the only mistake made is that of not putting on the face of the writ what has been put on the back, and what if put on the face of the writ would have made it good, there is a mere irregularity.—p. 155.

Smurthwaite v. Hannay, distinguished.

O'Keefe v. Walsh [1903] 2 Ir. R. 681, 705.—K.B.D.; affirmed C.A.

Cowper v. Clerk (1732) 3 P. Wms. 155.—L.C., *discussed*.

Fraser v. Mason (1883) 52 L. J. Q. B. 643; 11 Q. B. D. 574; 19 L. T. 761; 32 W. R. 421.—C.A. LINDLEY and FRY, L.JJ.

Jones v. Garcia del Rio (1823) T. & R. 297; 24 R. R. 64.—L.C.

Discussed, Beeching v. Lloyd (1855) 24 L. J. Ch. 679; 3 Drew. 227; 3 Eq. R. 737; 3 W. R. 364.—KINDERSLEY, V.-C.: *explained*, Turner v. Moy (1875) 32 L. T. 56.—BACON, V.-C.

Jones v. Garcia del Rio and Beeching v. Lloyd, discussed.

Ellis v. Bedford (Duke) (1899) 68 L. J. Ch. 289; [1899] 1 Ch. 494; 80 L. T. 332; 47 W. R. 385.—C.A.; affirmed *nom.* Bedford (Duke) v. Ellis (*post*).

LINDLEY, M.R.—The decision of Lord Eldon in *Weale v. West Middlesex Waterworks Co.* (1820) 1 J. & W. 358; 21 R. R. 183) was, I should have thought, extremely easy. In the first place, it was not a bill by one on behalf of himself and others. That was carefully avoided, and the real object of the suit was to compel the Court of Chancery to settle the price to be paid for water. The judgment is of considerable importance, because it is an extremely instructive one, and Lord Eldon refers to all sorts of cases in which a bill by one on behalf of himself and others would not lie, and the most important of all is that which counsel for the defendant relied on. My answer to that case

is this, that we have advanced a long way since Lord Eldon's time in suits of this description, and suits have been maintained by one on behalf of himself and others which perhaps Lord Eldon would not have sanctioned. Above all, now you can have under the Judicature Acts actions to declare rights, which is an innovation of a very important kind. . . . Counsel for the defendant referred to another case of Lord Eldon's, of *Jones v. Garcia del Rio*, which was to the effect that persons who had lost their money in subscribing to the Peruvian Loan could not sue on behalf of themselves and others. But that has been reconsidered and to a certain extent modified in modern times in *Beeching v. Lloyd*. . . . Whether that is an advance on Lord Eldon's doctrine or not, I do not know. The circumstances were different, because there the ground for rescission of the contract was a fraudulent prospectus. I understand that case as warranting an action by one on behalf of himself and others who have been defrauded by the prospectus to get the money back. Now the principle on which the old Courts of equity allowed suits by some on behalf of themselves and others was very much discussed in *Warrick v. Queen's College, Oxford* (*post*), in which there is a most instructive judgment on this point. That was a bill filed by two or three freeholders of a manor claiming common. There was a very great deal of litigation about the frame of the suit, and in point of fact a great deal depended on it, and Lord Hatherley held that an action in that form would lie, although each freeholder could sue on his separate prescriptive right.—p. 293.

RIGBY, L.J. to the same effect.

V. WILLIAMS, L.J. agreed as to the law, but dissented from the judgment.

Warrick v. Queen's College, Oxford (1871)

40 L. J. Ch. 780; L. R. 6 Ch. 716; 25 L. T. 254; 19 W. R. 1098.—HATHERLEY, L.C., *referred to*.

Betts v. Thompson (1871) L. R. 6 Ch. 732, 736; 25 L. T. 363; 19 W. R. 1100.—HATHERLEY, L.C.; Att.-Gen. v. Barker (1872) 41 L. J. Ex. 57; L. R. 7 Ex. 177, 182; 26 L. T. 34; 20 W. R. 539.—EX.

Warrick v. Queen's College, Oxford.

Discussed De la Warr (Earl) v. Miles (1881) 50 L. J. Ch. 754; 17 Ch. D. 535, 571; 44 L. T. 487; 29 W. R. 809.—BACON, V.-C.: reversed on one point, C.A.; Ellis v. Bedford (Duke) (1899) 68 L. J. Ch. 289; [1899] 1 Ch. 494.—C.A. *See supra*.

Warrick v. Queen's College, Oxford, distinguished.

Bedford (Duke) v. Ellis (1900) 70 L. J. Ch. 102; [1901] A. C. 1, 9; 83 L. T. 686.—H.L. (E.). LORD MACNAGHTEN.—In *Warrick v. Queen's College, Oxford*, the question was whether persons with titles diverse in origin, and rights in some respects distinct, could be combined as plaintiffs in a suit to redress a grievance common to all. No such question can arise here. All growers have the same rights. They all rely on one and the same Act of Parliament as their common charter.—p. 105.

Ellis v. Bedford (Duke) W. N. (1898) 169.—

ROMER, J., *reversed*; (1899) 68 L. J. Ch. 289; [1899] 1 Ch. 494; 80 L. T. 332; 47 W. R. 385.—C.A.; latter decision *affirmed nom.* Bedford.

(Duke) v. Ellis (1900) 70 L. J. Ch. 102; [1901] A. C. 1; 83 L. T. 686.—H.L. (E.).

Bedford (Duke) v. Ellis, referred to.

Taff Vale Ry. v. Amalgamated Society of Railway Servants (1901) 70 L. J. K. B. 905, 913; [1901] A. C. 426, 439; 85 L. T. 147; 50 W. R. 44; 65 J. P. 596.—H.L. (E.): West v. Sackville (Lord) (1903) 72 L. J. Ch. 649; [1903] 2 Ch. 378, 392; 88 L. T. 814; 51 W. R. 625.—C.A.

Peninsular & Oriental Steam Navigation Co.

v. Tsune Kijima (1895) 64 L. J. P. C. 146;

[1895] A. C. 661; 11 R. 508; 73 L. T.

37; 8 Asp. M. C. 23.—P.C., referred to.

Carter v. Rigby & Co. (1896) 65 L. J. Q. B. 537; [1896] 2 Q. B. 113; 74 L. T. 744; 44 W. R. 566.—C.A.

A. L. SMITH, L.J.—That [*Smurthwaite v. Hannay* (*supra*, col. 2294)] was an action brought by a number of holders of bills of lading against shipowners, claiming damages for the non-delivery of the goods specified in their bills of lading. I read that decision as applying both to actions in contract and in tort; but if there is any doubt as to this, it is only necessary to refer to *Peninsular & Oriental Steam Navigation Co. v. Tsune Kijima* in the P. C., which was a suit under Lord Campbell's Act, in which numerous plaintiffs sought to recover separate damages as due to each plaintiff or group of plaintiffs for injuries resulting from a collision at sea. In that case it was held that there was no authority to warrant the joinder in one suit of different and distinct causes of action not being causes of action by and against the same parties.—p. 542.

Peninsular & Oriental Steam Navigation

Co. v. Tsune Kijima, referred to.

Carter v. Rigby & Co., discussed.

Stroud v. Lawson (1898) 67 L. J. Q. B. 718; [1898] 2 Q. B. 44; 78 L. T. 729; 46 W. R. 626.—C.A. A. L. SMITH, CHITTY and V. WILLIAMS, L.JJ.

Colson v. Selby (1796) 1 Esp. 452, *overruled*.

Hill v. White (1839) 6 Bing. N. C. 26; 9 L. J. C. P. 5; 8 Scott 249; 8 D. P. C. 13.

TINDAL, C.J.—It may be difficult to reconcile *Colson v. Selby* with our present decision; but if it be not reconcilable, I cannot agree with what is laid down in that case. It stands by itself a *vis à vis* decision; and though a motion was made to set aside the nonsuit, the matter was not much considered, for a rule was refused.—p. 32.

Pare v. Clegg (1861) 30 L. J. Ch. 742; 29

Beav. 589; 7 Jur. (N.S.) 1136; 4 L. T.

669; 9 W. R. 795.—M.R., applied.

Smith v. Cork & Bandon Ry. (1870) Ir. R. 5 Eq. 65.—C.A.

Sykes v. Scholfield (1884) 28 Sol. J. 477.

—GROVE, J. and HUDDLESTON, B.,
discussed and approved.

Massey v. Heynes (1888) 59 L. T. 470.—WILLS and GRANTHAM, JJ.: *affirmed*, 57 L. J. Q. B. 521; 21 Q. B. D. 330; 36 W. R. 834.—C.A.

Stroud v. Lawson (1898) 67 L. J. Q. B. 718;

[1898] 2 Q. B. 44; 78 L. T. 729; 46 W. R.

626.—C.A. A. L. SMITH, CHITTY and V. WILLIAMS, L.JJ., *considered*.

Oxford and Cambridge Universities v. Gill (1898) 68 L. J. Ch. 34; [1899] 1 Ch. 55; 79 L. T. 338.

STIRLING, J.—According to the interpretations put on the rule [Ord. XVI. r. 1] by the C. A. [*Stroud v. Lawson*],—and, indeed, it seems to me plain on the face of the rule itself—there are two conditions to be satisfied: First, that the right of relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction; and, secondly, that there should be a common question of fact or law.—p. 37.

Stroud v. Lawson, explained and applied.

Drineqbler v. Wood (1898) 68 L. J. Ch. 181; [1899] 1 Ch. 393; 79 L. T. 548; 47 W. R. 252; 6 Manson 76.

BYRNE, J.—Prior to this order [Ord. XVI. r. 1] being made there had been certain decisions, notably *Smurthwaite v. Hannay* (*supra*, col. 2294), in which it had been held that the old Ord. XVI. r. 1, dealt merely with the parties to an action, and had no reference to joinder of several causes of action; and that where the causes of action of several plaintiffs were separate and distinct, the same could not be joined in one action. Since the new order has come into operation one case has been decided by the C. A.—namely, *Stroud v. Lawson*—which assists in interpreting this rule. In that case the plaintiff commenced an action claiming damages from the directors of a company for inducing him by fraud to purchase shares in the company. In the same action he sought relief, suing as a representative plaintiff, not on the ground of fraud, but on the ground that the payment of dividends out of capital was *ultra vires* and illegal. It was held that it did not come within Ord. XVI. r. 1, because it could not be said that the right to relief arose out of the same transaction or series of transactions.—p. 181.

Stroud v. Lawson, applied.

Walters v. Green (1899) 68 L. J. Ch. 730; [1899] 2 Ch. 696; 81 L. T. 151; 48 W. R. 23; 63 J. P. 742.—STIRLING, J.

Walsham v. Stainton, 32 L. J. Ch. 557;

1 H. & M. 322; 8 L. T. 633; 11 W. R. 771.
—WOOD, V.-C.: *reversed* (1863) 33 L. J. Ch. 68; 1 De G. J. & S. 678; 3 N. R. 56; 9 Jur. (N.S.) 1261; 9 L. T. 357; 12 W. R. 63.—KNIGHT BRUCE and TURNER, L.JJ.

Walsham v. Stainton, explained.

Peck v. Gurney (1873) 43 L. J. Ch. 19; L. R. 6 H. L. 377; 22 W. R. 29.—H.L. (E.). LORDS CHELMSFORD, COLONSAY and CAIRNS. See address of Lord Chelmsford.

Burstall v. Beyfus (1884) 53 L. J. Ch. 565;

26 Ch. D. 35; 50 L. T. 542; 32 W. R. 418.
—C.A. SELBORNE, L.C. and COTTON, L.J.,
referred to.

Amos v. Herne Bay Pavilion Promenade and Pier Co. (1886) 54 L. T. 264.—KAY, J.

Burstall v. Beyfus, discussed.

Hannay & Co. v. Smurthwaite (1893) 63 L. J. Q. B. 41; [1893] 2 Q. B. 412; 7 Asp. M. C. 380.—C.A. ESHER, M.R. and KAY, L.J.; BOWEN, L.J.

dissenting (see judgment of latter); C.A. reversed.
—H.L. See *supra*, col. 2294.

Att.-Gen. v. Poole Corporation (1888) 8 L. J. Ch. 27; 4 Myl. & Cr. 17; 2 Jur. 934. 1080.—COTTENHAM, L.C.: *varying* (1837) 2 Keen 190.—LANGDALE, M.R.: *affirmed nom.*
Parr v. Att.-Gen. (1842) 8 Cl. & F. 409; 6 Jur. 245.—H.L. (E.).

Parr v. Att.-Gen., *observations applied.*
Inman v. Wearing (1850) 2 De G. & Sm. 729.
—KNIGHT BRUCE, V.-C.

Att.-Gen. v. Poole Corporation and Pyle v. Price (1802) 6 Ves. 779.—L.C. *observed on.*
Pratt v. Keith (1864) 33 L. J. Ch. 528; 3 N. R. 406; 10 Jur. (N.S.) 805; 10 L. T. 15; 12 W. R. 394.

KINDERSLEY, V.-C.—But for *Att.-Gen. v. Poole Corporation* there could have been no doubt that there should have been a description of the parties. When that case is looked at it is not an expression of opinion, even as a *dictum*; and when Lord Eldon's language is referred to, he evidently appears to have scarcely doubted that there must be some sort of description.—p. 530.

Honduras Inter-Oceanic Ry. v. Lefevre and Tucker (1877) 46 L. J. Ex. 391; 2 Ex. D. 301; 36 L. T. 46; 25 W. R. 310.—C.A., *followed.*

Child v. Stenning (1877) 46 L. J. Ch. 523; 5 Ch. D. 695; 36 L. T. 426; 25 W. R. 519.—C.A.

Honduras Inter-Oceanic Ry. v. Lefevre and Tucker, *held not overruled.*

Bennetts v. Mellwraith (1896) 65 L. J. Q. B. 632; [1896] 2 Q. B. 464; 75 L. T. 145; 45 W. R. 17; 8 Asp. M. C. 176.—C.A. A. L. SMITH and RIGBY, L.JJ.

Honduras Inter-Oceanic Ry. v. Lefevre and Tucker, *applied.*

Sanderson v. Blyth Theatre Co. (1903) 72 L. J. K. B. 761; [1903] 2 K. B. 533, 538; 89 L. T. 159; 52 W. R. 33.—C.A.

Mathias v. Yetts (1882) 46 L. T. 497.—C.A., *referred to.*

Att.-Gen. v. Bermondsey Vestry (1883) 52 L. J. Ch. 567; 23 Ch. D. 60, 67; 48 L. T. 445; 31 W. R. 463; 47 J. P. 453.—C.A.

Sadler v. G. W. Ry. (1896) 65 L. J. Q. B. 26, 462; [1896] A. C. 450; 74 L. T. 561; 45 W. R. 51.—H.L. (E.): *affirming* [1895] 2 Q. B. 688; 14 R. 774; 60 J. P. 37.—C.A. A. L. SMITH, L.J.; RIGBY, L.J. *dissenting*; which *affirmed* DAY, J., *applied.*

Gower v. Couldridge (1898) 67 L. J. Q. B. 251; [1898] 1 Q. B. 348; 77 L. T. 707; 46 W. R. 214.—C.A. CHITTY and COLLINS, L.JJ.; **Thompson v. London County Council** (1899) 68 L. J. Q. B. 625; [1899] 1 Q. B. 840.—C.A. See col. 2300.

Sadler v. G. W. Ry., *discussed.*
Dawson v. McClelland [1899] 2 Ir. R. 486.—C.A.

Sadler v. G. W. Ry., *distinguished.*
Walters v. Green [1899] 2 Ch. 696; 68 L. J. Ch. 780; 81 L. T. 151; 48 W. R. 23; 63 J. P. 742.

STIRLING, J.—Therefore, what is alleged is a joint cause of action. In my judgment this case is distinguishable from *Sadler v. G. W. Ry.*, which was relied on on this point. The decision there was that claims for damages against two

or more defendants in respect of their several liability for separate torts could not be combined in one action. The present case is not one of suing several defendants on account of several liability for several torts, but jointly in respect of their joint acts.—p. 701.

Sadler v. G. W. Ry., *applied.*

Pope v. Hawtrey (1901) 85 L. T. 263.—C.A.

Sadler v. G. W. Ry., *distinguished.*

O'Keefe v. Walsh [1903] 2 Ir. R. 681, 705.—K.B.D.: *affirmed* C.A.

Vallance v. Birmingham and Midland Land Corporation (1876) 2 Ch. D. 369; 24 W. R. 454.—MALINS, V.-C., *referred to.*

Sheehan v. G. E. Ry. (1880) 50 L. J. Ch. 68; 16 Ch. D. 59, 65; 43 L. T. 432; 29 W. R. 69.—MALINS, V.-C.

Bennetts v. Mellwraith (1896) 65 L. J. Q. B. 632; [1896] 2 Q. B. 464; 75 L. T. 145; 45 W. R. 17; 8 Asp. M. C. 176.—C.A. A. L. SMITH and RIGBY, L.JJ., *explained.*

Thompson v. London County Council (1899) 68 L. J. Q. B. 625; [1899] 1 Q. B. 840; 80 L. T. 512; 47 W. R. 433.—C.A.; reversing **BINGHAM, J.** A. L. SMITH, L.J., after discussing *Sadler v. G. W. Ry.* (*supra*, col. 2299), said: We are bound by that decision, and, speaking for myself, I cordially agree with it. It seems to me impossible, in the face of that decision, to work Ord. XVI. r. 7 in the way the plaintiffs seek. It is said that we took a different view from this in *Bennetts v. Mellwraith*. I do not think that that is so. There I said that the redress was sought against two persons, "but the right to it arose out of one common transaction." The two were not as here, independent tort-feasors. That case, therefore, does not conflict with our decision in the present case.—p. 627.

COLLINS, L.J.—It was I who at chambers struck out the defendants in *Smurthwaite v. Hannay* (*supra*, col. 2294) and allowed the defendant to be added in *Bennetts v. Mellwraith*. I wish to point out that, in the view I take, the orders I made in those two cases are quite consistent. *Bennetts v. Mellwraith*, in my judgment, does not in the least conflict with the principle we are applying in the present case. In *Bennetts v. Mellwraith* there was one contract only, and one breach only of that one contract. The difficulty was, which of two persons broke it? If the person who purported to act as agent for another had authority to make the contract, then it was broken by that other person, his principal. If, however, he had not authority, then the truth of the matter is it was broken by himself. But whichever of the two was liable, there was only one contract and one breach.—p. 628.

Bennetts v. Mellwraith.

Referred to. **O'Keefe v. Walsh** [1903] 2 Ir. R. 681, 718.—K.B.D. (*affirmed*, C.A.); *applied*, **Sanderson v. Blyth Theatre Co.** (*supra*, col. 2299).

Gower v. Couldridge (1898) 67 L. J. Q. B. 251; [1898] 1 Q. B. 348; 77 L. T. 707; 46 W. R. 214.—C.A.; and **Thompson v. London County Council**, *distinguished.*

Frankenburg v. Great Horseless Carriage Co. (1899) 69 L. J. Q. B. 147; [1900] 1 Q. B. 504; 81 L. T. 634; 7 Manson 347.—C.A.; reversing **CHANNELL, J.**

LINDLEY, M.R.—The learned judge has, in my

opinion, misapplied *Gower v. Couldridge*. I do not quarrel with that decision. It is perfectly intelligible. In that case there were separate liabilities in respect of two distinct and separate torts. There was a conspiracy between two people, and then the issue of an improper prospectus by them and another; and it was held that the claims for damages in respect of those two things could not be joined. The issue of the prospectus was not the common ground of action against all the defendants. I do not say that the prospectus had nothing to do with it, but there were distinct and separate causes of action in the narrow sense alleged there. In this case, I repeat, in the wide sense, the whole case turns upon the prospectus, and there is nothing more than a complaint against a number of persons who are said to have done the plaintiff one wrong by issuing a prospectus which they had no right in point of law to issue.—p. 149.

ROGER, J.—As regards . . . *Gower v. Couldridge* . . . it is merely a case illustrating the principle that if there is a cause of action against A. and B. for a tort X., and quite a separate cause of action against B. for a tort Y., claims cannot be brought in one action in respect of both torts. X. and Y., against A. and B. As regards *Thompson v. London County Council*, that only illustrates another principle which has no application to the case before us. If you have suffered a wrong, and it may be that A. is the person who has committed the act that caused it, and if he did he is liable, but it is not certain that it was not B. who committed it, and if it was B. he would be liable, and A. and B. are strangers to one another in the matter, you cannot, because you cannot ascertain whether A. or B. was the person committing the wrong, bring the action for damages against A. and B. jointly.—p. 150.

Gower v. Couldridge.

Referred to, Dawson v. McClelland [1899] 2 Ir. R. 486.—Q.B.D. (affirmed C.A.); *not applied*, Kent Coal Exploration Co. v. Martin (1900) 16 Times L. R. 486.—C.A.; *applied*, Pope v. Hawtreay (1901) 85 L. T. 263.—C.A.

Gower v. Couldridge, Frankenburg v. Great Horseless Carriage Co. (supra), Dawson v. McClelland and Kent Coal Exploration Co. v. Martin, distinguished.

O'Keefe v. Walsh [1903] 2 Ir. R. 681, 705.—K.B.D.; affirmed C.A.

Walcott v. Lyons (1885) 54 L. J. Ch. 847; 29 Ch. D. 584; 52 L. T. 399.—C.A.; reversing BACON, V.-C., distinguished.

Ayscough v. Bullar (1889) 58 L. J. Ch. 474; 41 Ch. D. 341; 60 L. T. 471; 37 W. R. 529.—C.A. COTTON and LINDLEY, L.JJ.

Walcott v. Lyons and New Westminster Brewery v. Hannah. W. N. (1876) p. 215.—HALL, V.-C.; affirmed, W. N. (1877) 35.—C.A., distinguished.

Showell v. Winkup (1889) 60 L. T. 389.—KEKEWICH, J.

Walcott v. Lyons, approved, but report commented on.

Carswell v. Hyland (1887) 3 Times L. R. 708.—C.A. ESHER, M.R. and LINDLEY, L.J.

[ESHER, M.R., said *Walcott v. Lyons* was rightly decided, but the headline to that case was too

wide, and did not properly express the decision in that case.]

Walcott v. Lyons and Long v. Crossley (1879) 49 L. J. Ch. 168; 13 Ch. D. 388; 41 L. T. 793; 28 W. R. 226.—FRY, J., discussed.

The Duke of Buccleuch [1892] P. 201; 61 L. J. P. 57; 67 L. T. 739; 40 W. R. 455; 7 Asp. M. C. 294; affirmed, with a variation.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

JETNE, P.—It will be observed in that case [*Walcott v. Lyons*] that the C. A. would apparently have allowed the substitution if the terms they imposed had been acceded to; and in *Long v. Crossley* a plaintiff with a right was clearly substituted for a plaintiff with none.—p. 207.

The Duke of Buccleuch and Carswell v. Hyland (supra, col. 2301), applied.

Hughes v. Pump House Hotel Co. (No. 2) (1902) 71 L. J. K. B. 803; [1902] 2 K. B. 485; 87 L. T. 359; 50 W. R. 677.—C.A.

COLLINS, M.R.—I need not refer to the authorities, except the last one, *The Duke of Buccleuch*, which is quite conclusive. In each of the cases the right asserted by the new plaintiff excluded the right claimed for the original plaintiff, and in one of them the element present in this case was also present—a decision adverse to the original plaintiff; nevertheless Sir G. Jessel made an order under rule 2 [Ord. XVI.] allowing new plaintiffs to be added. Adding and substituting are practically the same thing.—p. 804.

COZENS-HARDY, L.J.—It is said that Ord. XVI. r. 2 does not apply where the original plaintiff had no right of action at all. If authority were needed against that it will be found in *Carswell v. Hyland*, which is directly in point. In that case the heir-at-law had no right of action, and the administratrix of the trustee was allowed to be added as a co-plaintiff. It is said that that was a case of adding, and not of substituting a plaintiff, but the Court may either substitute or add a plaintiff in a proper case.—p. 804.

Duckett v. Gover (1877) 46 L. J. Ch. 407; 6 Ch. D. 82; 25 W. R. 554.—JESSEL, M.R., explained.

Mason v. Harris (1879) 48 L. J. Ch. 589; 11 Ch. D. 97; 40 L. T. 614; 27 W. R. 699.—C.A. (see "COMPANY," vol. i., col. 470); Harben v. Phillips (1882-3) 23 Ch. D. 14; 48 L. T. 384; 31 W. R. 173.—CHITTY, J. (order discharged on appeal.—C.A.).

Duckett v. Gover, discussed.

Tryon v. National Provident Institution (1886) 16 Q. B. D. 678; 55 L. J. Q. B. 236; 54 L. T. 167; 34 W. R. 398.—MATHEW and A. L. SMITH, JJ.

A. L. SMITH, J.—With regard to the cases cited, *Duckett v. Gover*, as explained in *Mason v. Harris* (supra), so far from being an authority in favour of the plaintiff, is an authority against him, because in the latter case the M.R. said that he never intended to decide in *Duckett v. Gover* that consent was not necessary, and that the consent of the party added in that case had been obtained. *Turquand v. Pearson* (post, col. 2303) is not really an authority on the point now in question, because the party sought to be added had neither consented, nor had he been offered an indemnity.—p. 680.

Duckett v. Gover and Ayscough v. Bullar (1889) 58 L. J. Ch. 474; 41 Ch. D. 341; 60 L. T. 471; 37 W. R. 520.—C.A. COTTON and LINDLEY, L.JJ., *reversing* NORTH, J., *principle applied*.

Hughes v. Pump House Hotel Co. (No. 2) [1902] 2 K. B. 485; 71 L. J. K. B. 803; 87 L. T. 359; 50 W. R. 677.—C.A.

COLLINS, M.R.—*Duckett v. Gover and Ayscough v. Bullar* are clear authorities on the point raised before us. In each case the right asserted by the new plaintiff excluded that of the original one. In those cases plaintiffs were added, but there can be no difference in principle whether a plaintiff is added or substituted, and both adding and substituting are specially mentioned in the rule [Ord. XVI. r. 2].—p. 487.

Mason v. Harris (*supra*, col. 2302), *referred to*.
Tryon v. National Provident Institution (1886) 16 Q. B. D. 678 (*supra*, col. 2302); **Hannay v. Muir** (1898) 1 Fraser 306.—CT. OF SESSION.

Tryon v. National Provident Institution (1886) 55 L. J. Q. B. 236; 16 Q. B. D. 678; 54 L. T. 167; 34 W. R. 398.—MATHEW and A. L. SMITH, JJ., *discussed*.

Besley v. Besley (1888) 37 Ch. D. 648; 57 L. J. Ch. 464; 58 L. T. 510; 36 W. R. 604. *

CHITTY, J.—It is said that the point now before me was not decided in *Tryon v. National Provident Institution*, because it does not appear from that case that the person proposed to be joined as co-plaintiff was a trustee for the persons who proposed to join him. I am not satisfied that that is a correct statement of the case. It appears to me, as well as I can make out the facts, though I am not clear on all the facts, that the person proposed to be joined did stand in the relation of trustee to the person who proposed to join him. If so, that would be an express decision on the point. But, however that may be, I decide this case as if it were new, on the express words of Ord. XVI. r. 11, which are sufficiently clear to enable me to dispense with authorities.—p. 650.

Turquand v. Fearon (1879) 48 L. J. Q. B. 341; 4 Q. B. D. 280; 40 L. T. 191; 27 W. R. 396.—MELLOR and FIELD, JJ., *not applied*.

Tryon v. National Provident Institution (1886) 16 Q. B. D. 678 (*supra*, col. 2302).

Reynoldson v. Perkins (1769) Amb. 563.—L.C., *discussed*.

Prees v. Coke (1871) L. R. 6 Ch. 645, 650.—L.C.

Fairclough v. Marshall (1878) 48 L. J. Ex. 146; 4 Ex. D. 37; 39 L. T. 389; 27 W. R. 145.—C.A., *applied*.

Bennett v. Hughes (1886) 2 Times L. R. 715.—DAY and WILLS, JJ.

Fairclough v. Marshall, *approved and applied*.

Van Gelder v. Sowerby Flour Co. (1890) 44 Ch. D. 374; 59 L. J. Ch. 583; 63 L. T. 132; 38 W. R. 625; 7 Rep. Pat. Cas. 208.—C.A.; *reversing* KEKEWICH, J.

COTTON, L.J.—There the plaintiff was not even in as beneficial a position as a mortgagor; but he was rightly treated as being in the same position as if he were the mortgagor, and the Court . . . held that he was entitled to bring his action without making the person in whom the legal estate was vested a co-plaintiff or bringing

him before the Court at all, because the defendant was violating the rights of the plaintiff, and the fact that those rights were to a certain extent vested in another person did not prevent the plaintiff from suing to prevent an infringement of those rights.—p. 390.

Wilson v. Church (1878) 9 Ch. D. 552; 39 L. T. 413; 26 W. R. 735.—JESSEL, M.R., *discussed and approved*.

Berkeley v. Standard Discount Co. (1878) 9 Ch. D. 643.—MALINS, V.-C.

Wilson v. Church, *referred to*.

Amos v. Herne Bay Pavilion Promenade and Pier Co. (1886) 54 L. T. 264.—KAY, J.; **Welsbach Incandescent Gas Light Co. v. New Sunlight Incandescent Co.** (1900) 69 L. J. Ch. 546; [1900] 2 Ch. 1; 83 L. T. 58; 48 W. R. 595; 17 Rep. Pat. Cas. 401.—C.A. WEBSTER, M.R., RIGBY and COLLINS, L.JJ.

Wilson v. Church and Dix v. G. W. Ry. (1886) 55 L. J. Ch. 797.—KAY, J., *explained and not applied*.

McHeame v. Gyles (No. 2) (1902) 71 L. J. Ch. 446; [1902] 1 Ch. 911; 86 L. T. 217; 50 W. R. 587.

BUCKLEY, J.—It is true that there is a class of cases in which a defendant can be added adversely to the wish of the plaintiff, as in *Wilson v. Church*, where the claim is made against a member of a class. In such circumstances, if a person, a member of the class, asks to be added as a defendant, saying he takes a different view from that which the plaintiff takes, though the plaintiff objects to his being added as a defendant, yet certainly he may be. . . . There [*Dix v. G. W. Ry.*] the plaintiff sued a railway company upon a covenant by which the defendant company had agreed with the plaintiff to make a road between certain points for the use of the plaintiff and two other covenantees, with whom the defendant company entered into separate and similar covenants. The plaintiff brought the action against the company for specific performance of the covenant and damages, without joining the other separate covenantees. The plaintiff was not the only person interested in the road, but the two other covenantees were also. Kay, J. accordingly held, under Ord. XVI. r. 11, that the two separate covenantees ought to be added as parties to the action, and made an order accordingly, though the plaintiff objected. . . . In *Dix v. G. W. Ry.* the Court could not effectually and completely adjudicate upon and settle all the questions involved, without the presence before the Court of the two other covenantees. It was a case of the same class as *Wilson v. Church*.—p. 448.

Berkeley v. Standard Discount Co. (1878) 9 Ch. D. 643.—MALINS, V.-C., *approved*.

Alexandra Palace Co., In re (1880) 50 L. J. Ch. 7; 16 Ch. D. 58; 43 L. T. 406; 29 W. R. 70.—MALINS, V.-C.

Werdermann v. Société Générale d'Electricité (1881) 19 Ch. D. 246; 45 L. T. 514; 30 W. R. 33.—C.A. JESSEL, M.R., LUSH and LINDLEY, L.JJ., *applied*.

Pilley v. Robinson (1887) 57 L. J. Q. B. 54; 20 Q. B. D. 155, 159; 58 L. T. 110; 36 W. R. 269.—STEPHEN and CHARLES, JJ. *And see* col. 2305.

Werdermann v. Société Générale d'Electricité (*supra*), *distinguished*.

Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co. (1900) 70 L. J. Ch. 128; [1901] 1 Ch. 196; 83 L. T. 667; 49 W. R. 265.—KEKEWICH, J.; affirmed, C.A., *post*.

Werdermann v. Société Générale d'Electricité, *discussed*.

Bagot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co. (1901) 71 L. J. Ch. 158; [1902] 1 Ch. 146; 85 L. T. 652; 50 W. R. 177; 9 Manson 56.—C.A.

Pilley v. Robinson (1887) 57 L. J. Q. B. 54; 20 Q. B. D. 155; 58 L. T. 110; 36 W. R. 269.—STEPHEN and CHARLES, JJ., *discussed*.

Byrne v. Brown (1889) 58 L. J. Q. B. 410; 22 Q. B. D. 657; 60 L. T. 651.—DENMAN and STEPHEN, JJ. (*see post*, col. 2306).

Pilley v. Robinson, *distinguished*.

Wilson, Sons & Co. v. Balcarres Brook Steamship Co. [1893] 1 Q. B. 422; 4 R. 286; 41 W. R. 486; 7 Asp. M. C. 321; S. C. *nom.* Wilson, Sons & Co. v. Killick. 62 L. J. Q. B. 245; 68 L. T. 312.—C.A. ESHER, M.R., BOWEN and A. L. SMITH, L.JJ.

Pilley v. Robinson, *explained*.

Wilson, Sons & Co. v. Balcarres Brook Steamship Co. or Killick, *discussed*.

Robinson v. Geisel [1894] 2 Q. B. 685; 64 L. J. Q. B. 52; 9 R. 555; 71 L. T. 70; 42 W. R. 609.—C.A.

ESHER, M.R.—It is said that *Pilley v. Robinson* laid down that where an action is brought against one only of several joint contractors, the defendant is entitled as of right to have his co-contractors joined as defendants; but if that case was not overruled in *Wilson, Sons & Co. v. Balcarres Brook Steamship Co.*, it was to some extent explained. The state of the law seems to me to be this: if the co-contractors are within the jurisdiction and can be found, they ought to be joined, not because it is obligatory on the plaintiff to join them, but because, if there is no reason to the contrary, all the co-contractors ought to be joined as defendants. If it were shown in this case that all might have been joined, it would be right to compel the plaintiff to take that course.—p. 607. KAY, L.J., concurred.

A. L. SMITH, L.J.—In *Pilley v. Robinson* the Divisional Court held that one co-contractor who is sued is entitled as of right to have his co-contractors joined as defendants. A similar point, though on different facts, came before this Court in *Wilson, Sons & Co. v. Balcarres Brook Steamship Co.*, in which it was held, that where one co-contractor is out of the jurisdiction, it is not necessary to the continuance of the action that he should be joined as a defendant. So far that case overruled the hard and fast line laid down in *Pilley v. Robinson*. The M.R. foresaw that such a case as that now before us might arise, and expressed the view that there might be circumstances under which the Court could refuse to insist on all the joint contractors being joined as defendants. That case has now arisen, and I agree with the view then expressed, and now confirmed by the M.R.—p. 689.

Edward v. Lowther (1876) 45 L. J. C. P. 417; 34 L. T. 255; 24 W. R. 434.—C.P.D.

Referred to, Heard v. Borgwardt, W. N. (1883), p. 173.—FIELD, J.; *approved*, Norris v. Beazley (1877) 46 L. J. C. P. 169; 2 C. P. D. 87 (*post*); *referred to*, Byrne v. Brown (1889) 58 L. J. Q. B. 410; 22 Q. B. D. 657; 60 L. T. 651.—DENMAN and STEPHEN, JJ. (*reversed*, C.A., *post*).

Norris v. Beazley (1877) 46 L. J. C. P. 169; 2 C. P. D. 80; 35 L. T. 845; 25 W. R. 200.—C.P.D., *discussed*.

Smith v. Richardson (1878) 48 L. J. C. P. 140; 4 C. P. D. 112; 40 L. T. 256; 27 W. R. 230.—C.P.D. *See judgment of DENMAN, J.*

Norris v. Beazley, *not applied*.

Byrne v. Brown (1889) 22 Q. B. D. 657; 58 L. J. Q. B. 410; 60 L. T. 651.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

ESHER, M.R.—The judges in the Court below thought themselves bound by *Norris v. Beazley*. I think that that case is not in point. All it shows is that the new defendants could not be brought in without the consent of the plaintiffs. I assume, for the purpose of deciding the present case, that the decision in *Norris v. Beazley* was correct, but it is not applicable here, because the plaintiffs do consent to the new defendants being added.—p. 667.

Norris v. Beazley, *commented on*.

Montgomery v. Foy Morgan & Co. (1895) 65 L. J. Q. B. 18; [1895] 2 Q. B. 321; 14 R. 575; 73 L. T. 12; 43 W. R. 691; 2 Asp. M. C. 36.—C.A. ESHER, M.R., A. L. SMITH and KAY, L.JJ.

Montgomery v. Foy Morgan & Co., *distinguished*.

McCheane v. Gyles (No. 2) (1902) 71 L. J. Ch. 446; [1902] 1 Ch. 911; 86 L. T. 217; 50 W. R. 387.

BUCKLEY, J. *discussed Montgomery v. Foy Morgan & Co.* and continued: That case is, in my opinion, no authority for the proposition that, if a plaintiff has a right of action against two persons jointly and severally, and chooses to sue only one of them, the other can be brought in as a defendant, merely because the party sued says it would be convenient to him that he should be.—p. 449.

Bawtree v. Great North-West Central Ry. (1898) 14 Times L. R. 448.—C.A., *applied*.

Duder v. Amsterdamsch Trustees Kantoor (1902) 71 L. J. Ch. 618; [1902] 2 Ch. 132; 87 L. T. 22; 50 W. R. 551.

BYRNE, J.—The important case of *Bawtree v. Great North-West Central Ry.* (which I am surprised to find reported only in the Times Law Reports) is, I think, in point, and I do not consider the suggested distinction between that case and the present—namely, that there the validity of a charge on land in Canada was *sub judice* in Canada, while in the present case it is admitted that there is no subsisting charge by Brazilian law on the land in Brazil—is sufficient to differentiate the cases. As I understand the evidence about the Brazilian law, the plaintiffs, if they can so far establish their claim in England upon the contract, hope to be able to complete their title in Brazil also; and I see no reason why they should be prevented from endeavouring so to complete it.—p. 623.

Munster v. Bailton (1883) 52 L. J. Q. B. 409; 11 Q. B. D. 435; 48 L. T. 624; 31 W. R. 880.—C.A. COTTON and BOWEN, L.J.; *reversing* 10 Q. B. D. 475.—V. WILLIAMS and MATHEW, J.: *affirmed nom.* **Munster v. Cox** (1885) 55 L. J. Q. B. 108; 10 App. Cas. 680; 53 L. T. 474; 34 W. R. 461.—H.L. (E.). SELBORNE, L.C., LORDS BLACKBURN and FITZGERALD.

Munster v. Cox, *referred to*.
The Duke of Buccleuch [1892] P. 201 (*post*).

Att.-Gen. v. Birmingham Corporation (1880) 15 Ch. D. 423; 43 L. T. 77; 29 W. R. 127.—C.A.; *reversing* BACON, V.-C., *applied*.
Heard v. Borgwardt, W. N. (1883) p. 173.—FIELD, J.

Att.-Gen. v. Birmingham Corporation and Heard v. Borgwardt, *referred to*.
The Duke of Buccleuch (1892) 61 L. J. P. 57; [1892] P. 201; 67 L. T. 739; 40 W. R. 455; 7 Asp. M. C. 294.—JEUNE, J.; *affirmed with a variation*, C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Keith v. Butcher (1884) 53 L. J. Ch. 640; 25 Ch. D. 750; 50 L. T. 203; 32 W. R. 378.—KAY, J., *referred to*.
The Duke of Buccleuch (*supra*).

Chaytor v. Trinity College, Cambridge (1796) 3 Anstr. 841.—EX., *discussed*.
Bedford (Duke) v. Ellis (1900) [1901] A. C. 1, 3.—H.L. (E.) (*post*).

Adair v. New River Co. (1805) 11 Ves. 429.—L.C.; and **Cockburn v. Thompson** (1809) 16 Ves. 321.—L.C., *discussed*.
Long v. Yonge (1830) 2 Sim. 369; 29 R. R. 118.—V.-C.

Adair v. New River Co. and Cockburn v. Thompson, *discussed*.
Bedford (Duke) v. Ellis (1900) 70 L. J. Ch. 102; [1901] A. C. 1, 10; 83 L. T. 686.—H.L. (E.). See address of LORD MACNAGHTEN.

Sewers Commissioners v. Gellatly (1876) 45 L. J. Ch. 788; 3 Ch. D. 610; 24 W. R. 346.—JESSEL, M.R., *referred to*.
McHenry v. Lewis (1882) 52 L. J. Ch. 16; 21 Ch. D. 202, 208; 46 L. T. 567.—CHITTY, J., *affirmed*.—C.A. (*see post*, col. 2308).

Sewers Commissioners v. Gellatly, *explained*.
Conybeare v. Lewis (1883) 48 L. T. 527.
CHITTY, J.—In *Sewers Commissioners v. Gellatly*. . . the point raised was this: What was the effect of a decree obtained in a representative suit? Jessel, M.R., said it is binding upon all persons who are represented, if the suit has been fairly conducted. But if there is fraud (he only puts that by way of illustration) the decree would not be binding; . . . and it would be perfectly competent to any person, who was alleged to be bound by a representative decree, to say that, in point of fact, or in point of law, by reason of something that had been done, he ought not to be held as being bound. That I take to be the clear meaning of Jessel, M.R., in that case.—p. 529.

Sewers Commissioners v. Gellatly, *referred to*.
Taff Vale Ry. v. Amalgamated Society of Ry. Servants (1901) 70 L. J. K. B. 905; [1901] A. C. 426, 443.—H.L. (E.) (*supra*, col. 2297).

Watson v. Cave (No. 1) (1881) 17 Ch. D. 19; 44 L. T. 90; 29 W. R. 433.—C.A., *referred to*.

McHenry v. Lewis (1882) 52 L. J. Ch. 16; 21 Ch. D. 202, 207; 46 L. T. 567.—CHITTY, J., *affirmed*, 52 L. J. Ch. 323; 22 Ch. D. 397; 47 L. T. 549; 31 W. R. 305.—C.A.

Watson v. Cave and Fraser v. Cooper, Hall & Co. (1882) 51 L. J. Ch. 575; 21 Ch. D. 718; 46 L. T. 371; 30 W. R. 654.—FRY, J., *referred to*.

May v. Newton (1887) 34 Ch. D. 347; 56 L. J. Ch. 313; 56 L. T. 140; 35 W. R. 363.

KAY, J.—After such an order [*i.e.* a representation order under Ord. XVI. r. 9] I conceive the absent parties would be bound as though they had been present throughout. The course to be taken by any one of the class who desires to intervene is by summons asking to be made a defendant in person. That has been decided in two cases, *Watson v. Cave* and *Fraser v. Cooper, Hall & Co.*—p. 349.

Collingham v. Sloper (1891) 64 L. J. Ch. 149; [1894] 3 Ch. 716; 12 R. 87; 71 L. T. 456.—C.A., *discussed*. See "COM-PROMISE," vol. i., col. 619.

Collingham v. Sloper (1901) 70 L. J. Ch. 361; [1901] 1 Ch. 769; 84 L. T. 289; 49 W. R. 404.—C.A. RIGBY and STIRLING, L.JJ., v. WILLIAMS, L.J., *dissenting*.

Chapman v. Day, 48 L. T. 907; 31 W. R. 767.—POLLOCK, B. and LOPES, J.; *reversed*, (1883) 49 L. T. 436.—C.A. BRETT, M.R. and BOWEN, L.J.

Chapman v. Day, *discussed*.
The Duke of Buccleuch (1892) 61 L. J. P. 57; [1892] P. 201; 67 L. T. 739; 40 W. R. 455; 7 Asp. M. C. 294.—JEUNE, J.; *affirmed with a variation*, C.A.

Morgan v. Ravey (1861) 30 L. J. Ex. 131; 6 H. & N. 265; 3 L. T. 784; 9 W. R. 376.—EX., *discussed*.

Baylis v. Lintott (1873) 42 L. J. C. P. 119; L. R. 8 C. P. 343, 348; 28 L. T. 666.—C.P. (*see* vol. i., col. 738); *Batthyany v. Walford* (1887) 56 L. J. Ch. 881; 36 Ch. D. 269, 280; 57 L. T. 206; 35 W. R. 814.—C.A. COTTON, BOWEN and FRY, L.JJ. See judgment of COTTON, L.J.

Kirk v. Todd (1882) 52 L. J. Ch. 224; 21 Ch. D. 484; 47 L. T. 676; 31 W. R. 69.—C.A., *discussed*.

Phillips v. Homfray (1883) 24 Ch. D. 439; 52 L. J. Ch. 833; 49 L. T. 5; 32 W. R. 6.—C.A.; BAGGALLAY, L.J., *dissenting*.

BOWEN, L.J. (for self and COTTON, L.J.).—*Kirk v. Todd* seems to us materially in point. There the owners of certain dye-works sued the original defendants for fouling and polluting a brook. It was held that the action would not survive against their executors. . . . In every case where one man fouls the flow of water to which another is entitled he probably saves himself expense by doing so. But the benefit to which the M.R. alludes appears to us to be some beneficial property, or value capable of being measured, followed, and recovered.—p. 463.

Kirk v. Todd, *referred to*.
Duncan, *In re*, Terry v. Sweeting (1899) 68

L. J. Ch. 253; [1899] 1 Ch. 387; 80 L. T. 322; 47 W. R. 379.

ROMER, J.—If the claimant was suing, or was entitled to sue, on the footing that the price paid for the shares was still the claimant's property, then I agree that the rule [*Actio personæ movetur cum personâ*] does not apply—See *Phillips v. Homfray* (*post*), where the limits of the rule are examined. On the other hand, if the claimant can only sue for unliquidated damages, then the rule applies—See *Kirk v. Todd*, where Sir G. Jessel, M.R. observes, "As I understand the rule at common law it was this—you could not sue executors for a wrong committed by their testator for which you could only recover unliquidated damages."—p. 254.

Phillips v. Homfray (1883) 52 L. J. Ch. 833; 24 Ch. D. 439; 49 L. T. 5; 32 W. R. 6.—C.A. BAGGALLAY, L.J. *dissenting*.

Referred to, *Concha v. Murrieta* (1889) 40 Ch. D. 543; 60 L. T. 798.—C.A.; *discussed*, *Phillips v. Homfray* (1890) 59 L. J. Ch. 694; 44 Ch. D. 699; 62 L. T. 897; 39 W. R. 45.—STIRLING, J.; and (1892) 61 L. J. Ch. 210; [1892] 1 Ch. 465; 66 L. T. 657.—C.A.; *The Duke of Buccleuch* (1892) 61 L. J. P. 57; [1892] P. 201; 67 L. T. 729; 40 W. R. 455; 7 Asp. M. C. 294.—JEUNE, P. (affirmed, C.A.); *considered*, *Duncan, In re, Terry v. Sweeting* (1899) 18 L. J. Ch. 253; [1899] 1 Ch. 387 (*supra*). *And see* "EXECUTORS AND ADMINISTRATORS," vol. i., col. 1113.

Lowe v. Watson (1852) 1 Sm. & G. 123.—v.-c.; and **Morritt v. Walton** (1854) 2 W. R. 544.—v.-c., *explained and not applied*.

Hills v. Springett (1868) L. R. 5 Eq. 123, 127, n.; 37 L. J. Ch. 290.—ROMILLY, M.R.

Dendy v. Dendy (1857) 5 W. R. 221.—v.-c.; and **Jackson v. Ward** (1859) 28 L. J. Ch. 515; 1 Giff. 30.—v.-c., *explained and not applied*.

Hills v. Springett (1868) L. R. 5 Eq. 123, 128; 37 L. J. Ch. 290.—M.R.

Ireland v. Champneys (1813) 4 Taunt. 884.—C.P., *questioned*; **Palmer v. Cohen** (1831) 2 B. & Ad. 966.—K.B., *followed*.

Kramer v. Waymark (1866) L. R. 1 Ex. 241; 35 L. J. Ex. 148; 4 H. & C. 427; 12 Jur. (N.S.) 395; 14 L. T. 368; 14 W. R. 659.

MARTIN, B.—I am unable to account for the construction put upon the statute of Charles (17 Car. 2, c. 8) in *Ireland v. Champneys*; but in *Palmer v. Cohen* the same point arose again, and the Court of K. B. decided, rightly as I think, that the words of that statute are express, and admit of no doubt.—p. 243.

BRAMWELL and **PIGOTT, BB.**, to the same effect on *Palmer v. Cohen*.

[In *Ireland v. Champneys* the action was for a libel, and the plaintiff died after interlocutory judgment. It was held that final judgment could not be entered, the suit having abated by his death, and not being maintainable by his representatives, as, according to 8 & 9 Will. 3, c. 11, s. 6, an action ought originally to be, if it is not to abate after the death of a party (*see* p. 243, n. 2)].

Morgan v. Scudamore (1794) 2 Ves. 313; (1796) 3 Ves. 195.—ELDON, L.C., *followed*.
Lowten v. Colchester Corporation (1817) 2

Meriv. 113; 16 R. R. 187.—GRANT, M.R., for the L.C.

Morgan v. Scudamore and Barry v. Stawell (1840) Fl. & K. 1; 3 Ir. Eq. R. 18, 146.—PLUNKET, L.C., *observed on*.

Bowyer v. Beamish (1845) 2 Jo. & Lat. 228; 8 Ir. Eq. R. 63.—SUGDEN, L.C.

Bowyer v. Beamish, *referred to*.

Malins v. Greenway (1849) 18 L. J. Ch. 154; 7 Hare, 391; 12 Jur. 319.—v.-c.

Jackson v. N. E. Ry. (1877) 46 L. J. Ch. 723; 5 Ch. D. 844; 36 L. T. 779; 25 W. R. 518.—C.A., *referred to*.

Eldridge v. Burgess (1878) 47 L. J. Ch. 342; 7 Ch. D. 411; 38 L. T. 232; 26 W. R. 435.—FRY, J.

Jackson v. N. E. Ry., *applied*.

Ward v. Saunders (1882) 10 Q. B. D. 114; 47 L. T. 475.—DENMAN and NORTH, JJ.

NORTH, J.—I think the case is governed by *Jackson v. N. E. Ry.*, for as I read the judgments of Jessel, M.R., James and Baggallay, L.J., they all agreed in the view which they took, and that was not restricted by Baggallay, L.J., stating, as a second reason for his conclusion, that the bankruptcy in that case took place before the Judicature Act came into operation, and before the new rules were in force. I quite agree with the M.R. that the bankrupt cannot continue the action as plaintiff.—p. 117.

Jackson v. N. E. Ry., *referred to*.

Farnham v. Milward & Co. (1895) 64 L. J. Ch. 816; [1895] 2 Ch. 730; 13 R. 810; 73 L. T. 434; 44 W. R. 135.—STIRLING, J.

Eldridge v. Burgess (1878) 47 L. J. Ch. 342; 7 Ch. D. 411; 38 L. T. 232; 26 W. R. 435.—FRY, J., *discussed*.

Barker v. Johnson (1889) 60 L. T. 64.—HUDDLESTON, B. and WILLS, J.

Bean v. Flower (1895) 73 L. T. 118.—KEKEWICH, J.; *reversed*, (1895) 73 L. T. 371.—C.A.

Lyon v. McKenna (1818) 2 Moll. 460.—v.-c.; and **Whitecomb v. Minchin** (1820) 5 Madd.

91.—v.-c., *discussed and principle applied*.
Cook v. Hathway (1869) L. R. 8 Eq. 612; 21 L. T. 484; 17 W. R. 1057.—MALINS, v.-c.

Poole v. Franks (1828) 1 Moll. 78.—L.C., *discussed and applied*.

Cook v. Hathway (*supra*).

Troward v. Bingham (1831) 4 Sim. 483.—v.-c., *discussed*.

Cook v. Hathway (*supra*).

Pickering v. Cape Town Ry. (1869) L. R. 7 Eq. 224.—JAMES, v.-c., *not followed*.

Price v. Richards (1869) 39 L. J. Ch. 118; L. R. 9 Eq. 35.—JAMES, v.-c.

Chorlton v. Dickie (1879) 49 L. J. Ch. 40; 13 Ch. D. 160; 41 L. T. 467; 28 W. R. 228.—FRY, J., *distinguished*.

Barter v. Dubeux (1881) 7 Q. B. D. 413; 50 L. J. Ch. 527; 44 L. T. 596; 29 W. R. 622.—C.A. **BRAMWELL, BRETT and COTTON, L.JJ.**

COTTON, L.J.—There were two defendants, and it was necessary to go on with the action against the solvent defendant.—p. 415.

Barter v. Dubaux, explained.
Hale v. Boustead (1881) 8 Q. B. D. 453; 51 L. J. Q. B. 255; 46 L. T. 533; 30 W. R. 677; 46 J. P. 342.

CAVE, J.—That case does not decide that no relief can be given in this Division, but only that the trustee under the circumstance of that case ought not to have been joined as a defendant under Ord. L. r. 2, because the only relief which could be given against him could be more properly given in the Court of Bankruptcy.—p. 456.

Capps v. Capps (1868) L. R. 4 Ch. 1.—L.C.
Followed, **Auster v. Haines** (1869) 38 L. J. Ch. 385; L. R. 4 Ch. 445; 17 W. R. 900.—**HATHERLEY, L.C.** (see S.C., 20 L. T. 152.—**STUART, V.-C.**): *distinguished*. **Grunwell v. Garner** (1869) 39 L. J. Ch. 77; L. R. 8 Eq. 355; 20 L. T. 693.—**JAMES, V.-C.**

Auster v. Haines, *distinguished*.
Egremont v. Thompson (1869) L. R. 4 Ch. 448; 17 W. R. 900.—**HATHERLEY, L.C.**

Capps v. Capps (*supra*) and **Auster v. Haines**, *applied*.
Grunwell v. Garner, *not followed*.
Scott v. Duncombe (1870) 39 L. J. Ch. 644; L. R. 9 Eq. 665; 22 L. T. 540.—**JAMES, V.-C.**

Auster v. Haines and Capps v. Capps.
Applied, **Powell v. Phillips** (1871) 24 L. T. 128.—**BACON, V.-C.**; *referred to*, **Peter v. Thomas-Peter** (1884) 53 L. J. Ch. 514; 26 Ch. D. 181; 50 L. T. 176; 32 W. R. 409, 515.—**CHITTY, J.**

Browne v. Huggins, W. N. (1875) 59.—**JESSEL, M.R.**; **Occleston v. Fullalove, W. N.** (1875) 92.—**HALL, V.-C.**; **Scruby v. Payne, W. N.** (1876) 227.—**HALL, V.-C.**; and **Haldane v. Eckford, W. N.** (1879) 80.—**JESSEL, M.R.**, *discussed*.
Peter v. Thomas-Peter (1884) 53 L. J. Ch. 514; 26 Ch. D. 181; 50 L. T. 176; 32 W. R. 409, 515.—**CHITTY, J.**

Haldane v. Eckford (1866) 14 L. T. 14; 14 W. R. 306, 328.—**WOOD, V.-C.**, *followed*.
Guthrie v. Walrond (1874) 30 L. T. 377; 22 W. R. 723.—**MALINS, V.-C.**

Egremont v. Thompson (1869) L. R. 4 Ch. 448; 17 W. R. 900.—**HATHERLEY, L.C.**, *approved and applied*.
Askew v. Rooth (1875) 44 L. J. Ch. 200; 31 L. T. 819.—**C.A.**

[Their lordships thought that the true principle was laid down in **Egremont v. Thompson**. The infant could not be bound by the proceedings taken in the suit after his birth, except by means of a supplemental bill.—p. 201.]

Peter v. Thomas-Peter (1884) 53 L. J. Ch. 514; 26 Ch. D. 181; 50 L. T. 176; 32 W. R. 405, 515.—**CHITTY, J.**, *followed*.
Somerset (Duke), *In re*, **Thyune v. St. Maur** (1887) 34 Ch. D. 465; 56 L. J. Ch. 733; 56 L. T. 145; 35 W. R. 273.

CHITTY, J.—The right course will be to remove the present guardian *ad litem* and refer it to chambers for an inquiry, as in **Peter v. Thomas-Peter**, and for the appointment of a new guardian *ad litem*.—p. 466.

Colyer v. Colyer (1866) 35 L. J. Ch. 757; L. R. 1 Ch. 482.—**L.J.**, *referred to*.
Hobson v. Shearwood (1867) 15 W. R. 887.—**M.R.**, *approved but distinguished*.
Hills v. Springett (1868) 37 L. J. Ch. 290; L. R. 5 Eq. 123.—**ROMILLY, M.R.**

Seeat v. Lawson, 43 L. T. 466; 29 W. R. 45.—**BACON, V.-C.**, *reversed*, (1880) 50 L. J. Ch. 139; 16 Ch. D. 121; 43 L. T. 716; 29 W. R. 103.—**C.A.**

Rudge v. Weedon (1859) 28 L. J. Ch. 889; 5 Jur. N. S. 380; 7 W. R. 393.—**KINDERSELEY, V.-C.**; *reversed*. (1859) 28 L. J. Ch. 788; 4 De G. & J. 216; 7 W. R. 519; 5 Jur. (N.S.) 723.

Rudge v. Weedon, *considered and not applied*.
Hills v. Springett (1868) L. R. 5 Eq. 123; 37 L. J. Ch. 290.—**ROMILLY, M.R.**

Lucas v. Beale (1851) 20 L. J. C. P. 134; 10 C. B. 739.—**C.P.**, *distinguished*.
Clay v. Southen (1852) 21 L. J. Ex. 202; 7 Ex. 717; 16 Jur. 1074.—**EX.**

Wedderburn v. Wedderburn (1853) 17 Beav. 158.—**M.R.**, *principle applied*.
Norwich and Norfolk Provident Building Society (1874) 22 W. R. 856.—**HALL, V.-C.**

Brown v. Sawyer (1841) 10 L. J. Ch. 240; 3 Beav. 598; 5 Jur. 500.—**M.R.**; and **Butlin v. Arnold** (1864) 1 H. & M. 75; 3 N. R. 687; 10 L. T. 95; 12 W. R. 571.—**V.-C.**, *applied*.
Wright, In re, Kirke v. North (1895) 65 L. J. Ch. 37; [1895] 2 Ch. 747; 13 R. 849; 73 L. T. 396; 54 W. R. 125.—**KEKEWICH, J.**

Sigel v. Phelps (1835) 7 Sim. 239.—**V.-C.**, *explained*.
Rhodes v. Warburton (1834) 6 Sim. 617.—**V.-C.**, *referred to*.
Davies v. Quartermain (1840) 4 Y. & C. 252.—**ALDERSON, B.**

Rhodes v. Warburton, *followed*.
Roberts v. Roberts (1848) 17 L. J. Ch. 174; 2 De G. & Sm. 29; 2 Ph. 534; 12 Jur. 148.—**KNIGHT BRUCE, V.-C.**; *affirmed*, L.C.

Fray v. Voules (1868) L. R. 3 Q. B. 214; 9 B. & S. 60; 16 W. R. 399.—**Q.B.**, *distinguished*.
Tucker v. Cotterell (1886) 34 W. R. 323.—**A. L. SMITH and GRANTHAM, JJ.**

Taylor v. Bouchier (1774) 2 Dick 504.—**L.C.**; **Bland v. Lamb** (1820) 2 J. & W. 402.—**L.C.**; **Clarke v. Wyburn** (1848) 17 L. J. Ch. 159; 12 Jur. 167.—**L.C.**; **Bradberry v. Brooke** (1856) 4 W. R. 699.—**L.J.**; **Grimwood v. Shave** (1857) 5 W. R. 482.—**L.C.**; and **Dresser v. Morton** (1847) 2 Ph. 286; 1 Coop. C. C. 76.—**L.C.**, *referred to*.
Dreunan v. Andrew (1866) L. R. 1 Ch. 300, 302, n.; 14 L. T. 39; 14 W. R. 444.—**L.C.**

Battray v. George (1809) 16 Ves. 232.—**L.C.**; and **Dooley or Dewley v. G. N. Ry.** (1854) 24 L. J. Q. B. 25; 4 El. & Bl. 341; 3 C. L. R. 110; 1 Jur. (N.S.) 28; 3 W. R. 76.—**Q.B.**, *discussed*.
Carson v. Pickersgill (1885) 54 L. J. Q. B. 484; 14 Q. B. D. 859; 52 L. T. 950; 33 W. R. 589; 49 J. P. 612.—**C.A.**

Carson v. Pickersgill (*supra*), *rule applied*.
Richardson v. Richardson and Plowman (1895)
 64 L. J. P. 119; [1895] P. 276, 346; 11 R. 663;
 73 L. T. 135; 44 W. R. 102.—C.A.

Carson v. Pickersgill and Johnson v. Lindsay & Co. (No. 2) (1891) [1892] A. C. 110.
 —H.L. (E.).

Raphael, In re, Salomon, Ex parte (1899) 68 L. J. Ch. 309; [1899] 1 Ch. 553; 80 L. T. 226; 47 W. R. 330.

KEKEWICH, J.—They [the orders of the Supreme Court] are not binding upon the H. L., and they do not apply to costs in the H. L., and I cannot possibly say that because, if this had been an action in this Court. Mr. Raphael would have been entitled to recover no costs, therefore he is not entitled to recover costs incurred in the H. L. On that *Johnson v. Lindsay & Co.* does not help me in the least. . . . For the like reason I cannot find much to guide me in the otherwise instructive case of *Carson v. Pickersgill*, because that is a decision respecting the application of the Rules of the Supreme Court; and it was there held that a successful plaintiff in an action *in forma pauperis* before a judge and jury was entitled upon taxation, as against the defendant, to costs out of pocket only, and could not be allowed anything for remuneration to his solicitor or fees to counsel. The fact that it was tried by a jury was much discussed, and it went entirely on the rules, and did not touch upon the principle. . . . There is no authority upon the point, as I have said; but there is a very useful case [*Richardson v. Richardson (supra)*] before Sir F. Jeune, in which he expressed an opinion, subject no doubt to revision, if the actual point came before him, that a solicitor could sue his pauper client on his retainer. . . . Of course, that opinion is not binding upon me, and is not really a judicial decision, but it is a valuable and instructive opinion of a learned judge not upon the particular point before him, but in an action which involved a long disquisition on the subject of costs when a man sues *in forma pauperis*.—p. 311.

Richardson v. Richardson and Plowman (1895) 64 L. J. P. 119; [1895] P. 276, 346; 73 L. T. 135; 44 W. R. 102; 11 R. 663.—C.A., *adhered to*.

White v. White (1898) 67 L. J. P. 63; [1898] P. 124.—JEUNE, P.

Richardson v. Richardson and Plowman, dicta adopted.

Raphael, In re, Salomon, Ex parte (1899) 68 L. J. Ch. 309; [1899] 1 Ch. 553 (*supra*).

White v. White (1898) 67 L. J. P. 63; [1898] P. 124.—JEUNE, P., *followed*.

Guy v. Guy and Foster (1900) 17 Times L. R. 4.—JEUNE, P.

Raphael, In re, Salomon, Ex parte (1899) 68 L. J. Ch. 309; [1899] 1 Ch. 553; 80 L. T. 226; 47 W. R. 330.—KEKEWICH, J.; *reversed on the facts*, 68 L. J. Ch. 765; 81 L. T. 479.—C.A. *And see* **Moutrie v. Mitchell** (1901) 70 L. J. K. B. 401; [1901] 1 Q. B. 596; 84 L. T. 187; 49 W. R. 274.—C.A.

COLLINS, L.J.—In reference to the point which suggested itself in argument as to the practice at common law, I have referred to Chitty's Archbold's Practice (12th ed.). and I notice that at

p. 1289 [11th ed., p. 1277] it is stated that "Every poor person, who may have cause of action, shall have writs according to the nature of his case, and the justices shall assign him counsel and attorneys, who, together with the officers of the Court, shall act gratis." This substantially is what the statute 11 Hen. 7, c. 12, provides. That practice appears to be still followed, and I cannot find that there is any provision for the payment of any remuneration to such counsel or solicitor.—p. 403.

Mulleneisen v. Coulson (1888) 57 L. J. Q. B. 464; 21 Q. B. D. 3; 58 L. T. 562; 36 W. R. 311.—CAVE and A. L. SMITH, JJ., *distinguished*.

Clements v. L. and N. W. Ry. (1894) 9 R. 223; [1894] 2 Q. B. 482; 42 W. R. 338; 58 J. P. 816.—C.A. **ESHER, M.R., LOPES and DAVEY, L.JJ.**

ESHER, M.R.—We have consulted the other members of the C. A., and we are unanimously of opinion that the rule that no one can proceed *in forma pauperis* in matters on the Crown side is applicable only to Crown cases pure and simple. Proceedings like this, on appeal from the County Court, are between party and party. They are not Crown cases at all, properly so called.—p. 223.

* **Bryant v. Wagner** (1839) 7 D. P. C. 676; 3 Jur. 893.—COLERIDGE, J., *adopted*.

Hinchliffe, In re (1894) 64 L. J. Ch. 76; [1895] 1 Ch. 117; 12 R. 33; 71 L. T. 532; 43 W. R. 82.—C.A., *distinguished*.

Sloane v. British Steamship Co. (1896) 66 L. J. Q. B. 72; [1897] 1 Q. B. 185; 75 L. T. 542; 45 W. R. 203.—C.A.

LOPES, L.J.—I think it is immaterial whether the documents in question were exhibited to the affidavit made by the plaintiff or not. The case laid before counsel and his opinion are solely for the information of the judge to whom the application for leave to sue as a pauper is made, and the opposite party has no right to see them. In stating this I am stating no more than what was said by Coleridge, J. in *Bryant v. Wagner*, where he says: "The certificate of counsel . . . is not for the benefit of the opposite party, but for the information of the Court." *Hinchliffe, In re*, is an entirely different case from the present. The judges there had not such a case as this present to their minds. If they had, there can be no doubt they would have distinguished it.—p. 73.

Hinchliffe, In re, referred to.

Carter v. Roberts (1903) 72 L. J. Ch. 655; [1903] 2 Ch. 312; 89 L. T. 239; 51 W. R. 520.—BYRNE, J.

Fowler v. Bank of England (1845) 14 L. J. Q. B. 178; 6 Q. B. 878; 2 D. & L. 790; 9 Jur. 107.—Q.B., *referred to*.

Tucker v. Collinson (or Cotterell) (1886) 55 L. J. Q. B. 224; 16 Q. B. D. 562; 54 L. T. 263; 34 W. R. 354.—C.A., *approved*.

Jacobs v. Crusha (1894) 63 L. J. Q. B. 526; [1894] 2 Q. B. 37; 9 R. 392; 70 L. T. 524; 42 W. R. 387.—C.A. **LOPES and DAVEY, L.JJ.**

Quinlan v. Child, Quinlan v. Quinlan (1900) 69 L. J. P. C. 85; [1900] A. C. 497.—P.C., *order in council discharged*.

Quinlan v. Quinlan (1901) 70 L. J. P. C. 122; [1901] A. C. 612; 85 L. T. 360.—P.C.
 [Order in council granting leave to appeal

rescinded on petition of respondent on the ground that there was no real question to be tried.]

Blake v. Blake (1870) 18 W. R. 944.—

MALINS, V.-C., *explained*.

Matthaei v. Galitzin (1874) 43 L. J. Ch. 536 : L. R. 18 Eq. 849 ; 30 L. T. 455 ; 22 W. R. 700.—MALINS, V.-C.

Blake v. Blake and Matthaei v. Galitzin, *explained and applied*.

Doss v. Secretary of State for India (1875) L. R. 19 Eq. 509 ; 32 L. T. 294 ; 23 W. R. 773.—MALINS, V.-C.

Blake v. Blake and Matthaei v. Galitzin, *explained and applied*.

Reiner v. Salisbury (Marquis) (1876) 2 Ch. D. 378 ; 24 W. R. 843.

MALINS, V.-C.—I there [*Doss v. Secretary of State for India (supra)*] decided that if a person had a claim to property in India the proper tribunal for the recovery of such property was in India, where there are Courts armed with every requisite power for granting relief. . . . That was a suit in which the plaintiff claimed a debt, and if I was right in that case in holding that the Indian Courts were the proper tribunals, how much stronger is this case, where the claim is for land in India ! It is not the practice to entertain suits in this country for the recovery of land in a foreign country. That was decided in *Holmes, In re (post)*. That was a petition of right in respect of land in Canada, and a demurrer was allowed on the ground that the Queen was as much resident in Canada as in this country, and that the suit ought to have been brought in Canada. I decided *Blake v. Blake* upon the same principle. There the suit was to recover land in Ireland, and I allowed a plea which put the suit out of Court. I arrived at the same conclusion in *Matthaei v. Galitzin*, where a bill was filed to obtain a receiver in regard to property in Russia, and by allowing the demurrer that suit was put an end to.—p. 385.

Holmes, In re (1861) 31 L. J. Ch. 58 ; 2 J. & H. 527 ; 8 Jur. (N.S.) 76 ; 5 L. T. 548 ; 10 W. R. 39.—WOOD, V.-C., *principle applied*.

Doss v. Secretary of State for India (1875) L. R. 19 Eq. 509 ; 32 L. T. 294 ; 23 W. R. 773.—MALINS, V.-C.

Holmes, In re, and Doss v. Secretary of State for India, *explained and applied*.

Reiner v. Salisbury (Marquis) (1876) 2 Ch. D. 378 ; 24 W. R. 843.—MALINS, V.-C. *See supra*.

Wych v. Meal (1734) 3 P. Wms. 310.—L.C., *applied*.

Moodalay v. Morton (1785) 1 Bro. C. C. 469.—M.R. ; **Dummer v. Chippenham Corporation** (1807) 14 Ves. 245, 254.—L.C.

Wych v. Meal and Moodalay v. Morton, *referred to*.

Pringle v. United States (1866) 36 L. J. Ch. 36 ; L. R. 2 Eq. 659 ; 12 Jur. (N.S.) 724 ; 14 L. T. 700 ; 14 W. R. 1012.—WOOD, V.-C.

Wych v. Meal and United States President

v. Drummond (1864) 33 Beav. 449.—M.R., *distinguished*.

United States v. Wagner (1867) L. R. 2 Ch. 582 ; 36 L. J. Ch. 624 ; 16 L. T. 646 ; 15 W. R. 1026.—CHELMSFORD, L.C., TURNER and CAIRNS, L.JJ.

[In the Law Reports the case of *United States President v. Drummond*, as reported in Beavan, is referred to. The other reports state that the case is unreported. See the W. R., p. 1027, n.]

3. JOINDER OF CAUSES OF ACTION.

Bage v. Bromuel (1684) 3 Lev. 99.—C.P., *overruled*.

Kightly v. Birch (1814) 2 M. & S. 533.—K.B. ELLENBOROUGH, C.J., said that the case had had its day, and that it was time it should cease.—p. 533.

Bagot v. Easton 37 L. T. 266.—BACON, V.-C. ; *reversed*, (1877) 47 L. J. Ch. 225 ; 7 Ch. D. 1 ; 37 L. T. 369 ; 26 W. R. 66.—C.A. CAIRNS, L.C., JAMES, BAGGALLAY and THESIGER, L.JJ.

Sandes v. Wildsmith (1893) 62 L. J. Q. B. 404 ; [1893] 1 Q. B. 771 ; 67 L. T. 387.—WILLS and LAWRENCE, JJ., *referred to*.

Dawson v. McClelland [1899] 2 Ir. R. 486.—Q.B.D. ; *affirmed*, C.A. ; **Bedford (Duke) v. Ellis** (1900) 70 L. J. Ch. 102 ; [1901] A. C. 1, 23 ; 83 L. T. 686.—H.L. (E.).

Pilcher. In re, Pilcher v. Hinds (1879) 48 L. J. Ch. 587 ; 11 Ch. D. 905 ; 40 L. T. 832 ; 27 W. R. 789.—C.A. JESSEL, M.R., JAMES and BRETT, L.JJ., *discussed*.

Kendrick v. Roberts (1882) 46 L. T. 59 ; 30 W. R. 865.—KAY, J.

Whetstone v. Dewis (1875) 45 L. J. Ch. 49 ; 1 Ch. D. 99 ; 33 L. T. 501 ; 24 W. R. 93.—V.-C., *not followed*.

Gledhill v. Hunter (1880) 14 Ch. D. 492 ; 49 L. J. Ch. 333 ; 42 L. T. 392 ; 28 W. R. 530.

JESSEL, M.R.—The first question I have to decide is whether an action commenced by a writ indorsed as this is—putting aside for a moment the statement of claim—is “an action for the recovery of land,” within the meaning of Ord. XVII. r. 2. Upon that I am referred to a decision of Hall, V.-C., in *Whetstone v. Dewis*, in which he is supposed to have decided that an action to establish title to land is an action for recovery of land within the rule. I say “supposed to have decided,” because I do not think he finally decided the question. His judgment is this : “I think that an action to establish title to land is an action for the recovery of land so as to require the leave of the Court under R. S. C. 1875, Ord. XVII. r. 2, for its joinder with another cause of action :” and he gave the leave. I agree, the V.-C. says “I think :” but the matter only came before him upon an application for leave, and the leave could do no harm ; it might have been granted *ex abundanti cautela* ; and a judge saying “I think,” on the 24th of November, 1875—three weeks after the new rules came into operation—cannot be said to have given a final judgment where there was no argument, but a mere application for leave. I think, therefore, I ought not to treat this as a deliberate decision by Hall, V.-C., that such an action is an action for the recovery of land within the rules.

Although I wish to treat the decision with every possible respect, I look upon the case as one where an *ex parte* application for leave is made to a judge and he says, "I think so and so, and I will give you leave." That cannot preclude him—much less can it preclude other judges—from afterwards deliberately considering the question and deciding it after argument. In fact, I decline to treat this as a binding authority upon me. Even if it were a deliberate judgment, it would not be binding upon me, but I should be very loth to differ from it, although the matter might ultimately go to the Appeal Court to be finally settled.—p. 494.

Gledhill v. Hunter (*supra*).

Referred to, Compton (*or* Comton) *v.* Preston (1882) 51 L. J. Ch. 680; 21 Ch. D. 138; 47 L. T. 122; 30 W. R. 563.—*FRY, J.*: *followed*, Norwich Corporation *v.* Brown (1883) 48 L. T. 898.—*CHITTY, J.*: *discussed*, Howard *v.* Howard (1892) 32 L. R. Ir. 454.—*C.A.* PALLES, C.B., FITZGIBBON and BARRY, L.JJ.

Mulckern v. Doerks (1884) 53 L. J. Q. B. 526; 51 L. T. 429.—*HUDDLESTON, B.* and *HAWKINS, J.*: *followed*.

Derbon, In re, Derbon *v.* Collis (1888) 58 L. T. 519; 36 W. R. 687.—*KEKEWICH, J.*

Mulckern v. Doerks, *held overruled*.

Wilnot v. Freehold Property Co. (1884) 51 L. T. 552.—*C.A.* BAGGALLAY and *FRY, L.JJ.*, *referred to*.

Hunt v. Worsfold (1896) 65 L. J. Ch. 548; [1896] 2 Ch. 224; 74 L. T. 456; 44 W. R. 461.—*NORTH, J.*

4. WRIT OF SUMMONS.

Sedgwick v. Yedras Mining Co. (1887) 35 W. R. 780.—*HUDDLESTON, B.* and *A. L. SMITH, J.*, *distinguished*.

Zuccato v. Young (1890) 38 W. R. 474.—*NORTH, J.*, *referred to*.

Smith v. Hammond (1896) 65 L. J. Q. B. 477; [1896] 1 Q. B. 571; 74 L. T. 590; 44 W. R. 478.—*POLLOCK, B.* and *BRUCE, J.*

Satchwell v. Clarke (1892) 66 L. T. 641.—*C.A.*, *applied*.

Frühau v. Grosvenor (1892) 61 L. J. Q. B. 717; 67 L. T. 350; 6 Times L. R. 744.—*COLERIDGE, C.J.* and *BRUCE, J.*, *referred to*. *Bradley v.* Chamberlyn [1893] 1 Q. B. 439; 5 R. 185; 68 L. T. 413; 41 W. R. 300.—*DAY* and *COLLINS, JJ.*

Walker v. Hicks (1877) 47 L. J. Q. B. 27; 3 Q. B. D. 8; 37 L. T. 529; 26 W. R. 113.—*Q.B.*, *approved*.

Smith v. Wilson (1879) 49 L. J. C. P. 96; 5 C. P. D. 25; 41 L. T. 533; 28 W. R. 57.—*C.A.* *JESSEL, M.R.*, *BRAMWELL* and *BRETT, L.JJ.*

Poulett (Earl) v. Hill (Viscount) (1892) 62 L. J. Ch. 466; [1893] 1 Ch. 277; 2 R. 288; 68 L. T. 476; 41 W. R. 503.—*C.A.*, *explained*.

Lynde v. Waithman [1895] 2 Q. B. 180; 64 L. J. Q. B. 762; 14 R. 489; 72 L. T. 857.—*C.A.*

KAY, L.J.—It has been argued that *Poulett v. Hill* has absolutely decided that the moment a receiver has been appointed the case is not one in which there is a liquidated sum for which the writ can be specially indorsed under Ord. III. r. 6,

for the purposes of Ord. XIV. I do not think that is the result of that case. That case was one in which the mortgagees had brought an action to realize their security, and before an account had been taken a receiver was appointed, and subsequently the plaintiffs brought another action for interest in which they applied for judgment under Ord. XIV. The Court said that the case was not one in which a writ ought to have been indorsed for a liquidated sum, inasmuch as there was a prior action proceeding in which an account must be taken. To say that this was a decision that the mere appointment of a receiver prevents the indorsement of the writ with a claim for a liquidated sum is altogether a misapprehension.—p. 186.

ESHER, M.R. and *A. L. SMITH, L.J.* to the same effect.

Rodway v. Lucas (1855) 24 L. J. Ex. 155; 10 Ex. 667; 3 Q. L. R. 615; 1 Jur. (N.S.) 311; 3 W. R. 212.—*EX.*, *applied*.

Rhymney Ry. v. Rhymney Iron Co. (1890) 59 L. J. Q. B. 414; 25 Q. B. D. 146; 63 L. T. 407; 38 W. R. 764.—*C.A.*, *referred to*.

Ryley v. Master; *Sheba Gold Mining Co. v.* Trubshawe (1892) 61 L. J. Q. B. 219; [1892] 1 Q. B. 674; 66 L. T. 228; 40 W. R. 381.—*Q.B.D.*

Rodway v. Lucas, *discussed*.

Wilks v. Wood (1892) 61 L. J. Q. B. 516; [1892] 1 Q. B. 684; 66 L. T. 520; 40 W. R. 418.—*C.A.*

Elliott v. Roberts (1891) 26 L. J. N. C. 179; 36 Sol. J. 92.—*COLERIDGE, C.J.* and *MATHEW, J.*; and *Blood v. Robinson* (1892) 36 Sol. J. 203.—*COLERIDGE, C.J.* and *CAVE, J.*, *discussed*.

Ryley v. Master; *Sheba Gold Mining Co. v.* Trubshawe (1892) 61 L. J. Q. B. 219; [1892] 1 Q. B. 674; 66 L. T. 228; 40 W. R. 381.—*Q.B.D.*

Elliott v. Roberts and Blood v. Robinson, *considered*.

London and Universal Bank v. Clancarty (Earl) [1892] 1 Q. B. 689; 61 L. J. Q. B. 225; 66 L. T. 798; 40 W. R. 411.

A. L. SMITH, J.—In *Elliott v. Roberts*, *Coleridge, C.J.* and *Mathew, J.* decided that a writ was not specially indorsed because the interest claimed was abnormal (the case, however, was little argued). In *Blood v. Robinson*, *Coleridge, C.J.* and *Cave, J.* held that a claim for the amount of a bill of exchange, for money paid, money lent, and interest, was a good special indorsement. These cases raised a doubt as to whether there had not been wrong decisions under Ord. XIV. at chambers, and at last two cases were argued before a Court composed of five judges. These cases (*Sheba Gold Mining Co. v. Trubshawe* and *Ryley v. Master* (*supra*)) decided that where a plaintiff has to resort to the provisions of 3 & 4 Wm. 4, c. 42, s. 28, in order to make a claim for interest by way of damages, he cannot make a good specially indorsed writ. They left untouched the present point upon s. 57 of the Bills of Exchange Act, 1882.—p. 694.

DENMAN, J. to the same effect.

Elliott v. Roberts and Blood v. Robinson, *commented on*.

Lawrence & Sons v. Willcocks (1892) 61 L. J. Q. B. 519; [1892] 1 Q. B. 696; 66 L. T. 511;

40 W. R. 419.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Ryley v. Master; Sheba Gold Mining Co. v. Trubshawe (1892) 61 L. J. Q. B. 219; [1892] 1 Q. B. 674; 66 L. T. 228; 40 W. R. 381.—Q.B.D., *discussed and not applied*.

London and Universal Bank v. Clancarty (Earl) [1892] 1 Q. B. 689; 61 L. J. Q. B. 225; 66 L. T. 798; 40 W. R. 411.—SMITH and DENMAN, JJ. *See supra*.

Ryley v. Master; Sheba Gold Mining Co. v. Trubshawe, *approved*.
Wilks v. Wood (1892) 61 L. J. Q. B. 516; [1892] 1 Q. B. 684; 66 L. T. 520; 40 W. R. 418.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Ryley v. Master; Sheba Gold Mining Co. v. Trubshawe, *referred to*.
Gerard v. Clowes (1892) 61 L. J. Q. B. 487; [1892] 2 Q. B. 11; 67 L. T. 201.—A. L. SMITH and LAWRENCE, JJ.

Casey v. Hellyer, 34 W. R. 271.—DENMAN and MATHEW, JJ.; *reversed*, (1886) 55 L. J. Q. B. 207; 17 Q. B. D. 97; 54 L. T. 103; 34 W. R. 337.—C.A.

Casey v. Hellyer, *referred to*.
Beaufort v. Ledwith (1893) [1894] 2 Ir. R. 16.—Q.B.D.

Casey v. Hellyer, Beaufort v. Ledwith, and Cullen v. Jackson (1893) [1894] 2 Ir. R. 17, n.—Q.B.D., *discussed*.
Rochfort v. Somers (1898) [1899] 2 Ir. R. 45.—Q.B.D.

Cullen v. Jackson, *applied*.
Rochfort v. Somers, *discussed*.
Guinness v. Curaher [1900] 2 Ir. R. 505.—C.A. ASHBOURNE, L.C., FITZGIBBON, WALKER and HOLMES, L.JJ.

Daubuz v. Lavington (1884) 53 L. J. Q. B. 283; 13 Q. B. D. 347; 51 L. T. 206; 32 W. R. 772.—COLERIDGE, C.J. and CAVE, J., *approved and followed*.
Hall v. Comfort (1886) 56 L. J. Q. B. 185; 18 Q. B. D. 11; 55 L. T. 550; 35 W. R. 48.—Q.B.D.

Arden v. Boyce (1894) 63 L. J. Q. B. 338; [1894] 1 Q. B. 796; 9 R. 372; 70 L. T. 480; 42 W. R. 354.—C.A. ESHER, M.R., LOPES and DAVEY, L.JJ., *distinguished*.
Kemp v. Lester (1896) 65 L. J. Q. B. 532; [1896] 2 Q. B. 162; 74 L. T. 268; 44 W. R. 453.—C.A.

ESHER, M.R.—*Arden v. Boyce* shows that if a tenancy is put an end to by forfeiture, then the provisions of Ord. III. r. 6 (F.), do not apply, and judgment cannot be obtained under Ord. XIV. . . . Here there was a clause in the mortgage deed which created a tenancy from year to year, followed subsequently by a provision under which the landlord was entitled at any time without notice to enter upon and take possession of the premises. That being so, there was no forfeiture. *Arden v. Boyce*, therefore, does not apply.—p. 533.

LOPES and RIGBY, L.JJ. to the same effect.

O.C.

Smith v. Dobbin (1877) 47 L. J. Ex. 65; 3 Ex. D. 358; 37 L. T. 777; 26 W. R. 122.—C.A. BRAMWELL, BRETT and COTTON, L.JJ., *discussed*.
Farden v. Richter (1889) 58 L. J. Q. B. 224; 23 Q. B. D. 124, 129; 60 L. T. 304; 37 W. R. 767.—HUDDLESTON, B. and MANISTY, J.

Large v. Large, W. N. (1877) 198.—M.R., *approved and followed*.
Johnson v. Palmer (1879) 4 C. P. D. 258; 27 W. R. 941.—COLERIDGE, C.J. and DENMAN, J.
COLERIDGE, C.J.—The M.R. has held in *Large v. Large*—and I am glad of authority for this sensible decision—that there is no necessity for such an amendment [of the writ of summons] when the statement of claim is there to be looked at.—p. 262.

Large v. Large and Johnson v. Palmer, *observed on*.
Moore v. Alwill (1881) 8 L. R. Ir. 245.—EX. D.

L'Honeux v. Hong Kong and Shanghai Banking Corporation (1886) 55 L. J. Ch. 758; 33 Ch. D. 446; 54 L. T. 863; 34 W. R. 753.—BACON, V.-C.; and **Watson v. Sheather, Sons & Co.** (1886) 2 Times L. R. 473.—DAY and WILLS, JJ., *discussed*.
Wood v. Anderson Foundry Co. (1888) 36 W. R. 918.—STIRLING, J.

L'Honeux v. Hong Kong and Shanghai Banking Corporation, *discussed*.
Haggin v. Comptoir D'Escompte de Paris (1889) 58 L. J. Q. B. 508; 23 Q. B. D. 519; 61 L. T. 748; 37 W. R. 703.—C.A.

L'Honeux v. Hong Kong and Shanghai Banking Corporation, *distinguished*.
Golding v. La Sainte Union des Sacrees Coeurs (1892) 4 R. 93; 67 L. T. 605.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

ESHER, M.R.—It is admitted that in the case of an English corporation with several branches it is necessary to find out which is the chief branch and serve the head officer of that branch. *L'Honeux v. Hong Kong and Shanghai Banking Corporation* did not raise this point as to a foreign corporation, for in that case there was only one place of business in England.—p. 94.

L'Honeux v. Hong Kong and Shanghai Banking Corporation, *referred to*.
La Compagnie Générale Transatlantique v. Law & Co., La Bourgogne (1899) 68 L. J. P. 104; [1899] A. C. 431.—H.L. (E.). *See post*, col. 2323.

O'Neil v. Clason (1876) 46 L. J. Q. B. 191.—COLERIDGE, C.J. and POLLOCK, B.
Overruled, Russell v. Cambefort (1889) 58 L. J. Q. B. 498; 23 Q. B. D. 526; 61 L. T. 751; 37 W. R. 701.—C.A. COTTON, FRY and LOPES, L.JJ.; *treated as overruled*, Shepherd v. Hirsch, Pritchard & Co. (1890) 59 L. J. Ch. 819; 45 Ch. D. 231.—CHITTY, J.; Western National Bank of City of New York v. Perez, Triana & Co. (1890) 60 L. J. Q. B. 272; [1891] 1 Q. B. 304, 316.—C.A. (*post*, col. 2321).

Pollexfen v. Sibson (1886) 55 L. J. Q. B. 294; 16 Q. B. D. 792; 54 L. T. 297; 34 W. R. 534.—MATHEW and SMITH, JJ., *discussed*.
Russell v. Cambefort (1889) 58 L. J. Q. B. 498; 23 Q. B. D. 526; 61 L. T. 751; 37 W. R. 701.—C.A. *And see post*, col. 2321.

Pollexfen v. Sibson (*supra*), *followed*.

Russell v. Cambefort (*supra*), *considered*.

Shepherd v. Hirsch, Pritchard & Co. (1890) 59 L. J. Ch. 819; 45 Ch. D. 231; 63 L. T. 335; 38 W. R. 745.—CHITTY, J.

Pollexfen v. Sibson, *doubted*.

Russell v. Cambefort, *applied*.

Shepherd v. Hirsch, Pritchard & Co., *not followed*.

Western National Bank of City of New York v. Perez, Triana & Co. (1890) 60 L. J. Q. B. 272; [1891] 1 Q. B. 304, 313; 64 L. T. 543; 39 W. R. 245.—C.A. LINDLEY and BOWEN, L.J.; ESHER, M.R. *dissenting*; varying POLLOCK, B. and DAY, J.

Western National Bank v. Perez Triana & Co., *followed*.

Indigo Co. v. Ogilvy [1891] 2 Ch. 31, 39; 64 L. T. 846; 39 W. R. 646.—C.A.

Russell v. Cambefort and Western National Bank v. Perez Triana & Co., *followed*.

Heinemann & Co. v. Hale & Co. (1891) 60 L. J. Q. B. 650; [1891] 2 Q. B. 83, 89; 64 L. T. 548; 39 W. R. 485; 7 Times L. R. 497.—C.A. ESHER, M.R. and FRY, L.J.; reversing CAVE and CHARLES, JJ.

Russell v. Cambefort and Western National Bank v. Perez Triana & Co., *discussed and followed*.

Dobson v. Festi Rasini & Co. (1891) 60 L. J. Q. B. 481; [1891] 2 Q. B. 92; 64 L. T. 551; 39 W. R. 481.—C.A. LINDLEY, LOPES and KAY, L.JJ.

Russell v. Cambefort, *discussed*.

Grant v. Anderson (1891) 61 L. J. Q. B. 107; [1892] 1 Q. B. 108; 66 L. T. 79.—COLERIDGE, C.J. and WRIGHT, J.; *affirmed*, C.A.

Russell v. Cambefort, *discussed and principle applied*.

Turnbull v. Walker (1892) 5 R. 132; 67 L. T. 767; 9 Times L. R. 99.—WRIGHT, J.

Russell v. Cambefort, *approved and followed*.
Western National Bank v. Perez Triana & Co. and Grant v. Anderson (*supra*), *referred to*.

St. Gobain Chauny & Cirey Co. v. Hoyermann's Agency [1893] 2 Q. B. 97; 62 L. J. Q. B. 485; 4 R. 411; 69 L. T. 329; 41 W. R. 563.—C.A.

ESHER, M.R.—If the rule [Ord. XLVIII. A. r. 11] had contained words expressly in terms including a foreigner resident abroad, then an English Court would be bound to obey the directions of its own legislature, but when the words used are capable of one or other construction, then the Court ought to adopt the construction which will prevent an infringement upon the principles of international law by extending the jurisdiction of the English Courts against foreigners residing abroad, who have in no way submitted to the jurisdiction. That rule was laid down by the C. A. in *Russell v. Cambefort*. Cotton, L.J. in that case pointed out the reasons for it, and gave the canon of construction. He said: "Although the rule does authorise service on one member of a partnership in general terms, yet it ought to be construed only as applying to partnerships, the members of which either by their nationality or residence have become subject to English law, and to the power of Parliament." . . . Now,

Russell v. Cambefort, which overruled *O'Neil v. Clason* (*supra*, col. 2320), decided in terms that under a similar rule in r. 11. of Ord. XLVIII. D., where there is a single foreigner resident abroad, although he does carry on business within the jurisdiction, the rule does not apply, because the effect would be to make the English Parliament assume jurisdiction over a foreigner wholly resident abroad. *Russell v. Cambefort* has never been overruled. On the contrary, it has been recognised as a binding authority by Chitty, J., in *Shepherd v. Hirsch, Pritchard & Co.* (*supra*, col. 2321); by Coleridge, C.J. and Wright, J. in *Grant v. Anderson*, and by this Court in *Western National Bank v. Perez Triana & Co.* . . . It was said that the words in r. 1, "carrying on business within the jurisdiction," must be read into r. 11, by virtue of the concluding words of that rule, and had the effect of altering the effect of it. But the words "carrying on business within the jurisdiction" are already in r. 11; you cannot read them in over again, and the similar rule, with those words in it, had already been construed not to include a foreigner resident abroad before the alteration was made in r. 1. The alteration, therefore, in the rule could not affect the construction already given in *Russell v. Cambefort* to the similar rule to r. 11.—pp. 102-104.

a. L. SMITH, L.J. to the same effect.

Russell v. Cambefort and Heinemann v. Hale (*supra*, col. 2321), *approved*.

Worcester City, &c., Banking Co. v. Firbank Pauling & Co. (1894) 63 L. J. Q. B. 542; [1894] 1 Q. B. 784; 9 R. 784; 70 L. T. 443; 42 W. R. 402.—C.A.

Russell v. Cambefort and Grant v. Anderson (*supra*, col. 2321) *referred to*.

Singleton v. Roberts Stocks & Co. (1894) 10 R. 223; 70 L. T. 687.—CHARLES and BRUCE, JJ.

Russell v. Cambefort and St. Gobain Chauny & Cirey Co. v. Hoyermann's Agency (*supra*, col. 2321), *referred to*.

Maciver v. Burns (1895) 64 L. J. Ch. 681; [1895] 2 Ch. 630; 12 R. 467; 73 L. T. 39; 44 W. R. 40.—C.A.

Indigo Co. v. Ogilvy (*supra*, col. 2321), *referred to*.

Grant v. Anderson [1892] 1 Q. B. 108, 114 (*supra*, col. 2321).

Indigo Co. v. Ogilvy, *approved*.

Worcester City, &c., Banking Co. v. Firbank [1894] 1 Q. B. 784, 790 (*supra*).

Newby v. Von Oppen and Colts Patent Firearms Co. (1872) L. R. 7 Q. B. 293; 41 L. J. Q. B. 148; 26 L. T. 164; 20 W. R. 383.—Q.B., *distinguished*.

Mackereth (or Mackreth) v. Glasgow & N. W. Ry. (1873) L. R. 8 Ex. 149; 42 L. J. Ex. 82; 28 L. T. 167; 21 W. R. 339.

POLLOCK, B.—I felt at first pressed by *Newby v. Von Oppen*, but upon consideration I think it clearly distinguishable. There the very existence of the company as a trading corporation made it essential to have a place of business, with a manager, in England. In the present case, looking at the character of the company, and the duty of the agent, it may be said to be a mere accident that they employed a booking clerk of their own at Carlisle.—p. 135.

Newby v. Von Oppen.

Referred to. Cesena Sulphur Co. v. Nicholson; Calcutta Jute Mills Co. v. Nicholson (1876) 45 L. J. Ex. 821; 1 Ex. D. 428, 454; 35 L. T. 275; 25 W. R. 71.—*KELLY, C.B. and HUDDLESTON, B.*; Royal Mail Steam Packet Co. v. Braham (1877) 46 L. J. P. C. 67; 2 App. Cas. 381, 387; 36 L. T. 220; 25 W. R. 651.—*P.C.*; Nutter v. Messageries Maritimes de France (1885) 54 L. J. Q. B. 527.—*COLERIDGE, C.J. and A. L. SMITH, J.*; Wood v. Anderson Foundry Co. (1888) 36 W. R. 918.—*STIRLING, J.*

Newby v. Von Oppen, approved and applied.

Haggin v. Comptoir d'Escompte de Paris (1889) 58 L. J. Q. B. 508; 23 Q. B. D. 519; 61 L. T. 748; 37 W. R. 703.—*C.A.*

Newby v. Van Oppen, discussed.

La Bourgogne (1898) 68 L. J. P. 9; [1899] P. 1, 12; 79 L. T. 331; 8 Asp. M. C. 462.—*C.A.*: affirmed, (1899) 68 L. J. P. 104; [1899] A. C. 431; 80 L. T. 845; 8 Asp. M. C. 550.—*H.L. (E.)*.

A. L. SMITH, L.J.—It is too late to discuss the meaning of the expression "corporation aggregate" in Ord. IX. r. 8, and whether it applied to foreign corporations trading in this country, because the question has already been the subject of judicial decision binding upon this Court. It has been held that the rule applies to such corporations, and it seems to me on reading the judgment of the Court delivered by Blackburn, J. in *Newby v. Von Oppen*, and the judgment of Cotton, L.J. in *Haggin v. Comptoir d'Escompte (supra)*, that the law is that if a corporation established by foreign law carries on business here in such a way that it may be said to be resident in this country, it must be equally liable to service as if it was established here. The question, therefore, is one of fact. . . . I am aware of what the L.C. (Lord Cranworth) and Lord Brougham held in *Carron Iron Co. v. MacLaren* (1855) 24 L. J. Ch. 620; 5 H. L. Cas. 416; 3 W. R. 597.—*H.L. (E.)*, see *post*, col. 2356), but Lord St. Leonards took a different view of the facts, and Blackburn, J. . . . in *Newby v. Von Oppen*, treats the decision of the majority of the lords in *Carron Iron Co. v. MacLaren* as a finding of fact. But findings of fact are not binding upon us.—p. 13.

COLLINS, L.J.—In order to understand the decisions upon the rule it is necessary to examine the genesis of the principle upon which it has been found possible to reach a foreign corporation by English process. It was at first thought that a foreign corporation must be reached by some process for service out of the jurisdiction. Then arose the cases in which a corporation carried on business in more than one place, so that it could be contended that, although one and indivisible, it had more than one domicile. That was the question discussed in *Carron Iron Co. v. MacLaren*; but it is clear now that a corporation can have more than one domicile.—p. 15.

Newby v. Von Oppen, referred to.

Dunlop Pneumatic Tyre Co. v. Actien Gesellschaft für Motor und Motorfahrzeugbau (1902) 71 L. J. K. B. 284; [1902] 1 K. B. 342; 86 L. T. 472; 50 W. R. 226; 19 Rep. Pat. Cas. 46.—*C.A.*

Walton v. Universal Salvage Co. (1847) 16 M. & W. 438; 4 D. & L. 558.—*EX.*, referred to.

Mackreth (or Mackereth) v. Glasgow & S. W. Ry. (1873) 42 L. J. Ex. 82; L. R. 8 Ex. 149, 151; 28 L. T. 167; 21 W. R. 339.—*EX.*

Mackreth (or Mackereth) v. Glasgow & S. W. Ry. (see *supra*, col. 2322), referred to.

Nutter v. Messageries Maritimes de France, (1885) 54 L. J. Q. B. 527.—*COLERIDGE, C.J. and A. L. SMITH, J., distinguished.* Haggin v. Comptoir d'Escompte de Paris (1889) 58 L. J. Q. B. 508; 23 Q. B. D. 519; 61 L. T. 748; 37 W. R. 703.—*C.A.*

Nutter v. Messageries Maritimes de France referred to.

Tharsis Sulphur and Copper Co. v. La Société des Métaux (1889) 58 L. J. Q. B. 435, 437; 60 L. T. 924; 38 W. R. 78.—*COLERIDGE, C.J. and FIELD, J.*

Haggin v. Comptoir d'Escompte de Paris, discussed.

Balcock v. Cumberland Gap Park Co. (1892) 62 L. J. Ch. 247; [1893] 1 Ch. 362; 3 R. 188; 68 L. T. 155; 41 W. R. 204.—*STIRLING, J.*

Haggin v. Comptoir d'Escompte de Paris, discussed.

La Bourgogne (1898) 68 L. J. P. 9; [1899] P. 1; 79 L. T. 331.—*C.A.* See *supra*, col. 2323.

La Bourgogne, referred to.

Dunlop Pneumatic Tyre Co. v. Actien Gesellschaft für Motor, &c. [1902] 1 K. B. 342, 347.—*C.A. (supra, col. 2323).*

Keynsham Blue Lias Lime Co. v. Baker (1863) 33 L. J. Ex. 41; 2 H. & C. 729; 9 Jur. (N.S.) 1346; 9 L. T. 418; 12 W. R. 155.—*EX.*, discussed.

Baillie v. Goodwin & Co. (1886) 55 L. J. Ch. 849; 33 Ch. D. 604; 55 L. T. 56; 34 W. R. 787; 3 Rep. Pat. Cas. 729.—*NORTH, J.*

Baillie v. Goodwin & Co., referred to.

Wood v. Anderson Foundry Co. (1888) 36 W. R. 918.—*STIRLING, J.*; Singleton v. Roberts, Stocks & Co. (1894) 10 R. 223; 70 L. T. 687.—*CHARLES and BRUCE, JJ.*

Sheehy v. Professional Life Assurance Co. (1857) 27 L. J. C. P. 233; 3 C. B. (N.S.) 597; 4 Jur. (N.S.) 27; 6 W. R. 103.—*C.P.*, approved.

Royal Mail Steam Packet Co. v. Braham (1877) 2 App. Cas. 381; 46 L. J. P. C. 67; 36 L. T. 220; 25 W. R. 651.—*P.C.*

SIR M. SMITH (for self, SIR B. PEACOCK and SIR R. COLLIER).—In that case an English corporation, carrying on the business of life assurance, and having its domicile in England, was the defendant; and the judges forming the Court were of opinion that substituted service on an agent in Dublin, employed by the company to obtain life assurances there, was good.—p. 387.

Sheehy v. Professional Life Assurance Co., discussed and distinguished.

Dennis v. Leinster Paper Co. [1901] 2 Ir. R. 337.—*C.A.* ASHBOURNE, D.C., FITZGIBBON and HOLMES, L.JJ. See judgment of the L.C.

Tharsis Sulphur and Copper Co. v. La Société, &c., des Métaux (1889) 58 L. J. Q. B. 435; 60 L. T. 924; 38 W. R. 78.—COLERIDGE, C.J. and FIELD, J., *explained*.
British Wagon Co. v. Gray (1895) 65 L. J. Q. B. 75; [1896] 1 Q. B. 35; 73 L. T. 498; 44 W. R. 113.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Tharsis, &c., Co. v. La Société, &c., des Métaux, *followed*.

British Wagon Co. v. Gray, *distinguished*.

Montgomery v. Liebenenthal (1898) 67 L. J. Q. B. 313; [1898] 1 Q. B. 487; 78 L. T. 211; 46 W. R. 292.—C.A.

A. L. SMITH, L.J.—What happened in that case [*British Wagon Co. v. Gray*] was this: The words "unless the defendant is domiciled or ordinarily resident in Scotland," which have now been inserted in Ord. XI. r. 1 (e), prohibit the Court from allowing service of a writ out of the jurisdiction in a case which otherwise would fall within the rule where the defendant is ordinarily domiciled or resident in Scotland or Ireland. . . . It seems to me that the pith of the case is put by Lopes, L.J. in his judgment when he says that the parties cannot by any contract between themselves give the Court jurisdiction to do that which by the terms of the rule it is forbidden to do. Lord Esher in his judgment says the same. That case, therefore, is clearly distinguishable from the present, for here no application to the Court is made by the plaintiffs, and no application is necessary.—p. 315.

CHITTY and COLLINS, L.JJ. to the same effect.

Pollock v. Campbell (1876) 45 L. J. Ex. 199; 1 Ex. D. 50; 34 L. T. 360; 24 W. R. 320.—EX.D., *discussed*.

Norris v. Beazley (1877) 46 L. J. C. P. 169; 2 C. P. D. 80; 35 L. T. 846; 25 W. R. 320.—C.P.D.

Field v. Bennett (1886) 56 L. J. Q. B. 89; 1 Times L. R. 374.—COLERIDGE, C.J. and DENMAN, J., *approved*.

Fry v. Moore (1889) 58 L. J. Q. B. 382; 23 Q. B. D. 395; 61 L. T. 545; 37 W. R. 565.—C.A. LINDLEY and LOPES, L.JJ. *And see post*.

Field v. Bennett, *applied*.

De Bernales v. "New York Herald" (1893) 62 L. J. Q. B. 385; [1893] 2 Q. B. 97, n.; 5 R. 339; 68 L. T. 658; 41 W. R. 481.—COLERIDGE, C.J. and LOPES, L.J.; affirmed, 5 R. 343, n.—C.A. ESHER, M.R., LINDLEY and A. L. SMITH, L.JJ.

Field v. Bennett, *commented on*.

Croft v. King [1893] 1 Q. B. 419; 62 L. J. Q. B. 242; 5 R. 222; 68 L. T. 296; 41 W. R. 394.

COLLINS, J.—In *Field v. Bennett* it appears that counsel stated that the practice under the new rule was to refuse leave to serve out of the jurisdiction in cases of tort, and that my brother Cave adopted the statement; but the report is a very short one, and cannot be accepted as an authority.—p. 421.

DAY, J. to the same effect.

Fry v. Moore (*supra*).

Explained and distinguished, **Urquhart, Ex parte, Urquhart, In re** (1890) 59 L. J. Q. B. 364; 24 Q. B. D. 723; 38 W. R. 612; 7 Morrell 94.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.; *followed*, **Wilding v. Bean** (1890) 60 L. J. Q. B.

10; [1891] 1 Q. B. 100; 64 L. T. 41; 39 W. R. 40.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.; *referred to*, **Worcester City, &c., Banking Co. v. Firkbank Pauling and Co.** (1894) 63 L. J. Q. B. 542; [1894] 1 Q. B. 784; 9 R. 367; 70 L. T. 443; 42 W. R. 402.—C.A. ESHER, M.R., LOPES and DAVEY, L.JJ.

Fry v. Moore and Wilding v. Bean (*supra*), *distinguished*.

Jay v. Budd (1897) 66 L. J. Q. B. 863; [1898] 1 Q. B. 12; 77 L. T. 335; 46 W. R. 34.—C.A.

COLLINS, L.J.—In both these cases the defendant was out of the jurisdiction at the date of the issue of the writ. It seems to me that the fact that the defendant has since the issue of the writ gone out of the jurisdiction is no reason why the Court should not give effect to the wide language of the rule.—p. 865.

HALSBURY, L.C. to the same effect; RIGBY, L.J. dissenting.

Cook v. Dey (1876) 45 L. J. Ch. 611; 2 Ch. D. 218; 24 W. R. 362.—HALL, V.-C., *commented on*.

Dymond v. Croft (1876) 45 L. J. Ch. 612; 3 Ch. D. 512; 33 L. T. 27; 24 W. R. 818.—JESSEL, M.R. *And see post*, col. 2328.

• **Cook v. Dey, Rafael v. Ongley** (1876) 34 L. T. 134.—HALL, V.-C.; and **Crane v. Jullion** (1876) 2 Ch. D. 220; 24 W. R. 691.—HALL, V.-C., *discussed*.

Wolverhampton and Staffordshire Banking Co. v. Bond (1881) 43 L. T. 721.

JESSEL, M.R.—In *Cook v. Dey* the defendant was carrying on business when the writ was directed to be served, and in *Rafael v. Ongley* service was directed at the club of the defendant. . . . *Crane v. Jullion*, on the other hand, was merely an action for the recovery of land, and substituted service of the writ can always in such an action be sufficiently effected by leaving it on the land.—p. 722. •

Watt v. Barnett (1878) 3 Q. B. D. 363; 38 L. T. 903; 26 W. R. 745.—C.A.; *affirming* 47 L. J. Q. B. 329; 3 Q. B. D. 183.—Q.B.D., *explained*.

Farden v. Richter (1889) 58 L. J. Q. B. 224; 23 Q. B. D. 124, 130; 60 L. T. 304; 37 W. R. 767.—HUDDLESTON, B. and MANISTY, J.

Watt v. Barnett, *applied*.

Urquhart, Ex parte, Urquhart, In re (1890) 59 L. J. Q. B. 364; 24 Q. B. D. 723; 38 W. R. 612; 7 Morrell 94.—C.A.

Call v. Oppenheim (1885) 1 Times L. R. 622.—C.A. BRETT, M.R., BAGGALLAY and FRY, L.JJ., *explained*.

Société Générale de Paris v. Dreyfus (1887) 37 Ch. D. 215, 224.—C.A. (*post*).

Société Générale de Paris v. Dreyfus (1885) 54 L. J. Ch. 893; 29 Ch. D. 239; 53 L. T. 463; 33 W. R. 823.—PEARSON, J.; *reversed on the facts*, (1887) 57 L. J. Ch. 276; 37 Ch. D. 215; 58 L. T. 573; 36 W. R. 609.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

Société Générale de Paris v. Dreyfus, *discussed*.

De Penny, In re, De Penny v. Christie [1891] 2 Ch. 63; 60 L. J. Ch. 518; 64 L. T. 521; 39 W. R. 571.

CHITTY, J.—In *Société Générale de Paris v. Dreyfus*, Pearson, J. held that the plaintiffs, foreigners out of the jurisdiction, were entitled to restrain the defendants, also foreigners out of the jurisdiction, from removing out of the jurisdiction funds to which the plaintiffs claimed to be entitled. His judgment was reversed on appeal, on the ground that the further evidence adduced showed that the matter was *res judicata* between the parties by reason of the judgment of the French Courts having jurisdiction in the matter.—p. 68.

Young v. Brassey (1875) 45 L. J. Ch. 142; 1 Ch. D. 277; 24 W. R. 110.—V.-C., *not followed*.

Stigand v. Stigand (1882) 19 Ch. D. 460; 51 L. J. Ch. 446; 30 W. R. 312.

HALL, V.-C.—Since my decision in *Young v. Brassey*, a form of procedure has been adopted in chambers which appears to work well. It is not now the practice to apply to the judge in Court for orders of this kind, and I myself have an objection to making such orders in Court, as it involves ascertaining there whether the case is a proper one, which it is better to do in chambers. The practice is . . . This being so, notwithstanding my decision in *Young v. Brassey*, I must refuse the present application.—p. 460.

Young v. Brassey, *not followed*.

French v. Colles (1885) 17 L. R. Ir. 238.—PORTER, M.R.

Reynolds v. Coleman (1887) 56 L. J. Ch. 903; 36 Ch. D. 453; 57 L. T. 588; 35 W. R. 813.—C.A. COTTON and BOWEN, L.JJ.

Explained, **Bell v. Antwerp, London and Brazil Line** (1890) 60 L. J. Q. B. 270; [1891] 1 Q. B. 103; 64 L. T. 276; 39 W. R. 84.—C.A. **ESHER, M.R., LOPES and KAY, L.JJ.**; *followed*, **Rein v. Stein** (1892) 61 L. J. Q. B. 401; [1892] 1 Q. B. 753; 66 L. T. 469.—C.A. **LINDLEY and KAY, L.JJ.**; *applied*, **Hoerter v. Hanover Caoutchouc Gutta Percha and Telegraph Works** (1893) 10 Times L. R. 22.—**POLLOCK, B. and KENNEDY, J.** (affirmed, *ib.* p. 103.—C.A. **ESHER, M.R., LOPES and KAY, L.JJ.**).

Bell v. Antwerp, London and Brazil Line (*supra*), *applied*.

Reynolds v. Coleman and Rein v. Stein (*supra*), *observations applied*.

The Eider, Neptune Salvage Co. v. Norddeutscher Lloyd (1893) 62 L. J. P. 65; [1893] P. 19; 1 R. 593; 69 L. T. 622; 7 Asp. M. C. 354.—C.A.

Bell v. Antwerp, London and Brazil Line and The Eider, *explained and approved*.

Comber v. Leyland (1898) 67 L. J. Q. B. 884; [1898] A. C. 524; 79 L. T. 180.—H.L. (E.).

LORD SHAND.—I am clearly of opinion that the view taken by the learned judges in those two cases as to the sound construction of this rule (rd. XI. r. 1 (e)) is the right one. The result of those cases, I take it, is practically this—at when it is shown that a plaintiff is entitled to require the performance of a contract in this country, and that consequently a breach takes place in this country, a right to serve process out of the country exists; but I hold upon the authority of those cases . . .

be in accordance with sound principle, that the rule is limited to that, and that there is no right to serve out of the jurisdiction where the performance of the contract may either be within the jurisdiction or abroad in the option of one of the parties.—p. 888.

Comber v. Leyland, *referred to*.

Mackinnon v. Clark (1898) 67 L. J. Q. B. 763; [1898] 2 Q. B. 251; 79 L. T. 83; 47 W. R. 19.—C.A.

Moritz v. Stephan (1888) 58 L. T. 850; 36 W. R. 779.—NORTH, J., *approved*.

Kolchmann v. Meurice (1903) 72 L. J. K. B. 289; [1903] 1 K. B. 534; 88 L. T. 369; 51 W. R. 356.—C.A.

Westman v. Aktiebolaget, &c., Snikarefabrik (1876) 45 L. J. Ex. 327; 1 Ex. D. 237; 24 W. R. 405.—EX. D., *distinguished*.

Sedgwick v. Yedras Mining Co. (1887) 35 W. R. 780.—**HUDDLESTON, B. and A. L. SMITH, J.**

HUDDLESTON, B.—In that case leave of the Court for the issue of the writ had been obtained. The writ in this case is obviously one for service within the jurisdiction, no leave was obtained to issue it, and the words, "15, Queen Street, in the City of London," were inserted for the purpose of serving the secretary of the company, who happened to be passing through London.—p. 781.

Dymond v. Croft, 45 L. J. Ch. 612; 33 L. T. 27; 24 W. R. 818.—**JESSEL, M.R.**; *reversed on one point*, (1876) 45 L. J. Ch. 604; 3 Ch. D. 512; 34 L. T. 786; 24 W. R. 842.—C.A. **JAMES, L.J., BAGGALLAY, J.A., and LUSH, J.** *And see* **Morton v. Miller** (1876) 3 Ch. D. 516.—C.A. **JAMES, L.J., BAGGALLAY, J.A. and LUSH, J.**

Dymond v. Croft, 35 L. T. 27.—M.R.

Followed, **Gibbon v. Walker** (1878) 38 L. T. 217.—**BACON, V.-C.**; *considered*, **Livesey, In re, Fish v. Chatterton** (1882) 47 L. T. 328; 31 W. R. 87.—**BACON, V.-C.**

Maclean v. Dawson (1859) 28 L. J. Ch. 742; 4 De G. & J. 150; 5 Jur. (N.S.) 663; 7 W. R. 354.—L.JJ.

Approved, **Great Australian Gold Mining Co. v. Martin** (1877) 46 L. J. Ch. 289; 5 Ch. D. 1; 35 L. T. 874; 25 W. R. 246.—C.A. **JAMES, L.J., and BAGGALLAY, J.A.; BRAMWELL, J.A.** *dissenting*; *referred to*, **Société Générale de Paris v. Dreyfus** (1885) 54 L. J. Ch. 893; 29 Ch. D. 239 (*see supra*, col. 2326).

Diamond v. Sutton (1866) 35 L. J. Ex. 129; L. R. 1 Ex. 130; 12 Jur. (N.S.) 319; 13 L. T. 800; 14 W. R. 374.—EX.

Approved, **Jackson v. Spittall** (1870) 39 L. J. C. P. 321; L. R. 5 C. P. 542; 22 L. T. 755; 18 W. R. 1062.—C.P.; *followed*, **Arrowsmith v. Chandler** (1872) 27 L. T. 42.—EX.; *discussed*, **Thomas v. Hamilton (Dowager Duchess)** (1886) 55 L. J. Q. B. 555; 17 Q. B. D. 592.—C.A. (*see post*, col. 2329).

Hawarden v. Dunlop (1862) 2 Dr. & Sm. 155; 7 L. T. 37; 10 W. R. 683.—**KINDERSLEY, V.-C.**, *rule in, adopted*.

Great Australian Gold Mining Co. v. Martin (1877) 5 Ch. D. 117; 35 L. T. 702.—MARTIN, J.

Great Australian Gold Mining Co. v. Martin (1877) 46 L. J. Ch. 289; 5 Ch. D. 1; 35 L. T. 874; 25 W. R. 246.—C.A.; BAGGALLAY, J.A. *dissenting*; *reversing* 35 L. T. 708.—MALINS, V.-C.

Overruled on one point, **Fowler v. Barstow** (1881) 51 L. J. Ch. 103; 20 Ch. D. 240; 45 L. T. 603; 30 W. R. 113.—C.A. JESSEL, M.R., BAGGALLAY and LUSH, L.JJ.; *distinguished*, **Bree v. Marescaux** (1881) 50 L. J. Q. B. 676; 7 Q. B. D. 434, 437; 44 L. T. 765; 29 W. R. 858.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.

Fowler v. Barstow, *discussed*.

Preston v. Lamont (1876) 45 L. J. Ex. 797; 1 Ex. D. 361; 35 L. T. 341; 24 W. R. 928.—BRAMWELL and AMPHLETT, BB., *distinguished*.

Thomas v. Hamilton (Dowager Duchess) (1886) 17 Q. B. D. 592; 55 L. J. Q. B. 555; 55 L. T. 385; 35 W. R. 22.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.; *reversing* 55 L. T. 219.—FIELD and BUTT, JJ.

BOWEN, L.J.—**Preston v. Lamont**, cited for the plaintiff, has no application. The decision there only was that the point could not be raised by plea.—p. 597.

Eager, In re, Eager v. Johnstone (1882) 52 L. J. Ch. 56; 22 Ch. D. 86; 47 L. T. 685; 31 W. R. 33.—C.A. JESSEL, M.R. and COTTON, L.J., *referred to*.

Speller v. Bristol Steam Navigation Co. (1884) 53 L. J. Q. B. 322; 13 Q. B. D. 96; 50 L. T. 419; 32 W. R. 670; 5 Asp. M. C. 225.—GROVE, J. and HUDDLESTON, B.; *affirmed*, C.A. BRETT, M.R., BOWEN and FRY, L.JJ.; **Field v. Bennett** (1886) 56 L. J. Q. B. 89.—COLERIDGE, C.J. and DENMAN, J.; **Deutsche National Bank v. Paul** (1898) 67 L. J. Ch. 156; [1898] 1 Ch. 283; 78 L. T. 35; 46 W. R. 243.—STIRLING, J.

Lewis v. Baldwin (1848) 11 Beav. 153.—M.R., *discussed*.

Scott v. Royal Wax Candle Co. (1876) 1 Q. B. D. 404; 45 L. J. Q. B. 586; 54 L. T. 683; 24 W. R. 668.—Q.B.D.

Scott v. Royal Wax Candle Co., *followed*.
Bacon v. Turner (1876) 3 Ch. D. 275; 34 L. T. 647; 24 W. R. 637.—HALL, V.-C.

Agnew v. Usher (1884) 54 L. J. Q. B. 371; 14 Q. B. D. 78; 51 L. T. 576; 33 W. R. 126.—Q.B.D.; *on appeal*, 33 W. R. 126.—C.A., *distinguished*.

Kaye v. Sutherland (1887) 57 L. J. Q. B. 68; 20 Q. B. D. 147; 58 L. T. 56; 36 W. R. 508.—STEPHEN and CHARLES, JJ.

Agnew v. Usher, *distinguished*.

Kaye v. Sutherland, *approved*.
Tassell v. Hallen (1892) 61 L. J. Q. B. 159; [1892] 1 Q. B. 321; 66 L. T. 196; 40 W. R. 221; 56 J. P. 520.—COLERIDGE, C.J. and COLLINS, J.

Robey v. Snaefell Mining Co. (1887) 57 L. J. Q. B. 134; 20 Q. B. D. 152; 36 W. R. 224.—STEPHEN and CHARLES, JJ., *adopted*.

Thorn v. City Rice Mills (1889) 58 L. J. Ch. 297; 40 Ch. D. 357; 60 L. T. 359; 37 W. R. 398.—NORTH, J.; **Rein v. Stein** (1892) 61 L. J. Q. B. 401; [1892] 1 Q. B. 753; 66 L. T. 469.—C.A. LINDLEY and KAY, L.JJ.

Robey v. Snaefell Mining Co., *referred to*.

Fry v. Raggio (1891) 40 W. R. 120.—COLERIDGE, C.J.; MATHEW, J. *dissenting*, *discussed*.

The Elder, Neptune Salvage Co. v. Norddeutscher Lloyd (1893) 62 L. J. P. 65; [1893] P. 119, 128; 1 R. 593; 69 L. T. 622; 7 Asp. M. C. 354.—JEUNE, P.; *affirmed*, C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.

M'Stephens v. Carnegie, 42 L. T. 15; 28 W. R. 385.—BACON, V.-C.; *reversed*, (1880) 49 L. J. Ch. 397; 42 L. T. 309.—C.A. JESSEL, M.R., BRETT and COTTON, L.JJ.

Tozier v. Hawkins (1885) 55 L. J. Q. B. 152; 15 Q. B. D. 680; 34 W. R. 223.—C.A. BRETT, M.R., BAGGALLAY and BOWEN, L.JJ., *explained*.

Marshall v. Marshall (1888) 38 Ch. D. 330; 59 L. T. 484.—C.A. COTTON and FRY, L.JJ., *discussed and distinguished*.

Burland's Trade Mark, In re, Burland v. Broxburn Oil Co. (1889) 58 L. J. Ch. 591; 41 Ch. D. 542; 60 L. T. 586; 37 W. R. 470; 1 Meg. 215.—CHITTY, J.

Marshall v. Marshall, *applied*.

Burland's Trade Mark, In re, referred to.
Kinahan v. Kinahan (1890) 59 L. J. Ch. 705; 45 Ch. D. 78; 62 L. T. 718; 38 W. R. 655.—KEKEWICH, J.

Burland's Trade Mark, In re, referred to.
Collins v. North British and Mercantile Insurance Co. (1894) 63 L. J. Ch. 709; [1894] 3 Ch. 228; 8 R. 470; 71 L. T. 58; 43 W. R. 106.—KEKEWICH, J.

Massey v. Heynes (1888) 57 L. J. Q. B. 521; 21 Q. B. D. 330; 36 W. R. 834.—C.A. *Referred to*, **Washburn and Moen, & Co. v. Cunard Steamship Co.** (1889) 5 Times L. R. 592.—STIRLING, J.; *explained and applied*, **Burt v. Bowen** (1891) 8 Times L. R. 28.—COLERIDGE, C.J. and WRIGHT, J.; *discussed*, **Indigo Co. v. Ogilvy** [1891] 2 Ch. 31; 64 L. T. 846; 39 W. R. 646.—C.A.

Massey v. Heynes, *applied*.

Steamship Thanemore v. Thompson (1885) 52 L. T. 552; 5 Asp. M. C. 398.—MANISTY and LOPES, JJ., *referred to*.
The Elton (1891) 60 L. J. P. 69; [1891] P. 265; 65 L. T. 232; 39 W. R. 703; 7 Asp. M. C. 66.—JEUNE, J.

Massey v. Heynes, *followed*.

Firth v. De Las Rivas (1893) 9 R. 51; 69 L. T. 666; 42 W. R. 100.—C.A.

Massey v. Heynes, *applied*.

Witted v. Galbraith [1893] 1 Q. B. 431.—COLERIDGE, C.J. and HAWKINS, J.; *reversed*, C.A. (*post*, col. 2331).

Massey v. Heynes, *applied*.

Bennetts & Co. v. McIlwraith & Co. (1896) 65 L. J. Q. B. 632; [1896] 2 Q. B. 464; 75 L. T. 145; 45 W. R. 17; 8 Asp. M. C. 176.—C.A. A. L. SMITH and RIGBY, L.JJ.

A. L. SMITH, L.J.—In **Massey v. Heynes** this Court held that where, as in the present case, an action was brought against agents in this country for breach of warranty of authority, the foreign principals were proper parties to be joined as co-defendants.—p. 634.

Massey v. Heynes, referred to.

Thompson v. London County Council (1899) 68 L. J. Q. B. 625; [1899] 1 Q. B. 840; 80 L. T. 512; 47 W. R. 433.—C.A.: The Duc D'Aumale (No. 1) (1902) 72 L. J. P. 11; [1903] P. 18; 87 L. T. 674; 51 W. R. 332; 9 Asp. M. C. 359.—BARNES, J. (affirmed, C.A.); Sanderson v. Blyth Theatre Co. (1908) 72 L. J. K. B. 761; [1908] 2 K. B. 333, 541; 89 L. T. 159; 52 W. R. 33.—C.A.

Yorkshire Tannery and Boot Manufactory v. Eglinton Chemical Co. (1884) 54 L. J. Ch. 81; 33 W. R. 162.—PEARSON, J., *discussed and approved.*

Massey v. Heynes (1888) 59 L. T. 470.—WILLS and GRANTHAM, JJ.: affirmed, 57 L. J. Q. B. 521; 21 Q. B. D. 330; 36 W. R. 834.—C.A.

Yorkshire Tannery and Boot Manufactory v. Eglinton Chemical Co. *observed on.*

Tassell v. Hallen (1892) 61 L. J. Q. B. 159; [1892] 1 Q. B. 321; 66 L. T. 196; 40 W. R. 221; 56 J. P. 520.—COLERIDGE, C.J. and COLLINS, J.

Yorkshire Tannery and Boot Manufactory v. Eglinton Chemical Co. and Tassell v. Hallen. *discussed.*

Collins v. North British and Mercantile Insurance Co. [1894] 3 Ch. 228; 63 L. J. Ch. 709; 8 R. 470; 71 L. T. 58; 43 W. R. 106.

KEKEWICH, J.—The meaning of that clause [Ord. XI. r. 1 (g)] was carefully considered by Pearson, J. in *Yorkshire Tannery and Boot Manufactory v. Eglinton Chemical Co.*, and he came to the conclusion that the other party to the action upon the service on whom the propriety of the service out of the jurisdiction depends, must have been served before the Court can allow service on the party out of the jurisdiction. That, so far as I am aware, has always been held to be the meaning of the rule, except that some doubt was thrown upon it in *Tassell v. Hallen*. It would be presumptuous on my part to criticise the language of the late L.C.J.; but there is no occasion to do anything of the kind, because his lordship took pains to show, that though he was not satisfied with the conclusion of Pearson, J., he was not then sure that that conclusion was wrong, and Collins, J., who sat with him and was the only other judge present, did not adopt the criticism of the L.C.J., but did adopt the reasoning of Pearson, J.—p. 236.

Kinahan v. Kinahan (1890) 59 L. J. Ch. 705; 45 Ch. D. 78; 62 L. T. 718; 38 W. R. 655.—KEKEWICH, J., *discussed.*

Bayer v. Connell [1897] 1 Ir. R. 544.—PORTER, M.R.

Witted v. Galbraith (1893) 62 L. J. Q. B. 248; [1893] 1 Q. B. 577; 4 R. 362; 68 L. T. 421; 41 W. R. 395.—C.A. LINDLEY and KAY, L.JJ.; *reversing* [1893] 1 Q. B. 431.—Q.B.D., *principle applied.*

Collins v. North British and Mercantile Insurance Co. [1894] 3 Ch. 228; 63 L. J. Ch. 709; 8 R. 470; 71 L. T. 58; 43 W. R. 106.

KEKEWICH, J.—The principle seems to me to be contained in *Witted v. Galbraith*, which was very much discussed. You must have, as Lindley, L.J. said, "a *bona fide* case of an action properly brought against a person who has been served within the jurisdiction," and not an action brought against such person simply to enable the plaintiff to bring in other defendants who are to be served out of the jurisdiction.—p. 237.

Witted v. Galbraith, applied.

The Duc D'Aumale (1902) 72 L. J. P. 11; [1903] P. 18 (*supra*, col. 2331).

Binet v. Picot (1859) 28 L. J. Ex. 244; 4 H. & N. 465.—EX., *approved.*

Jackson v. Spittall (1870) 39 L. J. C. P. 321; L. R. 5 C. P. 542, 546; 22 L. T. 755; 18 W. R. 1162.—C.P.

Slade v. Noel (1862) 4 F. & F. 424; **Nettlefold v. Fünche** (1866) C. P., *observed on.*

Sichel v. Borch (1864) 2 H. & C. 954; 33 L. J. Ex. 179; 10 Jur. (N.S.) 107; 9 L. T. 657; 12 W. R. 346.—EX., *followed.*

Allhusen v. Malgarejo (1868) L. R. 3 Q. B. 340; 37 L. J. Q. B. 169; 18 L. T. 823; 16 W. R. 854.—Q.B.

BLACKBURN, J.—If the whole cause of action—that is, the contract and the breach—does not arise within the jurisdiction, then sects. 18 and 19 have no application. The Court of Exchequer have decided this point in this way, and in my opinion that decision is quite right. Two cases are given, in a note to sect. 18, in Mr. Day's Common Law Procedure Acts: *Slade v. Noel*, and *Nettlefold v. Fünche*, in which it is said that although the contracts were made abroad, yet the cause of action, within the meaning of sect. 18, arose within the jurisdiction. Those cases appear to be reported *ex relatione*. It is a mere assumption that the learned judges decided them on the ground that the whole cause of action arose within the jurisdiction. *Sichel v. Borch* has been since decided, and I think rightly decided.—p. 343.

MELLOR and LUSH, JJ. to the same effect.

Slade v. Noel, Nettlefold v. Fünche, Allhusen v. Malgarejo, and Fife v. Round (1858) 6 W. R. 282.—EX., *discussed.*

Jackson v. Spittall (1870) 39 L. J. C. P. 321; L. R. 5 C. P. 542; 22 L. T. 755; 18 W. R. 1162.—C.P.

Sichel v. Borch; Allhusen v. Malgarejo; Fife v. Round (1858) 6 W. R. 282.—EX.; and **Jackson v. Spittall**, *considered.*

Durham v. Spence (1870) 40 L. J. Ex. 3; L. R. 6 Ex. 46; 23 L. T. 500; 19 W. R. 162.

PIGOTT and CLEASBY, BB. expressed their assent to the judgment in *Jackson v. Spittall*, as to the meaning of cause of action in sect. 18.

KELLY, C.B. and MARTIN, B. adhered to the decisions in *Sichel v. Borch* and *Allhusen v. Malgarejo*. It is to be noted, however, that Martin, B. distinguished the cases and agreed generally in his judgment with Pigott and Cleasby, BB.

Sichel v. Borch and Allhusen v. Malgarejo, *adhered to.*

Cherry v. Thompson (1872) 41 L. J. Q. B. 243; L. R. 7 Q. B. 573; 26 L. T. 791; 20 W. R. 1029.

BLACKBURN, J. (for the Court).—After carefully considering the judgment of the Court of C. P. in *Jackson v. Spittall* (*supra*), we are unable to concur in that decision. We entirely adhere to what was said by Blackburn, J., in *Allhusen v. Malgarejo*, and by the Court of Ex. in *Sichel v. Borch*.—p. 246. See judgment at length.

Sichel v. Borch, referred to.

Horne v. Rouquette (1878) 3 Q. B. D. 524; 39 L. T. 219; 26 W. R. 894.—C.A.

Jackson v. Spittall (*supra*, col. 2332).
dissented from.

Cherry v. Thompson (1872) L. R. 7 Q. B. 573
(*supra*, col. 2332).

Jackson v. Spittall and Durham v. Spence
(*supra*, col. 2332), *referred to.*
Mathews v. Alexander (1873) Ir. R. 7 C. L.
575.—Q.B.

Jackson v. Spittall, *rule in, to be observed.*
Vaughan v. Weldon (1874) 44 L. J. C. P. 64;
L. R. 10 C. P. 47; 31 L. T. 683; 23 W. R. 138.
COLERIDGE, C.J.—The practice established in
the C. P. by the decision in *Jackson v. Spittall*
will henceforth be observed in all the superior
Courts of law.—p. 65.

Jackson v. Spittall, *referred to.*
Northey Stone Co. v. Gidney (1893) [1894]
1 Q. B. 99; 10 R. 16; 70 L. T. 82; 42 W.
R. 99.—CHARLES and WRIGHT, JJ.; affirmed,
C.A.

Jackson v. Spittall, *discussed.*
Payne v. Hogg (1900) 69 L. J. Q. B. 579; [1900]
2 Q. B. 43; 82 L. T. 584; 48 W. R. 417.—C.A.
COLLINS, L.J.—I think it clear that "the cause
of action" means the whole cause of action as
explained in *Cooke v. Gill* [(1873) 42 L. J. C. P. 98;
L. R. 8 C. P. 107 (*see* "MAYOR'S COURT," *supra*,
col. 1754)], and does not bear the same meaning
as "a cause of action" was held to bear in *Jack-
son v. Spittall*, a case which turned upon the
special language of sect. 18 of the Common Law
Procedure Act, 1852, and in which it was held,
distinguishing "a cause of action" from "the
cause of action," that "a cause of action" there
did not mean the whole cause of action, but the
act on the part of the defendant which gave the
plaintiff his cause of action.—p. 583.

Cherry v. Thompson (1872) 41 L. J. Q. B.
243; L. R. 7 Q. B. 573; 26 L. T. 791; 20
W. R. 1029.—Q.B., *followed.*
Mathews v. Alexander (1873) Ir. R. 7 C. L.
575.—Q.B.

**Cherry v. Thompson, Mathews v. Alexander,
and Hamilton v. Barr** (1886) 18 L. R. Ir.
297.—C.A., *followed.*

Holland v. Bennett (1902) 71 L. J. K. B. 490;
[1902] 1 K. B. 867; 86 L. T. 485; 50 W. R. 401.
—C.A. V. WILLIAMS and MATHEW, L.JJ.

Maugham, In re (1874) 22 W. R. 748.—
JESSEL, M.R., *approved.*
Busfield, In re, Whaley v. Busfield (1886) 55
L. J. Ch. 467; 32 Ch. D. 123; 54 L. T. 220; 34
W. R. 372.—C.A. COTTON, BOWEN and FRY, L.JJ.

Lenders v. Anderson (1883) 53 L. J. Q. B.
104; 12 Q. B. D. 50; 49 L. T. 537; 32
W. R. 230; 48 J. P. 136.—GROVE, J. and
HUDDLESTON, B., *applied.*

Speller v. Bristol Steam Navigation Co. (1884)
53 L. J. Q. B. 322; 13 Q. B. D. 96; 50 L. T. 419;
32 W. R. 670; 5 Asp. M. C. 228.—GROVE, J. and
HUDDLESTON, B.; affirmed, C.A.

Lenders v. Anderson, *discussed and distin-
guished.*

Croft v. King [1893] 1 Q. B. 419; 62 L. J. Q. B.
242; 5 R. 222; 68 L. T. 296; 41 W. R. 394.

COLLINS, J.—In *Lenders v. Anderson* Huddle-
ston, B. said: "The power which previously
existed of allowing service out of the jurisdiction
in actions of tort is taken away except so far as
such power is involved in clauses (a), (e), or (f)

of Ord. XII. r. 1;" but this *dictum* is not an
authority as to the effect of clause (g), to which
the attention of the learned judge had not been
directed in the argument.—p. 421.

DAY, J. to the same effect.

Croft v. King, *applied.*
Williams v. Cartwright (1894) 64 L. J. Q. B.
92; [1895] 1 Q. B. 142, 147; 14 R. 98; 71
L. T. 834; 43 W. R. 145.—C.A. ESHER, M.R.,
dissenting.

Williams v. Cartwright and Flower v. Rose
(1891) 7 Times L. R. 280.—Q.B.D., *applied.*
The Duc d'Aumale (1902) 72 L. J. P. 11;
[1903] P. 18.—BARNES, J. (*supra*, col. 2331).

Ingate v. Austrian Lloyd's Co. (1858) 27
L. J. C. P. 323; 4 C. B. (N.S.) 704; 4 Jur.
(N.S.) 975; 6 W. R. 659.—C.P., *commented
on.*

Royal Mail Steam Packet Co. v. Braham (1877)
2 App. Cas. 381; 46 L. J. P. C. 67; 36 L. T. 220;
25 W. R. 651.—P.C.

SIR M. SMITH (for self, SIR B. PEACOCK and
SIR R. COLLIER).—The learned counsel for the
appellants strongly relied on a decision of the
Court of C. P. [*Ingate v. Austrian Lloyd's Co.*],
which held that the 19th section of the English
Common Law Procedure Act, 1852, enabling a
person "residing out of the jurisdiction of the
Courts, and not being a British subject," to
be personally served, does not apply to foreign
corporations carrying on their business abroad.
Whatever may be the authority of this case upon
the construction of the English Procedure Act,
it ought not, in their lordships' view, to govern
their decision in construing the 19th section of
the Jamaica Procedure Law. It is to be observed
that the 19th section of the English Act is
analogous to, but by no means identical with, the
20th section of the Jamaica Procedure Law, and
relates to personal and not to substituted service.
—p. 386.

Ingate v. Austrian Lloyd's Co., *discussed.*
Newby v. Von Oppen (1872) 41 L. J. Q. B.
148; L. R. 7 Q. B. 203.—Q.B. (*supra*, col. 2322).

Ingate v. Austrian Lloyd's Co., *followed.*
Armstrong v. Elbinger Actien-Gesellschaft
(1874) 23 W. R. 94.—EX.

Ingate v. Austrian Lloyd's Co., *held prac-
tically overruled.*
Westman v. Aktiebolaget, &c. Snickarefabrik
(1876) 45 L. J. Ex. 327; 1 Ex. D. 237, 240; 24
W. R. 405.—EX. D.

Ingate v. Austrian Lloyd's Co., *commented on.*
Scott v. Royal Wax Candle Co. (1876) 45 L. J.
Q. B. 586; 1 Q. B. D. 404; 34 L. T. 683; 24
W. R. 668.—Q.B.D.

Ingate v. Austrian Lloyd's Co., *distinguished.*
Haggin v. Comptoir d'Escompte de Paris
(1889) 58 L. J. Q. B. 508; 23 Q. B. D. 519, 523;
61 L. T. 748; 37 W. R. 703.—C.A.

Doyle v. Kaufman (1877) 47 L. J. Q. B. 26;
3 Q. B. D. 7; 26 W. R. 98.—COCKBURN,
C.J. and LUSH, J.; affirmed, 3 Q. B. D. 340.
—C.A., *distinguished.*

Smallpage v. Tonge (1886) 17 Q. B. D. 644; 55
L. J. Q. B. 518; 55 L. T. 44; 34 W. R. 768.—C.A.
COTTON, L.J.—In that case the application was
for the renewal of a writ which the plaintiff had
neglected to renew in due time, and which had

ceased to be in force through his own negligence. There the right of action was gone, and the Court held that as the right of action had gone by the default of the plaintiff, it would be wrong to give him an opportunity of reviving that which he had already lost. Here the right of action still continues, and we are only asked to make the action effectual by ordering service out of the jurisdiction.—p. 648.

Doyle v. Kaufman, *followed*.

Hewett v. Barr (1890) 60 L. J. Q. B. 268; [1891] 1 Q. B. 98; 39 W. R. 294.—C.A.

Doyle v. Kaufman, *followed*.

Magee v. Hastings (1891) 28 L. R. Ir. 288.—ANDREWS, J.

5. APPEARANCE.

Paxton v. Baird (1892) 62 L. J. Q. B. 176; [1894] 1 Q. B. 139; 5 R. 129; 67 L. T. 623; 41 W. R. 88.—COLERIDGE, C.J. and WILLS, J.

Followed, Hamner v. Clifton (1893) [1894] 1 Q. B. 238; 10 R. 55; 42 W. R. 287.—CHARLES and WRIGHT, JJ.; *referred to*, Roberts v. Plant (1894) [1895] 1 Q. B. 597.—POLLOCK, B. and GRANTHAM, J.; *affirmed*, C.A. (*post*, col. 2339).

Davidson v. Hastings (Marchioness) (1838) 7 L. J. Ch. 186, 215; 2 Keen 509; 2 Jur. 756.—M.R., *discussed*.

Carroll Iron Co. v. Maclaren (1855) 24 L. J. Ch. 620; 5 H. L. Cas. 416; 3 W. R. 597.—H.L. (E.); LORD ST. LEONARDS *dissenting*.

Renshaw v. Renshaw (1880) 49 L. J. Ch. 127; 42 L. T. 353; 28 W. R. 409.—JESSEL, M.R., *followed*.

Phillips v. Kearney (1889) 58 L. J. Ch. 344; S. C. *nom.* Phillips v. Kearney, W. N. (1889) p. 8.—NORTH, J.

Gee v. Bell (1887) 56 L. J. Ch. 718; 35 Ch. D. 160; 56 L. T. 305; 35 W. R. 805.—NORTH, J., *followed*.

Kingdon v. Kirk (1887) 57 L. J. Ch. 328; 37 Ch. D. 141; 58 L. T. 383; 36 W. R. 430.—NORTH, J.

Hodges v. Callaghan (1857) 26 L. J. C. P. 171; 2 C. B. (N.S.) 306; 3 Jur. (N.S.) 369; 5 W. R. 531.—C.P.

Referred to, Huffer v. Allen (1866) 36 L. J. Ex. 17; L. R. 2 Ex. 15; 4 H. & C. 634; 15 L. T. 225; 15 W. R. 281.—EX.; *applied*, Hughes v. Justin (1894) 63 L. J. Q. B. 417; [1894] 1 Q. B. 667, 677; 9 R. 212; 70 L. T. 365; 42 W. R. 339.—C.A. ESHER, M.R., LOPES and DAVEY, L.JJ.

Caulin v. Lawley (1815) 2 Price 12.—EX., *questioned*.

Kemp v. Sumner (1828) 2 Y. & J. 405.

HULLOCK, B.—The case to which allusion has been made in 2 Price is certainly inconsistent with the current of authorities, unless, as it is suggested, that was an application under the statute, which does not appear.—p. 406.

Cookson v. Lee (1846) 15 Sim. 302.—SHADWELL, V.-C.; and **Wood v. Logsdon** (1852) 22 L. J. Ch. 257; 9 Hare (App.) xxvi.; 1 W. R. 46.—TURNER, V.-C., *referred to*.

Lloyd v. Rossmore (Lord) (1875) Ir. R. 9 Eq. 488.—SULLIVAN, M.R.

Bentley v. Robinson (1852) 9 Hare (App.) xxvi.—TURNER, V.-C.; and **Leese v. Knight**

(1862) 8 Jur. 1006; 10 W. R. 711.—KINDERSLEY, V.-C., *referred to*.

Lloyd v. Rossmore (Lord) (1875) Ir. R. 9 Eq. 488.—SULLIVAN, M.R.

6. JUDGMENT UNDER ORDER XIV.

Tutther v. Caralampi (1888) 21 Q. B. D. 414; 59 L. T. 141; 37 W. R. 94; 52 J. P. 616.—COLERIDGE, C.J. and HAWKINS, J., *distinguished*.

Gerard v. Clowes [1892] 2 Q. B. 11; 61 L. J. Q. B. 487; 67 L. T. 204.—A. L. SMITH and LAWRENCE, JJ.

A. L. SMITH, J.—*Tutther v. Caralampi* decides that Ord. XIV. cannot be used in an action on a bond on which breaches have been assigned—that is, a bond under the statute of Wm. [8 & 9 Wm. 3. c. 11]. But a common money bond under the statute of Anne [4 & 5 Anne c. 16] is a very different thing.—p. 13.

Hill v. Sidebottom (1882) 47 L. T. 224.—FRY, J., *applied*.

Imbert-Terry v. Carver (1887) 56 L. J. Ch. 716; 34 Ch. D. 506; 56 L. T. 91; 35 W. R. 328.—NORTH, J.

Hill v. Sidebottom and Imbert-Terry v. Carver, *discussed*.

Clarke v. Berger (1888) 36 W. R. 809.—MANISTY and STEPHEN, JJ.

Bailey v. Bailey (1884) 13 Q. B. D. 855.—C.A.; *affirming* 53 L. J. Q. B. 583; 50 L. T. 722; 32 W. R. 856.—Q.B.D.

Referred to, Linton v. Linton (1885) 54 L. J. Q. B. 529; 15 Q. B. D. 239, 247; 52 L. T. 782; 33 W. R. 714; 49 J. P. 597.—C.A.; *applied*, Chalk Webb & Co. v. Tennent (1887) 57 L. T. 598, 599; 36 W. R. 263.—NORTH, J.

Bailey v. Bailey, *explained and reasoning applied*.

Otway, In re. Otway, Ex parte (1888) 58 L. T. 885; 36 W. R. 698; 5 Morrell 115.

CAVE, J.—*Bailey v. Bailey* shows that a wife who has obtained an order for alimony against her husband *pendente lite* cannot sign final judgment under Ord. XIV. r. 1 where her action is for arrears of alimony under that order, and the reasoning which was applied . . . applies here, and so as Mrs. Otway is not a judgment creditor she cannot have a receiving order made.—p. 885.

Bailey v. Bailey, *discussed*.

Westmorland Green and Blue Slate Co. v. Feilden (1891) 60 L. J. Ch. 301, 680; [1891] 3 Ch. 15, 20; 65 L. T. 428; 40 W. R. 23.—KEKEWICH, J.; *affirmed*, C.A.

Bailey v. Bailey, *discussed*.

Norton v. Gregory (1895) 14 R. 735; 73 L. T. 10; 11 Times L. R. 439.—C.A.

RIGBY, L.J.—So also in *Bailey v. Bailey*, where the action was brought upon an order for alimony, that is, an order which is subject to variation, and to turn that into a final judgment would be to alter its effect altogether.—p. 738.

Davis v. Spence (1876) 1 C. P. D. 719; 25 W. R. 229.—C.P., *followed*.

North Central Waggon Co. v. North Wales Waggon Co. (1879) 39 L. T. 628.—COCKBURN, C.J. and POLLOCK, B., *not followed*.

Girvin v. Grepe (1879) 13 Ch. D. 174; 49 L. J. Ch. 63; 41 L. T. 522; 28 W. R. 123.

JESSEL, M.R.—As regards the decisions, I agree

they are entirely contradictory to each other. There is, first of all, the decision . . . in *Davis v. Spence*, in which Brett, Grove and Lindley, JJ. all agree that it is quite clear that the rule, in effect, adopts the practice under the Bills of Exchange Act, and that the leave to read the affidavit in reply was properly given: and they refused the motion to prevent the plaintiff from signing final judgment. On the other hand, we have *North Central Waggon Co. v. North Wales Waggon Co.*, a more recent decision, and in which *Davis v. Spence* seems to have been cited. . . . It is a distinct decision the other way. Therefore, the result is that the authorities are in conflict: and being decisions of Courts of co-ordinate jurisdiction, I am not bound by either of them.—p. 177.

Davis v. Spence and North Central Waggon Co. v. North Wales Waggon Co. (*supra*), *approved*.

Rotherham v. Priest (1879) 49 L. J. C. P. 104; 41 L. T. 558; 28 W. R. 277.—GROVE and LOPES, JJ.

Lloyd's Banking Co. v. Ogle (1876) 45 L. J. Ex. 606; 1 Ex. D. 262; 34 L. T. 584; 24 W. R. 678.—BRAMWELL and OLEASBY, BB., *distinguished*.

Anglo-Italian Bank v. Wells; *Anglo-Italian Bank v. Davies* (1878) 38 L. T. 197; *affirmed*, C.A. JESSEL, M.R., BAGGALLAY and THESIGER, L.JJ.

HALL, V.-C.—*Lloyd's Banking Co. v. Oyle* has been much relied upon, because it was the case of a guarantor, and the argument founded on it was this, that a guarantor might say: "I shall not pay until I have investigated the state of the accounts between the creditor and the principal debtor. I am not satisfied what the state of the account is, and, under those circumstances, I claim the right to defend." Now the general observations made by Bramwell, L.J., in that case, must be taken with reference to the particular question before him, and I think his language itself, if rightly understood, shows that he meant that. But there what was guaranteed was not, as in the present case, certain promissory notes—the amount found on an account taken and ascertained—but it was the guarantee of the balance upon a banking account, which balance had to be taken, and under those circumstances, the party having sworn the proper affidavit in that respect as to his defence, Bramwell, L.J., said: "If the plaintiffs had sworn that the debt had been admitted by the company, and that the defendant had been informed of the amount and had not dissented or in any other way denied his liability, it would seem to me that he could only defend the action for the purpose of delay, and such an order as that appealed against might be made; but where a guarantor *bond fide* says that he does not know that the debt is due, and that he requires it to be proved, I think the statute was not intended to operate to take that right from him." He afterwards says: "In my opinion it ought to be a general rule that where there is no acknowledgment of the debt by the defendant, or anything else to show that the defence is for mere purposes of delay in the case of a guarantor or surety, like the defendant, he should not be prevented from going to trial." "A guarantor like the defendant;" that is to

say, not a guarantor for payment of certain promissory notes of a fixed amount; the very object of getting promissory notes being to prevent disputes as to amounts and to put the holder of those notes in a position to enforce them at the time they become due.—p. 198.

Hodsoll v. Baxter (1858) 28 L. J. Q. B. 61; 11 L. B. & L. 884; 4 Jur. (N.S.) 556; 6 W. R. 686.—EX. CH., *followed*.

Grant v. Easton (1883) 13 Q. B. D. 302; 53 L. J. Q. B. 68; 49 L. T. 645; 32 W. R. 239.—C.A.

BRETT, M.R.—*Hodsoll v. Baxter*, which was cited during the argument, was decided upon the Common Law Procedure Act, 1852, s. 25, and therefore ought to be treated as a decision upon Ord. III. r. 6. As the Ex. Ch. was a Court of co-ordinate jurisdiction with our own, the judgment is binding upon us, and we must hold that the order giving leave to sign final judgment under Ord. XIV. was right. But if no authority had existed, I should have come to the same conclusion.—p. 303. BAGGALLAY and BOWEN, L.JJ. concurred.

Grant v. Easton and Hodsoll v. Baxter, *discussed and not applied*.

Bailey v. Bailey (1884) 53 L. J. Q. B. 583; 13 Q. B. D. 855; 50 L. T. 722; 32 W. R. 856.—GROVE J. and HUDDLESTON, B.; *affirmed*. C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

Runnacles v. Mesquita (1876) 45 L. J. Q. B. 407; 1 Q. B. D. 416; 24 W. R. 553.—Q.B.D., *not applied*.

Ray v. Barker (1879) 48 L. J. Ex. 569; 4 Ex. D. 279; 41 L. T. 265; 27 W. R. 745.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.

Ray v. Barker, *referred to*.

Manger v. Cash (1889) 5 Times L. R. 271.—DENMAN and MANISTY, JJ.

Christopherson v. Lotinga (1864) 33 L. J. C. P. 121; 15 C. B. (N.S.) 109; 10 Jur. (N.S.) 180; 9 L. T. 688; 12 W. R. 410.—C.P., *approved*.

Frederici v. Vanderzee (1877) 46 L. J. C. P. 194; 2 C. P. D. 70; 35 L. T. 889; 25 W. R. 389.—C.P.D.; *affirmed*, C.A.

Kingsford v. G. W. Ry. (1864) 33 L. J. C. P. 307; 16 C. B. (N.S.) 761; 10 Jur. (N.S.) 804; 10 L. T. 722; 12 W. R. 1059.—C.P., *distinguished and not applied*.

Frederici v. Vanderzee (1877) 46 L. J. C. P. 194; 2 C. P. D. 70; 35 L. T. 889; 25 W. R. 389.—C.A., *applied*.

Bank of Montreal v. Cameron (1877) 46 L. J. Q. B. 425; 2 Q. B. D. 536; 36 L. T. 415; 25 W. R. 593.—C.A.

Bank of Montreal v. Cameron, *discussed and approved*.

Shelford v. Louth and East Coast Ry. (1879) 4 Ex. D. 317; 28 W. R. 407.—C.A.

Muirhead v. Direct United States Cable Co. (1879) 27 W. R. 708.—Q.B.D.; MANISTY, J. *dissenting, followed*.

Shelford v. Louth and East Coast Ry. (1879) 4 Ex. D. 317; 28 W. R. 407.—EX. D.; *affirmed*, C.A.

Robinson v. Ralston (1880) 8 L. R. Ir. 26.—C.A., *commented on*.
Clarke v. Berger (1888) 36 W. R. 809.—MANISTY AND STEPHEN, JJ., *referred to*.
Gurney v. Small (1891) 60 L. J. Q. B. 774; [1891] 2 Q. B. 584; 65 L. T. 754.—WILLS and CHARLES, JJ.

Gurney v. Small, *discussed*.
Paxton v. Baird (1892) [1893] 1 Q. B. 139; 62 L. J. Q. B. 176; 5 R. 129; 67 L. T. 623; 41 W. R. 88.—COLERIDGE, C.J. and WILLS, J.
 WILLS, J.—I adhere to the view I expressed in *Gurney v. Small*. In that case the substantial decision is that Ord. XIV. r. 1 cannot apply unless when a person takes out a summons for judgment under it he has his tackle, so to speak, in order.—p. 141.

Gurney v. Small, *referred to*.
Roberts v. Plant (1894) [1895] 1 Q. B. 597.—POLLOCK, B. and GRANTHAM, J.: affirmed, C.A. (*post*).

May v. Chidley (1893) 63 L. J. Q. B. 355; [1894] 1 Q. B. 451; 10 R. 423.—WILLS and LAWRENCE, JJ., *explained*.

Roberts v. Plant (1895) 14 R. 222; 64 L. J. Q. B. 347; [1895] 1 Q. B. 597; 72 L. T. 181; 43 W. R. 308.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.; affirming S.C. (*supra*).

LOPES, L.J.—I should have thought that the affidavit must verify all the facts which are necessary to constitute a good cause of action. But I think that *May v. Chidley* only comes to this, that the Court there, rightly or wrongly, held that it could be inferred from the plaintiff's affidavit that notice of dishonour had been given. The headnote in the Law Reports goes too far.—p. 225.

Wallingford v. Mutual Society (1880) 50 L. J. Q. B. 49; 5 App. Cas. 685; 43 L. T. 258; 29 W. R. 81.—H.L. (E.), *referred to*.

Manger v. Cash (1889) 5 Times L. R. 271.—DENMAN and MANISTY, JJ.

Wallingford v. Mutual Society.
Followed, **Gunga Narain Gupta v. Tilukram Chowdhry** (1888) L. R. 15 Ind. App. 119.—P.C.: **Lawrance v. Norreys** (Lord) (1890) 59 L. J. Ch. 681; 15 App. Cas. 210; 62 L. T. 706; 38 W. R. 753; 54 J. P. 708.—H.L. (E.).

Hopton v. Robertson, W. N. (1884) p. 77.—FIELD, J., *approved*.

Farden v. Richter (1889) 58 L. J. Q. B. 224; 23 Q. B. D. 124; 60 L. T. 304; 37 W. R. 767.—HUDDLESTON, B. and MANISTY, J.

7. DISCONTINUANCE AND WITHDRAWAL OF DEFENCE.

Crosland v. Routledge, W. N. (1883) p. 228.—FIELD, J., *disapproved*.

M'Ilwraith v. Green (1884) 54 L. J. Q. B. 41; 14 Q. B. D. 766; 52 L. T. 81.—C.A.

M'Ilwraith v. Green, *applied*.
Smith v. Northleach Rural District Council (1901) [1902] 1 Ch. 197; 71 L. J. Ch. 8; 85 L. T. 449; 50 W. R. 104; 66 J. P. 88.—FARWELL, J.

Langdale v. Langdale (1896) 13 Ves. 167.—ELDON, L.C., *commented on*.

Holkirk v. Holkirk (1819) 4 Madd. 50.—LEACH, V.-C., *referred to*.

Winthrop v. Murray (1849) 18 L. J. Ch. 484; 7 Hare 150; 13 Jur. 955.—WIGRAM, V.-C.

Lambton v. Parkinson (1887) 33 W. R. 545.—COLERIDGE, C.J. and A. L. SMITH, J., *distinguished*.

Musman v. Boret (1892) 66 L. T. 171; 40 W. R. 352.—CAVE and CHARLES, JJ.; **Lloyd's Bank v. Princess Royal Colliery Co.** (1900) 82 L. T. 559; 48 W. R. 427.—BYRNE, J.

Johnson v. Mills (1867) 37 L. J. C. P. 57; L. R. 3 C. P. 22; 17 L. T. 215; 16 W. R. 132.—C.P., *discussed and applied*.

Real and Personal Advance Co. v. McCarthy (1881) 18 Ch. D. 362; 45 L. T. 116; 30 W. R. 481.—FRY, J.: affirmed, C.A.

Johnson v. Mills, *referred to*.
Stamm v. Dixon (1889) 58 L. J. Q. B. 183; 22 Q. B. D. 529, 535; 60 L. T. 560; 37 W. R. 456.—C.A.

Real and Personal Advance Co. v. McCarthy (*supra*), *dictum followed*.

Dearsley v. Middleweek (1881) 50 L. J. Ch. 777; 18 Ch. D. 236; 45 L. T. 404; 30 W. R. 45.—FRY, J.

Real and Personal Advance Co. v. McCarthy, *referred to*.

Dearsley v. Middleweek, *considered*.
Newry Salt Works v. Macdonnell [1903] 2 Ir. R. 454.—K.B.D.

Reg. v. City of London Court Judge (1891) 60 L. J. Q. B. 575; [1891] 2 Q. B. 71; 64 L. T. 869.—A. L. SMITH and GRANTHAM, JJ., *distinguished*.

Dierken v. Philpot [1901] 2 K. B. 380; 70 L. J. K. B. 675; 85 L. T. 246; 49 W. R. 703.—ALVERSTONE, C.J. and LAWRENCE, J.

8. NOTICE CLAIMING CONTRIBUTION OR INDEMNITY.

Pontifex v. Foord (1884) 53 L. J. Q. B. 321; 12 Q. B. D. 152; 49 L. T. 808; 32 W. R. 816.—POLLOCK, B. and LOPES, J., *followed*.
Catton v. Bennett (1884) 26 Ch. D. 161; 53 L. J. Ch. 685; 50 L. T. 383; 32 W. R. 485.

KAY, J.—I must take that as a decision that where the money to be paid by the third party or co-defendant is under another and different contract, and is not necessarily the same as is payable under the contract sued upon by the plaintiff—but may be less or more—it is not a case of indemnity.—p. 167.

Pontifex v. Foord, *approved*.
Speller v. Bristol Steam Navigation Co. (1884) 53 L. J. Q. B. 322; 13 Q. B. D. 96; 50 L. T. 419; 32 W. R. 670; 5 Asp. M. C. 228.—C.A.

Pontifex v. Foord and Catton v. Bennett, *referred to*.

Tritton v. Bankart (1887) 56 L. J. Ch. 629; 56 L. T. 306; 35 W. R. 474.—KEKEWICH, J.

Speller v. Bristol Steam Navigation Co. (*supra*), *distinguished*.
Carshore v. N. E. Ry. (1885) 29 Ch. D. 344; 54 L. J. Ch. 760; 52 L. T. 232; 33 W. R. 420.—C.A. COTTON and FRY, L.JJ.

FRY, L.J.—In that case the Court say that the

claim which the defendant had on the third party was not a claim for indemnity. That was the ground of the decision.—p. 347.

Speller v. Bristol Steam Navigation Co. (*supra*), discussed and approved.

Carsore v. N. E. Ry. (*supra*), explained.

Finlay v. Scott, W. N. (1884) p. 8.—PEARSON, J., commented on.

Birmingham and District Land Co. v. L. & N. W. Ry. (1886) 56 L. J. Ch. 956; 34 Ch. D. 261; 55 L. T. 699; 25 W. R. 173.—C.A. COTTON, FRY and BOWEN, L.JJ.

Speller v. Bristol Steam Navigation Co.

Referred to. Tritton v. Bankart (1887) 56 L. J. Ch. 629; 56 L. T. 806; 35 W. R. 474.—KEKEWICH, J.; Dubout v. Macpherson (1889) 58 L. J. Q. B. 496; 23 Q. B. D. 349; 61 L. T. 689; 38 W. R. 62.—A. L. SMITH and DAY, J.J.

Speller v. Bristol Steam Navigation Co., explained and applied.

Burt v. Bowen (1891) 8 Times L. R. 28.—COLERIDGE, C.J. and WRIGHT, J.

Swansea Shipping Co. v. Duncan, 45 L. J. Q. B. 423; 34 L. T. 685.—Q.B.D.; reversed, (1876) 45 L. J. Q. B. 638; 1 Q. B. D. 644; 35 L. T. 879; 25 W. R. 233.—C.A.

Swansea Shipping Co. v. Duncan.

Referred to. Horwell v. London General Omnibus Co. (1877) 46 L. J. Ex. 700; 2 Ex. D. 365, 373; 36 L. T. 637; 25 W. R. 610.—C.A.: BRETT, L.J. dissenting; The Cartsburn (1879) 49 L. J. P. 14; 5 P. D. 35.—SIR R. PHILLIMORE. (See post, col. 2342.)

Swansea Shipping Co. v. Duncan, applied.

Dubout v. Macpherson (1889) 23 Q. B. D. 349; 58 L. J. Q. B. 496; 61 L. T. 689; 38 W. R. 62. A. L. SMITH, J.—The O. A. there [*Swansea Shipping Co. v. Duncan*] held that the provision in Ord. XVI. r. 18 of those rules [of 1875], to the effect that such a notice [*i.e.* a third party notice] should be served "according to the rules relating to writs of summons," empowered the Court to allow service of such a notice out of the jurisdiction. That provision as to the service of third party notices is reproduced in terms in Ord. XVI. r. 48 of the rules of 1883. . . . The third party in *Swansea Shipping Co. v. Duncan* was a company carrying on business in Scotland, but there was no exception in the rules of 1875 to the service of writs out of the jurisdiction in favour of persons ordinarily resident in Scotland, corresponding to that which is to be found in the rules of 1883. A similar point arose after the rules of 1883 came into force, in *Speller v. Bristol Steam Navigation Co.* (*supra*), where leave was sought to serve a third party notice out of the jurisdiction on a person ordinarily resident in Scotland, on the suggested ground that he was a "proper party" to the action within the meaning of Ord. XI. r. 1 (g). The Court there held that they had no power to give such leave, and that sub-s. (g) of the rule did not apply to third party notices. That decision is not in any way in conflict with the decision in *Swansea Shipping Co. v. Duncan*, and is no authority against the present application.—p. 341. DAY, J. concurred.

Collie, In re, Smith, Ex parte (1876) 45 L. J. Bk. 116; 2 Ch. D. 51; 34 L. T. 603; 24 W. R. 310.—C.A.

Discussed, Child v. Stenning (1877) 46 L. J.

Ch. 523; 5 Ch. D. 695, 699; 36 L. T. 426; 25 W. R. 519.—HALL, V.-C. (varied, C.A.); Hale v. Boustead (1881) 51 L. J. Q. B. 255; 8 Q. B. D. 453; 46 L. T. 533; 30 W. R. 677; 46 J. P. 342.—CAVE, J.; Lowenthal, In re, Beesty, Ex parte (1884) 13 Q. B. D. 238; 53 L. J. Q. B. 524; 51 L. T. 431; 33 W. R. 138; 1 Morrell 117.—CAVE, J.

Treleven v. Bray (1875) 45 L. J. Ch. 113;

1 Ch. D. 176; 33 L. T. 827; 24 W. R.

198.—C.A., referred to.

Padwick v. Scott (1876) 45 L. J. Ch. 350; 2 Ch. D. 736; 24 W. R. 723.—HALL, V.-C.

Horwell v. London General Omnibus Co., 25 W. R. 512.—FOLLOK, B. and HAWKINS, J.; reversed, (1877) 46 L. J. Ex. 700; 2 Ex. D. 365; 36 L. T. 637; 25 W. R. 610.—C.A.; BRETT, L.J. dissenting.

The Cartsburn (1879) 49 L. J. P. 14; 5 P. D. 35.—SIR R. PHILLIMORE; partly reversed, (1880) 5 P. D. 59; 41 L. T. 711; 28 W. R. 378.—C.A. JAMES, BAGGALLAY and COTTON, L.JJ.

Wye Valley Ry. v. Hawes (1880) 50 L. J. Ch. 225; 16 Ch. D. 489; 43 L. T. 715; 29 W. R. 177.—HALL, V.-C.; affirmed, C.A. JESSEL, M.R., COTTON and LUSH, L.JJ., discussed.

Corrie v. Allen (1883) 48 L. T. 464.—C.A.

Bower v. Hartley (1876) 46 L. J. Q. B. 126; 1 Q. B. D. 652; 24 W. R. 941.—C.A.

Referred to, Norris v. Beazley (1877) 46 L. J. C. P. 515; 36 L. T. 409.—GROVE and LINCOLN, J.J.; applied, Associated Home Co. v. Whitehead (1878) 47 L. J. Ch. 652; 8 Ch. D. 457; 459; 38 L. T. 602; 26 W. R. 744.—MALINS, V.-C.

Yorkshire Waggon Co. v. Newport and Abercane Coal Co. (1880) 49 L. J. Q. B. 527; 5 Q. B. D. 268; 42 L. T. 367; 28 W. R. 505.—Q.B.D., commented on.

Dawson v. Shepherd (1880) 49 L. J. Ex. 529; 42 L. T. 611; 28 W. R. 505.—C.A.; reversing EX. D. and MANISTY, J.

[MANISTY, J. had said in chambers that *Yorkshire Waggon Co. v. Newport Coal Co.* was only a decision on the particular order which had been made on the especial facts of that case, and that it was not intended to lay down any general rule.]

BAGGALLAY, L.J.—I am pleased to learn that the decision in *Yorkshire Waggon Co. v. Newport Coal Co.* was only a decision on the particular facts of the case, and that therefore we are not obliged to differ from it.—p. 530.

BRETT, L.J.—I think that the opinion of Manisty, J. at chambers shows that the case cited is not binding on any one as a decision on a general principle.—*Id.*

Schneider v. Batt (1881) 59 L. J. Q. B. 525; 8 Q. B. D. 701; 45 L. T. 371; 30 W. R. 420.—C.A., discussed.

Baxter v. France (No. 2) [1895] 1 Q. B. 591; 64 L. J. Q. B. 337; 14 R. 265; 72 L. T. 183; 43 W. R. 341.—C.A.

ESHER, M.R.—I think *Schneider v. Batt* shows, in the first place, that, if the judge refuses to give directions [under Ord. XVI. r. 52], he thereby dismisses the third party from being a third party to the action. . . . It appears to me to follow from that case that, by refusing to give directions, the judge strikes the third party, as such, out of the action,

leaving him, of course, a simple defendant, where he is one of the defendants. Another result of *Schneider v. Butt* seems to me to be this. The general scope of the third party procedure is to deal with cases where, by applying it, all the disputes arising out of a transaction as between the plaintiff and the defendant, and between the defendant and a third party, can be tried and settled in the same action. In a case where there will remain a dispute arising out of the transaction which cannot be tried in the same action, but must form the subject of another action, so that in the result there must be two actions, the judge will rightly exercise his discretion by declining to give directions.—p. 593.

LOPES and RIGBY, L.JJ. to the same effect.

Coles v. Civil Service Supply Association (1884) 53 L. J. Ch. 638; 26 Ch. D. 529; 50 L. T. 114; 32 W. R. 407.—KAY, J., *followed*.

Barton v. L. & N. W. Ry. (1888) 57 L. J. Ch. 676; 38 Ch. D. 144; 59 L. T. 122; 36 W. R. 452.—KAY, J.: affirmed, C.A. COTTON, LINDLEY and BOWEN, L.JJ.

Barton v. L. & N. W. Ry., *followed*.

Byrne v. Brown (1889) 37 W. R. 592.—POLLOCK, B. and MANISTY, J.

Byrne v. Brown, *distinguished*.

Richard v. Talbot (1890) 38 W. R. 478.—DENMAN and V. WILLIAMS, JJ.

Barton v. L. & N. W. Ry., *distinguished*.

Baxter v. France (No. 1) (1895) 64 L. J. Q. B. 335; [1895] 1 Q. B. 455; 14 R. 212; 72 L. T. 146; 43 W. R. 227.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

Benecke v. Frost (1876) 45 L. J. Q. B. 693; 1 Q. B. D. 419; 34 L. T. 728; 24 W. R. 669.—BLACKBURN and LUSH, JJ.

Distinguished, **Norris v. Beazley** (1877) 46 L. J. C. P. 515; 36 L. T. 409.—GROVE and LINDLEY, JJ.: *referred to*, **Hornby v. Cardwell** (1881) 51 L. J. Q. B. 89; 8 Q. B. D. 329. 338; 45 L. T. 781; 30 W. R. 263.—C.A. JESSEL, M.R., BRETT and COTTON, L.JJ.

Benecke v. Frost, *distinguished*.

Witham v. Vane (1880) 49 L. J. Ch. 242; 41 L. T. 729; 28 W. R. 276.—FRY, J., *referred to*.

Barton v. L. & N. W. Ry. (1888) 57 L. J. Ch. 676; 38 Ch. D. 144.—C.A. (*supra*).

Norris v. Beazley (1877) 46 L. J. C. P. 515; 36 L. T. 409.—GROVE and LINDLEY, JJ., *distinguished*.

Byrne v. Brown, Diplock Third Party (1889) 58 L. J. Q. B. 410; 22 Q. B. D. 657; 60 L. T. 651.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.; reversing 60 L. T. 108.—DENMAN and STEPHEN, JJ.

Norris v. Beazley, *form of order followed*.

Macbeth v. Buller [1894] 2 Ir. R. 357.—JOHNSON and MADDEN, JJ.

Eden v. Weardale Iron & Coal Co. (1884) 54 L. J. Ch. 384; 28 Ch. D. 333; 51 L. T. 726; 33 W. R. 241.—C.A., *explained*.

Eden v. Weardale Iron & Coal Co. (1887) 56 L. J. Ch. 400; 35 Ch. D. 287; 56 L. T. 464; 35

W. R. 507.—C.A. COTTON and LINDLEY, L.JJ.; reversing KAY, J.

Eden v. Weardale Iron & Coal Co., 54 L. J. Ch. 384, *discussed*.

Alcoy & Gandia Ry. v. Greenhill (1895) 65 L. J. Ch. 99; [1896] 1 Ch. 19; 73 L. T. 452; 44 W. R. 117.—C.A. A. L. SMITH and RIGBY, L.JJ.

Hornby v. Cardwell (1878) 51 L. J. Q. B. 89; 8 Q. B. D. 329; 45 L. T. 781; 30 W. R. 263.—C.A., *distinguished*.

Piller v. Roberts (1882) 21 Ch. D. 198, 201; 46 L. T. 527; 30 W. R. 595.—KAY, J.

Hornby v. Cardwell, *distinguished*.

Pontifex v. Foord (1884) 12 Q. B. D. 152; 53 L. J. Q. B. 321; 49 L. T. 808; 32 W. R. 316.

POLLOCK, B.—*Hornby v. Cardwell* was relied upon by the defendant's counsel, but when that case comes to be looked at, the view taken seems to have been that the covenant there was substantially a covenant to indemnify, because the sub-lessee had contracted to perform the covenants of the original lease. It does not appear to me to be so in the present case.—p. 155. LOPES, J. concurred.

Hornby v. Cardwell.

Discussed and approved, **Birmingham & District Land Co. v. L. & N. W. Ry.** (1886) 56 L. J. Ch. 956; 34 Ch. D. 261, 273; 55 L. T. 699; 35 W. R. 173.—C.A. COTTON, BOWEN and FRY, L.JJ.: *referred to*, **Hammond & Co. v. Bussey** (1887) 57 L. J. Q. B. 58; 20 Q. B. D. 79, 97.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

Hornby v. Cardwell, *distinguished*.

Morris v. Kennedy (1892) 30 L. R. Ir. 461.—Q.B.D.

HARRISON, J.—In *Hornby v. Cardwell* the covenants in question were entirely different to those in this case. In that case the proposed third party had given an absolute covenant to perform the covenants in the original lease.—p. 463.

Birmingham & District Land Co. v. L. & N.

W. Ry. (1886) 56 L. J. Ch. 956; 34 Ch. D. 261; 55 L. T. 699; 35 W. R. 173.—C.A. COTTON, BOWEN and FRY, L.JJ., *referred to*.

Tritton v. Bankart (1887) 56 L. J. Ch. 629; 56 L. T. 306; 35 W. R. 474.—KEKEWICH, J.

Birmingham & District Land Co. v. L. & N. W. Ry., *approved*.

Johnston v. Salvage Association (1887) 19 Q. B. D. 460; 57 L. T. 219; 36 W. R. 56; 6 Asp. M. C. 167.—C.A.

LINDLEY, L.J.—The Court there laid down that the rule [Ord. XVI. r. 48] only applies to cases where the third party was under some obligation, by contract or otherwise, to indemnify the defendant against the demand of the plaintiff. This construction is, in my opinion, warranted by the history of the rule, by its language, and by the forms referred to in it.—p. 461.

LOPES, J.J.—I agree with what was laid down in *Birmingham and District Land Co. v. L. & N. W. Ry.*, viz., that to bring a case within the rule there must be a direct right to indemnity as such, a right which can be enforced either at law or in equity.—p. 462.

9. PAYMENT INTO AND OUT OF COURT.

Land v. Harris (1722) 1 Str. 515.—K.B.; and **Bridges v. Williamson** (1728) 2 Str. 814.—K.B., *referred to*.

Preston v. Dania (1872) 42 L. J. Ex. 33; L. R. 8 Ex. 19; 27 L. T. 612; 21 W. R. 128.—EX.

Bonafous v. Rybot (1763) 3 Burr. 1370.—MANSFIELD, C.J., *dissented from*.

Preston v. Dania (1872) 42 L. J. Ex. 33; L. R. 8 Ex. 19; 27 L. T. 612; 21 W. R. 128.—EX.

Bonafous v. Rybot, *considered*.

Dixon, In re, Heynes v. Dixon (1899) 68 L. J. Ch. 689; [1899] 2 Ch. 561; 48 W. R. 71.—BYRNE, J.; affirmed, C.A. (*post*).

Bonafous v. Rybot, *discussed*.

Dixon, In re, Heynes v. Dixon (1900) 69 L. J. Ch. 609; [1900] 2 Ch. 561; 83 L. T. 129; 48 W. R. 665.—C.A. WEBSTER, M.R., RIGBY and COLLINS, L.JJ.

Murray v. Stair (Earl) (1823) 2 B. & C. 82; 3 D. & R. 278; 26 R. R. 282.—K.B.; and **Preston v. Dania** (*supra*), *referred to*.

Gerard v. Clowes (1892) 61 L. J. Q. B. 487; [1892] 2 Q. B. 11; 67 L. T. 204.—A. L. SMITH and LAWRENCE, JJ.

Murray v. Stair (Earl), *referred to*.

London Freehold & Leasehold Property Co. v. Suffield (Baron) (1897) 66 L. J. Ch. 790; [1897] 2 Ch. 608; 77 L. T. 445; 46 W. R. 102.—C.A. LINDLEY, M.R., LUDLOW and CHITTY, L.JJ.

Preston v. Dania, *considered*.

Dixon, In re, Heynes v. Dixon (1899) 68 L. J. Ch. 689; [1899] 2 Ch. 561, 566; 48 W. R. 71.—BYRNE, J.; affirmed, C.A. (*supra*).

Yate v. Willan (1801) 2 East 128.—K.B., *overruled*.

Clarke v. Gray (1805) 6 East 564; 2 Smith 622; 4 Esp. 177.—K.B.

ELLENBOROUGH, C.J. (for the Court).—For the reasons already given, it appears to us that *Yate v. Willan* cannot be supported in its full extent; for although the payment of money in that case did admit the contract as stated in the declaration, it did not admit a contract incompatible with the restrictive provision as to the amount of damages to be recovered in case of loss, which existed in that case, and also in this.—p. 570.

Gutteridge v. Smith (1794) 2 H. Bl. 374; and **Harding v. Spicer** (1808) 1 Camp. 327, *disapproved*.

Anderson v. Shaw (1825) 3 Bing. 290; 11 Moore 44; 2 C. & P. 85; 4 L. J. (O.S.) C. P. 53.

BEST, C.J.—I understood that in *Gutteridge v. Smith* it had been decided by the Court of C.P. that when a tender was pleaded there could not be a nonsuit, but the defendant must have a verdict. I find that no other judge says anything on this point with Heath, J. The case in *Campbell* was also decided by the same learned judge. No man can entertain a higher respect for the opinion of any judge than I do for that of Heath, J. If there was anything like a defect in the comprehensive and accurate mind of that excellent man, it was that it could not easily

descend to the consideration of such points as that now to be decided. It was the practice to call the plaintiff in every case; if he did not answer no verdict could be given against him. At this day, if the plaintiff's counsel informs the Court, whilst the jury are considering their verdict, that the plaintiff does not appear, a nonsuit is entered. Can there, then, be anything but a nonsuit, when, instead of disappearing just before the end of the case, he does not appear at all? It is said that when there is a tender he takes something by his writ; so he does, if money be paid into Court and he takes it out, and it has been often held that a plaintiff may be nonsuited after payment of money into Court.—p. 291.

Spurr v. Hall (1877) 46 L. J. Q. B. 693; 2 Q. B. D. 615; 37 L. T. 313; 26 W. R. 78.—MELLOR and FIELD, JJ., *questioned*.

Berdan v. Greenwood (1878) 3 Ex. D. 251; 47 L. J. Ex. 628; 39 L. T. 223; 26 W. R. 902.—C.A. BRETT, COTTON and THESIGER, L.JJ.; reversing EX. D.

Berdan v. Greenwood.

Approved, Hawkesley v. Bradshaw (1880) 49 L. J. Q. B. 333; 5 Q. B. D. 302; 42 L. T. 235; 28 W. R. 557; 44 J. P. 473.—C.A.; *discussed*, Myers v. Defries (1880) 49 L. J. Ex. 266; 5 Ex. D. 188; 42 L. T. 137; 28 W. R. 406.—C.A.: Coughlan v. Morris (1880) 6 L. R. Ir. 405.—C.A.; MAY, C.J. *dissenting*: *followed*, Emden v. Carte (1881) 51 L. J. Ch. 371; 19 Ch. D. 311; 45 L. T. 328; 30 W. R. 17.—C.A. JESSEL, M.R., BRETT and LINDLEY, L.JJ.; *approved and applied*, Goutard v. Carr (1884) 53 L. J. Q. B. 467, n.; 13 Q. B. D. 598, n.; 33 W. R. 295, n.—C.A. BRETT, M.R., BAGGALLAY and BOWEN, L.JJ.; *discussed*, Campbell v. McClelland (1886) 20 L. R. Ir. 444.—C.A.; *applied*, Morgan, In re, Owen v. Morgan (1887) 56 L. J. Ch. 703; 35 Ch. D. 492; 56 L. T. 503; 35 W. R. 705.—NORTH, J. (reversed, C.A. LINDLEY and BOWEN, L.JJ.).

Berdan v. Greenwood, *referred to*.

Harper v. Davis (1887) 56 L. J. Q. B. 444; 19 Q. B. D. 170; 36 W. R. 77.—DAY and WILLS, JJ. WILLS, J.—Those who framed the County Court Rules of 1886 had before them the Rules of the Supreme Court, 1875, and were aware of the construction which had been placed upon them by the C. A. in *Berdan v. Greenwood*. They have adopted the rule [Ord. XXX. r. 1] of 1875, and not the rules of 1883.—p. 445.

Berdan v. Greenwood, *referred to*.

Maple v. Shrewsbury and Talbot (Earl) (1887) 56 L. J. Q. B. 601; 19 Q. B. D. 463; 57 L. T. 443; 35 W. R. 819.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.; reversing GROVE, J. and HUDDLESTON, B.

Berdan v. Greenwood, *discussed*.

Harris v. Arnott (1889) 24 L. R. Ir. 404.—EX. D. See judgment of PALLES, C.B.

Berdan v. Greenwood, *discussed*.

Moon v. Dickinson (1890) 63 L. T. 371.—NORTH, J., *referred to*.

Coote v. Ford (1899) 68 L. J. Ch. 508; [1899] 2 Ch. 93; 80 L. T. 697; 47 W. R. 439, 548.—STIRLING, J. and C.A. LINDLEY, M.R. and RIGBY, L.J.

STIRLING, J.—The practice of pleading a payment into Court, with a denial of liability, is of recent origin. It first arose under Ord. XXX.

of the Orders in the schedule to the Judicature Act, 1875. That Order did not expressly permit a payment into Court when there was a denial of liability, but the practice was established by the decision of the C. A. in *Berdan v. Greenwood*. The subsequent Orders of 1883 recognise the practice and contain provisions with respect to it. It is admitted in the case mentioned above, and has subsequently been remarked, that there is a want of logical consistency in allowing a defendant to say in one and the same breath that the plaintiff has no claim and yet to offer a sum in satisfaction—*Emden v. Carte* (1881) 19 Ch. D. 311.—C.A.; *supra*, col. 2346). In truth, the practice is a concession to practical convenience at the expense of logic, and under such circumstances difficulties may easily arise as to the effect of it.—p. 509.

LINDLEY, M.R.—I cannot help thinking, so far as the working out of these rules is concerned, that the view taken by Cotton, L.J., in *Berdan v. Greenwood*, is right. That is to say, if the plaintiff goes on with this action for an injunction, or if the defendant goes on, and the plaintiff succeeds in establishing his right, there is no reason why he should not get the costs of that controversy.—p. 513.

Hawkesley v. Bradshaw (1879) 49 L. J. Q. B. 207; 5 Q. B. D. 22; 41 L. T. 653; 28 W. R. 167.—COCKBURN, C.J. and MANISTY, J.; *reversed*, (1880) 49 L. J. Q. B. 333; 5 Q. B. D. 302; 42 L. T. 285; 28 W. R. 577; 44 J. P. 473.—C.A.

Hawkesley v. Bradshaw.

Discussed, *Coughlan v. Morris* (1880) 6 L. R. Ir. 405.—C.A.: MAY, C.J. *dissenting*; *followed*, *Emden v. Carte* (1881) 51 L. J. Ch. 371; 19 Ch. D. 311, 320; 45 L. T. 328; 30 W. R. 17.—C.A.; *principle applied*, *Goutard v. Carr* (1884) 53 L. J. Q. B. 467, n.; 13 Q. B. D. 598, n.; 33 W. R. 295, n.—C.A.; *dictum considered*, *Campbell v. McClelland* (1886) 20 L. R. Ir. 444.—C.A.

Hawkesley v. Bradshaw, discussed.

Fleming v. Dollar (1889) 23 Q. B. D. 388; 58 L. J. Q. B. 548; 61 L. T. 230; 37 W. R. 684. HAWKINS, J.—By Ord. XXX. r. 1 of the rules of 1875, according to the decision in *Hawkesley v. Bradshaw*, it was competent for a defendant even in an action of libel to deny liability and at the same time to pay money into Court. To meet that obvious inconvenience Ord. XXII. r. 1 of the present rules was made. . . . That gives liberty to a defendant in an action for a debt or damages, except in actions for libel or slander, to pay money into Court with a denial of liability; but in libel and slander payment of money into Court with a denial of liability was stopped by this rule.—p. 393.

COLERIDGE, C.J. to the same effect.

Lafone v. Smith (1859) 4 H. & N. 158; 5 Jur. (N.S.) 127.—EX.; and **Jones v. Mackie** (1867) 37 L. J. Ex. 1; L. R. 3 Ex. 1; 17 L. T. 151; 16 W. R. 109.—EX., *approved and distinguished*.

Coughlan v. Morris (1880) 6 L. R. Ir. 405.—C.A.; MAY, C.J. *dissenting*. (*See post*, col. 2348.)

Lafone v. Smith and Jones v. Mackie, explained.

Harris v. Arnott (1889) 24 L. R. Ir. 404.—EX. D.

Jones v. Mackie, referred to.

Dunn v. Devon and Exeter Constitutional Newspaper (1894) 63 L. J. Q. B. 342; [1895] 1 Q. B. 211, n.; 10 R. 167; 70 L. T. 593.—WILLS, J.

Coughlan v. Morris (*supra*, col. 2347), *principle applied*.

Mulcahy v. Perry (1881) 8 L. R. Ir. 147.

The Court (PALLES, C.B. and FITZGERALD, B.) considered that the principle of *Coughlan v. Morris* was equally applicable to cases where money is paid into Court together with a counter-claim.—p. 147.

Coughlan v. Morris.

Referred to, *Campbell v. McClelland* (1886) 20 L. R. Ir. 448.—C.A.; *discussed and distinguished*, *Harris v. Arnott* (1889) 24 L. R. Ir. 404.—EX. D.

Goutard v. Carr, 53 L. J. Q. B. 55.—W. WILLIAMS, J.; *reversed*, (1884) 53 L. J. Q. B. 467, n.; 13 Q. B. D. 598, n.; 33 W. R. 295, n.—C.A. BRETT, M.R., BAGGALLAY and BOWEN, L.JJ.

Goutard v. Carr, approved and applied.

Wheeler v. United Telephone Co. (1884) 13 Q. B. D. 597; 53 L. J. Q. B. 466; 50 L. T. 749; 33 W. R. 295.—C.A.; *reversing* W. WILLIAMS, J. BRETT, M.R.—In that case [*Goutard v. Carr*] I expressed an opinion that where payment into Court is allowed to be pleaded as an alternative defence, it is a defence to the action, in the sense that if it succeeds, the action is defeated.—p. 613.

BOWEN, L.J.—It is too late now to ask us to reconsider the decision in *Goutard v. Carr*, but I may say that I have no doubt that it is correct. . . . The result of the decision in *Goutard v. Carr* is, that variations in the form of expression in the defence do not destroy the effect of the fact of bringing the money into Court.—*Id.*

FRY, L.J.—I think the present case is governed by *Goutard v. Carr*. The principle of that decision is that payment into Court, so far as that portion of the defence is concerned, is an admission of liability.—*Id.*

Wheeler v. United Telephone Co., discussed.

Campbell v. McClelland (1886) 20 L. R. Ir. 444, 456.—C.A.

Goutard v. Carr and Wheeler v. United Telephone Co., distinguished.

Suckling v. Gabb (1887) 36 W. R. 175.

POLLOCK, B.—*Goutard v. Carr* may be dismissed with this observation, that in that case there was an agreement that the costs were to abide the event. *Wheeler v. United Telephone Co.* is not a decision which fetters our discretion at all. For in circumstances somewhat similar to the present, the C. A. considered that the case, having gone down to trial, was governed by Ord. LXV. r. 1.—p. 176. HAWKINS, J. concurred.

Goutard v. Carr and Wheeler v. United Telephone Co., discussed.

Myers v. Phelan (1890) 26 L. R. Ir. 218, 230.—C.A. ASHBOURNE, L.C., O'BRIEN, C.J., and FITZGIBBON, L.J.; PORTER, M.R. and BARRY, L.J. *dissenting*.

Wheeler v. United Telephone Co. (and see post, col. 2349), applied.

Ridout v. Green (1902) 87 L. T. 679; 18 Times L. R. 709.—BRUCE, J.

Wheeler v. United Telephone Co. (*supra*), and **Wood v. Leatham** (1892) 61 L. J. Q. B. 215.—Q.B.D., *referred to*.
Dunn v. S. E. & Chatham Ry. (1903) 72 L. J. K. B. 127; [1903] 1 K. B. 353; 88 L. T. 60; 51 W. R. 427.—ALVERSTONE, C.J., WILLS and CHANNELL, JJ.

Wagstaffe v. Bentley (1901) 71 L. J. K. B. 55; [1902] 1 K. B. 124; 85 L. T. 744.—C.A., *followed*.
Smith v. Wilson (1902) [1903] 2 Ir. R. 45, 77.—K.B.D.

Wagstaffe v. Bentley, *order followed*.
Ridout v. Green (1902) 87 L. T. 679; 18 Times L. R. 709.—BRUCE, J.

Wagstaffe v. Bentley, *referred to*.
Dunn v. S. E. & Chatham Ry. (*supra*).

Campbell v. McClelland (1886) 20 L. R. Ir. 444.—C.A., *referred to*.
Cosgrave v. National Telephone Co. [1901] 2 Ir. R. 611.—MORGAN, J.

Seaton v. Benedict (1828) 5 Bing. 28; 2 M. & P. 66; 6 L. J. (o.s.) C. P. 208.—C.P.

Distinguished, **Walker v. Rawson** (1833) 1 M. & R. 250; 5 Car. & P. 486.—TINDAL, C.J.; *doubted*, **Ravenscroft v. Wise (or Wylie)** (1834) 3 L. J. Ex. 309; 1 Cr. M. & R. 203; 4 Tyrw. 741; 2 D. P. C. 676.—EX.; *followed*, **Archer v. English** (1840) 10 L. J. C. P. 15; 1 Man. & G. 873 (*post*).

Meager v. Smith (1833) 2 L. J. K. B. 108; 4 B. & Ad. 673; 1 N. & M. 449.—K.B., *referred to*.

Booth v. Howard (1836) 5 D. P. C. 438; W. W. & D. 54; 1 Jur. 55.—PATTERSON, J.

Walker v. Rawson (*supra*) and **Meager v. Smith**, *overruled*.
Kingham v. Robins (1839) 8 L. J. Ex. 189; 5 M. & W. 94; 7 D. P. C. 352.—EX.

Ravenscroft v. Wise (or Wylie) (*supra*), *held overruled*.
Stapleton v. Nowell (or Noel) (1840) 9 L. J. Ex. 32; 6 M. & W. 9; 4 Jur. 90; 8 D. P. C. 196.—EX.

Ravenscroft v. Wise, *overruled*.
Archer v. English (1840) 1 Man. & G. 873; 10 L. J. C. P. 15; 1 Scott N. R. 156; 9 D. P. C. 21.—C.P.

TINDAL, C.J.—It seems to me that we must be governed by the law as laid down in **Seaton v. Benedict** (*supra*); for, although doubted by the Court of Ex. in **Ravenscroft v. Wise**, that Court returned to the doctrine which it established in the subsequent cases of **Kingham v. Robins** (*supra*), and **Stapleton v. Nowell** (*supra*). The law upon the subject now is, that where money is paid into Court upon the general *indebitatus* counts, the payment only amounts to an admission that the defendant is liable, in respect of some contract, to the extent of the sum so paid in; but that where the plaintiff declares upon a special contract, a payment into Court admits such contract.—p. 875.

Kingham v. Robins (*supra*) and **Stapleton v. Nowell (or Noel)**, *approved*.
Perren v. Monmouthshire Ry. and Canal Co. (1853) 22 L. J. C. P. 162; 11 C. B. 855; 17 Jur. 531; 1 W. R. 354.—C.P.

Story v. Finnis (1851) 20 L. J. Ex. 144; 6 Ex. 123; 2 L. M. & P. 198.—EX., *followed*.
Leyland v. Tancred (1850) 19 L. J. Q. B. 313; 16 Q. B. 664; 14 Jur. 695.—Q.B.; S. C. (1851) 20 L. J. Q. B. 316; 16 Q. B. 669; 15 Jur. 394.—EX. CH., *overruled*.

Schreger v. Carden (1852) 11 C. B. 851; 21 L. J. C. P. 135; 16 Jur. 568.—C.P.

MAULE, J.—I am well satisfied with the law laid down in **Story v. Finnis**, and cannot agree with that laid down in **Leyland v. Tancred**.—p. 854.

Story v. Finnis, **Leyland v. Tancred**, **Schreger v. Carden**, and **Knight v. Egerton** (1852) 7 Ex. 407.—EX., *discussed*.

Perren v. Monmouthshire Ry. and Canal Co. (1853) 22 L. J. C. P. 162; 11 C. B. 855; 17 Jur. 531; 1 W. R. 354.—C.P.

Davys v. Richardson (1888) 20 Q. B. D. 722; 58 L. T. 637; 36 W. R. 562, 575. n.—COLERIDGE, C.J. and MATHEW, J.; *reversed*, (1888) 57 C. J. Q. B. 409; 21 Q. B. D. 202; 59 L. T. 765; 36 W. R. 728.—C.A.

Dunn v. Devon and Exeter Constitutional Newspaper (1894) 63 L. J. Q. B. 342; [1895] 1 Q. B. 211. n.; 10 L. 167; 70 L. T. 593.—WILLS, J., *commented on and distinguished*.

Gray v. Bartholomew (1894) 64 L. J. Q. B. 125; [1895] 1 Q. B. 209; 14 R. 50; 71 L. T. 867; 43 W. R. 177.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

Goode v. Goldsmith (1836) 6 L. J. Ex. 70; 2 M. & W. 202; 5 D. P. C. 288; 2 Gale 194.—EX.; and **Harrison v. Watt** (1847) 17 L. J. Ex. 74; 16 M. & W. 316; 4 D. & L. 519; 11 Jur. 91.—EX., *followed*.

Rumbelow v. Whalley (1851) 20 L. J. Q. B. 262; 16 Q. B. 397; 2 L. M. & P. 245; 15 Jur. 724.—Q.B.

Harrison v. Watt and **Rumbelow v. Whalley**, *explained and distinguished*.

Langridge v. Campbell (1877) 2 Ex. D. 281; 46 L. J. Ex. 277; 36 L. T. 64; 25 W. R. 351.—KELLY, C.B. and HUDDLESTON, B.; reversing HAWKINS, J.

KELLY, C.B.—In both these cases the plaintiff, by accepting the payment in satisfaction of the causes of action in respect of which it was paid in, acquired a vested right to the costs, and nothing occurred to divest him of that right. . . . He [the plaintiff] did not accept the 200*l.* in satisfaction of the cause of action in respect of which it was paid in, and the element was wanting which was the foundation of the two cases I have referred to, and of the provisions of the Common Law Procedure Act, 1852, and the rules founded thereon, and also of the rules made under the Judicature Acts.—pp. 285-286.

M'Lean v. Phillips (1849) 7 C. B. 817; 6 D. & L. 697.—C.P., *explained*.
Rumbelow v. Whalley (1851) 20 L. J. Q. B. 262; 16 Q. B. 397; 2 L. M. & P. 245; 15 Jur. 724.—Q.B.

James v. Vane (Lord) (1860) 29 L. J. Q. B. 169; 2 Bl. & El. 883; 6 Jur. (N.S.) 731; 2 L. T. 281; 8 W. R. 446.—Q.B., *approved*.
O'Rourke v. M'Donnell (1862) 13 Ir. C. L. R. App. viii.—Q.B.

Myers v. Phelan.

Referred to. Scott's Pneumatic Tyre Co. v. Northern Wheeleries Cycle Co. (*supra*); *distinguished*, Quinn v. McKinlay (*supra*).

James v. Vane (Lord) (*supra*), explained and applied.

Scott's Pneumatic Tyre Co. v. Northern Wheeleries Cycle Co. (1898) [1899] 2 Ir. R. 34.—BOYD and KENNY, JJ.

James v. Vane (Lord), distinguished.

Quinn v. McKinlay (1901) [1902] 2 Ir. R. 315, 326.—K.B.D.

O'Rourke v. McDonnell.

Distinguished. Scott's Pneumatic Tyre Co. v. Northern Wheeleries Cycle Co. (*supra*); *referred to*, Myers v. Phelan (1890) 26 L. R. Ir. 218, 224.—C.A.; PORTER, M.R. and BARRY, L.J. *dissenting*.

Langridge v. Campbell (col. 2350), discussed.

Buckton v. Higgs (1879) 4 Ex. D. 174; 40 L. T. 755; 27 W. R. 808.

KELLY, C.B.—In *Langridge v. Campbell* the costs of the cause were to "abide the event." There were no pleadings, and I expressly limited my decision to cases in which there were no pleadings.—p. 175.

HAWKINS, J.—In that case I decided at chambers that the plaintiff ought to have his costs of the action up to the time of payment into Court, and the defendant his costs after that time, and I have never changed my opinion.—*Id.*

Langridge v. Campbell, distinguished.

Suckling v. Gabb (*post*).

Buckton v. Higgs (*supra*), considered.

The William Symington (1884) 54 L. J. Adm. 4; 10 P. D. 1; 51 L. T. 461; 33 W. R. 371; 5 Asp. M. C. 293.—BUTT, J.

Buckton v. Higgs, explained.

Suckling v. Gabb, (1887) 36 W. R. 175.

POLLOCK, B.—In that case [*Buckton v. Higgs*] the defendant denied the breach of covenant, and paid money into Court, and the issues were referred to a referee, who found that the money paid in was sufficient to satisfy the claim; the discretion was exercised by allowing the plaintiff his costs up to the time of payment into Court.—p. 176. HAWKINS, J. concurred.

Jervis v. White (1802) 6 Ves. 738; 6 R. R.

26.—L.C.; S.C., 7 Ves. 413.—L.C.

Dicta disapproved, Duncan v. Worrall (1822)

10 Price 31.—EX. CH.; *discussed*, Freeman v. Cox (1878) 47 L. J. Ch. 560; 8 Ch. D. 148; 26 W. R. 689.—JESSEL, M.R.

Freeman v. Cox.

Not followed, Nesbitt v. Baldwin (1881) 7 L. R. Ir. 134.—V.-C.; *applied*, Hampden v. Wallis (1884) 54 L. J. Ch. 1175; 27 Ch. D. 251; 51 L. T. 357; 32 W. R. 977.—CHITTY, J.

Freeman v. Cox, approved and followed.

Porrett v. White (1885) 55 L. J. Ch. 79; 31 Ch. D. 52; 53 L. T. 514; 34 W. R. 65.—C.A. SIR J. HANNEN, ROWEN and FRY, L.JJ.

Freeman v. Cox, considered.

Hollis v. Burton [1892] 3 Ch. 226; 67 L. T. 146; 40 W. R. 610.—C.A. LINDLEY, LOPES and KAY, L.JJ.; affirming on other grounds STIRLING, J.

O.C.

Freeman v. Cox, approved.

Neville v. Matthewman (1894) 7 R. 511; 63 L. J. Ch. 734; [1894] 3 Ch. 345; 71 L. T. 282; 42 W. R. 675.—C.A.; reversing CHITTY, J.

HERSCHELL, L.C.—In *Freeman v. Cox*, the late Sir G. Jessel, when M.R., said: "I will make a precedent. It seems to me that the principle on which the Court has ordered payment of money into Court has been that the defendant must admit that the money is in his hands for the purposes of the application. In *Jervis v. White* (*supra*), Lord Eldon took the affidavit of the plaintiff, charging the defendant with having a sum of money in his hands, and an affidavit of the defendant before answer, together, as an admission, and ordered the money to be paid into Court. Here we have the affidavit of the plaintiff and the service of the notice of motion upon the defendant. This, I think, is a sufficient admission, the principle being to make the defendant pay into Court what he does not dispute to be owing from him." That seems to me to lay down a clear, sound principle, and beyond that I, for my part, am not disposed to go. But if there is a question whether the money is owing or not, then the matter does not come within what I have read from the judgment of the late M.R. in *Freeman v. Cox*.—p. 515.

LINDLEY and DAVEY, L.JJ. to the same effect.

Chapman, In re, Fardell v. Chapman (1886)

54 L. T. 13.—KAY, J., *disapproved*.

Nutter v. Holland (1894) 63 L. J. Ch. 932; [1894] 3 Ch. 408; 7 R. 491; 71 L. T. 508; 43 W. R. 18.—C.A. LINDLEY, LOPES and DAVEY, L.JJ.

Neville v. Matthewman (*supra*) and Nutter v. Holland, discussed and applied.

Crompton and Evans Union Bank v. Burton (1895) 64 L. J. Ch. 811; [1895] 2 Ch. 711; 13 L. T. 792; 73 L. T. 181; 44 W. R. 60.

NORTH, J.—It does seem to me that these cases have modified the practice that was adopted, and that to a certain extent it may be an answer to a motion for an order to pay money into Court to say that the money is not in hand. I do not think that they go quite so far as is said—namely, that a man who has received money, which, if he had it hand to-day, he would be ordered to pay into Court, can get off by stating that he paid it yesterday to somebody to whom he had no title to pay it, and who had no title to receive it.—p. 813.

Landergan v. Feast, 55 L. J. Ch. 505; 54 L. T. 369; 34 W. R. 469.—BACON, V.-C.; *reversed*, (1886) 55 L. T. 42; 34 W. R. 691.—C.A. LINDLEY and LOPES, L.JJ.

Brown v. De Tastet (1828) 4 Russ. 126;

28 R. R. 25.—L.C., *approved and followed*.

London Syndicate v. Lord (1878) 8 Ch. D. 84; 38 L. T. 329; 26 W. R. 427.—C.A. JESSEL, M.R., BAGGALLAY and THESIGER, L.JJ.; varying BACON, V.-C.

London Syndicate v. Lord and Dunn v. Campbell (1879) 27 Ch. D. 254, n.—M.R., applied.

Hampden v. Wallis (1884) 54 L. J. Ch. 1175; 27 Ch. D. 251; 51 L. T. 357; 32 W. R. 977.—CHITTY, J.; Wanklyn v. Wilson (1887) 56 L. J.

Ch. 209; 35 Ch. D. 180; 56 L. T. 52; 35 W. R. 332.—STIRLING, J.

Hampden v. Wallis (*supra*) and **Porrett v. White** (1885) 55 L. J. Ch. 79; 31 Ch. D. 52; 53 L. T. 514; 34 W. R. 65.—C.A. SIR J. HANNEN, BOWEN and FRY, L.JJ., *discussed and applied*.

Wanklyn v. Wilson (1887) 56 L. J. Ch. 209; 35 Ch. D. 180; 56 L. T. 52; 35 W. R. 332.—STIRLING, J.

10. STAYING AND SETTING ASIDE PROCEEDINGS.

Chatfield v. Souter (1825) 3 Bing. 167; 10 Moore 572; 3 L. J. (o.s.) C. P. 221.—C.P., *followed*.

Bowyear v. Bowyear (1833) 2 D. P. C. 207.—C.P.

Hayter v. Moat (1836) 6 L. J. Ex. 32; 2 M. & W. 56; 5 D. P. C. 329.—EX., *approved*.

Brown v. Boorman (1844) 11 Cl. & F. 1, 40.—H.L. (E.).

Sivell v. Abraham (1846) 8 Beav. 598.—BOMILLY, M.R., *explained*.

Wilde v. Wilde (1862) 31 L. J. Ch. 558; 4 De G. F. & J. 348; 6 L. T. 275; 10 W. R. 503.—KNIGHT BRUCE and TURNER, L.JJ.; reversing 6 L. T. 185; 10 W. R. 368.—WOOD, V.-C.

Sivell v. Abraham and Wilde v. Wilde, *applied*.

Morgan v. G. E. Ry. (1868) 1 H. & M. 78; 2 N. R. 60; 11 W. R. 662.—WOOD, V.-C.

Wilde v. Wilde, *not applied*.

Elsey v. Adams (1864) 2 De G. J. & S. 147; 3 N. R. 696; 10 L. T. 242; 12 W. R. 586.—L.JJ.

Sivell v. Abraham, Wilde v. Wilde, and Morgan v. G. E. Ry., *distinguished*.

Tanqueray v. Bowles (1872) L. R. 14 Eq. 151, 158.—BACON, V.-C.

Wilde v. Wilde, *referred to*.

Morgan v. G. E. Ry., *rule in not applied*.

Sonnenschein v. Bernard (1887) 57 L. T. 712, 713.—STIRLING, J.

Gilbert v. Endean (1878) 9 Ch. D. 259; 39 L. T. 404; 27 W. R. 252.—C.A., *distinguished*.

Gaudet Frères Steamship Co., In re (1879) 48 L. J. Ch. 818; 12 Ch. D. 882.—FRY, J.

Gilbert v. Endean, *discussed*.

Stephenson v. Garnett (1898) 67 L. J. Q. B. 447; [1898] 1 Q. B. 677; 78 L. T. 371; 46 W. R. 410.—C.A.

CHITTY, L.J.—With regard to the authorities, I would refer to *Gilbert v. Endean*, in which Malins, V.-C. heard an application by the plaintiff for leave to proceed against the defendant on the following grounds: The defendant had submitted to a decree; a compromise was subsequently entered into under which the plaintiff agreed to accept a certain sum from the defendant payable by instalments, upon the representation that the defendant was penniless and quite unable to pay the claim against him. The V.-C. gave the plaintiff liberty to enforce the decree notwithstanding the agreement for the compromise, upon the ground that the plaintiff had been induced to enter into

the compromise by the representations of the defendant, and in granting that leave in effect set aside the compromise. The C. A. affirmed his decision, saying that as the parties had allowed the V.-C. to determine the case, no objection could afterwards be taken on the ground that the application itself was not the proper mode of procedure. To my mind that case shows that the County Court Judge had jurisdiction over his own judgment.—p. 450.

Gilbert v. Endean, *referred to*.

Carter v. Roberts (1903) 72 L. J. Ch. 655; [1903] 2 Ch. 312, 320; 59 L. T. 239; 51 W. R. 520.—BYRNE, J.

And see "COMPROMISE," vol. i., col. 619.

Dawkins v. Rokeby (Lord) (1875) 45 L. J. Q. B. 8; L. R. 7 H. L. 744; 33 L. T. 196; 23 W. R. 931.—H.L. (E.).

Applied, **Dawkins v. Saxe-Weimar** (Prince) (1876) 45 L. J. Q. B. 567; 1 Q. B. D. 499 (*post*); **Seaman v. Netherclift** (1876) 46 L. J. C. P. 128; 2 C. P. D. 53, 56; 35 L. T. 734; 25 W. R. 159.—C.A.; *referred to*, **Goffin v. Donnelly** (1881) 50 L. J. Q. B. 303; 6 Q. B. D. 307; 44 L. T. 141; 29 W. R. 440; 45 J. P. 439.—FIELD and MANISTY, JJ.; *discussed*, **Munster v. Lamb** (1883) 52 L. J. Q. B. 726; 11 Q. B. D. 588, 594; 49 L. T. 252; 32 W. R. 248; 47 J. P. 805.—C.A. BRETT, M.R. and FRY, L.J.; **Hennesy v. Wright** (No. 1) (1888) 57 L. J. Q. B. 530; 21 Q. B. D. 509, 520; 59 L. T. 323; 53 J. P. 52; 4 Times L. R. 597.—FIELD and WILLS, JJ. (*and see* "DEFAMATION," vol. i., col. 837); *referred to*, **Chatterton v. Secretary of State for India** (1895) 64 L. J. Q. B. 676; [1895] 2 Q. B. 189; 14 R. 504; 72 L. T. 858; 59 J. P. 596.—C.A. ESHER, M.R., KAY and A. L. SMITH, L.JJ.

Castro v. Murray (1875) 44 L. J. M. C. 70; L. R. 10 Ex. 213; 32 L. T. 675; 23 W. R. 596.—BRAMWELL and CLEASBY, BB., *followed*.

Dawkins v. Saxe-Weimar (Prince) (1876) 1 Q. B. D. 499; 45 L. J. Q. B. 567; 35 L. T. 323; 24 W. R. 670.

BLACKBURN, J.—Then there is a more material thing to consider; and that is, have we, although we see the action is utterly groundless, a right to stop it summarily? I grant that is a jurisdiction which in all cases should be very carefully exercised by the Court. But in *Castro v. Murray*, which was a stronger case than this, the Court of Ex. stayed an action against a public officer charging him with not performing a public duty, the action being absolutely without foundation. In the present case, although the declaration is freely sprinkled over with such words as "malice," "fraud," "combination," and the like, the substance of the action is that the defendants held a court of inquiry in obedience to her Majesty's commands, as a military tribunal, and made a report. No action can lie against them for that: *Dawkins v. Rokeby* (Lord), in the H. L., which is similar in its circumstances, has determined the precise point.—p. 502.

MELLOR, J. to the same effect.

See 59 & 60 Vict. c. 51.

Castro v. Murray, *principle applied*.

Dawkins v. Saxe-Weimar (Prince), *explained*.

Edmunds v. Attorney-General (1878) 47 L. J. Ch. 345; 38 L. T. 213; 26 W. R. 550.

MALINS, V.-C.—There [*Castro v. Murray*] the

well-known claimant to the Tichborne property brought an action against Mr. Murray, the clerk of the Petty Bag office in the Court of Chancery, for not sealing a writ of error. The defendant did not plead, but applied for and obtained an order at chambers, staying all further proceedings in the action, on the ground that it was frivolous and vexatious, and an abuse of the process of the Court. . . . In *Dawkins v. Saxe-Weimar (Prince)* the ground of the decision was not only that the defendants were public officers, acting in the due course of their duty as members of a military court of enquiry, but also that the action was utterly groundless, and never could succeed.—pp. 347, 348.

Castro v. Murray and Dawkins v. Saxe-Weimar (Prince), explained and principle not applied.

McHenry v. Lewis (1882) 52 L. J. Ch. 16; 21 Ch. D. 202; 46 L. T. 567.—CHITTY, J.; affirmed, C.A. (*post*).

Wilson v. Ferrand (1871) L. R. 13 Ex. 362; 26 L. T. 387.—MALINS, V.-C., referred to.
McHenry v. Lewis (1882) 52 L. J. Ch. 16; 21 Ch. D. 202; 46 L. T. 567.—CHITTY, J.; affirmed, C.A.

Cox v. Mitchell (1859) 29 L. J. C. P. 33; 7 C. B. (N.S.) 55; 6 Jur. (N.S.) 225; 1 L. T. 8; 8 W. R. 45.—C.P.
Not applied, *Alexander v. Adams* (1867) 16 L. T. 384; 15 W. R. 751.—C.P.; referred to, *The Mali Ivo* (1869) 38 L. J. Adm. 34; L. R. 2 A. & E. 356; 20 L. T. 681.—SIR R. PHILLIMORE.

Cox v. Mitchell, considered.

Dillon (Lord) v. Alvares (1798) 4 Ves. 357; 4 R. R. 206.—L.C., commented on.
McHenry v. Lewis (1882) 22 Ch. D. 397; 52 L. J. Ch. 325; 47 L. T. 549; 31 W. R. 305.—C.A.; affirming 21 Ch. D. 202.—CHITTY, J., who had followed *Cox v. Mitchell*.

JESSEL, M.R.—Notwithstanding what has been said about *Cox v. Mitchell*, I am of opinion that there is such a jurisdiction in this Court, and that it is part of the general jurisdiction of the Court to prevent a defendant being improperly vexed by legal procedure. I see no reason on principle why, if the Court is satisfied that the defendant is being improperly vexed, the mere fact of one of the actions being in this country and one in a foreign country, should prevent the Court protecting the defendant from being so improperly vexed. So much for the general jurisdiction. Now I am not sure that what I have stated really conflicts with the judgment of the Court of C. P. in *Cox v. Mitchell*. In one view it does not so conflict. If the true view of the judgment is that *prima facie* a man is not doubly vexed when the action is brought in the two countries, but that you want a special case to show that he is doubly vexed, then there is no conflict of opinion. If, however, it means that in no case can the Court interfere, then I must admit, with the greatest deference to the four learned judges who decided *Cox v. Mitchell*, I should not be prepared to indorse their opinion. . . . At the time when that case [*Dillon (Lord) v. Alvares*] was decided a judgment in Ireland could not be enforced in England, nor could a judgment in England be enforced in Ireland. That is not so now.—p. 399.

COTTON, L.J.—Possibly what the judges in

Cox v. Mitchell may have meant to decide was this, that where both the actions are in England, in the Queen's Courts in England, or under the present law in Scotland or Ireland, it would be a matter of course to stay one of them, merely from the fact that there is the litigation between the same parties about the same matter, but that where one of the actions is abroad, then it is not of course but it is a matter of discretion, having regard to the circumstances of the case, whether the Court, having jurisdiction, is willing to interfere.—p. 406.

BOWEN, L.J.—I think that *Cox v. Mitchell* . . . simply lays down the proposition, that the mere pendency of an action abroad is not a sufficient reason for staying an action at home, although the causes of action and the parties may be the same. So understood, it seems to me to be common sense. . . . At present I think that case [*Dillon (Lord) v. Alvares*] can no longer be cited as conclusive law.—p. 408.

Cox v. Mitchell, discussed.

The Christiansborg (1885) 54 L. J. P. 84; 10 P. D. 141; 53 L. T. 612; 5 Asp. M. C. 491.—C.A. BAGGALLAY and FRY, L.JJ.; ESHER, M.R. dissenting; *Mutrie v. Binney* (1887) 35 Ch. D. 614.—NORTH, J. See *post*.

McHenry v. Lewis (*supra*), applied.

Peruvian Guano Co. v. Bockwoldt (1883) 52 L. J. Ch. 714; 23 Ch. D. 225; 48 L. T. 7; 31 W. R. 851; 5 Asp. M. C. 29.—C.A. JESSEL, M.R., LINDLEY and BOWEN, L.JJ.

McHenry v. Lewis and Peruvian Guano Co. v. Bockwoldt, principle applied.

Hyman v. Helm (1888) 24 Ch. D. 531; 49 L. T. 376; 32 W. R. 258.—C.A. BRETT, M.R., COTTON and BOWEN, L.JJ.

McHenry v. Lewis, approved and applied.

Peruvian Guano Co. v. Bockwoldt, discussed.

The Christiansborg (1885) 54 L. J. P. 84; 10 P. D. 141; 53 L. T. 612; 5 Asp. M. C. 491; 1 Times L. R. 634.—C.A. BAGGALLAY and FRY, L.JJ.; ESHER, M.R. dissenting.

McHenry v. Lewis; Peruvian Guano Co. v. Bockwoldt and Hyman v. Helm, discussed.

Mutrie v. Binney (1887) 35 Ch. D. 614; 56 L. T. 455; 36 W. R. 131.—NORTH, J.; reversed, C.A. COTTON, LINDLEY and LOPES, L.JJ.

[The C. A. did not refer to any cases.]

McHenry v. Lewis, referred to.

The Reinbeck (1889) 60 L. T. 209; 6 Asp. M. C. 366.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

Maclaren v. Stainton (1852) 22 L. J. Ch. 274; 16 Beav. 279; 1 W. R. 70.—M.R.; reversed *nom.* *Carron Iron Co. v. Maclaren* (1855) 24 L. J. Ch. 620; 5 H. L. Cas. 416; 3 W. R. 597.—H.L. (E.). CRANWORTH, L.C. and LORD BROUGHAM; LORD ST. LEONARDS dissenting.

Carron Iron Co. v. Maclaren.

Applied, *Maunder v. Lloyd* (1862) 2 J. & H. 718; 1 N. R. 123; 11 W. R. 141.—WOOD, V.-C.; *considered*, *McHenry v. Lewis* (1882) 52 L. J. Ch. 325; 22 Ch. D. 397; 47 L. T. 549; 31 W. R. 305.—C.A. JESSEL, M.R., COTTON and BOWEN, L.JJ.; *dictum not applied*, *Hyman v. Helm* (1883) 24 Ch. D. 531; 49 L. T. 376; 32 W. R. 258.—

CHITTY, J. (affirmed, C.A. BRETT, M.R., COTTON and BOWEN, L.J.J.): *discussed*. Nutter v. Messageries Maritimes De France (1885) 54 L. J. Ch. 527.—COLERIDGE, C.J. and A. L. SMITH, J. *And see* Ewing v. Orr-Ewing (1885) 10 App. Cas. 453, 468, n.; 53 L. T. 826.—H.L. (SC.).

Carron Iron Co. v. Maclaren (*supra*), *referred to*.

Haggin v. Comptoir d'Escompte de Paris (1889) 23 Q. B. D. 519; 58 L. J. Q. B. 508; 61 L. T. 748; 37 W. R. 703.—C.A. COTTON, FRY and LOPES, L.J.J.

FRY, L.J.—It is not necessary to refer to the earlier authorities, because in *Carron Iron Co. v. Maclaren*, which was decided in 1855, Lord St. Leonards in the H. L. laid down that a corporation might have two domicils, and be subject to two jurisdictions. It is true that the other learned lords differed from Lord St. Leonards on the facts of the case, but they did not dissent from the principle of law which he laid down. The principle appears to me to have been followed in subsequent cases.—p. 524.

Carron Iron Co. v. Maclaren, *discussed*.

La Bourgogne (1898) 68 L. J. P. 9; [1899] P. 1, 15; 79 L. T. 331; 8 Asp. M. C. 462.—C.A. *See supra*, col. 2323. *And see* "INTERNATIONAL LAW," vol. i., col. 1386.

Kennedy v. Cassilis (Earl) (1818) 2 Swanst.

313.—L.O.: and *Jones v. Geddes* (1845) 1 Ph. 724; 14 Sim. 606.—L.C., *referred to*.

Carron Iron Co. v. Maclaren (1855) 24 L. J. Ch. 620; 5 H. L. Cas. 416, 440; 3 W. R. 597.—H.L. (E.); LORD ST. LEONARDS *dissenting*.

Bushby v. Munday (1821) 5 Madd. 297; 21 R. R. 294.—V.-C., *discussed*.

Carron Iron Co. v. Maclaren (1855) 5 H. L. Cas. 416, 438.—H.L. (E.) (*supra*, col. 2356).

Bushby v. Munday, *explained*.

Hyman v. Helm (1883) 24 Ch. D. 531; 49 L. T. 376; 32 W. R. 258.—C.A. BRETT, M.R., COTTON and BOWEN, L.J.J.

COTTON, L.J.—There was in that case an equity to restrain the prosecution of an action if it had been begun in England in a Common Law Court, and therefore the Court, on the ground of the equity, interfered against the defendant, even although the action which he had brought was before a foreign tribunal.—p. 542.

Harrison v. Gurney (1821) 2 J. & W. 563; 22 R. R. 211.—L.C.; and *Beckford v. Kemble* (1822) 1 Sim. & S. 7; 1 L. J. (O.S.) Ch. 5; 24 R. R. 143.—V.-C., *discussed*.

Carron Iron Co. v. Maclaren (1855) 5 H. L. Cas. 416, 437.—H.L. (E.) (*supra*, col. 2356).

Bayley v. Edwards (1792) 3 Swanst. 703.—L.C., *discussed*.

Mutrie v. Binney (1887) 35 Ch. D. 614; 56 L. T. 455; 36 W. R. 131.—NORTH, J.; reversed, C.A.

Elliott v. Minto (Lord) (1821) 6 Madd. 16.—V.-C., *considered*.

Carron Iron Co. v. Maclaren (1855) 24 L. J. Ch. 620; 5 H. L. Cas. 416, 439; 3 W. R. 597.—H.L. (E.); *Wilson v. Ferrand* (1871) L. R. 13 Eq. 362; 26 L. T. 287.—MALINS, V.-C.

Beauchamp v. Huntley (Marquis) (1822)

Jacob 546; 23 R. R. 143.—L.C., *distinguished*.

Carron Iron Co. v. Maclaren (1855) 5 H. L. Cas. 416, 443.—H.L. (E.) (*supra*, col. 2356).

Portarlington (Lord) v. Soulby (1834) 4 L. J. Ch. 241; 3 Myl. & K. 104; 41 R. R. 26.—L.C., *discussed*.

Carron Iron Co. v. Maclaren (1855) 5 H. L. Cas. 416, 439.—H.L. (E.) (*supra*).

Wade v. Simeon (1845) 1 C. B. 610; 14 L. J. C. P. 188; 3 D. & L. 27; 9 Jur. 472.—C.P.; *referred to*.

Chambers v. Mason (1858) 5 C. B. (N.S.) 59; 28 L. J. C. P. 10; 5 Jur. (N.S.) 148.—C.P.

Ostell v. Le Page (1852) 2 De G. M. & G. 892.—KNIGHT BRUCE and TURNER, L.J.J., *discussed and not applied*.

Wilson v. Ferrand (1871) L. R. 13 Eq. 362, 367; 26 L. T. 287.—MALINS, V.-C.

Ostell v. Le Page and Henderson v. Henderson (1843) 3 Hare 100.—V.-C.; *discussed*.

Mutrie v. Binney (1887) 35 Ch. D. 614; 56 L. T. 455; 36 W. R. 131.—NORTH, J.; reversed, C.A.

Ostell v. Lepage, *explained*.

Henderson v. Henderson, *referred to*.

Henderson, In re, Nouvion v. Freeman (1887) 35 Ch. D. 704; 56 L. T. 829; reversed, C.A. *See* "INTERNATIONAL LAW," *supra*, vol. i., col. 1386.

NORTH, J.—In *Ostell v. Lepage* a judgment, dissolving a partnership and directing accounts which were still pending, was held not to be final.—p. 717.

Henderson v. Henderson, *discussed*.

Worman v. Worman (1889) 43 Ch. D. 296; 61 L. T. 637; 38 W. R. 442 (*post*).

Henderson v. Henderson (1844) 13 L. J.

Q. B. 274; 6 Q. B. 288; 9 Jur. 755.—Q.B.; S.C., 3 Hare 100 (*supra*), *referred to*.

Ellis v. McHenry (1871) 40 L. J. C. P. 109; L. R. 6 C. P. 228; 23 L. T. 861; 19 W. R. 503.—C.P.

Henderson v. Henderson, *referred to*.

Marbella Iron Ore Co. v. Allen (1878) 47 L. J. C. P. 601; 38 L. T. 815.—C.P.D.

Askew v. Woodhead (1873) 23 L. T. 465; 21

W. R. 573.—BACON, V.-C.; and *Serrao v. Noel* (1885) 15 Q. B. D. 549.—C.A. BRETT, M.R., BAGGALLAY and BOWEN, L.J.J.; reversing GROVE, J., *explained*.

Worman v. Worman (1889) 43 Ch. D. 296; 61 L. T. 637; 38 W. R. 442.

KEKEWICH, J.—In *Askew v. Woodhead* a somewhat litigious plaintiff having got liberty to attend the proceedings in one action, in which he could raise and have disposed of the question which he raised in another, was anxious to continue this action also, and, of course, there the Court stopped him from so doing. In *Serrao v. Noel* the only question was whether a man might, as Mr. Warrington has described it, split his relief, and having a right to an injunction and damages in respect of the same cause of action, first bring an action for the injunction, and then afterwards for damages; and the only point discussed in the judgment was whether the Court before whom the injunction came was competent to award damages; and, as the Court came to the conclusion that that might have

been done, it followed that it ought to have been done, and so the second action could not be allowed.—p. 308.

Maunder v. Lloyd (1862) 2 J. & H. 718; 1 N. R. 123; 11 W. R. 141.—WOOD, V.-C.; and **Hendrick v. Wood** (1861) 30 L. J. Ch. 583; 9 W. R. 588.—WOOD, V.-C., *not applied*.

Matthaei v. Galitzin (1874) 43 L. J. Ch. 536; 1 L. R. 18 Eq. 340, 348; 30 L. T. 455; 22 W. R. 700.—MALINS, V.-C.

Brandlyn v. Ord (1738) 1 Atk. 571.—L.C.; and **Peterborough (Earl) v. Germaine** (1709) 6 Bro. P. C. 1.—H.L. (E.) (*see* 3 Bro. P. C. 539), *discussed*.

Moss v. Anglo-Egyptian Navigation Co. (1865) 35 L. J. Ch. 179; L. R. 1 Ch. 108, 115; 12 Jur. (N.S.) 13; 14 W. R. 150.—CRANWORTH, L.C.

Brandlyn v. Ord; Peterborough (Earl) v. Germaine; and Moss v. Anglo-Egyptian Navigation Co., *referred to*.
Tredegar (Lord) v. Windus (1875) 44 L. J. Ch. 268; L. R. 19 Eq. 607, 613; 32 L. T. 596; 23 W. R. 511.—HALL, V.-C.

Moss v. Anglo-Egyptian Navigation Co., *referred to*.

Houston v. Sligo (Marquis) (1885) 29 Ch. D. 448; 52 L. T. 96.

PEARSON, J. (compromised on appeal).—There is no estoppel unless everything which is in controversy in the one action was in controversy in the other: **Moss v. Anglo-Egyptian Navigation Co.**—p. 451.

Houston v. Sligo (Marquis), *referred to*.

Caird v. Moss (1886) 55 L. J. Ch. 854; 33 Ch. D. 22, 35; 55 L. T. 453; 35 W. R. 52; 5 Asp. M. C. 565.—C.A. COTTON, LINDLEY AND LOPES, L.JJ.

Houston v. Sligo (Marquis), *discussed*.

Irish Land Commission v. Ryan [1900] 2 Ir. R. 565.—C.A. ASHBOURNE, L.C., FITZGIBBON and HOLMES, L.JJ.

FITZGIBBON, L.J.—In **Houston v. Sligo** it was held that, in order to judge whether the same questions were at issue in the first action as in the second, the Court would look at the proceedings in the first action. But the arguments and the judgments indicate that it was necessary to show that the questions were “distinctly” raised, and that “it was necessary to decide them as the groundwork of the actual decision,” and that “there was no snapping of a judgment.”—p. 575.

Bartlett v. Stinton (1866) 35 L. J. C. P. 238; L. R. 1 C. P. 483; 12 Jur. (N.S.) 342; 14 L. T. 287; 14 W. R. 614.—C.P.; and **Cash v. Wells** (1830) 1 B. & Ad. 375; 35 R. L. 324.—K.B., *discussed*.

Anlaby v. Prætorius (1888) 57 L. J. Q. B. 287; 20 Q. B. D. 764; 58 L. T. 671; 36 W. R. 487.—C.A. FRY and LOPES, L.JJ.

Keene v. Angel (1796) 6 Term Rep. 740.—K.B., *considered and applied*.

Tichborne v. Mostyn (1872) 41 L. J. C. P. 113; L. R. 8 C. P. 29, 36; 26 L. T. 554; 20 W. R. 661.—C.P.

Hoare v. Dickson (1849) 18 L. J. C. P. 158; 7 C. B. 164; 6 D. & L. 577.—C.P., *principle applied*.

Cobbett v. Warner (1866) 36 L. J. Q. B. 94; 8 B. & S. 21; L. R. 2 Q. B. 108; 16 L. T. 150; 15 W. R. 403.—Q.B.

Hoare v. Dickson and Cobbett v. Warner, *referred to*.

Morton v. Palmer (1882) 51 L. J. Q. B. 307; 9 Q. B. D. 89; 46 L. T. 285; 30 W. R. 951; 46 J. P. 358.—MATHEW and CAVE, JJ.

Hoare v. Dickson, *referred to*.

Bywater v. Dunne (1883) 10 L. R. Ir. 380.—EX. D.

Morton v. Palmer (*supra*), *not followed*.

Youngs, In re, Doggett v. Revett (1885) 55 L. J. Ch. 371; 31 Ch. D. 239; 54 L. T. 50; 34 W. R. 290.—PEARSON, J.

Morton v. Palmer, *discussed*.

Wickham, In re, Marony v. Taylor (1887) 56 L. J. Ch. 748; 35 Ch. D. 272; 57 L. T. 468; 35 L. T. 525.—C.A. (*post*).

Youngs, In re, Doggett v. Revett, *approved*.

Neal, In re, Weston v. Neal (1886) 55 L. J. Ch. 376; 31 Ch. D. 437; 54 L. T. 68; 34 W. R. 319.—BACON, V.-C.

Youngs, In re, Doggett v. Revett and Neal, In re, Weston v. Neal, *questioned*.

Wickham, In re, Marony v. Taylor (1887) 56 L. J. Ch. 748; 35 Ch. D. 272; 57 L. T. 468; 35 W. R. 525.—C.A. COTTON and LINDLEY, L.JJ.

Youngs, In re, Doggett v. Revett and Neal, In re, Weston v. Neal, *disapproved*.

Wickham, In re, Marony v. Taylor, *principle applied*.

Graham v. Sutton, Carden & Co. (1897) 66 L. J. Ch. 666; [1897] 2 Ch. 367; 77 L. T. 35.—C.A.; *reversing* NORTH, J.

LINDLEY, L.J.—The decisions in **Youngs, In re**, and **Neal, In re**, can, therefore, no longer be supported as correct according to the present practice. The old doctrine, then, that non-payment of costs is a contempt being abolished, there cannot be a stay of proceedings by reason of mere non-payment. That was the view taken by this Court in **Wickham, In re**. The principle applicable is the same in the Ch. D. as in the Q. B. D.; the fact that a plaintiff has been ordered to pay costs, and has not paid them because he is unable to do so, is not a sufficient reason for ordering a stay of proceedings.—p. 667.

LOPES, L.J.—The principle of **Wickham, In re**, as I understand it, is this—that if the action itself is vexatious, or if the plaintiff in his mode of conducting it acts vexatiously and oppressively towards the defendant, then the Court has jurisdiction to stay the proceedings till the plaintiff has paid the costs which he has been ordered to pay.—*Ibid*.

CHITTY, L.J. to the same effect.

Altree v. Hordern (1842) 12 L. J. Ch. 76; 5 Beav. 623; 7 Jur. 247.—M.R.; and

Long v. Stone (1849) 19 L. J. Ch. 148; 13 Jur. 1091.—SHADWELL, V.-C., *discussed and principle applied*.

Cook v. Hathway (1869) L. R. 8 Eq. 612; 21 L. T. 484; 17 W. R. 1057.—MALINS, V. C.

Gibbs v. Daniel (1863) 3 De G. J. & S. 479; 9 Jur. (N.S.) 632; 8 L. T. 374; 11 W. R. 653.—L.J.J., *applied*.
Barrs v. Fewkes (1866) 35 L. J. Ch. 188; L. R. 1 Eq. 392; 14 W. R. 262.—WOOD, V.-C.

Martin v. Beauchamp (Earl) (1883) 53 L. J. Ch. 1150; 25 Ch. D. 12; 49 L. T. 384; 32 W. R. 17.—C.A., *approved*.
M'Cabe v. Bank of Ireland (1889) 59 L. J. P. C. 18; 14 App. Cas. 413; 61 L. T. 416; 38 W. R. 257.—H.L. (IR.).

M'Cabe v. Bank of Ireland and Cook v. Hathway (1869) L. R. 8 Eq. 612; 21 L. T. 484; 17 W. R. 1057.—MALINS, V.-C.; *distinguished*.

United Service Association, In re, Young, Ex parte (1900) 70 L. J. Ch. 15; [1901] 1 Ch. 97; 84 L. T. 145; 49 W. R. 216; 8 Manson 97.—WRIGHT, J.

Webb v. Adkins (or Atkins) (1854) 23 L. J. C. P. 96; 14 C. B. 401; 2 C. L. R. 702; 2 W. R. 225.—C.P., *followed*.

Tarn v. Commercial Bank of Sydney (1884) 12 Q. B. D. 294; 50 L. T. 365; 32 W. R. 492.

LOPES, J.—In *Webb v. Adkins*, decided since profert and oyer were abolished by that Act [C. L. P. Act, 1852], the Court ordered a stay of proceedings in an action by an executor upon the principle that until probate has been granted there is nobody clothed with any legal title to sue, who could give a valid discharge to the defendant.—p. 296.

Kingchurch v. People's Garden Co. (1875) 45 L. J. C. P. 131; 1 C. P. D. 45; 33 L. T. 381; 24 W. R. 41.—C.P.D., *not followed*.

People's Garden Co., In re (1875) 45 L. J. Ch. 129; 1 Ch. D. 44; 24 W. R. 40.—JESSEL, M.R.; **Walker v. Banagher Distillery Co.** (1875) 45 L. J. Q. B. 134; 1 Q. B. D. 129; 33 L. T. 502.—Q.B.D.

Kingchurch v. People's Garden Co. and Walker v. Banagher Distillery Co., *approved*.

Needham v. Rivers Protection and Manure Co., (1875) 45 L. J. Ch. 132; 1 Ch. D. 253; 33 L. T. 403; 24 W. R. 317.—MALINS, V.-C.

Anon. (1790) 1 Ves. 140.—L.C.; and **Dixon v. Parkes** (1791) 1 Ves. 402.—L.C., *not applied*.

Elsey v. Adams (1864) 2 De G. J. & S. 147; 3 N. R. 696; 10 L. T. 242; 12 W. R. 586.—L.J.J.

Elsey v. Adams, *discussed and distinguished*.
Seaton v. Grant (1867) 36 L. J. Ch. 638, 642.—MALINS, V.-C. (affirmed, L.J.J.); **Tanqueray v. Bowles** (1872) L. R. 14 Eq. 151, 158.—BACON, V.-C.

Pryer v. Gribble (1875) 44 L. J. Ch. 676; L. R. 10 Ch. 534; 32 L. T. 238; 23 W. R. 642.—JAMES, L.J., *discussed*.

Hake v. Hodgkins (1877) unreported.—JESSEL, M.R., *followed*.

Eden v. Naish (1878) 47 L. J. Ch. 325; 7 Ch. D. 781, 786; 26 W. R. 392.—HALL, V.-C.

Pryer v. Gribble, Hake v. Hodgkins and Eden v. Naish, *discussed*.

Scully v. Dundonald (Lord), (1878) 8 Ch. D. 658, 665; 39 L. T. 116; 27 W. R. 249.—MALINS, V.-C.; varied, C.A. JESSEL, M.R., COTTON and THESIGER, L.J.J.

Moor v. Anglo-Italian Bank (1879) 10 Ch. D. 681; 40 L. T. 621; 27 W. R. 652.—JESSEL, M.R., *discussed and distinguished*.
Belfast Shipowners' Co., In re (1893) [1894] 1 Ir. R. 321.—CHATTERTON, V.-C., and C.A.

11. PARTICULARS.

Ernest v. Brown (1837) 6 L. J. C. P. 211; 4 Scott 385; 3 Bing. N. C. 674.—C.P., *questioned*.

Coates v. Stevens (1835) 4 L. J. Ex. 167; 2 Cr. M. & R. 118.—EX., *referred to*.

Booth v. Howard (1836) 5 D. P. C. 438; W. & D. 54; 1 Jur. 55.—PATTESON, J., *approved*.

Kenyon v. Wakes (1837) 2 M. & W. 764; 6 L. J. Ex. 180; 6 D. P. C. 105.—EX.

PARKE, B.—I think this rule ought to be discharged, because the objection that the plaintiff was at all events entitled to nominal damages, was not taken at the trial. Had that point been raised we should have had to consider a question which must soon be determined, viz., whether a payment admitted by the particulars must be pleaded. Had it not been for the decision of the Court of C. P., in *Ernest v. Brown*, I should have had little or no doubt upon the subject. Before that case I entertained a strong opinion, and so expressed it in *Coates v. Stevens*, that such a payment need not be pleaded. I thought that the particulars were given to the defendant to enable him to know what to plead, as well as to restrain the plaintiff's proof of the claim in his declaration. In that view I agree with the decision of Patteson, J., in *Booth v. Howard*, that the particulars are for the benefit of the defendant. It is said that in *Ernest v. Brown* a distinction was taken between debt and assumpsit with reference to this point. I cannot understand that distinction, nor am I at present satisfied that my first impression on this point, which I expressed in *Coates v. Stevens*, was wrong.—p. 767.

Phipps v. Lothian (or Sothorn) (1839) 9 L. J. Ex. 88; 8 D. P. C. 208; 4 Jur. 204.—PARKE and ALDERSON, BB., *dissented from*.

Coombe v. Stephenson (1874) 23 W. R. 137; 31 L. T. 585.

[It was urged by counsel that Parke, B. laid down the rule in *Phipps v. Sothorn* that a defendant ought not to be compelled to disclose the evidence in support of his case.]

BLACKBURN, J.—It was formerly the notion that a defendant ought not to be called upon to disclose his case, but it is now every-day practice to order particulars where fraud, justification of a slander, and similar defences are set up, and I see no reason why that practice should not apply to a plea of exoneration.—p. 138.

Augustinus v. Nerinckx (1880) 16 Ch. D. 13; 43 L. T. 458; 29 W. R. 225.—C.A. JESSEL, M.R., JAMES and COTTON, L.J.J.; *reversing* POLLOCK, B., *followed*.

Blackie v. Osmaston (1884) 54 L. J. Ch. 473; 28 Ch. D. 119; 52 L. T. 6; 33 W. R. 178.—C.A.; *reversing* PEARSON, J.

Baxendale v. G. W. Ry. (1860) 30 L. J. Ex.

63: 6 H. & N. 95.—EX., *commented on and explained.*

Thames Ironworks and Shipbuilding Co. v. Royal Mail Steam Packet Co. (1861) 30 L. J. C. P. 265; 10 C. B. (N.S.) 375; 7 Jur. (N.S.) 972; 4 L. T. 250; 9 W. R. 577.

ERLE, C.J.—In *Baendele's Case* two of the judges thought the particulars ought to be given under the circumstances of that case, which was an action for breach of duty in a great number of instances, at a great number of places. The judgment went on the particular grounds of the case, and with a hesitating assent by one judge [Bramwell, J.], who took the case to be an exception, and the general rule to be quite different.—p. 267.

Williams v. Ramsdale (1887) 36 W. R. 125.

—STEPHEN and CHARLES, JJ., *applied.*

Roche v. Meyler (1895) [1896] 2 Ir. R. 35.—Q.B.D.

Wingard v. Cox, W. N. (1874), p. 106.—DENMAN, J., *discussed.*

Bradbury v. Cooper (1883) 53 L. J. Q. B. 558; 12 Q. B. D. 94; 32 W. R. 32.—GROVE and A. L. SMITH, JJ.

Kelly v. Briggs (1888) 4 Times L. R. 556.—

FIELD and WILLS, JJ., *not followed.*

Knight v. Engle (1889) 61 L. T. 780.—COLERIDGE, C.J. and MATHEW, J.

Knight v. Engle, *referred to.*

Hanna v. Keers [1896] 2 Ir. R. 226.—EX. D.

Millar v. Harper (1888) 57 L. J. Ch. 1091;

38 Ch. 110; 58 L. T. 698; 36 W. R. 454.

—C.A., *distinguished.*

Woolfe v. Automatic Picture Gallery, Ltd. (1902) 19 Rep. Pat. Cas. 161.—KEKEWICH, J.

Newport (Mon.) Slipway, Dry Dock and

Engineering Co. v. Paynter (1886) 56

L. J. Ch. 1021; 34 Ch. D. 88; 55 L. T.

711.—C.A.; and *Spedding v. Fitzpatrick*

(1888) 58 L. J. Ch. 139; 38 Ch. D. 410; 59

L. T. 492; 37 W. R. 20.—C.A., *referred to.*

Briton Medical and General Life Association v. Britannia Fire Association (1888) 59 L. T. 888.—KAY, J.

12. SECURITY FOR COSTS.

Beckman v. Legrainge (1794) 2 Anstr. 359.

—MACDONALD, C.B., *disapproved.*

Demanroffe v. Jackson (1824) 13 Price 603.—EX.

Mullett v. Christmas (1814) 2 Ball & B. 422.—L.C.

Discussed. Corner v. Irwin (1874) Ir. R. 8 C. L. 504.—EX. (see judgment of PALLES, C.B.); *not followed.* Yorke v. M'Laughlin (1874) Ir. R. 8 C. L. 547.—Q.B.; *considered.* Nicholson v. Wood (1884) 15 L. R. Ir. 76.—PORTER, M.R.

Pray v. Edie (1786) 1 Term Rep. 267;

1 R. R. 200.—K.B.; and *Fitzgerald v.*

Whitmore (1786) 1 Term Rep. 362.—K.B.,

referred to.

Raeburn v. Andrews (1874) 43 L. J. Q. B. 73; L. R. 9 Q. B. 118; 30 L. T. 15; 22 W. R. 489.—Q.B.

Raeburn v. Andrews, *followed.*

White v. Carroll (1874) Ir. R. 8 C. L. 296.—Q.B.

Raeburn v. Andrews, *distinguished.*

White v. Carroll, *dissented from.*

Clarke v. Croker (1874) Ir. R. 8 C. L. 318.—MONAHAN, C.J. and MORRIS, J.

Raeburn v. Andrews, *distinguished.*

White v. Carroll, *dissented from.*

Clarke v. Croker, *approved.*

Corner v. Irwin (1874) Ir. R. 8 C. L. 504.—EX.

Raeburn v. Andrews, *followed.*

Clarke v. Croker, *dissented from.*

Yorke v. M'Laughlin (1874) Ir. R. 8 C. L. 547.—Q.B.

Raeburn v. Andrews, White v. Carroll,

Clarke v. Croker, and Corner v. Irwin,

considered.

Nicholson v. Wood (1884) 15 L. R. Ir. 76.—PORTER, M.R.

Raeburn v. Andrews, *distinguished.*

East Llangynog Lead Mining Co., In re (1875) 23 W. R. 587.

JESSEL, M.R. said that the decision in *Raeburn v. Andrews*, was founded on the Judgments Extension Act, 1868, which applied only to actions at law. In Chancery, therefore, security must still be given by a plaintiff or petitioner residing in Scotland.—p. 588.

Raeburn v. Andrews, *principle not applied.*

East Llangynog Lead Mining Co., In re, *referred to.*

Howe Machine Co., In re, Fontaine's Case (1889) 41 Ch. D. 118; 61 L. T. 170; 37 W. R. 680.—NORTH, J.; order discharged by the C.A. (COTTON, LINDLEY and FRY, LJJ.) on fresh evidence.

Nelson v. Ogle (1810) 2 Taunt. 253.—C.P., *commented on.*

Nylander v. Barnes (1861) 30 L. J. Ex. 151; 6 H. & N. 509; 7 Jur. (N.S.) 194; 3 L. T. 819; 9 W. R. 339.

WILDE, B.—*Nelson v. Ogle* . . . lays down no fixed rule. It appears, there, that the plaintiff was a foreigner, that he had no fixed place of abode, that he was never resident in any particular place longer than while his ship was in port, and the Court say that his case is not distinguishable from that of an English sailor. Mr. James comes to the conclusion that the ship was a foreign ship; I cannot draw the same conclusion. That case seems to me to leave the question exactly where it was before. A seafaring man may not, strictly speaking, have a home anywhere, unless it be his ship or the port his ship belongs to. The home of a sailor navigating a foreign ship is probably a foreign port.—p. 152. MARTIN and CHANNELL, BB. concurred.

Ciragno v. Hassan (1815) 6 Taunt. 20;

1 Marsh. 421; 16 R. R. 559.—C.P.; and

Anon. (1819) 8 Taunt. 737.—C.P., *discussed.*

Redondo v. Chaytor (1879) 48 L. J. Q. B. 697;

4 Q. B. D. 453.—C.A. (*post*, col. 2365).

Willis v. Garbutt (1827) 1 Y. & J. 511.—

ALEXANDER, C.B.; and *Naylor v. Joseph*

(1825) 10 Moore 522; 3 L. J. (O.S.) C. P.

247.—C.P., *discussed.*

Redondo v. Chaytor (1879) 48 L. J. Q. B. 697; 4 Q. B. D. 453.—C.A. See *post*, col. 2365.

Oliva v. Johnson (1522) 5 B. & Ald. 908.—K.B.

Discussed. **Tambisco v. Pacifico** (1852) 21 L. J. Ex. 276; 7 Ex. 816.—EX.; *not applied*, **Westenberg v. Mortimore** (1875) 44 L. J. C. P. 289; L. R. 10 C. P. 438, 442; 32 L. T. 402.—C.P.; *overruled*, **Redondo v. Chaytor** (1879) 48 L. J. Q. B. 697; 4 Q. B. D. 453.—C.A. *See post*.

Tambisco v. Pacifico (1852) 21 L. J. Ex. 276; 7 Ex. 816.—EX.

Explained, **Crispin v. Doglione** (1860) 29 L. J. P. 130; 1 Sw. & Tr. 522; 6 Jur. (N.S.) 303; 1 L. T. 446.—SIR C. CRESSWELL; *discussed*, **Westenberg v. Mortimore** (1875) 44 L. J. C. P. 289; L. R. 10 C. P. 438, 442; 32 L. T. 402.—C.P.; **Redondo v. Chaytor** (1879) 48 L. J. Q. B. 697; 4 Q. B. D. 453, 455.—C.A. *See post*.

Tambisco v. Pacifico, *referred to*.

Crispin v. Doglione, *discussed*.

Twomey, In goods of, **O'Leary v. Stack** [1900] 2 Ir. R. 560.—ANDREWS, J.

Ainslie v. Sims (1853) 22 L. J. Ch. 834; 17 Beav. 57; 1 Eq. R. 17; 17 Jur. 657.—M.R.

Not followed, **Cambottie v. Inngate** (1853) 1 Eq. R. 533; 1 W. R. 533.—WOOD, V.-C.; *discussed*, **Swanzy v. Swanzy** (1858) 27 L. J. Ch. 419; 4 K. & J. 237; 4 Jur. (N.S.) 1013; 6 W. R. 414.—WOOD, V.-C.

Ainslie v. Sims, *overruled*.

Cambottie v. Inngate and **Swanzy v. Swanzy**, *discussed*.

Redondo v. Chaytor (1879) 48 L. J. Q. B. 697; 4 Q. B. D. 453; 40 L. T. 797; 27 W. R. 701.—C.A. BAGGALLAX, BRAMWELL and THESIGER, L.JJ. *See judgments at length*.

Redondo v. Chaytor, *applied*.

Hamburger v. Poetting (1882) 47 L. T. 249.—BACON, V.-C.

Redondo v. Chaytor, *followed*.

Ebrard v. Gassier (1884) 28 Ch. D. 232; 54 L. J. Ch. 441; 52 L. T. 63; 33 W. R. 287.—C.A. BOWEN, L.J.—A distinction, however, has been drawn between that case and the present on two grounds.

In the first place it is said that only one of the plaintiffs has arrived within the jurisdiction—but if when the action was originally brought one plaintiff had been within the jurisdiction and the others abroad it is admitted that the Court could not have ordered the plaintiffs to give security for costs; and if that be so, it seems to make very little difference that the plaintiff who is within the jurisdiction came to England after the writ was filed. I do not think the distinction is sufficient. In the second place it is said that *Redondo v. Chaytor* only applies where one of the plaintiffs is within the jurisdiction when the application for security for costs is made: whereas here the plaintiff Ebrard was abroad when the application was made to the V.-C., but has come to England before the appeal was heard. But I think it cannot be maintained that there is a hard and fast rule that a plaintiff can only take advantage of the rule in *Redondo v. Chaytor*, if at the very moment when the application is made he is within the jurisdiction. As Fry, L.J. suggested in the course of the argument, the true test must be whether he is in England when the judgment is given. I sympathise with what Bramwell, L.J.

said in *Redondo v. Chaytor* as to the apparent injustice of the general rule, but it is better to keep to the old ways than to make a new practice from moment to moment.—p. 236.

FRY, L.J.—I am of the same opinion, but I have come to that conclusion not without reluctance. I bow to the decision in *Redondo v. Chaytor*, and I can see no real distinction between that case and the present.—*Ibid*.

Redondo v. Chaytor and **Ebrard v. Gassier**, *referred to*.

Apollinaris Co.'s Trade Mark, In re (1890) 63 L. T. 502.—C.A. HALSBURY, L.C., BOWEN and FRY, L.JJ.

Umfreville v. Johnson (1875) 44 L. J. Ch. 752; L. R. 10 Ch. 580; 23 W. R. 844.—L.JJ., *applied*.

D'Hormusgee v. Grey (1882) 52 L. J. Q. B. 192; 10 Q. B. D. 13.—DENMAN and MANISTY, JJ.

Umfreville v. Johnson and **D'Hormusgee v. Grey**, *referred to*.

Gort (Viscount) v. Rowney (1886) 55 L. J. Q. B. 541; 17 Q. B. D. 625; 54 L. T. 817; 34 W. R. 696.—C.A. ESHER, M.R. and BOWEN, L.J.

Winterfield v. Bradnum (1878) 47 L. J. Q. B. 270; 3 Q. B. D. 324; 38 L. T. 250; 26 W. R. 742.—C.A.

Distinguished, **Mapleson v. Masini** (1879) 49 L. J. Q. B. 423; 5 Q. B. D. 144, 147; 28 W. R. 488.—FIELD and MANISTY, JJ.; *referred to*, **Stooke v. Taylor** (1880) 49 L. J. Q. B. 857; 5 Q. B. D. 569, 577; 43 L. T. 200; 29 W. R. 49; 44 J. P. 748.—Q.B.D.; *discussed and approved*, **Beddall v. Maitland** (1881) 50 L. J. Ch. 401; 17 Ch. D. 174, 182; 44 L. T. 248; 29 W. R. 484.—FRY, J.; *referred to*, **Toke v. Andrews** (1882) 51 L. J. Q. B. 281; 8 Q. B. D. 428, 433; 30 W. R. 659.—FIELD, J. and HUDDLESTON, B.

Winterfield v. Bradnum, *principle applied*.

Mapleson v. Masini (*supra*), *distinguished*.

Sykes v. Sacerdoti (1885) 54 L. J. Q. B. 560; 15 Q. B. D. 423, 425; 53 L. T. 418.—C.A. ESHER, M.R. and BAGGALLAX, L.J.

Winterfield v. Bradnum, **Mapleson v. Masini** and **Sykes v. Sacerdoti**, *discussed*.

Lake v. Heseltine (1885) 55 L. J. Q. B. 205.

HUDDLESTON, B.—The cases lay down this principle—that if the cause of action which is set up in the counter-claim is in substance a different cause of action to that which is set up in the statement of claim in the action, the defendant may be called upon to give security for costs. The decision of the C. A. in *Winterfield v. Bradnum* supports this view, though the circumstances of that case do not precisely correspond with those we find here. In his judgment in that case Brett, L.J. said: "A counter-claim is sometimes a mere set-off; sometimes it is in the nature of a cross-action; sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counter-claim is that they are wholly independent suits which, for the convenience of procedure, are combined in one action." When *Mapleson v. Masini* was decided, Field and Manisty, JJ. laid down the rule that the different claims must arise out of a similar set of circumstances, and in that case the matters in dispute

did arise out of the same transaction. In *Sykes v. Sacerdoti* the Court held that a defendant who had delivered a counter-claim for negligence on the part of the plaintiff was liable to give security. We do not stop to consider if the present case is on all fours with *Winterfield v. Bradnum*, for in that case the question before the Court was whether the defendant was entitled to security in respect of his counter-claim, he having admitted the plaintiff's claim. If in our judgment the counter-claim in this case constitutes a fresh cause of action, the defendant must give security.—p. 206. WILLS, J. concurred.

Winterfield v. Bradnum, discussed.

Griffiths v. Patterson (1888) 22 L. R. Ir. 656.—C.A. ASHBOURNE, L.C., FITZGIBBON, BARRY and NAISH, L.JJ.

Winterfield v. Bradnum, Mapleson v. Masini, Sykes v. Sacerdoti, and Lake v. Heseltine (supra, col. 2366), explained.

Neck v. Taylor [1893] 1 Q. B. 560; 62 L. J. Q. B. 514; 4 R. 344; 68 L. T. 399; 41 W. R. 486.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

ESHER, M.R.—The rule laid down by the cases seems to be as follows. Where the counter-claim is put forward in respect of a matter wholly distinct from the claim, and the person putting it forward is a foreigner resident out of the jurisdiction, the case may be treated as if that person were a plaintiff, and only a plaintiff, and an order for security for costs may be made accordingly, in the absence of anything to the contrary. Where, however, the counter-claim is not in respect of a wholly distinct matter, but arises in respect of the same matter or transaction upon which the claim is founded, the Court will not, merely because the party counter-claiming is resident out of the jurisdiction, order security for costs; it will in that case consider whether the counter-claim is not in substance put forward as a defence to the claim, whatever form in point of strict law and of pleading it may take, and, if so, what under all the circumstances will be just and fair as between the parties; and will act accordingly. Therefore, the Court in that case will have a discretion.—p. 562.

Winterfield v. Bradnum, referred to.

Kennedy v. Healy (1896) [1897] 2 Ir. R. 258.—EX. D. (affirmed, C.A. FITZGIBBON, BARRY and WALKER, L.JJ.); *Craig v. Boyd* (1900) [1901] 2 Ir. R. 645.—ANDREWS, J.

Sandys v. Long (1835) 4 L. J. Ch. 88; 2 Myl. & K. 487.—L.C.; affirming 7 Sim. 140.—V.-C. discussed.

Bailey v. Gundry (1836) 5 L. J. Ch. 199; 1 Keen 53.—M.R.

Bailey v. Gundry.

Discussed, *Fraser v. Palmer* (1838) 8 L. J. Ex. Eq. 39; 3 Y. & C. 279; 3 Jur. 145.—ALDERSON, B.; *followed*, *Manby v. Bewicke* (1856) 8 De G. M. & G. 468; 2 Jur. (N.S.) 761; 4 W. R. 622.—KNIGHT BRUCE and TURNER, L.JJ.

Calvert v. Day (1836) 2 Y. & C. 217.—ABINGER, C.B., discussed.

Fraser v. Palmer (1838) 8 L. J. Ex. Eq. 39; 3 Y. & C. 279; 3 Jur. 145.—ALDERSON, B.

Fraser v. Palmer, discussed.

Cambottie v. Inngate (1853) 1 W. R. 533.—WOOD, V.-C.

Calvert v. Day (supra), not applied.

Fraser v. Palmer, referred to.

Redondo v. Chaytor (1879) 48 L. J. Q. B. 697; 4 Q. B. D. 453.—C.A. (supra, col. 2365).

Manby v. Bewicke (1856) 8 De G. M. & G. 468; 2 Jur. (N.S.) 671; 4 W. R. 622.—L.JJ.; reversing 24 L. J. Ch. 664.—WOOD, V.-C.

Discussed, *Newall v. Telegraph Construction Co.* (1866) 35 L. J. Ch. 827; 2 L. R. Eq. 756, 762; 14 W. R. 914.—WOOD, V.-C.; *Hall v. Truman, Hanbury & Co.* (1885) 54 L. J. Ch. 717; 29 Ch. D. 307, 313; 51 L. T. 586.—KAY, J. (affirmed, C.A. COTTON and FRY, L.JJ.).

Elliot v. Kendrick (1840) 10 L. J. Q. B. 42; 12 A. & E. 597; 4 P. & D. 306; 9 D. P. C. 195; 1 Vol. P. C. 45.—Q.B.

Referred to, *Denston v. Ashton* (1869) 38 L. J. Q. B. 254; L. R. 4 Q. B. 590; 10 B. & S. 768 (*post*, col. 2369); *explained*, *Cowell v. Taylor* (1885) 31 Ch. D. 34 (*post*).

Perkins v. Adcock (1845) 15 L. J. Ex. 7; 14 M. & W. 808; 3 D. & L. 270.—EX.; and Goatley v. Emmott (1854) 24 L. J. C. P. 38; 15 C. B. 291; 3 W. R. 64.—C.P., referred to.

Denston v. Ashton (1869) 38 L. J. Q. B. 254; L. R. 4 Q. B. 590 (*post*, col. 2369).

Perkins v. Adcock and Goatley v. Emmott, explained.

Cowell v. Taylor (1885) 31 Ch. D. 34; 55 L. J. Ch. 92; 53 L. T. 483; 34 W. R. 24.

BOWEN, L.J.—These cases show that security is required in the case of an insolvent who is suing as a mere nominal plaintiff for the benefit of a third party.—p. 38.

Tenant (or Jones) v. Brown (1826) 5 B. & C. 208.—K.B., distinguished.

Robins v. Bridge (1837) 3 M. & W. 114, 118; 6 D. P. C. 140; M. & H. 357.—EX.

Tenant v. Brown, commented on.

Larssen v. Monmouthshire Ry. & Canal Co. (1867) 16 L. T. 280.—EX.

BRAMWELL, B.—*Tenant v. Brown* is inconsistent with the general practice in such matters as I am acquainted with it, namely, that the plaintiff must be both suing on behalf of another person and insolvent to entitle the defendant to security for costs. I think the decision in that case must have turned in some way upon the fact that the person on whose behalf the action was really brought was the attorney in the cause. It will be observed that the rule as reported in that case was for staying proceedings until the "plaintiff's attorney," not the "plaintiff," should give security for costs.—p. 290.

Burke v. Hutchinson (1844) 7 Ir. Eq. R. 508.—L.C., explained.

Worrall v. White (1846) 9 Ir. Eq. R. 572; 3 Jo. & Lat. 513.—SUGDEN, L.C.

Burke v. Lidwell (1844) 1 Jo. & Lat. 703.—L.C., referred to and applied.

Hastings Corporation v. Ivall (1874) 43 L. J. Ch. 728; L. R. 9 Ch. 758; 31 L. T. 262; 22 W. R. 788.—JAMES and MELLISH, L.JJ.

Harlock v. Ashberry (1881) 51 L. J. Ch. 98 ; 19 Ch. D. 84 ; 45 L. T. 602 ; 30 W. R. 112.—C.A. : and **Hastings Corporation v. Ivall** (*supra*), *discussed and applied*.
Brooke v. Kavanagh (1888) 21 L. R. Ir. 474.—C.A.

Farrer v. Lacy, Hartland & Co. (1885) 54 L. J. Ch. 808 ; 28 Ch. D. 482 ; 52 L. T. 38 ; 33 W. R. 265.—C.A. **BAGGALLAY, BOWEN and FRY, L.J.**, *referred to*.
Brooke v. Kavanagh (1888) 21 L. R. Ir. 474.—C.A.

Rourke v. White Moss Colliery Co. (1876) 1 C. P. D. 556 ; 35 L. T. 160.—C.A., *applied*.
Waddell v. Blockley (1878) 10 Ch. D. 416 ; 40 L. T. 286 ; 27 W. R. 233.—C.A.

Rourke v. White Moss Colliery Co., *not applied*.
Swain v. Follows (1887) 18 Q. B. D. 585 ; 56 L. J. Q. B. 310 ; 56 L. T. 335 ; 35 W. R. 408.—**HUDDLESTON, B. and A. L. SMITH, J.**
A. L. SMITH, J.—**Rourke v. White Moss Colliery Co.** does not apply, for it cannot be said here that the appellant has become insolvent in consequence of the accident, as appears to have been the case there.—p. 588.

Rourke v. White Moss Colliery Co., *referred to*.
Brooke v. Kavanagh (1888) 21 L. R. Ir. 474.—C.A. *And see* "COSTS," vol. i., col. 40.

Sykes v. Sykes (1869) 38 L. J. C. P. 281 ; L. R. 4 C. P. 645 ; 20 L. T. 663 ; 17 W. R. 799.—C.P., *approved*.
Cowell v. Taylor (1885) 55 L. J. Ch. 92 ; 31 Ch. D. 34.—C.A. *See post*.

Sykes v. Sykes, *referred to*.
Blackett v. Blackett (1902) 71 L. J. P. 69 ; [1902] P. 170.—C.A. (*post*, col. 2371).

Denston v. Ashton (1869) 38 L. J. Q. B. 254 ; L. R. 4 Q. B. 590 ; 21 L. T. 20 ; 17 W. R. 968 ; 10 B. & S. 768.—Q.B., *questioned*.
Pooley's Trustee v. Whetham (1884) 54 L. J. Ch. 182 ; 28 Ch. D. 38 ; 51 L. T. 608 ; 33 W. R. 423.—**PEARSON, J.**

Denston v. Ashton, *approved*.
Pooley's Trustee v. Whetham, *observations dissented from*.
Cowell v. Taylor (1885) 55 L. J. Ch. 92 ; 31 Ch. D. 34.—C.A. *See post*.

Malcolm v. Hodgkinson (1873) L. R. 8 Q. B. 209 ; 21 W. R. 360.—Q.B. : and **Brocklebank v. King's Lynn Steamship Co.** (1878) 46 L. J. C. P. 321 ; 3 C. P. D. 365 ; 38 L. T. 489 ; 27 W. R. 94.—**DENMAN and LINDLEY, JJ.**, *followed*.
Carta Para Mining Co., In re (1881) 51 L. J. Ch. 191 ; 19 Ch. D. 457 ; 46 L. T. 406 ; 30 W. R. 117.—**HALL, V.-C.**

Malcolm v. Hodgkinson, *explained*.
United Ports and General Insurance Co. v. Hill (1870) 39 L. J. Q. B. 227 ; L. R. 5 Q. B. 395 ; 23 L. T. 14 ; 18 W. R. 980.—Q.B. : and **Carta Para Mining Co., In re**, *approved*.
Cowell v. Taylor (1885) 31 Ch. D. 34 ; 55 L. J. Ch. 92 ; 53 L. T. 483 ; 34 W. R. 24.—C.A.
BAGGALLAY, L.J.—It is singular that from the

time of the decision in **Denston v. Ashton** (*supra*), in 1869, this point was not raised again till **Pooley's Trustee v. Whetham** in 1884. It appears to me that **Denston v. Ashton** and **United Ports and General Insurance Co. v. Hill** lay down a rule which has always been acted upon by the Court of Chancery. It is said that here we are dealing with an exception from the general rule. But the rule is that any one may sue without giving security, in any but certain excepted cases. Until lately, security was never required in Chancery unless the plaintiff was abroad, and if there were two co-plaintiffs, one of whom only was abroad, security was not ordered. In **Sykes v. Sykes** (*supra*) the circumstances were peculiar. The plaintiffs were two executors, one of whom was out of the jurisdiction, and the other a bankrupt. If the one abroad had been the sole plaintiff, security would have been ordered, if the one in England had been solvent it would not. It was held that the bankruptcy of the one in England made no difference. Again, if a trustee in bankruptcy or liquidation is the sole plaintiff, he will not be ordered to give security: **Pooley's Trustee v. Whetham**. But in that case an additional point was raised, whether the personal insolvency of the trustee was not a ground for ordering security. The evidence of insolvency broke down, and that point was not decided. Two propositions, then, are established—the fact that the plaintiff is a trustee in bankruptcy or liquidation is not a sufficient ground: the fact that the plaintiff is insolvent is not sufficient ground. Here it is said you have a combination of the two, and though neither alone would be sufficient, both together will suffice. I cannot come to that conclusion. It is said that Lord Blackburn came to it in **Malcolm v. Hodgkinson**. He there says: "Where an insolvent person is suing as trustee for another, it has long been the rule to require security for costs." I think that this observation is correctly interpreted by Hall, V.-C., in **Carta Para Mining Co., In re**, as not referring to a case like that of a trustee in bankruptcy, but to the case of a person who is a bare trustee for some one else. Suppose I, having a shadowy case, assign it over to a man of straw that he may sue for my benefit, then security for costs will be ordered.—p. 37.

BOWEN, L.J. to the same effect. *See* the judgment at length. **FRY, L.J.** concurred.

Malcolm v. Hodgkinson, *commented on*.
United Ports and General Assurance Co. v. Hill, *approved*.

Carta Para Mining Co., In re, and **Cowell v. Taylor**, *referred to*.
Rhodes v. Dawson (1886) 16 Q. B. D. 548 ; 55 L. J. Q. B. 134 ; 34 W. R. 240.—C.A.

LINDLEY, L.J.—But it is contended that the case is covered by **Malcolm v. Hodgkinson**. In that case security for costs was ordered to be given by a plaintiff, who was a liquidating debtor under the Bankruptcy Act, 1869, and a receiver of whose property had been appointed. This case was apparently followed in **Brocklebank v. King's Lynn Steamship Co.** (*supra*), but without argument on the point whether security for costs could be ordered or not. In **Carta Para Mining Co., In re**, Hall, V.-C. followed those decisions, remarking, however, that they were departures from the old rule. **Malcolm**

v. Hodgkinson was decided on the ground that the case came within the rule, according to which an insolvent plaintiff suing as trustee for another can be required to give security for costs. But, as pointed out in *Carta Para Mining Co., In re*, by Hall, V.-C., and by this Court in *Concell v. Taylor*, this rule only applies where the nominal plaintiff is not the real plaintiff, but is a person whose name is used by some one behind him. The present case is clearly not a case of that description, and is not within the principle on which the Court appears to have proceeded in *Malcolm v. Hodgkinson*. If *Malcolm v. Hodgkinson*, and the two cases in which it was followed, are to be considered as laying down a general rule, that wherever a plaintiff is insolvent and there is a receiver of his assets, the plaintiff can be properly ordered to give security for costs, they go further than any other cases in the books, and cannot be reconciled with *United Ports, &c., Co. v. Hill*. In that case an unlimited company, ordered to be wound up, brought an action to recover money due to it, and although a liquidator had been appointed, the Court decided that the company could not be ordered to give security for costs. This decision appears to me to have been quite right, and to be inconsistent with any such rule as that which is sought to be deduced from *Malcolm v. Hodgkinson*.—p. 554. LOPES, L.J. concurred.

Cowell v. Taylor, *applied*.

Swain v. Follows (1887) 56 L. J. Q. B. 310; 18 Q. B. D. 585; 56 L. T. 335; 35 W. R. 408.—HUDDLESTON, B. and A. L. SMITH, J.; Blackett v. Blackett (1902) 71 L. J. P. 69; [1902] P. 170.—C.A. (*post*).

Rhodes v. Dawson (1886) 55 L. J. Q. B. 134; 16 Q. B. D. 548; 34 W. R. 240.—C.A.

LINDLEY and LOPES, L.JJ.; reversing MATHEW and A. L. SMITH, JJ., *applied*.

Cook v. Whellock (1890) 24 Q. B. D. 658; 59 L. J. Q. B. 329; 62 L. T. 675; 38 W. R. 534.—C.A.; affirming 54 J. P. 423.—V. WILLIAMS and LAWRENCE, JJ.

ESHER, M.R.—It follows, I think, from what has been held in the C. A., in *Rhodes v. Dawson*, that the mere fact of bankruptcy is not *per se* a sufficient reason why a plaintiff should be ordered to give security for costs.—p. 662. FRY, L.J. concurred.

LOPES, L.J.—It seems to me that the question in this case is really answered by the judgment in that case [*Rhodes v. Dawson*], where a passage from Chitty's Archbold (vol. i., p. 398) is cited with approval, such passage being to the following effect: "The plaintiff will not be compelled to give security for costs merely because he is a pauper, or bankrupt, or insolvent, and this even in a *qui tam* action; and this rule applies where the plaintiff is a trustee of a bankrupt, and is suing for the benefit of the estate, or where the plaintiff is suing as executor for the benefit of the testator's estate."—p. 662.

Rhodes v. Dawson.

Discussed, Sartoris's Estate, *In re*, Sartoris v. Sartoris (1891) 61 L. J. Ch. 1; [1892] 1 Ch. 11; 65 L. T. 544; 40 W. R. 82.—CHITTY, J. and C.A. LINDLEY, BOWEN and FRY, L.JJ.; Blackett v. Blackett (1902) 71 L. J. P. 69; [1902] P. 170; 86 L. T. 669; 50 W. R. 516.—C.A. COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.

Cook v. Whellock (1890) 59 L. J. Q. B. 329; 24 Q. B. D. 658; 62 L. T. 675; 38 W. R. 534.—C.A. (*supra*, col. 2371), *referred to*, Ball, *In re* (1898) [1899] 2 Ir. R. 313.—BOYD, J.; *reversed*, C.A. ASHBOURNE, L.C., FITZGIBBON, WALKER and HOLMES, L.JJ.

Benazech v. Bassett (or *Bessett*) (1845) 14 L. J. C. P. 148; 1 C. B. 313; 2 D. & L. 801; 9 Jur. 376.—C.P., *distinguished*.

Belmonte v. Aynard (1879) 4 C. P. D. 221; 40 L. T. 627.—C.P.D.; *affirmed*, 4 C. P. D. 352; 27 W. R. 789.—C.A.

Benazech v. Bassett (or *Bessett*), *discussed*.

Rhodes v. Dawson (1886) 16 Q. B. D. 548; 55 L. J. Q. B. 134; 34 W. R. 240.—C.A.

LINDLEY, L.J.—In *Benazech v. Bassett*, the plaintiff in the action, who was made also plaintiff under the interpleader rule, and was a foreigner resident abroad, was ordered to give security for costs upon the application of the claimant who was substituted for the original defendants in the action.—p. 552. LOPES, L.J. concurred.

Howe Machine Co., In re, Fontaine's Case (1889) 41 Ch. D. 118; 67 L. T. 170; 37 W. R. 680.—NORTH, J.; *order discharged on fresh evidence*, C.A. COTTON, LINDLEY and FRY, L.JJ.

Howe Machine Co., In re, Fontaine's Case, *corrected*.

Queensland Mercantile Agency Co., *In re* (1891) 61 L. J. Ch. 48.—NORTH, J.

[His lordship said that it was now clearly settled by authority that stay of execution pending an appeal would not be granted unless there were special circumstances, and that no special circumstances had been shown in this case. As regarded the respondents being a Scotch company, that presented no difficulty, having regard to the Companies Act, 1862, s. 122. In the course of the argument his lordship stated that if that section had been present to his mind in *Fontaine's Case*, he would have decided that case differently.]

Martano v. Mann (1880) 49 L. J. Ch. 510; 14 Ch. D. 419.—C.A.; and *Lydney and Wigpool Iron Ore Co. v. Bird* (1883) 52 L. J. Ch. 640; 23 Ch. D. 358; 48 L. T. 893.—PEARSON, J., *considered*.

Smith, In re, Bain v. Bain (1896) 75 L. T. 46.—C.A. LINDLEY, LOPES and RIGBY, L.JJ.; reversing KEKEWICH, J.

LINDLEY, L.J.—The plaintiff is resident abroad. The defendant does not deny her right to an account as claimed by her, but says that there will be no residuary estate; and he therefore asks for security for his costs of the action. If there was any residuary estate it would not be necessary for the defendant to ask for security, because the costs would come out of the residuary estate. It does not, however, appear that there will be any, and consequently there is no reason for not acting on the general rule. I rather think, reading Kekewich, J.'s judgment, that this is the opinion which he held with regard to the residuary estate, but he took the view that security for costs ought not to be directed to be given after a defendant has delivered his statement of defence. When I look, however, at Ord. LXV. r. 6, and . . . *Martano v. Mann* and

Lydney and Wigpool Iron Ore Co., it seems to me that the Court is not bound by any hard and fast line as to when an order for security for costs can be made.—p. 47.

Gurney v. Key (1835) 1 H. & W. 263; 3 D. P. C. 559.—WILLIAMS, J., *followed*.
Dowling v. Harman (1840) 9 L. J. Ex. 53; 6 M. & W. 131; 8 D. P. C. 165; 4 Jur. 43.—EX.

Gurney v. Key, *discussed*.
Redendo v. Chaytor (1879) 48 L. J. Q. B. 697; 4 Q. B. D. 453, 499; 40 L. T. 797; 27 W. R. 701.—C.A.

Dowling v. Harman.
Followed, **Tambisco v. Pacifico** (1852) 21 L. J. Ex. 276; 7 Ex. 816.—EX.; *not applied*, **Westenberg v. Mortimore** (1875) 44 L. J. C. P. 289; L. R. 10 C. P. 438, 441; 32 L. T. 402.—C.P.

Seidler, Ex parte (1841) 12 Sim. 106.—SHADWELL, V.-C., *questioned*.

Murrow v. Wilson (1850) 12 Beav. 497.—M.R.; and **Royal Bank of Australia, In re, Latta, Ex parte** (1850) 19 L. J. Ch. 163; 3 De G. & Sm. 186; 14 Jur. 908.—KNIGHT BRUCE, V.-C., *followed*.

Home Assurance Association, In re (1871) 19 W. R. 947; L. R. 12 Eq. 112; 25 L. T. 199.

WICKENS, V.-C., said that the case of *Seidler, Ex parte*, was one of questionable authority, as it was not to be found in the registrar's book. This question had been considered by the M.R. in *Murrow v. Wilson*, where it was decided that filing affidavits would not in general waive the right to security for costs, and under the circumstances that judgment must be taken to establish the balance of authority. It was important that such matters should be decided, and on the authority of that case he should hold that the respondents were entitled to security for costs, and on the authority of *Latta, Ex parte*, the only case to be found upon the subject, he should hold that the amount of such security must be 100%.

Grant v. Banque Franco-Egyptienne (1876) 1 C. P. D. 143; 34 L. T. 470; 24 W. R. 338.—C.A., *discussed and approved*.

Indian Kingston and Sandhurst Mining Co., In re (1882) 52 L. J. Ch. 31; 22 Ch. D. 83; 48 L. T. 52; 31 W. R. 34.—C.A. JESSEL, M.R. and COTTON, L.J.

Northampton Coal Iron and Waggon Co. v. Midland Waggon Co. (1878) 7 Ch. D. 500; 38 L. T. 82; 26 W. R. 485.—C.A.; and **City of Moscow Gas Co. v. International Financial Society** (1872) 41 L. J. Ch. 350; L. R. 7 Ch. 225; 26 L. T. 377; 20 W. R. 394.—L.J., *discussed and applied*.

Pure Spirit Co. v. Fowler (1890) 25 Q. B. D. 235; 59 L. J. Q. B. 537; 63 L. T. 559; 38 W. R. 686.

DENMAN, J.—The case [*Northampton Coal, &c., Co. v. Midland Waggon Co.*] is a strong authority for the proposition that there is no discretion where the circumstance exists which admittedly exists in the present case, namely, that the company is in liquidation, and there is nothing to show that the assets will be sufficient.—p. 238.

CHARLES, J.—The M.R. there [*City of Moscow*

Gas Co. v. International Financial Society] said that security for costs ought always to be ordered where the company is in liquidation, and there is nothing to show that the assets will be sufficient to pay the defendant's costs if he is successful, and in that case, even though there were cross bills, he ordered security for costs to be given, and on appeal James, L.J. took the same view.—p. 238.

Harvey v. Jacob (1817) 1 B. & Ald. 159.—K.B., *followed*.

Oxenden v. Cropper (1836) 4 D. P. C. 574.—PATTESON, J., *overruled*.

Costa Rica Republic v. Erlanger (1876) 45 L. J. Ch. 743; 3 Ch. D. 62; 25 W. R. 198.—C.A., *distinguished*.

Brocklebank v. King's Lynn Steamship Co. (1878) 3 C. P. D. 365; 47 L. J. C. P. 321; 38 L. T. 489; 27 W. R. 94.—C.P.D.

DENMAN, J.—*Harvey v. Jacob* is an express authority upon the point. I see no distinction in principle between that case and the present. *Costa Rica Republic v. Erlanger* differs in this, that all the circumstances were known to the defendant from the very commencement of the suit; and when *Oxenden v. Cropper* was cited before Patteson, J., the previous cases were not cited.—p. 367.

LINDLEY, J.—The matter was not argued in *Erlanger's Case*, and there was a delay of two years there; nor do I think that Ord. LV. has any application to the matter. The rule, as stated in Daniell's Chancery Practice (5th edition), pp. 32, 33, shows that the common form of order is applicable to security for the whole costs, and is not limited to after accruing costs. The practice seems to me to be well settled.—*Id.*

Costa Rica Republic v. Erlanger, *considered*.

Massey v. Allen (1879) 48 L. J. Ch. 692; 12 Ch. D. 807; 41 L. T. 788; 28 W. R. 243.—HALL, V.-C.; **Hume v. Somerton** (1890) 59 L. J. Q. B. 420; 25 Q. B. D. 239; 62 L. T. 828; 38 W. R. 748; 55 J. P. 38.—DENMAN and CHARLES, JJ.

Bass v. Clive (1814) 3 M. & S. 283.—K.B., *distinguished*.

Baile v. De Bernales (1818) 1 B. & Ald. 331.—BAYLEY, J. *See also* **Adams v. Brown** (1832) 1 L. J. C. P. 167; 2 M. & Scott 154; 1 D. P. C. 273; 9 Bing. 81.—C.P.

Gage v. Stafford (Lady) (1754) 2 Ves. sen. 556.—L.C.; and **Ogilvie v. Herne** (1805) 11 Ves. 598.—L.C., *discussed*.

Bailey v. Gundry (1836) 5 L. J. Ch. 199; 1 Keen 53.—LANGDALE, M.R.

Vanderhaege, In re, Izard, Ex parte (1887) 20 Q. B. D. 146; 58 L. T. 236; 36 W. R. 525; 4 Morrell 27.—CAVE, J., *discussed*.

Howe Machine Co., In re, Fontaine's Case (1889) 41 Ch. D. 118; 61 L. T. 170; 37 W. R. 680.—C.A. *And see* "BANKRUPTCY," vol. i., col. 155.

Norris v. Carrington (1864) 16 C. B. (N.S.) 10.—C.P.

Distinguished, **Waterton v. Baker** (1868) 37 L. J. Q. B. 65; L. R. 3 Q. B. 173; 9 B. & S. 23; 17 L. T. 468; 16 W. R. 358.—Q.B.; *discussed*.

Francis v. Dowdeswell (*or* Dowdeswell v. Francis) (1874) L. R. 9 C. P. 423; 43 L. J. C. P. 243; 30 L. T. 607; 22 W. R. 755.—C.P.

13. TRANSFER OF ACTIONS.

Holloway v. York (1876) 2 Ex. D. 333; 25 W. R. 403.—C.A. JESSEL, M.R., MELLISH and BAGGALLAY, L.J.J., *referred to*.
Storey v. Waddle (1879) 4 Q. B. D. 289; 27 W. R. 833.—C.A. JAMES, BRAMWELL and BRETT, L.J.J.

Storey v. Waddle, *referred to*.

Leslie v. Clifford (1884) 50 L. T. 590.—GROVE, J. and HUDDLESTON, B.

Owens v. Woodsman (1868) 37 L. J. Q. B. 159; 9 B. & S. 243; L. R. 3 Q. B. 469; 18 L. T. 357; 16 W. R. 932.—Q.B., *reasoning in, applied*.

Hillman v. Mayhew (1876) 45 L. J. Ex. 334; 1 Ex. D. 132; 34 L. T. 256; 24 W. R. 435.—EX. D.

Hillman v. Mayhew.

Referred to, **Holme v. Harvey** (1876) 35 L. T. 600; 25 W. R. 80.—CLEASBY and HUDDLESTON, BB.; *distinguished*, **Chapman v. Real Property Trust, Ltd.** (1878) 7 Ch. D. 732; 26 W. R. 587.—JESSEL, M.R.; *adhered to*, **Leslie v. Clifford** (1884) 50 L. T. 590.—GROVE, J. and HUDDLESTON, B.

Tomkins v. Beard (1868) 18 L. T. 363.—C.P., *distinguished*.

Foster v. Usherwood (1877) 3 Ex. D. 1; 47 L. J. Ex. 30; 37 L. T. 389; 26 W. R. 94.—C.A.

BRETT, L.J.—*Tomkins v. Beard* is different. That was a case of faulty procedure: as the objection was not taken before verdict the defect was cured. In the present case no jurisdiction existed to make the order.—p. 3.

Hodgson v. Bell (1890) 59 L. J. Q. B. 231; 24 Q. B. D. 523; 62 L. T. 481; 38 W. R. 325.—C.A.; *reversing* 24 Q. B. D. 302; 54 J. P. 455, *referred to*.

Dierken v. Philpot (1901) 70 L. J. K. B. 675; [1901] 2 K. B. 383; 85 L. T. 246; 49 W. R. 703.
ALVERSTONE, C.J.—*Hodgson v. Bell* decided that where a claim indorsed on a writ in an action of contract brought in the High Court exceeds 100%, there is no jurisdiction under [County Courts Act, 1888] s. 65 to order the action to be tried in the county court, though after action brought the claim is reduced by payment below 100%.—p. 676. LAWRENCE, J. concurred.

14. CONSOLIDATION OF ACTIONS.

Amos v. Chadwick (1878) 9 Ch. D. 459; 47 L. J. Ch. 871; 39 L. T. 50; 26 W. R. 840.—C.A.; S.C., 4 Ch. D. 869, *followed*.

Bennett v. Bury (Lord) (1880) 5 C. P. D. 339; 49 L. J. C. P. 411; 42 L. T. 480.

COLERIDGE, C.J.—Two objections were urged against this order. First, that it is an entirely novel proceeding, an attempt by plaintiffs to consolidate, and not by defendants. That objection, I think, is answered by *Amos v. Chadwick*. There seventy-eight actions were brought by different plaintiffs against the same defendants in respect of an alleged misrepresentation in the prospectus of a company; and Malins, V.-C.,

upon the application of the plaintiffs, ordered that one of the actions should be tried as a representative action, and that the proceedings in the others should be stayed, the plaintiffs in all the other actions undertaking to abide by such order as the Court might think fit to make on the determination of the representative action; and the C.A. . . . held that the questions in all the actions being substantially the same, if all were tried, the order was well made under the general power of the Court to prevent a scandal in the administration of justice.—p. 342. LINDLEY, J. concurred.

Amos v. Chadwick, *referred to*.

McHenry v. Lewis (1882) 52 L. J. Ch. 16; 21 Ch. D. 202; 46 L. T. 567.—CHITTY, J.: *affirmed*, 52 L. J. Ch. 325; 22 Ch. D. 397; 47 L. T. 549; 31 W. R. 305.—C.A. (*supra*, col. 2355).

Thomas v. Wynter (1867) 17 L. T. 148; 16 W. R. 82.—C.P., *not followed*.

Briton Medical and General Life Association v. Jones (1889) 60 L. T. 637.—MATHEW and GRANTHAM, JJ.

15. CUSTODY, ETC., OF PROPERTY.

Bartholomew v. Freeman (1878) 3 C. P. D. 316; 38 L. T. 814; 26 W. R. 743.—GROVE and LINDLEY, JJ., *referred to*.

Reg. v. Slade (1888) 57 L. J. M. C. 120; 21 Q. B. D. 433; 59 L. T. 640; 37 W. R. 141.—MANISTY and HAWKINS, JJ.

Bartholomew v. Freeman, Reg. v. Slade, and Coddington v. Jacksonville, Pensacola and Mobile Ry. (1878) 39 L. T. 12.—C.A. JESSEL, M.R., COTTON and THESIGER, L.J.J., *discussed*.

Evans v. Davies (1893) 62 L. J. Ch. 661; [1893] 2 Ch. 216; 3 R. 360; 68 L. T. 244; 41 W. R. 687.—KEKEWICH, J.

Kynaston v. East India Co. (1819) 3 Swanst. 248; 19 R. R. 202.—L.C.; S. G. *nom.* **East India Co. v. Kynaston** (1821) 3 Bligh 153.—H.L. (E.), *applied*.

Smith v. Peters (1875) 44 L. J. Ch. 613; L. R. 20 Eq. 511; 23 W. R. 783.—JESSEL, M.R.

Smith v. Peters, *referred to*.

Punchard v. Dade (1894) 11 Rep. Pat. Cas. 257.—CHITTY, J.

Ennor v. Barwell (1860) 1 De G. F. & J. 529; 7 Jur. (N.S.) 788; 8 W. R. 300.—L.J.J., *not applied*.

Lumb v. Beaumont (1884) 27 Ch. D. 356; 53 L. J. Ch. 1111; 51 L. T. 197; 32 W. R. 985.

PEARSON, J.—In my opinion *Ennor v. Barwell* has no bearing on the constitution of the rules under the Judicature Act. Rule 3 of Ord. IV. gives a very convenient power of inspection before the trial of an action, in order that the Court may at the trial have before it the materials necessary to enable it to come to a decision.—p. 358.

Robinson, In re, Pickard v. Wheeler (1885) 55 L. J. Ch. 307; 31 Ch. D. 247; 53 L. T. 865.—PEARSON, J., *followed*.

Staines, In re, Staines v. Staines (1886) 55 L. J. Ch. 913; 33 Ch. D. 172; 35 W. R. 75.—NORTH, J.

16. MANDAMUS AND INJUNCTION.

Benson v. Paull (1856) 25 L. J. Q. B. 274; 6 El. & Bl. 273; 2 Jur. (N.S.) 425; 4 W. R. 493.—Q.B., *adhered to, but distinguished*.
Norris v. Irish Land Co. (1857) 27 L. J. Q. B. 115; 8 El. & Bl. 512; 4 Jur. (N.S.) 235.—Q.B.

Benson v. Paull, *referred to*.

Bush v. Beavan (1862) 32 L. J. Ex. 54; 1 H. & C. 500; 8 Jur. (N.S.) 1015; 7 L. T. 106; 10 W. R. 845.—EX.; **Fotherby v. Metropolitan Ry.** (1866) 36 L. J. C. P. 88; L. R. 2 C. P. 188, 195; 12 Jur. (N.S.) 1005; 15 L. T. 243; 15 W. R. 112.—C.P.

Bush v. Beavan (*supra*) *followed*.

Reg. v. Lyons (1869) Ir. R. 3 C. L. 484.—Q.B. **WHITESIDE, C.J.**—We are of opinion that *Bush v. Beavan* is an authority that, where there is a fixed sum which there is a duty upon a public body to pay, *mandamus* will lie to compel that body to pay it. Yet, upon the second branch of the case it is an authority that, where there is an unascertained sum in dispute, the Court will not grant a *mandamus*, and that for the reasons given very clearly by Channell, B. in his judgment.—p. 491.

Bush v. Beavan and Benson v. Paull, *referred to*.

Morgan v. Metropolitan Ry. (1868) 38 L. J. C. P. 87; L. R. 4 C. P. 97; 19 L. T. 655; 17 W. R. 261.—EX. CH.

Norris v. Irish Land Co. (1857) 27 L. J. Q. B. 115; 8 El. & Bl. 512; 4 Jur. (N.S.) 325.—Q.B., *referred to*.

Ward v. Lowndes (1859) 28 L. J. Q. B. 265; 1 El. & Bl. 940; 5 Jur. (N.S.) 1124; 7 W. R. 489.—Q.B.; *affirmed*, (1859) 29 L. J. Q. B. 40; 1 El. & Bl. 956; 6 Jur. (N.S.) 247; 1 L. T. 268; 8 W. R. 81.—EX. CH., *applied*.

Bush v. Beavan (1862) 32 L. J. Ex. 54; 1 H. & C. 500; 8 Jur. (N.S.) 1015; 7 L. T. 106; 10 W. R. 845.—EX.

orris v. Irish Land Co., *referred to*.

Re . v. All Saints', Wigan, Churchwardens (1874) L. R. 9 Q. B. 317, 326; 30 L. T. 569; 22 W. R. 771.—Q.B.; *affirmed*, (1876) 1 App. Cas. 611; 35 L. T. 381; 25 W. R. 128.—H.L. (E.). **LORDS CHELMSFORD, HATHERLEY and O'HAGAN**.

Reg. v. All Saints', Wigan, Churchwardens, *referred to*.

Reg. v. Maidenhead Corporation (1882) 9 Q. B. D. 494; 51 L. J. Q. B. 444; 46 J. P. 724.—C.A. **JESSEL, M.R., BRETT and COTTON, L.JJ.**; *affirming* 8 Q. B. D. 339.—**COLERIDGE, C.J. and POLLOCK, B.**; **MANISTY, J.** *dissenting*.

JESSEL, M.R.—In *Reg. v. Wigan* it is pointed out by Lord Chelmsford that where a peremptory writ of mandamus is granted, the matter is not one of discretion, but of legal right.—p. 499.

Reg. v. All Saints', Wigan, Churchwardens, *discussed*.

Reg. v. Cunningham (1885) 18 L. R. Ir. 375.—C.A. **NAISH, L.C., FITZGIBBON and BARRY, L.JJ.**; **Hill v. Clonmel Union Guardians** (1896) [1897] 1 Ir. R. 286.—**PORTER, M.R.**

Rex v. Chester (Bishop) (1786) 1 Term

Rep. 396; 1 R. R. 237.—K.B., *discussed*.
MacAllister v. Rochester (Bishop) (1880) 5 C. P. D. 194, 206; 42 L. T. 481.—**GROVE and LINDLEY, JJ.**; **Reg. v. Lambourn Valley Ry.** (1888) 22 Q. B. D. 463; 60 L. T. 54; 53 J. P. 248.—**POLLOCK, B. and MANISTY, J.**

Reg. v. St. Martin-in-the-Fields Guardians

(1851) 20 L. J. Q. B. 423; 17 Q. B. 149; 15 Jur. 800.—Q.B., *referred to*.
Barlow, In re (1861) 30 L. J. Q. B. 271; 5 L. T. 289.—**HILL, J.**

Reg. v. St. Martin-in-the-Fields Guardians and Barlow, In re, *discussed*.

Reg. v. Hertford College (1878) 47 L. J. Q. B. 649; 3 Q. B. D. 693, 704; 39 L. T. 18; 27 W. R. 347.—C.A. **COLERIDGE, C.J., BAGGALLAY, BRAMWELL and BRETT, L.JJ.**

Barlow, In re, (*supra*).

Principle applied, **Reg. v. Joint Stock Companies Registrar** (1888) 57 L. J. Q. B. 433; 21 Q. B. D. 131; 59 L. T. 67; 36 W. R. 695; 52 J. P. 710.—**FIELD and WILLS, JJ.**; *referred to*.
Reg. v. Lambourn Valley Ry. (1888) 22 Q. B. D. 463; 60 L. T. 54; 53 J. P. 248.—**POLLOCK, B. and MANISTY, J.**; **Reg. v. Leicester Guardians** (1899) 68 L. J. Q. B. 945; [1899] 2 Q. B. 632, 639; 81 L. T. 559.—**DARLING and PHILLIMORE, JJ.**

Rex v. Bank of England (1780) 2 Dougl. 524.—K.B., *approved and explained*.

Reg. v. Inland Revenue Commissioners, Nathan, In re (1884) 53 L. J. Q. B. 229; 12 Q. B. D. 461; 51 L. T. 46; 32 W. R. 543; 48 J. P. 452.—C.A. **BRETT, M.R. and BOWEN, L.J.**; reversing Q. B. D. (*post*, col. 2379).

Rex v. Bank of England and Reg. v. Inland Revenue Commissioners, Nathan, In re, *discussed and applied*.

Reg. v. Lambourn Valley Ry. (1888) 22 Q. B. D. 463; 60 L. T. 54; 53 J. P. 248.—**POLLOCK, B. and MANISTY, J.**

POLLOCK, B.—In *Rex v. Bank of England*, Lord Mansfield said: "Where there is no specific remedy the Court will grant a mandamus that justice may be done." These words were amplified by Esher, M.R. in the recent case of *Nathan, In re*, where he said that they meant, "Where there is no specific remedy, and by reason of the want of that specific remedy justice cannot be done unless a mandamus is to go, then a mandamus will go." . . . In *Nathan, In re* . . . this Court having granted a mandamus to the Commissioners of Inland Revenue to pay to the applicant certain duty which he alleged he had overpaid, the C. A. reversed the decision upon the ground that the proper remedy was by petition of right.—p. 468.

Reg. v. Inland Revenue Commissioners, Nathan, In re, *applied*.

Leakey v. Dunlingor (1891) 65 L. T. 152.—**A. L. SMITH, J.**; **Reg. v. Leicester Guardians** (1899) 68 L. J. Q. B. 945; [1899] 2 Q. B. 632, 638; 81 L. T. 559.—**DARLING and PHILLIMORE, JJ.**

Reg. v. Powell (1841) 1 Q. B. 352; 4 P. & D. 719; *S. C. nom. Reg. v. Richmond* (Steward of Manor) 10 L. J. Q. B. 148; 5 Jur. 605.—Q.B.

Referred to, **Reg. v. Woods and Forests Commissioners** (1848) 17 L. J. Q. B. 341.—Q.B.; *distinguished*, **Reg. v. Inland Revenue Commissioners**, Nathan, *In re* (1884) 53 L. J. Q. B. 229; 12 Q. B. D. 461; 51 L. T. 46; 32 W. R. 543; 48 J. P. 452.—DAY and A. L. SMITH, JJ. (reversed, C.A.; *see supra*, col. 2378); *referred to*, **Reg. v. Lambourn Valley Ry.** (1888) 22 Q. B. D. 463; 60 L. T. 54; 53 J. P. 248.—POLLOCK, B. and MANISTY, J.

Reg. v. Woods and Forests Commissioners (1848) 17 L. J. Q. B. 341.—Q.B.

Distinguished, **Birch v. St. Marylebone Vestry** (1869) 20 L. T. 697; 17 W. R. 1014.—COCKBURN, C.J. and BLACKBURN, J.; *discussed*, **Guest v. Poole and Bournemouth Ry.** (1870) 39 L. J. C. P. 329; L. R. 5 C. P. 553; 22 L. T. 589; 18 W. R. 836.—C.P.

Reg. v. Woods and Forests Commissioners (1850) 19 L. J. Q. B. 497; 15 Q. B. 761.—Q.B., *applied*.

Reg. v. Inland Revenue Commissioners, Nathan, *In re* (1884) 53 L. J. Q. B. 229; 12 Q. B. D. 461; 51 L. T. 46; 32 W. R. 543; 48 J. P. 452.—DAY and A. L. SMITH, JJ. (reversed, C.A.; *see supra*, col. 2378); **Reg. v. Income Tax Commissioners** (1888) 57 L. J. Q. B. 513; 21 Q. B. D. 313, 322; 59 L. T. 455; 36 W. R. 776; 53 J. P. 84.—C.A. *And see* "CROWN OFFICE," vol. i., col. 800.

Reg. v. Londonderry & Coleraine Ry. (1849) 13 Q. B. 998; *S. C. nom. Tooke. Ex parte*; 18 L. J. Q. B. 343; 13 Jur. 939; 6 Railw. Cas. 1.—Q.B.; and **Reg. v. General Cemetery Co.** (1856) 25 L. J. Q. B. 342; 6 Bl. & Bl. 415; 2 Jur. (N.S.) 972.—Q.B., *discussed*.

Reg. v. Lambourn Valley Ry. (1888) 22 Q. B. D. 463; 60 L. T. 54; 53 J. P. 248.—POLLOCK, B. and MANISTY, J. *And see* **West v. West** (1882) 9 L. R. Ir. 121.—V.-C.; and "COMPANY," vol. i., col. 548.

Webb v. Herne Bay Commissioners (1870) 39 L. J. Q. B. 221; L. R. 5 Q. B. 642; 22 L. T. 745; 19 W. R. 241.—Q.B., *applied*.

Hercules Insurance Co., *In re*, **Brunton's Claim** (1874) 44 L. J. Ch. 450; L. R. 19 Eq. 302, 313; 81 L. T. 747; 23 W. R. 286.—MALINS, V.-C.; **Romford Canal Co.**, *In re*, **Pocock's Claim**, **Trickett's Claim**, **Carew's Claim** (1883) 52 L. J. Ch. 729; 24 Ch. D. 85, 89; 49 L. T. 118.—KAY, J.

Reg. v. Treasury Lords (1851) 20 L. J. Q. B. 305; 16 Q. B. 357; 15 Jur. 767.—Q.B.

Discussed, **Reg. v. Treasury Commissioners** (1872) 41 L. J. Q. B. 178; L. R. 7 Q. B. 387, 399; 26 L. T. 64; 20 W. R. 336; 12 Cox C. C. 277.—Q.B.; *applied*, **Reg. v. Joint Stock Companies Registrar** (1888) 57 L. J. Q. B. 433; 21 Q. B. D. 131, 134; 59 L. T. 67; 36 W. R. 695; 52 J. P. 710.—FIELD and WILLS, JJ.; **Reg. v. Income Tax Commissioners** (1888) 57 L. J. Q. B. 513; 21 Q. B. D. 313, 322; 59 L. T. 455; 36 W. R. 776.—C.A. **ESHER, M.R.** and **LINDLEY, L.J.**; *referred to*, **Reg. v. Lambourn Valley** (1888) 58 L. J. Q. B. 136; 22 Q. B. D. 463, 467; 60 L. T. 54; 53 J. P. 248.—POLLOCK, B. and MANISTY, J.

Reg. v. Treasury Lords (1872) 41 L. J. Q. B. 178; L. R. 7 Q. B. 387; 26 L. T. 64; 20 W. R. 336; 12 Cox C. C. 277.—Q.B., *referred to*.

Reg. v. Inland Revenue Commissioners, Nathan, *In re* (1884) 53 L. J. Q. B. 229; 12 Q. B. D. 461; 51 L. T. 46; 32 W. R. 543; 48 J. P. 452.—DAY and A. L. SMITH, JJ. (reversed, C.A.; *see supra*, col. 2378).

Reg. v. Treasury Lords, *discussed and applied*.

Dixon v. Farrer (1886) 55 L. J. Q. B. 497; 17 Q. B. D. 658, 663; 55 L. T. 658.—FIELD and WILLS, JJ.; *affirmed*, 56 L. J. Q. B. 53; 18 Q. B. D. 43; 55 L. T. 578; 35 W. R. 95; 6 Asp. M. C. 52.—C.A. **ESHER, M.R.**, **LINDLEY** and **LOPES, L.JJ.** *And see* "CROWN OFFICE," vol. i., col. 800.

Reg. v. Fall (1841) 10 L. J. Q. B. 145; 1 Q. B. 636; 2 G. & D. 803.—Q.B.; *affirmed*, 13 L. J. Q. B. 187.—EX. CH., *referred to*.

Fotherby v. Metropolitan Ry. (1866) 36 L. J. C. P. 88; L. R. 2 C. P. 88; L. R. 2 C. P. 188; 12 Jur. (N.S.) 1005; 15 L. T. 243; 15 W. R. 112.—C.P.

Fotherby v. Metropolitan Ry., *applied*.

Morgan v. Metropolitan Ry. (1868) 37 L. J. C. P. 265; L. R. 3 C. P. 553, 561.—C.P.; and L. R. 4 C. P. 97, 104.—EX. CH. (*post*).

Reg. v. Liverpool, Manchester and Newcastle-upon-Tyne Ry. (1852) 21 L. J. Q. B. 284; 16 Jur. 949.—Q.B., *referred to*. **Reg. v. Wilts and Berks Canal Navigation** (1874) 29 L. T. 922, 924.—Q.B.

Rex v. Newcastle-upon-Tyne Hostmen

(1800) 1 East 114; 2 Str. 1223.—K.B.; and **Rex v. Lucas** (1808) 10 East 235; 10 R. R. 283.—K.B., *referred to*.

Mutter v. Eastern and Midland Ry. (1888) 57 L. J. Ch. 615; 38 Ch. D. 92, 105; 59 L. T. 117; 36 W. R. 401.—C.A. **COTTON, LINDLEY** and **BOWEN, L.JJ.**

Rex v. Merchant Tailors' Co. (1829) 9 L. J. (o.s.) K. B. 146; 2 B. & Ad. 115.—K.B., *referred to*.

Mutter v. Eastern and Midland Ry. (1888) 38 Ch. D. 92, 106.—C.A. (*supra*).

Morgan v. Metropolitan Ry. (1868) 38 L. J. C. P. 87; L. R. 4 C. P. 97; 19 L. T. 655; 17 W. R. 261.—EX. CH.

Referred to, **Reg. v. Vaughan** (1868) 38 L. J. M. C. 49; L. R. 4 Q. B. 190; 17 W. R. 115.—Q.B.; *applied*, **Tyson v. London Corporation** (1871) 41 L. J. C. P. 6; L. R. 7 C. P. 18, 22; 25 L. T. 640.—C.P.; *referred to*, **Tyson v. London Corporation** (1871) 20 W. R. 112.—Q.B.

Isenberg v. East India House Estate Co. (1868) 33 L. J. Ch. 392; 3 De G. J. & S. 263; 10 Jur. (N.S.) 221; 12 W. R. 450.—WESTBURY, L.C.

Referred to, **Senior v. Pawson** (1866) L. R. 3 Eq. 330, 334; 15 W. R. 220.—WOOD, V.-C.; **Stretton v. G. W. and Brentford Ry.** (1870) 40 L. J. Ch. 50; L. R. 5 Ch. 751, 761; 23 L. T. 379; 18 W. R. 1078.—HATHERLEY, L.C. and **JAMES L.J.**; *applied*, **Stanley of Alderley (Lady) v. Shrewsbury (Earl)** (1875) 44 L. J. Ch. 389; L. R. 19 Eq. 616, 619; 32 L. T. 248; 23 W. R. 678.—HALL, V.-C.

Curriers' Co. v. Corbett, 2 Dr. & Sm. 355: 12 L. T. 169; 13 W. R. 538.—**KINDERSLEY**, V.-C.; *reversed*, (1865) 4 De G. J. & S. 764; 11 Jur. (N.S.) 719; 13 L. T. 154; 13 W. R. 1056.—**L.J.J.**

Curriers' Co. v. Corbett, *applied*.

Robson (or Robinson) v. Whittingham (1866) 35 L. J. Ch. 227; L. R. 1 Ch. 442, 444; 12 Jur. (N.S.) 40; 13 L. T. 730; 14 W. R. 291.—**L.J.J.**

Curriers' Co. v. Corbett, 2 Dr. & Sm. 355.

Referred to, **Senior v. Pawson** (1866) L. R. 3 Eq. 330, 335; 15 W. R. 220.—**WOOD**, V.-C.; *statement of law approved*, **Heath v. Bucknall** (1869) 38 L. J. Ch. 372; L. R. 8 Eq. 1, 5; 20 L. T. 549; 17 W. R. 755.—**ROMILLY**, M.R.; *discussed*, **Aynsley v. Glover** (1874) 43 L. J. Ch. 777; L. R. 18 Eq. 544, 553; 31 L. T. 219; 23 W. R. 147.—**JESSEL**, M.R. (affirmed, (1875) 44 L. J. Ch. 523; L. R. 10 Ch. 283; 32 L. T. 345; 23 W. R. 459.—**L.J.J.**).

Curriers' Co. v. Corbett.

Discussed, **Stanley of Alderley (Lady) v. Shrewsbury (Earl)** (1875) 44 L. J. Ch. 339; L. R. 19 Eq. 616, 620; 32 L. T. 248; 23 W. R. 678.—**HALL**, V.-C.; *referred to*, **Smith v. Smith** (1875) 44 L. J. Ch. 630; L. R. 20 Eq. 500, 502; 32 L. T. 787; 23 W. R. 771.—**JESSEL**, M.R.; *applied*, **Ellis v. Manchester Carriage Co.** (1876) 2 C. P. D. 13, 16; 35 L. T. 476; 25 W. R. 229.—**GROVE** and **DENMAN**, JJ.; *referred to*, **Warner v. McBryde** (1877) 36 L. T. 360, 362.—**MALINS**, V.-C.; **Kino v. Rudkin** (1877) 6 Ch. D. 160, 164; 46 L. J. Ch. 807; 38 L. T. 461.—**FRY**, J.; *applied*, **National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co.** (1876) 46 L. J. Ch. 871; 6 Ch. D. 757, 761; 37 L. T. 91; 26 W. R. 26.—**JESSEL**, M.R.; *referred to*, **Wheeldon v. Burrows** (1878-9) 48 L. J. Ch. 853; 12 Ch. D. 31, 43; 41 L. T. 327; 28 W. R. 196.—**BACON**, V.-C. (affirmed, C.A.); **Birmingham Dudley and District Banking Co. v. Ross** (1888) 57 L. J. Ch. 601; 38 Ch. D. 295, 312; 59 L. T. 609; 36 W. R. 914.—**C.A.**

Dawson v. Paver (1844) 16 L. J. Ch. 274; 5 Hare 415; 11 Jur. 766.—**WIGRAM**, V.-C., *discussed*.

Lingwood v. Stowmarket Papermaking Co. (1865) L. R. 1 Eq. 77, 78; 11 Jur. (N.S.) 993; 13 L. T. 540; 14 W. R. 78.—**WOOD**, V.-C.

Blake, In re, Coker, Ex parte (1875) 44 L. J. Bk. 126; L. R. 10 Ch. 652; 24 W. R. 145.—**JAMES** and **MELLISH**, L.J.J.

Not applied, **Phosphate Sewage Co. v. Hartmont** (1877) 25 W. R. 743, 744.—**MALINS**, V.-C.; *referred to*, **Hale v. Boustead** (1881) 51 L. J. Q. B. 255; 8 Q. B. D. 453, 456; 46 L. T. 533; 30 W. R. 677; 46 J. P. 342.—**CAVE**, J.

L. & S. W. Ry. v. Webb (1864) 15 C. B. (N.S.) 450; 9 L. T. 291; 12 W. R. 51.—**C.P.**, *referred to*.

Midland Ry. v. G. W. Ry. (1873) 42 L. J. Ch. 438; L. R. 8 Ch. 841; 28 L. T. 718; 21 W. R. 657.—**JAMES** and **MELLISH**, L.J.J.

Sutton v. S. E. Ry. (1865) 35 L. J. Ex. 38; L. R. 1 Ex. 33; 4 H. & C. 325; 11 Jur. (N.S.) 935; 13 L. T. 438; 14 W. R. 133.—**EX.**, *referred to*.

London Association of Shipowners and Brokers v. London and India Docks Joint Committee (1892) 62 L. J. Ch. 294; [1892] 3 Ch. 242; 2 R. 23; 67 L. T. 238; 7 Asp. M. C. 195.—**C.A.**

Bunbury v. Bunbury (1839) 8 L. J. Ch. 297; 1 Beav. 318; 3 Jur. 644.—**M.R.**; *affirmed*, **L.C.**

Referred to, **Hope v. Carnegie** (1866) L. R. 1 Ch. 320, 324; 12 Jur. (N.S.) 284; 14 L. T. 117; 14 W. R. 489.—**L.J.J.**; **Oakeley v. Ramsay** (1872) 27 L. T. 745, 747.—**MALINS**, V.-C.

Hope v. Carnegie (1866) L. R. 1 Ch. 320; 12 Jur. (N.S.) 284; 14 L. T. 117; 14 W. R. 489.—**L.J.J.**

Discussed, **Liverpool Marine Credit Co. v. Hunter** (1867) L. R. 4 Eq. 62, 70; 36 L. J. Ch. 567.—**WOOD**, V.-C. (affirmed, (1868) L. R. 3 Ch. 479; 37 L. J. Ch. 386; 18 L. T. 749; 16 W. R. 1090.—**CHELMSFORD**, L.C.); **Baillie v. Baillie** (1867) 37 L. J. Ch. 225; L. R. 5 Eq. 175, 181; 17 L. T. 376; 16 W. R. 272.—**MALINS**, V.-C.; **Oakeley v. Ramsay** (1872) 27 L. T. 745, 747.—**MALINS**, V.-C.; **Ewing v. Orr Ewing** (1884) 10 App. Cas. 469, n. (in part; varied, (1885) 10 App. Cas. 453; 53 L. T. 826.—**H.L.** (sc.)).

Mollett v. Enequist (1858) 27 L. J. Ch. 815; 25 Beav. 609.—**M.R.**, *explained*.

Tredegar (Lord) v. Windus (1875) 44 L. J. Ch. 268; L. R. 19 Eq. 607; 32 L. T. 596; 23 W. R. 511.—**HALL**, V.-C.

• **Cutts v. Riddell** (1847) 1 De G. & Sm. 226.—**KNIGHT BRUCE**, V.-C.

Referred to, **Woodhams v. Anglo-Australian and Universal Family Life Assurance Co.** (1864) 2 De G. J. & S. 162.—**L.J.J.**; *approved and applied*, **Escott v. Gray** (1878) 47 L. J. C. P. 606, 607; 39 L. T. 121.—**GROVE** and **LINDLEY**, JJ.

Hervey v. Smith (1855) 1 K. & J. 389.—**WOOD**, V.-C. (*see also* 22 Beav. 289.—**M.R.**).

Referred to, **L. & N. W. Ry. v. Lancashire and Yorkshire Ry.** (1867) L. R. 4 Eq. 174; 36 L. J. Ch. 479; 17 L. T. 43; 15 W. R. 810.—**WOOD**, V.-C.; *discussed and not applied*, **Allen v. Seckham** (1879) 48 L. J. Ch. 611; 11 Ch. D. 790, 794; 41 L. T. 260; 28 W. R. 26.—**C.A.**

Chapman v. Midland Ry. (1880) 49 L. J. Q. B. 245, 449; 5 Q. B. D. 167, 431; 42 L. T. 612; 22 W. R. 413, 592.—**Q.B.D.** and **C.A.**, *discussed*.

Norfolk (Duke) v. Arbutnot (1880) 50 L. J. Q. B. 384; 6 Q. B. D. 279, 283; 29 W. R. 337.—**DENMAN** and **LINDLEY**, JJ.; **Horner v. Oyler** (1880) 49 L. J. C. P. 655.—**C.P.**; **Rust v. Victoria Graving Dock Co.** (1889) 60 L. T. 645.—**C.A.** *And see* "COSTS," vol. i., col. 735.

London and County Banking Co. v. Lewis (1882) 21 Ch. D. 490; 47 L. T. 501; 31 W. R. 233.—**C.A.**, *referred to*.

Manchester Ship Canal Co. v. Manchester Racecourse Co. (1901) 70 L. J. Ch. 468; [1901] 2 Ch. 37, 50; 84 L. T. 436; 49 W. R. 418.—**C.A.**

17. TRIAL.

Locke v. White, 34 W. R. 648.—**NORTH**, J.; *reversed*, (1886) 55 L. J. Ch. 731; 33 Ch. D. 308; 54 L. T. 891; 34 W. R. 747.—**C.A.**

Phillips v. Beale (1884) 54 L. J. Ch. 80; 26 Ch. D. 621; 50 L. T. 433; 32 W. R. 665.—**C.A.**

Discussed and applied, **Powell v. Cobb** (1885) 54 L. J. Ch. 962; 29 Ch. D. 486; 53 L. T. 188.—

PEARSON, J. (affirmed, C.A. COTTON and FRY, L.J.J.): *discussed*, Fairburn v. Household (1885) 53 L. T. 513.—C.A. COTTON and LINDLEY, L.J.J.

Drury (or Durie) v. Hopwood (1860) 29 L. J. C. P. 151; 7 C. B. (N.S.) 835; 6 Jur. (N.S.) 705.—C.P.; and Helliwell v. Hobson (1858) 3 C. B. (N.S.) 761.—C.P., *discussed*.
Levy v. Rice (1870) L. R. 5 C. P. 119; 21 L. T. 717; 18 W. R. 458.—C.P.; Church v. Barnett (1871) 40 L. J. C. P. 138; L. R. 6 C. P. 116; 23 L. T. 705; 19 W. R. 411.—C.P.

De Rothschild v. Shilston (1853) 8 Ex. 503; 22 L. J. Ex. 279; 1 W. R. 439; S. C. *nom.*

De Rothschild v. Kell, 17 Jur. 561.—EX., *explained*.

Jackson v. Kidd (1860) 29 L. J. C. P. 221; 8 C. B. (N.S.) 354; 6 Jur. (N.S.) 1117.—C.P. *See per WILLES, J.*

Gough v. Bertram (1857) 27 L. J. Ex. 53.—EX.; and De Rothschild v. Shilston, *referred to*.

Rogers v. Napier (1860) 6 Jur. (N.S.) 1161.—EX. *See per MARTIN, B.*

De Rothschild v. Shilston, *explained*.

Church v. Barnett (1871) 40 L. J. C. P. 138; L. R. 6 C. P. 116; 23 L. T. 705; 19 W. R. 411.—C.P.

WILLES, J.—With respect to the so-called resolution of the judges in *De Rothschild v. Shilston*, certainly it is not a rule in so far as it suggests that it is sufficient for the defendant, on an application to change the venue, to state in his affidavit as a ground for the change that the cause of action arose in some other county than that in which the venue had been laid. After that case of *De Rothschild v. Shilston*, defendants, in practically undefended actions, attempted, but unsuccessfully, for the mere purpose of delay, to obtain an order to change the venue from London, where it had been laid, to some place in the country on an affidavit that the cause of action arose there. That part of the so-called resolution was never adopted, and was not properly a resolution of the judges at all. If it had been adopted it would have been made a rule of Court. There is, however, no such rule.—p. 140.

Church v. Barnett, *applied*.

Cossham v. Leach (1875) 32 L. T. 665.—C.P.

Barry v. Peruvian Corporation (1896) 65 L. J. Q. B. 191; [1896] 1 Q. B. 208; 73 L. T. 678; 44 W. R. 487.—C.A., *followed*.

Sea Insurance Co. v. Carr (1900) 69 L. J. Q. B. 954; [1901] 1 Q. B. 7; 83 L. T. 517; 49 W. R. 55; 2 Asp. M. C. 138; 6 Com. Cas. 11.—C.A. HALSBURY, L.C., A. L. SMITH, M.R. and COLLINS, L.J.

Mirehouse v. Barnett (1878) 47 L. J. Ch. 689; 26 W. R. 690.—JESSEL, M.R., *followed*.

Moss v. Bradburn (1884) 32 W. R. 368.—PEARSON, J.

Cardinal v. Cardinal (1884) 53 L. J. Ch. 636; 25 Ch. D. 772; 32 W. R. 411.—PEARSON, J., *referred to*.

Green v. Bennett (1884) 54 L. J. Ch. 85; 50 L. T. 706; 32 W. R. 848.—CHITTY, J.

O.C.

Cardinal v. Cardinal, *commented on*.

Gardner v. Jay (1885) 29 Ch. D. 50; 54 L. J. Ch. 762; 52 L. T. 395; 33 W. R. 470.—C.A.

BAGGALLAY, L.J.—Reference has been made to . . . *Cardinal v. Cardinal*, the first part of the marginal note of which is in these terms: "An action, which falls within one of the classes of actions which . . . are specially assigned to the Ch. Div. will not be sent for trial by a jury unless it involves a simple issue of fact, the determination of which will decide the action." When I first read that marginal note it occurred to me that that was in effect saying that if the action did involve a simple issue of fact the determination of which would decide the action, it should be sent for trial by a jury. I think, however, that, if fairly interpreted, it only means that unless it involves a simple issue of fact it will not be sent to a jury, but not necessarily that in every case if there is a simple question of fact it will be sent to a jury. When, however, I look at the judgment of the learned judge I think it supports the other interpretation, for I find the learned judge saying, "I do not think it was the intention of the legislature, or of the judges who framed the new rules, that such a case as the present should be tried by a jury. I think the intention was, that if it appeared that there was a simple question of fact, the verdict upon which would decide the issue in the action, it should be sent for trial by a jury." Now, with regard to the case with which the learned judge was dealing, possibly this statement of opinion may be quite right, but I am not prepared to concur in the view that in every case in which there is some simple question of fact which will decide the whole of the matters in issue, it is to be sent to a jury. I can very well imagine a simple issue of fact, arising in an action properly assigned to the Ch. Div., upon which the judge is as capable of deciding as a jury, and as to which it would be an unnecessary expense to have a trial by jury. I think in each case the judge to whom the application is made must be guided by the circumstances.—p. 56.

BOWEN, L.J. to the same effect.

FRY, L.J. concurred.

Clarke v. Cookson (1876) 45 L. J. Ch. 752; 2 Ch. D. 746; 34 L. T. 646; 24 W. R. 535.

—HALL, V.-C., *approved and followed*.

Warner v. Murdoch, Murdoch v. Warner (1877) 46 L. J. Ch. 121; 4 Ch. D. 750; 35 L. T. 748; 25 W. R. 207.—M.R. and C.A.

[This latter case came originally before Jessel, M.R., who said that he thought it right to follow the decision in *Clarke v. Cookson*, that trials with a jury could not be heard before a judge of the Ch. Div. The C.A. (James, L.J., Baggallay and Bramwell, J.J.A.) affirmed Jessel, M.R., but *Clarke v. Cookson* is not mentioned in their judgments.]

Clarke v. Cookson.

Followed, Bordier v. Burrell (1877) 46 L. J. Ch. 615; 5 Ch. D. 512; 25 W. R. 801.—JESSEL, M.R.; *explained*, Ruston v. Tobin (1879) 10 Ch. D. 558, 563; 40 L. T. 111; 27 W. R. 588.—MALINS, V.-C. (affirmed, C.A.); *approved*, Singer Manufacturing Co. v. Long (1879) 11 Ch. D. 656 (*see post*, col. 2385); *referred to*, Wedderburn v. Pickering (1879) 13 Ch. D. 769; 41 L. T. 523; 28 W. R. 239.—JESSEL, M.R.

Spratt's Patent v. Ward & Co. (1879) 48

L. J. Ch. 645; 11 Ch. D. 240; 40 L. T. 250; 27 W. R. 470.—BACON, V.-C., *adhered to*.

Garling v. Royds (1876) 25 W. R. 123.—V.-C., *approved*.

Singer Manufacturing Co. v. Loog (1879) 48 L. J. Ch. 647; 11 Ch. D. 656; 40 L. T. 647; 27 W. R. 903.

BACON, V.-C.—But the judgment of Hall, V.-C. in *Garling v. Royds* expresses, in my opinion, distinctly the principle upon which the Court must act when it finds that in the case submitted for its decision there are questions of law—minute, serious, important questions of law—mixed up with questions of fact, and that it could not help the Court in the discharge of its plain duty to have findings of fact in the particular circumstances insisted upon by the defendant, but only evade or at least baffle the plaintiff in his attempt to obtain what he says is his right.—p. 649.

[In the judgment in the L. R. the case of *Clarke v. Cookson* (*supra*, col. 2384) is the case referred to.]

West v. White (1877) 46 L. J. Ch. 333; 4 Ch. D. 631; 36 L. T. 95; 25 W. R. 342.—BACON, V.-C., *referred to*.

Back v. Hay (1877) 5 Ch. D. 235; 36 L. T. 295; 25 W. R. 392.

MALINS, V.-C.—That many cases are proper for a jury, I agree, and *West v. White* was such a case, being a mere question whether some cement works were a nuisance.—p. 240.

West v. White, followed.

Bordier v. Burrell (1877) 46 L. J. Ch. 615; 5 Ch. D. 512; 25 W. R. 801.—JESSEL, M.R.

West v. White, considered.

Wood and Ivory, Ltd. v. Hamblet (1877) 47 L. J. Ch. 113; 6 Ch. D. 113.—JESSEL, M.R.; **Brooke v. Wigg** (1878) 47 L. J. Ch. 749; 8 Ch. D. 510, 514; 38 L. T. 732; 26 W. R. 729.—MALINS, V.-C.; *affirmed*, C.A.

West v. White, referred to.

Brooke v. Wigg, principles applied.

Ruston v. Tobin (1879) 10 Ch. D. 558; 40 L. T. 111; 27 W. R. 588.—MALINS, V.-C.; *affirmed*, C.A.

West v. White, discussed and distinguished.

Singer Manufacturing Co. v. Loog (1879) 48 L. J. Ch. 647; 11 Ch. D. 656; 40 L. T. 647; 27 W. R. 903.—BACON, V.-C.

Swindell v. Birmingham Syndicate, Birmingham Syndicate v. Swindell (1876) 45

L. J. Ch. 756; 8 Ch. D. 127; 35 L. T. 111; 24 W. R. 911.—HALL, V.-C., and C.A.

Referred to, **West v. White** (1877) 46 L. J. Ch. 333; 4 Ch. D. 631; 36 L. T. 95; 25 W. R. 342.—BACON, V.-C.; *observations approved*, **Back v. Hay** (1877) 5 Ch. D. 235; 36 L. T. 295; 25 W. R. 392.—MALINS, V.-C.

Swindell v. Birmingham Syndicate, referred to.

Ruston v. Tobin (1879) 10 Ch. D. 558; 40 L. T. 111; 27 W. R. 588.—C.A. JESSEL, M.R., JAMES and BRAMWELL, L.JJ.; *affirming* MALINS, V.-C. JESSEL, M.R.—I am of opinion that, as was said in *Swindell v. Birmingham Syndicate*, the C. A. ought not as a general rule to interfere with

the discretion of a judge as to the way in which a case before him shall be tried. There may be a case so strong as to induce it to interfere, but it must be a very strong case.—p. 565.

Swindell v. Birmingham Syndicate.

Discussed, **Ormerod v. Todmorden Mill Co.** (1882) 51 L. J. Q. B. 348; 8 Q. B. D. 664; 46 L. T. 669; 30 W. R. 805.—C.A. BRETT and HOLKER, L.JJ.; **COLERIDGE, C.J. doubting: principle not applied**, **Jones v. Andrews** (1888) 58 L. T. 601.—C.A. COTTON and FRY, L.JJ.

Warner v. Murdoch, Murdoch v. Warner

(1877) 46 L. J. Ch. 121; 4 Ch. D. 750; 35 L. T. 748; 25 W. R. 207.—C.A. *See supra*, col. 2384.

Discussed and not applied, **Pilley v. Baylis** (1877) 46 L. J. Ch. 847; 5 Ch. D. 241; 36 L. T. 296.—MALINS, V.-C.; *referred to*, **Krehl v. Burrell** (1878) 48 L. J. Ch. 252; 10 Ch. D. 420; 39 L. T. 461; 27 W. R. 234.—C.A. JAMES, BAGGALLAY and THESIGER, L.JJ.

Bordier v. Burrell (1877) 46 L. J. Ch. 615;

5 Ch. D. 512; 25 W. R. 801.—JESSEL, M.R., *explained and approved*.

Ruston v. Tobin (1879) 10 Ch. D. 558; 40 L. T. 111; 27 W. R. 588.—V.-C.; *affirmed*, C.A.

• MALINS, V.-C.—It was a case of alleged nuisance by the darkening of an ancient window, and that being the one matter of fact to be decided in the case, he [the M. R.] said it was a case for him to exercise the discretion given by the 26th rule [of Ord. XXXVI.] in allowing the case to be tried by a jury.—p. 563.

Bordier v. Burrell, applied.

Usil v. Whelpton (1881) 50 L. J. Ch. 511; 45 L. T. 39; 29 W. R. 799.—FRY, J.

Back v. Hay (1877) 5 Ch. D. 235; 36 L. T.

295; 25 W. R. 392.—MALINS, V.-C., *referred to*.

Pilley v. Baylis (1877) 46 L. J. Ch. 847; 5 Ch. D. 241, 247; 36 L. T. 296.—MALINS, V.-C.

Back v. Hay, Pilley v. Baylis and Sykes v. Firth (1877) 46 L. J. Ch. 627.—MALINS,

V.-C., *explained*.

Brooke v. Wigg (1878) 8 Ch. D. 510; 47 L. J. Ch. 749; 38 L. T. 732; 26 W. R. 729.—V.-C.; *affirmed*, C.A. JESSEL, M.R., JAMES and BRAMWELL, L.JJ.

MALINS, V.-C.—In *Back v. Hay* the defendants were charged with fraudulent misrepresentation in the formation of a company, and I thought that was a case to be decided in this Court. *Pilley v. Baylis* was a case for specific performance, and so was *Sykes v. Firth*. In those cases I thought it desirable that they should be tried here, because from the nature of the cases they had always been within the jurisdiction of this Court, and I thought it was the proper tribunal.—p. 514.

Back v. Hay, applied.

Mirehouse v. Barnett (1878) 47 L. J. Ch. 689; 26 W. R. 690.—JESSEL, M.R.

Back v. Hay, Pilley v. Baylis and Sykes v. Firth, adhered to.

Ruston v. Tobin (1879) 10 Ch. D. 558; 40 L. T. 111; 27 W. R. 588.—MALINS, V.-C.; *affirmed*, C.A.

Ruston v. Tobin.—C.A., *commented on.*

Martin, *In re, Hunt v. Chambers* (1882) 20 Ch. D. 365; 51 L. J. Ch. 683; 46 L. T. 399; 30 W. R. 527.—C.A.; reversing BACON, V.-C.

JESSEL, M.R.—Then the next point to be considered is, in what cases does the Court interfere with the discretion of a judge who has directed a case to be tried either with or without a jury? He having that discretion, I take it there must be a plain and clear case to justify the C. A. in interfering, for, as a general rule, the Court does not interfere with the exercise of the discretion of the judge. There must be some special reason to induce it to do so. And here I wish to make an observation about the judgment of the late James, L.J., in *Ruston v. Tobin*. I am satisfied that, whether his words there are correctly reported or not, he did not intend to decide (I was sitting with him at the time, and I know there was no difference of opinion between us) that in no case should the Court interfere, and I am sure he did not intend to overrule or interfere with his own decision in *Golding v. Wharton Saltworks Co.* ((1876) 1 Q. B. D. 374.—C.A., *see post*, col. 2496), in which he said the Court would interfere if there was serious injustice. In addition to that, there is another remark by James, L.J., in that case of *Ruston v. Tobin*, with regard to another case in which the Court will interfere, and that is, where the discretion has been exercised in a particular way, in consequence of an opinion on a point of law which the C. A. thinks to be a wrong opinion.—p. 369. COTTON and LINDLEY, L.JJ. concurred.

Ruston v. Tobin, discussed.

Ormerod v. Todmorden Mill Co. (1882) 51 L. J. Q. B. 348; 8 Q. B. D. 664; 46 L. T. 669; 30 W. R. 805.—C.A. BRETT and HOLKER, L.JJ.; COLERIDGE, C.J. *doubting*.

Ruston v. Tobin, referred to.

Martin, *In re, Hunt v. Chambers* (*supra*), *principle approved*.

Burgoine v. Moordaff, Moordaff, *In re* (1883) 52 L. J. P. 77; 8 P. D. 205; 48 L. T. 504; 31 W. R. 735.—C.A. BAGGALLAY and LINDLEY, L.JJ.

Martin, In re, Hunt v. Chambers, distinguished.

The Temple Bar (1885) 11 P. D. 6; 55 L. J. P. 1; 53 L. T. 904; 84 W. R. 68; 5 Asp. M. C. 509.—C.A. ESHER, M.R., COTTON and LINDLEY, L.JJ.; affirming BUTT, J.

COTTON, L.J.—*Hunt v. Chambers* . . . was decided on the rules of 1875, rules different from those now in force and under which the rights of the parties were different, so that it can have no bearing on the present case.—p. 9.

The Temple Bar, explained.

Martin, *In re, Hunt v. Chambers, referred to.*

Coote v. Ingram (1887) 56 L. J. Ch. 634; 35 Ch. D. 117; 56 L. T. 300; 35 W. R. 390.—CHITTY, J. *See judgment at length.*

The Temple Bar, explained.

Martin, *In re, Hunt v. Chambers, referred to.*

Fennessy v. Rabbits & Sons (1887) 56 L. T. 138.—KAY, J.

The Temple Bar, approved and followed.

Martin, *In re, Hunt v. Chambers, referred to.*

Timson v. Wilson; Fanshawe v. London Provincial Dairy Co. (1888) 38 Ch. D. 72; 59 L. T. 76; 36 W. R. 418.—C.A.; affirming KAY, J.

COTTON, L.J.—In the case of *The Temple Bar* we held, and as I think rightly, for reasons which I need not repeat, that r. 6 [Ord. XXXVI.] deals only with causes and matters not mentioned in the preceding rules.—p. 75.

LINDLEY, L.J.—As I said in *The Temple Bar*, the rules 2—7 of Ord. XXXVI. form a group of regulations hanging together and requiring to be read together. They form a new set of regulations as to trial by jury, and we should only be misled if we were to go back to decisions on the Orders of 1875. . . . It. 6 gives no right to trial by jury in any case which before could be tried without a jury, without any consent of parties: *The Temple Bar*. The actions now before us are actions for nuisance in the Ch. Div. These before the Judicature Acts would be tried by a judge without a jury, unless he saw fit to direct them to be tried with a jury. They come within r. 7 (a).—pp. 76—77.

BOWEN, L.J.—I think we are bound by the decision in *The Temple Bar*, to hold that the applicants cannot claim a trial by jury as a matter of right.—p. 77.

The Temple Bar; Timson v. Wilson; Fanshawe v. London and Provincial Dairy Co., and Coote v. Ingram (*supra*, col. 2387), *discussed*.

Att.-Gen. v. Vyner (1889) 38 W. R. 194.—C.A. COTTON, BOWEN and FRY, L.JJ., *distinguished*.

Jenkins v. Bushby (1891) 60 L. J. Ch. 254; [1891] 1 Ch. 484; 64 L. T. 213; 39 W. R. 321.—C.A. LINDLEY, LOPES and KAY, L.JJ.; reversing STIRLING, J.

Jenkins v. Bushby, explained.

Mangan v. Metropolitan Electric Supply Co. [1891] 2 Ch. 551; 65 L. T. 202.—C.A. LINDLEY, BOWEN and FRY, L.JJ.

LINDLEY, L.J.—We were pressed with *Jenkins v. Bushby*. The Solicitor-General there urged that the plaintiffs had a right to a trial by jury; that was decided against him. He then urged that there would be a miscarriage of justice unless there was a trial by a jury who could have a view. We thought that a view was essential to justice, and on that ground we interfered. Here I can see no reason to apprehend a failure of justice if the case is tried in the way which North, J. thinks the best.—p. 533.

Jenkins v. Bushby, referred to.

Baring Brothers & Co. v. North-Western of Uruguay Ry. [1893] 2 Q. B. 406; 9 R. 614; 69 L. T. 740.—C.A.

LINDLEY, L.J.—When we look at the rules and refer back to the exposition of them given in a case about which we took considerable trouble, *Jenkins v. Bushby*, we find that it is now settled that the expression “in any other cause or matter” in r. 6 [Ord. XXXVI.] refers to all causes and matters not previously referred to. Amongst those causes or matters previously referred to are causes or matters which previously to the passing of the principal Act—that is, the Judicature Act, which came into operation in 1875—“could without any consent of parties

have been tried without a jury." If once you find that this is such a cause or matter, then the rule *prima facie* applicable to it is r. 7, which says that cases of that description are to be tried by a judge without a jury, unless otherwise ordered.—p. 410.

LOPES, L.J. to the same effect.

Ormerod v. Todmorden Mill Co. (1882) 51 L. J. Q. B. 348; 8 Q. B. D. 664; 46 L. T. 669; 30 W. R. 805.—C.A.; COLERIDGE, C.J. *doubting, referred to*.
Huxley v. West London Extension Ry. (1886) 55 L. J. Q. B. 506; 17 Q. B. D. 373.—COLERIDGE, C.J.; affirmed, C.A. ESHER, M.R., BOWEN and FRY, L.JJ.; and (1889) 58 L. J. Q. B. 305; 14 App. Cas. 26; 60 L. T. 642; 37 W. R. 625; 5 Times L. R. 355.—H.L. (E.).

Rowe v. Brenton (1828) 8 B. & C. 737; 3 Man. & R. 133; 5 L. J. (O.S.) K. B. 137; 32 R. R. 524.—K.B.: **Att.-Gen. v. Plymouth Corporation** (1754) Wightw. 134.—EX.: **Att.-Gen. (Prince of Wales) v. St. Aubyn** (1811) Wightw. 167.—EX.; and **Att.-Gen. v. Churchill** (1841) 10 L. J. Ex. 314; 8 M. & W. 171; 9 D. P. C. 772; 5 Jur. 803.—EX., *referred to*.

Att.-Gen. (Prince of Wales) v. Crossman (1866) L. R. 1 Ex. 381; 4 H. & C. 568; 12 Jur. (N.S.) 712; 14 L. T. 556; 14 W. R. 996.—EX.

Rowe v. Brenton, Att.-Gen. v. Churchill, and Att.-Gen. (Prince of Wales) v. Crossman, considered.

Dixon v. Farrer (1886) 55 L. J. Q. B. 497; 17 Q. B. D. 658; 55 L. T. 438.—FIELD and WILLS, JJ.; affirmed (*post*).

Rowe v. Brenton, explained.

Dixon v. Farrer (1886) 56 L. J. Q. B. 53; 18 Q. B. D. 43; 55 L. T. 578; 35 W. R. 95; 6 Asp. M. C. 52.—C.A., affirming S. C. (*supra*).

Paddock v. Forrester (1840) 9 L. J. C. P. 342; 1 Man. & G. 533; 1 Scott N. R. 341; 8 D. P. C. 834.—C.P., *discussed*.

Dixon v. Farrer.—Q.B. and C.A. (*supra*).

Bellamont's (Lord) Case (1700) 2 Salk. 625.—K.B., *discussed*.

Dixon v. Farrer (1886) 55 L. J. Q. B. 497; 17 Q. B. D. 658; 55 L. T. 438.—FIELD and WILLS, JJ.: S. C. 56 L. J. Q. B. 53; 18 Q. B. D. 43; 55 L. T. 578; 35 W. R. 95; 6 Asp. M. C. 52.—C.A.

Rex v. Hales (1716) 2 Stra. 816.—K.B.: **Rex v. Webb** (1649) 1 Siderfin 412.—K.B.; and **Att.-Gen. v. Constable** (1879) 48 L. J. Ex. 455; 4 Ex. D. 172; 27 W. R. 661.—KELLY, C.B. and HUDDLESTON, B., *discussed*.

Dixon v. Farrer (1886) 55 L. J. Q. B. 497; 17 Q. B. D. 658; 55 L. T. 438.—FIELD and WILLS, JJ.

Rex v. Wilkes (1769) 4 Bro. P. C. 360; 19 How. St. Tr. 1075.—H.L. (E.); and see 4 Burr. 2527.

Discussed, Bradlaugh v. Reg. (1878) 3 Q. B. D. 607; 38 L. T. 118; 26 W. R. 410; 14 Cox C. C. 68.—C.A.; *applied, Reg. v. Castro* (1880) 49 L. J. Q. B. 747; 5 Q. B. D. 490, 502; 43 L. T. 78; 14 Cox C. C. 436.—C.A. (affirmed, H.L. (*post*)); *discussed and followed, Castro v. Reg.* (1881) 50 L. J. Q. B. 497; 6 App. Cas. 229, 236; 44 L. T. 350; 29 W. R. 609; 14 Cox C. C. 546; 45 J. P. 452.—H.L. (E.); *discussed, O'Brien v. Reg.* (1890) 26 L. R. Ir. 451, 464.—Q.B.D. (affirmed C.A.).

O'Brien v. Reg. (1849) 2 H. L. Cas. 465; Hodges' Rep.—H.L. (IR.), *considered*.

Mulcahy v. Reg. (1868) L. R. 3 H. L. 306.—H.L. (IR.) (S. C. Ir. R. 1 C. L. 13); **O'Brien v. Reg.** (1890) 26 L. R. Ir. 451.—Q.B.D. and C.A.

Mulcahy v. Reg., referred to.

Levinger v. Reg. (1870) 39 L. J. P. C. 49; L. R. 3 P. C. 282, 290; 23 L. T. 362; 18 W. R. 1109.—P.C.

Sandon (or Sandland) v. Proctor (1828) 7 B. & C. 800; 6 L. J. (O.S.) K. B. 138.—K.B., *referred to*.

O'Brien v. Reg. (1890) 26 L. R. Ir. 451.—C.A.

Reg. v. Dudley (1884) 54 L. J. M. C. 32; 14 Q. B. D. 273, 560; 52 L. T. 107; 33 W. R. 347; 15 Cox C. C. 624; 49 J. P. 69.—C.C.R., *discussed*.

O'Brien v. Reg. (1890) 26 L. R. Ir. 451.—C.A.; **Reg. v. Brooke** (1894) 11 Times L. R. 163.—WILLS and WRIGHT, JJ.

O'Connell v. Reg. (1844) 11 Cl. & F. 155; 9 Jur. 25; 1 Cox C. C. 413.—H.L. (IR.).

Referred to, Att.-Gen. v. Sillem (1864) 33 L. J. Ex. 92; 2 H. & C. 431.—EX. CH. (majority affirmed, 33 L. J. Ex. 209; 10 H. L. Cas. 704; 4 N. R. 29; 10 Jur. (N.S.) 446; 10 L. T. 434; 12 W. R. 641.—H.L. (E.); LORDS CRANWORTH and WENSLEYDALE *dissenting*); *distinguished, Irwin v. Grey* (1867) 36 L. J. C. P. 148; L. R. 2 H. L. 20; 16 L. T. 74; 15 W. R. 593.—H.L. (E.); *referred to, Burton v. Low* (1867) 16 L. T. 385; 15 W. R. 791.—C.P.

O'Connell v. Reg., dissented from.

Reg. v. Castro (1874) 43 L. J. Q. B. 105; L. R. 9 Q. B. 350, 361; 30 L. T. 320; 22 W. R. 187; 12 Cox C. C. 454.

BLACKBURN, J. (for the Court).—To substitute for the word "trial" the words "taking of the verdict," or any similar words, or to construe the word "trial" as limited to the "taking of the verdict," would be an alteration and straining of the words of the legislature for the purpose of defeating their obvious intention. We have no doubt that we cannot do so, and we should not have thought it necessary to render our reasons so much at length were it not for the expressions used by Tindal, C.J., in the opinion delivered by him in *O'Connell v. Reg.*, which certainly are an authority to the contrary. It is to be remembered how that opinion came to be delivered. The Court of Q. B. in Ireland had, under the Irish Act, which is identical in its terms with the English Act, appointed days in the vacation after Hilary Term for the trial of that cause. On one of those days the jury delivered in a long special finding on the issues, and on this finding many troublesome questions arose. Had the verdict been delivered on a day which actually as well as constructively fell in Hilary Term, the Court of Q. B. might, and on such findings probably would, have postponed sentence until those points were argued, and for that purpose have adjourned the cause till next term. Nor can any reasonable doubt be entertained that in point of fact the Court of Q. B. in Ireland did, on receiving these findings, declare that they would do so, for on the first day of the next term, Easter Term, the parties did appear, motions were made on their behalf in arrest of judgment and otherwise, and after long arguments, sentence was pronounced in Trinity Term.

But when the record was made up and returned in obedience to the writ of error, all that appeared on the record was that these special findings were taken on the 12th of February, being one of the days which, by virtue of the statute, were for the purposes of the trial to be deemed part of Hilary Term, and that on the 15th of April, being the first day of the ensuing Easter Term, the parties appeared, and that having done so, and taken various steps in the cause, it was continued into Trinity Term, in which the sentence was passed. The counsel for the defendants assigned thirty-three grounds of error, some of which were very serious, and on one of which the judgment was reversed. But many were frivolous, and amongst those was the twentieth objection, "that there was not any proper continuance from the time when the verdict was given to the following Term, when the judgment was pronounced." The H. L. had to determine for the first time whether this objection was good, and whatever might have been the judgment if there had been a long series of precedents determining that the absence of a formal entry was fatal, it is obvious that there could be but one decision when it was a case of the first impression. The House thought fit to ask the judges amongst other questions, whether this was a good ground for reversing the judgment. The unanimous answer of the judges, delivered by Tindal, C.J., was that it was not, and the judgment of the House was that it was not. But in delivering the reasons for that judgment, Tindal, C.J. does undoubtedly, at p. 250 of the report, state as the ground of his opinion that the day appointed was a day in Term for the purpose of the trial, which no one doubts; but he assumes that the trial means in this statute the taking of the verdict and nothing more. He gives no reasons for this assumption; it had not been argued at the bar of the House, and it evidently was not much considered. If this was part of the *ratio decidendi* of the Lords in that case, we should be obliged to submit to it. But the opinions of the judges rendered to the House are but advice to assist the House, as was strongly shown in that very case, where the Lords by a majority of one gave judgment contrary to the opinions of a great majority of the judges. But though not binding on us, the opinion of such an eminent lawyer as Tindal, C.J., is to be treated with great respect, and the more so as all the other judges subscribed to his opinion, giving this as a reason. We should not, therefore, presume to dissent from that opinion if it were not that we find this point was not argued, and the opinion seems to have been hastily adopted without considering the reasons, which we think would have brought those learned persons to an opposite opinion, and which certainly lead us, without any doubt, to hold that the sentence was in this case properly pronounced.—p. 111.

O'Connell v. Reg., referred to.

Anderson v. Morice (1876) 46 L. J. C. P. 11; 1 App. Cas. 713, 751; 35 L. T. 566; 25 W. R. 14.—H.L. (E.); LORDS O'HAGAN and SELBORNE dissenting; *Reg. v. Castro* (1880) 49 L. J. Q. B. 747; 5 Q. B. D. 490, 517; 43 L. T. 78; 14 Cox C. C. 436.—C.A. (*supra*, col. 2389); *Mackonochie v. Penzance* (1881) 50 L. J. Q. B. 611; 6 App. Cas. 424, 445; 44 L. T. 479; 29 W. R. 633; 45 J. P. 584.—H.L. (E.); *Enraght v. Penzance*

(Lord) (1882) 51 L. J. Q. B. 507; 7 App. Cas. 240, 250; 46 L. T. 779; 30 W. R. 753; 46 J. P. 644.—H.L. (E.).

O'Connell v. Reg., explained.

Combe v. De la Bere (1882) 22 Ch. D. 316; 47 L. T. 185; 31 W. R. 24.—CHITTY, J.; *affirmed*, 48 L. T. 298; 31 W. R. 258.—C.A. CHITTY, J.—The H. L. since the conclusion of the argument before me, decided in *Enraght v. Penzance* (Lord) (*supra*) that the principle of *O'Connell's Case* does not apply to an ecclesiastical sentence, so as to afford ground for prohibition. *O'Connell's Case* was decided by a court of error, where there was no jurisdiction to alter the sentence.—p. 322.

O'Connell v. Reg., discussed.

Mogul Steamship Co. v. McGregor, Gow & Co. (1885) 54 L. J. Q. B. 540; 15 Q. B. D. 476, 484; 53 L. T. 268; 49 J. P. 649.—Q.B.D.; and (1889) 58 L. J. Q. B. 465; 23 Q. B. D. 598, 616; 61 L. T. 820; 37 W. R. 756; 53 J. P. 709, 724; 6 Asp. M. C. 455; 5 Times L. R. 658.—C.A. ESHER, M.R. *dissenting*; *Leatham v. Craig* [1899] 2 Ir. R. 711, 761.—C.A. (*affirmed nom.* *Quinn v. Leatham* (1901) 70 L. J. P. C. 76; [1901] A. C. 495; 85 L. T. 239; 50 W. R. 139; 65 J. P. 708.—H.L. (IR.)); *Rex v. Plummer* (1902) 71 L. J. K. B. 805; [1902] 2 K. B. 339; 86 L. T. 836; 51 W. R. 137; 66 J. P. 647.—C.C.R. And see "CRIMINAL LAW" vol. i., col. 782.

Reg. v. Castro (1874) 43 L. J. Q. B. 105; L. R. 9 Q. B. 350; 30 L. T. 320; 22 W. R. 187; 12 Cox C. C. 454.—Q.B.; *affirmed*, C.A. and H.L. (E.) (*supra*, col. 2389).

Reg. v. Castro, referred to.

Dixon v. Farrer (1886) 17 Q. B. D. 658; 55 L. J. Q. B. 497; 55 L. T. 438.—FIELD and WILLS, JJ.; *affirmed*, 56 L. J. Q. B. 53; 18 Q. B. D. 43; 55 L. T. 578; 35 W. R. 95; 6 Asp. M. C. 52.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ. WILLS, J.—In *Reg. v. Castro*, a trial at bar was granted on the demand of the Attorney-General prosecuting on behalf of the Crown.—p. 666.

Reg. v. Castro, applied.

Reg. v. Poole Corporation (1887) 56 L. J. M. C. 131; 19 Q. B. D. 683; 57 L. T. 485; 36 W. R. 239; 16 Cox C. C. 323; 52 J. P. 84.—COLERIDGE, C.J. and DENMAN, J.

Bolivia Republic v. National Bolivian

Navigation Co. (1876) 24 W. R. 361.—JESSEL, M.R., *followed*. *Grosvenor v. White* (1890) 61 L. T. 663; 38 W. R. 201.—NORTH, J.

Emma Silver Mining Co. v. Grant (1879) 11 Ch. D. 918; 40 L. T. 804.—JESSEL, M.R.; *varied*, C.A. JAMES, BRAMWELL and BRETT, L.JJ.

Emma Silver Mining Co. v. Grant, discussed.

Tasmanian Main Line Ry. v. Clark (1879) 27 W. R. 67.—DENMAN and LINDLEY, L.JJ.

Emma Silver Mining Co. v. Grant, limited.

Piercy v. Young (1880) 15 Ch. D. 475; 42 L. T. 292.

JESSEL, M.R.—The object of the Judicature Act was to try all disputes together, and it was considered a beneficial object. Separate trials

of separate issues are nearly as expensive as separate actions, and ought certainly not to be encouraged, and they should only be granted on special grounds. Consider for a moment three illustrations I gave in *Emma Silver Mining Co. v. Grant*, when I directed an issue to be tried. The first case was that of a lady who alleged that she was the legitimate child of somebody, and as such entitled to an account, but her legitimacy was denied. If the plaintiff was legitimate, her right to an account was not contested, but the cost of taking the account would have been enormous, so that if I had directed the account in the first instance and decided the legitimacy afterwards, the whole costs would have been thrown away. Therefore it was essential to decide the question of legitimacy first. It was not a case really for directing an issue for the trial as distinguished from trying the action. If the case had come on in the regular way, the only question to be tried would have been legitimacy. It was expediting the trial on the only question that could be tried. The two next cases were very peculiar. The one was an heir-at-law case, in which the plaintiff was a pauper with a fishing action, a very special case indeed, and there was evidence—strong evidence, and it turned out to be satisfactory evidence—that the plaintiff had no claim at all. I have no such evidence here. As I said before, I cannot tell by the affidavits who is right and who is wrong. There is a statement by one side met by a contradictory statement on the other. One cannot say in this case that there is *prima facie* evidence that the defendant is right upon the issue, as there was in that case. The third case was still more remarkable, because it was not only a pauper plaintiff, but a pauper set up by other persons to sue on his and their behalf, and in that case, no doubt, it would have been an enormously expensive action to try. The simple question was whether he was a tenant of the manor or not. The defendant produced the Court rolls, and showed that his name was not entered as tenant. There was the strongest *prima facie* evidence that he was not tenant; I therefore thought it right first to put him to the proof that he was tenant, but he failed to prove it, and there was an end of the action. Here there is a conflict of testimony, and I have no means of forming an opinion as to which is right and which is wrong. I think that the application of the rule should be limited to extraordinary and exceptional cases, and I think *Emma Silver Mining Co. v. Grant* was an extraordinary and exceptional case.—p. 479.

Piercy v. Young (supra), referred to.

Liverpool, Brazil and River Plate Steam Navigation Co. v. London and St. Katherine Steam Navigation Co., W. N. (1875) 203.—LUSH, J., applied.

Smith v. Hargrove (1885) 16 Q. B. D. 183; 34 W. R. 294.—POLLOCK, B. and MANISTY, J.

Ogle v. Brandling (1831) 2 Russ. & M. 688.—L.C., followed.

Anon. (1874) 30 L. T. 153; 22 W. R. 512.—BACON, V.-C.

Andrew v. Raeburn (1874) L. R. 9 Ch. 522; 31 L. T. 73; 22 W. R. 564.—L.C. and L.J., referred to.

Nagle-Gilman v. Christopher (1876) 46 L. J. Ch. 60; 4 Ch. D. 173.—JESSEL, M.R.

Jacks v. Mayer (1799) 8 Term Rep. 245.—K.B.; and Ellis v. Trusler (1772) 2 W. Bl. 798.—C.P., overruled.

Claudet v. Prince (1867) 36 L. J. Q. B. 196; L. R. 2 Q. B. 406, 409; 8 B. & S. 360; 16 L. T. 397; 15 W. R. 794.—MELLOR, J.

Stockton and Darlington Ry. v. Fox (1851) 20 L. J. Ex. 96; 6 Ex. 127; 2 L. M. & P. 141.—EX., followed.

Cawley v. Knowles (1864) 16 C. B. (N.S.) 107.—C.P., distinguished.

Claudet v. Prince (1867) 36 L. J. Q. B. 196; L. R. 2 Q. B. 406; 8 B. & S. 360; 16 L. T. 397; 15 W. R. 794.—MELLOR, J.

Leigh v. Brooks (1877) 46 L. J. Ch. 344; 5 Ch. D. 592; 25 W. R. 401.—C.A., discussed.

Hoch v. Boor (1880) 49 L. J. C. P. 665; 43 L. T. 425.—C.A. BRETT, COTTON and THESIGER, L.JJ.

Hoch v. Boor and Leigh v. Brooks, referred to.

Sacker v. Ragozine (1881) 44 L. T. 308.—DENMAN, J. and POLLOCK, B.

Hoch v. Boor, referred to.

Ormerod v. Todmorden Mill Co. (1882) 51 L. J. Q. B. 348; 8 Q. B. D. 664; 46 L. T. 669; 30 W. R. 805.—C.A.

Leigh v. Brooks and Hoch v. Boor, discussed and approved.

Dimmock v. Randall (1889) 5 Times L. R. 358.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

Cruikshank v. Floating Swimming Baths Co. (1876) 45 L. J. C. P. 684; 1 C. P. D. 260; 34 L. T. 733; 24 W. R. 644.—C.P.D., adhered to.

Lloyd v. Lewis (1876) 46 L. J. Ex. 81; 2 Ex. D. 7; 35 L. T. 539; 25 W. R. 102.—C.A.

Lloyd v. Lewis, expressions explained.

Frederici v. Vanderzee (1877) 2 C. P. D. 70; 46 L. J. C. P. 194; 35 L. T. 889; 25 W. R. 389.—C.A.

BRETT, J.A.—I wish to mention that in a case which came before us a short time ago [*Lloyd v. Lewis*] I used the words "crotchety technicality," and I am told that I have been supposed to have used those words with respect to the decisions of some of the judges. I had no such intention, and what I said related to no particular person engaged in the case, but to crotchety persons who from time to time suggest technical subtleties in construing these rules. I said, speaking as of a rule of construction, that this Court ought to discourage these attempts, my notion being, that these rules should be construed broadly, so as to avoid technical difficulties.—p. 73.

Lloyd v. Lewis, discussed.

Johnson v. Wilson (1882) 46 L. T. 647.—C.A.

Weed v. Ward (1889) 58 L. J. Ch. 454; 40 Ch. D. 555; 60 L. T. 208; 37 W. R. 406.—C.A., referred to.

Hurlbatt v. Barnett & Co. (1892) 62 L. J. Q. B. 1; [1893] 1 Q. B. 77; 4 R. 103; 67 L. T. 818; 41 W. R. 33.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

- Laskier v. Tekieian** (1892) 67 L. T. 121.—
A. L. SMITH and LAWRENCE, JJ., *distinguished*.
- Baxter v. Holdsworth** (1898) 68 L. J. Q. B. 154; [1899] 1 Q. B. 266; 47 W. R. 179.—C.A.
- A. L. SMITH, L.J.—In that case the plaintiff, in an action where the venue was Middlesex, gave ten days' notice of trial for the Liverpool Assizes. The Court held that that notice was a nullity, and that an order that the notice should stand made after the giving of the notice of trial, but at such a time that the notice was not a ten days' notice, could not stand. The notice of trial there was in effect only a seven days' notice. That case does not decide that the Court could not order a ten days' notice of trial before trial. . . . The judge may order that the notice of trial may be given for the first day of the Assizes, but that the case shall not come on for trial until ten days after the notice of trial. That is what the order here does.—p. 155.
- COLLINS, L.J. to the same effect. RIGBY, L.J. concurred.
- Jacobs v. Allen** (1704) 1 Salk. 27.—TREVOR, C.J., *dissented from*.
- Sadler v. Evans** (1766) 4 Burr. 1984; S.C., Bull. 133.—MANSFIELD, C.J.
- Sadler v. Evans**, *distinguished*.
- Att.-Gen. v. Thornton** (1824) McCle. 600; 13 Price 805; 2 St. Tr. (N.S.) 130.—EX.
- Edgar v. Halliday** (1850) 1 L. M. & P. 367.—C.P., *overruled*.
- Driscoll v. Whalley** (1852) 21 L. J. Q. B. 232; 16 Jur. 150.—Q.B.
- Nicholson v. Smith** (1822) 3 Stark. 128.—ABBOTT, C.J.; and **Wallace v. Small** (1830) M. & M. 446.—TENTERDEN, C.J., *discussed*.
- Powell v. McGlynn and Bradlaw** (1901) [1902] 2 Ir. R. 154.—Q.B.D. and C.A.
- Brown v. Wren Brothers** (1895) 64 L. J. Q. B. 119; [1895] 1 Q. B. 390; 15 R. 239; 72 L. T. 109; 43 W. R. 351.—WILLS and WRIGHT, JJ., *discussed*.
- Powell v. McGlynn and Bradlaw** (1901) [1902] 2 Ir. R. 154.—Q.B.D.
- Greenough v. Eccles** (1859) 28 L. J. C. P. 160; 5 C. B. (N.S.) 786; 5 Jur. (N.S.) 766.—C.P., *applied*.
- Rice v. Howard** (1886) 55 L. J. Q. B. 311; 16 Q. B. D. 681; 34 W. R. 532.—GROVE and STEPHEN, JJ.
- Peaceable d. Uncle v. Watson** (1811) 4 Taunt. 16; 13 R. R. 552.—K.B., *applied*.
- Reg. v. Birmingham Overseers** (1861) 31 L. J. M. C. 63; 1 B. & S. 763; 8 Jur. (N.S.) 37; 5 L. T. 309; 10 W. R. 41.—Q.B.: Sly v. Sly (1877) 46 L. J. P. 63; 2 P. D. 91, 93; 25 W. R. 463.—HANNEN, P.
- Price v. Manning** (1889) 58 L. J. Ch. 649; 42 Ch. D. 372; 61 L. T. 537; 37 W. R. 785.—C.A. COTTON, FRY and LOPES, L.JJ., *discussed*.
- Darroch v. Kerr** (1901) 4 Fraser 396, 399.—COURT OF SESSION.
- Clark v. Gill** (1854) 23 L. J. Ch. 711; 1 K. & J. 19; 2 W. R. 652.—WOOD, V.-C.; and
- Brocas v. Lloyd** (1856) 26 L. J. Ch. 758; 23 Beav. 129; 2 Jur. (N.S.) 555; 4 W. R. 540.—ROMILLY, M.R., *discussed*.
- Working Men's Mutual Society, In re** (1882) 51 L. J. Ch. 850; 21 Ch. D. 831 (*post*).
- Wiltshire v. Marshall**, W. N. (1866) 80.—WOOD, V.-C., *discussed*.
- Working Men's Mutual Society, In re** (1882) 51 L. J. Ch. 850; 21 Ch. D. 831; 47 L. T. 645; 30 W. R. 938.—KAY, J.
- Working Men's Mutual Society, In re** *referred to*.
- Chamberlain v. Stoncham** (1889) 59 L. J. Q. B. 95; 21 Q. B. D. 113; 61 L. T. 560; 38 W. R. 107.—HUDDLESTON, B. and STEPHEN, J.
- Child v. Stenning** (1878) 47 L. J. Ch. 371; 7 Ch. D. 413; 33 L. T. 232; 26 W. R. 265.—FRY, J.; *varied*. (1879) 48 L. J. Ch. 392; 11 Ch. D. 82; 49 L. T. 302; 27 W. R. 462.—C.A. *And see S. C.* on demurrer (1877) 46 L. J. Ch. 523; 5 Ch. D. 695; 36 L. T. 426; 25 W. R. 519.—C.A.; *reversing* HALL, V.-C.
- Child v. Stenning** [46 L. J. Ch. 523], *referred to*.
- Cargill v. Bower** (1878) 47 L. J. Ch. 649; 10 Ch. D. 502; 38 L. T. 779; 26 W. R. 716.—FRY, J.
- Child v. Stenning**, *discussed*.
- Tritton v. Bankart** (1887) 56 L. J. Ch. 629; 56 L. T. 306; 35 W. R. 474.—KEKEWICH, J.
- Child v. Stenning**, *referred to*.
- O'Keefe v. Walsh** [1903] 2 Ir. R. 681, 719.—K.B.D., *affirmed* C.A.
- Jewell v. Parr** (1853) 13 C. B. 909, 916.—C.P., *referred to*.
- Ryder v. Wombwell** (1868) 38 L. J. Ex. 8; L. R. 4 Ex. 32, 39; 19 L. T. 491; 17 W. R. 167.—EX. CH. (*see* "INFANT," vol. i. col. 1295); **Steward v. Young** (1870) 39 L. J. C. P. 85; L. R. 5 C. P. 122, 128; 22 L. T. 168; 18 W. R. 492.—C.P.; **Gee v. Metropolitan Ry.** (1873) 42 L. J. Q. B. 105; L. R. 8 Q. B. 161, 177; 28 L. T. 282; 21 W. R. 584.—EX. CH.; **Metropolitan Ry. v. Jackson** (1877) 47 L. J. C. P. 303; 3 App. Cas. 193, 207; 37 L. T. 679; 26 W. R. 175.—H.L. (E.); **Dublin, Wicklow and Wexford Ry. v. Slaterry** (1878) 3 App. Cas. 1155, 1171; 39 L. T. 365; 27 W. R. 191.—H.L. (IR.); **Hall v. Jupe** (1880) 49 L. J. C. P. 721, 729; 43 L. T. 411.—C.P.
- Berdan v. Greenwood** (1880) 20 Ch. D. 764, n.; 46 L. T. 524, n.—C.A.; and **Nadin v. Bassett** (1883) 53 L. J. Ch. 253; 25 Ch. D. 21; 49 L. T. 454; 32 W. R. 70.—C.A., *distinguished*.
- Armour v. Walker** (1883) 25 Ch. D. 673; 53 L. J. Ch. 413; 50 L. T. 292; 32 W. R. 214.—C.A. COTTON, LINDLEY and FRY, L.JJ.
- COTTON, L.J.—In that case [*Berdan v. Greenwood*] we thought he (the plaintiff) was keeping out of the way (p. 676). . . . This is not a case of identity like *Nadin v. Bassett*, and I rather doubt whether the action turns much on any dispute as to facts.—p. 677.
- Berdan v. Greenwood and Boyse, In re**, **Crofton v. Crofton** (1882) 51 L. J. Ch. 660; 20 Ch. D. 760; 46 L. T. 522; 30 W. R. 812.—FRY, J., *referred to*.
- Coch v. Allcock** (1888) 21 Q. B. D. 1.—FIELD and WILLS, JJ.; *affirmed*, 57 L. J. Q. B. 489; 21

Q. B. D. 178; 36 W. R. 747.—C.A. *ESHER, M.R., LINDLEY and LOPES, L.J.J. And see "EVIDENCE,"* vol. i., col. 1044.

Bidder v. Bridges (1884) 26 Ch. D. 1; 50 L. T. 287; 32 W. R. 445.—C.A.

See Anthony Birrell Pearce & Co., *In re. Doig v. Anthony Birrell Pearce & Co.* (1899) 68 L. J. Ch. 444; [1899] 2 Ch. 50, 52; 80 L. T. 688.—*KEKEWICH, J.*; and *Young Manufacturing Co.* *In re. Young v. Young Manufacturing Co.* (1900) 69 L. J. Ch. 868; [1900] 2 Ch. 753, 755; 83 L. T. 418; 49 W. R. 115.—C.A.

Young Manufacturing Co., In re, Young v. Young Manufacturing Co., followed.

Badische Anilin und Soda Fabrik v. W. S. Thompson, Ltd. (1902) 19 Rep. Pat. Cas. 502.—*BUCKLEY, J.*

Lacharme v. Quartz Rock Mariposa Salt Mining Co. (1862) 31 L. J. Ex. 508; 1 H. & C. 134; 10 W. R. 799.—EX., *distinguished.*

Dickson v. Neath and Brecon Ry. (1869) L. R. 4 Ex. 87, 91; 38 L. J. Ex. 57; 19 L. T. 702; 17 W. R. 501.—EX.

Goodtitle d. Revett v. Braham (1792) 4 Term Rep. 497.—K.B.

Not followed. *Carey v. Pitt* (1797) 2 Peake, 130; 4 R. R. 895; *discussed.* *Doe d. Bather v. Brayne* (1848) 17 L. J. C. P. 127; 5 C. B. 655.—C.P. *See post.*

Doe d. Corbett v. Corbett (1813) 3 Camp. 368.—*BAYLEY, J.*; and **Doe d. Wollaston v. Barnes** (1834) 1 M. & Rob. 386; 42 R. R. 810.—*DENMAN, C.J., not followed.*

Doe d. Bather v. Brayne (1848) 17 L. J. C. P. 127; 5 C. B. 655.

COLTMAN, J.—*Doe d. Corbett v. Corbett* and *Doe d. Wollaston v. Barnes* are entitled to great respect although decided merely at Nisi Prius. At the same time it does not seem that there was any desire or any possibility to bring those decisions before the Court, and the parties respectively seem to have been satisfied with the decisions.—p. 131.

MAULE, J. to the same effect.

CRESSWELL, J.—*Goodtitle v. Braham (supra)* has never been supported to the extent there ruled. In such a case now there can be no question that the defendant would not be entitled to the general reply, but still that case may be considered law, so far as deciding that, in a question between heir-at-law and devisee, if the heirship be admitted, the devisee begins; that means, it must be admitted that the plaintiff is heir-at-law up to the time of the death. In *Doe v. Tucker (post)* the defendant would not admit that the seisin of the ancestor continued up to the time of the death; an intervening conveyance was set up; and, consequently, the defendant was not allowed to begin.—p. 132.

Doe d. Tucker v. Tucker (1830) M. & M. 536.—*BOLLAND, B., discussed.*

Doe d. Bather v. Brayne (1848) 17 L. J. C. P. 127; 5 C. B. 655.—C.P. *See supra.*

Huckman v. Fernie (1838) 7 L. J. Ex. 163; 3 M. & W. 505; 1 H. & H. 149; 2 Jur. 444.—EX., *followed.*

Geach v. Ingall (1845) 15 L. J. Ex. 37; 14 M. & W. 95; 9 Jur. 691.—EX.

Huckman v. Fernie, corrected.

Cripps v. Wells (1843) Car. & Mar. 489.—

ROLFE, B., approved.

Booth v. Millns (1846) 15 L. J. Ex. 355; 15 M. & W. 669; 4 D. & L. 52.—EX.

Huckman v. Fernie, referred to.

Edwards v. Matthews (1847) 16 L. J. Ex. 291; 4 D. & L. 721; 11 Jur. 398.—EX.

Huckman v. Fernie, corrected.

Edwards v. Matthews, adhered to.

Brandford (or Bandford) v. Freeman (1850) 20 L. J. Ex. 36; 5 Exch. 734; 14 Jur. 987.—EX.

POLLOCK, C.B.—I adhere to the decision in *Edwards v. Matthews*.—p. 37.

PARKE, B.—One of the first cases on this subject was *Huckman v. Fernie*, where Lord Abinger is reported to have said: "I cannot say we should interfere in a very doubtful case, but if the decision of the judge were clearly and manifestly wrong, the Court would interfere to set it right." Now that is an inaccuracy; and I have corrected it in my own hand in the copy of *Meeson & Welsby* which is in this Court. What Lord Abinger said was, that the order of beginning is a matter for the disposal of the judge at Nisi Prius, but if his ruling did clear and manifest wrong the Court would interfere to set it right; and that view of his language is confirmed by the note appended to the report of *Edwards v. Matthews* in the Jurist.—p. 37.

Brandford v. Freeman, discussed.

Beaufort (Duke) v. Crawshaw (1866) 35 L. J. C. P. 342; 1 R. 1 C. P. 699; 1 H. & L. 638; 12 Jur. (N.S.) 709; 14 L. T. 729; 14 W. R. 989.—C.P.

Smith v. Braine (1851) 20 L. J. Q. B. 201; 16 Q. B. 244; 15 Jur. 287.—Q.B.; and **Harvey v. Towers** (1851) 20 L. J. Ex. 318; 6 Ex. 656; 15 Jur. 544.—EX., *discussed.*

Dublin, Wicklow and Wexford Ry. v. Slattery (1878) 3 App. Cas. 1153, 1204; 39 L. T. 365; 27 W. R. 191.—H.L. (E.); LORDS HATHERLEY, COLERIDGE and BLACKBURN *dissenting.*

European Central Ry., In re; Gustard's Case (1869) 38 L. J. Ch. 610; L. R. 8 Eq. 438; 21 L. T. 196.—*JAMES, V.-C., referred to.*

European Central Ry., In re, Holden's Case (1869) L. R. 8 Eq. 444; 21 L. T. 197; 17 W. R. 875.—*JAMES, V.-C.*

Hill v. Cowdery (1856) 25 L. J. Ex. 286, n.; 1 H. & N. 360; 4 W. R. 681.—EX., *followed.*

Redway v. Sweeting (1867) 36 L. J. Ex. 185; L. R. 2 Ex. 400; 16 L. T. 495; 15 W. R. 908.—EX.

Gregory v. Brunswick (Duke) (1843) 13 L. J. C. P. 34; 1 Car. & K. 24; 1 D. & L. 803; 8 Jur. 148.—C.P., *referred to.*

Henwood v. Harrison (1872) 41 L. J. C. P. 206; L. R. 7 C. P. 606; 26 L. T. 938; 20 W. R. 1000.—C.P.; *GROVE, J. dissenting.*

Bray v. Somer (1862) 31 L. J. M. C. 135; 2 B. & S. 374; 8 Jur. (N.S.) 716; 6 L. T. 49; 10 W. R. 354.—Q.B., *followed.*

Edney v. Smallbones (1869) 21 L. T. 506.—*SIR R. PHILLIMORE.*

- Haldane v. Beauclerk** (1849) 18 L. J. Ex. 227; 3 Ex. 658; 6 D. & L. 642; 13 Jur. 326.—EX., followed but questioned.
- Montague v. Smith** (1851) 21 L. J. Q. B. 73; 17 Q. B. 688, 592.
- CAMPBELL, C.J.**—I feel bound by *Haldane v. Beauclerk*, although I entertain great doubt of the soundness of that decision. . . . In points of practice it is extremely desirable that there should be an uniformity of proceeding in all the Courts. I trust that we may soon see an entire alteration in the course of proceedings as respects special juries.—p. 74. [See 15 & 16 Vict. c. 76, s. 113.]
- Newman v. Graham** (1851) 11 C. B. 153.—C.P.; and *Montague v. Smith*, discussed.
- Irwin v. Grey** (1865) 19 C. B. (N.S.) 585, 601 (*post*).
- Holt v. Meddowcroft** (1816) 4 M. & S. 467.—K.B.; *Hague v. Hall* (1843) 5 Man. & G. 693; 6 Scott (N.R.) 705.—C.P., discussed.
- Irwin v. Grey** (1865) 19 C. B. (N.S.) 585, 601 (*post*).
- Rex v. Carlile** (1831) 9 L. J. (O.S.) K. B. 250; 2 B. & Ad. 362; 4 C. & P. 415.—K.B., discussed.
- Irwin v. Grey** (1865) 19 C. B. (N.S.) 585, 601 (*post*).
- Irwin v. Grey** (1865) 34 L. J. C. P. 313; 19 C. B. (N.S.) 585; 11 Jur. (N.S.) 860; 12 L. T. 847; 13 W. R. 1043.—C.P.; affirmed, 35 L. J. C. P. 43; L. R. 1 C. P. 171; 1 H. & R. 25; 12 Jur. (N.S.) 193; 13 L. T. 409; 14 W. R. 208.—EX. CH.; and (1867) 36 L. J. C. P. 148; L. R. 2 H. L. 20; 16 L. T. 74; 15 W. R. 593.—H.L. (E.).
- Irwin v. Grey**, referred to.
- Metropolitan Ry. v. Wilson** (1871) 40 L. J. C. P. 208; L. R. 6 C. P. 376, 381; 24 L. T. 550; 19 W. R. 775.—C.P.
- Irwin v. Grey**, discussed and applied.
- O'Brien v. Reg.** (1890) 26 L. R. Ir. 451, 499.—C.A.
- Gibbs v. Ralph** (1845) 15 L. J. Ex. 7; 14 M. & W. 804.—EX.; and **Burdon v. Flower** (1838) 7 D. P. C. 786.—Q.B., discussed.
- Thomas v. Exeter Flying Post Co.** (1887) 18 Q. B. D. 822; 56 L. J. Q. B. 313; 56 L. T. 361; 35 W. R. 594.—DAY and WILLS, JJ.
- WILLS, J.**—No doubt most persons would say that the effect of withdrawing a juror was that the cause thereby came to an end, and, popularly speaking, that is a very fair description of the result of such an agreement; in all ordinary cases the juror is withdrawn with the intention that the cause shall, and it does, come to an end. *Gibbs v. Ralph* is the only case where similar general language is used without qualification, and it is abundantly clear, both upon principle and from the decisions in *Burdon v. Flower* and *Norburn v. Hilliam* (*post*), that the withdrawal of a juror is not a legal determination of the cause, but is only a determination in this sense, that unless something very special happens the Court will hold the parties to their understanding and will stay any further proceedings in the action.—p. 825.
- Norburn v. Hilliam** (1870) 39 L. J. C. P. 183; L. R. 5 C. P. 129; 22 L. T. 67; 18 W. R. 602.—C.P., discussed.
- Thomas v. Exeter Flying Post Co.** (1887) 56 L. J. Q. B. 313; 18 Q. B. D. 822; 56 L. T. 361; 35 W. R. 594.—DAY and WILLS, JJ. See extract, *supra*.
- Everett v. Youells** (1832) 3 B. & Ad. 349.—K.B., referred to.
- Carnegie v. Carnegie** (1886) 17 L. R. Ir. 430.—WARREN, J.; affirmed, C.A.
- Powell v. Sonnett** (1826) 3 Bing. 381; 11 Moore 330.—EX. CH.; affirmed, (1827) 1 Dow & Cl. 56; 1 Bligh (N.S.) 545.—H.L. (E.).
- Powell v. Sonnett**, followed.
- Rex v. Johnson** (1836) 6 N. & M. 883; and **Scott v. Bennett** (1871) L. R. 5 H. L. 234; 20 W. R. 686.—H.L. (E.).
- Banks v. Newton** (1847) 11 Q. B. 340.—Q.B., overruled.
- Scott v. Bennett** (1871) L. R. 5 H. L. 234; 20 W. R. 686.—H.L. (E.).
- CHELMSFORD, L.C.**—As to *Banks v. Newton*, my opinion is, that it cannot be sustained. The fact that the defendant could, before judgment, have suggested that which he afterwards alleged as constituting matter of error ought to have precluded him from being heard after the judgment. The case stands alone, and the suggested analogies are misleading. . . . This is a case in which a party, fully competent, had a formal mode of raising the question by way of suggestion before judgment, and has passed by that occasion. He ought, therefore, not to bring error in fact any more than he could do to raise a matter of abatement or bar which he has not pleaded, or of challenge not formally assigned—a course clearly inadmissible. This was not considered in *Banks v. Newton*, and the reasons for the judgment are not given. The case was very summarily disposed of, and, undoubtedly, the judgment which was given, that the previous judgment should be reversed, was itself incorrect, because the judgment should have been revoked or recalled.—p. 249.
- LORDS WESTBURY, COLONSAY and CAIRNS** concurred.
- Scott v. Bennett**, referred to.
- Carnegie v. Carnegie** (1886) 17 L. R. Ir. 430, 435.—WARREN, J. (affirmed, C.A.); Att.-Gen. v. Kissane (1898) 32 L. R. Ir. 220, 260.—C.A.
- PORTER, M.R., PALLES, C.B., FITZGIBBON and BARRY, L.JJ.**
- George v. Whitmore** (1859) 26 Beav. 557.—M.R., approved.
- Morrison v. Barrow** (1860) 1 De G. F. & J. 633.—L.C. and L.JJ.
- Morrison v. Barrow**, discussed.
- Simpson, In re, Morgan, Ex parte** (1876) 45 L. J. Bk. 36; 2 Ch. D. 72, 96; 34 L. T. 329; 24 W. R. 414.—C.A.
- Armstrong v. Armstrong** (1834) 3 L. J. Ch. 101; 3 Myl. & K. 45; 1 De G. F. & J. 639, n.—M.R. and L.C., not to be regarded as an authority.
- Fernie v. Young** (1866) 35 L. J. Ch. 523; L. R. 1 H. L. 63; 12 Jur. (N.S.) 437; 14 L. T. 637; 14 W. R. 714.—H.L. (E.).
- Armstrong v. Armstrong**, considered.
- Simpson, In re, Morgan, Ex parte** (1876) 45 L. J. Bk. 36; 2 Ch. D. 72, 93; 34 L. T. 329; 24 W. R. 414.—C.A. See "BANKRUPTCY," vol. i., col. 185.

Simpson v. Holliday (1865) 12 L. T. 99; 13 W. R. 577.—L.C.: *reversed in part*, (1866) 35 L. J. Ch. 811; L. R. 1 H. L. 315.—H.L. (E.).

Simpson v. Holliday, *explained*.

Fernie v. Young (1866) 35 L. J. Ch. 523; L. R. 1 H. L. 63, 84; 12 Jur. (N.S.) 437; 14 L. T. 637; 14 W. R. 714.—H.L. (E.).

Simpson v. Holliday and Fernie v. Young, *considered*.

Simpson, *In re Morgan*, *Ex parte* (1876) 45 L. J. Bk. 36; 2 Ch. D. 72, 93; 34 L. T. 329; 24 W. R. 414.—C.A.

Marianski v. Cairns (1852) 1 Macq. H. L. 212, 766.—H.L. (S.C.), *discussed*.

Reg. v. Maidenhead Corporation (1882) 8 Q. B. D. 339; 51 L. J. Q. B. 209.—Q.B.D.; affirmed, 9 Q. B. D. 494; 51 L. J. Q. B. 444; 46 J. P. 724.—C.A.

POLLOCK, B.—With regard to the second contention, there is no doubt but that a mistake made by the clerk or officer of a court in entering a verdict or judgment may be amended from the judge's notes. The older authorities are referred to in *Com. Dig., Amendment P.*, and in *Marianski v. Cairns*, where the finding of issues at a trial had been entered imperfectly, and the Court sent the case back to have the verdict entered according to the substance of the finding with the assistance of the judge, who would be guided by his notes. It is to be observed, however, that this course was so adopted expressly upon the ground that what occurred amounted to a mere mis-entry of the verdict.—p. 353.

Williams v. Breedon (1798) 1 B. & P. 329.—C.P., *not followed*.

Reg. v. Virrier (1840) 12 A. & E. 317; 9 L. J. M. C. 120; 4 P. & D. 161; 4 Jur. 628.—Q.B.

PATTESON, J.—That is a very odd case.

DENMAN, C.J.—We decided differently in a case, tried by Park, J., which came before us last year [*Empson v. Griffin*, (1839) 11 A. & E. 186].—p. 331.

Alcock v. Wilshaw (1860) 6 Jur. (N.S.) 628.—Q.B., *discussed*.

Jones v. Curling (1884) 35 L. J. Q. B. 373; 13 Q. B. D. 262, 269; 50 L. T. 349; 32 W. R. 651.—C.A. **BRETT, M.R., BOWEN and FRY, L.JJ.**

O'Connor v. Malone (1839) 6 Cl. & F. 572; MacL. & R. 468.—H.L. (I.R.), *discussed*.

Butler v. Butler (1893) 63 L. J. P. 1; [1894] P. 25; 1 R. 535; 69 L. T. 545; 42 W. R. 49.—C.A.

A. L. SMITH (for self, **LINDLEY and DAVEY, L.JJ.**).—The L.C. (Lord Cottenham), in *O'Connor v. Malone*, said: "It is a well-known rule of law that a verdict without a judgment is no evidence at all, the reason being that there is nothing to show that such verdict has not been set aside or may not have been acted upon by the Court." . . . It appears to us that in ordinary cases, if a verdict be followed by a judgment, and such judgment is afterwards set aside, the verdict falls with the judgment, and, as was held in *O'Connor v. Malone*, neither party can give such verdict in evidence upon the second trial.—p. 2.

Richardson v. Mellish (1824) 2 Bing. 229; 9 Moore 435; Ry. & M. 66; 1 C. & P. 241; 3 L. J. (O.S.) C. P. 265; 27 R. R. 603.—C.P., *referred to*.

Davies v. Davies (1887) 56 L. J. Ch. 962; 36 Ch. D. 359, 364; 58 L. T. 209; 36 W. R. 86.—**KEKEWICH, J.**: *reversed*, C.A. **COTTON, BOWEN and FRY, L.JJ.**

Richardson v. Mellish (1825) 7 B. & C. 819; 3 Bing. 334, 346; 11 Moore 104; 4 L. J. (O.S.) C. P. 68, 77; 36 R. R. 111.—C.P.: *affirmed nom.* **Mellish v. Richardson** (1828—1832) 1 Cl. & F. 224; 6 Bligh (N.S.) 70; 9 Bing. 125; 2 M. & Scott 111.—H.L. (E.).

Richardson v. Mellish, *applied*.

Tetley v. Wanless (1867) 36 L. J. Ex. 153; L. R. 2 Ex. 275, 279; 16 L. T. 601; 15 W. R. 356.—EX. CH.

Richardson v. Mellish, *referred to*.

Scott v. Bennett (1871) L. R. 5 H. L. 234, 243; 20 W. R. 686.—H.L. (I.R.).

Cockle v. Joyce (No. 1) (1877) 7 Ch. D. 56; 26 W. R. 41.—**FRY, J.**, *not followed*.

Lows, Ex parte, Lows, In re (1877) 7 Ch. D. 160; 47 L. J. Bk. 24; 37 L. T. 583; 26 W. R. 229.—C.A., *followed*.

James v. Crow (1878) 7 Ch. D. 410; 47 L. J. Ch. 200; 37 L. T. 749; 26 W. R. 236.

FRY, J.—When *Cockle v. Joyce* came before me I was at first disposed to think that the defendant need not prove that he had been served with notice of trial. But I was told by the registrar that the practice was to require proof of the service. *Lows, Ex parte*, however, appears to be a case in point, and upon the authority of that decision I now hold that the defendant need not prove that he has been served with notice of trial, and I give judgment for him with costs.—p. 411.

Cockle v. Joyce (No. 2) (1877) 47 L. J. Ch. 543; 37 L. T. 428; 26 W. R. 59.—**FRY, J.**, *followed*.

Wright v. Clifford (1878) 47 L. J. Ch. 543; 26 W. R. 369.—**FRY, J.**

Cockle v. Joyce, 7 Ch. D. 56 (*supra*); and **Wright v. Clifford**, *distinguished*.

Burgoine v. Taylor (1878) 47 L. J. Ch. 542; 9 Ch. D. 1; 38 L. T. 438; 26 W. R. 568.—**FRY, J.**; *reversed*, C.A.

Burgoine v. Taylor, *discussed*.

Highton v. Treherne (1878) 48 L. J. Ex. 167; 39 L. T. 411; 27 W. R. 245.—C.A.

James v. Crow (*supra*), *followed*.

Palmer, In re, Skipper v. Skipper (1883) 49 L. T. 533; 32 W. R. 88.—**BACON, V.-C.**

Cockshott v. London General Cab Co. (1877) 47 L. J. Ch. 126; 26 W. R. 31.—**FRY, J.**, *not followed*.

Chorlton v. Dickie (1879) 13 Ch. D. 160; 49 L. J. Ch. 40; 41 L. T. 467; 28 W. R. 228.

FRY, J.—I came to that conclusion because I was told by the registrar that the practice was always to require the affidavit. I do not wish to impose on plaintiffs the obligation of proving service of notice of trial, if the other Divisions do not. In the Court of Ch. an affidavit of service of notice of motion for decree was always required.—p. 162.

Walker v. Budden (1879) 49 L. J. Q. B. 159; 5 Q. B. D. 267; 28 W. R. 665.—C.A. *Distinguished*, **Barton v. Titchmarsh** (1880) 49 L. J. Ex. 573; 42 L. T. 610; 28 W. R. 821.—C.A.; *explained*, **Streeter, Ex parte, Morris, In re** (1881) 19 Ch. D. 216; 45 L. T. 634; 30 W. R. 127.—C.A.

Walker v. Budden, referred to.

Allum v. Dickinson (1882) 9 Q. B. D. 632; 47 L. T. 493; 30 W. R. 930.—C.A. **JESSEL, M.R., LINDLEY and BOWEN, L.JJ.**

JESSEL, M.R.—In an ordinary case, if the plaintiff does not appear and lets judgment be taken against him by default, he cannot appeal. If there has been a mistake he must apply to the Court of first instance to have the case restored and reheard: *Walker v. Budden*.—p. 633.

And see **Vint v. Hudspeth** (1885) 54 L. J. Ch. 844; 29 Ch. D. 322; 52 L. T. 741; 33 W. R. 738.—C.A. **COTTON and BOWEN, L.JJ.**

Walter (or Walker) v. James (1885) 53 L. T. 597; 34 W. R. 29.—**NORTH, J., distinguished.**

Bradshaw v. Warlow (1886) 32 Ch. D. 403; 55 L. J. Ch. 852; 54 L. T. 438; 34 W. R. 557.—C.A. **COTTON, LINDLEY and LOPES, L.JJ.**

COTTON, L.J.—In that case the action was entirely dismissed out of Court; here the action is still pending.—p. 405.

Curtis v. Marsh (1858) 28 L. J. Ex. 36; 3 H. & N. 866; 4 Jur. (N.S.) 1112.—EX., *discussed.*

Irwin v. Grey (1865) 34 L. J. C. P. 313; 19 C. B. (N.S.) 585, 604; 11 Jur. (N.S.) 860; 12 L. T. 847; 13 W. R. 1043.—C.P.; affirmed, 35 L. J. C. P. 43; L. R. 1 C. P. 171; 1 H. & R. 25; 12 Jur. (N.S.) 193; 13 L. T. 409; 14 W. R. 208.—EX. CH.; and 36 L. J. C. P. 148; L. R. 2 H. L. 20; 16 L. T. 74; 15 W. R. 593.—H.L. (E.).

Wilmott v. Young (1881) 44 L. T. 331; 29 W. R. 413.—**JESSEL, M.R.**

Discussed, **Fitzwater, In re, Fitzwater v. Waterhouse** (1882) 52 L. J. Ch. 83.—**CHITTY, J.**; *applied*, **Wallis v. Jackson** (1883) 52 L. J. Ch. 384; 23 Ch. D. 204; 31 W. R. 419.—**CHITTY, J.**

Flower v. Gedge (1857) 23 Beav. 449; 5 W. R. 747.—M.R., *not followed.*

Hale v. Lewis (1838) 2 Keen 318.—M.R., *followed.*

Birch v. Williams (1876) 24 W. R. 700.—**MALINS, V.-C.**

Birch v. Williams, followed.

Cockle v. Joyce (No. 2) (1877) 47 L. J. Ch. 543; 37 L. T. 428; 26 W. R. 59.—**FRY, J.**

Garnett v. Bradley (1877) 46 L. J. Ex. 545; 2 Ex. D. 349; 36 L. T. 725; 25 W. R. 653.—C.A.; *reversed*, (1878) 48 L. J. Ex. 186; 3 App. Cas. 944; 39 L. T. 261; 26 W. R. 698.—H.L. (E.).

Garnett v. Bradley, discussed.

Monmouth Corporation v. Monmouth Churchwardens (1878) 38 L. T. 612.—**GROVE and LINDLEY, JJ.**

Garnett v. Bradley.

Referred to, **Bowey v. Bell, Brooks v. Israel, North v. Bilton, Siddons v. Lawrence** (1878) 48 L. J. Q. B. 161; 4 Q. B. D. 95; 39 L. T. 607; 27 W. R. 247.—**MELLOR and MANISTY, JJ.**; **Pellas**

v. Neptune Marine Insurance Co. (1879) 49 L. J. C. P. 153; 5 C. P. D. 34; 42 L. T. 35; 28 W. R. 405.—C.A.; *principle applied*, **Myers v. Defries** (No. 2) (1879) 5 Ex. D. 15; 41 L. T. 659; 28 W. R. 258.—**POLLOCK and HUDDLESTON, BB.** (affirmed, (1880) 49 L. J. Ex. 266; 5 Ex. D. 180; 42 L. T. 137; 28 W. R. 406.—C.A.); *not applied*, **The Ganges** (1880) 5 P. D. 247; 43 L. T. 12; 4 Asp. M. C. 317.—C.A. **JAMES, BAGGALLAY and BRAMWELL, L.JJ.**; *referred to*, **Barton v. Titchmarsh** (1880) 49 L. J. Ex. 573; 49 L. T. 610; 28 W. R. 821.—C.A. **BRAMWELL, BAGGALLAY and BRETT, L.JJ.**; **Brallaugh v. Clarke** (1883) 52 L. J. Q. B. 505; 8 App. Cas. 354, 372; 48 L. T. 681; 31 W. R. 677; 47 J. P. 407.—H.L. (E.). **SELBOENE, L.C., LORDS BLACKBURN, WATSON and FITZGERALD.**

Garnett v. Bradley, applied.

Hasker v. Wood (1885) 54 L. J. Q. B. 419; 33 W. R. 697.—C.A.

BRETT, M.R.—It seems to me that, as said by Lord Blackburn in *Garnett v. Bradley*, it was not intended by the order [Ord. LXV. r. 1] to overrule costs which are given by statute to a particular individual as a matter of right.—p. 419. **BAGGALLAY and BOWEN, L.JJ.** concurred.

Garnett v. Bradley.

Not applied, **Wilson v. M'Mains** (1887) 20 L. R. Ir. 582, 587.—C.A. (reversing Q.B.D.); **Stokes v. Stokes** (1887) 56 L. J. Q. B. 494; 19 Q. B. D. 419; 36 W. R. 28.—C.A. **ESHER, M.R., LINDLEY and LOPES, L.JJ.** (affirming 56 L. T. 712.—**FIELD and MANISTY, JJ.**); *referred to*, **Williams, In re, Jones v. Williams** (1887) 57 L. J. Ch. 264; 36 Ch. D. 573; 57 L. T. 756; 36 W. R. 34.—**NORTH, J.**; **Jones, In re** (1889) 59 L. J. Ch. 157; 61 L. T. 554; 38 W. R. 203.—**KEKEWICH, J.**; **Myers v. Phelan** (1890) 26 L. R. Ir. 218.—C.A.; *discussed*, **Harvey v. Copeland** (1892) 32 L. R. Ir. 419, 424.—C.A.

Garnett v. Bradley, explained.

The Dragoman (1895) 11 Times L. R. 428. **BRUCE, J.**—*Garnett v. Bradley* established that since the orders made under the authority of the Judicature Act, 1875, all the provisions of the earlier Acts which directed costs to follow certain rules, were repealed, and since the decision in *Garnett v. Bradley* the judges of the High Court have exercised general discretion as to costs in cases not tried before a jury, except in cases falling within the provisions of sects. 7, 8 & 10 of the County Courts Act, 1873.—p. 428.

Garnett v. Bradley, referred to.

Quinn v. M'Kinlay (1901) [1902] 2 Ir. R. 315, 325.—K.B.D. *And see* "COSTS," vol. i., col. 721.

Myers v. Defries (1879) 49 L. J. Ex. 266; 5 Ex. D. 180; 42 L. T. 137; 28 W. R. 406.—C.A., *distinguished.*

Collins v. Welch (1879) 49 L. J. C. P. 260; 5 C. P. D. 27; 41 L. T. 785; 28 W. R. 208.—**GROVE and LOPES, JJ.**; affirmed, C.A.

Myers v. Defries, approved.

Stooke v. Taylor (1880) 5 Q. B. D. 569; 49 L. J. Q. B. 857; 43 L. T. 200; 29 W. R. 49; 44 J. P. 748.—Q.B.D.

COCKBURN, C.J.—*Myers v. Defries* was, therefore, in my opinion, rightly decided, where it was held that, where the plaintiff succeeded in his claim, and the defendant on his counterclaim,

the word "event" in Ord. LV. was to be read distributively, and each party was entitled to his costs.—p. 577.

Myers v. Defries (*supra*), explained.

Marsden v. Lancashire and Yorkshire Ry. (1881) 7 Q. B. D. 641; 50 L. J. Q. B. 318; 44 L. T. 239; 29 W. R. 580.—C.A. SELBORNE, L.C., BRAMWELL and BAGGALLAY, L.JJ.

SELBORNE, L.C.—*Myers v. Defries* shows that an alternative power is vested in the Divisional Court, and that it has a jurisdiction to disallow the costs.—p. 643.

Myers v. Defries,

Referred to, **Bradlaugh v. Clarke** (1883) 52 L. J. Q. B. 505; 8 App. Cas. 354; 48 L. T. 681; 31 W. R. 677; 47 J. P. 407.—H.L. (E.); **Huxley v. West London Extension Ry.** (1889) 58 L. J. Q. B. 305; 14 App. Cas. 26, 35; 60 L. T. 642; 37 W. R. 625.—H.L. (E.); *discussed and applied*, **Kennedy v. Healy** (1896) [1897] 2 Ir. R. 258, 264.—EX. D. *See* judgment delivered by PALLES, C.B.

Ashcroft v. Foulkes (1856) 25 L. J. C. P. 202; 18 C. B. 261; 2 Jur. (N.S.) 449; 4 W. R. 457.—C.P., *discussed and not applied*.

Neale v. Clarke (1879) 4 Ex. D. 286; 41 L. T. 438.—KELLY, C.B., and HAWKINS, J.

Ashcroft v. Foulkes and Beard v. Perry

(1862) 31 L. J. Q. B. 180; 2 B. & S. 493; 8 Jur. (N.S.) 914; 6 L. T. 352; 10 W. R. 619.—Q.B., *discussed*.

Neale v. Clarke, referred to.

Stooke v. Taylor (1880) 49 L. J. Q. B. 857; 5 Q. B. D. 569, 575; 43 L. T. 200; 29 W. R. 49; 44 J. P. 748.—COCKBURN, C.J. and MANISTY, J.; FIELD, J. *dissenting*.

Ashcroft v. Foulkes, Beard v. Perry, and Savage v. Lipscombe (1836) 5 D. P. C. 385.

—K.B., *distinguished*.

Quinn v. M'Kinlay (1901) [1902] 2 Ir. R. 315, 327.—K.B.D. *And see* "COSTS," vol. i., col. 737.

Baker v. Oakes (1877) 46 L. J. Q. B. 246; 2

Q. B. D. 171; 35 L. T. 832; 25 W. R. 220.—C.A.

Referred to, **Tyne Alkali Co. v. Lawson** (1877) 36 L. T. 100.—CLEASBY and POLLOCK, BB.; **General Steam Navigation Co. v. London and Edinburgh Shipping Co.** (1877) 47 L. J. Ex. 77; 2 Ex. D. 467, 471; 36 L. T. 748; 25 W. R. 694.—KELLY, C.B. and HUDDLESTON, B.; **Callandar v. Hawkins** (1877) 2 C. P. D. 592; 26 W. R. 212.—COLERIDGE, C.J. and GROVE, J.; *applied*, **Bowey v. Bell** (1878) 48 L. J. Q. B. 161; 4 Q. B. D. 95; 39 L. T. 607; 27 W. R. 247.—Q.B.D.

Baker v. Oakes and General Steam Navigation Co. v. Edinburgh Shipping Co. (*supra*), *discussed*.

Myers v. Defries (1879) 49 L. J. Ex. 266; 4 Ex. D. 180; 42 L. T. 137; 28 W. R. 406.—C.A. *And see* "COSTS," vol. i., col. 725.

Marsden v. Lancashire and Yorkshire Ry.

(1881) 50 L. J. Q. B. 318; 7 Q. B. D. 641; 44 L. T. 239; 29 W. R. 580.—C.A., *discussed*.

Huxley v. West London Extension Ry. (1886) 55 L. J. Q. B. 560; 17 Q. B. D. 373.—COLERIDGE, C.J.; *varied*, (1889) 58 L. J. Q. B. 305; 14 App. Cas. 26; 60 L. T. 642; 37 W. R. 625.—H.L. (E.).

Marsden v. Lancashire and Yorkshire Ry., followed.

Forbes-Smith v. Forbes-Smith (1901) 70 L. J. P. 61; [1901] P. 258; 84 L. T. 789; 50 W. R. 6.—C.A.; reversing JEUNE, P.

Huxley v. West London Extension Ry. (*supra*), *applied*.

Walker v. Wilsher (1889) 58 L. J. Q. B. 501; 23 Q. B. D. 335; 37 W. R. 723; 5 Times L. R. 649.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.; **Bostock v. Ramsey Urban Council** (1900) 69 L. J. Q. B. 945; [1900] 2 Q. B. 616.—C.A. (*post*). *And see* "COSTS," vol. i., col. 725.

Jones v. Curling (1884) 53 L. J. Q. B. 373;

13 Q. B. D. 262; 50 L. T. 349; 32 W. R. 651.—C.A. BRETT, M.R., BOWEN and FRY, L.JJ.

Discussed, **Wilson v. M'Mains** (1887) 20 L. R. Ir. 582, 595.—C.A.; *explained*, **Moore v. Gill** (1888) 4 Times L. R. 738.—C.A.; *referred to*, **Wood v. Cox** (1889) 5 Times L. R. 272.—C.A.; *applied*, **Bostock v. Ramsey Urban Council** [1900] 2 Q. B. 616, 621.—C.A. (*post*). *And see* "COSTS," vol. i., col. 725.

Rooke v. Czarnikow (1888) 4 Times L. R.

669.—C.A., *referred to*. **Moore v. Gill** (1888) 4 Times L. R. 738.—C.A. ESHER, M.R. and BOWEN, L.J.

Harnett v. Vise (1880) 5 Ex. D. 307; 43

L. T. 645; 29 W. R. 7.—C.A. *Referred to*, **Shepherd v. Elliot** (1896) 23 *Bettie* 695.—COURT OF SESSION; *discussed and applied*, **Bostock v. Ramsey Urban Council** (1900) 69 L. J. Q. B. 945; [1900] 2 Q. B. 616; 83 L. T. 358; 64 J. P. 660.—C.A. (affirming 48 W. R. 254.—RUSSELL OF KILLOWEN, C.J.).

Budow v. Great Britain Mutual Life Assurance Society (1881) 50 L. J. Ch. 777; 17

Ch. D. 600; 44 L. T. 688; 29 W. R. 585.—C.A., *approved but not applied*.

Blenkinsopp v. Blenkinsopp (1850) 19 L. J. Ch. 425; 12 Beav. 568.—M.R.; and **Att-Gen. v. Chester Corporation** (1851) 11 Beav. 338.—M.R., *referred to*.

Sanderson v. Blyth Theatre Co. (1903) 72 L. J. K. B. 761; [1903] 2 K. B. 533, 542; 89 L. T. 159; 52 W. R. 33.—C.A.

Emery v. Binns (1850) 7 Moore P. C. 195.—

P.C., *principle approved and applied*. **Waylett v. Wyndham** (1864) 33 L. J. Ex. 172; 2 H. & C. 982; 9 L. T. 725.—EX., *referred to*.

The Young James (1869) 39 L. J. Adm. 1; L. R. 3 A. & E. 1; 21 L. T. 397; 18 W. R. 52.—SIR R. PHILLIMORE.

Emery v. Binns, distinguished.

Quinn v. M'Kinlay (1901) [1902] 2 Ir. R. 315, 320.—K.B.D.

Fewster v. Boggett (1841) 11 L. J. Ex. 8;

9 M. & W. 20.—EX., *referred to*. **Myers v. Phelan** (1890) 26 L. R. Ir. 218.—C.A. PORTER, M.R. and BARRY, L.J. *dissenting*.

Fewster v. Boggett, discussed and applied.

Quinn v. M'Kinlay (1901) [1902] 2 Ir. R. 315, 323.—K.B.D.

- Wilson v. Foote**, Buller's Nisi Prius, 7th ed., p. 335 C.; **S. C. nom. Wilson v. Foote**, Chitty's Archbold's Pract., 12th ed., vol. i., p. 498, *commented on*.
- Stumm (or Shumm) v. Dixon** (1889) 58 L. J. Q. B. 183; 22 Q. B. D. 529; 60 L. T. 560; 37 W. R. 456; 53 J. P. 500.—C.A. **ESHER, M.R.**; **FRY, L.J. dissenting**.
- Stumm (or Shumm) v. Dixon**, *referred to*.
- Kelly's Directories, Ltd. v. Gavin and Lloyd's** (1901) 70 L. J. Ch. 786; [1901] 2 Ch. 763; 85 L. T. 399.—**BYRNE, J.**
- Kelly's Directories, Ltd. v. Gavin and Lloyd's**, *referred to*.
- M'Gowan v. Hamilton** [1903] 2 Ir. R. 311, 316.—**K.B.D.**
- Sparrow v. Hill** (1881) 50 L. J. Q. B. 675; 8 Q. B. D. 479; 44 L. T. 917; 29 W. R. 705.—C.A., *distinguished*.
- Harley v. Hunt, W. N.** (1887) 184.—C.A.
- Sparrow v. Hill and Harley v. Hunt**, *discussed and applied*.
- Jenkins v. Jackson** (1890) 60 L. J. Ch. 206; [1891] 1 Ch. 89; 63 L. T. 688; 39 W. R. 242.—**KEKEWICH, J.** and C.A. **LINDLEY, BOWEN and FRY, L.JJ.** *See judgments*.
- Sparrow v. Hill, Harley v. Hunt and Jenkins v. Jackson**, *discussed and not applied*.
- Kennedy v. Healy** (1896) [1897] 2 Ir. R. 258, 264.—**EX. D.**; affirmed, C.A.
- Sparrow v. Hill**, *explained*.
- Craig v. Boyd** (1900) [1901] 2 Ir. R. 645.—**ANDREWS, J.** *And see "Costs,"* vol. i., col. 729.
- Abbott v. Andrews** (1882) 51 L. J. Q. B. 641; 8 Q. B. D. 648; 30 W. R. 779.—**COLERIDGE, C.J.** and **GROVE, J.**, *explained*.
- Kennedy v. Healy** (1896) [1897] 2 Ir. R. 258, 269.—**EX. D.**; affirmed, C.A.
- Forster v. Farquhar** (1893) 62 L. J. Q. B. 296; [1893] 1 Q. B. 564; 4 R. 346; 68 L. T. 308; 41 W. R. 425.—C.A., *referred to*.
- Kennedy v. Healy** (1896) [1897] 2 Ir. R. 258.—C.A.; **Forrest v. Carte** (1896) [1897] 2 Ir. R. 314.—**Q.B.D.**
- Forster v. Farquhar**, *referred to*.
- Dunn v. S. E. & Chatham Ry.** [1903] 1 K. B. 358; 72 L. J. K. B. 127; 88 L. T. 60; 51 W. R. 27.—**ALVERSTONE, C.J.**, **WILLS** and **CHANNELL, JJ.**
- CHANNELL, J.**—**Forster v. Farquhar** shows that, in order to give the Court discretion over particular items of proof, it is not necessary that those items should create separate issues in the pleader's sense.—p. 361.
- Harrop v. Ossett Corporation** (1898) 67 L. J. Ch. 347; [1898] 1 Ch. 525; 78 L. T. 387; 46 W. R. 391; 62 J. P. 297.—**ROMER, J.**, *followed*.
- Fielden v. Morley Corporation** (1898) 67 L. J. Ch. 611; [1899] 1 Ch. 1.—**BYRNE, J.**; affirmed, C.A. and **H.L.** (*post*, col. 2408).
- Shaw v. Hertfordshire County Council** (1899) 68 L. J. Q. B. 857; [1899] 2 Q. B. 282; 81 L. T. 208; 63 J. P. 659.—C.A., *referred to*.
- Bostock v. Ramsey Urban Council** (1900) 69 L. J. Q. B. 945; [1900] 2 Q. B. 616; 83 L. T. 358; 64 J. P. 660.—C.A. **A. L. SMITH, V. WILLIAMS and ROMER, L.JJ.**; affirming 48 W. R. 254.—**RUSSELL, C.J.**
- Shaw v. Hertfordshire County Council and Bostock v. Ramsey Urban Council**, *referred to*.
- Smith v. Northleach Rural Council** (1901) 71 L. J. Ch. 8; [1902] 1 Ch. 197; 85 L. T. 449; 50 W. R. 104; 66 J. P. 88.
- FARWELL, J.**—It is clear that Clause (b) [Public Authorities Protection Act, 1893, s. 1] points only to a case in which the proceedings culminate in a judgment. Upon that clause it was held in **Shaw v. Hertfordshire County Council** that an order by consent giving leave to enter up judgment is to be regarded as a judgment. And it has also been held that, although the discretion of the Court to deprive a successful litigant of his costs is not fettered in any way—see **Bostock v. Ramsey Urban Council**—yet that where the Court does not see fit to exercise that discretion, the public body is entitled as of right to costs as between solicitor and client—**Fielden v. Morley Corporation** (*post*).—p. 9.
- Fielden v. Morley Corporation** (1898) 67 L. J. Ch. 611; [1899] 1 Ch. 1; 79 L. T. 231; 47 W. R. 295.—C.A. **LINDLEY, M.R.**, **CHITTY** and **COLLINS, L.JJ.**; affirmed, (1900) 69 L. J. Ch. 314; [1900] A. C. 133; 82 L. T. 29; 48 W. R. 545; 64 J. P. 484.—**H.L. (E.)**.
- Fielden v. Morley Corporation**, *referred to*.
- Smith v. Northleach Rural Council** (1901) 71 L. J. Ch. 8; [1902] 1 Ch. 197. *See supra*.
- Smith v. Harnor** (1858) 3 C. B. (N.S.) 829.—C.P., *applied*.
- Blackmore v. Higgs** (1864) 33 L. J. C. P. 157; 15 C. B. (N.S.) 790; 10 Jur. (N.S.) 703; 10 L. T. 33; 12 W. R. 476.—C.P.
- Smith v. Harnor**, *applied*.
- Myers v. Phelan** (*post*).
- Blackmore v. Higgs**, *discussed*.
- Walsh v. Walsh** (1866) 17 Ir. C. L. R. 195.—**EX.**
- Blackmore v. Higgs and Walsh v. Walsh**, *discussed*.
- Arkins v. Armstrong** (1869) Ir. R. 3 C. L. 373.—**EX.**
- Blackmore v. Higgs**, *applied*.
- Arkins v. Armstrong**, *overruled*.
- Walsh v. Walsh**, *discussed*.
- Myers v. Phelan** (1890) 26 L. R. Ir. 218.—C.A. **ASHBOURNE, L.C.**, **O'BRIEN, C.J.** and **FITZGIBBON, L.J.**; **PORTER, M.R.** and **BARRY, L.J.** *dissenting*.
- Att.-Gen. v. Nethercote** (1841) 10 L. J. Ch. 162; 11 Sim. 529.—**V.-C.**, *referred to*.
- Marsden's Estate, In re, Withington v. Neumann** (1889) 58 L. J. Ch. 260; 40 Ch. D. 475, 479; 60 L. T. 696; 37 W. R. 525.—**CHITTY, J.**; **Taylor v. Roe** (1893) 63 L. J. Ch. 282; [1894] 1 Ch. 413, 417; 8 R. 295; 70 L. T. 232; 42 W. R. 426.—**STIRLING, J.** *See judgment at length*.
- Paddock v. Forrester** (1842) 3 Scott (N.R.) 715; 3 Man. & G. 903.—C.P., *not followed*.
- Williams v. Thomas** (1862) 2 Dr. & Sm. 29; 31 L. J. Ch. 674; 8 Jur. (N.S.) 250; 7 L. T. 184; 10 W. R. 417.—**KINDERSLEY, V.-C.** *And see post* col. 2409.

Paddock v. Forrester (*supra*), *approved*.
Williams v. Thomas (*supra*), *commented on*.
Walker v. Wilsher (1889) 58 L. J. Q. B. 501; 23 Q. B. D. 337, 338; 37 W. R. 723; 5 Times L. R. 649.—C.A. **ESHER, M.R., LINDLEY** and **BOWEN, L.JJ.**; reversing **HUDDLESTON, B.**

Walker v. Wilsher, *observations of* **LINDLEY, L.J., applied**.

Clark v. Taylor [1898] 2 Ir. R. 586, 591.—**MEREDITH, J.**; affirmed, C.A. **FITZGIBBON, WALKER** and **HOLMES, L.JJ.**

Cleave v. Jones (1852) 21 L. J. Ex. 105; 7 Ex. 421.—EX.; **Froude v. Hobbs** (1859) 1 F. & F. 612.—**BYLES, J.**; and **Boyle v. Wiseman** (1855) 24 L. J. Ex. 284; 11 Ex. 360; 3 W. R. 577.—EX., *applied*.

Daintrey, In re, Holt, Ex parte (1893) 62 L. J. Q. B. 511; [1893] 2 Q. B. 116; 5 R. 414; 69 L. T. 257; 41 W. R. 590; 10 Morrell 158.—**V. WILLIAMS** and **BRUCE, JJ.**

18. NEW TRIAL.

Wilson v. Rastall (1792) 4 Term Rep. 753; 2 R. L. 515.—K.B., *referred to*.
Biggs v. Head (1837) Sau. & Sc. 335.—M.B. (IR.); **Pearce v. Foster** (1885) 54 L. J. Q. B. 432; 15 Q. B. D. 114, 121; 52 L. T. 886; 33 W. R. 919; 50 J. P. 4.—C.A.

Brown v. Ray (1824) 9 Moore 583; 3 L. J. (O.S.) C. P. 2.—C.P., *commented on*.
Parry v. Duncan (1831) 7 Bing. 243; 5 M. & P. 19; M. & M. 533; 9 L. J. (O.S.) C. P. 83; 33 R. R. 459.—C.P., *referred to*.
Edgson v. Cardwell (1873) L. R. 8 C. P. 647; 28 L. T. 819.

BOVILL, C.J.—*Brown v. Ray* is not a very satisfactory decision; and the point hardly arose in *Parry v. Duncan*. . . . The rule as laid down in *Lush's Practice*, 3rd ed., p. 636, is as follows:—"A rule nisi for a new trial," on the ground that the verdict is contrary to the weight of evidence, "will not be granted for either party, when the sum given or recoverable is under 20*l.*, and the action is for damages only, and does not involve any other question of right." *Replevin* is not within the rule.—p. 648.

Calcraft v. Gibbs (1792) 5 Term Rep. 19.—K.B., *referred to*.
Sowerby v. Smith (1874) 43 L. J. C. P. 290; L. R. 9 C. P. 524, 544; 31 L. T. 309; 23 W. R. 79.—EX. CH.

Davis v. Godbehere (1879) 48 L. J. Ex. 410; 4 Ex. D. 215; 40 L. T. 358; 27 W. R. 485.—C.A., *applied*.

Swansea Co-operative Building Society v. Davies (1883) 53 L. J. Q. B. 64; 12 Q. B. D. 21; 49 L. T. 603; 32 W. R. 185.—**DAY** and **A. L. SMITH, JJ.**

Swansea Co-operative Building Society v. Davies and Mathews v. Ovey (1884) 53 L. J. Q. B. 439; 13 Q. B. D. 403; 50 L. T. 776.—C.A., *applied*.

Prichard v. Prichard (or Pritchard v. Pritchard) (1884) 54 L. J. Q. B. 30; 14 Q. B. D. 55; 51 L. T. 859; 33 W. R. 198.—Q.B.D.

Foulkes v. Chadd (1782) 3 Dougl. 157.—K.B., *discussed and approved*.

Metropolitan Asylum District v. Hill (1882) 47 L. T. 29; 47 J. P. 148.—H.L. (E.)

McGrath v. Bourne (1876) Ir. R. 10 C. L. 160.—EX.

Applied, **Reilly v. Thompson** (1877) Ir. R. 11 C. L. 238.—EX.; *approved*, **Præd v. Graham** (1889) 59 L. J. Q. B. 230; 24 Q. B. D. 53; 38 W. R. 103.—C.A.

Præd v. Graham, *discussed*.
Harris v. Arnott (1889-1890) 26 L. R. Ir. 55.—EX. D.; affirmed, C.A.

Præd v. Graham and Harris v. Arnott, *considered*.

McCarthy v. Maguire [1899] 2 Ir. R. 802.—Q.B.D.; affirmed, C.A., *referred to*.

M'Inerney v. "Clareman," Printing and Publishing Co. (1902-1903) [1903] 2 Ir. R. 347, 366.—K.B.D.; affirmed, C.A.

Præd v. Graham, *principle applied*.
Johnston v. G. W. Ry. (1904) 73 L. J. K. B. 568; [1904] 2 K. B. 250; 91 L. T. 157; 52 W. R. 612; 20 T. L. R. 455.—C.A.

Smith v. Woodfine (1857) 1 C. B. (N.S.) 600.—C.P., *explained and applied*.

Berry v. Da Costa (1866) 35 L. J. C. P. 191; L. R. 1 C. P. 331; 1 H. & R. 291; 12 Jur. (N.S.) 588; 14 W. R. 279.—C.P.

WILLES, J.—In *Smith v. Woodfine*, in which large damages were also given, it was laid down by this Court that it would not interfere with the discretion of the jury as to the amount unless there has been some obvious error or misconception on the part of the jury, or that they have been actuated by undue motives.—p. 192.

Smith v. Woodfine, *referred to*.
Finlay v. Chirney (1888) 57 L. J. Q. B. 247; 20 Q. B. D. 494; 53 L. T. 664; 36 W. R. 534; 52 J. P. 324.—C.A. *See judgment of BOWEN, L.J.*

Berry v. Da Costa (*supra*), *approved*.
Millington v. Loring (1880) 6 Q. B. D. 190; 50 L. J. Q. B. 214; 43 L. T. 657; 29 W. R. 207.—C.A.

SELBORNE, L.C.—Now on the trial of an action for breach of promise of marriage the plaintiff is entitled to give evidence of the fact of seduction by the defendant. For that *Berry v. Da Costa* is an authority, and with the case I entirely agree.—p. 194.

BAGGALLAY and **BRETT, L.JJ.** to the same effect.

Rendall v. Hayward (1839) 8 L. J. C. P. 243; 5 Bing. (N.C.) 424; 7 Scott 407; 2 Arn. 14; 3 Jur. 363.—C.P.; and **Gibbs v. Tunaley** (1845) 1 C. B. 640.—C.P., *applied*.

Kelly v. Sherlock (1866) 35 L. J. Q. B. 209; L. R. 1 Q. B. 686; 6 B. & S. 480; 12 Jur. (N.S.) 937.—Q.B.; **SHEE, J.** *dissenting*.

Rendall v. Hayward, *applied*.
Forsdike v. Stone (1868) 37 L. J. C. P. 301; L. R. 3 C. P. 607; 18 L. T. 722; 16 W. R. 976.—**WILLES** and **BYLES, JJ.**

Rendall v. Hayward, *discussed*.
Kelly v. Sherlock, *principles approved and applied*.

Falvey v. Stanford (1874) 44 L. J. Q. B. 7; L. R. 10 Q. B. 54; 31 L. T. 677; 23 W. R. 162.—Q.B.

QUAIN, J. (for self and **ARCHIBALD, J.**).—The principles by which we think the Court should

be governed in granting or refusing a new trial in actions of tort, on the ground of insufficiency of damages are not fully explained in the case referred to [*Rendall v. Hayward*], but are, as we conceive, correctly stated by Blackburn, J. in his judgment in *Kelly v. Sherlock*, namely, that there is no inexorable rule of practice precluding the granting a new trial on account of smallness of damages, but that where the smallness of the damages shows that the jury have made a compromise, and instead of deciding the issue submitted to them of guilty or not guilty, have agreed to find for the plaintiff for nominal damages only, a new trial will be granted, such a case being in effect as if the jury had been discharged without a verdict.—p. 8.

Forsdike v. Stone (*supra*), referred to.

Tyne Alkali Co. v. Lawson (1877) 36 L. T. 100.—CLEASBY and POLLOCK, BB.

Rendall v. Hayward (*supra*) and **Forsdike v. Stone**, distinguished.

Rowley v. L. & N.W. Ry. (1873) 42 L. J. Ex. 153; L. R. 8 Ex. 221; 29 L. T. 180; 21 W. R. 869.—EX. CH., dictum followed and explained.

Phillips v. L. & S. W. Ry. (1879) 4 Q. B. D. 406; 40 L. T. 813; 27 W. R. 797.—Q.B.D.: affirmed, 49 L. J. Q. B. 233; 5 Q. B. D. 78; 41 L. T. 121; 28 W. R. 10.—C.A.

COCKBURN, C.J. (for self and LOPES, J.).—Generally speaking, we agree with the rule as laid down by Brett, J. in *Rowley v. L. & N.W. Ry.*, an action brought on the 9 and 10 Vict. 93, that a jury in these cases "must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case and give what they consider under all the circumstances a fair compensation." . . . But we think that a jury cannot be said to take a reasonable view of the case unless they consider and take into account all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life. . . . It was contended, on behalf of the defendants, that even assuming the damages to be inadequate, the Court ought not on that account to set aside the verdict and direct a new trial, inadequacy of damages not being a sufficient ground for granting a new trial in an action of tort, unless there has been misdirection or misconduct in the jury, or miscalculation, in support of which *Rendall v. Hayward* and *Forsdike v. Stone* were relied on. But in both those cases the action was for slander, in which, as was observed by the judges in the latter case, the jury may consider, not only what the plaintiff ought to receive, but what the defendant ought to pay. We think the rule contended for has no application in a case of personal injury, and that it is perfectly competent to us if we think the damages unreasonably

small to order a new trial at the instance of the plaintiff. There can be no doubt of the power of the Court to grant a new trial where in such an action the damages are excessive. There can be no reason why the same principle should not apply when they are insufficient to meet the justice of the case.—p. 408.

Rowley v. L. & N. W. Ry., applied.

Phillips v. L. & S. W. Ry. (1879) 49 L. J. C. P. 233; L. R. 5 C. P. 280; 42 L. T. 6; 44 J. P. 217.—C.A. See judgment of BRETT, L.J.

And see *Lambkin v. S. E. Ry.* (1880) 5 App. Cas. 352; 28 W. R. 837.—P.C.: and *Belt v. Lawes* (1884) 53 L. J. Q. B. 249; 12 Q. R. D. 356; 50 L. T. 441; 32 W. R. 607.—C.A.

Phillips v. L. & S. W. Ry. (*supra*, col. 2411), principle applied.

Johnston v. G. W. Ry. (1904) 73 L. J. Ch. 568; [1904] 2 K. B. 250; 91 L. T. 157; 52 W. R. 612; 20 T. L. R. 455.—C.A.

Broadhead v. Marshall (1774) 2 W. Bl. 955.—C.P., distinguished.

Anderson v. Titmas (1877) 36 L. T. 711.—CLEASBY and HUDDLESTON, BB.

Anderson v. Titmas, followed.

Taylor v. Taylor and Day (1899) 68 L. J. P. 116; 81 L. T. 494.—BARNES and BUCKNILL, JJ.; **Young v. Kershaw** (1899) 81 L. T. 531.—C.A.

Dixon v. Graham (1817) 5 Dow, 267.—H.L. (IR.), referred to.

Browne v. McClintock (1873) L. R. 6 H. L. 456, 469; 22 W. R. 521.—H.L. (IR.).

Shields v. Boucher (1847) 1 De G. & Sm. 40.—KNIGHT BRUCE, V.-C., discussed.

Haines v. Guthrie (1884) 53 L. J. Q. B. 521; 13 Q. B. D. 818; 51 L. T. 645; 33 W. R. 99; 48 J. P. 756.—STEPHEN and MATHEW, JJ.; affirmed, C.A. BRETT, M.R., BOWEN and FRY, L.JJ.

Haines v. Guthrie, referred to.

Turner, in re, Glenister v. Harding (1885) 29 Ch. D. 985; 53 L. T. 528.—CHITTY, J.

Stones v. Byron (1846) 16 L. J. Q. B. 32; 1 B. C. Rep. 248; 11 Jur. 44; 4 D. & L. 303.—PATTESON, J., commented on.

Cobbett v. Hudson (1852) 22 L. J. Q. B. 11; 1 El. & Bl. 11; 17 Jur. 488; 1 W. R. 54.

LORD CAMPBELL, C.J. (for the Court).—In *Stones v. Byron*, upon a trial before the sheriff, an attorney having addressed the jury as advocate for the plaintiff, and then been examined as a witness for him, Patteson, J. observed, "I must say that I do not think that such a course of proceeding is proper or consistent with the due administration of justice. It seems to me that this evidence ought not to have been received, and that having been received, there ought to be a new trial." But there the evidence had been received after the defendant's case was closed, and after the plaintiff's advocate had replied; and this irregularity, testifying that the undersheriff who presided was unduly influenced, appears to have been a ground of the decision.—p. 13.

Hayes v. Warren (1732) 2 Strange, 933.—EX. CH., disapproved.

Pillans v. Van Mierop (1765) 3 Burr. 1663.—WILMOT, J.

Chambers v. Robinson (1726) 2 Strange, 691.

—K.B., *disapproved*.

Beardmore v. Carrington (1764) 2 Wils. 244.

—C.P.

THE COURT.—We are now come to *Chambers v. Robinson*, which seems to be the only case wherever a new trial was granted merely for the excessiveness of damages only: we are not satisfied with the reason given in that case, and think it of no weight, and want to know the facts upon which the Court could pronounce the damages to be excessive; the principle on which it was granted, mentioned in *Strange*, was to give the defendant a chance of another jury; this is a very bad reason, for if it was not it would be a reason for a third and fourth trial, and would be digging up the constitution by the roots, and therefore we are free to say this case is not law; and that there is not one single case (that is law), in all the books to be found, where the Court has granted a new trial for excessive damages in actions for torts.—p. 249.

Horford v. Wilson (1807) 1 Taunt. 12.—C.P., *dictum corrected*.

Hobson v. Midland Gt. W. Ry. (1877) Ir. R. 11 C. L. 109.—EX. DOWSE, B. *dissenting*.

Tyrwhitt v. Wynne (1819) 2 B. & Ald. 554; 21 R. R. 398.—K.B., *referred to*.

Crease v. Barrett (1835) 4 L. J. Ex. 297; 1 C. M. & R. 919, 932 (*see post*).

Doe d. Teynham (Lord) v. Tyler (1830) 6 Bing. 561; 4 M. & P. 377; 8 L. J. (O.S.) C. P. 222; 31 R. R. 496.—C.P., *questioned*.
Crease v. Barrett (1835) 1 C. M. & R. 919; 4 L. J. Ex. 297; 5 Tyr. 458; 40 R. R. 779.—EX.

PARKE, B. (for the Court).—The authority of *Doe d. Teynham (Lord) v. Tyler* was quoted to show that the Court have a power to refuse a new trial where evidence has been improperly rejected, if in their judgment the rejected evidence ought to have no effect, and there is enough to warrant the verdict against the party on whose behalf that evidence was offered, supposing it to have been admitted. Something to the same effect had fallen from Sir J. Mansfield in 1 Taunt. 14, and from Lord Tenterden in *Tyrwhitt v. Wynne* (2 B. & Ald. 559, *supra*). But we cannot help thinking that the rule is there laid down much too generally, and it is obvious that if it were acted upon to that extent, the Court would in a degree assume the province of the jury, and besides its frequent application would cause the rules of evidence to be less carefully considered; and the litigant parties would in all probability have on most occasions recourse to bills of exceptions for the rejection or reception of improper evidence, a course productive of great delay and inconvenience.—p. 932.

Doe d. Teynham (Lord) v. Tyler, *held over-ruled*.

Crease v. Barrett, *applied*.

Hobson v. Midland Gt. W. Ry. (1877) Ir. R. 11 C. L. 109.—EX.; DOWSE, B. *dissenting*.

Crease v. Barrett.

Referred to, *Mors-le-Blanch v. Wilson* (1873) 42 L. J. C. P. 70; L. R. 8 C. P. 227, 238; 21 W. R. 109.—C.P.; *principle applied*, *Carmarthen & Cardigan Ry. v. Manchester & Milford Ry.* (1873) L. R. 8 C. P. 685, 690; 42 L. J. C. P. 262.—C.P.; BOVILL, C.J. *dissenting*.

Penn v. Bibby (1866) 36 L. J. Ch. 455; L. R. 2 Ch. 127; 15 L. T. 399; 15 W. R. 208.—L.C., *referred to*.

Ball v. Ray (1873) 30 L. T. 1; 22 W. R. 283.—C.A.

Campbell v. Loader (1865) 34 L. J. Ex. 50; 3 H. & C. 520; 11 Jur. (N.S.) 286; 11 L. T. 608; 13 W. R. 348.—EX., *referred to*.
Hudson (or Hodson) v. Walker (1872) 41 L. J. Ex. 51; L. R. 7 Ex. 55; 25 L. T. 937; 20 W. R. 489.—EX.

Black v. Jones (1851) 20 L. J. Ex. 152; 6 Ex. 213.—EX., *discussed*.

Beaufort (Duke) v. Crawshaw (1866) 35 L. J. C. P. 342; L. R. 1 C. P. 699; 1 H. & R. 638; 12 Jur. (N.S.) 709; 14 L. T. 729; 14 W. R. 989.—C.P.

Parmiter v. Coupland (1840) 9 L. J. Ex. 202; 6 M. & W. 105; 4 Jur. 701.—EX., *referred to*.

Cox v. Lee (1869) 38 L. J. Ex. 219; L. R. 4 Ex. 284, 290; 21 L. T. 178.—EX.; *Harwood v. Harrison* (1872) 41 L. J. C. P. 206; L. R. 7 C. P. 606, 628; 26 L. T. 938; 20 W. R. 1000.—C.P.; GROVE, J. *dissenting*.

• **Parmiter v. Coupland and Fisher v. Clement** (1830) 10 B. & C. 472; 5 Man. & R. 730; 8 L. J. (O.S.) K. B. 176; 34 R. R. 542.—K.B., *discussed*.

Capital and Counties Bank v. Henty (1882) 52 L. J. Q. B. 232; 7 App. Cas. 741, 762; 47 L. T. 662; 31 W. R. 157; 47 J. P. 214.—H.L. (E.).

Parmiter v. Coupland and Fisher v. Clement, *referred to*.

Broome v. Gosden (1845) 1 C. B. 728.—C.P., *applied*.

O'Brien v. Salisbury (Marquis) (1889) 6 Times L. R. 133.—FIELD and MANISTY, JJ.

• **Parmiter v. Coupland and O'Brien v. Salisbury (Marquis)**, *discussed*.

Broome v. Gosden, *referred to*.

McInerney v. "Clareman" Printing and Publishing Co. (1902-3) [1903] 2 Ir. R. 347, 370, 399.—K.B.D. and C.A.

Ford v. Lacey (or Lacy) (1861) 30 L. J. Ex. 351; 7 H. & N. 151; 7 Jur. (N.S.) 684.—EX.

Rule adopted, *G. W. Ry. of Canada v. Braid* (1863) 1 Moore P. C. (N.S.) 101; 1 N. R. 527; 9 Jur. (N.S.) 339; 8 L. T. 31; 11 W. R. 444.—P.C.; *referred to*, *Foster v. Wright* (1878) 49 L. J. C. P. 97; 4 C. P. D. 438, 447; 44 J. P. 7.—C.P.D.

Martin v. G. N. Ry. (1855) 24 L. J. C. P. 209; 16 C. B. 179; 3 C. L. R. 817; 1 Jur. (N.S.) 613; 3 W. R. 477.—C.P., *distinguished*.

Foundation v. Keatinge (1874) Ir. R. 9 C. L. 278.—EX.

• **Martin v. G. N. Ry.**, *approved*.

Browne v. Dunn (1894) 6 R. 67.—H.L. (E.), *affirming C.A.*

LORD HALSBURY.—*Martin v. G. N. Ry.* . . . lays down what appears to me to be a very wholesome and sensible rule, namely, that you cannot take advantage afterwards of what was

open to you in the pleadings, and what was open to you upon the evidence, if you have deliberately elected to fight another question, and have fought it, and have been beaten upon it.—p. 76.

Martin v. G. N. Ry., *referred to.*

Hanna v. Pollock [1898] 2 Ir. R. 532.—Q.B.D.: affirmed, (1899) [1900] 2 Ir. R. 664.—C.A.

Foundation v. Keatinge (1874) Ir. R. 9 C. L. 278.—EX., *referred to.*

Hamilton v. Long (1902) [1903] 2 Ir. R. 407, 413.—K.B.D.

Solomon v. Bitton (1881) 8 Q. B. D. 176.—C.A., *observed on.*

Metropolitan Ry. v. Wright (1886) 11 App. Cas. 152; 55 L. J. Q. B. 401; 54 L. T. 658; 34 W. R. 746.—H.L. (E.); affirming (1885), C.A., which reversed *COLERIDGE, C.J.* and *STEPHEN, J.* **LORD HALSBURY.**—Now I think that the principle laid down in *Solomon v. Bitton* is erroneous, as reported, in the use of the word "ought." If a Court—not a Court of Appeal in which the facts are open for original judgment, but a Court which is not a Court to review facts at all—can grant a new trial whenever it thinks that reasonable men ought to have found another verdict, it seems to me that they must form and act upon their own view of what the evidence in their judgment proves. That, I think, is not the law. If reasonable men *might* find (not "ought to" as was said in *Solomon v. Bitton*) the verdict which has been found, I think no Court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges. My noble and learned friend on the woolsack [*Herschell, L.C.*, who had said that the verdict ought not to be disturbed unless it was one which a jury, viewing the whole of the evidence reasonably, could not properly find] has put the proposition in a form which is not open to objection, but which perhaps leaves open for definition in what sense the word "properly" is to be used. I think the test of reasonableness, in considering the verdict of a jury, is right enough, in order to understand whether the jury have really done their duty. If their finding is absolutely unreasonable, a Court may consider that that shows that they have not really performed the judicial duty cast upon them; but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal. If the word "might" were substituted for "ought" in *Solomon v. Bitton*, I think the principle would be accurately stated.—p. 155.

Solomon v. Bitton, *report corrected.*

Metropolitan Ry. v. Wright, *referred to.*

Webster v. Friedberg (1886) 55 L. J. Q. B. 403; 17 Q. B. D. 736; 55 L. T. 49; 34 W. R. 728; 2 Times L. R. 702.—C.A.

ESHER, M.R.—As to *Solomon v. Bitton*, I took part in the judgment according to the report. There may be some doubt as to the meaning of what was said, but, as Fry, L.J. has informed us, the late M.R. desired the word "not" to be inserted in the opinion attributed to the Court after the words "reasonable men ought." If that is done, the opinion then stated is the same as that of every one else. For the future we shall read this case as if the word "not" were so inserted. We said the same in *Metropolitan*

O.C.

Ry. Co. v. Wright, and the H. L. agreed with us.—p. 404. FRY, L.J. concurred.

Solomon v. Bitton, *commented on.*

Metropolitan Ry. v. Wright, *referred to.*

Harris v. Arnott (1890) 26 L. R. Ir. 55.—C.A. **O'BRIEN, C.J.**—It is said that *Solomon v. Bitton* has laid down that the Court in Banco should pay no regard to the opinion of the judge who tried the case. *Solomon v. Bitton*, if well decided in any respect—and the main proposition enunciated by that case was dissented from by Lord Halsbury in *Metropolitan Ry. Co. v. Wright*—did not, in my opinion, decide any such proposition as that the Court in Banco should, in coming to a conclusion as to whether a verdict should be set aside on the ground that it was against the weight of evidence, or on the ground that the damages were excessive, leave altogether out of consideration the opinion of the judge who tried the case.—p. 71.

Solomon v. Bitton, *referred to.*

M'Inerney v. "Clareman" Printing, &c., Co. [1903] 2 Ir. R. 347, 379 (*post*).

Metropolitan Ry. v. Wright, *applied.*

Phillips v. Martin (1890) 15 App. Cas. 193.—P.C.

LORD MACNAGHTEN (for the Court).—The appellant contends that the verdict was against the evidence, or against the weight of the evidence. It is settled that a verdict ought not to be disturbed on that ground unless, to use the words of Lord Herschell in *Metropolitan Ry. v. Wright*, "it was one which a jury, viewing the whole of the evidence reasonably, could not properly find."—p. 194.

Metropolitan Ry. v. Wright.

Applied, *Allcock v. Hall* (1891) 60 L. J. Q. B. 416; [1891] 1 Q. B. 444; 64 L. T. 309; 39 W. R. 448.—C.A.; *referred to*, *Seaton v. Sheridan* (1896) 12 Times L. R. 285.—C.A.; *Jones v. Spencer* (1897) 14 Times L. R. 41.—H.L. (E.); (reversing 13 Times L. R. 174.—C.A. **LOPES, L.J.** *dissenting*); *M'Inerney v. "Clareman" Printing, &c., Co.* [1903] 2 Ir. R. 347, 366 (*post*).

Webster v. Friedberg (1886) 55 L. J. Q. B.

403; 17 Q. B. D. 736; 55 L. T. 49; 34 W. R. 728; 2 Times L. R. 702.—C.A., *referred to.*

M'Inerney v. "Clareman" Printing, &c., Co. [1903] 2 Ir. R. 347, 379 (*post*).

Phillips v. Martin (*supra*), *applied.*

Jones v. Spencer (*supra*), *considered.*

M'Inerney v. "Clareman" Printing, &c., Co. [1903] 2 Ir. R. 347, 368 (*post*).

Brisbane Council v. Martin [1894] A. C.

249.—P.C.; and *Australian Newspaper Co. v. Bennett* (1894) 63 L. J. P. C. 105; [1894] A. C. 284; 6 R. 484; 70 L. T. 597; 58 J. P. 604.—P.C., *referred to.*

M'Inerney v. "Clareman" Printing and Publishing Co. (1902-3) [1903] 2 Ir. R. 347, 366, 400.—K.B.D.; affirmed, C.A.

Commissioners for Railways v. Brown

(1887) 57 L. J. P. C. 72; 13 App. Cas. 133; 57 L. T. 895.—P.C., *referred to.*

Aitken v. McMeekan [1895] A. C. 310.

—P.C., *discussed.*

M'Inerney v. "Clareman" Printing and Publishing Co. [1903] 2 Ir. R. 347, 368 (*supra*).

Brown v. Commissioners for Railways (1890) 59 L. J. P. C. 62; 15 App. Cas. 240; 62 L.T. 469.—P.C., *rule applied*.
Alcock v. Hall (1891) 60 L. J. Q. B. 416; [1891] 1 Q. B. 444; 64 L. T. 309; 39 W. R. 443.—C.A. *And see M'Inerney v. "Clareman" Printing, &c., Co. (supra, col. 2416).*

Chilvers v. Greaves (1843) 6 Scott (N. R.) 539; 5 Man. & G. 578.—C.P., *discussed*.
Quinlane v. Murnane (1885) 18 L. R. Ir. 53.—C.A.

Quinlane v. Murnane, *referred to*.
M'Inerney v. "Clareman" Printing, &c., Co. [1903] 2 Ir. R. 347, 369 (*supra*).

Bentley v. Fleming (1845) 14 L. J. C. P. 174; 1 C. B. 479; 3 D. & L. 23; 9 Jur. 402.—C.P., *referred to*.

Norburn v. Hilliam (1870) 39 L. J. C. P. 183; L. R. 5 C. P. 129; 22 L. T. 67; 18 W. R. 602.—C.P.; **BRETT, J.** *dissenting*.

Williams v. G. W. Ry. (1858) 28 L. J. Ex. 2; 3 H. & N. 869; 7 W. R. 97.—EX., *discussed*.

Irwin v. Grey (1865) 34 L. J. C. P. 313; 19 C. B. (N.S.) 585; 11 Jur. (N.S.) 860; 12 L. T. 847; 31 W. R. 1043.—C.P.; affirmed, 35 L. J. C. P. 43; L. R. 1 C. P. 171; 1 H. & R. 25; 12 Jur. (N.S.) 193; 13 L. T. 409; 14 W. R. 208.—EX. CH.; and 36 L. J. C. P. 148; L. R. 2 H. L. 20; 16 L. T. 74; 15 W. R. 593.—H.L. (E.). **CHELMSFORD, L.C.**

Hill v. Yates (1810) 12 East 229; 11 R. R. 371.—K.B., *applied*.

Falmouth (Earl) v. Roberts (1841) 11 L. J. Ex. 180; 9 M. & W. 469; 1 D. (N.S.) 633.—EX., *explained*.

Wells v. Cooper (1874) 30 L. T. 721.—C.P.

Doe d. Ashburnham (Earl) v. Michael (1851) 20 L. J. Q. B. 276; 16 Q. B. 320; 15 Jur. 677.—Q.B., *referred to*.
Wells v. Cooper (1874) 30 L. T. 721.—C.P.

Looke v. Colman (1836) 2 Myl. & Cr. 42.—L.C., *not applied*.

Baker v. Hart (1747) 3 Atk. 542; 1 Ves. sen. 28.—L.C., *discussed*.

O'Connor v. Malone (1839) 6 Cl. & F. 572; Macl. & R. 468.—H.L. (IR.). **COTTENHAM, L.C.**

Levi (or Levey) v. Milne (1827) 4 Bing. 195; 12 Moore 418; 5 L. J. (O.S.) C. P. 153.—C.P.; and **Hakewell v. Ingram** (1854) 2 C. L. R. 1397.—C.P., *discussed*.

M'Inerney v. "Clareman" Printing and Publishing Co. (1902-3) [1903] 2 Ir. R. 347, 370.—K.B.D.; affirmed, C.A.

Odger v. Mortimer (1873) 28 L. T. 472.—C.P., *discussed*.
M'Inerney v. "Clareman" Printing and Publishing Co. (supra).

Edie v. East India Co. (1761) 1 W. Bl. 298; 2 Burr. 1216.—K.B., *referred to*.

Crouch v. Credit Foncier Co. (1873) 42 L. J. Q. B. 183; L. R. 8 Q. B. 374, 386; 29 L. T. 259; 21 W. R. 946.—Q.B.; **Goodwin v. Roberts** (1875) 44 L. J. Ex. 157; L. R. 10 Ex. 337, 357.—EX. CH.; affirmed, (1876) 45 L. J. Ex. 748; 1 App. Cas. 476; 35 L. T. 179; 24 W. R. 987.—H.L. (E.).

Bland v. Warren (1837) 6 L. J. K. B. 193; 7 A. & E. 11; 2 N. & P. 97; 6 D. P. C. 21.—K.B.; and **Lett v. Watkins** (1858) 27 L. J. Ex. 319.—EX., *discussed*.

Wolff v. Goldring (1875) 44 L. J. C. P. 214; 32 L. T. 161; 23 W. R. 473.—**BRETT and GROVE, JJ.**

Etty v. Wilson (1878) 47 L. J. Ex. 664; 3 Ex. D. 359; 39 L. T. 83.—C.A., *not applied*.

Davies v. Felix (1878) 48 L. J. Ex. 3; 4 Ex. D. 32; 39 L. T. 322; 27 W. R. 108.—C.A.

Oastler v. Henderson (1877) 46 L. J. Q. B. 607; 2 Q. B. D. 575; 37 L. T. 22.—C.A., *discussed*.

Krehl v. Burrell (1878) 48 L. J. Ch. 252; 10 Ch. D. 420; 39 L. T. 461; 27 W. R. 234.—C.A.

Hunt v. City of London Real Property Co., 47 L. J. Q. B. 42; 2 Q. B. D. 605.—**KELLY, C.B.** and **FIELD, J.**; *reversed*, (1877) 47 L. J. Q. B. 51; 3 Q. B. D. 19; 37 L. T. 344; 26 W. R. 37.—C.A.

Hunt v. City of London Real Property Co., *discussed*.

Krehl v. Burrell (1878) 48 L. J. Ch. 252; 10 Ch. D. 420; 39 L. T. 461; 27 W. R. 234.—C.A.

Hunt v. City of London Real Property Co., *explained and approved*.

Jones v. Baxter (1880) 5 Ex. D. 275; 28 W. R. 817.—C.A.

JESSEL, M.R.—We thought [*Hunt v. City of London Real Property Co.*] that the words "tried in" had been left out by mistake from Ord. XXXIX. r. 1, and we decided that it must be read as if they had been inserted. The old rule contained those words.—p. 276.

JAMES, L.J.—The Court in that case thought that it was absolutely necessary to find some mode in which a new trial in an action originally set down in the Ch. Div. could be obtained, and they could not find any other place except the Common Law Div. Court. It seemed to the Court that that was the reasonable and necessary interpretation of the orders. I concur in that view.—**IB. BAGGALLAY, L.J.** concurred.

JESSEL, M.R.—It must be understood that our decision does not apply to the case of an issue directed by a judge of the Ch. Div.—p. 277.

Drayson v. Andrews (1854) 24 L. J. Ex. 22; 10 Ex. 472.—EX., *followed*.

Pfeiffer v. Midland Ry. (1886) 18 Q. B. D. 243; 35 W. R. 335.—**HUDDLESTON, B.** and **MANISTY, J.**

Pfeiffer v. Midland Ry., *followed*.

Murfett v. Smith (1887) 56 L. J. P. 87; 12 P. D. 116; 57 L. T. 498; 35 W. R. 460; 51 J. P. 374.—**COLERIDGE, C.J.** and **BUTT, J.**

Hallums v. Hills (1876) 46 L. J. Q. B. 88; 24 W. R. 956.—C.A.

Distinguished, **Crom v. Samuels** (1876) 46 L. J. C. P. 1; 2 C. P. D. 21; 35 L. T. 423; 25 W. R. 45.—**GROVE and DENMAN, JJ.**; **Runtz v. Sheffield** (1879) 48 L. J. Ex. 385; 4 Ex. D. 150; 40 L. T. 539.—C.A.

Hill v. Fox (1858) 27 L. J. Ex. 41^a; 3 H. & N. 547; 6 W. R. 652.—EX., *applied*.

Ward v. Lumley (1860) 29 L. J. Ex. 372; 5 H. & N. 656; 6 Jur. (N.S.) 560; 8 W. R. 543.—EX.

Ward v. Lumley, followed.

Abbott v. Bates (1874) 30 L. T. 470; 22 W. R. 632.—C.P.

Heckscher v. Crosley (1890) 60 L. J. Q. B. 75; [1891] 1 Q. B. 224; 39 W. R. 211.—C.A.

Commented on, Allcock v. Hall (1891) 60 L. J. Q. B. 416; [1891] 1 Q. B. 444; 64 L. T. 309; 39 W. R. 443.—C.A. LINDLEY, LOPES and KAY, L.JJ.; *practice applied, Rickaby v. Rickaby* and *Swift* (1901) 70 L. J. P. 24; [1901] P. 134; 84 L. T. 182.—C.A. RIGBY, V. WILLIAMS and STIRLING, L.JJ.

Heckscher v. Crosley, practice no longer to be followed.

Harwood v. Abrahams (1901) 70 L. J. K. B. 746; [1901] 2 K. B. 304; 84 L. T. 857.—C.A., *referred to.*

Wightwick v. Pope (1902) 71 L. J. K. B. 709; [1902] 2 K. B. 99; 86 L. T. 750; 50 W. R. 531.—C.A.

COLLINS, M.R. (for self, MATHEW and COZENS-HARDY, L.JJ.).—Having regard to the general rule of practice laid down in *Heckscher v. Crosley*, and since acted upon, not to grant security for costs in the case of new trial motions, we took time to consult the other members of the Court as to whether the time has not come when that practice should be altered. It has been more than once treated as anomalous—see *Harwood v. Abrahams*—and, when analysed, it does not seem to rest on any logical basis. . . . All the L.JJ. concur in thinking that we ought not any longer to treat ourselves as bound by the rule laid down in *Heckscher v. Crosley*.—p. 710.

Price v. Harris (1833) 3 L. J. C. P. 73; 10 Bing. 331; 3 M. & Scott 838.—C.P., *referred to.*

Purnell v. G. W. Ry. (1876) 45 L. J. C. P. 687; 1 Q. B. D. 636; 35 L. T. 605; 24 W. R. 909.—C.A.

Doe d. Dudgeon v. Martin (1845) 14 L. J. Ex. 128; 13 M. & W. 811; 2 D. & L. 678.—EX.; and *Belcher v. Magnay* (1845) 14 L. J. Ex. 305; 13 M. & W. 815, n.; 3 D. & L. 70; 9 Jur. 475.—EX., *discussed and approved.*

Purnell v. G. W. Ry. (1876) 1 Q. B. D. 636; 45 L. J. C. P. 687; 35 L. T. 605; 24 W. R. 909.—C.A.

JESSEL, M.R.—It seems to be established by . . . *Doe v. Martin* and *Belcher v. Magnay*, that where a verdict has been found in favour of one defendant and against another, and the defendant against whom the verdict has been found shall move for a new trial, he is bound to serve a notice of the rule for a new trial on the defendant in whose favour the verdict was returned, and no new trial could be granted unless that proceeding was adopted. That seems to me a very reasonable rule and entirely coincides with the similar practice in the Courts of equity.—p. 639.

MELLISH, L.J.—Now the authorities that have been cited seem to show very clearly that under the old practice the Court could not grant a new trial as against one defendant, even in an action of tort, without granting it as to all. That was decided in the two cases which have been referred to by the M.R. In *Price v. Harris* (*supra*) the defendant asked for a new trial, and

the Court put her under terms; but where one of several defendants got a new trial, it appears the Court had never granted a new trial as against one defendant without granting it as against all, and it was the duty of one defendant to bring the others before the Court.—p. 641. DENMAN, J. concurred.

Millar v. Toulmin (1886) 55 L. J. Q. B. 445; 17 Q. B. D. 603; 34 W. R. 695.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ., *reversed.*

Toulmin v. Millar (1887) 12 App. Cas. 746; 57 L. J. Q. B. 301; 58 L. T. 96.—H.L. (E.).

HALSBURY, L.C.—I doubt very much whether Ord. LVIII. r. 4 gives any such jurisdiction as the C. A. claimed to exercise in finding a verdict for themselves, and actually assessing damages for breaking a contract. As I think the judgment of the C. A. was wrong upon the facts, it is not absolutely necessary to determine that question.—p. 747.

LORDS WATSON and FITZGERALD concurred, but expressed no opinion upon the question under Ord. LVIII. r. 4.

Toulmin v. Millar, applied.

Allcock v. Hall (1891) 60 L. J. Q. B. 416; [1891] 1 Q. B. 444; 64 L. T. 309; 39 W. R. 443.—C.A. LINDLEY, LOPES and KAY, L.JJ.

Hamilton v. Johnson (1879) 49 L. J. Q. B. 155; 5 Q. B. D. 263; 41 L. T. 461.—C.A., *applied.*

Seear v. Cohen (1881) 45 L. T. 589.—Q.B.D.

Seear v. Cohen, discussed.

Flower v. Sadler (1882) 9 Q. B. D. 483; 46 J. P. 503.—DENMAN, J.; affirmed, 10 Q. B. D. 572.—C.A. BRETT and COTTON, L.JJ.

Gibbs v. Pike (1842) 12 L. J. Ex. 257; 9 M. & W. 351; 1 D. (N.S.) 409; 6 Jur. 465.—EX., *referred to.*

Seaman v. Netherclift (1876) 45 L. J. C. P. 798; 1 C. P. D. 540.—COLERIDGE, C.J. and BRETT, J.; affirmed, 46 L. J. C. P. 128; 2 C. P. D. 53; 35 L. T. 784; 25 W. R. 159.—C.A.

Levi (or Levy) v. Green (1858) 4 Jur. (N.S.) 36; 6 W. R. 209.—Q.B., *applied.*

Cockle v. S. E. Ry. (1870) L. R. 5 C. P. 457, 472; 39 L. J. C. P. 226.—C.P.; KEATING and M. SMITH, JJ. *dissenting*; affirmed, (1872) 41 L. J. C. P. 140; L. R. 7 C. P. 321; 27 L. T. 320; 20 W. R. 754.—EX. CH.

Dawson v. Harris (or Harrison) (1862) 31 L. J. C. P. 168; 11 C. B. (N.S.) 801; 5 L. T. 680; 10 W. R. 230.—C.P.

Explained and applied, Jones v. Williams (1873) 42 L. J. Q. B. 48; L. R. 8 Q. B. 280; 28 L. T. 122; 21 W. R. 390.—Q.B.; *referred to, Metropolitan Asylum District v. Hill* (1882) 47 L. T. 29; 47 J. P. 148.—H.L. (E.).

19. JUDGMENTS AND ORDERS.

Spencer, In re (1870) 39 L. J. Ch. 841; 21 L. T. 808; 18 W. R. 240.—L.J.

Referred to, Slater v. Slater (1888) 58 L. T. 149.—KAY J.; *discussed and order followed, Dangar's Trusts, In re* (1889) 58 L. J. Ch. 315; 41 Ch. D. 178; 60 L. T. 491; 37 W. R. 651.—STIRLING, J.

Hunter v. Richardson (1821) 6 Madd. 89.—V.-C., *discussed and not applied*.
Lambert v. Hutchinson (1839) 8 L. J. Ch. 196; 1 Beav. 277.—M.R., *applied*.
Davies v. Quartermain (1840) 4 Y. & C. 257.—ALDERSON, B.

Cottingham v. Shrewsbury (Earl) (1843) 15 L. J. Ch. 441; 3 Hare 627.—V.-C., *distinguished*.

Pelly v. Wathen (1849) 18 L. J. Ch. 281; 7 Hare 351; 14 Jur. 9.—WIGRAM, V.-C.; *affirmed*. (1851) 21 L. J. Ch. 105; 1 De G. M. & G. 16; 16 Jur. 47.—L.JJ.

Milissich v. Lloyds (1877) 46 L. J. C. P. 404; 36 L. T. 423; 25 W. R. 353; 13 Cox C. C. 575.—C.A. MELLISH, L.JJ., BAGGALLAY and BRETT, JJ.A., *discussed*.
Royal Mail Steam Packet Co. v. George and Brandray (1900) 69 L. J. P. C. 107; [1900] A. C. 480; 82 L. T. 539.—P.C.

Peirce (or Pierce) v. Derry (1843) 12 L. J. Q. B. 277; 4 Q. B. 635; 3 G. & D. 477; 7 Jur. 552.—Q.B., *commented on*.
Frewen (or Fewins) v. Lethbridge (1859) 4 H. & N. 418; 28 L. J. Ex. 243; 7 W. R. 442.—EX.

BRAMWELL, B.—*Peirce v. Derry* is relied on as an authority that there is no entry of judgment until the costs have been taxed. There the plaintiff had entered up final judgment as of the day when the original entry was made, and the Court ordered the date of the judgment to be altered to the day of taxation of costs; therefore it was not necessary to consider the statute of Charles (17 Car. 2, c. 8, s. 1). But if they meant to lay down a positive rule that for all purposes there is no judgment until the costs are taxed, that is opposed to the authorities. For the purpose of this statute (15 & 16 Vict. c. 76, s. 139) judgment is signed when the original entry is made.—p. 421.

Perkins v. National Investment Society (or National Assurance and Investment Association) (1857) 26 L. J. Ex. 182; 2 H. & N. 71; 3 Jur. (N.S.) 371; 5 W. R. 470.—EX., *approved but not applied*.
Smith v. Smith (1874) 43 L. J. Ex. 86; L. R. 9 Ex. 121; 30 L. T. 429.—BRAMWELL and PIGOTT, BB.

Davenport v. Stafford (1845) 14 L. J. Ch. 414; 8 Beav. 503; 9 Jur. 801.—M.R.
Explained, **Turner v. Turner** (1852) 21 L. J. Ch. 422; 2 De G. M. & G. 28.—KNIGHT BRUCE and CRANWORTH, L.JJ.; *referred to*, **Stannard v. Harrison** (1871) 24 L. T. 570; 19 W. R. 811.—BACON, V.-C.; *approved and applied*. **Huddersfield Banking Co. v. Henry Lister & Son** (1895) 64 L. J. Ch. 523; [1895] 2 Ch. 273; 12 R. 331; 72 L. T. 703; 43 W. R. 567.—C.A.

Davenport v. Stafford, *not applied*.
Ainsworth v. Wilding (1896) 65 L. J. Ch. 432; [1896] 1 Ch. 673; 74 L. T. 193; 44 W. R. 540.
ROMER, J.—That [case] was under the practice of the Court of Chancery, which had the inherent power of re-trying cases even after the drawing up and passing of the decree. That case only decided that, in the opinion of the then M.R., the Court in the exercise of its discretion would not re-hear the case, after the decree had been entered, on the ground of fraud, but would

re-hear it in the case of a mere mistake. That case has no application to the modern practice under the Judicature Acts.—p. 433.

Metcalf v. British Tea Association (1884) 46 L. T. 31.—GROVE and BOWEN, L.JJ., *not adopted*.
Script Phonography Co. v. Gregg (1890) 59 L. J. Ch. 406.—NORTH, J.

Leggott v. Western (1889) 53 L. J. Q. B. 316; 12 Q. B. D. 287; 32 W. R. 460.—Q.B.D.

Referred to, **Sedgwick, In re, McMurdo, Ex parte** (1888) 60 L. T. 9; 37 W. R. 72; 5 Morrell 262.—C.A.; *followed*, **Kolchmann v. Meurice** (1903) 72 L. J. K. B. 289; [1903] 1 K. B. 534; 88 L. T. 369; 51 W. R. 356.—C.A.

North of England Joint Stock Banking Co., In re, Sanderson, Ex parte (1849) 18 L. J. Ch. 248; 1 Mac. & G. 306.—L.C.
Referred to, **Risca Coal and Iron Co., In re, Hookey, Ex parte** (1862) 31 L. J. Ch. 429; 4 De G. F. & J. 456; 8 Jur. (N.S.) 900; 6 L. T. 567; 10 W. R. 701.—WESTBURY, L.C.

Risca Coal and Iron Co., In re, Hookey, Ex parte, *followed and approved*.
Greaves, In re, Whitton, Ex parte (1880) 13 Ch. D. 881; 49 L. J. Bk. 31; 42 L. T. 63; 28 W. R. 432.

BACON, C.J.—The judgment delivered by Lord Westbury in *Hookey, Ex parte*, relates not only to the practice of the Court of Bankruptcy but to the principles which govern that practice, and the reasons for the rule under discussion are fully stated in that judgment. . . . I cannot possibly overrule, nor am I at liberty to disregard, as it certainly is not my inclination to do the express ruling of Lord Westbury.—p. 884.

Collinson v. Lister (1855) 24 L. J. Ch. 762; 20 Beav. 356.—ROMILLY, M.R.; *affirmed*, 25 L. J. Ch. 38; 7 De G. M. & G. 634; 2 Jur. (N.S.) 75; 4 W. R. 133.—L.JJ.

Collinson v. Lister and Troup v. Troup (1868) 37 L. J. Ch. 390; 16 W. R. 573.—MALINS, V.-C., *discussed and followed*.
Turner v. L. & S. W. Ry. (1874) 43 L. J. Ch. 430; L. R. 17 Eq. 561.—HALL, V.-C.

Turner v. L. & S. W. Ry., *distinguished*.
Wilks, In re, Child v. Bulmer [1891] 3 Ch. 59; 60 L. J. Ch. 696; 65 L. T. 184; 40 W. R. 13.
STIRLING, J.—There it was held that where a plaintiff died after hearing but before judgment the Court had jurisdiction to date the judgment as of the date of the hearing. Here, however, there was no hearing: so that the decision does not exactly cover the point.—p. 64.

Turner v. L. & S. W. Ry., *followed*.
Ecroyd v. Coulthard (1897) 66 L. J. Ch. 751; [1897] 2 Ch. 554; 77 L. T. 357; 46 W. R. 119; 61 J. P. 791.—NORTH, J.; *affirmed*, (1898) 67 L. J. Ch. 458; [1898] 2 Ch. 358; 78 L. T. 702.—C.A. LINDLEY, M.R., CHITTY and COLLINS, L.JJ.

Wardle v. Carter (1836) 1 Myl. & Cr. 283.—L.C.; and **Wildman v. LaCoe** (1859) 4 De G. & J. 401.—CHELMSFORD, L.C., *referred to*.
International Financial Society v. City of

Moscow Gas Co. (1877) 47 L. J. Ch. 258; 7 Ch. D. 241; 37 L. T. 736; 26 W. R. 272.—C.A.

International Financial Society v. City of Moscow Gas Co., distinguished.

Ambrose Lake Tin and Copper Co., In re, Taylor's Case (1878) 8 Ch. D. 643; 47 L. J. Ch. 696; 38 L. T. 587; 26 W. R. 602.—C.A.

THESIGER, L.J.—There the party had allowed the whole of the year to elapse, and he then found that he had made a mistake, and was just beyond the year. There, if I may use the expression, nothing had been rightly done within the period. Here, undoubtedly, a proper notice was given within the period of twenty-one days.—p. 644.

International Financial Society v. City of Moscow Gas Co.

Discussed, Burke v. Rooney (1879) 48 L. J. C. P. 601; 4 C. P. D. 226; 27 W. R. 915.—C.P.D.; Carter v. Stubbs (1880) 50 L. J. Q. B. 161; 6 Q. B. D. 116; 43 L. T. 746; 29 W. R. 132.—C.A.

International Financial Society v. City of Moscow Gas Co., principle applied.

Shelfer v. City of London Electric Light Co.; Meux's Brewery Co. v. City of London Electric Light Co. (1894) 12 R. 112; 64 L. J. Ch. 216; [1895] 1 Ch. 287; 72 L. T. 34; 43 W. R. 238.—C.A.; reversing 8 R. 823; 70 L. T. 762; 42 W. R. 644.—KEKEWICH, J.

LORD HALSBURY.—It appears to me that this case comes distinctly within the principle pointed out by James, L.J., in *International Financial Society v. City of Moscow Gas Co.* He says that if it is a mere simple refusal of a simple application, the applicant knows very well what he has got to appeal against, and must give notice within the time allowed for an appeal against such refusal; but if the relief is granted, although not in a form satisfactory to the applicant, it is only reasonable he ought to know the precise terms of the order before he determines whether he will appeal.—p. 120.

Trail v. Jackson (1876) 46 L. J. Ch. 16; 4 Ch. D. 7; 25 W. R. 36.—C.A., followed.

Berdan v. Birmingham Small Arms and Metal Co. (1877) 47 L. J. Ch. 96; 7 Ch. D. 24; 37 L. T. 588; 26 W. R. 89.—C.A.

Berdan v. Birmingham Small Arms and Metal Co., distinguished.

Jones v. Andrews (1888) 58 L. T. 601.—C.A. COTTON and PRY, L.JJ.

Trail v. Jackson and Berdan v. Birmingham Small Arms and Metal Co., followed.

Roberts, In re, W. N. (1890) 23.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

Trail v. Jackson and Berdan v. Birmingham Small Arms and Metal Co., referred to.

Shelfer v. City of London Electric Lighting Co.; Meux's Brewery Co. v. City of London Electric Light Co. (1894) 12 R. 112; 64 L. J. Ch. 216; [1895] 1 Ch. 287.—C.A. (*supra*).

Stevens v. Guppy (1823) T. & R. 178.—L.C., principles applied.

Hill v. South Staffordshire Ry. (1864) 2 De G. J. & S. 230; 10 Jur. (N.S.) 531; 4 N. R. 39; 10 L. T. 358; 12 W. R. 699.—L.JJ.

Hill v. South Staffordshire Ry.

Commented on, Hill v. Curtis (1866) L. R. 1 Ch. 425; 12 Jur. (N.S.) 441; 14 L. T. 503.—GRANWORTH, L.C.; *applied*, Ollershaw (or Ollershaw) v. Harrop (1874) 43 L. J. Ch. 584; L. R. 9 Ch. 480; 31 L. T. 74.—JAMES and MELLISH, L.JJ.

Bruff v. Cobbold, Ayres, Ex parte (1872) 41

L. J. Ch. 402; L. R. 7 Ch. 217; 26 L. T. 223; 20 W. R. 284.—L.JJ., *discussed*. Youngs, In re, Doggett v. Revett (1885) 30 Ch. D. 421; 53 L. T. 682.—C.A. COTTON and LINDLEY, L.JJ.

COTTON, L.J.—*Bruff v. Cobbold* was a case where a suit was brought for distribution of a fund by one of a number of persons who claimed to be *cestuis que trust*. Another person who claimed to be a *cestui que trust*, and had not been made a party, was held entitled to appeal. He was a person who could properly have been made a party to the action.—p. 426.

Davis v. Dysart (Earl) (1855) 24 L. J. Ch.

381; 20 Beav. 405; 1 Jur. (N.S.) 743; 3 Eq. R. 599; 3 W. R. 393.—M.R.

Approved and followed, Pennell v. Dysart (Earl) (1859) 27 Beav. 542.—ROMILLY, M.R.; *not applied*, Chichester v. Donegal (Marquis) (1869) L. R. 4 Ch. 416; 20 L. T. 44; 17 W. R. 544.—SELWYN and GIFFARD, L.JJ.; *referred to*, Pryse v. Pryse (1872) 42 L. J. Ch. 253; L. R. 15 Eq. 86, 92; 27 L. T. 575; 21 W. R. 219.—WICKENS, V.-C.

Jackson v. Turnley (1853) 22 L. J. Ch. 949;

1 Drew. 617; 1 Eq. R. 328; 17 Jur. 643; 1 W. R. 461.—KINDERSLEY, V.-C., *referred to*.

Rooke v. Kensington (Lord) (1856) 25 L. J. Ch. 795; 2 K. & J. 795; 4 W. R. 829.—WOOD, V.-C.

Rooke v. Kensington (Lord), referred to.

Sree Narain Mitter v. Sreemutty Kishen, &c. (1873) L. R. Ind. App. Suppl. 149, 161.—P.C.

Jackson v. Turnley and Rooke v. Kensington (Lord), discussed.

Kathama Natchiar v. Dorasinga Tever (1875) L. R. 2 Ind. App. 169, 185.—P.C.

Jackson v. Turnley, referred to.

Barracrough v. Brown (*post*, col. 2425).

Rooke v. Kensington (Lord) and Bristow v.

Whitmore (1858) 4 K. & J. 743; 7 W. R. 150.—V.-C., *discussed*.

Cox v. Barker (1876) 3 Ch. D. 359; 35 L. T. 635.—C.A. JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A.

BAGGALLAY, J.A.—I felt a good deal pressed at first by the decisions of Wood, V.-C. in *Rooke v. Kensington (Lord)* and *Bristow v. Whitmore*; but it appears to me there is no room in this case for the objection which prevailed there. Sect. 50 of the 15 & 16 Vict. c. 86 empowers the Court of Chancery to make binding declarations of right without giving consequential relief; and Wood, V.-C. was of opinion that it only empowered the Court to make such declarations of right in cases in which some equitable relief might be granted if the plaintiff chose to ask for it. But, in this case, it appears to me that, consequential upon the declaration of rights which is asked for, several forms of consequential relief might be granted.—p. 372.

Rooke v. Kensington (Lord) (*supra*) and **London Association of Shipowners v. London and India Docks Joint Committee** (1892) 62 L. J. Ch. 294; [1892] 3 Ch. 242; 2 L. T. 23; 67 L. T. 238; 7 Asp. M. C. 195.—C.A., *referred to*.

Barracrough v. Brown (1897) 66 L. J. Q. B. 672; [1897] A. C. 615; 76 L. T. 797; 8 Asp. M. C. 290; 2 Com. Cas. 249.—H.L. (E.). LORDS HERSHELL, WATSON, SHAND and DAVEY.

Curtis v. Sheffield (1882) 51 L. J. Ch. 535; 21 Ch. D. 1; 46 L. T. 177; 30 W. R. 581.—C.A., *discussed*.

Fussell v. Dowding (1884) 53 L. J. Ch. 924; 27 Ch. D. 237; 51 L. T. 332; 32 W. R. 790.—CHITTY, J.

Greenwood v. Sutherland (1853) 10 Hare, App. xii.—V.-C.; and **Garlick v. Lawson** (1853) 10 Hare, App. xiv.—V.-C., *referred to*.

Langdale (Lady) v. Briggs (1856) 26 L. J. Ch. 27; 8 De G. M. & G. 391; 2 Jur. (N.S.) 982; 4 W. R. 703.—KNIGHT BRUCE and TURNER, L.JJ.

Greenwood v. Sutherland and Garlick v. Lawson, *applied*.

Gosling v. Gosling (1859) Johns. 265; 5 Jur. (N.S.) 910.—WOOD, V.-C.

Greenwood v. Sutherland and Garlick v. Lawson, *referred to*.

Pryse v. Pryse (1872) 42 L. J. Ch. 253; L. R. 15 Eq. 86; 27 L. T. 575; 21 W. R. 219.—V.-C. *See post*.

Greenwood v. Sutherland and Garlick v. Lawson, *discussed*.

Kathama Natchiar v. Dorasinga Tever (1875) L. R. 2 Ind. App. 169, 184.—P.C.; and **Bright v. Tyndall** (1876) 4 Ch. D. 189, 196; 25 W. R. 109.—V.-C.

De Windt v. De Windt (1866) 35 L. J. Ch. 332; L. R. 1 H. L. 87; 14 L. T. 529; 14 W. R. 545.—H.L. (E.); *affirming* (1864) 4 N. R. 185.—WOOD, V.-C.; and **Forsbrook v. Forsbrook** (1867) L. R. 3 Ch. 93; 16 W. R. 290.—L.JJ., *commented on*.

Key v. Key (1853) 22 L. J. Ch. 641; 4 De G. M. & G. 73; 1 Eq. R. 82; 17 Jur. 769.—L.JJ., *not followed*.

Pryse v. Pryse (1872) 42 L. J. Ch. 253; L. R. 15 Eq. 86; 27 L. T. 575; 21 W. R. 219.

WICKENS, V.-C.—According to the ordinary rule, this Court will not decide a legal question as to a right to real estate in remainder, and will not try the legal title to real estate not in remainder, at the instance of a person who is out of possession. Both propositions are elementary. As regards the former, *De Windt v. De Windt* was referred to during the argument, as giving the highest sanction to what was said in *Greenwood v. Sutherland* (*supra*) and *Garlick v. Lawson* (*supra*). But in fact, no authority is required for either. It is said, however, that the Court is asked to do no more here than was done in *Key v. Key*, by means of an artifice suggested by the Court in *Forsbrook v. Forsbrook*. If *Key v. Key* be law, the amendment in *Forsbrook v. Forsbrook* seems to have been unnecessary, so that the cases are not quite consistent. And notwithstanding my unfeigned respect for the judges who decided *Key v. Key*, and notwithstanding the fact stated to me, that the question

of jurisdiction was there considered, I must decline to follow it, as regards the jurisdiction in any case not similar, which this is not.—p. 255.

Forsbrook v. Forsbrook and Bell v. Cade (1861) 2 J. & H. 122; 5 L. T. 523; 10 W. R. 38.—WOOD, V.-C., *discussed*.

Bright v. Tyndall (1876) 4 Ch. D. 189, 196; 25 W. R. 109.—MALINS, V.-C.

Forsbrook v. Forsbrook, *discussed*.

Hampton v. Holman (1877) 46 L. J. Ch. 248; 5 Ch. D. 183; 36 L. T. 287; 25 W. R. 459.—JESSEL, M.R.

Langdale (Lady) v. Briggs (1856) 26 L. J. Ch. 27; 8 De G. M. & G. 391; 2 Jur. (N.S.) 982; 4 W. R. 703.—L.JJ., *distinguished*.

Juttendromohun Tagore v. Ganendromohun Tagore (1872) L. R. Ind. App. Suppl. 47.—P.C. WILLES, J. (for the Court).—This case is distinguishable from *Langdale (Lady) v. Briggs*, where it was laid down that, generally speaking, it is not according to the course of the Courts in England to declare future rights, and it falls within the exceptions there contemplated in the judgment of Turner, L.J. (p. 428): because all the existing parties interested are in Court, and it is impossible to decide the case without considering the whole scope of the will, and arriving at judicial conclusions as to the rights of each of the parties thereunder, which judicial conclusions, so far as they dispose, or may dispose, of the rights of those parties, ought to be incorporated in the decree.—p. 84.

Langdale (Lady) v. Briggs.

Discussed, **Kathama Natchiar v. Dorasinga Tever** (1875) L. R. 2 Ind. App. 169, 185.—P.C.; **Hampton v. Holman** (1877) 46 L. J. Ch. 248; 5 Ch. D. 183; 36 L. T. 287; 25 W. R. 459.—JESSEL, M.R.; *approved and applied*, **Ram Lal Mookerjee v. Secretary of State for India** (1881) L. R. 8 Ind. App. 46.—P.C.

Langdale (Lady) v. Briggs, *applied*.

Dugdale, In re, Dugdale v. Dugdale (1888) 38 Ch. D. 176; 57 L. J. Ch. 634; 58 L. T. 581; 36 W. R. 462.

KAY, J.—It is consistent with the practice of the Court, as recognised in *Langdale (Lady) v. Briggs*, that the plaintiff should have a declaration as to the nature of his interest and the validity of the gift over.—p. 183.

Cliffe, In re, Edwards v. Brown (1895) 64 L. J. Ch. 423; [1895] 2 Ch. 21; 13 R. 425; 72 L. T. 440; 43 W. R. 436.—C.A.

Referred to, **Deutsche National Bank v. Paul** (1898) 67 L. J. Ch. 156; [1898] 1 Ch. 283; 78 L. T. 35; 46 W. R. 243.—STIRLING, J.; **Wray v. Wray and D'Almeida** [1901] P. 132; 70 L. J. P. 32; 84 L. T. 64.—BARNES, J.

Rees, In re, Rees v. George (1880) 49 L. J. Ch. 568; 15 Ch. D. 490.—M.R., *considered*.

Rolfe, In re, Fyson v. Johnson (1894) 8 R. 335; 70 L. T. 624.

NORTH, J.—The persons served have not entered an appearance. I have to decide whether they ought to be served with notice of the setting down of this action for further consideration. In *Rees, In re*, Sir G. Jessel, M.R., made such an order. He considered that he had a discretion, and that as the order sought was to make

parties personally liable for payment of money, it was right that such parties should be served with notice. But, in the absence of some special reason, such as the one in that case, I do not see why an order for service should be made.—p. 336.

Holles (Lord) v. Hutchinson (1679) 3 Swanst. 665.—L.C., *discussed*.
Fraser v. Mason (1888) 52 L. J. Q. B. 643; 11 Q. B. D. 574; 49 L. T. 761; 32 W. R. 421.—C.A.

Wade v. Simeon (1845) 14 L. J. Ex. 117; 13 M. & W. 647; 2 D. & L. 658; 9 Jur. 117.—EX., *discussed and distinguished*.
Burnett v. Proois (1870) 22 L. T. 543, 545.—C.P.

Furnival v. Bogle (1827) 4 Russ. 142; 6 L. J. (O.S.) Ch. 91; 28 R. R. 34.—L.C.
Referred to, **Banner**, Ex parte, **Keyworth**, In re (1874) L. R. 9 Ch. 381, n.; 21 W. R. 850.—BACON, C.J.; (affirmed, L. R. 9 Ch. 379; 30 L. T. 620; S. C. *nom.* Tate, Ex parte, **Keyworth**, In re, 43 L. J. Bk. 102.—L.J.J.); *approved*, **Holt v. Jesse** (1876) 46 L. J. Ch. 254; 3 Ch. D. 177; 24 W. R. 879.—MALINS, V.-C.; *discussed*, **Harvey v. Croydon Union Rural Sanitary Authority** (1884) 53 L. J. Ch. 707; 26 Ch. D. 249.—C.A. (*see post*, col. 2428); **Neale v. Gordon-Lennox** (1902) 71 L. J. K. B. 536; [1902] 1 K. B. 836.—ALVERSTONE, C.J.; (reversed, C.A., but restored, H.L. (E.) *see post*, col. 2431).

Att.-Gen. v. Tomline (1877) 7 Ch. D. 388; 47 L. J. Ch. 473; 38 L. T. 57; 26 W. R. 188.—FRY, J., *dictum explained*.
Davis v. Davis (1880) 13 Ch. D. 861; 49 L. J. Ch. 241; 41 L. T. 790; 28 W. R. 345.
FRY, J.—I do not say anything as to whether a consent given altogether without the intervention of the Court can be afterwards withdrawn. All that I said in **Att.-Gen. v. Tomline** was that, if in any case a judgment made by consent can be varied, it must be varied before it is drawn up. But after the Court has gone into the merits of the case and assented to a deliberate compromise, it would be extremely inconvenient to allow a person who had instructed counsel to enter into such a compromise to retract such consent.—p. 862.

Att.-Gen. v. Tomline, *approved and applied*.
Huddersfield Banking Co. v. Henry Lister & Co. (1895) 64 L. J. Ch. 523; [1895] 2 Ch. 273; 12 R. 331; 72 L. T. 703; 43 W. R. 567.—C.A. LINDLEY, LOPES and KAY, L.J.J.

Holt v. Jesse (1876) 46 L. J. Ch. 254; 3 Ch. D. 177; 24 W. R. 879.—MALINS, V.-C.
Explained, **Scully v. Dundonald (Lord)** (1878) 8 Ch. D. 658; 39 L. T. 116; 27 W. R. 249.—MALINS, V.-C. (reversed, C.A.); *approved*, **Davis v. Davis** (1880) 49 L. J. Ch. 241; 13 Ch. D. 861; 41 L. T. 790; 28 W. R. 345.—FRY, J.; *discussed*, **Harvey v. Croydon Union Rural Sanitary Authority** (1884) 53 L. J. Ch. 707; 26 Ch. D. 249.—C.A. (reversing PEARSON, J., who discussed **Holt v. Jesse**, **Att.-Gen. v. Tomline** (*supra*), and **Davis v. Davis** (*supra*). *See post*, col. 2428).

Holt v. Jesse, *approved*.
Hickmann v. Berens (1895) 64 L. J. Ch. 785; [1895] 2 Ch. 638; 12 R. 602; 73 L. T. 323.—C.A.
Neale v. Gordon-Lennox (1902) 71 L. J. K. B.

536 [1902] 1 K. B. 836.—ALVERSTONE, C.J.; reversed, C.A., but restored, H.L. (*post*, col. 2431).

Rogers v. Horn (1878) 26 W. R. 432.—JESSEL, M.R., *corrected*.
Wilson v. Cave (No. 2) (1881) 44 L. T. 118, n.—C.A. JAMES and LUSH, L.J.J.
[**Rogers v. Horn** is not impugned in **Wilson v. Cave**, but in a note at the bottom of p. 118 it is said that in **Williams v. Meekin** (June 11, 1880), it was stated by counsel that the M.R. had said that the report of **Rogers v. Horn** was incorrect; and in the same case James, L.J., said that the passing and entering of an order were only machinery.]

Rogers v. Horn, *not followed*.
Harvey v. Croydon Union Rural Sanitary Authority (1884) 26 Ch. D. 249; 53 L. J. Ch. 707; 50 L. T. 291; 32 W. R. 389.—C.A.; reversing 53 L. J. Ch. 335; 49 L. T. 567.—PEARSON, J.

COTTON, L.J.—If a consent has been duly given, it is not right that it should be arbitrarily withdrawn. Then are we bound by authority to hold that it may? The case of **Rogers v. Horn** certainly supports that view, but there are others which tend in the opposite direction, as **Furnival v. Bogle** (*supra*, col. 2427) and **Holt v. Jesse** (*supra*, col. 2427). In these cases, there was something in the nature of a compromise, and the decisions may be referable to there being an agreement for valuable consideration, but the remarks of Lord Lyndhurst in **Furnival v. Bogle** are strong, and do not put the matter in the ground of there being a binding agreement. In **Seton on Decrees** [p. 1536] **Holt v. Jesse** is referred to as deciding that where a party with knowledge of the facts authorises his counsel to consent, and the consent is given, he cannot afterwards withdraw it, but there again the case was one of compromise. . . . It must be understood henceforth to be the rule that a consent given by authority of the client cannot be withdrawn.—p. 255. COLERIDGE, C.J. concurred.

Harvey v. Croydon Union Rural Sanitary Authority, *explained*.
West Devon Great Consols Mine, In re (1888) 57 L. J. Ch. 850; 38 Ch. D. 51; 58 L. T. 61; 36 W. R. 312.—C.A.

COTTON, L.J.—In **Harvey v. Croydon Union Rural Sanitary Authority**, PEARSON, J., considered himself bound to hold that, except in the case of a consent to a compromise sanctioned by the Judge, a party could withdraw his consent at any time before the order was passed, but the C.A. decided that it could not be withdrawn arbitrarily, but only on the ground of mistake or surprise, or for some other sufficient reason.—p. 54. LINDLEY and BRETT, L.J.J. concurred.

Harvey v. Croydon Union Rural Sanitary Authority.
Applied, **Lewis v. Lewis** (1890) 59 L. J. Ch. 412; 45 Ch. D. 281; 63 L. T. 84; 39 W. R. 75.—KEKEWICH, J.; *referred to*, **Neale v. Gordon-Lennox** (1902) 71 L. J. K. B. 536; [1902] 1 K. B. 836.—ALVERSTONE, C.J. (*see post*, col. 2431).

Swinfen v. Chelmsford (Lord) (1860) 29 L. J. Ex. 382; 5 H. & N. 890; 6 Jur. (N.S.) 1035; 2 L. T. 406; 8 W. R. 545.—EX., *discussed*.
Strauss v. Francis (1866) 35 L. J. Q. B. 133;

L. R. 1 Q. B. 379; 6 B. & S. 365; 12 Jur. (N.S.) 486; 14 L. T. 326; 14 W. R. 634.—Q.B.

Strauss v. Francis (*supra*) and **Rumsey v. King** (1876) 33 L. T. 728.—Q.B.D., *discussed*.
Holt v. Jesse (1876) 46 L. J. Ch. 254; 3 Ch. D. 177; 24 W. R. 879.—MALINS, V.-C.

Swinfen v. Chelmsford (Lord) (*supra*, col. 2428) *rule in, applied*.
Matthews v. Munster (1887) 57 L. J. Q. B. 49; 20 Q. B. D. 141; 57 L. T. 922; 36 W. R. 178; 52 J. P. 260.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

Swinfen v. Chelmsford (Lord), Strauss v. Francis and Rumsey v. King, *referred to*.
Neale v. Gordon-Lennox (1902) 71 L. J. K. B. 536; [1902] 1 K. B. 836.—ALVERSTONE, C.J.; reversed, C.A., but restored, H.L. (*see post*, col. 2431).

Bray v. Manson (1841) 10 L. J. Ex. 468; 8 M. & W. 668; 5 Jur. 635.—EX., *referred to*.

Gowan v. Wright (1886) 56 L. J. Q. B. 131; 18 Q. B. D. 201, 208; 35 W. R. 297.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Gowan v. Wright, *applied*.
Guest, Ex parte, Russell, In re (1888) 37 W. R. 21; 5 Morrell 253; 4 Times L. R. 781.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.; **Crawshaw v. Harrison** (1893) 63 L. J. Q. B. 94; [1894] 1 Q. B. 79; 10 R. 608; 69 L. T. 860; 1 Manson 407.—CHARLES and WRIGHT, JJ.

Gowan v. Wright and Guest, Ex parte, Russell, In re, *applied*.
Murphy, In re [1895] 1 Ir. R. 339.—C.A. WALKER, L.C., FITZGIBBON and BARRY, L.JJ.

Gowan v. Wright, *explained*.
Taylor v. Sturrock (1899) 69 L. J. P. C. 29; [1900] A. C. 225; 82 L. T. 97.—P.C.
LORD HOBHOUSE (for self, LORDS MORRIS and DAVEY, and SIR R. COUCH).—For the appeal reliance was placed on the judgments of Lord Esher and Bowen, L.J., in **Gowan v. Wright**. They were construing the enactment that a Judge's order for judgment made by consent of the defendant in a personal action, should be filed in the way prescribed, and otherwise should be void. This they held to mean void as against creditors, not as against the parties to the order. And they refer to analogous cases in which the Courts have held that the object of the enactment under their consideration was to protect creditors or other persons not parties to the transaction under consideration, and have therefore restricted to that object the nullity of the transaction which the enactment declares in unqualified terms.—p. 80.

Lingen v. Simpson (1821) 6 Madd. 290.—V.-C., *distinguished*.
Beresford (Lady) v. Driver (1851) 20 L. J. Ch. 476; 14 Beav. 387.—M.R., *discussed*.
Chichester v. Donegal (Marquis) (1869) L. R. 4 Ch. 416; 20 L. T. 44; 17 W. R. 544.—SELWYN and GIFFARD, L.JJ.

Freen v. Chaplin (1834) 2 D. P. C. 523.—TAUNTON, J., *overruled*.
Nurse v. Greeting (1834) 3 Dowl. Pr. 157; 4

L. J. Ex. 4; 1 Cr. M. & R. 567; 5 Tyr. 179.—EX.

Jacques v. Harrison (1883) 12 Q. B. D. 136; 32 W. R. 274.—GROVE, J., HUDDLESTON, B. and HAWKINS, J.; *varied*, (1884) 53 L. J. Q. B. 137; 12 Q. B. D. 165; 50 L. T. 246; 32 W. R. 471.—C.A. BRETT, M.R. and BOWEN, L.J.

Atwood v. Chichester (1878) 47 L. J. Q. B. 300; 3 Q. B. D. 722; 38 L. T. 48; 26 W. R. 320.—C.A., *followed*.
Davis v. Ballenden (1882) 46 L. T. 797.—C.A. BRETT and COTTON, L.JJ.

King v. Sandeman (1878) 38 L. T. 461; 26 W. R. 569.—C.A.; and **Atwood v. Chichester**, *considered and distinguished*.
Haigh v. Haigh (1885) 31 Ch. D. 478; 55 L. J. Ch. 198; 34 W. R. 120; 53 L. T. 863.

PEARSON, J.—The first case to which I will refer is that of **King v. Sandeman**. The head-note, which is substantially right, is this: "The plaintiff being unready to proceed with the trial of his action when it came on unexpectedly, applied for a postponement, and upon its being refused, let judgment go by default. The C. A., upon fresh materials, offering a reasonable explanation of the plaintiff's unreadiness, set aside the judgment, and ordered the action to be restored to the list on the plaintiff paying the costs of the day, including all costs thrown away." The late M.R., Sir G. Jessel, says this: "I do not decide this case with as much satisfaction as most cases. On the one hand, if we draw the string very tight, no plaintiff would be able to proceed to trial if not ready exactly at the day of trial. Solicitors would be required to do what they cannot always be sure of being able to do. On the other hand, we must be careful not to allow people to use the C. A. to remedy the effects of carelessness. This case is very near the line. On the whole, I think the case should be tried on its merits." And then he says that the plaintiff could not, with reasonable diligence, have got all the material information till the 4th of March, from the 4th to the 7th the action was not in the paper, and a long way down the list. On the 8th it came on suddenly. Under these circumstances, the plaintiff being in default as little as he could be, the Court ordered the judgment to be set aside. Thesiger, L.J., who also went into the case (Cotton, L.J. merely concurring), says this: "Certainly material documents could not be obtained till the 4th of March. If a summons had then been taken out for time, it would have been a proper case for indulgence, and if so, the slip of the plaintiff's solicitor in thinking the case would not come on is not enough to take away the indulgence. The case is very near the line, but being doubtful, the doubt should be decided in favour of trying the action on the merits, instead of putting the plaintiff to the expense of bringing another action."

Another case cited was that of **Atwood v. Chichester**. That was a case in which a lady had signed, at the request of her husband, a promissory note. A writ was issued against her, she put it into her husband's hands to defend the action. Her husband did nothing, and judgment was signed against the defendant. Now, in that case, the action being against a married woman, was bad altogether, and Brett, L.J. said he thought the plaintiff knew she was

a married woman, and he knew that no action could be brought, yet, in spite of that, Brett, L.J. says, "From the facts before us, I draw the inference that when she handed the writ to her husband, she did not understand its meaning, and that she did not know the consequences of suffering judgment by default. After various other proceedings, a summons is taken out to commit the defendant. Now, if it could have been shown that the object of the writ was at the time of service explained to her, she could not at this stage of the proceedings have been permitted to defend after suffering judgment by default; but she does not appear to have been informed by her husband what her position really was. I agree with the view of Bramwell, L.J.; the plaintiff could not have successfully prosecuted this action." Cotton, L.J. says this: "None of the provisions of the Judicature Acts have rendered a married woman liable to be sued as if she were unmarried. I should have thought that if the defendant had lain by intentionally, she could not be now allowed to appear; but the neglect to defend must be attributed to her husband, and she cannot be considered to have been guilty of such laches as to disentitle her to relief." "It seems to me that there is no case which has gone to show that this rule can be acted upon where the party who seeks to put it in force has, with full knowledge and wilfully, allowed judgment to go by default.—p. 433.

Cannan v. Reynolds (1855) 26 L. J. Q. B. 62; 5 El. & Bl. 301; 1 Jur. (N.S.) 873.—Q.B., *discussed*.

The Freedom (1871) 41 L. J. Adm. 1; L. R. 3 A. & E. 495; 25 L. T. 392; 1 Asp. M. C. 136.—SIR R. PHILLIMORE.

Kempshall v. Holland (1895) 14 R. 336.—

C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

Followed, **Hickman v. Berens** (1895) 64 L. J. Ch. 785; [1895] 2 Ch. 638; 12 R. 602; 73 L. T. 323.—C.A. LINDLEY, LOPES and RIGBY, L.JJ.; *referred to*, **Neale v. Gordon-Lennox** (1902) 71 L. J. K. B. 536; [1902] 1 K. B. 836.—ALVERSTONE, C.J. (*see post*).

Hickman v. Berens (1895) 64 L. J. Ch. 785;

[1895] 2 Ch. 638; 12 R. 602; 73 L. T.

323.—C.A.; and **Stewart v. Kennedy**

(1890) 15 App. Cas. 75, 108.—H.L. (SC.),

applied.

Wilding v. Sanderson (1897) 66 L. J. Ch. 467, 684; [1897] 2 Ch. 534; 77 L. T. 57; 45 W. R. 675.—C.A. LINDLEY, COTTON and LOPES, L.JJ.; affirming **BYRNE, J.** *See judgments at length*.

Hickman v. Berens, *discussed*.

Ainsworth v. Wilding (1896) 65 L. J. Ch. 432; [1896] 1 Ch. 673; 74 L. T. 193; 44 W. R. 540.—ROMER, J. *See post*, col. 2432.

Hickman v. Berens and **Wilding v. Sanderson**, *referred to*.

Neale v. Gordon-Lennox (1902) 71 L. J. K. B. 536; [1902] 1 K. B. 836.—ALVERSTONE, C.J.; reversed, C.A. COLLINS, M.R. and MATHEW, L.J.; C.A. reversed, *post*.

Wright v. Soresby (1834) 3 L. J. Ex. 207; 2 Cr. & M. 671; 4 Tyrw. 434.—EX., *referred to*.

Neale v. Gordon-Lennox (1902) 71 L. J. K. B. 939; [1902] A. C. 465; 87 L. T. 341; 51 W. R. 140; 66 J. P. 757.—H.L. (E.). HALSBURY, L.C.,

LORDS MACNAGHTEN, BRAMPTON and LINDLEY; reversing 71 L. J. K. B. 536; [1902] 1 K. B. 836.—C.A., and restoring order of ALVERSTONE, C.J.

Anlaby v. Praetorius (1888) 57 L. J. Q. B. 287; 20 Q. B. D. 764; 58 L. T. 671; 36 W. R. 487.—C.A.

Applied, **Cassidy v. M'Aloon** (1893) 32 L. R. Ir. 368.—C.A.; **Hughes v. Justin** (1894) 63 L. J. Q. B. 417; [1894] 1 Q. B. 667; 9 R. 212; 70 L. T. 365; 42 W. R. 339.—C.A. ESHER, M.R., LOPES and DAVEY, L.JJ.

Mullins v. Howell (1879) 48 L. J. Ch. 679; 11 Ch. D. 763.—JESSEL, M.R., *discussed and applied*.

Ainsworth v. Wilding (1896) 65 L. J. Ch. 432; [1896] 1 Ch. 673; 74 L. T. 193; 44 W. R. 540.—ROMER, J. *See post*, col. 2435.

Mullins v. Howell and **Ainsworth v. Wilding**, *referred to*.

Neale v. Gordon-Lennox (1902) 71 L. J. K. B. 536; [1902] 1 K. B. 836.—ALVERSTONE, C.J. *See supra*, col. 2431.

Scully v. Dundonald (Lord) (1878) 8 Ch. D. 658; 39 L. T. 116; 27 W. R. 249.—C.A., *referred to*.

Gilbert v. Endean (1878) 9 Ch. D. 259; 39 L. T. 404; 27 W. R. 252.—MALINS, V.-C.; affirmed C.A.

Huddersfield Banking Co. v. Lister & Son

(1895) 64 L. J. Ch. 523; [1895] 2 Ch.

273; 12 R. 381; 72 L. T. 703; 43 W. R.

567.—C.A. LINDLEY, LOPES and KAY,

L.JJ., *discussed*.

Emeris v. Woodward (1889) 59 L. J. Ch.

230; 43 Ch. D. 185; 61 L. T. 666; 38

W. R. 346.—NORTH, J., *commented on*.

Ainsworth v. Wilding (1896) 65 L. J. Ch. 432; [1896] 1 Ch. 673; 74 L. T. 193; 44 W. R. 540.

ROMER, J.—V. Williams, J. [**Huddersfield Banking Co. v. Lister & Son**] refused to upset an order for a compromise on motion, on the ground that he had no jurisdiction to do so.

When that case was before the C. A. leave was given to bring an action, and the C. A. did not entertain the application in its then form. . . .

The C. A. directed apparently by consent, that an action should be brought. As to **Emeris v. Woodward**, it is not clear on the report what the exact facts were, and I cannot find whether the order had been passed and entered or not. If it had, it is clearly an authority in point and against the applicant. If it had not, then it goes beyond what the respondents ask me to decide here, for

North, J. held that he could not entertain an application by summons. But that was before **Hickman v. Berens** (*supra*, col. 2431), and I cannot say consistently with **Hickman v. Berens** that it would now be held that an action to set aside a compromise was necessary in every case, even although the order had not been drawn up.—p. 434.

Death v. Harrison (1870) 40 L. J. Ex. 26;

L. R. 6 Ex. 15; 23 L. T. 495.—EX.; and

Tinkler v. Hilder or Holder (1849) 18

L. J. Ex. 429; 4 Ex. 187; 7 D. & L. 61;

13 Jur. 684.—EX., *applied*.

Hills v. Renny (1880) 49 L. J. Ex. 710; 5

Ex. D. 313; 42 L. T. 610; 29 W. R. 328.—

KELLY, C.B. and STEPHEN, J.; affirmed, C.A. BRETT, COTTON and THESIGER, L.JJ.

Death v. Harrison and Hills v. Renny (*supra*), referred to.

Cramer v. Matthews (*or* Davies v. Wise) (1881) 50 L. J. Q. B. 651; 7 Q. B. D. 425; 45 L. T. 26; 29 W. R. 804.—HUDDLESTON, B. and HAWKINS, J.

Matthey v. Wiseman (1865) 34 L. J. C. P. 216; 18 C. B. (N.S.) 657; 11 Jur. (N.S.) 603; 12 L. T. 846; 13 W. R. 914.—C.P., *discussed*.

London Corporation v. Cox (1867) 36 L. J. Ex. 225; L. R. 2 H. L. 239; 16 W. R. 44.—H.L. (E.), with the JUDGES; Cooke v. Gill (1873) L. R. 8 C. P. 107; 42 L. J. C. P. 98; 28 L. T. 32; 21 W. R. 334.—C.P.

And see "MAYOR'S COURT" (*supra*, col. 1751).

Williams v. Preston (1882) 51 L. J. Ch. 927; 20 Ch. D. 672; 47 L. T. 265; 30 W. R. 555.—C.A., referred to.

Youngs, In re, Doggett v. Revett (1885) 30 Ch. D. 421; 53 L. T. 682.—C.A. COTTON and LINDLEY, L.JJ.

COTTON, L.J.—In *Williams v. Preston*, where a solicitor had put in a fraudulent defence to the prejudice of the client, the C. A. held that there was jurisdiction to set aside the judgment.—p. 426.

Lawrie v. Lees (1881) 51 L. J. Ch. 209; 7 App. Cas. 19; 46 L. T. 210; 30 W. R. 185.—H.L. (E.), *discussed and applied*.

Swire, In re, Mellor v. Swire (1885) 30 Ch. D. 239; 53 L. T. 205; 33 W. R. 785.—C.A. COTTON, LINDLEY and BOWEN, L.JJ.

Flower v. Lloyd (1877) 46 L. J. Ch. 838; 6 Ch. D. 297; 37 L. T. 419; 25 W. R. 793.—C.A.; S. C. (1879) 10 Ch. D. 327; 39 L. T. 613; 27 W. R. 496.—C.A. (*see* "FRAUD," vol. i., col. 1162), *explained*.

Swire, In re, Mellor v. Swire (1885) 30 Ch. D. 239; 53 L. T. 205; 33 W. R. 785.—C.A. COTTON, LINDLEY and BOWEN, L.JJ.

COTTON, L.J.—That case only decides that after the Court has heard a case, it cannot rehear it.—p. 241.

Flower v. Lloyd, referred to.

Boswell v. Coaks (1894) 6 R. 167.—H.L. (E.); affirming C.A. LINDLEY, BOWEN and L. SMITH, L.JJ., and NORTH, J.

Flower v. Lloyd, *discussed*.

Baker v. Wadsworth (1898) 67 L. J. Q. B. 301.—WRIGHT and DARLING, JJ.

Flower v. Lloyd, 6 Ch. D. 297 (*supra*), followed.

Baker v. Wadsworth, *discussed*.

Cole v. Langford (1898) 67 L. J. Q. B. 698 [1898] 2 Q. B. 36.—RIDLEY and PHILLIMORE, JJ.

Shedden v. Patrick (1854) 1 Macq. 535.—H.L. (SC.), referred to.

Shedden v. Patrick (1869) L. R. 1 Sc. App. 470, 535.—H.L. (SC.)

Shedden v. Patrick, *considered*.

Goodman's Trusts, In re (1881) 50 L. J. Ch. 425; 17 Ch. D. 266, 280; 44 L. T. 527; 29 W. R. 586.—C.A. JAMES and COTTON, L.JJ.; LUSH, L.J. *dissenting*.

Shedden v. Patrick, referred to.

Grove, In re, Vaucher v. Treasury Solicitor (1888) 58 L. J. Ch. 57; 40 Ch. D. 216; 59 L. T. 587; 37 W. R. 1.—STIRLING, J. (affirmed C.A.).

Sprunt v. Pugh (1878) 7 Ch. D. 567; 26

W. R. 473.—JESSEL, M.R.; and **Lowten v. Colchester Corporation** (1817) 2 Meriv. 395; 16 R. R. 187.—L.C., *discussed*.

Harvey v. Harvey (1884) 26 Ch. D. 644; 33 W. R. 76; 48 J. P. 468.—CHITTY, J.

Williams v. Bagot (Lord) (1825) 4 D. & R.

315; 5 D. & R. 719; 3 B. & C. 772; 27 R. R. 482.—K.B., *distinguished*.

Reg. v. Maidenhead Corporation (1882) 51 L. J. Q. B. 444; 9 Q. B. D. 494; 46 J. P. 724.—C.A. JESSEL, M.R., BRETT and COTTON, L.JJ.

Winn (or Wynn) v. Nicholson (1849) 18 L. J.

C. P. 231; 7 C. B. 811; 6 D. & L. 717.—C.P., *commented on*.

Grafham v. Turnbull (1875) 44 L. J. Ch. 538; 23 W. R. 645.—MALINS, V.-C.

Chuck v. Cremer (1848) 17 L. J. Ch. 287; 2

Ph. 477.—L.C.; Londonderry and Inniskillen Ry. v. Leishman (1850) 12 Beav. 423.—M.R.; and **Harding v. Wickham**

(1861) 2 J. & H. 676; 4 L. T. 788; 9 W. R. 652.—WOOD, V.-C., *discussed and followed*.

Grafham v. Turnbull (1875) 44 L. J. Ch. 538; 23 W. R. 645.—MALINS, V.-C.

Cooke v. Cooke (1867) 36 L. J. Ch. 480; L. R.

4 Eq. 77; 15 W. R. 981.—WOOD, V.-C., *discussed*.

Law v. Garrett (1878) 8 Ch. D. 26; 38 L. T. 3; 26 W. R. 426.—C.A. JAMES, BAGGALLAY and THESIGER, L.JJ.

Fritz v. Hobson (1880) 49 L. J. Ch. 735; 14

Ch. D. 542; 42 L. T. 677; 28 W. R. 722.—FRY, J., referred to.

Penrice v. Williams (1883) 52 L. J. Ch. 593; 23 Ch. D. 353; 48 L. T. 868; 31 W. R. 496.—CHITTY, J.

Fritz v. Hobson, followed.

Barker v. Purvis (1886) 56 L. T. 131.—C.A.

Barker v. Purvis, referred to.

Ainsworth v. Wilding (1896) 65 L. J. Ch. 432; [1896] 1 Ch. 673 (*post*, col. 2435).

Fritz v. Hobson and Barker v. Purvis, approved.

Chessum & Sons v. Gordon (1901) 70 L. J. Q. B. 394; [1901] 1 Q. B. 694; 84 L. T. 137; 49 W. R. 309.—C.A.; affirming DAVY, J.

A. L. SMITH, M.R.—The applicant there [*Preston Banking Co. v. Allsup & Sons* (*post*, col. 2435)] desired to re-open an order of the Court and incidentally to obtain a new order as to costs. The V.-C. of the County Palatine of Lancaster held that he had no jurisdiction to grant the relief applied for, and his refusal was affirmed. That has no bearing on a case where there has been an accidental slip. . . . There [*Fritz v. Hobson*] the plaintiff in taking final judgment in the action had omitted to ask for the costs of an interlocutory motion, which had been adjourned to the hearing and had in fact been forgotten. The omission was afterwards discovered, and an application was made that the judgment as drawn up might be varied so as to

include the costs of the motion and so rectify the blunder. Fry, J. there held that under one or other jurisdiction, either that under Ord. XXVIII. r. 11, or that which is inherent in the Court itself, there was power to amend the blunder. Then there is *Barker v. Purris*, where the C. A. expressed the same view of Ord. XXVIII. r. 11, and held that blunders of this kind could be rectified under its terms.—p. 395. COLLINS and ROMER, L.JJ. concurred.

Swire, In re, Mellor v. Swire (1885) 30 Ch. D. 239; 53 L. T. 205; 33 W. R. 785.—C.A., *approved*.

Hutton v. Harris (1892) 62 L. J. P. C. 24; [1892] A. C. 547; 1 R. 1; 67 L. T. 722.—H.L. (IR.); affirming S. C. *nom.* Knipe's Estate, In re (1891) 27 L. R. Ir. 512.—C.A.; which reversed GIBSON, J.

Swire, In re, Mellor v. Swire; and Hutton v. Harris, approved.

Milson v. Carter (1893) 62 L. J. P. C. 126; [1893] A. C. 638; 1 R. 425; 69 L. T. 735.—P.C. LORD HOBHOUSE, (for the Court).—Their lordships do not doubt that the Court has power at any time to correct an error in a decree or order arising from a slip or accidental omission. A recent instance of the exercise of this power occurred in *Hutton v. Harris*, before the H. L., where an error arising from an accidental omission was corrected after the lapse of forty years. The H. L. in that case approved the views expressed by the C. A. in *Mellor v. Swire*.—p. 126.

Swire, In re, Mellor v. Swire, discussed and not applied.

Ainsworth v. Wilding (1896) 65 L. J. Ch. 432; [1896] 1 Ch. 673; 74 L. T. 193; 44 W. R. 540.

ROMER, J.—*Swire, In re*. . . decided that, even where a judgment had been duly passed and entered, it might still be altered by the Court if the Court saw that it did not truly represent the decision which the Court had pronounced. . . That case, therefore, has no true bearing upon the one before me, which is not one where it can be said that the judgment does not properly express the meaning and intention of the Court. *Mullins v. Howell* (*supra*, col. 2432), to which I have already referred, was a case of an order made on an interlocutory application, and that was the very ground taken by Sir G. Jessel for entertaining the jurisdiction to discharge the order, though he states a further ground, namely that the Court had discretion as to issuing an attachment, and would not in that case exercise it. That case, therefore, is no authority here. *Barker v. Purris* (*supra*, col. 2434) was a case of a slip which was corrected under Ord. XXVIII. r. 11.—pp. 443, 444.

Hutton v. Harris, referred to.

Stewart v. Rhodes (1900) 69 L. J. Ch. 174; [1900] 1 Ch. 386, 394; 82 L. T. 337; 48 W. R. 354.—STIRLING, J.; affirmed, C.A. LINDLEY, M.R., RIGBY and V. WILLIAMS, L.JJ.

Preston Banking Co. v. William Allsup and Sons (1894) 64 L. J. Ch. 196; [1895] 1 Ch. 141; 12 R. 51; 71 L. T. 708; 43 W. R. 231.—C.A.

Applied, **Scowby, In re, Scowby v. Scowby** (1897) 66 L. J. Ch. 327; [1897] 1 Ch. 741; 76 L. T. 363.—C.A. LINDLEY, A. L. SMITH and RIGBY, L.JJ.; *distinguished*, **Chessum and Sons v.**

Gordon (1901) 70 L. J. Q. B. 394; [1901] 1 Q. B. 694.—C.A. (*supra*, col. 2434).

Laming v. Gee (1878) 48 L. J. Ch. 196; 10 Ch. D. 715; 40 L. T. 33; 27 W. R. 227.—HALL, V.-C., *approved*.

Edmonds v. Robinson (1885) 54 L. J. Ch. 586; 29 Ch. D. 170; 52 L. T. 339; 33 W. R. 471.—KAY, J.

St. Nazaire Co., In re (1879) 12 Ch. D. 88; 41 L. T. 110; 27 W. R. 854.—C.A., *applied*.

Smith v. Smith, Major, Child, and Rabett (1882) 7 P. D. 84; 51 L. J. P. 31; 46 L. T. 696; 30 W. R. 688.

HANNEN, P.—The Court has not authority after a case is concluded, to recall an order, however erroneous, which correctly expressed the judge's meaning at the time: *St. Nazaire Co., In re*.—p. 92.

St. Nazaire Co., In re.

Referred to, **Swire, In re, Mellor v. Swire** (1885) 30 Ch. D. 239; 53 L. T. 205; 33 W. R. 785.—C.A.; *adopted*, **Suffield and Watts, In re, Brown, Ex parte** (1888) 20 Q. B. D. 693; 58 L. T. 911; 36 W. R. 303, 584; 5 Morrell 83.—C.A.; *discussed*, **Crown Bank, In re** (1890) 59 L. J. Ch. 739; 44 Ch. D. 634; 62 L. T. 823; 39 W. R. 45.—NORTH, J.; *distinguished*, **MacAlester's Estate, In re** (1890) 25 L. R. Ir. 258.—MONROE, J.; *considered*, **O'Brien v. Reg.** (1890) 26 L. R. Ir. 451, 523.—C.A. (*see* judgment of PALLES, C.B.); *approved*, **Preston Banking Co. v. Allsup** (1894) 64 L. J. Ch. 196; [1895] Ch. 141; 12 R. 51; 71 L. T. 708; 43 W. R. 231.—C.A. (*see post*).

St. Nazaire Co., In re, referred to.

Charles Bright & Co., Ltd. v. Sellar (1903) 72 L. J. Ch. 921; [1904] 1 K. B. 6; 89 L. T. 431; 52 W. R. 148.—C.A.

Staniar v. Evans (1886) 34 Ch. D. 470; 56 L. J. Ch. 581; 56 L. T. 87; 35 W. R. 286.—NORTH, J., *considered*.

Preston Banking Co. v. Allsup (1894) 12 R. 51; 64 L. J. Ch. 196; [1895] 1 Ch. 141; 71 L. T. 708; 43 W. R. 231.—C.A.

A. L. SMITH, L.J.—It is true that *Staniar v. Evans*. . . seems to show that there is jurisdiction; but it does not appear that in that case the judge's attention was called to *St. Nazaire Co., In re*, which . . . shows that when an order or judgment of the High Court has once been perfected there is no jurisdiction in the Court to alter it; nor was his attention called—indeed it could not have been, as the decision I am going to refer to was a subsequent decision—to *Suffield and Watts, In re, Brown, Ex parte* (*supra*), where Fry, L. J., refers to and adopts *St. Nazaire Co., In re*. I think that *Staniar v. Evans* would have to be reconsidered, should the occasion come for doing so. I think that Fry, L. J., was right in *Suffield and Watts, In re*, when he said that Cave, J., had no power to rehear the matter.—p. 54.

Nicol v. Vaughan (1831) 5 Bligh (N.S.) 505; 2 Dow & Cl. 420; 35 R. R. 60.—H.L. (E.), *discussed*.

Browne v. McClintock (1873) L. R. 6 H. L. 456, 463; 22 W. R. 521.—H.L. (IR.). *And see post*.

Nicol v. Vaughan (*supra*), referred to.
Morgan, Ex parte, Simpson, In re (1876) 45 L. J. Bk. 36; 2 Ch. D. 72; 34 L. T. 329; 24 W. R. 414.—C.A. *And see* "APPEAL," vol. i., col. 28.

Wiltshire Iron Co., In re, Pearson, Ex parte (1868) 37 L. J. Ch. 554; L. R. 3 Ch. 443; 18 L. T. 40, 423; 16 W. R. 444, 682.—L.JJ.

Applied. **International Life Assurance Society, In re, Gibbs and West's Case** (1870) 39 L. J. Ch. 667; L. R. 10 Eq. 312; 23 L. T. 350; 18 W. R. 970.—**MALINS, v.-c.**: *discussed*, **Oriental Bank Corporation, In re, Guillemin, Ex parte** (1884) 54 L. J. Ch. 322; 28 Ch. D. 631; 52 L. T. 167.—**CHITTY, J.**

Gildart v. Gladstone (1810) 12 East 668.—**K.B., questioned.**
Rex v. Bourne (1837) 7 A. & E. 58; 6 L. J. M. C. 129.—**K.B.**

LITLEDAL, J.—It is not necessary to enter into the cases . . . on which a distinction has been grounded between error by the plaintiff and error by the defendant; or to give an opinion as to the ruling in *Gildart v. Gladstone*, which seems contrary to some former decisions.—p. 67.

Gildart v. Gladstone, discussed.
Gregory v. Brunswick (Duke) (1846) 16 L. J. C. P. 35; 3 C. B. 481.—**EX. CH.**

Gildart v. Gladstone, approved.
Rex v. Bourne and Gregory v. Brunswick (Duke), considered.
Pollitt v. Forrest (1847) 17 L. J. Q. B. 291; 11 Q. B. 962; 12 Jur. 560.—**EX. CH.**

Perry v. Phelps (1810) 17 Ves. 173.—**L.C., applied.**
Hodson v. Ball (1842) 12 L. J. Ch. 80; 1 Ph. 177; 7 Jur. 745.—**COTTENHAM, L.C.**

Perry v. Phelps, approved.
Brend v. Brend (1683) 1 Vern. 213.—**L.K.**; and **Bonham v. Newcomb** (1683) 1 Vern. 215.—**L.K., observed on.**
Trulock v. Robey (1847) 2 Ph. 395; 11 Jur. 999.—**L.C.**; affirming (1846) 15 Sim. 267.—**V.-C.**

Perry v. Phelps and Trulock v. Robey, discussed.
Green v. Jenkins (1860) 29 L. J. Ch. 505; 1 De G. F. & J. 454; 6 Jur. (N.S.) 515; 2 L. T. 311; 8 W. R. 380.—**L.JJ.**

TURNER, L.J.—I think the cases warrant this conclusion, that a mere error in judgment does not furnish a sufficient foundation for such a bill [of review]. Lord Eldon has expressly so stated in *Perry v. Phelps*, and Lord Cottenham has adopted that statement in *Trulock v. Robey*. Lord Cottenham has, indeed gone further, and speaks of such bills as confined to cases in which the decree is contrary to the forms of practice of the Court, but with all deference to so high an authority, I venture to doubt whether this latter position is correct.—p. 509.

CAMPBELL, L.C. to the same effect.
KNIGHT BRUCE, L.J. doubted.

M'Neill v. Cahill (1820—1828) 2 Bligh 228; 2 Bligh (N.S.) 316.—**H.L. (IR.), observed on.**
Hosking v. Terry (1862) 15 Moore P. C. 493; 8 Jur. (N.S.) 975; 7 L. T. 52; 10 W. R. 884.—**P.C.**

LORD KINGSDOWN (for the Court).—We may observe with respect to the rules to which we were referred in the argument as laid down by Lord Redesdale in *M'Neill v. Cahill*, that we do not find any observations to the effect of those rules attributed to Lord Redesdale in the report. They appear to be the reporter's own note of what he considers to have been established by the decision.—p. 504.

Hosking v. Terry, referred to.
Scott v. Alvarez (1895) 64 L. J. Ch. 376; [1895] 1 Ch. 596; 72 L. T. 455.—**KEKEWICH, J.** [His lordship also referred to Mitford on Pleading (5th ed.), p. 102.]

Gwynne v. Edwards (1845) 15 L. J. Ch. 84; 9 Beav. 22.—**M.R., applied.**
Berry v. Att.-Gen. (1849) 19 L. J. Ch. 282; 3 Mac. & G. 16; 1 H. & Tw. 520.—**L.C.**

Gwynne v. Edwards and Hargrave v. Hargrave (1845) 14 L. J. Ch. 250; 8 Beav. 289.—**M.R., explained.**
Turner v. Turner (1852) 21 L. J. Ch. 422; 2 De G. M. & G. 28.—**L.JJ.**

Berry v. Att.-Gen. (1849) 19 L. J. Ch. 232; 3 Mac. & G. 16; 1 H. & Tw. 520.—**L.C., distinguished.**
Anglo-Californian Gold Mining Co., In re (1861) 34 L. J. Ch. 238; 1 Dr. & Sm. 628; 5 L. T. 739; 10 W. R. 127.—**KINDERSLEY, v.-c.**

Anglo-Californian Gold Mining Co., In re, applied.
Universal Bank, In re (post).

Anglo-Californian Gold Mining Co., In re, and Universal Bank, In re (1866) L. R. 1 Ch. 428; 12 Jur. (N.S.) 477; 14 L. T. 691; 14 W. R. 906.—**GRANWORTH, L.C., discussed and not applied.**
National Funds Assurance Co., In re (1876) 46 L. J. Ch. 183; 4 Ch. D. 305; 35 L. T. 689; 25 W. R. 151, 158.—**C.A.**

National Funds Assurance Co., In re, applied.
Mansel, In re, Rhodes v. Jenkins (1878) 47 L. J. Ch. 870; 7 Ch. D. 711; 38 L. T. 403; 26 W. R. 361.—**C.A.**; **Donovan v. Brown** (1879) 48 L. J. Ex. 456; 4 Ex. D. 148; 42 L. T. 30; 27 W. R. 648.—**EX. D.**

Scholey v. Central Ry. of Venezuela (1866) 14 W. R. 786.—**ROMILLY, M.R., applied.**
Pawle, Ex parte, Estates Investment Co., In re (1869) 38 L. J. Ch. 318; 20 L. T. 100.—**ROMILLY, M.R.**: affirmed, 38 L. J. Ch. 412; L. R. 4 Ch. 497; 17 W. R. 599.—**L.JJ.**

Sharrock v. L. & N. W. Ry. (1875) 1 C. P. D. 70; 33 L. T. 341; 24 W. R. 346.—**C.P.D.**; affirmed, **C.A., applied.**
Cousins v. Lombard Bank (1876) 1 Ex. D. 401, 407; 45 L. J. Ex. 573; 35 L. T. 484; 25 W. R. 116.—**EX. D.**

Sharrock v. L. & N. W. Ry., referred to.
Cousins v. Lombard Bank, applied.
Rhodes v. Liverpool Commercial Investment Co. (1879) 4 C. P. D. 425, 428.—**COLERIDGE, C.J.**

Cousins v. Lombard Bank, referred to.
Pierpont v. Cartwright (1880) 5 C. P. D. 139, 141; 42 L. T. 259; 28 W. R. 583.—**C.P.D.**

Shubrook v. Tufnell (1882) 9 Q. B. D. 621; 46 L. T. 749; 30 W. R. 740.—C.A., *followed*.
Bosson v. Altrincham Urban Council (No. 1) (1903) 72 L. J. K. B. 271; [1903] 1 K. B. 547; 51 W. R. 337; 67 J. P. 397.—C.A. *And see* "APPEAL," vol. i., cols. 37, 38.
Davie v. Brownlow (Lord) (1783) Dick. 611; **Huggins v. York Building Co.** (1740) 2 Atk. 44.—L.C.; and **Behrens v. Sieveking** (1837) 2 Myl. & Cr. 602.—L.C., *discussed*.
Bainbrigg v. Baddeley (1847) 2 Ph. 705.—COTTENHAM, L.C.
Portsmouth (Earl) v. Effingham (Lord) (1750) 1 Ves. sen. 430, 435.—L.C., *referred to*.
Hosking v. Terry (1862) 15 Moore P. C. 493; 8 Jur. (N.S.) 975; 7 L. T. 52; 10 W. R. 884.—P.C.
Young v. Keighly (1809) 16 Ves. 348.—L.C., and **Partridge v. Osborne** (1828) 5 Russ. 195; 7 L. J. (O.S.) Ch. 49.—L.C., *referred to*.
Hodson v. Ball (1842) 12 L. J. Ch. 80; 1 Ph. 177; 7 Jur. 745.—COTTENHAM, L.C.
Partridge v. Osborne, *referred to*.
Henderson v. Henderson (1843) 3 Hare 100.—WIGRAM, V.-C.
Young v. Keighly and Partridge v. Osborne, *referred to*.
Hosking v. Terry (1862) 15 Moore P. C. 493; 8 Jur. (N.S.) 975; 7 L. T. 52; 10 W. R. 884.—P.C.
Young v. Keighly, *rule in, applied*.
Partridge v. Osborne, *referred to*.
Michael v. Fripp (1870) 18 W. R. 423.—MALINS, V.-C.
Bainbrigg v. Baddeley, 9 Beav. 538; 10 Jur. 765.—M.R.; *reversed*. (1847) 2 Ph. 705.—L.C.
Bainbrigg v. Baddeley, *referred to*.
Toulmin v. Copland (1848) 2 Ph. 711.—COTTENHAM, L.C.; *reversing* (1844) 14 L. J. Ch. 92; 4 Hare 41; 8 Jur. 1160.—V.-C.
Bainbrigg v. Baddeley, *discussed*.
Hodson v. Ball (1842) 12 L. J. Ch. 80; 1 Ph. 177; 7 Jur. 745.—L.C., *distinguished*.
Taylor v. Taylor (1849) 1 Mac. & G. 397; 1 H. & Tw. 437.—COTTENHAM, L.C.
Hodson v. Ball, *distinguished*.
Dear v. Webster (1867) 15 W. R. 395.—WOOD, V.-C.
Bainbrigg v. Baddeley, Taylor v. Taylor, and Hodson v. Ball, *discussed*.
Turner v. Tepper (1877) 46 L. J. Ch. 703; 25 W. R. 726.—MALINS, V.-C.
Maharajah Moheshur Sing v. Bengal Government (1859) 7 Moore Ind. App. 283.—P.C., *applied*.
Sheonath v. Ramnath (1865) 35 L. J. P. C. 4.—P.C.
Thomas v. Rawlings (No. 3) (1864) 34 Beav. 50; 10 Jur. (N.S.) 1192; 11 L. T. 721; 13 W. R. 248.—M.R.; *affirmed*, L.J., *not applied*.
Hoghton In re, **Hoghton v. Fidley** (1874) 43 L. J. Ch. 758; L. R. 18 Eq. 573; 22 W. R. 854. MALINS, V.-C.—**Thomas v. Rawlings**, in which an application by a person *sui juris* for leave to

file a [supplemental] bill of this kind, not supported by the usual affidavit, that the mistake could not have been discovered by reasonable diligence before, . . . has no application to an infant of tender years who can be guilty of no negligence, and who cannot be answerable for the negligence of her next friend.—p. 760.

Falcke v. Scottish Imperial Insurance Co. (1887) 57 L. T. 39; 35 W. R. 794.—KAY, J. *Referred to*, **Scott v. Alvarez** (*post*); *approved but dictum discussed*; **Charles Bright & Co., Ltd. v. Sellar** (*post*).

Boswell v. Coaks (1894) 6 R. 167.—H.L. (E.), *discussed*.

Scott v. Alvarez [1895] 1 Ch. 596; 64 L. J. Ch. 376; 72 L. T. 455.

KEKEWICH, J.—It may, however, be worth while to mention that I do not regard **Boswell v. Coaks** as at all condemnatory of actions of review, though possibly an authority that they may now be commenced without leave.—p. 623.

Boswell v. Coaks, *applied*.
Remington v. Scoles (1897) 66 L. J. Ch. 526; [1897] 1 Ch. 1; 76 L. T. 667; 45 W. R. 580.—ROMER, J.; *affirmed* C.A. (*see post*, col. 2498).

Boswell v. Coaks, *discussed*.
Birch v. Birch (1902) 71 L. J. P. 58; [1902] P. 130; 86 L. T. 364; 50 W. R. 437.—C.A.; *reversing* [1902] P. 70.—BARNES, J.

Boswell v. Coaks and Birch v. Birch, *referred to*.
Charles Bright & Co., Ltd. v. Sellar (1903) 72 L. J. K. B. 921; [1904] 1 K. B. 6; 89 L. T. 431; 52 W. R. 148.—C.A.

Markham, In re, Markham v. Markham (1880) 16 Ch. D. 1; 29 W. R. 228.—C.A.; and **Farmiter v. Farmiter** (1860) 2 De G. F. & J. 526.—L.J., *referred to*.
Ritso, In re, and Ex parte (1883) 52 L. J. Ch. 535; 22 Ch. D. 529; 48 L. T. 376; 31 W. R. 373.—C.A.

Markham, In re, *discussed*.
Youngs, In re, Doggett v. Revett (1885) 30 Ch. D. 421; 53 L. T. 682; 33 W. R. 880.—C.A.

Ritso, In re, and Ex parte, *referred to*.
Lennox, Ex parte, Lennox, In re (1885) 55 L. J. Q. B. 45; 16 Q. B. D. 315, 322; 54 L. T. 452; 34 W. R. 51.—C.A.

Abud v. Riches (1876) 45 L. J. Ch. 649; 2 Ch. D. 528; 34 L. T. 713; 24 W. R. 637.—JESSEL, M.R., *referred to*.
Harvey v. Harvey (1884) 26 Ch. D. 644, 654; 33 W. R. 76; 48 J. P. 468.—CHITTY, J.

McLeod v. St. Aubyn (1899) 68 L. J. P. C. 137; [1899] A. C. 549; 81 L. T. 158; 48 W. R. 173.—P.C., *referred to*.

Rex v. Freeman's Journal (1901) [1902] 2 Ir. R. 91.—K.B.D.

And see **Reg. v. Gray** (1900) 69 L. J. Q. B. 502; [1900] 2 Q. B. 36, 42; 82 L. T. 534; 48 W. R. 474; 64 J. P. 484.—Q.B.D.

Hookpayton v. Bussell (1854) 10 Ex. 24; 23 L. J. Ex. 267; 2 C. L. R. 1081.—EX.; and **Thames Iron Works and Shipbuilding Co. v. Patent Derrick Co.** (1860) 29 L. J. Ch. 714; 1 J. & H. 93; 6 Jur. (N.S.) 1013; 2 L. T. 208; 8 W. R. 408.—WOOD, V.-C., *commented on*.
Lievesley v. Gilmore (1866) L. R. 1 C. P. 570;

35 L. J. C. P. 351; 12 Jur. (N.S.) 874; 1 H. & R. 849; 15 L. T. 386.

ERLE, C.J.—It is said that the authorities show that no action will lie on a judge's order. I have looked at *Hookpayton v. Bussell*, and in terms it supports Mr. Crompton's argument; but the order in that case provided that "if the defendant made default in payment, the plaintiff should be at liberty to issue execution by *pieri facias*, or *cupias ad satisfaciendum*." The agreement evidenced by the order, therefore, was an agreement that if the defendant failed to perform his part, the plaintiff should avail himself of that particular remedy. In *Thames Ironworks Co. v. Patent Derrick Co.*, the order similarly empowered the plaintiffs, in case the defendants made default, to issue execution for a particular sum; it therefore provided a particular form of remedy, and the ordinary remedy by action was consequently taken away. It is the same as the ordinary case in which the right of action is taken away by an agreement to refer all disputes to arbitration. The decisions, therefore, were in both cases correct, but the expressions used by the judges were wider than necessary.—p. 573. BYLES and M. SMITH, JJ. concurred.

Hookpayton v. Bussell (*supra*), discussed and distinguished.

Ingham, In re, The Trustee, Ex parte (1884) 52 L. T. 299, 301.—CAVE, J.; reversed, *nom.* Ingham, In re, Craven, Ex parte (1885) 52 L. T. 714.—C.A. BRETT, M.R., COTTON and LINDLEY, L.JJ.

Hookpayton v. Bussell, referred to.

Dent v. Basham (1854) 23 L. J. Ex. 161; 9 Ex. 469; 2 C. L. R. 989; 18 Jur. 295; 2 W. R. 201.—EX., distinguished.

Norton v. Gregory (1895) 14 R. 735; 73 L. T. 10; 11 Times L. R. 439.—C.A. ESHER, M.R., A. L. SMITH and RIGBY, L.JJ.

A. L. SMITH, L.J.—This is not a case like *Dent v. Basham*, where it was held that an action was not maintainable against an attorney for not delivering his bill of costs in obedience to a judge's order. The principle of that case was followed in *Hookpayton v. Bussell*, where it was held that an action could not be brought upon an undertaking for a good consideration that had been inserted by consent in a judge's order, but that an application must be made for leave to enforce the order by attachment.—p. 737.

Dent v. Basham and *Hookpayton v. Bussell*, distinguished.

Godfrey v. George (1895) 65 L. J. Q. B. 249; [1896] 1 Q. B. 48; 73 L. T. 599; 44 W. R. 245.—C.A.

JESSEL, M.R.—Both those cases were before the rule [Ord. XLII. r. 24].—p. 250.

Lievesley v. Gilmore (1866) 35 L. J. C. P. 351; L. R. 1 C. P. 570; 12 Jur. (N.S.) 874; 1 H. & R. 849; 15 L. T. 386.—C.P., referred to.

Conolan v. Leyland (1884) 54 L. J. Ch. 123; 27 Ch. D. 632, 638; 51 L. T. 895.—CHITTY, J.

Lehain v. Philpott (1875) 44 L. J. Ex. 225; L. R. 10 Ex. 242; 33 L. T. 98; 23 W. R. 876.—EX., applied.

Philpott v. Lehain (1876) 35 L. T. 855.—C.P.D.

Philpott v. Lehain, applied.

Norton v. Gregory (1895) 14 R. 735; 73 L. T. 10; 11 Times L. R. 439.—C.A.

Philpott v. Lehain and Norton v. Gregory, applied.

Godfrey v. George (1895) 65 L. J. Q. B. 249; [1896] 1 Q. B. 48; 73 L. T. 599; 44 W. R. 245.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

LOPES, L.J.—*Philpott v. Lehain and Norton v. Gregory* are clear authorities that an action may be brought for costs due under a judge's order by virtue of Ord. XLII. r. 24.—p. 251.

Boyd, In re, McDermott, Ex parte (1895) 64 L. J. Q. B. 439; [1895] 1 Q. B. 611; 14 R. 364; 72 L. T. 348; 2 Manson 166.—C.A., applied.

Norton v. Gregory (1895) 14 R. 735; 73 L. T. 10.—C.A. (*supra*).

Boyd, In re, McDermott, Ex parte, and Godfrey v. George (*supra*), applied.

Pritchett v. English and Colonial Syndicate (1899) 68 L. J. Q. B. 801; [1899] 2 Q. B. 428, 434; 81 L. T. 206; 47 W. R. 577.—C.A. LINDLEY, M.R., and ROMER, L.J.

Godfrey v. George and Pritchett v. English and Colonial Syndicate, referred to.

Furber v. Taylor (1900) 69 L. J. Q. B. 898; [1900] 2 Q. B. 719; 83 L. T. 308; 48 W. R. 689.—C.A.

A. L. SMITH, L.J.—Prior to the Judicature Act, 1873, and Ord. XLII. r. 24, no person could bring an action upon a judge's order, and confining my remarks to the High Court the reason is obvious. It would be an unnecessary waste of legal proceedings to allow such an action to go on, for a person could take proceedings by way of execution under the rules of Court. If authority be wanted, I refer to Bullen & Leake's *Precedents of Pleadings* (3rd ed.), p. 194, where it is stated "an action will not lie upon a rule of Court or a judge's order," and cases are there cited in support of that statement. Then the question arose whether that rule had not been altered by Ord. XLII. r. 24. It was held in *Godfrey v. George* and *Pritchett v. English and Colonial Syndicate*, both of which are decisions to a similar effect, that an action can by virtue of Ord. XLII. r. 24 be brought upon a judge's order; and whether that is right or not is not for us to decide, because those decisions are binding on this Court.—p. 898.

V. WILLIAMS, L.J.—The reasoning upon which the cases were decided will be found in the note to *Emerson v. Lashley*, and it will be found to apply just as much to an order in a County Court for the payment of costs as to a like order in one of the old superior Courts of Q.B., C.P., or Ex. But I go further, for the marginal note in *Emerson v. Lashley* is this: "No action will lie in this Court to recover costs ordered to be paid by a rule of an inferior Court in the course of a suit there, notwithstanding the defendant should not be liable to an attachment of the inferior Court, by being resident out of the jurisdiction." So that that is a positive decision—although it was before the passing of the County Courts Acts, 1846 (9 & 10 Vict. c. 95)—that although an action might have been brought upon a judgment of a superior Court, yet it could not have been brought upon an order.—p. 899.

Emerson v. Lashley (1793) 2 H. Bl. 248.—K.B.

Applied, **Dent v. Basham** (1854) 23 L. J. Ex. 161; 9 Ex. 469; 2 C. L. R. 989; 18 Jur. 295; 2 W. R. 201.—EX.; *referred to*, **Marbella Iron Ore Co. v. Allen** (*post*); *considered*, **Furber v. Taylor** (*supra*).

Carpenter v. Thoratton (1819) 3 B. & Ald. 52; 22 R. R. 299.—K.B.

Commented on, **Marbella Iron Ore Co. v. Allen** (1878) 47 L. J. C. P. 601; 38 L. T. 815.—C.P.D.; *distinguished*, **Ingham, In re, Trustee, Ex parte** (1884) 52 L. T. 299.—CAVE, J. (*see supra*, col. 2441); *applied*, **Chalk, Webb & Co. v. Tennent** (1887) 57 L. T. 598; 36 W. R. 263.—NORTH, J. *referred to*, **Westmoreland Green and Blue Slate Co. v. Feilden** [1901] 3 Ch. 15, 21 (*post*).

Westmoreland Green and Blue Slate Co. v. Feilden (1891) 60 L. J. Ch. 680; [1891] 3 Ch. 15; 65 L. T. 428; 40 W. R. 23.—

KEKEWICH, J.; *affirmed*.—C.A., *explained*.

Pritchett v. English and Colonial Syndicate (1899) 68 L. J. Q. B. 801; [1899] 2 Q. B. 428; 81 L. T. 206; 47 W. R. 577.—C.A.

Hamilton v. Houghton (1820) 2 Bligh 169; 21 R. R. 65.—H. L. (IR.), *discussed*.

O'Connell v. M'Namara (*post*).

O'Connell v. M'Namara (1843) 2 Con. & L. 266, n.; 3 Dr. & War. 411.—L.C.; and

Wilson v. Poe (1845) 2 Jo. & Lat. 765; 9 Ir. Eq. R. 114.—L.C., *discussed*.

Hatton v. Harris (1892) 62 L. J. P. C. 24; [1892] A. C. 547, 562; 1 R. 1; 67 L. T. 722.—H. L. (IR.). *And see* S. C. *nom.* **Knipe's Estate, In re** (1891) 27 L. R. Ir. 512.—C.A.

Berkeley v. Elderkin (1853) 22 L. J. Q. B. 281; 1 El. & Bl. 805; 17 Jur. 1153; 1 W. R. 305.—Q.B., *followed*.

Austin v. Mills (1853) 23 L. J. Ex. 40; 9 Ex. 288; 2 C. L. R. 414; 18 Jur. 16; 2 W. R. 107.—EX.

Berkeley v. Elderkin and Austin v. Mills, *discussed*.

Moffatt v. Burrowes (1855) 4 Ir. C. L. R. 297.—C.P.

Berkeley v. Elderkin.

Distinguished, **Edwards v. Coombe** (1872) 41 L. J. C. P. 202; L. R. 7 C. P. 519; 27 L. T. 315; 21 W. R. 107.—C.P.; *applied*, **Bailey v. Bailey** (1884) 53 L. J. Q. B. 583; 13 Q. B. D. 855.—C.A.

Berkeley v. Elderkin, *discussed*.

Norton v. Gregory (1895) 14 R. 735; 73 L. T. 10; 11 Times L. R. 439.—C.A.

RIGBY, L.J.—The dictum of Lord Campbell [*Berkeley v. Elderkin*] is explained by what follows, that the Act there allowed the County Court judgment to be altered from time to time; and if it could have been converted, by an action being brought upon it in the superior Court, into a judgment of that Court, the result would have been to entirely defeat the statute.—p. 738.

And see "COUNTY COURT," vol. i., col. 750.

White v. Witt (1877) 46 L. J. Ch. 560; 5 Ch. D. 589; 37 L. T. 110; 25 W. R. 435.—C.A., *discussed*.

Standard Discount Co. v. La Grange (1877) 47 L. J. C. P. 3; 3 C. P. D. 67, 72; 37 L. T. 372; 26 W. R. 25.—C.A.

Bennett v. Neale (1811) 14 East 343; Wightw. 324.—K.B., *applied*.

Hutchinson v. Gillespie (1856) 25 L. J. Ex. 103; 11 Ex. 798; 2 Jur. (N.S.) 403; 4 W. R. 302.—EX., *discussed and applied*.

Marbella Iron Ore Co. v. Allen (1878) 47 L. J. C. P. 601; 38 L. T. 815.—C.P.D.

Hutchinson v. Gillespie, *principle applied*.

Bailey v. Bailey (1884) 13 Q. B. D. 855.—C.A. *affirming* 53 L. J. Q. B. 583; 50 L. T. 722; 32 W. R. 856.—Q.B.D.

Rosenberg v. Lindo (1883) 48 L. T. 498.—CHITTY, J., *referred to*.

Hyde v. Hyde (1888) 57 L. J. P. 89; 13 P. D. 166, 174; 59 L. T. 529; 36 W. R. 708.—C.A.

Chinery, In re and Ex parte (1884) 53 L. J. Ch. 662; 12 Q. B. D. 342; 50 L. T. 342; 32 W. R. 469; 2 Morrell 52.—C.A.

Followed, **Schmitz, Ex parte, Cohen, In re** (1884) 53 L. J. Ch. 1168; 12 Q. B. D. 509; 50 L. T. 747; 32 W. R. 812, 1 Morrell 55.—C.A. *applied*, **Sanders, In re, Whinney, Ex parte** (1884) 13 Q. B. D. 476; 1 Morrell 185.—MATHEW and CAVE, JJ.; *referred to*, **Ford, In re, Ex parte** (1886) 56 L. J. Q. B. 188; 18 Q. B. D. 369; 56 L. T. 166; 3 Morrell 283.—CAVE and A. L. SMITH, JJ.

Chinery, In re and Ex parte, and Cohen, In re, Schmitz, Ex parte (*supra*), *considered*.

Riddell, In re, Strathmore (Earl) Ex parte (1888) 57 L. J. Q. B. 259; 20 Q. B. D. 512; 58 L. T. 838; 36 W. R. 532; 5 Morrell 59.—C.A.

Chinery, In re and Ex parte, *applied*.

Howe Sewing Machine Co., In re, Fontaine's Case (1889) 41 Ch. D. 118; 61 L. T. 170; 37 W. R. 680.—C.A.; *Combined Weighing and Advertising Machine Co., In re* (1889) 59 L. J. Ch. 26; 43 Ch. D. 99; 61 L. T. 582; 38 W. R. 67; 1 Meg. 398.—NORTH, J.; *affirmed*, C.A.

Chinery, In re and Ex parte, *adopted*.

Onslow v. Inland Revenue Commissioners (1890) 25 Q. B. D. 465; 59 L. J. Q. B. 556; 63 L. T. 513; 38 W. R. 728.—C.A.

ESHER, M.R.—I entirely adopt the decision of **Cotton, L.J.**, in *Chinery, Ex parte*, a decision supported by **Bowen and Fry, L.JJ.** . . . A "judgment," therefore, is a decision obtained in an action, and every other decision is an order.—p. 466.

And see "BANKRUPTCY," vol. i., col. 122.

Hews v. Pyke (1832) 1 L. J. Ex. 120; 1 D. P. C. 322; 2 Cr. & J. 359; 2 Tyrw. 313.—EX., *discussed and applied*.

Sinclair v. G. E. Ry. (1870) 39 L. J. C. P. 224; L. R. 5 C. P. 391, 395; 22 L. T. 410; 18 W. R. 758.

20. SPECIAL CASE.

Bulkeley v. Hope (1855) 24 L. J. Ch. 356; 1 K. & J. 482.—WOOD, V.-C.; *reversed*, (1856) 25 L. J. Ch. 240; 8 De G. M. & G. 36; 4 W. R. 280.—L.JJ.

Bulkeley v. Hope, *applied*.

Pryse v. Pryse (1872) 42 L. J. Ch. 253; L. R. 15 Eq. 86; 27 L. T. 575; 21 W. R. 219.—WICKENS, V.-C.

Price v. Quarrell (1842) 11 L. J. Q. B. 84; 12 A. & E. 784; 6 Jur. 604.—Q.B., *referred to*.

Udny v. East India Co. (1853) 22 L. J. C. P. 211; 13 C. B. 742; 17 Jur. 1078.—C.P.

Doe d. Phillips v. Rollings (1846) 15 L. J. C. P. 186; 2 C. B. 842.—C.P., *referred to*.
Norburn v. Hilliam (1870) L. R. 5 C. P. 129; 39 L. J. C. P. 183; 22 L. T. 67; 18 W. R. 602.—C.P.

Yorkshire Tyre and Axle Co. v. Rotherham Local Board (1858) 27 L. J. C. P. 235; 4 C. B. (N.S.) 362; 6 W. R. 443.—EX., *distinguished*.

Mersey Docks and Harbour Commissioners v. Jones (1860) 29 L. J. C. P. 239; 8 C. B. (N.S.) 124; 6 Jur. (N.S.) 960; 2 L. T. 243.—C.P.

WILLES, J.—In that case the Court had express power under the Act to amend. The question the plaintiffs here seek to raise, though a substantial question, is not the one the parties have agreed and intended to raise.—p. 240.

Notman v. Anchor Assurance Co. (1859) 6 C. B. (N.S.) 536.—C.P., *referred to*.

Pennington v. Cardale (1862) 10 W. R. 544.—EX.

Thistlethwayte v. Garmer (or Thistlethwaite v. Garnier) (1851) 21 L. J. Ch. 16; 5 De G. & Sm. 73; 16 Jur. 57.—PARKER, V.-C., *followed*.

Savage v. Snell (1871) 40 L. J. Ch. 216; L. R. 11 Eq. 264; 23 L. T. 801; 19 W. R. 382.—BACON, V.-C.

Harrison v. Cornwall Minerals Ry. (1880) 49 L. J. Ch. 834; 16 Ch. D. 66; 43 L. T. 496; 29 W. R. 258.—HALL, V.-C.: *affirmed with an alteration*, (1881) 51 L. J. Ch. 98; 18 Ch. D. 334; 45 L. T. 498.—C.A.: *latter decision affirmed*.—H.L. See "APPEAL," vol. i., col. 44.

Harrison v. Cornwall Minerals Ry., *commented on*.

Cane, In re, **Ruff v. Sivers** (1890) 60 L. J. Ch. 36; 63 L. T. 746.—KAY, J.

Harrison v. Cornwall Minerals Ry., *applied*.
Holmes v. Trench [1898] 1 Ir. R. 319.—CHATTERTON, V.-C.

21. PETITIONS.

Gordon's Settlement Trusts, In re, W. N. (1887) 192.—CHITTY, J., *not followed*.

Jellard's Trusts, In re (1888) 39 Ch. D. 424; 60 L. T. 83.—NORTH, J.

Gordon's Settlement Trusts, In re, *doubted*.

Cliff, In re, **Edwards v. Brown** (1895) 64 L. J. Ch. 423; [1895] 2 Ch. 21; 13 R. 425; 72 L. T. 440; 43 W. R. 436.—NORTH, J.; *affirmed*, C.A.

Jellard's Trusts, In re, *doubted, but followed*.

Stanway's Trusts, In re, W. N. (1892) 11.—KEKEWICH, J.

Bonelli's Electric Telegraph Co., In re Cook's Claim (1874) 43 L. J. Ch. 720; L. R. 18 Eq. 655; 22 W. R. 856.—BACON, V.-C., *followed*.

Haney, In re (1874) 44 L. J. Ch. 207; 31 L. T. 645.—BACON, V.-C.; *affirmed*, L.J. (*post*).

Bonelli's Electric Telegraph Co., In re, *followed*.

Haney's Trusts, In re (1875) 44 L. J. Ch. 272; L. R. 10 Ch. 275; 23 W. R. 662.—L.J.

Bonelli's Electric Telegraph Co., In re, *and Haney's Trusts, In re*, *discussed*.

Busfield, In re, **Whaley v. Busfield** (1886) 55 L. J. Ch. 467; 32 Ch. D. 123; 54 L. T. 220; 34 W. R. 372.—CHITTY, J. and C.A.

Duggan's Trusts, In re (1869) L. R. 8 Eq. 697; 18 W. R. 101.—JAMES, V.-C., *not followed*.

Wood v. Boucher (1870) 40 L. J. Ch. 112; L. R. 6 Ch. 77; 23 L. T. 522, 723; 19 W. R. 88, 234.—HATHERLEY, L.C.

London and Southampton Ry., In re, Stevens, Ex parte (1848) 2 Ph. 772; 13 Jur. 2; 5 Railw. Cas. 47.—L.C., *applied*.

Neath & Brecon Ry., Ex parte (1874) 45 L. J. Ch. 196; L. R. 9 Ch. 263; 24 W. R. 357.—L.J.

Neath & Brecon Ry., Ex parte, *not applied*.

Mutlow's Estate, In re (1878) 48 L. J. Ch. 198; 10 Ch. D. 131; 27 W. R. 245.—JESSEL, M.R.

22. MOTIONS AND RULES.

Petty v. Daniel (1886) 56 L. J. Ch. 192; 34 Ch. D. 172; 55 L. T. 745; 35 W. R. 151.—KAY, J., *explained*.

Taylor v. Roe (1893) 68 L. T. 213.—KEKEWICH, J.

Petty v. Daniel, *explained*.

Martin and Varlow, In re (1895) 13 R. 189; 43 W. R. 247.

NORTH, J.—**Petty v. Daniel** was on Ord. LII. r. 4; notice of motion for attachment was served without affidavits, which was not a proper form of procedure.—p. 190.

Taylor v. Roe (*supra*), *commented on*.

Rendell v. Grundy (1894) [1895] 1 Q. B. 16; 64 L. J. Q. B. 135; 14 R. 19; 71 L. T. 564; 43 W. R. 50.—C.A.

ESHER, M.R.—If Kekewich, J. meant, in **Taylor v. Roe**, to say that, whatever may have happened subsequently, the mere fact of failure to serve copies of the affidavits with the summons or notice of motion is necessarily, and in all circumstances fatal to the application for an attachment—which I do not believe—I must say that I do not agree with him.—p. 21.

Taylor v. Roe, *referred to*.

Carter v. Roberts (*post*).

Hutchings, In re, Neale v. Wilcocks (1887)

22 L. J. N. C. 174; W. N. (1887) 254.—

STIRLING, J., *referred to*.

Hunter v. Dublin, Wicklow and Wexford Ry. (1891) 28 L. R. Ir. 489.—C.A.

Hutchings, In re, *distinguished*.

Rosenbaum v. Belson (1901) 86 L. J. N. C. 174; W. N. (1901) 124.—BYRNE, J., *commented on*.

Carter v. Roberts (1903) 72 L. J. Ch. 655; [1903] 2 Ch. 312; 89 L. T. 239; 51 W. R. 520.—BYRNE, J.

Clarke v. Law (1855) 2 K. & J. 28; 2 Jur. (N.S.) 228; 4 W. R. 35.—V.-C.

Discussed, National Provident and Investment Association v. Carstairs (1863) 2 N. R. 255; 9 Jur. (N.S.) 955; 11 W. R. 866; *followed, but commented on*, **Pike v. Dickinson** (1873) 21 W. R. 862.—SELBORNE, L.C. (for M.R.).

Pike v. Dickinson, *commented on*.

Quartz Hill Consolidated Gold Mining Co., In re, Young, Ex parte (1882) 21 Ch. D. 642; 51 L. J. Ch. 940; 31 W. R. 173.—C.A.

JESSEL, M.R.—Considering the number of years

which have elapsed since *Clarke v. Law* was decided, and considering the good sense of the decision, I should have thought its authority unquestionable, had it not been for the observations attributed to Lord Selborne in *Pike v. Dickinson*, which probably are incorrectly reported, and which I do not understand. The principle of *Clarke v. Law* is quite intelligible—a party who has given notice to read an affidavit is not entitled to withdraw it in order to avoid cross-examination. He need not use the evidence if he does not like it. So a party who has called a witness is not to withdraw him in order to avoid his being cross-examined. This is good sense, and, in my opinion, we are not now at liberty to decline to follow that decision.—p. 641. BRETT and COTTON, L.JJ. to the same effect.

Cooke v. Gilbert, W. N. (1892) 111, and at p. 128, n.—NORRIS, J., *followed*.
Macmillan v. Australasian Territories, Ltd. (1897) 76 L. T. 182.—STIRLING, J.

Garey v. Whittingham (or Willingham) (1823) 1 Sim. & S. 163.—V.-C.; S.C., T. & R. 405; 2 L. J. (O.S.) Ch. 16.—M.R., *referred to*.

Hope v. Carnegie (No. 2) (1869) 38 L. J. Ch. 410; L. R. 7 Eq. 263.—STUART, V.-C.

Harris v. Lewis (1844) 8 Jur. 1063.—V.-C.; and **Chambers v. Toynebee** (1864) 10 L. T. 860; 12 W. R. 1100.—V.-C., *approved and to be followed*.

Dawson v. Beeson (1882) 22 Ch. D. 504; 52 L. J. Ch. 563; 48 L. T. 407; 31 W. R. 537.—C.A. JESSEL, M.R.—*Harris v. Lewis* . . . shows the practice which Knight Bruce, L.J., when V.-C., adopted in his Court, namely, that when an applicant obtained short notice of motion he should state on the notice which is served on the other party that leave was obtained to serve the notice on a certain day for a certain day, so that the person served should understand not only that he was to appear on the day appointed, but that leave had been given to serve the notice short of the two clear days to which he would otherwise have been entitled. That was a reasonable practice; . . . we think, therefore, that whether the practice has been usually followed or not in the other Courts up to this time, it ought to be understood that it is to be the practice for the future, so that there may be no mistake about it.—p. 508.

COTTON, L.J.—Here the notice did not state that leave was given for short notice; therefore the defendant was entitled to disregard it, and I find that is laid down by Knight Bruce, V.-C., in *Harris v. Lewis*, and the same point was decided by Kindersley, V.-C. in *Chambers v. Toynebee*. I have always myself understood that to be the practice.—p. 510.

Moggridge v. Thomas (1847) 2 C. P. Cooper 166.—V.-C., *not followed*.

French v. Colles (1885) 17 L. R. Ir. 238.—PORTER, M.R.

Daubney v. Shuttleworth (1876) 45 L. J. Ex. 177; 1 Ex. D. 53; 34 L. T. 357; 24 W. R. 321.—EX. D., *followed*.

Stirling v. Du Barry (1879) 5 Q. B. D. 65; 28 W. R. 405.—C.A., *distinguished*.

Maullin v. Rogers (1886) 55 L. J. Q. B. 377; 55 L. T. 121; 34 W. R. 592.—Q.B.D.

O.C.

Daubney v. Shuttleworth and Maullin v. Rogers, *not followed*.

Williams v. De Boinville (1886) 17 Q. B. D. 180; 54 L. T. 732; 34 W. R. 702.—MANISTY and MATHEW, JJ.

Daubney v. Shuttleworth, *overruled*.

Coulton, In re, Hambling v. Elliott (1886) 34 Ch. D. 22; 56 L. J. Ch. 312; 55 L. T. 464; 35 W. R. 49.—C.A. COTTON, BOWEN and FRY, L.JJ. [A notice of motion was given for a day not in the sittings of the Court. *Held*, that the notice was good.]

Milltown (Lord) v. Stuart (1837) 8 Sim. 34; 1 Jur. 940.—SHADWELL, V.-C., *considered*.
Seear v. Webb (1883) 53 L. J. Ch. 464; 25 Ch. D. 84; 49 L. T. 481; 32 W. R. 351.—C.A.; reversing 52 L. J. Ch. 832; 49 L. T. 94; 31 W. R. 837.—BACON, V.-C.

Seear v. Webb, *explained*.

Rosier, In re, Jones v. Bartholomew (1883) 49 L. T. 442.

PEARSON, J.—In *Seear v. Webb* the C. A. did not decide that the production of an affidavit three days after the date of the order was sufficient, but only (on the principle *fieri non debet, factum valet*) that, it being clear that the notice had been duly served, the lateness of production was not, in itself, under the circumstances, a sufficient irregularity to justify them in discharging the order.—p. 442.

Thomas v. Bernard (1858) 5 Jur. (N.S.) 31; 7 W. R. 86.—KINDERSLEY, V.-C., *principle applied*.

Att.-Gen. v. Cambridge Consumers' Gas Co. (1868) 38 L. J. Ch. 94; L. R. 6 Eq. 282; 16 W. R. 1007.—MALINS, V.-C.; affirmed on this point, but varied on the merits, L. R. 4 Ch. 71; 19 L. T. 508; 17 W. R. 145.—L.JJ.

Bellchamber v. Giani (1819) 3 Madd. 550.—V.-C.; and **Oldfield v. Cobbett** (1849) 12 Beav. 91.—M.R., *referred to*.

Morton v. Palmer (1882) 51 L. J. Q. B. 307; 9 Q. B. D. 89; 46 L. T. 285; 30 W. R. 951; 46 J. P. 358.—MATHEW and CAVE, JJ.

Viney v. Chaplin (1858) 28 L. J. Ch. 164; 3 De G. & J. 282; 7 W. R. 159.—L.C. and L.JJ., *applied*.

Kendall v. Marsters (1860) 2 De G. F. & J. 200.—L.C., *not followed*.

Harris v. Hilliard (1869) 20 L. T. 216.—MALINS, V.-C.

Viney v. Chaplin and Harris v. Hilliard, *applied*.

Mounsey v. Lonsdale (1870) L. R. 10 Eq. 557.—MALINS, V.-C.; affirmed, (1871) 40 L. J. Ch. 198; 6 Ch. 141; 23 L. T. 794; 19 W. R. 235.—L.JJ.

Viney v. Chaplin, *applied*.

Fritz v. Hobson (1880) 14 Ch. D. 542; 49 L. J. Ch. 735; 42 L. T. 677; 28 W. R. 722.

FRY, J.—According to my understanding of the practice . . . all orders of the Court carry with them *in gremio* liberty to apply to the Court. In *Viney v. Chaplin* application was made under the liberty to apply reserved by the order that the motion should stand to the hearing of the cause, and it appears to me, therefore, that I am right in following *Viney v. Chaplin*, and

that I can make the order which I am now about to make either under the liberty to apply reserved by implication in the order on the motion, or under the liberty expressly reserved by the judgment . . . I shall make a separate order (following the precedent in *Tiney v. Chaplin*) directing the taxation of the plaintiff's costs of the motion, and their payment by the defendant.—pp. 561, 562.

Hammersmith Rent Charge, In re (1849) 19 L. J. Ex. 66; 4 Ex. 87; 14 Jur. 917; 7 D. & L. 41.—EX.; PARKE, B. *dissenting*.

Referred to, Reg. v. Cheshire Lines Committee (1873) L. R. 8 Q. B. 344; 42 L. J. M. C. 100; 28 L. T. 808.—Q.B.; Wood v. Wood (1874) 43 L. J. Ex. 153; L. R. 9 Ex. 190, 196; 30 L. T. 815; 22 W. R. 709.—EX.

Wright v. Angle (1847) 17 L. J. Ch. 29; 6 Hare 107; 12 Jur. 34.—V.C.; and **Piper v. Gittens** (1840) 10 L. J. Ch. 69; 11 Sim. 282.—V.C., *discussed*.

Hughes v. Lewis (1860) 29 L. J. Ch. 424; Johns. 696; 6 Jur. (N.S.) 442; 8 W. R. 292.—WOOD, V.C.

Hughes v. Lewis, referred to:

Thomas v. Palin (1882) 21 Ch. D. 360; 47 L. T. 207; 30 W. R. 716.—C.A.

[It was said in argument that the briefs were delivered more than two clear days before the time for hearing the motion, and this was premature, as was laid down by Lord Hatherley in *Hughes v. Lewis*.]

JESSEL, M.R.—His lordship never meant to lay down any hard and fast rule of that kind. It depends on the nature of the case how long beforehand it is reasonable to deliver a brief, and the taxing master decides it.—p. 363.

23. SUMMONSES.

Nobbs, In re, Nobbs v. Law Reversionary Interest Society (1896) 65 L. J. Ch. 906; [1896] 2 Ch. 830; 75 L. T. 309.—KEKEWICH, J., *referred to*.

Mason v. Schnuppisser (1899) 81 L. T. 147.—STIRLING, J.

Stevenson v. Anderson (1814) 2 V. & B. 407; 13 R. R. 126.—L.C.

Applied, **Credits Gerundense v. Van Weede** (1884) 53 L. J. Q. B. 142; 12 Q. B. D. 171 (*post*); *not applied*, **Weldon v. Gounod** (1885) 15 Q. B. D. 622 (*post*); *discussed*, *King & Co.'s Trade Mark, In re* (1892) 62 L. J. Ch. 153; [1892] 2 Ch. 462.—C.A. (*see post*, col. 2453).

Credits Gerundense v. Van Weede (1884) 53 L. J. Q. B. 142; 12 Q. B. D. 171; 32 W. R. 414; 48 J. P. 184.—POLLOCK, B. and LOPES, J., *distinguished and not applied*.

Weldon v. Gounod (1885) 15 Q. B. D. 622; 1 Times L. R. 631.—COLERIDGE, C.J. and A. L. SMITH, J.

Credits Gerundense v. Van Weede, commented on.

Weldon v. Gounod, explained.

Bouron, In re, Brandon, Ex parte (1886) 54 L. T. 128; 34 W. R. 352.

A. L. SMITH, J.—I am aware of the decision of the Court in *Credits Gerundense v. Van Weede*. That, no doubt, was a peculiar case, and was considered by Coleridge, C.J. and myself in

banco in *Weldon v. Gounod*. We were of opinion that Mrs. Weldon was not entitled to serve M. Gounod, living out of the jurisdiction, with a notice of the appointment of a receiver, and that the principle of Pollock, B.'s decision ought not to be extended.—p. 128. GRANTHAM, J. concurred.

Credits Gerundense v. Van Weede and Weldon v. Gounod, discussed.

Busfield, In re, Whaley v. Busfield (1886) 3 Ch. D. 123; 55 L. J. Ch. 467; 54 L. T. 220; 34 W. R. 372.—C.A.

COTTON, L.J.—*Credits Gerundense v. Van Weede* was a case of interpleader, and the decision may perhaps be supported on the ground that the object of service was not to give jurisdiction over the party served, but only to give him notice of a proceeding affecting his rights, that he might if he pleased come in and defend them, and it is on this that Pollock, B. rests his judgment. In . . . *Weldon v. Gounod*, an application to serve out of the jurisdiction a summons for the appointment of a receiver was refused.—p. 132.

Credits Gerundense v. Van Weede, doubted.

Spence v. Parkes [1900] 2 Ir. R. 619.—Q.B.D.

Credits Gerundense v. Van Weede and Spence v. Parkes, referred to.

Galabrum v. Bruce and Symes (1902) [1903] 2 Ir. R. 458.—K.B.D.

British Imperial Corporation, In re (1877) 5 Ch. D. 749; 25 W. R. 583.—HALL, V.C., *referred to*.

Busfield, In re, Whaley v. Busfield (1886) 55 L. J. Ch. 467; 32 Ch. D. 123.—CHITTY, J.; affirmed, C.A. (*supra*).

Carlyon, In re, Carlyon v. Carlyon (1886) 56 L. J. Ch. 219; 56 L. T. 151; 35 W. R. 155.

—NORTH, J., *adhered to*.

Davies, In re, Davies v. Davies (1888) 57 L. J. Ch. 759; 38 Ch. D. 210; 58 L. T. 312; 36 W. R. 587.—NORTH, J.

Davies, In re, Davies v. Davies, approved.

Royle, In re, Royle v. Hayes (1889) 59 L. J. Ch. 1; 43 Ch. D. 18; 61 L. T. 542; 38 W. R. 17.—C.A. COTTON, BOWEN and FRY, L.JJ.

Fawsitt, In re, Galland v. Burton (1885) 54

L. J. Ch. 1131; 55 L. J. Ch. 568; 30 Ch. D. 231; 53 L. T. 271; 34 W. R. 26.—C.A., *referred to*.

Robinson, In re, Pickard v. Wheeler (1885) 55 L. J. Ch. 307; 31 Ch. D. 247; 53 L. T. 865.—PEARSON, J.

Fawsitt, In re, referred to.

Gee v. Bell (1887) 35 Ch. D. 160; 56 L. J. Ch. 718; 56 L. T. 305; 35 W. R. 805.

NORTH, J.—A proceeding commenced by originating summons under Ord. L.V. r. 3 is an action: *Fawsitt, In re*.—p. 161.

Shaw v. Lindsay (1812) 18 Ves. 406.—ELDON, L.C., *report corrected*.

Drummond v. Drummond (1866) 36 L. J. Ch. 153; L. R. 2 Ch. 32; 15 L. T. 337; 15 W. R. 267.—L.C. and L.J.

Cookney v. Anderson (1863) 32 L. J. Ch. 427; 1 De G. J. & S. 365; 9 Jur. (N.S.) 736;

2 N. R. 140; 8 L. T. 295; 11 W. R. 629.—WESTBURY, L.C., *adhered to*.

Foley v. Maillardet (1864) 33 L. J. Ch. 335; 1 De G. J. & S. 389; 3 N. R. 361, 446; 10 Jur. (N.S.)

161; 9 L. T. 700; 12 W. R. 355.—WESTBURY, L.C.; reversing STUART, V.-C.

Cookney v. Anderson, Foley v. Maillardet, and Samuel v. Rogers (1864) 1 De G. J. & S. 396.—WESTBURY, L.C., *overruled*.

Drummond v. Drummond (1866) 36 L. J. Ch. 153; L. R. 2 Ch. 32; 15 L. T. 337; 15 W. R. 267.—L.C. and L.J.

Foley v. Maillardet, *referred to*.

Fowler v. Barnstow (1881) 51 L. J. Ch. 103; 20 Ch. D. 240; 45 L. T. 603; 30 W. R. 113.—C.A.; **Dobson v. Festi Rasini & Co.** [1891] 2 Q. B. 92.—C.A. (*post*).

Cookney v. Anderson (*supra*).

Commented on, Herefordshire Banking Co., in re (1867) 36 L. J. Ch. 806; L. R. 4 Eq. 250; 17 L. T. 58; 15 W. R. 1056.—BOMILLY, M.R.; *applied*, **Blake v. Blake** (1870) 18 W. R. 944.—MALINS, V.-C.; *explained*, **Matthaci v. Galtzin** (1874) 43 L. J. Ch. 536; L. R. 18 Eq. 340, 347; 30 L. T. 455; 22 W. R. 700.—MALINS, V.-C.; *discussed*, **Robertson, Ex parte, Morton, In re** (1875) 44 L. J. Bk. 99; L. R. 20 Ex. 733, 741; 32 L. T. 697; 23 W. R. 906.—BACON, C.J.; *referred to*, **Hawthorne, In re, Graham v. Massey** (1883) 52 L. J. Ch. 750; 23 Ch. D. 743, 749; 48 L. T. 701; 32 W. R. 147.—KAY, J.

Cookney v. Anderson, *discussed*.

Busfield, In re, Whaley v. Busfield (1886) 55 L. J. Ch. 467; 32 Ch. D. 123; 54 L. T. 220; 34 W. R. 372.—CHITTY, J.; affirmed, C.A.

CHITTY, J.—In **Cookney v. Anderson**, an application was made for leave to serve a copy of the bill upon the defendants in Scotland, and was refused by Lord Westbury, on the ground that the words "any suit" in r. 7 of Ord. X. of the Consolidated Orders of 1860 must be taken to denote such suits only as are described in 2 Wm. 4, c. 33, and 4 & 5 Wm. 4, c. 82, and that the rule read in a more extensive sense was *ultra vires*. This decision was subsequently overruled by Lord Chelmsford and Turner, L.J. in **Drummond v. Drummond** (*post*, col. 2452), and the validity of the general order was established. In the interval between these two decisions **Alcan's Estate, In re** (*post*), was decided by the L.J.J., and leave was there given to serve an administration summons relating to stocks and shares in England on a defendant abroad. This decision, therefore, did not conflict with Lord Westbury's decision in **Cookney v. Anderson**, for the case fell within the statutes of Wm. 4. These statutes relate to service out of the jurisdiction in certain specified suits only, namely, those concerning land, or any charge, lien, judgment, or incumbrance thereon, or concerning stocks or shares within the jurisdiction.—p. 126.

Cookney v. Anderson.

Referred to, **Dobson v. Festi Rasini & Co.** (1891) 60 L. J. Q. B. 481; [1891] 2 Q. B. 92; 64 L. T. 551; 39 W. R. 481.—C.A.; *dicta commented on*, **Turnbull v. Walker** (1892) 5 R. 132; 67 L. T. 767; 9 Times L. R. 99.—WRIGHT, J.

Lester v. Bond (1861) 1 Dr. & Sm. 392.—

KINDERSLEY, V.-C., *overruled*.

Alcan's Estate, In re, Cohen v. Alcan (1864) 1 De G. J. & S. 398; 10 L. T. 284; 12 W. R. 678.—L.J.J.

Alcan's Estate, In re, *discussed*.

Busfield, In re, Whaley v. Busfield (1886) 55 L. J. Ch. 467; 32 Ch. D. 123 (*supra*).

Drummond v. Drummond (1866) 36 L. J. Ch. 153; L. R. 2 Ch. 32; 15 L. T. 337; 15 W. R. 267.—L.C. and L.J., *referred to*.

Dugdale v. Dugdale (1872) 41 L. J. Ch. 565; L. R. 14 Eq. 234; 27 L. T. 706.—MALINS, V.-C.; **Tomkins v. Conlthurst** (1875) 1 Ch. D. 626; 33 L. T. 591; 24 W. R. 267.—MALINS, V.-C.; **Busfield, In re, Whaley v. Busfield** (1886) 32 Ch. D. 123 (*supra*, col. 2451); **Dobson v. Festi Rasini & Co.** [1891] 2 Q. B. 92.—C.A. (*supra*, col. 2451).

Drummond v. Drummond, *discussed*.

Duder v. Amsterdamsch Trustees Kantoor (1902) 71 L. J. Ch. 618; [1902] 2 Ch. 132; 87 L. T. 22; 50 W. R. 551.

BYRNE, J.—In **Drummond v. Drummond**, where it was held that the Court had power under the old consolidated orders to order service of copy bill on the defendant, who was an Englishman resident in Germany, although the nature of the suit was not such as to bring it within the provisions of the Acts 2 Wm. 4, c. 33, and 4 & 5 Wm. 4, c. 82, Turner, L.J., says: "The question in this case, as I view it, is not against whom, or under what circumstances, or with relation to what property, the Legislature of a country may be justified in authorising the process of its Courts to be served out of the jurisdiction of those Courts, but whether the Legislature of this country has not in fact authorised the process of this Court to be so served." The nature of the action in that case was, as appears from the report of the case in the Court below, one having no relation to any property in England, but to enforce a claim depending upon Scotch law and to obtain a release of the Scotch lauds from a charge.—p. 623.

Reg. v. Lightfoot (1856) 25 L. J. M. C. 115; 6 El. & Bl. 822; 2 Jur. (N.S.) 786; 4 W. R. 655.—Q.B.

Discussed, **Berkley v. Thompson** (1884) 10 App. Cas. 45 (*post*); **Reg. v. Cork J.J.** (1893) 32 L. R. Ir. 542, 550.—Q.B.D.; *applied*, **Spence v. Parkes** [1900] 2 Ir. R. 619.—Q.B.D.

Berkley v. Thompson (1884) 54 L. J. M. C. 57; 10 App. Cas. 45; 52 L. T. 1; 33 W. R. 525; 49 J. P. 276.—H.L. (E.), *affirming S. C. nom. Reg. v. Thompson*, 53 L. J. M. C. 65; 12 Q. B. D. 261.—C.A.

Discussed, **Reg. v. Cork J.J.** (*supra*); *dictum explained*, **Reg. v. Webb** [1896] 1 Q. B. 487; 65 L. J. M. C. 98; 74 L. T. 428; 44 W. R. 527; 60 J. P. 280; 18 Cox C. C. 312.—Q.B.D.; *referred to*, **Spence v. Parkes** (*supra*); **Galabrum v. Bruce** (*supra*, col. 2450).

Busfield, In re, Whaley v. Busfield (1886)

55 L. J. Ch. 467; 32 Ch. D. 123; 54 L. T.

220; 34 W. R. 372.—C.A., *referred to*.

Anglo-African Steamship Co., In re (1886) 55 L. J. Ch. 579; 32 Ch. D. 348; 54 L. T. 807; 34 W. R. 554.—C.A.

Busfield, In re, *discussed and approved*.

Dubout v. Macpherson (1889) 23 Q. B. D. 340; 58 L. J. Q. B. 496; 61 L. T. 689; 38 W. R. 62.

A. L. SMITH, J.—It was there decided that the Court cannot order service of an originating summons out of the jurisdiction; and with that decision I quite agree, because there is no rule applicable to the service of an originating summons corresponding to the provision as to the service of third party notices in Ord. XVI. r. 48.—p. 342.

Busfield, In re (*supra*), referred to.

Hume v. Somerton (1890) 59 L. J. Q. B. 420; 25 Q. B. D. 239; 62 L. T. 828; 38 W. R. 748; 55 J. P. 38.—DENMAN and CHARLES, JJ.: La Compagnie Générale d'Eaux Minérales, &c., In re (1891) 60 L. J. Ch. 728; [1891] 3 Ch. 451; 40 W. R. 89; 7 Times L. R. 709.—STIRLING, J.

Busfield, In re, considered.

King & Co.'s Trade Mark, In re (1892) [1892] 2 Ch. 462; 62 L. J. Ch. 153; 66 L. T. 491.—C.A.

BOWEN, L.J.—In an early case before Lord Eldon, *Stevenson v. Anderson* (col. 2449), it was held that service of notice of an interpleader might be made on a foreigner abroad; and although I am aware that his view has been somewhat questioned, there have been two concurrent lines of authority—authorities in which notices have been allowed to be served abroad, and cases in which notices have not been allowed to be served abroad, or in which the service of the notice abroad has been held to be of no avail in this country. These cases were all reviewed in *Busfield, In re*, and Cotton, L.J. points out during the argument the distinction between a case where the object of the service abroad is merely to give notice of the proceedings with regard to which the Court has jurisdiction in this country, and a case where the object of the service abroad is to create jurisdiction at home. He distinguishes the authorities according as they fall on one side or other of the line. Although that was assumed, Cotton, L.J. does not, I think, intimate an absolute approval of the view that notice of an interpleader will avail if it is effectuated abroad, and that has been always a point on which the decisions have been, perhaps, not quite consistent.—p. 484.

Busfield, In re, referred to.

Spence v. Parkes [1900] 2 Ir. R. 619.—Q.B.D.; Galabrum v. Bruce and Symes (1902) [1903] 2 Ir. R. 458.—K.B.D.

La Compagnie Générale d'Eaux Minérales et de Bains de Mer (*supra*).

Applied, Spence v. Parkes (*supra*); referred to, Galabrum v. Bruce (*supra*).

Myer, In re, Pascall, Ex parte (1876) 1 Ch. D. 509.—C.A., referred to.

Cooke v. Charles A. Vogeler & Co. (1900) 70 L. J. Q. B. 181; [1901] A. C. 102; 84 L. T. 10; 8 Manson 113.—H.L. (E.).

Pheysey v. Pheysey (1879) 12 Ch. D. 305; 41 L. T. 607.—C.A., applied.

Lewis, In re, Lewis v. Williams (1886) 31 Ch. D. 623; 54 L. T. 198; 34 W. R. 410.—CHITTY, J.; affirmed, C.A.

Duffin v. Mexican Gold and Silver Ore Reduction Co., W. N. (1890) 116.—CHITTY, J., commented on.

Whitefriars Financial Co., In re, Reeves & Sons, Ltd., In re (1898) 68 L. J. Ch. 79; [1899] 1 Ch. 184; 79 L. T. 546; 6 Manson 72.—KEKEWICH, J. See judgment at length.

Whitefriars Financial Co., In re, Reeves & Sons, Ltd., In re, followed.

Dublin United Tramways Co. (1896), In re (1900) [1901] 1 Ir. R. 341.—PORTER, M.R.; Ferguson, Petitioner (1901) 4 Fraser 65.—COURT OF SESS.

24. PROCEEDINGS IN DISTRICT REGISTRY.

Hood v. Yates (1893) 63 L. J. Q. B. 218; [1894] 1 Q. B. 240; 70 L. T. 557; 42 W. R. 412.—WILLS and WRIGHT, JJ., considered.

Townend v. Kirkham (1897) 67 L. J. Q. B. 5; [1898] 1 Q. B. 51; 77 L. T. 419; 46 W. R. 65.—C.A.; reversing DAY, J.

A. L. SMITH, L.J.—Rules 1 to 5 of Ord. XXXV. are all imperative. They each provide that the several matters with which they deal "shall" be done in the district registry. In my opinion these rules give the district registrar exclusive jurisdiction in all those matters. Then we come to r. 6. There the word used is "may," and, in my judgment, the true reading of the rules is that r. 6 gives concurrent jurisdiction to the district registrar and the master over matters as to which exclusive jurisdiction has not already been given to the district registrar by the preceding rules 1 to 5. In *Hood v. Yates* the Divisional Court went further than was necessary for the decision there, and I think that we may, without overruling the actual decision in that case, say that the view I have expressed gives the true construction of the rules. What was done by the Rule Committee in 1894 is quite intelligible having regard to what had been said by the Court in *Hood v. Yates*.—p. 6. RIGBY and COLLINS, L.J.J. concurred.

Irlam v. Irlam (1876) 2 Ch. D. 608; 24 W. R. 292, 949.—HALL, V.-C., adhered to. *Smith, In re, Hutchinson v. Ward* (1877) 6 Ch. D. 692; 36 L. T. 178; 25 W. R. 452.—HALL, V.-C.

Smith, In re, Hutchinson v. Ward, approved. *Finlay v. Davis* (1879) 12 Ch. D. 735; 39 L. T. 662; 27 W. R. 352.

MALINS, V.-C.—I agree with Hall, V.-C. [*Smith, In re*] that money ordered to be paid into Court should be paid in under the Chancery Funds Act and Rules.—p. 737.

Smith, In re, Hutchinson v. Ward, followed. *Bowen, In re, Bennett v. Bowen* (1882) 20 Ch. D. 538; 51 L. J. Ch. 825; 47 L. T. 114.

FRY, J.—Hall, V.-C., in *Smith, In re*, held that a district registrar has no power to take accounts which are directed by a judgment to be taken, unless the judgment expressly directs him to do so. In the present case, the registrar's original order did not direct that the account should be taken by himself. This practice has been established for five years, and I think I should be wrong in departing from it.—p. 543.

Day v. Whittaker (1877) 46 L. J. Ch. 680; 6 Ch. D. 734; 36 L. T. 683; 25 W. R. 767.—HALL, V.-C., principle adopted.

Wilson, In re, Wilson v. Alltree (1884) 27 Ch. D. 242; 53 L. J. Ch. 989; 32 W. R. 897.

CHITTY, J.—I find that Hall, V.-C., in *Day v. Whittaker*, stated that he should not, except under very special circumstances, direct the costs of actions of this kind [*i.e.*, administration actions], though commenced and prosecuted in the district registry, to be taxed otherwise than by a taxing master in the Ch. Div. If I may respectfully say so, I think that is the right principle to act upon in these cases.—p. 245.

Walker v. Robinson (1875) 33 L. T. 779; 24 W. R. 137.—BACON, V.-C., *not followed*.
Birmingham Waste Co. v. Lane (1876) 24 W. R. 292.—HALL, V.-C.

Walker v. Robinson (1876) 34 L. T. 229; 24 W. R. 427.—BACON, V.-C., *discussed*.
Capper, In re, Robertson v. Capper (1878) 26 W. R. 434.—HALL, V.-C.

Oger v. Bradnum (1876) 45 L. J. C. P. 273; 1 C. P. D. 334; 34 L. T. 578; 24 W. R. 404.—C.P.D., *referred to*.
Smith v. Richardson (1878) 48 L. J. C. P. 140; 4 C. P. D. 112; 40 L. T. 256; 27 W. R. 230.—C.P.D. *See judgment of DENMAN, J.*

Foster v. Edwards (1877) 48 L. J. Q. B. 767.—DENMAN, J. and POLLOCK, B., *discussed*.
Bryant v. Reading (1886) 55 L. J. Q. B. 253; 17 Q. B. D. 128; 54 L. T. 524; 34 W. R. 496.—C.A.

25. PROCEEDINGS IN CHAMBERS.

Hayward v. Price (1854) 23 L. J. Ch. 549; *S. C. nom. Hayward v. Hayward*, Kay, App. xxxi.; 2 W. R. 322.—WOOD, V.-C., *adhered to*.

Croskey v. European and American Steam-shiping Co. (1866) 14 W. R. 514.—WOOD, V.-C.

Chifferiel, In re, Chifferiel v. Watson (1888) 58 L. J. Ch. 137; 58 L. T. 877; 36 W. R. 806.—NORTH, J., *discussed and approved*.
Davies, In re, Issard v. Lambert (1890) 44 Ch. D. 253; 59 L. J. Ch. 516; 62 L. T. 715; 38 W. R. 584.—C.A.; affirming CHITTY, J.

LINDLEY, L.J.—North, J., in *Chifferiel, In re*, held that the judge in chambers had authority to fix a time within which affidavits must be filed in any application. In this I think he was right; but there is no rule directly applicable to a case of this description. It has, however, been found convenient to deal with it in chambers by saying to a party, "If you wish to cross-examine, you may do so, but under ordinary circumstances you must bring in your own evidence first, and cross-examine afterwards." This has been found in practice to work well, and is understood in the judges' chambers; and it is well known to practitioners there that an order to cross-examine cannot be got except upon that understanding.

... We are asked to condemn this practice. I should condemn it if the rule were laid down as a hard-and-fast rule, but that is not so; it is only laid down as a convenient general rule.—p. 260.
 BOWEN, L.J. to the same effect.

York and Midland Ry. v. Hudson (1853) 18 Beav. 70; 2 Eq. R. 295; 17 Jur. 1090; 2 W. R. 90.—M.R., *distinguished*.

Douthwaite v. Spensley (1853) 18 Beav. 74.—ROMILLY, M.R.

Douthwaite v. Spensley, *followed*.
Craven v. Ingham (1888) 58 L. T. 486.—STIRLING, J.

Cummins v. Herron (1877) 46 L. J. Ch. 423; 4 Ch. D. 787; 36 L. T. 41; 25 W. R. 325.—C.A., *discussed*.

McAndrew v. Barker (1878) 47 L. J. Ch. 340; 7 Ch. D. 701; 37 L. T. 810; 26 W. R. 317.—C.A.

Wycherley v. Barnard (1859) 28 L. J. Ch. 562; Johns. 41; 5 Jur. (N.S.); 3; 7 W. R. 254.—WOOD, V.-C., and *os v.*

Maltby (1860) 8 W. R. 646.—KINDERSLEY, V.-C., *referred to*.
Henshaw v. Angell (1870) L. R. 9 Eq. 451; 39 L. J. Ch. 524; 21 L. T. 784.—JAMES, V.-C.

Upton v. Brown (1882) 20 Ch. D. 731; 47 L. T. 289; 30 W. R. 817.—C.A., *referred to*.
Hewlings v. Graham (1901) 70 L. J. Ch. 568; 84 L. T. 497.—JOYCE, J.

Turner v. Turner (1818) 1 Swanst. 154; 1 J. & W. 139.—L.C., *not followed*.
Briant v. Tebbut (*post*).

Ware v. Watson (1855) 25 L. J. Ch. 199; 7 De G. M. & G. 739; 2 Jur. (N.S.) 129; 4 W. R. 223.—L.J.J., *not followed*.
Briant v. Tebbut (*post*).

Howell v. Kightley (1856) 25 L. J. Ch. 341; 8 De G. M. & G. 325; 2 Jur. (N.S.) 455; 4 W. R. 477.—L.J.J.

Not followed, **Briant v. Tebbut** (1869) 20 L. T. 62; 17 W. R. 274.—MALINS, V.-C.; *referred to*, **McMurdo, In re, Pentfield v. McMurdo** (1902) 71 L. J. Ch. 691; [1902] 2 Ch. 684, 694; 86 L. T. 814; 50 W. R. 644.—EADY, J.; *reversed*, C.A.

Ashton v. Wood (1857) 26 L. J. Ch. 275; 8 De G. M. & G. 698; 3 Jur. (N.S.) 146; 5 W. R. 271.—L.J.J., *applied*.
Briant v. Tebbut (*supra*).

Everard, In re (1851) 20 L. J. Ex. 125; 6 Ex. 111.—EX., *applied*.

Dove, In re, Bousfield v. Dove (1884) 53 L. J. Ch. 1099; 27 Ch. D. 687; 33 W. R. 197.—PEARSON, J.

Smeeton v. Collier (1847) 17 L. J. Ex. 57; 1 Ex. 457; 5 D. & L. 184.—EX., *discussed*.
Davidson, In re, Davidson, Ex parte (1899) 68 L. J. Q. B. 836; [1899] 2 Q. B. 103; 81 L. T. 182.—DARLING and CHANNELL, JJ.

Dunkirk Colliery Co. v. Lever (1878) 9 Ch. D. 20; 39 L. T. 239; 26 W. R. 841.—C.A.

Not applied, **Cooke v. Newcastle and Gateshead Water Co.** (1882) 52 L. J. Q. B. 337; 10 Q. B. D. 332.—HAWKINS, J.; *discussed*, **Taylor, In re, Turpin v. Pain** (1890) 59 L. J. Ch. 803; 44 Ch. D. 128, 139; 62 L. T. 754; 38 W. R. 422.—CHITTY, J.

Miller v. Pilling (1880) 51 L. J. Q. B. 481; 9 Q. B. D. 736; 47 L. T. 536.—C.A., *referred to*.

Cooke v. Newcastle Water Co. (*supra*); **Dyke v. Cannell** (1883) 11 Q. B. D. 180; 47 L. T. 174; 31 W. R. 747.—Q.B.D.; **Clark v. Sonnenschein** (1890) 59 L. J. Q. B. 561; 25 Q. B. D. 464; 38 W. R. 743.—C.A.

Brook, In re, Sykes v. Brook (1881) 50 L. J. Ch. 744; 45 L. T. 172; 29 W. R. 821.—FRY, J., *referred to*.

Cooke v. Newcastle, &c., Water Co. (*supra*).

Salm Kyrburg v. Posnanski (1884) 53 L. J. Q. B. 428; 13 Q. B. D. 218; 32 W. R. 752.—GROVE, J. and HUDDLESTON, B.; DAY, J. *dissenting*; *followed*.

Amstell v. Lesser (1885) 16 Q. B. D. 187; 55 L. J. Q. B. 114; 53 L. T. 759; 34 W. R. 230.—HUDDLESTON, B. and WILKS, J.

[A judge sitting at chambers has jurisdiction to set aside a writ of prohibition issued out of the Petty Bag Office.]

Palmer v. Justice Assurance Society (1856) 26 L. J. Q. B. 73; 6 El. & Bl. 1015; 3 Jur. (N.S.) 44; 5 W. R. 55.—Q.B., *applied*.
Owens v. Woodsman or Woosman (1868) 37 L. J. Q. B. 159; L. R. 3 Q. B. 473; 9 B. & S. 243; 18 L. T. 357; 16 W. R. 932.—Q.B.; Hillman v. Mayhew (1876) 45 L. J. Ex. 334; 1 Ex. D. 132; 34 L. T. 256; 24 W. R. 435.—EX. D.

Robinson v. Tucker (1884) 53 L. J. Q. B. 417; 14 Q. B. D. 371; 50 L. T. 380; 32 W. R. 697.—C.A.; and **Dawson v. Fox** (1885) 54 L. J. Q. B. 299; 14 Q. B. D. 377; 33 W. R. 514.—C.A., *discussed*.
Webb v. Shaw (1886) 55 L. J. Q. B. 249; 16 Q. B. D. 658; 54 L. T. 216; 34 W. R. 415.—MATHEW and A. L. SMITH, JJ.

Dawson v. Fox, *commented on*.
Lyon v. Morris (1887) 19 Q. B. D. 139; 56 L. J. Q. B. 378; 57 L. T. 324; 35 W. R. 707.—DAY and WILLS, JJ.; *affirmed*, C.A.

Wormsley v. Sturt (1856) 22 Beav. 398.—ROMILLY, M.R., *principle applied*.
Brampton and Longtown Ry., In re (1871) 40 L. J. Ch. 234; L. R. 11 Eq. 428; 24 L. T. 17.—BACON, V.-C., *explained*.
Bates v. Eley (1876) 45 L. J. Ch. 270; 1 Ch. D. 473, 476; 34 L. T. 50; 24 W. R. 424.—BACON, V.-C.

Wormsley v. Sturt; Lord v. Lord (1866) 35 L. J. Ch. 683; L. R. 2 Eq. 605; 12 Jur. (N.S.) 698.—M.R.; and **M'Arthur v. Dudgeon** (1872) 41 L. J. Ch. 263; L. R. 15 Eq. 102; 21 W. R. 166.—M.R., *approved*.
Meyrick v. James (1876) 46 L. J. Ch. 38, 39.—JESSEL, M.R.

Piffard v. Beeby (1866) 35 L. J. Ch. 258; L. R. 1 Eq. 623; 14 L. T. 8; 14 W. R. 302.—KINDERSLEY, V.-C., *referred to*.
Newall v. Telegraph Construction Co. (1866) 35 L. J. Ch. 827; L. R. 2 Eq. 756; 14 W. R. 911.—WOOD, V.-C.; **Hall v. Truman, Hanbury & Co.** (1885) 54 L. J. Ch. 717; 29 Ch. D. 307; 51 L. T. 586.—KAY, J.; *affirmed*, C.A.

Cotter v. Bank of England (1833) 2 L. J. C. P. 158; 3 M. & Scott 180; 2 D. P. C. 728.—C.P.: **Reading v. London School Board** (1886) 16 Q. B. D. 686; 54 L. T. 678; 34 W. R. 609.—DAY and WILLS, JJ.; and **Bryant v. Reading** (1886) 55 L. J. Q. B. 253; 17 Q. B. D. 128; 54 L. T. 524; 134 W. R. 496.—C.A., *applied*.
Clench v. Dooley (1886) 56 L. T. 122.—Q.B.D.

Bell v. North Staffordshire Ry. (1879) 48 L. J. Q. B. 518; 4 Q. B. D. 205; 27 W. R. 263.—Q.B.D., *discussed and distinguished*.
Gibbons v. London Financial Association (1879) 4 C. P. D. 263; 48 L. J. C. P. 514; 27 W. R. 619.

DENMAN, J.—It is said that *Bell v. North Staffordshire Ry.* is on all fours. But I think it is not, because it appears that there was a judge sitting at chambers within four days from the order, for the order was made on the 23rd December, and the judge sat on the 27th. In this case there was no such possibility of going before a judge within four days.—p. 265.

LINDLEY, J.—I take Ord. LIV. r. 4, and will

adopt the construction put on it in *Bell v. North Staffordshire Ry.* There the Court was not asked to extend the time but to construe the rule. We, however, are asked to assume that their construction was right and to hear the case although the time has expired.—p. 266.

Crom v. Samuels (1876) 46 L. J. C. P. 1; 2 C. P. D. 21; 35 L. T. 423; 25 W. R. 45.—GROVE and DENMAN, JJ., *approved*.
Runtz v. Sheffield (1879) 48 L. J. Ex. 385; 4 Ex. D. 150; 40 L. T. 539.—C.A.

Runtz v. Sheffield, *discussed*.
Steedman v. Hakens (1888) 58 L. J. Q. B. 87; 22 Q. B. D. 16; 37 W. R. 208.—C.A.

M'Veagh, In re, M'Veagh v. Croall (1863) 1 De G. J. & S. 399; 1 N. R. 408; 9 Jur. (N.S.) 587; 8 L. T. 100; 11 W. R. 385.—L.JJ., *commented on*.

Kennedy v. Wakefield (1870) 39 L. J. Ch. 827; 22 L. T. 645; 18 W. R. 884.—STUART, V.-C.

Fox v. Wallis (1876) 2 C. P. D. 45; 35 L. T. 690; 25 W. R. 287.—C.A., *followed*.
Deykin v. Coleman (1877) 36 L. T. 195; 25 W. R. 294.—C.A.

Carter v. Stubbs (1880) 50 L. J. Q. B. 161; 6 Q. B. D. 116; 43 L. T. 746; 29 W. R. 132.—C.A., *referred to*.
Gilder v. Morrison (1882) 30 W. R. 815.—Q.B.D.

26. FUNDS AND SECURITIES IN COURT.

Peters, In re, Farden, Ex parte (1833) 3 Deac. & C. 479; 1 Mont. & Ayr. 219, *referred to*.
Ingham, In re, The Trustee, Ex parte (1884) 52 L. T. 299.—CAVE, J.; *reversed nom.* Ingham, In re, Craven, Ex parte (1885) 52 L. T. 714.—C.A.

Massarene's (Lord) Policy Fund, In re (or Massarene (Lord), In re) (1864) 10 L. T. 834; 12 W. R. 1095.—V.-C., *corrected*.
Vaughan v. Headfort (Marquis) (1873) 42 L. J. Ch. 456; L. R. 15 Eq. 173.—MALINS, V.-C.

Druce v. Denison, 16 L. J. Ch. 443; 15 Sim. 326.—V.-C.; *reversed*, (1848) 17 L. J. Ch. 149; 12 Jur. 254.—L.C.

Druce v. Denison, *explained*.
Spencer, In re (1852) 21 L. J. Ch. 314; 1 De G. M. & G. 311; 16 Jur. 233.—L.JJ.

Knowles, In re (1851) 21 L. J. Ch. 142; 1 De G. M. & G. 60; 15 Jur. 1163.—L.JJ., *followed*.

Spencer, In re (1852) 21 L. J. Ch. 314; 1 De G. M. & G. 311; 16 Jur. 233.—L.JJ.

Jervoise, In re (1849) 12 Beav. 209.—M.R., *followed*.

Eyton, In re, Bartlett v. Charles (1890) 45 Ch. D. 458; 59 L. J. Ch. 733; 63 L. T. 336; 39 W. R. 135.

CHITTY, J.—Where a fund is carried over to a particular separate account, "it is" (as was said by Lord Langdale in *Jervoise, In re*) "released from the general questions in the cause, and becomes marked as being subject only to the

questions arising upon the particular matter referred to in the heading of the account"; then he mentions the consequences of the proposition.—p. 461.

Jervoise, In re, referred to.

Eyton, In re, Bartlett v. Charles, approved and followed.

Edgar v. Plomley (1900) 69 L. J. P. C. 95; [1900] A. C. 431; 82 L. T. 573; 49 W. R. 142.—P.C.

Earl's Trust, In re (1858) 4 K. & J. 300.—WOOD, V.C.; and *Armstrong v. Stockham* (1854) 24 L. J. Ch. 176; 3 Eq. R. 130.—STUART, V.C., explained.

Goff's Estates, *In re*, Siddal v. Nicholson (1866) 14 L. T. 727; S. C. *nom.* Goss' Estate, *In re*, 12 Jur. (N.S.) 595.—WOOD, V.C. And see *Hayward v. Stephens* (1866) 36 L. J. Ch. 135; 15 L. T. 173.—STUART, V.C.

Butler's Will, In re (1873) L. R. 16 Eq. 479.—SELBORNE, L.C. (for M.R.), followed.

Norcop's Will, In re (1874) 31 L. T. 85.—BACON, V.C.

Butler's Will, In re, not followed.

Watson, In re (1864) 10 Jur. (N.S.) 1011.—L.J., followed.

Row's Estate, In re (1874) 43 L. J. Ch. 347; 29 L. T. 824; L. R. 17 Eq. 300.—MALINS, V.C.

Row's Estate, In re, and Wood's Settled Estates, In re (1875) L. R. 20 Eq. 372.—MALINS, V.C., not followed.

Broadwood's Settled Estates, In re (1875) 1 Ch. D. 438; 24 W. R. 108.—JESSEL, M.R.

Butler's Will, In re, followed.

Reynolds, In re (1876) 3 Ch. D. 61; 35 L. T. 293; 24 W. R. 991.—C.A.

JAMES, L.J.—We must follow the decision of Lord Selborne [*Butler's Will, In re*], which was, in truth, a decision of the L.C., though he was then exercising an original jurisdiction in a matter attached to the Rolls Court.—p. 62. MELLISH, L.J. concurred.

Haynes v. Haynes (1866) 35 L. J. Ch. 303; 14 L. T. 47; 14 W. R. 361.—KINDERSLEY, V.C. (see cases in note); *Widow's Trust, In re* (1871) 40 L. J. Ch. 380; L. R. 11 Eq. 408; 24 L. T. 87; 19 W. R. 468.—MALINS, V.C.; *Millner's Estate, In re* (1872) 42 L. J. Ch. 44; L. R. 14 Eq. 245; 26 L. T. 825; 20 W. R. 823.—MALINS, V.C.; and *Lyddon v. Ellison* (1854) 19 Beav. 565; 18 Jur. 1066; 2 W. R. 690.—ROMILLY, M.R., discussed.

White, In re, White v. Edmond (1901) 70 L. J. Ch. 300; [1901] 1 Ch. 570; 84 L. T. 199; 49 W. R. 429.

BUCKLEY, J.—A number of cases have been cited, but the material ones to my mind are these: *Haynes v. Haynes*, where it was presumed that a spinster aged fifty-three and two months was past the age of child-bearing; but the head-note to the report adds the query, "whether this age is not too low"; *Widow's Trust, In re*, where Malins, V.C., made the presumption in the case of a widow aged fifty-five and four months who had never had any children, and in the case of a spinster aged fifty-three years and nine months; *Millner's Estate, In re*, where the age of the lady was forty-nine years and nine months, and the husband was

still living, and she had never had a child. The marriage had taken place in 1846, and the decision was pronounced in 1872, so that there had been twenty-six years of married life, no issue, and the husband was still living; *Davidson v. Kimpton* ((1881) 18 Ch. D. 213—see "WILL"), where the lady was a spinster of the age of fifty-four; *Lyddon v. Ellison*, where the lady was a spinster and fifty-six years of age. It will be observed that in all the cases to which I have referred the ages were less than that of the lady in the present case [fifty-six years and three months]; but it will also be observed that I have not mentioned any case of a widow who had had a child. One case was that of a widow, but she had never had any children—*Widow's Trust, In re*; and there was one case in which the marriage was still subsisting—*Millner's Estate, In re*. In these circumstances I have to consider whether the cases relating to spinsters do not equally apply to widows who have had children. The only difference that occurs to me is that there is nothing to show in the case of spinsters whether they are or have been capable of child-bearing, while in the case of a widow who has had a child there is. On the other hand, if there has been a long lapse of time since the birth of a child, as in this case—twenty-three years—the presumption would be that the capacity of child-bearing had ceased. It seems to me that I can apply the principle of the cases relating to spinsters to widows who have had children.—p. 301.

Leng v. Hodges (1822) Jacob. 585.—M.R.; and *Fraser v. Fraser* (1814) Jacob. 586, n.—M.R., followed.

Lyddon v. Ellison (1854) 19 Beav. 565; 18 Jur. 1066; 2 W. R. 690.—ROMILLY, M.R.

Leng v. Hodges, referred to.

Dawson, In re, Johnston v. Hill (1888) 57 L. J. Ch. 1061; 39 Ch. D. 155; 59 L. T. 725; 37 W. R. 51.—CHITTY, J.

Maidstone and Ashford Ry., In re (1883) 53 L. J. Ch. 127; 25 Ch. D. 168; 49 L. T. 777; 32 W. R. 181.—CHITTY, J., followed.

Calton's Will, In re (1883) 53 L. J. Ch. 329; 25 Ch. D. 240; 49 L. T. 566; 32 W. R. 167.—PARSON, J.

Brandram, In re (1883) 53 L. J. Ch. 331; 25 Ch. D. 366; 49 L. T. 558; 32 W. R. 180.—BACON, V.C., dissented from.

Rhodes' Will, In re (1886) 55 L. J. Ch. 477; 31 Ch. D. 499; 54 L. T. 294; 34 W. R. 270, 501.—PEARSON, J.

Rhodes' Will, In re, referred to.

Broadwood's Trusts, In re (1886) 55 L. J. Ch. 646; 55 L. T. 312.—CHITTY, J.

Rhodes' Will, In re, commented on.

Bates v. Moore (1888) 38 Ch. D. 381; 57 L. J. Ch. 789; 58 L. T. 513; 36 W. R. 586.

NORTH, J.—I do not think that in *Rhodes, In re*, Pearson, J. intended to decide that a petition could properly be presented in every case in which the fund exceeds 1,000l.; if he did, I do not agree with him. The report of *Rhodes, In re*, shows that the title of the account in that case must have been entirely different from that of the account in the present case.—p. 382.

And see *Campbell, In re* (1893) 31 L. R. Ir. 434.—PORTER, M.R.

Elliott v. Remington (1839) 9 Sim. 502.—*v.-c., followed.*
Wilkinson v. Schneider, Le Blanc, In re (1870) 39 L. J. Ch. 410; L. R. 9 Eq. 423.—**JAMES, v.-c.**

Jones v. Jones (1879) 70 L. J. Ch. 272, n.; [1901] 1 Ch. 464, n.; 84 L. T. 109, n.—**CAIRNS, L.C., followed.**

Bath v. Bath (1901) 70 L. J. Ch. 270; [1901] 1 Ch. 460; 84 L. T. 107; 49 W. R. 341.—**KEKEWICH, J.**

Slater's Trusts, In re (1879) 48 L. J. Ch. 473; 11 Ch. D. 227; 40 L. T. 184; 27 W. R. 448.—**BACON, v.-c., overruled.**

Lloyd, In re, Lloyd v. Lloyd (1902) 72 L. J. Ch. 78; [1903] 1 Ch. 385; 87 L. T. 541; 51 W. R. 177.—**C.A.**

Day's Trusts, In re (1883) 49 L. T. 499.—**KAY, J., followed.**

Toogood's Trusts, In re (1887) 56 L. T. 703.—**CHITTY, J.**

Wrench v. Wynne (1869) 38 L. J. Ch. 235; 17 W. R. 198.—**MALINS, v.-c., followed.**

Wellesley v. Mornington (1871) 41 L. J. Ch. 776.—**MALINS, v.-c.**

Scott v. Spashett (1851) 21 L. J. Ch. 349; 3 Mac. & G. 599; 16 Jur. 157.—**TRURO, L.C., referred to.**

Taunton v. Morris (1878) 47 L. J. Ch. 721; 8 Ch. D. 453; 38 L. T. 552; 26 W. R. 674.—**MALINS, v.-c.**; affirmed, (1879) 48 L. J. Ch. 408; 11 Ch. D. 779; 27 W. R. 718.—**C.A.**

Greening v. Beckford (1832) 5 Sim. 195.—*v.-c., adopted.*

Warburton v. Hill (1854) 23 L. J. Ch. 633; Kay 470; 2 Eq. R. 441; 2 W. R. 365.—**WOOD, v.-c.**

Greening v. Beckford, referred to.
Mack v. Postle (1894) 63 L. J. Ch. 593; [1894] 2 Ch. 449 (*post*).

Warburton v. Hill, explained.
Thompson v. Tomkins (1862) 31 L. J. Ch. 633; 2 Dr. & Sm. 8 (*post*, col. 2463).

Warburton v. Hill, commented on.
Haly v. Barry (1868) 37 L. J. Ch. 723; L. R. 3 Ch. 452; 18 L. T. 490; 16 W. R. 654.—**L.JJ.** See "EXECUTION," vol. i., col. 1056.

Warburton v. Hill, referred to.
Pitman and Edwards, Ex parte, Hamilton's Windsor Ironworks, In re (1879) 12 Ch. D. 707; 40 L. T. 569; 27 W. R. 445.—**MALINS, v.-c.**

Warburton v. Hill, discussed.
Brereton v. Edwards (1888) 21 Q. B. D. 488.—**C.A. (post, col. 2462).**

Warburton v. Hill, discussed.
Mack v. Postle (1894) 63 L. J. Ch. 593; [1894] 2 Ch. 449; 8 R. 339; 71 L. T. 153.

STIRLING, J.—It is equally well settled that where the fund is in Court an encumbrancer cannot effectually gain priority except by obtaining a stop order. So far as I can discover, the first reported case in which this was decided was *Greening v. Beckford* (*supra*), but no reasons are given for the decision. The foundation of the rule was carefully considered by Lord Hatherley (then Wood, V.-C.) in *Warburton v. Hill*. In that case a judgment creditor of a person interested in a fund in Court had

obtained charging orders on the debtor's interest, and had left copies at the office of the Accountant-General, and entries had been made of the orders, but he obtained no stop order. The V.-C., although he did not decide the case on this ground, expressed the opinion that the judgment creditor's notice did not give priority.—p. 343.

Haly v. Barry (*supra*), *referred to.*
Hutchinson, Ex parte (or Plowden, Ex parte), Hutchinson, In re (1885) 55 L. J. Q. B. 582; 16 Q. B. D. 515; 54 L. T. 302; 34 W. R. 475; 3 Morrell 19.—**HUDDLESTON, B. and CAVE, J.**; **Womersley, In re, Etheridge v. Womersley** (1885) 54 L. J. Ch. 965; 29 Ch. D. 557; 53 L. T. 260; 33 W. R. 935.—**PEARSON, J.**; **Bell, In re, Carter v. Stadden** (1886) 54 L. T. 370; 34 W. R. 363.—**KAY, J.**

Haly v. Barry, discussed.
Robinson v. Peace (1838) 7 D. P. C. 93.—**PARKE, B., referred to.**
Brereton v. Edwards (1888) 21 Q. B. D. 488; 60 L. T. 5; 37 W. R. 47.—**C.A.**; affirming on other grounds 21 Q. B. D. 226; 52 J. P. 647.—**COLERIDGE, C.J. and MATHEW, J.**

Haly v. Barry, discussed.
Stewart v. Rhodes (1900) 69 L. J. Ch. 174; [1900] 1 Ch. 386; 82 L. T. 337; 48 W. R. 354.—**C.A.** See "EXECUTION," vol. i., col. 1056.

Bell, In re, Carter v. Stadden (*supra*), *approved.*

Watts v. Jefferyes (1851) 3 Mac. & G. 422; 15 Jur. 435.—**TRURO, L.C., discussed.**
Brereton v. Edwards (1888) 21 Q. B. D. 226, 488.—**C.A. (supra).**

Macleod v. Buchanan (1864) 33 L. J. Ch. 306; 4 De G. J. & S. 265; 3 N. R. 623; 10 Jur. (N.S.) 223; 10 L. T. 9; 12 W. R. 514.—**L.JJ., discussed and applied.**

Mack v. Postle (1894) 8 R. 339; 63 L. J. Ch. 593; [1894] 2 Ch. 449; 71 L. T. 153.

STIRLING, J.—In *Macleod v. Buchanan*, a stop order expressed in terms wide enough to affect the whole of a fund was held to be limited in its operation to a particular share of it.—p. 342.

Stuart v. Cockerell (1869) 39 L. J. Ch. 127; L. R. 8 Eq. 607.—**MALINS, v.-c., followed.**
Birmingham Banking Co. v. Carter (1872) 20 W. R. 354.—**MALINS, v.-c.**; **Russell's Policy Trusts, In re** (1872) L. R. 15 Eq. 26; 27 L. T. 706; 21 W. R. 97.—**MALINS, v.-c.**

Stuart v. Cockerell and Brown's Trusts, In re (1867) 37 L. J. Ch. 171; L. R. 5 Eq. 88; 17 L. T. 241.—**MALINS, v.-c.**
Semphill v. Queensland Sheep Investment Co. (1873) 29 L. T. 737.—**HALL, v.-c.**

Bartlett v. Bartlett, 3 Sm. & G. 533.—**STUART, v.-c., reversed**, (1857) 26 L. J. Ch. 577; 1 De G. & J. 127; 3 Jur. (N.S.) 705; 5 W. R. 541.—**L.JJ.**

Bartlett v. Bartlett.
Approved, but distinguished, Day v. Day (1857) 26 L. J. Ch. 585; 1 De G. & J. 44; 3 Jur. (N.S.) 782; 5 W. R. 701.—**L.JJ.**; *considered*, **Cooke v. Hemming** (1868) 37 L. J. C. P. 179; L. R. 3 C. P. 334; 18 L. T. 772; 16 W. R. 903.—**C.P.**; **WILLES, J. dissenting.**

Bartlett v. Bartlett, *discussed*.
Cooke v. Hemming, *referred to*.
Semphill v. Queensland Sheep Investment Co. (1873) 29 L. T. 737.—HALL, V.-C. *And see* "BANKRUPTCY," vol. i., col. 140.

Thompson v. Tomkins (1862) 31 L. J. Ch. 633; 2 Dr. & Sm. 8; 8 Jur. (N.S.) 185; 6 L. T. 305; 10 W. R. 310.—V.-C., *discussed*.
Mutual Life Assurance Society v. Langley (1886) 32 Ch. D. 460, 470.—C.A. (*post*).

Thompson v. Tomkins, *explained*.
Nettlefold's Trusts, *In re* (1888) 59 L. T. 315.—KAY, J.

Holmes (A. D.), *In re* (1885) 55 L. J. Ch. 83; 29 Ch. D. 786.—C.A., *discussed*.
Elder v. Maclean (1857) 3 Jur. (N.S.) 283; 5 W. R. 447.—KINDERSELEY, V.-C., *observed on*.

Mutual Life Assurance Society v. Langley (1886) 32 Ch. D. 460; 54 L. T. 326.—C.A.; affirming on one point 53 L. J. Ch. 996; 26 Ch. D. 686; 32 W. R. 791.—PEARSON, J.

COTTON, L.J. (after referring to *Holmes, In re*, continued:—) There was also a case of *Elder v. Maclean*, in which there is a short passage at the end of the judgment as it is reported, which apparently did give support to the contention; but although that passage is in the Weekly Reporter, it is not to be found in the report in the Jurist, to which we have been referred. Whether there is any inaccuracy in the report, or it was not argued, one can hardly tell; but if it was so laid down by Kindersley, V.-C., with the greatest respect for his care, intelligence, and knowledge of the law, I think it was erroneous, as laying down a wrong principle.—p. 468.

BOWEN, L.J.—*Holmes, In re*, decides nothing more than this, that you cannot, by getting a stop order, obtain a right which was unjust and contrary to the principles of equity to obtain. The passage . . . in *Elder v. Maclean* is not to be found either in the Jurist or in any of the regular constituted reports, and I do not think it can be relied upon absolutely.—p. 472.

FRY, L.J. to the same effect.

Holmes, In re, *referred to*.

Mutual Life Assurance Society v. Langley, *discussed*.

Mack v. Postle (1894) 63 L. J. Ch. 593; [1894] 2 Ch. 449; 8 R. 339; 71 L. T. 153.—STIRLING, J.

Mutual Life Assurance Society v. Langley, *explained*.

Stephens v. Green (1895) 12 R. 252; 64 L. J. Ch. 546; [1895] 2 Ch. 148; 72 L. T. 574; 43 W. R. 465.—C.A.

LINDLEY, L.J.—There was a fund of which part was in the hands of trustees and part had come into Court. The question was whether the assignee ought to give notice to the trustees or ought to get a stop order, and the Court said, "You ought to get a stop order, and you ought to give notice to the persons whose duty it is to distribute the fund to you."—p. 257.

Mutual Life Assurance Society v. Langley, *referred to*.

Lloyd's Bank v. Pearson (1901) 70 L. J. Ch. 422; [1901] 1 Ch. 865; 84 L. T. 314.—COZENS-HARDY, J.

Devereux's Estate, In re (1851) 4 Ir. Jur. 16.—L.C.C., *followed*.
Gage's Estate, In re (1886) 17 L. R. Ir. 111.—MONROE, J.

Devereux's Estate, In re, and **Grier's Estate, In re** (1870) Ir. R. 6 Eq. 1.—L.C. and L.J. (*affirmed nom. Grier v. Grier* (1872) L. R. 5 H. L. 688.—H.L. (IR.)), *discussed*.
Hall's Estate, In re (1893) 31 L. R. Ir. 416, 430.—MONROE, J.

27. RULES OF COURT.

Newbiggin-by-the-Sea Gas Co. v. Armstrong (1879) 49 L. J. Ch. 231; 13 Ch. D. 310; 41 L. T. 637; 28 W. R. 217.—C.A., *referred to*.

Boswell v. Coaks (1887) 57 L. J. Ch. 101; 57 L. T. 742; 36 W. R. 65.—NORTH, J.; affirmed, C.A. *And see* "SOLICITOR" (*post*).

Culley v. Buttifant (1875) 1 Ch. D. 84; 45 L. J. Ch. 200; 24 W. R. 55.—HALL, V.-C., *distinguished*.

Provident Permanent Building Society v. Greenhill (1876) 1 Ch. D. 624; 45 L. J. Ch. 272. JESSEL, M.R. thought the case cited did not apply where the defendant had not appeared, and directed that the suit should proceed under the new practice, treating the bill as a statement of claim, so that the plaintiff might proceed under Ord. XIX. r. 9, and Ord. XXIX. r. 10, as if the defendant had appeared and made default in delivering a statement of defence.—p. 272.

Garling v. Royds (1875) 45 L. J. Ch. 56; 1 Ch. D. 81; 24 W. R. 23.—HALL, V.-C., *distinguished*.

A Solicitor, *In re* (1875) 1 Ch. D. 445. JESSEL, M.R.—In *Garling v. Royds* the object was merely to compel the defendant to put in an answer, that is, to take a particular step in a pending cause in which no final decree had been made; and there the practice of the Court of Chancery was applicable under the concluding words of sect. 22 of the Judicature Act, 1873.—p. 446.

Garling v. Royds, *not followed*.
Dallas v. Glyn (1876) 3 Ch. D. 190; 46 L. J. Ch. 51; 34 L. T. 897; 24 W. R. 880.

MALINS, V.-C.—I beg to say, with great deference, that I do not concur in the decision in *Garling v. Royds*; and further, that I shall in future treat the new rule [Ord. XLIV. r. 2] as applying to orders in all suits whatever the stage at which they have arrived. If there had been a decision of the A. C. supporting *Garling v. Royds*, I should be bound to follow it, but until that is done I must act upon my own judgment.—p. 192.

Att.-Gen. v. Sillem, 33 L. J. Ex. 92, 134; 2 H. & C. 431.—EX. and EX. CH.; majority of judges affirmed, (1864) 33 L. J. Ex. 209; 10 H. L. Cas. 704; 4 N. R. 29; 10 Jur. (N.S.) 416; 10 L. T. 434; 12 W. R. 641.—H.L. (E.); LORDS CRANWORTH and WENSLEYDALE dissenting.

Att.-Gen. v. Sillem, *referred to*.
Reg. v. Pharmaceutical Society (1898) [1899] 2 Ir. R. 132, 139.—Q.B.D.

Att.-Gen. v. Sillem, *not applied*.
Darlow v. Shuttleworth (1902) 71 L. J. K. B. 460; [1902] 1 K. B. 721, 731; 86 L. T. 524; 50 W. R. 668; 66 J. P. 516.—K.B.D.

Wellesley v. Wellesley (1858) 28 L. J. Ch. 1. —CHILMSFORD, L.C.; *affirmed non.* **Beavan v. Mornington (Countess)** (1860) 30 L. J. Ch. 663; 8 H. L. Cas. 525; 6 Jur. (N.S.) 1123; 8 W. R. 669.—H.L. (E.).

Beavan v. Mornington (Countess), *principle applied.*
Mitchell, Ex parte, Hull Forge Co., In re (1867) 36 L. J. Ch. 337.—L.JJ.

Hann, In re, Foreman, Ex parte (1887) 56 L. J. Q. B. 161; 18 Q. B. D. 393; 55 L. T. 820; 35 W. R. 370; 4 Morrell 16.—C.A., *discussed.*

Knill v. Towse (1890) 59 L. J. Q. B. 136, 455; 24 Q. B. D. 195, 697; 62 L. T. 259; 63 L. T. 47; 38 W. R. 383, 521; 54 J. P. 454, 789; 6 Times L. R. 123, 310.—Q.B.D. and C.A., *referred to.*

Reg. v. Pharmaceutical Society (1898) [1899] 2 Ir. R. 132.—Q.B.D.

Ferrand v. Bradford (Corporation) (1856) 25 L. J. Ch. 389; 8 De G. M. & G. 93; 2 Jur. (N.S.) 340; 4 W. R. 350.—L.JJ., *applied.*

Howard v. Howard (1892) 32 L. R. Ir. 454.—C.A.

Smith v. Baker (1864) 2 H. & M. 498; 4 N. R. 321; 10 L. T. 599.—WOOD, V.C., *order in, followed.*

Coles v. Morris (1867) 36 L. J. Ch. 833, 836; 17 L. T. 155; 15 W. R. 1157.—MALINS, V.C.; *affirmed*, CATRNS, L.J.

Smith v. Baker, *applied.*
Howard v. Howard (1892) 32 L. R. Ir. 454.—C.A.

Coles v. Morris (*supra*), *commented on and distinguished.*
Rendle v. Metropolitan Provincial Bank (1867) 36 L. J. Ch. 789; 16 L. T. 764; 15 W. R. 1068.—STUART, V.C.

Mills v. Fry (1815) 19 Ves. 277.—L.C., *discussed.*
Fennings v. Humphery (1841) 10 L. J. Ch. 251; 4 Beav. 1; 3 Jur. 455.—LANGDALE, M.R.

Fennings v. Humphery, *applied.*
Anglo-Danubian Co. v. Rogerson (1867) 36 L. J. Ch. 667; L. R. 4 Eq. 3; 16 L. T. 262; 15 W. R. 729.—ROMILLY, M.R.

Hatfield Patent Cask Co., In re (1863) 2 N. R. 502; 9 Jur. (N.S.) 997.—L.C., *approved and applied.*
Herefordshire Banking Co., In re (1867) 36 L. J. Ch. 806; L. R. 4 Eq. 250; 17 L. T. 58; 15 W. R. 1056.—ROMILLY, M.R.

Hatfield Patent Cask Co., In re, and Herefordshire Banking Co., In re, commented on.
East of England Banking Co., In re, Provincial Banking Corporation, Ex parte (1868) L. R. 6 Eq. 368, 377; 18 L. T. 550; 16 W. R. 840.—MALINS, V.C.; *varied*, 38 L. J. Ch. 121; L. R. 4 Ch. 14; 19 L. T. 299; 17 W. R. 18.—L.C. and L.JJ.

Herefordshire Banking Co., In re, referred to.
International Contract Co., In re, Hughes' Claim (1872) 41 L. J. Ch. 373; L. R. 13

Eq. 623, 631; 26 L. T. 500; 20 W. R. 522.—WICKENS, V.C.; **Whittingstall v. Grover** (1886) 55 L. T. 213, 217; 53 W. R. 4.—CHITTY, J.

28. COURT FEES.

Hasker, Ex parte (1884) 54 L. J. M. C. 94; 14 Q. B. D. 82.—GROVE and STEPHEN, JJ., *distinguished.*
A Solicitor, In re, Dudley, **Ex parte** (1885) 33 W. R. 750.

DENMAN, J.—Clause 52 in the schedule to the order as to Supreme Court Fees, 1884, raises the question whether the fee of 2*l.* therein mentioned must be paid before this appeal can be set down for hearing. **Hasker, Ex parte**, decided that the fee was payable in a proceeding in the nature of a mandamus to compel a magistrate to hear an application for a summons. That case does not seem to me to affect the present one. All that that case decided was that the rule was as applicable to Crown as to civil matters; but there the application to the Court was an application in an original matter.—p. 751.

29. TIME.

Rex v. Holt (1793) 5 Term Rep. 436.—K.B., *discussed.*
Att.-Gen. v. Theakstone (1820) 8 Price 89; 22 R. R. 716.—EX.

Rowberry v. Morgan (1854) 23 L. J. Ex. 191; 9 Ex. 730; 18 Jur. 452; 2 W. R. 431.—EX., *followed.*
Peacock v. Reg. (1858) 27 L. J. C. P. 224; 4 C. B. (N.S.) 264; 6 W. R. 517.—C.P.

Rex v. Holt, Rowberry v. Morgan and Newton v. Boodle (1847) 16 L. J. C. P. 135; 3 C. B. 795; 4 D. & L. 664; 11 Jur. 148.—C.P., *discussed.*
Johnson v. Warwick (1856) 25 L. J. C. P. 102; 17 C. B. 516.—C.P., *approved.*
Prichard v. Prichard (*or* **Pritchard v. Pritchard**) (1884) 54 L. J. Q. B. 30; 14 Q. B. D. 55; 51 L. T. 859; 33 W. R. 198.—Q.B.D.

Newton v. Boodle and May v. Wooding (1815) 3 M. & S. 500.—K.B., *discussed.*
Webster v. Myer (1884) 14 Q. B. D. 231; 54 L. J. Q. B. 101; 51 L. T. 560; 33 W. R. 407.—C.A.

ESHER, M.R.—In . . . **May v. Wooding** a verdict had been obtained more than three years before judgment was signed, and a term's notice was not given; but it was held by the Court of K. B. that the judgment was duly signed. **Newton v. Boodle** appears to have been decided upon the authority of **May v. Wooding**. These were cases of proceeding after verdict, and it is not necessary to consider whether we could agree with these decisions; if the present were a case as to a proceeding after verdict, it would perhaps be difficult for us to express dissent from those cases; but it is to be observed that they were decided upon different Rules of Court, and it may be that they are not binding as to the construction of Ord. LXIV. r. 13; at all events they apply only where there has been a verdict. In the present case a month's notice of the intention to proceed ought to have been given.—p. 233.

Thomas v. Nokes (1868) L. R. 6 Eq. 521; 16 W. R. 995.—*ROMILLY, M.R., followed.*
Halford v. Hardy (1899) 81 L. T. 721.—*KEKEWICH, J.*

Thomas v. Nokes and D. v. A. & Co. (1900) 69 L. J. Ch. 382; [1900] 1 Ch. 484; 82 L. T. 47; 48 W. R. 429.—*COZENS-HARDY, J., discussed.*
Carter v. Roberts (1903) 72 L. J. Ch. 655; [1903] 2 Ch. 312, 320; 89 L. T. 239; 51 W. R. 520.—*BYRNE, J. And see "ATTACHMENT," vol. i., col. 89.*

Christ College, Brecknock v. Martin (1877) 46 L. J. Q. B. 591; 3 Q. B. D. 16; 36 L. T. 537; 25 W. R. 637.—*C.A., discussed.*
Oliver and Scott's Arbitration, In re (1889) 59 L. J. Ch. 148; 43 Ch. D. 310; 61 L. T. 552; 38 W. R. 476.—*KEKEWICH, J.*

Houlston v. Woodall or Woodward (1884) 78 L. T. Journal, p. 113.—*C.A., referred to.*
Taylor v. Roe (1893) 3 R. 306; 62 L. J. Ch. 361; 68 L. T. 253.

KEKEWICH, J.—In *Houlston v. Woodward* the C. A. appears to have held that there is no occasion to give notice of intention to issue execution after judgment on the ground that the rule [Ord. LXIV. r. 13] does not apply to proceedings after judgment. I do not think the rule applies at all to the issue of execution.—p. 507.

Houlston v. Woodward, referred to.
Warnock v. Mann [1896] 2 Ir. R. 630.—*Q.B.D.*

30. PLEADING.

Millington v. Loring (1880) 6 Q. B. D. 190; 50 L. J. Q. B. 214; 43 L. T. 657; 29 W. R. 207; 45 J. P. 268.—*C.A., explained.*

Lumb v. Beaumont (1884) 49 L. T. 772.
PEARSON, J.—Lord Selborne's judgment means this: If you may not plead anything except what you must prove in order to succeed, seduction must not be pleaded by the plaintiff in an action for breach of promise of marriage; but if you may plead material facts, as tending to support your case, then seduction may be so pleaded. That is all he says. You cannot say here, as was said there, that the facts pleaded will have any bearing on the amount of damages (p. 773). I agree that in these days you may put into pleadings not only matters which are material for proving the course of action alleged, but also any facts which can be properly given in evidence at the trial. That is what is laid down in *Millington v. Loring*.—p. 774.

Millington v. Loring.

Discussed and not applied, Wood v. Durham (Earl) (1888) 57 L. J. Q. B. 547; 21 Q. B. D. 501; 59 L. T. 142; 37 W. R. 222.—*MANISTY and HAWKINS, JJ.; applied, Whitney v. Moignard* (1890) 59 L. J. Q. B. 324; 24 Q. B. D. 630.—*HUDDLESTON, B. and V. WILLIAMS, J.; not applied, Rassam v. Budge* [1893] 1 Q. B. 571, 578 (post, col. 2468).

Morison v. Harmer (1837) 3 Bing. N. C. 759; 4 Scott. 524; 3 Hodges 108.—*C.P.; and Edge v. Pemberton* (1843) 13 L. J. Ex. 48; 13 M. & W. 187; 1 D. & L. 467.—*EX., referred to.*
Bremridge v. Latimer (1864) 10 L. T. 878; 12 W. R. 878.—*C.P.*

Bremridge v. Latimer, explained and approved.

Watkin v. Hall (1868) 37 L. J. Q. B. 125; L. R. 3 Q. B. 402; 9 B. & S. 279; 18 L. T. 561; 16 W. R. 857.—*Q.B.; Rassam v. Budge* (1893) 62 L. J. Q. B. 312; [1893] 1 Q. B. 571; 5 R. 336; 68 L. T. 717; 41 W. R. 377; 57 J. P. 361.—*COLERIDGE, C.J. and A. L. SMITH, J.*

Byrd v. Nunn (1877) 47 L. J. Ch. 1; 7 Ch. D. 284; 37 L. T. 585; 26 W. R. 110.—*C.A., applied.*

Collette v. Goode (1878) 47 L. J. Ch. 370; 7 Ch. D. 842, 847; 38 L. T. 504.—*FRY, J.*

Harris v. Gamble (1878) 47 L. J. Ch. 344; 7 Ch. D. 877; 38 L. T. 253; 26 W. R. 350.—*FRY, J., followed.*

Rutter v. Tregent (1879) 48 L. J. Ch. 791; 12 Ch. D. 758; 41 L. T. 16; 27 W. R. 902.—*BACON, V.-C.*

Brymer v. Thames Haven Dock and Ry. (1848) 18 L. J. Ex. 110; 2 Ex. 549.—*EX., affirmed nom.*
Thames Haven Dock and Ry. v. Brymer (1850) 19 L. J. Ex. 32; 5 Ex. 696.—*EX. CH.*

Thames Haven Dock and Ry. v. Brymer, principle applied.

Foquet v. Moor (1852) 22 L. J. Ex. 35; 7 Ex. 870.—*EX., discussed.*

Young v. Austen (1869) 38 L. J. C. P. 233; L. R. 4 C. P. 553, 557; 20 L. T. 396; 17 W. R. 706.—*C.P.*

Young v. Austen.

Distinguished, Abrey v. Crux (1869) 39 L. J. C. P. 9; L. R. 5 C. P. 37; 21 L. T. 377; 18 W. R. 63.—*C.P. (WILLES, J. doubting); referred to, Maillard v. Page* (1870) 39 L. J. Ex. 235; L. R. 5 Ex. 312; 23 L. T. 80.—*EX. (CHANNELL, B. dissenting); followed, Corkling v. Massey* (1873) 42 L. J. C. P. 153; L. R. 8 C. P. 395; 28 L. T. 636; 21 W. R. 680.—*C.P. And see "BILLS OF EXCHANGE," vol. i., col. 214.*

Archbold v. Charitable Bequests Commissioners (1849) 2 H. L. Cas. 440.—*H.L. (IR.), referred to.*

Hickson v. Lombard (1866) L. R. 1 H. L. 324, 331.—*H.L. (IR.); reversing 13 Ir. Ch. R. 98.—M.R. and C.A.*

Hickson v. Lombard, explained and not applied.

Parker v. McKenna (1874) 44 L. J. Ch. 425, 431; L. R. 10 Ch. 96; 31 L. T. 739; 23 W. R. 271.—*L.C. and L.JJ.*

Hoare v. Graham (1811) 3 Campb. 57; 13 R. R. 752.—*C.J., distinguished.*

Abrey v. Crux (1869) 39 L. J. C. P. 9; L. R. 5 C. P. 37; 21 L. T. 377; 18 W. R. 63.—*C.P.; WILLES, J. doubting.*

Abrey v. Crux, discussed.

Stott v. Fairlamb (1883) 52 L. J. Q. B. 420; 48 L. T. 574.—*DENMAN, J.; reversed on another point, 53 L. J. Q. B. 47; 49 L. T. 525; 32 W. R. 354.—C.A.*

Hoare v. Graham and Abrey v. Crux, referred to.

New London Credit Syndicate v. Neale (1898) 67 L. J. Q. B. 825; [1898] 2 Q. B. 487; 48 L. T. 323.—*C.A.*

Troup v. Ricardo, 10 Jur. N. S. 859; 10 L. T. 833; 12 W. R. 1135.—*ROMILLY, M.R.; reversed, (1864) 34 L. J. Ch. 91; 4 De G. J. & S. 489; 10*

Jur. (N.S.) 1161; 5 N. R. 62; 11 L. T. 399; 13 W. R. 147.—WESTBURY, L.C.

Troup v. Ricardo.

Discussed, Smith v. Moffatt (1865) 35 L. J. Ch. 19; L. R. 1 Eq. 397; 12 Jur. (N.S.) 22; 14 W. R. 242.—WOOD, V.-C.; *considered*, Roberts v. Moreton (1869) 17 W. R. 397.—JAMES, V.-C.; *explained*, Motion v. Moojen (1872) 41 L. J. Ch. 596; L. R. 14 Eq. 202; 20 W. R. 861.—BACON, V.-C.

Wearing v. Ellis (1856) 26 L. J. Ch. 345; 6 De G. M. & G. 596; 2 Jur. (N.S.) 1147.—L.C.

Considered, Martin v. Powning (1869) 38 L. J. Ch. 212; L. R. 4 Ch. 356, 369; 20 L. T. 133.—L.J.J.; *discussed and principle applied*, Motion v. Moojen (*supra*). *And see* "BANKRUPTCY," vol. i., col. 159.

Heath v. Chadwick (1848) 2 Ph. 649.—L.C. *Confirmed*, Rochfort v. Battersby (1849) 2 H. L. Cas. 388; 14 Jur. 229.—H.L. (IR.); *discussed*, Motion v. Moojen (1872) 41 L. J. Ch. 596; L. R. 14 Eq. 202; 20 W. R. 861.—BACON, V.-C.

Rochfort v. Battersby (*supra*), *applied*.

Dyson v. Hornby (1855) 7 De G. M. & G. 1.—L.J.J.

Rochfort v. Battersby and Dyson v. Hornby, *distinguished*.

Troup v. Ricardo (1864) 34 L. J. Ch. 91; 4 De G. J. & S. 489; 10 Jur. (N.S.) 1161; 11 L. T. 399; 13 W. R. 147.—WESTBURY, L.C.

Dyson v. Hornby, *discussed and principle applied*.

Martin v. Powning (1869) 38 L. J. Ch. 212; L. R. 4 Ch. 356, 369; 20 L. T. 133.—L.J.J.

Rochfort v. Battersby, *discussed*.

Motion v. Moojen (1872) 41 L. J. Ch. 596; L. R. 14 Eq. 202; 20 W. R. 861.—BACON, V.-C.; Leadbitter and Harvey, In re (*or* Leadbitter, In re) (1878) 48 L. J. Ch. 242; 10 Ch. D. 388; 39 L. T. 286; 27 W. R. 267.—C.A. *And see* "APPEAL," vol. i., col. 27.

Martin v. Powning (1869) 38 L. J. Ch. 212; L. R. 4 Ch. 356; 20 L. T. 133.—L.J.J.; and **Stone v. Thomas** (1870) 39 L. J. Ch. 168; L. R. 5 Ch. 219; 22 L. T. 359; 18 W. R. 385.—HATHERLEY, L.C., *applied*.

Hood v. N. E. Ry. (1870) 40 L. J. Ch. 17; L. R. 11 Eq. 116; 23 L. T. 433; 19 W. R. 266.—MALINS, V.-C.

Stone v. Thomas, *not applied*.

Pike v. Dickinson (1871) 41 L. J. Ch. 171; L. R. 7 Ch. 61; 25 L. T. 579; 20 W. R. 81.—HATHERLEY, L.C.

Martin v. Powning and Stone v. Thomas, *discussed*.

Graham v. Winterson (1873) 42 L. J. Ch. 633; L. R. 16 Eq. 243; 28 L. T. 803; 21 W. R. 722.—MALINS, V.-C.; Jenney v. Bell (1876) 45 L. J. Ch. 369; 2 Ch. D. 547; 34 L. T. 485; 24 W. R. 550.—MALINS, V.-C.

Martin v. Powning, *discussed and distinguished*.

Eyre v. Smith (1877) 2 C. P. D. 435; 37 L. T. 417; 25 W. R. 871.—C.A.

BAGGALLAY, L.J.—*Martin v. Powning* was not decided upon demurrer, though no doubt it

amounts to a decision that the question there raised by plea could have been raised by demurrer. But the distinction between that case and the present is this, that sect. 197 of the Bankruptcy Act, 1861, was absolute in its terms, and made no exception in the case of fraud, whereas sect. 127 of the Bankruptcy Act, 1869, makes the registration of the resolutions conclusive only in the absence of fraud.—p. 439.

Fessard v. Mugnier (1865) 34 L. J. C. P. 126; 18 C. B. (N.S.) 286; 11 Jur. (N.S.) 283; 11 L. T. 635.—C.P., *referred to*.

The Eider (1893) 62 L. J. P. 65; [1893] P. 119; 1 R. 593; 69 L. T. 622; 7 Asp. M. C. 354.—C.A. Esher, M.R., LINDLEY and BOWEN, L.J.J.

Kemble v. Mills (1840) 1 Man. & G. 757; 2 Scott (N.R.) 121; 9 D. P. C. 446; 1 Drink. 22.—C.P., *referred to*.

Carew v. Duckworth (1869) 38 L. J. Ex. 149; L. R. 4 Ex. 313, 318; 20 L. T. 882; 17 W. R. 927.—EX.

Hobson v. Middleton (1827) 6 B. & C. 295; 9 D. & R. 249; 5 L. J. (O.S.) K. B. 160.—K.B., *referred to*.

Murphy v. Glass (1869) 6 Moore P. C. (N.S.) 1; L. R. 2 P. C. 408, 419; 20 L. T. 461; 17 W. R. 592.—P.C.; Toleman v. Portbury (1872) 41 L. J. Q. B. 98; L. R. 7 Q. B. 344, 351; 26 L. T. 392; 20 W. R. 441.—EX. CH.

Hobson v. Middleton, *applied*.

Clifford v. Hoare (1874) 43 L. J. C. P. 225; L. R. 9 C. P. 362, 371; 30 L. T. 465; 22 W. R. 828.—C.P.

Downes v. Craig (1841) 11 L. J. Ex. 239; 9 M. & W. 166.—EX., *referred to*.

Goldham v. Edwards (1856) 25 L. J. C. P. 225; 18 C. B. 389; 2 Jur. (N.S.) 493; 4 W. R. 550.—EX. CH.; Wright v. Davies (1876) 46 L. J. C. P. 41; 1 C. P. D. 638; 35 L. T. 188; 24 W. R. 841.—C.P.D. (affirmed, C.A.); Rumsey v. Nicholl (1877) 2 C. P. D. 185, 294; 36 L. T. 786; 25 W. R. 614.—DENMAN, J. (affirmed, C.A.). *And see* "ECCLÉSIASTICAL LAW," vol. i., col. 938.

Collins v. Shirley (1830) 1 Russ. & M. 638; 32 R. R. 307.—M.R.

Applied, Rochfort v. Battersby (1849) 2 H. L. Cas. 388; 14 Jur. 229.—H.L. (IR.); *discussed*, Melbourne Banking Corporation v. Brougham (1879) 48 L. J. P. C. 12; 4 App. Cas. 156, 166; 48 L. T. 1.—P.C.

Cheltenham and Swansea Ry. Carriage and Wagon Co., In re (1869) 38 L. J. Ch. 330;

L. R. 8 Eq. 580; 20 L. T. 169; 17 W. R. 463.—MALINS, V.-C., *applied*.

Bowden v. Russell (1877) 46 L. J. Ch. 414, 416; 36 L. T. 177.—MALINS, V.-C.

Robertson v. Howard (1878) 47 L. J. C. P. 480; 3 C. P. D. 280; 38 L. T. 715; 26 W. R. 683.—LINDLEY, J., *disapproved*.

Fawcus v. Charlton (1883) 10 Q. B. D. 516; 52 L. J. Q. B. 710.—WILLIAMS and MATHEW, JJ. MATHEW, J.—*Robertson v. Howard* has been much doubted.—p. 517.

Philipps v. Philipps, 39 L. T. 329.—HUDDLESTON, B.; MELLOR, J. *doubting*; *reversed*, (1878) 48 L. J. Q. B. 135; 4 Q. B. D. 127; 39 L. T. 556; 27 W. R. 436.—C.A. BRAMWELL, BRETT and COTTON, L.J.J.

Philippis v. Philippis.

Explained. Philippis v. Philippis (1879) 40 L. T. 815; 27 W. R. 939.—DENMAN and LINDLEY, JJ.; *approved*, Sutcliffe v. James (1879) 40 L. T. 875; 27 W. R. 750.—FRY, J.; *distinguished*, Evelyn v. Evelyn (1880) 42 L. T. 248; 28 W. R. 531.—MALINS, V.-C.

Philippis v. Philippis, followed.

Davis v. James (1884) 26 Ch. D. 778; 53 L. J. Ch. 523; 50 L. T. 115; 32 W. R. 406.

KAY, J.—*Philippis v. Philippis* was an action for the recovery of land of which the plaintiff had never been in possession, and the statement was put in two or three ways, so as to give what Lord Bramwell speaks of as alternative rights to relief; but no deed or documents under or by virtue of which the plaintiff derived or deduced his title were stated, and the plaintiff confined himself to general averments. . . . It was held by the whole Court unanimously that the pleading was an embarrassing pleading, because it did not state that which the defendant was entitled to have stated for his own protection, and that, therefore, the pleading must be struck out; and this although it was not possible to demur to it successfully. Now, certainly there is nothing in the new rules which in the least degree interferes with the decision in *Philippis v. Philippis*. It is true that now there can be no demurrer, and the advantage which was formerly taken by way of demurrer must now be taken in a different way; but this pleading, if the case comes within *Philippis v. Philippis* is entirely within that decision; because there is nothing in the new rules which at all interferes—there is no alteration in Ord. XIX. r. 4, which makes the least difference so far as the decision in *Philippis v. Philippis* is concerned.—pp. 781, 782.

Philippis v. Philippis and Davis v. James, distinguished.

Darbyshire v. Leigh (1896) 65 L. J. Q. B. 360; [1896] 1 Q. B. 554; 74 L. T. 241; 44 W. R. 452.—C.A.

ESHER, M.R.—The facts of that case [*Philippis v. Philippis*] were entirely different from the facts here. There several documents were referred to, but the effect of any one of them was not stated. The pleader had not complied with the first part of the rule [Ord. XIX. r. 21]. The decision did not turn on the latter part of the rule, which had no application to the case.—p. 362.

LOPES, L.J.—In that case [*Philippis v. Philippis*] the legal effect of any document had not been set out. All that was done was to refer to a number of documents and state the result of them altogether. The decision of Kay, L.J., in *Davis v. James* does not seem to be inconsistent with our decision in this case.—*Id.*

RIGBY, L.J.—In *Davis v. James*, which was relied upon, the plaintiff, after alleging the fact of a lease having been made, professed to sue upon the covenants in it as owner of the reversion, without stating how he became entitled to the reversion. Kay, J. held that the pleading was insufficient, and referred to a passage in Stephen on Pleading (7th ed., p. 254), namely, "where a party claims by conveyance or alienation, the nature of the conveyance or alienation must in general be stated, as whether it be by devise, feoffment, &c." That was the ground upon

which the learned judge acted. It is quite clear that it is not sufficient for a plaintiff to state in general language that he is entitled to possession; he must state how he is so entitled. The learned judge said he had no idea what the reversion was which the plaintiff claimed. That decision seems to me to be precisely in accordance with the grounds of the decision in *Philippis v. Philippis*.—p. 363.

Evelyn v. Evelyn (1880) 42 L. T. 248; 28 W. R. 531.—MALINS, V.-C., *discussed*.

Palmer v. Palmer (1892) 61 L. J. Q. B. 236; [1892] 1 Q. B. 319.—DENMAN and CAVE, JJ.

Kenmare (Lord) v. Casey (1883) 12 L. R. Ir. 374.—Q.B.D.; JOHNSON, J. *dissenting*; *followed and approved*.

Beatty v. Leacy (1885) 16 L. R. Ir. 152.—C.A.

Owen v. Waters (1836) 6 L. J. Ex. 13; 2 M. & W. 91; 5 D. P. C. 324.—EX., *discussed*.

Brooks v. Jennings (1866) L. R. 1 C. P. 476; 12 Jur. (N.S.) 341; 14 L. T. 19; 14 W. R. 440.—C.P.

Cook v. Martyn (1737) 2 Atk. 2.—L.C.; and Beaumont v. Boulton (1800) 5 Ves. 485.—L.C., *discussed*.

Palk v. Clinton (1806) 12 Ves. 48, 64; 8 R. R. 283.—GRANT, M.R.

O'Connor v. O'Hara (1881) 8 L. R. Ir. 249.—EX. D., *discussed*.

Farrell v. Coogan (1883) 12 L. R. Ir. 14.—DOWSE, B.

Tomkin v. Lethbridge (1803) 9 Ves. 178.—ELDON, L.C., *overruled*.

Smith v. Serle (1807) 14 Ves. 415.—ELDON, L.C.

Young v. Rudd (1695) 5 Mod. 86.—K.B., *discussed*.

Foakes v. Beer (1884) 54 L. J. Q. B. 130; 9 App. Cas. 605, 618; 51 L. T. 833; 33 W. R. 233.—H.L. (E.).

Edmunds v. Harris (1834) 3 A. & E. 414; 4 N. & M. 182; 6 C. & P. 547, n.—K.B., *overruled*.

Jones v. Nanney (1836) 1 M. & W. 333; 2 Gale 24; 5 D. P. C. 90.

PARKE, B.—*Edmunds v. Harris* may certainly be considered as overruled.—p. 336.

[In *Haselden v. Stiff* (1836) 6 N. & M. 659; 5 A. & E. 153, the K.B. also held that *Edmunds v. Harris* was no longer a binding authority.]

Edmunds v. Harris, held overruled.

Jones v. Reade (1836) 6 L. J. K. B. 9; 5 A. & E. 529; 1 N. & P. 18; 2 H. & W. 382; 5 D. P. C. 216.—K.B.

Ferguson v. Mitchell (1835) 2 Cr. M. & R. 687.—EX., *explained*.

Boydell v. Jones (1838) 4 M. & W. 446; 1 H. & H. 408; 7 D. P. C. 210.—EX.

Boydell v. Jones; Lush v. Webb (1665) 1 Sid. 251.—K.B.; Hinde v. Gray (1840) 1 Man. & G. 195, 201, n.; 9 L. J. C. P. 253; 1 Scott (N.R.) 123; 4 Jur. 392.—C.P.; Briscoe v. Hill (1842) 12 L. J. Ex. 126; 10 M. & W. 735; 2 D. (N.S.) 556; 7 Jur.

306.—EX.; and **Slade v. Hawley** (1845) 13 M. & W. 757.—EX., *discussed*.
S. E. Ry. v. Ry. Commissioners (1881) 50 L. J. Q. B. 201; 6 Q. B. D. 586, 605; 44 L. T. 203; 45 J. P. 388.—C.A.

Dawson v. Wrench (1849) 18 L. J. Ex. 229; 3 Ex. 359; 6 D. & L. 474.—EX.

Applied, **Churchward v. Reg.** (1865) L. R. 1 Q. B. 173, 209; 14 L. T. 57.—Q.B.; *discussed*.
S. E. Ry. v. Ry. Commissioners (1881) 50 L. J. Q. B. 201; 6 Q. B. D. 586, 606; 44 L. T. 203; 45 J. P. 388.—C.A.

Carpenter v. Buller (1841) 10 L. J. Ex. 393; 8 M. & W. 209.—EX., *rule in, applied*.

Morgan, Ex parte, Simpson, In re (1876) 45 L. J. Bk. 36; 2 Ch. D. 72; 34 L. T. 329; 24 W. R. 414.—C.A.

Ipsstones Park Iron Ore Co. v. Pattinson (1864) 33 L. J. Ex. 193; 2 H. & C. 828.—EX., *discussed and observations adhered to*.

Wright v. Jelley (1868) 38 L. J. Ex. 22; L. R. 4 Ex. 9; 19 L. T. 384; 17 W. R. 164.—EX.

Wright v. Jelley, *referred to*.
Latter v. White (1870) 40 L. J. Q. B. 12; L. R. 5 Q. B. 622.—Q.B.; **LUSH, J.** *dissenting*; reversed. EX. CH. and H.L. (E.) (*ante*, vol. i., col. 189).

Coan v. Bowles (1691) 1 Show. 165.—K.B.; and **Hayward v. Williams** (1650-1) Sty. 254, 280.—K.B., *discussed and applied*.

Metropolitan Ry. v. Wilson (1871) 40 L. J. C. P. 208; L. R. 6 C. P. 376; 24 L. T. 550; 19 W. R. 775.—C.P.

Clarke v. Callow (1876) 46 L. J. Q. B. 53.—C.A., *discussed*.

Pullen v. Snelus (1879) 48 L. J. C. P. 394; 40 L. T. 363; 27 W. R. 534.—GROVE and **LINDLEY, JJ.**; **Fletcher v. Fletcher** (1881) 50 L. J. Ch. 735; 45 L. T. 306; 29 W. R. 884.—FRY, J. (*see post*).

Clarke v. Callow, *applied*.
Manchester and Oldham Bank v. Cook (1883) 49 L. T. 674, 677.—DAY and A. L. SMITH, JJ.

Catling v. King (1877) 46 L. J. Ch. 384; 5 Ch. D. 660; 36 L. T. 526; 25 W. R. 550.—C.A., *applied*.

Towle v. Topham (1877) 37 L. T. 308.—JESSEL, M.R.; **Morgan v. Worthington** (1878) 38 L. T. 443.—BACON, V.-C.

Catling v. King, *discussed*.
Fletcher v. Fletcher (1881) 50 L. J. Ch. 735; 45 L. T. 306; 29 W. R. 884.

FRY, J.—In **Catling v. King**, according to my reading of the decision of the C. A., and not merely of what was said in the course of argument, the Court held that the defence of the Statute of Frauds cannot now be raised by demurrer. That case came before the decision of the H. L., who expressed the same opinion in **Dawkins v. Perrehyne (Lord)** (*post*, col. 2475). Cairns, L.C., said: "The analogy which was referred to of the Statute of Frauds is not an analogy of any weight. The Statute of Frauds must be pleaded, because it never can be predicted beforehand that a defendant who may shelter himself under the Statute of Frauds desires to do so." There appears to have been a subsequent case before the M.R., the exact nature of which is not

before me, which confirms my view of the case. I have referred to **Clarke v. Gifford** (*supra*, col. 2473) before the Q. B. D. The question requiring adjudication in that case was, whether, where the statement of claim had alleged that there was an acceptance and receipt of the commodity sold, so as to take the contract alleged out of the Statute of Frauds, it was necessary for the defendant to plead the Statute if he wished to take advantage of it; and Brett, L.J., said this: "Ord. XIX. r. 3 is, in my opinion, intended partly as an enunciation of the jealousy with which the law regards that class of defences, and partly to assimilate the practice at law and in equity. If r. 23 is to be obeyed, if the defendant intends to insist on the defence that, though he undoubtedly entered into a contract yet, as that contract was not in writing, he does not intend to observe it, then he must clearly state his intention, or if he means to deny the legality of a contract he has entered into, he must say so in plain terms." Without saying that that case determines the present, it certainly leans towards the view I have expressed.—p. 737.

Buttmer v. Hayes (1839) 9 L. J. Ex. 44; 5 M. & W. 456; 7 D. P. C. 489.—EX.; and **Eastwood v. Kenyon** (1840) 91 L. J. Q. B. 409; 11 A. & E. 438; 3 P. & D. 276.—Q.B., *applied*.

Leaf v. Tuton (1842) 12 L. J. Ex. 69; 10 M. & W. 393; 2 D. (N.S.) 300.—EX.

Foster v. Hodgson (1812) 19 Ves. 180.—L.C. *Commented on*, **Adams v. Barry** (1845) 2 Coll. 290.—KNIGHT BRUCE, V.-C.; *explained and applied*, **Knox v. Gye** (1872) 42 L. J. Ch. 234; L. R. 5 H. L. 656.—H.L. (E.). *See* "LIMITATIONS (STATUTES OF)," *supra*, col. 1574.

Foster v. Hodgson and Hoare v. Peck (1833) 2 L. J. Ch. 123; 6 Sim. 51.—V.-C., *applied*.
Noyes v. Crawley (1878) 10 Ch. D. 31, 36 (*post*).

Miller v. Miller (1869) L. R. 8 Eq. 499.—V.-C., *commented on*.

Wakelee v. Davis (1876) 25 W. R. 60.—COCKBURN, C.J. and **LUSH, J.**, *held overruled*.

Noyes v. Crawley (1878) 10 Ch. D. 31; 48 L. J. Ch. 112; 27 W. R. 109; 39 L. T. 267.

MALINS, V.-C.—**Miller v. Miller** . . . was cited as a general authority, that between persons who have been partners, where there has once been a partnership, and the executor of one partner brings a bill for an account against the other after any lapse of time whatever, the statute cannot be taken advantage of. I cannot think that Sir J. Stuart, with his great learning and experience, could ever have intended to decide in such a manner. On the contrary, I believe the decision must have proceeded on the ground that in that case the parties had executed a deed by which all the partnership property was assigned on trust to pay the creditors, and afterwards to divide what remained between them. There, a trust being created, nothing short of twenty years could be a bar to that trust. I think it must have proceeded on that ground, not on the general principle that, as between partners, no lapse of time will be a bar to an action. If Sir J. Stuart did decide that, I can only say I entirely dissent from the decision, as every other case has dissented from it; and it is certainly overruled by the decision of the H. L. in **Knox v. Gye** (*supra*), which decided the

broad point that, *Wakelee* a bill for an account is filed by the executor of a deceased partner against the surviving partner after the lapse of more than six years; *Wakelee* the business, which in that case was a partnership of a theatre, was carried on by the surviving partner during the six years, the Statute of Limitations is a final bar to such a claim; and that is greatly to the benefit of society, because it is of the utmost importance that time should put an end to all disputes. . . . I am bound to say that *Wakelee v. Davis* is an authority which I cannot understand after the decision of the C. A. [*Dawkins v. Penrhyn* (Lord), (post)], which is so utterly inconsistent with it, and which is a subsequent decision. I think *Wakelee v. Davis* must be considered to be overruled by that authority.—p. 37.

Dawkins v. Penrhyn (Lord) (1877) 6 Ch. D. 318; 37 L. T. 80; 26 W. R. 6.—C.A.; affirmed, (1878) 48 L. J. Ch. 304; 4 App. Cas. 51; 39 L. T. 583; 27 W. R. 173.—H.L. (E.).

Dawkins v. Penrhyn (Lord), *discussed and applied*.

Noyes v. Crawley (1878) 48 L. J. Ch. 112; 10 Ch. D. 31, 36; 39 L. T. 267; 27 W. R. 109.—MALINS, V.-C.

Dawkins v. Penrhyn (Lord), *referred to*.

Futcher v. Futcher (1881) 50 L. J. Ch. 733.—FEB, J. (*supra*, col. 2473).

Danford v. McAnulty (1883) 52 L. J. Q. B. 652; 8 App. Cas. 456; 49 L. T. 207; 31 W. R. 817.—H.L. (E.), *referred to*.

Coppinger v. Norton (1901) [1902] 2 Ir. R. 240.—K.B.D.; WRIGHT, J., *dissenting*.

Danford v. McAnulty, *distinguished*.

Coppinger v. Norton, *adhered to*.

Miller v. Kirwan (1902) [1903] 2 Ir. R. 118, 137.—K.B.D. See judgment of BARTON, J.

Hemming v. Trenery (1839) 8 L. J. Q. B. 160; 9 A. & E. 926; 1 P. & D. 661.—Q.B., *approved and applied*.

Davidson v. Cooper (1843) 12 L. J. Ex. 467; 11 M. & W. 778; 1 D. & L. 377.—EX.; affirmed, (1844) 13 L. J. Ex. 276; 13 M. & W. 343.—EX. CH.

Hemming v. Trenery, *distinguished*.

Cock v. Coxwell (1835) 4 L. J. Ex. 307; 2 Cr. M. & R. 291; 4 D. P. C. 187; 1 Gale 177; 5 Tyr. 1077.—EX., *approved*.

Hirschman v. Budd (1873) 42 L. J. Ex. 113; L. R. 8 Ex. 171; 28 L. T. 602; 21 W. R. 582.—EX. And see "BILLS OF EXCHANGE," vol. i., col. 211.

Barnes v. Barnes (1881) 8 L. R. Ir. 165.—C.A., *discussed*.

Rowley v. Laffan (1882) 10 L. R. Ir. 9.—C.P.D.; *Rochfort v. Somers* (1898) [1899] 2 Ir. R. 45.—KENNY, J.; *Coppinger v. Norton* [1902] 2 Ir. R. 232, 240.—K.B.D. (WRIGHT, J. *dissenting*).

Rowley v. Laffan (*supra*), *discussed*.

Molloy v. Lewers (1882) 12 L. R. Ir. 39.—C.A.

Watters v. Smith (1881) 1 L. J. K. B. 31; 2 B. & Ad. 889; 36 R. R. 785.—K.B., *applied*.

Armitage, In re, Halifax Joint Stock Banking Co., Ex parte (1876) 5 Ch. D. 46, 55; 35 L. T. 554; 25 W. R. 83.—BACON, C.J.; affirmed on different grounds, *nom.* *Armitage, In re, Good, Ex parte* (1877) 46 L. J. Bk. 65; 5 Ch. D. 46, 56; 36 L. T. 338; 25 W. R. 422.—C.A.

Benett v. Peninsular and Oriental Steamboat Co. (1848) 18 L. J. C. P. 85; 6 C. B. 775.—C.P., *referred to*.

Readhead (or Redhead) v. Midland Ry. (1869) 38 L. J. Q. B. 169; L. R. 4 Q. B. 379, 388; 9 B. & S. 519; 20 L. T. 628; 17 W. R. 737.—EX. CH.

Cocksedge v. Fanshawe (1783) 1 Dougl. 118; 3 Bro. P. C. 690.—K.B. and H.L. (E.), *discussed*.

Reg. v. Rollett (1875) 44 L. J. M. C. 190; L. R. 10 Q. B. 469, 476; 24 W. R. 26; S. C. 32 L. T. 769.—Q.B.; *Goodman v. Saltash Corporation* (1882) 52 L. J. Q. B. 193; 7 App. Cas. 633, 640; 48 L. T. 239; 31 W. R. 293; 47 J. P. 276.—H.L. (E.); *Sewell v. Burdick* (1884) 54 L. J. Q. B. 156; 10 App. Cas. 74, 99; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.)

Sopwith v. Sopwith (1861) 30 L. J. P. 131; 2 Sw. & Tr. 160; 7 Jur. (N.S.) 554; 4 L. T. 256.—SIR C. CRESSWELL; and **Finney v. Finney** (1868) 37 L. J. Mat. 43; L. R. 1 P. 483; 18 L. T. 489.—LORD PENZANCE, *discussed*.

Carnegie v. Carnegie (1886) 17 L. R. Ir. 430.—WARREN, J.; affirmed, C.A.

Barber v. Lamb (1860) 29 L. J. C. P. 234; 8 C. B. (N.S.) 95; 6 Jur. (N.S.) 981; 8 W. R. 461.—C.P.

Distinguished, Frayes v. Worms (1861) 10 C. B. (N.S.) 149.—C.P.; *referred to, Taylor v. Holland* (1902) 71 L. J. K. B. 278; [1902] 1 K. B. 676, 681; 86 L. T. 228; 50 W. R. 558.—JELF, J.

Bedford (Earl) v. Exeter (Bishop) (1617) Hob. 137.—C.P.; and **Rawlinson v. Oriet** (1689) 1 Show. 75; Carth. 96.—K.B., *approved*.

Henry v. Goldney (1846) 15 M. & W. 494; 15 L. J. Ex. 298; 4 D. & L. 6; 10 Jur. 430.—EX.

PLATT, B.—The true rule is laid down in *Bedford (Duke) v. Exeter (Bishop)* and in *Rawlinson v. Oriet*, that a man is not to be twice vexed for the same cause.—p. 299.

Boyce v. Douglas (1807) 1 Camp. 60.—C.J., *dictum disapproved*.

King v. Hoare (1844) 14 L. J. Ex. 29; 13 M. & W. 494; 2 D. & L. 382.—EX., *explained and not applied*. And see col. 2477.

Henry v. Goldney (1846) 15 L. J. Ex. 298; 15 M. & W. 494; 4 D. & L. 6; 10 Jur. 439.—EX.

[In *Boyce v. Douglas*, it was ruled by Ellenborough, C.J., that where two parties guilty of an assault are sued separately, the pendency of one action may be pleaded in abatement of the other.]

POLLOCK, C.B.—The language of Lord Ellenborough, in *Boyce v. Douglas*, is a mere casual remark, not called for, and, therefore, not amounting to a decision. . . . If Mr. Bramwell is right, and this plea may be pleaded in tort, it may also be pleaded in contract; but there are no *dicta*, and no precedents in support of such a position, except the language of Lord Ellenborough.—p. 299.

ROLFE, B.—*King v. Hoare* has no bearing upon the question. The decision there was, that a judgment recovered against one of two joint debtors is a bar to an action against the other; and it proceeded on the ground that the plaintiff was going on to judgment in a matter that had passed *in rem judicatum*.—p. 300.

King v. Hoare (supra).

Commented on, Baker v. Sayers (1868) 17 L. T. 579.—BLACKBURN, J.; *referred to*, Wheal Ludcott and Wrey Consols Mines, In re, Jackson, Ex parte (1869) 21 L. T. 67; 17 W. R. 745.—L.JJ.

Kendall v. Hamilton (1879) 48 L. J. C. P. 705; 4 App. Cas. 504; 41 L. T. 418; 28 W. R. 97.—H.L. (E.), *referred to*.

McRae, In re, Forster v. Davis, Norden v. McRae (1883) 53 L. J. Ch. 1132; 25 Ch. D. 16; 49 L. T. 544; 32 W. R. 304.—KAY, J. and C.A. COTTON and LINDLEY, L.JJ.

King v. Hoare (supra), and **Kendall v. Hamilton**, *referred to*.

Davidson, In re, Chandler, Ex parte (1884) 13 Q. B. D. 50; 50 L. T. 635.—CAVE, J.

King v. Hoare and Kendall v. Hamilton, *discussed*.

Munster v. Cox (1885) 10 App. Cas. 680; 55 L. J. Q. B. 108; 53 L. T. 474; 34 W. R. 461.—H.L. (E.).

LORD BLACKBURN.—There is a difficulty in the case which I am about to mention, and I do not know whether or not it has been thoroughly considered. It may very well be that when you are serving the partners, who are all ostensible partners, and you know who are the partners, there may be no difficulty, when you have served one partner and an appearance is entered, in going on against the firm and getting your judgment ultimately. But *King v. Hoare* (and a comparatively recent case in the H. L. [*Kendall v. Hamilton*]) went to the same point) shows that where there is a dormant and concealed partner, your getting judgment for a joint debt against the other partners will bar you from commencing an action against that concealed principal, because the mere fact of the judgment without execution turns it into *rem judicatum*, and it is a bar. There may be difficulties arising in such cases as that.—p. 688.

King v. Hoare and Kendall v. Hamilton, *referred to*.

Odell v. Cormack (1887) 19 Q. B. D. 223, 228.—HAWKINS, J.

Kendall v. Hamilton, *considered and applied*.

King v. Hoare, *discussed*.

Pilley v. Robinson (1887) 57 L. J. Q. B. 54; 20 Q. B. D. 155; 58 L. T. 110; 36 W. R. 269.—STEPHEN and CHARLES, JJ.

King v. Hoare, *not applied*.

Kendall v. Hamilton, *referred to*.

Westmorland Green and Blue Slate Co. v. Feilden (1891) 60 L. J. Ch. 680; [1891] 3 Ch. 15, 22; 65 L. T. 428; 40 W. R. 23.—KEKEWICH, J., affirmed C.A.

King v. Hoare, *not applied*.

Penny v. Wimbledon Urban Council (1899) 68 L. J. Q. B. 704; [1899] 2 Q. B. 72 (*post*, col. 2478).

Kendall v. Hamilton.

Discussed, Wilson, Son & Co. v. Killick (1893) 62 L. J. Q. B. 245; S. C. *nom.* Wilson, Sons & Co. v. Balcarres Brook Steamship Co. [1893] 1 Q. B. 422; 4 R. 286; 68 L. T. 312; 41 W. R. 486; 7 Asp. M. C. 321.—C.A.; *referred to*, Robinson v. Geisel (1894) 64 L. J. Q. B. 52.—C.A.; *distinquished*, Hall v. Sim (1894) 10 Times L. R. 463.—CHARLES and COLLINS, JJ. *And see* "ESTOPPEL," vol. i., col. 1010.

Seddon v. Tutop (179my 3 Term Rep. 607; 3

R. R. 274.—K.B., *he wired to*.

Stevens v. Tillett (18B. D.0 L. J. C. P. 58, 74; L. R. 6 C. P. 147, 148; 23 L. T. 622.—C.P.; Jones v. Brassey (18th clai24 L. T. 947.—EX.; Brunnsden v. Humphre and 1884) 53 L. J. Q. B. 476; 14 Q. B. D. 141; 47; 51 L. T. 529; 32 W. R. 944; 49 J. P. 4.—C.A.

Thurman v. Wild (1840) 11 A. & E. 453; 3

P. & D. 289.—Q.B., *not applied*.

Penny v. Wimbledon Urban Council (1899) 68 L. J. Q. B. 704; [1899] 2 Q. B. 72; 80 L. T. 615; 47 W. R. 565; 63 J. P. 406.—C.A.

V. WILLIAMS, L.J.—Here one of the defendants has improved his position by making a payment into Court. Why should the other, who made no such payment, be put in the same improved position? *King v. Hoare (supra*, col. 2476) and *Thurman v. Wild* are cited as authorities entitling him to be put in that position, because they decide that satisfaction by one of two persons jointly liable is a satisfaction of the whole liability. But those cases have no application here, for there never was any satisfaction of this cause of action against the council by the mere payment into Court by the contractor.—p. 707.

Barrs v. Jackson (1842) 1 Y. & C. C. C. 585.—7-C.; *reversed*, (1845) 14 L. J. Ch. 433; 1 Ph. 582; 9 Jur. 609.—L.C.

Barrs v. Jackson.

Approved, but not applied, Spencer v. Williams (1871) 40 L. J. P. 45; L. R. 2 P. 230, 235; 24 L. T. 513; 19 W. R. 703.—LORD PENZANCE; *referred to*, Tekait Doorga Persad Singh v. Tekaitni Doorga Konwari (1878) L. R. 5 Ind. App. 149, 158.—P.C.; *principle applied*, Gillooly v. Plunkett (1882) 9 L. E. R. 324, 335.—V.C.

Barrs v. Jackson, *discussed*.

Abouloff v. Oppenheimer (1882) 10 Q. B. D. 295; 52 L. J. Q. B. 1; 47 L. T. 325; 31 W. R. 57.—C.A.

BRETT, L.J.—It has been contended that the same issue ought not to be tried in an English Court which was tried in the Russian Courts, but I agree that the question whether the Russian Courts were deceived never could be an issue in the action tried before them. That question might be raised in the Russian Courts in order to determine the matters which were in issue; but I think it is true to say that the judgment of Knight Bruce, V.-C., in *Barrs v. Jackson* does show that the mere fact of evidence having been brought forward to substantiate or defeat one issue, does not prevent a party from bringing forward the same evidence in a subsequent action between the same parties, either to maintain or to defend other issues raised therein.—p. 306.

Barrs v. Jackson, *referred to*.

Pittapur Rajah v. Sri Rajah Row Buchi (1884) L. R. 12 Ind. App. 1619.—P.C.; Caird v. Moss (1886) 55 L. J. Ch. 854; 33 Ch. D. 22, 28; 55 L. T. 453; 35 W. R. 52; 5 Asp. M. C. 565.—KAY, J. (reversed, C.A.); Allsop and Joy's Contract, In re (1889) 61 L. T. 213, 215.—CHITTY, J.; De Penny, In re, De Penny v. Christie (1891) 60 L. J. Ch. 518; [1891] 2 Ch. 63; 64 L. T. 521; 39 W. R. 571.—CHITTY, J.; Irish Land Commission v. Ryan [1900] 2 Ir. R. 563, 584.—C.A. *And see* "ESTOPPEL," vol. i., col. 1008.

Gregory v. Milesworth (1747) 3 Atk. 626.—L.C.

Approved; **Soorjmonjee Dayee v. Suddanund Mohapatter** (1873) L. R. Ind. App. Suppl. 212.—P.C.; *applied*, **Tekait Doorga Persad Singh v. Tekaitni Doorga Konwari** (1878) L. R. 5 Ind. App. 149.—P.C.

Outram v. Morewood (1303) 3 East 346; 7 R. R. 473.—K.B., *discussed*.

Pittapur Rajah v. Sri Rajah Row Buchi (1884) L. R. 12 Ind. App. 16.—P.C.; *Irish Land Commission v. Ryan* [1900] 2 Ir. R. 584.—C.A. ASHBOURNE, L.C., FITZGERALD and HOLMES, L.JJ.

Rex v. Turner (1816) 5 M. & S. 206.—K.B., *questioned*.

Elkin v. Jansen (or Janson) (1845) 14 L. J. Ex. 201; 13 M. & W. 655; 9 Jur. 353.—EX.

[Counsel cited the following from the judgment of Bayley, J., in *Rex v. Turner*:] "I have always understood it to be a general rule that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative, is to prove it, and not he who avers the negative."

ALDERSON, B.—I doubt, whether, as a general rule, these expressions are not too strong: they are right as to the *weight* of the evidence, but there should be some evidence in order to cast the onus on the other side.—p. 203.

Rex v. Turner and Elkin v. Jansen (or Janson), *discussed*.

Mahony v. Waterford, Limerick and Western Ry. (1899) [1900] 2 Ir. R. 273.—Q.B.D., *commented on*.

Graham v. Belfast and Northern Counties Ry. (1900) [1901] 2 Ir. R. 13.—Q.B.D.

Goodburne v. Bowman (1833) 2 L. J. C. P. 148; 9 Bing. 533; 2 Moore & Sc. 700; 35 R. R. 604.—C.P., *dicta considered*.

Gwynne v. Burnell (1840) 7 Cl. & F. 572; West 342; 1 Scott (N.R.) 711; 6 Bing. (N.C.) 853.—H.L. (E.); *reversing* (1835) 2 Bing. (N.S.) 7; 2 Scott 16.—EX. CH.; which had *reversed* S. C. *nom.* Collins v. Gwynne (1833) 2 L. J. C. P. 249; 9 Bing. 544; 2 Moore & Sc. 640.—C.P.

Smith v. Nicolls (1839) 8 L. J. C. P. 92; 5 Bing. (N.C.) 208; 7 Scott 147; 7 D. P. C. 282; 1 Arn. 474.—C.P., *applied*.

Bank of Australasia v. Harding (1850) 9 C. B. 661 (*post*, col. 2480).—C.P.; *Brine v. G. W. Ry.* (1862) 31 L. J. Q. B. 101; 2 B. & S. 402; 8 Jur. (N.S.) 410; 6 L. T. 50; 10 W. R. 341.—Q.B.; COCKBURN, C.J. *dissenting*; *Meccredy v. Taylor* (1873) Ir. R. 7 C. L. 256, 267.—EX. CH. (*see judgment of O'BRIEN, J. dissenting*).

Smith v. Nicolls, *referred to*.

King and Beesley, In re, and Ex parte (1894) [1895] 1 Q. B. 189; 64 L. J. Q. B. 126; 15 R. 22; 71 L. T. 530; 43 W. R. 78; 1 Manson 505.—V. WILLIAMS and KENNEDY, JJ.

KENNEDY, J.—There are good reasons why at common law the recovery of a judgment should afford a perfectly good defence or plea in bar, for the Court has already given by the judgment the relief sought by the plaintiff, and entirely fresh proceedings on his part could only result in his obtaining another judgment; this was pointed out by Tindal, C.J. in *Smith v. Nicolls*, and is consistent with common sense. But the

O.C.

same rule has never been applied to bankruptcy proceedings; a judgment is *prima facie* conclusive evidence of the existence of the debt upon which it is founded, and its existence is no bar to the creditor's obtaining his rights on the debt which existed before the judgment.—p. 193.

Bank of Australasia v. Harding (1850) 19 L. J. C. P. 345; 9 C. B. 661; 14 Jur. 1094.—C.P.

Referred to, **Godard v. Gray** (1870) 40 L. J. Q. B. 62; L. R. 6 Q. B. 139; 24 L. T. 89; 19 W. R. 348.—Q.B.; *applied*, **Copin v. Adamson** (1874) 43 L. J. Ex. 161; L. R. 9 Ex. 345; 31 L. T. 242; 22 W. R. 658.—EX. (KELLY, C.B. *dissenting* on one point). *And see* **Trufort, In re, Trafford v. Blane** (1887) 57 L. J. Ch. 135; 36 Ch. D. 600; 57 L. T. 674; 36 W. R. 163.—STIRLING, J.

Original Hartlepool Collieries Co. v. Gibb, (1877) 46 L. J. Ch. 311; 5 Ch. D. 713; 36 L. T. 433.—JESSEL, M.R., *not followed*.

Vavasour v. Krupp (1880) 15 Ch. D. 474; 28 W. R. 366.—JESSEL, M.R., *questioned*.

Beddall v. Maitland (1881) 17 Ch. D. 174; 50 L. J. Ch. 401; 44 L. T. 249; 29 W. R. 484.

FRY, J.—The point which now arises for my determination is one upon which the present M.R. has, in *Original Hartlepool Collieries Co. v. Gibb*, expressed a decided opinion. He has held that the damages claimed by a counterclaim must be limited to the date when the writ in the original action was issued. The result of that, of course, is this, that a counterclaim can never extend to any right of action subsequent to the date of the original writ. The point is one of very great importance as regulating the procedure under the Judicature Acts, and as I have the misfortune to differ in opinion from the M.R., I desire to encourage an application to the C. A., in order that the question may be finally determined.—p. 180. . . . The M.R. has, no doubt, in *Vavasour v. Krupp*, held that a counterclaim fails or falls to the ground with the original action. But, if the view of the late L.C.J. of England and of Brett, L.J., and also, I may add, of Manisty, J., in *Stooke v. Taylor* ((1880) 49 L. J. Q. B. 857; 5 Q. B. D. 569, *post*, col. 2486), be the correct one—viz., that the counterclaim constitutes a wholly independent action, it would seem, to say the least, doubtful whether the decision in *Vavasour v. Krupp* is correct.—p. 183.

Original Hartlepool Collieries Co. v. Gibb.

Referred to, **Toke v. Andrews** (1882) 51 L. J. Q. B. 281; 8 Q. B. D. 428; 30 W. R. 659.—FIELD, J. and HUDDLESTON, B.; *considered*, **Barber v. Penley** (1893) 62 L. J. Ch. 623; [1893] 2 Ch. 447; 3 R. 489; 68 L. T. 662.—NORTH, J.; *approved and adopted*, **Lowdens v. Kcaveny** (1901) [1903] 2 Ir. R. 82, 88.—K.B.D.

Vavasour v. Krupp (*supra*), *explained*.

Gathercole v. Smith (1881) 50 L. J. Q. B. 681; 7 Q. B. D. 626; 45 L. T. 106; 29 W. R. 577; 45 J. P. 812.—C.A.; BRAMWELL, L.J. *dissenting* on one point.

Vavasour v. Krupp, *overruled*.

McGowan v. Middleton (1883) 11 Q. B. D. 464; 52 L. J. Q. B. 355; 31 W. R. 835.—C.A. *See post*, col. 2481.

Vavasour v. Krupp, *referred to*.

Caroli v. Hirst (1883) 48 L. T. 759; 31 W. R. 839.—KAY, J.

counterclaim was really not a counterclaim at all.—p. 140.

Shephard v. Beane (1876) 2 Ch. D. 223; 45 L. J. Ch. 429; 24 W. R. 363.—HALL, V.-C., *not followed*.

Furness v. Booth (1876) 4 Ch. D. 586; 46 L. J. Ch. 112; 25 W. R. 267.

JESSEL, M.R.—With regard to *Shephard v. Beane* I do not think the V.-C. intended to lay down that a "counterclaim" is the right form of such a pleading as between co-defendants. He does not, in fact, use the word in his decision, and it seems to me, therefore, that the head-note of the case is incorrect in so laying it down.—p. 587.

Shephard v. Beane, *disapproved*.

Harris v. Gamble (1877) 6 Ch. D. 748; 46 L. J. Ch. 768.

HALL, V.-C.—*Shephard v. Beane* was an irregular application for the direction of the Court, which, perhaps, ought not to have been entertained (p. 751). I may add, that I consider that *Shephard v. Beane* ought not to be cited as an authority.—p. 752.

Furness v. Booth (*supra*), *explained*.

Turner v. Hednesford Gas Co. (1878) 3 Ex. D. 145; 47 L. J. Ex. 296; 38 L. T. 8; 26 W. R. 308.—C.A.

COTTON, L.J.—In *Furness v. Booth* the question was whether or no there was any counterclaim, and it was decided that there was no counterclaim; here the question is whether there is a good counterclaim. I think clearly that there is.—p. 152.

Turner v. Hednesford Gas Co., *referred to*.

Central African Trading Co. v. Grove (1879) 48 L. J. Q. B. 510.—C.A.

Turner v. Hednesford Gas Co., *discussed*.

Pender v. Taddei (1898) 67 L. J. Q. B. 703; [1898] 1 Q. B. 798; 78 L. T. 581; 46 W. R. 452.—C.A.

A. L. SMITH, L.J.—He [the defendant] is not by his counterclaim raising any question between himself and the plaintiffs along with any other person within the meaning of Ord. XXI. r. 11. The question he raises is a question between himself along with another person and the plaintiffs, and he makes Bellani a defendant to the counterclaim when he ought to be a co-plaintiff. In my opinion the defendant cannot do indirectly what the rule does not, as it appears to me, enable him to do directly. In so holding there is nothing inconsistent between our decision and what was said by Bramwell, L.J., in *Turner v. Hednesford Gas Co.*—p. 704. CHITTY and COLLINS, L.JJ. concurred.

Street v. Gover (1877) 46 L. J. Q. B. 582; 2 Q. B. D. 498; 36 L. T. 766; 25 W. R. 750.—MELLOR and LUSH, JJ., *followed*.

Toke v. Andrews (1882) 51 L. J. Q. B. 281; 8 Q. B. D. 428; 30 W. R. 659.—FIELD, J. and HUDDESTON, B., *distinguished*.

Alcoy & Gandia Ry. v. Greenhill (1895) 65 L. J. Ch. 99; [1896] 1 Ch. 19; 73 L. T. 452; 44 W. R. 117.—C.A.

A. L. SMITH, L.J.—In my opinion Field, J. and Huddleston, B. did not decide what it is now said that they did. In the first place, they had not to decide upon the construction of Ord. XXI. r. 8. What they decided was that, where a plaintiff sued a defendant and the defendant counterclaimed against the plaintiff, the plaintiff could counterclaim against the

counterclaim of the defendant for a cause of action which accrued to the plaintiff after the issue of the writ. That was all those learned judges decided. . . . It is no decision that a person brought in by a defendant can counterclaim against an original plaintiff. It is true that Field, J. points out that Lush, J. [in *Street v. Gover*] had doubts as to whether he was placing the correct construction upon the word "reply" in Ord. XXII. r. 8, but he and Mellor, J. did nevertheless expressly hold that the word "reply" did not include a counterclaim, and so it has remained until the present time. . . . In *Eden v. Wear-dale Iron and Coal Co.* [(1884) 54 L. J. Ch. 384; 28 Ch. D. 333; *see supra*, col. 2343], in which a third party was brought in by a defendant under Ord. XVI. r. 48, in order that the defendant might obtain indemnity or contribution from him, it was argued that such third party could file a counterclaim against the original plaintiff; but this Court held that he could not, and Bowen, L.J. and Fry, L.J. pointed out the inconveniences which would arise if this were allowed, and similar inconveniences would, as it appears to me, arise in the present case if the application were allowed.—p. 100.

RIGBY, L.J. to the same effect.

Toke v. Andrews, *approved and followed*.

James v. Page (1888) 85 L. T. Jour., p. 157.—Q.B.D., *discussed*.

Renton, Gibbs & Co. v. Neville & Co. (1900) 69 L. J. Q. B. 514; [1900] 2 Q. B. 181, 185; 82 L. T. 446; 48 W. R. 532.—C.A.

COLLINS, L.J.—The technical point is taken that this is a counterclaim set up by the plaintiffs in reply, and that the R. S. C. do not contemplate such a proceeding; and we are referred to *James v. Page* as deciding that such a course is not open to a plaintiff. Upon that case there is the incidental observation to be made that the claim there set up was intended not as a shield but as a sword. . . . In that case [*Toke v. Andrews*] the plaintiff had brought an action for arrears of rent. After the writ, but before the statement of claim was delivered, the tenancy determined, and the defendant became entitled to an outgoing valuation, for which, in so far as it exceeded the plaintiff's claim, he counterclaimed. In answer to this the plaintiff, in his reply, claimed the quarter's rent due on the determination of the tenancy and a certain sum for tithe-rent charge left unpaid by the defendant. There was no machinery in that case, any more than in the present, to allow such a claim to be set up in the reply. Yet the Court held that it would be unjust to strike out the claims set up in reply. . . . I think that *Toke v. Andrews* was a just decision.—p. 516.

ROMER, L.J.—I agree that, as a rule, if a plaintiff wants to set up an additional claim he should do so by amendment of the statement of claim in regular course—*James v. Page*—but that rule has exceptions. . . . The Court has jurisdiction by way of exception to allow a plaintiff to set up a cause of action as counterclaim to the defendant's counterclaim. In my opinion, *Toke v. Andrews* is right in principle, and ought to be followed. That case worked a great deal of good.—p. 517.

Young v. Kitchin (1871) 47 L. J. Ex. 579; 3 Ex. D. 127; 26 W. R. 403.—OLESBY, B., *approved*.

Newfoundland Government v. Newfoundland

Ry. (1888) 13 App. Cas. 199; 57 L. J. P. C. 35; 58 L. T. 235.—P.C.

LORD HOBHOUSE (for the Court).—Unliquidated damages may now be set off as between the original parties, and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment. It appears to their lordships that in the cited case of *Young v. Kitchen* the decision to allow the counterclaim was rested entirely on this principle.—p. 213.

Cahill v. Kearney (1868) Ir. R. 2 C. L. 498.—C.P., *distinguished*.

Whitton v. Hanlon (1885) 16 L. R. Ir. 137, 143.—EX. D.

Whitton v. Hanlon, *applied*.

Wilson v. Burne (1888) 24 L. R. Ir. 14, 19.—K.B.D., affirmed (1889).—C.A.

Holloway v. York (1877) 25 W. R. 627.—JESSEL, M.R., *applied*.

Crowe v. Barnicot (1877) 46 L. J. Ch. 855; 6 Ch. D. 753; 37 L. T. 68; 25 W. R. 789.—FRY, J.

Holloway v. York, *explained*.

Birmingham Estates Co. v. Smith (1880) 13 Ch. D. 506; 49 L. J. Ch. 251; 42 L. T. 111; 28 W. R. 666.

JESSEL, M.R.—I did not decide in *Holloway v. York* that a counterclaim should do any more than state the facts properly on which the counterclaim was founded. I did not decide that they were to be stated all over again. . . . He need not print them all over again; it is quite enough if he refer to them, and thereupon counterclaims.—p. 509.

Holloway v. York, *distinguished*.

Morony v. Guest (1878) 1 L. R. Ir. 564.—CHATTERTON, V.-C. *And see* "BANKRUPTCY," vol. i., col. 163.

Crowe v. Barnicot (1877) 46 L. J. Ch. 855; 6 Ch. D. 753; 37 L. T. 68; 25 W. R. 789.—FRY, J., *distinguished*.

Lees v. Patterson (1878) 7 Ch. D. 866; 47 L. J. Ch. 616; 38 L. T. 451; 26 W. R. 399.

FRY, J.—In *Crowe v. Barnicot* the defendant only claimed damages "for the loss he has sustained in consequence of his expenditure aforesaid." Here the reference is to "the said two orders and writs of *ne erant regno*," which have been previously mentioned. I think this is unobjectionable. It is not necessary that a counterclaim should have the words "by way of counterclaim" printed in big letters at the head of it. I think this case does not come within my ruling in *Crowe v. Barnicot*.—p. 868.

Crowe v. Barnicot, *discussed and principle approved*.

Morony v. Guest (1878) 1 L. R. Ir. 564.—CHATTERTON, V.-C.

Padwick v. Scott (1876) 45 L. J. Ch. 350; 2 Ch. D. 736; 24 W. R. 723.—HALL, V.-C., *discussed*.

Macdonald v. Carington (1878) 48 L. J. Ch. 179; 4 C. P. D. 28; 39 L. T. 426; 27 W. R. 153.—DENMAN and LINDLEY, JJ.

Padwick v. Scott and Macdonald v. Carington, *discussed*.

Gray v. Webb (1882) 51 L. J. Ch. 815; 21 Ch. D. 802; 46 L. T. 913; 31 W. R. 8.—KAY, J.

Padwick v. Scott, *distinguished*.

Quinn v. Hession (1878) 4 L. R. Ir. 35.—EX. D. **PALLES**, C.B. distinguished the case on the ground that in it the counterclaim sought relief against other parties as well as against the plaintiff.

Stooke v. Taylor (1880) 49 L. J. Q. B. 857; 5

Q. B. D. 569; 43 L. T. 200; 29 W. R. 49;

44 J. P. 748.—Q.B.D. **FIELD**, J. *dissenting*.

Referred to, **Baines v. Bromley** (1880) 50 L. J. Q. B. 129; 6 Q. B. D. 197; 43 L. T. 735; 29 W. R.

245.—**POLLOCK**, B. (reversed, (1881) 50 L. J. Q. B.

465; 6 Q. B. D. 691; 44 L. T. 915; 29 W. R.

706.—C.A.; *approved*, **Beddall v. Maitland** (1881)

50 L. J. Ch. 401; 17 Ch. D. 174; 44 L. T. 249;

29 W. R. 481.—**FRY**, J. (*see supra*, col. 2480); *re-*

ferred to, **Take v. Andrews** (1882) 51 L. J. Q. B.

281; 8 Q. B. D. 428; 30 W. R. 659.—**FIELD**, J.

and **HUDDESTON**, J.; *applied*, **Lund v. Campbell**

(1885) 54 L. J. Q. B. 281; 14 Q. B. D. 821, 830;

53 L. T. 900; 33 W. R. 510.—C.A.; *referred to*,

Tagart & Co. v. Marcus & Co. (1888) 36 W.

R. 469.—**HUDDESTON**, B. and **MANISTY**, J.;

discussed, **Griffiths v. Patterson** (1888) 22 L. R.

Ir. 656.—C.A.

Baines v. Bromley (1881) 50 L. J. Q. B. 465;

6 Q. B. D. 691; 44 L. T. 915; 29 W. R.

706.—C.A.; *reversing* **POLLOCK**, B. (*supra*).

Discussed, **Brown**, *In re*, **Ward v. Morse**

(1883) 52 L. J. Ch. 524; 23 Ch. D. 377; 49 L. T.

68; 31 W. R. 936.—C.A.; *referred to*, **Shrapnel v.**

Laing (1888) 57 L. J. Q. B. 195; 20 Q. B. D. 334;

58 L. T. 707; 36 W. R. 297.—C.A. **ESHER**, M.R.;

FRY and **LOPES**, L.JJ.; **Griffiths v. Patterson**

(1888) 22 L. R. Ir. 656.—C.A.

Baines v. Bromley and Brown, *In re*, **Ward**

v. Morse (*supra*), *discussed*.

Craig v. Boyd (1900) [1901] 2 Ir. R. 645.—

ANDREWS, J. *And see* "COSTS," vol. i., cols. 726

and 730.

Hewitt & Co. v. Blumer & Co. (1886) 3 Times

L. R. 221.—C.A., *followed*.

Shrapnel v. Laing (*post*).

Shrapnel v. Laing (1888) 57 L. J. Q. B. 195;

20 Q. B. D. 334; 58 L. T. 705; 36 W. R.

297.—C.A.

Applied, **Griffiths v. Patterson** (1888) 22 L. R.

Ir. 656.—C.A.; *followed*, **Finska Angfartygs**

Aktiebolaget v. Brown, Toogood & Co. (1891) 7

Times L. R. 578.—C.A. **ESHER**, M.R. and **KAY**,

L.J.; *distinguished*, **Westcott v. Bevan** (1891)

60 L. J. Q. B. 536; [1891] 1 Q. B. 774; 65 L. T.

263; 39 W. R. 369.—**WILLS** and **V. WILLIAMS**,

JJ.; *discussed*, **Craig v. Boyd** (1900) [1901] 2

Ir. R. 645.—**ANDREWS**, J. *And see* "COSTS,"

vol. i., col. 726.

Shrapnel v. Laing and Griffiths v. Patterson,

applied.

Kennedy v. Healy (1896) [1897] 2 Ir. R. 253.

—EX. D.; affirmed, C.A.

Hall v. Eve, 35 L. T. 735.—**BACON**, V.-C.;

reversed, (1876) 46 L. J. Ch. 145; 4 Ch. D. 341;

35 L. T. 926; 25 W. R. 177.—C.A.

Hall v. Eve, *approved*.

Copinger v. Spotten (1879) 3 L. R. Ir. 144.—V.-C.

Hall v. Eve, *applied*.

Dowson, Taylor & Co. v. Drosophone Co.

(1895) 12 Rep. Pat. Cas. 95, 100.—**ROBINSON**,

V.-C.; affirmed, C.A.

Hall v. Eve, *referred to*.
Coppinger v. Norton (1901) [1902] 2 Ir. R. 232.—K.B.D.

KENNY, J.—**Hall v. Eve**, in the C. A. in England, decides that a plaintiff can, by his reply, confess and avoid.—p. 244.

Wilders v. Stevens (1846) 15 L. J. Ex. 108; 15 M. & W. 208.—EX., *discussed*.

Wilkinson v. Unwin (1881) 50 L. J. Q. B. 338; 7 Q. B. D. 636; 46 L. T. 123; 29 W. R. 458.—C.A. BRAMWELL, BAGGALLAY and BRETT, L.JJ.

Bishop v. Hayward (1791) 4 Term Rep. 470.—K.B., *referred to*.

Britten v. Webb (1824) 2 B. & C. 483; 3 D. & R. 650; 2 L. J. (O.S.) K. B. 118.—K.B.

Bishop v. Hayward, Britten v. Webb and Boulcott v. Woolcott (1847) 17 L. J. Ex. 149; 16 M. & W. 584.—EX., *discussed*.

Morris v. Walker (1850) 19 L. J. Q. B. 401; 15 Q. B. 589; 14 Jur. 851.—Q.B.

Britten v. Webb, distinguished.
Wilkinson v. Unwin (1881) 50 L. J. Q. B. 338; 7 Q. B. D. 636; 46 L. T. 123; 29 W. R. 458.—C.A.

Smith v. Marsack (1848) 18 L. J. C. P. 65; 6 C. B. 486; 6 D. & L. 363; 12 Jur. 1050.—C.P., *approved*.

Morris v. Walker (1850) 19 L. J. Q. B. 401; 15 Q. B. 589; 14 Jur. 851.—Q.B.

Smith v. Marsack and Morris v. Walker, discussed.

Wilkinson & Co. v. Unwin (1881) 50 L. J. Q. B. 338; 7 Q. B. D. 636; 46 L. T. 123; 29 W. R. 458.—C.A.

Summers v. City Bank (1874) 43 L. J. C. P. 261; L. R. 9 C. P. 580; 31 L. T. 268.—C.P.

Explained, Moore v. Robinson (1878) 48 L. J. Q. B. 156, 159; 40 L. T. 99; 27 W. R. 312.—LUSH, J.; *referred to*, Reg. v. London Corporation (1886) 55 L. J. M. C. 118; 16 Q. B. D. 772, 776; 54 L. T. 761; 34 W. R. 544; 16 Cox C. C. 81; 50 J. P. 614.—MATHEW and A. L. SMITH, JJ.

Williamson v. L. & N. W. Ry. (1879) 48 L. J. Ch. 559; 12 Ch. D. 787; 27 W. R. 724.—HALL, V.-C., *applied*.

Kingston v. Corker (1892) 29 L. R. Ir. 364.—CHATTERTON, V.-C.

Williamson v. L. & N. W. Ry. and Howard v. Hill, W. N. (1887) p. 193.—NORTH, J., *explained and not applied*.

Darbyshire v. Leigh (1896) 65 L. J. Q. B. 360; [1896] 1 Q. B. 554; 74 L. T. 241; 44 W. R. 452.—C.A.

RIGBY, L.J.—In **Howard v. Hill** the objection was taken that the statement of claim did not disclose any reasonable cause of action. It happened that certain rules of a society were referred to in the statement of claim, and counsel for the defendants in support of the objection proposed to read other rules of the society. They were not allowed to do so, upon the ground that the only question was as to the sufficiency of the claim as it stood. In **Williamson v. L. & N. W. Ry.** all that Hall, V.-C. decided was that to refer to an extraneous document in a pleading, and thus try to treat it as part of the pleading, was not proper pleading, and in my opinion that decision was quite right.—p. 362.

Le Bret v. Papillon (1804) 4 East 502; 7 R. R. 610.—K.B.

Referred to, Head v. Baldrey (1837) 7 L. J. Q. B. 94; 6 A. & E. 459.—K.B. (s.c. (1840) 9 L. J. Q. B. 221; 11 A. & E. 906.—Q.B.); *applied*, Allen v. Hopkins (1844) 13 L. J. Ex. 316; 13 M. & W. 94.—EX.

Charnley v. Winstanley (1804) 5 East 266; 1 Smith 433.—K.B.

Distinguished, Marsh v. Bulteel (1822) 5 B. & Ald. 507; 1 D. & R. 106; 2 Chitty 316.—K.B.: *referred to*, Head v. Baldrey (*supra*).

Head v. Baldrey (*supra*), on question of costs *applied*.

Greaves v. Eastern Counties Ry. (1859) 28 L. J. Q. B. 290; 1 EL. & EL. 761; 7 W. R. 453.—Q.B.

Ashford v. Thornton (1818) 1 B. & Ald. 405; 19 R. R. 349.—K.B., *applied*.

Allen v. Hopkins (*supra*), *adopted*.
Cobbett v. Grey (1850) 19 L. J. Ex. 137; 4 Ex. 729.—EX.

Allen v. Hopkins and Cobbett v. Grey, discussed.

Carlisle v. Whaley (1867) L. R. 2 H. L. 391; 16 W. R. 229.—H.L. (E.).

Jones v. Williams (1779) 1 Dougl. 214.—K.B., *overruled*.

Barton v. Webb (1800) 8 Term Rep. 459.—K.B.

Dunn v. Hill (1843) 12 L. J. Ex. 316; 11 M. & W. 470.—EX.

Distinguished, Payne v. Shenton (1846) 16 L. J. Q. B. 61.—PATERSON, J.; *followed*, Foster v. Gamgee (1876) 45 L. J. Q. B. 576; 1 Q. B. D. 666; 34 L. T. 248; 24 W. R. 319.—Q.B.D.

Dunn v. Hill and Foster v. Gamgee, distinguished.

Harrison v. Abergavenny (Marquis) (1887) 57 L. T. 360.—KAY, J.

Stamps v. Birmingham, Wolverhampton and Stour Valley Ry. (1848) 7 Hare 251; 12 Jur. 720.—V.-C.; *affirmed*, 17 L. J. Ch. 431; 2 Ph. 673; 6 Railw. Cas. 123.—L.C., *applied*.

Southall v. British Mutual Life Assurance Society (1869) 38 L. J. Ch. 711.—ROMILLY, M.R.

Greathead v. Bromley (1798) 7 Term Rep. 455.—K.B.; and **Langmead v. Maple** (1865) 18 C. B. (N.S.) 255; 11 Jur. (N.S.) 177; 12 L. T. 143; 13 W. R. 469.—C.P., *referred to*.

Newington v. Levy (1870) 40 L. J. C. P. 29; L. R. 6 C. P. 180; 23 L. T. 595; 19 W. R. 473.—EX. CH.

Langmead v. Maple, discussed.

Tredegar (Lord) v. Windus (1875) 41 L. J. Ch. 268; L. R. 19 Eq. 607, 614; 32 L. T. 596; 23 W. R. 511.—HALL, V.-C.

Rumley v. Winn (1889) 58 L. J. Q. B. 128; 22 Q. B. D. 265; 60 L. T. 32; 37 W. R. 285.—DENMAN and STEPHEN, JJ., *followed*.

Page v. Gilmore (1891) 30 L. R. Ir. 47.—HARRISON, J.

Ellis v. Robbins (1881) 50 L. J. Ch. 512.—**HALL, V.-C.**; and **National Provincial Bank of England v. Evans** (1881) 51 L. J. Ch. 97; 30 W. R. 177.—**HALL, V.-C.**, *discussed*.
Fitzwater, In re. Fitzwater v. Waterhouse (1882) 52 L. J. Ch. 88.—**CHITTY, J.**

Fitzwater, In re. Fitzwater v. Waterhouse, *followed*.
Gardner v. Tapling (1885) 33 W. R. 473.—**NORTH, J.**

Holmes v. Shaw (1885) 52 L. T. 797.—**KAY, J.**, *doubted*.
De Jongh v. Newman (1887) 56 L. T. 180; 35 W. R. 403.—**STIRLING, J.**

De Jongh v. Newman, *referred to*.
Bagley v. Searle (1887) 56 L. T. 306; 35 W. R. 404.

STIRLING, J.—Since my decision in *De Jongh v. Newman* I have looked into the cases, and I find that the practice is not uniform as to requiring an affidavit proving the statement of claim, and therefore I shall not require it in future.—p. 306.

Boak, In re. Boak v. Moore (1881) 7 L. R. Ir. 322.—**C.A.**
Discussed, **Cristof v. Dodd** (1884) 15 L. R. Ir. 83.—**PORTER, M.R.**; *not applied*, **Elliot v. Harris** (1886) 17 L. R. Ir. 351.—**PORTER, M.R.**

Smith v. Buchan (1888) 58 L. T. 710; 36 W. R. 631.—**KAY, J.**, *explained*.
Darbyshire v. Leigh (1896) 65 L. J. Q. B. 330; [1896] 1 Q. B. 554; 74 L. T. 241; 44 W. R. 452.—**C.A.** **ESHER, M.R.** **LOPES** and **RIGBY, L.J.**

RIGBY, L.J.—In *Smith v. Buchan*, which was an action for specific performance of an agreement for the purchase of land, a motion was made for judgment on the statement of claim in default of defence. The statement of claim was defective in not describing the property clearly, but it was sought to supplement the statement of claim by referring to a document mentioned in it. **Kay, J.**, refused to allow this to be done. He said that he could act only on the pleading as it stood.—p. 363.

And see **Young v. Thomas** (1892) 61 L. J. Ch. 496; [1892] 2 Ch. 134; 66 L. T. 575; 40 W. R. 468.—**C.A.**, "**COSTS**," vol. i., col. 742.

Young v. Thomas, *referred to*.
Sanderson v. Blyth Theatre Co. (1903) 72 L. J. K. B. 761; [1903] 2 K. B. 533, 544; 89 L. T. 159; 52 W. R. 33.—**C.A.**

Hall v. Snelling (1876) 20 Sol. Jour. 312.—**M.R.**, *followed*.
Gillott v. Ker (1876) 24 W. R. 428.—**JESSEL, M.R.**

Higgins v. Scott (1888) 58 L. J. Q. B. 97; 21 Q. B. D. 10; 58 L. T. 383.—**POLLOCK, B.** and **CHARLES, J.**, *approved*.
Jones v. Macaulay (1890) 60 L. J. Q. B. 258; [1891] 1 Q. B. 221; 64 L. T. 621; 39 W. R. 211.—**C.A.** **ESHER, M.R.**, **LOPES** and **KAY, L.J.**

Jones v. Macaulay, *applied*.
Roberts v. Booth (1892) [1893] 1 Ch. 52; 3 R. 151; 67 L. T. 646; 41 W. R. 220.—**NORTH, J.**

O'Connell v. O'Connell (1880) 6 L. R. Ir. 470.—**FITZGERALD, B.**, *approved and followed*.
Sampson v. O'Donnell (1880) 6 L. R. Ir. 471.—**HARRISON** and **LAWSON, JJ.**

Harding v. Lyons (1884) 14 L. R. Ir. 302.—**EX. D.**, *followed*.
Meehan v. Meehan (1884) 14 L. R. Ir. 300.—**HARRISON** and **MURPHY, JJ.**, *not followed*.
Kennane v. Mackey (1889) 24 L. R. Ir. 495.—**Q.B.D.**

Whistler v. Hancock (1878) 3 Q. B. D. 83; 47 L. J. Q. B. 152; 37 L. T. 639; 26 W. R. 211.—**Q.B.D.**, *followed*.
Wallis v. Hepburn (1878) 3 Q. B. D. 84, n.—**GLEASBY, B.** and **HAWKINS, J.**

Whistler v. Hancock and Wallis v. Hepburn, *distinguished*.
Burke v. Rooney (1879) 48 L. J. C. P. 601; 4 C. P. D. 226; 27 W. R. 915.—**COCKBURN, C.J.**, **GROVE** and **LOPES, JJ.**

Whistler v. Hancock and Wallis v. Hepburn, *distinguished*.
Burke v. Rooney, *approved*.
Carter v. Stubbs (1880) 6 Q. B. D. 116; 50 L. J. Q. B. 161; 43 L. T. 746; 29 W. R. 132.—**C.A.**

BRETT, L.J.—In those cases [*Whistler v. Hancock* and *Wallis v. Hepburn*] the Court had no jurisdiction to do what they were asked to do, because there had been no order in either of those cases to enlarge the time for appealing against the order dismissing the action, and that order existing and having taken effect the cause was dead. In *Burke v. Rooney*, however, a different course was pursued, and there application was made by the plaintiff, similar to that which has been made here, to extend the time for appealing against the order, so that he might afterwards get it varied or set aside, and it was held that there was jurisdiction to extend the time. I am clearly of opinion that the decision in that case was right, although *Whistler v. Hancock* and *Wallis v. Hepburn* were also rightly decided.—p. 120.

Burke v. Rooney, *followed*.
Metcalfe v. British Tea Association (1881) 46 L. T. 31.—**GROVE** and **BOWEN, JJ.**

Whistler v. Hancock and Wallis v. Hepburn, *followed*.
Feehan v. Mandeville (1890) 26 L. R. Ir. 391.—**ANDREWS, J.**

Whistler v. Hancock and King v. Davenport (1879) 48 L. J. Q. B. 606; 4 Q. B. D. 402; 27 W. R. 798.—**Q.B.D.**, *followed*.
Script Phonography Co. v. Gregg (1890) 59 L. J. Ch. 406.—**NORTH, J.**

Carter v. Stubbs (1880) 50 L. J. Q. B. 161; 6 Q. B. D. 116; 43 L. T. 746; 29 W. R. 132.—**C.A.**, *discussed*.
Feehan v. Mandeville (1890) 26 L. R. Ir. 391.—**ANDREWS, J.** *And see ante*, col. 2458.

Thellusson v. Smith (1793) 5 Term Rep. 152.—**K.B.**, *distinguished*.
Ellis v. Saxton (1875) 44 L. J. C. P. 193; 32 L. T. 118.—**C.P.**

Beazley v. Bailey (1846) 16 L. J. Ex. 1; 16 M. & W. 58; 4 D. & L. 271; 10 Jur. 906.—**EX.**, *referred to*.
Falck v. Axthelm (1889) 59 L. J. Q. B. 161; 24 Q. B. D. 174; 38 W. R. 196.—**C.A.**

Tildesley v. Harper (1878) 47 L. J. Ch. 263; 7 Ch. D. 403; 38 L. T. 60; 26 W. R. 263.—FRY, J.; *reversed*, (1878) 48 L. J. Ch. 495; 10 Ch. D. 393; 39 L. T. 532; 27 W. R. 249.—C.A.

Tildesley v. Harper, *referred to*.

Laird v. Briggs (1880) 50 L. J. Ch. 260; 16 Ch. D. 440; 43 L. T. 632; 29 W. R. 197.—FRY, J.

Tildesley v. Harper, *approved and principle adopted*.

Clarapade v. Commercial Union Association (1883) 52 W. R. 151.—GROVE, J. and HUDDLESTON, B.; *reversed on another ground* (1884) 32 W. R. 262.—C.A.

Tildesley v. Harper, *followed*.

Trufort, In re, Trafford v. Blanc (1885) 53 L. T. 498; 34 W. R. 56.—KAY, J.

Tildesley v. Harper and Clarapade v. Commercial Union Association, *rule expressed in, applied*.

Steward v. North Metropolitan Tramways Co. (1885—1886) 55 L. J. Q. B. 157; 16 Q. B. D. 178, 556; 54 L. T. 35; 34 W. R. 316; 50 J. P. 324.—POLLOCK, B. and MANISTY, J.; and C.A.

Steward v. North Metropolitan Tramways Co., *referred to*.

Edevain v. Cohen (1889) 41 Ch. D. 563; 61 L. T. 168; 31 W. R. 8.—NORTH, J.; *affirmed*, (1890) 43 Ch. D. 187; 62 L. T. 17; 38 W. R. 177.—C.A.

Newby v. Sharpe (1878) 47 L. J. Ch. 617; 8 Ch. D. 39; 38 L. T. 583; 26 W. R. 685.—C.A., *applied*.

Laird v. Briggs (1880) 50 L. J. Ch. 260; 16 Ch. D. 440; 43 L. T. 632; 29 W. R. 197.—FRY, J.; *reversed on another ground (post)*.

Newby v. Sharpe, *explained*.

Blenkhorn v. Penrose (1881) 43 L. T. 668, 670; 29 W. R. 237.—FRY, J.

Laird v. Briggs (*supra*), *reversed*.

Newby v. Sharpe, *considered*.

Laird v. Briggs (1881) 19 Ch. D. 22; 45 L. T. 238.—C.A. JESSEL, M.R., BRETT and COTTON, L.JJ.

BRETT, L.J.—Two amendments were asked from the Court below, one of which I think ought to have been granted, which is the material one in the present case, and the other I think ought not. I do not think the learned judge exercised his discretion with regard to the facts of this particular case, but declined to allow both the amendments upon a particular view which he took of the meaning of the decision in *Newby v. Sharpe*. Now, I think the decision in *Newby v. Sharpe* was a strong authority against the second amendment which was asked for, but was no authority against the first, which I think ought to have been allowed. I therefore venture to disagree with the learned judge, not upon a mere question of discretion exercised with regard to the facts of this particular case, but on his declining to amend upon a particular view of *Newby v. Sharpe*.—p. 34.

Doe v. Leigh v. Roe (1841) 11 L. J. Ex. 57; 8 M. & W. 579.—EX., *applied*.

Dillon v. Balfour (1887) 20 L. R. Ir. 600.—EX. D.

Duncombe v. Lewis (1847) 10 Beav. 273.—M.R., *principle applied*.

Wharton v. Swann (1835) 2 Myl. & K. 362.

—BROUGHAM, L.C., *not applied*.

Winthrop v. Murray (1848—1849) 7 Hare 150; 13 Jur. 32, 935.—HARE, V.-C.

Filkin v. Hill (1719) 4 Bro. P. C. 640; 1 De G. J. & S. 220, n.—L.C.; and **Bierdermann v. Seymour** (1839) 1 Beav. 594.—M.R., *applied*.

Darnley (Earl) v. L. C. & D. Ry. (1863) 33 L. J. Ch. 9; 1 De G. J. & S. 204; 9 Jur. (N.S.) 452; 8 L. T. 94; 11 W. R. 388.—L.JJ.

Darnley (Earl) v. L. C. & D. Ry., *principle applied*.

Att.-Gen. v. Cambridge Consumers' Gas Co. (1868) L. R. 6 Eq. 282; 16 W. R. 1007.—MALINS, V.-C.; *affirmed on this point*, 38 L. J. Ch. 94; L. R. 4 Ch. 71; 19 L. T. 508; 17 W. R. 145.—L.JJ.; *applied*, **Breckon v. Russell** (1868) 19 L. T. 81.—MALINS, V.-C.

Darnley (Earl) v. L. C. & D. Ry., *explained*.
Breckon v. Russell, *varied*.

Breckon v. Russell (1869) 19 L. T. 470.—L.JJ.

Darnley (Earl) v. L. C. & D. Ry., *referred to*.

Budding v. Murdoch (1875) 1 Ch. D. 42; 45 L. J. Ch. 213; 24 W. R. 23.—JESSEL, M.R.

The M.R. said that the case now set up by the plaintiff was not raised by the bill; and if the suit had come to a hearing before the recent Act, the question whether the plaintiff should be allowed to amend would have required just consideration, having regard to the decision in *Darnley (Earl) v. L. C. & D. Ry.* Under the circumstances, he thought the new practice ought to be applied, and that the plaintiff ought to have liberty to amend; and he made an order accordingly, with liberty for the defendant to put in a further answer, and both parties to go into further evidence.

Budding v. Murdoch, *headnote commented on*.

St. Nazaire Co., In re (1879) 12 Ch. D. 88; 41 L. T. 110; 27 W. R. 854.—C.A. JESSEL, M.R., BAGGALLAY and THESIGER, L.JJ.

JESSEL, M.R.—I never went so far as is represented in the headnote to that case.—p. 92.

Southampton Boat and Pier Co. v. Rawlins

(1864) 3 N. R. 349; 10 Jur. (N.S.) 118; 9

L. T. 633; 12 W. R. 285.—M.R.; and

Drake v. Symes (1860) 2 De G. F. & J. 81.

—L.JJ., *not applied*.

Newry (Viscount) v. Kilmorey (Earl) 40 L. J. Ch. 371; L. R. 11 Eq. 425; 24 L. T. 87; 19 W. R. 469.—BACON, V.-C.

Walker v. Armstrong (1856) 25 L. J. Ch.

738; 8 De G. M. & G. 531; 2 Jur. (N.S.)

959; 4 W. R. 770.—L.JJ., *principle*

applied.

Att.-Gen. v. Cambridge Consumers' Gas Co. (1868) 38 L. J. Ch. 94; L. R. 6 Eq. 282; 16 W. R. 1007.—MALINS, V.-C.; *affirmed on this point*, L.JJ. (*post*, col. 2493).

Pilkington v. Wignall (1817) 2 Madd. 240.
—V.-C., *distinguished*.

Att.-Gen. v. Cambridge Consumers' Gas Co. (1868) 38 L. J. Ch. 94; L. R. 4 Ch. 71; 19 L. T. 508; 17 W. R. 145.—WOOD and SELWYN, L.JJ.

SELWYN, L.J.—There the original bill was filed to redeem a mortgage, and it was held that the bill could not properly be amended by stating the subsequent acquisition of title. In all the other cases which have been cited there was an original defect in the plaintiff's title, which it was sought to cure by the introduction of statements of fact which occurred after the bill was filed. But in the present case the title of the Att.-Gen. does not in any degree depend upon the contract between the Commissioners and the defendants. He sues as representing the public by an original independent title, namely, as protector of the rights of the public against a nuisance to the public highway.—p. 110.

Weldon v. Neal (1887) 56 L. J. Q. B. 621; 19 Q. B. D. 394; 35 W. R. 820.—C.A.

Discussed, Bank of Scotland v. Fergusson (1898) 1 Fraser 96.—CT. OF SESS.; *applied*. Lancaster v. Moss (1899) 15 Times L. R. 476.—C.A. A. L. SMITH, RIGBY and V. WILLIAMS, L.JJ.

Robert v. Harnage (1705) 6 Mod. 228.—Q.B., *incorrectly reported*.

Mostyn v. Fabrigas (1774) 1 Cowp. 161. MANSFIELD, C.J. said that the above case was more truly reported in 2 Ld. Raym. 1042.

Caldwell v. Pagham Harbour Reclamation Co (1876) 45 L. J. Ch. 796; 2 Ch. D. 221; 24 W. R. 690.—HALL, V.-C., *referred to*. Ward v. Sheffield Corporation (1887) 56 L. J. Q. B. 418; 19 Q. B. D. 22, 28.—CAVE, J.

Collette v. Goode (1878) 47 L. J. Ch. 370; 7 Ch. D. 842; 38 L. T. 504.—FRY, J., *doubted and distinguished*.

Edevain v. Cohen (1889) 41 Ch. D. 563; 61 L. T. 168; 38 W. R. 8.—NORTH, J.; affirmed, (1890) 43 Ch. D. 187; 62 L. T. 17; 38 W. R. 177.—C.A.

Newman v. Wallis (1877) 2 Bro. C. C. 143.—L.C., *disapproved*.

Hall v. Noyes (1792) 3 Bro. C. C. 483.—TALBOT, L.C.

Newman v. Wallis, *held overruled*.

Hardman v. Ellaines (1834) 2 Myl. & K. 732; 4 L. J. Ch. 181; Coop. t. Brough. 351; 39 R. R. 344.—L.C.; affirming, (1883) 5 Sim. 640; 3 L. J. Ch. 74, 782.—V.-C.

BROUGHAM, L.C.—It was at one time doubted by Lord Thurlow whether a negative plea was good; at least he held in *Newman v. Wallis* that a plea of "no heir" was bad without averring who was the heir, but afterwards, in *Hall v. Noyes*, he altered this opinion on the ground that the defendant might not be able to show who was the heir, though he might prove that the plaintiff was not.—p. 740.

Nichols v. Ward (1850) 2 Mac. & G. 140.—L.C., *referred to*.

Hope v. Carnegie (No. 1) (1868) L. R. 7 Eq. 254, 261; 19 L. T. 374.—STUART, V.-C.

Cargill v. Bower (1878) 47 L. J. Ch. 649; 10 Ch. D. 502; 38 L. T. 779; 26 W. R. 716.—FRY, J., *discussed*.

Symonds v. City Bank (1886) 34 W. R. 364.—

NORTH, J.; *Capel v. Sims* Ships' Compositions Co. (1888) 57 L. J. Ch. 713; 58 L. T. 807; 36 W. R. 689.—KEKEWICH, J.

Attwood v. Anon. (1826) 1 Russ. 353.—M.R., *applied*.

Taylor v. Tabrum (1833) 6 Sim. 281; 38 R. R. 115.—SHADWELL, V.-C.

Blackmore v. Edwards (1879) W. N. 175.—V.-C., *considered*.

Bourne v. Coulter (1884) 53 L. J. Ch. 699; 50 L. T. 321.

KAY, J.—I have been referred to . . . *Blackmore v. Edwards*, which was decided by Hall, V.-C., before any rule like this 13th rule of the 28th Order was in existence. Accordingly, I cannot treat that as being any authority upon this point. If I were at liberty to guess, I should think that the framers of these rules inserted that rule in order to obviate the necessity of applications to the Court similar to that in *Blackmore v. Edwards*.—p. 701.

Durling v. Lawrence (1877) 46 L. J. Ch. 808.—JESSEL, M.R., *not followed*.

Boddy v. Wall (1877) 7 Ch. D. 164; 47 L. J. Ch. 112; 26 W. R. 348.

JESSEL, M.R.—I am not disposed to follow *Durling v. Lawrence*.—p. 165.

Milligan v. Mitchell (1836) 7 L. J. Ch. 37; 1 Myl. & Cr. 433.—L.C., *applied*.

Hodson v. Ball (1842) 12 L. J. Ch. 80; 1 Ph. 177; 7 Jur. 745.—L.C.

Palk v. Clinton (1806) 12 Vcs. 48; 8 R. R. 283.—M.R., *discussed*.

Wilson v. Bell (1843) 8 Ir. Eq. R. 501, 508.—EX. EQ.; **Watts v. Hyde** (1847) 17 L. J. Ch. 39; 2 Ph. 406.—COTTENHAM, L.C. (reversing, 2 Coll. 368.—KNIGHT BRUCE, V.-C.).

Palk v. Clinton, *referred to*.

Watts v. Hyde, *discussed*.

Darnley (Earl) v. L. C. & D. Ry. (1863) 33 L. J. Ch. 9; 1 De G. J. & S. 204; 9 Jur. (N.S.) 452; 8 L. T. 94; 11 W. R. 388.—L.JJ.

Watts v. Hyde, *discussed*.

King v. Corke (1875) 45 L. J. Ch. 190; 1 Ch. D. 57; 33 L. T. 375; 24 W. R. 23.—BACON, V.-C.

Watts v. Hyde and King v. Corke, *referred to*.

Roe v. Davies (1876) 2 Ch. D. 729; 23 W. R. 606.

BACON, V.-C.—The old practice was perfectly well understood. It had been the subject of consideration in *Watts v. Hyde*, in which case Knight Bruce, L.J., thought fit at the hearing of the case to give the plaintiff, under the circumstances, leave to amend the bill (see *King v. Corke*); but Lord Cottenham discharged the order. The inconvenience and imperfection of the old practice was made so manifest on that occasion that no one can wonder that a remedy has at length been applied to this defect. And here a very extensive authority has been conferred on the Court, which is enabled to allow either party to alter his statement of claim, "at any stage of the proceedings," without any limitation except the discretion of the judge.—p. 733.

King v. Corke, *followed*.

Mozeley v. Cowie (1877) 47 L. J. Ch. 271; 38 L. T. 908; 26 W. R. 854.—FRY, J.

Watts v. Hyde and King v. Corke, *applied*.

Nobel's Explosives Co. v. Jones & Co. (1880) 49 L. J. Ch. 726; 42 L. T. 754; 28 W. R. 653.—BACON, V.-C.

Brennan v. Howard (1856) 25 L. J. Ex. 289; 1 H. & N. 138; 2 Jur. (N.S.) 546; 4 W. R. 609.—EX., *applied*.

Caultfield v. Whitworth (1868) 18 L. T. 527.—C.P.

Tennyson v. O'Brien (1855) 5 El. & Bl. 497.—Q.B., *discussed*.

Savage v. Canning (1867) Ir. R. 1 C. L. 434; 16 W. R. 133.—C.P.

Peru Republic v. Peruvian Guano Co. (1887)

56 L. J. Ch. 1081; 36 Ch. D. 489; 57 L. T. 337; 36 W. R. 217.—CHITTY, J., *discussed*.

Fletcher v. Bethom (1893) 3 R. 589; 68 L. T. 438; 41 W. R. 621.—KEKEWICH, J.

Peru Republic v. Peruvian Guano Co., *referred to*.

Hubbuck & Sons, Ltd. v. Wilkinson, Heywood, and Clark, Ltd. (1898) 68 L. J. Q. B. 34; [1899] 1 Q. B. 86; 79 L. T. 429.—C.A. LINDLEY, M.R., CHITTY and V. WILLIAMS, L.JJ.

LINDLEY, M.R. (for the Court).—The use of the expression "reasonable cause of action" in r. 4 [Ord. XXV.] shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases. The authorities collected in the Annual Practice show that the Courts have always so construed r. 4, although sometimes, no doubt, a statement of claim may be so long and the facts so complicated that considerable time and attention are required to ascertain their true result, as in *Peru Republic v. Peruvian Guano Co.*—p. 36.

Peru Republic v. Peruvian Guano Co., *applied*.

Ripley v. Arthur & Co. (1900) 18 Rep. Pat. Cas. 82.—FARWELL, J.

Peru Republic v. Peruvian Guano Co. and

Hubbuck & Sons, Ltd. v. Wilkinson, Heywood, and Clark, Ltd., *principle applied*.
Worthington v. Belton (1902) 18 Times L. R. 438.—C.A. ROMER and MATHEW, L.JJ.

Att.-Gen. of Duchy of Lancaster v. L. & N.

W. Ry. (1892) 62 L. J. Ch. 271; [1892] 3 Ch. 274; 2 R. 84; 67 L. T. 810.—C.A., *discussed*.

Fletcher v. Bethom (1893) 3 R. 589; 68 L. T. 438; 41 W. R. 621.—KEKEWICH, J.

Cashin v. Cradock (1876) 3 Ch. D. 376; 35

L. T. 452; 25 W. R. 4.—C.A., *referred to*.

Watson v. Rodwell (1876) 45 L. J. Ch. 744; 3 Ch. D. 380; 35 L. T. 86; 24 W. R. 1009.—C.A.

Watson v. Rodwell, *discussed*.

Davy v. Garrett (1878) 47 L. J. Ch. 218; 7 Ch. D. 473; 38 L. T. 77; 26 W. R. 225.—C.A.; reversing 26 W. R. 110.—HALL, V.-C.

Watson v. Rodwell, *distinguished*.

Hawkesley v. Bradshaw (1880) 49 L. J. Q. B. 333; 5 Q. B. D. 302; 42 L. T. 285; 28 W. R. 557.—C.A. *See post*, col. 2496.

Watson v. Rodwell, *referred to*.

Townsend v. Parton, Parton. In re (1882) 45 L. T. 755; 30 W. R. 287.—KAY, J.

Watson v. Rodwell and Davy v. Garrett (*supra*), *discussed and distinguished*.

Ormerod v. Todmorden Mill Co. (1882) 51 L. J. Q. B. 348; 8 Q. B. D. 664, 673; 46 L. T. 669; 30 W. R. 805.—C.A. BRETT and HOLKER, L.JJ.; COLERIDGE, C.J. *doubting*.

Watson v. Rodwell and Davy v. Garrett, *discussed*.

Knowles v. Roberts (1888) 38 Ch. D. 263; 58 L. T. 259.—C.A. COTTON, LINDLEY and BOWEN, L.JJ.

BOWEN, L.J.—We have been referred to a passage from the judgment of James, L.J., in *Watson v. Rodwell*, that in matters within the discretion of the judge of first instance, the C.A. would not overrule that discretion. But when it was urged before that learned judge in the subsequent case of *Davy v. Garrett*, on the authority of *Watson v. Rodwell*, that where the V.-C. had exercised his discretion the C.A. would not interfere with it, James, L.J., made the following observations: "The argument was strongly pressed upon us that this was an appeal from a matter lying within the discretion of the judge, and an observation of my own in *Watson v. Rodwell* was relied on. I do not know whether my expressions were stronger than was required; but it is very important that time and money should not be wasted on appeals on interlocutory matters, and I have therefore always set my face against appeals from the discretion of the judge in matters of procedure. But a defendant may claim *ex debito justitiæ* to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it." The power which is given to the judge of first instance by this rule ought to be exercised in a fit case.—p. 271.

Golding v. Wharton Salt Works Co. (1876) 1

Q. B. D. 374; 34 L. T. 474; 24 W. R. 423.

—C.A., *explained*.

Watson v. Rodwell (1876) 3 Ch. D. 380; 45 L. J. Ch. 744; 35 L. T. 86; 24 W. R. 1009.—C.A.

MELLISH, L.J.—In *Golding v. Wharton Salt Works Co.*, which was the first case before us, we held that striking out pleadings was a matter of discretion, and that, except in very extreme cases, or where the judge has adopted a wrong principle, we should not interfere with that discretion.—p. 383.

Golding v. Wharton Salt Works Co., *distinguished*.

Hawkesley v. Bradshaw (1880) 5 Q. B. D. 302; 49 L. J. Q. B. 333; 42 L. T. 285; 28 W. R. 557.—C.A.

BAGGALLAY, L.J.—In those cases [*Golding v. Wharton Salt Works Co.* and *Watson v. Rodwell* (*supra*, col. 2495)] no doubt the Court refused to interfere with the exercise of a mere discretion, but the present case was determined upon principle, the Court deciding as matter of law that these defences ought not to be pleaded together.—p. 304.

Golding v. Wharton Salt Works Co., *explained*.

Laird v. Briggs (1881) 19 Ch. D. 22; 45 L. T.

238.—C.A. JESSEL, M.R., BRETT and COTTON, L.JJ.

JESSEL, M.R.—I take it that every injustice is serious, and that the use of that word by James, L.J., in *Golding v. Wharton Salt Works Co.* simply means that the C. A. will not interfere in a trivial matter.—p. 28.

Golding v. Wharton Salt Works Co.

Distinguished, Ormerod v. Todmorden Mill Co. (1882) 51 L. J. Q. B. 348; 8 Q. B. D. 664; 46 L. T. 669; 30 W. R. 805.—C.A. BRETT and HOLKER, L.JJ.; COLERIDGE, C.J. *doubting*; *referred to*, Martin, In re, Hunt v. Chambers (1882) 51 L. J. Ch. 683; 20 Ch. D. 363, 369; 46 L. T. 399; 30 W. R. 527.—C.A. JESSEL, M.R., COTTON and LINDLEY, L.JJ. *See supra*, col. 2387.

Cutts v. Surridge (1847) 16 L. J. Q. B. 193; 9 Q. B. 1015; 4 D. & L. 642; 11 Jur. 585.

—DENMAN, C.J., *explained and qualified*.

Tallis v. Tallis (1852) 21 L. J. Q. B. 269; 1 El. & Bl. 391, 397 n.; (1853) 16 Jur. 744.

CAMPBELL, C.J.—In *Cutts v. Surridge* there was reason for believing that a trap had been laid for the defendant, and that it was not fair and *bona fide* pleading, and that was given as one of the grounds for that decision.—p. 271.

WIGHTMAN, J. to the same effect.

CROMPTON, J.—If *Cutts v. Surridge* is to be taken to have established that, in all cases where there is a demurrer to a plea containing an immaterial traverse, the defendant may put the plaintiff to the alternative of having the demurrer set aside as frivolous, or the immaterial allegation struck out of the declaration, I should hesitate before I assented to it. There is great reason to doubt the sufficiency of the grounds of that decision, but it may possibly be supported for the reason mentioned by Lord Campbell.—*ibid*.

Mountney v. Watton (1831) 9 L. J. (o.s.)

K. B. 298; 2 B. & Ad. 673; 36 R. R. 709.

—K.B.; **McGregor v. Gregory** (1843) 12

L. J. Ex. 204; 11 M. & W. 287; 2

D. (N.S.) 769.—C.P.; and **Reg. v. Newman**

(1853) 22 L. J. Q. B. 156; 1 El. & Bl.

558.—Q.B., *referred to*.

Fleming v. Dollar (1889) 58 L. J. Q. B. 548;

23 Q. B. D. 388; 61 L. T. 230; 37 W. R. 684.—

COLERIDGE, C.J. and HAWKINS, J.

Willis v. Beauchamp (Earl) (1886) 55 L. J.

P. 17; 11 P. D. 59; 54 L. T. 185; 34

W. R. 357.—C.A., *referred to*.

Barrett v. Day (1890) 59 L. J. Ch. 464; 43

Ch. D. 435; 62 L. T. 597; 38 W. R. 362.—

NORTH, J.; **Remington v. Scoles** (1896) 66

L. J. Ch. 526; [1897] 1 Ch. 1 (*post*).

Reichel v. Magrath (1889) 59 L. J. Q. B.

159; 14 App. Cas. 665; 54 J. P. 196.—

H.L. (E.), *referred to*.

MacDougall v. Knight (1890) 59 L. J. Q. B. 517;

25 Q. B. D. 1; 63 L. T. 43; 38 W. R. 553; 54

J. P. 788; 6 Times L. R. 276.—C.A. ESHER, M.R.,

FRY and LOPES, L.JJ.; **Barrett v. Day** (1890) 59

L. J. Ch. 464; 43 Ch. D. 435; 62 L. T. 597; 38

W. R. 362.—NORTH, J.

Reichel v. Magrath, discussed.

Remington v. Scoles (1896) 66 L. J. Ch. 526;

[1897] 1 Ch. 1; 76 L. T. 667; 45 W. R. 580;

affirmed, C.A. LINDLEY, LOPES and RIGBY, L.JJ.

ROMER, J.—The Court has an inherent power to prevent the abuse of its legal machinery, as was well observed by Bowen, L.J., in *Willis v. Beauchamp (Earl)* (*supra*, col. 2497), where after pointing out that in that case the application to strike out the statement of claim was not made under the rule, he says: "The rules, as we have pointed out more than once, do not, and that particular rule does not, deprive the Court in any way of the inherent power which every Court has to prevent the abuse of legal machinery." Undoubtedly, in a proper case, the Court has power to strike out a statement of claim which the Court considers is an abuse of the legal machinery of the Court. That power is not confined to a statement of claim. It applies to every pleading, and that it applies to defences is shown by *Reichel v. Magrath*, to which my attention has been called. Further, it appears to me that the Court may receive evidence on a motion of this kind for the purpose of showing, but only for the purpose of showing, that any pleading complained of and sought to be struck out is an abuse of the process of the Court. If authority were wanted for that proposition, it is given by *Biswell v. Chaks* (1894) 6 R. 167, *supra*, col. 2440; and I think that the present case is one where the plaintiff is entitled by his evidence to state the circumstances which show that the defence is merely an abuse.—p. 526.

Reichel v. Magrath, MacDougall v. Knight

(*supra*, col. 2497), and **Remington v. Scoles**, *discussed and applied*.

Stephenson v. Garnett (1898) 67 L. J. Q. B.

447; [1898] 1 Q. B. 677; 78 L. T. 371; 46 W. R.

410.—C.A.; reversing **PHILLIMORE, J.**

A. L. SMITH, L.J.—*Reichel v. Magrath*, coupled

with what was said in *MacDougall v. Knight*,

shows that it is an abuse of the process of the

Court to allow identically the same question

which has already been decided to be litigated

again and again.—p. 449.

CHITTY, L.J.—I would refer to *Remington*

v. Scoles, in which the ground for striking out

the defence was that it was a sham defence, and

not that the question was *res judicata*.—

p. 450.

COLLINS, L.J.—I agree as to the difficulty in

bringing this case strictly within the rules

governing the doctrine of *res judicata*.—*ib*.

Reichel v. Magrath, discussed.

Dunlop Pneumatic Tyre Co. v. Rimington

Bros. & Co. (1900) 17 Rep. Pat. Cas. 665.—

STIRLING, J.; *affirmed*, C.A. ALVERSTONE, M.R.,

RIGBY and COLLINS, L.JJ.

Greav v. Hodgins (1831) Hayes's Rep. 184.

—EX. (IR.); and **Munce v. Black** (1858)

7 Ir. C. L. R. 475.—EX., *discussed*.

Metropolitan Bank v. Pooley (1885) 54 L. J.

Q. B. 449; 10 App. Cas. 210; 53 L. T. 163; 33

W. R. 709; 49 J. P. 756.—H.L. (E.).

Metropolitan Bank v. Pooley, discussed.

Magrath v. Reichel (1887) 57 L. T. 850.—

WILLS and GRANTHAM, JJ.

Metropolitan Bank v. Pooley, discussed.

Lawrance v. Norreys (Lord) (1888) 89 Ch. D.

213; 59 L. T. 703.—C.A. COTTON, BOWEN and

FRY, L.JJ.; *affirmed*, H.L. (E.) (*post*, col. 2499).

COTTON, L.J.—But the jurisdiction of the

Court to prevent its process being abused, and to

prevent actions being brought which are mere vexation, is original and does not depend on the general orders of the Court. That jurisdiction is recognised by the House of Lords in *Metropolitan Bank v. Pooley*, a case which was relied on by Mr. Pearson, who said that the House of Lords held the question to be whether on the statements contained in the statement of claims there was any good ground of action. But undoubtedly though they did consider that question, they did not limit the jurisdiction of the Court to cases where the pleadings show no right of action in the plaintiff.—p. 231.

Metropolitan Bank v. Pooley, *referred to*.

Barrett v. Day (1890) 59 L. J. Ch. 464; 43 Ch. D. 435; 62 L. T. 597; 38 W. R. 362.—NORTH, J.; Haggard v. Pelicier Frères (1891) 61 L. J. P. C. 19; [1892] A. C. 61; 65 L. T. 769.—P.C. See *post*.

Metropolitan Bank v. Pooley and Lawrance v. Norreys (Lord) (*supra*), *applied*.

Bruce v. Ailesbury (Marquis) W. N. (1892) p. 149.—STIRLING, J.

Metropolitan Bank v. Pooley, *referred to*.

Fletcher v. Bethom (1893) 3 R. 589; 68 L. T. 438; 41 W. R. 621.—KEKEWICH, J.

Lawrance v. Norreys (Lord), *applied*.

Dunlop Pneumatic Tyre Co. v. Rimington Bros. & Co. (1900) 17 Rep. Pat. Cas. 665.—STIRLING, J.; affirmed, C.A. ALVERSTONE, M.R., HIGBY and COLLINS, L.JJ.

Lawrance v. Norreys (Lord) (1890) 59 L. J. Ch. 681; 15 App. Cas. 210; 62 L. T. 706; 38 W. R. 753; 54 L. J. 708; 6 Times L. R. 285.—H.L. (E.); *affirming* S. G. (*supra*, col. 2498), *approved*.

Haggard v. Pelicier Frères (1891) [1892] A. C. 61; 61 L. J. P. C. 19; 65 L. T. 769.—P.C.

LORD WATSON (for LORDS HOBHOUSE and MORRIS, SIR R. COUCH and MR. SHAND (LORD SHAND)).—Their lordships hold it to be settled that a Court of competent jurisdiction has inherent power to prevent abuse of its process, by staying or dismissing, without proof, actions which it holds to be vexatious. In *Metropolitan Bank v. Pooley* (*supra*, col. 2498), the Lord Chancellor (the Earl of Selborne), speaking with reference to the dismissal of an action on that ground, said that—"The power seemed to be inherent in the jurisdiction of every Court of justice to protect itself from the abuse of its own procedure." The same principle was again laid down by the House of Lords in *Lawrance v. Norreys (Lord)*. In that case the A. C. had refused to allow proof, and dismissed the action, and Lord Herschell observed:—"It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases." In the remarks made by Lord Herschell, as to the caution with which the power of summary dismissal on such grounds ought to be exercised, their lordships unhesitatingly concur.—p. 68.

Lawrance v. Norreys (Lord), *applied*.

Kellaway v. Bury (1892) 65 L. T. 599.—DENMAN and WILLIAMS, JJ.; affirmed, C.A. LINDLEY and KAY, L.JJ. See "VEXATIOUS ACTIONS ACT, 1896" (59 & 60 Vict. c. 51).

Kemp v. Fyson (1834) 3 D. P. C. 265, *disapproved*.

Blundell v. Harrison (1837) 2 M. & W. 243.—PARKE and ALDERSON, BB.

PARKE, B.—I have reason to believe that complaints have been made of the decision in *Kemp v. Fyson*.—p. 244.

ALDERSON, B.—I felt myself bound at Chambers by the decision in *Kemp v. Fyson*, but I have not approved of it.—p. 244.

Forrest v. Manchester, Sheffield and Lincolnshire Ry. (1861) 4 De G. F. & J. 126; 7 Jur. (N.S.) 887; 4 L. T. 666; 9 W. R. 818.—WESTBURY, L.C.

Distinguished, Seaton v. Grant (1867) 36 L. J. Ch. 641; L. R. 2 Ch. 459, 465; 16 L. T. 758; 15 W. R. 602.—TURNER and CAIRNS, L.JJ.; *applied*, Bloxam v. Metropolitan Ry. (1868) L. R. 3 Ch. 337, 343 n., 353; 18 L. T. 41; 16 W. R. 490.—CHELMSFORD, L.C.; Robson v. Dodds (1869) 38 L. J. Ch. 547; L. R. 8 Eq. 301; 20 L. T. 968; 17 W. R. 782.—MALINS, V.-C.; *discussed*, Gray v. Lewis (1869) L. R. 8 Eq. 540.—MALINS, V.-C. (See S. C. (1874) 43 L. J. Ch. 281; L. R. 8 Ch. 1035; 29 L. T. 12; 21 W. R. 928.—JAMES and MELLISH, L.JJ.) And see "COMPANY," vol. i., col. 519.

Seaton v. Grant (1867) L. R. 2 Ch. 459; 16 L. T. 758; 15 W. R. 602.—L.JJ.; *affirming* 36 L. J. Ch. 638.—V.-C., *principle applied*.

Bloxam v. Metropolitan Ry. (1868) L. R. 3 Ch. 337; 18 L. T. 41; 16 W. R. 490.—CHELMSFORD, L.C., *referred to*.

Robson v. Dodds (1869) 38 L. J. Ch. 547; L. R. 8 Eq. 301; 20 L. T. 968; 17 W. R. 782.—MALINS, V.-C.

Bloxam v. Metropolitan Ry., *referred to*.

Yool v. G. W. Ry. (1870) 39 L. J. Ch. 562, 566; 22 L. T. 781; 18 W. R. 825.—JAMES, V.-C.; Bardwell v. Sheffield Waterworks Co. (1872) 41 L. J. Ch. 700; L. R. 14 Eq. 517, 521; 20 W. R. 939.—MALINS, V.-C.; Mutton v. Eastern and Midlands Ry. (1888) 57 L. J. Ch. 615; 38 Ch. D. 92, 96; 59 L. T. 117; 36 W. R. 401.—CHITTY, J.; affirmed, C.A. LINDLEY, COTTON and BOWEN, L.JJ.

Blake v. Albion Life Assurance Society (1876) 45 L. J. C. P. 663; 35 L. T. 269; 24 W. R. 677; 14 Cox C. C. 246.—C.P.D., *discussed and not applied*.

Blake v. Albion Life Assurance Society (1878) 48 L. J. C. P. 169; 4 C. P. D. 94; 40 L. T. 211; 27 W. R. 321.—C.P.D.

Blake v. Albion Life Assurance Society, 48 L. J. C. P. 169, *not applied*.

Reg. v. Ollis (1900) 69 L. J. Q. B. 918; [1900] 2 Q. B. 758; 83 L. T. 251; 49 W. R. 76; 64 J. P. 518.—C.C.R. See judgment of BRUCE, J.

Christie v. Christie, 42 L. J. Ch. 261.—MALINS, V.-C.; *reversed*, (1873) 42 L. J. Ch. 554; L. R. 8 Ch. 499; 28 L. T. 607; 21 W. R. 493.—C.A.

Christie v. Christie, *followed*.

Pearse v. Pearse (1873) 29 L. T. 453; 22 W. R. 69.—HALL, V.-C.

Smith and Co. v. British Marine Mutual Insurance Association, W. N. (1883) 232.—FIELD, J., *applied*.

Lumb v. Beaumont (1884) 49 L. T. 772.—PEARSON, J.

Erskine v. Garthshore (1811) 18 Ves. 114.—L.C., *applied*.
Miller, In re, French. In re, **Love v. Hills** (1884) 54 L. J. Ch. 205; 51 L. T. 853; 33 W. R. 210.—KAY, J.

Drogheda (Marquis) v. Hanlon (1867) Ir. R. 1 C. L. 319.—O'BRIEN, J.; and O'Donnell v. **Reilly** (1860) 11 Ir. C. L. R. 329.—EX., *explained and applied*.
Hildige v. O'Farrell (1881) 8 L. R. Ir. 158.—C.A. MAY, C.J., DEASY and FITZGIBBON, L.JJ.

Hildige v. O'Farrell, *discussed*.
Dillon v. Balfour (1887) 20 L. R. Ir. 600.—EX. D.

Hildige v. O'Farrell, *distinguished*.
Remington v. Scoles (1897) 66 L. J. Ch. 526; [1897] 2 Ch. 1; 76 L. T. 667; 45 W. R. 580.—C.A.; affirming **ROMER, J.**

LINDLEY, L.J.—There is no doubt that what **Romer, J.**, has done is a very unusual thing. It is a strong thing to say, and it cannot be said as a general proposition, that a defendant is not at liberty to put in a defence denying the allegations in the statement of claim. Of course, he is entitled to do so as a general rule. The learned judge is quite right. He recognises the rule illustrated by **Hildige v. O'Farrell**. In a case of that kind the Court will not try whether the matters alleged in a defence are true or false; but the ground of his decision in this case is that the defence is a mere sham.—p. 528.

LOPES and RIGBY, L.JJ. to the same effect.

Edmunds v. Groves (1837) 6 L. J. Ex. 203; 2 M. & W. 642; 5 D. P. C. 775; M. & H. 211; 1 Jur. 592.—EX.; and **Bennion v. Davison** (1838) 7 L. J. Ex. 116; 3 M. & W. 179.—EX., *disapproved*.

Bingham v. Stanley (1841) 10 L. J. Q. B. 319; 2 Q. B. 117; 1 G. & D. 237; 9 Car. & P. 374; 6 Jur. 389.—Q.B.

Edmunds v. Groves and Bingham v. Stanley, *distinguished*.

Bonzi v. Stewart (1842) 11 L. J. Q. B. 228; 4 Man. & G. 295; 5 Scott (N.R.) 1.—C.P.

Edmunds v. Groves, *overruled*.
Aumirtollall Bose v. Rajoneekaut Mitter (1875) L. R. 2 Ind. App. 113, 125.—P.C.

Bingham v. Stanley and Smith v. Martin (1842) 11 L. J. Ex. 129; 9 M. & W. 304; Car. & M. 58; 1 D. (N.S.) 418.—EX., *discussed*.

Robins v. Maidstone (1843) 12 L. J. Q. B. 321; 4 Q. B. 811; D. & M. 30; 7 Jur. 694.—Q.B.

Bingham v. Stanley, *approved*.
Carter v. James (1844) 13 L. J. Ex. 373; 13 M. & W. 137; 2 D. & L. 236; 8 Jur. 912.—EX.

Bingham v. Stanley, Smith v. Martin and Robins v. Maidstone, *referred to*.
Aumirtollall Bose v. Rajoneekaut Mitter (1875) L. R. 2 Ind. App. 113.—P.C.

Carter v. James (1844) 13 L. J. Ex. 373; 13 M. & W. 137; 2 D. & L. 236; 8 Jur. 912.—EX., *explained*.

Hutt v. Morrell (1849) 3 Ex. 240; 6 D. & L. 447; 13 Jur. 215.—EX.

POLLOCK, C.B.—I find at the end of that case the following query in my own handwriting:—“*Quære*, whether in this case the rule was brought under the notice of the Court, that where the plaintiff replies to one part of the plea and thereby admits the other, if the issue be found for him, the admission avails nothing; but, if the issue be found against him, and there be judgment, he is estopped as to both.”—p. 241.

Carter v. James, *discussed*.
Irish Land Commission v. Ryan [1900] 2 Ir. R. 563.—C.A. ASHBOURNE, L.C., FITZGIBBON and HOLMES, L.JJ.

Doe d. Harding v. Cooke (1831) 9 L. J. (o.s.) C. P. 118; 7 Bing. 346; 5 M. & P. 181; 33 R. R. 503.—C.P., *referred to*.
Whale v. Hitchcock (1876) 34 L. T. 136.—Q.B.D.

Gould v. Oliver (1840) 2 Man. & G. 208; 2 Scott (N.R.) 241.—EX., *referred to*.
Reg. v. Paul (1890) 59 L. J. M. C. 138; 25 Q. B. D. 202, 211; 62 L. T. 845; 38 W. R. 704; 17 Cox C. C. 111; 54 J. P. 677.—C.C.R.

Boileau v. Rutlin (1848) 2 Ex. 665; 12 Jur. 899.—EX., *referred to*.
Howlett v. Tarte (1861) 31 L. J. C. P. 146; 10 C. B. (N.S.) 813; 9 W. R. 868.—C.P.

Boileau v. Rutlin, *discussed*.
Lyell v. Kennedy (1889) 59 L. J. Q. B. 268; 14 App. Cas. 437; 62 L. T. 77; 38 W. R. 353.—H.L. (E.). HALSBURY, L.C., LORDS SELBORNE, FITZGERALD and MACNAGHTEN.

Boileau v. Rutlin, *applied*.
Walters, In re, **Neison v. Walters** (1889) 61 L. T. 872.

KEKEWICH, J.—I think the defence could not properly be treated as a conclusive admission in other proceedings on a different issue. That was the old rule respecting bills in Chancery laid down in **Boileau v. Rutlin**, which is directly in point.—p. 874.

Boileau v. Rutlin, *referred to*.
Butler v. Butler (1893) 63 L. J. P. 1; [1894] P. 25, 28; 1 R. 535; 69 L. T. 545; 42 W. R. 49.—C.A.

Boileau v. Rutlin, *explained*.
Howlett v. Tarte (1861) 31 L. J. C. P. 146; 10 C. B. (N.S.) 813; 9 W. R. 868.—C.P., *applied*.

Irish Land Commission v. Ryan [1900] 2 Ir. R. 563.—C.A. ASHBOURNE, L.C., FITZGIBBON and HOLMES, L.JJ.

Jenkins v. Robertson (1867) L. R. 1 H. L. (Sc.) 117.—H.L. (Sc.), *distinguished*.

South American and Mexican Co., In re, **Bank of England**, Ex parte (1894) [1895] 1 Ch. 37; 64 L. J. Ch. 189; 12 R. 1; 71 L. T. 594; 43 W. R. 131; affirmed, C.A. **HERSCHELL, L.C.**, LINDLEY and A. L. SMITH, L.JJ.

V. WILLIAMS, J.—I have only to say, with regard to that case, that it is no decision whatever upon the general law. The action was an action in which, according to the law of Scotland, one person is allowed, if he chooses, to represent the public; and apparently, according to the law of Scotland, the result of that action binds the public at large. All that the H. L. decided was that such a result would not

bind the public at large unless it was a result arrived at after judicial consideration, and that it would not bind the public if it was a result arrived at by consent, and *a fortiori* if such consent was a purchased consent. The decision does not seem to me to touch this matter at all.—p. 45.

Jenkins v. Robertson, *explained*.

South American and Mexican Co., In re, Bank of England, Ex parte, *dictum discussed*.

Irish Land Commission v. Ryan [1900] 2 Ir. R. 563.—C.A. ASHBOURNE, L.C., FITZGIBBON and HOLMES, L.JJ.

Bank of Hindustan, China and Japan, In re, Alison's Case (1873) 43 L. J. Ch. 1; L. R. 9 Ch. 1; 29 L. T. 519; 22 W. R. 113.—C.A. SELBORNE, L.C. and MELLISH, L.J., *explained*.

Irish Land Commission v. Ryan [1900] 2 Ir. R. 563.—C.A. ASHBOURNE, L.C., FITZGIBBON and HOLMES, L.JJ.

Thorp v. Holdsworth (1876) 45 L. J. Ch. 406; 3 Ch. D. 637.—JESSEL, M.R., *referred to*.

Tildesley v. Harper (1878) 48 L. J. Ch. 495; 10 Ch. D. 398, 397; 39 L. T. 552; 27 W. R. 249.—C.A.

Linton v. Linton (or Litton v. Litton) (1876) 46 L. J. Ch. 64; 3 Ch. D. 793; 24 W. R. 962.—HALL, V.-C., *considered*.

Pascoe v. Richards (1881) 50 L. J. Ch. 337; 44 L. T. 87; 29 W. R. 330.—JESSEL, M.R.

Litton v. Litton and Pascoe v. Richards, *discussed*.

Elliot v. Harris (1886) 17 L. R. Ir. 351.—PORTER, M.R.

Litton v. Litton, *discussed*.

Elliot v. Harris, *followed*.

Andrews v. Andrews (1887) 19 L. R. Ir. 574.—CHATTERTON, V.-C.

Lumsden v. Winter (1882) 51 L. J. Q. B. 413; 8 Q. B. D. 650; 30 W. R. 751; 46 J. P. 487.—GROVE and LOPES, JJ., *distinguished*.

Graves v. Terry (1882) 9 Q. B. D. 170; 51 L. J. Q. B. 464; 30 W. R. 748.

FIELD, J.—*Lumsden v. Winter* differs from the present case, because no reply had been delivered; the pleadings at that stage were practically closed, and there were materials upon which the judgment could be maintained. No case has gone so far as to decide that where, as here, reply has been actually delivered, judgment can be signed against the plaintiff.—p. 172. CAVE, J. concurred.

Lumsden v. Winter.

Approved and followed, Thornton v. Clinch (1883) 10 L. R. Ir. 378.—DOWSE, B. and ANDREWS, J.; *discussed*, Elliot v. Harris (1886) 17 L. R. Ir. 351.—PORTER, M.R.

Hammer (Lord) v. Flight, 35 L. T. 127; 24 W. R. 346; *reversed*, (1877) 36 L. T. 279.—C.A.

Showell v. Bournon or Bowron (1883) 52 L. J. Q. B. 434; 48 L. T. 613; 31 W. R. 550.—HUDDLESTON, B., *commented on*.

Mersey Steamship Co. v. Shuttleworth (1883) 10 Q. B. D. 468; 48 L. T. 389; 31 W. R. 609; 5

Asp. M. C. 48.—Q.B.D.; and 11 Q. B. D. 531; 52 L. J. Q. B. 522; 48 L. T. 625; 32 W. R. 245.—C.A. COTTON, L.J.—The contention for the present plaintiffs is that whenever the claim of a plaintiff is admitted, he is entitled to have the money paid into Court. I cannot agree to that argument: a plaintiff is not entitled to have the money paid into Court, unless the counter-claim is frivolous and unsubstantial. I agree with the reasons and with the judgment of the Q. B. D. In *Showell v. Bournon* there may have been some special reason for granting the order, and in that case the decision will be right; but it seems to me that if the decision cannot be supported upon that ground, it was wrong.—p. 532. BOWEN, L.J. concurred.

Mersey Steamship Co. v. Shuttleworth, *discussed and applied*.

Westacott v. Devan (1891) 60 L. J. Q. B. 536; [1891] 1 Q. B. 774; 65 L. T. 263; 39 W. R. 363.—WILLS and V. WILLIAMS, JJ.

United Telephone Co. v. Donohue (1886) 55 L. J. Ch. 480; 31 Ch. D. 399; 54 L. T. 34; 34 W. R. 326.—C.A., *referred to*.

Andrews v. Patriotic Assurance Co. (1886) 18 L. R. Ir. 115.—ANDREWS, J.

Church Temporalities Commissioners v. M'Ivor (1879) 3 L. R. Ir. 438.—V.-C., *not applied*.

Elliot v. Harris (1886) 17 L. R. Ir. 351.—PORTER, M.R.

Cook v. Haynes, W. N. (1884) 75.—KAY, J., *referred to*.

London Steam Dyeing Co. v. Digby (1888) 57 L. J. Ch. 505; 58 L. T. 724; 36 W. R. 497.—NORTH, J.

London Steam Dyeing Co. v. Digby, *followed*.

Allen v. Oakey (1890) 62 L. T. 724.—NORTH, J.

Morgan v. Evans (1834) 3 Cl. & F. 159; 8

Bligh (N.S.) 777.—H.L. (E.), *followed*.

Birch v. Joy (1852) 3 H. L. Cas. 565, 604.—H.L. (E.).

Bennett v. Moore (1876) 1 Ch. D. 692; 45 L. J. Ch. 275; 24 W. R. 690.—V.-C., *followed*.

Gilbert v. Smith (1876) 2 Ch. D. 686; 45 L. J. Ch. 514; 35 L. T. 43; 24 W. R. 568.—C.A.; reversing MALINS, V.-C.

JAMES, L.J.—In *Bennett v. Moore*, Hall, V.-C., following the course adopted by the M.R. in other cases, upon a motion under Ord. XL r. 11, founded on admissions of fact in the answers, made an order amounting to a full decree for execution of the trusts of a settlement, with inquiries as to parties and accounts, and an order that a defaulting trustee should pay money into Court, and adjourned the further hearing of the cause without requiring any further prior hearing than the motion. The view thus adopted by other branches of the Court seems to me consistent with the spirit of the rules, and I think the course taken by the M.R. and Hall, V.-C. should be now followed.—p. 688.

Gilbert v. Smith and Bennett v. Moore, *referred to*.

Barker's Estate, In re, Hetherington v. Longrigg (1878) 48 L. J. Ch. 171; 10 Ch. D. 162; 27 W. R. 393.—HALL, V.-C.

PRINCIPAL AND AGENT.

1. CREATION OF RELATIONSHIP.
2. AGENTS OF DIFFERENT KINDS.
3. DURATION OF AGENCY.
4. RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT.
5. RIGHTS AND LIABILITIES OF PRINCIPAL AND THIRD PARTIES.
6. RIGHTS AND LIABILITIES OF AGENTS AND THIRD PARTIES.
7. POWER OF ATTORNEY.

1. CREATION OF RELATIONSHIP.

Pole v. Leask, 29 L. J. Ch. 888; 28 Beav. 562; 6 Jur. (N.S.) 1104.—M.R.: *reversed*, (1863) 33 L. J. Ch. 155; 9 Jur. (N.S.) 829; 8 L. T. 645.—H.L. (E.).

Audley (Lord) v. Pollard (1587) Cro. Eliz. 561; Moore 457; *nom.* Awdeley's Case, Poph. 176.—K.B., *principle approved*.
Podger's Case (1613) 9 Co. Rep. 104a.—K.B.

Audley (Lord) v. Pollard, *principle applied*.
Bird v. Brown (1850) 19 L. J. Ex. 154; 4 Ex. 786; 14 Jur. 132.—EX.

Audley (Lord) v. Pollard, *approved, but held inapplicable*.

Lyell v. Kennedy (1889) 59 L. J. Q. B. 268; 14 App. Cas. 437; 62 L. T. 77; 38 W. R. 353.—H.L. (E.).

LORD SELBORNE.—There is not here a *ius tertii*, complete before ratification, as there was in *Lord Audley v. Pollard* and *Bird v. Brown* (*infra*, col. 2506). Those cases are good law, but I think them inapplicable to a question between the self-constituted agent and the ratifying principal.—p. 279.

Audley (Lord) v. Pollard, *referred to*.
Dibbins v. Dibbins (1896) 65 L. J. Ch. 724; [1896] 2 Ch. 348; 75 L. T. 137; 44 W. R. 595.—CHITTY, J.

Saunderson v. Griffiths (1826) 4 L. J. (O.S.) K.B. 318; 5 B. & C. 909; 8 D. & R. 643.—K.B., *observations adopted*.

Bobbett v. Pinkett (1876) 45 L. J. Ex. 555; 1 Ex. D. 368, 375; 34 L. T. 851; 24 W. R. 711.—EX. D.; **Keighley v. Durant** (1901) 70 L. J. K. B. 662; [1901] A. C. 240; 84 L. T. 777.—H.L. (E.).

Wilson v. Tumman (1843) 12 L. J. C. P. 306; 6 Man. & G. 236; 6 Scott (N.R.) 894; 1 D. & L. 573.—C.P., *applied*.
Ancona v. Marks (1862) 31 L. J. Ex. 163; 7 H. & N. 686; 8 Jur. (N.S.) 516; 5 L. T. 753; 10 W. R. 251.—EX.

Wilson v. Tumman, *dictum adopted*.
Brook v. Hook (1871) 40 L. J. Ex. 50; 1 L. R. 6 Ex. 89, 96; 24 L. T. 34; 19 W. R. 506.—EX.; MARTIN, B. dissenting; **Morris v. Salberg** (1889) 58 L. J. Q. B. 275; 22 Q. B. D. 614, 620; 61 L. T. 283; 37 W. R. 469; 53 J. P. 772.—C.A.

Wilson v. Tumman, and **Woollen v. Wright** (1862) 31 L. J. Ex. 513; 1 H. & C. 554; 7 L. T. 73; 10 W. R. 715.—EX. CH., *considered*.

Durant v. Roberts (1900) 69 L. J. Q. B. 382; [1900] 1 Q. B. 629; 82 L. T. 217; 48 W. R. 476.—C.A.; *reversed* H.L., *infra*.

Wilson v. Tumman, *discussed and approved*.
Keighley v. Durant (1901) 70 L. J. K. B. 662; [1901] A. C. 240; 84 L. T. 777.—H.L. (E.).

Wilson v. Tumman, *See*
Connor v. Butler [1902] 2 Ir. R. 576, 596.—C.A.; and **O'Keefe v. Walsh** [1903] 2 Ir. R. 712.—K.B.D. and C.A.

Holland v. King (1848) 6 C. B. 727.—C.P., *followed*.
Dibbins v. Dibbins (1896) 45 L. J. Ch. 724; [1896] 2 Ch. 348; 75 L. T. 137; 44 W. R. 595.—CHITTY, J.

Bird v. Brown (1850) 19 L. J. Ex. 154; 4 Ex. 786; 14 Jur. 132.—EX., *distinguished*.
Hutchings v. Nynes (1863) 1 Moore P. C. (N.S.) 243; 10 Jur. (N.S.) 109; 9 L. T. 125.—P.C.

Bird v. Brown, *applied*.
Ainsworth v. Creeke (1868) 38 L. J. C. P. 58; L. R. 4 C. P. 476, 486; 19 L. T. 824; 17 W. R. 229; 1 Hopw. & C. 141.—C.P.; **Smart v. Pessol** (1874) 30 L. T. 632.—Q.B.

Bird v. Brown, *distinguished*.
Bolton v. Lambert (1889) 58 L. J. Ch. 425; 41 Ch. D. 295; 60 L. T. 687; 37 W. R. 434.—C.A.
COTTON, L.J.—*Bird v. Brown* . . . is distinguishable from this case. There it was held that the ratification could not operate to divest the ownership which had previously vested in the purchaser by the delivery and the passing of the possession of the goods before the ratification of the alleged stoppage *in transitu*.—p. 431.

Bird v. Brown, *approved, but held inapplicable*.

Lyell v. Kennedy (1889) 59 L. J. Q. B. 268; 14 App. Cas. 437; 62 L. T. 77; 38 W. R. 353.—H.L. (E.). *See supra*, col. 2505.

Bird v. Brown, *referred to*.
Portuguese Consolidated Copper Mines, In re, Badman, Ex parte (1890) 45 Ch. D. 16, 35; 63 L. T. 423; 39 W. R. 25; 2 Meg. 249.—C.A.

Bird v. Brown, *followed*.
Dibbins v. Dibbins (1896) 45 L. J. Ch. 724; [1896] 2 Ch. 348; 75 L. T. 137; 44 W. R. 595.—CHITTY, J.

Bird v. Brown, *considered and report questioned*.
Keighley v. Durant (1901).—H.L. (E.) (*infra*, col. 2507).

Bird v. Brown, *followed*.
Ford v. Newth (1901) 70 L. J. K. B. 459; [1901] 1 K. B. 683; 84 L. T. 354; 49 W. R. 345; 65 J. P. 391.—K.B.D.

Ancona v. Marks (1862) 31 L. J. Ex. 163; 7 H. & N. 686; 8 Jur. (N.S.) 516; 5 L. T. 753; 10 W. R. 251.—EX., *considered*.
Bolton v. Lambert (1889) 58 L. J. Ch. 425; 41 Ch. D. 295; 60 L. T. 687; 37 W. R. 434.—C.A.
COTTON, L.J.—It was said . . . that in that case there was a previously existing liability of the defendant towards some person. But the liability of the defendant to Ancona was established by Ancona's authorising and ratifying the act of the agent, and a previously existing liability to others did not affect the principle laid down.—p. 431.

Ancona v. Marks, *considered*.
Durant v. Roberts (1900).—C.A. (*infra*).

Watson v. Swan (1862) 31 L. J. C. P. 210; 11 C. B. (N.S.) 756.—C.P., *referred to*.
Browning v. Provincial Insurance Co. of Canada (1873) L. R. 5 P. C. 263; 28 L. T. 853; 21 W. R. 587.—P.C.

Watson v. Swann, *applied and considered*.
Ebsworth v. Alliance Marine Insurance Co. (1873) 42 L. J. C. P. 305; L. R. 8 C. P. 596, 610; 29 L. T. 479; 2 Asp. M. C. 125.—C.P.

Watson v. Swann, *referred to*.
Byas v. Miller (1897) 3 Com. Cas. 39.—MATHEW, J.

Watson v. Swann, *considered*.

Durant v. Roberts (1900).—C.A. (*infra*).

Durant v. Roberts (1900) 69 L. J. Q. B. 382; [1900] 1 Q. B. 629; 82 L. T. 217; 48 W. R. 476.—C.A.: *reversed nom. Keighley, Maxted & Co. v. Durant* (1901) 70 L. J. K. B. 662; [1901] A. C. 240; 84 L. T. 777.—H.L. (E.).

Keighley v. Durant (1901) 70 L. J. K. B. 662; [1901] A. C. 240; 84 L. T. 777.—H.L. (E.), *referred to*.

Connor v. Butler [1902] 2 Ir. R. 569.—K.B.D.

Keighley v. Durant, *dictum discussed*.

Hambro v. Burnand (1903) 72 L. J. K. B. 662; [1903] 2 K. B. 399; 89 L. T. 180; 51 W. R. 652; 8 Com. Cas. 252.—BIGHAM, J.: *reversed* (1904).—C.A.

Keighley v. Durant. *See*

O'Keefe v. Walsh [1903] 2 Ir. R. 712.—K.B.D. and C.A.

Lewis v. Read (1845) 14 L. J. Ex. 295; 13 M. & W. 834.—EX., *applied*.

Freeman v. Rosher (1849) 18 L. J. Q. B. 340; 13 Q. B. 780.—Q.B.

Carter v. St. Mary, Abbott's Vestry, 63 J. P. 487.—RIDLEY, J.; *reversed*, (1900) 64 J. P. 548.—C.A.

Fitzmaurice v. Bayley, 26 L. J. Q. B. 114; 6 El. & Bl. 868; 3 Jur. (N.S.) 264.—Q.B.; COMPTON, J. *dissenting*; *reversed on another ground*, (1858) 27 L. J. Q. B. 143; 8 El. & Bl. 664; 4 Jur. (N.S.) 506.—EX. CH.; *the latter decision affirmed*, (1860) 9 H. L. Cas. 78; 6 Jur. (N.S.) 1215; 8 W. R. 750.—H.L. (E.).

Fitzmaurice v. Bayley (1860) 9 H. L. Cas. 78; 6 Jur. (N.S.) 1215; 8 W. R. 750.—H.L. (E.). *See*

Wood v. Aylward (1888) 58 L. T. 662.—C.A.

2. AGENTS OF DIFFERENT KINDS.

Fenn v. Harrison (1790) 3 Term Rep. 357, 760; 3 C. C. 4 Term Rep. 177.—K.B.

Applied, **Coleman v. Riches** (1855) 16 C. B. 104; 3 C. L. R. 795; 24 L. J. C. P. 125; 1 Jur. (N.S.) 596; 3 W. R. 453.—C.P.; **Collen v. Gardner** (1856) 21 Beav. 540.—M.R.; *inapplicable*, **Baines v. Ewing** (1866) 35 L. J. Ex. 194; L. R. 1 Ex. 320, 324; 4 H. & C. 511; 14 L. T. 733; 14 W. R. 782.—EX.; *observations adopted*, **Baldry v. Bates** (1885) 52 L. T. 620.—HUDDLESTON, B.

Parnther v. Gaitskell (1811) 13 East 432.—K.B., *applied*.

Whitehead v. Tuckett (1812) 15 East 400; 13 R. R. 509.—K.B., *dictum adopted*.

Cotman v. Orton (1840) 10 L. J. Ch. 18; 1 Cr. & P. 304.—L.C.

Whitehead v. Tuckett, *adopted*.

Beaufort (Duke) v. Neeld (1845) 12 Cl. & F. 248; 9 Jur. 813.—H.L. (E.).

Neeld v. Beaufort (Duke) (1841) 5 Jur. 1123.—L.C.; *affirmed nom. Beaufort (Duke) v. Neeld* (1845) 12 Cl. & F. 248; 9 Jur. 813.—H.L. (E.).

Beaufort (Duke) v. Neeld (*supra*, in H.L.), *distinguished*.

Wheatley v. Bastow (1855) 24 L. J. Ch. 727, 732; 7 De G. M. & G. 261; 3 Eq. R. 865; 1 Jur. (N.S.) 1124; 3 W. R. 540.—L.JJ.

Beaufort (Duke) v. Neeld, *adopted*.

Collen v. Gardner (1856) 21 Beav. 540.—M.R.

Beaufort (Duke) v. Neeld, *discussed*.

Barrow v. Isaacs & Son (1890) 60 L. J. Q. B. 179; [1891] 1 Q. B. 417; 64 L. T. 686; 39 W. R. 338; 53 J. P. 517.—C.A.

KAY, J. J.—It is a decision of the highest tribunal that equity will not relieve when the mistake arises from negligence of the suitor who seeks its help.—p. 186.

Foster v. Pearson (1835) 4 L. J. Ex. 120; 1 C. M. & R. 849; 5 Tyr. 255.—EX.

Discussed, **Collis v. Hibernian Bank** (1893) 31 L. R. Ir. 261.—C.A.; *principle applied*, **Sheffield v. London Joint Stock Bank** (1888) 57 L. J. Ch. 986; 13 App. Cas. 33.—H.L. (E.); **London Joint Stock Bank v. Simmons** (1892) 61 L. J. Ch. 723; [1892] A. C. 201.—H.L. (E.); and **Bentinck v. London Joint Stock Bank** (1893) 62 L. J. Ch. 358; [1893] 2 Ch. 120.—NORTH, J.

Green v. Weaver (1827) 6 L. J. (O.S.) Ch. 1; 1 Sim. 404; 27 R. R. 214.—V.-C., *approved*.
Robinson v. Kitchin (1856) 25 L. J. Ch. 441; 8 De G. M. & G. 88; 2 Jur. (N.S.) 294; 4 W. R. 344.—L.JJ.

Conturier v. Hastie (1852) 8 Ex. 40; 22 L. J. Ex. 97.—EX.; *reversed*, 9 Ex. 102.—EX. CH.; *the latter decision affirmed on appeal*, (1856) 5 H. L. Cas. 673; 25 L. J. Ex. 253; 2 Jur. (N.S.) 1241.—H.L. (E.).

Conturier v. Hastie. *See*

The John Bellamy (1870) 39 L. J. Ad. 28; L. R. 3 A. & E. 129, 134; 22 L. T. 244.—ADM.; **Flect v. Murton** (1871) 41 L. J. Q. B. 49; L. R. 7 Q. B. 126, 132; 26 L. T. 181; 20 W. R. 97.—Q.B.; **Jolliffe v. Baker** (1883) 52 L. J. Q. B. 609; 11 Q. B. D. 255, 272; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.—W. WILLIAMS and SMITH, JJ.

Conturier v. Hastie, *discussed*.

Sutton v. Grey (1893) 63 L. J. Q. B. 633; [1894] 1 Q. B. 285; 9 R. 106; 69 L. T. 673; 42 W. R. 195.—C.A.

Conturier v. Hastie, *discussed and not applied*.

Harburg India Rubber Comb Co. v. Martin (1902) 71 L. J. K. B. 529; [1902] 1 K. B. 778; 86 L. T. 505; 50 W. R. 449.—C.A.

Conturier v. Hastie, *applied*.

Griffith v. Brymer (1903) 19 Times L. R. 434.—WRIGHT, J.

Grove v. Dubois (1786) 1 Term Rep. 112; 16 R. R. 664, n.—K.B., *disapproved*.
Morris v. Cleasby (1816) 4 M. & S. 566; 16 R. R. 544.

ELLENBOROUGH, C.J. (for the Court).—Lord Mansfield is made to say, in *Grove v. Dubois*, "that a commission *del credere* is an absolute engagement to the principal from the broker, and makes him liable in the first instance, that there is no occasion for the principal to communicate with the underwriter, though the law allows the principal for his benefit to resort to him as a collateral security." Some expressions nearly similar, and probably founded on them, have fallen from other judges in *Houghton v. Matthews* (3 Bos. & P. 489). With all the respect which is due to Lord Mansfield and those judges, we cannot accede to these propositions thus generally laid down without restriction or qualification. The doctrine contained in them, as so laid down, appears to us to reverse the relative situations of principal and factor, and to have a tendency to introduce uncertainty and confusion into the law on this subject.—p. 574.

Baring v. Corrie (1818) 2 B. & Ald. 187; 20 R. R. 383.—K.B., *approved and applied*.
Drakeford v. Piercy (1866) 7 B. & S. 515; 14 L. T. 403.—Q.B.

Baring v. Corrie, *dictum adopted*.
Fairlie v. Fenton (1870) 39 L. J. Ex. 107; L. R. 5 Ex. 169; 22 L. T. 373; 18 W. R. 700.—EX.

Baring v. Corrie, *adopted*.
Pearson v. Scott (1878) 47 L. J. Ch. 705; 9 Ch. D. 198; 38 L. T. 747; 26 W. R. 796.—FRY, J.; **Cooke v. Eshelby** (1887) 56 L. J. Q. B. 505; 12 App. Cas. 271, 275; 56 L. T. 673; 35 W. R. 629.—H.L. (E.).

3. DURATION OF AGENCY.

Phillips v. Jones (1888) 4 Times L. R. 401.—CHITTY, J., *followed*.
Overweg, In re; **Haas v. Durant** (1899) 69 L. J. Ch. 255; [1900] 1 Ch. 209; 81 L. T. 776.—BYRNE, J.

Smout v. Ilbery (1842) 12 L. J. Ex. 357; 10 M. & W. 1.—EX., *adopted*.
Oriental Bank Corporation, In re; **Guillemin, Ex p.** (1884) 54 L. J. Ch. 322; 28 Ch. D. 634, 641; 52 L. T. 167.—CHITTY, J.

Smout v. Ilbery, *considered and applied*.
Salton v. New Beeston Cycle Co. (1899) 69 L. J. Ch. 20; [1900] 1 Ch. 43; 81 L. T. 437; 48 W. R. 92; 7 Manson 74.—STIRLING, J.

Smout v. Ilbery, *held overruled*.
Halbot v. Lens (1900) 70 L. J. Ch. 125; [1901] 1 Ch. 344; 83 L. T. 702; 49 W. R. 214.
KEKEWICH, J.—The judgment in *Smout v. Ilbery*, which was delivered fifteen years before **Collen v. Wright** (27 L. J. Q. B. 215; 8 Bl. & Bl. 647), must, I think, be taken to be overruled by the latter case.—p. 127.

Smout v. Ilbery, *distinguished*.
Oliver v. Bank of England (1901) 70 L. J. Ch. 377; [1901] 1 Ch. 652; 84 L. T. 253; 49 W. R. 391; 65 J. P. 294.—KEKEWICH, J. (affirmed in C.A.).

Raleigh v. Atkinson (1840) 9 L. J. Ex. 206; 6 M. & W. 670.—EX., *applied*.
Smart v. Sandars (1845) 17 L. J. C. P. 258; 5 C. B. 895; 12 Jur. 751.—C.P.

4. RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT.

Coles v. Trecothick (1804) 9 Ves. 234; 1 Smith 233; 7 E. R. 167.—L.C. *See*
Kenney v. Wexham (1822) 6 Madd. 355;
Henderson v. Barnetwall (1827) 1 Y. & J. 387; 30 R. R. 799; **Williams v. Llewellyn** (1827) 2 Y. & J. 63, 69, n.; **Wood v. Midgley** (1854) 2 Sm. & G. 115, 124, n.; 23 L. J. Ch. 553; 2 W. R. 301.—L.J.J.; **Tottenham v. Green** (1863) 32 L. J. Ch. 201; 1 N. R. 466.—WOOD, V.-C.; **Seal v. Claridge** (1881) 50 L. J. Q. B. 316; 7 Q. B. D. 516; 44 L. T. 501; 29 W. R. 598.—C.A.; **Dyas v. Stafford** (1881) 7 L. R. 590; **Plowright v. Lambert** (1885) 52 L. T. 646, 653.—FIELD, J.; **Luddy's Trustee v. Peard** (1886) 55 L. J. Ch. 884; 33 Ch. D. 500; 55 L. T. 137; 35 W. R. 44.—KAY, J.

Burdett v. Willett (1708) 2 Vern. 638.—L.C. *See*
Pennell v. Deffell (1853) 23 L. J. Ch. 115; 4 De G. M. & G. 372; 18 Jur. 273; 1 W. R. 499.—E.J.J.

Chapman v. Derby (1689) 2 Vern. 117.—LORDS COMRS., *referred to*.
Bailey v. Finch (1871) 41 L. J. Q. B. 83; L. R. 7 Q. B. 34, 44; 25 L. T. 871; 20 W. R. 294.—Q.B.; **Middleton v. Pollock, Nugee, Ex parte** (1875) 44 L. J. Ch. 584; L. R. 20 Eq. 29, 34; 33 L. T. 240; 23 W. R. 766.—M.R.

Green v. Bartlett (1863) 32 L. J. C. P. 261; 14 C. B. (N.S.) 681; 8 L. T. 503; 11 W. R. 834.—C.P.
Explained, **Curtis v. Nixon** (1871) 24 L. T. 706.—C.P.; *applied*, **Oetzmann v. Emmott** (1887) 4 T. L. R. 10.—SMITH, J.

Wilkinson v. Alston (1879) 48 L. J. Q. B. 733; 41 L. T. 394; 44 J. P. 35.—C.A., *distinguished*.
Taplin v. Barrett (1889) 6 T. L. R. 30.—Q.B.D.

Bayley v. Chadwick, 36 L. T. 740.—COLERIDGE, C.J. and DENMAN, J.; *reversed*, (1878) 37 L. T. 593.—C.A.; *the latter decision reversed and the former restored*, (1878) 39 L. T. 429.—H.L. (E.).

Cash v. Kennion (1804) 11 Ves. 314.—L.C.; and **Cockerell v. Barber** (1810) 16 Ves. 461.—L.C., *considered*.
Manners v. Pearson (1898) 67 L. J. Ch. 304; [1898] 1 Ch. 581; 78 L. T. 432; 46 W. R. 498.—C.A. WILLIAMS, L.J. *dissenting*.

Rhodes v. Forwood, 31 L. T. 61.—EX.; *reversed*, (1875) 33 L. T. 314.—EX. CH.; *the latter decision reversed and the former restored*, (1876) 47 L. J. Ex. 396; 1 App. Cas. 256; 34 L. T. 890; 24 W. R. 1078.—H.L. (E.).

Rhodes v. Forwood (*supra* in H.L.), *distinguished*.
Turner v. Goldsmith (1891) 60 L. J. Q. B. 247; [1891] 1 Q. B. 544; 64 L. T. 301; 39 W. R. 547.—C.A.
LINDLEY, L.J.—In the two former cases [the

above case and *Taylor v. Caldwell*, 32 L. J. Q. B. 164] there was no express contract to employ the plaintiff, and the Court held that no such contract ought to be implied.—p. 250.

Rhodes v. Forwood, *considered*.

Turner v. Goldsmith, *distinguished*.

Turner v. Sawdon (1901) 70 L. J. K. B. 897; [1901] 2 K. B. 653; 85 L. T. 222; 49 W. R. 712.—C.A.: STIRLING, J., *doubting*.

SMITH, M.R.—Now this case is not like *Turner v. Goldsmith*, where the agent's remuneration was by commission. In such a case the employer must not prevent the agent from earning his commission. In this case the plaintiff had been serving the defendants as representative salesman for some time before the contract in question was entered into. The defendants agree to continue the plaintiff in their employment for four years and to pay him a salary of 200*l.* or 250*l.* a year, no more and no less. That is all this contract provides for. There is to be no payment by commission.—p. 899.

Rhodes v. Forwood and Turner v. Goldsmith, *explained*.

Northey v. Trevillion (1902) 7 Com. Cas. 201.—PHILLIMORE, J.

Rhodes v. Forwood, *distinguished*.

Turner v. Goldsmith, *referred to*.

Ogdens, Ltd. v. Nelson (1904) 73 L. J. K. B. 865; [1904] 2 K. B. 410.—C.A.

White v. Lincoln (Lady) (1803) 8 Ves. 363; 7 R. R. 71.—L.C., *principle applied*.

Gray v. Haig (1855) 20 Beav. 219, 235.—M.R.

White v. Lincoln (Lady), *inapplicable*.

Lee, In re, Neville, Ex parte (1868) L. R. 4 Ch. 43; 19 L. T. 435; 17 W. R. 108.—L.JJ.

PAGE-WOOD, L.J.—The solicitor had been employed by Mr. Neville as solicitor, and also as receiver of his rents. . . . He was also employed in specific operations for raising money on mortgage and by discounting bills. . . . The circumstances in *White v. Lincoln (Lady)* were quite different. Lord Eldon there pointedly rests his judgment on Jackson's being the Duke's general agent, bound in duty to him to keep regular accounts of his money transactions, and the same principle is indicated in Lord Rosslyn's previous order. The principle is founded on this, that, when you employ a man as general agent, he can receive money to an amount which you have no means of finding out unless he keeps regular accounts of his receipts and payments. So here, if no account of the rents had been furnished, Lee must have been charged with the full amount of the rental, and would have had to discharge himself. But the case is very different when a solicitor is employed to raise money by mortgage or by discounting a bill. The client there is aware of the whole transaction, and knows what the solicitor receives.—p. 45.

Harrington v. Victoria Graving Dock Co.

(1878) 47 L. J. Q. B. 594; 3 Q. B. D. 549; 39 L. T. 120; 26 W. R. 740.—Q.B.D., *referred to*.

Reg. v. Great Yarmouth J.J. (1882) 51 L. J. M. C. 39; 8 Q. B. D. 525; 30 W. R. 460.—Q.B.D.

Harrington v. Victoria Graving Dock Co.

Adopted, *Grant v. Gold Exploration &c., Syndicate* (1899) 69 L. J. Q. B. 150; [1900] 1 Q. B. 233; 82 L. T. 5; 48 W. R. 280.—C.A.;

O.C.

principle applied, *Bartram v. Lloyd* (1903) 19 T. L. R. 293.—BRUCE, J.

Michael v. Hart (1901) 70 L. J. K. B. 1000; [1901] 2 K. B. 867; 85 L. T. 548; 50 W. R. 154.—WILLS, J.; *affirmed*, (1902) 71 L. J. K. B. 265; [1902] 1 K. B. 482; 86 L. T. 474; 50 W. R. 308.—C.A.: *the latter decision affirmed on the facts*, 89 L. T. 422.—H.L. (E.).

Michael v. Hart, *distinguished*.

De Verges v. Sandeman (1902) 71 L. J. Ch. 328; [1902] 1 Ch. 579; 86 L. T. 269; 50 W. R. 404.—C.A.

Rogers v. Boehm (1799) 2 Esp. 702, *applied*.

Morrison v. Thompson (1874) 43 L. J. Q. B. 215; L. R. 9 Q. B. 480; 30 L. T. 869; 22 W. R. 859.—Q.B.

Salomons v. Pender (1865) 3 H. & C. 639, 642; 34 L. J. Ex. 95; 11 Jur. (N.S.) 432; 12 L. T. 267; 13 W. R. 637.—EX., *observations adopted*.

Tetley v. Shand (1871) 25 L. T. 658; 20 W. R. 206.—C.P.

Salomons v. Pender, *referred to*.

Robinson v. Mollett (1875) 44 L. J. C. P. 362; L. R. 7 H. L. 802, 829; 33 L. T. 544.—H.L. (E.); *reversing* 20 W. R. 544.—EX. CH.

Salomons v. Pender, *applied*.

Andrew v. Ramsay (1903) 72 L. J. K. B. 865; [1903] 2 K. B. 635; 89 L. T. 450; 52 W. R. 126.—ALVERSTONE, C.J., WILLS and CHANNELL, JJ.

Tetley v. Shand (1871) 25 L. T. 658; 20

W. R. 206.—C.P., *distinguished*.
Borrowman v. Free (1878) 48 L. J. Q. B. 65; 4 Q. B. D. 500.—C.A.

Lowther v. Lowther (1806) 13 Ves. 95,

102.—L.C.; **Murphy v. O'Shea** (1845) 2 Jo. & Lat. 422.—L.C. (IR.); and **Molony v. Kernan** (1842) 2 Dr. & War. 31, 38.—L.C., *applied*.

Dunne v. English (1874) L. R. 18 Eq. 524; 31 L. T. 75.—JESSEL, M.R.

Dunne v. English (*supra*), *applied*.

Guy v. Churchill (1889) 60 L. T. 740.—CHITTY, J. (*affirmed*, 62 L. T. 132.—C.A.); *Battison v. Hobson* (1896) 65 L. J. Ch. 695; [1896] 2 Ch. 403; 74 L. T. 689; 44 W. R. 615.—STIRLING, J.; *Costa Rica Ry. v. Forwood* (1901) 70 L. J. Ch. 385; [1901] 1 Ch. 746; 84 L. T. 279; 49 W. R. 337.—C.A.

Allfrey v. Allfrey (1849) 1 Mac. & G. 87;

1 H. & Tw. 179; 13 Jur. 269.—L.C.; *affirming* 17 L. J. Ch. 30; 10 Beav. 353; 11 Jur. 981.—M.R., *followed*.

Williamson v. Barbour (1877) 50 L. J. Ch. 147; 9 Ch. D. 529; 37 L. T. 698.—JESSEL, M.R.

Allfrey v. Allfrey, *distinguished*.

Williamson v. Barber, *applied*.

Gething v. Keighley (1878) 48 L. J. Ch. 45; 9 Ch. D. 547, 550; 27 W. R. 283.—M.R.

Williamson v. Barber, *referred to*.

Webb, In re, Lambert v. Still (1893) 63 L. J. Ch. 145; [1894] 1 Ch. 73, 84; 70 L. T. 318.—C.A.

King v. Anderson, L. R. 8 Eq. 147.—V.-C.: *reversed*, (1874) L. R. 8 Eq. 625.—C.A.

Walter v. King (1897) 13 Times L. R. 270.
—C.A., *considered*.
Macoun v. Erskine (1901) 70 L. J. K. B. 973;
[1901] 2 K. B. 493; 85 L. T. 372.—C.A.

Walter v. King and Macoun v. Erskine,
discussed.
Erskine v. Sachs (1901) 70 L. J. K. B. 978;
[1901] 2 K. B. 504; 85 L. T. 385.—C.A.

Turnbull v. Garden (1869) 38 L. J. Ch. 331;
20 L. T. 218.—V.-C., *followed*.
Spain (Queen) v. Parr (1869) 39 L. J. Ch.
73; 21 L. T. 555; 18 W. R. 110.—V.-C.; and
Morison v. Thompson (1874) 43 L. J. Q. B. 215;
L. R. 9 Q. B. 480; 30 L. T. 869; 22 W. R. 859.
—Q.B.

Turnbull v. Garden and Spain (Queen) v.
Parr (1869) 39 L. J. Ch. 73; 21 L. T.
555; 18 W. R. 110.—V.-C., *distinguished*.
Baring v. Stanton (1876) 3 Ch. D. 502; 35
L. T. 652; 25 W. R. 237.—C.A.

MELLISH, L.J.—I think we do not at all over-
rule the case of *Turnbull v. Garden*, because, as
I understand it, in that case the party from
whom the discount was taken was not in the
position of Messrs. Baring, but was an agent for
somebody else. The real brokers were willing to
allow a discount, and then the question was
whether the next agent could keep it in his own
pocket, or was bound to give it to the principal,
which was an entirely different question.

Turnbull v. Garden, *referred to*.
Bartram v. Lloyd (1903) 88 L. T. 286; 19
T. L. R. 293.—BRUCE, J.; *reversed*, 20 T. L. R.
281.—C.A.

Great Luxemburg Ry. v. Magnay (1858) 25
Beav. 586, 593; 4 Jur. (N.S.) 839; 6 W. R.
711.—M.R., *commented upon and dis-*
tinguished.

Kimber v. Barber (1872) L. R. 8 Ch. 56; 27
L. T. 526; 21 W. R. 65.—SELBORNE, L.C.

SELBORNE, L.C.—*Great Luxemburg Ry. v.*
Magnay, is, assuming it to be well decided, a case
in its circumstances very different from the
present case. On the view which I take of the
facts in this case, there is no difficulty in granting
the relief sought.—p. 59.

Kimber v. Barber, 26 L. T. 654.—M.R.;
reversed, (1872) L. R. 8 Ch. 56; 27 L. T. 526; 21
W. R. 65.—L.C.

Kimber v. Barber, *applied*.
Morison v. Thompson (1874) 43 L. J. Q. B. 215;
L. R. 9 Q. B. 480; 30 L. T. 869; 22 W. R. 859.—
Q.B.

Great Western Insurance Co. of New York
v. Cunliffe, 30 L. T. 113.—V.-C.; *reversed*, (1874)
43 L. J. Ch. 741; L. R. 9 Ch. 525; 30 L. T.
661.—L.JJ.

Great Western Insurance Co. of New York v.
Cunliffe, *followed*.
Baring v. Stanton (1876) 3 Ch. D. 502; 35 L. T.
652; 25 W. R. 237.—C.A.

Great Western Insurance Co. of New York v.
Cunliffe, *distinguished*.
Bartram v. Lloyd (1903) 88 L. T. 286; 19
T. L. R. 293.—BRUCE, J. (*reversed*, C.A.).

Lupton v. White (1808) 15 Ves. 432; 10
R. R. 94, *principle applied*.
Gray v. Haig (1855) 20 Beav. 219, 235.—M.R.

Lupton v. White, *referred to*.
Walsh v. Secretary of State for India (1863)
32 L. J. Ch. 585; 10 F. L. L. Cas. 367; 2 N. R.
339; 9 Jur. (N.S.) 757; 8 L. T. 839; 11 W. R.
823.—H.L. (E.).

Lupton v. White, *adopted*.
Cook v. Addison (1869) 38 L. J. Ch. 322; L. R.
7 Eq. 466, 470; 20 L. T. 212; 17 W. R. 480.—
V.-C.; **Oatway, In re** (1903) 72 L. J. Ch. 575;
[1903] 2 Ch. 356.—JOYCE, J.

Dinwiddie v. Bailey (1801) 6 Ves. 136.—L.C.,
observations adopted.
Shepard v. Brown (1862) 9 Jur. (N.S.) 195; 7
L. T. 499; 11 W. R. 162.—V.-C.

Dinwiddie v. Bailey, *explained*.
Hemmings v. Pugh (1863) 4 Giff. 456; 9 Jur.
(N.S.) 1124; 9 L. T. 283; 12 W. R. 44.—V.-C.

Mackenzie v. Johnston (1819) 4 Madd. 373,
417.—V.-C., *applied*.
Williams v. Trye (1854) 23 L. J. Ch. 860; 18
Jur. 442; 2 W. R. 314.—M.R.

Mackenzie v. Johnston, *observations adopted*.
Shepard v. Brown (1862) 9 Jur. (N.S.) 195;
7 L. T. 499; 11 W. R. 162.—V.-C.

York and North Midland Ry. v. Hudson
(1853) 22 L. J. Ch. 529; 16 Beav. 485; 1
W. R. 187, 510.—M.R.

Followed, **Williams v. Trye** (1854) 23 L. J. Ch.
860; 18 Jur. 442; 2 W. R. 314.—M.R.; and
Stalton v. Carron Co. (1857) 27 L. J. Ch.
89; 24 Beav. 346; 3 Jur. (N.S.) 1235.—M.R.;
observations adopted, **Faure Electric, & Co.,**
In re (1888) 58 L. J. Ch. 48; 40 Ch. D. 141; 59
L. T. 918; 37 W. R. 116.—KAY, J. *And see*
ante, vol. i., col. 424.

Gray v. Haig (1854) 20 Beav.—M.R.,
principle applied.
Stainton v. Carron Co. (1857) 27 L. J. Ch. 89;
24 Beav. 346; 3 Jur. (N.S.) 1235.—M.R.

Phillips v. Phillips (1852) 9 Hare 471.—
V.-C., *followed*.
Shepard v. Brown (1862) 9 Jur. (N.S.) 195; 7
L. T. 499; 11 W. R. 162.—V.-C.

Phillips v. Phillips, *explained*.
Hemmings v. Pugh (1863) 4 Giff. 456; 9 Jur.
(N.S.) 1124; 9 L. T. 283; 12 W. R. 44.—V.-C.

Phillips v. Phillips, *explained*.
Makepeace v. Rogers (1865) 4 De G. J. & S.
649; 34 L. J. Ch. 396; 11 Jur. (N.S.) 314; 12
L. T. 221; 13 W. R. 566.—L.JJ.

TURNER, L.J.—*Phillips v. Phillips* went upon
the footing of the account there in question being
a current account between the parties, and the
bill made no case of general agency, alleging only
an isolated agency transaction connected with
the sale by the defendant of some railway shares
belonging to the plaintiff. That case had no
reference to a case of general account between
principal and agent; and if his language in
giving judgment in that case had been in fact
such as to give rise to misapprehension, such
misapprehension ought to have been dispelled by

what he had said in the subsequent case of *Padwick v. Stanley* (9 Hae 623), when adverting to the want of correlation between the rights of a principal and an agent to sue in Chancery.—p. 654.

Phillips v. Phillips, *distinguished*.
St. Aubyn v. Smart (367) L. R. 5 Eq. 183, 189; 17 L. T. 439; 16 W. R. 394.—V.-C.; *affirmed*, (1868) L. R. 3 Ch. 646; 19 L. T. 192; 16 W. R. 1095.—L.JJ.

Rothschild v. Brookman (1831) 5 Bli. (N.S.) 165; 2 Dow & Cl. 188.—H.L. (E.); *affirming* **S. C. name. Brookman v. Rothschild**, 7 L. J. (O.S.) Ch. 163; 3 Sim. 153; 30 R. R. 147.—V.-C., *applied*.
Tetley v. Shand (1871) 25 L. T. 658; 20 W. R. 206.—C.P.; Robinson v. Mollett (1875); 44 L. J. C. P. 362; L. R. 7 H. L. 802, 819; 33 L. T. 544.—H.L. (E.).

Rothschild v. Brookman.
Distinguished, Waddell v. Blockey (1879) 48 L. J. Q. B. 517; 4 Q. B. D. 678, 680; 41 L. T. 458; 27 W. R. 931.—C.A.; *followed*, Hamilton v. Young (1881) 7 L. R. 1r. 289, 299.—V.-C.; *referred to*, Cape Breton Co., In re (1884) 26 Ch. D. 221, 228.—PEARSON, J.

Rothschild v. Brookman, *explained*.
Ladywell Mining Co. v. Brookes (1887) 56 L. J. Ch. 684; 35 Ch. D. 400, 408; 56 L. T. 677; 35 W. R. 785.—C.A.

COTTON, L.J.—It was said that in that case, after the transaction had been completed, so that the sale and purchase could not be set aside, relief was granted, and the judgment was approved by the House of Lords. But if we look at the judgment in that case it assumes throughout a setting aside of the transactions which were impeached, and it was a case where that could be done.—p. 686.

Rothschild v. Brookman, *followed*.
Guy v. Churchill (1889) 60 L. T. 740, 743.—CHITTY, J.

Smith v. Leveaux, 1 H. & M. 123.—V.-C.; *reversed*, (1863) 2 De G. J. & S. 1; 33 L. J. Ch. 167; 3 N. R. 18; 9 Jur. (N.S.) 1140; 9 L. T. 313; 12 W. R. 31.—L.JJ.

Smith v. Leveaux, *adopted*.
Moxon v. Bright (1869) L. R. 4 Ch. 292, 294; 20 L. T. 961.—HATHERLEY, J.C.

Waters v. Shaftesbury (Earl) 12 Jur. (N.S.) 311; 14 L. T. 184; 14 W. R. 572.—V.-C.; *reversed in part*, (1867) 15 L. T. 489; 15 W. R. 289.—L.C.

Cornwal v. Wilson (1750) 1 Ves. sen. 509.—L.C., *distinguished*.
Devaux v. Conolly (1849) 19 L. J. C. P. 71; 8 C. B. 640.—C.P.

Cox v. Prentice (1815) 3 M. & S. 344; 16 R. R. 288.—K.B., *distinguished*.
Devaux v. Conolly (1849) 19 L. J. C. P. 71; 8 C. B. 640.—C.P.; and Beavor v. Marler (1898) 14 T. L. R. 289.—Q.B.D.

Frietas v. Dos Santos (1827) 1 Y. & J. 574.—EX. EQ., *applied*.
Grenville-Murray v. Clarendon (Earl) (1869) 39 L. J. Ch. 222; L. R. 9 Eq. 11.—ROMILLY, M.R.

Frietas v. Dos Santos, *referred to*.
Vanner v. Frost (1870) 39 L. J. Ch. 626.—M.R.

Thorne v. Tilbury (1858) 27 L. J. Ex. 407; 3 H. & N. 534.—EX., *observation adopted*.
Biddle v. Bond (1865) 34 L. J. Q. B. 137; 6 B. & S. 225; 11 Jur. (N.S.) 425; 12 L. T. 178; 13 W. R. 561.—Q.B.

Weymouth v. Boyer (1792) 1 Ves. 416, 426.—BULLER, J. (for L.C.), *dictum held overruled*.

Blogg v. Johnson (1867) 36 L. J. Ch. 859; L. R. 2 Ch. 225; 16 L. T. 306; 15 W. R. 626.

CHELMSFORD, L.C.—It was objected that the plaintiff was not entitled to interest because it was not prayed by the bill; but the *dictum* of Buller, J. in *Weymouth v. Boyer* was overruled by the later authorities of *Pearse v. Green* (1 Jac. & W. 135) and *Johnson v. Prendergast* (28 Beav. 480).—p. 860.

Hardwicke v. Vernon (1799) 4 Ves. 411; 4 R. R. 244.—L.C.; **S. C.** (1808) 14 Ves. 504.—L.C.

Dictum adopted, Turner v. Burkinshaw (1867) L. R. 2 Ch. 488, 491; 15 W. R. 753.—L.C.; *distinguished*, Rishon v. Grissell (1870) L. R. 10 Eq. 393, 397; 18 W. R. 821.—JAMES, V.-C.; *applied*, Harsant v. Blaine (1887) 56 L. J. Q. B. 511, 513.—C.A.

Pearse v. Green (1819) 1 Jac. & W. 135, 140; 20 R. R. 258.—M.R., *adopted*.

Blogg v. Johnson (1867) 36 L. J. Ch. 859; L. R. 2 Ch. 225, 229; 16 L. T. 306; 15 W. R. 626.—L.C. (*see extract, supra*); Turner v. Burkinshaw (1867) L. R. 2 Ch. 488; 15 W. R. 753.—CHELMSFORD, L.C.

Pearse v. Green, *distinguished*.
Rishon v. Grissell (1870) L. R. 10 Eq. 393; 18 W. R. 821.—V.-C.

JAMES, V.-C.—These shipping cases appear to have been actual partnerships, where there was a fund to be divided which was the common property of all. In this case the plaintiff and defendant were not partners, and there is no such common fund.—p. 396.

Pearse v. Green, *followed*.
Harsant v. Blaine (1887) 56 L. J. Q. B. 511.—C.A.

Boorman v. Brown (1842) 11 L. J. Ex. 437; 3 Q. B. 511; 2 G. & D. 793.—EX. CH.; *affirmed*, (1844) 11 Cl. & F. 1.—H.L. (E.).

Explained, Courtenay v. Earle (1850) 20 L. J. C. P. 7; 10 C. B. 73; 15 Jur. 15.—C.P.; *observations cited*, Baylis v. Lintott (1873) 42 L. J. C. P. 119; L. R. 8 C. P. 345; 28 L. T. 666.—C.P.; *adopted*, Hyman v. Nye (1881) 6 Q. B. D. 685; 44 L. T. 919; 45 J. P. 554.—Q.B.D.; *referred to*, Steljes v. Ingram (1903) 19 T. L. R. 534.—PHILLIMORE, J.

Goupy v. Harden (1816) 7 Taunt. 159; 2 Marsh. 454; Holt 342; 17 R. R. 178, n.—C.P., *referred to*.
Fry v. Hill (1817) 7 Taunt. 397; 18 R. R. 512.—C.P.

Goupy v. Harden, *explained*.
Castrique v. Buttigieg (1855) 10 Moore P. C. 94; 4 W. R. 445.—P.C.

Mackersy v. Ramsays (1843) 9 Cl. & F. 818.—H.L. (SC.), *applied*.
Prince v. Oriental Bank (1878) 47 L. J. P. C. 42; 3 App. Cas. 325; 38 L. T. 41; 26 W. R. 543.—P.C.; and Meyerstein v. Eastern Agency Co. (1885) 1 T. L. R. 595.—HUDDLESTON, B.

Pidgeon v. Burslem (1849) 18 L. J. Ex. 193; 3 Ex. 465.—EX., *followed*.
Smith v. Lindo (1858) 27 L. J. C. P. 335; 5 C. B. (N.S.) 587; 4 Jur. (N.S.) 974; 6 W. R. 748.—EX. CH.

Taylor v. Stray (1857) 26 L. J. C. P. 175, 287; 2 C. B. (N.S.) 197; 3 Jur. (N.S.) 964; 5 W. R. 761.—EX. CH., *applied*.
Chapman v. Shepherd (1867) 36 L. J. C. P. 113; L. R. 2 C. P. 228, 238; 15 L. T. 477; 15 W. R. 314.—C.P.; **Cropper v. Cook** (1868): L. R. 3 C. P. 194, 198; 17 L. T. 603; 16 W. R. 596.—C.P.

Curtis v. Barclay (1826) 5 B. & C. 141; 7 D. & R. 539; 4 L. J. (O.S.) K. B. 82.—K.B., *applied*.

The Lord of the Isles, **Williams v. Knight** (1894) 64 L. J. Adm. 15; [1894] P. 342; 11 R. 736; 71 L. T. 92; 7 Asp. M. C. 500.—BRUCE, J.

Lacey v. Hill, Crowley's Claim (1874) 43 L. J. Ch. 551; L. R. 18 Eq. 182; 30 L. T. 484; 22 W. R. 586.—M.R., *applied*.

Blundell, In re, Blundell v. Blundell (1888) 57 L. J. Ch. 780; 40 Ch. D. 370, 377; 58 L. T. 933; 36 W. R. 779.—STIRLING, J.; The Lord of the Isles, **Williams v. Knight** (1894) 64 L. J. P. 15; [1894] P. 342; 71 L. T. 92; 7 Asp. M. C. 500; 11 R. 736.—BRUCE, J.

Frixione v. Tagliaferro (1856) 4 W. R. 373.—P.C., *distinguished*.

Halbroun v. International Horse Agency and Exchange (1902) 72 L. J. K. B. 90; [1903] 1 K. B. 270; 88 L. T. 232.—BRUCE, J.

BRUCE, J.—*Frixione v. Tagliaferro* . . . has little or no bearing on the present case. . . . It appeared that the agent [in that case] communicated, at every step in the action brought against him at Genoa, with the respondents and acted with their approval; that he treated the action as their action and defended it for them; and that the respondents approved of his conduct on their behalf . . . the principals in that case had authorised their agent to defend the proceedings in that Court, and so had rendered themselves liable for the consequences resulting from the judgment of the Court. In the present case the plaintiff has failed, in my opinion, in making out a good cause of action against the defendants.—p. 92.

Sutton v. Tatham (1839) 8 L. J. Q. B. 210; 10 A. & E. 27.—Q.B., *followed*.

Pollock v. Stables (1848) 17 L. J. Q. B. 352; 12 Q. B. 765; 5 Railw. Cas. 352.—Q.B.

Bayliffe v. Butterworth (1847) 1 Ex. 425.—EX.

Followed, **Pollock v. Stables** (1848).—Q.B. (*supra*); *dictum adopted*, **Ireland v. Livingstone** (1866) 36 L. J. Q. B. 50; L. R. 2 Q. B. 99; 15 L. T. 206.—Q.B. (reversed, EX. CH., but restored, H.L.; see col. 2526).

Humble v. Langston (1841) 10 L. J. Ex. 442; 7 M. & W. 517.—EX., *principle applied*.

Sayles v. Blane (1849) 19 L. J. Q. B. 19; 14 Q. B. 205; 6 Railw. Cas. 79; 14 Jur. 87.—Q.B.

Humble v. Langston, distinguished.
Bayley v. Wilkins (1849) 18 L. J. C. P. 273; 7 C. B. 886.—C.P.; and **Walker v. Bartlett** (1856) 25 L. J. C. P. 263; 18 C. B. 845; 2 Jur. (N.S.) 648; 4 W. R. 681.—EX. CH.

Humble v. Langston, dictum considered.
Moule v. Garrett (9 L. J.) 39 L. J. Ex. 69; L. R. 5 Ex. 132, 137*applied*. L. T. 343; 18 W. R. 697.—EX. (affirmed, L. J. CH.).

Humble v. Langston, considered.
Masted v. Pain (171) 40 L. J. Ex. 57; L. R. 6 Ex. 132, 153 OF 24 L. T. 149; 19 W. R. 527.—EX. CH.

Humble v. Langston, referred to.
Kellock v. Enthoven (1874) 43 L. J. Q. B. 90; L. R. 9 Q. B. 241, 246; 30 L. T. 68; 22 W. R. 322.—EX. CH.

Duncan v. Hill, L. R. 6 Ex. 255; 40 L. J. Ex. 187; 25 L. T. 59; 19 W. R. 894.—EX.: reversed on one point, (1873) 42 L. J. Ex. 179; L. R. 8 Ex. 242; 29 L. T. 268; 21 W. R. 797.—EX. CH.

Duncan v. Hill (*supra*, in EX. CH.); *referred to*.

Lacey v. Hill, Scrimgeour's Claim (1873) 42 L. J. Ch. 657; L. R. 8 Ch. 921, 925; 29 L. T. 281; 21 W. R. 857.—L.JJ.

Duncan v. Hill, distinguished.
Hartas v. Ribbons (1889) 58 L. J. Q. B. 187; 22 Q. B. D. 254; 37 W. R. 278.—C.A.

● **ESHER, M.R.**—The present case is, in my opinion, clearly distinguishable from *Duncan v. Hill*. In the present case the plaintiff, a member of the London Stock Exchange, was instructed by the defendant to enter into bargain on the Stock Exchange for the purchase of certain stock and shares for the defendant. . . . The shares and stocks in question had been carried over to the 14th of October, but before that day—namely, on the 12th of October—the plaintiff became a defaulter on the Stock Exchange. . . . The defendant, instead of throwing over the plaintiff as his broker by dealing directly with the jobbers himself, or by selecting another broker, elected to treat the plaintiff as still acting as his broker, and so altered the circumstances of the plaintiff by continuing the plaintiff's liability to the jobbers. There was therefore a new contract between the defendant and the plaintiff, under which the defendant was bound to indemnify the plaintiff: or, if you will, the old contract to the same effect was left standing. . . . That being so, this case is the same as the ordinary case, and the defendant . . . is bound to indemnify the plaintiff. p. 189.

Duncan v. Hill and Lacey v. Hill, Scrimgeour's Claim, discussed.

Hartas v. Ribbons, distinguished.
Ellis v. Pond (1897) 67 L. J. Q. B. 345; [1898] 1 Q. B. 426; 78 L. T. 125.—C.A. See judgments.

Duncan v. Hill, adopted.
Beckhuson v. Hamlet (1900) 69 L. J. Q. B. 431; [1900] 2 Q. B. 18; 82 L. T. 459.—KENNEDY, J. (affirmed, C.A.).

Read v. Anderson (1884) 53 L. J. Q. B. 532; 13 Q. B. D. 779; 51 L. T. 55; 32 W. R. 950.—C.A., *alluded to*.

Leigh v. Dickson (1884) 54 L. J. Q. B. 18; 15 Q. B. D. 60, 64; 52 L. T. 790; 33 W. R. 539.—C.A.

Read v. Anderson, applied.
Seymour v. Bridge (1885) 54 L. J. Q. B. 347; 14 Q. B. D. 460.—MATHEW, J.

Read v. And, *assured*.
Bridger v. Savage (1885) 54 L. J. Q. B. 464;
 15 Q. B. D. 363; 53 L. T. 29; 33 W. R. 891;
 49 J. P. 725.—C.A.

Read v. Anderson, *distinguished*.
Perry v. Barnett (1885) 54 Q. B. D. 467.—
GROVE, J.; *affirmed*, 54 L. J. Q. B. 466; 15
 Q. B. D. 388; 53 L. T. 585.—C.A.

GROVE, J.—[On the ground of the ignorance
 of the defendant of the Stock Exchange usage,
 knowledge of which, according to his lordship, is
 essential to bring the case within the authority
 of *Read v. Anderson*.]

**Read v. Anderson, *dissented from, but fol-
 lowed*.**

Cohen v. Kittell (1889) 58 L. J. Q. B. 241; 22
 Q. B. D. 680; 60 L. T. 932; 37 W. R. 400; 53
 J. P. 469.—Q.B.D.

**Read v. Anderson. *See now* Gaming Act,
 1892 (55 & 56 Vict. c. 9, s. 1).**

Read v. Anderson, *considered*.
Tatam v. Reeve (1892) 62 L. J. Q. B. 30;
 [1893] 1 Q. B. 44; 5 R. 83; 67 L. T. 683; 41
 W. R. 174; 57 J. P. 118.—Q.B.D.

Read v. Anderson, *discussed*.
Burge v. Ashley (1900) 69 L. J. Q. B. 538;
 [1900] 1 Q. B. 744; 82 L. T. 518; 48 W. R. 438.
 —C.A. SMITH, COLLINS, and ROMER, L.JJ.

Read v. Anderson, *referred to*.
Lennox v. Stoddart (1902) 71 L. J. K. B. 747;
 [1902] 2 K. B. 21; 87 L. T. 283; 66 J. P. 469.
 —C.A.

Seymour v. Bridge (1885) 54 L. J. Q. B.
 347; 14 Q. B. D. 460.—MATHEW, J., *dis-
 tinguished*.

Perry v. Barnett (1885) 54 Q. B. D. 467.—
GROVE, J.; *affirmed*, 54 L. J. Q. B. 466; 15
 Q. B. D. 388; 53 L. T. 585.—C.A.

Bridger v. Savage (1885) 54 L. J. Q. B. 464;
 15 Q. B. D. 363; 53 L. T. 129; 33 W. R.
 891; 49 J. P. 725.—C.A., *referred to*.

Cohen v. Kittell (1889) 58 L. J. Q. B. 241; 22
 Q. B. D. 680; 60 L. T. 932; 37 W. R. 400; 53
 J. P. 469.—Q.B.D.; and *Galland v. Hall* (1888)
 4 T. L. R. 761.—C.A.

Mace v. Cadell (1774) Cowp. 232.—K.B.,
referred to.

Whitfield v. Brand (1847) 16 L. J. Ex. 103;
 16 M. & W. 282.—EX.

Mace v. Cadell, *adopted*.
Cooke v. Hemming (1868) 37 L. J. C. P. 179;
 L. R. 3 C. P. 334, 357; 18 L. T. 772; 16 W. R.
 903.—C.P.

5. RIGHTS AND LIABILITIES OF PRINCIPAL AND THIRD PARTIES.

Rights of Principal against Third Party.

Fitzherbert v. Mather (1785) 1 Term Rep.
 12; 1 R. R. 134.

Gladstone v. King (1813) 1 M. & S. 35; 14
 R. R. 392, *recognised and upheld*.

Proudfoot v. Montefiore (1867) 36 L. J. Q. B.
 225; 8 B. & S. 510; L. R. 2 Q. B. 511; 16 L. T.
 585; 15 W. R. 920.—Q.B.

**Fitzherbert v. Mather, Gladstone v. King,
 and Proudfoot v. Montefiore, *observed*
upon.**

Stribley v. Imperial Marine Insurance Co.

(1876) 45 L. J. Q. B. 396; 1 Q. B. D. 507, 511;
 34 L. T. 281; 24 W. R. 701; 3 Asp. M. C. 134.—
 Q.B.D.

**Fitzherbert v. Mather, Gladstone v. King,
 and Proudfoot v. Montefiore, *observed*
upon.**

Blackburn v. Vigors (1887) 57 L. J. Q. B. 114;
 12 App. Cas. 531; 57 L. T. 730; 36 W. R. 449;
 6 Asp. M. C. 216.—H.L. (E.).

LORD HALSBURY, L.C.—Whatever may be said
 of the logic of that case [*Gladstone v. King*],
 which acquitted the captain of all ill intention
 but decided upon the ground that otherwise
 owners might direct their captains to remain
 silent, and which upon a policy lost or not lost
 assumes any antecedent damage to have been an
 implied exception out of the policy—it does not
 proceed upon any such ground as the C. A. ap-
 peared to rely on here. . . . I can quite under-
 stand that . . . the owner of the ship cannot
 escape the necessity of being acquainted with
 his ship and its history because he has committed
 to others—his captain or his general agent for
 the management of his shipping business—the
 knowledge which the underwriter has a right to
 assume the owner possesses when he comes to
 insure his ship. With respect to agency so
 limited, I am not disposed to differ with the pro-
 position laid down by Chief Justice Cockburn
 in *Proudfoot v. Montefiore*. A part of this pro-
 position is "that the insurer is entitled to assume
 as the basis of the contract between him and the
 assured, that the latter will communicate to him
 every material fact of which the assured has,
 or in the ordinary course of business ought to
 have, knowledge." I think these last words are
 the cardinal words, and contemplate such an
 agency as I have described above. I am unable,
 however, to see that the present case is governed
 by any such principle. A broker is employed
 to effect a particular insurance. While so
 employed he receives material information; he
 does not effect the insurance, and he does not
 communicate the information. How is it pos-
 sible to suggest that the assured could rely upon
 the communication to the principal of every
 piece of information acquired by any agent
 through whom the assured has unsuccessfully
 endeavoured to procure an insurance? . . . In
 this case, I think the agency of the broker had
 ceased before the policy sued upon was effected.
 The principal himself, and the broker through
 whom the policy sued on was effected, were both
 admitted to be unacquainted with any material
 fact which was not disclosed. I cannot but
 think that the somewhat vague use of the word
 "agent" leads to confusion. Some agents so far
 represent the principal that in all respects their
 acts and intentions and their knowledge may
 truly be said to be the acts, intentions, and
 knowledge of the principal. . . . In *Fitzherbert*
v. Mather the consignor and shipper of the
 goods insured was the agent whose knowledge
 was in question. In *Gladstone v. King* the
 master of the ship was the agent; and in *Proud-*
foot v. Montefiore the agent was the accepted
 representative of the principal in effect trading
 and acting for him. . . .—p. 117.

Blackburn v. Vigors (1886) 55 L. J. Q. B.
 347; 17 Q. B. D. 553; 54 L. T. 852; 5 Asp.
 M. C. 597.—C.A. Esher, M.R., LINDLEY and
 LOPES, L.JJ.; *reversed*, (1887) 57 L. J. Q. B.

114; 12 App. Cas. 531; 57 L. T. 730; 37 W. R. 449; 6 Asp. M. C. 216.—H.L. (E.).

Blackburn v. Vigors (*supra*. in H.L.). *considered*.

Blackburn v. Haslam (1888) 57 L. J. Q. B. 479; 21 Q. B. D. 144; 59 L. T. 407; 36 W. R. 855; 6 Asp. M. C. 326.—POLLOCK, B. and CHARLES, J. POLLOCK, B. (for the Court).—Although the opinion was expressed in that case that it was not the duty of the agents to communicate to their principals the information which they had received, we take that opinion as applying to the particular facts before the House, which showed that before the negotiation for the policy sued upon had commenced, all connection of the plaintiff with his former brokers had ceased; and we cannot suppose it would be intended to apply to the facts proved in the present case, which showed that, so far from the connection with the principals and their brokers ceasing, the brokers used the name of the principals to continue the negotiation, and the principals adopted this act, and themselves continued and carried out what their brokers had commenced.—p. 482.

Blackburn v. Vigors, *principle applied*.

Wilson v. Salamandra Assurance Co. (1903) 8 Com. Cas. 129, 132.—BRUCE, J.

Thomson v. Clydesdale Bank (1893) 62 L. J. P. C. 61; [1893] A. C. 282; 1 R. 255; 67 L. T. 156.—H.L. (SC.), *referred to*.

Shields v. Bank of Ireland (1900) [1901] 1 Ir. R. 222.—PORTER, M.R.; and Bank of New South Wales v. Goulburn Valley Butter Co. (1902) 71 L. J. P. C. 112; [1902] A. C. 543; 87 L. T. 88.—P.C.

Bridges v. Garrett (1869) 38 L. J. C. P. 242; L. R. 4 C. P. 580; 21 L. T. 141.—C.P.; *reversed*, (1870) 39 L. J. C. P. 251; L. R. 5 C. P. 451; 22 L. T. 448; 18 W. R. 815.—EX. CH.

Bridges v. Garrett (*supra*, EX. CH.), *commented on*.

Pearson v. Scott (1878) 47 L. J. Ch. 705; 9 Ch. D. 198; 38 L. T. 767; 26 W. R. 796.

FRY, J.—I think . . . that the law stands as it certainly stood before that case, that a person who owes money to an agent, knowing him to be an agent, must pay in that manner as to facilitate the agent in transmitting the money to his principal, and the payer cannot pay that agent by a settler at the account, in which the payer himself gets the benefit of the payment, as took place in this case.—p. 207.

Bridges v. Garrett, *distinguished*.

Crossley v. Magniac (1893) [1893] 1 R. 202; 67 L. T. 798; 41 W. R. 598.—Ch. 594;

ROMER, J.—The case of *Bridges v. Garrett* . . . is clearly distinguishable. There the payment was made to a person entitled to receive it in respect of the moneys which the person clearly in it was paid was entitled to receive on at to whom his principal and in respect of the amount of he was so entitled to receive. The only question which arose there was because the payment included other moneys, and was made by a crossed cheque; but it was held that the payment was not the less one in cash payment authorised, merely because it included other moneys, or because it was paid by a crossed cheque which was duly cashed.—p. 601. *sed*

Bridges v. Garrett, *distinguished*.

Pape v. Westacott (1893) 63 L. J. Q. B. 222; [1894] 1 Q. B. 272; 69 R. 55; 70 L. T. 18; 42 W. R. 181.—C.A.

Hodgson v. Anderson (1825) 3 B. & C. 842;

3 D. & L. 733; *followed*. Hamilton v. Spottiswoode (1849) 18 L. J. Ex. 393; 4 Ex. 300.—EX. CH.

Catterall v. Hind

1 C. P. 186; 1 H. & L. 35 L. J. C. P. 161; L. R. 14 L. T. 102; 14 V. R. 267; 12 Jur. (N.S.) 488; (1871) L. R. 2 C. P. 371.—C.P.; *reversed*, 368.—EX. CH.

Barrett v. Deane

distinguished (1828) M. & M. 200.—K.B., *Graves v. May*. COLERIDGE, C.J. *stated* (1883) 1 Cab. & E. 73.—

Barker v. G

414; 1 Greenwood (1837) 2 Y. & C. Ex. 1088.—EX.; *Vanley v. Cassan* (1847) 11 Jur. 705; 9 Ch. D. 198; 38 L. T. 747; 26 W. R. 796.

—FRY, J.: *distinguished*, Shanks, In re, Swinbanks, Ex. Ch. D. 525; *parte* (1879) 48 L. J. Bk. 120; 11 adopted, 40 L. T. 825; 27 W. R. 898.—C.A.; KAY, J. *Poupe v. Collyer* (1890) 62 L. T. 927.—

Van

—M.R.; *Blagrove v. Blagrove* (1843) 6 Beav. 565. Jur. 93; *affirmed*, (1847) 17 L. J. Ch. 45; 11 5.—L.C.

Wandaleur v. Blagrove, *referred to*.

ROMER, J. *Cockerell* (1860) 29 L. J. Ch. 816.—H.L., M.R. (reversed, L.C., but restored, (E)).

Thorold v. Smith (1706) 11 Mod. 87.—Q.B., *referred to*.

Sykes v. Giles (1840) 9 L. J. Ex. 106; 5 M. & W. 645.—EX. *followed*.

Williams v. Evans (1866) 35 L. J. Q. B. 111; L. R. 1 Q. B. 352; 13 L. T. 753; 14 W. R. 330.—Q.B.

Liability of Principal to Third Party.

Henderson v. Williams (1894) 64 L. J. Q. B.

308; [1895] 1 Q. B. 521; 14 R. 375; 72 L. T. 98; 43 W. R. 274.—C.A.

Considered and approved, Farquharson v. King (1901).—H.L. (E.), (*infra*); *referred to*, Herdman v. Wheeler (1901) 71 L. J. K. B. 270; [1902] 1 K. B. 361; 86 L. T. 48; 50 W. R. 300.—K.B.D.

Farquharson v. King (1901) 70 L. J. K. B.

985; [1901] 2 K. B. 697; 85 L. T. 264; 49 W. R. 673.—C.A.; STIRLING, L.J. *dissenting*; *reversed*, (1902) 71 L. J. K. B. 667; [1902] A. C. 325; 86 L. T. 810; 51 W. R. 94.—H.L. (E.).

Summers v. Solomon (1857) 7 El. & B. 879;

26 L. J. Q. B. 301; 3 Jur. (N.S.) 962; 5 W. R. 660.—Q.B., *disapproved*. Hambro v. Hull and London Fire Insurance Co. (1858) 3 H. & N. 787; 28 L. J. Ex. 62.—EX. BRAMWELL, B.—I cannot assent to the law as laid down in that case.—p. 794.

Summers v. Solomon, *expressed and distinguished*.

Hambro v. Burnand (1903) 72 L. J. K. B. 662; [1903] 2 K. B. 399; 89 L. T. 180; 51 W. R. 652.—BIGHAM, J. (reversed, C.A.).

Hawtayne v. Bourn224; 7 M. & W. 59.
adopted.

—Cox v. Midland Ry. (1849) 18 L. J. Ex. 65; 3 Ex. 268; 13 Jur. 65.—EX.; Cunningham, In re, Simpson's Claim (1887) 57 L. J. Ch. 169; 36 Ch. D. 532; 58 L. T. 16.—NORTH, J.; and Jacobs v. Morris (1902) 71 L. J. Ch. 363; [1902] 1 Ch. 516; 86 L. T. 275; 50 W. R. 371.—C.A.

Edmunds v. Bushell (1865) 35 L. J. Q. B. 20; L. R. 1 Q. B. 97; 12 Jur. (N.S.) 332.—Q.B., *discussed and distinguished.*

Miles' Claim, Adanson's Fibre Co. In re (1874) 43 L. J. Ch. 732; L. R. 9 Ch. 635, 647; 31 L. T. 9; 22 W. R. 889.—L.J.J.

MELLISH, L.J.—In my opinion that is no authority at all on the case now before us.—p. 736.

Edmunds v. Bushell, *distinguished.*

Yorkshire Banking Co. v. Beaton (1879) 48 L. J. C. P. 428; 4 C. P. D. 204; 40 L. T. 654; 27 W. R. 911.—DENMAN and LOPES, JJ.

Edmunds v. Bushell, *followed.*

Watteau v. Fenwick (1892) [1893] 1 Q. B. 346; 5 R. 143; 67 L. T. 831; 41 W. R. 222; 56 J. P. 839.—COLERIDGE, C.J. and WILLS, J.

Brocklesby v. Temperance Permanent Building Society (1895) 64 L. J. Ch. 433; [1895] A. C. 173; 11 R. 159; 72 L. T. 477; 43 W. R. 606; 59 J. P. 676.—H.L. (E.), *applied.*

Lloyd's Bank v. Bullock (1896) 65 L. J. Ch. 680; [1896] 2 Ch. 192.—CHITTY, J.; Thurstan v. Nottingham Permanent Benefit Building Society (1901) 71 L. J. Ch. 83; [1902] 1 Ch. 1.—C.A.; Herdman v. Wheeler (1901) 71 L. J. K. B. 270; [1902] 1 K. B. 361.—K.B.D.; and Rimmer v. Webster (1902) 71 L. J. Ch. 561; [1902] 2 Ch. 163.—FARWELL, J.

Brocklesby v. Temperance Permanent Building Society, *inapplicable.*

Farquharson v. King (1902).—H.L. (E.) (*supra*, col. 2522).

Mare v. Charles (1856) 5 E. & B. 978; 25 L. J. Q. B. 119; 2 Jur. (N.S.) 234; 4 W. R. 267.—Q.B., *followed.*

Herald v. Connah (1876) 34 L. T. 885.—EX. D.

Mare v. Charles, *distinguished.*

Atkins v. Wardle (1889) 58 L. J. Q. B. 377, 379; 61 L. T. 23.—DENMAN, J.

Martyn v. Kingsly (1702) Pre. Ch. 209, *referred to.*

Beaufort (Duke) v. Neeld (1845) 12 Cl. & F. 248, 290; 9 Jur. 813.—H.L. (E.).

Pickering v. Busk (1812) 15 East 38; 13 R. R. 364.—K.B., *applied.*

Coleman v. Riches (1855) 24 L. J. C. P. 125; 16 C. B. 104; 3 C. L. R. 795; 1 Jur. (N.S.) 596; 3 W. R. 453.—C.P.; Collen v. Gardner (1856) 21 Beav. 540.—M.R.; Brady v. Todd (1861) 30 L. J. C. P. 223; 9 C. B. (N.S.) 592; 4 L. T. 212; 9 W. R. 483.—C.P.

Pickering v. Busk, *referred to.*

Cole v. North Western Bank (1875) 44 L. J. C. P. 233; L. R. 10 C. P. 354, 364; 32 L. T. 733.—EX. CH.

Pickering v. Busk, *distinguished.*

Johnson v. Crédit Lyonnais (1877) 47 L. J. C. P. 241; 3 C. P. D. 32, 37; 37 L. T. 637; 26 W. R. 195.—C.A.

COCKBURN, C.J.—In *Pickering v. Busk* the purchaser had himself expressly directed that the goods should be entered in the broker's name. In the present case the plaintiff has simply remained passive; he has left things as he found them at the time of his purchase.—p. 246.

Dyer v. Pearson (1824) 3 B. & C. 38; 4 D. & R. 648; 27 R. R. 286.—K.B. *See*

Cole v. North-Western Bank (1875) 44 L. J. C. P. 233; L. R. 10 C. P. 354, 364; 32 L. T. 733.—EX. CH.

Dyer v. Pearson, *considered and not adopted.*

Johnson v. Crédit Lyonnais (1877) 47 L. J. C. P. 241; 3 C. P. D. 32; 37 L. T. 637; 26 W. R. 195.—C.A.

COCKBURN, C.J.—It is to be observed that the Chief Justice here [in the above case] states the proposition in anything but positive terms.—p. 247.

Dyer v. Pearson, *held inapplicable.*

Farquharson v. King (1902).—H.L. (E.) (*see* col. 2522).

Mollett v. Robinson (1870) 39 L. J. C. P. 290; L. R. 5 C. P. 646; 23 L. T. 185.—C.P.; WILLES and KEATING, JJ. *dissenting; affirmed*, (1872) 41 L. J. C. P. 65; L. R. 7 C. P. 84; 26 L. T. 207; 20 W. R. 544.—EX. CH.; *the latter decision reversed nom. Robinson v. Mollett* (1875) 44 L. J. C. P. 362; L. R. 7 H. L. 802; 33 L. T. 544.—H.L. (E.).

Robinson v. Mollett (*supra*, in C.P.), *considered.*

Tetley v. Shand (1871) 25 L. T. 658; 20 W. R. 206.—C.P.

Robinson v. Mollett (*supra*, in EX. CH.), *referred to.*

Armstrong v. Stokes (1872) 41 L. J. Q. B. 253; L. R. 7 Q. B. 598, 605; 26 L. T. 872; 21 W. R. 52.—Q.B.

Robinson v. Mollett, *distinguished.*

Rogers, In re, Rogers, Ex parte (1880) 15 Ch. D. 207; 43 L. T. 163; 29 W. R. 29.—C.A.

JAMES, L.J.—There is no ground whatever for the contention that the case has anything to do with *Robinson v. Mollett*, where a broker was selling his own goods to his principal. This is the ordinary common case of a broker employed by a person who is speculating on the Stock Exchange, and authorised by his client to pay his losses, and actually paying them.—p. 212.

Robinson v. Mollett, *applied.*

Perry v. Barnett (1885) 54 L. J. Q. B. 466; 15 Q. B. D. 388, 394; 53 L. T. 585.—C.A.; Antisell v. Doyle [1899] 2 Ir. R. 275, 285.—Q.B.D.; Beckhuson v. Hamblet (1900).—KENNEDY, J. (*infra*, col. 2525); and Anderson v. Beard (1900).—MATHEW, J. (*infra*, col. 2525).

Robinson v. Mollett, *distinguished and dicta explained.*

Levitt v. Hamblet (1901) 70 L. J. K. B. 520; [1901] 2 K. B. 53; 84 L. T. 633; 6 Com. Cas. 79.—C.A. SMITH, M.R., COLLINS and ROMER, L.JJ. COLLINS, L.J.—In that case the Court was dealing with a custom by which the plaintiff having no knowledge of it was held not to be

bound. In this case we are dealing with the custom of the Stock Exchange, with which all the parties must be taken to be cognisant. I give no opinion whether in any future case that may arise that will make any difference, and I will treat this case as though the principle laid down in *Robinson v. Mollett* applied. I have come to the opinion that the difficulty raised in that case does not exist in the one before us. When it came to the last carrying over, which is the only one we are concerned with, it was a purchase by the broker on behalf of his principal of the shares that were carried over.

ROMER, L.J.—I would add one remark about what was said with reference to certain statements made by Lord Chelmsford in *Robinson v. Mollett* about a mere intention of appropriation not establishing privity. I think that the effect that was sought to be given to that statement of Lord Chelmsford, as if it were a decision that the intention was always immaterial, cannot be supported for the reason given during the argument, that the appropriation in that case would have involved the taking of a part out of the whole bulk.

Robinson v. Mollett, distinguished.

Scott v. Godfrey (1901) 70 L. J. K. B. 954; [1901] 2 K. B. 726; 85 L. T. 415; 50 W. R. 61; 6 Com. Cas. 226.

BIGHAM, J.—The judgment of Lord Chelmsford in that case (in which the rest of the lords concurred) proceeded, I think, upon the view which he took of the particular facts.

Robinson v. Mollett, explained.

Matvieff v. Crossfield (1903) 51 W. R. 365; 8 Com. Cas. 120.—KENNEDY, J.

Beckhusen v. Hamblet (1900) 69 L. J. Q. B. 431; [1900] 2 Q. B. 18; 82 L. T. 459; 5 Com. Cas. 216.—KENNEDY, J.: *affirmed*, (1901) 70 L. J. K. B. 600; [1901] 2 K. B. 73; 84 L. T. 617; 49 W. R. 481; 6 Com. Cas. 141.—C.A.

Beckhusen v. Hamblet, dictum followed and approved.

Anderson v. Beard (1900) 69 L. J. Q. B. 610; [1900] 2 Q. B. 260; 82 L. T. 714; 5 Com. Cas. 261.—MATHEW, J.

Beckhusen v. Hamblet, considered.

Scott v. Godfrey (1901) 70 L. J. K. B. 954; [1901] 2 K. B. 726; 85 L. T. 415; 50 W. R. 61; 6 Com. Cas. 226.

BIGHAM, J.—With much of that [the judgment of Kennedy, J. in the above case] I entirely agree, but I do not agree with the view that there is no contract created. In my opinion a contract was created in *Beckhusen v. Hamblet*. . . . That case went to the C.A., and the appeal was dismissed on the ground that the existence of the alleged usage had not been established; the C.A., however, said that the decision was not to prejudice the right of the plaintiffs to raise the question of the existence and validity of the usage in another action.

Anderson v. Beard (supra), referred to.

Levitt v. Hamblet (1901) 70 L. J. K. B. 520; [1901] 2 K. B. 53; 84 L. T. 638; 6 Com. Cas. 79.—C.A. SMITH, M.R., COLLINS and ROMER, L.JJ.

Levitt v. Hamblet, considered.

Scott v. Godfrey (1901).—BIGHAM, J. (*supra*).

Union Corporation v. Charrington (1903) 8

Com. Cas. 99.—BIGHAM, J., *followed*.

Benjamin v. Barnett (1903) 8 Com. Cas. 244.—KENNEDY, J.

Briad v. Livingstone, 36 L. J. Q. B. 50; L. Rep. B. 99; 15 L. T. 206.—Q.B.; *reversed*, (1870) 39 L. J. Q. B. 282; L. R. 5 Q. B. 516.—EX. CH.; *the latter decision reversed*, (1872) 41 L. J. Q. B. 201; L. R. 5 H. L. 395; 27 L. T. 79.—H.L. (H.).

Ireland v. Livingstone (supra, in Q.B.), followed.

Johnston v. Kershaw (1867) 36 L. J. Ex. 44; L. R. 2 Ex. 32; 15 L. T. 485; 15 W. R. 354.—EX.

Ireland v. Livingstone (supra, in H.L.), dictum applied.

Jefferson v. Querner (1874) 30 L. T. 867, 869.—Q.B.

Ireland v. Livingstone, observations explained.

Cassaboglou v. Gibbs (1883) 52 L. J. Q. B. 538; 11 Q. B. D. 797; 48 L. T. 850; 32 W. R. 138.—C.A.

BRETT, M.R.—It is argued that . . . in *Ireland v. Livingstone*, he [Lord Blackburn] said that "an agent who in thus executing an order ships goods to his principal is, in contemplation of law, a vendor to him." That is no doubt a high authority; but Lord Blackburn has never said that as long as the contract of principal and agent remains executory the principal can sue the agent as though the contract were one of purchase and sale, and as though the parties to it were in the relation of vendor and purchaser.—p. 541.

Ireland v. Livingstone, distinguished.

Lindsay v. Barter (1885) 2 T. L. R. 4.—C.A.

Ireland v. Livingstone, applied.

Loring v. Davis (1886) 55 L. J. Ch. 725; 32 Ch. D. 625; 54 L. T. 899; 34 W. R. 701.—CHITTY, J.; Dufourcet v. Bishop (1886) 56 L. J. Q. B. 497; 18 Q. B. D. 373, 374; 56 L. T. 633; 6 Asp. M. C. 109.—DENMAN, J.: Bank of England v. Vagliano (1891) 60 L. J. Q. B. 147; [1891] A. C. 107; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.—H.L. (E.): Dupont v. British South Africa Co. (1901) 18 Times L. R. 24.—KENNEDY, J.

Montaignac v. Shitta (1890) 15 App. Cas. 357.—P.C., *distinguished*.

Jacobs v. Morris (1900) 70 L. J. Ch. 183; [1901] 1 Ch. 261; 84 L. T. 112; 40 W. R. 365.—FARWELL, J. (*affirmed*, C.A., *infra*, col. 2533); and Hambro v. Burnand (1903) 72 L. J. K. B. 662; [1903] 2 K. B. 399.—BIGHAM, J. (*reversed*, C.A.).

Alexander v. Mackenzie (1848) 6 C. B. 766.—C.P., *considered*.

Smith v. McQuire (1858) 27 L. J. Ex. 465; 3 H. & N. 554; 6 W. R. 726.—EX.

Alexander v. Mackenzie, adopted.

Charles v. Blackwell (1877) 46 L. J. C. P. 368; 2 C. P. D. 151; 36 L. T. 195; 25 W. R. 472.—C.A.

Stagg v. Elliott (1862) 31 L. J. C. P. 260; 12 C. B. (N.S.) 373; 9 Jur. (N.S.) 158; 6 L. T. 433; 10 W. R. 647.—C.P., *distinguished*.

Land Credit Co. of Ireland, In re, Overend, Gurney & Co., Ex parte (1869) 39 L. J. Ch. 27; L. R. 4 Ch. 460, 468; 20 L. T. 641; 17 W. R. 689.—L.JJ.; Charles v. Blackwell (1877) 46 L. J. C. P. 368; 2 C. P. D. 151, 159; 36 L. T. 195; 25 W. R. 472.—C.A.

Stagg v. Elliott, adopted.

Bryant v. La Banque du Peuple (1893) 1 P. C. 68; [1893] A. C. 170; 1 R. 336; 61 W. R. 600.—P.C.

Hyde v. Johnson (1836) 5 L. J. C. P. 111; 3 Scott 289; 2 Bing. N. C. 770; 2

Hodges 94.—C.P., followed.
Williams v. Mason (1873) 28 L. T. 232; 21 W. R. 386.—C.P.

Hyde v. Johnson, referred to.

Reg. v. Kent J.J. (1873) 42 L. J. M. C. 112; 1 L. R. 8 Q. B. 305, 307; 21 W. R. 635.—Q.B.

Hyde v. Johnson and Williams v. Mason (*supra*), recognised.

Swift v. Jewsbury (1874) 43 L. J. Q. B. 56; 1 L. R. 9 Q. B. 301; 30 L. T. 31; 22 W. R. 319.—EX. CH.

Hyde v. Johnson, explained.

Whitley, Partners, In re, Callan, Ex parte (1886) 55 L. J. Ch. 540; 32 Ch. D. 337; 54 L. T. 912; 34 W. R. 505.—C.A.

COTTON, J.J.—Now there is nothing in the Companies Act expressly requiring that the memorandum and articles must be signed by the subscribers with their own hands, but it is contended by the appellant that the Act, according to its true construction, requires personal signature. Sect. 6 of the Companies Act, 1862, provides that "any seven or more persons associated for any lawful purpose may by subscribing their names to a memorandum of association and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company;" and by sect. 11 it is provided that the memorandum of the association "shall be signed by each subscriber in the presence of, and attested by, one witness at the least." The appellant contends that as nothing is said in the statute about signature by an agent, these expressions must mean that the signature is to be affixed by the subscriber himself. In support of this *Hyde v. Johnson* is referred to. That case, I think, was decided on the special ground that the enactment which the Court was then considering was one of a series of enactments which made a distinction between a man's signing by himself and signing by an agent, and it was therefore considered that where signature by an agent was not mentioned the Act required signature by the man himself. That may be quite right, but in the present case the enactment we have to construe is not one of a series of enactments some of which refer to a signature by an agent, and I think it would be wrong to hold that an enactment simply referring to signature is not satisfied by signature by means of an agent.

Addison v. Gandasequi (1812) 4 Taunt. 574; 13 R. R. 689.—C.P., distinguished.

Seymour v. Pychlau (1817) 1 B. & Ald. 14.—K.B.

Paterson v. Gandasequi (1812) 15 East 62; 13 R. R. 68.—K.B.; and **Addison v. Gandasequi, referred to.**

Thomson v. Davenport (1829) 9 B. & C. 78; 4 M. & Ry. 110.—EX. CH.

Paterson v. Gandasequi and Addison v. Gandasequi, adopted.

Smyth v. Anderson (1849) 18 L. J. C. P. 109; 7 C. B. 21; 13 Jur. 211.—C.P.

Paterson v. Gandasequi, not applied.

Emnell v. Alexandra (1854) 23 L. J. Q. B. 171; 21 L. & Bl. 283; 18 Jur. 627.—Q.B.

Paterson v. Gandasequi and Addison v. Gandasequi, referred to.

Calder v. Dobell (1871) 40 L. J. C. P. 224; 1 L. R. 6 C. P. 486, 494; 25 L. T. 129; 19 W. R. 978.—EX. CH.

Addison v. Gandasequi, cited.

Armstrong v. Stokes (1872) 41 L. J. Q. B. 253; 1 L. R. 7 Q. B. 598; 26 L. T. 872; 21 W. R. 52.—Q.B.

Addison v. Gandasequi, referred to.

Elbinger Actien Gesellschaft v. Claye (1873) 42 L. J. Q. B. 151; 1 L. R. 8 Q. B. 313; 28 L. T. 405.—Q.B.

Paterson v. Gandasequi and Addison v. Gandasequi, adopted.

Curtis v. Williamson (1874) 44 L. J. Q. B. 27; 1 L. R. 10 Q. B. 57; 31 L. T. 678; 23 W. R. 236.—Q.B.

Paterson v. Gandasequi, observations adopted.

Flinn v. Hoyle (1893) 63 L. J. Q. B. 1.—C.A.
FISHER, M.R., LOPES and KAY, L.JJ.

Kymer v. Suwercroft (1807) 1 Camp. 109.—

K.B., discussed and distinguished.
Smyth v. Anderson (1849) 18 L. J. C. P. 102; 7 C. B. 21; 13 Jur. 211.—C.P.

Kymer v. Suwercroft, applied.

MacClure v. Schemeil (1871) 20 W. R. 168.—EX.

Kymer v. Suwercroft, observed upon.

Armstrong v. Stokes (1872) 1 L. R. 7 Q. B. 598; 41 L. J. Q. B. 253; 26 L. T. 872; 21 W. R. 52.—Q.B.

BLACKBURN, J.—The marginal note appended to this case is perhaps too general, even in the case of a broker, as is pointed out by Maule, J., in *Smyth v. Anderson* (7 C. B. 39; 18 L. J. C. P. 114); but what was actually decided was probably right.—p. 607.

Kymer v. Suwercroft, adopted.

Irvine v. Watson (1879) 49 L. J. Q. B. 239; 5 Q. B. D. 102, 108; 42 L. T. 51; 28 W. R. 353.—Q.B.D. (affirmed, C.A., *infra*, col. 2530); *Davison v. Donaldson* (1882) 9 Q. B. D. 623, 631; 47 L. T. 564; 31 W. R. 277; 4 Asp. M. C. 601.—C.A. JESSEL, M.R., LINDLEY and BOWEN, L.JJ.

Thomson v. Davenport (or Davenport v. Thomson) (1829) 7 L. J. (O.S.) K. B. 134;

9 B. & C. 78; 4 M. & Ry. 110.—K.B., adopted.
Smyth v. Anderson (1849) 18 L. J. C. P. 109; 7 C. B. 21; 13 Jur. 211.—C.P.

Thomson v. Davenport, dissented from.

Heald v. Kenworthy (1855) 24 L. J. Ex. 76; 10 Ex. 739; 3 C. L. R. 612; 1 Jur. (N.S.) 70; 3 W. R. 176.—EX. PARKE, B.

Thomson v. Davenport, distinguished.

Calder v. Dobell (1871) 40 L. J. C. P. 224; 1 L. R. 6 C. P. 486; 25 L. T. 129; 19 W. R. 978.—EX. CH.

Thomson v. Davenport, applied.

MacClure v. Schemeil (1871) 20 W. R. 168.—EX.; *Armstrong v. Stokes* (1872) 41 L. J. Q. B.

253; L. R. 7 Q. B. 598, 607; 26 L. T. 872; 1 W. R. 52.—Q.B.; Elbinger Actien-Gesellschaft v. Claye (1873) L. R. 8 Q. B. 313, 317; 42 L. T. 405.—Q.B.; Curtis v. Williamson (1874) 44 L. J. Q. B. 27; L. R. 10 Q. B. 57; 31 L. T. 678; 23 W. R. 236.—Q.B.

Thomson v. Davenport, *inapplicable*.

Eastman v. Harry (1876) 33 L. T. 800, 802; 3 Asp. M. C. 117.—C.A.

Thomson v. Davenport, *referred to*.

Gadd v. Houghton (1876) 46 L. J. Ex. 71; 1 Ex. D. 357, 360; 35 L. T. 222; 24 W. R. 975.—C.A.; Concordia Chemische Fabrik v. Squire (1876) 34 L. T. 824.—C.A.; Ogden v. Hall (1879) 40 L. T. 751.—EX. D.

Thomson v. Davenport, *dissented from*.

Irvine v. Watson (1880) 5 Q. B. D. 414; 49 L. J. Q. B. 531; 42 L. T. 810.—C.A.

BAGGALLAY, L.J.—If the *dicta* in *Thomson v. Davenport* are to be taken as strictly correct, they certainly go a long way to support the defendant's contention. But it is to be observed that they were mere *dicta*, and quite unnecessary to the decision. The largeness of those *dicta* has since then been dissented from by Parke, B., in the case of *Heald v. Kenworthy*, and with that dissent I entirely agree. . . . But reliance is placed upon the case of *Armstrong v. Stokes*, as establishing the doctrine that the buyer is released from liability if he pays the agent at a time at which the seller still gives credit to the agent. And it is contended that, as that state of facts existed here, the defendants are accordingly discharged. But I think that is not the true view of the decision in *Armstrong v. Stokes*. It must be accepted with reference to the particular circumstances of that case. There, at the time of the payment by the principal to the brokers, the sellers still give credit to the brokers, and to the brokers alone.—p. 418.

BRAMWELL and BRETT, L.JJ. to the same effect.

Thomson v. Davenport, *referred to*.

Darlow v. Shuttleworth (1902) 71 L. J. K. B. 460; [1902] 1 K. B. 721; 86 L. T. 524; 50 W. R. 668; 66 J. P. 516.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Thomson v. Davenport, *observations adopted*.

British Homes Assurance Corporation v. Paterson (1902) 71 L. J. Ch. 872; [1902] 2 Ch. 404; 86 L. T. 826; 50 W. R. 612.—PARWELL, J.

Smith (or Smyth) v. Anderson (1849) 18 L. J.

C. P. 109; 7 C. B. 21; 13 Jur. 211.—C.P., *referred to*.

MacClure v. Schemeil (1871) 20 W. R. 168.—

EX.; *Armstrong v. Stokes* (1872) 41 L. J. Q. B. 253; L. R. 7 Q. B. 598, 607; 26 L. T. 872; 21 W. R. 52.—Q.B.; Hutton v. Bullock (1873) L. R. 8 Q. B. 331, 334; 28 L. T. 764.—Q.B.; *affirmed*, (1874) L. R. 9 Q. B. 572; 30 L. T. 648; 22 W. R. 956.—EX. CH.; Irvine v. Watson (1880) 49 L. J. Q. B. 531; 5 Q. B. D. 414, 420; 42 L. T. 810.—C.A.

Heald v. Kenworthy (1855) 24 L. J. Ex. 76; 10 Ex. 739; 3 C. L. R. 612; 1 Jur. (N.S.) 70; 3 W. R. 176.—EX., *dictum observed upon*.

Green v. Kopke (1856) 25 L. J. C. P. 297; 18 C. B. 549; 2 Jur. (N.S.) 1049; 4 W. R. 598.—C.P.

Heald v. Kenworthy, *rule applied*.

Irvine v. Watson (1880) 49 L. J. Q. B. 531; 5 Q. B. D. 414; 42 L. T. 810.—C.A. See extract, *supra*, col. 2529.

Heald v. Kenworthy, *observations applied*.

Smethurst v. Mitchell (1859) 28 L. J. Q. B. 241; 1 El. & El. 623; 5 Jur. (N.S.) 978; 7 W. R. 226.—Q.B.

Heald v. Kenworthy, *considered*.

Armstrong v. Stokes (1872) 41 L. J. Q. B. 253; L. R. 7 Q. B. 598, 609; 26 L. T. 872; 21 W. R. 52.—Q.B.

Heald v. Kenworthy, *followed*.

Irvine v. Watson (1880) 49 L. J. Q. B. 531; 5 Q. B. D. 414; 42 L. T. 810.—C.A. See extract, *supra*, col. 2529.

Heald v. Kenworthy, *considered*.

Davison v. Donaldson (1882) 9 Q. B. D. 623; 47 L. T. 564; 31 W. R. 277; 4 Asp. M. C. 601.—C.A. See extract, *infra*, col. 2531.

Smethurst v. Mitchell (1859) 28 L. J. Q. B.

241; 1 El. & El. 622; 5 Jur. (N.S.) 978; 7 W. R. 226.—Q.B., *adopted*.

Curtis v. Williamson (1874) 44 L. J. Q. B. 27; L. R. 10 Q. B. 57, 59; 31 L. T. 678; 23 W. R. 236.—Q.B.

Smethurst v. Mitchell, *considered*.

Davison v. Donaldson (1882) 9 Q. B. D. 623; 47 L. T. 564; 31 W. R. 277; 4 Asp. M. C. 601.—C.A. See extract, col. 2531.

Armstrong v. Stokes (1872) 41 L. J. Q. B.

253; L. R. 7 Q. B. 598; 26 L. T. 872; 21 W. R. 52.—Q.B., *discussed*.

Irvine v. Watson (1880) 49 L. J. Q. B. 531; 5 Q. B. D. 414; 42 L. T. 810.—C.A.

Armstrong v. Stokes, *referred to*.

Elbinger Actien Gesellschaft v. Claye (1873) 42 L. J. Q. B. 151; L. R. 8 Q. B. 313; 28 L. T. 405.—Q.B.

Armstrong v. Stokes, *applied*.

Hutton v. Bullock (1874) L. R. 9 Q. B. 572; 30 L. T. 648; 22 W. R. 956.—EX. CH.

Armstrong v. Stokes, *referred to*.

Hood v. Stallybrass (1878) 3 App. Cas. 880, 887; 38 L. T. 826; 27 W. R. 1.—P.C.; Davison v. Donaldson (1882) 9 Q. B. D. 623, 628; 31 W. R. 277; 4 Asp. M. C. 601.—C.A.

Armstrong v. Stokes, *applied*.

Maspons v. Mildred (1882) 51 L. J. Q. B. 604; 9 Q. B. D. 530, 539; 47 L. T. 318; 30 W. R. 862.—C.A. (*affirmed nom.* Mildred v. Maspons (1883) 53 L. J. Q. B. 33; 8 App. Cas. 874; 32 W. R. 125.—H.L. (E.)); Kaltenbach v. Lewis (1885) 55 L. J. Ch. 58; 10 App. Cas. 617, 627; 53 L. T. 787; 34 W. R. 477.—H.L. (E.).

Irvine v. Watson (1880) 49 L. J. Q. B. 531;

5 Q. B. D. 414; 42 L. T. 800.—C.A., *adopted*.

Maspons v. Mildred (1882) 51 L. J. Q. B. 604; 9 Q. B. D. 530, 541; 47 L. T. 318; 30 W. R. 862.—C.A.; *affirmed in H.L., supra*.

Irvine v. Watson, *considered*.

Davison v. Donaldson (1882) 9 Q. B. D. 623; 47 L. T. 564; 31 W. R. 277; 4 Asp. M. C. 601.—C.A.

JESSEL, M.R.—No doubt there is a well-known

principle of equity which has been laid down, sometimes by the Courts of equity and sometimes by the Courts of common law, for the purpose of that is the same in both Courts, that if the defendant has been misled by the plaintiff, either by his words or by his conduct, to believe that which is not true, so that his position is altered, the plaintiff cannot be heard to deny the truth of what he has thus led the defendant to believe. This is well laid down in *Irvine v. Watson*. In that case the defendants had paid the broker, and the question was whether that discharged their liability to the plaintiff. Bramwell, L.J. says, "I think it is impossible to say that it discharged them, unless they were led by some conduct of the plaintiff into the belief that the broker had already settled with the plaintiff, and made such payment in consequence of such belief." Now, assuming that there is no distinction in this respect between a partnership and a case of principal and agent, that observation applies exactly to this case. The payment which the defendant made was not made in consequence of being misled by the plaintiff. The mere fact that by the conduct of the plaintiff he lost the opportunity of getting the money back is not sufficient (p. 627). . . . All the judges agreed in laying down that where the seller knows that there is a principal behind the person with whom he is dealing, he must be shown to have himself done something which raises an equity against him, otherwise the principal is not discharged; though I am far from saying that there may not be special cases in which mere delay on the part of the plaintiff would be held to be sufficiently misleading conduct, it may amount to a representation that he has been paid. The case of *Smethurst v. Mitchell* is an authority that where the goods are not to be delivered till the account is paid, and yet the goods are delivered, whether the seller takes a bill of exchange or not, the seller cannot afterwards come upon the principal. The conduct of the seller would be treated as evidence of payment—it would be conduct which would naturally lead men of business to believe that the money had been paid (p. 628). . . . Both in that case and in *Heald v. Kemworthy*, it is said that there must be a change of position between the principal and agent caused by the conduct of the seller.—p. 629.

Priestley v. Fernie (1865) 34 L. J. Ex. 172; 3 H. & C. 977; 11 Jur. (N.S.) 813; 13 L. T. 208; 13 W. R. 1089.—EX., distinguished.

Curtis v. Williamson (1874) 44 L. J. Q. B. 27; L. R. 10 Q. B. 57; 31 L. T. 678; 23 W. R. 236.—Q.B.

ARCHIBALD, J. (for the Court).—The Court in *Priestley v. Fernie* held that where an agent, who has made a contract in his own name, has been sued on it to judgment, even without satisfaction, no second action would be maintainable against the principal; but it is clear from the language used by Bramwell, B., in delivering the judgment of the Court, that whilst it was considered that judgment against the agent, even without satisfaction, would constitute a conclusive election, yet that no legal proceedings short of judgment would have that effect, for he distinctly points out that by the word "sue" he meant "sue to judgment."

Priestley v. Fernie, referred to. *Wickendall v. Hamilton* (1879) 48 L. J. C. P. 705; 40 App. Cas. 504; 41 L. T. 418; 28 W. R. 97.—H.L. (E.).

Curtis v. Williamson (1874) 44 L. J. Q. B. 27; L. R. 10 Q. B. 57; 31 L. T. 678; 23 W. R. 236.—Q.B., explained.

Scarf v. Jardine (1882) 51 L. J. Q. B. 612; 7 App. Cas. 345; 47 L. T. 258; 30 W. R. 893.—H.L. (E.).

SELBORNE, L.C.—*Curtis v. Williamson* simply held that the mere act of making an affidavit of the kind which was made in this case in bankruptcy was not one as to which the party would have no *locus penitentie* under any circumstances, where he had been desirous, when he had fully considered the matter, of withdrawing it before it was put upon the file, and nothing was done, so far as appears, after it was put upon the file. There was nothing to bind him to his election except that inadvertent and (at the time when it was done) unintentional act of his agent; and the Court, who probably knew the facts of the case, were quite right in holding that that ought not to be regarded as an election by him.—p. 617.

Curtis v. Williamson, applied.

Davison, In re, Chandler, Ex parte (1884) 13 Q. B. D. 50, 54; 50 L. T. 635.—DAVE, J.; **Longman v. Hill** (1891) 7 Times L. R. 639.—SMITH, J.

Calder v. Dobell (1871) 40 L. J. C. P. 224; L. R. 6 C. P. 486; 25 L. T. 129; 19 W. R. 978.—EX. CH., applied.

Fleet v. Murton (1871) 41 L. J. Q. B. 49; L. R. 7 Q. B. 126, 131; 26 L. T. 181; 20 W. R. 97.—Q.B.

Calder v. Dobell, adopted.

Armstrong v. Stokes (1872) 41 L. J. Q. B. 253; L. R. 7 Q. B. 598, 607; 26 L. T. 872; 21 W. R. 52.—Q.B.

Calder v. Dobell, adopted.

Browning v. Provincial Insurance Co. of Canada (1873) L. R. 5 P. C. 263; 28 L. T. 853; 21 W. R. 587.—P.C.

Calder v. Dobell, referred to.

Curtis v. Williamson (1874) 44 L. J. Q. B. 27; L. R. 10 Q. B. 57, 59; 31 L. T. 678; 23 W. R. 236.—Q.B.

Calder v. Dobell, applied.

Longman v. Lord Arthur Hill (1891) 7 Times L. R. 639.—A. L. SMITH, J.

Longman v. Lord Arthur Hill, followed.

W. Sugg & Co. v. Lord Arthur Hill (1893) 10 Times L. R. 126.—KENNEDY, J.; affirmed, (1894) 10 Times L. R. 288.—C.A. ESHER, M.R., LOPES and DAVEY, L.JJ.

Walter v. James (1871) 40 L. J. Ex. 104; L. R. 6 Ex. 124; 24 L. T. 188; 19 W. R. 472.—EX., considered.

Bolton v. Lambert (1889) 58 L. J. Ch. 425; 41 Ch. D. 295; 60 L. T. 687; 37 W. R. 434.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

COTTON, L.J.—In that case there was an agreement between the assumed agent of the defendant and the plaintiff to cancel what had been done

before any ratification by the defendant; in the present case there was no agreement made between Scratchley and the defendant that what had been done by Scratchley should be considered as null and void.

LINDLEY, L.J.—That the acceptance by the assumed agent cannot be treated as going for nothing is apparent from *Walter v. James*.

Marsh v. Keating (1834) 2 Cl. & F. 250 : 8 Bl. N. S. 651; 1 Ring. N. C. 198 : 1 Scott 5; 1 Mont. & Ayr. 592.—H.L. (E.), *adopted*.
Bonzi v. Stewart (1842) 11 L. J. C. P. 228; 4 Man. & G. 295; 5 Scott N. R. 1.—C.P.

Marsh v. Keating, distinguished.
Vaughan v. Matthews (1849) 18 L. J. Q. B. 191 : 13 Q. B. 187; 13 Jur. 470.—Q.B.

Marsh v. Keating, applied.
Bailey v. Johnson (1871) 40 L. J. Ex. 189 : L. R. 6 Ex. 279, 285; 24 L. T. 711.—EX.; *affirmed*. (1872) 41 L. J. Ex. 211; L. R. 7 Ex. 263; 20 W. R. 1013.—EX. CH.

Marsh v. Keating, followed.
Reid v. Rigby (1894) 63 L. J. Q. B. 451 : [1894] 2 Q. B. 40; 10 R. 280.—CHARLES and COLLINS, JJ.

Marsh v. Keating, discussed.
Jacobs v. Morris (1902) 71 L. J. Ch. 363; [1902] 1 Ch. 816; 86 L. T. 275; 50 W. R. 371.—C.A. WILLIAMS, STIRLING and HARDY, L.J.J.
WILLIAMS, L.J.—I am not sure that in *Marsh v. Keating* either the H. L. or the judges whose opinion was taken meant to decide either that ignorance and want of means of knowledge will exonerate a person through whose account a sum of money has passed from responsibility, or that knowledge of the fact is essential to liability. Nothing more seems to me to have been decided than that there the defendants could not rely upon ignorance if they had the means of knowledge.

Hern v. Nichols, 1 Salk. 289; 1 Rol. 95; Holt 462.—HOLT, C.J., *applied*.
Barwick v. English Joint Stock Bank (1867) 36 L. J. Ex. 147; L. R. 2 Ex. 259, 265; 16 L. T. 461; 15 W. R. 877.—EX. CH.; Mackay v. Commercial Bank of New Brunswick (1874) 43 L. J. P. C. 31; L. R. 5 P. C. 394, 410; 30 L. T. 180; 22 W. R. 473.—P.C.; Weir v. Barnett (or Bell) (1877); 3 Ex. D. 32, 39.—EX. D.

Cornfoot v. Fowke (1840) 6 M. & W. 358; 9 L. J. Ex. 297; 4 Jur. 919.—EX., *commented on*.

Fuller v. Wilson (1842) 3 Q. B. 58; 2 G. & D. 460; 11 L. J. Q. B. 251.—EX. CH.
[Fuller v. Wilson was reversed (3 Q. B. 1009); but the reversal proceeded not on any substantial disaffirmance of the judgment, but on the insufficiency of the statement of facts in the special verdict, which did not show the same state of things as that presented to the Court below.]

DENMAN, C.J. (for the Court).—On these facts, it was assumed at the trial that the recent case of *Cornfoot v. Fowke* was directly in point; on which supposition I thought myself bound by the authority of the Court of Exchequer to direct a

verdict allowing the plaintiff to move for a new trial. It now likewise appears to the Court that on one point of view, that case is a direct authority bearing on the present, though the facts are not in all respects entirely similar. For it was then held by three of the learned Barons, in opposition to the opinion of Lord Abinger, that the plea of fraud was not sustained, because the plaintiff had made no representation, and the plaintiff's agent did not know his own representation to be false. If this be correct as to a plea of fraud, neither can the action for deceit lie under the same circumstances. Lord Abinger maintained, and surely not without reason, that there was some moral fraud in the conduct of both, the principal concealing a fact which made his house utterly unfit for the purpose for which he was letting it; the agent stating a falsehood, which, of course, he could not know to be true, even if he believed it. We do not, however, take this ground. We adopt the other proposition of the Chief Baron, namely, that whether there was fraud or not, if the purchaser was actually deceived in his bargain, the law will relieve him from it. We think the principal and his agent are for this purpose completely identified; and that the question is, not what was passing in the mind of either, but whether the purchaser was in fact deceived by them or either of them.—p. 66.

Compare Ormrod v. Huth (1845) 14 L. J. Ex. 366; 14 M. & W. 651.—EX. CH.

Cornfoot v. Fowke, commented on.
National Exchange Co. v. Drew (1855) 2 Macq. H. L. 103.

LORD ST. LEONARDS.—[See judgment at length, at p. 144.]

Cornfoot v. Fowke, observed upon.
Wheulton v. Hardisty (1857) 3 Jur. (N.S.) 1169; 26 L. J. Q. B. 265; 8 El. & Bl. 232.—Q.B.; *affirmed*, (1858) 27 L. J. Q. B. 241; 8 El. & Bl. 285; 5 Jur. (N.S.) 14; 6 W. R. 539.—EX. CH.

CAMPBELL, C.J.—As to *Cornfoot v. Fowke*, which was brought before us to illustrate the liability of a principal for his agent, I am not called upon to say whether the case was well decided by the majority of the judges in the Exchequer, although the voice of Westminster Hall was, I believe, rather in favour of the dissentient Chief Baron.—p. 1175.

Cornfoot v. Fowke, explained (during argument).

Barwick v. English Joint Stock Bank (1867) 36 L. J. Ex. 147; L. R. 2 Ex. 258, 262; 16 L. T. 461; 15 W. R. 877.—EX. CH.

Cornfoot v. Fowke, adopted.
Mackay v. Commercial Bank of New Brunswick (1874) 43 L. J. P. C. 31; L. R. 5 P. C. 394, 410; 30 L. T. 180; 22 W. R. 473.—P.C.; Shackleton, In re, Whittaker, Ex parte (1875) L. R. 10 Ch. 446, 447, n.; 44 L. J. Bk. 91; 32 L. T. 102, 443; 23 W. R. 555.—BACON, C.J. (*affirmed*, L.J.J.): Ludgates v. Love (1881) 44 L. T. 694; 45 J. P. 600.—C.A. SELBORNE, L.C., BAGGALLAY and BRETT, L.J.J.

Cornfoot v. Fowke, considered.
Joliffe v. Baker (1883) 52 L. J. Q. B. 609; 11 Q. B. D. 255; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.—Q.B.D.

Cornfoot v. Fowke, distinguished.

Reg. v. Butt (1884) 51 L. T. 607.—C.C.
COLERIDGE, C.J.—There is high authority that where a man who knew of the falsity of the representation he was making, made such representation by means of an agent who was ignorant of its falsity, there was no fraud (*Cornfoot v. Fowke*); but that was in a civil action, and is, I believe, a decision not universally approved of.—p. 608.

Wilde v. Gibson (1848) 1 H. L. Cas. 605 : 12

Jur. 527.—H.L. (E.). *dictum commented on.*

Udell v. Atherton (1861) 7 H. & N. 172 ; 30 L. J. Ex. 337 ; 7 Jur. (N.S.) 777 ; 4 L. T. 797.—EX.

[*Dictum* of LORD CAMPBELL.—In an action upon contract the representation of an agent is the representation of the principal, but in an action on the case for deceit the misrepresentation must be proved against the principal.]

MARTIN, B.—This, in my opinion, is an accurate statement of the law.—p. 197.

WILDE, B.—There is, I believe, no case in which the principal's immunity, under such circumstances, has been established. The only *dictum* in favour of it is, I believe, that of Lord Campbell in the course of the argument in *Wilde v. Gibson*. It may be doubted if it is correctly reported, at any rate it is to be taken, in my opinion, in reference only to the point then under argument.—p. 181.

Udell v. Atherton, discussed.

Archbold v. Howth (Lord) (1866) Ir. R. 1 Ch. 608.—C.P.

Udell v. Atherton, explained.

Barwick v. English Joint Stock Bank (1867) L. R. 2 Ex. 259 ; 36 L. J. Ex. 147 ; 16 L. T. 461 ; 15 W. R. 877.—EX. CH.

WILLES, J. (for the Court).—If there be fraud in the manager, then arises the question, whether it was such a fraud as the bank, his employers, would be answerable for. With respect to that, we conceive we are in no respect overruling the opinions of my brothers Martin and Bramwell in *Udell v. Atherton*, the case most relied on for the purpose of establishing the proposition that the principal is not answerable for the fraud of his agent. Upon looking at that case, it seems pretty clear that the division of opinion which took place in the Court of Exchequer arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business—a question which was settled as early as Lord Holt's time (*Hera v. Nichols*, 1 Salk. 289)—but in applying that principle to the peculiar facts of the case ; the act which was relied upon there as constituting a liability in the sellers having been an act adopted by them under peculiar circumstances, and the author of that act not being their general agent in business, as the manager of a bank is. But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit though no express command or privity of the master be proved.—p. 265.

Udell v. Atherton, observations adopted.

Mackay v. Commercial Bank of New Brunswick (1874) 43 L. J. P. C. 31 ; L. R. 5 P. C. 394 ; 30 L. T. 180 ; 22 W. R. 473.—P.C.

Udell v. Atherton, approved.

Weir v. Bell (or Barnett) (1878) 47 L. J. Ex. 704 ; 3 Ex. D. 238, 245 ; 38 L. T. 929 ; 26 W. R. 746.—C.A.

Udell v. Atherton, commented upon.

Houldsworth v. City of Glasgow Bank (1880) 5 App. Cas. 317 ; 42 L. T. 194 ; 28 W. R. 677.—H.L. (SC.).

LORD BLACKBURN (adopting the language of Lord Shand).—I say nothing of *Udell v. Atherton* except that it was the decision of a Court equally divided ; that it was considered in most, if not all, of the subsequent cases just cited ; and that I am not aware of any judgment since its date in which it was spoken of with approval, while it has been more than once referred to as a decision to be explained and accounted for on special grounds.—p. 339.

Udell v. Atherton, applied.

Baldry v. Bates (1885) 52 L. T. 620, 622.—**HUDDESTON, B.** ; and **Arnold v. Armitage** (1885) 1 T. L. R. 670, 675.—COLERIDGE, C.J.

Barwick v. English Joint Stock Bank (1867)

36 L. J. Ex. 147 ; L. R. 2 Ex. 259 ; 16 L. T. 461 ; 15 W. R. 877.—EX. CH., *dictum applied.*

The Thetis (1869) 38 L. J. Adm. 42 ; L. R. 2 A. & E. 365, 367 ; 22 L. T. 276.—ADM.

Barwick v. English Joint Stock Bank, distinguished.

Bolingbroke (Lord) v. Swindon New Town Local Board (1874) 43 L. J. C. P. 287 ; L. R. 9 C. P. 575 ; 30 L. T. 723 ; 23 W. R. 47.—C.P.

Barwick v. English Joint Stock Bank, distinguished.

Mackay v. Commercial Bank of New Brunswick (1874) L. R. 5 P. C. 394 ; 43 L. J. P. C. 31 ; 30 L. T. 180 ; 22 W. R. 473.—P.C.

SIR MONTAGUE SMITH (for the Court).—It has been contended, however, that *Western Bank of Scotland v. Addie*, L. R. 1 H. L. Sc. 145, . . . is at variance with *Barwick v. English Joint Stock Bank*. Their lordships, however, do not so regard it. Mr. Addie alleged that he had been induced to take shares in the Western Bank of Scotland by fraudulent representations of its directors, and claimed to recover the value of his shares, or to be reimbursed the damages which he had sustained. After his purchase of the shares, and before he instituted his suit, the bank, which had been an unincorporated company under 7 Geo. 4, c. 67, was, with his concurrence, incorporated and registered under the Joint Stock Companies Act, 1856, for the purpose of being wound up. Upon these facts it was decided that Mr. Addie had no remedy against the new corporation which had been formed. Lord Cranworth observes : "He was a party to a proceeding whereby the company from which the purchase was made was put an end to—it ceased to be unincorporated, and became an incorporated company, with many statutable incidents connected with it, which did not exist before the incorporation. The new company is now in the course of being wound up.

... He comes too late; the appellants are not the persons who were guilty of the fraud, and although the incorporated company is by the express provisions under which it was incorporated made liable for the debts and liabilities incurred before the incorporation, I cannot read the statute as transferring to the incorporated company a liability to be sued for frauds or other wrongful acts committed by the directors before incorporation." The case was therefore decided upon a point which did not arise in the case of *Barwick v. English Joint Stock Bank*.—p. 413.

Barwick v. English Joint Stock Bank, distinguished.

Swift v. Jewsbury (1874) 43 L. J. Q. B. 56; L. R. 9 Q. B. 301; 30 L. T. 31; 22 W. R. 319.—EX. CH.

Barwick v. English Joint Stock Bank, approved and followed.

Swire v. Francis (1877) 3 App. Cas. 106; 47 L. J. P. C. 18; 37 L. T. 554.—P.C.

Barwick v. English Joint Stock Bank, commented upon.

Weir v. Bell (1878) 26 W. R. 746; 47 L. J. Ex. 704; 8 Ex. D. 238; 38 L. T. 929.—C.A.

BRAMWELL, L.J.—But it is said that there is an exception to the rule that a man is only liable for fraud when it is actual fraud, and that, though not morally fraudulent himself, he is in some cases liable for the fraud of his agent; and for this *Barwick v. English Joint Stock Bank* and the cases following thereon are cited. I am not going to say that case is not law. In the first place we are bound by it; in the next it has been so much approved and followed that it has become part of the law; and lastly, it is undoubtedly a most convenient and useful rule that principals should be responsible for damage occasioned by the fraud of their agents acting within the scope of their authority, at least to the extent of the gains of the principal, especially now that so much of the world's business is carried on by corporations. But with all respect, be it said, the reasoning in *Barwick v. English Joint Stock Bank* is not satisfactory. Mr. Justice Willes says: "On the question whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between fraud and any other wrong." Now, with all submission, there is a very obvious distinction. Fraud is always wilful; and a master, as a rule, is not liable for the wilful wrong of his servant. "The general rule," proceeds the learned judge, "is that the master is answerable for every such wrong of the servant or agent as is committed in the course of his service, and for the master's benefit, though no express command or privity of the master be proved. That principle is acted on every day in running down cases." The illustration is unfortunate, for it is certain there is no such liability where the act of the servant is wilful. He then cites 7 C. B. 797, where the owner of a ship was held liable for a tortious conversion by the captain of part of the cargo by selling it. That case, however, was expressly decided on the ground that the captain was acting for the owner within the scope of his authority. A similar remark applies to the next case cited. The principle that

such cases as these is not that the principal is held liable for the acts of his servant. It is the responsibility of the principal for the acts of his servants. For suppose the defendants had been, not a joint stock company, but a private partnership, they would (if the decision is right) have been liable. It seems to me, then, that *Barwick v. English Joint Stock Bank* cannot be supported on the reasons given. ... But, though doubting the reasoning on which it is formed (if one may say so without presumption), I think it may be supported on other grounds. It is important to put the case on its true grounds. I think that every person, who authorises another to act for him in the making of any contract, undertakes for the absence of fraud in that person in that execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract. I retain the opinion I expressed in *Udell v. Atherton* (*supra*), and mean what I now say to be consistent with it.—p. 748.

Barwick v. English Joint Stock Bank, adopted.

Burmah Trading Corporation v. Mirzah Mahomed Ally Sherazee (1878) L. R. 5 Ind. App. 130, 135.—P.C.; *Collie, In re, Adamson, Ex parte* (1878) 47 L. J. Bk. 106; 8 Ch. D. 817, 822; 38 L. T. 920; 26 W. R. 892.—C.A.; *Houldsworth v. City of Glasgow Bank* (1880) 5 App. Cas. 317; 42 L. T. 194; 28 W. R. 677.—H.L. (SC.).

Barwick v. English Joint Stock Bank, observations distinguished.

Chapleo v. Brunswick Benefit Building Society (1880) 50 L. J. Q. B. 372; 6 Q. B. D. 696, 712; 44 L. T. 449; 29 W. R. 529.—C.A.

Barwick v. English Joint Stock Bank, applied.

British Mutual Banking Co. v. (Harnwood) Forest Ry. (1887) 56 L. J. Q. B. 449; 18 Q. B. D. 714; 57 L. T. 833; 35 W. R. 590; 52 J. P. 150.—C.A.; *Whitechurch v. Cavanagh* (1901) 71 L. J. K. B. 400; [1902] A. C. 117, 140; 85 L. T. 349; 50 W. R. 218.—H.L. (E); *Hamlyn v. Houston & Co.* (1902) [1903] 1 K. B. 81; 87 L. T. 500; 51 W. R. 99.—C.A.; *Giblan v. National Amalgamated Labourers' Union* (1903) 72 L. J. K. B. 907; [1903] 2 K. B. 600; 89 L. T. 386.—C.A.

Mackay v. Commercial Bank of New Brunswick, distinguished.

Bolingbroke (Lord) v. Swindon New Town Local Board (1874) 43 L. J. C. P. 287; L. R. 9 C. P. 575; 30 L. T. 723; 23 W. R. 47.—C.P.

Mackay v. Commercial Bank of New Brunswick, approved and followed.

Swire v. Francis (1877) 47 L. J. P. C. 18; 3 App. Cas. 106; 37 L. T. 554.—P.C.

Mackay v. Commercial Bank of New Brunswick, referred to.

Burmah Trading Corporation v. Mirzah Mahomed Ally Sherazee (1878) L. R. 5 Ind. App. 130, 135.—P.C.

Mackay v. Commercial Bank of New Brunswick, applied.

Bank of New South Wales v. Owston (1879)

48 L. J. P. C. 25; 4 App. Cas. 270, 281 King v. Weir v. Barnett (or Bell), *dicta* discussed. 500; 14 Cox C. C. 267.—P.C.; Chaplin v. Wick Benefit Building Society (1887) 12 L. J. C. P. 372; 6 Q. B. D. 696, 712; 1 L. J. P. C. 29 W. R. 529.—C.A.; Houldsworth v. City of Glasgow Bank (1880) 5 App. Cas. 317, 326; 42 L. T. 194; 28 W. R. 677.—H.L. (SC.).

Mackay v. Commercial Bank of New Brunswick, *observed upon*.

British Mutual Banking Co. v. Charnwood Forest Ry. (1887) 56 L. J. Q. B. 449; 18 Q. B. D. 714; 57 L. T. 833; 35 W. R. 590; 52 J. P. 150.—C.A.

Mackay v. Commercial Bank of New Brunswick, *applied*.

Citizens' Life Assurance Co. v. Brown (1904) 73 L. J. C. P. 102; [1904] A. C. 423; 90 L. T. 739.—P.C.

Swire v. Francis (1877) 47 L. J. P. C. 18; 3 App. Cas. 106; 37 L. T. 554.—P.C., *adopted*.

Houldsworth v. City of Glasgow Bank (1880) 5 App. Cas. 317, 326; 42 L. T. 194; 28 W. R. 677.—H.L. (SC.); and Citizen's Life Assurance Co. v. Brown (1904).—P.C. (*supra*).

Weir v. Barnett (1877) 3 Ex. D. 32.—EX. D.; *affirmed nom.* Weir v. Bell (1878) 47 L. J. Ex. 704; 3 Ex. D. 238; 38 L. T. 929; 26 W. R. 746.—C.A.

Weir v. Barnett (or Bell), *distinguished*.

Watt v. Barnett (1878) 3 Q. B. D. 363, 366; 38 L. T. 908; 26 W. R. 745.—C.A.; *affirming* 47 L. J. Q. B. 329.—Q.B.D.

Weir v. Barnett (or Bell) (EX. D., *supra*), *followed*.

Cargill v. Bower (1878) 47 L. J. Ch. 649; 10 Ch. D. 502; 38 L. T. 779; 26 W. R. 716.

FRY, J.—As a general rule, I think that one agent is not responsible for the acts of another agent, unless he does something by which he makes himself a principal in the fraud. It is said that that view of the law is inconsistent with the decision of the House of Lords in *Peek v. Gurney*, so far as it related to Mr. Barclay. . . . If that be not the principle of the decision in that case, it must, I think, be admitted that a totally new principle was introduced into the law. It would be impossible also to reconcile the decision with *Weir v. Barnett*, which seems to me a very important authority, as showing that the only persons who can be made responsible for a fraud are those who come within one or other of the two categories which I have mentioned. I entirely adopt the language of Bramwell, B. in *Swift v. Jewsbury* (L. R. 9 Q. B. 315), "No doubt there are cases in which a man may be charged with having committed a fraud when he has not committed it himself; but I think that that ought to be held in as few cases as possible."

[This decision was appealed from but compromised.]

Weir v. Barnett (or Bell) (1878).—C.A. (*supra*). See

Houldsworth v. City of Glasgow Bank (1880) 5 App. Cas. 317, 339; 42 L. T. 194; 28 W. R. 677.—H.L. (SC.).

Weir v. Barnett (or Bell), *dicta* adopted.

Joliffe v. Baker (1883) 52 L. J. Q. B. 609; 11 Q. B. D. 255, 270; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.—Q.B.D.

Weir v. Barnett (or Bell), *dicta* discussed.
Derry v. Peek (1889) 58 L. J. Ch. 864; 14 App. Cas. 337, 372; 61 L. T. 265; 38 W. R. 33; 1 Meg. 292.—H.L. (E.).

LORD MERSCHALL.—In *Weir v. Bell* Lord Bramwell vigorously criticised the expression "legal fraud," and indicated a very decided opinion that an action founded on fraud could not be sustained except by the proof of fraud in fact. I have already given my reasons for thinking that, until recent times at all events, the judges who spoke of fraud in law did not mean to exclude the existence of fraud in fact, but only of an intention to defraud or injure.

Newlands v. National Employers' Accident

Association (1885) 54 L. J. Q. B. 428; 53 L. T. 242; 49 J. P. 628.—C.A., *followed*.

Barnett v. South London Tramways Co. (1887) 56 L. J. Q. B. 452; 18 Q. B. D. 815; 57 L. T. 436; 35 W. R. 640.—C.A.

British Mutual Banking Co. v. Charnwood

Forest Ry., 55 L. J. Q. B. 399; 34 W. R. 718.—Q.B.D.; *reversed*, (1887) 56 L. J. Q. B. 449; 18 Q. B. D. 714; 35 W. R. 590.—C.A.

British Mutual Banking Co. v. Charnwood

Ry. (*supra*, in C.A.).

Observations inapplicable, Bishop v. Balkis Consolidated Co. (1890) 59 L. J. Q. B. 565; 25 Q. B. D. 512, 522; 39 W. R. 99; 2 Meg. 292.—C.A.; *followed*, Thorne v. Heard (1894) 63 L. J. Ch. 356; [1894] 1 Ch. 599.—C.A. (*affirmed*, H.L.); *explained*, Trott v. National Discount Co. (1900) 17 T. L. R. 37.—KENNEDY, J.; *adopted*, Whitechurch v. Cavanagh (1901) 71 L. J. K. B. 400; [1902] A. C. 117, 141; 85 L. T. 349; 50 W. R. 218.—H.L. (E.); *considered*, Hambro v. Burnand (1903) 72 L. J. K. B. 662; [1903] 2 K. B. 399, 400.—BIGHAM, J. (*reversed*, C.A.).

Swift v. Winterbotham (1873) 42 L. J. Q. B. 111; L. R. 8 Q. B. 244; 28 L. T. 338; 21 W. R. 562.—Q.B.; *varied nom.* Swift v. Jewsbury (1874) 43 L. J. Q. B. 56; L. R. 9 Q. B. 301; 30 L. T. 31; 22 W. R. 319.—EX. CH.

Swift v. Jewsbury, *referred to*.

Mackay v. Commercial Bank of New Brunswick (1874) 43 L. J. P. C. 31; L. R. 5 P. C. 394; 30 L. T. 180; 22 W. R. 473.—P.C.

Swift v. Jewsbury, *followed*.

Hosegood v. Bull (1876) 36 L. T. 617.—EX. D.

Swift v. Jewsbury, *dictum* adopted.

Weir v. Barnett (1877) 3 Ex. D. 32, 40.—EX. D.; *affirmed*, C.A. (*supra*, col. 2539).

Swift v. Jewsbury, *commented upon*.

Cargill v. Bower (1878) 47 L. J. Ch. 649; 10 Ch. D. 502; 38 L. T. 779; 26 W. R. 716.—FRY, J.

Swift v. Jewsbury, *referred to*.

Houldsworth v. City of Glasgow Bank (1880) 5 App. Cas. 317, 339; 42 L. T. 194; 28 W. R. 677.—H.L. (SC.).

Swift v. Jewsbury, *observations explained*.

Pearson v. Seligman (1883) 48 L. T. 842; 31 W. R. 730.—C.A.

Swift v. Jewsbury, *referred to*.

British Mutual Banking Co. v. Charnwood Forest Ry. (1887) 56 L. J. Q. B. 449; 18 Q. B. D. 714, 717; 57 L. T. 833; 35 W. R. 590.—C.A. Esher, M.R., BOWEN and FRY, L.J.J.; Bishop v. Balkis Consolidated Co. (1890) 25 Q. B. D. 77,

84; 63 L. T. 316.—*v. WILLIAMS, J.* (affirmed in effect, C.A.).

Swift v. Jewsbury, *considered*.

Hockey v. Clydesdale Bank (1898) 1 F. 119.—Ct. of Sess.

Swift v. Jewsbury, *followed*.

Hirst v. West Riding Union Banking Co. (1901) 70 L. J. K. B. 828; [1901] 2 K. B. 560; 85 L. T. 3; 49 W. R. 715.—C.A.

Swift v. Jewsbury, *explained*.

Hamlyn v. Houston & Co. (1902) 72 L. J. K. B. 72; [1903] 1 K. B. 81; 87 L. T. 500; 51 W. R. 99.—C.A.

COLLINS, M.R.—*Swift v. Winterbotham* [*i.e.*, the above case] was one of a class of cases in which, before the Act of 1890, a bank was held to be liable for a false representation by its manager in the course of carrying on the business of the bank; but the decision did not rest on any doctrine of a holding out by the principal, but upon the principle that as the agent is chosen by the principal, the latter must take the risk of the agent acting beyond the express authority given to him.—p. 75.

Black v. Christchurch Finance Co. (1893)

63 L. J. P. C. 32; [1894] A. C. 48; 6 L. 394; 70 L. T. 77; 58 J. P. 332.—P.C., *applied*.

Hardacre v. Idle District Council (1896) 65 L. J. Q. B. 363; [1896] 1 Q. B. 335; 74 L. T. 69; 44 W. R. 323; 60 J. P. 196.—C.A.

Penny v. Wimbledon Urban Council (1888)

67 L. J. Q. B. 754; [1898] 2 Q. B. 212; 78 L. T. 748; 62 J. P. 582.—**BRUCE, J.**, *reversed*, (1899) 68 L. J. Q. B. 704; [1899] 2 Q. B. 72; 80 L. T. 615; 47 W. R. 565; 63 J. P. 406.—C.A.

Penny v. Wimbledon Urban Council, *followed*.

The Snark (1900) 69 L. J. P. 41; [1900] P. 105; 82 L. T. 42; 48 W. R. 279.—C.A.; **Mileham v. St. Marylebone Borough Council** (1903) 1 L. G. R. 412.—**CHANNELL, J.**

Effect of Factors Acts.

Paterson v. Tash (1743) 2 Str. 1178, *commented on*.

Cole v. North Western Bank (1875) 44 L. J. C. P. 233; L. R. 10 C. P. 354; 32 L. T. 733.—EX. CH.

M'Combie v. Davies (1807) 7 East 5.—K.B., *considered and applied*.

Donald v. Suckling (1866) 35 L. J. Q. B. 232; L. R. 1 Q. B. 585, 607; 7 B. & S. 783; 12 Jur. (N.S.) 795; 14 L. T. 772; 15 W. R. 13.—Q.B.

M'Combie v. Davies. *See*

Cole v. North-Western Bank (1875) 44 L. J. C. P. 233; L. R. 10 C. P. 354; 32 L. T. 733.—EX. CH.

Boyson v. Coles (1817) 6 M. & S. 14; 18

R. R. 284.—K.B., *distinguished*.

Johnson v. Crédit Lyonnais (1877) 47 L. J. C. P. 241; 3 C. P. D. 32; 37 L. T. 657; 26 W. R. 195.—C.A.

Monk v. Whittenbury (1831) 2 B. & Ad. 484; 1 M. & Rob. 81.—K.B., *distinguished*.

Baines v. Swainson (1863) 32 L. J. Q. B. 281; 1 B. & S. 270; 8 L. T. 536; 11 W. R. 945.—Q.B.

Mcster v. Whittenbury, *confirmed*.
Cole v. North Western Bank (1875) 44 L. J. C. P. 233; L. R. 10 C. P. 354, 369; 32 L. T. 733.—EX. CH.

Taylor v. Kymer (1832) 1 L. J. K. B. 114; 3 B. & Ad. 320.—K.B., *adopted*.

Bonzi v. Stewart (1842) 11 L. J. C. P. 228; 4 Man. & G. 295; 5 Scott N. R. 1.—C.P.

Taylor v. Kymer, *commented on*.
Cole v. North Western Bank (1875) 44 L. J. C. P. 233; L. R. 10 C. P. 354; 32 L. T. 733.—EX. CH.

Taylor v. Kymer, *distinguished*.
Shenstone v. Hilton (1894) 63 L. J. Q. B. 584; [1894] 2 Q. B. 452; 10 R. 890; 71 L. T. 339.

BRUCE, J.—That case does not seem to me to govern the present. It was a decision upon the words of the 2nd section of the Factors Act (6 Geo. 4, c. 94) (*repealed*). The words there are "any contract . . . for the sale or disposition" of goods. The Court held that the word "disposition" in that section must mean "something in the nature of a sale." The phrase "any agreement for sale, pledge, or other disposition," is, I think, wider in its scope than the phrase "any contract for sale or disposition"; but even if I were to adopt the interpretation of the old Act, as applicable to the words of the Act of 1889, I should be prepared to hold that a delivery of goods on the terms that they should be sold by the person to whom they were delivered for the benefit of the person delivering them, was a "disposition," something in the nature of a sale.

Evans v. Trueman (1830) 1 M. & Rob. 10.—K.B., *observations considered*.
Navulshaw v. Brownrigg (1852) 21 L. J. Ch. 908; 2 De G. M. & G. 241; 16 Jur. 979.—L.C.

Evans v. Trueman, *approved*.
Gobind Chunder Sein v. Ryan (1861) 15 Moore P. C. 230; 9 Moore Ind. App. 140; 8 Jur. (N.S.) 343; 5 L. T. 559; 10 W. R. 155.—P.C.

Hatfield v. Phillips (1842) 11 L. J. Ex. 425; 9 M. & W. 647.—EX. CH.; *affirmed*, (1845) 12 Cl. & F. 343; 14 M. & W. 665.—H.L. (E.), *applied*.

Bonzi v. Stewart (1842) 11 L. J. C. P. 228; 4 Man. & G. 295; 5 Scott N. R. 1.—C.P.; **Baines v. Swainson** (1863) 32 L. J. Q. B. 281; 4 B. & S. 270; 8 L. T. 536; 11 W. R. 945.—Q.B.

Hatfield v. Phillips, *commented on*.
Cole v. North Western Bank (1875) 44 L. J. C. P. 233; L. R. 10 C. P. 354, 367; 32 L. T. 733.—EX. CH.

Phillips v. Huth (1840) 10 L. J. Ex. 65; 6 M. & W. 572.—EX.

Referred to, **Cole v. North Western Bank** (1875) 44 L. J. C. P. 233; L. R. 10 C. P. 354; 32 L. T. 733.—EX. CH.; *observations adopted*, **Cahn v. Pockett's British Channel Steam Packet Co.** (1899) 68 L. J. Q. B. 515; [1899] 1 Q. B. 643, 660; 80 L. T. 269; 47 W. R. 422.—C.A.

Bonzi v. Stewart (1842) 11 L. J. C. P. 228; 4 Man. & G. 295; 5 Scott N. R. 1.—C.P.; and **Wood v. Rowcliffe** (1846) 6 Hare 183; 11 Jur. 707, 915.—L.C. *See* **Cole v. North Western Bank** (1875) 44 L. J. C. P. 233; L. R. 10 C. P. 354, 367; 32 L. T. 733.—EX. CH.; *affirming* 22 W. R. 861.—C.P.

Learoyd v. Robinson (1844) 13 L. J. Ex. 213; 12 M. & W. 745.—EX., explained
Macnee v. Gorst (1867) L. R. 4 Eq. 315, 324; 15 W. R. 1197.—WOOD, V.-C.

Learoyd v. Robinson, *observations applied*.
 Cole v. North Western Bank (1874) 43 L. J. C. P. 194; L. R. 9 C. P. 470, 490; 30 L. T. 684.—C.P.; *affirmed*, (1875) 44 L. J. C. P. 233; L. R. 10 C. P. 354; 32 L. T. 733.—EX. CH.

Learoyd v. Robinson, *distinguished*.
 Kaltenbach v. Lewis (1885) 55 L. J. Ch. 58; 10 App. Cas. 617; 53 L. T. 787; 34 W. R. 477.—H.L. (E.).

LORD WATSON.—I do not think there is any analogy between the case of money actually paid to a real borrower in order that he may pay his own debt, and the case of money paid to a so-called borrower in order that he may pay the so-called lender's debt.

Learoyd v. Robinson, *adopted*.
 Collis v. Hibernian Bank (1893) 31 L. R. Ir. 261, 289.—C.A.

Navulshaw v. Brownrigg (1852) 21 L. J. Ch. 908; 2 De G. M. & G. 441; 16 Jur. 979.—L.C. (affirming 1 Sim. (N.S.) 573), *approved*.
 Gobind Chunder Sein v. Ryan (1861) 15 Moore P. C. 230; 9 Moore Ind. App. 140; 8 Jur. (N.S.) 343; 5 L. T. 559; 10 W. R. 155.—P.C.

Navulshaw v. Brownrigg, *adopted*.
 Jewan v. Whitworth (1866) 36 L. J. Ch. 127; L. R. 2 Eq. 692; 14 W. R. 1020.—WOOD, V.-C.; *Portalis v. Tetley* (1867) 37 L. J. Ch. 139; L. R. 5 Eq. 140; 17 L. T. 344; 16 W. R. 503.—WOOD, V.-C.; *Moxon v. Bright* (1869) L. R. 4 Ch. 292, 295; 20 L. T. 961.—L.C.

Navulshaw v. Brownrigg, *distinguished*.
 Kaltenbach v. Lewis (1885) 55 L. J. Ch. 58; 10 App. Cas. 617; 53 L. T. 787; 34 W. R. 477.—H.L. (E.).

Lamb v. Attenborough (1862) 31 L. J. Q. B. 41; 1 B. & S. 831; 8 Jur. (N.S.) 280; 10 W. R. 20.—Q.B. *See*
 Cole v. North Western Bank (1875) 44 L. J. C. P. 233; L. R. 10 C. P. 354; 32 L. T. 733.—EX. CH.

Lamb v. Attenborough, *applied*.
 Farquharson v. King (1902).—H.L. (E.) (*ante*, col. 2522).

Sheppard (or Shepherd) v. Union Bank of London (1862) 31 L. J. Ex. 154; 7 H. & N. 661; 8 Jur. (N.S.) 264; 5 L. T. 757; 10 W. R. 299.—EX. *See*
 Cole v. North Western Bank (1875) 44 L. J. C. P. 233; L. R. 10 C. P. 354; 32 L. T. 733.—EX. CH.

Sheppard v. Union Bank of London, *adopted*.
 Cahn v. Pockett's Bristol Channel Steam Packet Co. (1899) 68 L. J. Q. B. 515; [1899] 1 Q. B. 643; 80 L. T. 269; 47 W. R. 422.—C.A.

Heyman v. Flewker (1863) 32 L. J. C. P. 137; 13 C. B. (N.S.) 519; 1 N. R. 479; 9 Jur. (N.S.) 895.—C.P., *followed*.

Hellings v. Russell (1875) 33 L. T. 380.—C.P.D.; *and see* Cole v. North Western Bank (1875) 44 L. J. C. P. 233; L. R. 10 C. P. 354; 32 L. T. 733.—EX. CH.

O.C.

Heyman v. Flewker, *approved*.
 City Bank v. Barrow (1880) 5 App. Cas. 664; 43 L. T. 393.—H.L. (E.).

Heyman v. Flewker, *followed*.
 Tremouille v. Christie (1893) 69 L. T. 338.—STIRLING, J.

Baines v. Swainson (1863) 32 L. J. Q. B. 281; 4 B. & S. 270; 8 L. T. 536; 11 W. R. 945.—Q.B., *discussed*.

Fuentes v. Montis (1868) 37 L. J. C. P. 137; L. R. 3 C. P. 268, 279; 18 L. T. 21.—C.P.; *affirmed*, EX CH. (*infra*); *and see* Cole v. North Western Bank (1875).—EX. CH. (*supra*).

Baines v. Swainson, *adopted*.
 Cahn v. Pockett's Bristol Channel Steam Packet Co. (1899).—C.A. (*supra*).

Jewan v. Whitworth (1866) 36 L. J. Ch. 127; L. R. 2 Eq. 692; 14 W. R. 1020.—WOOD, V.-C., *explained*.

Macnee v. Gorst (1867) L. R. 4 Eq. 315; 15 W. R. 1197.

WOOD, V.-C.—In that case [which was very different from the present] there was an arrangement by which Whitworth, the person buying in his own name, had become liable for Hodgson, the person for whom he bought, which liability would result in a debt due, as soon as Whitworth made the payment, from Hodgson, who pledged the goods to Whitworth, the broker, who had so pledged his credit. But the money not having been yet actually paid, the broker, not having funds to make the payment, went to a third person, Clare. Whitworth, who held the same position there that Gorst does here, did not say to Hodgson, "Give me the cotton, that I may raise the money and free myself from the liability," but wanting to raise money for the purpose of paying this liability, he went to Clare with the documents of title, Clare having no antecedent claim against Hodgson, and being under no obligation to provide for the payment, and, with the consent of the principal, asked Clare to advance this money; Clare agreed to do this upon having the securities, and they were put into Whitworth's hands for the purpose of being handed to Clare, and for the purpose of raising this money. It was with reference to that part of the case that I made the observations, upon which Mr. Kay relied, at p. 702 of the report of *Jewan v. Whitworth*.—p. 323.

Jewan v. Whitworth, *distinguished*.
 Kaltenbach v. Lewis (1885).—H.L. (E.) (*infra*, col. 2546).

Macnee v. Gorst (1867) L. R. 4 Eq. 315; 15 W. R. 1197.—V.-C., *observed upon*.

Thackrah v. Ferguson (1877) 25 W. R. 307.—GROVE and DENMAN, JJ.

Macnee v. Gorst, *distinguished*.
 Kaltenbach v. Lewis (1885).—H.L. (E.) (*infra*, col. 2546).

Fuentes v. Montis (1868) 37 L. J. C. P. 137; L. R. 3 C. P. 268; 18 L. T. 21.—C.P.; *affirmed*, 38 L. J. C. P. 95; L. R. 4 C. P. 93; 19 L. T. 364; 17 W. R. 208.—EX. CH., *referred to*.

Vickers v. Hertz (1871) L. R. 2 H. L. Sc. 113, 118; *and see* Cole v. North Western Bank (1875).—EX. CH. (*supra*).

Fuentes v. Montis, followed.
 Johnson v. Crédit Lyonnais (1877) 47 L. J. C. P. 241; 3 C. P. D. 32; 37 L. T. 657; 26 W. R. 195.—C.A.

Vickers v. Hertz (1871) L. R. 2 H. L. Sc. 113. *See*
 Cole v. North Western Bank (1875).—EX. CH. (*supra*).

Vickers v. Hertz, explained.
 Babcock v. Lawson (1879) 48 L. J. Q. B. 524, 528; 4 Q. B. D. 394, 401; 41 L. T. 252.—Q.B.; *affirmed*, (1880) 49 L. J. Q. B. 408; 5 Q. B. D. 284; 42 L. T. 289; 28 W. R. 591.—C.A.

Vickers v. Hertz, distinguished.
 Farquharson v. King (1902) 71 L. J. K. B. 667; [1902] A. C. 325.—H.L. (E.) (*ante*, col. 2522).

Cole v. North Western Bank (1875) 44 L. J. C. P. 233; L. R. 10 C. P. 354, 367; 32 L. T. 738.—EX. CH., *followed*.

Hellings v. Russell (1875) 33 L. T. 380.—C.P.D.; Johnson v. Crédit Lyonnais (1877) 47 L. J. C. P. 241; 3 C. P. D. 32; 37 L. T. 657; 26 W. R. 195.—C.A.

Cole v. North Western Bank, approved.
 City Bank v. Barrow (1880) 5 App. Cas. 664; 43 L. T. 393.—H.L. (E.).

Cole v. North Western Bank, observations adopted.

Colonial Bank v. Whinney (1886) 56 L. J. Ch. 43; 11 App. Cas. 426, 435; 55 L. T. 362; 34 W. R. 705; 3 Morrell, 207.—H.L. (E.); and Williams v. Colonial Bank (1888) 57 L. J. Ch. 826; 38 Ch. D. 388; 59 L. T. 643; 36 W. R. 625.—C.A.

Cole v. North Western Bank, dictum applied.
 Robertson v. Inglis (1897) 24 Rettie, 758.—CT. OF SESS.

Cole v. North Western Bank, applied.
 Cahn v. Pockett's Bristol Channel Steam Packet Co. (1899) 68 L. J. Q. B. 515; [1899] 1 Q. B. 643.—C.A. (*see ante*, col. 2543).

Cole v. North Western Bank, observations cited.

Farquharson v. King (1901) 70 L. J. K. B. 985; [1901] 2 K. B. 697; 85 L. T. 264; 49 W. R. 673; —C.A., STIRLING, L.J. *dissenting*.

Johnson v. Crédit Lyonnais (1877) 47 L. J. C. P. 241; 3 C. P. D. 32; 37 L. T. 657; 26 W. R. 195.—C.A.

Considered, Robertson v. Inglis (1897) 24 Rettie, 758.—CT. OF SESS.; *applied*, Farquharson v. King (1902).—H.L. (E.) (*ante*, col. 2522).

New Zealand Land Co. v. Ruston, 49 L. J. Q. B. 842; 5 Q. B. D. 474; 43 L. T. 473; 29 W. R. 75.—FIELD, J.; *reversed nom.* New Zealand and Australian Land Co. v. Watson (1881) 50 L. J. Q. B. 433; 7 Q. B. D. 374; 44 L. T. 675; 29 W. R. 694.—C.A.

New Zealand and Australian Land Co. v. Watson, discussed.

Maspons v. Mildred (1882) 51 L. J. Q. B. 604; 9 Q. B. D. 530; 47 L. T. 318; 30 W. R. 862.—C.A.; *affirmed*, H.L. (*infra*).

New Zealand and Australian Land Co. v. Watson, distinguished and explained.

Kaltenbach v. Lewis (1885) 55 L. J. Ch. 58; 10 App. Cas. 617; 53 L. T. 787; 34 W. R. 477.—H.L. (E.).

LORD BRAMWELL.—There are in this case three things which did not exist in the case cited. There is privity between the plaintiffs and the defendants, there is existing property or rights of possession in the plaintiffs when notice was given to the defendants, and there is the right given to the plaintiffs by sect. 7 of 5 & 6 Vict. c. 39 [Factors Act]. . . I wish to add that in the report of my judgment in *New Zealand Co. v. Watson*, the words "produce of goods" did not "get in by mistake." I said and think as reported on the authority of cases then cited by Mr. Barnes. But there there was no privity, and before notice to the then defendants the "produce" was blended in the general account with the intermediate man Thielman.—pp. 67, 68.

Kaltenbach v. Lewis (1881) 45 L. T. 666; 30 W. R. 356.—BACON, V.-C.; *varied*, (1883) 52 L. J. Ch. 881; 24 Ch. D. 54; 48 L. T. 844; 31 W. R. 731.—C.A.; *the latter decision reversed in part*, (1885) 55 L. J. Ch. 58; 10 App. Cas. 617; 53 L. T. 787; 34 W. R. 477.—H.L. (E.).

Kaltenbach v. Lewis. See
 Anderson v. Sutherland (1897) 13 Times L. R. 163, 165.

Maspons v. Mildred (1882) 51 L. J. Q. B. 604; 9 Q. B. D. 530; 47 L. T. 318; 30 W. R. 862.—C.A. JESSEL, M.R., LINDLEY and BOWEN, L.JJ.; *affirmed nom.* Mildred v. Maspons (1883) 53 L. J. Q. B. 33; 8 App. Cas. 874; 32 W. R. 125.—H.L. (E.).

Maspons v. Mildred, inapplicable.
 Kaltenbach v. Lewis (1885).—H.L. (E.) (*supra*).
 LORD FITZGERALD.—I shall only say of that case that the defendants can derive no countenance from it . . . and especially from the judgment . . . as delivered by Lord Blackburn.

Hastings v. Pearson (1892) 62 L. J. Q. B. 75; [1893] 1 Q. B. 62; 67 L. T. 553; 41 W. R. 127; 5 R. 26; 57 J. P. 70.—MATHEW and BRUCE, JJ., *distinguished*. Tremoille v. Christie (1893) 69 L. T. 338.—STIRLING, J.

Hastings v. Pearson, distinguished.
 Shenstone v. Hilton (1894) 63 L. J. Q. B. 584; [1894] 2 Q. B. 452; 10 R. 390; 71 L. T. 339.

BRUCE, J.—The case of *Hastings v. Pearson* which was cited by the plaintiffs' counsel, seems to me to have no application to the present case [which arose under s. 9 of the Factors Act, 1889]. The point there raised related solely to the construction to be put upon the 2nd section of the Act.

Lee v. Butler (1893) 62 L. J. Q. B. 591; [1893] 2 Q. B. 318; 4 R. 563; 69 L. T. 370; 42 W. R. 88.—C.A., *distinguished*. Helby v. Matthews (1895) 64 L. J. Q. B. 465; [1895] A. C. 471; 11 R. 232; 72 L. T. 841; 43 W. R. 561; 60 J. P. 20.—H.L. (E.).
 HERSCHELL, L.C.—Reliance was placed on the decision in *Lee v. Butler*, and it was said that

the present case was not in principle distinguishable from it. There seems to me to be the broadest distinction between the two cases. There was there an agreement to buy. The purchase-money was to be paid in two instalments; but as soon as the agreement was entered into there was an absolute obligation to pay both of them, which might have been enforced by action. The person who obtained the goods could not insist upon returning them and so absolve himself from any obligation to make further payment. Unless there were a breach of contract by the party who engaged to make the payments, the transaction necessarily resulted in a sale. That there was in that case an agreement to buy appears to me, as it did to the Court of Appeal, to be beyond question.—p. 468.

Lee v. Butler, followed.

Hull Ropes Co. v. Adams (1895) 65 L. J. Q. B. 114; 73 L. T. 446; 44 W. R. 108.—GRANTHAM and WRIGHT, JJ.

GRANTHAM, J.—We have now seen that judgment in *Helby v. Matthews (supra)* and are of opinion that this case is not governed by that decision, but is within the decision of the Court of Appeal in *Lee v. Butler*, which case is in fact affirmed by the House of Lords in *Helby v. Matthews*. The agreement in question is ill-expressed, but it appears to us to contain an irrevocable promise by the hirer to pay 4*l.* a month until the full price of 15*l.* 5*s.* is paid, and when the 15*l.* 5*s.* has been paid, the rope thereupon becomes the property of the hirer. Various contingencies are named in which the owner may put an end to the arrangement for sale, but there is nothing corresponding to the provision on which the decision of the House of Lords in *Helby v. Matthews* appears to have turned—there “the hirer may terminate the hiring by delivery up to the owner the said instrument.” We therefore think that in the present case the hirer had agreed to buy the rope within the meaning of the Factors Act, 1889.—p. 116.

Lee v. Butler, applied.

Wylde v. Legge (1901) 84 L. T. 121.—BRUCE and PHILLIMORE, JJ.

Helby v. Matthews (1894) 63 L. J. Q. B. 577; [1894] 2 Q. B. 262; 9 R. 767; 70 L. T. 837; 42 W. R. 514; 58 J. P. 785.—C.A. ESHER, M.R., SMITH and DAVEY, L.JJ.; *reversed*, (1895) 64 L. J. Q. B. 465; [1895] A. C. 471; 11 R. 232; 72 L. T. 841; 43 W. R. 561; 60 J. P. 20.—H.L. (E.).

Helby v. Matthews (supra, in H.L.), followed.

Payne v. Wilson (1894) 65 L. J. Q. B. 150; [1895] 2 Q. B. 537; 15 R. 239, n.; 73 L. T. 12; 43 W. R. 657.—C.A.

Helby v. Matthews, distinguished.

Hull Ropes Co. v. Adams (1895) 65 L. J. Q. B. 114; 73 L. T. 446; 44 W. R. 108.—GRANTHAM and WRIGHT, JJ. See extract, *supra*.

Helby v. Matthews, referred to.

Hepple v. Brumby (1896) 60 J. P. 792.—GRANTHAM and WRIGHT, JJ.

Helby v. Matthews, applied.

Wylde v. Legge (1901) 84 L. T. 121.—BRUCE and PHILLIMORE, JJ.

Payne v. Wilson (1895) [1895] 1 Q. B. 653; 15 R. 233.—POLLOCK, B. and GRANTHAM, J.; *reversed*, (1895) 65 L. J. Q. B. 150; [1895] 2 Q. B. 537; 15 R. 239, n.; 73 L. T. 12; 43 W. R. 657.—C.A.

Graham v. Dyster (1817) 6 M. & S. 1; 2 Stark. 21.—K.B., *observations explained*.

Smart v. Sandars (1848) 17 L. J. C. P. 258 C. B. 895; 12 Jur. 751.—C.P.

Gorgier v. Mieville (1824) 2 L. J. (o.s.) K. B. 206; 3 B. & C. 45; 4 D. & R. 641; 27 R. R. 290.—ABBOTT, C.J., *held inapplicable*.

Crouch v. Crédit Foncier of England (1873) 42 L. J. Q. B. 183; L. R. 8 Q. B. 374, 384; 29 L. T. 259; 21 W. R. 946.—Q.B.

Gorgier v. Mieville, approved.

Goodwin v. Roberts (1876) 45 L. J. Ex. 748; 1 App. Cas. 476; 35 L. T. 179; 24 W. R. 987.—H.L. (E.). (see extract, *ante*, col. 1980).

Gorgier v. Mieville, referred to.

London and County Banking Co. v. London and River Plate Bank (1887) 20 Q. B. D. 232, 238.—MANISTY, J., affirmed C.A.; *held applicable*, London Joint Stock Bank v. Simmons (1892) 61 L. J. Ch. 723; [1892] A. C. 201.—H.L. (E.); *referred to*, Bechuanaland Exploration Co. v. London Trading Bank (1898) 67 L. J. Q. B. 986; [1898] 2 Q. B. 658.—KENNEDY, J.

Nicholson v. Hooper, 2 Jur. 9.—V.-C.; *reversed*, (1838) 4 Myl. & C. 179.—L.C.

6. RIGHTS AND LIABILITIES OF AGENT AND THIRD PARTIES.

Action by Agent.

Bickerton v. Burrell (1816) 5 Maule & S. 383.—K.B., *commented on*.

Rayner v. Grote (1846) 15 M. & W. 359; 16 L. J. Ex. 79.—EX.

ALDERSON, B. (for the Court).—And it may be observed that this case is really distinguishable from *Bickerton v. Burrell*, on the very ground on which that case was decided; for here, at all events, before action brought and trial had, the defendant knew that the plaintiff was the principal in the transaction. Perhaps it may be doubted whether that case was well decided on such a distinction, as it may fairly be argued that it would have been quite sufficient to prevent any possible inconvenience or injustice, and more in accordance with former authorities, if the Court had held that a party named as agent under such circumstances as existed in that case, was entitled, on showing himself to be the real principal, to maintain the action, the defendant being, however, allowed to make any defence to which he could show himself to be entitled either as against the plaintiff or as against the person named as principal by the plaintiff in the contract. It is not, however, necessary for us, in the present case, to question the authority of that decision.—p. 366.

Bickerton v. Burrell and Rayner v. Grote, considered.

Schmalz v. Avery (1831) 20 L. J. Q. B. 228; 15 Jur. 291.—Q.B.

Rayner v. Grote, referred to.

Tetley v. Shand (1871) 25 L. T. 658; 20 W. R. 206.—C.P.

Liability of Agent.

Frontin v. Small (1726). Ld. Raym. 1418.—K.B., *rule adopted*.

McArdle v. Irish Iodine Co. (1864) 15 Ir. C. L. R. 146.—EX.

PIGOT, C.B.—According to that rule [the rule laid down in the above case, *Appleton v. Binks* (*infra*), and *Berkely v. Hardy* (*infra*, col. 2558)], with some very special exceptions which have no application here, no person can be sued upon an instrument under seal, made *inter partes*, who is not a party to the deed; and where a deed is executed by one person on behalf of another, either he must, in order to bind that other person, execute it, either using the name of his principal, or he must employ such words as show that he executed it, not as himself a party to the deed, but as the agent, in the act of executing it, of his principal. The form of words is immaterial if in substance this is done.—p. 153.

Appleton v. Binks (1804) 5 East. 148; 1 Smith, 361; 7 R. R. 672.—K.B., *distinguished*.

Downman v. Williams (1845) 14 L. J. Q. B. 226; 7 Q. B. 103; 9 Jur. 454.—EX. CH.

Appleton v. Binks, adopted.

Tanner v. Christian (1855) 24 L. J. Q. B. 91; 4 El. & Bl. 591; 1 Jur. (N.S.) 519; 3 W. R. 204.—Q.B.; **McArdle v. Irish Iodine Co.** (1864) 15 Ir. C. L. R. 146.—EX. *See extract, supra*.

Spittle v. Lavender (1821) 2 Br. & B. 452; 5 Moore, 270; 23 R. R. 598.—C.P., *distinguished*.

Tanner v. Christian (1855) 24 L. J. Q. B. 91; 4 El. & Bl. 591; 1 Jur. (N.S.) 519; 3 W. R. 204.—Q.B.

Spittle v. Lavender, principle applied.

Brannwell v. Spiller (1870) 21 L. T. 672.—C.P.

Norton v. Herron (1825) 1 Car. & P. 648; R. & M. 229; 28 R. R. 797, *adopted*.

Tanner v. Christian (1855) 24 L. J. Q. B. 91; 4 El. & Bl. 591; 1 Jur. (N.S.) 519; 3 W. R. 204.—Q.B.

Magee v. Atkinson (1837) 6 L. J. Ex. 115; 2 M. & W. 410.—EX.; and **Jones v. Littledale** (1837) 6 L. J. K. B. 169; 6 A. & E. 486; 1 N. & P. 677.—K.B., *referred to*.

Johnston v. Osborne (1840) 3 P. & D. 236; 11 A. & E. 549; 1 Jur. 943.—Q.B.

Magee v. Atkinson and Jones v. Littledale, followed.

Higgins v. Senior (1841) 11 L. J. Ex. 199; 8 M. & W. 834.—EX.

Magee v. Atkinson, referred to.

Jones v. Littledale, commented on.

Holding v. Elliott (1860) 29 L. J. Ex. 134; 5 H. & N. 117; 8 W. R. 192.—EX.

Jones v. Littledale, principle applied.

Fleet v. Murton (1871) 41 L. J. Q. B. 49; 19 L. R. 126, 131; 26 L. T. 181; 20 W. R. 97.—Q.B.

Higgins v. Senior (1841) 8 M. & W. 834; 11 L. J. Ex. 199.—EX., *adopted*.

Williamson v. Barton (1861) 31 L. J. Ex. 170; 7 H. & N. 899; 8 Jur. (N.S.) 341; 5 L. T. 800; 10 W. R. 321.—EX.

Higgins v. Senior, approved but distinguished.
Holding v. Elliott (1860) 29 L. J. Ex. 134; 5 H. & N. 117; 8 W. R. 192.—EX.

Higgins v. Senior, adopted.

Fisher v. Marsh (1865) 6 B. & S. 411; 34 L. J. Q. B. 177; 11 Jur. (N.S.) 795; 12 L. T. 604; 13 W. R. 834.—Q.B.; **Cropper v. Cook** (1868) L. R. 3 C. P. 194, 199; 17 L. T. 603; 16 W. R. 596.—C.P.; **Calder v. Dobell** (1871) 40 L. J. C. P. 224; L. R. 6 C. P. 486, 490; 25 L. T. 129; 19 W. R. 978.—EX. CH.; **Fleet v. Murton** (1871) 41 L. J. Q. B. 49; L. R. 7 Q. B. 126, 131; 26 L. T. 181; 20 W. R. 97.—Q.B.; **Armstrong v. Stokes** (1872) 41 L. J. Q. B. 253; L. R. 7 Q. B. 598, 607; 26 L. T. 872; 21 W. R. 52.—Q.B.; **Browning v. Provincial Insurance Company of Canada** (1873) L. R. 5 P. C. 263, 273; 28 L. T. 853; 21 W. R. 587.—P.C.

Downman v. Williams (1845) 14 L. J. Q. B. 226; 7 Q. B. 103; 9 Jur. 454.—EX. CH., *applied*.

Carr v. Jackson (1852) 21 L. J. Ex. 137.—EX.; **Lewis v. Nicholson** (1852) 21 L. J. Q. B. 311; 18 Q. B. 503; 16 Jur. 1041.—Q.B.; **Collen v. Wright** (1857) 27 L. J. Q. B. 215; 8 El. & Bl. 647; 4 Jur. (N.S.) 357; 6 W. R. 123.—EX. CH.; **Allaway v. Duncan** (1867) 16 L. T. 264; 15 W. R. 711.—C.P.; **Cherry v. Colonial Bank of Australasia** (1869) 6 Moore P. C. (N.S.) 235; 38 L. J. P. C. 49; L. R. 3 P. C. 24; 21 L. T. 356; 17 W. R. 1031.—P.C.

Humble v. Hunter (1848) 17 L. J. Q. B. 350; 12 Q. B. 310.—Q.B., *considered*.

Schmalz v. Avery (1851) 20 L. J. Q. B. 228; 15 Jur. 291.—Q.B.; *referred to*, **British Wagon Co. v. Lea** (1880) 49 L. J. Q. B. 321; 5 Q. B. D. 149, 152; 42 L. T. 437; 28 W. R. 349; 44 J. P. 440.—COCKBURN, C.J.

Humble v. Hunter, distinguished.

Killick v. Price (1896) 12 T. L. R. 263.—RUSSELL, C.J.

Humble v. Hunter, dictum applied.

Associated Portland Cement Manufacturers v. Tolhurst (1902) 71 L. J. K. B. 949; [1902] 2 K. B. 660; 87 L. T. 465; 51 W. R. 81.—C.A.

Jenkins v. Hutchinson (1849) 18 L. J. Q. B. 274; 13 Q. B. 744; 13 Jur. 763.—Q.B., *distinguished*.

Schmalz v. Avery (1851) 20 L. J. Q. B. 228; 15 Jur. 291.—Q.B.

Jenkins v. Hutchinson, approved.

Lewis v. Nicholson (1852) 21 L. J. Q. B. 311; 18 Q. B. 503; 16 Jur. 1041.—Q.B.; **Collen v. Wright** (1857) 27 L. J. Q. B. 215; 8 El. & Bl. 647; 4 Jur. (N.S.) 357; 6 W. R. 123.—EX. CH.

Lewis v. Nicholson (1852) 21 L. J. Q. B. 311; 18 Q. B. 503; 16 Jur. 1041.—Q.B., *distinguished*.

Tanner v. Christian (1855) 24 L. J. Q. B. 91; 4 El. & Bl. 591; 1 Jur. (N.S.) 519; 3 W. R. 204.—Q.B.

Lewis v. Nicholson, adopted.

Collen v. Wright (1857) 27 L. J. Q. B. 215; 8 El. & Bl. 647; 4 Jur. (N.S.) 357; 6 W. R. 123.—EX. CH.; **Cherry v. Colonial Bank of Australasia** (1869) 6 Moore P. C. (N.S.) 235; 38 L. J. P. C. 49; L. R. 3 P. C. 24; 21 L. T. 356; 17 W. R. 1031.—P.C.; **Royal Albert Hall v. Winchelsea** (1890) 7 T. L. R. 362.—C.A.; and **Starkey v. Bank of England** (1903) 72 L. J. Ch. 402; [1903] A. C. 114.—H.L. (E.).

Tanner v. Christian (1855) 24 L. J. Q. B. 91; 4 El. & Bl. 591; 1 Jur. (N.S.) 519; 3 W. R. 204.—Q.B., *applied*.

Paice v. Walker (1870) 39 L. J. Ex. 109; L. R. 5 Ex. 173; 22 L. T. 547; 18 W. R. 789.—EX.; Ogden v. Hall (1879) 40 L. T. 751.—EX. D.

Lennard v. Robinson (1855) 24 L. J. Q. B. 275; 5 El. & Bl. 125; 3 C. L. R. 1363; 1 Jur. (N.S.) 853.—Q.B., *adopted*.

Williamson v. Barton (1861) 31 L. J. Ex. 170; 7 H. & N. 899; 8 Jur. (N.S.) 341; 5 L. T. 800; 10 W. R. 321.—EX.; **Paice v. Walker** (1870) 39 L. J. Ex. 109; L. R. 5 Ex. 173; 22 L. T. 547; 18 W. R. 789.—EX.

Kelner v. Baxter (1866) 36 L. J. C. P. 94; L. R. 2 C. P. 174; 12 Jur. (N.S.) 1016; 15 L. T. 213; 15 W. R. 278.—C.P., *explained and distinguished*.

Hollman v. Pullin (1884) Cab. & E. 254.—WILLIAMS, J.

Kelner v. Baxter *discussed*.

Thompson v. L. C. C. (1899) 68 L. J. Q. B. 625; [1899] 1 Q. B. 840; 80 L. T. 512; 47 W. R. 433.—C.A., *applied*. **Keighley v. Durant** (1901) 70 L. J. K. B. 662; [1901] A. C. 240; 84 L. T. 777.—H.L. (E.); and **O'Keeffe v. Walsh** [1903] 2 Ir. R. 681, 712.—K.B.D. (reversed C.A.); *approved*, **Natal Land, &c., Co. v. Pauline Colliery, &c., Syndicate** (1904) 73 L. J. P. C. 22; [1904] A. C. 120.—P.C. *And see ante*, vol. i. col. 439.

Fairlie v. Fenton (1870) 39 L. J. Ex. 107; L. R. 5 Ex. 169; 22 L. T. 373; 18 W. R. 700.—EX., *distinguished*.

Paice v. Walker (1870) 39 L. J. Ex. 109; L. R. 5 Ex. 173; 22 L. T. 547; 18 W. R. 789.—EX.; **Fleet v. Murton** (1871) 41 L. J. Q. B. 49; L. R. 7 Q. B. 126, 129; 26 L. T. 181; 20 W. R. 97.—Q.B.

Fairlie v. Fenton, *principle applied*.

Hutchinson v. Tatham (1873) 42 L. J. C. P. 260; L. R. 8 C. P. 482; 29 L. T. 103; 22 W. R. 18.—C.P.

Paice v. Walker (1870) 39 L. J. Ex. 109; L. R. 5 Ex. 173; 22 L. T. 547; 18 W. R. 789.—EX., *observed upon*.

Concordia Chemische Fabrik auf Actien v. Squire (1876) 34 L. T. 824.—C.A.

Paice v. Walker, *commented on*.

Gadd v. Houghton (1876) 1 Ex. D. 357; 46 L. J. Ex. 71; 35 L. T. 222; 24 W. R. 975.—C.A., *reversing* 33 L. T. 811.—EX. D.

JAMES, L.J.—The *ratio decidendi* in **Paice v. Walker** was that having regard to the contract and all the circumstances of the case, the words "as agents" must be considered as merely describing or intimating the fact that the defendants were agents, and did not amount to a statement that they are making a bargain "on account of" another person. . . . As to **Paice v. Walker**, I cannot conceive that the words "as agents" can be properly understood as implying merely a description. The word "as" seems to exclude that idea. If that case were now before us, I should hold that the words "as agents," in that case, had the same effect as the words "on account of" in the present case, and that the decision in that case ought not to stand. I do not dissent from the principle that a man does not relieve himself from liability upon a

contract by using words which are intended to be merely words of description; but I do not think the words "as agents" are words of description.—p. 359.

Paice v. Walker, *not applied*.

Gadd v. Houghton, *applied*.

Ogden v. Hall (1879) 40 L. T. 751.—EX. D.

Paice v. Walker, *adopted*.

Gadd v. Houghton, *dictum considered*.

Hough v. Manzaos (1879) 48 L. J. Ex. 398; 4 Ex. D. 104; 27 W. R. 536.—EX. D.

Paice v. Walker, *questioned*.

Gadd v. Houghton, *applied*.

Royal Albert Hall Corporation v. Winchelsea (1890) 7 T. L. R. 362.—C.A.; and **Glover v. Langford** (1892) 8 T. L. R. 628.—CHARLES, J.

Southwell v. Bowditch 45 L. J. C. P. 374; 1 C. P. D. 100; 34 L. T. 133; 24 W. R. 275.—C.P.D.; *reversed*, (1876) 45 L. J. C. P. 630; 1 C. P. D. 374; 35 L. T. 196; 24 W. R. 838.—C.A.

Southwell v. Bowditch (*supra*, in C.A.), *commented on*.

Adams v. Hall (1877) 37 L. T. 70.—C.P.D. [Counsel urged that the case of **Southwell v. Bowditch** was distinguishable; there the defendant gave the plaintiff to understand all through the transaction that the defendant was dealing with the plaintiff's principal.]

GROVE, J.—**Southwell v. Bowditch** went entirely on the construction to be put on the words "sold to" and "bought of." The words there were "for my principal"; here they are not so definite. [The words were "for owners."]—p. 71.

Southwell v. Bowditch, *dicta adopted*.

Lamare v. London and St. Katherine Docks Co. (1878) 39 L. T. 330.—C.P.D.; **Woodgate v. G. W. Ry.** (1884) 51 L. T. 826, 833; 33 W. R. 428; 49 J. P. 196.—HAWKINS and SMITH, JJ.; **Bristol Waterworks Co. v. Uren** (1885) 54 L. J. M. C. 97; 15 Q. B. D. 637, 645; 52 L. T. 655; 49 J. P. 564.—MATHEW and SMITH, JJ.

Stephens v. Badcock (1832) 1 L. J. K. B. 75; 3 B. & Ad. 354.—K.B., *distinguished*.

Collins v. Brook (1860) 29 L. J. Ex. 255; 5 H. & N. 700; 6 Jur. (N.S.) 999; 2 L. T. 774; 8 W. R. 474.—EX. CH.; and **Mildred v. Maspons** (1883) 53 L. J. Q. B. 33; 8 App. Cas. 374, 386; 49 L. T. 685; 32 W. R. 125.—H.L. (E.).

Randell v. Trimen (1856) 25 L. J. C. P. 307; 18 C. B. 786.—C.P.

Applied, **Spedding v. Newell** (1869) 38 L. J. C. P. 133; L. R. 4 C. P. 212.—C.P.; *explained and distinguished*, **Dickson v. Reuter's Telegraph Co.** (1877) 46 L. J. C. P. 197; 2 C. P. D. 62; 35 L. T. 842.—C.P.D. [affirmed C.A.]

Simons v. Patchett (1857) 26 L. J. Q. B. 195; 7 El. & Bl. 568; 3 Jur. (N.S.) 742; 5 W. R. 500.—Q.B., *applied*.

Spedding v. Nevell (1869) 38 L. J. C. P. 133; L. R. 4 C. P. 212.—C.P.; **National Coffee Palace Co., In re, Panmure, Ex parte** (1883) 53 L. J. Ch. 57; 24 Ch. D. 367; 50 L. T. 38; 32 W. R. 236.—C.A.; **Meek v. Wendt** (1888) 21 Q. B. D. 126, 129; 39 L. T. 558; 6 Asp. M. C. 331.—CHARLES, J.

Aggs v. Nicholson (1866) 25 L. J. Ex. 348 : 1 H. & N. 165 : 4 W. R. 776.—EX., *applied*.
Alexander v. Sizer (1869) 38 L. J. Ex. 59 : L. R. 4 Ex. 102.—EX.

Aggs v. Nicholson, *distinguished*.
Herald v. Connah (1876) 34 L. T. 885.—EX. D.

Collen v. Wright (1857) 27 L. J. Q. B. 215 : 8 E. & B. 647 : 4 Jur. (N.S.) 357 : 6 W. R. 123.—EX. CH., *not to be extended*.
Robson v. Turnbull (1858) 1 F. & F. 365.
MARTIN, B.—I agree with the decision of the Court in the case of *Collen v. Wright*, but I will never be a party to carrying it further.—p. 369.

Collen v. Wright, *referred to*.
Pow v. Davis (1861) 30 L. J. Q. B. 257 : 1 B. & S. 220 : 7 Jur. (N.S.) 1010 : 4 L. T. 399 : 9 W. R. 611.—Q.B.

Collen v. Wright, *applied*.
Hughes v. Graeme (1864) 33 L. J. Q. B. 335 : 12 W. R. 857.—Q.B.

Collen v. Wright, *explained*.
Henderson v. Squire (1869) 38 L. J. Q. B. 73 : L. R. 4 Q. B. 170, 174 : 10 B. & S. 183 : 19 L. T. 601 : 17 W. R. 519.—Q.B.

Collen v. Wright, *held applicable*.
Spedding v. Nevell (1869) 38 L. J. C. P. 133 : L. R. 4 C. P. 212, 223.—C.P.

Collen v. Wright, *approved and applied*.
Cherry v. Colonial Bank of Australasia (1869) 6 Moore P. C. (N.S.) 235 : 38 L. J. P. C. 49 : L. R. 3 P. C. 24 : 21 L. T. 356 : 17 W. R. 1031.—P.C.; **Spedding v. Nevell** (1869) 38 L. J. C. P. 133 : L. R. 4 C. P. 212.—P.C.; **Richardson v. Williamson** (1871) 40 L. J. Q. B. 145 : L. R. 6 Q. B. 276.—Q.B.

Collen v. Wright, *distinguished*.
Beattie v. Ebury (Lord) (1872) 41 L. J. Ch. 804 : L. R. 7 Ch. 777 : 27 L. T. 398 : 20 W. R. 994.—L.J.; *affirmed* in H.L.

[The above case was distinguished on the ground that it involved a misrepresentation in point of fact.]

Collen v. Wright, *considered and distinguished*.
Weeks v. Probert (1873) 42 L. J. C. P. 129 : L. R. 8 C. P. 427 : 21 W. R. 676.—C.P.

Collen v. Wright, *explained*.
Dixon (or Dickson) v. Reuter's Telegraph Co. (1877) 47 L. J. C. P. 1 : 3 C. P. D. 1. 5 : 37 L. T. 370 : 26 W. R. 23.—C.A.

Collen v. Wright, *considered*.
Chapleo v. Brunswick Benefit Building Society (1881) 50 L. J. Q. B. 372 : 6 Q. B. D. 696 : 44 L. T. 449 : 29 W. R. 529.—C.A. **BRAMWELL, BAGGALLAY and BRETT, L.JJ.**

Collen v. Wright, *applied*.
National Coffee Palace Co., In re, Panmure, Ex parte (1883) 53 L. J. Ch. 57 : 24 Ch. D. 367 : 50 L. T. 38 : 32 W. R. 236.—C.A. **BRETT, M.R., COTTON and BOWEN, L.JJ.** : **Hollman v. Pullin** (1884) Cab. & E. 254.—V. **WILLIAMS, J.**

Collen v. Wright, *followed*.
Firbank v. Humphreys (1886) 56 L. J. Q. B. 57 : 18 Q. B. D. 54 : 56 L. T. 36 : 35 W. R. 29.—C.A. **ESHER, M.R. LINDLEY and LOPES, L.JJ.**

Collen v. Wright, *principle applied*.
Firbank's Exors. v. Humphreys (1886) 56 L. J. Q. B. 57 : 18 Q. B. D. 54 : 56 L. T. 36 : 35 W. R. 92.—C.A.; **Hammond v. Bussey** (1887) 57 L. J. Q. B. 58 : 20 Q. B. D. 79, 90.—C.A.

Collen v. Wright, *considered and distinguished*.
Dunn v. Macdonald (1896) 66 L. J. Q. B. 209 : [1897] 1 Q. B. 401.—**CHARLES, J.** ; *affirmed* C.A.

Collen v. Wright, *followed*.
Halbot v. Lens (1900) 70 L. J. Ch. 125 : [1901] 1 Ch. 344 : 83 L. T. 702 : 49 W. R. 214.—**KEKEWICH, J.**

Collen v. Wright, *explained*.
Oliver v. Bank of England (1902) 71 L. J. Ch. 388 : [1902] 1 Ch. 610 : 86 L. T. 248 : 50 W. R. 340 : 7 Com. Cas. 89.—C.A.; *affirmed*, H.L.

Collen v. Wright, *approved and followed*.
Sheffield Corporation v. Barclay (1902) 72 L. J. K. B. 8 : [1903] 1 K. B. 1 : 87 L. T. 479.—**ALVERSTONE, C.J.** [reversed C.A.]; **Starkey v. Bank of England** (1903) 72 L. J. Ch. 402 : [1903] A. C. 114 : 88 L. T. 244 : 51 W. R. 513.—H.L. (E.).

Pow v. Davis (1861) 30 L. J. Q. B. 257 : 1 B. & S. 220 : 7 Jur. (N.S.) 1010 : 4 L. T. 399 : 9 W. R. 611.—Q.B., *distinguished*.
Hughes v. Graeme (1864) 33 L. J. Q. B. 335 : 12 W. R. 857.—Q.B.

Rashdall v. Ford (1866) 35 L. J. Ch. 769 : L. R. 2 Eq. 750 : 14 W. R. 950.—**WOOD, V.-C.**, *approved*.

Beattie v. Ebury (Lord) (1872) 41 L. J. Ch. 804 : L. R. 7 Ch. 777 : 27 L. T. 398 : 20 W. R. 994.—L.JJ.

MELLISH, L.J. (for the Court : **JAMES and MELLISH, L.JJ.**)—Now, although I have found no case at law, there is a case in equity which clearly shows that the rule in this Court is that a person cannot be made liable for making a misrepresentation unless it is a misrepresentation in point of fact. No suit can be maintained for making a misrepresentation in point of law. . . . The case I refer to is *Rashdall v. Ford*.—p. 806.
 [The decision in this case was, with an unimportant variation, affirmed by the House of Lords. See *infra*, col. 2556.]

Rashdall v. Ford, *approved*.
Beattie v. Ford (1872) 41 L. J. Ch. 804 : L. R. 7 Ch. 777 : 27 L. T. 398 : 20 W. R. 994.—L.JJ.

Rashdall v. Ford, *distinguished*.
West London Commercial Bank v. Kitson (1884) 53 L. J. Q. B. 354 : 13 Q. B. D. 360 : 50 L. T. 656 : 32 W. R. 757.—C.A.

Spedding v. Nevell (1869) 38 L. J. C. P. 133 : L. R. 4 C. P. 212.—C.P., *applied*.
National Coffee Palace Co., In re, Panmure, Ex parte (1883) 53 L. J. Ch. 57 : 24 Ch. D. 367 : 50 L. T. 38 : 32 W. R. 236.—C.A. **BRETT, M.R., COTTON and BOWEN, L.JJ.** ; **Meek v. Wendt** (1888) 21 Q. B. D. 126, 129 : 59 L. T. 558.—**CHARLES, J.**

Cherry v. Colonial Bank of Australasia (1869) 6 Moore P. C. (N.S.) 235 : 38 L. J. P. C. 49 : L. R. 3 P. C. 24 : 21 L. T. 356 : 17 W. R. 1031.—P.C., *distinguished*.
Beattie v. Ebury (Lord) (1874) 44 L. J. Ch. 20 : L. R. 7 H. L. 102, 111 : 30 L. T. 581 : 22 W. R. 897.—H.L. (E.).

Cherry v. Colonial Bank of Australasia, *adopted*.

Lakeman v. Mountstephen (1874) 43 L. J. Q. B. 188; L. R. 7 H. L. 17, 25; 30 L. T. 437; 22 W. R. 617.—H.L. (E.).

Cherry v. Colonial Bank of Australasia, *distinguished*.

Colonial Bank of Australasia v. Willan (1874) 43 L. J. P. C. 39; L. R. 5 P. C. 417, 448; 30 L. T. 237; 22 W. R. 516.—P.C.

Cherry v. Colonial Bank of Australasia, *referred to*.

Starkey v. Bank of England (1903) 72 L. J. Ch. 402; [1903] A. C. 114.—H.L. (E.).

Richardson v. Williamson (1871) 40 L. J. Q. B. 145; L. R. 6 Q. B. 276.—Q.B., *distinguished*.

Beattie v. Ebury (Lord) (1872) 41 L. J. Ch. 804; L. R. 7 Ch. 777; 27 L. T. 398; 20 W. R. 994.—C.A.; affirmed in H.L.

[The above case distinguished on the ground that it involved a misrepresentation in point of fact.]

Richardson v. Williamson, *applied*.

Weeks v. Propert (1873) 42 L. J. C. P. 129; L. R. 8 C. P. 427; 21 W. R. 676.—C.P.

Richardson v. Williamson, *referred to*.

Chapleo v. Brunswick Benefit Building Society (1881) 50 L. J. Q. B. 372; 6 Q. B. D. 596, 706; 44 L. T. 449; 29 W. R. 529.—C.A.

Richardson v. Williamson, *distinguished*.

Atkins v. Wardle (1889) 58 L. J. Q. B. 377, 380; 61 L. T. 23.—DENMAN, J.

Beattie v. Ebury (Lord), 41 L. J. Ch. 393; 26 L. T. 350.—BACON, V.-C.; *reversed*, (1872) 41 L. J. Ch. 804; L. R. 7 Ch. 777; 27 L. T. 398; 20 W. R. 994.—L.J.J.; *the latter decision affirmed with variations*, (1874) 44 L. J. Ch. 20; L. R. 7 H. L. 102; 30 L. T. 581; 22 W. R. 897.—H.L. (E.).

Beattie v. Ebury (Lord) (*supra*, L.J.J.), *explained and distinguished*.

Weeks v. Propert (1873) 42 L. J. C. P. 129; L. R. 8 C. P. 427, 437; 21 W. R. 676.—C.P.

Beattie v. Ebury (Lord), *observations inapplicable*.

West London Commercial Bank v. Kitson (1884) 53 L. J. Q. B. 345; 13 Q. B. D. 360; 50 L. T. 656; 32 W. R. 757.—C.A.

Beattie v. Ebury (Lord), *observations applied*.

Halbot v. Lens (1900) 70 L. J. Ch. 125; [1901] 1 Ch. 344; 83 L. T. 702; 49 W. R. 214.—KEKEWICH, J.

Weeks v. Propert (1873) 42 L. J. C. P. 129; L. R. 8 C. P. 427; 21 W. R. 676.—C.P., *discussed*.

Firbank v. Humphreys (1886) 56 L. J. Q. B. 57; 18 Q. B. D. 54; 56 L. T. 36; 35 W. R. 92.—C.A.

Chapleo v. Brunswick Benefit Building Society, 49 L. J. C. P. 796; 5 C. P. D. 331; 42 L. T. 741; 29 W. R. 153.—COLERIDGE, C.J.; *partly reversed*, (1881) 50 L. J. Q. B. 372; 6 Q. B. D. 696; 44 L. T. 449; 29 W. R. 529.—C.A.

Chapleo v. Brunswick Benefit Building Society, *referred to*.

Watson, Ex parte (1888) 57 L. J. Q. B. 609; 21 Q. B. D. 301; 59 L. T. 401; 36 W. R. 829.—Q.B.D.; **Taff Vale Ry. v. Amalgamated Society of Railway Servants** (1901) 70 L. J. K. B. 905; [1901] A. C. 426; 85 L. T. 147; 50 W. R. 44.—H.L. (E.); and **O'Keeffe v. Walsh** [1903] 2 Ir. R. 631.—K.B.D.; affirmed C.A.

National Coffee-Palace Co., In re, Panmure, Ex parte (1883) 53 L. J. Ch. 57; 24 Ch. D. 367; 50 L. T. 38; 32 W. R. 236.—C.A., *followed*.

Meek v. Wendt (1888) 21 Q. B. D. 126; 59 L. T. 558; 6 Asp. M. C. 331.—CHARLES, J.

Firbank v. Humphreys (1886) 56 L. J. Q. B. 57; 18 Q. B. D. 54; 56 L. T. 36; 35 W. R. 92.—C.A., *distinguished*.

Elkington v. Hürter (1892) 61 L. J. Ch. 514; [1892] 2 Ch. 452; 66 L. T. 764.

ROMER, J.—It seems to me that the case of *Firbank's Errors v. Humphreys* is clearly distinguishable. There the directors contracted to issue certain debentures, and it turned out that they had no power to issue them. It was, therefore, not unnatural that the directors by issuing invalid debenture certificates were held to have implied and represented that they had authority to issue them when in fact they had no such authority. Here there were debentures which might have been made available for the purpose of the contract. I hold, therefore, that the defendant is not personally liable.

Firbank v. Humphreys, *referred to*.

Oliver v. Bank of England (1902) 71 L. J. Ch. 388; [1902] 1 Ch. 610; 86 L. T. 248; 50 W. R. 340; 7 Com. Cas. 89.—C.A. (affirmed, H.L. (E.).)

Firbank v. Humphreys, *approved and followed*.

Starkey v. Bank of England (1903) 72 L. J. Ch. 402; [1903] A. C. 114; 88 L. T. 244; 51 W. R. 513.—H.L. (E.).

Oliver v. Bank of England (1902) 71 L. J. Ch. 388; [1902] 1 Ch. 610; 86 L. T. 248; 50 W. R. 340; 7 Com. Cas. 89.—C.A., *not followed*.

Sheffield Corporation v. Barclay (1902).—ALVERSTONE, C.J. (*supra*, col. 2554).

Oliver v. Bank of England, *affirmed nom.*

Starkey v. Bank of England (1903) 72 L. J. Ch. 402; [1903] A. C. 114; 88 L. T. 244; 51 W. R. 513.—H.L. (E.).

Currie v. Booth (1901) 6 Com. Cas. 74.—PHILLIMORE, J.; *reversed*, (1902) 7 Com. Cas. 77.—C.A.

McCollin v. Gilpin (1880) 49 L. J. Q. B. 558; 5 Q. B. D. 380.—LUSH, J.; *affirmed*, (1881) 6 Q. B. D. 516; 44 L. T. 914; 29 W. R. 408; 45 J. P. 828.—C.A.

Rutter v. Baldwin (1719) 1 Eq. Ca. Ab. 226.

—M.R., *commented on and distinguished*.
Le Texier v. Anspach (Margravine) (1808) 15 Ves. 159.

ELDON, L.C.—That principle does not apply to the present case; the bill distinctly stating, that this defendant held herself out, and was held out by the late defendant, as his wife, from beginning to end.—p. 165.

Mahony v. Kekulé (1854) 23 L. J. Q. P. 54; 14 C. B. 390; 2 C. L. R. 343; 18 Jur. 313; 2 W. R. 155.—C.P., *approved*.
Green v. Kopke (1856) 25 L. J. Q. P. 297; 18 C. B. 549; 2 Jur. (N.S.) 1049; 4 W. R. 598.—C.P.

Mahony v. Kekulé, *observations adopted*.
Flinn v. Hoyle (1893) 63 L. J. Q. B. 1.—C.A.
 ESHER, M.R., LOPES and KAY, L.JJ.

Hanson v. Roberdeau (1792) Penke N. P. 120.—LORD KENYON, *adopted*.
Franklyn v. Lamond (1847) 16 L. J. C. P. 221; 4 C. B. 637; 11 Jur. 780.—C.P.

Franklyn v. Lamond, *followed*.
Fisher v. Marsh (1865) 34 L. J. Q. B. 177; 6 B. & S. 411; 11 Jur. (N.S.) 795; 12 L. T. 604; 13 W. R. 834.—Q.B.

Hanson v. Roberdeau and Franklyn v. Lamond, *adopted*.
Wood v. Baxter (1883) 49 L. T. 45.—W. WILLIAMS and SMITH, JJ.

Franklyn v. Lamond, *distinguished*.
Payne v. Elsdon (1900) 17 Times L. R. 161.—RIDLEY, J.

Wood v. Baxter (1883) 49 L. T. 45.—W. WILLIAMS and SMITH, JJ., *followed*.
Payne v. Elsdon (1900) 17 Times L. R. 161.—RIDLEY, J.

Healey v. Story (1848) 18 L. J. Ex. 8; 3 Ex. 3.—EX., *distinguished*.
Alexander v. Sizer (1869) 35 L. J. Ex. 59; L. R. 4 Ex. 105; 20 L. T. 38.—EX.

Healey v. Story, *followed*.
Allan v. Miller (1870) 22 L. T. 825.—EX.

Price v. Taylor (1860) 29 L. J. Ex. 331; 5 H. & N. 540; 6 Jur. (N.S.) 402; 2 L. T. 221; 8 W. R. 419.—EX., *followed*.
Courtauld v. Saunders (1867) 16 L. T. 562; 15 W. R. 906.—C.P.; and **Allan v. Miller** (1870) 22 L. T. 825.—EX.

Allan v. Miller, *followed*.
Jenkins v. Morris (1847) 16 M. & W. 877.—EX.; and **Nicholls v. Diamond** (1853) 23 L. J. Ex. 1; 9 Ex. 154; 2 C. L. R. 305; 2 W. R. 12.—EX., *approved*.
Jones v. Jackson (1870) 22 L. T. 828.—EX.

Buller v. Harrison (1777) Cowp. 565.—K.B., *observations applied*.
Newall v. Tomlinson (1871) L. R. 6 C. P. 405, 410; 25 L. T. 382.—C.P.

Buller v. Harrison, *distinguished*.
Owen v. Cronk (1894) 64 L. J. Q. B. 288; [1895] 1 Q. B. 265; 14 R. 229; 2 Manson, 115.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

Buller v. Harrison, *cited in argument*.
Bavins v. London and South Western Bank (1900) 69 L. J. Q. B. 164; [1900] 1 Q. B. 270; 81 L. T. 655; 48 W. R. 211; 5 Com. Cas. 1.—C.A.

Buller v. Harrison and Newall v. Tomlinson (*supra*), *applied*.
Continental Caoutchouc, &c., Co. v. Kleinwort (1901) 90 L. T. 474; 52 W. R. 489.—C.A.

Att.-Gen. v. Chesterfield (Earl) (1854) 18 Beav. 596; 18 Jur. 686; 2 W. R. 499.—M.R., *referred to*.
Maw v. Pearson (1860) 28 Beav. 196.—M.R.

7. POWER OF ATTORNEY.

Frampton, In re and Ex parte (1859) 1 De G. F. & J. 263.—L.JJ., *followed*.
Wallace, In re, Richards (or Wallace) Ex parte (1884) 54 L. J. Q. B. 293; 14 Q. B. D. 22; 51 L. T. 551; 33 W. R. 66; 1 Morrell, 246.—C.A.

Berkely v. Hardy (1826) 4 L. J. (O.S.) K. B. 184; 5 B. & C. 355; 8 D. & R. 102.—K.B., *rule adopted*.
M'Ardele v. Irish Iodine Co. (1864) 15 Ir. C. L. R. 146.—EX. See extract, *supra*, col. 2549.

Lepard v. Vernon (1813) 2 V. & B. 51, 53.—M.R.

Explained and applied, **Gurnell v. Gardner** (1863) 4 Giff. 626; 9 Jur. (N.S.) 1220; 9 L. T. 367; 12 W. R. 67.—V.C. *referred to*, **Ingham, In re, Jones v. Ingham** (1892) 62 L. J. Ch. 100; [1893] 1 Ch. 352; 68 L. T. 152; 41 W. R. 235.—STIRLING, J.

• **Douglas, In re, Snowball Ex parte** (1872) 14 L. J. Bk. 49; L. R. 7 Ch. 534; 26 L. T. 894; 20 W. R. 786.—L.JJ., *principle applied*.

Elliott v. Turquand (1881) 51 L. J. P. C. 1; 7 App. Cas. 79; 45 L. T. 771; 30 W. R. 477.—P.C.

Walsh v. Whitecomb (1797) 2 Esp. 565; **Watson v. King** (1815) 4 Camp. 272; 1 Stark. 121; and **Gaussen v. Morton** (1839) 8 L. J. K. B. 313; 10 B. & C. 731.—K.B., *doctrine considered*.
Smart v. Sanders (1848) 17 L. J. C. P. 258; 5 C. B. 895; 12 Jur. 731.—C.P.,

Watson v. King, *not applied*.
Carter v. White (1882) 20 Ch. D. 225, 228; 46 L. T. 223.—KAY, J.; *affirmed*, (1883) 54 L. J. Ch. 138; 25 Ch. D. 669; 50 L. T. 670; 32 W. R. 692.—C.A. COTTON, LINDLEY and FRY, L.JJ.

Attwood v. Munnings (1827) 6 L. J. (O.S.) K. B. 9; 7 B. & C. 278; 1 M. & Ry. 66; 31 R. R. 194.—K.B.

Followed, **Alexander v. Mackenzie** (1848) 18 L. J. C. P. 94; 6 C. B. 766.—C.P.; *considered*, **Smith v. McGuire** (1858) 27 L. J. Ex. 465; 3 H. & N. 554; 6 W. R. 726.—EX.; *impliedly approved and distinguished*, **Perry v. Holl** (1860) 2 De G. F. & J. 38; 29 L. J. Ch. 677; 6 Jur. (N.S.) 661; 2 L. T. 585; 8 W. R. 570.—L.C.; *distinguished*, **Land Credit Company of Ireland, In re, Overend, Ex parte** (1869) 39 L. J. Ch. 27; L. R. 4 Ch. 460, 468; 20 L. T. 641; 17 W. R. 689.—L.JJ.; *referred to*, **Danby v. Countts** (1885) 54 L. J. Ch. 577; 29 Ch. D. 500, 514; 52 L. T. 401; 33 W. R. 559.—KAY, J.; *applied*, **Lewis v. Ramsdale** (1886) 55 L. T. 179; 35 W. R. 8.—STIRLING, J.; and **Jacobs v. Morris** (1900) 70 L. J. Ch. 183; [1901] 1 Ch. 261; 84 L. T. 112; 49 W. R. 365.—FARWELL, J. [*affirmed*, C.A.]

Perry v. Holl (*supra*), *adopted*.
Parish v. Poole (1885) 53 L. T. 35, 38.—NORTH, J.

Perry v. Holl. *distinguished.*
Lewis v. Ramsdale (1886) 55 L. T. 179 : 35 W. R. 8.—STIRLING, J.

Harper v. Godsell (1870) 39 L. J. Q. B. 185 : L. R. 5 Q. B. 422 ; 18 W. R. 951.—Q.B.
Distinguished. **Hawksley v. Outram** (1892) 62 L. J. Ch. 215 : [1892] 3 Ch. 359 ; 2 R. 60 ; 67 L. T. 804.—C.A. : *applied.* **Jacobs v. Morris** (1900) 70 L. J. Ch. 183 ; [1901] 1 Ch. 261 ; 84 L. T. 112 : 49 W. R. 365.—FARWELL, J. [affirmed, C.A.]

Danby v. Coutts (1885) 54 L. J. Ch. 577 : 29 Ch. D. 500 : 52 L. T. 401 ; 33 W. R. 559.—KAY, J., *distinguished.*
Hawksley v. Outram (1892) 62 L. J. Ch. 215 : [1892] 3 Ch. 359 ; 2 R. 60 ; 67 L. T. 801.—C.A.

Spain (King) v. Machado (1827) 6 L. J. (o.s.) Ch. 61 ; 4 Russ. 225 : 28 R. R. 56.—L.C.
Discussed. **Davies v. Quartermain** (1840) 4 Y. & C. 257.—EX. : *adopted.* **Goodwin v. Robarts** (1876) 45 L. J. Ex. 748 ; 1 App. Cas. 476, 496 ; 35 L. T. 179 ; 24 W. R. 937.—H.L. (E.).

Hamilton v. Clanricarde (Earl) (1762) 1 Bro. P. C. 341.—H.L. (IR.), *adopted.*
Beaufort (Duke) v. Need (1845) 12 Cl. & F. 248 ; 9 Jur. 813.—H.L. (E.).

Kenrick v. Wood (1869) 39 L. J. Ch. 92 : L. R. 9 Eq. 333 ; 19 W. R. 57.—MALINS, V.-C., *adhered to.*
Stanley v. Stanley (1878) 47 L. J. Ch. 256 ; 7 Ch. D. 589 : 37 L. T. 777 ; 26 W. R. 310.—MALINS, V.-C.

PRINCIPAL AND SURETY.

1. NATURE OF CONTRACT.
2. DISCHARGE OF SURETY.
3. RIGHTS OF SURETY.
4. ACTION AGAINST SURETY.
5. OTHER INDEMNITIES.

1. NATURE OF CONTRACT.

Lakeman v. Mountstephen, 39 L. J. Q. B. 275 ; L. R. 5 Q. B. 613 ; 18 W. R. 1001.—Q.B. ; *reversed.* (1871) 41 L. J. Q. B. 67 ; L. R. 7 Q. B. 196 ; 25 L. T. 755 : 20 W. R. 117.—EX. CH. : *the latter decision affirmed.* (1874) 43 L. J. Q. B. 188 ; L. R. 7 H. L. 17 ; 30 L. T. 437 ; 22 W. R. 617.—H.L. (E.).

Lakeman v. Mountstephen, *referred to.*
Wildes v. Dullow (1874) 44 L. J. Ch. 341 : L. R. 19 Eq. 198, 201 ; 23 W. R. 435.—MALINS, V.-C.

Jones v. Cowper (1774) 1 Cowp. 227.—K.B., *overruled.*
Matson v. Wharam (1787) 2 T. R. 80 ; 1 R. R. 429.—K.B.

Read v. Nash (1751) 1 Wils. 305.—K.B., *followed.*
Bird v. Gammon (1837) 6 L. J. C. P. 258 ; 3 Bing. N. C. 883 ; 5 Scott, 213 ; 3 Hodges, 224.—TINDAL, C.J.

Lexington v. Clarke (1696) 2 Vent. 223 ; and **Chater v. Becket** (1797) 7 Term. Rep. 201 ; 4 R. R. 418.—K.B., *applied.*
Thomas v. Williams (1830) 8 L. J. (o.s.) K. B. 314 ; 10 B. & C. 664.—K.B.

Lexington v. Clarke, Chater v. Becket and Thomas v. Williams (*supra*), *approved.*
Wood v. Benson (1831) 1 L. J. Ex. 18 ; 2 C. & J. 95 ; 2 Tyr. 228 ; 1 Price, P. C. 169.—EX.

Chater v. Beckett and Thomas v. Williams, *applied.*
Head v. Baklrey (1837) 7 L. J. Q. B. 94 ; 6 A. & E. 459 ; 2 N. & P. 217.—K.B.

Chater v. Williams, *discussed.*
Savage v. Canning (1867) Ir. R. 1 C. L. 434 ; 16 W. R. 133.—C.P.

Maggs v. Ames (1827) 6 L. J. (o.s.) C. P. 75 ; 4 Bing. 470 ; 1 M. & P. 294.—C.P., *dissented from.*
Leaf v. Tuton (1842) 12 L. J. Ex. 69 ; 10 M. & W. 393 ; 2 D. (N.S.) 300.—EX.

Williams v. Leper (1766) 2 Wils. 308 ; 3 Burr. 1886.—K.B., *approved and followed.*
Castling v. Aubert (1802) 2 East, 325.—K.B. ; **Bampton v. Paulin** (1827) 5 L. J. (o.s.) C. P. 168 ; 4 Bing. 264 ; 12 Moore, 497.—C.P.

Williams v. Leper and Castling v. Aubert, *distinguished.*
Thomas v. Williams (1830) 8 L. J. (o.s.) K. B. 314 ; 10 B. & C. 664.—K.B.

Williams v. Leper and Castling v. Aubert, *referred to.*
Macrory v. Scott (1850) 20 L. J. Ex. 90 ; 5 Ex. 907.—EX.

Williams v. Leper and Castling v. Aubert, *adopted.*
Conturier v. Hastie (1852) 22 L. J. Ex. 97 ; 8 Ex. 40.—EX.

Williams v. Leper, Castling v. Aubert and Anstey v. Marden (1804) 1 Bos. & P. (N.R.) 124 ; 2 Smith, 426 ; 8 R. R. 713.—C.P., *explained and adopted.*
Fitzgerald v. Dressler (1859) 29 L. J. C. P. 113 ; 7 C. B. (N.S.) 374 ; 5 Jur. (N.S.) 598.—C.P.

Williams v. Leper, Castling v. Aubert and Anstey v. Marden, *distinguished.*
Harburg India Rubber Comb Co. v. Martin (1902) 71 L. J. K. B. 529 ; [1902] 1 K. B. 778 ; 86 L. T. 505 ; 50 W. R. 449.—C.A. WILLIAMS, STIRLING and COZENS-HARDY, L.JJ.

WILLIAMS, L.J.—If the subject-matter of the contract was the purchase of property . . . there was a larger matter which was the subject of the contract. That being the object of the contract, the mere fact that as an incident to it—not as the immediate object, but indirectly—the debt of another to a third person will be paid does not bring the case within the section. This definition or rule for ascertaining the kind of cases outside the section covers both “property cases” [*i.e.* cases such as those mentioned above] and “*del credere* cases.” . . . I wish to point out that Cockburn, C.J. was there [in *Fitzgerald v. Dressler*, *infra*] in terms dealing only with the “property cases” as an instance—and I think it is clear that he intended to deal with them only as an instance—of a general rule.

Fitzgerald v. Dressler (1859) 29 L. J. C. P. 113; 7 C. B. (N.S.) 374; 5 Jur. (N.S.) 598.—C.P., referred to.

Reader v. Kingham (1862).—C.P. (*see infra*, col. 2562); and Wildes v. Dudlow (1874).—MALINS, V.-C. (*infra*, col. 2562).

Fitzgerald v. Dressler, distinguished.
Harburg India Rubber Comb Co. v. Martin (1902)—C.A. *See* references and extract, *supra*.

Goodman v. Chase (1818) 1 B. & Ald. 297; 19 R. R. 322.—K.B., distinguished.
Tomlinson v. Gell (1837) 6 L. J. K. B. 139; 1 N. & P. 588; 6 A. & E. 564; W. W. & D. 229.—K.B.

Goodman v. Chase, followed.
Lane v. Burghart (1841) 10 L. J. Q. B. 343; 1 Q. B. 993; 1 G. & D. 311; 6 Jur. 155.—Q.B.; Butcher v. Stuart (1843) 12 L. J. Ex. 391; 11 M. & W. 857; 1 D. & L. 508; 7 Jur. 774.—EX.

Thomas v. Cook (1828) 7 L. J. (O.S.) K. B. 49; 8 B. & C. 728; 3 M. & Ry. 444.—K.B., disapproved.

Green v. Cresswell (1839) 10 Ad. & E. 453; 2 P. & D. 430; 9 L. J. Q. B. 63; 4 Jur. 169.—Q.B.
DENMAN, C.J. (for the Court).—The case most relied upon by the plaintiff is that of *Thomas v. Cook*, where this Court held that a promise of B. to hold A. harmless against the consequences of his entering with B. and C. at B.'s request, into a joint bond to indemnify D. against debts due from C. to D. was binding, though not in writing: Bayley, J., and Parke, J., the only judges present, saying that a promise to indemnify does not fall within the words or policy of the statute. But the reasoning in this case does not appear to us satisfactory in support of the doctrine there laid down; which taken in its full extent would repeal the statute.—p. 458.

Thomas v. Cook, approved and adopted.
Hargreaves v. Parsons (1844) 14 L. J. Ex. 250; 13 M. & W. 561.—EX.

Thomas v. Cook, considered.
Cripps v. Hartnoll (1863) 32 L. J. Q. B. 381; 4 B. & S. 414; 10 Jur. (N.S.) 200; 8 L. T. 768; 11 W. R. 953.—EX. CH.

WILLIAMS, J.—In *Thomas v. Cook* it may be observed, that although Bayley, J. put it upon the question that the statute does not apply to a promise to indemnify, Lord Wensleydale, the only other judge in that Court, certainly does not put it at all upon that ground.—p. 382.

Thomas v. Cook, approved and adopted.
Wildes v. Dudlow (1874) 44 L. J. Ch. 341; L. R. 19 Eq. 198, 201; 23 W. R. 435.—V.-C. (*see* extract, *infra*, col. 2562); Bolton, In re (1892) 8 Times L. R. 668.—CHITTY, J.

Thomas v. Cook, approved and followed.
Guild v. Conrad (1894) 63 L. J. Q. B. 721; [1894] 2 Q. B. 885; 9 R. 746; 71 L. T. 140; 42 W. R. 642.—C.A. LINDLEY, LOPES, and DAVEY, L.JJ.

Thomas v. Cook, referred to.
Harburg India Rubber Comb Co. v. Martin (1902) 71 L. J. K. B. 529; [1902] 1 K. B. 773; 86 L. T. 505; 50 W. R. 449.—C.A.

Green v. Cresswell (1839) 9 L. J. Q. B. 63; 10 A. & E. 453; 2 P. & D. 430; 4 Jur. 169.—Q.B., held binding and distinguished.

Cripps v. Hartnoll. (1862) 31 L. J. Q. B. 150; 2 B. & S. 697; 6 L. T. 605.—Q.B.; reversed. (1863)

32 L. J. Q. B. 381; 4 B. & S. 414; 8 L. T. 765; 11 W. R. 953.—EX. CH.

CROMPTON, J. (in Q.B.).—We wish to express no opinion upon a point, upon which I doubt, whether *Green v. Cresswell* is or is not reconcilable with some later cases: we are bound by it.—p. 152.

POLLOCK, C.B. (in EX. CH.).—There is a great distinction between the case of *Green v. Cresswell* and the present. This is a case where the bail was given in a criminal case; and where the bail was given in a criminal case, no contract exists on the part of the person bailed to indemnify the person who bailed him. There is no debt.—p. 766.

Green v. Cresswell, questioned.
Batson v. King (1862) 4 H. & N. 740; 28 L. J. Ex. 327.—EX.

POLLOCK, C.B.—I do not think that the case was rightly decided.

Green v. Cresswell, not followed.
Reader v. Kingham (1862) 32 L. J. C. P. 108; 13 C. B. (N.S.) 344; 9 Jur. (N.S.) 797; 7 L. T. 789; 11 W. R. 366.—C.P.

Green v. Cresswell, held overruled.
Reader v. Kingham, (*supra*) approved.
Wildes v. Dudlow (1874) 44 L. J. Ch. 341; L. R. 19 Eq. 198; 23 W. R. 435.

MALINS, V.-C.—The point was originally decided by two of the most eminent judges known on the bench, sitting in banc, Mr. Justice Bayley and Mr. Justice Parke (afterwards Lord Wensleydale), in the case of *Thomas v. Cook* (*supra*), and they decided it upon the plainest principles of common sense and justice. I was therefore surprised to find that, in a later case of *Green v. Cresswell*, the same Court, constituted at that time of other judges, had taken a different view—and a view which, if it had been maintained, I should have followed very reluctantly, if I had been obliged to follow it at all. But I am happy to find that, the matter having been most carefully and elaborately considered in the case of *Reader v. Kingham*, when the full number of judges was present, the case of *Green v. Cresswell* was considered, and was overruled, and the law, as laid down by *Thomas v. Cook*, restored. The learned judges commented upon those cases, and said that the law was accurately laid down in *Thomas v. Cook*. I entirely approve of that expression of opinion. I accordingly decide that, where a man induces another man to enter into an engagement by a promise to indemnify him against liability, an agreement of that nature is not within the Statute of Frauds, and does not require to be in writing. This is a case in which the father induced his son to guarantee the debt of his son-in-law, upon a promise that he would see him harmless. Upon every principle of justice he is bound to indemnify him, and I think, therefore, that the son is perfectly right in helping himself out of the estate which has come to his hands. The force of the decision in *Reader v. Kingham* was somewhat shaken by the opinion expressed by Blackburn, J. in *Mountstephen v. Lakeman* (L. R. 5 Q. B. 613). However I am glad to find that *Mountstephen v. Lakeman* was overruled, not only by the Court of Exchequer Chamber but in the House of Lords. Therefore, the law is restored to the plain and reasonable ground upon which it was put in *Reader v. Kingham*.—p. 343.

Green v. Cresswell, *not followed*.

Wildes v. Dudlow (*supra*), *approved and followed*.

Guild v. Conrad (1894) 63 L. J. Q. B. 721; [1894] 2 Q. B. 885; 9 R. 746; 71 L. T. 140; 42 W. R. 642.—C.A. LINDLEY, LOPES and DAVEY, L.JJ.

Eastwood v. Kenyon (1840) 9 L. J. Q. B. 409; 11 A. & E. 438; 3 P. & D. 276; 4 Jur. 1801.—K.B., *approved and adopted*.

Leaf v. Tuton (1842) 12 L. J. Ex. 69; 10 M. & W. 393; 2 D. (N.S.) 300.—EX.; **Hargreaves v. Parsons** (1844) 14 L. J. Ex. 250; 13 M. & W. 551.—EX.

Eastwood v. Kenyon and Hargreaves v. Parsons, *adopted*.

Cripps v. Hartnoll (1863) 32 L. J. Q. B. 381; 4 B. & S. 414; 10 Jur. (N.S.) 200; 8 L. T. 765; 11 W. R. 953.—EX. CH.

Eastwood v. Kenyon and Hargreaves v. Parsons, *followed*.

Reader v. Kingham (1862) 32 L. J. C. P. 108; 13 C. B. (N.S.) 344; 9 Jur. (N.S.) 797; 7 L. T. 789; 11 W. R. 366.—C.P.

ERLE, C.J.—An important rule has been adopted with reference to this statute, that the promisee must be the original creditor. It was so held in *Eastwood v. Kenyon*, and again in *Hargreaves v. Parsons*. The rule has also been recognised in *Fitzgerald v. Dressler*, in this Court. The two cases cited from the Q.B., *Green v. Cresswell*, and *Cripps v. Hartnoll*, relate to bail for the default of another. The balance of authority is, that where the original creditor and the promisee are distinct persons, the promise does not fall within the statute.—p. 110.

Hargreaves v. Parsons, *adopted*.

Guild v. Conrad (1894) 63 L. J. Q. B. 721; [1894] 2 Q. B. 885.—C.A. (*see infra*).

Cripps v. Hartnoll (1862) 31 L. J. Q. B. 150; 2 B. & S. 697; 6 L. T. 605.—Q.B.; *reversed*, (1863) 32 L. J. Q. B. 381; 4 B. & S. 414; 10 Jur. (N.S.) 200; 8 L. T. 768; 11 W. R. 953.—EX. CH.

Cripps v. Hartnoll, *observations adopted*.

Consolidated Exploration, &c., Co. v. Musgrave (1899) 16 T. L. R. 13.—NORTH, J.

Guild v. Conrad (1894) 63 L. J. Q. B. 721; [1894] 2 Q. B. 885; 9 R. 746; 71 L. T. 140; 42 W. R. 642.—C.A., *approved and distinguished*.

Harburg India Rubber Comb Co. v. Martin (1902) 71 L. J. K. B. 529; [1902] 1 K. B. 778; 86 L. T. 505; 50 W. R. 449.—C.A. WILLIAMS, STIRLING and HARDY, L.JJ.

STIRLING, L.J.—In *Guild v. Conrad* it was found that the contract was not to pay if the foreign firm did not pay, because there was no expectation at that time that the foreign firm would be able to pay, but the contract was to provide funds to enable the plaintiffs to meet certain acceptances. In the present case it seems to me that the transaction in contemplation was to give time to the syndicate in the expectation that in the interval they would be placed in funds by which they would be enabled to pay all their debts. The important element corresponding to that which existed in *Guild v. Conrad*, namely, the absence of any expectation that the syndicate would ever be able to pay is here wanting.

Coe v. Duffield (1822) 7 B. Moore 252.—C.P., *explained*.

James v. Williams (1884) 5 B. & Ad. 1109; 3

N. & M. 196; 2 D. P. C. 481; 3 L. J. K. B. 97.—K.B.

PATTESON, J.—*Coe v. Duffield* was cited in support of the rule on account of what was there said by Richardson, J., and, certainly, whatever fell from that learned judge would be great authority. There the guarantee was given on the 3rd of April, 1820, but on the 29th of March the defendant had written to the plaintiff that, feeling himself interested for Wilson (the principal debtor), he could not refrain from giving this security, if the plaintiff would agree to his terms, which were to allow Wilson two years to pay the whole sum by instalments, and accept the defendant's guarantee to see it paid in that time. Richardson, J., said:—"Not that the guarantee itself contained a consideration, but that the declaration might have been framed on the first letter—viz., that of the 29th of March—which was prior to the guarantee, and contained the terms on which the guarantee was to be given, and showed a sufficient consideration."—p. 1112.

Holmes v. Mitchell (1859) 28 L. J. C. P. 301; 7 C. B. (N.S.) 361; 6 Jur. (N.S.) 73.—C.P.; and **Bateman v. Phillips** (1812) 15 East 272.—K.B., *applied*.

Sheers v. Thimbleby (1897) 76 L. T. 709.—C.A. ESHER, M.R., LOPES and CHITTY, L.JJ.

Garrett v. Handley (1825) 4 B. & C. 664; 7 D. & R. 144; 1 Car. & P. 483; 27 R. R. 405.—K.B., *considered and distinguished*.
Agacio v. Forbes (1861) 14 Moore P. C. 160; 4 L. T. 155; 9 W. R. 503.—P.C.

LORD CHELMSFORD.—With regard, however, to *Garrett v. Handley*, it is to be observed that there it was impossible to separate the consideration into parts, and to make the party who was suing the person from whom the consideration alone moved. It was an advance of money which was to be made, not by him, but by the firm of which he was a member; it was a joint consideration in no manner separable, so as to apply any part of it to the separate partners. But in this case . . . the contract was clearly entered into with Agacio, the plaintiff, himself, although the benefit of it would result to the firm.—p. 170.

Thorp v. Jackson (1837) 2 Y. & Coll. 553, 561.—EX. EQ., *dicta questioned*.

Jones v. Beach (1852) 2 De G. M. & G. 886; 5 C. 22 L. J. Ch. 425.—L.JJ.

Thorp v. Jackson, *dictum disapproved*.

Other v. Iveson (1855) 24 L. J. Ch. 654; 3 Drew. 177; 3 Eg. R. 562; 1 Jur. (N.S.) 568; 3 W. R. 332.—KINDERSLEY, V.C.

Gardom, Ex parte (1808) 15 Ves. 286.—L.C., *commented on*.

Brettel v. Williams (1849) 4 Ex. 623; 19 L. J. Ex. 121.—EX.

PARKE, B. (for the Court).—To allow one partner to bind another by contracts out of the apparent scope of the partnership dealings, because they were reasonable acts towards effecting the partnership purposes, would be attended with great danger. Could one of the defendants in this case have bound the others by a contract to lease or buy lands, or a coal mine, though it might be a reasonable mode of effecting a

legitimate object of the partnership business. Our opinion is that one partner cannot bind the others in such a case, simply by virtue of the partnership relation. In the case of *Ex parte Gardum*, this point was not fully discussed, but given up by Sir S. Romilly, who had two other objections to the guarantee, on which he could rely, and on one of which he succeeded. Besides, we are not sufficiently informed by the report whether there might not have been some peculiar circumstances in the case which caused the abandonment of that point. We do not think that is an authority sufficient to establish the doctrine now contended for.—p. 630.

Tomlinson v. Gill (1756) Amb. 330.—L.C. applied.

Lloyd's v. Harper (1880) 50 L. J. Ch. 140; 16 Ch. D. 290, 309; 43 L. T. 481; 29 W. R. 452.—FRY, J. (affirmed in C.A.): Flavell, In re. Murray v. Flavell (1883) 53 L. J. Ch. 185; 25 Ch. D. 89; 49 L. T. 690; 32 W. R. 102.—NORTH, J. (affirmed in C.A.).

Tomlinson v. Gill, referred to.

Kenney v. Employers' Liability Assurance Corporation [1901] 1 Ir. R. 301, 332.—C.A.

Barber v. Mackrell, 67 L. T. 108; 40 W. R. 618.—NORTH, J.: reversed, (1892) 2 R. 72; 68 L. T. 29; 41 W. R. 341.—C.A.

Shum v. Farrington (1797) 1 Bos. & P. 640.—C.P.; and **Barton v. Webb** (1800) 8 Term Rep. 459.—K.B., followed.

Calvert v. Gordon (1828) 7 L. J. (o.s.) K. B. 77; 3 M. & Ry. 124; 7 B. & C. 809.—K.B.

Shum v. Farrington and Barton v. Webb, distinguished.

Hickinbotham v. Leach (1842) 10 M. & W. 361, 363; 11 L. J. Ex. 341; 2 D. (N.S.) 270.—EX.

Calvert v. Gordon (1828) 7 L. J. (o.s.) K. B. 77; 7 B. & C. 809; 3 M. & Ry. 124.—K.B., followed.

Lloyd's v. Harper (1880) 50 L. J. Ch. 140; 16 Ch. D. 290; 43 L. T. 481; 29 W. R. 452.—C.A.; **Crace**, In re. **Balfour v. Crace** (1902) 71 L. J. Ch. 358; [1902] 1 Ch. 733; 86 L. T. 144.—JOYCE, J.

Lamb v. Vise (1840) 9 L. J. Ex. 177; 6 M. & W. 467; 8 D. P. C. 360; 4 Jur. 341.—EX., applied.

Pugh v. Stringfield (1858) 27 L. J. C. P. 225; 6 W. R. 487.—C.P.; S. C. 4 C. B. (N.S.) 364; **Lloyd's v. Harper** (1880) 50 L. J. Ch. 140; 16 Ch. D. 290, 309; 43 L. T. 481; 29 W. R. 452.—FRY, J. (affirmed, C.A.); Flavell, In re. **Murray v. Flavell** (1883) 53 L. J. Ch. 185; 25 Ch. D. 89, 97; 49 L. T. 690; 32 W. R. 102.—NORTH, J.; affirmed, C.A.

West v. Houghton (1879) 4 C. P. D. 197; 40 L. T. 364; 27 W. R. 678.—C.P.D., questioned.

Lloyd's v. Harper (1880) 50 L. J. Ch. 140; 16 Ch. D. 290; 43 L. T. 481; 29 W. R. 452.—C.A.

JAMES, L.J.—I desire to add that I entertain great doubts as to the correctness of the decision of the Common Pleas Division in *West v. Houghton*.

West v. Houghton, applied.

Flavell, In re. **Murray v. Flavell** (1883) 53 L. J. Ch. 185; 25 Ch. D. 89, 98; 49 L. T. 690; 32 W. R. 102.—NORTH, J.; affirmed, C.A.

Lloyd's v. Harper (1880) 50 L. J. Ch. 140; 16 Ch. D. 290; 43 L. T. 481; 29 W. R. 452.—C.A., applied.

Flavell, In re. **Murray v. Flavell** (1883) 53 L. J. Ch. 185; 25 Ch. D. 89; 49 L. T. 690; 32 W. R. 102.—NORTH, J. (affirmed, C.A.): **Crace**, In re. **Balfour v. Crace** (1902) 71 L. J. Ch. 358; [1902] 1 Ch. 733; 86 L. T. 144.—JOYCE, J.

Lloyd's v. Harper, considered.

Kenney v. Employers' Liability Assurance Corporation [1901] 1 Ir. R. 301, 329, 338.—C.A.

Bradbury v. Morgan (1862) 31 L. J. Ex. 462; 1 H. & C. 249; 8 Jur. (N.S.) 918; 7 L. T. 104; 10 W. R. 776.—EX., dissented from.

Harris v. Fawcett (1873) L. R. 15 Eq. 311; 28 L. T. 182; 21 W. R. 504.—M.R.; affirmed, L.J. (*infra*).

ROMILLY, M.R.—I think it a very startling thing to say, as the chief baron in effect does say there, that the words "I give you notice," mean "you receive notice." It is a very startling proposition, because, if so, if a stranger gave notice in the lifetime of guarantor that would be a sufficient notice to determine it. But surely that can hardly be meant. . . I am not disposed to follow *Bradbury v. Morgan* even in a case exactly similar, and certainly I shall not extend that case.—p. 313.

Bradbury v. Morgan, applied.

Dodd v. Whelan [1897] 1 Ir. R. 575.—V.-C.

Offord v. Davies (1862) 31 L. J. C. P. 319; 12 C. B. (N.S.) 748; 9 Jur. (N.S.) 22; 6 L. T. 579; 10 W. R. 758.—C.P., observed upon.

Coulthart v. Clementson (1879) 49 L. J. Q. B. 204; 5 Q. B. D. 42; 41 L. T. 798; 28 W. R. 355.—BOWEN, J.

Offord v. Davies, applied.

Beckett v. Addyman (1882) 9 Q. B. D. 783, 789; 51 L. J. Q. B. 597.—Q.B.D. (affirmed, C.A.): **Crace**, In re. **Balfour v. Crace** (1902) 71 L. J. Ch. 358; [1902] 1 Ch. 733; 86 L. T. 144.—JOYCE, J.

Harris v. Fawcett (1873) 42 L. J. Ch. 502; L. R. 8 Ch. 866; 29 L. T. 84; 21 W. R. 742.—L.J., referred to.

Coulthart v. Clementson (1879).—BOWEN, J. (*supra*).

Harris v. Fawcett, applied.

Dodd v. Whelan [1897] 1 Ir. R. 575.—V.-C.

Coulthart v. Clementson (1879) 49 L. J. Q. B. 204; 5 Q. B. D. 42; 41 L. T. 798; 28 W. R. 355.—Q.B.D., distinguished.

Lloyd's v. Harper (1880) 16 Ch. D. 290; 50 L. J. Ch. 140; 43 L. T. 481; 29 W. R. 452.—C.A.

JAMES, L.J.—The testator (in this case), in my opinion, could not have determined the guarantee, and in that respect the case differs essentially from that of *Coulthart v. Clementson*, in which **Bowen, J.**, followed the decision in *Harris v. Fawcett* (*supra*) with regard to the effect of death in determining a guarantee. In those cases there is this distinction (whether it is sufficient to sustain them or not) that each advance of goods was a separate consideration.—p. 314.

Coulthart v. Clementson, applied.

Beckett v. Adklyman (1882) 9 Q. B. D. 783, 788; 51 L. J. Q. B. 597.—Q.B.D.; *affirmed*, C.A.

Coulthart v. Clementson, discussed.

Silvester, *In re*, *Midland Ry. v. Silvester* (1895) 64 L. J. Ch. 390; [1895] 1 Ch. 573; 72 L. T. 283; 43 W. R. 443; 13 R. 448.

ROMER, J.—The case before me is exactly that referred to by Lord Justice (then Mr. Justice) Bowen in *Coulthart v. Clementson*, where he observes as follows: "If, indeed, the contracting parties desire that on the death of the guarantor a special notice shall be necessary to determine the guarantee, they can so provide in the guarantee itself and such a provision will, of course, bind the estate."

Coulthart v. Clementson, applied.

Dodd v. Whelan (1897) 1 Ir. R. 575.—V.C.

Coulthart v. Clementson, approved.

Crace, *In re*, *Balfour v. Crace* (1902) 71 L. J. Ch. 358; [1902] 1 Ch. 733; 86 L. T. 144.—JOYCE, J.

Silvester, *In re*, *Midland Ry. v. Silvester* (1895) 64 L. J. Ch. 390; [1895] 1 Ch. 573; 13 R. 448; 72 L. T. 283; 43 W. R. 443.—ROMER, J., *dictum not adopted*.

Dodd v. Whelan [1897] 1 Ir. R. 575.—V.C.

Silvester, *In re*, *Midland Ry. v. Silvester*, *observed upon*.

Crace, *In re*, *Balfour v. Crace* (1901) 71 L. J. Ch. 358; [1902] 1 Ch. 733; 86 L. T. 144.

JOYCE, J.—I certainly agree with what Romer, J. says in *Silvester, In re*, where he observed on Lord Bowen's decision in *Coulthart v. Clementson* (5 Q. B. D. 42).

Parker v. Wise (1817) 6 M. & S. 239; 18 R. R. 359.—K.B., *considered*.

Gordon v. Rae (1858) 27 L. J. Q. B. 185; 8 El. & Bl. 1,605; 4 Jur. (N.S.) 530.—Q.B.

Parker v. Wise, adopted.

Laurie v. Scholefield (1869) 38 L. J. C. P. 290; L. R. 4 C. P. 622; 20 L. T. 852; 17 W. R. 931.—C.P.

Pease v. Hirst (1829) 8 L. J. (O.S.) K. B. 94; 10 B. & C. 122; 5 M. & Ry. 88.—K.B., *observations applied*.

Dry v. Davy (1839) 8 L. J. Q. B. 209; 10 A. & E. 30; 2 P. & D. 249; 3 Jur. 315.—K.B.

Walker v. Hardman (1837) 4 Cl. & F. 258; 11 Bl. (N.S.) 229.—H.L. (E.). *See*

Boys, *In re*, *Eedes v. Boys* (1870) 39 L. J. Ch. 655; L. R. 10 Eq. 467.—M.R.

Boyd v. Robins, 27 L. J. C. P. 299; 4 C. B. (N.S.) 749; 4 Jur. (N.S.) 1084.—C.P.; *reversed*, (1858) 28 L. J. C. P. 73; 5 C. B. (N.S.) 597; 7 W. R. 78; 5 Jur. (N.S.) 915.—EX. CH.

Heffield v. Meadows (1869) L. R. 4 C. P. 596; 20 L. T. 746.—C.P., *principle applied*.

Grainger, *In re*, *Dawson v. Higgins* (1900) 69 L. J. Ch. 789; [1900] 2 Ch. 756; 83 L. T. 209; 48 W. R. 673.—C.A.

Merle v. Wells (1810) 2 Camp. 413.—K.B.; **Mason v. Pritchard** (1810) 12 East, 227; 2 Camp. 436; 11 R. R. 369.—K.B., *distinguished*.

Nicholson v. Paget (1832) 2 L. J. Ex. 18; 1 C. & M. 48; 3 Tyr. 164; 5 Car. & P. 395.—EX.

Mason v. Pritchard, approved.

Mayer v. Isaac (1840) 9 L. J. Ex. 225; 6 M. & W. 605; 4 Jur. 437.—EX.

Melville v. Hayden (1826) 3 B. & Ald. 593; 22 R. R. 495.—K.B., *distinguished*.

Hargrave v. Smea (1829) 8 L. J. (O.S.) C. P. 46; 3 M. & P. 573; 6 Bing. 244; 31 R. R. 407.—C.P.

Melville v. Hayden, followed.

Nicholson v. Paget (1832) 2 L. J. Ex. 18; 1 C. & M. 48; 3 Tyr. 164; 5 Car. & P. 395.—EX.

Hargrave v. Smea (1829) 8 L. J. (O.S.) C. P. 46; 6 Bing. 244; 3 M. & P. 573; 31 R. R. 407.—C.P., *distinguished*.

Nicholson v. Paget (1832) 2 L. J. Ex. 18; 1 C. & M. 48; 3 Tyr. 164; 5 Car. & P. 395.—EX.

Nicholson v. Paget (1832) 2 L. J. Ex. 18; 5 Car. & P. 395; 1 C. & M. 48; 3 Tyr. 164.—EX., *questioned*.

Mayer v. Isaac (1840) 6 M. & W. 605; 9 L. J. Ex. 225; 4 Jur. 437.—EX.

ALDERSON, B.—If I were obliged to choose between the two conflicting principles which have been laid down on this subject I should rather be disposed to agree with that given in *Mason v. Pritchard*, than with the opinion of Bayley, B., in *Nicholson v. Paget*.—p. 612.

Nicholson v. Paget, held overruled.**Mayer v. Isaac, approved.**

Horlor v. Carpenter, (1858) 3 C. B. (N.S.) 172; 27 L. J. C. P. 1.—C.P.

[In *Nicholson v. Paget*, Bayley, B., laid down that it is not unreasonable to expect from a party who is furnishing goods on the faith of a guarantee, that he will take the guarantee in terms which shall plainly and intelligibly point out to the party giving the guarantee the extent to which he expects that the liability is to be carried.]

WILLES, J.—That is not the law of England (though it is the law of France), since the case of *Mayer v. Isaac*, where this point was well considered, and where Alderson, B., expressly repudiates Mr. Baron Bayley's doctrine.—p. 182.

Nicholson v. Paget, dictum questioned.

Wood v. Priestner (1866) L. R. 2 Ex. 66; 36 L. J. Ex. 42; 15 L. T. 317.—EX.: *affirmed* (1867) 36 L. J. Ex. 127; L. R. 2 Ex. 282; 15 W. R. 912.—EX. CH.

MARTIN, B.—I cannot assent to the opinion expressed by Bayley, B., in *Nicholson v. Paget*, that a contract of guarantee ought to be read in any peculiar way. I think it should be read in the same way as any other contract.—p. 70.

BRAMWELL, B.—I cannot adopt the dictum contained in *Nicholson v. Paget*.—p. 71.

Nicholson v. Paget, referred to.

Chalmers v. Victors (1868) 18 L. T. 481; 16 W. R. 1046.—C.P.; *Heffield v. Meadows* (1869) L. R. 4 C. P. 596; 20 L. T. 746.—C.P.

Allnutt v. Ashenden (1843) 12 L. J. C. P. 124; 5 Man. & G. 392; 6 Scott (N.R.) 127; 7 Jur. 113.—C.P., *followed*.

Broom v. Batchelor (1856) 25 L. J. Ex. 299; 1 H. & N. 255; 4 W. R. 712.—EX.

Allnutt v. Ashenden, commented on.

Wood v. Priestner (1866) L. R. 2 Ex. 66; 36 L. J. Ex. 42; 15 L. T. 317.—EX.; *affirmed*, (186

36 L. J. Ex. 127; L. R. 2 Ex. 282; 15 W. R. 912.—EX. CH.

BRAMWELL, B.—I bow to the authority of *Allnutt v. Ashguden*, but I do not understand it.—p. 71.

Hoad v. Grace (1861) 7 H. & N. 494; 31 L. J. Ex. 98; 8 Jur. (N.S.) 43; 5 L. T. 359; 10 W. R. 85.—EX., *referred to*.
Chalmers v. Victors (1861) 18 L. T. 481; 16 W. R. 1046.—C.P.

Hawes v. Armstrong (1885) 4 L. J. C. P. 254; 1 Bing. (N.C.) 761; 1 Scott. 661; 1 Hodges. 179.—C.P., *principle adopted*.

Raikes v. Todd (1838) 8 L. J. Q. B. 35; 1 P. & D. 138; 8 A. & E. 846; 1 W. W. & H. 619.—Q.B.; *Kennaway v. Treleaven* (1839) 9 L. J. Ex. 20; 5 M. & W. 498; 3 Jur. 1034.—EX.

Hawes v. Armstrong, followed.
Eyre, In re, McAndrew v. Norris (1895) 13 R. 674; 72 L. T. 585; 43 W. R. 538.—ROMER, J.

Raikes v. Todd (1838) 8 L. J. Q. B. 35; 8 A. & E. 846; 1 P. & D. 138; 1 W. W. & H. 619.—Q.B., *adopted*.

Kennaway v. Treleaven (1839) 9 L. J. Ex. 20; 5 M. & W. 498; 3 Jur. 1034.—EX.

Raikes v. Todd (1838) 8 L. J. Q. B. 35; 8 A. & E. 846; 1 P. & D. 138; 1 W. W. & H. 619.—Q.B., *distinguished*.

Chapman v. Sutton (1846) 15 L. J. C. P. 166; 2 C. B. 634; 3 D. & L. 646.—C.P.

Raikes v. Todd, considered.
Ellis v. Emmanuel (1876) 46 L. J. Ex. 25; 1 Ex. D. 157; 34 L. T. 553; 22 W. R. 832.—EX. CH.

Newbury v. Armstrong (1829) 8 L. J. (O.S.) C. P. 4; 6 Bing. 201; 3 M. & P. 509; 4 Car. & P. 59; M. & M. 389; 31 R. R. 386.—C.P., *adopted*.

Kennaway v. Treleaven (1839) 9 L. J. Ex. 20; 5 M. & W. 498; 3 Jur. 1034.—EX.

Shortrede v. Cheek (1834) 3 L. J. K. B. 125; 1 A. & E. 57; 3 N. & M. 366.—K.B.

Distinguished, Squire v. Campbell (1836) 6 L. J. Ch. 41; 1 Myl. & Cr. 459.—L.C.; *adopted, Morris v. Wilson* (1859) 5 Jur. (N.S.) 168.—WOOD, V.-C.; and *Baumann v. James* (1868) L. R. 3 Ch. 508, 512; 18 L. T. 424; 16 W. R. 877.—L.J.J.; *considered, Buxton v. Rust* (1872) 41 L. J. Ex. 173; L. R. 7 Ex. 279, 280; 27 L. T. 210; 20 W. R. 1014.—EX. CH.; *adopted, Stanley v. Dowdeswell* (1874) L. R. 10 C. P. 102, 106; 23 W. R. 389.—C.P.

Morrell v. Cowan, 6 Ch. D. 166; 37 L. T. 122; 25 W. R. 808.—FRY, J.; *reversed, (1877)* 47 L. J. Ch. 73; 7 Ch. D. 151; 37 L. T. 586; 26 W. R. 90.—C.A.

Morrell v. Cowan, distinguished.
Hibernian Bank v. Gilbert (1889) 23 L. R. Ir. 321.—V.-C.

Morrell v. Cowan, dictum applied.
Henton v. Paddison (1893) 68 L. T. 405.—STIRLING, J.

Morrell v. Cowan, approved.
Brunning v. Odhams (1896) 75 L. T. 602.—H.L. (E.).

Wain v. Warlters (1804) 5 East 10.—K.B., *referred to*.

Hemming v. Perry (1828) 2 Moore & P. 375.—C.P.; *Haigh v. Brooks* (1839) 9 L. J. Q. B. 194; 10 A. & E. 309; 9 P. & D. 452.—Q.B.

Wain v. Warlters and Stadt v. Lill (1808) 9 East 348; 1 Camp. 242.—K.B., *applied*.
Bainbridge v. Wade (1850) 20 L. J. Q. B. 7; 16 Q. B. 89; 15 Jur. 572.—Q.B.

Wain v. Warlters, commented upon.
Holmes v. Mitchell (1859) 28 L. J. C. P. 301; 7 C. B. (N.S.) 361; 6 Jur. (N.S.) 73.—C.P.

Wain v. Warlters, referred to.
Malpas v. L. & S. W. Ry. (1866) 35 L. J. C. P. 166; L. R. 1 C. P. 336, 339; 1 H. & R. 227; 12 Jur. (N.S.) 271; 13 L. T. 710; 14 W. R. 391.—C.P.

Wain v. Warlters, adopted.
Frost, In re (1898) 67 L. J. Ch. 691; [1898] 2 Ch. 556; 79 L. T. 269; 47 W. R. 27.—ROMER, J.

Butcher v. Steuart (1843) 12 L. J. Ex. 391; 11 M. & W. 857; 1 D. & L. 508; 7 Jur. 774.—EX., *applied*.

Tanner v. Moore (1846) 15 L. J. Q. B. 391; 9 Q. B. 1; 11 Jur. 11.—Q.B.; *Goldshede v. Swan* (1847) 16 L. J. Ex. 284; 1 Ex. 154.—EX.; *Steele v. Hoe* (1849) 19 L. J. Q. B. 89; 14 Q. B. 431; 14 Jur. 147.—Q.B.; *Colbourn v. Dawson* (1851) 20 L. J. C. P. 154; 10 C. B. 765; 15 Jur. 680.—C.P.; *Broom v. Batchelor* (1856) 25 L. J. Ex. 299; 1 H. & N. 255; 4 W. R. 712.—EX.

Haigh v. Brooks (1839) 9 L. J. Q. B. 194; 10 A. & E. 309; 9 P. & D. 452.—Q.B. *See* *Souch v. Strawbridge* (1846) 15 L. J. C. P. 170; 2 C. B. 808; 10 Jur. 357.—C.P.

Haigh v. Brooks, followed.
Goldshede v. Swan (1847) 16 L. J. Ex. 284; 1 Ex. 154.—EX.

Haigh v. Brooks, adopted.
Edwards v. Jevons (1849) 19 L. J. C. P. 50; 8 C. B. 436; 14 Jur. 131.—C.P.; *Bainbridge v. Wade* (1850) 20 L. J. Q. B. 7; 16 Q. B. 89; 15 Jur. 572.—Q.B.; *Broom v. Batchelor* (1856) 25 L. J. Ex. 299; 1 H. & N. 255; 4 W. R. 712.—EX.

Haigh v. Brooks, observed upon.
Way v. Hearne (1862) 32 L. J. C. P. 34; 11 C. B. (N.S.) 774.—C.P.

King v. Cole (1848) 17 L. J. Ex. 283; 2 Ex. 628.—EX., *adopted*.
Steele v. Hoe (1849) 19 L. J. Q. B. 89; 14 Q. B. 431; 14 Jur. 147.—Q.B.

Goldshede v. Swan (1847) 16 L. J. Ex. 284; 1 Ex. 154.—EX., *applied*.
Edwards v. Jevons (1849) 19 L. J. C. P. 50; 8 C. B. 436; 14 Jur. 131.—C.P.; *Steele v. Hoe* (1849) 19 L. J. Q. B. 89; 14 Q. B. 431; 14 Jur. 147.—Q.B.

Goldshede v. Swan and Edwards v. Jevons (1849) 19 L. J. C. P. 50; 8 C. B. 436; 14 Jur. 131.—C.P., *approved*.
Bainbridge v. Wade (1850) 20 L. J. Q. B. 7; 16 Q. B. 89; 15 Jur. 572.—Q.B.

Goldshede v. Swan, applied.
Colbourn v. Dawson (1851) 20 L. J. C. P. 154; 10 C. B. 765; 15 Jur. 680.—C.P.

Saunders v Wakefield (1821) 4 B. & Ald. 595; 23 R. R. 409.—K.B.

Not followed. **Lilley v. Hewitt** (1822) 11 Price 494.—EX.; *followed.* **Cole v. Dyer** (1831) 9 L. J. (O.S.) Ex. 109; 1 Tyr. 304; 1 C. & J. 461.—EX.; *applied.* **Frost, In re** (1898) 67 L. J. Ch. 691; [1898] 2 Ch. 556; 79 L. T. 239; 17 W. R. 27.—ROMER, J.

Johnson v. Nicholls (1845) 14 L. J. C. P. 151; 1 C. B. 251; 9 Jur. 429.—C.P., *followed.* **White v. Woodward** (1848) 17 L. J. C. P. 209; 5 C. B. 810; 12 Jur. 439.—C.P.

Johnson v. Nicholls, doctrine approved.

Oldershaw v. King (1857) 27 L. J. Ex. 120; 2 H. & N. 517; 3 Jur. (N.S.) 1152; 5 W. R. 753.—EX. CH.

Seiple (or Temple) v. Pink (1837) 16 L. J. Ex. 237; 1 Ex. 74.—EX., *questioned.* **Oldershaw v. King** (1857) 27 L. J. Ex. 120; 2 H. & N. 517; 3 Jur. (N.S.) 1152; 5 W. R. 753.—EX. CH.

Seiple v. Pink, held overruled.

Coles v. Pack (1869) L. R. 5 C. P. 65; 39 L. J. C. P. 63; 18 W. R. 292.—C.P.

BRETT, J.—With regard to the question of consideration, I cannot help thinking that *Seiple v. Pink* is overruled by *Oldershaw v. King*.—p. 71.

Seiple v. Pink, held overruled.

Wynne v. Hughes (1873) 21 W. R. 628.—EX.

Oldershaw v. King, 2 H. & N. 399.—EX.; *reversed*, (1857) 27 L. J. Ex. 120; 2 H. & N. 517; 3 Jur. (N.S.) 1152; 5 W. R. 753.—EX. CH.

Oldershaw v. King (1857) 27 L. J. Ex. 120; 2 H. & N. 517; 3 Jur. (N.S.) 1152; 5 W. R. 753.—EX. CH., *distinguished.*

Westhead v. Sproson (1861) 30 L. J. Ex. 265; 6 H. & N. 728; 7 Jur. (N.S.) 502; 4 L. T. 408; 9 W. R. 695.—EX.

BRAMWELL, B.—The only difficulty that I have arises from *Oldershaw v. King*. If we can understand two people agreeing, one to supply goods, and the other to be liable to a debt within a reasonable time, then there is some way of understanding that case; and I do not see why it is not to be understood to be applicable to a reasonable supply of goods; only we should have to find out somehow or other what that reasonable supply is. It is enough, however, to say that *Oldershaw v. King* was the case of a reasonable giving of time for payment of a debt, and by that, therefore, we are bound; but that did not determine what is a reasonable supply of goods from a manufacturer to a draper, and, therefore, it is not an authority in this case.—p. 268.

Oldershaw v. King, applied.

Coles v. Pack (1869) 39 L. J. C. P. 63; L. R. 5 C. P. 65, 71; 18 W. R. 292.—C.P.; **Wynne v. Hughes** (1873) 21 W. R. 628.—EX.; **Clough, In re, Bradford Banking Co. v. Cure** (1885) 55 L. J. Ch. 77; 31 Ch. D. 324; 53 L. T. 716; 34 W. R. 96.—**NORTH, J.**; **Miles v. New Zealand Alford Estate Co.** (1886) 54 L. J. Ch. 1035; 32 Ch. D. 266, 289; 53 L. T. 219; 34 W. R. 669.—C.A.; **Reichel v. Oxford (Bishop)** (1887) 56 L. J. Ch. 2085; 35 Ch. D. 48, 69; 56 L. T. 539; 36 W. R. 307.—C.A., *affirmed*, (1889) 59 L. J. Ch. 66; 14 App. Cas. 250; 61 L. T. 131; 54 J. P. 101.—H.L. (E.).

Oldershaw v. King, dicta applied.

Crears v. Hunter (1887) 56 L. J. Q. B. 518; 19 Q. B. D. 341; 57 L. T. 534; 35 W. R. 821.—C.A.

Oldershaw v. King, approved and applied.

Fullerton v. Provincial Bank of Ireland [1903] A. C. 309.—H.L. (IR.).

Ross v. Moss (1597), Cro. Eliz. 560, *questioned.*

Harris v. Venables (1872) 41 L. J. Ex. 180; L. R. 7 Ex. 235; 26 L. T. 437; 20 W. R. 974.—EX.

BRAMWELL, B.—Mr. Trevelyan says "withdraw" means "not to present or persevere in a petition against the company for the space of eighteen months"; and he says it must mean this, because if it only meant that the plaintiff would withdraw his petition for the moment, there would be no consideration and no valid contract. For this purpose he cites *Ross v. Moss*, which certainly goes very far; but whether that case is good law, and would be decided in the same way now, I will not say. If a man expressly contracts that on a particular petition being withdrawn he will pay a sum of money, that is a good contract; it was his own folly not to provide against another petition being filed. It is obvious that a real benefit is gained by the withdrawal, because of the disinclination to commence a new proceeding, after so much labour and expense have been wasted. I cannot but doubt, therefore, whether *Ross v. Moss* is good law, and I think that a promise made in consideration of such an agreement would be good.

Wood v. Benson (1832) 1 L. J. Ex. 18; 2 Cr. & J. 94; 2 Tyrw. 98; 1 Price P. C. 169.—EX.

Explained. **Williams v. Burgess** (1839) 8 L. J. Q. B. 286; 10 A. & E. 499; 2 P. & D. 422.—Q.B.; *and see* **Harris v. Venables** (1872) 41 L. J. Ex. 180; L. R. 7 Ex. 235; 26 L. T. 437; 20 W. R. 974.—EX.

Cooper v. Joel (1859) 1 De G. F. & J. 240; 1 L. T. 351.—L.C.; *affirming* 27 Beav. 313.—M.R., *explained.*

Glegg v. Gilbey (1877) 46 L. J. Q. B. 325; 2 Q. B. D. 209; 35 L. T. 927; 25 W. R. 311.—C.A.

BRETT, J.A.—But the law is, that a surety is only relieved if his position has been altered by the persons whom he is guaranteeing. There is no authority for saying he is released if his position is altered by any other means, unless *Cooper v. Joel* be such an authority. The rule has always been laid down with reference to the surety's position having been altered by the creditor; and the only point must be, whether that case does enlarge the rule. In my opinion it does not. In that case the liability of the defendant was only to arise if the condition was first performed, viz., that the sale should be postponed, and the persons guaranteed undertook that the sale should be postponed. True, the sale was stopped, not by their means, but by extraneous means; but they made the condition depend not upon what they should do, but upon what should be done. The case, therefore, is no authority to show that the ordinary examination of the rule is couched in too limited terms.

Cooper v. Joel, explained.

Brooking v. Maudslay, Sons & Field (1888) 57 L. J. Ch. 1001; 38 Ch. D. 636; 58 L. T. 852; 36 W. R. 664.—STIRLING, J.

Napier v. Bruce (1842) 8 Cl. & F. 470.—H.L. (SC.). *See*
Anderson v. Thornton (1842) 11 L. J. Q. B. 265; 3 Q. B. 271; 3 G. & D. 502; 6 Jur. 1109.—Q.B.: N. W. Ry. v. Whinray (1854) 23 L. J. Ex. 261; 10 Ex. 77; 2 C. L. R. 1207; 2 W. R. 523.—EX.; **Pattison v. Belford Union** (1836) 1 H. & N. 523; 26 L. J. Ex. 115; 3 Jur. (N.S.) 116; 5 W. R. 121.—EX. CH.

Turner, Ex parte (1796) 3 Ves. 243; 3 R. R. 90.—ELDON, L.C., *distinguished and limited*.

Gray v. Seckham (1872) L. R. 7 Ch. 680; 27 L. T. 290; 20 W. R. 920.—L.J.J.; *affirming* 41 L. J. Ch. 281.—BACON, V.-C.

JAMES, L.J.—The form of the order in **Turner, Ex parte**, and the subsequent case of **Rushforth, Ex parte**, may easily be explained by reference to the then state of the law as regarded payments by sureties. As the law then stood a surety paying a debt after the bankruptcy had no means whatever of proving against the estate, though he was entitled to his remedy against the bankrupt, to whom the certificate was no discharge. That was the remedy of the surety, and it was, therefore, according to common sense and common equity for the principal creditors to claim the same rights, that is, the same dividend as they would have had if the surety had paid the debt after the bankruptcy, and before they themselves proved. But I cannot understand how that principle can apply to the case of a winding-up where the administration is exactly similar to that of the estate of a deceased person, and where it is of no consequence whatever at what time the surety paid the debt, his right of proof being the same whether he paid it at one moment or at another, the estate being liable to exactly the same amount of dividend in both cases.—p. 129. MELLISH, L.J. concurred.

Rushforth, Ex parte (1805) 10 Ves. 409, 420.—L.C., *followed*.

Reed v. Norris (1837) 6 L. J. Ch. 197; 2 Myl. & Cr. 361; 1 Jur. 233.—L.C.; **Midland Banking Co. v. Chambers** (1868) L. R. 7 Eq. 179, 183; 19 L. T. 548.—V.-C.; *affirmed*, (1869) 38 L. J. Ch. 478; L. R. 4 Ch. 398; 20 L. T. 346; 17 W. R. 598.—L.J.J.

Rushforth, Ex parte, distinguished and limited.

Gray v. Seckham (1872) 42 L. J. Ch. 127; L. R. 7 Ch. 680; 27 L. T. 290; 20 W. R. 920.—L.J.J. *See extract, supra*.

Rushforth, Ex parte, considered and distinguished.

Ellis v. Emmanuel (1876) 46 L. J. Ex. 25; 1 Ex. D. 157; 34 L. T. 553; 24 W. R. 832.—EX. CH.

BLACKBURN, J.—I have now cited and examined every case [*i.e.*, the above case and other cases *infra*] of which I am aware bearing on this subject. In every one of them the limited liability was to secure a floating balance, and I think the decisions establish that in such a case the suretyship is *prima facie* at least to be construed as a security for a part only of the debt. . . . But there is no case that I am aware of which lays down that where the suretyship, limited in amount, is for a debt already ascertained, which exceeds that limit, it is *prima*

facie to be construed as a security for a part of the debt only. And I have failed to see any principle on which such a *prima facie* construction ought to be adopted. I think in such a case it is a question of construction on which the Court is to say whether the intention was to guarantee the whole debt with a limitation on the liability of the surety, or to guarantee a part of the debt only.—p. 30.

Paley v. Field (1806) 12 Ves. 435; 8 R. R. 349.—M.R., *followed*.

Bardwell v. Lydall (1831) 9 L. J. (O.S.) C. P. 148; 7 Bing. 489; 5 M. & P. 327.—C.P.

Paley v. Field, not followed.

Hobson v. Bass (1871) L. R. 6 Ch. 792; 19 W. R. 992.

HATHERLEY, L.C.—In **Paley v. Field**, before Sir W. Grant, there were indeed words specifically pointing at the liability of the surety being only for a part of the debt, but the present case is not really distinguishable from **Garner, In re, Holmes, Ex parte** (*infra*).—p. 795.

Paley v. Field, considered and distinguished.
Ellis v. Emmanuel (1876) 46 L. J. Ex. 25; 1 Ex. D. 157; 34 L. T. 553; 24 W. R. 832.—EX. CH. *See extract, supra*.

Garner, In re, Holmes, Ex parte, 8 L. J. Bk. 41; 3 Deac. 662.—B.K.; *reversed*, (1839) 9 L. J. Ch. 33; 4 Deac. 82; Mont. & Ch. 301; 3 Jur. 1023.—L.C.

Garner, In re, Holmes, Ex parte (*supra*, L.C.), *applied*.

Midland Banking Co. v. Chambers (1868) L. R. 7 Eq. 179, 183; 19 L. T. 548.—V.-C., *affirmed*, (1869) 38 L. J. Ch. 478; L. R. 4 Ch. 398; 20 L. T. 346; 17 W. R. 598.—L.J.J.; **Hobson v. Bass** (1871) L. R. 6 Ch. 792; 19 W. R. 992.—L.C. *See extract, supra*.

Garner, In re, Holmes, Ex parte, considered and distinguished.

Ellis v. Emmanuel (1876) 46 L. J. Ex. 25; 1 Ex. D. 157; 34 L. T. 553; 24 W. R. 832.—EX. CH. *See extract, supra*.

Bardwell v. Lydall (1831) 9 L. J. (O.S.) C. P. 148; 7 Bing. 489; 5 M. & P. 327.—C.P., *followed*.

Gee v. Pack (1863) 33 L. J. Q. B. 49; 9 L. T. 290.—EX. CH.

Bardwell v. Lydall and Gee v. Pack, considered and distinguished.

Ellis v. Emmanuel (1876) 46 L. J. Ex. 25; 1 Ex. D. 157; 34 L. T. 553; 24 W. R. 832.—EX. CH. *See extract, supra*, col. 2573.

Thornton v. M'Kewan (1862) 32 L. J. Ch. 69; 1 H. & M. 525; 1 N. R. 16; 11 W. R. 140.—WOOD, V.-C., *applied*.

Midland Banking Co. v. Chambers (1869) 38 L. J. Ch. 478; L. R. 4 Ch. 398, 400; 20 L. T. 346; 17 W. R. 598.—L.J.J.; **Goodwin v. Gray** (1874) 22 W. R. 312.—JESSEL, M.R.

Thornton v. M'Kewan; Hobson v. Bass (1871) L. R. 6 Ch. 792; 19 W. R. 992.—L.C.; and **Gray v. Seckham** (1872) 42 L. J. Ch. 127; L. R. 7 Ch. 680; 27 L. T. 290; 20 W. R. 920.—L.J.J., *considered and distinguished*.

Ellis v. Emmanuel (1876); 46 L. J. Ex. 25; 1 Ex. D. 157; 34 L. T. 553; 24 W. R. 832.—C.A. *See extract, supra*.

Dawson v. Raynes (1826) 2 Russ. 466; 26 R. R. 9.—*L.C., followed.*
Graham. In re. Graham v. Noakes (1894) 64 L. J. Ch. 98; 1895; 1 Ch. 66; 13 R. R. 81; 71 L. T. 623; 43 W. R. 103.—*CHITTY, J.*

Metcalf v. Bruin (1810) 12 East 400; 2 Camp. 422; 11 R. R. 432.—*K.B., distinguished.*
Leadley v. Evans (1824) 2 L. J. (o.s.) C. P. 108; 2 Bing. 32; 9 Moore 102.—*C.P.*

Metcalf v. Bruin, referred to.
Backhouse v. Hall (1865) 34 L. J. Q. B. 141; 6 B. & S. 507.—*Q.B. (see extract, infra, col. 2586).*

St. Saviour's. Southwark v. Bostock (1806) 2 Bos. & P. (N.R.) 175.—*C.P.; Hassell v. Long* (1814) 2 M. & S. 363.—*K.B.; and Peppin v. Cooper* (1819) 2 B. & Ald. 431.—*K.B., applied.*
Leadley v. Evans (1824) 2 L. J. (o.s.) C. P. 108; 2 Bing. 32; 9 Moore 102.—*C.P.*

Webb v. James (1840) 10 L. J. Ex. 89; 7 M. & W. 279; 9 D. P. C. 315.—*EX., adopted.*

Kepp v. Wiggett (1850) 20 L. J. C. P. 49; 10 C. B. 35; 14 Jur. 1137.—*C.P.; Durham Corporation v. Fowler* (1889) 58 L. J. Q. B. 246; 22 Q. B. D. 394; 413; 60 L. T. 456; 53 J. P. 374.—*DENMAN and STEPHEN, JJ.*

Kepp v. Wiggett (1850) 20 L. J. C. P. 49; 10 C. B. 35; 14 Jur. 1137.—*C.P., adopted.*
Durham Corporation v. Fowler (1889) 58 L. J. Q. B. 246; 22 Q. B. D. 394; 413; 60 L. T. 456; 53 J. P. 374.—*DENMAN and STEPHEN, JJ.*

Gwynne v. Burnell (1840) 7 Cl. & F. 372; West. 342; 1 Scott (N. R.) 711; 6 Bing. N. C. 453, 544.—*H.L. (E.), cited.*
Reg. v. Fay (1879) 4 L. R. Ir. 606, 613, 623, 631.—*EX. D.; and see Mansfield Union v. Wright* (1882) 9 Q. B. D. 683.—*C.A., affirming* 46 J. P. 200.—*W. WILLIAMS, J.*

2. DISCHARGE OF SURETY.

Whitcher v. Hall (1835) 4 L. J. K. B. 167; 5 B. & C. 269; 8 D. & R. 22; 29 R. R. 244.—*K.B., approved and adopted.*

Bonser v. Cox (1844) 13 L. J. Ch. 260; 6 Beav. 110; 8 Jur. 387.—*L.C.; Bonar v. Macdonald* (1850) 3 H. L. Cas. 226; 14 Jur. 1077.—*H.L. (SC.).*

Whitcher v. Hall, distinguished.
Sanderson v. Aston (1873) 42 L. J. Ex. 64; L. R. 8 Ex. 73, 78; 28 L. T. 35; 21 W. R. 293.—*EX.*

POLLOCK, B.—There the surety took care that the terms of the original agreement should be made part of his own contract.—p. 67.

Whitcher v. Hall, adopted.
Holme v. Brunskill (1878) 47 L. J. Q. B. 610; 3 Q. B. D. 495, 499; 38 L. T. 838.—*C.A.*

Angero v. Keen (1836) 5 L. J. Ex. 233; 1 M. & W. 390.—*EX., adopted.*
Kitson v. Julian (1855) 24 L. J. Q. B. 202; 4 El. & Bl. 854; 1 Jur. (N.S.) 754; 3 W. R. 371.—*Q.B.*

Mackintosh v. Wyatt (1814) 3 Hare 562.—*V.-C., adopted.*
Cooper v. Evans (1867) 36 L. J. Ch. 431; L. R. 4 Eq. 45; 15 W. R. 609.—*M.R.*

O.C.

Bonser v. Cox (1844) 4 Beav. 379; 8 Jur. 387.—*M.R., distinguished.*
Cooper v. Evans (1867) 36 L. J. Ch. 431; L. R. 4 Eq. 45; 15 W. R. 609.—*M.R.*

Bonser v. Cox, applied.
Beckett v. Addyman (1882) 9 Q. B. D. 783, 789; 51 L. J. Q. B. 597.—*FIELD, J., (affirmed, C.A.); Ward v. National Bank of New Zealand* (1883) 52 L. J. P. C. 65; 8 App. Cas. 755; 49 L. T. 315.—*P.C.; Wolmershausen. In re. Wolmershausen v. Wolmershausen* (1890) 62 L. T. 541; 38 W. R. 537.—*STIRLING, J.*

Archer v. Hale (1828) 6 L. J. (o.s.) C. P. 79; 4 Bing. 464; 1 M. & P. 285.—*C.P.; and Evans v. Whyte* (1829) 7 L. J. (o.s.) C. P. 205; 5 Bing. 485; M. & M. 468; 3 M. & P. 130.—*C.P., principle adopted.*
Bonar v. Macdonald (1850) 3 H. L. Cas. 226; 14 Jur. 1077.—*H.L. (SC.).*

Bonar v. Macdonald (1850) 3 H. L. Cas. 226; 14 Jur. 1077.—*(H.L.) (SC.), considered and adopted.*

Pybus v. Gibb (1856) 6 El. & Bl. 902, 913; 26 L. J. Q. B. 41; 3 Jur. (N.S.) 315; 5 W. R. 44.—*Q.B.*

Bonar v. Macdonald, distinguished.
Skillett v. Fletcher (1867) 36 L. J. C. P. 206; L. R. 2 C. P. 469; 16 L. T. 426; 15 W. R. 876.—*EX. CH.*

MARTIN, B.—*Bonar v. Macdonald* is distinguishable: there the principal debtor was the officer of a bank and his employment was one employment; for when he, a bank clerk, was employed as manager and to discount bills, he was appointed to a new office, which was an entire thing, and it was impossible to hold the sureties responsible for any default as to his old duties.—p. 208.

Evans v. Bremridge, 2 Kay & J. 174; 25 L. J. Ch. 102; 2 Jur. (N.S.) 134; 4 W. R. 161.—*V.-C.; affirmed*, (1856) 8 De G. M. & G. 100; 25 L. J. Ch. 334; 2 Jur. (N.S.) 311; 4 W. R. 350.—*L.JJ.*

Evans v. Bremridge, distinguished.
Cooper v. Evans (1867) 36 L. J. Ch. 431; L. R. 4 Eq. 45; 15 W. R. 609.—*M.R.*

Evans v. Bremridge, adopted.
Beckett v. Addyman (1882) 9 Q. B. D. 783, 789; 51 L. J. Q. B. 597.—*FIELD, J.; affirmed, C.A. COLERIDGE, C.J., BRETT AND COTTON, L.JJ.*

Evans v. Bremridge, followed.
Fitzgerald v. McCowan (1896) [1898] 2 Ir. R. 1.—*Q.B.D.*

Mayhew v. Crickett (1818) 2 Swanst. 185; 1 Wils. Ch. 418; 19 R. R. 57.—*L.C.; applied.*

Smith v. Winter (1838) 8 L. J. Ex. 34; 4 M. & W. 454.—*EX.; Newton v. Chorlton* (1853) 10 Hare 646; 2 Drew. 333.—*V.-C.; Phillips v. Foxall* (1872) 41 L. J. Q. B. 293; L. R. 7 Q. B. 666, 677; 27 L. T. 231; 20 W. R. 900.—*Q.B.*

Mayhew v. Crickett, dicta adopted.
Polak v. Everett (1876) 46 L. J. Q. B. 218; 1 Q. B. D. 669, 674; 35 L. T. 350; 24 W. R. 689.—*Q.B.D.; affirmed, C.A.*

Mayhew v. Crickett, applied.

Forbes v. Jackson (1882) 51 L. J. Ch. 690; 19 Ch. D. 615; 30 W. R. 652.—*HALL, v.-c.*; and Wolmershausen, *In re, Wolmershausen v. Wolmershausen* (1890) 62 L. T. 541; 38 W. R. 537.—*STIRLING, J.*

Wheatley v. Bastow (1855) 24 L. J. Ch. 727; 7 De G. M. & G. 261; 3 Eq. R. 765; 1 Jur. (N.S.) 1124; 3 W. R. 540.—*L.J.*, *considered and distinguished.*

Strange v. Fooks (1863) 4 Giff. 408; 2 N. R. 507; 9 Jur. (N.S.) 943; 8 L. T. 789; 11 W. R. 983.—*v.-c.*

Wheatley v. Bastow and Hodgson v. Hodgson (1837) 2 Keen 704; 7 L. J. Ch. 5.—*M.R.*, *discussed.*

Bolton v. Salmon (1891) 60 L. J. Ch. 239; [1891] 2 Ch. 48; 64 L. T. 222; 39 W. R. 589.

CHITTY, J.—For the defendants two cases were cited. The first was *Wheatley v. Bastow*. This is not an express decision on the point. . . . On the facts the Court decided that the surety was not discharged. But it seems to have been assumed throughout the case, both by the eminent counsel engaged and by the Court, . . . that, if the facts had shown a release the mortgaged property of the surety would have been discharged. The second case is *Hodgson v. Hodgson*. There it was held that the release of one co-surety discharged the security given by the other. This is in point. On principle, I can find no ground for the proposition that, although the surety's covenant is gone by alteration of the contract with the principal debtor, yet the security which the surety has given remains bound.

Strange v. Fooks (1863) 4 Giff. 408; 2 N. R. 507; 9 Jur. (N.S.) 943; 8 L. T. 789; 11 W. R. 983.—*v.-c.*, *observations adopted.*

Wulff (or Woulff) v. Jay (1872) 41 L. J. Q. B. 322; L. R. 7 Q. B. 756; 27 L. T. 118; 20 W. R. 1030.—*Q.B.*

Strange v. Fooks, distinguished.

Andrews v. Patriotic Assurance Co. (1886) 18 L. R. Ir. 355, 372.—*EX. D.*

Wulff (or Woulff) v. Jay (1872) 41 L. J. Q. B. 322; L. R. 7 Q. B. 756; 27 L. T. 118; 20 W. R. 1030.—*Q.B.*, *distinguished.*

Polak v. Everett (1876) 45 L. J. Q. B. 369; 34 L. T. 128.—*Q.B.D.*; (affirmed *C.A.*, *infra*); and *Reg. v. Fay* (1878) 4 L. R. Ir. 606.—*C.A.*

Wulff v. Jay, followed.

Rainbow v. Juggins (1880) 49 L. J. Q. B. 353; 5 Q. B. D. 138; 42 L. T. 88; 28 W. R. 428.—*MANISTY, J.*, (affirmed, *C.A.*). *See extract, infra.*

Wulff v. Jay, distinguished.

Andrews v. Patriotic Assurance Co. (1886) 18 L. R. Ir. 355, 372.—*EX. D.*

Wulff v. Jay, applied.

Wolmershausen, In re, Wolmershausen v. Wolmershausen (1890) 62 L. T. 541; 38 W. R. 537.—*STIRLING, J.*

Hitchcock v. Humphrey (1843) 12 L. J. C. P. 235; 5 Man. & G. 559; 6 Scott (N.R.) 540; 7 Jur. 423.—*C.P.*, *adopted.*

Carter v. White (1883) 54 L. J. Ch. 138; 25 Ch. D. 666; 50 L. T. 670; 32 W. R. 692.—*C.A.*

Polak v. Everett (1876) 46 L. J. Q. B. 218; 1 Q. B. D. 669; 35 L. T. 350; 24 W. R. 689.—*C.A.*, *distinguished.*

Rainbow v. Juggins (1880) 5 Q. B. D. 138, 422; 49 L. J. Q. B. 353; 42 L. T. 88; 28 W. R. 428.—*MANISTY, J.*, (affirmed, *C.A. infra*, col. 2579).

MANISTY, J.—It was contended by the counsel for the defendant, that Mrs. Rainbow, having been warned as she was by the defendant's solicitor that if she did not put a value on the policy she would discharge the defendant from his liability, by not doing so wilfully gave up or abandoned the policy, and so discharged the defendant from all liability as surety. In support of that contention they cited *Polak v. Everett*. In that case the complicated arrangement into which the parties had entered, and for the part performance of which the defendant had become surety, was substantially altered and varied without the defendant's consent. No doubt some dicta are to be found in the judgments of the judges in the Queen's Bench Division, which seem in the abstract to be in favour of the defendant in the present case, but the *ratio decidendi* in *Polak v. Everett* was that to which I have already adverted, and I do not think it is applicable to the present case. The Court of Appeal simply said they had no doubt that the view taken by the judges of the Queen's Bench Division was correct, and affirmed the judgment. I think this case is at the most one of neglect or omission to put a value upon the policy, assuming it to have some value, when Mrs. Rainbow proved her debt, and that in accordance with several authorities, including *Wulff v. Jay*, the defendant was only discharged from his liability as surety to the extent of the value of the policy.—p. 142.

Polak v. Everett, applied.

Ward v. National Bank of New Zealand (1883) 52 L. J. P. C. 65; 8 App. Cas. 755; 49 L. T. 315.—*P.C.*; *Carter v. White* (1883) 54 L. J. Ch. 132; 25 Ch. D. 666; 50 L. T. 670; 32 W. R. 692.—*C.A.*; *Dowden v. Lewis* (1884) 14 L. R. Ir. 307.—*EX. D.*

Polak v. Everett, considered.

Taylor v. Bank of New South Wales (1886) 55 L. J. P. C. 47; 11 App. Cas. 596; 55 L. T. 444.—*P.C.*

Polak v. Everett, applied.

Wolmershausen, In re, Wolmershausen v. Wolmershausen (1890) 62 L. T. 541; 38 W. R. 537.—*STIRLING, J.*; *Greenwood v. Francis* (1898) 68 L. J. Q. B. 228; [1899] 1 Q. B. 312; 79 L. T. 624.—*C.A.*; and *Rex v. Herron* [1903] 2 Ir. R. 474, 481.—*K.B.D.*

Holme v. Brunskill (1878) 47 L. J. Q. B. 610; 3 Q. B. D. 495; 38 L. T. 838.—*C.A.*, *applied.*

Ward v. National Bank of New Zealand (1883) 52 L. J. P. C. 65; 8 App. Cas. 755; 49 L. T. 315.—*P.C.*; *Dowden v. Lewis* (1884) 14 L. R. Ir. 307.—*EX. D.*

Holme v. Brunskill, considered.

Taylor v. Bank of New South Wales (1886) 55 L. J. P. C. 47; 11 App. Cas. 596; 55 L. T. 444.—*P.C.*

Holme v. Brunskill, followed.

Baynton v. Morgan (1888) 57 L. J. Q. B. 465; 21 Q. B. D. 101, 103; 59 L. T. 478; 52 J. P. 710.—*Q.B.D.*; affirmed. (1888) 58 L. J. Q. B. 139; 22 Q. B. D. 74; 37 W. R. 148; 53 J. P. 166.—*C.A.*

Holme v. Brunskill, applied.

Bolton v. Salmon (1891) 60 L. J. Ch. 239; [1891] 2 Ch. 48; 64 L. T. 222; 39 W. R. 589.—CHITTY, J.; and Rex v. Herron [1903] 2 Ir. R. 474.—K.B.D.

Rainbow v. Juggis (1876) 49 L. J. Q. B. 718; 5 Q. B. 422; 42 L. T. 346; 29 W. R. 130; 14 J. P. 829.—C.A., applied.

Wolmershausen, In re, Wolmershausen v. Wolmershausen (1890) 62 L. T. 541; 38 W. R. 537.—STIRLING, J.

Carter v. White (1888) 54 L. J. Ch. 138; 25 Ch. D. 666; 50 L. T. 670; 32 W. R. 692.—C.A., applied.

Wolmershausen, In re, Wolmershausen v. Wolmershausen (1890) 62 L. T. 541; 38 W. R. 537.—STIRLING, J.; Barber v. Mackrell (1892) 68 L. T. 29; 41 W. R. 341; 2 R. 72.—C.A.

Ward v. National Bank of New Zealand (1888) 52 L. J. P. C. 65; 8 App. Cas. 755; 49 L. T. 315.—P.C., applied.

Wolmershausen, In re, Wolmershausen v. Wolmershausen (1890) 60 L. T. 541; 38 W. R. 537.—STIRLING, J.

Merchants' Bank v. Maud, 18 W. R. 312.—V.-C.; reversed, (1871) 19 W. R. 657.—L.C.**Cowper v. Smith (1838) 4 M. & W. 519.—EX., followed.**

Union Bank of Manchester v. Beech (1865) 34 L. J. Ex. 133; 3 H. & C. 672; 12 L. T. 499; 13 W. R. 922.—EX.

Williams v. Owen (1843) 13 L. J. Ch. 105; 13 Sim. 597; 7 Jur. 1147.—V.-C., questioned.

Forbes v. Jackson (1882) 51 L. J. Ch. 690; 19 Ch. D. 615; 30 W. R. 652.

HALL, V.-C.—*Duncan, Fox & Co. v. North and South Wales Bank* (*infra*, col. 2581) was decided by the Court of Appeal, who reversed the decision of Little, V.-C., and it afterwards went to the House of Lords, who, though they reversed the decision of the Court of Appeal (which had proceeded upon some supposed distinction between the ordinary case of suretyship and that of a suretyship arising out of a bill transaction), did not say anything which affected the principles laid down in the judgment of the Master of the Rolls, which is all I desire to notice in that case. I consider that the principle laid down in that case is perfectly plain and right, and also that the decision in *Williams v. Owen* must be now no longer considered as law after the cases to which I have referred. I decline to recognise it.—p. 694.

Williams v. Owen, considered.

Dawson v. Bank of Whitehaven (1877) 46 L. J. Ch. 545; 4 Ch. D. 939; 36 L. T. 319; 25 W. R. 582.—BACON, V.C. (reversed C.A.).

Williams v. Owen, disapproved.

Kirkwood's Estate, In re (1878) 1 L. R. Ir. 108.—FLANAGAN, J.

Williams v. Owen, held overruled.

Nicholas v. Ridley (1903) [1904] 1 Ch. 192; 73 L. J. Ch. 115.—BYRNE, J.; affirmed C.A.

Bowker v. Bull (1850) 20 L. J. Ch. 47; 1 Sim. (N.S.) 29; 15 Jur. 4.—V.C., considered.

Farebrother v. Wodehouse (1856) 26 L. J. Ch. 81; 23 Beav. 18; 2 Jur. (N.S.) 1178; 5 W. R. 12.—M.R.; and Dawson v. Bank of Whitehaven (1877) 46 L. J. Ch. 545; 4 Ch. D. 639; 36 L. T. 310; 25 W. R. 582.—BACON, V.-C. (reversed C.A.).

Bowker v. Bull, followed.

Kirkwood's Estate, In re (1878) 1 L. R. Ir. 108.—FLANAGAN, J.

Newton v. Chorlton (1853) 10 Hare 646; 2 Drewry 333; 1 W. R. 266.—V.-C., doubted.

Pledge v. Buss (1860) Johns. 663; 6 Jur. (N.S.) 695.—WOOD, V.-C.

Newton v. Chorlton, applied.

Watts v. Shuttleworth (1860) 29 L. J. Ex. 229; 7 H. & N. 353; 7 Jur. (N.S.) 945; 5 L. T. 58; 10 W. R. 132.—EX. CH.

Newton v. Chorlton, not followed.

Campbell v. Rothwell (1877) 38 L. T. 33; 47 L. J. Q. B. 144.

DENMAN, J.—I have felt great doubt whether I ought not to adhere to the doctrine laid down in *Newton v. Chorlton*, but, upon the whole, I think it more probable that *Pledge v. Buss*, though not raising the same point, contains the expression of the final opinion of the Courts of Equity (including that of Wood, V.-C.) than the decision of *Newton v. Chorlton*. I find that *Newton v. Chorlton* has been treated as overruled in the last three editions of White & Tudor's L. C., and I can see nothing unreasonable in the doctrine that a surety is discharged if the creditor has so dealt with any security he possesses that he cannot on payment by the surety give him all the securities he possesses, whether in existence at the time of the contract of suretyship or subsequently, in the same condition as they were when he first acquired them.

Newton v. Chorlton, considered.

Duncan, Fox & Co. v. North and South Wales Bank (1880) 50 L. J. Ch. 355; 6 App. Cas. 11; 43 L. T. 706; 29 W. R. 763.—H.L. (E.).

Newton v. Chorlton, observed upon and approved.

Forbes v. Jackson (1882) 51 L. J. Ch. 690; 19 Ch. D. 615; 30 W. R. 652.—HALL, V.-C.

Newton v. Chorlton, followed.

Nicholas v. Ridley (1903) 73 L. J. Ch. 145; [1904] 1 Ch. 192.—C.A. WILLIAMS, L.J., dissenting.

Pledge v. Buss (1860) Johns. 663; 6 Jur. (N.S.) 695.—WOOD, V.-C.

Followed, Campbell v. Rothwell (1877) 47 L. J. Q. B. 144; 38 L. T. 33.—DENMAN, J. (*see extract, supra*); referred to, Forbes v. Jackson (1882) 51 L. J. Ch. 690; 19 Ch. D. 615; 30 W. R. 652.—HALL, V.-C.

Holland v. Teed (1848) 7 Hare 50.—V.-C., considered and applied.

Sherry, In re, London and County Banking Co. v. Terry (1884) 53 L. J. Ch. 404; 25 Ch. D. 692; 50 L. T. 227; 32 W. R. 394.—C.A.

Lake v. Brutton (1856) 25 L. J. Ch. 842; 8 De G. M. & G. 440; 18 Beav. 134; 2 Jur. (N.S.) 835.—L.J., referred to.

Campbell v. Rothwell (1877) 47 L. J. Q. B. 144; 38 L. T. 33.—DENMAN, J.

Lake v. Brutton, considered.

Forbes v. Jackson (1882) 51 L. J. Ch. 690; 19 Ch. D. 615; 30 W. R. 652.—HALL, V.-C.

Pearl v. Deacon (1857) 26 L. J. Ch. 761; 1 De G. & J. 461; 3 Jur. (N.S.) 1187; 5 W. R. 793.—L.J., affirming 24 Beav. 188.—M.R., applied.

Watts v. Shuttleworth (1860) 29 L. J. Ex. 229;

7 H. & N. 353; 7 Jur. (N.S.) 945; 5 L. T. 58; 10 W. R. 132.—EX. CH.

Pearl v. Deacon, followed.

Coates v. Coates (1864) 33 L. J. Ch. 448; 3 N. R. 355; 10 Jur. (N.S.) 532; 9 L. T. 795; 12 W. R. 634.—M.R.

Pearl v. Deacon, referred to.

Campbell v. Rothwell (1877) 47 L. J. Q. B. 144, 146; 38 L. T. 33.—DENMAN, J.

Pearl v. Deacon, adopted.

Kinnaird v. Webster (1878) 48 L. J. Ch. 348; 10 Ch. D. 139; 39 L. T. 494; 27 W. R. 212.—BACON, V.-C.

Pearl v. Deacon, considered.

Duncan, Fox & Co. v. North and South Wales Bank (1880) 50 L. J. Ch. 355; 6 App. Cas. 11; 43 L. T. 706; 29 W. R. 763.—H.L. (E.); Forbes v. Jackson (1882) 51 L. J. Ch. 690; 19 Ch. D. 615; 30 W. R. 652.—HALL, V.-C.

Pearl v. Deacon, considered and applied.

Ward v. National Bank of New Zealand (1883) 52 L. J. P. C. 65, 69; 8 App. Cas. 755, 765; 49 L. T. 315.—P.C.

Pearl v. Deacon, inapplicable.

Sherry, In re. London and County Banking Co. v. Terry (1884) 53 L. J. Ch. 404; 25 Ch. D. 692, 702; 50 L. T. 227; 32 W. R. 394.—C.A.

SELBORNE, L.C.—Therefore we are remitted to the question whether there was here an express or an implied contract to appropriate these monies in reduction of the secured or guaranteed debt. If there was, of course, that contract could not be defeated by any mode of keeping the account which the creditor might prefer: the contract must prevail: and in that case, no doubt, the principle of *Pearl v. Deacon* which dealt with securities (and I agree that moneys which by contract are appropriated to a particular purpose stand as regards the surety on the same footing as securities) would be applicable. [His lordship then went on to show that there was not in the case before him either an express or an implied contract to appropriate payments received subsequently to the termination of the guarantee towards the guaranteed debt.]

Pearl v. Deacon, considered.

Taylor v. Bank of New South Wales (1886) 55 L. J. P. C. 47; 11 App. Cas. 596; 55 L. T. 444.—P.C.

Kinnaird v. Webster (1878) 48 L. J. Ch.

348; 10 Ch. D. 139; 39 L. T. 494; 27 W. R. 212.—V.-C., distinguished.

Booth, In re. Browning v. Baldwin (1879) 40 L. T. 248; 27 W. R. 645.

BACON, V.-C.—The case of *Kinnaird v. Webster* . . . was of a totally different character; there upon the terms of the contract fairly read and interpreted I came to the conclusion that the intention of the parties was that only if enough money was not paid in by the principal debtor, was the guarantor to be looked to for payment: and enough money did come in.—p. 249.

Duncan, Fox & Co. v. North and South Wales Bank. 48 L. J. Ch. 376; 11 Ch. D. 88; 40 L. T. 371; 27 W. R. 521.—C.A.: reversed. (1880) 50 L. J. Ch. 355; 6 App. Cas. 1; 43 L. T. 706; 29 W. R. 763.—H.L. (E.).

Duncan, Fox & Co. v. North and South Wales Bank (*supra*, in C.A.), principles recognised.

Forbes v. Jackson (1882) 51 L. J. Ch. 690; 19 Ch. D. 615; 30 W. R. 652.—HALL, V.-C. See extract, *supra*, col. 2579.

Duncan, Fox & Co. v. North and South Wales Bank, observations applied.

Nicholas v. Ridley (1903) 73 L. J. Ch. 145; [1904] 1 Ch. 192, 211; 89 L. T. 653; 52 W. R. 226.—C.A.

Gifford, Ex parte (1802) 6 Ves. jun. 805, 808; 6 R. R. 53.—L.C., questioned.

Nicholson v. Revill (1836) 4 A. & E. 675; 6 N. & M. 192; 1 H. & W. 756; 5 L. J. K. B. 129.—K.B.

DENMAN, C.J. (for the Court).—This view cannot perhaps be made entirely consistent with all that is said by Lord Eldon in the case of *Ex parte Gifford*, where his lordship dismissed a petition to expunge the proof of a surety against the estate of a co-surety. But the principle to which we have adverted was not presented to his mind in its simple form, and the point certainly did not undergo much consideration. For some of the expressions employed would seem to lay it down that a joint debtor might release one of his debtors, and yet, by using some language of reservation in the agreement between himself and such debtor, keep his remedy entire against the others, even without consulting them. If Lord Eldon used any language which could be so interpreted, we must conclude that he either did not guard himself so cautiously as he intended, or that he did not lend that degree of attention to the legal doctrine connected with the case before him, which he was accustomed to afford.—p. 683.

Gifford, Ex parte, adopted.

Davies v. Humphreys (1840) 9 L. J. Ex. 263; 6 M. & W. 153; 4 Jur. 250.—EX.; Kearsley v. Cole (1846) 16 L. J. Ex. 115; 16 M. & W. 128.—EX. (see extract, *infra*); Thompson v. Lack (1846) 16 L. J. C. P. 75; 3 C. B. 540.—C.P.

Gifford, Ex parte, considered.

Webb v. Hewitt (1857) 3 Kay & J. 438.—WOOD, V.-C.; Bateson v. Gosling (1871) 41 L. J. C. P. 53; L. R. 7 C. P. 9, 13; 25 L. T. 570; 20 W. R. 98.—C.P.

Gifford, Ex parte, applied.

Snowdon, In re and Ex parte (1881) 50 L. J. Ch. 540; 17 Ch. D. 44, 48; 44 L. T. 830; 29 W. R. 654.—C.A. See extract, *post*, col. 2610.

Gifford, Ex parte, explained.

Wolmershausen, In re. Wolmershausen v. Wolmershausen (1890) 62 L. T. 541; 38 W. R. 537.—STIRLING, J.

Gifford, Ex parte, considered.

Wolmershausen v. Gullick (1893) 62 L. J. Ch. 773; [1893] 2 Ch. 514; 3 R. 610; 68 L. T. 753.—WRIGHT, J.

Renton, In re. Glendinning, Ex parte (1819)

1 Buck. 517.—L.C., applied.

Bell v. Shuttleworth (1841) 10 L. J. C. P. 239; *nom.* Bell v. Banks, 3 Man. & G. 258; 3 Scott, N. R. 497.—C.P.; Bateson v. Gosling (1871) L. R. 7 C. P. 9, 14; 41 L. J. C. P. 53; 25 L. T. 570; 20 W. R. 98.—C.P.

Nicholson v. Revill (1836) 5 L. J. K. B. 129; 4 A. & E. 675; 6 N. & M. 192; 1 H. & W. 756.—K.B., *distinguished and dicta disapproved*.

Thompson v. Lack (1846) 16 L. J. C. P. 75; 3 C. B. 540.—C.P.

Nicholson v. Revill, *commented on*.

Kearsley v. Cole (1846) 16 M. & W. 128; 16 L. J. Ex. 115.—EX.

PARKE, B. (for the Court).—Some remarks, indeed have been made by Lord Denman, in the case of *Nicholson v. Revill*, on the doctrine of Lord Eldon in *Ex parte Gifford*, throwing doubt on its correctness, on the supposition that Lord Eldon had held that a creditor could release one joint and several debtor, and hold another liable by a reserve of remedies; which would certainly be against the decision in *Cheetham v. Ward* (1 Bos. & P. 630), unless the instrument of release could, by reason of the context, be construed to be a covenant not to sue, as it was in the case of *Solby v. Forbes* (2 Brod. & B. 38). But we consider it clear that Lord Eldon meant only to apply the doctrine to cases where there was no release, but a composition, or giving time, not amounting to a release, which is the present case; and with reference to it, the rule laid down by Lord Eldon is not impeached by Lord Denman's remarks.—p. 136.

Nicholson v. Revill and Rogers v. Payne (1768) 2 Wils. 376, n.—C.P., *discussed and applied*.

Webb v. Hewitt (1857) 3 Kay & J. 438.—WOOD, V.-C.

Nicholson v. Revill, *referred to*.

Bateson v. Gosling (1871) 41 L. J. C. P. 53; L. R. 7 C. P. 9; 13; 25 L. T. 570; 20 W. R. 98.—C.P.; **Simpson v. Henning** (1875) 44 L. J. Q. B. 143; L. R. 10 Q. B. 406, 418; 33 L. T. 508.—EX. CH.

Nicholson v. Revill, *rule explained*.

Armitage, In re, *Halifax Joint Stock Banking Co., Ex parte* (1876) 35 L. T. 554; 25 W. R. 83.—BK.

Nicholson v. Revill, *applied*.

Armitage, In re, *Good, Ex parte* (1877) 46 L. J. Bk. 65, 68; 5 Ch. D. 46, 53; 36 L. T. 338; 25 W. R. 422.—BACON, C.J.; *affirmed* in C.A.

Nicholson v. Revill, *distinguished*.

Cardwell v. Smith (1886) 2 T. L. R. 779.—Q.B.D.; and **Wolmershausen**, In re, *Wolmershausen v. Wolmershausen* (1890) 62 L. T. 541; 38 W. R. 537.—STIRLING, J.

Nicholson v. Revill, *adopted*.

Blyth v. Fladgate (1890) 63 L. T. 546, 553.—STIRLING, J.

Boulton v. Stubbs (1811) 18 Ves. 20; 11

R. R. 141.—L.C., *approved*.

Kearsley v. Cole (1846) 16 L. J. Ex. 115; 16 M. & W. 128.—EX.

Boulton v. Stubbs, *referred to*.

Tucker v. Laing (1856) 2 Kay & J. 745.—WOOD, V.-C.; **Maingay v. Lewis** (1870) Ir. R. 5 C. L. 229.—EX. CH.

Boulton v. Stubbs, *applied*.

Bateson v. Gosling (1871) 41 L. J. C. P. 53; L. R. 7 C. P. 9; 25 L. T. 570; 20 W. R. 98.—C.P.

Solby v. Forbes (1820, 2 Br. & B. 38; 4 Moore 448; 22 R. R. 641.—C.P., *followed*.

Thompson v. Lack (1846) 16 L. J. C. P. 75; 3 C. B. 540.—C.P.

Solby v. Forbes, *referred to*.

Kearsley v. Cole (1846) 16 L. J. Ex. 115; 16 M. & W. 128.—EX.

Solby v. Forbes, *adopted*.

Price v. Barker (1855) 24 L. J. Q. B. 130; 4 EL. & BL. 760; 3 C. L. R. 927; 1 Jur. (N.S.) 775.—Q.B.; **Green v. Wynn** (1868) 38 L. J. Ch. 76; L. R. 7 Eq. 28, 32; 19 L. T. 553.—V.-C.; (affirmed, (1869) 38 L. J. Ch. 220; L. R. 4 Ch. 204; 20 L. T. 131; 17 W. R. 385.—L.C.)

Solby v. Forbes, *referred to*.

Hooper v. Marshall (1869) 39 L. J. C. P. 14; L. R. 5 C. P. 4; 21 L. T. 639.—C.P.

Solby v. Forbes, *adopted*.

Bateson v. Gosling (1871) 41 L. J. C. P. 53; L. R. 7 C. P. 9; 25 C. P. 570; 20 W. R. 98.—C.P.

Lewis v. Jones (1834) 3 L. J. (O.S.) K. B.

270; 4 B. & C. 506; 6 D. & R. 567; 28

R. R. 360.—K.B., *referred to*.

Kearsley v. Cole (1846) 16 L. J. Ex. 115; 16 M. & W. 128.—EX.

Lewis v. Jones, *adopted*.

Bateson v. Gosling (1871) 41 L. J. C. P. 53; L. R. 7 C. P. 9; 25 C. P. 570; 20 W. R. 98.—C.P.

Kearsley v. Cole (1846) 16 L. J. Ex. 115; 16

M. & W. 128.—EX., *ambited*.

Owen v. Homan (1851) 20 L. J. Ch. 314; 3 Mac. & G. 378.—L.C., *affirmed*, (1853) 4 H. L. Cas. 997; 1 Eq. R. 370; 17 Jur. 861.—H.L. (E.).

Kearsley v. Cole, *adopted*.

Price v. Barker (1855) 24 L. J. Q. B. 130; 4 EL. & BL. 760; 3 C. L. R. 927; 1 Jur. (N.S.) 775.—Q.B.

Kearsley v. Cole, *followed*.

Webb v. Hewitt (1857) 3 Kay & J. 438.—V.-C.; **Green v. Wynn** (1869) 38 L. J. Ch. 220; L. R. 4 Ch. 204; 20 L. T. 131; 17 W. R. 385.—L.C.

Kearsley v. Cole and Cowper v. Green (1841)

10 L. J. Ex. 346; 7 M. & W. 638.—EX.,

adopted.

Bateson v. Gosling (1871) 41 L. J. C. P. 53; L. R. 7 C. P. 9; 25 L. T. 570; 20 W. R. 98.—C.P.

Kearsley v. Cole, *approved*.

Cragoe v. Jones (1873) 42 L. J. Ex. 68; L. R. 8 Ex. 81; 28 L. T. 36; 21 W. R. 408.—EX.

Kearsley v. Cole, *applied*.

Wolmershausen, In re, *Wolmershausen v. Wolmershausen* (1890) 62 L. T. 541; 38 W. R. 537.—STIRLING, J.

Wyke v. Rogers (1852) 21 L. J. Ch. 611;

1 De G. M. & G. 408.—L.C., *adopted*.

Boaler v. Mayor (1865) 34 L. J. C. P. 230; 19 C. B. (N.S.) 76; 11 Jur. (N.S.) 565; 12 L. T. 457; 13 W. R. 775.—C.P.; **Oriental Financial Corporation v. Overend, Gurney & Co.** (1871) L. R. 7 Ch. 142, 147, n.; 41 L. J. Ch. 332; 25 L. T. 813.

—HATHERLEY, L.C.; Wolmershausen, In re. Wolmershausen v. Wolmershausen (1890) 62 L. T. 541; 38 W. R. 537.—STIRLING, J.

Webb v. Hewitt (1857) 3 K. & J. 438.—V.-C., *observations applied*.

Boaler v. Mayor (1865) 34 L. J. C. P. 230; 19 C. B. (N.S.) 76; 11 Jur. (N.S.) 565; 12 L. T. 457; 13 W. R. 775.—C.P.

Webb v. Hewitt, *explained*.

Green v. Wynn (1868) 38 L. J. Ch. 76; L. R. 7 Eq. 28; 19 L. T. 553.—V.-C.; *affirmed*. (1869) 38 L. J. Ch. 220; L. R. 4 Ch. 204; 20 L. T. 131; 17 W. R. 385.—L.C.

GIFFARD, V.-C.—The question in this case is, whether the plaintiff, who is a surety, is released or not. If he is released, of course he is entitled to an injunction; if he is not released, his bill must be dismissed. Now, the first and main authority relied upon on the part of the plaintiff is *Webb v. Hewitt*. I have only to say this, as to the decision in *Webb v. Hewitt*, that it seems to me to proceed entirely upon this view of the transaction, that there had been a contract between the principal debtor and the principal creditor that a certain transaction should amount to payment and to extinguishment; and, that being so, it renders it unnecessary to allude to that case further, for it has no application to the present.—p. 77.

Webb v. Hewitt, *followed*.

Bateson v. Gosling (1871) 41 L. J. C. P. 54; L. R. 7 C. P. 9; 25 L. T. 570; 20 W. R. 98.—C.P.

Webb v. Hewitt, *referred to*.

Ellis v. Wilmot (1874) 44 L. J. Ex. 10; L. R. 10 Ex. 10; 31 L. T. 574; 23 W. R. 214.—EX.

Webb v. Hewitt, *explained and distinguished*.

Muir v. Crawford (1875) L. R. 2 H. L. (Sc.) 456, 459.—H.L. (Sc.).

LORD HATHERLEY.—Looking at the report of that case, I see exactly what occurred there. The discharge was not in the form in which it is here—that is to say, taking part payment and discharging the rest, but there was a purchase by the creditor of all the property of the principal debtor, and that property so acquired by the creditor was taken in discharge of the debt that was due to him; and though he said that there ought to have been in the deed that which there was not, namely, a clause reserving his rights against the surety, and that such a clause had been omitted by mistake, I held that, had it been there, the rule would not have been applicable to a case where it is impossible to say how much the debtor's estate was worth, or to say that it exceeded, or that it fell short of the amount of the debt in question. The creditor had taken it for what it was worth, and had taken it in satisfaction. Therefore, my lords, the questions which have been argued here could not possibly arise in such a case as that.

Webb v. Hewitt, *explained*.

Steeds v. Steeds (1889) 58 L. J. Q. B. 302; 22 Q. B. D. 537; 60 L. T. 318; 37 W. R. 378.—HUDDLESTON, B. and WILLS, J.

Webb v. Hewitt, *referred to*.

Wolmershausen, In re. Wolmershausen v. Wolmershausen (1890) 62 L. T. 541, 546; 38 W. R. 537.—STIRLING, J.

Muir v. Crawford (1875) L. R. 2 H. L. Sc. 456.—H.L. (Sc.), *followed*.

Jones v. Whitaker (1887) 57 L. T. 216.—C.A.

Green v. Wynn (1869) 38 L. J. Ch. 220; L. R. 4 Ch. 204; 20 L. T. 131; 17 W. R. 385.—L.C., *adopted*.

Bateson v. Gosling (1871) 41 L. J. C. P. 53, 55; L. R. 7 C. P. 9, 14; 25 L. T. 570.—C.P.

Green v. Wynn, *dictum applied*.

Forbes v. Jackson (1882) 51 L. J. Ch. 690, 694; 19 Ch. D. 615; 30 W. R. 652.—HALL, V.-C.

Green v. Wynn, *applied*.

Whitehouse, In re. Whitehouse v. Edwards (1887) 57 L. J. Ch. 161; 37 Ch. D. 683; 57 L. T. 761; 36 W. R. 181.—STIRLING, J.

Bateson v. Gosling (1871) 41 L. J. C. P. 54; L. R. 7 C. P. 9; 25 L. T. 570; 20 W. R. 98.—C.P., *approved*.

Cragoe v. Jones (1873) 42 L. J. Ex. 68; L. R. 8 Ex. 81; 28 L. T. 36; 21 W. R. 408.—EX.

Bateson v. Gosling and Cragoe v. Jones, *considered and distinguished*.

Ellis v. Wilmot (1874) 44 L. J. Ex. 10; L. R. 10 Ex. 10; 31 L. T. 574; 23 W. R. 214.—EX.

Bateson v. Gosling, *applied*.

Whitehouse, In re. Whitehouse v. Edwards (1887) 57 L. J. Ch. 161; 37 Ch. D. 683, 694; 57 L. T. 761; 36 W. R. 181.—STIRLING, J.

Bateson v. Gosling, *followed*.

Duck v. Mayen (1892) [1892] 2 Q. B. 511; 67 L. T. 547; 41 W. R. 56.—C.A.

Browne v. Carr (1827) 2 Russ. 600.—ELDON, L.C. See S. C. in C.P., *infra*.

Browne v. Carr (1831) 9 L. J. (O.S.) C. P. 144; 7 Bing. 508; 5 M. & P. 497.—C.P., *approved and followed*.

Ellis v. Wilmot (1874) 44 L. J. Ex. 10; L. R. 10 Ex. 10; 31 L. T. 574; 23 W. R. 214.—EX.

Browne v. Carr, *adopted*.

Beckett v. Addyman (1882) 9 Q. B. D. 783, 790; 51 L. J. Q. B. 597.—FIELD, J., *affirmed* C.A.

Barclay v. Lucas (1783) 1 Term Rep. 291, n.; 3 Dougl. 321; 1 K. R. 202, n.—K.B., *questioned*.

Weston v. Barton (1812) 4 Taunt. 673; 13 R. R. 726.

MANSFIELD, C.J. (for the Court).—This, then, being the construction of the instrument from almost all the cases—in truth we may say, from all—(for, though there is one adverse case of *Barclay v. Lucas*, the propriety of that decision has been very much questioned), it results that where one of the obligees dies the security is at an end.—p. 681.

Barclay v. Lucas, *considered*.

Backhouse v. Hall (1865) 11 Jur. (N.S.) 562; 34 L. J. Q. B. 141; 6 B. & S. 507; 12 L. T. 375; 13 W. R. 654.—Q.B.

BLACKBURN, J.—In Chitty on Contracts, 473, 7th ed., it is said, "Before the 19 & 20 Vict. c. 97, it appears to have been held, that when the security is given to a house, e.g., to a banking house, and not to the members of the firm by name, the surety would continue liable, notwithstanding a change of partners"; citing *Barclay v. Lucas*, *Metcalfe v. Bruin* (12 East,

400), and per Cur., *Chapman v. Beckington* (3 Q. B. 703, 722). And in the note to the above passage it is said, "*Burclay v. Lucas* has been doubted (*see* 1 N. R. 42; 4 Taunt. 681); but it gives the true principle, viz., that if the words show an intention that the security should continue, notwithstanding the accession of a new partner, the surety shall be liable."

[Counsel for defendant urged that *Burclay v. Lucas* was entirely overruled by *Weston v. Barton* (4 Taunt. 673) and *Simson v. Cooke* (8 Moore, 588).]

BLACKBURN, J.—At all events, the case is treated as good law in the notes to *Lord Arlington v. Meyrick* (2 Wms. Saund. 414), and seems to have been accepted as such by Mr. Justice Patteson, in his edition of the work.—p. 563.)

Hassell v. Long (1814) 2 M. & S. 363.—K.B.; and **Bellairs v. Ebsworth** (1811) 3 Camp. 53; 13 R. R. 750.—K.B., considered and applied.

London Assurance Corporation v. Bold (1844) 14 L. J. Q. B. 50; 6 Q. B. 514; 8 Jur. 1118.—Q.B.

Bellairs v. Ebsworth and London Assurance Corporation v. Bold (*supra*), adopted.

Mills v. Alderbury Union (1849) 18 L. J. Ex. 252; 3 Ex. 590.—EX.

Bellairs v. Ebsworth and London Assurance Corporation v. Bold, observed upon.

Montefiore v. Lloyd (1863) 33 L. J. C. P. 49; 15 C. B. (N.S.) 203; 9 Jur. (N.S.) 1245; 9 L. T. 330; 12 W. R. 83.—C.P.

Bellairs v. Ebsworth, distinguished.

Leathley v. Spyer (1870) 39 L. J. C. P. 299, 303; L. R. 5 C. P. 595, 602; 22 L. T. 821.—C.P.

Woodcock v. Oxford and Worcester Ry. (1853) 1 Drew. 521.—KINDERSLEY, V.-C., followed.

Noyes v. Pollock (1884) 32 Ch. D. 53, 57.—PEARSON, J.; partly affirmed and partly reversed. (1886) 55 L. J. Ch. 513; 32 Ch. D. 53; 54 L. T. 473; 34 W. R. 383.—C.A.

Montefiore v. Lloyd (1863) 15 C. B. (N.S.) 203; 33 L. J. C. P. 49; 9 Jur. (N.S.) 1245; 9 L. T. 330; 12 W. R. 83.—C.P., applied.

Leathley v. Spyer (1870) 39 L. J. C. P. 299; L. R. 5 C. P. 595; 22 L. T. 821.—C.P.

Arlington (Lord) v. Merricke (1871) 2 Wms. Saund. 403, 410, n. 4, distinguished.

Hickinbotham v. Leach (1842) 11 L. J. Ex. 341; 10 M. & W. 361; 2 D. (N.S.) 270.—EX.

Arlington (Lord) v. Merricke, applied.

Chapman v. Beckington (1842) 12 L. J. Q. B. 61; 3 Q. B. 703; 3 G. & D. 33; 7 Jur. 62.—Q.B.

Arlington (Lord) v. Merricke. See

L. & N. W. Ry. v. Whinray (1854) 23 L. J. Ex. 261; 10 Ex. 77; 2 C. L. R. 1207; 2 W. R. 523.—EX.

Arlington (Lord) v. Merricke, distinguished.

Oswald v. Berwick Corporation (1856) 25 L. J. Q. B. 533; 5 H. L. Cas. 856; 2 Jur. (N.S.) 743; 4 W. R. 738.—H.L. (E.).

THE LORD CHANCELLOR.—But that case turned upon the particular nature of the recital.

The recital in that case was, that the party appointed had been appointed a postmaster for the space of six months; and there the bond was conditioned upon his duly performing the duties of the said office so long as he shall continue postmaster. . . . Looking at the true construction of the instrument, all the parts being taken together, it is clear that what they [the sureties] meant to bind themselves for was, for the holding of office during the time mentioned in the recital. But of course it is competent to parties to make themselves liable to a future appointment, if they think fit.

Arlington (Lord) v. Merricke, applied.

Skilleet v. Fletcher (1857) 36 L. J. C. P. 206; L. R. 2 C. P. 469, 472; 16 L. T. 426; 15 W. R. 876.—EX. CH.; **Harper v. Godsell** (1870) 39 L. J. Q. B. 185; L. R. 5 Q. B. 422, 427; 13 W. R. 954.—Q.B.

Arlington (Lord) v. Merricke, referred to.

Danby v. Courts (1885) 54 L. J. Ch. 577; 29 Ch. D. 500, 515; 52 L. T. 401; 33 W. R. 559.—KAY, J.

Bamford v. Hles (1848) 18 L. J. M. C. 49; 3 Ex. 380.—EX., distinguished.

Frank v. Edwards (1852) 22 L. J. Ex. 42; 8 Ex. 214.—EX.

Frank v. Edwards (1852) 22 L. J. Ex. 42; 8 Ex. 214.—EX., applied.

Holland v. Lea (1854) 23 L. J. Ex. 122; 9 Ex. 430; 2 C. L. R. 532.—EX.; **L. & N. W. Ry. v. Whinray** (1854) 23 L. J. Ex. 261; 10 Ex. 77; 2 C. L. R. 1207; 2 W. R. 523.—EX.; and **Rex v. Herron** [1903] 2 Ir. R. 474, 481.—K.B.D.

L. B. & S. C. Ry. v. Goodwin (1849) 18 L. J. Ex. 174; 3 Ex. 786; 6 Railw. Cas. 177.—EX., applied.

Eastern Union Ry. v. Cochrane (1853) 23 L. J. Ex. 61; 9 Ex. 197; 2 C. L. R. 292; 7 Railw. Cas. 792; 17 Jur. 1103; 2 W. R. 43.—EX.

Berwick-upon-Tweed Corporation v. Oswald (1853) 22 L. J. Q. B. 129; 1 E. & B. 295.—Q.B.; affirmed *nom.* **Oswald v. Berwick-upon-Tweed Corporation** (1854) 23 L. J. Q. B. 321; 2 E. & B. 653.—EX. CH.; the latter decision affirmed, (1856) 5 H. L. Cas. 856; 25 L. J. Q. B. 383; 2 Jur. (N.S.) 743; 4 W. R. 738.—H.L. (E.).

Oswald v. Berwick-upon-Tweed Corporation, distinguished.

L. & N. W. Ry. v. Whinray (1854) 23 L. J. Ex. 261; 10 Ex. 77; 2 C. L. R. 1207; 2 W. R. 523.—EX.

Oswald v. Berwick-upon-Tweed Corporation, applied.

Pybus v. Gibb (1856) 26 L. J. Q. B. 41; 6 E. & B. 902; 3 Jur. (N.S.) 315; 5 W. R. 44.—Q.B.; **Clifton, Dartmouth and Hardness Corporation v. Silly** (1857) 26 L. J. Q. B. 90; 7 E. & B. 97; 3 Jur. (N.S.) 434; 5 W. R. 255.—Q.B.

Oswald v. Berwick-upon-Tweed Corporation and Clifton, Dartmouth and Hardness Corporation v. Silly. See

Cambridge Corporation v. Dennis (1858) 27 L. J. Q. B. 474; E. L. & E. 660; 5 Jur. (N.S.) 265; 6 W. R. 653.—Q.B.

Oswald v. Berwick-upon-Tweed Corporation,
observation applied.

Baily v. De Crespigny (1869) 38 L. J. Q. B. 98 :
L. R. 4 Q. B. 180, 186 ; 19 L. T. 681 ; 17 W. R.
494.—Q.B.

Oswald v. Berwick-upon-Tweed Corporation,
observation considered.

Collins v. Collins (1884) 9 App. Cas. 205, 233 ;
32 W. R. 500.—H.L. (SC.).

Fybus v. Gibb (1856) 26 L. J. Q. B. 41 : 6
E. & B. 902 ; 3 Jur. (N.S.) 815 ; 5 W. R.
44.—Q.B., *followed.*

Portsea Island Building Society v. Whillier
(1860) 29 L. J. Q. B. 150 ; 2 EL. & EL. 755 : 6
Jur. (N.S.) 887 : 2 L. T. 211 ; 8 W. R. 493.—Q.B.

Fybus v. Gibb, distinguished.

Skillett v. Fletcher (1867) 36 L. J. C. P. 206 :
L. R. 2 C. P. 469 ; 16 L. T. 426 : 15 W. R. 876.
—EX. CH.

Giving Time.

Cross v. Sprigg (1849) 18 L. J. Ch. 204 : 6
Hare 552 : 13 Jur. 785.—WIGRAM, V.-C. : S.C.
on appeal (1850) 19 L. J. Ch. 528 : 2 Mac. & G.
113 ; 2 Hall & Tw. 233 ; 14 Jur. 631.—COTTEN-
HAM, L.C.

Cross v. Sprigg, dictum disapproved.

Hedges v. Aldworth (1850) 13 Ir. Eq. R. 406.
—L.C.

Cross v. Sprigg (*supra*, V.-C.), *commented on.*

Yeomans v. Williams (1865) L. R. 1 Eq. 184 :
35 Beav. 130.

ROMILLY, M.R.—I am of opinion that the plaintiffs are entitled to redeem on payment of the principal, and interest thereon from the last day previous to the death of the testator, on which interest fell due. I do not understand it to be laid down in the case before Vice-Chancellor Wigram (*Cross v. Sprigg*), that a man may not let his house to his son-in-law, and at the same time say to him, "You may hold it rent free." Is there anything contrary to equity in this? and is there any technical rule that, as this would not release the son-in-law from the rent at law, it would not do so in equity? I think not. I think the case would come under another head of equity, namely, that where one man induces another to enter upon a certain course of action upon the faith of representations held out by him, he shall be compelled to make such representations good. Thus, if a man asks his son-in-law to take a house, and the latter says he is not rich enough, and the father-in-law then says that the son-in-law shall hold it rent free, or what is the same thing, that the father-in-law will pay the rent for him, I think that if the son-in-law acted on such representations the Court would compel the father-in-law to make them good. Moreover, the Vice-Chancellor suggests at the end of his judgment that there may be a difference between the case of a release of principal and of interest . . . Here only the interest is released, and I think the plaintiff is entitled to the decree I have already stated.—p. 185.

Cross v. Sprigg, followed.

Luxmore v. Clifton (1867) 17 L. T. 460 ; 16
W. R. 265.—M.R. ; Milnes, In re. Milnes v.
Sherwin (1885) 53 L. T. 534 ; 33 W. R. 927.—
NORTH, J.

Wilson, Ex parte (1805) 11 Ves. 410 : 8
R. R. 194.—L.C., *distinguished.*

Scholesfield v. Templer (1859) 4 De G. & J.
429 ; 7 W. R. 635.—L.C. and L.J. : *affirming* 28
L. J. Ch. 452 ; Johns. 155 ; 5 Jur. (N.S.) 619.
—V.-C.

THE LORD CHANCELLOR.—*Ex parte Wilson*, which was relied on by the appellant, is quite distinguishable, for there the creditor acted voluntarily, here the surety was an actor, and concurred in the representations on the faith of which the release was given.—p. 434.

Rees v. Berrington (1795) 2 Ves. J. 540.—
L.C., *referred to.*

Tyson v. Cox (1823) Turn. & R. 395 ; 24 R. R.
79.—L.C.

Rees v. Berrington, adopted.

Macaggart v. Watson (1835) 3 Cl. & F. 525 ;
10 Bligh (N.S.) 618.—H.L. (SC.).

Rees v. Berrington, referred to.

Maingay v. Lewis (1870) Ir. R. 3 Ch. 229.—
EX. CH.

Rees v. Berrington, commented on.

Petty v. Cook (1871) L. R. 6 Q. B. 790 : 40
L. J. Q. B. 281 : 25 L. T. 90 : 19 W. R. 1112.—Q.B.
BLACKBURN, J.—As early as *Rees v. Berrington*, a case decided in 1795 by Lord Loughborough, it was held, on what certainly seems somewhat artificial reasoning, that where any time is given by a creditor to a principal debtor without the consent of the surety, the surety is in equity discharged, however short the time may be, on the ground that the giving of time interferes with the right which the surety has to come to the principal debtor to say, "I pay you the money, and require you, on my giving you a proper indemnity, to hand over all your right to me." If he did that, and it turns out that the creditor has, by giving time to the debtor, precluded himself from suing, and so deprived the surety of the right of suing in his (the creditor's) name, though for ever so short a time, it has been held to discharge the surety from his obligation. Lord Eldon, in *Samwell v. Howarth* (*infra*), cited in the notes to *Rees v. Berrington*, says :—"The rule is, that if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety—that is, time is given by virtue of positive contract between the creditor and principal, not where the creditor is merely inactive. And in the case put, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract. . . . It has been truly stated that the renewal of these bills might have been for the benefit of the surety ; but the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is or is not for his benefit. The creditor has no right—it is against the faith of his contract—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety." Such is the principle which Lord Eldon lays down ; I think it is impossible to read it

without saying, with due respect for so great a judge, that it is based on highly technical reasoning, however accurate and strictly logical the reasoning may be. That the creditor who gives time to the principal without expressly reserving his right against the surety does not alter the rights of the surety, and so discharge him, is clear. But that time, given by a lenient creditor which, ninety-nine times out of a hundred, does not injure the surety should yet discharge him, is to my mind not justice, although established by Courts of Equity; and if in the course of the legislation which is contemplated it should be enacted, as is proposed, that where law and equity conflict, the rule of equity shall prevail, I, for one, shall be very reluctant to administer such a doctrine of equity as that I have mentioned. The law would have to adopt the doctrine, that giving of time discharges the surety unless the rights are saved. Now the whole ground of the doctrine there is that it is against good faith, that is against the duty of the creditor, that he injured the surety with his eyes open, that he did it in such a way that it was a breach of duty and good faith.—p. 794.

Rees v. Berrington, dicta adopted.

Phillips v. Foxall (1872) 41 L. J. Q. B. 293; L. R. 7 Q. B. 666, 675; 27 L. T. 231; 20 W. R. 900.—Q.B.

Rees v. Berrington, applied.

Wulff (or Woulff) v. Jay (1872) 41 L. J. Q. B. 322; L. R. 7 Q. B. 756; 27 L. T. 118; 20 W. R. 1030.—Q.B.

Rees v. Berrington, referred to.

Grant v. Budd (1874) 30 L. T. 319; 22 W. R. 544.—Q.B.

Rees v. Berrington, principle applied.

Polak v. Everett (1876) 45 L. J. Q. B. 369; 34 L. T. 128.—Q.B.D.; affirmed, 46 L. J. Q. B. 218; 1 Q. B. D. 669; 35 L. T. 350; 24 W. R. 689.—C.A.

Rees v. Berrington, referred to.

Hohne v. Brunsell (1878) 47 L. J. Q. B. 610; 3 Q. B. D. 495; 38 L. T. 838.—C.A.

Rees v. Berrington, discussed and applied.

Dowden v. Levis (1884) 14 L. R. Ir. 307.—EX. D.; and see Bolton v. Salmon (1891) 60 L. J. Ch. 239; [1901] 2 Ch. 48, 54; 64 L. T. 222; 39 W. R. 589.—CHITTY, J.

Samuell v. Howarth (1817) 3 Mer. 272; 17 R. R. 81, observations applied.

Reade v. Lowndes (1857) 26 L. J. Ch. 793; 23 Beav. 361; 3 Jur. (N.S.) 877.—M.R.; General Steam Navigation Co. v. Rolt (1859) 6 C. B. (N.S.) 550, 586; 6 Jur. (N.S.) 801; 8 W. R. 223.—C.P.; affirmed, EX. CH.

Samuell v. Howarth adopted.

Watts v. Shuttleworth (1861) 7 H. & N. 353; 7 Jur. (N.S.) 945; 5 L. T. 58; 10 W. R. 132.—EX. CH.; affirming 29 L. J. Ex. 229.—EX.

Samuell v. Howarth. See

Black v. Ottoman Bank (1862) 15 Moore P. C. 472; 8 Jur. (N.S.) 801; 6 L. T. 763; 10 W. R. 871.—P.C.

Samuell v. Howarth, applied.

Bailey v. Edwards (1864) 34 L. J. Q. B. 41; 4 R. & S. 761; 11 Jur. (N.S.) 134; 9 L. T. 646.—Q.B.; Oriental Financial Corporation v. Overend, Gurney & Co. (1871) 41 L. J. Ch. 332; L. R. 7 Ch. 142, 150; 25 L. T. 813.—L.C.

Samuell v. Howarth, principle criticised.

Perry v. Cooke (1871) 40 L. J. Q. B. 281; L. R. 6 Q. B. 790, 794; 25 L. T. 90; 19 W. R. 1112.—Q.B.

BLACKBURN, J.—However accurate and logical the reasoning [of Lord Eldon in the above case] may be, I must say, with all respect to so great a judge, that it is highly technical and artificial; but it is clear that a creditor who gives time to the principal debtor, without expressly reserving his right against the surety, does alter the right of the surety, and does discharge him from liability. Where time given by a creditor does not injure the surety, it seems to me unjust that he should be discharged. The whole ground of the doctrine that giving of time discharges the surety unless the rights are saved, is that such a proceeding is against good faith, that is, against the duty of the creditor; that he injured the surety with his eyes open, and that it was a breach of duty and good faith.—p. 284.

Samuell v. Howarth, considered.

Robinson v. Mollett (1875) 44 L. J. C. P. 362; L. R. 7 H. L. 802, 814; 33 L. T. 544.—H.L. (E.); reversing 20 W. R. 544.—EX. CH.; Polak v. Everett (1876) 46 L. J. Q. B. 218; 1 Q. B. D. 669, 674; 35 L. T. 350; 24 W. R. 689.—C.A.

Samuell v. Howarth, applied.

Ward v. National Bank of New Zealand (1883) 52 L. J. P. C. 65; 8 App. Cas. 755; 49 L. T. 315.—P.C.; Grahame v. Grahame (1887) 19 L. R. Ir. 249.—V.-C.

Samuell v. Howarth, explained.

Clarke v. Birley (1889) 58 L. J. Ch. 616; 41 Ch. D. 422; 60 L. T. 948; 37 W. R. 746.—NORTH, J.

Samuell v. Howarth, adopted.

Durham Corporation v. Fowler (1889) 58 L. J. Q. B. 246; 22 Q. B. D. 394, 417; 60 L. T. 456; 53 J. P. 374.—DENMAN and STEPHEN, JJ.

Calvert v. London Dock Co. (1838) 2 Keen.

638; 7 L. J. Ch. 90; 2 Jur. 62.—M.R.; and General Steam Navigation Co. v. Rolt (1859) 6 C. B. (N.S.) 550; 6 Jur. (N.S.) 801; 8 W. R. 223.—C.P.; adopted.

Watts v. Shuttleworth (1861) 7 H. & N. 353; 7 Jur. (N.S.) 945; 5 L. T. 58; 10 W. R. 132.—EX. CH.; affirming 29 L. J. Ex. 229.—EX.

Eyre v. Bartrop (1818) 3 Madd. 221; 18 R. R. 216.—V.-C., applied.

Bonar v. Macdonald (1850) 3 H. L. Cas. 226; 14 Jur. 1077.—H.L. (SC.); Watts v. Shuttleworth (1861) 7 H. & N. 353; 7 Jur. (N.S.) 945; 5 L. T. 58; 10 W. R. 132.—EX. CH.; affirming 29 L. J. Ex. 229.—EX.

Eyre v. Bartrop, explained.

Croydon Commercial Gas Co. v. Dickinson (1876) 46 L. J. C. P. 157; 2 C. P. D. 46; 36 L. T. 135; 25 W. R. 157.—C.A.

Eyre v. Bartrop, discussed and applied.

Dowden v. Levis (1884) 14 L. R. Ir. 307.—EX. D.

- Davey v. Prendergrass** (1821) 5 B. & Ald. 187; 2 Chit. 336; 6 Madd. 124.—K.B., *approved*.
- Blake v. White** (1835) 4 L. J. Ex. Eq. 48; 1 Y. & Coll. 420.—C.B.
- Sikes, In re. Hippias, Ex parte** (1826) 4 L. J. (O.S.) Ch. 195; 2 Gl. & J. 93.—L.C., *considered*.
- Strong v. Foster** (1856) 25 L. J. C. P. 106; 17 C. B. 201; 4 W. R. 151.—C.P.
- Sikes, In re. Hippias, Ex parte, explained and adopted.**
- Duncan, Fox & Co. v. North and South Wales Bank** (1880) 50 L. J. Ch. 355; 6 App. Cas. 1, 12; 43 L. T. 706; 29 W. R. 763.—H.L. (E.).
- Blake v. White** (1835) 1 Y. & C. Ex. 420; 4 L. J. Ex. Eq. 48.—EX., *applied*.
- Tucker v. Laing** (1856) 2 Kay & J. 745.—WOOD, V.-C.; and **Munster and Leinster Bank v. France** (1889) 24 L. R. Ir. 82.—C.A.
- Hodgson v. Nugent** (1793) 5 Term Rep. 277.—K.B., *referred to*.
- Bowfield v. Tower** (1812) 4 Taunt. 456.—C.P.
- Laxton v. Peat** (1809) 2 Camp. 185, *observed upon*.
- Pooley v. Harradine** (1857) 7 El. & Bl. 431.—Q.B.
- Orme v. Young** (1815) 1 Holt N. P. 84; 17 R. R. 611.—C.P., *applied*.
- Goring v. Edmunds** (1829) 7 L. J. (O.S.) C. P. 235; 6 Bing. 94; 3 M. & P. 259; 31 R. R. 358.—C.P.; **Combe v. Woolf (or Woulfe)** (1832) 1 L. J. C. P. 51; 1 M. & Scott 241; 8 Bing. 156.—C.P.
- Orme v. Young, referred to.**
- Howell v. Jones** (1834) 3 L. J. Ex. 255; 4 Tyr. 548; 1 C. M. & R. 97.—EX.
- Bank of Ireland v. Beresford** (1818) 6 Dow. 233; 19 R. R. 30.—H.L. (IR.), *commented on*.
- Archer v. Hall** (1828) 6 L. J. (O.S.) C. P. 79; 4 Bing. 464, 468; 1 M. & P. 286.—C.P.
- Bank of Ireland v. Beresford, considered.**
- Strong v. Foster** (1856) 25 L. J. C. P. 106; 17 C. B. 201; 4 W. R. 151.—C.P.
- Combe v. Woolf** (1832) 1 L. J. C. P. 51; 1 M. & Scott 241; 8 Bing. 156.—C.P., *referred to*.
- Howell v. Jones** (1834) 3 L. J. Ex. 255; 4 Tyr. 548; 1 C. M. & R. 97.—EX.; **Maingay v. Lewis** (1870) Ir. R. 5 C. L. 229.—EX. CH.
- Combe v. Woolf, followed.**
- Croydon Commercial Gas Co. v. Dickinson** (1876) 45 L. J. C. P. 869; 1 C. P. D. 707, 718; 35 L. T. 943.—C.P.D., partly affirmed and partly reversed, (1876) 46 L. J. C. P. 157; 2 C. P. D. 46; 36 L. T. 135; 25 W. R. 157.—C.A.
- Howell v. Jones** (1834) 3 L. J. Ex. 255; 4 Tyr. 548; 1 C. M. & R. 97.—EX., *referred to*.
- Maingay v. Lewis** (1870) Ir. R. 5 C. L. 229.—EX. CH.
- Howell v. Jones, adopted.**
- Grahame v. Grahame** (1887) 19 L. R. Ir. 249.—V.-C.

- Croydon Commercial Gas Co. v. Dickinson**, 45 L. J. C. P. 869; 1 C. P. D. 707; 35 L. T. 943; 24 W. R. 825.—C.P.D.; *partly reversed*, (1876) 46 L. J. C. P. 157; 2 C. P. D. 46; 36 L. T. 135; 25 W. R. 157.—C.A.
- Croydon Commercial Gas Co. v. Dickinson, adopted.**
- Holme v. Brunskill** (1878) 47 L. J. Q. B. 610; 3 Q. B. D. 493; 38 L. T. 838.—C.A.
- Croydon Commercial Gas Co. v. Dickinson, discussed and applied.**
- Dowden v. Lewis** (1884) 14 L. R. Ir. 307.—EX. D.
- Pasheller v. Hammett** (1832) 1 L. J. Ch. 204.—M.R.; *affirmed*, (1834)—L.C.; *the latter decision affirmed nom.* **Oakeley v. Pasheller** (1836) 4 Cl. & F. 207; 10 Bl. (N.S.) 548.—H.L. (E.).
- Oakeley v. Pasheller** (1836) 4 Cl. & F. 207; 10 Bl. (N.S.) 548.—H.L. (E.), *explained and not applied*.
- Oakford v. European and American Steam Shipping Co.** (1863) 1 H. & M. 182; 9 L. T. 15.—V.-C.
- Oakeley v. Pasheller and Price v. Barker** (1855) 24 L. J. Q. B. 130; 4 El. & Bl. 760; 3 C. L. R. 927; 1 Jur. (N.S.) 775.—Q.B., *applied*.
- Bailey v. Edwards** (1864) 34 L. J. Q. B. 41; 4 B. & S. 761; 11 Jur. (N.S.) 134; 9 L. T. 646.—Q.B.
- Oakeley v. Pasheller, referred to.**
- Maingay v. Lewis** (1870) Ir. R. 5 C. L. 229.—EX. CH.
- Oakeley v. Pasheller, approved.**
- Black, In re. Graham, Ex parte** (1854) 5 D. M. & G. 356, *observed upon*.
- Oriental Financial Corporation v. Overend, Gurney & Co.** (1871) L. R. 7 Ch. 142; 41 L. J. Ch. 332; 25 L. T. 815; 20 W. R. 253; *affirmed nom.* **Overend, Gurney & Co. (Liquidators) v. Oriental Financial Corporation (Liquidators)** (1874); L. R. 7 H. L. 348; 31 L. T. 322.—H.L. (E).
- HATHERLEY, L.C.**—Undoubtedly, if we look to the earlier cases, amongst which I might cite especially **Oakeley v. Pasheller**, the principle is laid down very clearly that if you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety you immediately turn him upon the principal, and therefore your act breaks the agreement into which you have entered with the principal. It is not simply neglecting to sue the principal which would have any effect upon the surety, but there must be a positive agreement with the principal that the creditor will postpone the suing of him to a subsequent period. To show that this is the principle, we have only to refer to another class of cases, which, down to one very late case, clearly and distinctly established that it is competent to the creditors to reserve all rights against the surety, in which case the surety is not discharged; and for this reason, that the contract made with the principal is then preserved, because the creditors have engaged with the principal not to sue him for a given time, but subject to the proviso that the creditors shall be at liberty to sue the surety, and so turn the surety upon the principal without

any breach of the engagement with the principal. I say that this doctrine has always been recognised down to a late period, because Lord Truro threw some doubts upon it in the case of *Owen v. Homan*. But Lord Cranworth, in giving judgment in that case on appeal to the House of Lords (4 H. L. C. 997; 17 Jur. 861), said there could be no doubt about the case before the House, and that he did not think he should have entered into any discussion of the case had it not been for the doubt thrown by Lord Truro upon the principle that you might retain the surety, if that formed part of the original contract as to not suing the principal; and Lord Cranworth said he thought it right to protest against the doubt, because he thought the doctrine was perfectly clear and established.—p. 150. There remains one point upon which Mr. Cole pressed me very strongly. He argued that Overend, Gurney & Co. at the time when they took the bills, knew nothing of this, but believed the plaintiffs to be the principals in every sense of the word as between themselves and McH., and as between them and Overend, Gurney & Co., and he argued that their position could not be altered by their being afterwards informed of the existence of a different arrangement, and he cited an authority, *Ex parte Graham*. Now, in that case the lords justices asked if there was any authority to show that knowledge acquired subsequently to the engagement would fix upon the creditors the obligation of seeing to the interests of the surety: and counsel citing none, it seems to have been held that in that case the discharge did not take place. But *Oakeley v. Pasheller* is a precise and direct authority upon the point, and, being in the House of Lords, is of course above that of this Court or that of the lords justices.—p. 152.

Oakeley v. Pasheller, followed.

Wilson v. Lloyd (1873) 42 L. J. Ch. 559; L. R. 16 Eq. 60; 28 L. T. 331; 21 W. R. 507.—BACON, V.-C.

Oakeley v. Pasheller, discussed.

Maingay v. Lewis (1870) 5 Ir. R. C. L. 229.

—EX. CH., commented on.

Swire v. Redman (1876) 35 L. T. 470; 1 Q. B. D. 536; 24 W. R. 1069.—Q.B.D.

COCKBURN, C.J.—It was, however, argued, that however much this might be contrary to principle, it was established by the House of Lords in *Oakeley v. Pasheller*. We do not think that any such point either arose or was decided in that case. The case is very imperfectly reported, and the judgment seems to have been very meagre. The case is abstracted in Lindley on Partnerships, 3rd. ed. p. 463. The decision appears to us to have proceeded on the ground that, by an arrangement to which the creditor, Sir Charles Oakeley, was a party, Kynaston, who was Sir Charles's son-in-law, became a partner in the house, which was indebted to Sir Charles, and then by arrangement between the three parties, Kynaston became a principal debtor to Sir Charles, and the outgoing partners became sureties to Kynaston. There was ample consideration for Sir Charles Oakeley agreeing to this change, and whether the conclusion of fact that he did so agree was right or wrong, the case did not and could not decide that it could be done without his consent. That such was the ground of the decision of the lords we think sufficiently appears from both reports, ill as they

are reported. The facts clearly were that Kynaston made himself a new debtor to Sir Charles Oakeley; and, if he was so, the respondent could not be liable for his default except in consequence of some arrangement by which they became his sureties. In the very meagre report of the judgment of the Master of the Rolls in *Bligh* (10 Bligh (N.S.), p. 578), he bases his judgment on the fact that "Sir Charles Oakeley well knew, in 1817, that by the arrangement between the two partners, Reid and Kynaston, they had become the principal debtors," that is, to Sir Charles, which Kynaston could not be without Sir Charles's consent, "and Sherard's estate surety only." And during the argument in the House of Lords, Lord Lyndhurst points out the difficulty of converting a joint debtor into a surety without the creditor's assent (10 Bligh (N.S.), p. 586; and 4 Cl. & F. p. 232). He seems to have relied on this objection until the fact that Kynaston became a new debtor was brought to his notice (10 Bligh (N.S.), p. 587). And, finally, in the judgment he says, "an arrangement was made between Sir Charles Oakeley and Kynaston" (10 Bligh (N.S.), p. 589). This would have been quite irrelevant unless Kynaston had become a new debtor, and the other parties, by agreement with Sir Charles, sureties for him. It is impossible to suppose that if Lord Lyndhurst had been delivering a judgment of the House of Lords on a case of the first impression, and on which he knew (as appears from 10 Bligh (N.S.), p. 586; 4 Cl. & F. p. 232) there was no previous decision, he would have done it in so perfunctory a manner as he appears to have done. It was not right in deciding on the special facts of the particular case to give so little information to the parties, but it would have been an incredible neglect of duty to say so little. It is, however, true that in *Wilson v. Lloyd* (16 L. R. Eq. 60, 70; 40 L. J. Ch. 559; 28 L. T. 331; 21 W. R. 507), Bacon, V.-C., in citing *Oakeley v. Pasheller*, takes no notice of the very important fact that the new partner was introduced as a new member of the firm, and as a fresh debtor to the creditor by an arrangement between the three. No English case has actually decided this point if *Oakeley v. Pasheller* does not. But there is an Irish case cited by Mr. Wills, which should be noticed. It is that of *Maingay v. Lewis*. There was a plea there on equitable grounds raising this very defence. The Irish Court of Queen's Bench, on demurrer, unanimously held the plea to be bad. But, on appeal before seven judges, four reversed this decision, three being for affirming it. But it is worth while to notice the reasons on which Lawson, J. based his judgment, which turned the scale. After stating the point, he says: "To hold that this is so seems to me contrary to all sound principles of law. To affect the rights and alter the remedies, or even the order of the remedies of a creditor by an arrangement entered into between his debtors to which he was no party, seems to me to be an interference with contracts very contrary to the spirit of our law" (5 Ir. R. C. L. p. 231). So far we quite agree with him; but he adds, "I feel myself bound to come to the conclusion that the case is governed by the decision of the House of Lords in *Oakeley v. Pasheller*, and that I ought to follow it implicitly." Had Mr. Justice Lawson thought, as we do, that the decision in *Oakeley v. Pasheller* proceeded on the ground

that the creditor was a party to the arrangement, he would have decided in conformity with the opinion of the dissentient three in the Irish Court of Appeal.—p. 472.

Oakeley v. Pasheller and Swire v. Redman.
discussed.

Rouse v. Bradford Banking Co. (1894) 63 L. J. Ch. 890; [1894] A. C. 586; 6 R. 349; 71 L. T. 522; 43 W. R. 78.—H.L. (E.). (LORDS HERSCHELL, L.C., WATSON, ASHBOURNE, MACNAGHTEN and MORRIS).

HERSCHELL, L.C., after considering the effect of *Oakeley v. Pasheller* and *Overend, Gurney & Co. v. Oriental Financial Corporation*, continued: My lords, I own I am quite unable to see any distinction, even if *Oakeley v. Pasheller* did not exist, between that case [*Overend, Gurney & Co. v. Oriental Financial Corporation*] in the House of Lords and the present. If, notwithstanding that both the debtors appeared to be principal debtors, the knowledge afterwards that one of them is a surety only disentitles the creditors to deal with the other in the way of giving time without discharging that debtor, then it seems to me that it must equally be the case—for otherwise there would be a distinction, resting on no intelligible or solid basis—that where, although both are principal debtors at the date of the contract, one of them afterwards, as between himself and his co-debtor, becomes a surety, a dealing with the one who remains the principal debtor discharges the surety.—p. 354.

Hollier v. Eyre (1842) 9 Cl. & F. 1.—H.L. (IR.), *applied.*

Pooley v. Harradine (1857) 7 El. & Bl. 431.—Q.B.

Hollier v. Eyre, observed upon.

Wythes v. Labouchere (1859) 3 De G. & J. 593; 5 Jur. (N.S.) 499; 7 W. R. 271.—L.C.

Hollier v. Eyre, applied.

Ewin v. Lancaster (1865) 12 L. T. 632; 13 W. R. 857.—Q.B.

Hollier v. Eyre, referred to.

Maingay v. Lewis (1870) Ir. R. 5 C. L. 229.—EX. CH.

Hollier v. Eyre, observation inapplicable.

Holme v. Brunskill (1878) 47 L. J. Q. B. 610; 3 Q. B. D. 495, 507; 38 L. T. 388.—C.A.

Amott v. Holden (1852) 22 L. J. Q. B. 14;

18 Q. B. 593; 17 Jur. 318.—Q.B., *affirmed.*
White v. Corbett (1859) 1 El. & Bl. 692; 28 L. J. Q. B. 228; 5 Jur. (N.S.) 407; 7 W. R. 363.—EX. CH.

Amott v. Holden, explained.

Wythes v. Labouchere (1859) 5 Jur. (N.S.) 499; 3 De G. & J. 593; 7 W. R. 271.—L.C.

CHELMSFORD, L.C.—It was contended, that in order to entitle a surety to stand in that position as to a creditor, he must show, not only that he creditor knew at the time of his contract of the relation of principal and surety existing, but also that he expressly accepted him in that relation; and various cases have been cited to support this position, and particularly what was said by Lord Campbell, in *Amott v. Holden*, where, after describing the surety as a person who makes himself liable for another, he adds, "If he has no interest in the transaction except

as surety, and this is fully known to the creditor, who accepts him in the relation of surety, his contract with the creditor must be attended with all the incidents of suretyship" (18 Q. B. 615). In *Hollier v. Eyre* (9 Cl. & F. 1), nothing more than notice or knowledge by the creditor of the existence of the relation of principal and surety is stated to be necessary. It does not appear to me that there is any real difference between these two decisions. What Lord Campbell means is clearly this: if a creditor, with a knowledge that a person is intending to be surety, accepts the instrument or security which pledges his liability, the rights of suretyship attach upon the transaction; and thus explained, it is clear that in these cases knowledge and acceptance merely mean one and the same thing.—p. 500.

Manley v. Boycott (1853) 22 L. J. Q. B. 265;

2 El. & Bl. 46; 17 Jur. 1118.—Q.B., *considered and adopted.*
Strong v. Foster (1856) 25 L. J. C. P. 106; 17 C. B. 201; 4 W. R. 151.—C.P.

Manley v. Boycott, referred to.

Greenough v. McClelland (1860) 30 L. J. Q. B. 15; 2 El. & Bl. 424; 6 Jur. (N.S.) 772; 2 L. T. 571; 8 W. R. 612.—EX. CH.

Davies v. Stainbank (1854) 6 De G. M. & G. 679.—L.J., *discussed and applied.*

Pooley v. Harradine (1857) 7 El. & Bl. 431.—Q.B.

Davies v. Stainbank, dictum commented on.

Greenough v. McClelland (1860) 30 L. J. Q. B. 15; 2 El. & Bl. 424; 6 Jur. (N.S.) 772; 2 L. T. 571; 8 W. R. 612.—EX. CH.

Davies v. Stainbank, applied.

Wake v. Harrop (1862) 31 L. J. Ex. 451; 1 H. & C. 202; 8 Jur. (N.S.) 845; 7 L. T. 96; 10 W. R. 626.—EX. CH.

Davies v. Stainbank, considered.

Duncan, Fox & Co. v. North & South Wales Bank (1880) 50 L. J. Ch. 355, 358; 6 App. Cas. 1, 12; 43 L. T. 706; 29 W. R. 763.—H.L. (E.).

Davies v. Stainbank, referred to.

Leicestershire Banking Co. v. Hawkins (1900) 16 Times L. R. 317.—MATHEW, J.

Strong v. Foster (1856) 25 L. J. P. C.

106; 17 C. B. 201; 4 W. R. 151.—P.C., *not applied.*

Pooley v. Harradine (1857) 7 El. & Bl. 431.—Q.B.; *Wright v. Sandars* (1857) 3 Jur. (N.S.) 504; 5 W. R. 644.—STUART, V.-C.

Strong v. Foster, applied.

Bailey v. Edwards (1864) 34 L. J. Q. B. 41; 4 B. & S. 761; 11 Jur. (N.S.) 134; 9 L. T. 646.—Q.B.; *Ewin v. Lancaster* (1865) 6 B. & S. 571; 12 L. T. 632; 13 W. R. 857.—Q.B.; *York City and County Banking Co. v. Bainbridge* (1880) 43 L. T. 732; 45 J. P. 158.—HAWKINS, J.

Pooley v. Harradine (1857) 26 L. J. Q. B.

156; 7 El. & Bl. 431.—Q.B., *followed.*
Taylor v. Burgess (1859) 29 L. J. Ex. 7; 5 H. & N. 1; 5 Jur. (N.S.) 1317; 1 L. T. 12; 8 W. R. 27.—EX.

Pooley v. Harradine, approved.

Greenough v. McClelland (1860) 30 L. J. Q. B. 15; 2 El. & El. 424; 6 Jur. (N.S.) 772; 2 L. T. 571; 8 W. R. 612.—EX. CH.

Pooley v. Harradine, adopted.

Lawrence v. Walmsley (1862) 31 L. J. C. P. 143; 5 L. T. 798; 10 W. R. 344.—C.P.; Bailey v. Edwards (1864) 34 L. J. Q. B. 41; 4 B. & S. 761; 11 Jur. (N.S.) 134; 9 L. T. 646.—Q.B.; Price v. Kirkham (1864) 34 L. J. Ex. 35; 3 H. & C. 437; 11 L. T. 314.—EX.; Ewin v. Lancaster (1865) 12 L. T. 632; 13 W. R. 857.—Q.B.

Pooley v. Harradine and Greenough v. McClelland (supra), referred to.

Maingay v. Lewis (1870) Ir. R. 5 C. L. 229.—EX. CH.

Pooley v. Harradine, adopted.

Phillips v. Foxhall (1872) 41 L. J. Q. B. 293; L. R. 7 Q. B. 666, 680; 27 L. T. 231; 20 W. R. 900.—Q.B.; Swire v. Redman (1876) 1 Q. B. D. 536, 542; 35 L. T. 470; 24 W. R. 1069.—Q.B.D.

Pooley v. Harradine, considered and applied.

Rouse v. Bradford Banking Co. (1894) 63 L. J. Ch. 337; [1894] 2 Ch. 32, 75; 7 R. 127; 70 L. T. 427.—C.A. LINDLEY, KAY and SMITH, L.JJ.

Pooley v. Harradine, referred to.

Leicestershire Banking Co. v. Hawkins (1900) 16 Times L. R. 317.—MATHEW, J.

Frazer v. Jordan (1857) 26 L. J. Q. B. 288; 8 El. & Bl. 303; 3 Jur. (N.S.) 1054; 5 W. R. 819.—Q.B., *applied*.

Oriental Financial Corporation v. Overend (1871).—V.C. (*infra*); and **Clarke v. Birley** (1889) 58 L. J. Ch. 616; 41 Ch. D. 422, 434; 60 L. T. 948; 37 W. R. 746.—NORTH, J.

Bailey v. Edwards (1864) 34 L. J. Q. B. 41; 4 B. & S. 761; 11 Jur. (N.S.) 134; 9 L. T. 646.—Q.B.

Applied, **Ewin v. Lancaster** (1865) 12 L. T. 632; 13 W. R. 857.—Q.B.; *referred to*, **Phillips v. Foxhall** (1872) 41 L. J. Q. B. 293, 303; L. R. 7 Q. B. 666; 27 L. T. 231; 20 W. R. 900.

Oriental Financial Corporation v. Overend, Gurney & Co. (1871) L. R. 7 Ch. 145, n.; 24 L. T. 774.—V.C.; *affirmed*, (1871) 41 L. J. Ch. 332; L. R. 7 Ch. 142; 25 L. T. 813; 20 W. R. 253.—L.C.; *the latter decision affirmed nom.* **Overend, Gurney & Co. v. Oriental Financial Corporation** (1874) L. R. 7 H. L. 348; 31 L. T. 322.—H.L. (E.).

Overend, Gurney & Co. v. Oriental Financial Corporation, applied.

Swire v. Redman (1876) 1 Q. B. D. 536, 542; 35 L. T. 470; 24 W. R. 1069.—Q.B.D.

Overend, Gurney & Co. v. Oriental Financial Corporation, observed upon.

Duncan, Fox & Co. v. North & South Wales Bank (1881) 50 L. J. Ch. 355; 6 App. Cas. 1, 12; 43 L. T. 706; 29 W. R. 763.—H.L. (E.).

Overend, Gurney & Co. v. Oriental Financial Corporation, principle applied.

Clarke v. Birley (1889) 58 L. J. Ch. 616; 41 Ch. D. 422; 60 L. T. 948; 37 W. R. 746.—NORTH, J.

Overend, Gurney & Co. v. Oriental Financial Corporation, discussed.

Rouse v. Bradford Banking Co. (1894) 63 L. J. Ch. 390; [1894] A. C. 586; 4 R. 349; 71 L. T. 522; 43 W. R. 78.—H.L. (E.).

Fraud, Negligence, &c.**Shepherd v. Beecher** (1725) 2 P. Wms. 288.

—L.C., *explained*.

Burgess v. Eve (1872) 41 L. J. Ch. 515; L. R. 13 Eq. 450; 26 L. T. 540; 20 W. R. 311.—MALINS, V.C.; **Phillips v. Foxhall** (1872) 41 L. J. Q. B. 293, 301; L. R. 7 Q. B. 666, 676; 27 L. T. 231; 20 W. R. 900.—Q.B.; and *see* **Lloyd's v. Harper** (1880) 16 Ch. D. 290, 307; 49 L. J. Ch. 219.—FRY, J., *affirmed*, 16 Ch. D. 290; 50 L. J. Ch. 140; 43 L. T. 481; 29 W. R. 452.—C.A.

Smith v. Bank of Scotland (1813) 1 Dow. 272.—H.L. (SC.), *applied*.

Railton v. Matthews (1844) 10 Cl. & F. 934; 3 Bell 56.—H.L. (SC.)

Smith v. Bank of Scotland, distinguished.

North British Insurance Co. v. Lloyd (1854) 24 L. J. Ex. 14; 10 Ex. 523; 3 C. L. R. 264; 1 Jur. (N.S.) 45.—EX.

Smith v. Bank of Scotland, explained and applied.

Lee v. Jones (1864) 34 L. J. C. P. 181, 139; 17 C. B. (N.S.) 482; 11 Jur. (N.S.) 81; 12 L. T. 122; 13 W. R. 318.—EX. CH.

Smith v. Bank of Scotland, dicta discussed.

Phillips v. Foxhall (1872) 41 L. J. Q. B. 293; L. R. 7 Q. B. 666; 27 L. T. 231; 20 W. R. 900.—Q.B.

Smith v. Bank of Scotland, applied.

Mackreth v. Walmsley (1884) 51 L. T. 19; 32 W. R. 819.—KAY, J.

Pidcock v. Bishop (1825) 3 L. J. (O.S.) K. B. 109; 3 B. and C. 605; 5 D. & R. 505; 27 R. R. 430.—K.B., *inapplicable*.

Williams v. Rawlinson (1825) 3 L. J. (O.S.) C. P. 164; 3 Bing. 71; 10 Moore 362; R. & M. 233; 28 R. R. 584.—C.P.

Pidcock v. Bishop and Railton v. Matthews (1844) 10 Cl. & F. 934; 3 Bell 56.—H.L. (SC.), *distinguished*.

North British Insurance Co. v. Lloyd (1854) 24 L. J. Ex. 14; 10 Ex. 523; 3 C. L. R. 264; 1 Jur. (N.S.) 45.—EX.

Pidcock v. Bishop, explained.**Railton v. Matthews, applied.**

Lee v. Jones (1864) 34 L. J. C. P. 181; 17 C. B. (N.S.) 482; 11 Jur. (N.S.) 81; 12 L. T. 122; 13 W. R. 318.—EX. CH.

Railton v. Matthews, applied.

Phillips v. Foxhall (1872) 41 L. J. Q. B. 293, 299; L. R. 7 Q. B. 666, 672; 27 L. T. 231; 20 W. R. 900.—Q.B.

Pidcock v. Bishop and Railton v. Matthews, applied.

Mackreth v. Walmsley (1884) 51 L. T. 19; 32 W. R. 819.—KAY, J.

Railton v. Matthews, considered.
 Durham Corporation v. Fowler (1889) 58 L. J. Q. B. 246; 22 Q. B. D. 394; 60 L. T. 456; 53 J. P. 374.—DENMAN and STEPHEN, JJ.

Stone v. Compton (1838) 6 Scott 846; 5 Bing. N. C. 142.—C.P., *applied*.
 Mackreth v. Walmsley (1884) 51 L. T. 19; 32 W. R. 819.—KAY, J.

Hamilton v. Watson (1845) 12 Cl. & F. 109.—H.L. (SC.), *referred to*.

North British Insurance Co. v. Lloyd (1854) 24 L. J. Ex. 14; 10 Ex. 523, 528; 3 C. L. R. 264; 1 Jur. (N.S.) 45.—EX.; Wythes v. Labouchere (1858) 3 De G. & J. 593, 609; 5 Jur. (N.S.) 499; 7 W. R. 271.—L.C.; *Lee v. Jones* (1864) 34 L. J. C. P. 131; 17 C. B. (N.S.) 482; 11 Jur. (N.S.) 81; 12 L. T. 122; 13 W. R. 318.—EX. CH.; Phillips v. Foxhall (1872) 41 L. J. Q. B. 293; L. R. 7 Q. B. 666, 673; 27 L. T. 231; 20 W. R. 900.—Q.B.; Mackreth v. Walmsley (1884) 51 L. T. 19; 32 W. R. 819.—KAY, J.; Welton v. Somes (1889) 5 Times L. R. 184.—C.A.

Hamilton v. Watson, referred to.

Seaton v. Heath (1899) 68 L. J. Q. B. 631; [1899] 1 Q. B. 782; 80 L. T. 579; 47 W. R. 487.—C.A.

Owen v. Homan (1850) 19 L. J. Ch. 549; 13 Beav. 196.—M.R.; *reversed*. (1851) 20 L. J. Ch. 314; 3 Mac. & G. 378; 15 Jur. 339.—L.C.; *the latter decision affirmed*. (1853) 4 H. L. Cas. 997; 1 Eq. R. 370; 17 Jur. 861.—H.L. (E).

Owen v. Homan, dictum questioned.

North British Insurance Co. v. Lloyd (1854) 24 L. J. Ex. 14; 10 Ex. 523; 3 C. L. R. 264; 1 Jur. (N.S.) 45.—EX.

Owen v. Homan, considered.

Price v. Barker (1855) 24 L. J. Q. B. 130; 4 El. & Bl. 760; 3 C. L. R. 927; 1 Jur. (N.S.) 775.—Q.B.

Owen v. Homan, referred to.

Davies v. Stainbank (1855) 6 De. G. M. & G. 679, 693.—L.JJ.

Owen v. Homan, distinguished.

General Steam Navigation Co. v. Rolt (1859) 6 C. B. (N.S.) 550, 586; 6 Jur. (N.S.) 801; 8 W. R. 223.—C.P.; *affirmed*, EX. CH.

Owen v. Homan, observed upon.

Lee v. Jones (1864) 34 L. J. C. P. 131; 17 C. B. (N.S.) 482; 11 Jur. (N.S.) 81; 12 L. T. 122; 13 W. R. 318.—EX. CH.; Oriental Financial Corporation v. Overend, Gurney & Co. (1871) 41 L. J. Ch. 332; L. R. 7 Ch. 142; 25 L. T. 813; 20 W. R. 253.—L.C.; *affirmed*, H.L. (*supra*, col. 2599). See extract, cols. 2594, 5.

Owen v. Homan, considered.

Bateson v. Gosling (1871) 41 L. J. C. P. 53; L. R. 7 C. P. 9, 14; 25 L. T. 570; 20 W. R. 98.—C.P.; Muir v. Crawford (1875) L. R. 2 H. L. Sc. 456; Duncan, Fox & Co. v. North and South Wales Bank (1880) 50 L. J. Ch. 355; 6 App. Cas. 1 43 L. T. 706; 29 W. R. 763.—H.L. (E).

North British Insurance Co. v. Lloyd (1854) 24 L. J. Ex. 14; 10 Ex. 523; 3 C. L. R. 264.—EX., *applied*.

Lee v. Jones (1864) 34 L. J. C. P. 131; 17 C. B. (N.S.) 482; 11 Jur. (N.S.) 81; 12 L. T. 122; 13 W. R. 318.—EX. CH.; Fletcher v. Krell (1872) 42 L. J. Q. B. 55; 28 L. T. 105.—Q.B.; Phillips v. Foxall (1872) 41 L. J. Q. B. 293; L. R. 7 Q. B. 666, 673; 27 L. T. 231; 20 W. R. 900.—Q.B.; Mackreth v. Walmsley (1884) 51 L. T. 19; 32 W. R. 819.—KAY, J.; and Welton v. Somes (1888) 5 T. L. R. 46.—Q.B.D.

N. W. Ry. v. Whinray (1834) 23 L. J. Ex. 261; 10 Ex. 77; 2 C. L. R. 1207; 2 W. R. 523.—EX.

Distinguished, Sanderson v. Aston (1873) 42 L. J. Ex. 64; L. R. 8 Ex. 73; 28 L. T. 35; 21 W. R. 293.—EX.; *applied*, Holme v. Brunskill (1878) 3 Q. B. D. 495, 500.—DENMAN, J.; *affirmed*, C.A., *infra*, col. 2605; *adopted*, Rex v. Herron [1903] 2 Ir. R. 474, 481.—K.B.D.

Berwick Corporation v. Murray (1856) 26 L. J. Ch. 201; 3 Jur. (N.S.) 1; 5 W. R. 208.—L.C., *distinguished*.

General Steam Navigation Co. v. Rolt (1859) 6 C. B. (N.S.) 550, 586; 6 Jur. (N.S.) 801; 8 W. R. 223.—C.P.; *affirmed*, EX. CH.

Lee v. Jones (1864) 34 L. J. C. P. 131; 17 C. B. (N.S.) 482; 11 Jur. (N.S.) 8; 12 L. T. 122; 13 W. R. 318.—EX. CH., *considered*.
 Phillips v. Foxall (1872) 41 L. J. Q. B. 293; L. R. 7 Q. B. 666, 673; 27 L. T. 231; 20 W. R. 900.—Q.B.

Lee v. Jones, followed.

Fletcher v. Krell (1872) 42 L. J. Q. B. 55; 28 L. T. 105.—Q.B.

Lee v. Jones, held inapplicable.

Lawder v. Lawder (1873) Ir. R. 7 C. L. 57.—C.P.

Lee v. Jones, applied.

Mackreth v. Walmsley (1884) 51 L. T. 19; 32 W. R. 819.—KAY, J.

Burgess v. Eve (1872) 41 L. J. Ch. 515; L. R. 13 Eq. 450; 26 L. T. 540; 20 W. R. 311.—V.-C., *followed*.

Ellerby's Case; Consolidated Land Co., In re (1872) 20 W. R. 855.—V.-C.

Burgess v. Eve, approved.

Phillips v. Foxall (1872) L. R. 7 Q. B. 666; 41 L. J. Q. B. 293; 27 L. T. 231; 20 W. R. 900.—Q.B.

Burgess v. Eve, distinguished.

Lloyd's v. Harper (1880) 49 L. J. Ch. 217, 221; 16 Ch. D. 290, 307.—FRY, J.; *affirmed*, 50 L. J. Ch. 140; 16 Ch. D. 290; 43 L. T. 481; 29 W. R. 452.—C.A.

Burgess v. Eve, considered.

Durham Corporation v. Fowler (1889) 58 L. J. Q. B. 246; 22 Q. B. D. 394; 60 L. T. 456; 53 J. P. 374.—DENMAN and STEPHEN, JJ.

Phillips v. Foxall or Foxhall (1872) 41 L. J. Q. B. 293; L. R. 7 Q. B. 666; 27 L. T. 231; 20 W. R. 900.—Q.B., *followed*.

Sanderson v. Aston (1873) L. R. 8 Ex. 73; 42 L. J. Ex. 64; 28 L. T. 35; 21 W. R. 293.—EX.

Phillips v. Foxall, held inapplicable.

Lawder v. Lawder (or Simpson) (1878) 1r. R. 7 C. L. 57; 21 W. R. 439.—C.P.

[*Headnote*.—The doctrine of *Phillips v. Foxall* and *Lee v. Jones* (*supra*) does not apply to the case of a public officer, such as a county treasurer, suing on a bond given to him in his official capacity.]

Phillips v. Foxall, held inapplicable.

Lawder v. Lawder (or Simpson), applied.

Byrne v. Muzio (1881) 8 L. R. Ir. 396.—EX. D.

PALLES, C.B.—The doctrine of *Phillips v. Foxall* and *Sanderson v. Aston* . . . is now quite too firmly established to be shaken by any tribunal short of the H. L., and I hold myself entirely bound by those two decisions. *Phillips v. Foxall* was determined upon two different views of the law; Quain, J., who delivered the judgment of the majority of the Court, taking one view and Blackburn, J., arriving at the same conclusion upon another view. I rather think that the view taken by Blackburn, J., which was the one adopted in the Court of Exchequer in the subsequent case of *Sanderson v. Aston*, was the view that has since been most generally followed; but it appears to me that the *ratio decidendi* of both classes of judgments in *Phillips v. Foxall* involved this—that there should be, in the person who is suing and to whom the knowledge of the fraud, irregularity or misconduct is traced, a power of dismissal. Quain, J. specially limits his judgment to that class of case, and the judgment of Blackburn, J. is entirely founded upon it. The power of the employer to dismiss for misconduct is a power the exercise of which, when misconduct comes to his knowledge, the surety has a right to call for; and if the employer condones the misconduct in such a way as to deprive himself of the power of dismissal, he has deprived the surety of one of the rights which he, the surety, would have if he stood in the place of the employer, and therefore the surety is discharged by the ordinary rules that formerly were supposed to regulate questions arising between principal and surety in such cases. The Court of Common Pleas in this country in *Lawder v. Lawder* considered the effect in *Phillips v. Foxall* upon a bond in receipt of which the party suing was much in the same position as the Collector-General here, viz., a bond given by a county cess collector to a county treasurer. The Court of Common Pleas held—and, in my opinion rightly—that the *ratio decidendi* of *Phillips v. Foxall* and *Sanderson v. Aston* did not apply to such a case, because there was absent that which was the ground of the decision in both cases—the power to dismiss. I conceive that the doctrine of *Lawder v. Lawder* entirely applies to the case before us, that of a collector of rates appointed by the Lord Lieutenant, subject to be removed by the Lord Lieutenant only, and whose security, though nominally given to the Collector-General, is so given in pursuance of a statute which directs that that security shall be subject to the approval of the Lord Lieutenant. This is not in any sense a technical point. In my opinion upon the true construction of this Act of Parliament, the Collector-General, in respect of this security, acts in a public capacity—he is the person to whom this security is by statute to be given for the proper collection of the rates, but he has nothing to say to either the

appointment or the discharge of the collectors. Upon that ground, I am of opinion that *Phillips v. Foxall* and *Sanderson v. Aston* do not apply to the present case. . . . But it was argued that there was something more in the case. The Collector-General had the power to suspend, and it was said that that power was of the same character as the power to dismiss relied upon in *Phillips v. Foxall* and *Sanderson v. Aston*, and that as he omitted to exercise that power . . . the surety is discharged. I must say I doubt very much whether that question also is not involved in the decision of the Common Pleas Division in *Lawder v. Lawder*. Whether, however, it be or be not, I may say for myself that, while I am prepared to follow *Phillips v. Foxall* and *Sanderson v. Aston*, and even to extend their authority so far as the reasoning on which they were founded legitimately and logically can be pressed, I am not prepared to go further. There is a broad ground of distinction between the two powers—the power of suspension and the power to discharge. The exercise of a power to discharge terminates the relationship between the employer and employed, and with it once and for ever determines the liability of the guarantee society; so in such a case, when the plaintiff fails to do that which he had the power to do, and which, he ought to have done, namely, dismissed the person employed, he in effect fails to do that which would have terminated the liability of the surety. The power of suspension, on the other hand, does not terminate the relation of employer and employed, nor does it terminate the liability.

Phillips v. Foxall and Lawder v. Lawder, considered.

Durham Corporation v. Fowler (1889) 58 L. J. Q. B. 246; 22 Q. B. D. 394; 60 L. T. 456; 53 J. P. 374.—DENMAN and STEPHEN, JJ.

Phillips v. Foxall, distinguished.

Caxton and Arrington Union v. Dew (1899) 68 L. J. Q. B. 380; 80 L. T. 325.

BRUCE, J.—*Phillips v. Foxall* which was relied upon by the defendants, decided that on a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the course of his service, and, instead of dismissing the servant, he chooses to continue him in his employ without the knowledge or consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service. But here there was no evidence that the plaintiffs had notice of any act of dishonesty on the part of Walter Dew in the course of his service. Walter Dew was in a position of pecuniary embarrassment, and he may have been guilty, prior to his dismissal, of acts of irregularity in delaying to pay over moneys, although that is not clearly made out; but there is nothing to show that he appropriated any money of the guardians, or failed to pay over to them when required, the money collected by him. It was only after his dismissal and after his death that it was found that he was behind in his accounts. *Phillips v. Foxall* is fully considered and explained in the more recent case of *Durham Corporation v. Fowler* (1889) 58 L. J. Q. B. 246; 22 Q. B. D. 394. There it was held that the plaintiff's acquiescence in the collector's irregular

mode of accounting was not such connivance as to discharge the sureties. But, further, in the present case the plaintiffs had no power to dismiss the collector. . . . If in other respects *Phillips v. Foxhall* were applicable—and for the reasons I have given I think it is not—*Byrne v. Muzio* is an authority to show that the principle of *Phillips v. Foxhall* does not apply where the obligee of the bond has not the power to dismiss the collector.—pp. 382, 383.

Sanderson v. Aston (1873) 42 L. J. Ex. 64; L. R. 8 Ex. 73; 28 L. T. 35; 21 W. R. 293.—EX., *questioned*.

Holme v. Brunskill (1878) 47 L. J. Q. B. 610; 3 Q. B. D. 495; 38 L. T. 838.—C.A.

Sanderson v. Aston, *inapplicable*.
Byrne v. Muzio (1881) 8 L. R. Ir. 396.—EX. D. (see extract, *supra*).

Sanderson v. Aston, *doubted*.
Durham Corporation v. Fowler (1889) 58 L. J. Q. B. 246; 2 Q. B. D. 394; 60 L. T. 456; 53 J. P. 374.—DENMAN and STEPHEN, JJ.

Byrne v. Muzio (1881) 8 L. R. Ir. 396.—EX. D., *approved*.
Caxton and Arrington Union v. Dew (1899) 68 L. J. Q. B. 380; 80 L. T. 325.—BRUCE, J.
See extract *supra*, col. 2604.

Wright v. Simpson (1802) 6 Ves. 714, 733.—L.C., *observation applied*.
Madden v. M'Mullen (1860) 13 Ir. C. L. R. 305; 4 L. T. 180.—Q.B. (IR.); **Liverpool Marine Credit Co. v. Hunter** (1867) 36 L. J. Ch. 567; L. R. 4 Eq. 68; 16 L. T. 447.—V.C.; (affirmed. (1868) 37 L. J. Ch. 386; L. R. 3 Ch. 479; 18 L. T. 749; 16 W. R. 1090.—CHELMSFORD, L.C.)

Wright v. Simpson, *applied*.
Barber v. Mackrell (1892) 68 L. T. 29; 41 W. R. 341; 2 R. 172.—C.A.

Trent Navigation Co. v. Harley (1808) 10 East. 34.—K.B., *adopted*.
Davey v. Prendergrass (1821) 5 B. & Ald. 187; 2 Chit. 336; 6 Madd. 124.—K.B.

Trent Navigation Co. v. Harley; English v. Darley (1800) 2 Bos. & P. 61; 3 Esp. 49; 5 R. R. 543; and **London Assurance Co. v. Buckle** (1820) 4 Moore 153.—C.P., *applied*.
Goring v. Edmonds (1829) 7 L. J. (O.S.) C. P. 235; 6 Bing. 94; 3 M. & P. 259; 31 R. R. 538.—C.P.

Trent Navigation Co. v. Harley, *adopted*.
Mactaggart v. Watson (1835) 3 Cl. & F. 525; 10 Bligh (N.S.) 618.—H.L. (SC.).

Trent Navigation Co. v. Harley. See
Black v. Ottoman Bank (1862) 15 Moore P. C. 472; 8 Jur. (N.S.) 801; 6 L. T. 763; 10 W. R. 871.—P.C.

Trent Navigation Co. v. Harley, *adopted*.
Durham Corporation v. Fowler (1889) 58 L. J. Q. B. 246; 2 Q. B. D. 394; 417; 60 L. T. 456; 53 J. P. 374.—DENMAN and STEPHEN, JJ.

Eyre v. Everett (1826) 2 Russ. 381.—L.C.
See
Black v. Ottoman Bank (1862) 15 Moore P. C. 472; 8 Jur. (N.S.) 801; 6 L. T. 763; 10 W. R. 871.—P.C.

Mactaggart v. Watson (1835) 3 Cl. & F. 525; 10 Bligh (N.S.) 618.—H.L. (SC.), *applied*.

Dawson v. Lawes (1854) 23 L. J. Ch. 434; Kay 280; 2 Eq. R. 230; 2 W. R. 213.—WOOD, V.C.; **Madden v. M'Mullen** (1860) 13 Ir. C. L. R. 305; 4 L. T. 180.—Q.B. (IR.).

Mactaggart v. Watson. See
Black v. Ottoman Bank (1862) 15 Moore P. C. 472; 8 Jur. (N.S.) 801; 6 L. T. 763; 10 W. R. 871.—P.C.; **Mansfield Union v. Wright** (1882) 9 Q. B. D. 685.—C.A.; *affirming* 46 J. P. 200.

Mactaggart v. Watson, *considered*.
Durham Corporation v. Fowler (1889) 58 L. J. Q. B. 246; 2 Q. B. D. 394; 60 L. T. 456; 53 J. P. 374.—DENMAN and STEPHEN, JJ.

Mactaggart v. Watson. See
Kingston Corporation v. Harding (1892) 62 L. J. Q. B. 55; [1892] 2 Q. B. 494, 508; 4 R. 7; 67 L. T. 539; 41 W. R. 19; 57 J. P. 85.—C.A.

Creighton v. Rankin (1840) 7 Cl. & F. 325. H.L. (SC.), *discussed*.
Biggar v. Wright (1846) 9 Dunlop 78.—CT. OF SESS.

Creighton v. Rankin. See
Dawson v. Lawes (1854) 23 L. J. Ch. 434; Kay 280; 2 Eq. R. 230; 2 W. R. 213.—WOOD, V.C.; **Black v. Ottoman Bank** (1862) 15 Moore P. C. 472; 8 Jur. (N.S.) 801; 6 L. T. 763; 10 W. R. 871.—P.C.

Watson v. Alcock (1853) 22 L. J. Ch. 858; 4 De G. M. & G. 242; 1 Eq. R. 231; 17 Jur. 568; 1 W. R. 399.—L.J., *adopted*.
Lawrence v. Walmsley (1862) 31 L. J. C. P. 143; 5 L. T. 798; 10 W. R. 344.—C.P.

Dawson v. Lawes (1854) 1 Kay 280; 23 L. J. Ch. 434; 2 Eq. R. 230; 2 W. R. 213.—V.C., *adopted*.
Black v. Ottoman Bank (1862) 15 Moore P. C. 472; 8 Jur. (N.S.) 801; 6 L. T. 763; 10 W. R. 871.—P.C.

Dawson v. Lawes, *considered*.
Durham Corporation v. Fowler (1889) 58 L. J. Q. B. 246; 2 Q. B. D. 394; 60 L. T. 456; 53 J. P. 374.—DENMAN and STEPHEN, JJ.

Watts v. Shuttleworth 29 L. J. Ex. 229; 5 H. & N. 235.—EX.; *affirmed*. (1860) 29 L. J. Ex. 229; 7 H. & N. 353; 7 Jur. (N.S.) 945; 5 L. T. 58; 10 W. R. 132.—EX. CH.

Watts v. Shuttleworth, *adopted*.
Lawrence v. Walmsley (1862) 31 L. J. C. P. 143; 5 L. T. 798; 10 W. R. 344.—C.P.

Watts v. Shuttleworth, *distinguished*.
Barber, In re, **Agra Bank**, Ex parte (1870) 39 L. J. Bk. 39; L. R. 9 Eq. 725, 732.—BK.; **Grant v. Budd** (1874) 30 L. T. 319; 22 W. R. 544.—Q.B.

Watts v. Shuttleworth, *dictum approved but not applied*.
Barber, In re, **Agra Bank**, Ex parte (1870) 39 L. J. Bk. 39; L. R. 9 Eq. 725.—BACON, C.J.

Watts v. Shuttleworth, distinguished.

Grant v. Budd (1874) 30 L. T. 319; 22 W. R. 544.—Q.B.

Watts v. Shuttleworth, referred to.

Mansfield Union v. Wright (1882) 9 Q. B. D. 688.—C.A. (affirming 46 J. P. 200.—W. WILLIAMS, J.); and Alliance Gas Consumers Co. v. Blott (1886) 3 T. L. R. 111.—MANISTY, J.

Madden v. McMullen (1860) 13 Ir. C. L. R. 305; 4 L. T. 180.—Q.B.

Considered. Durham Corporation v. Fowler (1889) 58 L. J. Q. B. 246; 22 Q. B. D. 394; 60 L. T. 456; 53 J. P. 374.—DENMAN and STEPHEN, JJ.; *applied*, Lindsay v. Maguire. [1899] 2 Ir. R. 554.—GIBSON, J.

Black v. Ottoman Bank (1862) 15 Moore P. C. 472, 484; 8 Jur. (N.S.) 801; 6 L. T. 763; 10 W. R. 871.—P.C., *adopted*.

Carter v. White (1883) 54 L. J. Ch. 138; 25 Ch. D. 666; 50 L. T. 670; 32 W. R. 692.—C.A.

Black v. Ottoman Bank, considered.

Durham Corporation v. Fowler (1889) 58 L. J. Q. B. 246; 22 Q. B. D. 394; 60 L. T. 456; 53 J. P. 374.—DENMAN and STEPHEN, JJ.

Alteration of Instrument.

Davidson v. Cooper (1844) 12 L. J. Ex. 467; 13 M. & W. 343.—EX. CH., *followed*.

Bank of Hindustan, China and Japan v. Smith (1867) 36 L. J. C. P. 241; 16 L. T. 518.—C.P.: Akdous v. Cornwell (1868) 37 L. J. Q. B. 201; L. R. 3 Q. B. 573, 576; 9 B. & S. 607; 16 W. R. 1045.—Q.B.

Davidson v. Cooper, distinguished.

Robinson v. Mollett (1875) 44 L. J. C. P. 362; L. R. 7 H. L. 802, 813; 33 L. T. 544.—H.L. (E.).

Davidson v. Cooper, applied.

Suffell v. Bank of England (1882) 51 L. J. Q. B. 401, 404; 9 Q. B. D. 555, 562; 47 L. T. 146; 30 W. R. 932; 46 J. P. 500.—C.A.

Davidson v. Cooper, distinguished.

Barnes v. Richards (1902) 71 L. J. K. B. 341; 86 L. T. 231; 50 W. R. 363.—ALVERSTONE, C.J.

Harrison v. Nettleship (1833) 3 L. J. Ch. 86; 2 Myl. & K. 423.—M.R., *observed upon*.

Thornton v. McKewan (1862) 32 L. J. Ch. 69; 1 H. & M. 525; 1 N. R. 16; 11 W. R. 140.

WOOD, V.-C.—*Harrison v. Nettleship* only showed that after a verdict at law, equity had no jurisdiction in cases of account, unless some special grounds for its interference could be shown, and in this case such special grounds were shown.—p. 70.

Dean v. Newhall (1799) 8 Term Rep. 168.—K.B., *adopted*.

Lancaster v. Harrison (1830) 8 L. J. (O.S.) C. P. 288; 6 Bing. 726; 4 M. & P. 561.—C.P.

3. RIGHTS OF SURETY.

Peter v. Rich (1629) 1 Ch. Rep. 34., *distinguished*.

Hitchman v. Stewart (1855) 24 L. J. Ch. 690; 3 Drew. 271; 3 Eq. R. 838; 1 Jur. (N.S.) 839; 3 W. R. 464.—V.-C.

O.C.

Peter v. Rich; Morgan v. Seymour (1637)

1 Ch. Rep. 120; **Swain v. Wall** (1611) 1 Ch. Rep. 149; **Hole v. Harrison** (1673) 1 Ch. Ca. 246; Finch 15. 203. *considered*.
Wohnershausen v. Gullick (1893) 62 L. J. Ch. 773; [1893] 2 Ch. 514; 3 R. 610; 68 L. T. 753.—WRIGHT, J.

Dering (or Deering) v. Winchelsea (Earl)

(1800) 1 Cox 318; 2 Bos. & P. 270; 1 R. R. 41.—EX., *explained and approved*.
Craythorne v. Swinburne (1807) 14 Ves. 160; 9 R. R. 264.—L.C.; Stirling v. Forrester (1821) 3 Bligh 575; 22 R. R. 69.—H.L. (SC.).

Dering v. Winchelsea (Earl), applied.

Whiting v. Burke (1870) L. R. 10 Eq. 539, 544.—V.-C. [affirmed, (1871) L. R. 6 Ch. 342.—L.J.J.]; Roberts v. Crowe (1872) 41 L. J. C. P. 198, 201; L. R. 7 C. P. 629, 637; 27 L. T. 238.—C.P.; Duncan, Fox & Co. v. North and South Wales Bank (1880) 50 L. J. Ch. 355, 362; 6 App. Cas. 1, 19; 43 L. T. 706; 29 W. R. 763.—H.L. (E.); Steel v. Dixon (1881) 50 L. J. Ch. 591; 17 Ch. D. 825, 830; 45 L. T. 142; 29 W. R. 735.—FRY, J.

Dering v. Winchelsea (Earl), referred to.

Leigh v. Dickeson (1883) 53 L. J. Q. B. 120; 12 Q. B. D. 194; 50 L. T. 124.—POLLOCK, B. [affirmed, (1884) 54 L. J. Q. B. 18; 15 Q. B. D. 60; 52 L. T. 791; 33 W. R. 539.—C.A.]; Arcedeckne, In re, Atkins v. Arcedeckne (1883) 53 L. J. Ch. 102; 24 Ch. D. 709, 714; 48 L. T. 725.—PEARSON, J.

Dering v. Winchelsea (Earl), principle applied.

Ward v. National Bank of New Zealand (1883) 52 L. J. P. C. 65; 8 App. Cas. 755, 765; 49 L. T. 315.—P.C.

Dering v. Winchelsea (Earl), referred to.

Edmunds v. Wallingford (1885) 54 L. J. Q. B. 305; 14 Q. B. D. 811, 814; 52 L. T. 720; 33 W. R. 647; 49 J. P. 549.—C.A. (affirming 1 Cab. & E. 334); Ramskill v. Edwards (1885) 55 L. J. Ch. 81; 31 Ch. D. 100, 109; 53 L. T. 949; 34 W. R. 96.—PEARSON, J.

Dering v. Winchelsea (Earl), principle applied.

Bacon v. Camphausen (1833) 58 L. T. 851.—STIRLING, J.; Robinson v. Harkin (1896) 65 L. J. Ch. 773; [1896] 2 Ch. 415; 74 L. T. 777; 44 W. R. 702.—STIRLING, J.

Dering v. Winchelsea (Earl), referred to.

Fitzgerald v. McCowan (1897) [1898] 2 Ir. R. 1.—Q.B.D.

Dering v. Winchelsea (Earl). See

Ruabon Steamship Co. v. London Assurance (1899) 69 L. J. Q. B. 86; [1900] A. C. 6; 81 L. T. 585; 48 W. R. 225; 9 Asp. M. C. 2; 5 Com. Cas. 71.—H.L. (E.).

Dering v. Winchelsea (Earl), principle adopted.

Denton's Estate, In re (1903) 72 L. J. Ch. 732; [1903] 2 Ch. 670; 89 L. T. 62; 52 W. R. 93.—SWINFEN EADY, J.

Turner v. Davies (1796) 2 Esp. 478.—K.B., *adopted*.

Batard v. Hawes (1853) 22 L. J. Q. B. 443; 2 El. & Bl. 287; 17 Jur. 1154; 1 W. R. 387.—Q.B.

Cowell v. Edwards (1800) 2 Bos. & P. 268.—C.P., *adopted*.

Davies v. Humphreys (1840) 9 L. J. Ex. 263; 6 M. & W. 153; 4 Jur. 250.—EX.; **Mackreth v. Walmesley** (1884) 51 L. T. 19; 32 W. R. 819.—KAY, J.

Craythorne v. Swinburne (1807) 14 Ves. 160.—L.C.

Referred to, **Hodgson v. Shaw** (1834) 3 L. J. Ch. 190; 3 Myl. & K. 183.—L.C.; **Davies v. Humphreys** (1840) 6 M. & W. 153; 9 L. J. Ex. 263; 4 Jur. 250.—EX.; **Kemp v. Finden** (1834) 12 M. & W. 421; 13 L. J. Ex. 137; 8 Jur. 65.—EX.; *observations explained*, **Batard v. Hawes** (1853) 22 L. J. Q. B. 443; 2 El. & Bl. 287; 3 Car. & K. 277; 17 Jur. 1154; 1 W. R. 387.—Q.B.; *applied*, **Newton v. Chorlton** (1853) 10 Hare 646; 3 Drew. 333.—V.C.; **Farebrother v. Wodehouse** (1856) 26 L. J. Ch. 81; 23 Beav. 18; 2 Jur. (N.S.) 1178; 5 W. R. 12.—M.R.

Craythorne v. Swinburne, *approved*.

Pearl v. Deacon (1857) 24 Beav. 186.—M.R.; *affirmed*, 26 L. J. Ch. 761; 1 De G. & J. 461; 3 Jur. (N.S.) 1187; 5 W. R. 793.—L.JJ.

Craythorne v. Swinburne and Kemp v. Finden (1843) 13 L. J. Ex. 137; 12 M. & W. 421; 8 Jur. 65.—EX., *referred to*.

Reynolds v. Wheeler (1861) 30 L. J. C. P. 350; 10 C. B. (N.S.) 561; 7 Jur. (N.S.) 1290; 4 L. T. 472.—C.P.

Craythorne v. Swinburne, *applied*.

Whiting v. Burke (1870) L. R. 10 Eq. 539, 543.—V.C.; *affirmed*, L. R. 6 Ch. 342.—L.JJ.

Craythorne v. Swinburne, *referred to*.

Duncan, Fox & Co. v. North and South Wales Bank (1880) 50 L. J. Ch. 355; 6 App. Cas. 1, 12; 43 L. T. 706; 29 W. R. 763.—H.L. (E.).

Craythorne v. Swinburne, *discussed*.

Snowdon, *In re and Ex parte* (1881) 50 L. J. Ch. 540; 17 Ch. D. 44; 44 L. T. 830; 29 W. R. 654.—C.A. *See extract, infra*.

Craythorne v. Swinburne, *adopted*.

Ward v. National Bank of New Zealand (1883) 52 L. J. P. C. 65; 8 App. Cas. 755, 765; 49 L. T. 315.—P.C.

Craythorne v. Swinburne, *considered*.

Wolmershausen v. Gullick (1893) 62 L. J. Ch. 773; [1893] 2 Ch. 514; 3 R. 610; 68 L. T. 753.—WRIGHT, J.

Craythorne v. Swinburne, *principle applied*.

Denton's Estate, *In re*, **Licenses Insurance Corporation v. Denton** (1904) 73 L. J. Ch. 465; [1904] 2 Ch. 178; 90 L. T. 698; 52 W. R. 484.—C.A.

Antrobus v. Davidson (1817) 3 Mer. 569; 17

R. R. 130.—M.R., *considered*.

Wolmershausen v. Gullick (1893) 62 L. J. Ch. 773; [1893] 2 Ch. 514; 3 R. 610; 68 L. T. 753.—WRIGHT, J.

Stirling v. Forrester (1821) 3 Bligh 575; 22 R. R. 69.—H.L. (SC.), *observations adopted*.

Duncan, Fox & Co. v. North and South Wales Bank (1881) 50 L. J. Ch. 355; 6 App. Cas. 1, 19; 43 L. T. 706; 29 W. R. 763.—H.L. (E.).

Stirling v. Forrester, *principle applied*.

Ward v. National Bank of New Zealand (1883) 52 L. J. P. C. 65; 8 App. Cas. 755; 49 L. T. 315.—H.L. (E.).

Stirling v. Forrester, *dicta adopted*.

Bacon v. Camphausen (1888) 58 L. T. 851.—STIRLING, J.; **Wolmershausen v. Gullick** (1893) 62 L. J. Ch. 773; [1893] 2 Ch. 514; 3 R. 610; 68 L. T. 753.—WRIGHT, J.

Stirling v. Forrester, *discussed*.

Ruabon Steamship Co. v. London Assurance (1900) 69 L. J. Q. B. 86; [1900] A. C. 6; 81 L. T. 585; 48 W. R. 225; 9 Asp. M. C. 2; 5 Com. Cas. 71.—H.L. (E.).

Pendlebury v. Walker (1841) 4 Y. & Col.

Ex. 424.—EX., *principle applied*.

Steel v. Dixon (1881) 50 L. J. Ch. 591; 17 Ch. D. 825, 830; 45 L. T. 142; 29 W. R. 735.—FRY, J.; **Arceadeckne**, *In re*, **Atkins v. Arceadeckne** (1883) 53 L. J. Ch. 102; 24 Ch. D. 709, 714; 48 L. T. 725.—PEARSON, J.; **Ellesmere Brewery Co. v. Cooper** (1895) 65 L. J. Q. B. 173; [1895] 1 Q. B. 75; 73 L. T. 567; 44 W. R. 254.—RUSSELL, C.J. and CAVE, J.

Davies v. Humphreys (1840) 6 M. & W. 153;

9 L. J. Ex. 263; 4 Jur. 250.—EX., *followed*. **Snowdon**, *In re*, **Snowdon**, *Ex parte* (1881) 17 Ch. D. 44; 50 L. J. Ch. 540; 44 L. T. 830; 29 W. R. 654.—C.A.

BRETT, L.J.—When does the claim of the one surety against the other for contribution arise? It is not when he has paid only his own half of the amount for which he originally became surety, but his claim arises when he has paid more than half of the whole of the debt due to the creditor. That is the doctrine which was laid down in **Davies v. Humphreys**, and it was a doctrine taken from the Courts of Equity and adopted by the Courts of Law. The doctrine laid down in **Davies v. Humphreys** has never been questioned, and it seems to be absolutely in accordance with what Lord Eldon said in *Ex parte Gifford* (6 Ves. 805), upon the authority of which **Davies v. Humphreys** was decided. There is nothing to the contrary in the other cases which have been cited, and the doctrine of **Davies v. Humphreys** remains untouched, that a surety has no claim against his co-sureties until he has paid more than his share of the debt due to the principal creditor.—p. 47.

[Counsel observed: The decision of Lord Eldon in *Ex parte Gifford*, which is referred to by Baron Parkes in **Davies v. Humphreys**, was earlier in date than his decision in **Craythorne v. Swinburne**. There he says: "It has been long settled that if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that a surety has a right in this Court, either upon a principle of equity or upon contract, to call upon his co-surety for contribution."]

COTTON, L.J.—Does that mean while any part of the principal debt remains unsatisfied? Does it not mean when the surety has paid more than his share of the debt which remains due to the creditor?—p. 45.

Davies v. Humphreys, *considered*.

Wolmershausen v. Gullick (1893) 62 L. J. Ch. 773; [1893] 2 Ch. 514; 3 R. 610; 68 L. T. 753.—WRIGHT, J.

- Reynolds v. Wheeler** (1861) 30 L. J. C. P. 359; 10 C. B. (N.S.) 561; 7 Jur. (N.S.) 1290; 4 L. T. 472.—C.P., *discussed and approved*.
- Macdonald v. Whitfield** (1883) 52 L. J. P. C. 70; 8 App. Cas. 733; 49 L. T. 446.—P.C. *See* extract, vol. i., col. 207.
- Reynolds v. Wheeler, considered.**
- Wolmershausen v. Gullick** (1893) 62 L. J. Ch. 773; [1893] 2 Ch. 514; 3 R. 610; 68 L. T. 753.—WRIGHT, J.
- Bechervaise v. Lewis** (1872) 41 L. J. C. P. 161; L. R. 7 C. P. 372; 26 L. T. 848; 20 W. R. 726, *dictum applied*.
- Wolmershausen v. Gullick** (1893) 62 L. J. Ch. 773; [1893] 2 Ch. 514; 3 R. 610; 68 L. T. 753.—WRIGHT, J.
- Bechervaise v. Lewis, followed.**
- Alcoy and Gandia Ry. v. Greenhill** (1897) 76 L. T. 542.—STIRLING, J., *affirmed in part and reversed in part*, 79 L. T. 257.—C.A.
- Snowdon, In re and Ex parte** (1881) 50 L. J. Ch. 540; 17 Ch. D. 44; 44 L. T. 830; 29 W. R. 654.—C.A.; and **Macdonald v. Whitfield** (1883) 52 L. J. P. C. 70; 8 App. Cas. 733.—P.C., *considered*.
- Wolmershausen v. Gullick** (1893) 62 L. J. Ch. 773; [1893] 2 Ch. 514; 3 R. 610; 68 L. T. 753.—WRIGHT, J.
- Wolmershausen v. Gullick** (1893) 62 L. J. Ch. 773; [1893] 2 Ch. 514; 3 R. 610; 68 L. T. 753.—WRIGHT, J., *applied*.
- Robinson v. Harkin** (1896) 65 L. J. Ch. 773; [1896] 2 Ch. 415; 74 L. T. 777; 44 W. R. 702.—STIRLING, J.
- Wolmershausen v. Gullick, followed.**
- Gardner v. Brooke** (1895) [1897] 2 Ir. R. 6.—Q.B.D.; *affirmed*, C.A.
- Wolmershausen v. Gullick. See**
- Fuller v. McMahon, McMahon, In re** (1896) 69 L. J. Ch. 142; [1900] 1 Ch. 173; 81 L. T. 715; 7 Manson 38.—STIRLING, J.
- Wolmershausen v. Gullick, referred to.**
- Ellis v. Pond** (1897) 67 L. J. Q. B. 345; [1898] 1 Q. B. 426; 78 L. T. 125.—C.A.; **Fitzgerald v. McCowan** (1897) [1898] 2 Ir. R. 1, 13.—Q.B.D.
- Wolmershausen v. Gullick, applied.**
- Blackpool Motor Car Co., In re, Hamilton v. Blackpool Motor Car Co.** (1900) 70 L. J. Ch. 61; [1901] 1 Ch. 77; 49 W. R. 124; 8 Manson 193.—BUCKLEY, J.; **Gore v. Gore** (1900) [1901] 2 Ir. R. 275.—Q.B.D.
- Ellesmere Brewery Co. v. Cooper** (1895) 65 L. J. Q. B. 173; [1896] 1 Q. B. 75; 73 L. T. 567; 44 W. R. 254.—Q.B.D. *See* **Fitzgerald v. McCowan** [1898] 2 Ir. R. 1, 26.—Q.B.D.
- Ellesmere Brewery Co. v. Cooper, explained and applied.**
- Denton's Estate, In re, Licenses Insurance Corporation v. Denton** (1903) 72 L. J. Ch. 732; [1903] 2 Ch. 670, 680; 89 L. T. 62; 52 W. R. 93.—SWINFEN EADY, J.; *reversed*, C.A. (*see* col. 2609).
- Gardner v. Brooke** [1897] 2 Ir. R. 6.—C.A. *referred to*.
- Fitzgerald v. McCowan** (1897) [1898] 2 Ir. R. 1.—Q.B.D.
- Stokes, Ex parte** (1848) De Gex Bkey. Rep. 618.—V.-C., *followed*.
- Parker, In re, Morgan v. Mill** (1894) 64 L. J. Ch. 6; [1894] 3 Ch. 400; 7 R. 590; 71 L. T. 557; 43 W. R. 1.—C.A.
- Lawson v. Wright** (1786) 1 Cox 275. *followed*.
- Hitchman v. Stewart** (1855) 3 Drew. 271.—V.-C.
- Lawson v. Wright, referred to.**
- Fox, In re, Bishop, Ex parte** (1880) 50 L. J. Ch. 18, 25; 15 Ch. D. 400, 422; 43 L. T. 165; 29 W. R. 144.—C.A.; and **Scottish Provident Institution v. Conolly** (1893) 31 L. R. Ir. 329, 336.—M.R.
- Lawson v. Wright, considered.**
- Wolmershausen v. Gullick** (1893) 62 L. J. Ch. 773; [1893] 2 Ch. 514; 3 R. 610; 68 L. T. 753.—WRIGHT, J.
- Mountcashel v. Barber** (1853) 23 L. J. C. P. 43; 14 C. B. 53; 2 C. L. R. 60; 2 W. R. 96.—C.P., *distinguished*.
- Whillier v. Roberts** (1873) 28 L. T. 668.—C.P.
- Herepath, In re, Delmar, Ex parte** (1890) 38 W. R. 752; 7 Morrell 129, 190.—CAVE, J., *commented on*.
- Parrott, In re, Whittaker, Ex parte** (1891) 63 L. T. 777; 39 W. R. 400; 8 Morrell 49.—BKCX.
- O'Carroll's Case** (1745) Amb. 61.—L.C. *See* **Dering (or Deering) v. Winchelsea (Earl)** (1800) 2 Bos. & P. 274 n.; 1 Cox 318; 1 R. R. 41.—EX.
- Butcher v. Churchill** (1808) 14 Ves. 567.—M.R., *followed*.
- Reed v. Norris** (1837) 6 L. J. Ch. 197; 2 Myl. & Cr. 361; 1 Jur. 233.—L.C.
- Rigby v. Macnamara** (1795) 2 Cox 415; 2 R. R. 92.—L.C., *applied*.
- Bell v. Free** (1818) Wils. Ch. Cas. 51; 1 Swanst. 90; 18 R. R. 153.—M.R.; **Oriental Commercial Bank, In re, European Bank, Ex parte** (1871) 41 L. J. Ch. 217; L. R. 7 Ch. 99, 103; 25 L. T. 648; 20 W. R. 82.—L.JJ.
- Rigby v. Macnamara and Bell v. Free, dissented from.**
- Maria Anna and Steinbank Coal and Coke Co., In re, McKewan's Case** (1877) 46 L. J. Ch. 819; 6 Ch. D. 447; 37 L. T. 201; 25 W. R. 857.—MALINS, V.-C., *partly affirmed and partly reversed* C.A.
- Ranelagh v. Hayes** (1683) 1 Vern. 189.—LORD KEEPER, *disapproved*.
- Lloyd v. Dimmack** (1877) 47 L. J. Ch. 398; 7 Ch. D. 398; 38 L. T. 173; 26 W. R. 458.—FRY, J.
- Ranelagh v. Hayes, not followed.**
- Hughes Hallett v. Indian Mammoth Co.** (1882) 52 L. J. Ch. 418; 22 Ch. D. 561; 48 L. T. 107; 31 W. R. 285.—FRY, J.
- Ranelagh v. Hayes, approved and followed.**
- Mathews v. Saurin and Provincial Bank** (1893) 31 L. R. Ir. 181.—M.R.

Padwick v. Stanley (1852) 9 Hare 627; 16 Jur. 586.—V.-C., *disapproved*.
Mathews v. Saurin and Provincial Bank (1893) 31 L. R. Ir. 281.—M.R.

Parsons v. Briddock (1708) 2 Vern. 608.—L.C., *followed*.
Wright v. Morley (1805) 11 Ves. 14, 21, 22; 8 R. R. 69.—M.R.

Parsons v. Briddock, *referred to*.
Nelthorpe v. Holgate (1844) 1 Coll. C. C. 203.
Drew v. 333, 346; 10 Hare 646.—V.-C.

Parteriche v. Powlet (1742) 2 Atk. 383, 384.—L.C., *implied*.
Clinan v. Cooke (1802) 1 Sch. & Lof. 22, 35; 9 R. R. 3.—L.C.

Parteriche v. Powlet, *See*
Hudson v. Carmichael (1854) Kay 613; 23 L. J. Ch. 893; 18 Jur. 851.—WOOD, V.-C.

Parteriche v. Powlet, *distinguished*.
Caldwell v. Fellowes (1870) 39 L. J. Ch. 618; L. R. 9 Eq. 410, 418; 22 L. T. 225; 18 W. R. 486.—V.-C.

Fraed v. Gardiner (1788) 2 Cox 86; 2 R. R. 8.—L.C., *observed upon*.
Duncan, Fox & Co. v. North & South Wales Bank (1880) 50 L. J. Ch. 355; 6 App. Cas. 11; 43 L. T. 706; 29 W. R. 763.—H.L. (E.).

Aldrich v. Cooper (1802) 8 Ves. 382.—L.C., *observations explained*.
Yonge v. Reynell (1852) 9 Hare 809.—V.-C.

Aldrich v. Cooper, *applied*.
Dolphin v. Aylward (1870) L. R. 4 H. L. 486, 501; 23 L. T. 636; 19 W. R. 49.—H.L. (IR.).

Aldrich v. Cooper, *observed upon*.
Duncan, Fox & Co. v. North & South Wales Bank (1880) 50 L. J. Ch. 355; 6 App. Cas. 11; 43 L. T. 706; 29 W. R. 763.—H.L. (E.): **Athill**, *In re*, **Athill v. Athill** (1880) 49 L. J. Ch. 821; 16 Ch. D. 211, 218; 43 L. T. 153.—V.-C., *affirmed*, 50 L. J. Ch. 123; 16 Ch. D. 211; 43 L. T. 581; 29 W. R. 309.—C.A.

Aldrich v. Cooper, *observations explained*.
Webb v. Smith (1885) 30 Ch. D. 192, 200; 53 L. T. 737.—C.A.

Copis v. Middleton (1823) Turn. & R. 224; 2 L. J. (O.S.) Ch. 82.—L.C., *adopted*.
Simpkins v. Poulett (1824) 2 L. J. (O.S.) Ch. 81.—V.-C.; **Lockhart v. Reilly** (1857) 27 L. J. Ch. 54; 1 De G. & J. 464.—L.C.; **Dawson v. Lawes** (1854) 23 L. J. Ch. 434; Kay 280; 2 Eq. R. 280; 2 W. R. 213.—WOOD, V.-C.

Copis v. Middleton and Jones v. Davids (1828) 4 Russ. 277.—M.R., *referred to*.
Batchellor v. Lawrence (1860) 30 L. J. C. P. 39; 9 C. B. (N.S.) 543; 6 Jur. (N.S.) 1306; 3 L. T. 508; 9 W. R. 373.—C.P.

Copis v. Middleton, *principle applied*.
Willes v. Greenhill (1860) 30 L. J. Ch. 808; 9 W. R. 217.—M.R.

Copis v. Middleton, *explained*.
South v. Bloxham (1865) 34 L. J. Ch. 369; 2 H. & M. 457; 11 Jur. (N.S.) 319; 12 L. T. 201.—V.-C.

Copis v. Middleton, *applied*.

Badeley v. Consolidated Bank (1886) 34 Ch. D. 536, 556; 55 L. T. 635; 35 W. R. 136.—STIRLING, J.

Yonge v. Reynell (1852) 9 Hare 809.—V.-C.; **Clark v. Devlin** (1803) 3 Bos. & P. 363; 7 R. R. 793.—C.P., *principles applied*.
Duncan, Fox & Co. v. North & South Wales Bank (1880) 50 L. J. Ch. 355; 6 App. Cas. 1; 43 L. T. 706; 29 W. R. 763.—H.L. (E.).

Farebrother v. Wodehouse (1856) 26 L. J. Ch. 81; 23 Beav. 18; 2 Jur. (N.S.) 1178; 5 W. R. 12.—M.R., *referred to*.
Jeffery's Policy, In re (1872) 20 W. R. 857.—MALINS, V.-C.

Farebrother v. Wodehouse, *considered*.
Forbes v. Jackson (1882) 51 L. J. Ch. 690; 19 Ch. D. 615, 620; 30 W. R. 652.—HALL, V.-C.; and **Nicholas v. Ridley** (1903) 73 L. J. Ch. 145; [1901] 1 Ch. 192; 89 L. T. 653; 52 W. R. 226.—C.A.

Batchellor v. Lawrence (1860) 30 L. J. C. P. 39; 9 C. B. (N.S.) 543; 6 Jur. (N.S.) 1306; 3 L. T. 508; 9 W. R. 373.—C.P., *referred to*.

Fitzgerald v. McCowan (1897) [1898] 2 Ir. R. 1.—Q.B.D.

M'Myn, In re, Lightbown v. M'Myn (1886) 55 L. J. Ch. 845; 33 Ch. D. 575; 55 L. T. 834; 35 W. R. 179.—CHITTY, J., *applied*.
Churchill (Lord) In re, Manisty v. Churchill (1888) 58 L. J. Ch. 136; 39 Ch. D. 174; 59 L. T. 597; 36 W. R. 805.—NORTH, J.

Miller v. Sawyer, 30 Vermont 412; and **Hall v. Robinson**, 8 Iredell 56 (American Cases), *followed*.
Steel v. Dixon (1881) 17 Ch. D. 825; 50 L. J. Ch. 591; 45 L. T. 142; 29 W. R. 735.—FRY, J.

Steel v. Dixon (1881) 50 L. J. Ch. 591; 17 Ch. D. 825; 45 L. T. 142; 29 W. R. 735.—FRY, J.

Observations considered, **Arceadeckne, In re**, **Atkins v. Arceadeckne** (1883) 53 L. J. Ch. 102; 24 Ch. D. 709, 714; 48 L. T. 725.—V.-C.; *followed*, **Berridge v. Berridge** (1890) 59 L. J. Ch. 533; 44 Ch. D. 168; 63 L. T. 101; 38 W. R. 599.—NORTH, J.; and *see* **Denton's Estate, In re** [1903] 2 Ch. 670, 680.—SWINFEN EADY, J. (reversed, C.A.).

4. ACTION AGAINST SURETY.

Wright v. Morley (or Morley v. St. Alban) (1805) 11 Ves. 12.—M.R., *discussed*.
Waring, Ex parte (1815) 2 Gly. & J. 404; 2 Rose 182; 19 Ves. 345; 13 R. R. 217.—L.C.

Wright v. Morley, *applied*.
Stringer v. English and Scottish Marine Insurance Co. (1869) 38 L. J. Q. B. 321, 326; L. R. 4 Q. B. 676, 692.—Q.B. [affirmed, (1870) 39 L. J. Q. B. 214; L. R. 5 Q. B. 599; 40 B. & S. 770; 22 L. T. 802; 18 W. R. 1201.—E.S. CH.]; **City Bank v. Luckie** (1869) L. R. 5 Ch. 775, n.; 21 L. T. 693.—V.-C. [reversed, L. R. 5 Ch. 773; 23 L. T. 376; 18 W. R. 1181.—L.C.].

Wright v. Morley, *principle applied*.

Taunton v. Morris (1878) 47 L. J. Ch. 721; 8 Ch. D. 453, 456; 38 L. T. 552; 26 W. R. 674.—*v. c.*; *affirmed*. (1879) 48 L. J. Ch. 408; 11 Ch. D. 779; 27 W. R. 718.—C.A.

Wright v. Morley and Maure v. Harrison (1692) 1 Eq. Cas. Abr. 93; 20 Vin. Abr. 102, *dicta disapproved*.

Sheffield Banking Co. v. Clayton, Walker, In re (1892) 61 L. J. Ch. 234; [1892] 1 Ch. 621; 66 L. T. 315; 40 W. R. 327.—STIRLING, J.

Held that there was no authority for the proposition that the principal creditor is entitled to the benefit of all counter bonds or collateral security given by the principal debtor to the surety; that the proposition was not supported by the case of *Maure v. Harrison* and was at most a *dictum* in the course of the argument in that case.

Douglass v. Howland, 24 Wendell 35 (American case), *followed*.

Kitchen, In re, Young, *Ex parte* (1881) 17 Ch. D. 668; 50 L. J. Ch. 824; 45 L. T. 90.—C.A.

Kitchen, In re, Young, Ex parte, *distinguished*.

Abbeylex Union v. Sutcliffe (1890) 26 L. R. Ir. 332, 336.—Q.B.D.

Duffield v. Scott (1789) 3 Term Rep. 374.—K.B.

Dictum approved, Smith v. Compton (1832) 3 B. & Ad. 407; 1 L. J. K. B. 146.—K.B.; and Jones v. Williams (1841) 10 L. J. Ex. 120; 7 M. & W. 493; 9 D. P. C. 252.—EX.; *dictum discussed*, Parker v. Lewis (1873) 43 L. J. Ch. 281; L. R. 8 Ch. 1035; 29 L. T. 199; 21 W. R. 923, 928.—L.JJ. (reversing 28 L. T. 91.—V.C.).

Parker v. Lewis * (1873).—L.JJ. (*supra*), *referred to*.

Mercantile Investment and General Trust Co. v. River Plate Trust Loan and Agency Co. (1894) 63 L. J. Ch. 366; [1894] 1 Ch. 578; 8 R. 791; 70 L. T. 131; 42 W. R. 365.—ROMER, J.

5. OTHER INDEMNITIES.

Fergus v. Gore (1803) 1 Sch. & Lef. 107 (Ir.), L.C.

Observed upon, Congreve v. Power (1828) 1 Molloy 121.—L.C.; *adopted*, Petre v. Duncombe (1831) 20 L. J. Q. B. 242; 2 L. M. & P. 107; 15 Jur. 86.—Q.B.

Smith v. Compton (1832) 1 L. J. K. B. 146; 3 B. & Ad. 189.—K.B., *referred to*.

Canavan v. Bruton [1900] 2 Ir. R. 359.—Q.B.D.

Bullock v. Lloyd (1825) 2 Car. & P. 119, *disapproved*.

Collinge v. Heywood (1839) 9 A. & E. 633; 1 P. & D. 502; 2 W. W. & H. 107; 8 L. J. Q. B. 98.—Q.B.

DENMAN, C.J.—We thought it necessary to consider this case, because there was a ruling at *nisi prius*, in *Bullock v. Lloyd*, which seemed to be in point. But I think that cannot be supported; it is too clear that, in a case like this, no damage has arisen till the party to be indemnified is called upon to pay. The mere fault of

the surety after the debt has accrued is insufficient, because that default may be amended.—p. 639.

Collinge v. Heywood (1839) 9 A. & E. 633; 1 P. & D. 502; 2 W. W. & H. 107; 8 L. J. Q. B. 98.—Q.B., *not followed*.

Spark v. Heslop (1859) 1 E. & E. 563; 28 L. J. Q. B. 197; 5 Jur. (N.S.) 730; 7 W. R. 312.—Q.B.

Collinge v. Heywood, *adapted*.

Blyth v. Fladgate (1890) 63 L. T. 546, 556.—STIRLING, J.

Wooldridge v. Norris (1868) 37 L. J. Ch. 640; L. R. 6 Eq. 410; 19 L. T. 144; 16 W. R. 965.—V.C., *considered*.

Wohmershausen v. Gullick (1893) 62 L. J. Ch. 773; [1893] 2 Ch. 514; 3 R. 610; 68 L. T. 753.—WRIGHT, J. *And see further, ante*, vol. i., col. 1115.

Toplis v. Grane (1839) 9 L. J. C. P. 180; 5 Bing. N. C. 636; 7 Scott, 620; 2 Arn. 110.—C.P., *followed*.

Dugdale v. Lovering (1875) 44 L. J. C. P. 197; L. R. 10 C. P. 196; 32 L. T. 155; 23 W. R. 391.—C.P.

Toplis v. Grane, *considered*.

Sheffield Corporation v. Barclay (1903) 72 L. J. K. B. 777; [1903] 2 K. B. 580, 589; 89 L. T. 227; 52 W. R. 54; 1 L. G. R. 794; 9 Com. Cas. 53; 68 J. P. 17.—C.A.

Dugdale v. Lovering (1875) 44 L. J. C. P. 197; L. R. 10 C. P. 196; 32 L. T. 155; 23 W. R. 391.—C.P., *distinguished*.

Birmingham and District Land Co. v. L. & N. W. Ry. (1886) 56 L. J. Ch. 956; 34 Ch. D. 261; 55 L. T. 699; 35 W. R. 173.—C.A.

Dugdale v. Lovering, *not applied*.

Seager, In re and *Ex parte* (1891) 8 Morrell 216.—CAVE, J.

Dugdale v. Lovering, *referred to*.

Sheffield Corporation v. Barclay (1902) [1903] 1 K. B. 1; 87 L. T. 479; 51 W. R. 204; 8 Com. Cas. 49.—ALVERSTONE, C.J.; *reversed*, C.A. *See supra*.

Bridgman v. Daw (1891) 40 W. R. 253.—NORTH, J., *applied*.

Dodson v. Downey (1901) 70 L. J. Ch. 854; [1901] 2 Ch. 620; 85 L. T. 273; 50 W. R. 57.—FARWELL, J.

PRISON.

Olliet v. Bessey (1679) T. Jones 214.—K.B.; and **Butt v. Newman** (1819) Gow 97.—C.P., *followed*.

Henderson v. Preston (1888) 57 L. J. Q. B. 607; 21 Q. B. D. 362; 36 W. R. 834; 52 J. P. 820.—C.A., *affirming* 59 L. T. 334.—STEPHEN, J.

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Moone v. Rose (*supra*), *distinguished*.
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Smyth, Ex parte (1835) 2 C. M. & R. 748; 1 Gale 274; S. C. 3 A. & E. 719.—K.B., *considered and applied*.
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Read v. Lincoln (Bishop) (1889) 14 P. D. 88, 127; 61 L. T. 403.—ARCHBISHOP OF CANTERBURY.

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London Corporation v. Cox (1867) 36 L. J. Ex. 225; L. R. 2 H. L. 239, 283; 16 W. R. 44.—H.L. (E.); *Combe v. De la Bere* (1882) 22 Ch. D. 316, 325; 47 L. T. 185; 31 W. R. 24.—CHITTY, J., affirmed, C.A. (*supra*, col. 2618); *Reg. v. Shropshire County Court Judge* (1887) 57 L. J. Q. B. 143; 20 Q. B. D. 242, 248; 58 L. T. 86; 36 W. R. 476.—POLLOCK, B. and HAWKINS, J.

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Elston and Rose, In re (1868) 38 L. J. Q. B. 6; L. R. 4 Q. B. 4; 3 B. & S. 503; 19 L. T. 280; 17 W. R. 52.—Q.B., *discussed*.
Liverpool United Gas Co. v. Everton Township Overseers (1871) 40 L. J. M. C. 104; L. R. 6 C. P. 414; 28 L. T. 813; 19 W. R. 412.—C.P.

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Mostyn v. Fabrigas (1774) Cowper 161.—K.B. *See*

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S. C. ann. Stuart v. Moore, 4 Macq. H. L. 49; 7 Jur. (N.S.) 1129; 4 L. T. 382; 9 W. R. 722.—H.L. (sc.), *considered and distinguished*.

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Brown v. Collins (1843) 53 L. J. Ch. 368; 23 Ch. D. 56, 61; 49 L. T. 329.—KAY, J.

Stuart v. Bute. *See*

Ewing v. Orr-Ewing (1885) 10 App. Cas. 453, 474, n.—CT. OF SESS.

Bonham's Case (1609) 8 Coke 107.—C.P., *considered*.

Kemp v. Neville (1861) 10 C. B. (N.S.) 522; 31 L. J. C. P. 158; 7 Jur. (N.S.) 913; 4 L. T. 640; 10 W. R. 6.—C.P.

ERLE, C.J.—In the report of *Groenvelt's Case*, under the name of *Dr. Grenville v. The College of Physicians* (12 Mod. 388), it is said, that, wherever there is a power *de novo* created by Parliament to fine and imprison, either of these two makes it a Court of Record, although in *Dr. Bonham's Case* the same principle is not affirmed; yet all that Lord Coke says there extra-judicially after deciding that the action lay has been doubted by Lord Holt in *Groenvelt's Case*, and attributed to the desire of Lord Coke to support a graduate of Cambridge, and to prevent what he considered an affront of the university, which must be venerated.—p. 552.

Floyd v. Barker (1608) 12 Coke 23.—STAR

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Taaffe v. Downes (1813) 3 Moore P. C. 36, n.—C.P. (IR.).

Floyd v. Barker, *considered and adopted*.

Kemp v. Neville (1861) 31 L. J. C. P. 158; 10 C. B. (N.S.) 523; 7 Jur. (N.S.) 913; 4 L. T. 640; 10 W. R. 6.—C.P.

Hamond v. Howell (1677) 2 Mod. 218, *referred to*.

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Hamond v. Howell, *applied*.

Taaffe v. Downes (1813) 3 Moore P. C. 36, n.—C.P. (IR.).

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- Hamond v. Howell**, *considered and adopted*.
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- Groenvelt v. Burwell** (1699) 1 Ld. Raym. 454; 12 Mod. 386; Comb. 76.—K.B., *considered and adopted*.
Kemp v. Neville (1861) 31 L. J. C. P. 158; 10 C. B. (N.S.) 523; 7 Jur. (N.S.) 913; 4 L. T. 640; 10 W. R. 6.—C.P. *See extract, supra*, col. 2622.
- Groenvelt v. Burwell**, *adopted*.
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- Napper Tandy v. Westmoreland** (1792) 27 St. Tr. 1247, *distinguished and disapproved*.
Hill v. Bigge (1841) 3 Moore P. C. 435.—P.C.
- Napper Tandy v. Westmoreland**, *considered*.
Luby v. Wodehouse (1865) 17 Ir. C. L. R. 618.—C.P.
- Napper Tandy v. Westmoreland**, *dicta applied*.
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Luby v. Wodehouse (*supra*), *followed*.
Sullivan v. Spencer (Earl) (1872) Ir. R. 6 C. L. 173.—Q.B.
- Miller v. Seare** (1777) 2 W. Bl. 1141.—C.P., *dicta adopted*.
Taaffe v. Downes (1813) 3 St. Tr. (N.S.) 1326; 3 Moore P. C. 36, n.—C.P. (IR.).
- Miller v. Seare**. *See*
Calder v. Halket (1840) 4 St. Tr. (N.S.) 491.—P.C.
- Miller v. Seare**, *adopted*.
Ferguson v. Kinnoull (1842) 4 St. Tr. (N.S.) 785, 813.—H.L. (SC.).
- Miller v. Seare and Rex v. White** (1734) Cas. t. Hardw. 42.—K.B., *applied*.
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- Radnor (Earl) v. Reeve** (1801) 2 Bos. & P. 391; 5 R. R. 630.—C.P., *applied*.
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- Taaffe v. Downes**, *adopted*.
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- Taaffe v. Downes**, *considered and adopted*.
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- Dicas v. Brougham (Lord)** (1838) 6 Car. & P. 249.—EX., *distinguished*.
Houlden v. Smith (1850) 19 L. J. Q. B. 170; 14 Q. B. 841; 14 Jur. 598.—Q.B.
- Garnett v. Ferrand** (1827) 5 L. J. (O.S.) K. B. 221; 6 B. & C. 611; 9 D. & R. 657.—K.B., *considered and adopted*.
Kemp v. Neville (1861) 31 L. J. C. P. 158; 10 C. B. (N.S.) 523; 7 Jur. (N.S.) 913; 4 L. T. 640; 10 W. R. 6.—C.P.
- Garnett v. Ferrand**, *referred to*.
Willis v. MacLachlan (1876) 45 L. J. Q. B. 689; 1 Ex. D. 376, 383; 35 L. T. 218.—D.
- Houlden v. Smith** (1850) 19 L. J. Q. B. 170; 14 Q. B. 841; 14 Jur. 598.—Q.B., *considered and adopted*.
Kemp v. Neville (1861) 31 L. J. C. P. 158; 10 C. B. (N.S.) 523; 7 Jur. (N.S.) 913; 4 L. T. 640; 10 W. R. 6.—C.P.
- Houlden v. Smith**, *adopted*.
London Corporation v. Cox (1867) L. R. 2 H. L. 239, 263; 36 L. J. Ex. 225; 16 W. R. 44.—H.L. (E.).
- Kemp v. Neville** (1861) 31 L. J. C. P. 158; 10 C. B. (N.S.) 523; 7 Jur. (N.S.) 913; 4 L. T. 640; 10 W. R. 6.—C.P., *adopted*.
Wildes v. Russell (1866) 35 L. J. M. C. 241; L. R. 1 C. P. 722, 741; 12 Jur. (N.S.) 645; 16 L. T. 478; 14 W. R. 796.—C.P.
- Kemp v. Neville**, *applied*.
Reg. v. Williams (1866) 15 L. T. 290.—BLACKBURN, J.
- Kemp v. Neville and Hamilton v. Anderson** (1858) 3 Macq. H. L. 363, 378.—H.L. (SC.), *referred to*.
Haggard v. Pelicier Frères (1891) 61 L. J. P. C. 19; [1892] A. C. 61; 65 L. T. 769.—P.C.
- Miller v. Hope** (1824) 2 Shaw Sc. Ap. 125.—H.L. (SC.), *applied*.
Anderson v. Gorrie (1894) [1895] 1 Q. B. 668; 14 R. 79; 71 L. T. 382; 10 Times L. R. 660.—C.A.
- Gelan v. Hall** (1857) 27 L. J. M. C. 78; 2 H. & N. 379, 393; 5 W. R. 757.—EX., *dictum adopted*.
Scott v. Stansfield (1868) 37 L. J. Ex. 155; L. R. 3 Ex. 220; 18 L. T. 572; 16 W. R. 911.—EX.
- Fray v. Blackburn** (1863) 3 B. & S. 576.—Q.B., *adopted*.
Dawkins v. Paulet (Lord) (1869) 39 L. J. Q. B. 53, 59; L. R. 5 Q. B. 94, 116; 9 B. & S. 768; 21 L. T. 584; 18 W. R. 336.—Q.B.
- Fray v. Blackburn**, *applied*.
Anderson v. Gorrie (1894) [1895] 1 Q. B. 668; 14 R. 79; 71 L. T. 382; 10 Times L. R. 660.—C.A.
- Scott v. Stansfield** (1868) 37 L. J. Ex. 155; L. R. 3 Ex. 220; 18 L. T. 572; 16 W. R. 911.—EX., *adopted*.
Dawkins v. Paulet (1869) 39 L. J. Q. B. 53, 59; L. R. 5 Q. B. 94, 116; 9 B. & S. 768; 21 L. T. 584; 18 W. R. 336.—Q.B.
- Scott v. Stansfield**, *limited*.
Seaman v. Netherclift (1876) 45 L. J. C. P. 798; 1 C. P. D. 540, 544; 34 L. T. 878.—C.P.D.;

affirmed, 46 L. J. C. P. 128; 2 C. P. D. 53; 35 L. T. 784; 25 W. R. 159.—C.A.

Scott v. Stansfield, *explained and applied*.

Munster v. Lamb (1883) 52 L. J. Q. B. 726; 11 Q. B. D. 588, 603; 49 L. T. 252; 32 W. R. 248; 47 J. P. 805.—C.A.

Scott v. Stansfield, *applied*.

Anderson v. Gorrie (1894) [1895] 1 Q. B. 668; 14 R. 79; 71 L. T. 382; 10 Times L. R. 660.—C.A.

Holroyd v. Breare (1819) 2 B. & Ald. 473; 21

R. R. 361.—K.B., *approved*.

Bradley v. Carr (1841) 3 Man. & G. 221; 3 Scott N. R. 523.—C.P.

Dimes v. Grand Junction Canal (1852) 3

H. L. Cas. 759; 17 Jur. 73.—H.L. (E.), *not applied*.

Ranger v. G. W. Ry. (1854) 5 H. L. Cas. 72.—H.L. (E.).

Dimes v. Grand Junction Canal Co., *adopted*.

Wildes v. Russell (1866) 35 L. J. M. C. 241; L. R. 1. C. P. 722, 741; 12 Jur. (N.S.) 645; 16 L. T. 478; 14 W. R. 796.—C.P.: **Phillips v. Eyre** (1870) 40 L. J. Q. B. 28; L. R. 6 Q. B. 1, 22; 10 B. & S. 1004; 22 L. T. 869.—EX. CH.: **Todd v. Robinson** (1884) 54 L. J. Q. B. 47; 14 Q. B. D. 739, 745; 52 L. T. 120; 49 J. P. 278.—C.A.: **Reg. v. Farrant** (1887) 57 L. J. M. C. 17; 20 Q. B. D. 58, 61; 57 L. T. 880; 36 W. R. 184; 52 P. J. 116.—STEPHEN and CHARLES, JJ.

Dimes v. Grand Junction Ry., *applied*.

Heaphy, *In re* (1888) 22 L. R. Ir. 500, 511.—EX. D.; **Reg. v. Antrim JJ.** [1895] 2 Ir. 652.—Q.B.D.

Dimes v. Grand Junction Ry., *referred to*.

City of London Electric Lighting Co. v. London Corporation (1900) 16 Times L. R. 362, 364.—FARWELL, J.

Lincoln (Bishop) v. Smith (1668) 1 Vent. 3.—K.B., *referred to*.

Medwin, *Ex parte*, **Rawlinson v. Medwin** (1853) 22 L. J. Q. B. 169; 1 El. & Bl. 609; 17 Jur. 1178.—Q.B.

Ward v. Society of Attorneys (1844) 1 Coll. C. C. 370.—V.-C., *principle applied*.

Hoey v. M'Farlane (1858) 4 C. B. (N.S.) 718; 4 Jur. (N.S.) 785.—C.P.

Ward, *In re* (1838) 7 L. J. Ch. 137.—L.C., *referred to*.

Whiting, *In re* (1846) 15 L. J. Ch. 242, 252; S. C. *nom.* Master's Clerks' Case, 1 Ph. 650.—L.C.

Att.-Gen. v. Sitwell (1835) 5 L. J. Ex. Eq. 86; 1 Y. & C. 559.—EX.

Referred to, **Steele v. Haddock** (1855) 24 L. J. Ex. 78; 10 Ex. 643; 3 C. L. R. 326; 3 W. R. 172.—EX.; *discussed*, **Gun v. McCarthy** (1884) 13 L. R. Ir. 304.—FLANAGAN, J.

Macbeath v. Haldimand (1786) 1 Term Rep. 172; 1 R. R. 177.—K.B., *applied*.

Thomas v. Reg. (1874) 44 L. J. Q. B. 9, 16; L. R. 10 Q. B. 81, 43; 31 L. T. 439; 23 W. R. 176.—Q.B.; **Grant v. Secretary of State for India** (1877) 46 L. J. C. P. 681; 2 C. P. D. 445; 37 L. T. 188; 25 W. R. 848.—C.P.D.; and **Palmer v. Hutchinson** (1881) 50 L. J. P. C. 62; 6 App. Cas. 619; 45 L. T. 180.—P.C.

Rankin v. Huskisson (1830) 4 Sim. 13.—V.-C., *distinguished*.

Squire v. Campbell (1836) 4 L. J. Ch. 41; 1 Myl. & Cr. 459.—L.C.

Squire v. Campbell (1836) 6 L. J. Ch. 41; 1 Myl. & Cr. 459.—L.C., *explained and distinguished*.

Soltan v. De Held (1851) 21 L. J. Ch. 153; 2 Sim. (N.S.) 133; 16 Jur. 326.—KINDERSLEY, V.-C.

Churchward v. Reg. (1865) L. R. 1 Q. B. 173; 14 L. T. 57.—Q.B., *dictum adopted*.

Midland Ry. v. L. & N. W. Ry. (1866) 35 L. J. Ch. 831; L. R. 2 Eq. 524; 15 L. T. 264; 15 W. R. 34.—V.-C.

Unwin v. Walesby (1787) 1 Term Rep. 674.—K.B., *principle applied*.

Grant v. Secretary of State for India (1877) 46 L. J. C. P. 681; 2 C. P. D. 445; 37 L. T. 188; 25 W. R. 848.—C.P.D.

Gidley v. Palmerston (Lord) (1822) 3 Br. & B. 275; 7 Moore 91; 24 L. R. 668.—C.P., *applied*.

Tufnell, *In re* (1876) 45 L. J. Ch. 731; 3 Ch. D. 164; 175; 34 L. T. 838; 24 W. R. 915.—MALINS, V.-C.; **Grant v. Secretary of State for India** (1877) 46 L. J. C. P. 681; 2 C. P. D. 445; 37 L. T. 188; 25 W. R. 848.—C.P.D.; and **Palmer v. Hutchinson** (1881) 50 L. J. P. C. 62; 6 App. Cas. 619; 45 L. T. 180.—P.C.

Gidley v. Palmerston (Lord), *adopted*.

Smith v. Lord Advocate (1897) 25 Rettie 112, 121, n.—CT. OF SESS.

Gidley v. Palmerston (Lord), *applied*.

Mackie v. Lord Advocate (1898) 25 Rettie 769, 775.—CT. OF SESS.

Gidley v. Palmerston (Lord), *distinguished*.

Graham v. Public Works Commissioners (1901) 70 L. J. K. B. 860; [1901] 2 K. B. 781; 85 L. T. 96; 50 W. R. 122; 65 J. P. 677.—K.B.D.

Poe, *In re* (1833) 3 L. J. K. B. 33; 5 B. & Ad. 681; 2 N. & M. 636.—K.B., *principle applied*.

Tufnell, *In re* (1876) 45 L. J. Ch. 731; 3 Ch. D. 164; 34 L. T. 838; 24 W. R. 915.—V.-C.; and **Grant v. Secretary of State for India** (*infra*).

Napier, *Ex parte* (1852) 21 L. J. Q. B. 332; 18 Q. B. 692; 17 Jur. 380.—Q.B.; and

Tufnell, *In re* (*supra*), *principles applied*.

Grant v. Secretary of State for India (1877) 46 L. J. C. P. 681; 2 C. P. D. 445; 37 L. T. 188; 25 W. R. 848.—C.P.D.

Buron v. Denman (1848) 2 Ex. 167.—EX., *discussed and applied*.

Doss v. Secretary of State for India (1875) L. R. 19 Eq. 509; 32 L. T. 294; 23 W. R. 773.—MALINS, V.-C.

Buron v. Denman, *adopted*.

London Corporation v. Cox (1867) 36 L. P. Ex. 225; L. R. 2 H. L. 239, 262; 16 W. R. 44.—H.L. (E.).

Buron v. Denman, *applied*.

Phillips v. Eyre (1870) 40 L. J. Q. B. 28; L. R. 6 Q. B. 1, 24; 22 L. T. 869; 10 B. & S. 1004.—EX. CH.

Buron v. Denman, applied.

Mill v. Hawker (1874) 43 L. J. Ex. 129; L. R. 9 Ex. 309, 326; 30 L. T. 894; 23 W. R. 26.—EX.: *affirmed*, 44 L. J. Ex. 49; L. R. 10 Ex. 92; 33 L. T. 177; 23 W. R. 348.—EX. CH.

Buron v. Denman, referred to.

Dixon v. Farrer (1886) 56 L. J. Q. B. 53; 18 Q. B. D. 43; 55 L. T. 578; 35 W. R. 95; 6 Asp. M. C. 52.—C.A. ESHER, M.R. LINDLEY and LOPES, L.JJ.

Buron v. Denman, inapplicable.

Francis v. Carr (1900) 82 L. T. 698.—C.A.: *reversed*, 85 L. T. 144.—H.L. (E.).

Grenville-Murray v. Clarendon (1869) 39 L. J. Ch. 221; L. R. 9 Eq. 11.—M.R., explained and applied.

Hayman v. Rugby School Governors (1874) 43 L. J. Ch. 834; L. R. 18 Eq. 28, 86; 30 L. T. 217; 22 W. R. 587.—MALINS, V.-C.

Gibson v. East India Co. (1839) 8 L. J. C. P. 193; 5 Bing. N. C. 262; 7 Scott 74.—C.P., principle applied.

Tufnell, In re (1876) 45 L. J. Ch. 731; 3 Ch. D. 164, 175; 34 L. T. 838; 24 W. R. 915.—V.-C.

Gibson v. East India Co., applied.

Grant v. Secretary of State for India (1877) 46 L. J. C. P. 681; 2 C. P. D. 445; 37 L. T. 188; 25 W. R. 848.—C.P.D.

Gibson v. East India Co., distinguished.

Booth v. Traill (1883) 53 L. J. Q. B. 24; 12 Q. B. D. 8, 11; 49 L. T. 471; 32 W. R. 122.—COLLIERIDGE, C.J. and STEPHEN, J.

Dickson v. Combermere (Viscount) (1863) 3 F. & F. 527.—Q.B., distinguished.

Dawkins v. Paulet (1869) 39 L. J. Q. B. 53; L. R. 5 Q. B. 94, 122; 9 B. & S. 768; 21 L. T. 584; 18 W. R. 336.—Q.B.

Dickson v. Combermere (Lord), principle applied.

Grant v. Secretary of State for India (1877) 46 L. J. C. P. 681; 2 C. P. D. 445; 37 L. T. 188; 25 W. R. 848.—C.P.D.

Kirk v. Reg. (1872) L. R. 14 Eq. 558.—V.-C., explained and distinguished.

Palmer v. Hutchinson (1881) 50 L. J. P. C. 62; 6 App. Cas. 619; 45 L. T. 180.—P.C.

SIR B. PEACOCK (for the Court).—The Crown by virtue of its prerogative, has a right to sue by information in the name of the Attorney-General, and also has a right to sue in the Admiralty Court in the name of the Procurator-General. . . . But this right of the Crown affords no support for the proposition that the Government revenue may be reached by a suit against a public officer in his official capacity. *Kirk v. Reg.*, which was cited by the C.J., is no authority for that proposition. . . . It seems to have been intimated that in such a suit the Secretary of State for War should be a party—that is, a party as complainant, not as defendant. Their lordships are clearly of opinion that the Deputy Commissary-General cannot be sued, either personally or in his official capacity, upon a contract entered into by him on behalf of the Commissariat Department.—p. 66.

Wood's Estate, In re, Works and Public Buildings Commissioners, Ex parte (1886)

55 L. J. Ch. 488; 31 Ch. D. 607; 54 L. T.

145; 34 W. R. 375.—C.A., *dictum disapproved*.

Mill's Estate, In re, Commissioners of Works and Buildings, Ex parte (1886) 56 L. J. Ch. 60; 34 Ch. D. 24; 55 L. T. 465; 35 W. R. 65; 51 J. P. 151.—C.A.

Wood's Estate, In re, Works and Public Buildings Commissioners, Ex parte, observations applied.

Graham v. Works and Public Buildings Commissioners (1901) 70 L. J. K. B. 860; [1901] 2 K. B. 781; 85 L. T. 96; 50 W. R. 122; 65 J. P. 677.—RIDLEY and PHILLIMORE, JJ.

Dunn v. Macdonald (1897) 66 L. J. Q. B. 420; [1897] 1 Q. B. 555; 76 L. T. 444; 45 W. R. 355.—C.A., distinguished.

Graham v. Works and Public Buildings Commissioners (1901) 70 L. J. K. B. 860; [1901] 2 K. B. 781; 85 L. T. 96; 50 W. R. 122; 65 J. P. 677.—RIDLEY and PHILLIMORE, JJ.

Graham v. Works and Public Buildings Commissioners (1901) 70 L. J. K. B. 860;

[1901] 2 K. B. 781; 85 L. T. 96; 50 W. R. 122; 65 J. P. 677.—K.B.D., *considered*.

Wheeler v. Public Works Commissioners (1901) [1903] 2 Ir. R. 202.—C.A.: *and see* Madden's Estate, In re (1901) [1902] 1 Ir. R. 63.—C.A.

Charlesworth v. Rudgard (1885) 1 C. M. & R. 896.—EX. *See* 56 & 57 Viet. c. 61, s. 1.

Att.-Gen. v. Andrews (1850) 19 L. J. Ch. 197; 2 H. & Tw. 431.—V.-C.: *affirmed*, 20 L. J. Ch. 467; 2 Mac. & G. 225; 14 Jur. 905.—LORDS COMMISSIONERS.

Att.-Gen. v. Andrews, referred to.

Bateman v. Ashton-under-Lyne Corporation (1858) 27 L. J. Ex. 458; 3 H. & N. 323; 6 W. R. 829.—EX.

Att.-Gen. v. Andrews, followed.

Att.-Gen. v. West Hartlepool Improvement Commissioners (1870) 39 L. J. Ch. 624; L. R. 10 Eq. 152; 22 L. T. 510; 18 W. R. 685.—V.-C.; Cleverton v. St. Germain's Sanitary Authority (1886) 56 L. J. Q. B. 83, 85.—STEPHEN, J.

Woolley v. Kay (1856) 25 L. J. Ex. 351; 1 H. & N. 307.—EX., *distinguished*.

Nicholson v. Fields (1862) 31 L. J. Ex. 233; 7 H. & N. 810; 10 W. R. 304.—EX.

Nicholson v. Fields, followed.

Lewis v. Carr (1876) 46 L. J. Ex. 314, 315; 1 Ex. D. 484, 487; 36 L. T. 44; 24 W. R. 940.—C.A.

Nicholson v. Fields, commented on.

Fletcher v. Hudson (1881) 51 L. J. Q. B. 48; 7 Q. B. D. 611; 46 L. T. 125; 30 W. R. 349; 46 J. P. 372.—C.A.

Hall v. Smith (1824) 2 Bing. 156; 9 Moore 226; 2 L. J. (o.s.) C. P. 113.—C.P., *commented on*.

Scott v. Manchester Corporation (1856) 1 H. & N. 59; 26 L. J. Ex. 132.—EX., *affirmed*, (1857) 2 H. & N. 204; 26 L. J. Ex. 406; 3 Jur. (N.S.) 590; 5 W. R. 598.—EX. CH.

ALDERSON, B.—*Hall v. Smith* goes too far: the person who selects the workmen is the party liable. Commissioners may get rid of liability by making contracts, but if they employ their own servants to do the work, they will be liable for the acts of such servants (p. 60), . . .

Hall v. Smith was rightly decided upon the facts.—p. 61.

POLLOCK, C.B.—I do not mean to say that the decision in *Hall v. Smith* was not a correct one, but more was said than was necessary for the decision of the case.—p. 60.

Hall v. Smith, explained.

Sharpley v. Hornsby (1852) 2 Ir. C. L. R. 590. 623.—EX.

Hall v. Smith, dicta denied.

Mersey Docks v. Gibbs (1866) 11 H. L. Cas. 686; 35 L. J. Ex. 225, 233; L. R. 1 H. L. 93, 113; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.—H.L. (E.).

BLACKBURN, J. [in answering the question put by their lordships to the judges].—He [*i.e.*, Best, C.J., in *Hall v. Smith*] points out, clearly and forcibly, that it is harsh and impolitic to cast on individuals, acting gratuitously, a public duty, and make them responsible out of their private means for the non-fulfilment of it. But for many years it has been the practice of the Legislature to exempt the private means of commissioners from liability, either as in the present series of Acts, by incorporating them, or by enabling them to sue and be sued in the name of a clerk, and restricting the execution to the property which they hold as commissioners. The basis of Chief Justice Best's reasoning fails, and *debile fundamentum fallit opus*.

Wormwell v. Hailstone (1830) 8 L. J. (O.S.) C. P. 264; 6 Bing. 668; 4 M. & P. 512.—C.P., *adopted*.

Cane v. Chapman (1836) 6 L. J. K. B. 49; 5 A. & E. 647; 1 N. & P. 104; 2 H. & W. 355.—K.B.

Cane v. Chapman (1836) 6 L. J. K. B. 49; 5 A. & E. 647; 1 N. & P. 104; 2 H. & W. 355.—K.B., *adopted*.

Bogg v. Pearse (1851) 20 L. J. C. P. 99; 10 C. B. 534; 2 L. M. & P. 21.—C.P.

Cane v. Chapman, *distinguished*.

Edwards v. Lowndes (1852) 22 L. J. Q. B. 104; 1 El. & Bl. 81, 90; 17 Jur. 412.—Q.B.

Bogg v. Pearse (1851) 20 L. J. C. P. 99; 10 C. B. 534; 2 L. M. & P. 21.—C.P., *not applied*.

Hall v. Taylor (1858) 27 L. J. Q. B. 311; El. Bl. & El. 107; 4 Jur. (N.S.) 877.—Q.B.

Bogg v. Pearse, *distinguished*.

Bush v. Martin (1863) 33 L. J. Ex. 17; 2 H. & C. 311; 10 Jur. (N.S.) 347; 9 L. T. 510; 12 W. R. 204.—EX.

Kendall v. King (1856) 25 L. J. C. P. 132; 17 C. B. 483; 4 W. R. 389.—C.P., *approved*.

Hall v. Taylor (1858) 27 L. J. Q. B. 311; El. Bl. & El. 107; 4 Jur. (N.S.) 877.—Q.B.

Kendall v. King and Hall v. Taylor, *applied*.

Bush v. Beavan (1862) 32 L. J. Ex. 54; 1 H. & C. 500; 8 Jur. (N.S.) 1015; 7 L. T. 106; 10 W. R. 845.—EX.

Pallister v. Gravesend Corporation (1850)

19 L. J. C. P. 358; 9 C. B. 774.—C.P.

Followed, Bush v. Martin (1863) 33 L. J. Ex. 17; 2 H. & C. 311; 10 Jur. (N.S.) 347; 9 L. T. 510; 12 W. R. 204.—EX.; *adopted*, Att.-Gen. v. Newcastle Corporation (1889) 58 L. J. Q. B. 558; 23 Q. B. D. 492, 497.—C.A., *reversing* 60 L. T. 791; 53 J. P. 421.—WILLS, J.

Payne v. Brecon Corporation (1858) 27 L. J. Ex. 495; 3 H. & N. 572; 6 W. R. 801.—EX., *followed*.

Bush v. Martin (1863) 33 L. J. Ex. 17; 2 H. & C. 311; 10 Jur. (N.S.) 347; 9 L. T. 510; 12 W. R. 204.—EX.

Payne v. Brecon Corporation, *referred to*.

Pickering v. Ilfracombe Ry. (1868) 37 L. J. C. P. 118, 123; L. R. 3 C. P. 235, 250; 17 L. T. 650; 16 W. R. 458.—C.P.

Payne v. Brecon Corporation, *adopted*.

Att.-Gen. v. Newcastle Corporation (1889) 58 L. J. Q. B. 558; 23 Q. B. D. 492, 497.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.; *reversing* 60 L. T. 791; 53 J. P. 421.—WILLS, J.

Payne v. Brecon Corporation, *referred to*.

Canavan v. Burton (1899) [1900] 2 Ir. R. 365.—Q.B.D.

Barber v. Nottingham and Grantham Ry.

(1864) 33 L. J. C. P. 193; 15 C. B. (N.S.) 726; 10 Jur. (N.S.) 260; 9 L. T. 829; 12 W. R. 376.—C.P., *distinguished*.

Dunn v. Birmingham Canal Co. (1872) 41 L. J. Q. B. 121, 126; L. R. 7 Q. B. 244, 267.—Q.B. (*affirmed*, EX. CH.); Rhodes v. Airedale Drainage Commrs. (1876) 45 L. J. C. P. 337; 1 C. P. D. 380, 396.—C.P.D.; *reversed*, C.A. *See ante*, col. 1547.

Saunders v. Slack (1864) 11 L. T. 484; L. R.

1 C. P. 720, n.—EX., *followed*.

Worral Waterworks Co. v. Lloyd (1866) L. R. 1 C. P. 719.—C.P.

Coe v. Wise (1866) 37 L. J. Q. B. 262; L. R.

1 Q. B. 711; 7 B. & S. 831; 14 L. T. 891; 14 W. R. 865.—EX. CH., *observation adopted*.

Mersey Docks v. Gibbs (1866) L. R. 1 H. L. 93, 107; 11 H. L. Cas. 686; 35 L. J. Ex. 225; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.—H.L. (E.).

Coe v. Wise, *followed*.

Worral Waterworks Co. v. Lloyd (1866) L. R. 1 C. P. 719.—C.P.

Coe v. Wise, *applied*.

Birch v. St. Marylebone Vestry (1869) 20 L. T. 697, 701.—Q.B.

Coe v. Wise, *referred to*.

Gibraltar Sanitary Commrs. v. Orfila (1890) 59 L. J. P. C. 95; 15 App. Cas. 400, 408; 63 L. T. 58.—P.C.

Coe v. Wise, *applied*.

Wheeler v. Public Works Commissioners (1901) [1903] 2 Ir. R. 202.—C.A.

Bulstrode v. Gilburn (1736) 2 Str. 1027.

—K.B., *adopted*.

Campbell v. Hewlitt (1851) 16 Q. B. 258.—Q.B.

Radford v. McIntosh (1790) 3 Term Rep.

632.—K.B., *applied*.

Doe d. Bowley v. Barnes (1846) 15 L. J. Q. B. 293; 8 Q. B. 1037.—Q.B.

M'Gahey v. Alston (1836) 6 L. J. Ex. 29; 2

M. & W. 206; 2 Gale 238.—EX.; and

Doe d. Bowley v. Barnes (1846) 15 L. J.

Q. B. 293; 8 Q. B. 1037.—Q.B., *recognised*.

M'Mahon v. Lennard (1858) 6 H. L. Cas. 970.—H.L. (IR.).

Doe d. Bowley v. Barnes, *adapted*.
Reg. v. Roberts (1878) 38 L. T. 690; 14 Cox C. C. 101.—C.C.R.

Stephenson v. Stephens (1847) 11 Ir. L. R. 10.—EX., *not followed*.

Haylock v. Sparke (1853) 22 L. J. M. C. 67; 1 El. & Bl. 471; 17 Jur. 731.—K.B., *principle applied*.

McMahon v. Lennard (1858) 6 H. L. Cas. 970.—H.L. (1R.).

Haylock v. Sparke, *commented upon*.

Halpin v. Rice [1901] 2 Ir. R. 607.—K.B.D.

GIBSON, J.—In *Haylock v. Sparke*, the magistrate wrongly adjudicated as in a peace case when he only would have had jurisdiction for good behaviour. Lord Campbell held that he was protected in an action for false imprisonment. I am not certain that Lord Campbell would have used the language he did if there was such a radical difference as to defence between the two proceedings as is now urged.—p. 607.

Rex v. Stratton (1780) 21 Howell St. Tr. 1045, 1223.—K.B., *dicta inapplicable*.

Reg. v. Dudley (1884) 54 L. J. M. C. 32; 14 Q. B. D. 273; 52 L. T. 107; 33 W. R. 347; 15 Cox C. C. 624; 49 J. P. 69.—C.C.R.

Rex v. Gayer (1757) 1 Burr. 245.—K.B.;

Gage v. Peacock, Noy 12; **Verier v.**

Sandwich Corporation (1666) 2 Keble 92;

Rex v. Trelawney, 3 Burr. 1615.—K.B.;

Rex v. Pateman (1788) 2 Term Rep. 777;

1 R. R. 621.—K.B.; **Rex v. Hughes**

(1826) 5 L. J. (O.S.) M. C. 20; 5 B. & C.

886; 8 D. & R. 708; 29 R. R. 458.—K.B.;

Johnstone v. Margetson (1789) 1 H. Bl.

261.—C.P.; **Rex v. Tizzard** (1829) 7

L. J. (O.S.) K. B. 275; 9 B. & C. 418; 4

M. & R. 400.—K.B.; **Rex v. Holt** (1818)

2 Chitty 366.—K.B.; and **Reg. v. Lane**

(1709) 2 Ld. Raym. 1304; 8 C. 11 Mod.

270; Fort. 275.—K.B., *observed upon*.

Rex v. Patteson (1832) 2 L. J. K. B. 33; 4 B.

& Ad. 9; 1 N. & M. 612.—K.B.

Milward v. Thatcher (1787) 2 Term Rep.

81; 1 R. R. 431.—K.B., *observed upon*.

Rex v. Patteson (1832) 2 L. J. K. B. 33; 4 B.

& Ad. 9; 1 N. & M. 612.—K.B.

Milward v. Thatcher, *adapted*.

Reg. v. Bangor Corporation (1887) 56 L. J.

Q. B. 326; 18 Q. B. D. 349, 359; 35 W. R. 158;

51 J. P. 51.—C.A.

Milward v. Thatcher. *See*

Pritchard v. Bangor Corporation (1888) 57

L. J. Q. B. 313; 13 App. Cas. 241; 58 L. T. 502;

37 W. R. 103; 52 J. P. 564.—H.L. (E.).

Rex v. Patteson (1832) 2 L. J. K. B. 33; 4

B. & Ad. 9; 1 N. & M. 612.—K.B., *con-*

sidered.

Worth v. Newton (1854) 23 L. J. Ex. 338; 10

Ex. 247; 2 C. L. R. 1471; 2 W. R. 628.—EX.

Rex v. Patteson, *dictum not adopted*.

Davis v. Pembrokehire JJ. (1881) 7 Q. B. D. 513, 515.—GROVE and LINDLEY, JJ.

Rex v. Patteson, *referred to*.
Reg. v. Blaney (1900) [1901] 2 Ir. R. 104.—Q.B.D.

Rex v. Griffiths (1822) 5 B. & Ald. 731.—K.B., *dictum approved but distinguished*.
Reg. v. Saddlers' Co. (1863) 10 H. L. Cas. 404; 32 L. J. Q. B. 337; 9 Jur. (N.S.) 1081; 9 L. T. 60; 11 W. R. 1004.—H.L. (E.).

Reg. v. Saddlers' Co. (1860) 30 L. J. Q. B. 186; 3 El. & El. 42; 6 Jur. (N.S.) 1113.—Q.B., *affirmed*, (1861) 30 L. J. Q. B. 194; 7 Jur. (N.S.) 138.—EX. CH.; *the latter reversed*, (1863) 32 L. J. Q. B. 337; 10 H. L. Cas. 404; 9 Jur. (N.S.) 1081; 9 L. T. 60; 11 W. R. 1004.—H.L. (E.).

Wray v. Chapman (1850) 19 L. J. M. C. 155; 14 Q. B. 742; 14 Jur. 687.—Q.B.

Reddish v. Hitchinor (1878) 48 L. J. M. C. 31, 33; 40 L. T. 65.—Q.B.

Marchant v. Lee Conservancy Board, L. R. 8 Ex. 290; 42 L. J. Ex. 141.—EX.; *reversed*, (1874) L. R. 9 Ex. 60; 43 L. J. Ex. 44; 30 L. T. 367.—EX. CH.

Marchant v. Lee Conservancy Board, *distinguished*.

Reg. v. St. George's, Southwark, Vestry (1887) 56 L. J. Q. B. 652; 19 Q. B. D. 533; 35 W. R. 841; 52 J. P. 6.—STEPHEN and WILLS, JJ.

Reg. v. Postmaster-General (1878) 47 L. J. Q. B. 435; 3 Q. B. D. 428; 38 L. T. 89.—C.A., *adopted*.

Cooper v. Reg. (1880) 49 L. J. Ch. 490; 14 Ch. D. 311; 42 L. T. 617; 28 W. R. 611.—MALINS, V.-C.

Davis v. Marlborough (Duke) (1818) 1 Swanst. 74, 79; 2 Wils. 130.—L.C., *distinguished*.

Grenfell v. Windsor (Dean) (1840) 2 Beav. 544.—M.R.

Davis v. Marlborough (Duke), *observation adopted*.

Hill v. Paul (1841) 8 Cl. & F. 295.—H.L. (SC.).

Davis v. Marlborough (Duke), *approved*.
Duke of Marlborough's Parliamentary Estates, In re (1891) 8 Times L. R. 180.—CHITTY, J.

Palmer v. Vaughan (1818) 3 Swanst. 173.—L.C.; **Parsons v. Thompson** (1790) 1 H. Bl. 322; 28 R. R. 289.—C.P., *applied*.

Liverpool Corporation v. Wright (1859) 28 L. J. Ch. 868; 1 Johns. 359; 5 Jur. (N.S.) 1156; 7 W. R. 728.—WOOD, V.-C.

Palmer v. Bate (1821) 6 Moore 28; 2 Br. & B. 673; 23 R. R. 525.—C.P., *applied*.

Hill v. Paul (1841) 8 Cl. & F. 295.—H.L. (SC.).

Wells v. Foster (1841) 10 L. J. Ex. 216; 8 M. & W. 149; 5 Jur. 464.—EX. *See*

Morris v. Manesty (1845) 14 L. J. Q. B. 285; 7 Q. B. 674; 9 Jur. 1034.—Q.B.

Wells v. Foster, *distinguished*.

Spooner v. Payne (1849) 18 L. J. Ex. 401, 403.—EX. *And see col. 2633.*

Wells v. Foster (*supra*), *dictum adopted*.
Willcock v. Terrell (1878) 3 Ex. D. 323; 39 L. T. 84.—C.A.

Wells v. Foster, *adopted*.
Birch v. Birch (1883) 52 L. J. P. 88; 8 P. D. 163; 32 W. R. 96.—HANNEN, P.

Wells v. Foster, *adopted*.
Lucas v. Harris (1886) 56 L. J. Q. B. 15; 18 Q. B. D. 127, 136; 55 L. T. 658; 35 W. R. 112; 51 J. P. 261.—C.A.

Willcock v. Terrell (1878) 3 Ex. D. 323; 39 L. T. 84.—C.A., *followed*.
Sansom v. Sansom (1879) 48 L. J. P. 25; 4 P. D. 69; 39 L. T. 642; 27 W. R. 692.—HANNEN, P.

Willcock v. Terrell, *referred to*.
Hoare, In re, Nelson, Ex parte (1880) 49 L. J. Bk. 44, 47; 14 Ch. D. 41, 48; 42 L. T. 389; 28 W. R. 554.—C.A.

Willcock v. Terrell, *distinguished*.
Birch v. Birch (1883) 52 L. J. P. 88; 8 P. D. 163; 32 W. R. 96.—HANNEN, P.
 [The above case was distinguished on the ground that there the pension was assignable by the person entitled to it.]

Willcock v. Terrell, *applied*.
Lucas v. Harris (1886) 56 L. J. Q. B. 15; 18 Q. B. D. 127, 132; 55 L. T. 658; 35 W. R. 112; 51 J. P. 261.—C.A.

Willcock v. Terrell, *observations applied*.
Robinson v. Galland (1889) 60 L. T. 697; 37 W. R. 396.—CHITTY, J.

Willcock v. Terrell, *referred to*.
Holmes v. Millage (1893) 62 L. J. Q. B. 380; [1893] 1 Q. B. 551, 556; 4 R. 332; 68 L. T. 205; 41 W. R. 354; 57 J. P. 551.—C.A.
 LINDLEY and BOWEN, L.JJ.

Willcock v. Terrell, *distinguished*.
Manning v. Mullins (1896) [1898] 2 Ir. R. 34, 41.—C.A.

Birch v. Birch (1883) 52 L. J. P. 88; 8 P. D. 163; 32 W. R. 96.—HANNEN, P., *explained and distinguished*.
Crowe v. Price (1888) 58 L. J. Q. B. 215; 22 Q. B. D. 429, 431; 60 L. T. 57.—COLERIDGE, C.J. and HAWKINS, J., *affirmed*, (1889) 58 L. J. Q. B. 215; 22 Q. B. D. 429, 431; 60 L. T. 915; 37 W. R. 424; 53 J. P. 389.—C.A.

Reg. v. Humphery (1839) 10 A. & E. 335; 2 P. & D. 691.—EX. CH.; *reversing* 7 L. J. Q. B. 202; 3 N. & P. 681; 1 W. W. & H. 470; 2 Jur. 1084.—Q.B., *distinguished*.
Reg. v. Cambridge Corporation (1840) 10 L. J. Q. B. 25; 12 A. & E. 702; 4 P. & D. 294.—Q.B.

Reg. v. Humphery, *observations applied*.
Paynter v. James (1867) L. R. 2 C. P. 348, 354; 15 L. T. 660; 15 W. R. 493.—C.P.; *affirmed*, 18 L. T. 449; 16 W. R. 768.—EX. CH.

Reg. v. Humphery. *See*
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Reg. v. Humphery, *referred to*.
Sidebotham v. Holland (1894) 64 L. J. Q. B.

200; [1895] 1 Q. B. 378, 381; 72 L. T. 62; 43 W. R. 228; 14 R. 135.—C.A.

Reg. v. Bridgewater Corporation (1837) 6 L. J. M. C. 78; 6 A. & E. 339; 1 N. & P. 466.—Q.B., *distinguished*.

Reg. v. Poole Corporation (1838) 7 L. J. Q. B. 126; 7 A. & E. 730; 3 N. & P. 119.—Q.B.; **Harvey, Ex parte** (1838) 7 L. J. Q. B. 129; 7 A. & E. 739; 3 N. & P. 159.—Q.B.

Reg. v. Bridgewater Corporation, *followed*.
Reg. v. Poole Corporation (*supra*), *not followed*.

Reg. v. Norwich Corporation (1842) 11 L. J. Q. B. 246; 3 Q. B. 285; 2 G. & D. 605.—Q.B.

Reg. v. Bridgewater Corporation, *distinguished*.

Reg. v. York Corporation (1842) 11 L. J. Q. B. 326; 3 Q. B. 550; 2 G. & D. 580; 6 Jur. 1082.—Q.B.

Reg. v. Bridgewater Corporation, *approved, but not applied*.

Reg. v. Brighton Council (1857) 26 L. J. Q. B. 153; 7 El. & Bl. 249; 3 Jur. (N.S.) 585; 5 W. R. 257.—Q.B.

• **Reg. v. Bridgewater Corporation**, *principle applied*.

Reg. v. Local Government Board (1874) 43 L. J. Q. B. 49; L. R. 9 Q. B. 148; 29 L. T. 769; 22 W. R. 315.—Q.B.

Reg. v. Bridgewater Corporation, *referred to*.

Reg. v. Armagh Urban District Council [1901] 2 Ir. R. 33.—Q.B.D.

Lee, Ex parte (1837) 7 A. & E. 139; 2 N. & P. 63.—K.B., *distinguished*.

Reg. v. Harwich Corporation (1842) 2 Q. B. 909; 2 G. & D. 109; 6 Jur. 821.—Q.B.

Reg. v. Norwich Corporation (1838) 8 A. & E. 633.—K.B.; and **Reg. v. Manchester Corporation** (1843) 5 Q. B. 402; 8 Jur. 421.—Q.B., *applied*.

Reg. v. Poor Law Board (1871) 41 L. J. M. C. 16; L. R. 6 Q. B. 785; 25 L. T. 304.—BAIL COURT.

Reg. v. Norwich Corporation. *See*
 Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 5.

Reg. v. Warwick Corporation (1840) 9 L. J. Q. B. 265; 10 A. & E. 386; 3 P. & D. 429.—Q.B. *See*

Reg. v. Newbury Corporation (1841) 1 Q. B. 751; 1 G. & D. 388; 6 Jur. 365.—Q.B.

Reg. v. Warwick Corporation and Reg. v. Newbury Corporation, *applied*.

Reg. v. Sandwich Corporation (1842) 11 L. J. Q. B. 132; 2 Q. B. 895; 2 G. & D. 28; 6 Jur. 684.—Q.B.

• **Reg. v. Warwick Corporation**. *See*
Reg. v. Harwich Corporation (1842) 2 Q. B. 909; 2 G. & D. 109; 6 Jur. 821.—Q.B.

QUIA TIMET.

Hughes-Hallett v. Indian Mammoth Gold Mines Co. (1882) 52 L. J. Ch. 418; 22 Ch. D. 561; 48 L. T. 107; 31 W. R. 285.—**FRY, J., distinguished.**
Hobbs v. Wayet (1887) 36 Ch. D. 256; 57 L. T. 225; 36 W. R. 73.—**KEKEWICH, J.**

Hughes-Hallett v. Indian Mammoth Gold Mines Co., distinguished.
Blyth v. Fladgate (1890) 63 L. T. 546, 555.—**STIRLING, J.**

Hughes-Hallett v. Indian Mammoth Gold Mines Co., considered.
Wolmershausen v. Gullick (1893) 62 L. J. Ch. 773; [1893] 2 Ch. 514; 3 R. 610; 68 L. T. 753.—**WRIGHT, J.**

Hughes-Hallett v. Indian Mammoth Gold Mines Co., explained.
Hardoon v. Belilios (1900) 70 L. J. P. C. 9; [1901] A. C. 118; 83 L. T. 573; 49 W. R. 209.—**P.C.**

QUO WARRANTO.

Reg. v. Ward (1873) 42 L. J. Q. B. 126; L. R. 8 Q. B. 210; 28 L. T. 118; 21 W. R. 632.—**BAIL CT., adopted.**
Julius v. Oxford (Bishop) (1880) 49 L. J. Q. B. 577, 591; 5 App. Cas. 214, 246; 42 L. T. 546; 28 W. R. 726; 44 J. P. 600.—**H.L. (E.).**

Reg. v. Blizard (1866) 36 L. J. Q. B. 18; L. R. 2 Q. B. 55; 7 B. & S. 922; 15 L. T. 242; 15 W. R. 105.—**Q.B., referred to.**
Reg. v. Tewkesbury Corporation (1868) 37 L. J. Q. B. 288; L. R. 3 Q. B. 629, 634; 18 L. T. 851; 16 W. R. 1200; 5 B. & S. 683.—**Q.B.**

Rex v. Tate (1803) 4 East 337.—**K.B., approved and distinguished.**
Reg. v. Jones (1873) 28 L. T. 270.—**Q.B.**

Rex v. Marsden (1765) 1 W. Bl. 579; 3 Burr. 1812.—**K.B., followed.**
Moseley v. Chadwick (1782) 3 Dougl. 117; 7 B. & C. 47, n.; 81 L. R. 150, n.—**MANSFIELD, C.J.**

Rex v. Bedford Level Corporation (1805) 6 East 356; 2 Smith 535.—**K.B. See**
Reg. v. Hampton (1865) 6 B. & S. 923; 12 Jur. (N.S.) 583; 13 L. T. 431; 15 W. R. 43.—**Q.B.**

Rex v. Bedford Level Corporation, commented upon.
Reg. v. Hertford College (1878) 47 L. J. Q. B. 649, 656; 3 Q. B. D. 693, 704; 39 L. T. 18; 27 W. R. 347.—**C.A.**

Rex v. Bedford Level Corporation, considered and applied.
Reg. v. Bayly (1897) [1898] 2 Ir. R. 335.—**Q.B.D., affirmed, C.A.**

Darley v. Reg. (1846) 12 Cl. & F. 520.—**H.L. (Ib.), explained.**
Barlow, In re (1861) 30 L. J. Q. B. 271; 5 L. T. 289.—**BAIL CT.**

Darley v. Reg., discussed and principles applied.
Reg. v. Bayly (1897) [1898] 2 Ir. R. 335.—**Q.B.D., affirmed, C.A.**

Darley v. Reg., discussed.
Reg. v. Blaney (1900) [1901] 2 Ir. R. 93.—**Q.B.D.**

Reg. v. St. Martin-in-the-Fields Guardians (1851) 20 L. J. Q. B. 423; 17 Q. B. 149; 15 Jur. 800.—**Q.B., observations considered.**
Reg. v. Petticrew (1886) 18 L. R. Ir. 342, 352.—**Q.B.D.; and Reg. v. Whelan** (1887) 20 L. R. Ir. 461.—**Q.B.D.**

Reg. v. St. Martin-in-the-Fields Guardians, distinguished.
Reg. v. Bayly (1897) [1898] 2 Ir. R. 335.—**Q.B.D., affirmed, C.A.**

Reg. v. St. Martin-in-the-Fields Guardians, referred to.
Reg. v. Blaney (1900) [1901] 2 Ir. R. 93, 108.—**Q.B.D.; and see Barlow, In re, infra.**

Reg. v. Bayly (1897) [1898] 2 Ir. R. 335.—**C.A., considered.**
Reg. v. Blaney (1900) [1901] 2 Ir. R. 93.—**Q.B.D.**

Barlow, In re (1861) 30 L. J. Q. B. 271; 5 L. T. 289.—**BAIL CT., dictum approved, but not applied.**
Reg. v. Hertford College (1878) 47 L. J. Q. B. 649; 3 Q. B. D. 693; 39 L. T. 18; 27 W. R. 347.—**C.A.**

Barlow, In re, principle adopted.
Reg. v. Registrar of Joint Stock Companies (1888) 57 L. J. Q. B. 433; 21 Q. B. D. 131; 59 L. T. 67; 36 W. R. 695; 52 J. P. 710.—**Q.B.D.**

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Reg. v. Lambourn Valley Ry. (1888) 58 L. J. Q. B. 136; 22 Q. B. D. 463, 467; 60 L. T. 54; 53 J. P. 248.—**Q.B.D.**

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Reg. v. Leicester Guardians (1899) 68 L. J. Q. B. 945; [1899] 2 Q. B. 632; 81 L. T. 559.—**DARLING and PHILLIMORE, JJ.**

Rex v. Oxford Corporation (1837) 6 L. J. K. B. 103; 6 A. & E. 349; 1 N. & P. 474.—**K.B., referred to.**
Reg. v. Welchpool Corporation (1876) 35 L. T. 594, 598.—**Q.B.D.**

Reg. v. Leeds Corporation (1841) 11 A. & E. 512.—**Q.B., distinguished.**
Reg. v. Welchpool Corporation (1876) 35 L. T. 594, 598.—**Q.B.D.**

Reg. v. Leeds Corporation, distinguished.
Reg. v. Bangor Corporation (1886) 56 L. J. Q. B. 326; 18 Q. B. D. 349, 367; 35 W. R. 158; 51 J. P. 51.—**C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.**

Reg. v. Chester Corporation (1855) 25 L. J. Q. B. 61; 5 El. & Bl. 531; 2 Jur. (N.S.) 114; 4 W. R. 14.—**Q.B., applied.**
Reg. v. Welchpool Corporation (1876) 35 L. T. 594, 598.—**Q.B.D.**

Rex v. Clarke (1890) 1 East 38; 5 R. R. 505.—K.B., *dictu applied*.
Reg. v. Lofthouse (1866) 35 L. J. Q. B. 145; 152; L. R. 1 Q. B. 433; 7 B. & S. 447; 12 Jur. (N.S.) 619; 14 L. T. 359; 14 W. R. 649.—Q.B.

Rex v. McKay (1825) 4 B. & C. 351.—K.B., *referred to*.
Reg. v. Tugwell (1868) 38 L. J. Q. B. 12, 15; L. R. 3 Q. B. 704, 709; 9 B. & S. 367.—Q.B.

Reg. v. Quayle (1840) 10 L. J. Q. B. 99; 11 A. & E. 508; 4 P. & D. 442; 5 Jur. 368.—Q.B., *dictum questioned*.
Reg. v. Tugwell (1868) 38 L. J. Q. B. 12, 14; L. R. 3 Q. B. 704, 710; 9 B. & S. 367.—Q.B.

Reg. v. Quayle, *applied*.
Reg. v. Collins (1875) 23 W. R. 325.—BLACKBURN, J.

Reg. v. Lofthouse (1866) 35 L. J. Q. B. 145; L. R. 1 Q. B. 433; 7 B. & S. 447; 12 Jur. (N.S.) 619; 14 L. T. 359; 14 W. R. 649.—Q.B., *observations adopted*.
Reg. v. Collins (1876) 45 L. J. Q. B. 413; 1 Q. B. D. 336; 34 L. T. 447; 24 W. R. 732.—Q.B.D., *affirmed*. 46 L. J. Q. B. 257; 2 Q. B. D. 30; 36 L. T. 192.—C.A.

Reg. v. Tugwell (1868) 38 L. J. Q. B. 12; L. R. 3 Q. B. 704; 9 B. & S. 367.—Q.B., *applied*.
Reg. v. Harrald (1873) L. R. 8 Q. B. 418; 42 L. J. Q. B. 211; 28 L. T. 767; 21 W. R. 910.—Q.B.

Reg. v. Tugwell, *principle applied*.
Isaacson v. Durrant (1886) 54 L. T. 684.—DENMAN and FIELD, JJ.

RAILWAY.

1. PLACE OF BUSINESS.
2. POWERS AND DUTIES IN CONSTRUCTING AND WORKING.
3. MANAGEMENT OF BUSINESS.
4. TRESPASS ON RAILWAY.
5. PASSENGER DUTY.
6. ARBITRATION.
7. RAILWAY COMMISSION.
8. ABANDONMENT, ARRANGEMENT, WINDING UP AND EXECUTION.

1. PLACE OF BUSINESS.

Adams v. G. W. Ry. (1861) 30 L. J. Ex. 124; 6 H. & N. 404; 3 L. T. 631; 9 W. R. 254.—EX., *applied*.
Shiels v. G. N. Ry. (1861) 30 L. J. Q. B. 331; 4 B. & S. 326; 4 L. T. 479; 9 W. R. 739; S. C. *nom.* **Shields v. G. N. Ry.**, 7 Jur. (N.S.) 631.—HILL, J.

Shiels v. G. W. Ry., *approved*.
Brown v. L. & N. W. Ry. (1863) 32 L. J. Q. B. 318; 4 B. & S. 326; 10 Jur. (N.S.) 234; 8 L. T. 695; 11 W. R. 884.—Q.B.

Adams v. G. W. Ry. and Shiels v. G. W. Ry. *referred to*.
Cesena Sulphur Co. v. Nicholson (1876) 45 L. J. Ex. 821; 1 Ex. D. 428; 35 L. T. 275; 25 W. R. 71.—HUDDLESTON, B.

Taylor v. Crowland Gas and Coke Co. (1855) 11 Ex. 1; 24 L. J. Ex. 233; 1 Jur. (N.S.) 358; 3 W. R. 368.—EX., *applied*.
Adams v. G. W. Ry. (1861) 30 L. J. Ex. 124; 6 H. & N. 404; 3 L. T. 631; 9 W. R. 254.—EX.; **Shiels v. G. N. Ry.** (1861) 30 L. J. Q. B. 331; 4 B. & S. 326; 4 L. T. 479; 9 W. R. 739; S. C. *nom.* **Shields v. G. N. Ry.**—HILL, J.

Taylor v. Crowland Gas and Coke Co., *discussed*.
Strachey v. Osborne (1874) L. R. 10 C. P. 92; 44 L. J. C. P. 6; 31 L. T. 374; 23 W. R. 75.—C.P.; **Cesena Sulphur Co. v. Nicholson** (1876) 45 L. J. Ex. 821; 1 Ex. D. 428; 35 L. T. 275; 25 W. R. 71.—HUDDLESTON, B.

Brown v. L. & N. W. Ry. (1863) 32 L. J. Q. B. 318; 4 B. & S. 326; 10 Jur. (N.S.) 234; 8 L. T. 695; 11 W. R. 884.—Q.B., *referred to*.
Cesena Sulphur Co. v. Nicholson (1876) 45 L. J. Ex. 821; 1 Ex. D. 428; 35 L. T. 275; 25 W. R. 71.—HUDDLESTON, B.

Brown v. L. & N. W. Ry., *followed*.
Le Tailleur v. S. E. Ry. (1877) 3 C. P. D. 18.—GROVE, J.

Brown v. L. & N. W. Ry., *followed*.
Rogers v. L. C. & D. Ry. (1877) 26 W. R. 192.—GROVE and LINDLEY, JJ.

2. POWERS AND DUTIES IN CONSTRUCTING AND WORKING.

Scottish N. E. Ry. v. Stewart (1859) 3 Macq. 382; 5 Jur. (N.S.) 607; 7 W. R. 458.—H.L. (SC.), *discussed*.
Taylor v. Chichester and Midhurst Ry. (1867) 36 L. J. Ex. 201; L. R. 2 Ex. 356.—EX. CH.; judgment of majority reversed (*see post*, col. 2680).

Scottish N. E. Ry. v. Stewart, *discussed*.
Reg. v. G. W. Ry. (1893) 62 L. J. Q. B. 572; 9 R. 1; 69 L. T. 572.—C.A. **ESHER, M.R., BOWEN and KAY, L.JJ.**

Reg. v. York and North Midland Ry. (1852) 22 L. J. Q. B. 41; 1 El. & Bl. 178; 7 Railw. Cas. 336; 17 Jur. 35.—Q.B.; *reversed nom.* **York and North Midland Ry. v. Reg.** (1853) 22 L. J. Q. B. 225; 1 El. & Bl. 558; 1 C. L. R. 119; 17 Jur. 630; 7 Railw. Cas. 459; 1 W. R. 358.—EX. CH.

York and North Midland Ry. v. Reg., *applied*.
G. W. Ry. v. Reg. (1853) 1 El. & Bl. 874; 16 Jur. 675; 2 W. R. 54.—EX. CH.

York and North Midland Ry. v. Reg., *approved*.
Edinburgh, Perth and Dundee Ry. v. Philip (1857) 2 Macq. 514; 3 Jur. (N.S.) 249; 5 W. R. 377.—H.L. (SC.); **Astley v. Manchester, Sheffield and Lincolnshire Ry.** (1858) 27 L. J. Ch. 478; 2 De G. & J. 453; 4 Jur. (N.S.) 567; 6 W. R. 561.—CHELMSFORD, L.C.

York and North Midland Ry. v. Reg.,
discussed.

Reg. v. French (1878) 47 L. J. M. C. 74; L. R. 3 Q. B. 187; 38 L. T. 385; 26 W. R. 437.—MELLOR and LUSH, JJ.; and (1879) 48 L. J. M. C. 175; 4 Q. B. D. 507; 41 L. T. 63.—C.A.

York and North Midland Ry. v. Reg.,
referred to.

Forbes v. Lee Conservancy Board (1879) 48 L. J. Ex. 402; 4 Ex. D. 116; 27 W. R. 688.—POLLOCK, B.

York and North Midland Ry. v. Reg.,
referred to.

S. E. Ry. v. Ry. Commissioners (1880) 5 Q. B. D. 217; 49 L. J. Q. B. 273; 41 L. T. 760; 28 W. R. 464; 44 J. P. 362.—Q.B.D.; LUSH, J. dissenting; reversed, (1881) 6 Q. B. D. 586; 50 L. J. Q. B. 201; 44 L. T. 203; 45 J. P. 388.—C.A.

MANISTY, J.—As a rule, Acts for the construction of railways are permissive not obligatory: See *York and North Midland Ry. v. Reg.* No doubt there are exceptions, but they are of rare occurrence.—p. 256.

York and North Midland Ry. v. Reg.,
referred to.

Julius v. Oxford (Bishop) (1880) 5 App. Cas. 214; 49 L. J. Q. B. 577; 42 L. T. 546; 28 W. R. 726; 44 J. P. 600.—H.L. (R.).

LORD PENZANCE.—If the matter were to be decided by previous definitions, I should prefer that of Jervis, C.J., who said, in *York and North Midland Ry. v. Reg.*, that such words as "it shall be lawful" were to be understood as permissive only, unless some "absurdity or injustice" would follow from giving them that, their natural meaning.—p. 230.

York and North Midland Ry. v. Reg.,
discussed.

Reg. v. G. W. Ry. (1893) 62 L. J. Q. B. 572; 9 R. 1; 69 L. T. 572.—C.A.

York and North Midland Ry. v. Reg. and
Reg. v. G. W. Ry., *referred to.*

Att.-Gen. v. Simpson (1901) 70 L. J. Ch. 828; [1901] 2 Ch. 671, 699; 85 L. T. 325.—C.A. RIGBY, V. WILLIAMS and STIRLING, L.J.J.; varying FAIRWELL, J.

V. WILLIAMS, L.J.—It is quite true that the principle established by *York and North Midland Ry. v. Reg.* that permissive powers contained in an Act of Parliament are not to be construed as compulsory unless there is something in the context or subject-matter justifying such a construction, applies as well to the maintenance of the authorised works as to their construction, as was decided in *Reg. v. G. W. Ry.*; but it does not follow that the grantee of a toll created by Act of Parliament can levy the toll irrespective of doing and executing the work in respect of which the toll purports by the Act of Parliament to be granted. I think that, if the grantee of the toll fails so to maintain and repair the stanch and other works as to keep the river navigable, he cannot collect the toll.—p. 839.

Reg. v. Lancashire and Yorkshire Ry. (1852)

22 L. J. Q. B. 57; 1 El. & Bl. 228; 7 Railw. Cas. 266; 17 Jur. 62; 1 W. R. 35.

—Q.B. *overruled.*

York and North Midland Ry. v. Reg. (1853) 22 L. J. Q. B. 225; 1 El. & Bl. 858; 7 Railw. Cas. 459; 1 C. L. R. 119; 17 Jur. 630; 1 W. R. 358.—EX. CH.

O.C.

Reg. v. G. W. Ry. (1852) 22 L. J. Q. B. 65; 1 El. & Bl. 253; 17 Jur. 85.—Q.B.; *reversed nom.*
G. W. Ry. v. Reg. (1853) 1 El. & Bl. 874; 16 Jur. 675; 2 W. R. 54.—EX. CH.

G. W. Ry. v. Reg., *applied.*

Weld v. L. & S. W. Ry. (1862) 33 L. J. Ch. 142; 32 Bear. 340; 9 Jur. (N.S.) 510; 8 L. T. 13; 11 W. R. 448.—ROMILLY, M.R.

G. W. Ry. v. Reg., *referred to.*

Forbes v. Lee Conservancy Board (1879) 48 L. J. Ex. 402; 4 Ex. D. 116, 120; 27 W. R. 688.—POLLOCK, B.

Edinburgh, Perth and Dundee Ry. v. Philip
(1857) 2 Macq. 514; 3 Jur. (N.S.) 249; 5

W. R. 377.—H.L. (SC.), *referred to.*

Scottish N. E. Ry. v. Stewart (1859) 3 Macq. 382; 5 Jur. (N.S.) 607; 7 W. R. 458.—H.L. (SC.); *Reg. v. French* (1878) 47 L. J. M. C. 74; L. R. 3 Q. B. 187; 38 L. T. 385; 26 W. R. 437.—MELLOR and LUSH, JJ.; affirmed, C.A. (*supra*, col. 2639).

Cohen v. Wilkinson (1849) 18 L. J. Ch. 378, 411; 12 Beav. 138; 13 Jur. 641; 5 Railw. Cas. 741.—M.R.; *affirmed*, 1 Mac. & G. 481; 1 H. & Tw. 554; 5 Railw. Cas. 758; 14 Jur. 535.—L.C.

Cohen v. Wilkinson.

Principle applied. *Bagshaw v. Eastern Union Ry.* (1850) 19 L. J. Ch. 410; 2 Mac. & G. 389; 2 H. & Tw. 201; 6 Railw. Cas. 169; 14 Jur. 491.

—COTTENHAM, L.C.; *discussed*, *Graham v. Birkenhead, Lancashire and Cheshire Junction Ry.* (1850) 20 L. J. Ch. 445; 2 Mac. & G. 147; 2 H. & Tw. 450; 14 Jur. 494.—COTTENHAM, L.C.; *Ffooks v. S. W. Ry.* (1853) 1 Sm. & G. 142; 17 Jur. 365; 1 W. R. 175.—STUART, V.-C.; *applied*, *Sharpley v. Louth and East Coast Ry.* (1876) 46 L. J. Ch. 259; 2 Ch. D. 663, 678; 35 L. T. 71.—C.A. JAMES and MELLISH, L.J.J., and BAGGALLAY, J.A.

Rex v. Severn and Wye Ry. (1819) 2 B. & Ald. 646; 21 R. R. 433 n.—K.B., *referred to.*

Winch v. Thames Conservators (1872) 41 L. J. C. P. 241; L. R. 7 C. P. 458, 471; 27 L. T. 95; 20 W. R. 945.—C.P.; *affirmed*, 43 L. J. C. P. 167; L. R. 9 C. P. 378; 31 L. T. 128; 22 W. R. 879.—EX. CH.

Rex v. Severn and Wye Ry., *referred to.*

Lee Conservancy Board v. Button (1879) 12 Ch. D. 383, 395; 41 L. T. 481.—MALINS, V.-C.; varied, C.A. JAMES, BRETT and COTTON, L.J.J.; C.A. *affirmed*, (1881) 51 L. J. Ch. 17; 6 App. Cas. 685; 45 L. T. 385; 30 W. R. 233; 46 J. P. 164.—H.L. (E.).

Rex v. Severn and Wye Ry., *explained and distinguished.*

Reg. v. G. W. Ry. (1893) 9 R. 1; 62 L. J. Q. B. 572; 69 L. T. 572; 9 Times L. R. 573.—C.A.

BOWEN, L.J.—There [*Rex v. Severn and Wye Ry.*] a mandamus did go to reinstate the line, Abbott, C.J. pointing out that they would not grant a mandamus to maintain it, but they would grant a mandamus to reinstate it. Upon what ground? If one looks at the 49 & 50 George III., which is not correctly transcribed in the case, one finds that there is an express obligation imposed upon the railway company to make, complete, and maintain. It is that they "shall and are hereby authorised and empowered to make, complete, and maintain the railway." Therefore the

Severn and Wye Case does not prove what it is cited for; it does not prove that when a railway is once made it shall be maintained for ever. It only proves that when the statute says that they shall maintain it, there being an obligation upon them to do so, and that obligation necessarily involving an obligation to reinstate, the mandamus will go to reinstate. But here there is no obligation to maintain to be found in the statute.—p. 9.

Graham v. Birkenhead, Lancashire and Cheshire Junction Ry. (1850) 20 L. J. Ch. 445; 2 Mac. & G. 147; 14 Jur. 494; 2 H. & Tw. 450.—COTTENHAM, L.C.

Discussed, *Ffooks v. S. W. Ry.* (1853) 1 Sm. & G. 142; 17 Jur. 365; 1 W. R. 175.—STUART, v.-c.; *distinguished*, *Hare v. L. & N. W. Ry.* (1861) 30 L. J. Ch. 817; 2 J. & H. 80; 7 Jur. (N.S.) 1145.—WOOD, v.-c.

Bishop v. North (1848) 12 L. J. Ex. 362; 11 M. & W. 418; 3 Railw. Cas. 459.—EX., *referred to*.

Att.-Gen. v. Cambridge Consumers Gas Co. (1868) 38 L. J. Ch. 94; L. R. 6 Eq. 305; 16 W. R. 1007.—v.-c.; varied, L. R. 4 Ch. 71; 19 L. T. 508; 17 W. R. 145.—L.JJ.

Dun (River) Navigation Co. v. North Midland Ry. (1838) 1 Railw. Cas. 135.—L.C., *referred to*.

Sutton v. S. E. Ry. (1865) 35 L. J. Ex. 38; 4 H. & C. 325; L. R. 1 Ex. 32, 39; 11 Jur. (N.S.) 885; 13 L. T. 438; 14 W. R. 130.—EX.

Dun (River) Navigation Co. v. North Midland Ry., considered.

Richmond v. North London Ry. (1868) L. R. 5 Eq. 352; 37 L. J. Ch. 273; 18 L. T. 8; 16 W. R. 449.—M.B.; affirmed, 37 L. J. Ch. 886; L. R. 3 Ch. 679.—CAIRNS, L.C.

ROMILLY, M.B.—Assuming that the company are about to exceed the powers given to them by the Legislature, it is the right of any person who will be damaged thereby, to come to this Court for an injunction. *Dun (River) Navigation Co. v. North Midland Ry.* seems to me to establish this proposition, which is also consistent with all principles of equity.—p. 357.

Dun (River) Navigation Co. v. North Midland Ry., referred to.

Dowling v. Pontypool, Caerleon and Newport Ry. (1874) 43 L. J. Ch. 761; L. R. 18 Eq. 714, 746.—HALL, v.-c.

Dun (River) Navigation Co. v. North Midland Ry., referred to.

London Association of Shipowners and Brokers v. London and India Docks Joint Committee (1892) 62 L. J. Ch. 294; [1892] 3 Ch. 242, 270; 2 R. 23; 67 L. T. 238; 7 Asp. M. C. 195.—C.A. LINDLEY, BOWEN and KAY, L.JJ.

KAY, L.J.—One of the cases before Lord Cottenham most commonly referred to is *Dun (River) Navigation Co. v. North Midland Ry.*, in which he points out how necessary it is to interfere with a public company which is exceeding its powers to the injury of individuals, and that it is most essential to the interest of the public "that the extraordinary remedy by injunction" should exist and should be exercised in such cases. That case has been followed and treated as a leading authority on the subject from the year 1838 to the present time.—p. 310.

Spencer v. London and Birmingham Ry. (1836) 7 L. J. Ch. 281; 8 Sim. 193; 1 Railw. Cas. 159.—SHADWELL, v.-c.

Not applied, *Thorne v. Taw Vale Ry. and Dock Co.* (1850) 13 Beav. 10.—LANGDALE, M.B.; *followed*, *Cook v. Bath Corporation* (1868) L. R. 6 Eq. 177, 180.—MALINS, v.-c.; *referred to*, *Att.-Gen. v. Lonsdale (Earl)* (1868) 38 L. J. Ch. 335; L. R. 7 Eq. 377, 390; 20 L. T. 64; 17 W. R. 219.—MALINS, v.-c.; *explained*, *London Association of Shipowners and Brokers v. London and India Docks Joint Committee* (1892) 62 L. J. Ch. 294; [1892] 3 Ch. 242, 270; 2 R. 23; 67 L. T. 238; 7 Asp. M. C. 195.—C.A. LINDLEY, BOWEN and KAY, L.JJ.

North British Ry. v. Tod (1846) 12 Cl. & F. 722; 4 Railw. Cas. 449; 10 Jur. 975.—H.L. (SC.).

Applied, *Beardmer v. L. & N. W. Ry.* (1849) 18 L. J. Ch. 432; 1 Mac. & G. 112; 1 H. & Tw. 161; 13 Jur. 327; 5 Railw. Cas. 728.—COTTENHAM, L.C.; *Reg. v. Caledonian Ry.* (1850) 20 L. J. Q. B. 147; 16 Q. B. 19; 15 Jur. 396.—Q.B.; *discussed*, *Ware v. Regent's Canal Co.* (1858) 28 L. J. Ch. 153; 3 De G. & J. 212; 5 Jur. (N.S.) 25; 7 W. R. 67.—CHELMSFORD, L.C.; *not applied*, *Att.-Gen. v. Tewkesbury and Malvern Ry.* (1863) 32 L. J. Ch. 482; 1 De G. J. & S. 423; 9 Jur. (N.S.) 951; 8 L. T. 682.—KNIGHT BRUCE and TURNER, L.JJ.; *applied*, *Att.-Gen. v. G. E. Ry.* (1872) 41 L. J. Ch. 505; L. R. 7 Ch. 475; 26 L. T. 749; 20 W. R. 599.—JAMES and MELLISH, L.JJ. (affirmed, *post*).

North British Ry. v. Tod and Att.-Gen. v. G. E. Ry. (1873) L. R. 6 H. L. 367; 23 L. T. 344; 22 W. R. 281.—H.L. (E.), *referred to*.

Edinburgh Street Tramways Co. v. Black (1873) L. R. 2 Sc. App. 336, 339.—H.L. (SC.).

North British Ry. v. Tod and Att.-Gen. v. G. E. Ry., referred to.

Mackett v. Herne Bay Commissioners (1876) 35 L. T. 202; affirmed, 37 L. T. 812.—C.A.

BACON, v.-c.—It has now been very conclusively decided that whatever representation may be made on a plan deposited and referred to in an Act of Parliament is of no effect, unless the representation is incorporated in the Act: *North British Ry. v. Tod*; *Att.-Gen. v. G. E. Ry.*—p. 208.

Att.-Gen. v. G. E. Ry., referred to.

Yarmouth Corporation v. Simmons (1878) 10 Ch. D. 518; 47 L. J. Ch. 792; 38 L. T. 881; 22 W. R. 802.

FRY, J.—In the next place, it is to be borne in mind that when there are provisions in a special Act which are inconsistent with the provisions of a prior general Act, the provisions of the general Act must yield to those of the special Act: *Att.-Gen. v. G. E. Ry.* is an authority for that, if authority was wanting.—p. 528.

Att.-Gen. v. G. E. Ry., referred to.

Redington v. Millar (1838) 22 L. R. Ir. 78, 86.—Q.B.D.; O'BRIEN, J. dissenting; reversed, 24 L. R. Ir. 65.—C.A.

Wyburn v. G. N. Ry. (1858) 1 F. & F. 152.—WATSON, B., *referred to*.

Withers v. North Kent Ry. (1858) 27 L. J. Ex. 417; 1 F. & F. 165.—EX.

Withers v. North Kent Ry.

Discussed, G. W. Ry. of Canada v. Braid (1863) 1 Moore P. C. (N.S.) 101; 9 Jur. (N.S.) 339; 1 N. R. 527; 8 L. T. 31; 11 W. R. 444.—P.C.; *principle applied*, Madras Ry. v. Carvatenagarum Zemindar (1874) L. R. 1 Ind. App. 364, 386; 30 L. T. 770; 22 W. R. 865.—P.C.

G. W. Ry. of Canada v. Fawcett and G. W. Ry. of Canada v. Braid (1863) 1 Moore P. C. (N.S.) 101; 1 N. R. 527; 9 Jur. (N.S.) 339; 8 L. T. 31; 11 W. R. 444.—P.C., *questioned*.

Uzoch v. General Steam Navigation Co. (1867) L. R. 3 C. P. 14; 37 L. J. C. P. 3; 17 L. T. 246; 16 W. R. 130.

WILLES, J.—That case has been much remarked on. The late C.J. of this Court (Erle. C.J.) protested against the onus of proof in such a case being thrown on the railway company.—p. 16.

Fenwick v. East London Ry. (1875) 44 L. J. Ch. 602; L. R. 20 Eq. 544; 23 W. R. 901.

—JESSEL, M.R., *explained and applied*.

Norton v. L. & N. W. Ry. (1878) 4 Ch. D. 623; 47 L. J. Ch. 859; 39 L. T. 25; 27 W. R. 352.—V.C.; *affirmed*, 13 Ch. D. 268; 41 L. T. 421; 28 W. R. 173.—C.A.

MALINS, V.C.—In *Fenwick v. East London Ry.* the M.R. decided that where a thing may be done in one of two ways—one of which is injurious and one of which is not—the railway company are bound to do the thing in a manner which will not be injurious.—p. 633.

Fenwick v. East London Ry., *discussed*.

Pugh v. Golden Valley Ry. (1879) 48 L. J. Ch. 666; 12 Ch. D. 274, 282; 41 L. T. 30; 28 W. R. 44.—FRY, L.J.; *affirmed*, (1880) 49 L. J. Ch. 721; 15 Ch. D. 330; 42 L. T. 863; 28 W. R. 863.—C.A.

Fenwick v. East London Ry.

Explained and distinguished, *Harrison v. Southwark and Vauxhall Water Co.* (1891) 60 L. J. Ch. 630; [1891] 2 Ch. 409; 64 L. T. 864.—V. WILLIAMS, J.; *referred to*, *Morris v. Tottenham and Forest Gate Ry.* (1892) 61 L. J. Ch. 215; [1892] 2 Ch. 47; 66 L. T. 585; 40 W. R. 310.—NORTH, J.; *explained*, *Barnard v. G. W. Ry.* (1902) 86 L. T. 798; 66 J. P. 568.—KEKEWICH, J.

Rex v. Pease (1832) 2 L. J. M. C. 36; 4 B. & Ad. 30; 1 N. & M. 690; 38 R. R. 207.—K.B., *distinguished*.

Lawrence v. G. N. Ry. (1851) 20 L. J. Q. B. 293; 16 Q. B. 643; 15 Jur. 652; 6 Railw. Cas. 656.—Q.B.

Rex v. Pease.

Followed, *Vaughan v. Taff Vale Ry.* (1860) 29 L. J. Ex. 247; 5 H. & N. 679; 6 Jur. (N.S.) 899; 8 W. R. 549; 2 L. T. 394.—EX. CH.; *referred to*, *Mersey Docks v. Gibbs* (1866) 35 L. J. Ex. 225; L. R. 1 H. L. 93, 112; 11 H. L. Cas. 686; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.—H.L. (E.), with the JUDGES; *distinguished*, *Jones v. Festiniog Ry.* (1868) 37 L. J. Q. B. 214; L. R. 3 Q. B. 733, 736; 9 B. & S. 835; 18 L. T. 902; 17 W. R. 28.—Q.B.; *applied*, *Dungey v. London Corporation* (1869) 38 L. J. C. P. 298, 304; 20 L. T. 921; 17 W. R. 1106.—C.P.; *approved*, *Hammer-smith and City Ry. v. Brand* (1869) 38 L. J. Q. B. 265; L. R. 4 H. L. 171; 21 L. T. 238; 18 W. R. 12.—H.L. (E.) (*see post*, col. 2646); *re-*

ferred to, *Att.-Gen. v. Leeds Corporation* (1870) 39 L. J. Ch. 711; L. R. 5 Ch. 583; 19 W. R. 19.—L.C. and L.J. (*affirming* 22 L. T. 330.—V.C.); *discussed and not applied*, *Smith v. Midland Ry.* (1877) 37 L. T. 224; 25 W. R. 861; 26 W. R. 10.—BACON, V.C.; *referred to*, *Matson v. Baird* (1878) 3 App. Cas. 1082, 1088; 39 L. T. 304; 26 W. R. 835.—H.L. (SC.); *discussed*, *Hill v. Metropolitan Asylum District* (1879) 48 L. J. Q. B. 167; 4 Q. B. D. 433, 444; 40 L. T. 491.—POLLOCK, B. (*affirmed*, 49 L. J. Q. B. 228; 42 L. T. 212.—C.A. and H.L., *post*); *disapproved*, *Powell v. Full* (1880) 49 L. J. Q. B. 428; 5 Q. B. D. 597; 43 L. T. 562.—C.A. BRAMWELL, BAGGALLAY and THESIGER, L.JJ. (*see post*, col. 2645); *commented on*, *Reg. v. Sheward* (1880) 49 L. J. Q. B. 716; 9 Q. B. D. 741.—C.A. (*see post*, col. 2647); *distinguished*, *Metropolitan Asylum District v. Hill* (1881) 50 L. J. Q. B. 853; 6 App. Cas. 193, 201; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664.—H.L. (E.); *discussed*, *Truman v. L. B. & S. C. Ry.* (1883) 25 Ch. D. 423; 53 L. J. Ch. 209; 50 L. T. 89; 32 W. R. 364; 48 J. P. 260.—NORTH, J. (*affirmed*, C.A., *post*); *distinguished*, *Truman v. L. B. & S. C. Ry.* (1885) 54 L. J. Ch. 849; 29 Ch. D. 89; 52 L. T. 522; 33 W. R. 762; 49 J. P. 581.—C.A. BAGGALLAY, BOWEN and FRY, L.JJ. (*reversed*, H.L., *post*).

Rex v. Pease, *approved and applied*.

L. B. & S. C. Ry. v. Truman (1885) 55 L. J. Ch. 354; 11 App. Cas. 45, 50; 54 L. T. 250; 34 W. R. 657.—H.L. (E.); *reversing* S. C. *nom.* Truman v. L. B. & S. C. Ry. (*supra*).

Rex v. Pease, *approved but not applied*.

Evans v. Manchester, Sheffield and Lincolnshire Ry. (1887) 57 L. J. Ch. 153; 36 Ch. D. 626; 57 L. T. 194; 36 W. R. 328.—KEKEWICH, J.

Rex v. Pease, *discussed*.

Cowper-Essex v. Acton Local Board (1889) 58 L. J. Q. B. 594; 14 App. Cas. 153, 170; 61 L. T. 1; 38 W. R. 209; 53 J. P. 756.—H.L. (E.).

Rex v. Pease, *referred to*.

Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works (1898) 67 L. J. Ch. 657; [1898] 2 Ch. 603; 79 L. T. 132; 47 W. R. 107; 62 J. P. 756.—C.A. LINDLEY, M.R., CHITTY and COLLINS, L.JJ.; *Jordeson v. Sutton, Southcoates and Drypool Gas Co.* (1899) 67 L. J. Ch. 666; [1898] 2 Ch. 614; 79 L. T. 478; 47 W. R. 222; 63 J. P. 137.—NORTH, J.; *affirmed*, C.A. (*post*, col. 2684). *And see* *Armagh Union Guardians v. Bell* (1899) [1900] 2 Ir. R. 371.—Q.B.D.; *affirmed*, (1900).—C.A.

Rex v. Pease, *distinguished*.

Long Eaton Recreation Grounds Co. v. Midland Ry. (1901) 71 L. J. K. B. 74; 85 L. T. 278; 50 W. R. 120.—LAWRANCE, J. (*see post*, col. 2649); *affirmed*, (1902) 71 L. J. K. B. 837; [1902] 2 K. B. 574; 86 L. T. 873; 50 W. R. 693; 67 J. P. 1.—C.A. COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.

Vaughan v. Taff Vale Ry. (1858) 28 L. J. Ex. 41; 3 H. & N. 743; 4 Jur. (N.S.) 1302; 7 W. R. 120.—EX.; *reversed*, (1860) 29 L. J. Ex. 247; 5 H. & N. 679; 9 Jur. (N.S.) 899; 2 L. T. 394; 8 W. R. 549.—EX. CH.

Vaughan v. Taff Vale Ry. (1860) 29 L. J. Ex. 247; 5 H. & N. 679; 6 Jur. (N.S.) 899; 2

L. T. 394; 8 W. R. 549.—EX. CH.; *reversing* (1858) 28 L. J. Ex. 41; 3 H. & N. 743; 4 Jur. (N.S.) 1302; 7 W. R. 120.—EX.

Not applied: *Fremantle v. L. & N. W. Ry.* (1861) 31 L. J. C. P. 12; 10 C. B. (N.S.) 89; 9 W. R. 611.—C.P. (S. C. at *nisi prius*: 2 F. & F. 337); *distinguished*, *Jones v. Festiniog Ry.* (1868) 37 L. J. Q. B. 214; 1 L. R. 3 Q. B. 733; 9 B. & S. 835; 18 L. T. 902; 17 W. R. 28.—Q.B.: *applied*, *Dungey v. London Corporation* (1869) 38 L. J. C. P. 298; 20 L. T. 921; 17 W. R. 1106.—C.P.

Vaughan v. Taff Vale Ry., approved.

Hammersmith and City Ry. v. Brand (1869) L. R. 4 H. L. 171; 38 L. J. Q. B. 265; 21 L. T. 238.—H.L. (E.).

LORD CHELMSFORD.—Assuming that before the passing of their Act the defendants would have been liable to an action for the injury caused to the plaintiffs' house, it is necessary for the plaintiffs, in the first place, to establish that the company's Act has taken away the remedy by action, in order to open the way to their claim for compensation. If *Re v. Pease* (*supra*, col. 2643) and *Vaughan v. Taff Vale Ry.* were rightly decided, this question has been determined. It was established by those cases, "that when the legislature has sanctioned the use of a locomotive engine, there is no liability for any injury caused by using it, so long as every precaution is taken consistent with its use." *Bramwell, B.*, in his answer to the questions put by your lordships to the judges, adverting to the above cases, said: "With great respect, I think those cases clearly wrong, and that they have proceeded on an inadvertent misapprehension of the object and effect of the clauses in question."—p. 201. . . . I therefore think, notwithstanding the respect to which every opinion of *Bramwell, B.*, is entitled, that *Re v. Pease* and *Vaughan v. Taff Vale Ry.* were rightly decided.—p. 202.

LORD COLONSAY concurred.

LORD CAIRNS dissented.

Vaughan v. Taff Vale Ry., disapproved.

Powell v. Fall (1880) 5 Q. B. D. 597; 49 L. J. Q. B. 428; 43 L. T. 562.—C.A.

BRAMWELL, L.J.—The arguments which we have heard are ingenious; but I need only say in reply to them that they have hardened my conviction that *Re v. Pease* (col. 2643) and *Vaughan v. Taff Vale Ry.* were wrongly decided.—p. 601.

Vaughan v. Taff Vale Ry., discussed.

Smith v. L. & S. W. Ry. (1870) 40 L. J. C. P. 21; L. R. 6 C. P. 14; 23 L. T. 678; 19 W. R. 230.—EX. CH.; BLACKBURN, J. doubting; *Dunn v. Birmingham Canal Co.* (1872) L. R. 8 Q. B. 42, 47; 42 L. J. Q. B. 34; 27 L. T. 683; 21 W. R. 266.—EX. CH.; *Boughton v. Mid Great Western Ry.* (1873) Ir. R. 7 C. L. 169, 181.—C.P.; *Madras Ry. v. Carvatenagarum Zemindar* (1874) L. R. 1 Ind. App. 384; 30 L. T. 770; 22 W. R. 865.—P.C.; *Hill v. Metropolitan Asylum District* (1879) 4 Q. B. D. 433; 40 L. T. 491.—POLLOCK, B. (affirmed, 49 L. J. Q. B. 228; 42 L. T. 212.—C.A. and H.L. (*post*, col. 2647)).

Vaughan v. Taff Vale Ry., commented on.

Reg. v. Sheward (1880) 49 L. J. Q. B. 716; 9 Q. B. D. 741.—C.A. (*see post*, col. 2647).

Vaughan v. Taff Vale Ry., not applied

Dixon v. Metropolitan Board of Works (1881) 50 L. J. Q. B. 772; 7 Q. B. D. 418, 421; 45 L. T. 312; 30 W. R. 83; 46 J. P. 4.—COLERIDGE, C.J.

Vaughan v. Taff Vale Ry., applied.

Lea Conservancy Board v. Hertford Corporation (1884) 48 J. P. 628; 1 Cab. & E. 299.—V. WILLIAMS, J.

Vaughan v. Taff Vale Ry., commented on.

Reg. v. Essex (1884) 54 L. J. Q. B. 459; 14 Q. B. D. 753, 763; 52 L. T. 926; 33 W. R. 214.—MATHEW and DAY, JJ.; reversed, C.A., but restored *nom.* *Cowper-Essex v. Acton Local Board.*—H.L. (*post*).

Vaughan v. Taff Vale Ry.

Approved and applied, L. B. & S. C. Ry. v. Truman (1885) 55 L. J. Q. B. 334; 11 App. Cas. 45, 53; 54 L. T. 250; 34 W. R. 657.—H.L. (E.); *approved but distinguished*, *Evans v. Manchester, Sheffield and Lincolnshire Ry.* (1887) 57 L. J. Ch. 153; 36 Ch. D. 626; 57 L. T. 194; 36 W. R. 328.—KEKEWICH, J.; *discussed*, *Cowper-Essex v. Acton Local Board* (1889) 58 L. J. Q. B. 594; 14 App. Cas. 153, 170; 61 L. T. 1; 38 W. R. 209; 53 J. P. 756.—H.L. (E.); *referred to*, *Emsley v. N. E. Ry.* (1896) 65 L. J. Ch. 385; [1896] 1 Ch. 418; 74 L. T. 113; 60 J. P. 182.—C.A. (*see post*, col. 2648).

Vaughan v. Taff Vale Ry., distinguished.

Long Eaton Recreation Grounds Co. v. Midland Ry. (1901) 71 L. J. K. B. 74; 85 L. T. 278; 50 W. R. 120.—LAWRANCE, J.; affirmed, C.A. (*see post*, col. 2648). *And see* *Armagh Union Guardians v. Bell* (1899) [1900] 2 Ir. R. 371.—Q.B.D.; affirmed, (1900).—C.A.

Brand v. Hammersmith and City Ry. (1865) 35

L. J. Q. B. 53; L. R. 1 Q. B. 130; 12 Jur. (N.S.) 336; 13 L. T. 501; 14 W. R. 129.—Q.B.: reversed. (1867) 36 L. J. Q. B. 139; L. R. 2 Q. B. 223; 7 B. & S. 1; 16 L. T. 101; 15 W. R. 437.—EX. CH.; the latter decision reversed and the former restored, *nom.* *Hammersmith and City Ry. v. Brand* (1869) 38 L. J. Q. B. 265; L. R. 4 H. L. 171; 21 L. T. 238; 18 W. R. 12.—H.L. (E.).

Hammersmith and City Ry. v. Brand.

Explained, *City of Glasgow Union Ry. v. Hunter* (1870) L. R. 2 H. L. (Sc.) 78.—H.L. (Sc.). HATHERLEY, L.C., LORDS CHELMSFORD, WESTBURY and COLONSAY; *discussed*, *Smith v. L. & S. W. Ry.* (1870) 40 L. J. C. P. 21; L. R. 6 C. P. 14; 23 L. T. 678; 19 W. R. 230.—EX. CH.; BLACKBURN J. doubting; *distinguished*, *Reg. v. Cambrian Ry.* (1871) 40 L. J. Q. B. 169; L. R. 6 Q. B. 422; 25 L. T. 84; 19 W. R. 1138.—COCKBURN, C.J., and BLACKBURN, J. *And see* "LANDS CLAUSES ACT" (*ante*, col. 1536).

Hammersmith and City Ry. v. Brand, principle applied.

Jones v. Stanstead, Sheffield and Chambley Ry. (1872) 41 L. J. P. C. 19; L. R. 4 P. C. 98; 8 Moore, P. C. (N.S.) 312; 26 L. T. 456; 20 W. R. 417.—P.C. *See* "COLONY," vol. i., col. 358.

Hammersmith and City Ry. v. Brand, distinguished.

Buccleuch (Duke) v. Metropolitan Board of Works (1872) 41 L. J. Ex. 137; L. R. 5 H. L. 418; 27 L. T. 1.—H.L. (E.).

Hammersmith and City Ry. v. Brand, discussed.

G. W. Ry. v. Smith (1876) 45 L. J. Ch. 235; 2 Ch. D. 235; 34 L. T. 267; 24 W. R. 443.—C.A.;

affirmed with a variation, *nom.* Smith v. G. W. Ry. (1877) 47 L. J. Ch. 97; 3 App. Cas. 165; 37 L. T. 645; 26 W. R. 130.—H.L. (E.).

Hammersmith and City Ry. v. Brand.

Applied, Hopkins v. G. N. Ry. (1877) 46 L. J. Q. B. 265; 2 Q. B. D. 224; 36 L. T. 898.—C.A.; *not applied*, Smith v. Midland Ry. (1877) 37 L. T. 224; 25 W. R. 861; 26 W. R. 10.—BACON, V.-C.; *discussed*, Hill v. Metropolitan Asylum District (1879) 4 Q. B. D. 433; 40 L. T. 491.—POLLOCK, B. (affirmed, 49 L. J. Q. B. 228; 42 L. T. 212.—C.A. and H.L. (*post*)).

Hammersmith and City Ry. v. Brand, distinguished.

Reg. v. Sheward (1880) 9 Q. B. D. 741; 49 L. J. Q. B. 716.—C.A.

BRAMWELL, L.J.—The land of the claimant was worth 6,000l. for the purposes of his business, and that has been taken from him by the company. A difficulty might have arisen from the decision in *Brand v. Hammersmith Ry.*, but in that case no land of the plaintiff's was taken. I think that mischief has arisen from the judgments in *Vaughan v. Taff Vale Ry.* (*supra*, col. 2644) and *Re v. Pease* (*supra*, col. 2643); it would be strange if a claimant could get compensation in one case and not in another.—p. 742.

Hammersmith and City Ry. v. Brand.

Discussed and distinguished, Metropolitan Asylum District v. Hill (1881) 50 L. J. Q. B. 353; 6 App. Cas. 193, 201; 44 L. T. 653; 29 W. R. 617; 45 J. P. 664.—H.L. (E.); *not applied*, Dixon v. Metropolitan Board of Works (1881) 50 L. J. Q. B. 772; 7 Q. B. D. 418; 45 L. T. 312; 30 W. R. 83; 46 J. P. 4.—COLERIDGE, C.J.; *discussed*, Caledonian Ry. v. Walker's Trustees (1882) 7 App. Cas. 259; 46 L. T. 826; 30 W. R. 569; 46 J. P. 676.—H.L. (SC.); *distinguished*, Truman v. L. B. & S. C. Ry. (1883) 53 L. J. Ch. 209; 25 Ch. D. 423; 50 L. T. 89; 32 W. R. 364; 48 J. P. 260.—NORTH, J. (affirmed, C.A., *post*); *applied*, Lea Conservancy Board v. Hertford Corporation (1884) 48 J. P. 628; 1 Cab. & E. 299.—V. WILLIAMS, J.; *discussed and distinguished*, Truman v. L. B. & S. C. Ry. (1885) 54 L. J. Ch. 849; 29 Ch. D. 89; 52 L. T. 522; 33 W. R. 762; 49 J. P. 581.—C.A. BAGGALLAY, BOWEN and FRY, L.JJ. (reversed, H.L., *post*).

Hammersmith and City Ry. v. Brand, discussed and not applied.

Reg. v. Essex (1884) 54 L. J. Q. B. 459; 14 Q. B. D. 753; 52 L. T. 926; 33 W. R. 214.—MATHEW and DAY, JJ. (reversed, C.A. (*post*)), but restored H.L. (*post*, col. 2648).

Hammersmith and City Ry. v. Brand, applied.

L. B. & S. C. Ry. v. Truman (1885) 55 L. J. Q. B. 334; 11 App. Cas. 45, 52; 54 L. T. 250; 34 W. R. 657.—H.L. (E.). HALSBURY, L.C., LORDS SELBORNE, BLACKBURN and FITZGERALD; Reg. v. Essex (1886) 55 L. J. Q. B. 313; 17 Q. B. D. 447; 54 L. T. 779; 34 W. R. 587.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ. (reversed, H.L., *post*, col. 2648).

Hammersmith and City Ry. v. Brand, referred to.

Parkdale Corporation v. West (1887) 56 L. J. P. C. 66; 12 App. Cas. 602, 614; 57 L. T. 602.—P.C. See "COLONY," vol. I., col. 358.

Hammersmith and City Ry. v. Brand, discussed.

Cowper-Essex v. Acton Local Board (1889) 58 L. J. Q. B. 594; 14 App. Cas. 153; 61 L. T. 1; 38 W. R. 209; 53 J. P. 756.—H.L. (E.). HALSBURY, L.C., LORDS WATSON, BRAMWELL, FITZGERALD and MACNAGHTEN; reversing S. C. *nom.* Reg. v. Essex.—C.A. (*supra*, col. 2647).

Hammersmith and City Ry. v. Brand, referred to.

North Shore Ry. v. Pion (1889) 59 L. J. P. C. 25; 14 App. Cas. 612, 628; 61 L. T. 52.—P.C. EARL OF SELBORNE, LORDS WATSON, BRAMWELL, HOBHOUSE and SIR R. COUCH.

Hammersmith and City Ry. v. Brand, followed.

Att.-Gen. and Hare v. Metropolitan Ry. (1893) [1894] 1 Q. B. 384; 9 R. 598; 69 L. T. 811; 42 W. R. 381; 58 J. P. 342.—C.A. LINDLEY, A. L. SMITH and DAVEY, L.JJ.

Hammersmith and City Ry. v. Brand, referred to.

Emsley v. N. E. Ry. (1896) 65 L. J. Ch. 385; [1896] 1 Ch. 418; 74 L. T. 113; 60 J. P. 182.—C.A. LINDLEY, KAY and A. L. SMITH, L.JJ.

LINDLEY, L.J.—A railway company when it has acquired the land on which its rails are laid, requires no statutory power to run trains over it; but the company does want statutory power to do so in such a way as to commit an unavoidable nuisance without being exposed to actions for damages, and the company has such a power accordingly—*Vaughan v. Taff Vale Ry.* (*supra*, col. 2644) and *Hammersmith and City Ry. v. Brand.*—p. 391.

Hammersmith and City Ry. v. Brand, adopted.

Emsley v. N. E. Ry., referred to.

Kirby v. Harrogate School Board (1896) 65 L. J. Ch. 376; [1896] 1 Ch. 437; 74 L. T. 6; 60 J. P. 182.—C.A. LINDLEY, KAY and A. L. SMITH, L.JJ.

Hammersmith and City Ry. v. Brand, not applied.

Jordeson v. Sutton, Southcoates and Drypool Gas Co. (1898) 67 L. J. Ch. 666; [1898] 2 Ch. 614; 79 L. T. 478; 47 W. R. 222; 63 J. P. 137.—NORTH, J.; affirmed, (1899) 68 L. J. Ch. 457; [1899] 2 Ch. 217; 80 L. T. 815; 63 J. P. 692.—C.A. LINDLEY, M.R., RIGBY and V. WILLIAMS, L.JJ.

Hammersmith and City Ry. v. Brand, referred to.

Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works (1898) 67 L. J. Ch. 657; [1898] 2 Ch. 603; 79 L. T. 132; 47 W. R. 107; 62 J. P. 756.—C.A. LINDLEY, M.R., CHITTY and COLLINS, L.JJ.; Canadian-Pacific Ry. v. Parke (1899) 68 L. J. P. C. 89; [1899] A. C. 533; 81 L. T. 127; 48 W. R. 118.—P.C.; Canadian-Pacific Ry. v. Roy (1901) 71 L. J. P. C. 51; [1902] A. C. 220; 86 L. T. 127; 50 W. R. 415.—P.C.

Hammersmith and City Ry. v. Brand, distinguished and principle not applied.

Long Eaton Recreation Grounds Co. v. Midland Ry. (1901) 71 L. J. K. B. 74; 85 L. T. 278; 50 W. R. 120.—LAWRANCE, J.; affirmed, (1902) 71 L. J. K. B. 837; [1902] 2 K. B. 574; 86 L. T. 873; 50 W. R. 693; 67 J. P. 1.—C.A. LAWRENCE, J.—It is argued, and no doubt it

was held, in *Hammersmith Ry. v. Brand*, that no compensation could be recovered by an owner of land, no part of which had been actually taken, for annoyance caused through the ordinary working of a railway, although it is to be observed, full compensation for such annoyance could be recovered if any part of the land were taken—*Essex v. Acton Local Board* (1889) 58 L. J. Q. B. 594; 14 App. Cas. 153 (*supra*, col. 2648)). But no case has decided that where land, being under an express covenant that it shall not be used for a noisy business, and that covenant being for the benefit of other land, is taken by a railway company or other statutory body carrying on a business of a noisy character, the owner of the land for whose benefit the covenant is imposed, is debarred from recovering compensation for the loss and the consequent injurious affecting of his land. I think that upon principle he ought to be entitled to compensation—*Fleming v. Newport Ry.* (1883) 8 App. Cas. 265, and *Kirby v. Harrogate School Board* ([1896] 1 Ch. 437; 65 L. J. Ch. 376 (*supra*, col. 2648)). Where land is taken which is bound by a covenant restricting its user for the benefit of other land, the owner of that other land suffers an injury which is special and apart from that which the rest of the community are exposed to. His right is, as I have said, hardly distinguishable for this purpose from an easement, which would unquestionably, if disturbed, give a right to compensation. The presence of the restrictive covenant distinguishes such a case as this from cases of the class of *Re v. Pease* (*supra*, col. 2643), *Vaughan v. Taff Vale Ry.* (*supra*, col. 2644), and *Hammersmith Ry. v. Brand*, the principle of which is, in my opinion, inapplicable.—p. 78.

Fremantle v. L. & N. W. Ry. (1861) 31 L. J. C. P. 12; 10 C. B. (N.S.) 89; 9 W. R. 611.—C.P.: S.C. *in nisi prius*, 2 F. & F. 337, *discussed*.

Harrison v. Southwark and Vauxhall Water Co. (1891) 60 L. J. Ch. 630; [1891] 2 Ch. 409; 64 L. T. 864.—V. WILLIAMS, J.

Swaine v. G. N. Ry. (1864) 33 L. J. Ch. 399; 4 De G. J. & S. 211; 3 N. R. 399; 10 Jur. (N.S.) 191; 9 L. T. 745; 12 W. R. 391.—L.J.J.; *varying* 9 Jur. (N.S.) 1196.—WOOD, V.-C., *discussed*.

Dowling v. Pontypool, Caerleon and Newport Ry. (1874) 43 L. J. Ch. 761; L. R. 18 Eq. 714. 747.—HALL, V.-C.

Swaine v. G. N. Ry., *referred to*.

Serrao v. Noel (1885) 15 Q. B. D. 549, 553.—GROVE, J.; reversed, C.A. BRETT, M.R., BAGGALLAY and BOWEN, L.J.J.

Swaine v. G. N. Ry., *rule stated in, applied*.

Gosnell v. Aerated Bread Co. (1894) 10 Times L. R. 661.—STIRLING, J.

Swaine v. G. N. Ry., *referred to*.

Att.-Gen. v. Preston Corporation (1896) 13 Times L. R. 14.—STIRLING, J.

Jones v. Festiniog Ry. (1868) 37 L. J. Q. B. 214; L. R. 3 Q. B. 733; 9 B. & S. 835; 18 L. T. 902; 17 W. R. 28.—Q.B., *referred to*.

Hammersmith and City Ry. v. Brand (1869) 38 L. J. Q. B. 265; L. R. 4 H. L. 171; 21 L. T. 238; 18 W. R. 12.—H.L. (E.); *Madras Ry. v. Carvatnagarum Zemindar* (1874) L. R. 1 Ind.

App. 364; 30 L. T. 770; 22 W. R. 865.—P.C. *And see* *Armagh Union Guardians v. Bell* (1899) [1900] 2 Ir. R. 371.—Q.B.D.; affirmed, (1900).—C.A.

Smith v. L. & S. W. Ry. (1870) 40 L. J. C. P. 21; L. R. 6 C. P. 14; 23 L. T. 678; 19 W. R. 230.—EX. CH., *referred to*.

Petrie v. Owners SS. "Rostrevor" [1898] 2 Ir. R. 556, 571.—C.A.; *O'Gorman v. O'Gorman* (1902) [1903] 2 Ir. R. 573, 587.—K.B.D.

Reg. v. Wycombe Ry. (1867) 36 L. J. Q. B. 121; L. R. 2 Q. B. 310; 8 B. & S. 259; 15 L. T. 610; 15 W. R. 489.—Q.B.

Not applied, *Beauchamp (Earl) v. G. W. Ry.* (1868) 38 L. J. Ch. 162; L. R. 3 Ch. 745, 749; 19 L. T. 189; 16 W. R. 1155.—WOOD and SELWYN, L.J.J.; *discussed*, *Lamb v. North London Ry.* (1869) L. R. 4 Ch. 522, 527; 21 L. T. 98; 17 W. R. 746.—L.J.J.; *applied*, *Dowling v. Pontypool, Caerleon and Newport Ry.* (1874) 43 L. J. Ch. 761; L. R. 18 Eq. 714, 741.—HALL, V.-C.; *Fenwick v. East London Ry.* (1875) 44 L. J. Ch. 602; L. R. 20 Eq. 544, 550; 23 W. R. 901.—JESSELL, M.R.; *questioned but followed*, *Pugh v. Golden Valley Ry.* (1879) 48 L. J. Ch. 666; 12 Ch. D. 274; 41 L. T. 30; 28 W. R. 44.—FRY, J. (affirmed, *post*): *followed and approved*, *Pugh v. Golden Valley Ry.* (1880) 49 L. J. Ch. 721; 15 Ch. D. 330; 42 L. T. 863; 28 W. R. 863.—C.A.

Reg. v. Wycombe Ry., *referred to*.

Glasgow (Lord Provost) v. Farie (1888) 13 App. Cas. 657; 58 L. J. P. C. 33; 60 L. T. 274; 37 W. R. 627.—H.L. (SC.). HALSBURY, L.C., LORDS WATSON and MACNAGHTEN; LORD HERSCHELL *dissenting*.

LORD MACNAGHTEN.—How strictly railway companies are tied down when their powers are limited by reference to what is "necessary" is shown by the decisions on sect. 16 of the English Act as to the diversion of roads and rivers: See *Reg. v. Wycombe Ry.*; *Pugh v. Golden Valley Ry.* (*supra*). The rights of the undertakers or of the company are limited by the necessity of the case.—p. 688.

Reg. v. Wycombe Ry., *distinguished*.

City and South London Ry. v. London County Council [1891] 2 Q. B. 513; 60 L. J. M. C. 149; 65 L. T. 362; 40 W. R. 166; 56 J. P. 6.—C.A. LINDLEY, FRY and LOPES, L.J.J.

LINDLEY, L.J.—The appellants rely very much upon a line of cases, of which *Reg. v. Wycombe Ry.* is the best known—to the effect that a work is not "necessary" merely because it will save expense. But none of those cases turned on the particular mode of doing a thing that was necessary, but upon the question whether it was necessary to do the thing itself . . . but when once you have found, as the learned magistrate here has found as a fact, that a station is necessary, and the station is within the limits set by sect. 4 [City and South London Railway Companies Special Act, 1887], there is no authority which requires us to decide that the expense is to be disregarded, and that the County Council can say, "As there is no objection to putting your buildings behind the building line except that it will be more expensive, you must put them back."—p. 523.

Reg. v. Wycombe Ry., *approved*.

Breadalbane (Marquess) v. West Highland Ry. (1895) 22 Retie 307.—CT. OF SESSION.

Reg. v. Wycombe Ry., referred to.

Emsley v. N. E. Ry. (1896) 65 L. J. Ch. 385; [1896] 1 Ch. 418; 74 L. T. 113; 60 J. P. 182.—C.A. LINDLEY, KAY and A. L. SMITH, L.JJ.

Doe d. Hudson v. Leeds and Bradford Ry.

(1851) 20 L. J. Q. B. 486; 16 Q. B. 796; 15 Jur. 946.—Q.B.; and **Reg. v. Manchester, Sheffield and Lincolnshire Ry.** (1854) 4 Bl. & Bl. 88; 1 Jur. (N.S.) 419; 2 W. R. 591.—Q.B., *applied*.

Knapp v. L. C. & D. Ry. (1863) 32 L. J. Ex. 236; 2 H. & C. 212; 9 Jur. (N.S.) 761; 8 L. T. 541; 11 W. R. 890.—EX.

Doe d. Hudson v. Leeds and Bradford Ry., explained.

Wing v. Tottenham and Hampstead Junction Ry. (1868) 37 L. J. Ch. 654; L. R. 3 Ch. 740, 745; 16 W. R. 1098.—WOOD and SELWYN, L.JJ.

Wrigley v. Lancashire and Yorkshire Ry.

(1863) 4 Giff. 352; 9 Jur. (N.S.) 710; 8 L. T. 267.—STUART, V.-C., *distinguished*.

Dowling v. Pontypool, Caerleon and Newport Ry. (1874) 43 L. J. Ch. 761; L. R. 18 Eq. 714, 741.—HALL, V.-C.

Wrigley v. Lancashire and Yorkshire Ry., discussed and explained.**Dowling v. Pontypool, Caerleon and Newport Ry., followed.**

Finck v. L. & S. W. Ry. (1890) 44 Ch. D. 330; 59 L. J. Ch. 458; 62 L. T. 881; 38 W. R. 513.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

LINDLEY, L.J.—The limit of deviation has reference to the line of rails, and if there are pieces of land outside the limit of deviation, but properly referred to in the book of reference and deposited plans, and if those pieces of land are *bond fide* wanted for the purpose of making the line within the limit of deviation, there is no authority I know of to show that such pieces of land cannot be properly taken by the railway company. There was a doubt thrown upon this point by a case which came before Stuart, V.-C., of *Wrigley v. Lancashire and Yorkshire Ry.*, which was referred to and examined with his usual care by Hall, V.-C., in *Dowling v. Pontypool, &c. Ry.* The report of the judgment of Stuart, V.-C. [4 Giff. 360] runs in this way: "It is evident that no part of the field which is now in dispute as described on the deposited plans of reference constituted one close. If so, the company have no power to take the land comprised in their notice." This is not very clear; but on turning to the Jurist [9 Jur. (N.S.) 711], his meaning is intelligible enough. "It was very plain that no part of the field except that within the line of deviation was described in the deposited plans." With this explanation, which Hall, V.-C. had before him in *Dowling v. Pontypool, &c. Ry.*, the doubt, which did exist, appears to me to disappear. That case is a clear authority, if an authority is wanted, that if you have lands properly described in the books of reference and deposited plans, and they are *bond fide* wanted for the purpose of making the line within the limits of deviation, the company may take them; that is common sense, and in accordance with the Act.—p. 351.

Dowling v. Pontypool, Caerleon and Newport Ry., discussed.

Protheroe v. Tottenham and Forest Gate Ry.

[1891] 3 Ch. 278; 65 L. T. 323.—C.A.; *reversing* KAY, J.

LINDLEY, L.J.—The peculiarity of this case is, that there is no indication at all upon the deposited plan of the limit of what the company want north of the line of deviation. In *Dowling v. Pontypool, &c. Ry.* there was a plan showing the boundary of what was wanted; but that boundary was not carried quite so far as in strictness it ought to have been. The V.-C. held that, though the boundary was not carried far enough, yet that piece was sufficiently delineated. I am not quarrelling with his inference. Whether I should have drawn the same, I do not know. Perhaps I should; but it does not follow that because he drew the inference that the piece of land in that case was sufficiently delineated, it is to be inferred that the piece of land here is sufficiently delineated. I do not think that it is delineated at all.—p. 288.

FRY, L.J.—I cannot help thinking that Hall, V.-C., in *Dowling's Case*, put as wide an interpretation upon the word "delineated" as it could possibly bear. Whether it is not rather wider than I should put upon it is a point upon which I need express no opinion.—p. 290.

Doe d. Payne v. Bristol and Exeter Ry.

(1840) 9 L. J. Ex. 232; 6 M. & W. 320; 55 R. R. 634 n.—EX., *referred to*.

Dowling v. Pontypool, Caerleon and Newport Ry. (1874) 43 L. J. Ch. 761; L. R. 18 Eq. 714, 738.—HALL, V.-C.

Herron v. Rathmines and Rathgar Improvement Commissioners (1890) 27 L. R. Ir. 179.—C.A. (*reversing* PORTER, N.R.); *reversed*, [1892] A. C. 498; 67 L. T. 658.—H.L. (IR.). LORDS MORRIS and HANNEN *dissenting*.

Holyoake v. Shrewsbury and Birmingham Ry.

(1848) 5 Railw. Cas. 421.—COTTEHAM, L.C., *applied*.

Wintle v. Bristol and South Wales Union Ry. (1862) 6 L. T. 20; 10 W. R. 210.—WOOD, V.-C.

Grosvenor v. Hampstead Junction Ry.

(1857) 26 L. J. Ch. 731; 1 De G. & J. 446; 3 Jur. (N.S.) 1085; 5 W. R. 812.—L.JJ.

Principle applied, *Fergusson v. L. B. & S. C. Ry.* (1863) 33 L. J. Ch. 29; 3 De G. J. & S. 653; 2 N. R. 566; 9 L. T. 134; 11 W. R. 1088.—TURNER, L.J.; KNIGHT BRUCE, L.J. *dissenting* (affirming 33 Beav. 103.—M.R.); *Marson v. L. C. & D. Ry.* (1868) 37 L. J. Ch. 483; L. R. 6 Eq. 101; 18 L. T. 319.—GIFFARD, V.-C.; *referred to*, *Harvie v. South Devon Ry.* (1874) 31 L. T. 426.—MALINS, V.-C. (*reversed*, 32 L. T. 1; 23 W. R. 202.—CAIRNS, L.C. and JAMES, L.J.); *applied* *Kerford v. Seacombe, Hoylake and Deeside Ry.* (1888) 57 L. J. Ch. 270, 274; 58 L. T. 445; 36 W. R. 431; 52 J. P. 487.—KEKEWICH, J.

Richards v. Swansea Improvement and Tramways Co.

(1878) 9 Ch. D. 425; 38 L. T. 833; 26 W. R. 764.—HALL, V.-C. and C.A., *applied*.

Siegenberg v. Metropolitan District Ry. (1883) 49 L. T. 554; 32 W. R. 333.—BACON, V.-C.; *Brook v. Manchester, Sheffield and Lincolnshire Ry.* (1895) 64 L. J. Ch. 890; [1895] 2 Ch. 571; 13 R. 798; 73 L. T. 205; 43 W. R. 698.—CHITTY, J.

Sparrow v. Oxford, Worcester and Wolverhampton Ry. (1851) 9 Hare 441.—TURNER, V.-C.; *reversed*, (1852) 21 L. J. Ch. 731; 2 De G. M. & G. 94; 16 Jur. 703.—L.JJ. *And see post*

Sparrow v. Oxford, Worcester and Wolverhampton Ry. (*supra*), *discussed*.
Haynes v. Haynes (1861) 30 L. J. Ch. 578; 1 Dr. & Sm. 426; 7 Jur. (N.S.) 595; 4 L. T. 199; 9 W. R. 497.—KINDERLEY, V.-C.

Sparrow v. Oxford, Worcester and Wolverhampton Ry. and Spackman v. G. W. Ry. (1865) 1 Jur. (N.S.) 790.—WOOD, V.-C., *applied*.
Furniss v. Midland Ry. (1868) L. R. 6 Eq. 473, 477.—GIFFARD, V.-C.

Fergusson v. L. B. & S. C. Ry. (1863) 33 L. J. Ch. 29; 3 De G. J. & S. 653; 2 N. R. 566; 9 L. T. 134; 11 W. R. 1088.—TURNER, L.J.; KNIGHT BRUCE, L.J. *dissenting*; *affirming* 33 Beav. 102.—M.R.
Referred to, **Pulling v. L. C. & D. Ry.** (1864) 33 L. J. Ch. 505; 3 De G. J. & S. 661; 10 Jur. (N.S.) 665; 10 L. T. 740; 12 W. R. 969.—TURNER, L.J.; KNIGHT BRUCE, L.J. *doubting*; *applied*, **Barnes v. Southsea Ry.** (1884) 27 Ch. D. 536, 542; 51 L. T. 762; 32 W. R. 976.—BACON, V.-C.

Fergusson v. L. B. & S. C. Ry. and Pulling v. L. C. & D. Ry. (*supra*), *discussed and applied*.
Kerford v. Seacombe, Hoylake and Deeside Ry. (1888) 57 L. J. Ch. 270; 58 L. T. 445; 36 W. R. 431; 52 J. P. 437.—KEKEWICH, J.

Pulling v. L. C. & D. Ry., *distinguished*.
Finck v. L. & S. W. Ry. (1890) 59 L. J. Ch. 453; 44 Ch. D. 330; 62 L. T. 831; 38 W. R. 513.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

Steele v. Midland Ry. (1866) L. R. 1 Ch. 275; 12 Jur. (N.S.) 218; 14 L. T. 3; 14 W. R. 367.—TURNER, L.J.; KNIGHT BRUCE, L.J. *doubting*.

Referred to, **Smith v. Ridgway** (1866) 35 L. J. Ex. 198; L. R. 1 Ex. 331; 12 L. T. 611; 14 W. R. 868.—EX. CH.; **Berrington v. Metropolitan Board of Works** (1886) 54 L. T. 837; 50 J. P. 740.—CHITTY, J.; *explained*, **Wright v. Wallasey Local Board** (1887) 56 L. J. Q. B. 259; 18 Q. B. D. 783; 52 J. P. 4.—A. L. SMITH, J.; *applied*, **Kerford v. Seacombe, Hoylake and Deeside Ry.** (1888) 57 L. J. Ch. 270; 58 L. T. 445; 36 W. R. 431; 52 J. P. 437.—KEKEWICH, J.

Barnes v. Southsea Ry. (1884) 27 Ch. D. 536; 51 L. T. 762; 32 W. R. 976.—BACON, V.-C., *explained*.

Wright v. Wallasey Local Board (1887) 56 L. J. Q. B. 259; 18 Q. B. D. 783; 52 J. P. 4.—A. L. SMITH, J.

Glover v. North Staffordshire Ry. (1851) 20 L. J. Q. B. 376; 16 Q. B. 912; 15 Jur. 673.—Q.B., *referred to*.

Brand v. Hammersmith and City Ry. (1867) L. R. 2 Q. B. 223, 244; 36 L. J. Q. B. 139; 7 B. & S. 1; 16 L. T. 101; 15 W. R. 437.—EX. CH.; CHANNELL, B. *dissenting*; reversed, H.L. (*post*, col. 2654).

Glover v. North Staffordshire Ry.
Distinguished, **Ricket v. Metropolitan Ry.** (1867) 36 L. J. Q. B. 205; L. R. 2 H. L. 175, 189; 16 L. T. 542; 15 W. R. 937.—H.L. (E.); LORD WESTBURY *dissenting* (see "LANDS CLAUSES ACT," *ante*, col. 1531); *referred to*, **Eagle v. Charing Cross Ry.** (1867) L. R. 2 C. P. 638, 645; 36 L. J. C. P. 297; 16 L. T. 593; 15 W. R. 1016.—C.P.; *applied*, **Reg. v. Metropolitan**

Board of Works (1869) 38 L. J. Q. B. 201; L. R. 4 Q. B. 358, 365; 10 B. & S. 93.—Q.B.

Reg. v. G. N. Ry. (1849) 14 Q. B. 25; 14 Jur. 128; S. C. *nom.* **Cooling and G. N. Ry.**, *In re*, 19 L. J. Q. B. 25.—Q.B.

Distinguished, **Ricket v. Metropolitan Ry.** (1867) 36 L. J. Q. B. 205; L. R. 2 H. L. 175, 190; 16 L. T. 542; 15 W. R. 937.—H.L. (E.) (see "LANDS CLAUSES ACT," *ante*, col. 1531); *referred to*, **Eagle v. Charing Cross Ry.** (1867) L. R. 2 C. P. 638, 645; 36 L. J. C. P. 297; 16 L. T. 593; 15 W. R. 1016.—C.P.

Eagle v. Charing Cross Ry., *referred to*.
Ellis v. Rogers (1884) 50 L. T. 660; 29 Ch. D. 661, 666.—KAY, J.; *affirmed*, (1885) 29 Ch. D. 661; 53 L. T. 377.—C.A.

Eagle v. Charing Cross Ry., *discussed*.
Reg. v. Poulter (1887) 56 L. J. Q. B. 581; 57 L. T. 488.—Q.B.D.; reversed, 57 L. J. Q. B. 138; 20 Q. B. D. 132; 58 L. T. 534; 36 W. R. 117; 52 J. P. 224.—C.A. ESHER, M.R., FRY and BOWEN, L.JJ.

Penny and S. E. Ry., *In re* (1857) 26 L. J. Q. B. 225; 7 El. & Bl. 660; 3 Jur. (N.S.) 957; 5 W. R. 612.—Q.B.

Discussed, **Brand v. Hammersmith and City Ry.** (1865) 35 L. J. Q. B. 53; L. R. 1 Q. B. 130; 12 Jur. (N.S.) 335; 13 L. T. 501; 14 W. R. 129.—MELLOR and LUSH, JJ. (reversed, *post*, EX. CH., but restored, *post*, H.L.); **Reg. v. Halifax Corporation** (1866) 14 L. T. 447.—LUSH, J.; **Brand v. Hammersmith and City Ry.** (1867) 36 L. J. Q. B. 139; L. R. 2 Q. B. 223; 7 B. & S. 1; 16 L. T. 101; 15 W. R. 437.—EX. CH.; CHANNELL, B. *dissenting* (reversed, *post*, H.L.); *approved*, **Ricket v. Metropolitan Ry.** (1867) 36 L. J. Q. B. 205; L. R. 2 H. L. 175, 187; 16 L. T. 542; 15 W. R. 937.—H.L. (E.); CHELMSFORD, L.C. and LORD CRANWORTH, LORD WESTBURY *dissenting*.

Penny and S. E. Ry., *In re*, *referred to*.
Reg. v. Metropolitan Board of Works (1869) 38 L. J. Q. B. 201; L. R. 4 Q. B. 358, 363; 10 B. & S. 391; 17 W. R. 1094.—Q.B.; **Hammersmith and City Ry. v. Brand** (1869) 38 L. J. Q. B. 265; L. R. 4 H. L. 171, 201; 21 L. T. 238; 18 W. R. 12.—H.L. (E.); LORD CAIRNS *dissenting*.

Penny and S. E. Ry., *In re*, *discussed*.
Buccleuch (Duke) v. Metropolitan Board of Works (1870) 39 L. J. Ex. 130; L. R. 5 Ex. 221, 231; 23 L. T. 255.—EX. CH.; WILLES, A. L. SMITH and BRETT, JJ. *dissenting on one point*; *affirmed*, (1872) 41 L. J. Ex. 137; L. R. 5 H. L. 418; 27 L. T. 1.—H.L. (E.); **City of Glasgow Ry. v. Hunter** (1870) L. R. 2 H. L. (Sc.) 78, 85.—H.L. (Sc.); **McCarthy v. Metropolitan Board of Works** (1873) 42 L. J. C. P. 81; L. R. 8 C. P. 191, 194; 28 L. T. 417.—EX. CH.; CLEASBY, B. *dissenting*; **Metropolitan Board of Works v. McCarthy** (1874) L. R. 7 H. L. 243, 261; 43 L. J. C. P. 385; 31 L. T. 282; 23 W. R. 115.—H.L. (E.), *affirming*, EX. CH.

Penny and S. E. Ry., *In re*, *applied*.
Lyon v. Fishmongers' Co. (1876) 1 App. Cas. 662; 46 L. J. Ch. 68; 35 L. T. 549; 25 W. R. 165.—H.L. (E.). CAIRNS, L.C., LORDS CHELMSFORD and SELBOURNE.

CAIRNS, L.C.—Lord Campbell, in *Penny, In re*, which was a claim for compensation under the

Lands Clauses and Railways Clauses Acts, stated this would be the test of the right, that "unless the particular injury would have been actionable before the company had acquired statutory powers, it is not an injury for which compensation can be claimed."—p. 680.

Penny and S. E. Ry., In re, discussed and applied.

County Mayo Presentment, In re. Kelly v. Reg. [1898] 2 Ir. R. 719, 738.—Q.B.D.; PALLES, C.B. *dissenting*.

Penny and S. E. Ry., In re, referred to.

Ned's Point Battery, In re (1901) [1903] 2 Ir. R. 192, 201.—K.B.D.; Edinburgh and District Water Trustees v. Clippens Oil Co. (1902); 4 Fraser H. L. 41, 48.—H.L. (SC.). HALSBURY, L.C., LORDS MACNAGHTEN, BRAMPTON, ROBERTSON and LINDLEY.

Lamb v. North London Ry. (1869) L. R. 4 Ch. 522; 21 L. T. 98; 17 W. R. 746.—L.J.J., *rule adopted*.

Dowling v. Pontypool, Caerleon and Newport Ry. (1874) 43 L. J. Ch. 761; L. R. 18 Eq. 714, 746.—HALL, V.-C.

Lund v. Midland Ry. (1865) 34 L. J. Ch. 276.—ROMILLY, M.R., *discussed*.

May v. G. W. Ry. (1872) 41 L. J. Q. B. 104; L. R. 7 Q. B. 385.—Q.B.; and 42 L. J. Q. B. 6; L. R. 8 Q. B. 30.—EX. CH.; MARTIN, B. and BYLES, J. *dissenting*; affirmed *nom.* G. W. Ry. v. May (1874) 43 L. J. Q. B. 233; L. R. 7 H. L. 283; 31 L. T. 137; 43 W. R. 141.—H.L. (E.).

Eton College v. G. W. Ry. (1839) 1 Railw. Cas. 200; 3 Jur. 163.—V.-C.; and **Petre (Lord) v. Eastern Counties Ry.** (1843) 3 Railw. Cas. 367.—V.-C., *discussed*.

Cother v. Midland Ry. (1848) 17 L. J. Ch. 235; 2 Ph. 469; 5 Railw. Cas. 187.—COTTENHAM, L.C.

Cother v. Midland Ry., referred to.

Sadd v. Maldon, Witham and Braintree Ry. (1851) 20 L. J. Ex. 102; 6 Ex. 143; 6 Railw. Cas. 779.—EX.

Hood v. N. E. Ry., L. R. 8 Eq. 666; 20 L. T. 970; 17 W. R. 1035.—JAMES, V.-C.; *varied*, (1870) L. R. 5 Ch. 525; 23 L. T. 206; 18 W. R. 473.—HATHERLEY, L.C. and GIFFARD, L.J.

Wilson v. Northampton and Banbury Junction Ry. (1874) 43 L. J. Ch. 503; L. R. 9 Ch. 279; 30 L. T. 147; 22 W. R. 380.—C.A., *considered and distinguished*.

Todd v. Midland G. W. (Ireland) Ry. (1881) 9 L. R. Ir. 85.—SULLIVAN, M.R.

Churchill v. Salisbury and Dorset Ry. (1875) 32 L. T. 216; 23 W. R. 534.—BACON, V.-C.; *varied*, 23 W. R. 894.—L.J.J.

S. E. Ry. v. Reg. (1851) 20 L. J. Q. B. 428; 17 Q. B. 485.—EX. CH.; *affirmed nom.* **Reg. v. S. E. Ry.** (1853) 4 H. L. Cas. 471; 17 Jur. 931.—H.L. (E.).

Reg. v. S. E. Ry., discussed.

Local Government Board for Ireland v. Rex (1903) 72 L. J. C. 101; [1903] A. C. 402, 410; 89 L. T. 277.—H.L. (IR.): LORD LINDLEY *dissenting*; reversing S. C. *nom.* Rex v. Local Government Board for Ireland [1902] 2 Ir. R. 637.—C.A.

Reg. v. Caledonian Ry. (1850) 20 L. J. Q. B. 147; 16 Q. B. 19; 15 Jur. 396.—Q.B., *distinguished*.

Ware v. Regent's Canal Co. (1858) 28 L. J. Ch. 153; 3 De G. & J. 212; 5 Jur. (N.S.) 25; 7 W. R. 67.—CHELMSFORD, L.C.

Reg. v. Caledonian Ry., explained.

Att.-Gen. v. Tewkesbury and Malvern Ry. (1863) 32 L. J. Ch. 482; 1 De G. J. & S. 423; 9 Jur. (N.S.) 951; 8 L. T. 682.—L.J.J.

Beardmer v. L. & N. W. Ry. (1849) 18 L. J. Ch. 432; 1 Mac. & G. 112; 1 H. & Tw. 161; 13 Jur. 327; 5 Railw. Cas. 728.—COTTENHAM, L.C., *referred to*.

Little v. Newport, Abergavenny and Hereford Ry. (1852) 22 L. J. C. P. 39; 12 C. B. 753; 17 Jur. 209; 1 W. R. 81; 7 Railw. Cas. 280.—C.P., *discussed*.

Att.-Gen. v. Tewkesbury and Malvern Ry. (1863) 32 L. J. Ch. 482; 1 De G. J. & S. 423; 9 Jur. (N.S.) 951; 8 L. T. 682.—KNIGHT BRUCE and TURNER, L.J.J.

Coats (or Coates) v. Clarence Ry. (1830) 1 Russ. & M. 181; 8 L. J. (o.s.) Ch. 72; 32 R. R. 183.—L.C., *referred to*.

Armstrong v. Waterford and Limerick Ry. (1846) 10 Ir. Eq. R. 60.—M.R.

Coats v. Clarence Ry.

Not applied, Hood v. N. E. Ry. (1870) 40 L. J. Ch. 17; L. R. 11 Eq. 116, 126; 23 L. T. 433; 19 W. R. 266.—MALINS, V.-C.; *discussed*, Milward v. Redditch Local Board (1873) 21 W. R. 429.—ROMILLY, M.R.; *referred to*, Dowling v. Pontypool, Caerleon and Newport Ry. (1874) 43 L. J. Ch. 761; L. R. 18 Eq. 714, 743.—HALL, V.-C.

Coats v. Clarence Ry., distinguished.

Biddulph v. St. George's, Hanover Square, Vestry (1863) 33 L. J. Ch. 411; 3 De G. J. & S. 493; 9 Jur. (N.S.) 953; 8 L. T. 558; 11 W. R. 739.—L.J.J.

TURNER, L.J.—On examining that case I see that there was in the first instance, an order by consent, referring it to an engineer to say what damage would be sustained by the party; but, independently of that, I think the case must be considered to have proceeded on the ground that there was not a *bona fide* exercise of the powers; for what the company in that case were doing was, that having powers to make an arch, they were making an insufficient arch, in order to save themselves the expense of making a sufficient one, and no one can doubt that that was not a *bona fide* exercise of the powers of the Act of Parliament.—p. 417.

Coats v. Clarence Ry., referred to.

Southwark and Vauxhall Water Co. v. Wandsworth District Board of Works (1898) 67 L. J. Ch. 657; [1898] 2 Ch. 603, 611; 79 L. T. 132; 47 W. R. 107; 62 J. P. 756.—C.A.; Roberts v. Charing Cross, Euston and Hampstead Ry. (1903) 19 Times L. R. 160.—FARWELL, J.

Manser v. Northern and Eastern Counties Ry. (1841) 2 Railw. Cas. 380; 5 Jur. 983.—L.C., *referred to*.

Hood v. N. E. Ry. (1870) 40 L. J. Ch. 17; L. R. 11 Eq. 116, 126; 23 L. T. 433; 19 W. R. 266.—MALINS, V.-C.

Reg. v. East and West India Docks Ry. (1853) 22 L. J. Q. B. 380; 2 El. & Bl. 466; 1 C. L. R. 496; 17 Jur. 1181; 1 W. R. 409.—Q.B., *applied*.

Fenwick v. East London Ry. (1875) 44 L. J. Ch. 602; L. R. 20 Eq. 544, 549; 23 W. R. 901. JESSEL, M.R.—Now, first of all, what does "do as little damage as can be" mean? It does not mean, make the works without any damage, but it refers to the mode of constructing and using works authorised to be done—*Reg. v. East and West India Docks Ry.*—p. 604.

Att.-Gen. v. Mid Kent and S. E. Ry. (1867) L. R. 3 Ch. 100; 16 W. R. 258.—CAIRNS and ROLT, L.J., *referred to*.

Dowling v. Pontypool, Caerleon and Newport Ry. (1874) 43 L. J. Ch. 761; L. R. 18 Eq. 714, 746.—HALL, V.-C.

Att.-Gen. v. Mid Kent and S.E. Ry., discussed and applied.

Att.-Gen. v. L. & N. W. Ry. (1899) 69 L. J. Q. B. 26; [1900] 1 Q. B. 78; 81 L. T. 649; 63 J. P. 772.—C.A.

COLLINS, L.J.—The only difference is that in that case [*Att.-Gen. v. Mid Kent Ry.*] the provision, upon which the suggestion of a parliamentary contract was founded, was contained in the special Act, whereas in the present case the provision is contained in the general Act, which, by the terms of the special Act is incorporated with it. If, therefore, there is a parliamentary contract in the one case, there is equally a parliamentary contract in the other.—p. 80.

Reg. v. Bexley Heath Ry. (1896) 65 L. J. Q. B. 469; [1896] 2 Q. B. 74; 74 L. T. 540; 44 W. R. 501; 60 J. P. 54.—C.A.: *affirmed nom. Dartford Rural District Council v. Bexley Heath Ry.* (1897) 67 L. J. Q. B. 231; [1898] A. C. 210; 77 L. T. 601; 46 W. R. 235; 62 J. P. 227.—H.L. (E.).

Dartford Rural District Council v. Bexley Heath Ry., referred to.

Gorman v. Waterford and Limerick Ry. (1899) [1900] 2 Ir. R. 341, 346.—Q.B.D.

Att.-Gen. v. London and Southampton Ry. (1837) 7 L. J. Ch. 15; 9 Sim. 78; 1 Railw. Cas. 302.—V.-C., *commented on*.

Reg. v. Birmingham and Gloucester Ry. (1841) 10 L. J. Q. B. 322; 2 Q. B. 47; 1 G. & D. 324; 2 Railw. Cas. 694; 4 Jur. 966.—Q.B.

Att.-Gen. v. London and Southampton Ry., distinguished.

Clarke v. Manchester, Sheffield and Lincolnshire Ry. (1861) 1 J. & H. 631.—WOOD, V.-C.

Att.-Gen. v. Eastern Counties Ry. (1842) 2 Railw. Cas. 823.—COTTENHAM, L.C.: S. C. at law, 12 L. J. Ex. 106; 10 M. & W. 263.—EX., *discussed*.

London and Blackwall Ry. v. Limehouse District Board of Works (1856) 26 L. J. Ch. 164; 3 K. & J. 123; 5 W. R. 64.—WOOD, V.-C.

L. & S. W. Ry. v. Flower (1875) 45 L. J. C. P. 54; 1 C. P. D. 77; 33 L. T. 687.—C.P.D.

Referred to, Manchester Bonded Warehouse Co. v. Carr (1880) 49 L. J. C. P. 809; 5 C. P. D. 507; 43 L. T. 476; 29 W. R. 354; 45 J. P. 7.—C.P.D.; *followed*, Huggall or Huggall v. McLean or Mc'Kean (1885) 53 L. T. 94; 33 W. R. 588.—C.A.

Pugh v. Golden Valley Ry. (1880) 49 L. J.

Ch. 721; 15 Ch. D. 330; 42 L. T. 863; 28 W. R. 863.—C.A., *explained*.

Wilkinson v. Hull, &c. Ry. and Dock Co. (1882) 20 Ch. D. 323; 51 L. J. Ch. 788; 46 L. T. 455; 30 W. R. 617.—C.A. JESSEL, M.R., COTTON and LINDLEY, L.J.; reversing KAY, J.

COTTON, L.J.—The decision there [*Pugh v. Golden Valley Ry.*] was that the railway company, coming on a river very much winding, the course of that winding river being crossed by the railway, had no power to divert it so as entirely to take it away from one side of their railway. And on what ground? It was that sect. 16 [Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20)] must be read *reddendo singulis singulis*, that when in making a railway it is necessary to divert the river, then the diversion may be made; if it is necessary to cross it, then the crossing may be made, but the mode of the diversion and the mode of crossing, when it is ascertained that that is the way which is necessary for the construction of the railway, is left entirely to the discretion of the engineer. This, I understand, is the meaning of what was said by Thesiger, L.J., in giving the judgment of the Court.—p. 338.

Pugh v. Golden Valley Ry., referred to.

Pearson v. Pearson (1884) 54 L. J. Ch. 32; 27 Ch. D. 145, 154; 51 L. T. 311; 32 W. R. 1006.—C.A.: LINDLEY, L.J. dissenting on one point; Glasgow Lord Provost v. Farie (1888) 58 L. J. P. C. 33; 13 App. Cas. 657, 689; 60 L. T. 274; 37 W. R. 627.—H.L. (SC.) (*ante*, col. 1804).

Pugh v. Golden Valley Ry., approved.

Breadalbane (Marquess) v. West Highland Ry. (1895) 22 Rottie 307.—CT. OF SESSION.

Beauchamp (Earl) v. G. W. Ry. (1867) 37 L. J. Ch. 74.—STUART, V.-C.: *reversed*, (1868) 38 L. J. Ch. 162; L. R. 3 Ch. 745; 19 L. T. 189; 16 W. R. 1155.—WOOD and SELWYN, L.JJ.

Beauchamp (Earl) v. G. W. Ry.

Referred to, May v. G. W. Ry. (1872) 42 L. J. Q. B. 6; L. R. 8 Q. B. 24; 30; 27 L. T. 620; 21 W. R. 295.—EX. CH. (*affirmed nom. G. W. Ry. v. May* (1874) 43 L. J. Q. B. 233; L. R. 7 H. L. 283; 31 L. T. 137; 23 W. R. 141.—H.L. (E.)); Dowling v. Pontypool, Caerleon and Newport Ry. (1874) 43 L. J. Ch. 761; L. R. 18 Eq. 714, 742.—HALL, V.-C.: *discussed and followed*, Wilkinson v. Hull, &c. Ry. and Dock Co. (1882) 51 L. J. Ch. 778; 20 Ch. D. 323; 46 L. T. 455; 30 W. R. 617.—C.A.

Beauchamp (Earl) v. G. W. Ry., distinguished.

Hobbs v. Midland Ry. (1882) 20 Ch. D. 418; 51 L. J. Ch. 320; 46 L. T. 270; 30 W. R. 516.

MANISTY, J.—That [*Beauchamp (Earl) v. G. W. Ry.*] was a case of setting apart lands to make a road. That cannot apply here, because in the result the Court arrived at the conclusion that that was one of the purposes of the undertaking, and therefore it was impossible to hold it was superfluous land; in other words, the Court held that the land was not superfluous.—p. 436.

Beauchamp (Earl) v. G. W. Ry., not applied.

Macfie v. Callander and Oban Ry. (1897) 24 Rottie 1156, 1171.—CT. OF SESSION; *affirmed*, (1898) 67 L. J. P. C. 58; [1898] A. C. 270; 78 L. T. 598.—H.L. (SC.).

Att.-Gen. v. Ely, Haddenham and Sutton Ry.

(1869) 38 L. J. Ch. 258; L. R. 4 Ch. 194;

20 L. T. 1; 17 W. R. 356.—HATHERLEY, L.C.

Discussed, Pugh v. Golden Valley Ry. (1879) 48 L. J. Ch. 666; 12 Ch. 274; 41 L. T. 30; 28 W. R. 44.—FRY, J. (affirmed, (1880) 49 L. J. Ch. 721; 15 Ch. D. 330; 42 L. T. 863; 28 W. R. 863.—C.A.); *Att.-Gen. v. Shrewsbury (Kingsland) Bridge Co.* (1882) 51 L. J. Ch. 746; 21 Ch. D. 752; 46 L. T. 687; 30 W. R. 916.—FRY, J. (*see post*, col. 2697).

Wood v. North Staffordshire Ry., 13 Jur. 466.—KNIGHT BRUCE, V.-C.; *reversed*, (1849) 1 Mac. & G. 275; 1 H. & Tw. 611.—L.C.

Att.-Gen. v. G. N. Ry. (1850) 4 De G. & Sm. 75; 14 Jur. 684; 15 Jur. 387.—KNIGHT BRUCE, V.-C., *followed*.

Reg. v. Wycombe Ry. (1867) 36 L. J. Q. B. 121; L. L. 2 Q. B. 310, 319; 8 B. & S. 259; 15 L. T. 610; 15 W. R. 489.—Q.B.

Att.-Gen. v. G. N. Ry., *applied*.

Att.-Gen. v. Barry Docks and Ry. (1887) 35 Ch. D. 573; 56 L. J. Ch. 1018; 56 L. T. 559; 35 W. R. 830; 51 J. P. 644.

NORTH, J.—The injunction to be granted would be to restrain the defendants from using the said road without providing a substituted road in accordance with sect. 53 [Railways Clauses Consolidation Act, 1845], and it seems from *Att.-Gen. v. G. N. Ry.* that an injunction of that sort would have the effect of preventing the company running their trains over the line of railway that they have opened along the site of the original highway. Therefore, in granting an injunction I do not restrain the defendants from allowing their embankments or their rails, or whatever may be upon them, to remain where they are. I do not order those to be removed, but I must restrain the defendants from using the railway upon the site of the old road until they have substituted a proper road under sect. 53.—p. 575.

Att.-Gen. v. Barry Docks and Ry., *referred to*.

Pollock v. North British Ry. (1901) 3 Fraser 727, 741.—CT. OF SESSION.

Reg. v. Scott (1842) 11 L. J. Q. B. 254; 3 Q. B. 543; 6 Jur. 1084; 3 Railw. Cas. 187; 2 G. & D. 729.—Q.B., *distinguished*.

Watkins v. G. N. Ry. (1851) 20 L. J. Q. B. 391; 16 Q. B. 961.—Q.B.

PATTERSON, J.—That case was decided before the passing of the 8 & 9 Vict. c. 20, and rested entirely upon the provisions of the special Act, which contained no remedy for the act complained of, and therefore the common law remedy remained. But here the question is one of construction upon quite a different Act.—p. 394.

Watkins v. G. N. Ry., *not applied*.

Caledonian Ry. v. Colt (1860) 3 Macq. H. L. 833; 7 Jur. (N.S.) 475; 3 L. T. 252.—H.L. (SC.).

Caledonian Ry. v. Colt, *applied*.

Pollock v. North British Ry. (1901) 3 Fraser 727, 741.—CT. OF SESSION.

Collinson v. Newcastle and Darlington Ry. (1844) 1 Car. & K. 546.—CRESSWELL, J., *commented on*.

Mann v. Gt. Southern and Western Ry. (1858) 9 Ir. C. L. R. 105.—EX.; PIGOT, C.B. dissenting.

North Staffordshire Ry. v. Dale (1858) 27

L. J. M. C. 147; 8 El. & Bl. 836; 4 Jur. (N.S.) 631.—Q.B.

Approved and followed, **Leech v. North Staffordshire Ry.** (1860) 29 L. J. M. C. 150; 1 L. T. 332; 8 W. R. 216, S. C. *nom.* **Newcastle-under-Lyne Turnpike Trustees v. North Staffordshire Ry.**, 5 H. & N. 160, 175.—EX.; *referred to*, **Waterford and Limerick Ry. v. Kearney** (1860) 12 Ir. C. L. R. 224, 232.—Q.B.; *discussed*, **Fosberry v. Waterford and Limerick Ry.** (1862) 13 Ir. C. L. R. 494.—C.P.

North Staffordshire Ry. v. Dale, *followed*.

North of England Ry. v. Langbaugh (1871) 24 L. T. 544.—Q.B.

North Staffordshire Ry. v. Dale, *referred to*. **Reg. v. S. E. Ry.** (1875) 32 L. T. 858.—Q.B.

North Staffordshire Ry. v. Dale, *approved and followed*.

Bury Corporation v. Lancashire and Yorkshire Ry. (1888) 20 Q. B. D. 485; 57 L. J. Q. B. 280; 59 L. T. 193; 36 W. R. 491; 52 J. P. 341.—C.A.; affirmed, H.L. (*post*).

ESHER, M.R.—I think the first decision on the section [Railways Clauses Consolidation Act, 1845, s. 46], which was the decision of Campbell, C.J. and Wightman and Crompton, JJ., in **North Staffordshire Ry. v. Dale**, really puts the matter on the true grounds. The substance of their view is this: here is a section dealing with certain specified cases in plain language, and if that section is to be looked at alone, according to the plain meaning of the words, there could not be a doubt as to its effect: but then astute counsel suggested that it must be read in conjunction with other sections, and so endeavoured to bring a fog over its meaning. The Court said that that was not the way to construe it; that, dealing specifically with particular cases, it must be taken by itself. One thing is quite clear, that, whatever works the section compels the railway company to execute, it likewise compels them to maintain for ever. The question is, therefore, what they are bound to execute under the section? The section does not refer to all bridges which they may have to make, but only to certain bridges, which they have to make under certain specified circumstances.—p. 488.

FRY, L.J. to the same effect.

LOPES, L.J.—This is a case where a road which is a highway is carried on arches over a railway. In that case sect. 46 applies, and its language appears to me to impose on the railway company the burden of perpetually maintaining, not only the fabric of the bridge and approaches, but also the roadway over them. It seems to me idle to say that the term "bridge" does not include the roadway by which the traffic is to pass from one side to the other. The construction I put upon the section is, in my opinion, the plain meaning of the language, and there is a long current of authority in favour of that construction.—p. 490.

North Staffordshire Ry. v. Dale, *followed*.

Lancashire and Yorkshire Ry. v. Bury Corporation (1889) 14 App. Cas. 417 (*post*).

Leech v. North Staffordshire Ry. or Newcastle-under-Lyne Turnpike Trustees v. North Staffordshire Ry. (*supra*), *followed*.

North of England Ry. v. Langbaugh (1871) 24 L. T. 544.—Q.B.; **Lancashire and Yorkshire Ry. v. Bury Corporation** (1889) 59 L. J. Q. B. 85; 14 App. Cas. 417; 61 L. T. 417; 54 J. P. 197.—H.L. (E.).

- Leech v. North Staffordshire Ry.** (*supra*), referred to.
 Irish Land Commission v. Magorian (1900) [1901] 2 I. R. 445, 459.—Q.B.D.
- Waterford and Limerick Ry. v. Kearney** (1860) 12 Ir. C. L. R. 224.—Q.B.; and **Fosberry v. Waterford and Limerick Ry.** (1862) 13 Ir. C. L. R. 494.—C.P., followed.
 L. & N. W. Ry. v. Skerton (1864) 33 L. J. M. C. 158; 5 B. & S. 559; 10 L. T. 648; 12 W. R. 1102.—Q.B.
- L. & N. W. Ry. v. Skerton.** See West Lancashire Rural Council v. Lancashire and Yorkshire Ry. (1903) 72 L. J. K. B. 675; [1903] 2 K. B. 394; 89 L. T. 139; 51 W. R. 694; 67 J. P. 410; 1 L. G. R. 788.—WRIGHT, J.
- Wakesfield Local Board v. West Riding and Grimsby Ry.** (1865) 35 L. J. M. C. 69; L. R. 1 Q. B. 84; 6 B. & S. 794; 13 Jur. (N.S.) 160; 13 L. T. 590; 14 W. R. 100; 10 Cox C. C. 162.—Q.B., distinguished.
- Muir v. Hore** (1877) 47 L. J. M. C. 17; 37 L. T. 315.—GROVE and DENMAN, JJ.
- Bell v. Midland Ry.** (1861) 30 L. J. C. P. 273; 10 C. B. (N.S.) 287; 7 Jur. (N.S.) 1200; 4 L. T. 293; 9 W. R. 612.—C.P., discussed.
- Beckett v. Midland Ry.** (1867) 37 L. J. C. P. 11; L. R. 3 C. P. 82, 101; 17 L. T. 499; 16 W. R. 221.—C.P.; **Thompson v. Hill** (1870) L. R. 5 C. P. 564; 39 L. J. C. P. 264; 22 L. T. 820; 18 W. R. 1070.—C.P.
- Oliver v. N. E. Ry.** (1874) 43 L. J. Q. B. 198; L. R. 9 Q. B. 409.—Q.B., referred to.
- Att.-Gen. v. Conduit Colliery Co.** (1894) 64 L. J. Q. B. 207; [1895] 1 Q. B. 301; 15 R. 267; 71 L. T. 777; 43 W. R. 366; 59 J. P. 70; 11 Times L. R. 57.—WRIGHT and COLLINS, JJ.
- Fawcett v. York and North Midland Ry.** (1851) 20 L. J. Q. B. 222; 16 Q. B. 610; 15 Jur. 173.—Q.B., distinguished.
- Manchester, Sheffield and Lincolnshire Ry. v. Wallis** (1854) 23 L. J. C. P. 85; 14 C. B. 213; 2 C. L. R. 573; 18 Jur. 268; 2 W. R. 194; 7 Railw. Cas. 709.—C.P.
- JERVIS, C.J.** (for the Court).—In *Fawcett v. York and North Midland Ry.*, the company were required, by express words of the statute, to keep the gate closed across the road under all circumstances, and were guilty of a wrong in omitting to do so.—p. 88.
- Fawcett v. York and North Midland Ry.** Followed, *Dickinson v. L. & N. W. Ry.* (1866) H. & R. 399, 404.—C.P.; referred to, *Gorman v. Waterford and Limerick Ry.* (*post*, col. 2663).
- Wyatt v. G. W. Ry.** (1865) 34 L. J. Q. B. 204; 6 B. & S. 709; 11 Jur. (N.S.) 825; 12 L. T. 568; 13 W. R. 837.—Q.B.; **BLACKBURN, J.** dissenting.
- Referred to, *Skelton v. L. & N. W. Ry.* (1867) 36 L. J. C. P. 249; L. R. 2 C. P. 631, 636; 16 L. T. 563; 15 W. R. 925.—C.P.; discussed, *Dublin, Wicklow and Wexford Ry. v. Slatery* (1878) 3 App. Cas. 1155, 1196; 39 L. T. 365; 27 W. R. 191.—H.L. (IR.); **LORDS HATHERLEY, COLE-RIDGE and BLACKBURN** dissenting; disapproved, *Lax v. Darlington Corporation* (1879) 49 L. J. Ex. 105; 5 Ex. D. 28, 36; 41 L. T. 489; 28 W. R. 221.—C.A.; questioned but followed, *Reg. v. Strange* (1889) 16 Cox C. C. 552.—COLE-
- RIDGE, C.J.**; applied, *Boyd v. G. N. Ry.* [1895] 2 Ir. R. 555.—ANDREWS and MURPHY, JJ.
- Wyatt v. G. W. Ry.**, distinguished.
Gorman v. Waterford and Limerick Ry. (1899) [1900] 2 Ir. R. 341.—Q.B.D.
- GIBSON, J.** (for the Court).—*Wyatt v. G. W. Ry.* was relied upon as establishing that the servants of the company alone were entitled to open gates at a level crossing, and that the same principle applied to the gates here. That case, however, related to an ordinary railway. The local legislation, with which we have to deal, enacts specific provisions and stipulations for the benefit and protection of the public; but how can new and expensive obligations, such as employing a servant to open, shut, &c., be imported into it by implication? Even if *Wyatt's Case* (from which *Blackburn, J.* dissented, and which has been questioned by Lord Coleridge) was rightly decided, it seems to me that any member of the public going by these gates was entitled to open them for the purpose of passage, and was bound to close them again after use.—p. 348.
- Boyd v. G. N. Ry.** (*supra*), referred to.
Smith v. Wilson (1902) [1903] 2 Ir. R. 45, 52.—K.B.D.
- Matson v. Baird** (1878) 3 App. Cas. 1082; 39 L. T. 304; 26 W. R. 835.—H.L. (SC.), discussed.
- Gorman v. Waterford and Limerick Ry.* (1899) [1900] 2 Ir. R. 341.—Q.B.D.
- GIBSON, J.** (for the Court).—In *Matson v. Baird*, a private railway, with the permission of the road authority, ran across a public highway without being fenced by gates, and it was held that the owner of the railway was not responsible for an accident thereby caused. The presence of gates is some protection, but the Court cannot enlarge that protection by imposing duties which the Legislature deemed it unnecessary to prescribe.—p. 349.
- Matson v. Baird**, distinguished.
Att.-Gen. v. Barker (1900) 83 L. T. 245.—FARWELL, J.
- Manchester, Sheffield and Lincolnshire Ry. v. Wallis** (1854) 23 L. J. C. P. 85; 14 C. B. 213; 2 C. L. R. 573; 18 Jur. 268; 2 W. R. 194; 7 Railw. Cas. 709.—C.P., followed.
- Midland Ry. v. Daykin** (1855) 25 L. J. C. P. 73; 17 C. B. 126; 4 W. R. 16.—C.P.
- Manchester, Sheffield and Lincolnshire Ry. v. Wallis**, discussed and approved.
Charman v. S. E. Ry. (1888) 57 L. J. Q. B. 597; 21 Q. B. D. 524; 37 W. R. 8; 53 J. P. 86.—C.A.
- Manchester, Sheffield and Lincolnshire Ry. v. Wallis**, discussed.
- Luscombe v. G. W. Ry.* (1899) 68 L. J. Q. B. 711; [1899] 2 Q. B. 313, 317; 81 L. T. 183.
- DARLING, J.**—I think that the decision in *Manchester &c. Ry. v. Wallis* depends upon the fact that cattle were straying, not that they were trespassers in the sense in which, in the contention upon behalf of the plaintiff, it was argued that the word "trespass" ought to be understood.—p. 712.
- CHANNELL, J.**—In *Manchester, &c. Ry. v. Wallis*, the Court seems to have come to the conclusion (I am not sure that it decided the question, because the judgment was in favour of the railway company) that the cattle of persons who were lawfully using the highway for passing and

re-passing might be considered to be cattle of the owners and occupiers of the adjoining land within the meaning of this section [s. 68 of the Railways Clauses Act, 1845]. That construction appears to me to somewhat strain the natural meaning of the words "owners and occupiers of lands adjoining," and the Court seems to have adopted it because, unless that interpretation were placed upon the words, there would be no provision in the Act, for the case of a highway adjoining a railway; and it was necessary to place a sensible meaning upon the section in the case where the adjoining land was in fact a highway. The meaning which the Court held that it bore in that case was that the cattle, which were lawfully using the highway for the purpose of passing and re-passing, were to be considered the cattle of the owners and occupiers of the adjoining land within the meaning of the section. It seems to me that that construction excludes the view that cattle which happen to belong to, or to be licensed by the individual who owns the soil over which the highway passes, could be considered to be cattle of the owners and occupiers within the meaning of the section.—p. 713.

Manchester, Sheffield and Lincolnshire Ry. v. Wallis and Luscombe v. G. W. Ry., explained.

Charman v. S. E. Ry. (supra, col. 2662), referred to.

Gorman v. Waterford and Limerick Ry. (1899) [1900] 2 Ir. R. 341.—Q.B.D.

GIBSON, J. (for the Court).—As the company were not bound by any absolute obligation to keep the gates closed, I need not consider whether the fact that the sheep were straying might not be a defence. *Fawcett v. York, &c. Ry.* (see supra, col. 2661), followed in *Charman's Case*, decides that such fact would not be an answer if an express statutory duty to keep the gates closed was violated. But, where there is no such express legislation, and the alleged breach is of an implied duty, or the action is based on negligence, different considerations may possibly arise. Whether, in such case, the reasoning in *Wallis's Case*, and in *Luscombe v. G. W. Ry.*, may not apply, is a point on which I offer no opinion. Those authorities decide that a railway gate at the side of a high road is a fence within sect. 68 of the Railway Clauses Act, and that there is no obligation to maintain the gate for the protection of animals straying and trespassing on the highway.—p. 350.

Stapley v. L. B. & S. C. Ry. (1865) 35 L. J. Ex. 7; L. R. 1 Ex. 21; 4 H. & C. 93; 11 Jur. (N.S.) 954; 13 L. T. 406; 14 W. R. 132.—EX., discussed and applied.

Lunt v. L. & N. W. Ry. (1866) L. R. 1 Q. B. 277, 282; 12 Jur. (N.S.) 409; 14 L. T. 225; 14 W. R. 497; S. C. nom. Lunn v. L. & N. W. Ry. 35 L. J. Q. B. 105.—Q.B.

Stapley v. L. B. & S. C. Ry. and Lunn (or Lunt) v. L. & N. W. Ry., distinguished.

Skelton v. L. & N. W. Ry. (1867) 36 L. J. C. P. 249; L. R. 2 C. P. 631, 637; 16 L. T. 563; 15 W. R. 925.—C.P.

WILLES, J.—In *Lunn v. L. & N. W. Ry.* and *Stapley v. L. B. & S. C. Ry.* there was that which was equivalent to an invitation to passengers to cross the railway.—p. 254.

Stapley v. L. B. & S. C. Ry., affirmed.

Wanless v. N. E. Ry. (1871) L. R. 6 Q. B. 481;

25 L. T. 103; 22 W. R. 351.—EX. CH.: affirmed *nom. N. E. Ry. v. Wanless* (1874) 43 L. J. Q. B. 185; L. R. 7 H. L. 12; 30 L. T. 275; 22 W. R. 561.—H.L. (E.).

Wanless v. N. E. Ry.

Discussed and principle applied. *Coyle v. G. N. Ry. of Ireland* (1887) 20 L. R. Ir. 409.—EX. D.: *distinguished*, *Newman v. L. & S. W. Ry.* (1899) 7 Times L. R. 138.—STEPHEN, J. *And see* "CARRIERS," vol. i., col. 290.

Davey v. L. & S. W. Ry. (1883) 52 L. J. Q. B. 665; 11 Q. B. D. 213.—Q.B.D.: affirmed, 53 L. J. Q. B. 58; 12 Q. B. D. 70; 49 L. T. 739; 48 J. P. 279.—C.A.; BAGGALLAY, L.J. *dissenting*.

Davey v. L. & S. W. Ry.

Referred to, *Martin v. Connah's Quay Alkali Co.* (1884) 33 W. R. 216—MATHEW and DAY, JJ.: *discussed*, *Brown v. G. W. Ry.* (1885) 1 Times L. R. 614.—C.A.; *Bettany v. Waine* (1885) 1 Times L. R. 588.—COLERIDGE, C.J. and MATHEW, J.; *commented on*, *Holland v. North Metropolitan Tramways Co.* (1886) 3 Times L. R. 245.—MANISTY, J.: *explained*, *Coyle v. G. W. Ry. of Ireland* (1887) 20 L. R. Ir. 409, 417.—PALLES, C.B. and DOWSE, B.: *referred to*, *Yarmouth v. France* (1887) 57 L. J. Q. B. 7; 19 Q. B. D. 647, 654; 36 W. R. 281.—DIV. CT.: *distinguished*, *M'Donnell v. G. S. W. (Ireland) Ry.* (1888) 24 L. R. Ir. 369.—C.A.

Davey v. L. & S. W. Ry. [C.A.], dictum adopted.

Pearce v. Lansdowne (1893) 62 L. J. Q. B. 441; 69 L. T. 316; 57 J. P. 760.—WILLIAMS and COLLINS, JJ.

Davey v. L. & S. W. Ry., 12 Q. B. D. 70, discussed.

White v. Barry Ry. (1899) 15 Times L. R. 474.—C.A. A. L. SMITH, RIGBY and V. WILLIAMS, L.JJ.

White v. Barry Ry., reversed nom. Barry Ry. v. White (1901) 17 Times L. R. 944.—H.L. (E.).

Wright v. Midland Ry. (1884) 51 L. T. 539.—Q.B.D.: reversed, (1885) W. N. (1885); 1 Times L. R. 406 n.—C.A.

Wright v. Midland Ry.—C.A.

Applied, *Brown v. G. W. Ry.* (1885) 52 L. T. 622.—Q.B.D. (*post*); *distinguished*, *M'Donnell v. G. S. & W. (Ireland) Ry.* (*post*).

Brown v. G. W. Ry. (1885) 52 L. T. 622; 1 Times L. R. 406.—Q.B.D.: affirmed, 1 Times L. R. 614.—C.A., *discussed*.

Coyle v. G. W. (Ireland) Ry. (1887) 20 L. R. Ir. 409, 428.—PALLES, C.B. and DOWSE, B.

Brown v. G. W. Ry., distinguished.

Curtin v. G. S. & W. (Ireland) Ry. (1887) 22 L. R. Ir. 219.—C.A., applied.

M'Donnell v. G. S. & W. (Ireland) Ry. (1888) 24 L. R. Ir. 369, 388.—C.A.

Coyle v. G. W. (Ireland) Ry., Curtin v. G. S. & W. (Ireland) Ry. and M'Donnell v. G. S. & W. (Ireland) Ry., applied.

Delany v. Dublin United Tramways Co. (1892) 30 L. R. Ir. 725, 747.—C.A.; BARRY, L.J. *dissenting*; reversing EX.D.

United Land Co. v. G. E. Ry. (1873) 43 L. J. Ch. 363; L. R. 17 Eq. 158; 22 W. R. 126.—MALINS, V.-C.: affirmed with a variation. (1875) 44 L. J. Ch. 685; L. R. 10 Ch. 586; 33 L. T. 292; 23 W. R. 896.—L.JJ. *And see post*.

United Land Co. v. G. E. Ry. (*supra*).

Approved but not applied, Neath Canal Co. v. Ynisarwed Resolven Colliery Co. (1875) L. R. 10 Ch. 455 r.—BACON, v.-c. (affirmed, L. R. 10 Ch. 450.—L.J.J.); *referred to*, Wood v. Saunders (1875) 44 L. J. Ch. 514; L. R. 10 Ch. 584 n; 32 L. T. 363; 23 W. R. 514.—HALL, v.-c. (affirmed with a variation, F. R. 10 Ch. 582.—L.J.J.); *explained and applied*, Newcomen v. Coulson (1877) 46 L. J. Ch. 459; 5 Ch. D. 133. 139; 36 L. T. 385; 25 W. R. 469.—MALINS, v.-c. (affirmed, C.A.): Norton v. L. & N. W. Ry. (1878) 47 L. J. Ch. 859; 9 Ch. D. 623, 628; 39 L. T. 25.—MALINS, v.-c. (affirmed, 13 Ch. D. 268; 41 L. T. 429; 28 W. R. 173.—C.A.): Finch v. G. W. Ry. (1879) 5 Ex. D. 254, 259; 41 L. T. 781; 28 W. R. 229; 44 J. P. S.—EX. D.; *discussed*, Midland Ry. v. Gribble [1895] 2 Ch. 129, 133; 60 J. P. 55.—WRIGHT, J. (affirmed, [1895] 2 Ch. 827; 64 L. J. Ch. 526; 73 L. T. 270; 12 R. 133; 44 W. R. 133.—C.A.); *not applied*, G. E. Ry. v. McAlister [1897] 1 Ir. R. 587.—CHATTERTON, v.-c. (affirmed, C.A.).

United Land Co. v. G. E. Ry., *explained*.

G. W. Ry. v. Talbot (1902) 71 L. J. Ch. 835; [1902] 2 Ch. 759, 767; 87 L. T. 405.—C.A.

STIRLING, J. (for self, v. WILLIAMS and ROMER, J.J.).—*United Land Co. v. G. E. Ry.* turned on the provisions of a very special enactment requiring the railway company to construct such convenient communications over or under the railway as in the judgment of the Commissioners of Woods and Forests might be necessary for the convenient enjoyment and occupation of the lands there in question, which were common property.—p. 338. *And see* "EASEMENTS," vol. i., col. 924.

Pym v. G. N. Ry. (1863) 32 L. J. Q. B. 377; 4 B. & S. 396; 10 Jur. (N.S.) 199; 11 W. R. 922.—EX. CH.

Referred to, Seward v. "Vera Cruz" (1884) 54 L. J. P. 9; 10 App. Cas. 59, 70; 52 L. T. 474; 33 W. R. 477.—H.L. (E.); Grand Trunk Ry. of Canada v. Jennings (1888) 58 L. J. P. C. 1; 13 App. Cas. 800; 59 L. T. 679; 37 W. R. 403.—P.C.; *observations adopted*, Wolfe v. G. N. (Ireland) Ry. (1890) 26 L. R. Ir. 548, 552.—C.A.

G. W. Ry. v. Blake (1862), 7 H. & N. 987; 8 Jur. (N.S.) 1013; 10 W. R. 388; **S. C. nom. Blake v. G. W. Ry.**, 31 L. J. Ex. 346.—EX. CH.

Applied, John v. Bacon (1870) L. R. 5 C. P. 437, 441.—C.P. (*post*): *referred to*, Foulkes v. Metropolitan District Ry. (1880) 49 L. J. C. P. 361; 5 C. P. D. 157, 168; 42 L. T. 345; 28 W. R. 526.—C.A. *And see* "CARRIERS," vol. i., col. 284, *nom.* Blake v. G. W. Ry.

Buxton v. N. E. Ry. (1868) 37 L. J. Q. B. 258; L. R. 3 Q. B. 549; 9 B. & S. 824; 18 L. T. 795; 16 W. R. 1124.—Q.B., *discussed and applied*.

Thomas v. Rhymney Ry. (1870) 39 L. J. Q. B. 141; L. R. 5 Q. B. 226; 22 L. T. 297; 18 W. R. 668.—Q.B.; and (1871) 40 L. J. Q. B. 89; L. R. 6 Q. B. 266, 273; 24 L. T. 145; 19 W. R. 477.—EX. CH.; John v. Bacon (1870) 39 L. J. C. P. 365; L. R. 5 C. P. 437, 441; 22 L. T. 477; 18 W. R. 894.—C.P.

John v. Bacon, *discussed*.

Wright v. Midland Ry. (1873) 42 L. J. Ex. 89; L. R. 8 Ex. 137, 147; 29 L. T. 436; 21 W. R. 460.—EX.

G. W. Ry. v. McCarthy (1887) 56 L. J. P. C. 33; 12 App. Cas. 218; 56 L. T. 582; 25 W. R. 429; 51 J. P. 532.—H.L. (TR.). *referred to*.

Rickett, Smith & Co. v. Midland Ry. (1895) 65 L. J. Q. B. 274; [1896] 1 Q. B. 260; 9 Ry. & Can. Traff. Cas. 58.—RY. COMMS.

G. W. Ry. v. McCarthy and Shaw v. G. W. Ry. (1893) 10 R. 85; [1894] 1 Q. B. 373; 70 L. T. 218; 42 W. R. 285; 58 J. P. 318.—LAWRANCE and WRIGHT, J.J., *discussed*. Murphy v. Midland Gt. Western (Ireland) Ry. [1903] 2 Ir. R. 5, 18.—Q.B.D. *And see* "CARRIERS," vol. i., col. 307.

Reynolds v. N. E. Ry. (1868)—C.P. (Roscoe's Nisi Prius, 15th ed., p. 681), *discussed*. Foulkes v. Metropolitan District Ry. (1880) 49 L. J. C. P. 361; 5 C. P. D. 157, 169; 42 L. T. 345; 28 W. R. 526.—C.A.

Richardson v. Metropolitan Ry. (1868) 37 L. J. C. P. 300; L. R. 3 C. P. 374 n; 18 L. T. 721; 16 W. R. 909.—C.P., *distinguished*.

Fordham v. L. B. & S. C. Ry. (1869) L. R. 4 C. P. 621; 17 W. R. 896.—EX. CH.; *affirming* (1868) 37 L. J. C. P. 176; L. R. 3 C. P. 368; 18 L. T. 566; 16 W. R. 365.—C.P.

Rideal v. G. W. Ry. (1859) 1 F. & F. 706.—ERLE, C.J.; and **Roberts v. Eastern Counties Ry.** (1858) 1 F. & F. 460.—COCKBURN, C.J., *discussed*.

Lee v. Lancashire and Yorkshire Ry. (1871) L. R. 6 Ch. 527, 537; 25 L. T. 77; 19 W. R. 729.—L.J.J.

Lee v. Lancashire and Yorkshire Ry.

Observations approved, Hoare v. Bremridge (1872) L. R. 14 Eq. 522, 530; 27 L. T. 368.—MALINS, v.-c.: *affirmed*, 42 L. J. Ch. 1; L. R. 8 Ch. 22; 27 L. T. 593; 21 W. R. 43.—C.A.; *applied*, Ellen v. G. N. Ry. (1901) 17 T. L. R. 453.—C.A. (*affirming* 49 W. R. 395.—BUCKNILL, J.).

Bechervaise v. G. W. Ry. (1870) 40 L. J. C. P. 8; L. R. 6 C. P. 36; 23 L. T. 808; 19 W. R. 229.—C.P., *referred to*.

Alexandra (Newport) Dock Co. v. Elliot (1871) 23 L. T. 847.—C.P.; Bolckow, Vaughan & Co. v. Fisher (1882) 52 L. J. Q. B. 12; 10 Q. B. D. 161, 168; 47 L. T. 724; 31 W. R. 235; 5 Asp. M. C. 20.—C.A.

Cornman v. Eastern Counties Ry. (1859) 29

L. J. Ex. 94; 4 H. & N. 781; 4 Jur. (N.S.) 657.—EX., *rule in, adopted*. Cotton v. Wood (1860) 29 L. J. C. P. 333; 8 C. B. (N.S.) 568; 7 Jur. (N.S.) 168.—C.P.

Cornman v. Eastern Counties Ry., *distinguished*.

Ayles v. S. E. Ry. (1868) 37 L. J. Ex. 104; L. R. 3 Ex. 146; 18 L. T. 332; 16 W. R. 709.—EX. MARTIN, B.—There the plaintiff was pushed by an unusually great crowd over the weighing machine, which had stood where it was for ten years. Here one train runs into another, and knocks the carriages off the line.—p. 107.

Cornman v. Eastern Counties Ry.

Applied, Blackman v. L. B. & S. C. Ry. (1869) 17 W. R. 769.—C.P.; Watkins v. G. W. Ry. (1877) 46 L. J. C. P. 817, 821; 37 L. T. 193; 25 W. R. 905.—C.P.D.; G. W. Ry. v. Davies (1878) 39 L. T. 475, 479.—EX. D.

Watkins v. G. W. Ry. (*supra*), *referred to*. Thatcher v. G. W. Ry. (1893) 10 T. L. R. 13.—C.A.

Longmore v. G. W. Ry. (1865) 19 C. B. (N.S.) 183; 35 L. J. C. P. 135 n.—C.P., *distinguished*.

Crafter v. Metropolitan Ry. (1866) 35 L. J. C. P. 132; L. R. 1 C. P. 300; 1 H. & R. 164; 12 Jur. (N.S.) 372; 14 W. R. 334.—C.P.

WILLES, J.—The charge there [*Longmore v. G. W. Ry.*] consisted of there being an apparent rail for the protection of persons who might slip on a wooden bridge, whereas, in fact, the rail, instead of being any protection, offered none at all, and there was a hole through which the husband of the plaintiff fell and received the injury as to which damages were sought to be recovered. In that case there was a trap, whilst here the usual mode of constructing stairs had been adopted.—p. 135.

KEATING, J. concurred, but felt some difficulty in distinguishing *Longmore v. G. W. Ry.*

Longmore v. G. W. Ry., applied.

Lay v. Midland Ry. (1876) 34 L. T. 30.—EX. D.

Crafter v. Metropolitan Ry. (supra), applied.

Rigg v. Manchester, Sheffield and Lincolnshire Ry. (1866) 12 Jur. (N.S.) 525; 14 W. R. 834.—C.P.: *G. W. Ry. v. Davies* (1878) 39 L. T. 475, 479.—EX. D.

Walker v. Midland Ry. (1866) 14 L. T. 796.—EX., *referred to*.

Clarke v. Midland Ry. (1880) 43 L. T. 381.—STEPHEN, J.

Nicholson v. Lancashire and Yorkshire Ry.

(1865) 34 L. J. Ex. 84; 3 H. & C. 534; 12 L. T. 391.—EX., *applied*.

Holmes v. N. E. Ry. (1869) 38 L. J. Ex. 161; L. R. 4 Ex. 254, 257; 17 W. R. 800.—EX.; affirmed, (1871) 40 L. J. Ex. 121; L. R. 6 Ex. 123; 24 L. T. 69.—EX. CH.

Macaulay (or McCawley) v. Furness Ry. (1872) 42 L. J. Q. B. 4; L. R. 8 Q. B. 57; 27 L. T. 485; 21 W. R. 140.—Q.B., *distinguished*.

Mitchell v. Lancashire and Yorkshire Ry. (1875) 44 L. J. Q. B. 107; L. R. 10 Q. B. 256, 262; 33 L. T. 161; 23 W. R. 853.—Q.B.

Mitchell v. Lancashire and Yorkshire Railway, referred to.

Price v. Union Lighterage Co. (1903) 72 L. J. K. B. 374; [1903] 1 K. B. 750; 88 L. T. 428; 51 W. R. 477; 9 Asp. M. C. 398; 8 Com. Cas. 155.—WALTON, J.; affirmed, 73 L. J. K. B. 222; [1904] 1 K. B. 412.—C.A.

Grote v. Chester and Holyhead Ry. (1848) 2 Ex. 251; 5 Railw. Cas. 649.—EX., *referred to*.

Burns v. Cork and Bandon Ry. (1863) 13 Ir. C. L. R. 543, 546.—EX.

Grote v. Chester and Holyhead Ry. and Burns v. Cork and Bandon Ry., discussed.

Readhead v. Midland Ry. (1867) 36 L. J. Q. B. 181; L. R. 2 Q. B. 412, 424.—Q.B.; BLACKBURN, J. dissenting; and (1869) 38 L. J. Q. B. 169; L. R. 4 Q. B. 379, 389; 9 B. & S. 519; 17 W. R. 737.—EX. CH.; affirming Q.B.

Readhead v. Midland Ry., Grote v. Chester and Holyhead Ry. and Burns v. Cork and Bandon Ry., principles adopted.

Francis v. Cockrell (1870) 39 L. J. Q. B. 113, 291; L. R. 5 Q. B. 184, 501; 10 B. & S. 850; 21 L. T. 203; 23 L. T. 466; 18 W. R. 668, 1205.—Q.B. and EX. CH.* *And see col. 2668.*

Burns v. Cork and Bandon Ry., distinguished.

Burrell v. Tuohy [1898] 2 Ir. R. 271, 281.—Q.B.D.

Readhead v. Midland Ry. (supra), referred to.

John v. Bacon (1870) L. R. 5 C. P. 437, 443; 39 L. J. C. P. 365; 22 L. T. 477; 18 W. R. 894.—C.P.: **Stanton v. Richardson** (1872) 41 L. J. C. P. 180; L. R. 7 C. P. 421, 435; 27 L. T. 513; 21 W. R. 71.—C.P. (affirmed, (1874) 43 L. J. C. P. 280; L. R. 9 C. P. 390; 30 L. T. 643.—EX. CH.; and (1875) 45 L. J. C. P. 78; 33 L. T. 193; 24 W. R. 824; 3 Asp. M. C. 23.—H.L. (E.)).

Readhead v. Midland Ry., explained.

Wright v. Midland Ry. (1873) 42 L. J. Ex. 89; L. R. 8 Ex. 139; 29 L. T. 436; 21 W. R. 460.—EX.

POLLOCK, B.—The distinction between the duty of a carrier in the carriage of goods and in the carriage of passengers was for many years not clearly laid down in this country. In America it had been considered, and the decisions were tolerably clear. But in *Readhead v. Midland Ry.* the whole law was thoroughly considered, and it was shown that the contract of a railway company with a passenger is not that of an insurer, but simply to take sufficient care and to use due diligence in the provision of proper materials, engines, carriages, and the like for the carriage of the passengers.—p. 97.

Readhead v. Midland Ry.

Explained, **Searle v. Laverick** (1874) 43 L. J. Q. B. 43; L. R. 9 Q. B. 122; 30 L. T. 89; 22 W. R. 367.—Q.B.; *discussed*, **Richardson v. G. E. Ry.** (1875) L. R. 10 C. P. 480, 493; 32 L. T. 248.—C.P. (reversed, (1876) 1 C. P. D. 342; 35 L. T. 351; 24 W. R. 107.—C.A.); *explained*, **Kopitoff v. Wilson** (1876) 45 L. J. Q. B. 436; 1 Q. B. D. 377, 381; 34 L. T. 677; 24 W. R. 706; 3 Asp. M. C. 163.—Q.B.D.; *referred to*, **The Virgo** (1876) 35 L. T. 519; 3 Asp. M. C. 285.—SIR R. PHILLIMORE.

Readhead v. Midland Ry., principle not applied.

Randall v. Newson (or Newsom) (1877) 46 L. J. Q. B. 259; 2 Q. B. D. 102; 36 L. T. 164; 25 W. R. 313.—C.A.

Readhead v. Midland Ry., discussed.

Steel v. State Line Steamship Co. (1877) 3 App. Cas. 72; 37 L. T. 333; 3 Asp. M. C. 516.—H.L. (SC.).

LORD BLACKBURN.—In *Readhead v. Midland Ry.*, which was the case of a contract to carry passengers upon land, there had been a good deal of reasoning in the Ex. Ch. to the effect that the obligation there was not to furnish a carriage which was absolutely perfect or landworthy, but only to furnish a carriage which was fit as far as they could reasonably make it, which is a different kind of contract from what is now supposed.—p. 86.

Readhead v. Midland Ry.

Referred to, **Hyman v. Nye** (1881) 6 Q. B. D. 685, 687; 44 L. T. 919; 45 J. P. 554.—Q.B.D.; **Robertson v. Amazon Tug and Lighterage Co.** (1881) 51 L. J. Q. B. 68; 7 Q. B. D. 598, 604; 46 L. T. 146; 4 Asp. M. C. 196.—C.A. BRETT and COTTON, L.J.; **BRAMWELL, L.J.** dissenting; *followed*, **Pounder v. N. E. Ry.** (1891) 61 L. J. Q. B. 136; [1892] 1 Q. B. 385; 65 L. T. 679; 40 W. R. 189; 56 J. P. 247.—A. L. SMITH and MATHEW, JJ.; *distinguished*, **Burrell v. Tuohy** [1898] 2 Ir. R. 271.—Q.B.D.; *referred to*, **Powell v. M'Glynn & Bradlaw** (1901 [1902] 2 Ir. R. 154, 163.—K.B.D.,

Blamires v. Lancashire and Yorkshire Ry. (1873) 42 L. J. Ex. 182; L. R. 8 Ex. 283.—EX. CH., *referred to*.
Gorris v. Scott (1874) 43 L. J. Ex. 92; L. R. 9 Ex. 125, 131; 30 L. T. 431; 22 W. R. 575.—EX.

Blamires v. Lancashire and Yorkshire Ry., *applied*.

Baddeley v. Granville (Earl) (1887) 19 Q. B. D. 423; 56 L. J. Q. B. 501; 57 L. T. 268; 36 W. R. 63; 51 J. P. 822.—Q.B.D.

GRANTHAM, J.—It was there held that a breach by the defendants of a statutory obligation to have a communication between the guard of a train and the passengers was evidence against them in an action of negligence, although the non-compliance with the statutory obligation was not the proximate cause of the accident.—p. 428.

Harrold v. G. W. Ry. (1866) 14 L. T. 440.—EX., *principle applied*.

Siner v. G. W. Ry. (1869) 38 L. J. Ex. 67; L. R. 4 Ex. 117, 124; 20 L. T. 114; 17 W. R. 417.—EX. CH.; *Plant v. Midland Ry.* (1870) 21 L. T. 836.—BRAMWELL, B.

Plant v. Midland Ry. and Harrold v. G. W. Ry., *distinguished*.

Cockle v. S. E. Ry. (1870) 39 L. J. C. P. 226; L. R. 5 C. P. 457, 471; 22 L. T. 513; 18 W. R. 759.—C.P.; KEATING and M. SMITH, JJ. dissenting; affirmed, (1872) 41 L. J. C. P. 140; L. R. 7 C. P. 321; 27 L. T. 320; 20 W. R. 754.—EX. CH.

Cockle v. S. E. Ry.

Referred to, *Bridges v. North London Ry.* (1871) 40 L. J. Q. B. 188; L. R. 6 Q. B. 377, 382; 24 L. T. 835; 19 W. R. 824.—EX. CH. (judgment of majority reversed, (1874) 43 L. J. Q. B. 151; L. R. 7 H. L. 213; 30 L. T. 844; 23 W. R. 62.—H.L. (E.)); *followed*, *Johnson v. Emerson* (1871) 40 L. J. Ex. 201; L. R. 6 Ex. 329, 403; 25 L. T. 377.—EX.; MARTIN and BRAMWELL, BB. dissenting; *Gill v. G. E. Ry.* (1872) 26 L. T. 945.—EX. CH.

Cockle v. S. E. Ry.

Distinguished, *Lewis v. L. C. & D. Ry.* (1873) 43 L. J. Q. B. 8; L. R. 9 Q. B. 66, 71; 29 L. T. 397; 22 W. R. 153.—Q.B.; *considered*, *Bridges v. North London Ry.* (1874) 43 L. J. Q. B. 151; L. R. 7 H. L. 213, 236; 30 L. T. 844; 23 W. R. 62.—H.L. (E.).

Cockle v. S. E. Ry., *discussed*.

Lewis v. L. C. & D. Ry. (*supra*), *distinguished*.

Weller v. L. B. & S. C. Ry. (1874) 43 L. J. C. P. 137; L. R. 9 C. P. 126, 132; 29 L. T. 888; 22 W. R. 303.—C.P.

BRETT, J.—As to *Lewis v. S. E. Ry.*, we should have followed it if the facts there had been the same as those here, but that case is as distinguishable from the present one as that case was from *Cockle v. S. E. Ry.* There it appeared that the plaintiff knew or ought to have known that the train was beyond the platform and that it was about to back. The stoppage there was not a final stand-still, and the train was in fact put back.—p. 139.

HONYMAN, J.—I do not think that the calling out the name of the station is an invitation to alight so as to be of itself evidence of negligence, but I agree with what was said by my brother Keating in *Bridges v. North London Ry.* (40 L. J. Q. B. 188, *supra*), that if the train stops

afterwards it amounts to a notice that that is the place for passengers to that station to get out.—p. 139.

Cockle v. S. E. Ry., Lewis v. L. C. & D. Ry. and Weller v. L. B. & S. C. Ry., *referred to*.
Robson v. N. E. Ry. (1875) 44 L. J. Q. B. 112; L. R. 10 Q. B. 271; 32 L. T. 551; 23 W. R. 791.—Q.B.; affirmed, (1876) 46 L. J. Q. B. 50; 2 Q. B. D. 85; 35 L. T. 535; 25 W. R. 418.—C.A.

Whittaker v. Manchester, Sheffield and Lincolnshire Ry. (1870) 39 L. J. C. P. 229, n; L. R. 5 C. P. 464, n; 22 L. T. 545.—C.P.

Discussed, *Cockle v. S. E. Ry.* (1870) 39 L. J. C. P. 226; L. R. 5 C. P. 457, 472.—C.P. (*supra*, col. 2669); *distinguished*, *McAulay v. Glasgow & S. W. Ry.* (1896) 23 R. 845.—CT. OF SESSION.

Colley v. L. & N. W. Ry. (1880) 49 L. J. Ex. 575; 5 Ex. D. 277; 42 L. T. 807; 29 W. R. 16; 44 J. P. 427.—KELLY, C.B., *followed*.

Corry v. G. W. Ry. (1881) 50 L. J. Q. B. 386; 7 Q. B. D. 322; 44 L. T. 701; 29 W. R. 623; 45 J. P. 712.—C.A., *distinguished*.

Ryan v. G. S. & W. Ry. (1892) 32 L. R. Ir. 15.—Q.B.D.

JOHNSON, J.—In *Corry's Case* the railway company made a ditch or dyke between their lands and the plaintiffs' lands, which they cleared out from time to time, but not for three years before the action. On the side of the ditch or dyke nearest the railway they planted a thorn hedge; and on the opposite side of the ditch or dyke, being that nearest to the plaintiffs' land, they set up on their own land a post-and-rail fence. In doing this they took upon themselves to define the extent of their obligation, and having done so, they neglected to maintain and keep up the post-and-rail fence. They allowed it to rot away; and the plaintiff's cow, which had been grazing in his field, fell into the ditch and was killed. The railway company neglected to maintain the ditch and post-and-rail fence which they had constructed, and were, therefore, held liable for the loss of the cow. In the present case the facts are essentially different; . . . That [*Colley v. L. & N. W. Ry.*] in principle is exactly the present case, for what is here alleged is, in effect, that the fence was originally constructed in such a manner as not sufficiently and effectually to separate the land taken by the railway company from the adjoining lands not taken, and prevent the cattle of the occupier of the adjoining land from straying thereout, and that it had been allowed to remain such insufficient fence.—pp. 19, 20.

Colley v. L. & N. W. Ry. and Ryan v. G. S. & W. Ry., *explained*.

Dixon v. G. W. Ry. (1896) 65 L. J. Q. B. 664; [1896] 2 Q. B. 333; 75 L. T. 245; 60 J. P. 631.—RUSELL, C.J.; affirmed, C.A. (*post*).

Corry v. G. W. Ry. (*supra*), *approved and applied*.

Dixon v. G. W. Ry. (1896) 66 L. J. Q. B. 132; [1897] 1 Q. B. 300, 335; 75 L. T. 539; 45 W. R. 226.—C.A.

ESHER, M.R.—The facts here do not in any way bring the case within sect. 73 [Railways Clauses Act, 1845], and if so, sect. 63 remains without any limitation being imposed upon it by

sect. 73. Therefore sect. 68 imposes upon the defendants no limitation as to the time within which they are to make and maintain fences which will prevent the cattle of owners and occupiers of lands adjoining the railway from straying. That seems to me to be the plain construction of sect. 68, and is the same as that which has been placed upon that very section by Lush, L.J. in *Corry v. G. W. Ry.*, and as that which has been put upon it in this case by the L.C.J., I agree that that is the right construction. The defendants were right in doing what sect. 68 enacts that they shall do—namely, in putting up this fence—but they omitted to maintain it, because they allowed it to get into a rotten condition.—p. 135.

Roberts v. G. W. Ry. (1858) 27 L. J. C. P. 266; 4 C. B. (N.S.) 506; 4 Jur. (N.S.) 1240.—C.P., *explained*.

Rooth v. N. E. Ry. (1867) 36 L. J. Ex. 83; L. R. 2 Ex. 173, 180; 15 L. T. 624; 15 W. R. 695.—EX.

KELLY, C.B.—There [*Roberts v. G. W. Ry.*] the pleader on behalf of the plaintiff had taken upon himself to allege in the declaration an absolute legal obligation upon the railway company to provide something of a specific value, namely, a fence to the station yard. But it is clear that while some protection is required in a railway station, it is impossible to say as a matter of law, without information as to the circumstances of the locality, that any specific precaution ought to have been taken so as to constitute a legal obligation upon the railway company. Upon that ground only that case appears to have been decided.—p. 86.

Rooth v. N. E. Ry., distinguished.

Harris v. Midland Ry. (1876) 25 W. R. 63.—CLEASBY, B. and GROVE, J.

Harris v. Midland Ry., applied.

Smith v. Midland Ry. (1887) 57 L. T. 813; 52 J. P. 262.—STEPHEN and A. L. SMITH, JJ.

Allday v. G. W. Ry. (1864) 34 L. J. Q. B. 5; 5 B. & S. 903; 11 Jur. (N.S.) 12; 11 L. T. 267; 13 W. R. 43.—Q.B., *followed*.

Kirby v. G. W. Ry. (1868) 18 L. T. 658.—MARTIN, B.

Allday v. G. W. Ry., distinguished.

Harris v. Midland Ry. (1876) 25 W. R. 63.—CLEASBY, B. and GROVE, J.

Allday v. G. W. Ry., referred to.

Sheridan v. Midland G. W. (Ireland) Ry. (1888) 24 L. R. Ir. 146, 160.—Q.B.D.; affirmed, C.A.

Kirby v. G. W. Ry. (supra), followed.

Foreman v. G. W. Ry. (1878) 38 L. T. 851.—EX. D.

Child (or Childs) v. Hearn (1874) 43 L. J. Ex. 100; L. R. 9 Ex. 176; 22 W. R. 864.—EX., *discussed*.

The Bernina (1887) 56 L. J. P. 17; 12 P. D. 58, 73; 56 L. T. 258; 35 W. R. 314; 6 Asp. M. C. 75.—C.A.; affirmed, H.L. (B.) (*see ante*, col. 1953).

Woodruff v. Brecon and Merthyr Tydfil Ry. (1884) 54 L. J. Ch. 620; 28 Ch. D. 190; 52 L. T. 69; 33 W. R. 125.—C.A., *referred to*.

Portway v. Colne Valley and Halstead Ry. (1891) 7 Ry. & Can. Traff. Cas. 102.—RY. COMMRS.

O.C.

Wilkinson v. Hull, &c., Ry. and Dock Co.

(1882) 51 L. J. Ch. 788; 20 Ch. D. 323; 46 L. T. 455; 30 W. R. 617.—C.A., *referred to*. East and West India Dock Co., *in re* (1888) 38 Ch. D. 576; 57 L. J. Ch. 1053; 59 L. T. 237; 36 W. R. 849.—CHITTY, J.; affirmed, C.A.

CHITTY, J.—Where, by Act of Parliament, a company is incorporated and empowered to construct a railway, the purpose or one of the purposes for which it is constituted is ascertained by reference to the power, and the purpose for which the power is conferred is one of the purposes for which the company is constituted, as was said by the late M.R., Sir G. Jessel, in *Wilkinson v. Hull, &c., Ry. and Dock Co.*, "every work which the company is empowered to do is a purpose."—p. 583.

Eversfield v. Mid Sussex Ry. (1858) 28

L. J. Ch. 107; 3 De G. & J. 286; 5 Jur. (N.S.) 776; 7 W. R. 102.—L.JJ.

Discussed and not applied, **Quinton v. Bristol Corporation** (1874) 43 L. J. Ch. 783; L. R. 17 Eq. 524, 532; 30 L. T. 112; 22 W. R. 434.—MALINS, V.-C.; *explained*, **Wilkinson v. Hull, &c., Ry. and Dock Co.** (1882) 51 L. J. Ch. 788; 20 Ch. D. 323, 340; 46 L. T. 455; 30 W. R. 617.—C.A. **JESSEL, M.R., COTTON and LINDLEY, L.JJ.**

Ramsden v. Manchester South Junction and

Altrincham Ry. (1848) 1 Ex. 723; 12 Jur. 293; 5 Railw. Cas. 552.—EX., *applied*.

Souch v. East London Ry. (1874) 22 W. R. 566.—BACON, V.-C.

Souch v. East London Ry. (1873) 42 L. J. Ch.

477; L. R. 16 Eq. 108; 21 W. R. 590.—MALINS, V.-C., *referred to*.

Vernon v. St. James' Vestry Westminster (1879) 49 L. J. Ch. 130; 16 Ch. D. 449, 458; 42 L. T. 82.—MALINS, V.-C.; affirmed, (1880) 50 L. J. Ch. 81; 44 L. T. 229; 29 W. R. 222.—C.A.

Bagnall v. L. & N. W. Ry. (1861) 31 L. J. Ex. 121; 7 H. & N. 423; 8 Jur. (N.S.) 16; 5 L. T. 621.—EX.; *affirmed*, (1862) 31 L. J. Ex. 480; 1 H. & C. 544; 9 Jur. (N.S.) 254; 9 L. T. 419; 10 W. R. 232, 802.—EX. CH.

Bagnall v. L. & N. W. Ry., applied.

Reg. v. Fisher (1862) 32 L. J. M. C. 12; 3 B. & S. 191; 9 Jur. (N.S.) 571; 7 L. T. 325; 11 W. R. 69.—Q.B.; **Midland Ry. v. Checkley** (1867) 36 L. J. Ch. 380; L. R. 4 Eq. 19, 28; 16 L. T. 260; 15 W. R. 671.—ROMILLY, M.R.

Bagnall v. L. & N. W. Ry., distinguished.

Cracknell v. Thetford Corporation (1869) 38 L. J. C. P. 353; L. R. 4 C. P. 629.—C.P.

M. SMITH, J.—*Bagnall v. L. & N. W. Ry.* is distinguishable on the ground that there the railway company were bound by their act to provide proper drains to carry off the water. For these reasons I have come to the conclusion that the plaintiff has failed to establish a duty on the part of the defendants to cut the weeds or to remove the accumulation of silt.—p. 356.

Bagnall v. L. & N. W. Ry., discussed.

Dunn v. Birmingham Canal Co. (1872) 41 L. J. Q. B. 121; L. R. 7 Q. B. 244, 267; 26 L. T. 241; 20 W. R. 573.—Q.B.; **HANNEN, J.** dissenting; affirmed, 42 L. J. Q. B. 34; L. R. 8 Q. B. 42; 27 L. T. 683; 21 W. R. 266.—EX. CH. *And see Baroda (Gaekwar) v. Gaudhi Kachrabhai Kasturchand* (1903) L. R. 30 Ind. App. 60.—P.C.

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- Reg. v. Fisher** (1862) 32 L. J. M. C. 12; 3 B. & S. 191; 9 Jur. (N.S.) 571; 7 L. T. 325; 11 W. R. 69.—Q.B.; and **Reg. v. Brown** (1867) 36 L. J. Q. B. 322; L. R. 2 Q. B. 680; 16 L. T. 827; 15 W. R. 988; S. C. *nom.* **Reg. v. Midland, &c., Ry., Brown, Ex parte**, 8 B. & S. 456.—Q.B., *referred to*.
- Midland Ry. v. Gribble** (1895) 64 L. J. Ch. 541; [1895] 2 Ch. 129, 133; 72 L. T. 683; 60 J. P. 55.—**WRIGHT, J.**: varied, 64 L. J. Ch. 826; [1895] 2 Ch. 827; 12 R. 513; 73 L. T. 270; 44 W. R. 133.—C.A.
- Reg. v. Fisher and Reg. v. Brown, approved.** **Rhondda and Swansea Ry. v. Talbot** (1897) 66 L. J. Ch. 570; [1897] 2 Ch. 131, 137; 56 L. T. 694.—C.A.
- Reg. v. Fisher, Reg. v. Brown and Rhondda and Swansea Ry. v. Talbot, referred to.**
- L. & N. W. Ry. v. Runcorn Rural Council** (1897) [1898] 1 Ch. 31; 67 L. J. Ch. 28; 77 L. T. 485; 46 W. R. 121; 62 J. P. 9.—**STIRLING, J.**: affirmed, [1898] 1 Ch. 561; 67 L. J. Ch. 324; 78 L. T. 343; 46 W. R. 484; 62 J. P. 643.—C.A.
- STIRLING, J.**—In **Reg. v. Fisher** it was held that the drains and other passages for the conveyance of water which the railway company is bound to provide are to be such as are required at the time when the land is taken, and not such as might be necessary at a subsequent date, when the land might be applied to uses of a totally different kind. This decision was followed in **Reg. v. Brown**, and has been recently approved of by the C.A. in **Rhondda and Swansea Ry. v. Talbot**.—p. 42.
- Reg. v. Brown, applied.**
- G. N. Ry. v. M'Alister** [1897] 1 Ir. R. 587, 601.—**CHATTERTON, V.-C.**; affirmed, C.A.
- Reg. v. Brown, Rhondda and Swansea Ry. v. Talbot and Reg. v. Fisher, referred to.**
- G. N. Ry. v. M'Alister, approved and adopted.**
- G. W. Ry. v. Talbot** (1902) 71 L. J. Ch. 835; [1902] 2 Ch. 759, 765; 87 L. T. 405.—C.A.
- STIRLING, L.J.** (forself, **v. WILLIAMS and ROMER, L.J.**).—Now, as is pointed out by Lindley, L.J. in **Rhondda and Swansea Ry. v. Talbot**, it has been decided in **Reg. v. Fisher** and **Reg. v. Brown** that the "accommodation works which the company may be required to make are such accommodation works as are required at the time the land is taken having regard to its then use, and not accommodation works which may be required when the character of the land, and perhaps the nature of the neighbourhood, is entirely altered years afterwards." Further, it has been decided, first by the V.-C., and then by the C.A. in Ireland, in **G. N. Ry. v. M'Alister**, that the landowner having obtained accommodation works (in that case, as in this, a level crossing) suitable for his land at a time when it was used for agricultural purposes, was not entitled to use the works for the purposes of traffic in minerals quarried from the same lands. In the course of his judgment, Fitzgibbon, L.J. thus defines the rights of the landowner: "The owner of the adjoining land was entitled, when the railway was made, to a convenient passage over the railway sufficient to make good, so far as possible, any interruption which the construction of the railway caused by severance in the working of his farm, including, I should say, any alteration or extension of that working which could or ought to have been contemplated by the parties when the accommodation works were made and were accepted." With that decision and definition we agree.—p. 837.
- Lawrence v. G. N. Ry.** (1851) 20 L. J. Q. B. 293; 16 Q. B. 643; 15 Jur. 652; 6 Railw. Cas. 656.—Q.B., *principle adopted*.
- Clothier v. Webster** (1862) 31 L. J. C. P. 216; 12 C. B. (N.S.) 790; 9 Jur. (N.S.) 231; 6 L. T. 461; 10 W. R. 624.—C.P.; **Coe v. Wise** (1866) 35 L. J. Q. B. 262; L. R. 1 Q. B. 711, 721; 7 B. & S. 831; 14 L. T. 891; 14 W. R. 865.—EX. CH.
- Lawrence v. G. N. Ry., distinguished.**
- Clowes v. Staffordshire Potteries Waterworks Co.** (1872) 27 L. T. 298.—**MALINS, V.-C.**: reversed, 42 L. J. Ch. 102; L. R. 8 Ch. 125; 27 L. T. 521; 21 W. R. 32.—**JAMES and MELLISH, L.J.**.—*And see* **Baroda (Gaekwar) v. Gandhi Kachrabhai Kasturchand** (1903) L. R. 30 Ind. App. 60.—P.C.: and *ante*, col. 1543.
- Jersey (Earl) v. G. W. Ry.** (1893) [1894] 3 Ch. 625, n.—C.A., *applied*.
- Fortescue v. Lostwithiel and Fowey Ry.** (1894) 64 L. J. Ch. 37; [1894] 3 Ch. 621; 8 L. 664; 71 L. T. 423; 43 W. R. 138.—**KEKEWICH, J.**
- Sanderson v. Cockermouth and Workington Ry.** (1849) 11 Beav. 497; 7 Railw. Cas. 613.—M.R.: affirmed, 19 L. J. Ch. 503; 2 H. & Tw. 327.—L.C.
- Order in, followed.* **Lyrton v. G. W. Ry.** (1856) 2 K. & J. 394.—**WOOD, V.-C.**: *applied*, **Wells v. Maxwell** (1863) 32 Beav. 408; 33 L. J. Ch. 46, n.; 9 Jur. (N.S.) 1021; 8 L. T. 591; 11 W. R. 842.—**ROMILLY, M.R.** (affirmed, 33 L. J. Ch. 44; 8 L. T. 713.—L.J.); *explained*, **Greenhill v. Isle of Wight (Newport Junction) Ry.** (1871) 23 L. T. 885; 19 W. R. 345.—**MALINS, V.-C.**; *referred to*, **Lewis v. Weston-super-Mare Local Board** (1888) 58 L. J. Ch. 39; 40 Ch. D. 55, 66; 59 L. T. 769; 37 W. R. 121.—**STIRLING, J.**
- Raphael v. Thames Valley Ry.**, 35 L. J. Ch. 659; L. R. 2 Eq. 37; 14 L. T. 632; 14 W. R. 750.—**ROMILLY, M.R.**; *reversed*, (1866) 36 L. J. Ch. 209; L. R. 2 Ch. 147; 16 L. T. 1; 15 W. R. 322.—**CHILMSFORD, L.C.**
- Raphael v. Thames Valley Ry., discussed.**
- Cambrian Rys. Scheme, In re** (1867) L. R. 3 Ch. 289, n.—**WOOD, V.-C.** (affirmed with a variation, 37 L. J. Ch. 409; L. R. 3 Ch. 278; 18 L. T. 522; 16 W. R. 346.—**CAIRNS, L.J.**); **Greenhill v. Isle of Wight (Newport Junction) Ry.** (1871) 23 L. T. 885; 19 W. R. 345.—**MALINS, V.-C.**; **Dowling v. Pontypool, Caerleon and Newport Ry.** (1874) 43 L. J. Ch. 761; L. R. 18 Eq. 714, 746.—**HALL, V.-C.**
- Wilson v. Furness Ry.** (1869) 39 L. J. Ch. 19; L. R. 9 Eq. 28; 21 L. T. 416, 553; 18 W. R. 891.—**JAMES, V.-C.**
- Observations applied.* **Greene v. West Cheshire Ry.** (1871) 41 L. J. Ch. 17; L. R. 13 Eq. 44, 52; 25 L. T. 409; 20 W. R. 54.—**BACON, V.-C.**; *explained*, **Greenhill v. Isle of Wight (Newport Junction) Ry.** (1871) 23 L. T. 885; 19 W. R. 345.—**MALINS, V.-C.**; *referred to*, **Ryan v. Mutual Tontine Westminster Chambers Association** (1892) 62 L. J. Ch. 252; [1893] 1 Ch. 116, 124; 2 R. 156; 67 L. T. 820; 41 W. R. 146.—C.A.
- Att.-Gen. v. G. E. Ry.** (1879) 48 L. J. Ch. 428; 11 Ch. D. 449; 40 L. T. 265; 27 W. R. 750.—C.A., **BAGGALLAY, L.J.** *dissenting*; affirmed,

(1880) 49 L. J. Ch. 545; 5 App. Cas. 473; 42 L. T. 810; 28 W. R. 769.—H.L. (E.).

Att.-Gen. v. G. E. Ry., discussed.

Att.-Gen. v. Shrewsbury (Kingsland) Bridge Co. (1882) 51 L. J. Ch. 746; 21 Ch. D. 752; 46 L. T. 687; 30 W. R. 916.—FRY, J. (*post*, col. 2696).

Att.-Gen. v. G. E. Ry. distinguished.

Guinness v. Land Corporation of Ireland (1882) 22 Ch. D. 349; 52 L. J. Ch. 177; 47 L. T. 517; 31 W. R. 341.—C.A.

COTTON, L.J.—That case [*Att.-Gen. v. G. E. Ry.*] was essentially different from the present. The G. E. Ry. there was doing something which was not strictly within the objects of its incorporation, viz., supplying and letting on hire rolling stock to another company, but as it was only supplied for a railway which could only be effectively worked in conjunction with their railway, what they did was for the purpose of providing for the traffic going over both railways, which was within their objects. The observation of James, L.J. comes only to this, that in such a case the directors have and ought to have a very large discretion as to the mode of attaining the objects of the company. Here the application of the B. capital is not for the purpose of carrying on the business, but of inducing persons to come in and subscribe the A. capital with which the company was to carry on the business.—p. 374.

Att.-Gen. v. G. E. Ry., principle applied.

L. & N. W. Ry. v. Price (1883) 52 L. J. Q. B. 754; 11 Q. B. D. 485, 488.—WATKIN WILLIAMS and A. L. SMITH, JJ.

Att.-Gen. v. G. E. Ry. [H.L.].

Adhered to, *Small v. Smith* (1884) 10 App. Cas. 119, 129.—H.L. (SC.); *discussed*, *Wenlock (Baroness) v. River Dee Co.* (1865) 54 L. J. Q. B. 577; 10 App. Cas. 354, 361; 53 L. T. 62; 49 J. P. 773.—H.L. (E.). LORDS, BLACKBURN, WATSON and FITZGERALD.

Att.-Gen. v. G. E. Ry.

Applied, *Harris v. De Pinna* (1885-1886) 56 L. J. Ch. 344; 33 Ch. D. 238, 254; 54 L. T. 38; 50 J. P. 308.—CHITTY, J. (affirmed, C.A. COTTON, BOWEN and FRY, L.J.J.); *Henderson v. Bank of Australasia* (1888) 58 L. J. Ch. 197; 40 Ch. D. 170, 178; 59 L. T. 856; 37 W. R. 332.—NORTH, J.; *referred to*, *Sheffield and S. Yorkshire Permanent Building Society v. Aislewood* (1889) 59 L. J. Ch. 34; 44 Ch. D. 412, 462; 62 L. T. 678.—STIRLING, J.

Att.-Gen. v. G. E. Ry., referred to.

Johns v. Balfour (1889) 5 Times L. R. 389; 1 Megone 191.—STIRLING, J.

Att.-Gen. v. G. E. Ry.

Discussed, *Foster v. L. C. & D. Ry.* (1894) 64 L. J. Q. B. 65; [1895] 1 Q. B. 711, 719; 14 R. 27; 71 L. T. 855; 43 W. R. 116.—C.A. HALSBURY, L.C., LINDLEY and A. L. SMITH, L.J.J. (*see post*, col. 2687); *applied*, *Att.-Gen. v. L. & N. W. Ry.* (1899) 69 L. J. Q. B. 26; [1900] 1 Q. B. 78; 68 J. P. 772.—C.A. (*see post*, col. 2698). *And see* "COMPANY," vol. i., col. 443.

Colman v. Eastern Counties Ry. (1846) 16 L. J. Ch. 73; 10 Beav. 1; 11 Jur. 74; 4

Railw. Cas. 513.—M.R., *explained*.

Filder v. L. B. & S. C. Ry. (1863) 1 H. & M. 489.—WOOD, V.-C.

Colman v. Eastern Counties Ry., referred to.
East Anglian Rys. v. Eastern Counties Ry.

(1851) 21 L. J. C. P. 23; 11 C. B. 775; 16 Jur. 219; 7 *Railw. Cas.* 150.—C.P.; *Eastern Counties Ry. v. Hawkes* (1855) 24 L. J. Ch. 601; 5 H. L. Cas. 341, 345; 7 *Railw. Cas.* 188; 3 W. R. 609.—H.L. (E.) (*post*, col. 2679); *Att.-Gen. v. G. N. Ry.* (1860) 29 L. J. Ch. 794; 1 Dr. & Sm. 154; 6 Jur. (N.S.) 1006; 2 L. T. 653; 8 W. R. 556.—KINDERSTLEY, V.-C.

Colman v. Eastern Counties Ry.

Distinguished, *South Wales Ry. v. Redmond* (1861) 10 C. B. (N.S.) 675; 4 L. T. 619; 9 W. R. 806.—C.P.; *discussed*, *Bloxham v. Metropolitan Ry.* (1868) L. R. 3 Ch. 343, n.; 17 L. T. 637.—WOOD, V.-C. (affirmed, L. R. 3 Ch. 337; 18 L. T. 41; 16 W. R. 490.—L.C.); *explained*, *Norton v. L. & N. W. Ry.* (1878) 47 L. J. Ch. 859; 9 Ch. D. 623, 632; 37 L. T. 25.—MALINS, V.-C. (affirmed, 13 Ch. D. 268.—C.A.; *post*, col. 2683); *referred to*, *Att.-Gen. v. G. E. Ry.* (1879) 48 L. J. Ch. 428; 11 Ch. D. 449, 487.—C.A., BAGGALLAY, L.J. dissenting (affirmed, H.L., *supra*, col. 2674). *And see* "COMPANY," vol. i., col. 468.

Greenhalgh v. Manchester and Birmingham Ry. (1838) 8 L. J. Ch. 75; 3 Myl. & Cr.

784; 3 Jur. 693; 1 *Railw. Cas.* 68.—COTTENHAM, L.C., *discussed*.

Lindsay (Earl) v. G. N. Ry. (1853) 22 L. J. Ch. 995; 10 Hare 665; 17 Jur. 522; 1 W. R. 257.—WOOD, V.-C.

Salomons v. Laing (1850) 19 L. J. Ch. 225; 12 Beav. 339; 14 Jur. 279, 471; 6 *Railw. Cas.* 289, 363.—M.R., *referred to*.

East Anglian Rys. v. Eastern Counties Ry. (1851) 21 L. J. C. P. 23; 11 C. B. 775; 16 Jur. 249; 7 *Railw. Cas.* 150.—C.P.

Salomons v. Laing, discussed.

Eastern Counties Ry. v. Hawkes (1855) 24 L. J. Ch. 601; 5 H. L. Cas. 331, 346; 7 *Railw. Cas.* 188; 3 W. R. 609.—H.L. (E.).

Salomons v. Laing, discussed.

Russell v. Wakefield Waterworks Co. (1875) 44 L. J. Ch. 496; L. R. 20 Eq. 474, 481; 32 L. T. 685; 23 W. R. 887.

JESSEL, M.R.—*Salomons v. Laing* can be supported on the ground that the bill prayed an injunction to restrain future unauthorised acts on the part of the defendants, although the fact is not expressly stated in the report.—p. 498.

Munt v. Shrewsbury and Chester Ry. (1850)

20 L. J. Ch. 169; 13 Beav. 1; 15 Jur. 26.—M.R., *referred to*.

Att.-Gen. v. G. E. Ry. (1878) 48 L. J. Ch. 428; 11 Ch. D. 449, 487; 40 L. T. 265; 27 W. R. 759.—C.A., BAGGALLAY, L.J. dissenting; affirmed, (1880) 49 L. J. Ch. 545; 5 App. Cas. 473; 42 L. T. 810; 28 W. R. 769.—H.L. (E.).

Rogers v. Oxford, Worcester and Wolverhampton Ry. (1858) 2 De G. & J. 662.—L.J., *referred to*.

Hare v. L. & N. W. Ry. (1861) 30 L. J. Ch. 817; 2 J. & H. 80; 7 Jur. (N.S.) 1145.—WOOD, V.-C.

Rogers v. Oxford, Worcester and Wolverhampton Ry., discussed.

Bloxham v. Metropolitan Ry. (1868) L. R. 3 Ch. 337, 353; 18 L. T. 41; 16 W. R. 490.—CHELMSFORD, L.C. *And see* "COMPANY," vol. i., col. 519.

Filder v. L. B. & S. C. Ry. (1863) 1 H. & M. 489.—V.-C., *discussed*.

Seaton v. Grant (1867) 36 L. J. Ch. 638; L. R.

2 Ch. 459; 16 L. T. 758; 15 W. R. 602.—MALINS, V.-C.; affirmed, L.JJ.

Filder v. L. B. & S. C. Ry. (*ante*), *referred to*.

Bloxam v. Metropolitan Ry. (1868) L. R. 3 Ch. 337, 353; 18 L. T. 41; 16 W. R. 490.—CHELMSFORD, L.C.

Bloxam v. Metropolitan Ry., *applied*.

Salisbury v. Metropolitan Ry. (1869) 38 L. J. Ch. 249; 20 L. T. 72; 17 W. R. 144.—JAMES, V.-C.

Bloxam v. Metropolitan Ry., *referred to*.

National Bank of Wales, *In re*. Cory's Case (1899) 68 L. J. Ch. 634; [1899] 2 Ch. 629, 670; 81 L. T. 363; 48 W. R. 99.—C.A.; affirmed *nom*. Dovey v. Cory (1901) 70 L. J. Ch. 753; [1901] A. C. 477; 85 L. T. 257; 50 W. R. 65; 8 Manson 346.—H.L. (E.). *And see* "PRACTICE," *ante*, col. 2500.

Hoole v. G. W. Ry. (1867) L. R. 3 Ch. 262; 17 L. T. 153; 16 W. R. 260.—CATRNS and ROLT, L.JJ.

Referred to, **Bloxam v. Metropolitan Ry.** (1868) L. R. 3 Ch. 343, n.—WOOD, V.-C. (affirmed, L.R. 3 Ch. 337; 18 L. T. 41; 16 W. R. 490.—CHELMSFORD, L.C.); *distinguished*, Yool v. G. W. Ry. (1870) 39 L. J. Ch. 562; 22 L. T. 781; 18 W. R. 825.—JAMES, V.-C.; *observations applied*, Wood v. Odessa Waterworks Co. (1889) 58 L. J. Ch. 628; 42 Ch. D. 636, 643; 37 W. R. 733; 1 Meg. 265.—STIRLING, J.

Norwich Corporation v. Norfolk Ry. (1855) 24 L. J. Q. B. 105; 4 El. & Bl. 397; 3 C. L. R. 519; 1 Jur. (N.S.) 344.—Q.B.

Explained, **Eastern Counties Ry. v. Hawkes** (1855) 24 L. J. Ch. 601; 5 H. L. Cas. 331, 358; 7 Railw. Cas. 188; 3 W. R. 609.—H.L. (E.); *approved and applied*, **Bateman v. Ashton-under-Lyne Corporation** (1858) 27 L. J. Ex. 458; 3 H. & N. 323, 335; 6 W. R. 829.—EX.; **BRAMWELL, B.** dissenting; *discussed*, **Taylor v. Chichester and Midhurst Ry.** (1867) 36 L. J. Ex. 201; L. R. 2 Ex. 356, 371.—EX. CH.; **BLACKBURN and WILLES, JJ.** dissenting (*and see post*, col. 2680); **Riche v. Ashbury Ry. Carriage and Iron Co.** (1874) 43 L. J. Ex. 177; L. R. 9 Ex. 224, 289.—EX. CH. (reversed, *see post*, col. 2681).

Bagshaw v. Eastern Union Ry. (1850) 19 L. J. Ch. 410; 2 Mac. & G. 349; 2 H. & Tw. 201; 14 Jur. 491; 6 Railw. Cas. 169.—COTTENHAM, L.C.

Referred to, **East Anglian Rys. v. Eastern Counties Ry.** (1851) 21 L. J. C. P. 23; 11 C. B. 775; 16 Jur. 249; 7 Railw. Cas. 150.—C.P.; *not applied*, **Hawkes v. Eastern Counties Ry.** (1852) 1 De G. M. & G. 737; 20 L. J. Ch. 243; 16 Jur. 1051; 7 Railw. Cas. 216.—ST. LEONARDS, L.C. (*see post*, col. 2679); *referred to*, **Shrewsbury and Birmingham Ry. v. L. & N. W. Ry.** (1857) 26 L. J. Ch. 482; 6 H. L. Cas. 113; 3 Jur. (N.S.) 775.—H.L. (E.).

East Anglian Rys. v. Eastern Counties Ry.

(1851) 21 L. J. C. P. 23; 11 C. B. 775; 16 Jur. 249; 7 Railw. Cas. 150.—C.P., *applied*.

MacGregor v. Dover and Deal Ry. (1852) 22 L. J. Q. B. 69; 18 Q. B. 618, 631; 17 Jur. 21; 7 Railw. Cas. 227.—EX. CH.

East Anglian Rys. v. Eastern Counties Ry., *not applied*.

Hawkes v. Eastern Counties Ry. (1852) 1 De G. M. & G. 737; 20 L. J. Ch. 243; 16 Jur.

1051; 7 Railw. Cas. 216.—L.C.; affirmed, H.L. (*post*, col. 2679).

ST. LEONARDS, L.C.—Those [*MacGregor v. Dover and Deal Ry.* (*supra*), *East Anglian Rys. v. Eastern Counties Ry.*, and *Bagshaw v. Eastern Union Ry.* (*supra*, col. 2677)] were all cases in which the companies were beyond all doubt exceeding their powers, and the parties contracting with them must be presumed to have had notice of the illegality. Those cases, therefore, have no bearing on the present.—p. 759.

East Anglian Rys. v. Eastern Counties Ry.

Referred to, **Shrewsbury and Birmingham Ry. v. L. & N. W. Ry.** (1857) 26 L. J. Ch. 482; 6 H. L. Cas. 113; 3 Jur. (N.S.) 775.—CRANWORTH, L.C.; *applied*, **Bateman v. Ashton-under-Lyne Corporation** (1857) 27 L. J. Ex. 458; 3 H. & N. 323; 6 W. R. 829.—EX.; *not applied*, **Bateman v. Green** (1867) Ir. R. 2 C. L. 166.—Q.B.; *discussed*, **Taylor v. Chichester and Midhurst Ry.** (1867) 36 L. J. Ex. 201; L. R. 2 Ex. 356.—EX. CH. (*See* judgment of **BLACKBURN, J.**, who dissented, *and see post*, col. 2680.)

East Anglian Rys. v. Eastern Counties Ry.

Applied, **L. B. & S. C. Ry. v. L. & S. W. Ry.** (1859) 28 L. J. Ch. 521; 4 De G. & J. 362; 5 Jur. (N.S.) 801; 7 W. R. 591.—L.C. and L.J.; *referred to*, **Hammersmith and City Ry. v. Brand** (1869) 38 L. J. Q. B. 265; L. R. 4 H. L. 171, 189; 21 L. T. 238; 18 W. R. 12.—H.L. (E.) (**LORD CATRNS** dissenting); **Driver v. Kingston Highway Board** (1871) 24 L. T. 480, 485.—EX.; *applied*, **Ashbury Ry. Carriage and Iron Co. v. Riche** (1875) 44 L. J. Ex. 185; L. R. 7 H. L. 653, 694; 33 L. T. 451; 24 W. R. 794.—H.L. (E.).

East Anglian Rys. v. Eastern Counties Ry., *referred to*.

Evershed v. L. & N. W. Ry. (1877) 47 L. J. Q. B. 284; 3 Q. B. 1, 134, 141; 37 L. T. 623; 26 W. R. 863.—C.A.; affirmed *nom*. L. & N. W. Ry. v. Evershed (1878) 48 L. J. Q. B. 22; 3 App. Cas. 1029; 39 L. T. 306.—H.L. (E.).

East Anglian Rys. v. Eastern Counties Ry., *commented on*.

Att.-Gen. v. G. E. Ry. (1879) 11 Ch. D. 449; 48 L. J. Ch. 429; 40 L. T. 265; 27 W. R. 759.—C.A. **JAMES and BRAMWELL, L.JJ.**, **BAGGALLAY, L.J.** dissenting; affirmed, (1880) 49 L. J. Ch. 545; 5 App. Cas. 473; 42 L. T. 810; 28 W. R. 769.—H.L. (E.).

BRAMWELL, L.J.—I was counsel for the plaintiff in the latter case [*East Anglian Rys. v. Eastern Counties Ry.*]. I know of none at common law before it in which a trace of this doctrine is to be found, and certainly, I was never more surprised than at that decision—a decision that proceeded on grounds which, with all respect be it said, were erroneous, and led, as I believe they have in other cases, to an erroneous result. The mistake was in not distinguishing that many of the provisions of Acts of Parliament constituting companies are not provisions as between the companies and the public, but agreements among the shareholders *inter se* which constitute their agreement of partnership, their instrument of settlement.—p. 501.

MacGregor v. Dover and Deal Ry. (1852)

22 L. J. Q. B. 69; 18 Q. B. 618; 17 Jur. 21; 7 Railw. Cas. 227.—EX. CH.

Not applied, **Hawkes v. Eastern Counties Ry.**

(1852) 1 De G. M. & G. 737, 759; 20 L. J. Ch. 243; 16 Jur. 1051; 7 Railw. Cas. 216.—ST. LEONARDS, L.C. (*see post*); *applied*, Bateman v. Ashton-under-Lyne Corporation (1858) 27 L. J. Ex. 458; 3 H. & N. 323; 6 W. R. 829.—EX. (BRAMWELL, B. dissenting); *not applied*, Bateman v. Green (1867) Ir. R. 2 C. L. 166.—Q.B.

MacGregor v. Dover and Deal Ry., *discussed and approved*.

South Wales Ry. v. Redmond (1861) 10 C. B. (N.S.) 675; 4 L. T. 619; 9 W. R. 806.—C.P., *referred to*.

Taylor v. Chichester and Midhurst Ry. (1867) 36 L. J. Ex. 201; L. R. 2 Ex. 356, 384.—EX. CH. *See* judgment of BLACKBURN, J., who with WILLES, J., dissented from the majority. *And see post*, col. 2680.

Hawkes v. Eastern Counties Ry. (1852) 1 De G. M. & G. 737; 22 L. J. Ch. 77; 16 Jur. 1051; 7 Railw. Cas. 188; 1 W. R. 25, 41.—ST. LEONARDS, L.C.

Applied, Ffooks v. S. W. Ry. (1853) 1 Sm. & G. 142; 17 Jur. 365; 1 W. R. 175.—KINDERSLEY, V.-C.; *approved*, Shrewsbury and Birmingham Ry. v. L. & N. W. Ry. (1853) 22 L. J. Ch. 682; 4 De G. M. & G. 115; 17 Jur. 845.—KNIGHT BRUCE and TURNER, J.J.: *referred to*, Lindsey (Earl) v. G. N. Ry. (1853) 10 Hare 665; 22 L. J. Ch. 995; 17 Jur. 552; 1 W. R. 527.—WOCOD, V.-C.

Hawkes v. Eastern Counties Ry., *affirmed nom.* **Eastern Counties Ry. v. Hawkes** (1855) 24 L. J. Ch. 601; 5 H. L. Cas. 331; 7 Railw. Cas. 188; 3 W. R. 609.—H.L. (E.).

Eastern Counties Ry. v. Hawkes, *approved*.

Bateman v. Ashton-under-Lyne Corporation (1858) 27 L. J. Ex. 458; 3 H. & N. 323, 337; 6 W. R. 829.—EX. (BRAMWELL, B. dissenting); Taylor v. Chichester and Midhurst Ry. (1870) 39 L. J. Ex. 217; L. R. 4 M. L. 628, 642; 23 L. T. 659.—H.L. (E.).

Eastern Counties Ry. v. Hawkes, *referred to*. Ashbury Railway Carriage and Iron Co. v. Riche (1875) 44 L. J. Ex. 185; L. R. 7 H. L. 653, 693; 33 L. T. 451; 24 W. R. 794.—H.L. (E.); Att.-Gen. v. G. E. Ry. (1879) 48 L. J. Ch. 429; 11 Ch. D. 449, 487; 40 L. T. 265; 27 W. R. 759.—C.A.; BAGGALLAY, L.J. dissenting.

Webb v. Direct London and Portsmouth Ry. (1851) 20 L. J. Ch. 566; 9 Hare 129.—TURNER, V.-C.; *reversed*, (1852) 21 L. J. Ch. 337; 1 De G. M. & G. 521; 16 Jur. 323.—KNIGHT BRUCE and CRANWORTH, L.JJ.

Webb v. Direct London and Portsmouth Ry., *explained*.

Stuart v. L. & N. W. Ry. (1852) 21 L. J. Ch. 450; 1 De G. M. & G. 721, 732; 16 Jur. 531.—KNIGHT BRUCE and CRANWORTH, L.JJ.; reversing 15 Beav. 524.—ROMILLY, M.R.

Webb v. Direct London and Portsmouth Ry. and Stuart v. L. & N. W. Ry., *commented on*.

Hawkes v. Eastern Counties Ry. (1852) 22 L. J. Ch. 77; 1 De G. M. & G. 737, 757; 16 Jur. 1051; 7 Railw. Cas. 188; 1 W. R. 25, 41.—ST. LEONARDS, L.C.; and S. C. *nom.* **Eastern Counties Ry. v. Hawkes** (1855) 24 L. J. Ch. 601; 5 H. L. Cas. 331, 351; 7 Railw. Cas. 188; 3 W. R. 609.—H.L. (E.).

Webb v. Direct London and Portsmouth Ry. and Stuart v. L. & N. W. Ry.

Referred to, Shrewsbury and Birmingham Ry. v. L. & N. W. Ry. (1853) 22 L. J. Ch. 682; 4 De G. M. & G. 115; 17 Jur. 845.—KNIGHT BRUCE and TURNER, J.J.: *impugned*, Preston v. Liverpool, Manchester and Newcastle Ry. (1856) 25 L. J. Ch. 421; 5 H. L. Cas. 605; 2 Jur. (N.S.) 241; 4 W. R. 383.—H.L. (E.): *referred to*, Tiverton and North Devon Ry. v. Loosemore (1884) 53 L. J. Ch. 812; 9 App. Cas. 480, 491; 50 L. T. 637; 32 W. R. 929; 48 J. P. 372.—H.L. (E.).

Gage v. Newmarket Ry. (1852) 21 L. J. Q. B. 398; 18 Q. B. 457; 16 Jur. 1136; 7 Railw.

• Cas. 168.—Q.B.; and **Gooday v. Colchester and Stour Valley Ry.** (1852) 17 Beav. 132.—ROMILLY, M.R., *discussed*.

Hawkes v. Eastern Counties Ry. (1852) 22 L. J. Ch. 77; 1 De G. M. & G. 737, 758; 16 Jur. 1051; 7 Railw. Cas. 188; 1 W. R. 25, 41.—ST. LEONARDS, L.C.

Gage v. Newmarket Ry., *referred to*.

Eastern Counties Ry. v. Hawkes (1855) 24 L. J. Ch. 601; 5 H. L. Cas. 331, 351; 7 Railw. Cas. 188; 3 W. R. 609.—H.L. (E.): Taylor v. Chichester and Midhurst Ry. (1867) 36 L. J. Ex. 201; L. R. 2 Ex. 356.—EX. CH. (reversed, *see post*); Hammersmith and City Ry. v. Brand (1869) 38 L. J. Q. B. 265; L. R. 4 H. L. 171, 189; 21 L. T. 238; 18 W. R. 12.—H.L. (E.); LORD CAIRNS dissenting.

Taylor v. Chichester and Midhurst Ry., 4 H. & C. 409; 14 L. T. 437.—EX.; *reversed*, (1867) 36 L. J. Ex. 201; L. R. 2 Ex. 356.—EX. CH., BLACKBURN and WILLES, J.J. *dissenting*; the latter decision *reversed*, (1870) 39 L. J. Ex. 217; L. R. 4 H. L. 628; 23 L. T. 657.—H.L. (E.).

Taylor v. Chichester and Midhurst Ry., *not applied*.

Guest v. Poole and Bournemouth Ry. (1870) 39 L. J. C. P. 329; L. R. 5 C. P. 553; 22 L. T. 589; 18 W. R. 836.—C.P.

Taylor v. Chichester and Midhurst Ry.

Referred to, Driver v. Kingston Highway Board (1876) 24 L. T. 480.—EX.; Att.-Gen. v. G. E. Ry. (1879) 48 L. J. Ch. 429; 11 Ch. D. 449, 487; 40 L. T. 265; 37 W. R. 757.—C.A.; BAGGALLAY, L.J. dissenting (C.A. affirmed, (1880) 49 L. J. Ch. 545; 5 App. Cas. 473.—H.L. (E.), *see supra*, col. 2674); South City Market Co., In re, Bergin, Ex parte (1884) 13 L. R. Ir. 245.—CHATTERTON, V.-C.

Att.-Gen. v. G. N. Ry. (1860) 29 L. J. Ch. 794; 1 Dr. & Sm. 154; 6 Jur. (N.S.) 1006; 2 L. T. 653; 8 W. R. 556.—KINDERSLEY, V.-C., *referred to*.

Norton v. L. & N. W. Ry. (1878) 47 L. J. Ch. 859; 9 Ch. D. 623, 632; 39 L. T. 25.—MALINS, V.-C.; affirmed, C.A. (*see post*, col. 2683).

• **Att.-Gen. v. G. N. Ry.**, *discussed*.

Att.-Gen. v. G. E. Ry. (1879) 11 Ch. D. 449; 48 L. J. Ch. 429; 40 L. T. 265; 27 W. R. 759.—C.A.; affirmed, H.L. (E.) (*see supra*, col. 2674).

JAMES, L.J.—According to **Att.-Gen. v. G. N. Ry.**, the Court must exercise its discretion, and the Att.-Gen. ought to exercise his discretion as to whether a sufficient case is made out for the interference of the Court. We do

not mean to contend that any technical violation would do, we admit that it must be such as the Att.-Gen. in his discretion first of all, and the Court in its discretion afterwards, thinks of sufficient magnitude to warrant an injunction. —p. 472.

BAGGALLAY, L.J. (dissenting).—I am unable to distinguish this case in principle from that of *Att.-Gen. v. G. N. Ry.* decided by Kindersley, V.-C., eighteen years ago, and the authority of which has never, to my knowledge, been questioned. . . . The law and the practice in this respect were declared by the V.-C. in the following terms, in which I entirely agree: "Wherever the interests of the public are damaged by a company, established for any particular purpose by Act of Parliament, acting illegally and in contravention of the powers conferred upon it, I conceive it is the function and duty of the Att.-Gen. to protect the interests of the public by an information." —p. 500.

BRAMWELL, L.J.—In *Att.-Gen. v. G. N. Ry.* it was said that where, in the case of injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the Acts creating it, it is competent to the Att.-Gen., in case of injury to public interests from such a cause, to file an information for an injunction. But I ask, with sincere respect for the learned judge, what is the similarity of or analogy between the two cases, and what is the injury to public interests in such a case? How is the public injured, or any class of it? —p. 501.

Riche v. Ashbury Ry. Carriage and Iron Co. (1874) 43 L. J. Ex. 177; L. R. 9 Ex. 224. —EX. CH., *discussed*.

Gibson v. Barton (1875) 44 L. J. M. C. 81; L. R. 10 Q. B. 329, 337; 32 L. T. 396; 23 W. R. 856.—Q.B.; *QUAIN, J. dissenting*.

Riche v. Ashbury Ry. Carriage & Co. v. Ashbury, reversed nom. Ashbury Ry. Carriage and Iron Co. v. Riche (1875) 44 L. J. Ex. 185; L. R. 7 H. L. 653; 33 L. T. 451; 24 W. R. 794.—H.L. (E.).

Ashbury Ry. Carriage, & Co. v. Riche.

Discussed, *Hope v. International Financial Society* (1876) 46 L. J. Ch. 200; 4 Ch. D. 327, 340; 35 L. T. 924; 25 W. R. 203.—C.A.: *explained and applied*, *Cree v. Somervail* (1879) 4 App. Cas. 648, 667.—H.L. (SC.): *considered*, *Chapleo v. Brunswick Benefit Building Society* (1880) 49 L. J. C. P. 796; 5 Q. B. D. 331, 335; 42 L. T. 741; 29 W. R. 153.—COLERIDGE, C.J. (reversed in part, *post*): *referred to*, *Chapleo v. Brunswick Benefit Building Society* (1881) 50 L. J. Q. B. 372; 6 Q. B. D. 696, 711; 44 L. T. 449; 29 W. R. 529.—C.A.: *BRAMWELL, L.J. doubting* (reversing in part S. C., *supra*).

Ashbury Ry. Carriage, & Co. v. Riche, distinguished.

West of England Bank, In re. Booker, Ex parte (1880) 14 Ch. D. 317; 49 L. J. Ch. 400; 42 L. T. 619; 28 W. R. 809.

MALINS, V.-C.—In *Ashbury Ry. Carriage, & Co. v. Riche*, the transaction was not binding on the other shareholders, because it was embarking in a totally different business. The company was constituted to build railway carriages at Birmingham, and the directors took the capital and

used it in making a railway in Belgium. It was decided not only that it was not within their power, but that no acquiescence of the shareholders in what was done would bind them. But this was the act of the directors, who have only such powers as the shareholders confer on them, and they have conferred on the directors the power of conducting every kind of banking business.—p. 321.

Ashbury Ry. Carriage, & Co. v. Riche, referred to.

Dronfield Silkstone Coal Co., In re (1880) 50 L. J. Ch. 387; 17 Ch. D. 76, 83; 44 L. T. 361; 29 W. R. 768.—JESSEL, M.R. (reversed, C.A.); *German Date Coffee Co., In re* (1882) 51 L. J. Ch. 564; 20 Ch. D. 169, 180; 46 L. T. 327; 30 W. R. 717.—KAY, J. (affirmed, C.A.).

Ashbury Ry. Carriage, & Co. v. Riche.

Discussed, *Guinness v. Land Corporation of Ireland* (1882) 52 L. J. Ch. 177; 22 Ch. D. 349, 357; 47 L. T. 517; 31 W. R. 341.—CHITTY, J., and C.A. *COTTON and BOWEN, L.JJ.*; *L. & N.W. Ry. v. Price* (1883) 52 L. J. Q. B. 754; 11 Q. B. D. 485, 489.—Q.B.D.; *applied*, *Ashbury v. Watson* (1884) 54 L. J. Ch. 12; 28 Ch. D. 56, 61; 51 L. T. 766.—KAY, J.; and (1885) 54 L. J. Ch. 985; 30 Ch. D. 376, 381; 54 L. T. 27; 33 W. R. 882.—C.A. *ESHER, M.R., BAGGALLAY and FRY, L.JJ.*; *considered*, *South Durham Brewery Co., In re* (1885) 55 L. J. Ch. 179; 31 Ch. D. 261, 269; 53 L. T. 928; 34 W. R. 126.—C.A. *LINDLEY, FRY and LOPES, L.JJ.*; *referred to*, *Howard v. Patent Ivory Manufacturing Co., In re* (1888) 57 L. J. Ch. 878; 38 Ch. D. 156, 169; 58 L. T. 395; 36 W. R. 801.—KAY, J. *and see "COMPANY,"* vol. i., col. 441.

Bostock v. North Staffordshire Ry. (1855)

24 L. J. Q. B. 225; 4 El. & Bl. 798; 3 C. L. R. 1027; 1 Jur. (N.S.) 921.—Q.B.; *ERLE, J. dissenting*; S. C., 3 Sm. & G. 283, *approved*.

Bostock v. North Staffordshire Ry. (1856) 25 L. J. Ch. 325; 5 De G. & Sm. 584; 2 Jur. (N.S.) 248; 4 W. R. 336.—STUART, V.-C.

Bostock v. North Staffordshire Ry., discussed.

Norton v. L. & N.W. Ry. (1878) 47 L. J. Ch. 859; 9 Ch. D. 623, 630; 39 L. T. 25.—MALINS, V.-C.; *affirmed*, (1879) 13 Ch. D. 268; 41 L. T. 429; 28 W. R. 173.—C.A.

Bostock v. North Staffordshire Ry., considered.

Mulliner v. Midland Ry. (1879) 11 Ch. D. 611; 48 L. J. Ch. 258; 40 L. T. 121; 27 W. R. 330.

JESSEL, M.R.—It is, moreover, a mistake to suppose that they themselves [the railway company] have the ordinary rights of proprietors in every respect to use the lands. Their rights, no doubt, are limited, though it is not necessary to state the exact limits. That point came before the Court of Q. B., in *Bostock v. North Staffordshire Ry.*, which is not really distinguishable from the present case. It has been reported, once before Stuart, V.-C., and also before the Court of Q. B. There the majority of the Court of Q. B. were clearly of opinion, though the words there were "for the purposes of this Act and for no other purpose," which words as I said before, are implied without being expressed, that the company could not use the land except for the

purposes of the Act. They had not the ordinary rights of ordinary proprietors but the Legislature empowered them to acquire and hold and use the lands merely for the special purposes of the Act.—p. 622.

Bostock v. North Staffordshire Ry., distinguished.

Foster v. L. C. & D. Ry. (1894) [1895] 1 Q. B. 711; 64 L. J. Q. B. 65; 14 R. 27; 71 L. T. 855; 43 W. R. 116.—C.A.

LORD HALSBURY.—As to *Bostock v. North Staffordshire Ry.*, it seems to me that the rights of the adjoining proprietor in that case were, rightly or wrongly, supposed to rest on the peculiar words of the statute.—p. 717.

LINDLEY, L.J.—If the plaintiff is well founded in his allegation that the railway company have exceeded their powers, and that he is damaged, then the authorities on which he relies entitle him to relief, although no right peculiar to him is infringed. I think *Bostock v. North Staffordshire Ry.* goes that length, and there are certainly cases to be found before Lord Eillon and Lord Cottenham in Chancery which sanction that purpose.—p. 719.

A. L. SMITH, L.J. to the same effect.

Norton v. L. & N. W. Ry. (1878) 47 L. J. Ch. 859; 9 Ch. D. 623; 39 L. T. 25.—MALINS, V.-C.; affirmed with a slight variation (1879) 13 Ch. D. 268; 41 L. T. 429; 28 W. R. 173.—C.A.

Norton v. L. & N. W. Ry., considered.

Bobbett v. S. E. Ry. (1882) 51 L. J. Q. B. 161; 9 Q. B. D. 424, 429; 46 L. T. 31; 46 J. P. 823.—DENMAN, J.

Norton v. L. & N. W. Ry. [47 L. J. Ch. 859], explained.

Bonner v. G. W. Ry. (1883) 24 Ch. D. 1; 48 L. T. 619; 32 W. R. 190; 47 J. P. 580.—C.A. BAGGALLAY, LINDLEY and PHX, L.JJ. See "EASEMENTS AND PRESCRIPTION," vol. i., col. 912.

Norton v. L. & N. W. Ry., referred to.

Bayley v. G. W. Ry. (1884) 26 Ch. D. 434, 450; 51 L. T. 337.—C.A. COTTON, BOWEN and FRY, L.JJ.

Norton v. L. C. & D. Ry., ratio decidendi disapproved.

Foster v. L. C. & D. Ry. (1894) [1895] 1 Q. B. 711; 64 L. J. Q. B. 65; 14 R. 27; 71 L. T. 855; 43 W. R. 116.—C.A.

LORD HALSBURY.—It is admitted that in this case there is no private nuisance. So it comes back to this, that there must be some express language of the statute or some covenant implied in the statute that nothing shall be done which shall render the use of the property taken inconvenient or annoying to the adjoining property. For that proposition I think we have complete absence of authority. The only case that I remember which runs in the other direction is *Norton v. L. & N. W. Ry.*, which was in respect of a board put up by a railway company to prevent the acquisition of light by the owner of a house near their line. Whether that case has been approved of or not, I am bound to say for myself that if the proposition to which I have referred was necessary to the decision I should entirely disagree with it, and when the matter came before the C.A. afterwards it is clear that that point never was approved of at all.—p. 717.

LINDLEY, L.J.—In that case [*Norton v. L. & N. W. Ry.*] Malins, V.-C. went to the length of saying that a railway company were exceeding their powers when they put up a hoarding to obstruct a neighbour's light. I must say I cannot follow that at all. It appears to me to be contrary to sound principle. It is certainly not warranted by any other decision in the books, and it is in my opinion quite inconsistent with other decisions. Although that decision of Malins, V.-C. was affirmed on appeal, it was affirmed on different grounds.—p. 721.

A. L. SMITH, L.J. to the same effect.

Norton v. L. & N. W. Ry.

Discussed, *Marshall v. Taylor* (1895) 64 L. J. Ch. 416; [1895] 1 Ch. 641; 12 R. 310; 72 L. T. 670.—C.A. LORD HALSBURY, LINDLEY and A. L. SMITH, L.JJ. (see "LIMITATIONS (STATUTES OF)," ante, col. 1600); distinguished, *Littledale v. Liverpool College* (1899) 69 L. J. Ch. 87; [1900] 1 Ch. 19; 81 L. T. 564; 48 W. R. 177.—C.A. LINDLEY, M.R., SIR F. JEUNE and ROMER, L.JJ. (see "LIMITATIONS (STATUTES OF)," ante, col. 1601); explained and not applied, *M'Evoy v. G. N. (Ireland) Ry.* (1898) [1900] 2 Ir. R. 325, 335.—Q.B.D.; affirmed, (1899).—C.A. ASHBOURNE, L.C., FITZGIBBON, WALKER and HOLMES, L.JJ.

Norton v. L. & N. W. Ry. and Marshall v. Taylor (supra), discussed.

Midland Ry. v. Wright (1901) 70 L. J. Ch. 411; [1901] 1 Ch. 738; 84 L. T. 225; 49 W. R. 474.

BYRNE, J.—Then, turning to the questions arising from the fact of one of the parties to the dispute being a railway company, I may say in the first place that in my opinion the land in question is not superfluous land, and I think that *Metropolitan District Ry. and Cosh, In re* (1880) 13 Ch. D. 607 [see "LANDS CLAUSES ACT," ante, col. 1555] establishes this, notwithstanding a certain doubt which was expressed by Baggallay, L.J., in that case. I think, further, it is established by *Norton v. L. & N. W. Ry.* (in that case, however, perhaps the opinion of the C.A. on the point was not necessary for the decision of the case), and by *Bobbett v. S. E. Ry.* (post), and by the observations of Lindley and A. L. Smith, L.JJ., in *Marshall v. Taylor*, as to the effect of *Norton v. L. & N. W. Ry.*, that a title may be acquired by possession by a stranger to the land of a railway company even though not superfluous land, and, therefore, land which the railway company could not sell or dispose of. . . . It is true that the cases establishing the proposition I have last mentioned, having reference to railway companies, deal with land situate laterally to the companies' works, and not to land over a tunnel.—p. 415.

Bobbett v. S. E. Ry. (1882) 51 L. J. Q. B. 161; 9 Q. B. D. 424; 46 L. T. 31; 46 J. P. 823.—DENMAN, J.; affirmed on question of evidence, *W. N.* (1882) 92.—C.A. JESSEL, M.R., LINDLEY and BOWEN, L.JJ.

Bobbett v. S. E. Ry.

Referred to, *Duffy's Estate, In re* (1896) [1897] 1 Ir. R. 307.—ROSS, J. (affirmed, (1897).—C.A.); discussed, *Midland Ry. v. Wright* (1901) 70 L. J. Ch. 411 [1901] 1 Ch. 738 (supra).

Mulliner v. Midland Ry. (1879) 48 L. J. Ch. 258; 11 Ch. D. 611; 40 L. T. 121; 27 W. R. 330.—JESSEL, M.R., *followed*.
Metropolitan District Ry. and Cosh, *In re* (1880) 49 L. T. Ch. 277; 13 Ch. D. 607, 612; 42 L. T. 73; 28 W. R. 685; 44 J. P. 393.—C.A.; BAGGALLAY, L.J. *doubting*.

Mulliner v. Midland Ry., distinguished.
Ware v. L. B. & S. C. Ry. (1885) 52 L. J. Ch. 193; 47 L. T. 541; 31 W. R. 228.

PEARSON, J.—In *Mulliner's* case what the company attempted to sell was the piece of land lying under one of the arches which supported a part of the station, and which was to all intents and purposes, therefore, a part of the works of the company which they required to keep for their own absolute use. What the M.R. decided, if I am to put it into plain and simple language, was, I think, practically this—that you could not in a case of that kind sell the floor of your house, keeping the roof only. The reason he gave in that case was that, if you wanted to repair the crown of the arch, it would be necessary to put a scaffolding under the arch, and upon this very piece of land which had been attempted to be sold. I need not say also that in that case there were other grounds for deciding as he did which would have disposed of the case without going into the question of law at all. But I cannot think that that is any precedent, or forms any principle for the present case . . . ; and to say that when a railway company have a field on one side of the boundary wall for which they have no use, and which, if they do not sell it, will vest in the adjoining landowner, they must retain so much land on the further side of their boundary wall as will lie between that wall and a line drawn vertically from the footings of the wall, would be to give a most mischievous decision.—p. 200.

Mulliner v. Midland Ry.
Principle explained and applied. *Ayr Harbour Trustees v. Oswald* (1883) 8 App. Cas. 623, 635.—H.L. (SC.). LORDS BLACKBURN, WATSON and FITZGERALD; *considered*, *Bayley v. G. W. Ry.* (1884) 26 Ch. D. 434, 450; 51 L. T. 337.—C.A. OOTTON, BOWEN and FRY, L.J.; *referred to*, *Stevens v. Metropolitan District Ry.* (1885) 54 L. J. Ch. 737; 29 Ch. D. 60, 64; 52 L. T. 832; 33 W. R. 531.—CHITTY, J. (reversed, (1885)).—C.A. BAGGALLAY, BOWEN and FRY, L.J.; *explained*, *Grand Junction Canal Co. v. Petty* (1888) 57 L. J. Q. B. 572; 21 Q. B. D. 273, 275; 59 L. T. 767; 36 W. R. 795; 52 J. P. 692.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Mulliner v. Midland Ry., discussed and not applied.

Gonty and Manchester, Sheffield and Lincolnshire Ry., In re (1896) 65 L. J. Q. B. 625; [1896] 2 Q. B. 439; 75 L. T. 239; 45 W. R. 83.—C.A. ESHER, M.R., A. L. SMITH and RIGBY, L.JJ.

A. L. SMITH, L.J.—Upon the question whether the company have any power in law to grant a perpetual right of way over the piece of land they have taken, reliance was placed upon *Mulliner v. Midland Ry.* I do not think that that case has any application to the questions now before the Court. If the case decided that a railway company have no power to give a right of way under an archway through a railway embankment, I could not agree with it.

It seems perfectly obvious that there may be cases in which a railway company could grant a right of way of that kind, and, therefore, I think that Sir G. Jessel, M.R., never intended to lay down the law in that way.—p. 630.

RIGBY, L.J.—I conceive that the decision of Sir G. Jessel, M.R., in that case [*Mulliner v. Midland Ry.*] was in accordance with the law, and I am not aware that its correctness has ever been seriously disputed. No doubt attempts have been made, as in the present case, to extend the effect of the decision beyond what was intended by the M.R., and such attempts have failed. His decision was that a piece of land acquired by a railway company under their Act for the purposes of their railway, and used for the purposes of a railway-station, could not be alienated by them except under the authority of Parliament. That is undoubted law. Sir G. Jessel, M.R., then went a step further, and said that the company were not only unable to alienate the land, but were also unable to create a perpetual right of way over it. It seems to me that that is a reasonable deduction to draw from the other proposition, that the company could not alienate. That, I believe, is all that was decided in that case, and the decision, therefore, has no application to the case now before us.—p. 631.

* **Mulliner v. Midland Ry., referred to.**
Caledonian Ry. v. Turcan (1897) 25 Rettie 7.—CT. OF SESS. (affirmed, (1898) 67 L. J. P. C. 69; [1898] A. C. 256.—H.L. (SC.)); *Thames Conservators v. Southwark and Vauxhall Water Co.* (1897) 13 Times L. R. 155.—MATHEW, J.; *L. & N. W. Ry. v. Runcorn Rural Council* (1897) 67 L. J. Ch. 23; [1898] 1 Ch. 34; 77 L. T. 485; 46 W. R. 121; 62 J. P. 9.—STIRLING, J.; (affirmed, (1898) 67 L. J. Ch. 324; [1898] 1 Ch. 561; 78 L. T. 343; 46 W. R. 484; 62 J. P. 642.—C.A.); *McEvoy v. G. N. (Ireland) Ry.* (1898) [1900] 2 Ir. R. 325, 336.—Q.B.D.; (affirmed, (1899)).—C.A.; *Manchester, Sheffield and Lincolnshire Ry. v. Anderson* (1898) 67 L. J. Ch. 568; [1898] 2 Ch. 394, 402; 78 L. T. 821.—C.A. (affirming 46 W. R. 509.—BYRNE, J.).

Mulliner v. Midland Ry., applied.
G. W. Ry. v. Solihull Rural Council (1902) 86 L. T. 852; 66 J. P. 772; 18 Times L. R. 707.—C.A.

Mulliner v. Midland Ry., referred to.
G. W. Ry. v. Talbot (1902) 71 L. J. Ch. 835; [1902] 2 Ch. 759, 765; 87 L. T. 405.—C.A.

STIRLING, L.J. (for the Court).—On the other hand, the legislature has not seen fit expressly to authorise a railway to make general grants and easements over land acquired for the purpose of its undertaking; and in *Mulliner v. Midland Ry.* it was laid down by Sir G. Jessel, M.R., that (with some exceptions which do not affect the present question) a railway company has no right to sell, grant, or dispose of such land, or any easement or right of way over it, except for the purposes of the Companies' Act—that is, with a view to the traffic of the company; and it was there held by him that a grant of such right of way was *ultra vires*.—p. 837.

Mulliner v. Midland Ry., applied.
Stretford Urban Council v. Manchester South Junction and Altrincham Ry. (1903) 1 L. G. R. 683; 68 J. P. 59; 19 T. L. R. 546.—C.A.

Foster v. L. C. & D. Ry. (1894) 64 L. J. Q. B. 65; [1895] 1 Q. B. 711; 14 R. 27; 71 L. T. 855; 43 W. R. 116.—C.A.
Principle applied, *Onslow v. Manchester, Sheffield and Lincolnshire Ry.* (1895) 64 L. J. Ch. 355; 72 L. T. 256.—ROMER, J.; *discussed*, *Gouty and Manchester, Sheffield and Lincolnshire Ry.*, in re (1896) 65 L. J. Q. B. 625; [1896] 2 Q. B. 439; 75 L. T. 239; 45 W. R. 83.—C.A.; *distinguished*, *Caledonian Ry. v. Turcan* (1897) 25 Rettie 7.—CT. OF SESS. (affirmed, (1898) 67 L. J. P. C. 69; [1898] A. C. 256.—H.L. (SC.)); *explained and not applied*, *M'Evoy v. G. N. Ry.* (1898) [1900] 2 Ir. R. 325, 335.—Q.B.D. (affirmed, (1899).—C.A.).

Dickson v. Swansea Vale and Neath and Brecon Ry. (1868) 38 L. J. Q. B. 17; L. R. 4 Q. B. 44; 19 L. T. 846; 17 W. R. 51.—Q.B.

Applied, *Higgs v. Northern Assam Tea Co.* (1869) 38 L. J. Ex. 233; L. R. 4 Ex. 387, 396; 21 L. T. 336; 17 W. R. 1125.—EX.; *discussed*, *Romford Canal Co.*, in re, *Pocock's Claim*, *Trickett's Claim*, *Carew's Claim* (1883) 52 L. J. Ch. 729; 24 Ch. D. 85, 90; 49 L. T. 118.—KAY, J.; *referred to*, *Gwelo, &c., Co.*, in re (*post*).

Fountaine v. Carmarthen and Cardigan Ry. (1868) 37 L. J. Ch. 429; L. R. 5 Eq. 316; 16 W. R. 476.—WOOD, V.-C., *referred to*.
Overend, Gurney & Co., Ex parte, *Land Credit Co. of Ireland*, in re (1869) 39 L. J. Ch. 27; L. R. 4 Ch. 460, 468; 20 L. T. 641; 17 W. R. 689.—L.J.J.; *Weeks v. Propert* (1873) L. R. 8 C. P. 427, 436; 42 L. J. C. P. 127; 21 W. R. 676.—C.P.

Fountaine v. Carmarthen and Cardigan Ry., *considered*.

Colonial Bank of Australasia v. Willan (1874) 43 L. J. P. C. 39; L. R. 5 P. C. 417, 448; 30 L. T. 237; 22 W. R. 516.—P.C.; *Landowners West of England and South Wales Land Drainage and Inclosure Co. v. Ashford* (1880) 50 L. J. Ch. 276; 16 Ch. D. 411, 438; 44 L. T. 20.—FRY, J.

Fountaine v. Carmarthen and Cardigan Ry., *explained*.

Romford Canal Co., in re, *Pocock's Claim* (1883) 24 Ch. D. 85; 52 L. J. Ch. 729; 49 L. T. 118.

KAY, J.—Where a company has power to issue securities, an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite acta*. *Fountaine v. Carmarthen Ry.*—p. 92.

Fountaine v. Carmarthen and Cardigan Ry., *referred to*.

Atkins v. Wardle (1889) 58 L. J. Q. B. 379; 61 L. T. 23.—DENMAN, J.; *Gwelo (Matabeleland) Exploration and Development Co.*, in re, *Williamson's Claim* (1900) [1901] 1 Ir. R. 38, 48.—PORTER, M.R.; reversed, C.A. *And see* "COMPANY," vol. i., col. 454.

Landowners West of England, &c., Inclosure Co. v. Ashford (*supra*), *referred to*.

Howard v. Patent Ivory Manufacturing Co. (1888) 57 L. J. Ch. 878; 38 Ch. D. 156, 169; 58 L. T. 395; 36 W. R. 801.—KAY, J.

West Cornwall Ry. v. Mowatt (1848) 17 L. J. Ch. 366; 12 Jur. 407.—SHADWELL, V.-C., *not applied*.

Inns of Court Hotel Co., in re (1868) 37 L. J. Ch. 692; L. R. 6 Eq. 82, 89.—GIFFARD, V.-C.

Hubbersty v. Manchester, Sheffield and Lincolnshire Ry. (1866—1867) 36 L. J. Q. B. 33, 198; L. R. 2 Q. B. 59, 471; 8 B. & S. 420; 16 L. T. 425; 15 W. R. 793.—EX. and EX. CH., *considered and distinguished*.
Stringer, Ex parte (1882) 9 Q. B. D. 436.—COLERIDGE, C.J. and BRETT, L.J.

Eustace v. Dublin Trunk Connecting Ry. (1868) 37 L. J. Ch. 716; L. R. 6 Eq. 182; 18 L. T. 678; 16 W. R. 1110, *followed*.
Asiatic Banking Corporation, in re, *Collum*, Ex parte (1869) 39 L. J. Ch. 59; L. R. 9 Eq. 236, 269; 21 L. T. 350; 18 W. R. 245.—STUART, V.-C.

**Eustace v. Dublin Trunk Connecting Ry. and Asiatic Banking Corporation, in re, *Collum*, Ex parte, *approved and followed*.
Millwraith v. Dublin Trunk Connecting Ry. (1871) 40 L. J. Ch. 652; 24 L. T. 929; 19 W. R. 941.—ROMLEY, M.R., and 41 L. J. Ch. 262; L. R. 7 Ch. 134, 139; 25 L. T. 776; 20 W. R. 156.—HATHERLEY, L.C.**

Copeland v. N. E. Ry. (1856) 6 El. & Bl. 277; 2 Jur. (N.S.) 1162.—Q.B.

Approved, *Freeman v. Inland Revenue Commissioners* (1871) 40 L. J. Ex. 85; L. R. 6 Ex. 101, 104; 24 L. T. 323; 19 W. R. 590.—EX.; *applied*, *Nanney v. Morgan* (1887) 56 L. J. Ch. 805; 35 Ch. D. 598, 603; 57 L. T. 48; 35 W. R. 713.—STIRLING, J., and 57 L. J. Ch. 311; 37 Ch. D. 346, 357; 58 L. T. 238; 36 W. R. 677.—C.A.

Tomkinson v. S. E. Ry. (1887) 35 Ch. D. 675; 56 L. T. 812; 35 W. R. 758.—KAY, J., *discussed*.

Faure Electric Accumulator Co., in re (1888) 58 L. J. Ch. 48; 40 Ch. D. 141, 154; 59 L. T. 918; 37 W. R. 116; 1 Meg. 99.—KAY, J.

Bateman v. Mid-Wales Ry. (1866) 35 L. J. C. P. 205; L. R. 1 C. P. 499; 1 H. & R. 508; 12 Jur. (N.S.) 453; 14 W. R. 672.—C.P., *approved but not applied*.

Peruvian Rys., in re, *Peruvian Rys. v. Thames and Mersey Marine Insurance Co.* (1867) L. R. 2 Ch. 617, 623; 36 L. J. Ch. 864; 16 L. T. 644; 15 W. R. 1002.—TURNER and CAIRNS, L.J.J.

Bateman v. Mid-Wales Ry., *applied*.

Atkins v. Wardle (1889) 61 L. T. 23; 58 L. J. Q. B. 377.

DENMAN, J.—*Bateman v. Mid-Wales Ry.* seems to me clearly to establish that a company such as this, in the absence of any provision in the memorandum or articles of association, is not empowered to bind the shareholders by accepting bills. The only case cited on the other side was *Peruvian Rys. v. Thames, &c. Insurance Co.* (*post*), but that case was decided on the ground that the words of the memorandum gave an absolute discretion to the directors to decide whether the accepting of bills of exchange was incidental or conducive to the main object of the company. In the present case no such discretion is given, and I think it clear that it would be inconsistent with *Bateman v. Mid-Wales Ry.* to hold that any such power is to be inferred.—p. 24.

Peruvian Rys., in re, *Peruvian Rys. v. Thames and Mersey Marine Insurance Co.* (1867) 36 L. J. Ch. 864; L. R. 2 Ch. 617;

16 L. T. 644; 15 W. R. 1002.—TURNER and CAIENS, L.J., *referred to*.
Imperial Silver Quarries Co., In re (1868) 16 W. R. 1220.—MALINS, V.-C.

Peruvian Rys., In re, Peruvian Rys. v. Thames and Mersey Marine Insurance Co. (*supra*), *distinguished*.

General Credit Co. for the Promotion of Land Credit, In re, Bos, Ex parte (1869) L. R. 5 Ch., 370, n.—MALINS, V.-C. (reversed, 1870) 39 L. J. Ch. 737; L. R. 5 Ch. 363; 22 L. T. 454; 18 W. R. 505.—GIFFARD, L.J.; latter decision affirmed, (1871) 40 L. J. Ch. 655; L. R. 5 H. L. 176; 24 L. T. 641.—H.L. (E.): Guinness v. Land Corporation of Ireland (1882) 52 L. J. Ch. 177; 22 Ch. D. 349, 374; 47 L. T. 517; 31 W. R. 341.—C.A.: COTTON and BOWEN, L.J.; Atkins v. Wardle (1889) 58 L. J. Q. B. 377; 61 L. T. 23.—DENMAN, J.

Carlisle v. S. E. Ry. 19 L. J. Ch. 477; 13 Beav. 295; 14 Jur. 515; 6 Railw. Cas. 670.—M.R.; *reversed*, (1850) 1 Mac. & G. 689; 2 H. & Tw. 366; 14 Jur. 535; 6 Railw. Cas. 682.—COTTENHAM, L.C.

Carlisle v. S. E. Ry. and Sturge v. Eastern Union Ry. (1855) 7 De G. M. & G. 158; 1 Jur. (N.S.) 713.—L.J., *referred to*.

Hoole v. G. W. Ry. (1867) 17 L. T. 193.—WOOD, V.-C.

Sturge v. Eastern Union Ry., explained.

London India Rubber Co., In re (1868) 37 L. J. Ch. 235; L. R. 5 Eq. 519, 526; 17 L. T. 530; 16 W. R. 334.—MALINS, V.-C. (*see post*).

Henry v. G. N. Ry. (1857) 27 L. J. Ch. 1; 1 De G. & J. 606; 3 Jur. (N.S.) 1133; 6 W. R. 87.—L.C. and L.J., *applied*.

Corry v. Londonderry and Enniskillen Ry. (1860) 30 L. J. Ch. 290; 29 Beav. 263, 272; 7 Jur. (N.S.) 508; 4 L. T. 131; 9 W. R. 301.—ROMILLY, M.R.

Henry v. G. N. Ry., explained.

London India Rubber Co., In re (1868) 37 L. J. Ch. 235; L. R. 5 Eq. 519; 17 L. T. 530; 16 W. R. 334.

MALINS, V.-C.—None of these cases [*Henry v. G. N. Ry.*, *Sturge v. Eastern Union Ry.* (*supra*), and *Corry v. Londonderry, &c. Ry.*] go beyond the right to dividend. They all go upon this principle, that when a dividend is declared, those who hold shares entitled to a preferential dividend must have all their arrear of preferential dividend paid before the holders of ordinary stock can get any dividend whatever.—p. 237.

Henry v. G. N. Ry., applied.

Webb v. Earle (1875) 44 L. J. Ch. 608; L. R. 20 Eq. 556, 560; 24 W. R. 46.—JESSEL, M.R.

Henry v. G. N. Ry., referred to.

Sewers Commissioners v. Gellatly (1876) 45 L. J. Ch. 788; 3 Ch. D. 610, 616; 24 W. R. 346.—JESSEL, M.R.: Allen v. Londonderry and Enniskillen Ry. (1877) 25 W. R. 524.—JESSEL, M.R.

Henry v. G. N. Ry. and Webb v. Earle (*supra*), *distinguished*.

Staples v. Eastman Photographic Materials Co. (1896) 65 L. J. Ch. 682; [1896] 2 Ch. 303; 74 L. T. 479.—C.A.; reversing CHITTY, J.

LINDLEY, L.J.—The language of the clause in *Henry v. G. N. Ry.* shows, I think, tolerably

plainly that what was promised to the preference shareholders there was ten per cent., and it was called interest or dividend, and the Court gave to those words the construction which they required. So with regard to *Webb v. Earle*—there was in that case no such context as we have here.—p. 684.

LOPES, L.J. concurred.

KAY, L.J.—The key of the whole decision [*Henry v. G. N. Ry.*] is this—that there was, without indication of any special fund out of which it was to be paid, a declaration, on the faith of which parties took the shares which were there in question, that such shares should be entitled to interest or preference dividend at a certain rate—they were to be entitled in any event to that; and the key of the whole decision is, to my mind, in these words . . . of Turner, L.J.: "It seems to me to be clear that the expression 'preference dividend' in that report was used in the sense of interest."—p. 685.

Corry v. Londonderry and Enniskillen Ry.

(1860) 30 L. J. Ch. 290; 29 Beav. 263; 7 Jur. (N.S.) 508; 4 L. T. 131; 9 W. R. 301.—M.R.

Explained, London India Rubber Co., In re (1868) 37 L. J. Ch. 235; L. R. 5 Eq. 519, 526 (*supra*, col. 2689); *applied*, Allen v. Londonderry and Enniskillen Ry. (1877) 25 W. R. 524.—JESSEL, M.R.: *discussed*, Navan and Kingscourt Ry., In re, Price, Ex parte (1885) 17 L. R. Ir. 398, 404.—C.A.: ASHBOURNE, L.C. and MORRIS, C.J.; FITZGIBBON and BARRY, L.J., *dissenting*.

Dalton v. Midland Counties Ry. (1853) 22

L. J. C. P. 177; 13 C. B. 474; 1 C. L. R. 102; 17 Jur. 719; 1 W. R. 308.—C.P., *discussed and applied*.

Fleet v. Perrins (1868) 37 L. J. Q. B. 233; L. R. 3 Q. B. 536, 542; 9 B. & S. 575; 19 L. T. 147.—Q.B.; affirmed, (1869) 38 L. J. Q. B. 247; L. R. 4 Q. B. 500; 20 L. T. 814; 17 W. R. 862.—EX. CH.

Denton v. G. N. Ry. (1856) 25 L. J. Q. B.

129; 5 El. & Bl. 860; 2 Jur. (N.S.) 185; 4 W. R. 240.—Q.B., *applied*.

Agra and Masterman's Bank, In re, Asiatic Banking Corporation, Ex parte (1867) 36 L. J. Ch. 222; L. R. 2 Ch. 391, 397; 16 L. T. 162; 15 W. R. 414.—L.J.

Taylor v. G. N. Ry. (1866) 35 L. J. C. P. 210;

L. R. 1 C. P. 385; 12 Jur. (N.S.) 372; 1 H. & R. 471; 14 L. T. 363; 14 W. R. 639.—C.P., *discussed and applied*.

Postlethwaite v. Freeland (1880) 49 L. J. Ex. 630; 5 App. Cas. 599, 621; 42 L. T. 845; 28 W. R. 833.—H.L. (E.).

Glenister v. G. W. Ry. (1873) 29 L. T. 423;

S. C. nom. G. W. Ry. v. Glenister, 22 W. R. 72.—Q.B., *referred to*.

Webb v. G. W. Ry. (1877) 26 W. R. 111.—Q.B.D.; Graham v. Belfast & N. Counties Ry. (1900) [1901] 2 Ir. R. 13, 19.—Q.B.D.

Lewis v. G. W. Ry. (1877) 47 L. J. Q. B.

131; 3 Q. B. D. 195; 37 L. T. 774; 26 W. R. 255.—C.A.

Discussed, Foreman v. G. W. Ry. (1878) 38 L. T. 851.—EX. D.; Haynes v. G. W. Ry. (1879) 41 L. T. 436.—C.P.D.; *applied*, Ruddy v. Midland G. W. (Tr.) Ry. (1880) 8 L. R. Ir. 224, 233.—EX. D.

Lewis v. G. W. Ry.

Applied. Brown v. Manchester, Sheffield and Lincolnshire Ry. (1882) 52 L. J. Q. B. 132; 10 Q. B. D. 250, 260; 48 L. T. 473; 31 W. R. 491. —C.A. (reversed, (1883) 53 L. J. Q. B. 124; 8 App. Cas. 703; 50 L. T. 281; 32 W. R. 207; 48 J. P. 388.—H.L. (B.)); *considered*, McCarthy v. G. W. Ry. (1885) 18 L. R. Ir. 1, 15.—C.A.; (reversed, *nom.* G. W. Ry. v. McCarthy (1887) 56 L. J. P. C. 33; 12 App. Cas. 218.—H.L. (IR.). See "CARRIERS," vol. I. col. 397; *applied*, G. W. Ry. v. Lowenfeld (1892) 8 T. L. R. 230.—JUDGE STONOR: *referred to*, Pontifex v. Hartley (1892) 8 T. L. R. 557.—CHARLES, J.; *discussed*, London Corporation and Tubbs, *In re* (1894) 63 L. J. Ch. 580; [1894] 2 Ch. 524, 536; 7 R. 265; 70 L. T. 719.—C.A. (KAY, L.J. dissenting); *considered*, Bennett v. Stone (1901) 71 L. J. Ch. 60; [1902] 1 Ch. 226, 232; 85 L. T. 753; 50 W. R. 118.—BUCKLEY, J. (affirmed, (1903) 72 L. J. Ch. 240; [1903] 1 Ch. 509; 88 L. T. 35; 51 W. R. 338.—C.A.); *referred to*, Murphy v. Midland G. W. (Ireland) Ry. (1902) [1903] 2 Ir. R. 521.—Q.B.D.; Cordey v. Cardiff Pure Ice, & Co. (1903) 19 T. L. R. 256.—C.A. *And see* "CARRIERS," vol. I. cols. 305—307.

Haynes v. G. W. Ry. (1879) 41 L. T. 436.—C.P.D., *referred to*.

Graham v. Belfast, & Co., Ry. (*supra*, col. 2690).

McCance v. L. & N. W. Ry. (1861) 31 L. J. Ex. 65; 7 H. & N. 477; 7 Jur. (N.S.) 1304; 5 L. T. 587; 10 W. R. 154.—EX.; *affirmed*, (1864) 34 L. J. Ex. 39; 3 H. & C. 343; 10 Jur. (N.S.) 1058; 11 L. T. 426; 12 W. R. 1086.—EX. CH.

McCance v. L. & N. W. Ry.

Considered, Lebeau v. General Steam Navigation Co. (1872) 42 L. J. C. P. 1; L. R. 8 C. P. 88, 96; 27 L. T. 447; 21 W. R. 146; 1 Asp. M. C. 435.—C.P.; *applied*, Nevin v. G. S. & W. Ry. (1891) 30 L. R. Ir. 125, 133.—Q.B.D.

Behrens v. G. N. Ry., G. N. Ry. v. Behrens (1862) 31 L. J. Ex. 299; 7 H. & N. 950; 8 Jur. (N.S.) 537; 8 L. T. 328; 10 W. R. 389.—EX. CH., *distinguished*.

Robinson v. L. & S. W. Ry. (1865) 34 L. J. C. P. 234; 19 C. B. (N.S.) 51; 11 Jur. (N.S.) 390; 12 L. T. 347; 13 W. R. 660.—C.P.

Robinson v. L. & S. W. Ry., discussed.

Hill v. L. & N. W. Ry. (1880) 42 L. T. 513.—DENMAN and LOPES, JJ.

Crouch v. G. N. Ry. (1854) 23 L. J. Ex. 148; 9 Ex. 556.—EX., and (1856) 25 L. J. Ex. 137; 11 Ex. 742.—EX., *discussed*.

G. W. Ry. v. Sutton (1869) 38 L. J. Ex. 177; L. R. 4 H. L. 226, 242; 18 W. R. 92.—H.L. (E.).

Riley v. Horne (1828) 5 Bing. 217; 2 M. & P. 331; 7 L. J. (O.S.) C. P. 37; 30 R. R. 576.—C.P., *considered*.

Crouch v. L. & N. W. Ry. (1854) 14 C. B. 255, 294 (*post*, col. 2692); Readhead v. Midland Ry. (1867) 36 L. J. Q. B. 181; L. R. 2 Q. B. 412, 417.—Q.B. BLACKBURN, J. dissenting (affirmed, (1869) 38 L. J. Q. B. 169; L. R. 4 Q. B. 379; 9 B. & S. 519; 17 W. R. 737.—EX. CH.); Horne v. Midland Ry. (1873) 42 L. J. C. P. 59; L. R. 8 C. P. 131, 145; 28 L. T. 312; 21 W. R. 481.—EX. CH.; PIGOTT, B. and LUSH, J. dissenting; Nugent v. Smith (1875) 45 L. J. C. P. 19; 1 C. P. D. 19, 24; 32 L. T. 731; 24 W. R. 237.—C.P.D. (reversed, (1876) 45 L. J. C. P. 697; 1 C. P. D. 423; 34 L. T. 827; 25 W. R. 117.—C.A.).

Crouch v. L. & N. W. Ry. (1854) 23 L. J. C. P. 73; 14 C. B. 255; 2 C. L. R. 188; 18 Jur. 148; 2 W. R. 166; 7 Railw. Cas. 717.—C.P., *discussed*.

Nugent v. Smith (1875) 45 L. J. C. P. 19; 1 C. P. D. 19, 23; 32 L. T. 731; 24 W. R. 237.—C.P.D.; reversed, C.A. (*see supra*, col. 2691).

Chippendale v. Lancashire and Yorkshire Ry. (1851) 21 L. J. Q. B. 22; 15 Jur. 1106; 7 Railw. Cas. 824.—Q.B., *referred to*.

Harris v. G. W. Ry. (1876) 45 L. J. Q. B. 729; 1 Q. B. D. 515, 534; 34 L. T. 647; 25 W. R. 63.—Q.B.D.

Johnson v. Midland Ry. (1849) 18 L. J. Ex. 366; 4 Ex. 367; 6 Railw. Cas. 61.—EX., *referred to*.

Carr v. Lancashire and Yorkshire Ry. (1852) 21 L. J. Ex. 261; 7 Ex. 707; 17 Jur. 397; 7 Railw. Cas. 426.—EX.; West v. L. & N. W. Ry. (1870) 39 L. J. C. P. 282; L. R. 5 C. P. 622, 634; 23 L. T. 371; 18 W. R. 1028.—C.P.; M. SMITH and BRETT, JJ. dissenting; Dickson v. G. N. Ry. (1886) 56 L. J. Q. B. 111; 18 Q. B. D. 176, 184; 55 L. T. 868; 35 W. R. 202; 51 J. P. 388.—C.A.

Carr v. Lancashire and Yorkshire Ry. (1852) 21 L. J. Ex. 261; 7 Ex. 707; 17 Jur. 397; 7 Railw. Cas. 426.—EX.; PLATT, B. hesitating.

Referred to, G. W. Ry. v. Blower (*or* Blower v. G. W. Ry.) (1872) L. R. 7 C. P. 655, 662; 41 L. J. C. P. 268; 26 L. T. 883; 20 W. R. 776.—WILLES and KEATING, JJ.; *applied*, Gallin v. L. & N. W. Ry. (1875) 44 L. J. Q. B. 89; L. R. 10 Q. B. 212, 216; 32 L. T. 550; 23 W. R. 308.—Q.B.; *discussed*, Murphy v. Midland G. W. (Ireland) Ry. (1902) [1903] 2 Ir. R. 5, 41.—K.B.D.

Hearne v. Garton (1859) 28 L. J. M. C. 216; 2 El. & El. 66; 5 Jur. (N.S.) 648; 7 W. R. 566.—Q.B., *referred to*.

G. W. Ry. v. Blower (*or* Blower v. G. W. Ry.) (1872) 41 L. J. C. P. 268; L. R. 7 C. P. 655, 663; 26 L. T. 883; 20 W. R. 776.—WILLES and KEATING, JJ.; Reg. v. Prince (1875) 44 L. J. M. C. 122; L. R. 2 C. C. 154, 165; 32 L. T. 700; 24 W. R. 76; 13 Cox C. C. 138.—C.C.R.; Reg. v. Paget (1881) 51 L. J. M. C. 9; 8 Q. B. D. 151, 157; 45 L. T. 794; 30 W. R. 336; 46 J. P. 151.—Q.B.D.; Reg. v. Tolson (1889) 58 L. J. M. C. 97; 23 Q. B. D. 168, 173; 60 L. T. 899; 37 W. R. 716; 16 Cox C. C. 629; 54 J. P. 4.—C.C.R.

Collins v. Bristol and Exeter Ry. (1856) 25 L. J. Ex. 185; 11 Ex. 790.—EX.; reversed, (1856) 26 L. J. Ex. 103; 1 H. & N. 517; 3 Jur. (N.S.) 141.—EX. CH.; *latter decision reversed nom.* **Bristol and Exeter Ry. v. Collins** (1859) 29 L. J. Ex. 41; 7 H. L. Cas. 194; 5 Jur. (N.S.) 1367.—H.L. (E.).

Bristol and Exeter Ry. v. Collins.

Applied, Hall v. N. E. Ry. (1875) 44 L. J. Q. B. 164; L. R. 10 Q. B. 437, 441; 33 L. T. 306; 23 W. R. 860.—Q.B.; *referred to*, Hooper v. L. & N. W. Ry. (1880) 50 L. J. C. P. 103; 43 L. T. 570; 29 W. R. 241; 45 J. P. 223.—C.P.; *followed*, Tuohy v. G. S. & W. Ry. [1898] 2 Ir. R. 789, 796.—Q.B.D. and C.A.

Curran v. Midland G. W. (Ir.) Ry. (1895) [1896] 2 Ir. R. 183.—EX. D., *discussed*.

Mahony v. Waterford, & Co., Ry. (1899) [1900] 2 Ir. R. 273, 279.—Q.B.D.; Murphy v. Midland G. W. (Ir.) Ry. (1902) [1903] 2 Ir. R. 5, 25.—K.B.D.

- Midland Ry. v. Freeman** (1884) 53 L. J. M. C. 79; 12 Q. B. D. 629; 32 W. R. 830; 48 J. P. 660.—Q.B.D., *applied*.
- Williams v. G. W. Ry.** (1885) 52 L. T. 250; 49 J. P. 439.—Q.B.D.
- Malpas v. L. & S. W. Ry.** (1866) 35 L. J. C. P. 166; L. R. 1 C. P. 336; 1 H. & R. 227; 12 Jur. (N.S.) 271; 13 L. T. 710; 14 W. R. 391.—C.P., *referred to*.
- Lord v. Midland Ry.** (1867) L. R. 2 C. P. 339, 347; 36 L. J. C. P. 170; 15 L. T. 576; 15 W. R. 405.—C.P.
- Lord v. Midland Ry.**, *observations applied*.
- Duckham Brothers v. G. W. Ry.** (1899) 80 L. T. 774.—DARLING, J.
- Higginbotham v. G. N. Ry.** (1862) 2 F. & F. 796; 10 W. R. 358.—EX., *followed*.
- Cox v. L. & N. W. Ry.** (1862) 3 F. & F. 77.—MELLOR, J., *distinguished*.
- Barbour v. S. E. Ry.** (1876) 34 L. T. 67.—CLEASBY, B. and FIELD, J.
- Syms v. Chaplin** (1836) 6 L. J. K. B. 25; 5 A. & E. 634; 1 N. & P. 129; 2 H. & W. 411; 5 D. P. C. 429.—K.B., *referred to*.
- Stephens v. L. & S. W. Ry.** (1886) 56 L. J. Q. B. 171; 18 Q. B. D. 121; 56 L. T. 226; 35 W. R. 161; 51 J. P. 324.—C.A.
- Stoessiger v. S. E. Ry.** (1854) 23 L. J. Q. B. 293; 3 El. & Bl. 549; 2 C. L. R. 1595; 18 Jur. 605; 2 W. R. 375.—Q.B.
- Distinguished*, **Harvey v. Cane** (1876) 34 L. T. 64; 24 W. R. 400.—C.P.D.: *referred to*, **Baxendale v. Bennett** (1878) 47 L. J. Q. B. 24; 3 Q. B. D. 525, 532; 26 W. R. 399.—C.A.
- Stoessiger v. S. E. Ry.**
Applied, **Reg. v. Harper** (1881) 50 L. J. M. C. 90; 7 Q. B. D. 78; 44 L. T. 615; 29 W. R. 743; 14 Cox C. C. 574.—C.C.R.; *distinguished*, **Reg. v. Bowerman** (1890) 60 L. J. M. C. 13; [1891] 1 Q. B. 112; 63 L. T. 532; 39 W. R. 207; 55 J. P. 373; 17 Cox C. C. 151.—C.C.R.
- Wyld v. Pickford** (1841) 10 L. J. Ex. 382; 8 M. & W. 443; 58 R. R. 775, n.—EX., *discussed*.
- Hinton v. Dibbin** (1842) 2 Q. B. 646, 661 (*post*); **Treadwin v. G. E. Ry.** (1868) 37 L. J. C. P. 83; L. R. 3 C. P. 308, 312; 17 L. T. 601; 16 W. R. 365.—C.P.; **WILLES, J.** doubting; **G. W. Ry. v. Blower** (*or* **Blower v. G. W. Ry.**) (1872) 41 L. J. C. P. 268; L. R. 7 C. P. 655, 663; 26 L. T. 883; 20 W. R. 776.—C.P.; **Manchester, Sheffield and Lincolnshire Ry. v. Brown** (1883) 52 L. J. Q. B. 124; 8 App. Cas. 703, 709; 50 L. T. 281; 32 W. R. 207; 48 J. P. 388.—H.L. (E.): **Price v. Union Lighterage Co.** (1903) 72 L. J. K. B. 374; [1903] 1 K. B. 750; 88 L. T. 428; 51 W. R. 477; 9 Asp. M. C. 398; 8 Com. Cas. 155.—WALTON, J. (affirmed, (1904).—C.A.). *And see* "CARRIERS," vol. i., col. 298.
- Brunt v. Midland Ry.** (1864) 33 L. J. Ex. 187; 2 H. & C. 889; 10 Jur. (N.S.) 181; 9 L. T. 690; 12 W. R. 380.—EX., *applied*.
- Woodward v. L. & N. W. Ry.** (1878) 47 L. J. Ex. 263; 3 Ex. D. 121; 38 L. T. 321; 26 W. R. 354.—CLEASBY, B. and HAWKINS, J.
- Treadwin v. G. E. Ry.** (1868) 37 L. J. C. P. 83; L. R. 3 C. P. 308; 17 L. T. 601; 16 W. R. 365.—C.P.; **WILLES, J.** doubting, *distinguished*.
- Henderson v. L. & N. W. Ry.** (1870) 39 L. J. Ex. 55; L. R. 5 Ex. 90; 21 L. T. 756; 18 W. R. 352.—EX.
- Hinton v. Dibbin** (1842) 2 Q. B. 646; 2 G. & D. 36; 6 Jur. 201.—Q.B.
- Discussed and applied*, **Morritt v. N. E. Ry.** (1876) 45 L. J. Q. B. 289; 1 Q. B. D. 302, 309; 34 L. T. 940; 24 W. R. 386.—Q.B.D. (affirmed, C.A.); *referred to*, **Manchester, Sheffield, &c., Ry. v. Brown** (1883) 8 App. Cas. 703, 709 (*supra*, col. 2693).
- Morritt v. N. E. Ry.** (1876) 45 L. J. Q. B. 289; 1 Q. B. D. 302; 34 L. T. 940; 24 W. R. 386.—Q.B.D.; *affirmed*, C.A., *principle applied*.
- Millen v. Brash** (*or* **Brasch**) (1881) 51 L. J. Q. B. 166; 8 Q. B. D. 35; 45 L. T. 653.—LOPES, J. (reversed, (1882) 52 L. J. Q. B. 127; 10 Q. B. D. 142; 47 L. T. 685; 31 W. R. 190; 47 J. P. 180.—C.A.); **Skipwith v. G. W. Ry.** (1888) 59 L. T. 520.—Q.B.D.
- Millen v. Brash** (*or* **Brasch**), and **G. W. Ry. v. Bagge** (1885) 54 L. J. Q. B. 599; 15 Q. B. D. 625; 53 L. T. 225; 34 W. R. 45.—Q.B.D., *referred to*.
- Murphy v. Midland G. W. (Ireland) Ry.** (1902) [1903] 2 Ir. R. 5, 25.—K.B.D.
- O'Hanlan v. G. W. Ry.** (1865) 34 L. J. Q. B. 154; 6 B. & S. 484; 11 Jur. (N.S.) 797; 12 L. T. 490; 13 W. R. 741.—Q.B., *applied*.
- The Notting Hill** (1883—1884) 53 L. J. P. 56; 9 P. D. 105, 110; 51 L. T. 66; 32 W. R. 764; 5 Asp. M. C. 241.—HANNEN, P.; *affirmed*, C.A.
- G. W. Ry. v. Redmayne** (1866) L. R. 1, C. P. 329.—C.P., *discussed and applied*.
- Woodger v. G. W. Ry.** (1867) 36 L. J. C. P. 177; L. R. 2 C. P. 318, 321; 15 L. T. 579; 15 W. R. 383.—C.P.
- G. W. Ry. v. Shepherd** (1852) 21 L. J. Ex. 286; 8 Ex. 30.—EX., *applied*.
- Cahill v. L. & N. W. Ry.** (1861) 30 L. J. C. P. 289; 10 C. B. (N.S.) 454; 4 L. T. 246.—C.P.; *affirmed*, (1862) 31 L. J. C. P. 271; 13 Q. B. (N.S.) 818; 8 Jur. (N.S.) 1063; 10 W. R. 821.—EX. CH.
- Cahill v. L. & N. W. Ry. and G. N. Ry. v. Shepherd**, *discussed*.
- Macrow v. G. W. Ry.** (1871) 40 L. J. Q. B. 300; L. R. 6 Q. B. 612, 619; 24 L. T. 618; 19 W. R. 873.—Q.B.
- COCKBURN, C.J.** (for the Court).—(*Chill v. L. & N. W. Ry., G. N. Ry. v. Shepherd and Belfast and Ballymena Ry. v. Keys* (*post*) establish that articles of merchandise cannot be considered as personal luggage.—p. 304.
- Belfast and Ballymena Ry. v. Keys** (1858) 8 Ir. C. L. R. 167.—C.P.; *affirmed*, (1859) 11 Ir. C. L. R. 145.—EX. CH.: *the latter decision reversed*, (1861) 9 H. L. Cas. 556; 8 Jur. (N.S.) 367; 4 L. T. 841; 9 W. R. 793.—H.L. (IR.).
- Belfast and Ballymena Ry. v. Keys**, *discussed*.
- Macrow v. G. W. Ry.** (1871) L. R. 6 Q. B. 612, 621.—Q.B. (*supra*); **Harris v. G. W. Ry.** (1876) 45 L. J. Q. B. 729; 1 Q. B. D. 515, 534; 34 L. T. 647; 25 W. R. 63.—Q.B.D.
- Phelps v. L. & N. W. Ry.** (1865) 34 L. J. C. P. 259; 19 C. B. (N.S.) 321; 11 Jur. (N.S.) 652; 12 L. T. 496; 13 W. R. 782.—C.P.; and **Hudson v. Midland Ry.** (1869) 38 L. J. Q. B. 213; L. R. 4 Q. B. 366; 20 L. T. 526; 17 W. R. 705.—Q.B., *discussed*.
- Macrow v. G. W. Ry.** (1871) 40 L. J. Q. B. 300; L. R. 6 Q. B. 612, 620; 24 L. T. 618; 19 W. R. 873.—Q.B.

Phelps v. L. & N. W. Ry., *referred to*.
Roche v. Cork and Passage Ry. (1889) 24 L. R. Ir. 250, 256.—GIBSON, J.

Macrow v. G. W. Ry. (col. 2694), *discussed*.
Britten v. G. W. Ry. (1898) 68 L. J. Q. B. 75; [1899] 1 Q. B. 243, 248; 79 L. T. 640.—CHANNELL, J.

Munster v. S. E. Ry. (1858) 27 L. J. C. P. 308; 4 C. B. (N.S.) 676; 4 Jur. (N.S.) 738.—C.P., *referred to*.
Talley v. G. W. Ry. (1870) 40 L. J. C. P. 9; L. R. 6 C. P. 44, 51; 23 L. T. 413; 19 W. R. 154.—C.P.

Hooper v. L. & N. W. Ry. (1880) 50 L. J. C. P. 103; 43 L. T. 570; 29 W. R. 241; 45 J. P. 223.—DENMAN and LINDLEY, JJ., *not applied*.
Baldwin v. L. C. & D. Ry. (1882) 9 Q. B. D. 582.—MATHEW and CAVE, JJ.

Martin v. Gt. Indian Peninsular Ry. (1867) 37 L. J. Ex. 27; L. R. 3 Ex. 9; 17 L. T. 349.—EX., *distinguished*.
Taubman v. Pacific Steam Navigation Co. (1872) 26 L. T. 704; 1 Asp. M. C. 336.—EX.

Middleton v. Fowler (1698) 1 Salk. 282.—HOLT, C.J.; and **Upshare v. Aidae** (1697) Comyns 25.—K.B., *discussed*.
Cohen v. S. E. Ry. (1877) 46 L. J. Ex. 417; 2 Ex. D. 253; 36 L. T. 130; 25 W. R. 475.—C.A.

Hodgman v. West Midland Ry. (1864) 33 L. J. Q. B. 233; 5 B. & S. 173; 10 Jur. (N.S.) 673; 10 L. T. 609; 12 W. R. 1054.—Q.B.; COCKBURN, C.J. *dissenting*; *affirmed*, (1865) 35 L. J. Q. B. 85; 13 W. R. 758.—EX. CH.

Hodgman v. West Midland Ry., *applied*.
Gallin v. L. & N. W. Ry. (1875) 44 L. J. Q. B. 89; L. R. 10 Q. B. 212; 32 L. T. 550; 23 W. R. 308.—Q.B.; Hill v. L. & N. W. Ry. (1880) 24 L. T. 513.—DENMAN and LOPES, JJ.

Hodgman v. West Midland Ry., *distinguished*.
Bunch v. G. W. Ry. (1885) 55 L. T. 9; 34 W. R. 74; 2 Times L. R. 62 (*see post*).

Hodgman v. West Midland Ry., *applied*.
Knox v. G. N. Ry. (1894—1895) [1896] 2 Ir. R. 632.—Q.B.D. and C.A.; BARRY, L.J. *dissenting*.

Leach v. S. E. Ry. (1876) 34 L. T. 134.—GROVE and QUAIN, JJ., *discussed*.
Bunch v. G. W. Ry. (1885) 55 L. T. 9; 34 W. R. 74; 2 Times L. R. 62.—DAY, J.; A. L. SMITH, J. *dissenting* on a question of fact, but withdrawing his judgment.

Bunch v. G. W. Ry., *distinguished*.
Welch v. L. & N. W. Ry. (1885) 34 W. R. 166.—DAY and A. L. SMITH, JJ.

Leach v. S. E. Ry., *approved and applied*.
Bunch v. G. W. Ry., *reversed*.
Bunch v. G. W. Ry. (1886) 55 L. J. Q. B. 427; 17 Q. B. D. 215, 223; 55 L. T. 247; 34 W. R. 574.—C.A.; LOPES, L.J. *dissenting*; *affirmed*, H.L. (*post*).

Bunch v. G. W. Ry. (*supra*, in C.A.) *affirmed nom. G. W. Ry. v. Bunch* (1888) 57 L. J. Q. B. 361; 13 App. Cas. 31; 58 L. T. 128; 36 W. R. 785; 52 J. P. 147.—H.L. (E.); LORD BRAMWELL *dissenting*.

G. W. Ry. v. Bunch, *referred to*.
Nicholls v. N. E. Ry. (1888) 59 L. T. 137.—Q.B.D. *And see* "CARRIERS," vol i, col. 293.

Doolan v. Midland Ry. (1877) 2 App. Cas. 792; 37 L. T. 317; 25 W. R. 882.—H.L. (IR.); *reversing* Ir. R. 10 C. L. 47.—EX. CH.; and *restoring* Ir. R. 9 C. L. 20.—C.P., *applied*.

Ruddy v. Midland G. W. (Ir.) Ry. (1880) 8 L. R. Ir. 224, 233.—EX. D.

Ruddy v. Midland G. W. (Ir.) Ry., *considered*.
Sheridan v. Midland G. W. (Ir.) Ry. (1888) 24 L. R. Ir. 154, 172.—C.A.

3. MANAGEMENT OF BUSINESS.

Att.-Gen. v. Birmingham and Oxford Junction Ry., 4 De G. & Sm. 490.—V.-C.; *affirmed*, (1851) 3 Mac. & G. 453; 16 Jur. 113.—L.C.

Att.-Gen. v. Birmingham and Oxford Junction Ry., *discussed*.
Att.-Gen. v. L. & N. W. Ry. (1899) 69 L. J. Q. B. 26; [1900] 1 Q. B. 78 (*see post*, col. 2697).

Att.-Gen. v. Oxford, Worcester and Wolverhampton Ry. (1854) 2 W. R. 330.—ROMILLY, M.R.

Approved and applied, Att.-Gen. v. G. W. Ry. (1872) L. R. 7 Ch. 770, n.—WICKENS, V.-C. (*affirmed*, L. R. 7 Ch. 767.—L.JJ.); *adopted*, Att.-Gen. v. Cokermonth Local Board (1874) 44 L. J. Ch. 118; L. R. 18 Eq. 172; 30 L. T. 590; 22 W. R. 619.—JESSEL, M.R.; *discussed*, Att.-Gen. v. Shrewsbury (Kingsland) Bridge Co. (1882) 21 Ch. D. 752.—FRY, J. (*see post*); Att.-Gen. v. L. & N. W. Ry. (1899) 69 L. J. Q. B. 26; [1900] 1 Q. B. 78 (*see post*, col. 2697).

Att.-Gen. v. G. W. Ry. (*supra*).
Considered, Att.-Gen. v. G. E. Ry. (1879) 48 L. J. Ch. 428; 48 L. J. Ch. 429, 433; 11 Ch. D. 449; 40 L. T. 265; 27 W. R. 759.—C.A.; BAGGALLAY, L.J. *dissenting* (*affirmed*, (1880) 49 L. J. Ch. 545; 5 App. Cas. 473.—H.L. (E.), *supra*, col. 2674); *approved and followed*, Att.-Gen. v. L. & N. W. Ry. [1899] 1 Q. B. 72 (*post*, col. 2697); *discussed*, Att.-Gen. v. L. & N. W. Ry. [1900] 1 Q. B. 78 (*post*, col. 2697).

Att.-Gen. v. Cokermonth Local Board (*supra*), *discussed*.
Att.-Gen. v. Shrewsbury (Kingsland) Bridge Co. (1882) 21 Ch. D. 752; 51 L. J. Ch. 746; 46 L. T. 687; 30 W. R. 916.

FRY, J.—There [*Att.-Gen. v. Oxford, &c. Ry.* (*supra*)], at the instance of the Att.-Gen., the Court restrained the opening of a railway not authorised by the Board of Trade. . . . Again, in *Att.-Gen. v. Cokermonth Local Board*, Jessel, M.R., refused to grant an injunction on the bill, because he came to the conclusion that there was no evidence of any nuisance resulting to the plaintiffs from the defendants' acts. Nevertheless, at the instance of the Att.-Gen., he granted an injunction to restrain the defendants from polluting the water of the river, because that was expressly prohibited by Act of Parliament. There, as in the present case, there was no evidence of any actual injury, but there was evidence that the defendants were doing certain illegal acts which tended in their nature to injure the public, and accordingly the injunction was granted with costs. In the more recent case of *Att.-Gen. v. G. E. Ry.* (*supra*, col. 2674), the learned L.JJ.

appear to have differed somewhat in their opinions. If they had expressed any decided view affecting the present case, I need not say that I should have followed it. But having regard to that difference of opinion, it appears to me that that case furnishes no distinct guide to me. But, when I examine the judgment of James, L.J., who was the most adverse to the rights of the Att.-Gen., I think that, even according to his view, the present action could be maintained, for, commenting on *Att.-Gen. v. Cockermouth Local Board*, he said (p. 483): "The board were doing works which would or might possibly poison a running stream, in direct violation of the law which prohibited them from committing a nuisance." Just as there the acts which were restrained without proof of injury were acts which in their nature tended to injure the public, so, in the present case, the acts which the Att.-Gen. sought to restrain were in their nature such as tended to injure the public. In coming, therefore, to the conclusion that this action can be maintained without proof of actual injury to the public, I think I am acting in accordance with the view of James, L.J. There is, moreover, the authority of Lord Hatherley in *Att.-Gen. v. Ely, Haddenham and Sutton Ry.* (1869) L. R. 4 Ch. 194; 38 L. J. Ch. 258 (*supra*, col. 2658). He said (p. 199): "The question is, whether what has been done has been done in accordance with the law; if not, the Att.-Gen. strictly represents the whole of the public in saying that the law shall be observed."—p. 755.

Att.-Gen. v. Cockermouth Local Board
(*supra*, col. 2696), *applied*.

Att.-Gen. v. Logan [1891] 2 Q. B. 100; 65 L. T. 162; 55 J. P. 615.—WILLS and WILLIAMS, JJ.

Att.-Gen. v. Shrewsbury (Kingsland) Bridge Co. (*supra*, col. 2696), *adopted*.

London Association of Shipowners v. London and India Docks Joint Committee (1892) 62 L. J. Ch. 294; [1892] 3 Ch. 242; 2 R. 23; 67 L. T. 238; 7 Asp. M. C. 195.—C.A. LINDLEY, BOWEN and KAY, L.JJ.

Att.-Gen. v. Cockermouth Local Board and Att.-Gen. v. Shrewsbury (Kingsland) Bridge Co., *approved and followed*.

Att.-Gen. v. L. & N. W. Ry. (1898) 68 L. J. Q. B. 4; [1899] 1 Q. B. 72; 79 L. T. 412.—BRUCE, J.; affirmed, C.A., *post*.

Att.-Gen. v. Cockermouth Local Board, *applied*.

Att.-Gen. v. Shrewsbury (Kingsland) Bridge Co., *discussed*.

Att.-Gen. v. L. & N. W. Ry. (1899) 69 L. J. Q. B. 26; [1900] 1 Q. B. 78; 63 J. P. 772.—C.A.

A. L. SMITH, L.J.—I think counsel for the defendants were well founded in saying that Sir G. Jessel was mistaken in what he there said had been decided in *Att.-Gen. v. Oxford, &c. Ry.* twenty years before. When the report of the latter case is looked at, it will be found that it was decided on other grounds than those on which Sir G. Jessel thought it had been decided. However, what Sir G. Jessel said in *Att.-Gen. v. Cockermouth Local Board* was this: ". . . 'Then this is an information by the Att.-Gen. against a public body, to enforce the terms of a public Act of Parliament. Now, if I understand the law

*upon the subject, it is not necessary for the Att.-Gen. to show any injury at all. The Legislature is of opinion that certain acts will produce injury, and that is enough.' That seems to me to be directly applicable to the present case. . . . There [Att.-Gen. v. G. E. Ry. (*supra*, col. 2674)] the L.J. [James], dealing with the question as to certain matters being *ultra vires*, and as to whether, and when, the Att.-Gen. could take proceedings in such cases, said: "When a company entrusted with large powers is deliberately violating an express enactment. . . . it is really committing a misdemeanour, and ought to be at once stopped. In *Att.-Gen. v. G. W. Ry.* (*supra*, col. 2696) the railway company was prohibited by law from opening a line before it was passed by an engineer appointed by the Board of Trade, a provision intended for the safety of people's lives, and they were going to disregard that prohibition, and it is no answer for them to say that the line was so safe that no mischief could arise. The company was, of course, restrained from this violation of an express compact with the Legislature." That seems to me very apposite to the present case. . . . There [Att.-Gen. v. Shrewsbury Bridge Co.] Fry, J., commences his judgment thus: "This is clearly a case in which the defendant company without any power (for their powers had come to an end) thought fit to do certain acts which undoubtedly tended in their nature to interfere with public rights, and so tended to injure the public." This may be applied to the present case, because in the present case the defendants' sole powers of crossing the road are conditional upon their doing so at a speed not exceeding four miles an hour. . . . I refer to it [Att.-Gen. v. G. W. Ry.] because of the statement there by Wickens, V.-C.: "It is said, however, that the unsanctioned alteration is an improvement, and tends to the greater safety and advantage of the public: but, in my opinion, that is a matter with which we have nothing to do." Whether in the present case it is for the benefit of the public or not that the defendants should cross the road at a greater rate of speed than four miles an hour across a level crossing adjoining a station is a matter with which we have nothing to do.—p. 29.*

V. WILLIAMS, L.J.—Speaking for myself, I should hesitate to say that wherever a public body invested with statutory powers does something which is *ultra vires* by reason of its not having complied with the conditions subject to which the powers are given to it, the Att.-Gen. is entitled *ex debito justitiæ* to an injunction, and that the Court has no discretion in the matter. The observations of Lord Truro in *Att.-Gen. v. Birmingham & Oxford Ry.* (*supra*, col. 2696) seems to me to point against such a proposition being accurate. No such question, however, arises here.—p. 30.

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Att.-Gen. v. L. & N. W. Ry., *referred to*.

Att.-Gen. v. Ashbourne Recreation Ground Co. (1902) 72 L. J. Ch. 67; [1903] 1 Ch. 101, 108; 87 L. T. 561; 51 W. R. 125; 67 J. P. 73; 1 L. G. R. 146.—BUCKLEY, J.; Rickmore v. Dimmer (1902) 72 L. J. Ch. 96; [1903] 1 Ch. 158, 163; 88 L. T. 78; 51 W. R. 180.—C.A.

Cromford and High Peak Ry. v. Stockport, Disley and Whaley Bridge Ry. (1857) 24 Beav. 74; 3 Jur. (N.S.) 628; 5 W. R. 636.—M.R.; *reversed*, (1857) 1 De G. & J. 326.—KNIGHT BRUCE and TURNER, L.JJ.

Powell Duffryn Steam Coal Co. v. Taff Vale Ry. 22 W. R. 182.—HALL, V.-C.: *affirmed*, (1874) 43 L. J. Ch. 575; L. R. 9 Ch. 331; 30 L. T. 208.—L.J.J. See S. C., 26 L. T. 357; 20 W. R. 460.

Powell Duffryn Steam Coal Co. v. Taff Vale Ry., considered and distinguished.
Todd & Co. v. Midland & W. (Ireland) Ry. (1881) 9 L. R. Ir. 85.—SULLIVAN, M.R.

Powell Duffryn Steam Coal Co. v. Taff Vale Ry., distinguished.
Woodruff v. Brecon & Merthyr Tydfil Junction Ry. (1884) 28 Ch. D. 190; 54 L. J. Ch. 620; 52 L. T. 69; 33 W. R. 125; *affirmed*, C.A.

BACON, V.-C.—In that case, if the application of the plaintiff had been acceded to, there would have been an order that the railway company should do something. The plaintiff in this case does not ask the railway company to do anything except to desist from injuring him and interfering with his statutory right under sect. 76 [of the Railway Clauses Act]—p. 197.

Powell Duffryn Steam Coal Co. v. Taff Vale Ry.

Applied, Phipps v. Jackson (1887) 56 L. J. Ch. 550; 33 W. R. 378.—STIRLING, J.: *referred to*, Ryan v. Mutual Tontine Westminster Chambers Association (1892) 62 L. J. Ch. 252; [1893] 1 Ch. 116, 128; 2 R. 156; 67 L. T. 820; 41 W. R. 146.—C.A.: Daubian Sugar Factories v. Inland Revenue Commissioners (1900) 70 L. J. K. B. 211; [1901] 1 K. B. 245; 84 L. T. 101; 65 J. P. 212.—C.A.

Yorkshire Ry. Wagon Co. v. Maclure (1882)

51 L. J. Ch. 857; 21 Ch. D. 309; 47 L. T. 290; 30 W. R. 761.—C.A.

Discussed, Cornwall Minerals Ry. In re (1882) 48 L. T. 41.—KAY, J., and C.A.: Yarrow, In re, Collins v. Weymouth (1889) 59 L. J. Q. B. 18; 61 L. T. 642; 38 W. R. 175.—CAVE, J.: Reg. v. County Cork Treasurer (1889) 24 L. R. Ir. 415, 419.—Q.B.D.: *applied*, Liskeard and Caradon Ry., In re (1903) 72 L. J. Ch. 754; [1903] 2 Ch. 681, 686; 89 L. T. 437.—SWINFEN EADY, J. *And see* "BILLS OF SALE," vol. I., col. 233.

G. N. Ry. v. Tahourdin (1883) 53 L. J. Q. B. 69; 13 Q. B. D. 320; 50 L. T. 186; 32 W. R. 559.—C.A., *discussed and applied*.

East and West India Dock Co., In re (1888) 38 Ch. D. 576; 57 L. J. Ch. 1053; 59 L. T. 237; 36 W. R. 849.—CHITTY, J.; *affirmed*, C.A. COTTON and FRY, L.J.J.; LOPES, L.J. *doubting*.

CHITTY, J.—The purpose mentioned in the section [Railway Companies Act, 1867, s. 3] need not be the principal purpose for which the company is constituted; it may be an ancillary or subsidiary purpose. This point was decided by the C.A. in *G. N. Ry. v. Tahourdin*.—p. 582.

FRY, L.J.—Then, again, it has been said that making, working or maintaining the railway must be the primary purpose or the fundamental purpose of the company; but the statute seems to me to negative that, because it says, "either alone or in conjunction with any other purpose." And accordingly, in *G. N. Ry. v. Tahourdin* it was determined that a company authorised by statute to make a railway, which was merely ancillary to its purposes as a dock company, was

a railway company within the meaning of the Railway Companies Act, 1867. I think, therefore, that the company in this case satisfies all the requirements of the words to which I have referred.—p. 595.

LOPES, L.J.—That case [*G. N. Ry. v. Tahourdin*], I think, is clearly distinguishable from the present.—p. 596.

Shrewsbury and Birmingham Ry. v. L. & N. W. Ry. (1850) 2 Mac. & G. 324.—COTTENHAM, L.C.: 20 L. J. Ch. 90; 3 Mac. & G. 70; 2 H. & Tw. 257; 14 Jur. 921, 1125.—TRURO, L.C., *distinguished*.

Beman v. Rufford (1851) 20 L. J. Ch. 537; 1 Sim. (N.S.) 550; 15 Jur. 914; 7 Railw. Cas. 48.—CRANWORTH, V.-C.

Shrewsbury and Birmingham Ry. v. L. & N. W. Ry.

Approved, Shrewsbury and Birmingham Ry. v. L. & N. W. Ry. (1851) 21 L. J. Q. B. 89; 17 Q. B. 652; 16 Jur. 311.—Q.B.: *discussed*, Shrewsbury and Birmingham Ry. v. L. & N. W. Ry. (1853) 22 L. J. Ch. 682; 4 De G. M. & G. 115; 17 Jur. 845; 1 W. R. 172.—L.J.J.: *referred to*, Lancaster and Carlisle Ry. v. N. W. Ry. (1856) 25 L. J. Ch. 223; 2 K. & J. 293; 4 W. R. 220.—WOOD, V.-C.: *affirmed*, Shrewsbury and Birmingham Ry. v. L. & N. W. Ry. (1857) 26 L. J. Ch. 48; 6 H. L. Cas. 113; 3 Jur. (N.S.) 775.—H.L. (E.).

Shrewsbury and Birmingham Ry. v. L. & N. W. Ry. (H.L.), applied.

L. B. & S. C. Ry. v. L. & N. W. Ry. (1859) 28 L. J. Ch. 521; 4 De G. & J. 362; 5 Jur. (N.S.) 801; 7 W. R. 591.—CHELMSFORD, L.C., and TURNER, L.J.; Hare v. L. & N. W. Ry. (1861) 30 L. J. Ch. 817; 2 J. & H. 80; 7 Jur. (N.S.) 1145.—WOOD, V.-C.

Shrewsbury and Birmingham Ry. v. L. & N. W. Ry., discussed.

Taylor v. Chichester and Midhurst Ry. (1867) 36 L. J. Ex. 201; L. R. 2 Ex. 356, 384.—EX. CH. (reversed, H.L. *supra*, col. 2680); Riche v. Ashbury Ry. Carriage & Iron Co. (1874) 43 L. J. Ex. 177; L. R. 9 Ex. 224, 292.—EX. CH.; reversed H.L. (*see supra*, col. 2681); Att.-Gen. v. G. E. Ry. (1879) 48 L. J. Ch. 428; 11 Ch. D. 449, 487; 40 L. T. 265; 27 W. R. 759.—C.A.: BAGGALLAY, L.J. *dissenting* (*affirmed*, (1880) 49 L. J. Ch. 545; 5 App. Cas. 473.—H.L. (E.) *supra*, col. 2674).

Shrewsbury and Birmingham Ry. v. L. & N. W. Ry., applied.

Hire Purchase Furnishing Co. v. Richens (1887) 20 Q. B. D. 387; 58 L. T. 460; 36 W. R. 365.—C.A. ESHER, M.R., BOWEN and FRY, L.J.J.

FRY, L.J.—The only observation I will add is on *Shrewsbury and Birmingham Ry. v. L. & N. W. Ry.* It was there said by Lord Cranworth: "When the Legislature constitutes a corporation it gives to that body *prima facie* an absolute right of contracting."—p. 390.

Kent Coast Ry. v. L. C. & D. Ry. (1868) L. R.

3 Ch. 656; 19 L. T. 174; 16 W. R. 1027.

—*discussed and explained*.

Manchester Ship Canal Co. v. Manchester Racecourse Co. (1900) 69 L. J. Ch. 850; [1900] 2 Ch. 852; 83 L. T. 274.—FARWELL, J.; *affirmed*,

(1901) 70 L. J. Ch. 468; [1901] 2 Ch. 37; 84 L. T. 436; 49 W. R. 418.—C.A. RIGBY, v. WILLIAMS and STIRLING, L.JJ.

G. N. Ry. v. Eastern Counties Ry. (1851) 21 L. J. Ch. 887; 9 Hare 306; 7 Railw. Cas. 643.—V.-C., *applied*.

L. B. & S. C. Ry. v. L. & S. W. Ry. (1859) 28 L. J. Ch. 521; 4 De G. & J. 362; 5 Jur. (N.S.) 801; 7 W. R. 591.—CHELMSFORD, L.C. and TURNER, L.J.

G. N. Ry. v. Eastern Counties Ry., *principle approved and applied*.

Shrewsbury and Birmingham Ry. v. Stour Valley Ry. (1852) 2 De G. M. & G. 866.—L.JJ., *distinguished*.

Richmond Waterworks Co. v. Richmond Vestry (1876) 3 Ch. D. 82; 45 L. J. Ch. 441; 34 L. T. 480.

MALINS, V.-C.—Upon the former occasion, the decision of Sir G. Turner in *G. N. Ry. v. Eastern Counties Ry.* was appealed to, and Mr. Pearson this morning referred to a great many other authorities—for instance, *Shrewsbury, &c. v. Stour Valley Ry.*, which he so much relied upon, but that appears to me to be a totally distinct case. That was a case in which several railway companies had the power amongst themselves of running over a large tract of country, and the consequence of their running in opposition was to destroy each other. Thereupon they came to an arrangement that they would throw the common earnings into one purse, and divide them in certain defined proportions. There was nothing illegal in that, and the contract was decided by the Court of Queen's Bench not to be illegal. But where one company attempts to transfer all its powers, privileges, and authorities to another company, then I apprehend it does fall within the rule laid down by Sir G. Turner, which I have heard no authority to refute, and in which I entirely agree. In *G. N. Ry. v. Eastern Counties Ry.* there was an agreement between two railway companies, made without the authority of the legislature, whereby one of them delegated to the other all the powers which had been conferred upon it by Parliament, and it was held that it was an unlawful attempt to effect that which Parliament alone could authorise, and was against public policy, and in such a case the Court would not interfere to assist either of the parties in obtaining a collateral benefit which the agreement would give, or aid them in any manner which would promote the object of the agreement.—p. 98.

L. B. & S. C. Ry. v. L. & S. W. Ry. (1859) 28 L. J. Ch. 521; 4 De G. & J. 362; 5 Jur. (N.S.) 801; 7 W. R. 591.—CHELMSFORD, L.C. and TURNER, L.J., *explained*.

Midland Ry. v. G. W. Ry. (1873) L. R. 8 Ch. 841, 857; 42 L. J. Ch. 438; 28 L. T. 718; 21 W. R. 657.—JAMES and MELLISH, L.JJ.

Beman v. Rufford (1851) 20 L. J. Ch. 537; 1 Sim. (N.S.) 550; 15 Jur. 914; 7 Railw. Cas. 48.—CRANWORTH, V.-C.

Referred to, **East Anglian Rys. v. Eastern Counties Ry.** (1851) 21 L. J. Ch. 23; 11 C. B. 775; 16 Jur. 249; 7 Railw. Cas. 150.—C.P.: *applied*, **Winch v. Birkenhead, Lancashire and Cheshire Junction Ry.** (1852) 5 De G. & Sm. 562; 16 Jur. 1035.—PARKER, V.-C.; *referred*

to, **G. W. Ry. v. Oxford, Worcester and Wolverhampton Ry.** (1852) 5 De G. & Sm. 437, 447; 16 Jur. 443.—PARKER, V.-C. (and on appeal (1853) 5 De G. M. & G. 341.—KNIGHT BRUCE and TURNER, L.JJ.); **Ffooks v. S. W. Ry.** (1853) 1 Sm. & G. 142; 17 Jur. 365; 1 W. R. 175.—STUART, V.-C.: *discussed*, **Hare v. L. & N. W. Ry.** (1861) 30 L. J. Ch. 817; 2 J. & H. 80; 7 Jur. (N.S.) 1145.—WOOD, V.-C.

Beman v. Rufford, *applied*.

Midland Ry. v. G. W. Ry. (1873) L. R. 8 Ch. 845, n.—ROMILLY, M.R.: reversed, 42 L. J. Ch. 438; L. R. 8 Ch. 841; 28 L. T. 718; 21 W. R. 657.—JAMES and MELLISH, L.JJ.

Beman v. Rufford.

Referred to, **Russell v. Wakefield Waterworks Co.** (1875) 44 L. J. Ch. 496; L. R. 20 Eq. 474, 481; 32 L. T. 685; 23 W. R. 887.—JESSEL, M.R.; *applied*, **Sevenoaks, Maidstone and Tunbridge Ry. v. L. C. & D. Ry.** (1879) 48 L. J. Ch. 513; 11 Ch. D. 625, 637; 40 L. T. 545; 27 W. R. 672.—JESSEL, M.R. (*see post*).

Winch v. Birkenhead, Lancashire and Cheshire Junction Ry. (1852) 5 De G. & Sm. 562; 16 Jur. 1035.—PARKER, V.-C., *applied*.

Midland Ry. v. G. W. Ry. (1873) L. R. 8 Ch. 845, n.—ROMILLY, M.R.: reversed, 42 L. J. Ch. 438; L. R. 8 Ch. 841; 28 L. T. 718; 21 W. R. 657.—JAMES and MELLISH, L.JJ.

Winch v. Birkenhead, Lancashire and Cheshire Junction Ry., *applied*.

Sevenoaks, Maidstone and Tunbridge Ry. v. L. C. & D. Ry. (1879) 11 Ch. D. 625; 48 L. J. Ch. 513; 40 L. T. 545; 27 W. R. 672.

JESSEL, M.R.—It seems to me that the working, and the maintenance, and the consequent possession must be exclusive, and, therefore, that the Sevenoaks company after the completion of the line under this agreement had no right to enter at all, and had no right to interfere with the construction of any part of the works. I may mention in corroboration of the view I have taken of the working agreement two cases which seem to me to have some bearing on the matter.—p. 637. [His lordship then discussed *Beman v. Rufford* (*supra*), and *Winch v. Birkenhead, &c. Ry.*, and continued:] It appears to me, on both those authorities, that agreements for working mean the exclusive use, and as the agreements, the subjects of those decisions, are not only similar in words, but similar in purpose, I think they are guides to me in showing that in construing this agreement I ought to arrive at the same conclusion.—p. 639.

Sevenoaks, Maidstone and Tunbridge Ry. v. L. C. & D. Ry., *explained*.

Manchester Ship Canal Co. v. Manchester Race-course Co. (1900) 69 L. J. Ch. 850; [1900] 2 Ch. 852; 83 L. T. 274.—FARWELL, J.; affirmed, (1901) 70 L. J. Ch. 468; [1901] 2 Ch. 37; 84 L. T. 436; 49 W. R. 418.—C.A.

Sevenoaks, &c. Ry. v. L. C. & D. Ry., *referred to*.

Taff Vale Ry. v. Amalgamated Society of Ry. Servants (1900) 70 L. J. K. B. 905, n; [1901] A. C. 429.—FARWELL, J.; reversed, 70 L. J. K. B. 219; [1901] 1 K. B. 170; 83 L. T. 474;

49 W. R. 101; 64 J. P. 788.—C.A. A. L. SMITH, M.R., COLLINS and STIRLING, L.JJ.; but restored, (1901) 70 L. J. K. B. 905; [1901] A. C. 426; 85 L. T. 147; 50 W. R. 44; 65 J. P. 596.—H.L. (E.).

FARWELL, J.—For instance, a lease in perpetuity is unknown at common law, but such a lease granted by one railway company to another when confirmed by the legislature becomes valid and binding—see Sir G. Jessel's judgment in *Serenwicks, Jr. Ry. v. L. C. & D. Ry.*—p. 906.

Simpson v. Denison, (1852) 10 Hare 51; 16 Jur. 828.—TURNER, V.-C., *discussed*.

South Yorkshire Ry. v. G. N. Ry. (1853) 22 L. J. Ex. 305; 9 Ex. 55.—EX. (affirmed, 23 L. J. Ex. 186; 9 Ex. 642.—EX. CH.); Russell v. Wakefield Waterworks Co. (1875) 44 L. J. Ch. 496; L. R. 20 Eq. 474, 481; 32 L. T. 685; 23 W. R. 887.—JESSEL, M.R.

Hare v. L. & N. W. Ry. (1861) 30 L. J. Ch. 817; 2 J. & H. 80; 7 Jur. (N.S.) 1145.—WOOD, V.-C., *discussed*.

Midland Ry. v. L. & N. W. Ry. (1866) 35 L. J. Ch. 831; L. R. 2 Eq. 524; 15 L. T. 264; 15 W. R. 34.—KINDERSLEY, V.-C.; Russell v. Wakefield Waterworks Co. (1875) 44 L. J. Ch. 496; L. R. 20 Eq. 474, 481; 32 L. T. 685; 23 W. R. 887.—JESSEL, M.R.; Dickson v. G. N. Ry. (1886) 56 L. J. Q. B. 111; 18 Q. B. D. 176, 184; 55 L. T. 868; 35 W. R. 202; 51 J. P. 388.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.; Winsford Local Board v. Cheshire Lines Committee (1890) 59 L. J. Q. B. 372; 24 Q. B. D. 456, 459; 62 L. T. 268; 38 W. R. 511; 7 Ry. & Can. Traff. Cas. 72.—RY. COMMS. (overruled, see Darlaston Local Board v. L. & N. W. Ry., *post*, col. 2712).

South Yorkshire Ry. v. G. N. Ry. (1853) 22 L. J. Ex. 305; 9 Ex. 55.—EX.; *affirmed nom.* G. N. Ry. v. South Yorkshire Ry. (1854) 23 L. J. Ex. 183; 9 Ex. 642.—EX. CH.

South Yorkshire Ry. v. G. N. Ry., *principle applied*.

Shrewsbury and Birmingham Ry. v. L. & N. W. Ry. (1857) 26 L. J. Ch. 482; 6 H. L. Cas. 113; 3 Jur. (N.S.) 775.—H.L. (E.). CRANWORTH, L.C.; Bateman v. Ashton-under-Lyne Corporation (1858) 27 L. J. Ex. 458; 3 H. & N. 323; 6 W. R. 829.—EX.; South Wales Ry. v. Redmond (1861) 10 C. B. (N.S.) 675; 4 L. T. 619; 9 W. R. 806.—C.P.; Chambers v. Manchester and Milford Ry. (1864) 33 L. J. Q. B. 268; 5 B. & S. 588; 10 Jur. (N.S.) 700; 10 L. T. 715; 12 W. R. 980.—Q.B.; *discussed*, Taylor v. Chichester and Midhurst Ry. (1867) 36 L. J. Ex. 201; L. R. 2 Ex. 356, 370, 384.—EX. CH.; WILLES and BLACKBURN, JJ. dissenting (reversed, H.L., *supra*, col. 2680).

South Yorkshire Ry. v. G. N. Ry., *referred to*. Riche v. Ashbury Ry. Carriage and Iron Co. (1874) 43 L. J. Ex. 177; L. R. 9 Ex. 224, 264.—EX. CH.; reversed, H.L., see *supra*, col. 2681.

South Yorkshire Ry. v. G. N. Ry., *applied*. Yorkshire Ry. Wagon Co. v. Maclure (1881) 51 L. J. Ch. 253; 19 Ch. D. 478, 484; 45 L. T. 747; 30 W. R. 288.—KAY, J.; on appeal, 21 Ch. D. 309; 51 L. J. Ch. 857; 47 L. T. 290; 30 W. R. 761.—C.A.

South Yorkshire Ry. v. G. N. Ry., *referred to*. Dartford Guardians v. Trickett (1888) 59 L. T. 754, 757.—FOLLOCK, B.

O.C.

Dublin and Meath Ry. v. Midland G. W. (Ireland) Ry. (1879) 3 Ry. & Can. Traff. Cas. 379.—RY. COMMS., *approved but distinguished*.

N. E. Ry. v. Scarborough and Whitby Ry. (1893—4) 8 Ry. & Can. Traff. Cas. 157.—WILLES, J.; affirmed, C.A. ESHER, M.R., LOPES and DAVEY, L.JJ.

G. N. Ry. v. Manchester, Sheffield, &c. Ry. (1851) 5 De G. & Sm. 138; 16 Jur. 146.—PARKER, V.-C., *followed*.

Llanelly Ry. and Dock Co. v. L. & N. W. Ry. (1873) 42 L. J. Ch. 884; 21 W. R. 889.—L.JJ.; *affirmed*, (1875) 45 L. J. Ch. 539; L. R. 7 H. L. 550; 32 L. T. 575; 23 W. R. 927.—H.L. (E.).

Llanelly Ry. v. L. & N. W. Ry., *distinguished and not applied*.

Cochrane v. Exchange Telegraph Co. (1896) 12 Times L. R. 197.—CHITTY, J.

Lindsey (Earl) v. Capper (1848) 2 Ex. 801.—EX. CH.; *reversing* 1 Ex. 579.—EX.; *affirmed nom.* Capper v. Lindsey (Earl), (1851) 3 H. L. Cas. 293.—H.L. (E.).

Rigby v. G. W. Ry., 15 L. J. Ch. 266; 1 Coop. C. C. 9; 10 Jur. 488; 4 Railw. Cas. 175.—WIGRAM, V.-C.; *reversed*, (1846) 2 Ph. 44; 1 Coop. C. C. 3; 10 Jur. 531.—COTTENHAM, L.C.; S.C., (1845) 14 M. & W. 811; 4 Railw. Cas. 190.—EX.

Rigby v. G. W. Ry., *discussed*.

Lindsey (Earl) v. G. N. Ry. (1853) 22 L. J. Ch. 995; 10 Hare 665; 17 Jur. 552; 1 W. R. 527.—WOOD, V.-C.; Miles v. Tobin (1867) 17 L. T. 432, 435; 16 W. R. 465.—CHELMSFORD, L.C.

Rigby v. G. W. Ry., *referred to*.

Hood v. N.E. Ry. (1869) L. R. 8 Eq. 666, 672; 20 L. T. 970; 17 W. R. 1085.—JAMES, V.-C.; varied, (1870) L. R. 5 Ch. 525; 23 L. T. 206; 18 W. R. 473.—HATHERLEY, L.C. and GIFFARD, L.J.

Rigby v. G. W. Ry., *discussed and not applied*.

Jegon v. Vivian (1871) 40 L. J. Ch. 389; L. R. 6 Ch. 742; 19 W. R. 365.

HATHERLEY, L.C.—In the case of the Swindon Refreshment Room—**Rigby v. G. W. Ry.**, the expression in the lease of an intention on the part of the railway company to stop trains at the station, coupled with the rest of the deed, was held to amount to a covenant to do so. But it would be a monstrous stretch of this doctrine to imply covenants throughout a lease, as I am invited to do here, by looking into the licences and powers secured for the benefit of the lessee as the part of the lease from which I am to imply obligations upon him.—p. 394.

Rigby v. G. W. Ry., *referred to*.

Phillips v. G. W. Ry. (1872) L. R. 7 Ch. 409, 417; 41 L. J. Ch. 614; 26 L. T. 532; 20 W. R. 562.—C.A. HATHERLEY, L.C., JAMES and MELLISH, L.JJ.

Rigby v. G. W. Ry., *explained*.

Ryan v. Mutual Tontine Westminster Chambers Association (1892) 62 L. J. Ch. 252; [1893] 1 Ch. 116, 124; 2 R. 156; 67 L. T. 820; 41 W. R. 146.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Burnett v. Great North of Scotland Ry. (1883) 11 Ct. of Sess. Cas. (4th series) 375; *reversed*, 54 L. J. Q. B. 531; 10 App. Cas. 147; 53 L. T. 507.—H.L. (SC.).

Bentham v. Hoyle, (1878) 47 L. J. M. C. 51; 3 Q. B. D. 289; 37 L. T. 753; 24 W. R. 314.—Q.B.D., *applied*.

L. B. & S. C. Ry. v. Watson (1878) 47 L. J. C. P. 634; 3 C. P. D. 429, 436; 39 L. T. 199; 26 W. R. 856.—C.P.D. COLERIDGE, C.J. and LUSH, J.; *affirmed*, (1879) 48 L. J. C. P. 316; 4 C. P. D. 118; 40 L. T. 183; 27 W. R. 614.—C.A.

Bentham v. Hoyle, *distinguished*.

White v. Morley (1899) 68 L. J. Q. B. 702; [1899] 2 Q. B. 34, 37; 80 L. T. 761; 47 W. R. 588; 63 J. P. 550.—DARLING and CHANNELL, JJ. *And see* "CARRIERS," vol. i., col. 284.

Saunders v. S. E. Ry. (1880) 49 L. J. Q. B. 761; 5 Q. B. D. 456; 43 L. T. 281; 29 W. R. 56; 44 J. P. 781.—COCKBURN, C.J. and LUSH, J., *applied*.

Dyson v. L. & N. W. Ry. (1881) 50 L. J. M. C. 78; 7 Q. B. D. 32, 37; 44 L. T. 609; 29 W. R. 565; 45 J. P. 650.—LINDLEY and MATHEW, JJ.

Saunders v. S. E. Ry., *referred to*.

Butler v. Manchester, Sheffield and Lincolnshire Ry. (1888) 57 L. J. Q. B. 564; 21 Q. B. D. 207, 212; 60 L. T. 89; 36 W. R. 726; 52 J. P. 611.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Butler v. Manchester, Sheffield and Lincolnshire Ry., *applied*.

Kerrison v. Smith (1897) 66 L. J. Q. B. 762; [1897] 2 Q. B. 445, 450; 77 L. T. 344.—LAW-RANCE and COLLINS, JJ.

Dyson v. L. & N. W. Ry. (*supra*), *discussed and applied*.

Huffam v. North Staffordshire Ry. (1894) 63 L. J. M. C. 225; [1894] 2 Q. B. 821, 825; 10 R. 507; 71 L. T. 517; 43 W. R. 28; 8 Cox C. C. 41; 59 J. P. 23.—MATHEW and KENNEDY, JJ.

Motteram v. Eastern Counties Ry. (1859) 29 L. J. M. C. 57; 7 C. B. (N.S.) 58, 80; 6 Jur. (N.S.) 583; 1 L. T. 101; 8 W. R. 77.—C.P.; WILLIAMS, J. *dissenting*; *referred to*.

Bell-Cox (or Cox) v. Hakes (1890) 60 L. J. Q. B. 89; 15 App. Cas. 506, 543; 63 L. T. 392; 39 W. R. 145; 54 J. P. 820; 17 Cox C. C. 158.—H.L. (E.); LORDS MORRIS and FIELD *dissenting*.

4. TRESPASS ON RAILWAY.

Jones v. Taylor (1858) 28 L. J. M. C. 204, n.; 1 El. & El. 20.—Q.B., *followed*.

Bennett v. Blackpool Local Board (1859) 28 L. J. M. C. 203; S. C. *nom.* Blackpool Local Board v. Bennett, 4 H. & N. 127.—EX.

Jones v. Taylor, *disapproved*.

Foulger v. Steadman, (1872) L. R. 8 Q. B. 65; 42 L. J. M. C. 3; 26 L. T. 395.

BLACKBURN, J.—*Jones v. Taylor* appears to have been very little considered. The judgment is very meagre.—p. 67.

Jones v. Taylor, *referred to*.

Foulger v. Steadman, *approved*.

Perth General Station Committee v. Ross (1897) 66 L. J. P. C. 81; [1897] A. C. 479, 494;

77 L. T. 226; 24 Rennie 44.—H.L. (SC.); LORD MORRIS *dissenting*; *reversing* (1896) 23 Rennie 885.—CT. OF SESS.

Barker v. Midland Ry. (1856) 25 L. J. C. P. 184; 18 C. B. 46.—C.P., *applied*.

Beadell and Eastern Counties Ry., *In re* (1857) 26 L. J. C. P. 250; 2 C. B. (N.S.) 509; 5 W. R. 650.—C.P.; Perth General Station Committee v. Ross [1897] A. C. 479, 493 (*supra*).

Marriott and L. & S. W. Ry., *In re*, (1857) 26 L. J. C. P. 154; 1 C. B. (N.S.) 499; 3 Jur. (N.S.) 493; 5 W. R. 312.—C.P.

Distinguished, **Beadell and Eastern Counties**, *In re* (*supra*); **West v. L. & N. W. Ry.** (*post*).

Beadell and Eastern Counties Ry., *In re*, *referred to*.

Painter. Ex parte (1857) 2 C. B. (N.S.) 702.—C.P.; **Case v. Storey** (1869) 38 L. J. M. C. 113; L. R. 4 Ex. 319, 326; 20 L. T. 618; 17 W. R. 802.—EX.

Beadell and Eastern Counties Ry., *In re*, *discussed*.

West v. L. & N. W. Ry. (1870) 39 L. J. C. P. 282; L. R. 5 C. P. 622, 633; 23 L. T. 371; 18 W. R. 1028.—M. SMITH and BRETT, JJ. *dissenting*. *See judgment of M. SMITH, J.*

5. PASSENGER DUTY.

Att.-Gen. v. North London Ry. (1874) 43 L. J. Ex. 223; L. R. 9 Ex. 330; 31 L. T. 377.—EX.; *affirmed nom.* **North London Ry. v. Att.-Gen.** (1876) 45 L. J. Ex. 315; 1 App. Cas. 148; 34 L. T. 297; 24 W. R. 852.—H.L. (E.).

Att.-Gen. v. L. & N. W. Ry. (1880) 5 Ex. D. 247.—EX. D.; *affirmed*, (1881) 50 L. J. Q. B. 170; 6 Q. B. D. 216; 44 L. T. 236; 29 W. R. 346; 45 J. P. 390.—C.A., *observations applied*.

Att.-Gen. v. Furness Ry. (1899) 68 L. J. Q. B. 623; [1899] 2 Q. B. 267; 80 L. T. 710; 63 J. P. 326.—GRANTHAM and KENNEDY, JJ.

Att.-Gen. v. Oxford, Worcester and Wolverhampton Ry. (1862) 31 L. J. Ex. 218; 7 H. & N. 840.—EX.; MARTIN, B. *dissenting*; *affirmed nom.* **G. W. Ry. v. Att.-Gen.** (1866) 35 L. J. Ex. 123; L. R. 1 H. L. 1; 12 Jur. (N.S.) 417; 14 L. T. 33; 14 W. R. 519.—H.L. (E.).

6. ARBITRATION.

Maunsell v. Midland Great Western (Ireland) Ry. (1863) 32 L. J. Ch. 513; 1 H. & M. 130; 9 Jur. (N.S.) 660; 8 L. T. 826; 11 W. R. 768.—WOOD, V.-C., *discussed and approved*.

London and Blackwall Ry. v. Cross (1886) 31 Ch. D. 354, 368; 55 L. J. Ch. 313; 54 L. T. 309; 34 W. R. 201.—C.A. LINDLEY, FRY and LOPES, L.JJ.

Maunsell v. Midland Great Western (Ireland) Ry., *referred to*.

Wood v. Lillies (1892) 61 L. J. Ch. 158.—CHITTY, J.

Maunsell v. Midland Great Western (Ireland) Ry. and L. & S. W. Ry. v. Coward (1848) 5 Railw. Cas. 703; 1 H. & Tw. 377, n.—V.-C., *affirmed*; L.C., *explained*.

Kitts v. Moore & Co. (1894) [1895] 1 Q. B.

253; 64 L. J. Q. B. 152; 12 R. 43; 71 L. T. 676; 43 W. R. 84.—C.A. LINDLEY and A. L. SMITH, L.JJ.

A. L. SMITH, L.J.—In *Mannell v. Midland Great Western (Ireland) Ry.* . . . there was an agreement to refer, and an injunction was asked for by one of the parties to restrain proceedings by arbitration, on the ground that the directors of the defendant company had been acting *ultra vires*. If the point had been that the agreement had been entered into by the directors on behalf of the shareholders *intra vires*, and they wanted to get rid of the arbitration on the ground of its being useless and futile, no injunction would have gone; but as the shareholders, who were the plaintiffs, impeached the agreement, because they alleged that the agreement was *ultra vires* the directors, and consequently they were not bound by it and not bound by the proceedings on arbitration, the Court granted the injunction until the proceedings in equity were taken to determine whether the agreement to refer could be successfully impeached or not. *L. & S. W. Ry. v. Curd* was another case which proceeded on the same principle.—p. 263.

Watford and Rickmansworth Ry. v. L. & N. W. Ry. (1869) 38 L. J. Ch. 449; L. R. 8 Eq. 231; 21 L. T. 81; 17 W. R. 814.—M.R., *applied*.

Llanely Ry. v. L. & N. W. Ry. (1872) 20 W. R. 898.—MALINS, V.-C.: affirmed, (1873) 42 L. J. Ch. 884; L. R. 8 Ch. 942; 29 L. T. 357; 21 W. R. 889.—L.JJ., and (1875) 45 L. J. Ch. 539; L. R. 7 H. L. 550; 32 L. T. 573; 23 W. R. 927.—H.L. (E.).

Watford and Rickmansworth Ry. v. L. & N. W. Ry., *discussed*.

L. C. & D. Ry. v. S. E. Ry. (1888) 58 L. J. Ch. 75; 40 Ch. D. 100, 105; 60 L. T. 370; 37 W. R. 65.—C.A. COTTON, BOWEN and LINDLEY, L.JJ.

Caledonian Ry. v. Greenock and Wemyss Bay Ry. (1874) L. R. 2 H. L. Sc. 347.—H.L. (SC.).

Distinguished, G. W. Ry. v. Halesowen Ry. (1883) 52 L. J. Q. B. 473, 477; 48 L. T. 410; 4 Ry. & Can. Traff. Cas. 224.—A. L. SMITH, J.; GROVE, J. doubting; *considered and applied*, Reg. v. Midland Ry. (1887) 56 L. J. Q. B. 585; 19 Q. B. D. 540, 545; 57 L. T. 619; 36 W. R. 270; 5 Ry. & Can. Traff. Cas. 267; 51 J. P. 550.—STEPHEN and WILLS, J.; *discussed*, L. C. & D. Ry. v. S. E. Ry. (1888) 58 L. J. Ch. 75; 40 Ch. D. 100, 105; 60 L. T. 370; 37 W. R. 65.—C.A. COTTON, BOWEN and LINDLEY, L.JJ.

Caledonian Ry. v. Greenock and Wemyss Bay Ry., *distinguished and not applied*.

Jersey (Earl) v. G. W. Ry. (1893) [1894] 3 Ch. 625, n.—C.A. LINDLEY, LOPES and A. L. SMITH, L.JJ.; *Manchester Ship Canal Co. v. Manchester Racecourse Co.* (1900) 69 L. J. Ch. 850; [1900] 2 Ch. 352, 361; 83 L. T. 274.—FARWELL, J. (*see post*, col. 2708); affirmed, (1901) 70 L. J. Ch. 468; [1901] 2 Ch. 37; 84 L. T. 436; 49 W. R. 418.—C.A.

Reg. v. G. N. Ry. (1876) 46 L. J. Q. B. 4; 2 Q. B. D. 151; 35 L. T. 551; 25 W. R. 41.—MELLOR and LUSH, J.J., *applied*.
Shepherd v. Norwich Corporation (1885) 54

L. J. Ch. 1050; 30 Ch. D. 553, 569; 53 L. T. 251; 33 W. R. 841.—NORTH, J.

Reg. v. G. N. Ry., *referred to*,
Reg. v. Cork J.J. (1899) [1900] 2 Ir. R. 105, 120.—Q.B.D.

L. C. & D. Ry. v. S. E. Ry. (1888) 58 L. J. Ch. 75; 40 Ch. D. 100; 60 L. T. 370; 37 W. R. 65.—C.A., *referred to*.
Davis v. Starr (1889) 58 L. J. Ch. 808; 41 Ch. D. 242, 245; 60 L. T. 797; 37 W. R. 481.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

L. C. & D. Ry. v. S. E. Ry., *explained and distinguished*.

Manchester Ship Canal Co. v. Manchester Racecourse Co. (1900) 69 L. J. Ch. 850; [1900] 2 Ch. 352; 83 L. T. 274.—FARWELL, J.; affirmed, (1901) 70 L. J. Ch. 468; [1901] 2 Ch. 37; 84 L. T. 436; 49 W. R. 418.—C.A.

FARWELL, J.—A great deal of argument was founded upon *Caledonian Ry. v. Greenock, &c., Ry.* (*supra*, col. 2707). It appears to me that the problem before the Court in that and subsequent cases is absolutely different from anything I have to contend with here. The question there was not whether the parties were or were not bound by the contract into which they had entered. No such question arose. The question was whether the Courts were bound or not by a substantive statutory enactment, presumably in the interests of the public, that the agreement which was confirmed between the parties should be implemented—to use the Scotch term in the Scotch case—and made effective by the two parties to it . . . The parties might waive the agreement between themselves for their own benefit. They could not, however, waive the statutory duty imposed upon them, if it be a duty imposed for the benefit of the public at large. That was the point which was considered in all the cases, and I think that what Bowen, L.J. says in *L. C. & D. Ry. v. S. E. Ry.* makes that abundantly clear, if it were not so otherwise . . . What the Court held in that particular case was . . . that the Court was at liberty to consider the question raised between the parties, notwithstanding the arbitration clause which had been confirmed and rendered valid by the Act of Parliament. No question arose as to whether the contract was or was not valid as between the parties themselves. The same observation applies to the other cases, especially *Reg. v. Midland Ry.* ((1887) 19 Q. B. D. 540, *supra*, col. 2707), which appears to me to be merely a question on the construction of a particular Act of Parliament, with which I really need not deal further.—pp. 855, 856.

7. RAILWAY COMMISSION.

Caterham Ry., In re (1857) 26 L. J. C. P. 161; 1 C. B. (N.S.) 410.—C.P.; and **Bennett v. Manchester, Sheffield and Lincolnshire Ry.** (1859) 6 C. B. (N.S.) 707; 7 W. R. 585.—C.P., *considered*.

S. E. Ry. v. Ry. Commissioners and Hastings Corporation (1880) 49 L. J. Q. B. 273; 5 Q. B. D. 217, 238; 41 L. T. 760; 28 W. R. 464; 44 J. P. 362.—Q.B.D.; reversed, C.A. (*post*, col. 2711).

Caterham Ry., In re, and Bennett v. Manchester, Sheffield and Lincolnshire Ry. (*supra*, col. 2708), *referred to*.

Reg. v. Ry. Commissioners and Dington

Iron Co. (1889) 58 L. J. Q. B. 233; 22 Q. B. D. 642, 655; 60 L. T. 606; 37 W. R. 446; 53 J. P. 533; 6 Ry. & Can. Traff. Cas. 108.—HUDDLESTON, B. and MANISTY, J.

Ransome v. Eastern Counties Ry. (1857) 26 L. J. C. P. 91; 1 C. B. (N.S.) 437; 3 Jur. (N.S.) 217.—C.P., *referred to*.

Harris v. Cocker-mouth and Workington Ry. (1858) 27 L. J. C. P. 162; 3 C. B. (N.S.) 693; 4 Jur. (N.S.) 239; 6 W. R. 209.—C.P.; **Ransome v. Eastern Counties Ry.** (1858) 27 L. J. C. P. 166; 4 C. B. (N.S.) 135; 4 Jur. (N.S.) 284; 6 W. R. 395.—C.P.

Ransome v. Eastern Counties Ry., 27 L. J. C. P. 166, *principle adhered to*.

Ransome v. Eastern Counties Ry. (1860) 29 L. J. C. P. 329; 8 C. B. (N.S.) 709; 7 Jur. (N.S.) 99; 2 L. T. 376; 8 W. R. 527.—C.P.

Ransome v. Eastern Counties Ry., 26 L. J. C. P. 91 and 27 L. J. C. P. 166, *considered*.

G. W. Ry. v. Sutton (1869) 38 L. J. Ex. 177; L. R. 4 H. L. 226, 252; 18 W. R. 92.—H.L. (E.); CAIRNS, L.C., LORDS CHELMSFORD and COLON-SAY with the judges; **Budd v. L. & N. W. Ry.** (1877) 36 L. T. 802; 25 W. R. 752; 4 Ry. & Can. Traff. Cas. 393.—EX. D.

Ransome v. Eastern Counties Ry., *referred to*.

Toomer v. L. C. & D. Ry. (1877) 47 L. J. Ex. 276; 2 Ex. D. 450; 37 L. T. 161; 26 W. R. 31.—CLEASBY, B. and HAWKINS, J.

Ransome v. Eastern Counties Ry., *referred to*.

Reg. v. Ry. Commissioners and Distington Iron Co. (1889) 58 L. J. Q. B. 233; 22 Q. B. D. 642, 655; 60 L. T. 606; 37 W. R. 446; 6 Ry. & Can. Traff. Cas. 108; 53 J. P. 533.—HUDDLESTON, B. and MANISTY, J. *And see* "CARRIERS," vol. i., col. 309.

Oxlade v. N. E. Ry. (1857) 26 L. J. C. P. 129; 1 C. B. (N.S.) 454; 3 Jur. (N.S.) 637.—C.P., *referred to*.

Harris v. Cocker-mouth and Workington Ry. (1858) 27 L. J. C. P. 162; 3 C. B. (N.S.) 693; 4 Jur. (N.S.) 239; 6 W. R. 209.—C.P.

Oxlade v. N. E. Ry., *referred to*.

Dickson v. G. N. Ry. (1886) 18 Q. B. D. 176; 56 L. J. Q. B. 112; 55 L. T. 868; 35 W. R. 202; 51 J. P. 388.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

LINDLEY, L.J.—The Railway and Canal Traffic Act, 1854, does not make railway companies liable as common carriers in respect of goods which they do not profess to carry as such. This was, in fact, decided in *Oxlade v. N. E. Ry.*—p. 185.

And see "CARRIERS," vol. i., col. 304.

Harris v. Cocker-mouth and Workington Ry. (1858) 27 L. J. C. P. 162; 3 C. B. (N.S.) 693; 4 Jur. (N.S.) 239; 6 W. R. 209; 1 Ry. & Can. Traff. Cas. 97.—C.P.

Applied, **Jones v. Eastern Counties Ry.** (1858) 3 C. B. (N.S.) 718.—C.P.; **Rhymney Iron Co. v. Rhymney Ry.** (1888) 6 Ry. & Can. Traff. Cas. 60.—EX. COMMRS. (affirmed, 53 J. P. 309.—C.A.); *referred to*, **Reg. v. Ry. Commissioners and Distington Iron Co.** (1889) 58 L. J. Q. B. 233;

22 Q. B. D. 642; 60 L. T. 606; 37 W. R. 446; 6 Ry. & Can. Traff. Cas. 108; 53 J. P. 533.—HUDDLESTON, B. and MANISTY, J. *And see* "CARRIERS," vol. i., col. 309.

Jones v. Eastern Counties Ry. (1858) 3 C. B. (N.S.) 718.—C.P., *not applied*.

Budd v. L. & N. W. Ry. (1877) 36 L. T. 802; 25 W. R. 752; 4 Ry. & Can. Traff. Cas. 393.—EX. D. *See* "CARRIERS," vol. i., col. 309.

Nicholson v. G. W. Ry. (1858) 28 L. J. C. P. 89; 5 C. B. (N.S.) 366; 4 Jur. (N.S.) 1187; 7 W. R. 49; 1 Ry. & Can. Traff. Cas. 121.—C.P., *referred to*.

Rhymney Iron Co. v. Rhymney Ry. (1888) 6 Ry. & Can. Traff. Cas. 60.—EX. COMMRS.; affirmed, 53 J. P. 309.—C.A. *And see* "CARRIERS," vol. i., col. 304.

Gallagher v. G. W. Ry. (1874) Ir. R. 8 C. L. 326.—EX.

Applied, **Foreman v. G. W. Ry.** (1878) 38 L. T. 851, 854.—EX. D.; *explained and distinguished*, **Ruddy v. Midland G. W. (Ir.) Ry.** (1880) 8 L. R. Ir. 224, 233.—EX. D.

Garton v. Bristol and Exeter Ry. (1861) 30 L. J. Q. B. 273; 1 B. & S. 112; 7 Jur. (N.S.) 1234; 9 W. R. 734.—Q.B., *considered and explained*.

G. W. Ry. v. Sutton (1869) 38 L. J. Ex. 177; L. R. 4 H. L. 226, 242; 18 W. R. 92.—H.L. (E.).

Garton v. Bristol and Exeter Ry., *discussed*. **Brown v. G. W. Ry.** (1882) 51 L. J. Q. B. 529; 9 Q. B. D. 744, 750; 47 L. T. 216; 30 W. R. 671; 46 J. P. 803.—FIELD and NORTH, JJ.; affirmed, C.A.

Garton v. Bristol and Exeter Ry. and Scottish North-Eastern Ry. v. Anderson (1863) 1 Macpherson 1056.—CT. OF SESS., *referred to*.

Hall v. L. B. & S. C. Ry. (1885) 15 Q. B. D. 505, 545; 53 L. T. 345; 5 Ry. & Can. Traff. Cas. 28.—Q.B.D.

Garton v. Bristol and Exeter Ry., *referred to*.

Murphy v. Midland and Great Western (Ireland) Ry. (1902) [1903] 1 Ir. R. 1, 20.—K.B.D.; **Stone v. Midland Ry.** (1903) 72 L. J. K. B. 377; [1903] 1 K. B. 741, 746; 88 L. T. 92.—K.B.D.

Branley v. S. E. Ry. (1862) 31 L. J. C. P. 286; 12 C. B. (N.S.) 63; 9 Jur. (N.S.) 329; 6 L. T. 458.—C.P., *discussed*.

G. W. Ry. v. Sutton (1869) 38 L. J. Ex. 177; L. R. 4 H. L. 226, 237; 18 W. R. 92.—H.L. (E.).

Beal v. South Devon Ry. (1864) 3 H. & C. 337; 11 L. T. 184; 12 W. R. 1115.—EX. CH.; *affirming* (1860) 29 L. J. Ex. 441; 5 H. & N. 875.—EX., *referred to*.

Grill v. General Iron Screw Collier Co. (1866) 35 L. J. C. P. 321; L. R. 1 C. P. 600, 612; 12 Jur. (N.S.) 727; 14 L. T. 711; 14 W. R. 893.—C.P.; **Giblin v. McMullen** (1869) 38 L. J. P. C. 25; L. R. 2 P. C. 317, 336; 5 Moore P. C. (N.S.) 434; 21 L. T. 214; 17 W. R. 445.—P.C.; **Dickson v. G. N. Ry.** (1886) 56 L. J. Q. B. 112; 18 Q. B. D. 176, 192; 55 L. T. 868; 35 W. R. 202; 51 J. P. 388.—C.A. *And see* "CARRIERS," vol. i., col. 306.

Thompson v. L. & N. W. Ry. (1875) 2 Ry. & Can. Traff. Cas. 115.—RY. COMMS., *approved*.

Wallis v. L. & S. W. Ry. (1870) 39 L. J. Ex. 57; L. R. 5 Ex. 62; 21 L. T. 675; 18 W. R. 347.—EX., *distinguished*.

Evershed v. L. & N. W. Ry. (1877) 46 L. J. Q. B. 289; 2 Q. B. D. 254; 267; 36 L. T. 12; 25 W. R. 411.—Q.B.; *affirmed*, 47 L. J. Q. B. 284; 3 Q. B. D. 134; 37 L. T. 623; 26 W. R. 863.—C.A.; and 48 L. J. Q. B. 22; 3 App. Cas. 1029; 39 L. T. 306; 26 W. R. 863.—H.L. (E.).

Wallis v. L. & S. W. Ry., *discussed and applied*.

Caledonian Ry. v. Guild (1873) 1 Rettle 198.—CT. OF SESS., *commented on*.

Brown v. G. W. Ry. (1882) 51 L. J. Q. B. 529; 9 Q. B. D. 744, 750; 47 L. T. 216; 30 W. R. 671; 46 J. P. 803.—FIELD and NORTH, JJ.; *affirmed*, C.A.

Wallis v. L. & S. W. Ry. and Caledonian Ry. v. Guild, *referred to*.

North Central Wagon Co. v. Manchester, Sheffield and Lincolnshire Ry. (1887) 56 L. J. Ch. 609; 35 Ch. D. 191, 225; 56 L. T. 755; 35 W. R. 447.—C.A.; *affirmed*, (1888) 58 L. J. Ch. 219; 13 App. Cas. 554; 59 L. T. 730; 37 W. R. 305.—H.L. (E.).

Toomer v. L. C. & D. Ry. (1877) 47 L. J. Ex. 276; 2 Ex. D. 450; 37 L. T. 161; 26 W. R. 31.—CLEASBY, B. and HAWKINS, J., *considered*.

Warwick Canal Co. v. Birmingham Canal Co. (1879) 5 Ex. D. 1; 48 L. J. Ex. 550; 40 L. T. 846.

POLLOCK, B.—I am not aware of any decision which throws light upon this question, unless it be *Toomer v. L. C. & D. Ry.*, where it was held that the Commissioners had exceeded their jurisdiction in ordering a company to do some act which they had no power to do except with the consent of another company. The difficulty in carrying out the order in that case was to a great extent of a physical character, but the objection to the order was in principle much the same as in the present case.—p. 12.

Barret v. G. N. Ry. and Midland Ry., In re (1857) 26 L. J. C. P. 33; 1 C. B. (N.S.) 423.—C.P., *referred to*.

Beadall and Eastern Counties Ry., In re (1857) 26 L. J. C. P. 250; 2 C. B. (N.S.) 509; 5 W. R. 650.—C.P.

S. E. Ry. v. Ry. Commissioners and Hastings Corporation (1880) 49 L. J. Q. B. 273; 5 Q. B. D. 217; 41 L. T. 760; 28 W. R. 464; 44 J. P. 362.—Q.B.D.; LUSH, J., *dissenting; reversed*, (1881) 50 L. J. Q. B. 201; 6 Q. B. D. 586; 44 L. T. 203; 45 J. P. 388; 3 Ry. & Can. Traff. Cas. 464.—C.A.; SELBORNE, L.C. and COLERIDGE, C.J., BRETT, L.J. *dissenting*.

S. E. Ry. v. Ry. Commissioners and Hastings Corporation.

Discussed and distinguished, G. W. Ry. v. Ry. Commissioners, *Brown, In re* (1881) 50 L. J. Q. B. 483; 7 Q. B. D. 182, 186; 45 L. T. 206; 29 W. R. 901; 45 J. P. 35.—FIELD and MANISTY, JJ. (*affirmed*, C.A.); *applied*, Huddersfield Corporation v. G. N. Ry. (1881) 50 L. J. Q. B. 587, 590.—FIELD and MANISTY, JJ.; *discussed*, Reg. v. Ry. Commissioners and Distington Iron Co. (1889)

58 L. J. Q. B. 233; 22 Q. B. D. 642, 647; 60 L. T. 606; 37 W. R. 446; 6 Ry. & Can. Traff. Cas. 108; 53 J. P. 533.—HUDDLESTON, B. and MANISTY, J.; Newry Navigation Co. v. G. N. (Ireland) Ry. (1889) 7 Ry. & Can. Traff. Cas. 176.—RY. COMMS.: Winsford Local Board v. Cheshire Lines Committee (1890) 59 L. J. Q. B. 372; 24 Q. B. D. 456; 62 L. T. 268; 38 W. R. 511; 7 Ry. & Can. Traff. Cas. 72.—RY. COMMS.; Reg. v. G. W. Ry. (1893) 62 L. J. Q. B. 572; 9 R. 1; 69 L. T. 572.—COLERIDGE, C.J. and CAVE, J. (*affirmed*, C.A.).

S. E. Ry. v. Ry. Commissioners and Hastings Corporation, *applied*.

Winsford Local Board v. Cheshire Lines Committee (*supra*), *discussed*.

Glamorganshire County Council v. G. W. Ry. (1894) 8 Ry. & Can. Traff. Cas. 196.—RY. COMMS.

S. E. Ry. v. Ry. Commissioners and Hastings Corporation, *applied*.

Winsford Local Board v. Cheshire Lines Committee, *overruled*.

Darlaston Local Board v. L. & N. W. Ry. (1894) 63 L. J. Q. B. 826; [1894] 2 Q. B. 694, 698; 9 R. 712; 71 L. T. 461; 43 W. R. 29; 8 Ry. & Can. Traff. Cas. 216.—C.A.

S. E. Ry. v. Ry. Commissioners and Hastings Corporation.

Discussed, West Ham Corporation v. G. E. Ry. (1895) 64 L. J. Q. B. 340; 72 L. T. 395; 9 Ry. & Can. Traff. Cas. 7.—RY. COMMS.: *applied*, Milner v. G. N. Ry. (1900) 69 L. J. Q. B. 427; [1900] 1 Q. B. 795; 82 L. T. 187; 48 W. R. 387; 64 J. P. 291.—C.A. A. L. SMITH, COLLINS and ROMER, L.JJ.

S. E. Ry. v. Ry. Commissioners and Hastings Corporation and Darlaston Local Board v. L. & N. W. Ry. (1894) 63 L. J. Q. B. 826; [1894] 2 Q. B. 694; 9 R. 712; 71 L. T. 461; 43 W. R. 29; 8 Ry. & Can. Traff. Cas. 216.—C.A.; *reversing* (1893) [1894] 2 Q. B. 45.—RY. COMMS., *discussed and not applied*.

Cowan & Sons, Limited v. North British Ry. (1901) 3 Fraser 677.—CT. OF SESS.; LORDS YOUNG and MONCREIFF *dissenting*; *affirming* RY. COMMS.

Cowan & Sons v. North British Ry., *considered*.

Lancashire Brick and Terra Cotta Co. v. Lancashire and Yorkshire Ry. (1902) 71 L. J. K. B. 431; [1902] 1 K. B. 651; 86 L. T. 176.—C.A. COLLINS, M.R., ROMER and MATHEW, L.JJ.

Dickson v. G. N. Ry. (1886) 56 L. J. Q. B. 112; 18 Q. B. D. 176; 55 L. T. 868; 35 W. R. 202; 51 J. P. 388.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ., *considered*.

Winsford Local Board v. Cheshire Lines Committee (1890) 59 L. J. Q. B. 372; 24 Q. B. D. 456; 62 L. T. 268; 38 W. R. 511; 7 Ry. & Can. Traff. Cas. 72.—RY. COMMS. (*see supra*); Glamorganshire County Council v. G. W. Ry. (1894) 8 Ry. & Can. Traff. Cas. 196.—RY. COMMS.; *Murphy v. Midland Gt. Western (Ireland) Ry.* (1902) [1903] 2 Ir. R. 5.—K.B.D. *And see "CARRIERS,"* vol. i., col. 307.

Milner v. G. N. Ry. (1900) 69 L. J. Q. B. 427; [1900] 1 Q. B. 795; 82 L. T. 187; 48 W. R. 387; 64 J. P. 291.—C.A., *distinguished*.

Caledonian Ry. v. Breslin (1900) 2 Fraser 1158.—CT. OF SESS.

THE LORD PRESIDENT.—The appellants relied upon *Milner v. G. N. Ry.*, where compensation was refused to a barmaid who was injured by the fall of a framed sign-board in the station refreshment room at Peterborough. It appears from the report that the refreshment room was kept by the company in its own hands, and not let to third parties, as is often done, both in the case of refreshment rooms and bookstalls. Whether such places are let or not, they are in degree similar to a smithy used for shoeing the horses employed in carrying on the proper business of the company.—p. 1161.

LORD ADAM to the same effect.

Garton v. G. W. Ry. (1859) 28 L. J. C. P. 158; 5 C. B. (N.S.) 669; 5 Jur. (N.S.) 685.—C.P., *referred to*.

Parkinson v. G. W. Ry. (1871) 40 L. J. C. P. 222; L. R. 6 C. P. 554, 562; 24 L. T. 830; 19 W. R. 1088.—C.P.

Greenock and Wemyss Bay Ry. v. Caledonian Ry. (No. 3) (1878) 5 Fraser 995; 3 Ry. & Can. Traff. Cas. 145.—RY. COMMS., *approved and applied*.

G. W. Ry. v. Central Wales and Carmarthen Junction Ry. (1882) 52 L. J. Q. B. 211; 10 Q. B. D. 235; 48 L. T. 234, 315; 31 W. R. 821; 4 Ry. & Can. Traff. Cas. 110.—FIELD and STEPHEN, JJ.

Greenock and Wemyss Bay Ry. v. Caledonian Ry. (No. 3). *applied*.

G. W. Ry. v. Central Wales and Carmarthen Ry. *referred to*.

Dilcot, Newbury and Southampton Ry. v. G. W. Ry. (1896) 9 Ry. & Can. Traff. Cas. 210.—RY. COMMS., affirmed on the facts (*post*).

Swindon, Marlborough and Andover Ry. v. G. W. Ry. (1884) 4 Ry. & Can. Traff. Cas. 349.—RY. COMMS., *distinguished*.

Dilcot, Newbury and Southampton Ry. v. G. W. Ry. (1896) 9 Ry. & Can. Traff. Cas. 210.—RY. COMMS., affirmed on the facts (*post*).

Severn and Wye Ry. v. G. W. Ry. (1886) 5 Ry. & Can. Traff. Cas. 156.—RY. COMMS., *distinguished*.

Uckfield Local Board v. L. B. & S. C. Ry. (1875) 2 Ry. & Can. Traff. Cas. 214.—RY. COMMS., *followed*.

Dilcot, Newbury and Southampton Ry. v. G. W. Ry. (1896) 9 Ry. & Can. Traff. Cas. 210.—COLLINS, J. and SIR F. PEEL: LORD COBHAM dissenting on the facts; affirmed on the facts (*post*).

G. W. Ry. v. Severn and Wye Ry. (1887) 5 Ry. & Can. Traff. Cas. 170, 193.—RY. COMMS., *explained and disapproved*.

Sussex County Council v. L. B. & S. C. Ry. (1892) 8 Ry. & Can. Traff. Cas. 17.—RY. COMMS., *approved*.

Dilcot, Newbury and Southampton Ry. v. G. W. Ry. (1896) 66 L. J. Q. B. 33; [1897] 1 Q. B. 33; 75 L. T. 401; 45 W. R. 282.—C.A.

ESHER, M.R.—The question of law which I

think Collins, J., intended to decide was that the Court, in dealing with the question of through booking, is not bound by considerations of the advantage to the public, and the other considerations introduced by sect. 25 of the Railway and Canal Traffic Act, 1888. He thought the decision of Mr. Commissioner Miller in the earlier case of *G. W. Ry. v. Severn and Wye Ry.*, until it was overruled was binding upon him, and accordingly he held that as a matter of law the Court could decide a question as to through booking without having regard to the limitations and conditions which in deciding a question of through rates they are bound to take into consideration. If this was what Collins, J., held as a question of law, then I am bound to say that the decision is wrong.—p. 35.

LOPES, L.J.—I do not think that Collins, J., meant to hold that through booking must be granted as a matter of right. All he meant, I think, to decide was that slight evidence would be sufficient to justify the Court in making the order. For myself, I think that through booking can be ordered without granting a through rate. . . . I agree with what was said by Wills, J., in *Sussex County Council v. L. B. & S. C. Ry.*—namely, "We think that through booking, which is a small matter comparatively, but which is yet a great convenience, ought to be included amongst the reasonable facilities, but, except in one particular about to be mentioned, our order is not intended to have any further operation."—p. 35. RIGBY, L.J. concurred.

Chatterley Iron Co. v. North Staffordshire Ry. (1878) 3 Ry. & Can. Traff. Cas. 238.—RY. COMMS. and Q.B.D., *referred to*.

Aberdeen Commercial Ry. v. Gt. North of Scotland Ry. (1878) 3 Ry. & Can. Traff. Cas. 235.—CT. OF SESS., *explained*.

G. W. Ry. v. Ry. Commissioners, Brown, In re (1881) 50 L. J. Q. B. 483; 7 Q. B. D. 182; 45 L. T. 206; 29 W. R. 901; 46 J. P. 35.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.

G. W. Ry. v. Ry. Commissioners, Brown, In re, applied.

Reg. v. Ry. Commissioners and Distington Iron Co. (1889) 22 Q. B. D. 642; 58 L. J. Q. B. 233; 60 L. T. 606; 37 W. R. 446; 53 J. P. 533; 6 Ry. & Can. Traff. Cas. 108.—HUDDLESTON, B. and MANISTY, J.

HUDDLESTON, B.—*Brown's* case decided that the question of excessive charges was not a question for the Railway Commissioners, because the parties would have their remedy in the Courts. If the railway charges were excessive they could go into the County Court or the Superior Court, and recover the surplus; or if such charges were only threatened, the parties could go into the Courts and obtain an injunction.—p. 649.

G. W. Ry. v. Ry. Commissioners, Brown, In re, followed.

West Ham Corporation v. G. E. Ry. (1895) 64 L. J. Q. B. 340; 72 L. T. 395; 9 Ry. & Can. Traff. Cas. 7.—RY. COMMS.

West v. L. & N. W. Ry. (1870) 39 L. J. C. P. 282; L. R. 5 C. P. 622; 23 L. T. 371; 18 W. R. 1028.—C.P.: M. SMITH and

BRETT, JJ. *dissenting*, and

Baxendale v. L. & S. W. Ry. (1866) 35 L. J. Ex. 108; L. R. 1 Ex. 137; 4 H. & C.

130 : 12 Jur. (N.S.) 274 ; 14 L. T. 26 ; 14 W. R. 458.—EX., *discussed and explained*.
East and West India Dock Co. v. Shaw, Savill and Albion Co. (1888) 57 L. J. Ch. 1038 ; 39 Ch. D. 524, 532 ; 60 L. T. 142 ; 6 Ry. & Can. Traff. Cas. 94.—CHITTY, J. *See* judgment at length.

Pickering Phipps v. L. & N. W. Ry. (1892) 8 Ry. & Can. Traff. Cas. 83.—RY. COMMS., *applied*.

Liverpool Corn Traders' Association v. G. W. Ry. (1892) 8 Ry. & Can. Traff. Cas. 114.—RY. COMMS. : SIR F. PEEL dissenting ; affirmed, C.A. ESHER, M.R., BOWEN and KAY, L.JJ.

Manchester Ship Canal Co. v. Midland Ry. (1897) 10 Ry. & Can. Traff. Cas. 54.—RY. COMMS., *discussed and distinguished*.

London and India Docks Co. v. G. E. Ry. (1902) 71 L. J. K. B. 369 ; [1902] 1 K. B. 568 ; 86 L. T. 339 ; 50 W. R. 461.—C.A. COLLINS, M.R. and MATHEW, J. : reversing (1901) 71 L. J. K. B. 153.—RY. COMMS., WRIGHT, J. and VISCOUNT COBHAM. SIR F. PEEL dissenting.

COLLINS, M.R.—I was a party to that decision, as also was Sir F. Peel. . . . The decision was in favour of the applicants in that case simply and solely upon grounds which do not exist here, and was based upon very special circumstances. The Canal Company had in that case special powers authorising them to charge tolls on their railways, and had an order, made under statutory power, regulating the tolls and charges which they were to make. The Court, therefore, thought that they were in the position of persons who owned a railway in the proper sense of the term, which the public were entitled to use at certain given rates, and that that fact put them in the position of a railway company so as to bring it within the jurisdiction of the Railway Commissioners to grant them a through rate. I think that that was an extreme case decided on very special circumstances, and no such special circumstances exist here.—p. 379.

Mansion House Association v. G. W. Ry. (1895) 64 L. J. Q. B. 434 ; [1895] 2 Q. B. 141 ; 14 R. 429 ; 72 L. T. 523 ; 9 Ry. & Can. Traff. Cas. 58.—C.A. ; and **Pickford v. Grand Junction Ry.** (1842) 10 M. & W. 399.—EX., *referred to*.

Rickett Smith & Co. v. Midland Ry. (1895) 65 L. J. Q. B. 274 ; [1896] 1 Q. B. 260 ; 9 Ry. & Can. Traff. Cas. 107.—RY. COMMS.

Canada Southern Ry. v. International Bridge Co. (1883) 8 App. Cas. 723.—P.C., *principle applied*.

Rickett Smith & Co. v. Midland Ry. (1895) 65 L. J. Q. B. 264 ; [1896] 1 Q. B. 260 ; 2 Ry. & Can. Traff. Cas. 107.—RY. COMMS.

Canada Southern Ry. v. International Bridge Co., *discussed*.

Rickett Smith & Co. v. Midland Ry., *approved*.

John Watson, Ltd. v. Caledonian Ry. (1901) 3 Fraser 791.—LORD STORMONTH-DARLING : affirmed, CT. OF SESS.

Harborne Ry. v. L. & N. W. Ry. (1875) 2 Ry. & Can. Traff. Cas. 169.—RY. COMMS.

Referred to, **Jones v. N. E. Ry.** (1875) 2 Ry. & Can. Traff. Cas. 169.—RY. COMMS. ; *discussed and not applied*, **Pelsall Coal and Iron Co. v. L. &**

N. W. Ry. (No. 2) (1891) 7 Ry. & Can. Traff. Cas. 36.—RY. COMMS.

Jones v. N. E. Ry. (1875) 2 Ry. & Can. Traff. Cas. 208.—RY. COMMS., *referred to*.
New Union Mills Co. v. G. W. Ry. (1896) 65 L. J. Q. B. 493 ; [1896] 2 Q. B. 290 ; 74 L. T. 791 ; 9 Ry. & Can. Traff. Cas. 152.—RY. COMMS.

New Union Mills Co. v. G. W. Ry., *applied*.
Salt Union v. North Staffordshire Ry. (1897) 67 L. J. Q. B. 889 ; [1898] 2 Q. B. 435 ; 79 L. T. 16 ; 47 W. R. 4.—WRIGHT, J. (affirmed, (1898).—C.A. : V. WILLIAMS, L.J. not assenting) ; **Stone v. Midland Ry.** (1903) 72 L. J. K. B. 377 ; [1903] 1 K. B. 741, 747 ; 88 L. T. 92.—K.B.D.

Webb, In re (1818) 8 Taunt. 443 ; 2 Moore 500 ; 20 R. L. 520.—C.P., *principle applied*.
Chapman v. G. W. Ry. (1880) 49 L. J. Q. B. 420 ; 5 Q. B. D. 278, 284 ; 42 L. T. 252 ; 28 W. R. 566 ; 44 J. P. 363.—Q.B.D.

Webb, In re, *referred to*.

Chapman v. G. W. Ry., *applied*.

Manchester and Northern Counties Federation v. Lancashire and Yorkshire Ry. (1897) 76 L. T. 786.—RY. COMMS.

Pidcock v. Manchester, Sheffield and Lincolnshire Ry. (1893) 9 Ry. & Can. Traff. Cas. 45.—RY. COMMS., *referred to*.

Birmingham Corporation v. Midland Ry. (1896) 9 Ry. & Can. Traff. Cas. 165.—RY. COMMS.

Birmingham Corporation v. Midland Ry., *discussed and applied*.

Salt Union v. North Staffordshire Ry. (1898) 67 L. J. Q. B. 889 ; [1898] 2 Q. B. 435 ; 79 L. T. 16 ; 47 W. R. 4.—C.A. A. L. SMITH and RIGBY, L.JJ., V. WILLIAMS, L.J. not assenting.

Crompton v. Lancashire and Yorkshire Ry. (1900) 17 T. L. R. 26.—RY. COMMS. ; *reversed*, (1902) 18 T. L. R. 322.—C.A.

Lancashire Brick and Terra Cotta Co. v. Lancashire and Yorkshire Ry. (1901) 71 L. J. K. B. 141 ; [1902] 1 K. B. 381 ; 86 L. T. 26.—RY. COMMS. ; *reversed*, (1902) 71 L. J. K. B. 431 ; [1902] 1 K. B. 651 ; 86 L. T. 176.—C.A.

Stokes Bay Ry. and Pier Co. v. L. & S. W. Ry. (1875) 2 Ry. & Can. Traff. Cas. 143.—RY. COMMS., and **Portpatrick Ry. v. Caledonian Ry.** (1878) 3 Ry. & Can. Traff. Cas. 189.—RY. COMMS., *disapproved*.

G. W. Ry. v. Waterford and Limerick Ry. (1881) 17 Ch. D. 493 ; 50 L. J. Ch. 513 ; 44 L. T. 723 ; 29 W. R. 826.—C.A.

BRETT, L.J.—We are then met by the decision of the Railway Commissioners themselves. In 1875, the first case that was cited to us was heard. Strangely enough, notwithstanding the argument we have heard, on the first occasion when this question of their jurisdiction was challenged before them, they hardly entered upon the matter. They did not hear or call upon the counsel who were to support their jurisdiction, but at once, and without giving any reasons at all, determined that they had this jurisdiction. That being so in 1875, in 1878, when the second case was heard they seem to have been called upon to listen to counsel. The Lord Advocate and Mr. Kay, who I suppose did

that which all counsel ought to do, insisted upon being heard. They no doubt adduced an elaborate argument before the Commissioners. Then the Commissioners decided this question, but I think their judgment contains the decision and not the reason for it. Therefore it hardly helps us.—p. 507.

G. W. Ry. v. Waterford and Limerick Ry.
(*supra*), *explained*.

Stanward v. St. Giles, Camberwell (Vestry) (1882) 51 L. J. Ch. 629; 20 Ch. D. 190; 46 L. T. 243; 30 W. R. 693.—JESSEL, M.R. See "INJUNCTION."

G. W. Ry. v. Waterford and Limerick Ry.
referred to.

G. W. Ry. v. Halesowen Ry. (1883) 52 L. J. Q. B. 473, 478; 48 L. T. 710; 4 Ry. & Can. Traff. Cas. 274.—A. L. SMITH, J., GROVE, J. doubting.

G. W. Ry. v. Waterford and Limerick Ry.
discussed and not applied.

Reg. v. Midland Ry. (1887) 56 L. J. Q. B. 585; 19 Q. B. D. 540, 549; 57 L. T. 619; 36 W. R. 270; 51 J. P. 550; S.C. *nom.* Midland Ry. v. G. W. Ry. (No. 3), 5 Ry. & Can. Traff. Cas. 267.—STEPHEN and WILLS, JJ.

Reg. v. Midland Ry., distinguished.

Manchester Ship Canal Co. v. Manchester Racecourse Co. (1900) 69 L. J. Ch. 850; [1900] 2 Ch. 352; 83 L. T. 274.—FARWELL, J.: affirmed, (1901) 70 L. J. Ch. 468; [1901] 2 Ch. 37; 84 L. T. 436; 49 W. R. 418.—C.A.

Hall v. L. B. & S. C. Ry. (1885) 15 Q. B. D. 505; 53 L. T. 345; 5 Ry. & Can. Traff. Cas. 28.—WILLS and MANISTY, JJ.; affirmed, (1886) 55 L. J. Q. B. 328; 17 Q. B. D. 230; 54 L. T. 713; 34 W. R. 558; 5 Ry. & Can. Traff. Cas. 28.—C.A.

Hall v. L. B. & S. C. Ry. and Foreman v. G. W. Ry. (1878) 38 L. T. 851.—EX. D.

Referred to, McCarthy v. G. W. Ry. (1885) 17 L. R. Ir. 1.—C.A.; reversed *nom.* G. W. Ry. v. McCarthy (1887) 56 L. J. P. C. 33; 12 App. Cas. 218; 56 L. T. 582; 35 W. R. 429; 51 J. P. 532.—H.L. (IR.).

Hall v. L. B. & S. C. Ry., referred to.

N. E. Ry. v. North British Ry. (1897) 25 Rettie 333.—CT. OF SESS. *And see* "CARRIERS," vol. i., col. 310.

Foster v. G. W. Ry. (1882) 51 L. J. Q. B. 233; 8 Q. B. D. 515; 46 L. T. 74; 30 W. R. 398; 4 Ry. & Can. Traff. Cas. 58.—C.A., *applied*.

Lambton v. Parkinson (1887) 35 W. R. 545.—Q.B.D.

Foster v. G. W. Ry., referred to.

Madden's Estate, *In re* (1901) [1902] 1 Ir. R. 63.—C.A. FITZGIBBON, WALKER and HOLMES, L.JJ. *And see* "COSTS," vol. i., col. 721.

8. ABANDONMENT, ARRANGEMENT, WINDING-UP AND EXECUTION.

Brampton and Longtown Ry., *In re* (1870) L. R. 10 Eq. 613; 39 L. J. Ch. 681; 23 L. T. 356; 18 W. R. 994.—BACON, V.-C., *followed*.

Barry Ry., *In re* (1876) 46 L. J. Ch. 206; 4 Ch. D. 315; 37 L. T. 125; 25 W. R. 201.—MALINS, V.-C.; affirmed, C.A.

Potteries, Shrewsbury and North Wales Ry., *In re* (1883) 53 L. J. Ch. 556; 25 Ch. D. 251; 50 L. T. 104; 32 W. R. 300.—C.A., *considered*.

Ruthin and Cerrig-y-Druidion Ry. Act, *In re* (1886) 32 Ch. D. 438; 56 L. J. Ch. 30; 55 L. T. 237; 34 W. R. 581.—C.A.

COTTON, L.J.—The claim depends on sect. 23 of the Act by which the company was established, which is in the usual form, and provides for the compensation of landowners whose land has been rendered less valuable by the abandonment of the railway. I say, "by the abandonment of the railway," because although the Act uses the words "rendered less valuable by the commencement, construction, or abandonment of the railway," the appellant makes no claim except in respect of the abandonment of the railway. We had those words before us recently in *Potteries, Shrewsbury and North Wales Ry., In re*, in which we decided that the words "by the commencement, construction, or abandonment of the railway" were disjunctive, and the landowner's claim in this case is confined to injury from the abandonment of the railway.—p. 441.

LINDLEY, L.J.—*In . . . Potteries, &c. Ry., In re*, it was established that some injury was done, and we directed an inquiry as to the amount. In the present case there has been an inquiry, and the claimant fails to show that the property has been diminished in value.—p. 444.

LOPES, L.J. (who dissented on one point).—With respect to the measure of the injury, it has been laid down in *Potteries, &c. Ry., In re*, that it is to be determined by the value of the land immediately before and immediately after the abandonment. That is a decision by which I am bound, although it seems to me that the value of the land must be very much the same immediately before and immediately after the act of abandonment; because notice of the intention to abandon the railway must be given some time before the abandonment, and after that time there can be much change in the value of the land.—p. 445.

Cambrian Rys. Scheme, *In re* (1868) 37 L. J. Ch. 409; L. R. 3 Ch. 278; 18 L. T. 522; 16 W. R. 346.—CAIRNS, L.J., *discussed and applied*.

Bristol and North Somerset Ry., *In re* (1868) 37 L. J. Ch. 851; L. R. 6 Eq. 448, 452; 16 W. R. 1112.—GIFFARD, V.-C.

Cambrian Rys. Scheme, *In re*, explained.

Irish North-Western Rys. Scheme, *In re* (1868) Ir. R. 3 Eq. 190.—C.A. L.C. and L.J.; *Potteries, Shrewsbury and North Wales Ry., In re* (1869) 39 L. J. Ch. 273; L. R. 5 Ch. 67, 70; 22 L. T. 53; 18 W. R. 155.—GIFFARD, L.J.

Cambrian Rys. Scheme, *In re*.

Principle applied, Somerset and Dorset Ry., *In re* (1869) 21 L. T. 656; 18 W. R. 332.—STUART, V.-C.; Stephens v. Cork and Kinsale Junction Ry. (1872) Ir. R. 6 Eq. 604.—SULLIVAN, M.R.; *referred to*, Navan and Kingscourt Ry., *In re*, Price, *Ex parte* (1885) 17 L. R. Ir. 398.—C.A. ASHBOURNE, L.C. and MORRIS, C.J., FITZGIBBON and BARRY, L.JJ. *dissenting*.

Cambrian Rys. Scheme, *In re*, discussed and explained.

East and West India Dock Co., *In re* (1890) 44 Ch. D. 38, 45; 62 L. T. 239; 38 W. R. 516.—

CHITTY, J. and C.A. COTTON, LINDLEY and LOPES, L.JJ.

COTTON, L.J.—It [*Cambrian Rys. Scheme, In re*] does not directly bear on the question which is now before us—the confirmation of the scheme—but it lays down usefully the principles which have to be considered on an application to confirm a scheme. In that case there was an application under sect. 7 of the [Railway Companies] Act, which provides that after the filing of the scheme it shall be lawful for the Court to stay any action, and the question there was whether the Court would, having regard to the scheme, stay the action. What Lord Cairns said was, that the scheme proposed to do that which it could not do so as to bind the creditors, and he also said that it was not a scheme on the ground of which he would stay the action of a creditor, the creditor not in any way being bound by the provisions of that scheme. Lord Cairns lays down a principle which, I think, will be useful in guiding us to a decision whether Chitty, J. was right in confirming this scheme: “Without professing to lay down any rule which is to meet every case, I cannot think it would be right that the Court should suspend the proceedings of any unpaid landowner, or, indeed, of any outside creditor, unless it saw that a scheme was proposed in good faith, which, if it reached maturity, would afford a reasonable prospect of providing for the payment of the claims of creditors, and thus compensate them for a temporary suspension of their remedies.” . . . Giffard, L.J. there [*Bristol and North Somerset Ry., In re, post*] referred to the case before Lord Cairns, and held that as there were provisions which directly purported to alter the position of the creditors by compelling them to give up their position as creditors and to take another and different position as shareholders, the scheme ought not to be confirmed without their assent.—p. 61.

Bristol and North Somerset Ry., In re (1868)

37 L. J. Ch. 851; L. R. 6 Eq. 448; 16 W. R. 1112.—GIFFARD, V.-C., *explained and distinguished*.
Irish North-Western Rys. Scheme, In re (1868) Ir. R. 3 Eq. 190.—L.C. and L.J.

Bristol and North Somerset Ry., In re.

Principle applied, Somerset and Dorset Ry., In re (1869) 21 L. T. 656; 18 W. R. 332.—STUART, V.-C.; Stephens v. Cork and Kinsale Junction Ry. (1872) Ir. R. 6 Eq. 604.—SULLIVAN, M.R.; *referred to*, West Cork Ry., In re (1873) Ir. R. 7 Eq. 96.—CHATTERTON, V.-C.; Navan and Kingscourt Ry., In re, Price, Ex parte (1885) 17 L. R. Ir. 398.—C.A. FITZGIBBON and BARRY, L.JJ. *dissenting* (affirming CHATTERTON, V.-C.); East and West India Docks Co., In re (1890) 44 Ch. D. 38, 44; 62 L. T. 239; 38 W. R. 516.—CHITTY, J. and C.A. (*see supra*).

East and West Junction Ry., In re (1869)

38 L. J. Ch. 522; L. R. 8 Eq. 87; 21 L. T. 86.—JAMES, V.-C., *applied*.
Stephens v. Cork and Kinsale Junction Ry. (1872) Ir. R. 6 Eq. 604.—SULLIVAN, M.R.; East and West India Dock Co., In re (1890) 44 Ch. D. 38, 44; 62 L. T. 239; 38 W. R. 516.—CHITTY, J. (see judgment at length); affirmed, C.A. COTTON, LINDLEY and LOPES, L.JJ.

Potteries, Shrewsbury and North Wales Ry.

v. Minor (1871) 40 L. J. Ch. 685; L. R. 6 Ch. 621; 25 L. T. 522; 19 W. R. 883.—L.JJ., *discussed*.
London Financial Association v. Wrexham, Mold and Connah's Quay Ry. (1874) L. R. 18 Eq. 566, 572; 30 L. T. 491.—MALINS, V.-C.

Stevens v. Mid-Hants Ry. (1873) 42 L. J.

Ch. 694; L. R. 8 Ch. 1064; 29 L. T. 318; 21 W. R. 858.—L.JJ.

Referred to, Adams v. Angell (1876) 25 W. R. 139.—HALL, V.-C. (affirmed, (1877) 46 L. J. Ch. 352; 5 Ch. D. 634, 641; 36 L. T. 334.—C.A.); *discussed*, Gokulloss Gopalloss v. Rambux Stochaud (1884) L. R. 11 Ind. App. 126, 131.—P.C.; *applied*, Navan and Kingscourt Ry., In re, Price, Ex parte (1885) 17 L. R. Ir. 398, 411.—C.A. ASHBOURNE, L.C. and MORRIS, C.J., FITZGIBBON and BARRY, L.JJ. *dissenting*; *discussed*, East and West India Dock Co., In re (1890) 44 Ch. D. 38, 44; 62 L. T. 239; 38 W. R. 516.—CHITTY, J. (affirmed, C.A. COTTON, LINDLEY and LOPES, L.JJ.).

Devon and Somerset Ry., In re (1868) L. R.

6 Eq. 615.—GIFFARD, V.-C., *discussed*.
Stephens v. Cork and Kinsale Junction Ry. (1872) Ir. R. 6 Eq. 604.—SULLIVAN, M.R.

Devon and Somerset Ry., In re, order followed.

Devas v. East and West India Dock Co. (1889) 58 L. J. Ch. 523; 61 L. T. 217.

CHITTY, J.—Sir G. Giffard, when V.-C., stated the object of the Act [Railway Companies Act, 1867] in *Devon and Somerset Ry., In re*, to be “to prevent a multiplicity of actions and the increase of costs, in order that railway companies might have time to see whether they could arrange with their creditors.” That, I take it, is a sufficient statement of the general object of this Act of Parliament. . . . consequently I make the same order as was made in *Devon and Somerset Ry., In re*, in which the V.-C. restrained execution and so forth, without the leave of the Court, but without prejudice to any application which might be made by leave.—pp. 523-4.

Hull and Hornsea Ry., In re (1866) 35 L. J.

Ch. 838; L. R. 2 Eq. 262; 14 L. T. 855; 14 W. R. 758.—WOOD, V.-C., *order followed*.

Bishop's Waltham Ry., In re (1866) 14 W. R. 1008.—ROMILLY, M.R.; S. C. on appeal, L. R. 2 Ch. 382; 15 W. R. 96.—TURNER and CAIRNS, L.JJ.

Bowen v. Brecon and Merthyr Tydfil Junction Ry. (1867) 36 L. J. Ch. 344; L. R.

3 Eq. 541; 16 L. T. 6; 15 W. R. 482.—WOOD, V.-C., *questioned*.

Potteries, Shrewsbury and North Wales Ry., In re (1869) L. R. 5 Ch. 67; 18 W. R. 155.

GIFFARD, L.J. (during the argument) referred to *Bowen v. Brecon Ry.*, in which it was held by Hatherley, L.C., then V.-C., that a debentureholder who issued execution could only do so as a trustee on behalf of himself and the other judgment creditors, and said that if the same question was involved in the present case, he should wish it to be heard by the full Court in order that the principle of that decision might be reconsidered.—p. 69. *And see post*, col. 2721.

Bowen v. Brecon and Merthyr Tydfil Ry.,
(*supra*), *referred to*.

Potteries, Shrewsbury and North Wales Ry. v. Minor (1871) 40 L. J. Ch. 685; L. R. 6 Ch. 621; 25 L. T. 522; 19 W. R. 883.—L.JJ.

Bowen v. Brecon and Merthyr Tydfil Ry.,
applied.

Usborne v. Limerick Market Trustees (1898) [1899] 1 Ir. R. 229, 242.—PORTER, M.R.

Potteries, Shrewsbury and North Wales Ry., In re (1869) 39 L. J. Ch. 77.—MALINS, V.-C.; Minor (1871) 40 L. J. Ch. 273; L. R. 5 Ch. 67; 22 L. T. 53; 18 W. R. 155.—GIFFARD, L.J.

Potteries, Shrewsbury and North Wales Ry., In re, commented on.

Usborne v. Limerick Market Trustees (1898) [1899] 1 Ir. R. 229, 243.—M.R.

Gardner v. L. C. & D. Ry., Grissell, Ex parte
(1867) L. R. 2 Ch. 385; 15 L. T. 644; 15 W. R. 324.—L.JJ., *order followed*.

Bristol and North Somerset Ry., In re (1869) 20 L. T. 70.—MALINS, V.-C.

Gardner v. L. C. & D. Ry., Grissell, Ex parte.
referred to.

Stagg v. Medway (Upper) Navigation Co. (1902) 71 L. J. Ch. 177; [1903] 1 Ch. 169, 174; 87 L. T. 705; 51 W. R. 329.—C.A.

COZENS-HARDY, L.J.—It has repeatedly been held that a judgment creditor to whom land has been delivered in execution may obtain an order for sale of superfluous lands, although under ordinary circumstances the Court would in the first instance only direct an enquiry as to what lands are superfluous and whether there are any incumbrancers. See *Gardner v. L. C. & D. Ry., Grissell, Ex parte*.—p. 183.

Gardner v. L. C. & D. Ry. (1867) 36 L. J. Ch. 323; L. R. 2 Ch. 201; 15 L. T. 552; 15 W. R. 324.—L.JJ.

Explained, *Bowen v. Brecon Ry., In re*, Howell, *Ex parte* (1867) 36 L. J. Ch. 344; L. R. 3 Eq. 541, 548; 16 L. T. 6; 15 W. R. 482.—WOOD, V.-C.; *applied*. *Kingston v. Cowbridge Ry.* (1871) 41 L. J. Ch. 152.—ROMILLY, M.R.; *Herne Bay Waterworks Co., In re* (1878) 48 L. J. Ch. 69; 10 Ch. D. 42, 46; 39 L. T. 324; 27 W. R. 36.—MALINS, V.-C.; *discussed*, *Manchester and Milford Ry., In re*, *Cambrian Ry., Ex parte* (1880) 49 L. J. Ch. 365; 14 Ch. D. 645, 657; 42 L. T. 714.—C.A.; *referred to*, *Bourgoin v. La Compagnie de Chemin de Fer de Montreal Ottawa et Occidental* (1880) 49 L. J. P. C. 68; 5 App. Cas. 381, 403; 42 L. T. 414.—P.C.; *discussed*, *Cornwall Minerals Ry., In re* (1882) 48 L. T. 41.—KAY, J. and C.A.; *not applied*, *Southern Ry., In re*, *Robson, Ex parte* (1885) 17 L. R. 121, 150.—C.A.; *followed*, *Hope v. Croydon and Norwood Tramways Co.* (1887) 56 L. J. Ch. 760; 34 Ch. D. 730; 56 L. T. 822; 35 W. R. 594.—NORTH, J.

Gardner v. L. C. & D. Ry., discussed.

Redfield v. Corporation of Wickham (1888) 18 App. Cas. 467; 57 L. J. P. 94; 58 L. T. 455.—P.C.

LORD WATSON (for the Court).—The appellants relied upon the authority of *Gardner v. L. C. & D. Ry.* and *Bishop's Waltham Ry., In re* (1866) L. R. 2 Ch. 382; 15 W. R. 96). These cases, which were decided by Earl Cairns (then L.J.)

and Turner, L.J., establish conclusively that, in England, the undertaking of a railway company, duly sanctioned by the legislature, is a going concern, which cannot be broken up or annihilated by the mortgagees or other creditors of the company. The rule thus settled appears to rest upon these considerations,—that, inasmuch as Parliament has made no provision for the transfer of its statutory powers, privileges, duties, and obligations from a railway corporation to any other person, whether individual or corporate, it would be contrary to the policy of the legislature, as disclosed in the general railway statutes, and in the special Acts incorporating railway companies, to permit creditors of any class to issue execution which would have the effect of destroying the undertaking or of preventing its completion.—p. 474.

Gardner v. L. C. & D. Ry.

Referred to, *Thompson, In re*, *Bedford v. Teal* (1889) 59 L. J. Ch. 689; 45 Ch. D. 161, 169; 63 L. T. 471; 39 W. R. 50.—C.A.; *Eastern and Midlands Ry., In re* (1890) 45 Ch. D. 367, 381; 63 L. T. 181, 604.—KAY, J. (affirmed, C.A.); *Eastern and Midlands Ry. (No. 2), In re* (1891) 66 L. T. 153.—KEKEWICH, J.; *Portsmouth Tramways Co., In re* (1892) 61 L. J. Ch. 462; [1892] 2 Ch. 362, 366; 66 L. T. 671; 40 W. R. 553.—STIRLING, J.; *followed*, *Bartlett v. West Metropolitan Tramways Co.* (1891) 63 L. J. Ch. 519; [1894] 2 Ch. 286; 8 B. 259; 70 L. T. 491; 42 W. R. 50; 1 Manson 272.—NORTH, J.; *Marshall v. South Staffordshire Tramways Co.* (1895) 64 L. J. Ch. 481; [1895] 2 Ch. 36; 12 B. 275; 72 L. T. 542; 43 W. R. 469; 2 Manson 292.—C.A.; *applied*, *Pegge v. Neath District Tramways Co.* (1895) 64 L. J. Ch. 737; [1895] 2 Ch. 508; 13 B. 762; 73 L. T. 25; 44 W. R. 72; 2 Manson, 474.—NORTH, J. (compromised on appeal, (1896) 65 L. J. Ch. 536; [1896] 1 Ch. 684.—C.A.); *referred to*, *Usborne v. Limerick Market Trustees* (1898) [1899] 1 Ir. R. 229, 243.—PORTER, M.R.; *Knott End Ry., In re* (1900) [1901] 2 Ch. 8, 13; 70 L. J. Ch. 463; 84 L. T. 433; 49 W. R. 469.—C.A.

Gardner v. L. C. & D. Ry., discussed and applied.

Stagg v. Medway (Upper) Navigation Co. (1902) 72 L. J. Ch. 177; [1903] 1 Ch. 169, 179; 87 L. T. 705; 51 W. R. 329.—C.A. V. WILLIAMS, STIRLING, AND COZENS-HARDY L.JJ.; affirming (1902) 50 W. R. 446.—SWINFEN EADY, J.

V. WILLIAMS, L.J.—The observation of Lord Cairns (then Cairns, L.J.) in *Gardner v. L. C. & D. Ry.*, seems plainly to apply: "It cannot, in my opinion, be doubted but that the company, owing a sum to their contractors for works done, might have paid this sum out of those surplus sale moneys (the claim of debenture-holders being out of the way); and, if so, they might equally, as I think, have given the contractors a charge upon the sale-moneys for the amount." It is true that this observation deals only with proceeds of the sale of surplus lands, and not with surplus lands themselves, but the security given was a charge upon the surplus lands and the rents and proceeds of the sale of such lands, and the principle involved in the observation does not seem to be affected by being applied to the proceeds. I do not gather that Lord Cairns meant to exclude surplus lands, at all events in any case where such lands were extendible by *devisit*, and could thus be commensurably applied to

the satisfaction of the creditors' debt. This principle is recognised in *Blackmore v. Yates* (1867) 36 L. J. Ex. 121; L. R. 2 Ex. 225; 16 L. T. 288; 15 W. R. 750.—EX., where a railway company conveyed to a creditor (before the Act for the protection of rolling-stock) their rolling stock as security. I do not think that one ought to read the observations of Martin, B., declining to determine what the shareholders or the Att.-Gen. might do to prevent the charge being given, as really affecting the principle. It is a remark made *ex abundanti cautela*.—p. 181.

STIRLING and COZENS-HARDY, L.J.J. also discussed *Gardner v. L. C. & D. Ry.* And see "CHARITY," vol. i., col. 341; and "COMPANY," vol. i., col. 460.

Calne Ry., In re (1870) L. R. 9 Eq. 658.—

JAMES, V.-C., *followed*.

Bithray, In re (1889) 59 L. J. Ch. 66; 61 L. T. 383; 38 W. R. 60.—NORTH, J.

Calne Ry., In re, and Ogilvie, In re (1871)

41 L. J. Ch. 336; L. R. 7 Ch. 174; 25 L. T. 860; 20 W. R. 226.—L.J.J., *referred to*.

Stagg v. Medway (Upper) Navigation Co. (1902) 72 L. J. Ch. 177; [1903] 1 Ch. 169, 177; 87 L. T. 705; 51 W. R. 329.—C.A.

V. WILLIAMS, L.J.—In *Calne Ry., In re, and Ogilvie, In re*, the right of a judgment creditor of a railway company to obtain an order for a conveyance in the former case and an order for sale in the latter was recognised.—p. 181.

Cowbridge Ry., In re (1868) 37 L. J. Ch.

306; L. R. 5 Eq. 413; 18 L. T. 102; 16 W. R. 506.—WOOD, V.-C.; and *Guest v.*

Cowbridge Ry. (1868) 37 L. J. Ch. 909; L. R. 6 Eq. 619; 18 L. T. 871; 17 W. R. 7.—HIFARD, V.-C.

Referred to. *Newcastle (Duke), In re, Padwick, Ex parte* (1869) 39 L. J. Ch. 68; L. R. 8 Eq. 700, 707; 21 L. T. 343; 18 W. R. 8.—ROMILLY, M.R.; *Hatton v. Haywood* (1873) 29 L. T. 385; 22 W. R. 53.—MALINS, V.-C. (see vol. i., col. 1415); and (1874) 43 L. J. Ch. 372; L. R. 9 Ch. 229, 234; 30 L. T. 279; 22 W. R. 356.—C.A.; *Anglo-Italian Bank v. Davies* (1878) 47 L. J. Ch. 833; 9 Ch. D. 275, 279; 39 L. T. 244; 27 W. R. 3.—HALL, V.-C. (affirmed, C.A.).

Hull, Barnsley, and West Riding Ry.,

In re (1888) 58 L. J. Ch. 205; 40 Ch. D.

119; 59 L. T. 877; 37 W. R. 145.—

CHITTY, J.; *affirmed*, C.A., *referred to*.

East and West India Dock Co., In re (1890) 44 Ch. D. 38, 49; 62 L. T. 239; 38 W. R. 516.—CHITTY, J.; *affirmed*, C.A.

Hull, Barnsley and West Riding Ry., In re,
applied.

Liskeard and Caradon Ry., In re (1903) 72 L. J. Ch. 754; [1903] 2 Ch. 681, 686; 89 L. T. 437.—SWINFEN EADY, J.

Birmingham and Lichfield Junction Ry.,

In re (1881) 50 L. J. Ch. 594; 18 Ch. D.

155; 45 L. T. 164; 29 W. R. 908.—

JESSEL, M.R., *applied.*

Uxbridge and Rickmansworth Ry., In re, MacIntyre's Case (1889) 59 L. J. Ch. 409; 43 Ch. D. 536, 542; 62 L. T. 347; 38 W. R. 644.—STIRLING, J. (partly affirmed and reversed, C.A.); *West Lancashire Ry., In re* (1890) 63 L. T. 56.—STIRLING, J.

Birmingham and Lichfield Junction Ry., In re, *discussed.*

Knott End Ry., In re (1901) 70 L. J. Ch. 463; [1901] 2 Ch. 8, 12; 84 L. T. 433; 49 W. R. 469.—C.A. V. WILLIAMS, RIGBY and STIRLING, L.J.J.

Bouch v. Sevenoaks, Maidstone and Ton-

bridge Ry. (1879) 48 L. J. Ex. 338; 4

Ex. D. 133; 40 L. T. 560; 27 W. R. 507.

—KELLY, C.B. and HUDDLESTON, B.

Discussed. *Waterford, Dungarvan and Lismore Ry., In re* (1880) 5 L. R. Ir. 102.—SULLIVAN, M.R. (affirmed, C.A. *post*); *disapproved and not followed.* *Waterford, Dungarvan and Lismore Ry., In re, Finlayson, Ex parte* (1880) 5 L. R. Ir. 584.—C.A.; *distinguished.* *Clifford v. Imperial Brazilian, &c. Ry.* (1888) 60 L. T. 60.—HAWKINS, J.

Waterford, Dungarvan and Lismore Ry.,

In re.—M.R. (*supra*).

Distinguished. *Southern Ry., In re* (1880) 5 L. R. Ir. 165.—CHATTERTON, V.-C.; *discussed.* *Southern Ry., In re, Robson, Ex parte* (1885) 17 L. R. Ir. 121, 136.—M.R. (reversed, C.A.); *distinguished.* *Clifford v. Imperial Brazilian, &c. Ry.* (1888) 60 L. T. 60.—HAWKINS, J.

Manchester and Milford Ry., In re (1880)

49 L. J. Ch. 365; 14 Ch. D. 645; 42 L. T.

714.—C.A., *not applied.*

Southern Ry., In re, Robson, Ex parte (1885) 17 L. R. Ir. 121, 149.—C.A.; reversing M.R.

Manchester and Milford Ry., In re, explained.

Knott End Ry., In re (1901) 70 L. J. Ch. 463; [1901] 2 Ch. 8; 84 L. T. 433; 49 W. R. 469.—C.A.; reversing FARWELL, J.

RIGBY, L.J.—But it has been argued that though the two clauses of sect. 4 [Railway Companies Act, 1867]—the first which restricts the right of execution, and the second beginning with the word "but," which introduces the power to appoint a receiver—are parts of one section, yet the two parts are quite independent of each other, and should be treated as if they were two sections, and the judgment of Sir G. Jessel, M.R., is cited as an authority that they ought to be treated as two sections. I entirely dissent from that. No Court can by its finding alter facts. No Court by its finding can say that there are two sections and not one. But in my opinion the judgment which is relied on in *Manchester and Milford Ry., In re*, has no such effect as has been attributed to it. No doubt in that case Sir G. Jessel, M.R., speaks of the new right conferred by the second part of the section as "wholly independent of the fact that the railway company had or had not rolling-stock to be taken in execution," and as "an entirely new right given to all judgment creditors of railway companies"; but we must consider what the facts in that case were. The line there had been opened for public traffic, and the Court was asked to appoint a manager of the undertaking. The appointment was apparently objected to on the ground that the petitioning creditor was not deprived of any right by the first part of sect. 4; and the Court said that the second part of the section applied notwithstanding that the company had no rolling stock to be taken in execution; but no one, I think, would have been more astonished than the learned judges who decided that case if they had been told that their language was to be wrested out of its meaning, out of the context in which it occurs,

and out of the facts to which it was applied, to mean that the two branches of the section could be treated as two sections having no relation to one another. All that the learned judges meant to say, I think, was this—that it was not necessary for a creditor to show that he had been deprived of a special or particular right by the first part of the section before he could have the benefit of the new general right which is conferred by the second part. That, in my opinion, is all the Court meant to lay down in that case.—p. 465.

V. WILLIAMS, L.J. to the same effect. STIRLING, L.J. concurred.

Doe d. Myatt v. St. Helens and Runcorn Gap Ry. (1841) 11 L. J. Q. B. 6; 2 Q. B. 364; 1 G. & D. 663; 6 Jur. 641; 2 Railw. Cas. 756.—Q.B., *referred to*.

Ashton v. Langdale (1850) 4 De G. & Sm. 402.—KNIGHT BRUCE, V.-C.: Fripp v. Chard Ry. (1853) 22 L. J. Ch. 1084; 11 Hare 241; 1 Eq. R. 503; 17 Jur. 887; 1 W. R. 447.—WIGRAM, V.-C.

Doe v. St. Helens, &c. Ry., *discussed*.

Wickham v. New Brunswick and Canada Ry. and Land Co. (1865) 35 L. J. P. C. 6; L. R. 1 P. C. 64, 78; 12 Jur. (N.S.) 34; 14 L. T. 311; 14 W. R. 251.—P.C.

Doe v. St. Helens, &c. Ry. and Wickham v. New Brunswick and Canada Ry. and Land Co., *referred to*.

Panama, New Zealand and Australian Royal Mail Co., *In re* (1869) 39 L. J. Ch. 162, 165.—MALINS, V.-C.: affirmed, (1870) 39 L. J. Ch. 482; L. R. 5 Ch. 318; 22 L. T. 424; 18 W. R. 441.—GIFFARD, L.J.

Doe v. St. Helens, &c. Ry., *discussed*.

Mitchell's Estate, *In re* Mitchell v. Moberly (1877) 6 Ch. D. 665; 37 L. T. 145; 25 W. R. 903.—BACON, V.-C.: Attree v. Hawe (1878) 47 L. J. Ch. 863; 9 Ch. D. 337, 347; 38 L. T. 733; 26 W. R. 871.—C.A. (*see post*).

Eastern Union Ry. v. Hart (1852) 22 L. J. Ex. 20; 8 Ex. 116; 17 Jur. 89.—EX. CH., *applied*.

Coleman v. Llanelly Ry. (1867) 17 L. T. 86; 15 W. R. 1014.—C.P.

Eastern Union Ry. v. Hart, *referred to*.

Attree v. Hawe (1878) 9 Ch. D. 337; 47 L. J. Ch. 863; 38 L. T. 733; 26 W. R. 871.—C.A.

JAMES, L.J. (for the Court).—The nature of such a debenture came under the consideration of the Court of Q. B. in *Doe v. St. Helens Ry.* (*supra*), and of the Court of Ex. in *Hart v. Eastern Union Ry.*, by which it was established that the debenture, wide as the words were, did not pass the soil and did not pass the rolling stock of the company.—p. 347. *And see* "CORPORATION," vol. i., col. 718.

Beddgelert Ry., *In re* (1871) 24 L. T. 122; 19 W. R. 427.—STUART, V.-C., *discussed*.

Knott End Ry. Act, 1898, *In re* (1900) [1901] 2 Ch. 8, 13; 70 L. J. Ch. 463; 84 L. T. 433; 49 W. R. 469.—C.A. RIGBY, V. WILLIAMS and STIRLING, L.JJ.

Mersey Ry., *In re* (1888) 57 L. J. Ch. 283; 37 Ch. D. 610; 58 L. T. 745; 36 W. R. 372.—C.A., *referred to*.

East and West India Dock Co., *In re* (1888) 38 Ch. D. 576; 57 L. J. Ch. 1053; 59 L. T. 237; 36 W. R. 849.—C.A.

COTTON, L.J.—I said in a former case, *Mersey*

Ry., In re, that this section [Railway Companies Act, 1867, s. 4] deprives those who obtain judgments on certain contracts, and under certain circumstances, of the right they would otherwise have of taking the rolling stock in execution, and gives them a remedy against something quite different from that which they could have taken in execution, by enabling all the revenues of the company to be brought in and applied in payment of the judgment creditors, and possibly of all creditors. What is there to require the Court to restrict the receiver to the mere railway undertaking?—p. 592.

Kehoe v. Waterford and Limerick Ry. (1888)

21 L. R. Ir. 221.—M.R., *referred to*.
Reg. v. County Cork Treasurer (1889) 24 L. R. Ir. 415, 419.—Q.B.D.: Reg. v. County Dublin Grand Jury (1892) 32 L. R. Ir. 644, 669.—C.A.

Cornwall Minerals Ry., *In re* (1882) 48 L. T.

41.—KAY, J. and C.A., *referred to*.
Reg. v. County Cork Treasurer (*supra*).

Cornwall Minerals Ry., *In re*.

Applied, Eastern and Midland Ry., *In re* (1890) 45 Ch. D. 367; 63 L. T. 181, 604.—KAY, J. (affirmed, C.A.); *discussed*, Eastern and Midland Ry. (No. 2), *In re* (1891) 66 L. T. 153.—KEKEWICH, J.: *referred to*, Wrexham Mold and Connah's Quay Ry., *In re* (1900) 69 L. J. Ch. 291; [1900] 1 Ch. 261, 265; 82 L. T. 33; 48 W. R. 311.—BYRNE, J. (varied, C.A., *post*).

Eastern and Midlands Ry., *In re* (1891) 65

L. T. 668.—KEKEWICH, J., *referred to*.
Eastern and Midlands Ry. (No. 2), *In re* (1891) 66 L. T. 153.—KEKEWICH, J.

Eastern and Midlands Ry., *In re* (1890) 45

Ch. D. 367; 63 L. T. 604.—C.A.
Distinguished, Proffitt v. Wye Valley Ry. (1891) 64 L. T. 669.—C.A.: *discussed*, Eastern and Midlands Ry., *In re* (No. 2), (1891) 66 L. T. 153.—KEKEWICH, J.

Eastern and Midlands Ry., *In re* and **Navan**

and Kingscourt Ry., *In re*, Price, **Ex parte** (1885) 17 L. R. Ir. 398.—C.A., *referred to*.
Wrexham, Mold and Connah's Quay Ry. (No. 2), *In re* (1900) 69 L. J. Ch. 291; [1900] 1 Ch. 261; 82 L. T. 33; 48 W. R. 311.—C.A. LINDLEY, M.R., V. WILLIAMS and ROMER; varying BYRNE, J.

Eastern and Midlands Ry., *In re*, and **Navan**

and Kingscourt Ry., *In re*; *discussed and applied*.

Wrexham, Mold and Connah's Quay Ry.

(No. 2), *In re*, *considered*.
Wrexham, Mold and Connah's Quay Ry. (No. 3), *In re* (1900) 69 L. J. Ch. 671; [1900] 2 Ch. 436; 83 L. T. 49.

FARWELL, J.—As expressed by Kay, J. in *Eastern and Midlands Ry., In re*, and explained, and perhaps a little varied, by the C.A. in *Wrexham, Mold and Connah's Quay Ry. (No. 2), In re*, the section [Railway Companies Act, 1867, s. 4] points to all expenses or outgoings, which may be called a *sine qua non* to the continued existence of the undertaking as a going concern. In the latter case the C.A. did not altogether approve of the way in which it was put by Kay, J. in *Eastern and Midlands Ry., In re*, if he intended—and I am not sure that he did

intend—to say that “proper outgoings” added nothing to “working expenses.” I do not think that is what he meant. It is obvious that “working expenses” are one thing, and “other proper outgoings” are another thing. The question before the C.A. was one relating to the costs of the receiver and manager in defending certain proceedings in respect of a very large claim which they defended under the direction of the Court, and the Court thought that those costs might be allowed, although they held that they were neither working expenses nor proper outgoings. That case, however, does not really affect the point before me. The principle which has been laid down by the Courts is summed up shortly by Chatterton, V.-C. in *Naran and Kingscourt Ry., In re*, as follows: “The Act plainly intended that expenses, such as common sense will show to have been for the working of the railway and for the outgoings necessary to enable it to do its service to the public efficiently, should be paid in the first place, and all the surplus applied to payment of all the debts of the company, properly so called, according to their respective rights and priorities, to be ascertained by the Court.”—p. 672.

Furness v. Caterham Ry. (1858) 27 L. J. Ch. 771; 25 Beav. 614; 4 Jur. (N.S.) 1213.—ROMILLY, M.R.; S. C. (1859) 27 Beav. 358.—M.R., *discussed and latter decision followed.*

Panama, New Zealand and Australian Royal Mail Co., In re (1869) 39 L. J. Ch. 162, 165.—MALINS, V.-C.; affirmed, (1870) 39 L. J. Ch. 482; L. R. 5 Ch. 318; 22 L. T. 424; 18 W. R. 441.—GIFFARD, L.J.

Imperial Mercantile Credit Association v. Newry and Armagh Ry., In re. 2 Eq. 1.—V.-C.; reversed, (1868) Ir. R. 2 Eq. 524.—C.A. BREWSTER, L.C. and CHRISTIAN, L.J.

Imperial Mercantile Credit Association v. Newry and Armagh Ry., applied.

Osborne v. Limerick Market Trustees [1899] 1 Ir. R. 229, 246.—PORTER, M.R.

Russell v. East Anglian Ry. (1850) 20 L. J. Ch. 257; 3 Mac. & G. 104, 125; 15 Jur. 935; 6 Railw. Cas. 501.—TRURO, L.C., *referred to.*

Fripp v. Chard Ry. (1853) 22 L. J. Ch. 1084; 11 Hare 241; 1 Eq. R. 503; 17 Jur. 887; 1 W. R. 477.—WIGRAM, V.-C.; *Gantner v. L. C. & D. Ry.* (1867) 36 L. J. Ch. 323; L. R. 2 Ch. 201, 216; 15 L. T. 552; 15 W. R. 324.—L.J.; *Bowen v. Brecon and Merthyr Tydfil Junct. Ry., Howell, Ex parte* (1867) 36 L. J. Ch. 344; L. R. 3 Eq. 541, 548; 16 L. T. 6; 15 W. R. 482.—WOOD, V.-C.; *Till, Ex parte, Mayhew, In re* (1873) L. R. 16 Eq. 97; 42 L. J. Bk. 84; 21 W. R. 574.—BACON, C.J.; *Cochrane, Ex parte, Mead, In re* (1875) 44 L. J. Bk. 87; L. R. 20 Eq. 282, 287; 23 W. R. 726.—BACON, C.J.

Russell v. East Anglian Ry., explained.

Edwards v. Edwards (1875) 1 Ch. D. 454; 33 L. T. 633; 24 W. R. 201.—V.-C.; reversed, (1876) 45 L. J. Ch. 391; 2 Ch. D. 291; 34 L. T. 472; 24 W. R. 713.—C.A.

MALINS, V.-C.—It is agreed that when once the receiver is in possession the goods are put out of reach of the execution creditor. This was

the conclusion arrived at in *Russell v. East Anglian Ry.*, after an argument lasting for nine days.—p. 458.

Russell v. East Anglian Ry., referred to.

Burry Port and Gwendreath Valley Ry., In re (1855) 54 L. J. Ch. 710, 714; 52 L. T. 842; 33 W. R. 741.—KAY, J.; *Valby, In re* (1893) [1894] 1 Ir. R. 335, 347.—C.A. BARRY, L.J. dissenting; *Osborne v. Limerick Market Trustees* (1898) [1899] 1 Ir. R. 229.—PORTER, M.R. *And see* “COMPANY,” vol. i., col. 580, and “CONTEMPT OF COURT,” vol. i., col. 641.

Griffin v. Bishop's Castle Ry. (1867) 16 L. T. 345; 15 W. R. 1058.—WOOD, V.-C., *order approved.*

Belfast and County Down Ry. v. Belfast, Holywood and Bangor Ry. (1869) Ir. R. 3 Eq. 581.—WALSH, M.R.

Devereux v. Kilkenny and Great Southern and Western Ry. (1850) 20 L. J. Ex. 37; 5 Ex. 834; 1 L. M. & P. 788; 14 Jur. 1028.—EX., *applied.*

Kernaghan v. Dublin Trunk Connecting Ry., James, Ex parte (1867) 37 L. J. Q. B. 50; L. R. 3 Q. B. 47; 8 B. & S. 773; 16 W. R. 107.—Q.B.

G. N. Ry. v. Kennedy (1849) 19 L. J. Ex. 11; 4 Ex. 417; 7 D. & L. 197; 13 Jur. 1008; 6 Railw. Cas. 5.—EX., *referred to.*

Henry v. G. N. Ry. (1857) 27 L. J. Ch. 5, n.; 4 K. & J. 1.—WOOD, V.-C.; affirmed, 27 L. J. Ch. 1; 1 De G. & J. 606; 3 Jur. (N.S.) 1133; 6 W. R. 87.—L.C. and L.J.

Shrimpton v. Sidmouth Ry. (1867) L. R. 3 C. P. 80; 17 L. T. 647.—C.P., *distinguished and head-note commented on.*

Scott v. Uxbridge and Rickmansworth Ry. (1866) 35 L. J. C. P. 293; L. R. 1 C. P. 596; 12 Jur. (N.S.) 602; 13 L. T. 596; 14 W. R. 893.—C.P., *explained.*

Lee v. Bude and Torrington Junction Ry. (1871) 40 L. J. C. P. 285; L. R. 6 C. P. 576, 581; 24 L. T. 827; 19 W. R. 954.—C.P.

Cromford and High Peak Ry. v. Lacey (1829) 3 Y. & J. 80.—EX., *referred to.*

Portal v. Emmens (1876) 45 L. J. C. P. 305; 1 C. P. D. 201, 210; 34 L. T. 318; 24 W. R. 641.—C.P.D.; affirmed, 46 L. J. C. P. 179; 1 C. P. D. 664; 35 L. T. 882; 25 W. R. 235.—C.A.

Cheltenham and G. W. Union Ry. v. Daniel (1841) 2 Q. B. 281; 2 Railw. Cas. 728.—Q.B., *referred to.*

Spackman v. Evans (1868) 37 L. J. Ch. 752; L. R. 3 H. L. 171, 208; 19 L. T. 151.—H.L. (E.). LORDS ST. LEONARDS and ROMILLY dissenting; *Kipling v. Todd* (1878) 47 L. J. C. P. 617; 3 C. P. D. 350, 359; 39 L. T. 188; 27 W. R. 84.—C.A.

Gt. North of England Ry. v. Biddulph (1840) 10 L. J. Ex. 17; 7 M. & W. 243; 2 Railw. Cas. 401.—EX., *applied.*

Newry and Enniskillen Ry. v. Edmunds (1848) 2 Ex. 118, 122; 17 L. J. Ex. 102; 5 Railw. Cas. 275.—EX.; *Johnson v. Lyttle's Iron Agency* (1877) 46 L. J. Ch. 786; 5 Ch. D. 687, 690; 36 L. T. 528; 25 W. R. 548.—JESSEL, M.R.; reversed, C.A.

Rex v. London (City) (1681) 8 St. Tr. 1039; El. Bl. & El. 112, n.—K.B.; and **Whitfield v. S. E. Ry.** (1858) El. Bl. & El. 115; 27

L. J. Q. B. 229; 4 Jur. (N.S.) 688; 6 W. R. 545.—Q.B., *discussed*.
 Edwards v. Midland Ry. (1880) 50 L. J. Q. B. 281; 6 Q. B. D. 287; 43 L. T. 694; 29 W. R. 609; 45 J. P. 24.—FRY, J.

Whitfield v. S. E. Ry., *discussed and applied*.
 Nevill v. Fine Arts and General Insurance Co. (1895) 64 L. J. Q. B. 681; [1895] 2 Q. B. 156; 14 R. 587; 72 L. T. 525; 59 J. P. 371.—POLLOCK, B.: judgment entered for defendants, C.A. ESHER, M.B., LOPES and RIGBY, L.J.J.: latter decision affirmed, (1896) 66 L. J. Q. B. 195; [1897] A. C. 68; 75 L. T. 606; 61 J. P. 500.—H.L. (E.).

RATES AND RATING.

1. MAKING RATE.
2. LIABILITY OF OWNERS AND OCCUPIERS IN GENERAL.
3. LIABILITY OF PARTICULAR OWNERS AND OCCUPIERS.
4. PROCEEDINGS.
5. COUNTY RATES.

1. MAKING RATE.

Reg. v. Ingall (1876) 46 L. J. M. C. 113; 2 Q. B. D. 199; 35 L. T. 552; 25 W. R. 57. Q.B.D., *considered and applied*.
 Regent United Service Stores, In re (1878) 8 Ch. D. 75, 82; 38 L. T. 84; 26 W. R. 425.—C.A.

Reg. v. Ingall, *discussed*.
 Reg. v. London County J.J. and L.C.C. (1893) [1893] 2 Q. B. 476; 69 L. T. 438; 41 W. R. 668; 57 J. P. 488.—CHARLES and WILLIAMS, J.J.; *affirmed*, 63 L. J. Q. B. 148; [1893] 2 Q. B. 476; 9 R. 14; 69 L. T. 682.—C.A. ESHER, M.B., BOWEN and KAY, L.J.J.

Reg. v. Edmonds (1874) 43 L. J. M. C. 156; L. R. 9 Q. B. 598; 31 L. T. 237; 22 W. R. 944.—Q.B., *applied*.
 Reg. v. Langrville Overseers (1884) 54 L. J. Q. B. 124; 14 Q. B. D. 83, 86; 52 L. T. 253; 33 W. R. 213; 49 J. P. 54.—HAWKINS and SMITH, J.J.

Rex v. Carpenter (1837) 6 A. & E. 794; 1 N. & P. 773.—K.B., *inapplicable*.
 Southampton Dock Co. v. Southampton Harbour Board (1871) L. R. 11 Eq. 254; 23 L. T. 698.—V.-C.

Rex v. Carpenter, *discussed*.
 Hill v. Clonmel Union (1896) [1897] 1 Ir. R. 272, 286.—M.R.

Harrison v. Stickney (1848) 2 H. L. Cas. 108.—H.L. (E.), *dictum not applied*.
 Reg. v. All Saints, Wigan (1874) L. R. 9 Q. B. 317, 327; 30 L. T. 569.—EX. CH.; *affirmed*, (1876) 1 App. Cas. 611; 35 L. T. 381; 25 W. R. 128.—H.L. (E.).

Harrison v. Stickney, *referred to*.
 Reg. v. Wexford Corporation (1886) 18 L. R. Ir. 119, 129.—Q.B.D.

Harrison v. Stickney, *applied*.

Easton & Co. v. Nar Valley Drainage Commissioners (1892) 8 Times L. R. 649.—CHARLES and GRANTHAM, J.J.; and Reg. v. Leigh Rural Council (1898) 67 L. J. Q. B. 562; [1898] 1 Q. B. 836, 846; 78 L. T. 604; 46 W. R. 471; 62 J. P. 355.—C.A.

Reg. v. St. Michael's, Scutthamptton, Churchwardens (1856) 25 L. J. Q. B. 379; 6 El. & Bl. 807; 2 Jur. (N.S.) 1090; 4 W. R. 741.—Q.B., *distinguished*.

Reg. v. All Saints, Wigan, Churchwardens (1876) 1 App. Cas. 611; 35 L. T. 381; 25 W. R. 128.—H.L. (E.).

LORD O'HAGAN.—Lord Coleridge has pointed out that in Reg. v. St. Michael's, Southampton and Reg. v. Hurstbourne Tarrant (*infra*), the amounts in question were charged upon the rates, whereas in this case they were not.—p. 630.

Reg. v. Hurstbourne Tarrant Overseers (1858) 27 L. J. M. C. 214; El. Bl. & El. 246; 4 Jur. (N.S.) 733; 6 W. R. 521.—Q.B., *distinguished*.

Reg. v. All Saints, Wigan, Churchwardens (1876) 1 App. Cas. 611, 630; 35 L. T. 381; 25 W. R. 128.—H.L. (E.). See extract, *supra*.

Reg. v. Hurstbourne Tarrant Overseers, *considered and applied*.
 Hill v. Clonmel Union (1896) [1897] 1 Ir. R. 272.—M.R.

Reg. v. Fordham (1839) 9 L. J. M. C. 3; 11 A. & E. 73; 3 P. & D. 95.—Q.B., *adopted*.
 Ainsworth v. Creeke (1868) 38 L. J. C. P. 58; L. R. 4 C. P. 476, 485; 19 L. T. 824; 17 W. R. 229; 1 Hopw. & C. 141.—C.P.

Scadding v. Eyles (or Lorant) (1851) 3 H. L. Cas. 418; 15 Jur. 955.—H.L. (E.), *inapplicable*.
 Ainsworth v. Creeke (1868) 38 L. J. C. P. 58; L. R. 4 C. P. 476, 485; 19 L. T. 824; 17 W. R. 229; 1 Hopw. & C. 141.—C.P.

Jones v. Bubb (1868) 38 L. J. C. P. 57; L. R. 4 C. P. 468; 19 L. T. 483; 17 W. R. 205; 1 Hopw. & C. 128.—C.P., *referred to*.
 Ainsworth v. Creeke (1868) 38 L. J. C. P. 58; L. R. 4 C. P. 476, 484; 19 L. T. 824; 17 W. R. 229; 1 Hopw. & C. 121.—C.P.

Jones v. Bubb, *adopted*.
 Boon v. Howard (1874) 43 L. J. C. P. 115; L. R. 9 C. P. 277, 289; 30 L. T. 382; 22 W. R. 535; 2 Hopw. & C. 208.—C.P.

Ainsworth v. Creeke (1868) 38 L. J. C. P. 58; L. R. 4 C. P. 476; 19 L. T. 824; 17 W. R. 229; 1 Hopw. & C. 121.—C.P., *explained*.
 Medwin v. Streeter (1869) 38 L. J. C. P. 180, 181; L. R. 4 C. P. 488, 496; 19 L. T. 827; 17 W. R. 380; 1 Hopw. & C. 157.—C.P.

BOVILL, C.J. (during the argument).—Our decision in that case (*Ainsworth v. Creeke*) is not inconsistent with the Irish cases, because there the claim was made on the day of revision by the revising barrister; whereas in the last of the Irish cases (*Muldowney v. Malcolmson*, 15 Ir. L. R. 375), it was considered that it ought to be made before the holding of the revising sessions; but I agree that the reasons which we gave for our decision . . . are directly opposed to those

in the Irish cases, unless there be any material difference between the English and Irish Acts.—p. 181.

Ainsworth v. Creeke, adopted.

Boon v. Howard (1874) 43 L. J. C. P. 115; L. R. 9 C. P. 277, 289; 30 L. T. 382; 22 W. R. 535; 2 Hopw. & C. 208.—C.P.

N. E. Ry. v. Scarborough Local Board (1868)

38 L. J. M. C. 65; L. R. 4 Q. B. 163; 17 W. R. 574; 33 J. P. 244.—Q.B., *principle applied*.

L. & N. W. Ry. v. Llandudno Improvement Commissioners (1896) 66 L. J. Q. B. 232; [1897] 1 Q. B. 287; 75 L. T. 659; 45 W. R. 350; 61 J. P. 55.—POLLOCK, B. and WILLES, J.

London Union v. Acocks (1860) 8 C. B. (N.S.)

760; 8 W. R. 608.—C.P., *applied*.
Caistor Union v. North Kelsey Overseers (1890) 59 L. J. M. C. 102; 62 L. T. 731.—Q.B.D. (*see infra*).

Saul v. Wigan Sanitary Authority (1887)

56 L. T. 438; 35 W. R. 252; 51 J. P. 406, *distinguished*.

Caistor Union v. North Kelsey Overseers (1890) 59 L. J. M. C. 102; 62 L. T. 731.—Q.B.D.
HUDDLESTON, B.—*London Union v. Acocks (supra)* is clearly distinguishable from *Saul v. Wigan Sanitary Authority*, for in the latter the rate was made for sanitary purposes, and was not in any way connected with the relief of the poor. In the present case the same question arises as in *London Union v. Acocks*, namely whether a retrospective rate may be made for purposes connected with the relief of the poor. I am of opinion [that it can and] that the justices were wrong.

Woods v. Reed (1837) 6 L. J. M. C. 105; 2

M. & W. 777.—EX.; **Chesterton v. Farlar (1838) 7 L. J. Q. B. 77; 7 A. & E. 713.—Q.B.; Rex v. Sillifant (1835) 4 A. & E. 354; 7 N. & M. 640.—K.B., considered.**
Jones v. Johnson (1850) 20 L. J. M. C. 11; 5 Ex. 862.—EX.

Woods v. Reed, referred to.

Reg. v. Maidenhead Corporation (1882) 51 L. J. Q. B. 209; 8 Q. B. D. 339, 355.—Q.B.D. [affirmed, C.A.].

Fletcher v. Gibbon (1856) 23 Beav. 212.—M.R., applied.

Preston v. Great Yarmouth Corporation (1872) 41 L. J. Ch. 310; L. R. 7 Ch. 658, n.; 26 L. T. 235.—V.-C. (affirmed, 1872).—L.J.J.

Reg. v. White (or Sibley, Ex parte) (1883) 52

L. J. M. C. 123; 11 Q. B. D. 309; 49 L. T. 183; 31 W. R. 811.—Q.B.D.; *reversed*, (1884) 54 L. J. M. C. 23; 14 Q. B. D. 358; 52 L. T. 116; 33 W. R. 248; 49 J. P. 294.—C.A.

Ormerod v. Chadwick (1847) 16 M. & W.

367; 16 L. J. M. C. 143; 2 New Sess. Cas. 697.—EX., *applied*.
Reg. v. Stretfield (1863) 32 L. J. M. C. 236; 11 W. R. 736.—BAIL COURT.

Rex v. Marsh (1836) 6 N. & M. 668; 5 A. & E. 468; 2 H. & W. 255.—K.B., applied.

Reg. v. Green (1874) 31 L. T. 543, 547.—

EX. CH.; St. Sepulchre (Vicar) v. St. Sepulchre (Churchwardens) (1879) 5 P. D. 64, 69.—DR. TRISTRAM.

Walton Improvement Commissioners v.

Walford (1875) 44 L. J. Q. B. 74; L. R. 10 Q. B. 180; 31 L. T. 825; 23 W. R. 292.—Q.B., applied.

Monmouth Corporation v. Monmouth Churchwardens (1878) 38 L. T. 612, 618.—C.P.D.

2. LIABILITY OF OWNERS AND OCCUPIERS IN GENERAL.

Hughes v. Chatham Overseers (1843) 13 L. J.

C. P. 44; 5 Man. & G. 54; 7 Scott N. R. 581; 1 Lutw. Reg. Cas. 51; 7 Jur. 1136.—C.P., *followed*.

Smith v. Seghill Overseers (1875) 44 L. J. M. C. 114; L. R. 10 Q. B. 422; 32 L. T. 859; 23 W. R. 745.—Q.B.

Cross v. Alsop (1870) 40 L. J. C. P. 53; L. R.

6 C. P. 315; 23 L. T. 589; 19 W. R. 131; 1 Hopw. & C. 444.—C.P., *referred to*.
Thompson v. Ward (1871) 40 L. J. C. P. 169; L. R. 6 C. P. 327, 339; 24 L. T. 679; 1 Hopw. & C. 530, 537.—C.P.

Cross v. Alsop, commented on.

Smith v. Seghill (1875) L. R. 10 Q. B. 422; 44 L. J. M. C. 114; 32 L. T. 859; 23 W. R. 745.—Q.B.

Cross v. Alsop, distinguished and dicta disapproved of.

Smith v. Seghill Overseers (supra), followed.
Barton v. Birmingham Town Clerk (1878) 48 L. J. C. P. 87; 39 L. T. 352.—C.P.

COLERIDGE, C.J.—It has been said that this decision must conflict with the case of *Cross v. Alsop*, but, in the first place, the facts in that case are not the facts in this case. So far from the complainant's name in that case having been omitted, it had been inserted, and wrongly inserted; and the argument in the case raised the point distinctly. On those facts, argued upon this footing, the judges in *Cross v. Alsop* say that when the complainant has lost his vote, partly in consequence of its having been improperly claimed, the case is not within the statute, his name not having been omitted from the rate-book, but inserted in a wrong manner. The judges do, no doubt, go on—and it was necessary for them to go on, in order to show that the proviso in sect. 19 did not apply to the case before them—to deal with the only two questions raised by the facts. There was no order of the vestry, and no agreement between the owner and the overseers; and they say that the complainant is not therefore aided by sect. 19—first, because his name was not omitted from the rate book, and, secondly, because the owner had not been made liable to the payment of rates in either of these two ways. It was not suggested that this third mode of liability existed in that case. But in this case the facts raised a question which was not before the Court then, and was not decided by the judges at all. We are not, therefore, conflicting with the decision of this Court in that case, though, no doubt, expressions may be found in the judgments which appear to limit the operation of sect. 19. I do not, however, think that those expressions are to be taken in their full sense, especially as sects. 7 and 8 were not brought

before the notice of the Court. But there is a case which is directly in point—the case of *Smith v. Seghill*.

Smith v. Seghill Overseers, *dictum adopted*.
Att.-Gen. v. Croydon Corporation (1889) 58 L. J. Ch. 527; 42 Ch. D. 178; 61 L. T. 291; 37 W. R. 648; 53 J. P. 726.—STIRLING, J.

Smith v. Seghill Overseers, *followed*.
Marsh v. Estcourt (1889) 59 L. J. Q. B. 100; 24 Q. B. D. 147; 38 W. R. 495; 54 J. P. 294; 1 Fox 157.—COLERIDGE, C.J., MATHEW and WILLS, JJ.

Rex v. Morgan (1834) 2 A. & E. 618.—K.B., *explained*.
New Ross Union v. Byrne (1892) 30 L. R. Ir. 160, 179.—Q.B.D.

Limerick Union v. White (1852) 2 Ir. C. L. R. 630.—Q.B., *recognised*.
Staunton v. Powell (1867) Ir. R. 1 C. L. 182.—EX. CH.; Sligo Corporation v. Wynne (1873) Ir. 7 C. L. 465.—C.P.; New Ross Union v. Byrne (1892) 30 L. R. Ir. 160.—Q.B.D.

Westport Union v. Sligo (Marquis) (1859) 5 Ir. Jur. (N.S.) 182.—QUARTER SESS., *approved*.
New Ross Union v. Byrne (1892) 30 L. R. Ir. 160.—Q.B.D.

Callan Union v. Armstrong (1885) 16 L. R. Ir. 33.—C.P.D., *discussed*.
New Ross Union v. Byrne (1892) 30 L. R. Ir. 160.—Q.B.D.

Smith v. New Forest Union (1889) 61 L. T. 870; 54 J. P. 324.—C.A., *discussed*.
New Ross Union v. Byrne (1892) 30 L. R. Ir. 160.—Q.B.D.

New Ross Union v. Byrne (1892) 30 L. R. Ir. 160.—Q.B.D., *referred to*.
Att.-Gen. v. McCormack [1908] 2 Ir. R. 517.—K.B.D. GIBSON and BOYD, JJ.

Southend-on-Sea Corporation v. White (1900) 83 L. T. 408; 65 J. P. 7.—LAWRANCE and KENNEDY, JJ., *considered*.
Bootle Overseers v. Liverpool Warehousing Co. (1901) 85 L. T. 45; 65 J. P. 740.—RIDLEY and BIGHAM, JJ.

Staley v. Castleton Overseers (1864) 5 B. & S. 505; 33 L. J. M. C. 178; 10 L. T. 606; 12 W. R. 911.—Q.B., *applied*.
Watson, Kipling & Co., In re (1883) 52 L. J. Ch. 473, 476; 23 Ch. D. 500, 506; 49 L. T. 115; 31 W. R. 574.—KAY, J.

Staley v. Castleton Overseers, *distinguished*.
Hoyle v. Oldham Union (1894) 63 L. J. M. C. 178; [1894] 2 Q. B. 372; 9 R. 287; 70 L. T. 741; 58 J. P. 669.—C.A. ESHER, M.R., LOPES and DAVEY, L.JJ.

ESHER, M.R.—But the occupiers did not give up the occupation of the mill [during the strike]; they occupied with some servants who were keeping the machinery in order. Then it is said that the overseers, who admittedly cannot alter the amount of the rate, are to say, "This mill was being used as a warehouse [for storing machinery] during the time [of the strike]"—

which was not the fact—and upon that they are to make an allowance or deduction from the rate to be collected. There is no authority for such a proposition as that. The case which has been cited has nothing to do with the facts of this case.

Staley v. Castleton Overseers, *dictum observed upon*.
Farnham Flint, &c., Co. v. Farnham Union (1900) 70 L. J. K. B. 180; [1901] 1 K. B. 272; 83 L. T. 660.—C.A.

Harter v. Salford Overseers (1865) 34 L. J. M. C. 206; 6 B. & S. 591; 11 Jur. (N.S.) 1036; 13 W. R. 861.—Q.B., *applied*.
Watson, Kipling and Co., In re (1883) 52 L. J. Ch. 473, 476; 23 Ch. D. 500, 506; 49 L. T. 115; 31 W. R. 574.—KAY, J.

Rex v. Trent and Mersey Navigation Co. (1825) 3 L. J. (o.s.) K. B. 140; 4 B. & C. 57; 6 D. & R. 47; 28 R. R. 212.—K.B., *considered*.
L. & N. W. Ry. v. Buckmaster (1875) 44 L. J. M. C. 180; L. R. 10 Q. B. 444; 33 L. T. 329; 24 W. R. 16.—EX. CH. [*The Court of six Judges were equally divided.*]

Reg. v. St. Mary Abbott's (1840) 12 A. & E. 824.—Q.B., *followed*.
Reg. v. Abney Park Cemetery Co. (1873) L. R. 8 Q. B. 515; 42 L. J. M. C. 124; 29 L. T. 174; 21 W. R. 847.—Q.B.; L. & N. W. Ry. v. Buckmaster (1874) 44 L. J. M. C. 29; L. R. 10 Q. B. 70, 79; 31 L. T. 835.—Q.B., [affirmed, EX. CH. (*supra*)]; Rochdale Canal Co. v. Brewster (1894) 64 L. J. Q. B. 37; [1894] 2 Q. B. 852; 9 R. 680; 71 L. T. 243; 59 J. P. 132.—C.A.

Reg. v. Westbrook (1847) 16 L. J. M. C. 87; 10 Q. B. 178; 2 New Sess. Cas. 599; 11 Jur. 515.—Q.B., *applied*.

Reg. v. Abney Park Cemetery Co. (1873) L. R. 8 Q. B. 515, 520; 42 L. J. M. C. 124; 29 L. T. 174; 21 W. R. 847.—Q.B.; and Farnham Flint, &c., Co. v. Farnham Union (1900) 70 L. J. K. B. 180; [1901] 1 K. B. 272; 83 L. T. 660.—C.A.

Allison v. Monkwearmouth Shore Overseers (1854) 23 L. J. M. C. 177; 4 El. & Bl. 13; 18 Jur. 1075; S. C. nom. Reg. v. Allison, 2 C. L. R. 1544; 2 W. R. 592.—Q.B., *considered*.
Reg. v. L. & N. W. Ry. (1874) L. R. 9 Q. B. 134, 145.—Q.B.

Reg. v. Morrish (1863) 32 L. J. M. C. 245; 10 Jur. (N.S.) 71; 8 L. T. 697; 11 W. R. 960.—Q.B., *applied*.

Smith v. Lambeth Assessment Committee (1882) 51 L. J. M. C. 106, 110; 9 Q. B. D. 585, 596; 31 W. R. 31.—FIELD and CAVE, JJ.; *affirmed*, 52 L. J. M. C. 1; 10 Q. B. D. 327; 48 L. T. 57; 47 J. P. 244.—C.A.

Reg. v. Smith (1860) 30 L. J. M. C. 74; 7 Jur. (N.S.) 24; 3 L. T. 687.—Q.B.; and **Roads v. Trumpington** (1870) 40 L. J. M. C. 35; L. R. 6 Q. B. 56; 23 L. T. 821.—Q.B., *distinguished*.

Reg. v. St. George's Assessment Committee (1871) 41 L. J. M. C. 30; L. R. 7 Q. B. 90; 25 L. T. 696; 20 W. R. 179.—Q.B.

Roads v. Trumpington Overseers, applied.

Reg. v. Whaddon (1875) 44 L. J. M. C. 73, 79; L. R. 10 Q. B. 230, 242; 32 L. T. 633; 23 W. R. 653.—Q.B.; Cory v. Bristow (1875) 45 L. J. M. C. 145, 149; 1 C. P. D. 54, 59; 33 L. T. 624; 24 W. R. 336.—C.A.; affirmed, H.L. (E.). (*See infra*, col. 2764).

Roads v. Trumpington Overseers, distinguished.

Smith v. Lambeth Assessment Committee (1882) 51 L. J. M. C. 106, 110; 9 Q. B. D. 585, 595; 31 W. R. 31.—FIELD and CAVE, JJ.; affirmed, C.A. (*supra*).

Reg. v. St. George's Assessment Committee

(1871) 41 L. J. M. C. 30; L. R. 7 Q. B. 90; 25 L. T. 696; 20 W. R. 179.—Q.B., applied.

L. & N. W. Ry. v. Buckmaster (1875) 44 L. J. M. C. 180; L. R. 10 Q. B. 444, 450; 33 L. T. 329; 24 W. R. 16.—EX. CH.; Att.-Gen. v. Mutual Tontine Westminster Chambers Association (1876) 45 L. J. Ex. 886, 887; 1 Ex. D. 469; 35 L. T. 224; 24 W. R. 996.—C.A.

Reg. v. Abney Park Cemetery Co. (1873) 42

L. J. M. C. 124; L. R. 8 Q. B. 515; 29 L. T. 174; 21 W. R. 847.—Q.B. *See*

L. & N. W. Ry. v. Buckmaster (1874) 44 L. J. M. C. 29; L. R. 10 Q. B. 70, 79; 31 L. T. 835.—Q.B.

Reg. v. Abney Park Cemetery Co., dictum disapproved.

Farnham Flint Co. v. Farnham Union (1900) 70 L. J. K. B. 130; [1901] 1 K. B. 272; 83 L. T. 660; 65 J. P. 102.—C.A. SMITH, M.R., COLLINS and STIRLING, L.JJ.; affirming (1900) 48 W. R. 376.—Where CHANNELL and BUCKNILL, JJ., disagreed.

Allan v. Liverpool Overseers (or Inman v. Kirkdale Overseers) (1874) 43 L. J. M. C.

69; L. R. 9 Q. B. 180; 30 L. T. 93; 22 W. R. 330.—Q.B., observations adopted.

Morton v. Palmer (1881) 51 L. J. Q. B. 7; 45 L. T. 426; 30 W. R. 115.—C.A.

Allan v. Liverpool Overseers, applied.

Smith v. Lambeth Assessment Committee (1882) 51 L. J. M. C. 106, 110; 9 Q. B. D. 585, 596; 31 W. R. 31.—FIELD and CAVE, JJ.; affirmed, C.A. (*supra*, col. 2734).

Allan v. Liverpool Overseers, followed.

Rochdale Canal Co. v. Brewster (1894) 64 L. J. Q. B. 37; [1894] 2 Q. B. 852; 9 R. 680; 71 L. T. 243; 59 J. P. 132.—C.A. LINDLEY, LOPES and DAVEY, L.JJ.

Reg. v. Whaddon Overseers (1875) 44 L. J. M. C. 73; 32 L. T. 633; 23 W. R. 653.—distinguished.

Smith v. Lambeth Assessment Committee (1882) 9 Q. B. D. 585, 595; 51 L. J. M. C. 106; 31 W. R. 31.—FIELD and CAVE, JJ., (affirmed, C.A. *supra*, col. 2734); Farnham Flint Co. v. Farnham Union (1900) 70 L. J. K. B. 130; [1901] 1 K. B. 272; 83 L. T. 660; 65 J. P. 102.—C.A. SMITH, M.R., COLLINS and STIRLING, L.JJ.

L. & N. W. Ry. v. Buckmaster (1874) 44 L. J. M. C. 29; L. R. 10 Q. B. 70; 31 L. T. 835.—Q.B.; affirmed, (1875) 44 L. J. M. C. 180; L. R. 10 Q. B. 444; 33 L. T. 329; 24 W. R. 16.—EX. CH.

L. & N. W. Ry. v. Buckmaster, referred to.

Bobbett v. S. E. Ry. (1882) 9 Q. B. D. 424, 430.—DENMAN, J.

L. & N. W. Ry. v. Buckmaster, questioned.

Smith v. Lambeth Assessment Committee (1882) 10 Q. B. D. 327; 52 L. J. M. C. 1, 3; 48 L. T. 57; 47 J. P. 244.—C.A.; affirming 31 W. R. 31.—Q.B.D.

BRETT, L.J.—That case is not an authority which is binding upon us, because in the Exchequer Chamber, which was a Court of co-ordinate jurisdiction with ourselves, the judges were equally divided, and, therefore, the judgment of the Queen's Bench stood affirmed.—p. 328.

I reserve until a proper occasion my opinion whether *London & North-Western Railway Co. v. Buckmaster* was correctly decided.—p. 331.

[Note.—In the report of this case in the Law Journal (52 L. J. M. C.), Brett, L.J., is reported to say, "If it were necessary I should desire to say that I reserve my opinion on the case of *The Electric Telegraph Co. v. Overseers of Salford*."

L. & N. W. Ry. v. Buckmaster, distinguished.

Reg. (or Manchester Overseers) v. Headlam (1888) 57 L. J. M. C. 89; 21 Q. B. D. 96; 52 J. P. 517.—WILLS and GRANTHAM, JJ.

WILLS, J. (for the Court).—It may be conceded on the authority of *L. & N. W. Ry. v. Buckmaster* that if one entire assessment be made in terms upon property which he does occupy, and upon other property which he does not occupy, so that upon the true state of facts being ascertained, it is impossible to satisfy the description in the rate book without including property which he does not occupy, the rate will be bad and ought not to be enforced. This is, however, a very different case from the present one, in which the property actually occupied by the persons rated, fulfils the description appearing upon the rate book.

L. & N. W. Ry. v. Buckmaster, considered.

New Ross Union v. Byrne (1892) 30 L. R. Ir. 160.—Q.B.D.

L. & N. W. Ry. v. Buckmaster, followed.

Rochdale Canal Co. v. Brewster (1894) 64 L. J. Q. B. 37; [1894] 2 Q. B. 852; 9 R. 680; 71 L. T. 243; 59 J. P. 132.—C.A.

L. & N. W. Ry. v. Buckmaster, applied.

Holywell Union v. Halkyn District, &c., Co. (1894).—H.L. (E.) *infra*.

L. & N. W. Ry. v. Buckmaster. See

Wilson v. Taverer (1901) 70 L. J. Ch. 263; [1901] 1 Ch. 578; 84 L. T. 48.—JOYCE, J.

Halkyn District Mines Drainage Co. v. Holywell Union, 5 R. 480; 69 L. T. 112; 57

J. P. 726.—MATHEW and COLLINS, JJ.; reversed, (1893) 9 R. 779; 69 L. T. 705.—C.A.; the latter decision reversed *non*. Holywell Union v. Halkyn District Mines Drainage Co. (1894) 64 L. J. M. C. 113; [1895] A. C. 117; 11 R. 98; 71 L. T. 818; 59 J. P. 566.—H.L. (E.).

Reg. v. Vange Overseers (1842) 11 L. J.

M. C. 117; 3 Q. B. 242; 2 G. & D. 476; 6 Jur. 893.—Q.B., distinguished.
Reg. v. Smith (1885) 55 L. J. M. C. 49, 53; 54 L. T. 431; 50 J. P. 215.—CAVE and WILLS, JJ.

CAVE, J.—I think, too, that *Reg. v. Fange* is distinguishable. It is quite true that in that case the rate was imposed by an Act of Parliament, but the Act appears to have been passed in accordance with an original agreement. Here the real point is that the rate is paid for the preservation of the salmon, which is better accomplished by concerted action under an Act of Parliament than by leaving each owner to protect his own property. . . . I think the learned recorder was wrong, and that the rate is an expense deductible within the meaning of 6 & 7 Will. 4, c. 96.

Reg. v. St. Martin's-in-the-Fields Overseers (1852) 21 L. J. M. C. 53; 16 Jur. 335; S.C. *nom.* **Reg. v. Cockburn**, 16 Q. B. 460.—Q.B., *dictum adopted*.

Inland Revenue Commissioners v. Forrester (1890) 15 App. Cas. 334, 352; 60 L. J. Q. B. 281; 63 L. T. 36; 39 W. R. 33; 54 J. P. 772.—H.L. (E.). LORD HALSBURY, L.C., dissenting.

Reg. v. St. Pancras (1877) 46 L. J. M. C. 243; 2 Q. B. D. 581; 37 L. T. 126; 25 W. R. 827.—Q.B.D., *distinguished*.

Taylor v. Pendleton Overseers (1887) 56 L. J. M. C. 146; 19 Q. B. D. 288; 57 L. T. 530; 35 W. R. 762; 51 J. P. 613.—Q.B.D.

Reg. v. St. Pancras, followed.

Smith v. New Forest Assessment Committee (1889) 60 L. T. 927; 53 J. P. 661.—FIELD and CAVE, JJ., affirmed, 61 L. T. 870; 54 J. P. 324.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Sunderland-near-the-Sea Overseers v. Sunderland Union (1865) 18 C. B. (N.S.) 531; 34 L. J. M. C. 121; 11 Jur. (N.S.) 688; 13 L. T. 239; 13 W. R. 943.—C.P., *applied*.

Bradford-on-Avon Assessment Committee v. White (1898) 67 L. J. Q. B. 643; [1898] 2 Q. B. 630; 78 L. T. 758; 46 W. R. 603; 62 J. P. 533.—RIDLEY and CHANNELL, JJ.

Hare v. Putney Overseers (1881) 50 L. J. M. C. 81; 7 Q. B. D. 223; 45 L. T. 337; 29 W. R. 721; 46 J. P. 100.—C.A., *principle applied*.

West Bromwich School Board v. West Bromwich Overseers (1884) 53 L. J. M. C. 153; 13 Q. B. D. 929, 941; 52 L. T. 164; 32 W. R. 866; 48 J. P. 808.—C.A.; Dewsbury and Heckmondwike Waterworks Board v. Penistone Assessment Committee (1885) 55 L. J. M. C. 28; 16 Q. B. D. 585, 594; 54 L. T. 592.—MANISTY and SMITH, JJ., affirmed, (1886) 55 L. J. M. C. 121; 17 Q. B. D. 384; 54 L. T. 592; 34 W. R. 622; 50 J. P. 644.—C.A.

Hare v. Putney Overseers, approved and followed.

Lambeth Overseers v. L. C. C. (1897) 66 L. J. Q. B. 806; [1897] A. C. 625; 76 L. T. 795; 46 W. R. 79.—H.L. (E.).

Hare v. Putney Overseers, recognised.

London County Council v. Wandsworth Borough Council (1903) 72 L. J. K. B. 399; [1903] 1 K. B. 797; 88 L. T. 783; 51 W. R. 499; 67 J. P. 215.—C.A.

Reg. v. London School Board (or London School Board v. St. Leonard's, Shoreditch) (1886) 55 L. J. M. C. 169; 17 Q. B. D. 738; 55 L. T. 384; 34 W. R. 583.—C.A., *explained and applied*.

Owen's College v. Chorlton Overseers (1887)

56 L. J. M. C. 29; 18 Q. B. D. 403; 56 L. T. 373; 35 W. R. 236; 51 J. P. 356.—C.A.

Reg. v. London School Board, followed.

Burton-on-Trent Corporation v. Eggington Overseers (or Burton Union) (1889) 59 L. J. M. C. 1; 24 Q. B. D. 197; 62 L. T. 412; 38 W. R. 181; 54 J. P. 453.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Reg. v. London School Board, approved.

London County Council v. Erith Overseers (1893) 63 L. J. M. C. 9; [1893] A. C. 562; 6 R. 22; 69 L. T. 725; 42 W. R. 330; 57 J. P. 821.—H.L. (E.). See judgment, *infra*.

Reg. v. London School Board, adopted.

Liverpool Corporation v. Llanfyllin Assessment Committee (1899) 68 L. J. Q. B. 762; [1899] 2 Q. B. 14, 21; 80 L. T. 667; 63 J. P. 452.—C.A. SMITH, WILLIAMS and ROMER, L.JJ.

Burton-on-Trent Corporation v. Eggington Overseers (1889) 58 L. J. M. C. 137; 61 L. T. 368.—COLERIDGE, C.J. and STEPHEN, J.; *reversed*, 59 L. J. M. C. 1; 24 Q. B. D. 197; 62 L. T. 412; 38 W. R. 181; 54 J. P. 453.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Burton-on-Trent Corporation v. Eggington Overseers (*supra* in C. A.), *approved*.

Owen's College v. Chorlton-upon-Medlock Overseers (1887) 56 L. J. M. C. 29; 18 Q. B. D. 403; 56 L. T. 373; 35 W. R. 236; 51 J. P. 356.—C.A., *disapproved*.

London County Council v. Erith Overseers (1893) 63 L. J. M. C. 9; [1893] A. C. 562; 6 R. 22; 69 L. T. 725; 42 W. R. 330; 57 J. P. 821.—H.L. (E.).

LORD HERSCHELL.—Having given my reasons for thinking that the judgment of the C. A. in the *Burton-on-Trent Case* was correct, and that the principles there laid down are in accordance with the law, I turn now to the point which it was thought differentiated the *St. George's Case* [one of the cases under appeal] from the *Burton-on-Trent Case*—namely that neither the M.B.W. nor the L.C.C. could under the statutes which gave them their powers, have become tenants of the pumping stations of which they were and are the owners. The point was first glanced at in the judgment of the M.R. in *Reg. v. London School Board* (*see supra*). "If," said the learned judge, "by the terms of any statute, it" (the school board) "could not legally be tenant, it would be excluded from the calculation." The view thus suggested was adopted by the C. A. as the ground of their decision in *Owen's College v. Chorlton-upon-Medlock*. . . . I have stated fully the reasons which led the learned judges to the conclusion that the governors of Owen's College were to be left out of account as possible tenants when determining the annual value of the premises occupied by them, and I have most carefully considered these reasons with all the respect which is justly due to the views of the learned judges who concurred in them; but I am unable to share the opinion which they expressed. The conclusion arrived at is in its result sufficiently startling. Two public bodies might have erected buildings similar in all respects upon lands similar in situation and of equal value; and these buildings might be occupied in the same way and applied to the same purposes; and yet, if one of these bodies had

power, under the statute constituting it, to hire such buildings, and the other had no such power, the rateable value of the buildings might, and almost certainly would, be different—that is to say, the buildings would have a different annual value, for the words in the statute of Will. 4 which follow the expression “annual value” only provide a means of arriving at what is the annual value of the premises. Why should the annual or the rateable value of the premises for the purposes of the poor law depend upon the statutory power of the owner to take them, supposing he had not been the owner? I am unable to discover any satisfactory reason for this difference, and none seems to me to be suggested by the judgments in the *Owen's College Case*. I do not think the distinction drawn can be confined to premises belonging to and occupied by public bodies for public purposes. A private individual might receive money under an obligation to erect with it a building upon a particular site to be occupied by him during his lifetime, and with a prohibition against letting to anyone else. If the principle adopted in the *Owen's College Case* be a sound one, such an owner would, I presume, be equally excluded from consideration. No attempt was made to show that it was reasonable or just that the distinction drawn in that case should affect the rateability of premises or their assessment to the poor rate: it appears to have been thought a necessary consequence of the application to such a case of the rule for the assessment of property laid down by the statute of Will. 4. No doubt if this were so the conclusion reached was a right one, however unsatisfactory or even unjust it might be, that the rateability or assessment of premises in other respects similar, and occupied for similar purposes, should depend upon whether the owner could have taken the premises which he occupied as tenant, or was only enabled to become the owner of them. But having regard to the language used in the statute, and the construction which has been put upon it, I do not myself feel the difficulty by which the C. A. seem to have been pressed. An owner who is in occupation of premises can, of course, never reasonably be expected to take them as tenant from year to year—he cannot become tenant to himself. Yet it has been held that the rent which, if the property were in other hands, he would be willing to pay, may be taken into account when enquiring what is its annual value; that is, at what sum it might reasonably be expected to let from year to year. If the hypothesis be admissible that the owner might himself be amongst the possible tenants—although, as a matter of fact, he could not be so—it seems to me no more violent hypothesis to conceive him as amongst the possible tenants, even although he may be subject to certain legal restrictions which would prevent him becoming so. And, having regard to the scope and object of the enactment in the statute of Will. 1, I can see no sufficient reason why, if in the one case he may be regarded as the hypothetical tenant, he may not equally be so regarded in the other.—pp. 24, 25, 26.

Burton-on-Trent Corporation v. Eggington and Owen's College v. Chorlton-upon-Medlock Overseers, considered.

London County Council v. Lambeth Churchwardens (1896) 65 L. J. M. C. 118; [1896] 2

Q. B. 25; 74 L. T. 605; 44 W. R. 621; 60 J. P. 470.—C.A. [affirmed H.L. (E.), *post*, col. 2741].

London County Council v. West Ham (1892).

—C.A. (*see infra*), *followed*.
L. C. C. v. Woolwich Union (1892) 62 L. J. M. C. 136; [1893] 1 Q. B. 210; 68 L. T. 71; 41 W. R. 227.—C.A. *See in H. L.*, 6 R. (Feb.) 1.

London County Council v. West Ham (1892)

62 L. J. M. C. 17; [1892] 2 Q. B. 44; 67 L. T. 363; 40 W. R. 659; 56 J. P. 647.—C.A.; and **London County Council v. St. George's Union** (1892) 62 L. J. M. C. 136; [1893] 1 Q. B. 210; 68 L. T. 71; 41 W. R. 227.—C.A.; *both reversed nom.* London County Council v. Erith Churchwardens (1893) 63 L. J. M. C. 9; [1893] A. C. 562; 6 R. 22; 69 L. T. 725; 42 W. R. 330; 57 J. P. 821.—H.L. (E.).

London County Council v. Erith Churchwardens (*supra*), explained.

Sculcoates Union v. Hull Docks Co. (1894) 64 L. J. M. C. 49; [1895] A. C. 136; 11 R. 74; 71 L. T. 642; 43 W. R. 623; 59 J. P. 612.—H.L. (E.); reversing on this point. S. C. *nom.* Hull Docks Co. v. Sculcoates Union (1894) 63 L. J. M. C. 279; [1894] 2 Q. B. 69; 70 L. T. 742; 42 W. R. 595; 58 J. P. 800.—C.A. LORD HALSBURY dissenting.

HERSCHELL, L.C.—*The Erith Case* and all the cases there dealt with were cases of a totally different character. They were cases in which the argument had been used, that, inasmuch as the particular occupier, who was the only person who would give anything considerable for the land, could not make any profit out of it, from the very nature of the circumstances under which the hereditament was employed, therefore, either it had no rateable value, or in estimating its rateable value you were bound to regard the actual tenant as not being within the category of hypothetical tenants. That was the question raised there; and all that was said about profits and about land being “struck with sterility” by the statute and so on, was said in relation to a case of that description, where the argument was either that the land was not rateable or that you were to exclude from amongst the possible tenants the actual tenant. I took care to guard myself, as I thought, in the opinion which I delivered against being supposed to deal with the class of cases now before your lordships, because I said: “There is no doubt a certain class of cases in which the amount of profit which can be earned by the occupation of a hereditament is very material in ascertaining the sum at which it should be assessed. In the case of gasworks, waterworks, and other industrial undertakings where a hereditament is enhanced in value by its connection with a profit-earning undertaking, the profits earned and the shares of those profits attributable to any particular hereditament have to be taken into account, and in such cases as these” (that is wherever profits have to be taken into account) “any restrictions which the law has imposed upon the profit-earning capacity of the undertaking must, of course, be considered.” The present case, I agree with Lord Halsbury in thinking, comes exactly within the class of cases which I had in view when I used those words, in which I expressly said that, in my opinion, any restrictions put by the legislature on the profit-earning capacity of the undertaking were to be taken into account. Now the present

is just one of those cases. . . . In the *Erith Case* I pointed out that where you came to the conclusion that the actual owner or occupier would pay a higher rent than anybody else was likely to pay, even there, taking the occupier into account in considering what a hypothetical tenant would give, you were not to fix the amount higher than you thought that tenant would pay.—pp. 54, 55.

London County Council v. Erith Churchwardens, distinguished.

Lambeth Overseers v. London County Council (1897) 66 L. J. Q. B. 806; [1897] A. C. 625; 76 L. T. 795; 46 W. R. 79.—H.L. (E.).

LORD HERSCHELL.—In my opinion the *Erith Case* has no application. The land on which the pumping-stations were constructed, the rateability of which was there in question, was not by statute dedicated to that use. . . . About the rateability of the land there could be no real controversy. . . . Here these very lands and every part thereof, by statute must be held in perpetuity for the use of the public, and the question is, whether, under these circumstances, they are rateable at all. I think that on principle they are not.

London County Council v. Erith Churchwardens, discussed.

Ystradyfodwg and Pontypridd Main Sewage Board v. Newport Assessment Committee (1901) 70 L. J. K. B. 318; [1901] 1 K. B. 406; 84 L. T. 40; 49 W. R. 292; 65 J. P. 307.—C.A.

London County Council v. Lambeth Churchwardens (1895) 64 L. J. M. C. 252; [1895] 2 Q. B. 511; 15 R. 626; 73 L. T. 408; 59 J. P. 646.—

POLLOCK B. and WRIGHT J.: *reversed nom.* Lambeth Overseers v. London County Council (1896) 65 L. J. M. C. 148; [1896] 2 Q. B. 25; 74 L. T. 605; 44 W. R. 621; 60 J. P. 470.—C.A.; *the latter decision affirmed.* (1897) 66 L. J. Q. B. 806; [1897] A. C. 625; 76 L. T. 795; 46 W. R. 79.—H.L. (E.).

Lambeth Overseers v. London County Council (supra in C.A.), distinguished.

Soane Museum Trustees v. St. Giles' and St. George's, Bloomsbury, Vestry (1900) 83 L. T. 248.—GRANTHAM and CHANNELL, JJ.

Lambeth Overseers v. London County Council, recognised.

London County Council v. Wandsworth Borough Council (1903) 72 L. J. K. B. 399; [1903] 1 K. B. 797; 88 L. T. 783; 51 W. R. 499; 47 J. P. 215.—C.A.

Rex v. Birmingham and Staffordshire Gas Light Co. (1837) 6 L. J. M. C. 92; 6 A. & E. 634; 1 N. & P. 691.—K.B., applied.

Laing v. Bishopwearmouth (1878) 47 L. J. M. C. 41; 3 Q. B. D. 299, 305; 37 L. T. 781; 26 W. R. 351.—Q.B.D.: Tyne Boiler Works Co. v. Longbenton Overseers (or Tynemouth Union) (1886) 56 L. J. M. C. 8; 18 Q. B. D. 81, 89; 55 L. T. 825; 35 W. R. 110; 51 J. P. 420.—C.A.

Reg. v. Guest (1838) 7 L. J. M. C. 38; 7 A. & E. 951; 2 N. & P. 663; W. W. & D. 651.—Q.B., applied.

Laing v. Bishopwearmouth (1878) 47 L. J. M. C. 41; 3 Q. B. D. 299, 305; 37 L. T. 781; 26 W. R. 351.—Q.B.D.: Tyne Boiler Works Co. v.

Longbenton Overseers (or Tynemouth Union) (1886) 56 L. J. M. C. 8; 18 Q. B. D. 81, 89; 55 L. T. 825; 35 W. R. 110; 51 J. P. 420.—C.A.

Reg. v. Southampton Dock Co. (1851) 20 L. J. M. C. 155; 14 Q. B. 587; 6 Railw. Cas. 428; 15 Jur. 268.—Q.B., applied.

Reg. v. Lee (1866) 35 L. J. M. C. 105, 109; L. R. 1 Q. B. 241, 250; 12 Jur. (N.S.) 225; 13 L. T. 704; 14 W. R. 311.—Q.B.: Laing v. Bishopwearmouth (1878) 47 L. J. M. C. 41; 3 Q. B. D. 299, 305; 37 L. T. 781; 26 W. R. 351.—Q.B.D.

Reg. v. Southampton Dock Co., referred to.

Tyne Boiler Works Co. v. Longbenton Overseers (or Tynemouth Union) (1886) 56 L. J. M. C. 8; 18 Q. B. D. 81; 55 L. T. 825; 35 W. R. 110; 51 J. P. 420.—C.A.

Reg. v. North Staffordshire Ry. (1860) 30 L. J. M. C. 68; 3 E.L. & E.L. 392; 7 Jur. (N.S.) 363; 3 L. T. 554; 9 W. R. 235.—Q.B., principle applied.

Reg. v. Lee (1866) 35 L. J. M. C. 105, 109; L. R. 1 Q. B. 241, 250; 12 Jur. (N.S.) 225; 13 L. T. 704; 14 W. R. 311.—Q.B.: Laing v. Bishopwearmouth (1878) 47 L. J. M. C. 41; 3 Q. B. D. 299, 306; 37 L. T. 781; 26 W. R. 351.—Q.B.D.

Reg. v. North Staffordshire Ry., referred to.

Tyne Boiler Works Co. v. Longbenton Overseers (or Tynemouth Union) (1886) 56 L. J. M. C. 8; 18 Q. B. D. 81, 89; 55 L. T. 825; 35 W. R. 110; 51 J. P. 420.—C.A.

Reg. v. Lee (1866) 35 L. J. M. C. 105; L. R. 1 Q. B. 241; 12 Jur. (N.S.) 225; 13 L. T. 704; 14 W. R. 311.—Q.B., distinguished. Parsons v. Hind (1866) 14 W. R. 860.—Q.B.

Reg. v. Lee, applied.

Laing v. Bishopwearmouth (1878) 47 L. J. M. C. 41; 3 Q. B. D. 299, 306; 37 L. T. 781; 26 W. R. 351.—Q.B.D.

Reg. v. Lee, discussed.

Tyne Boiler Works Co. v. Longbenton Overseers (or Tynemouth Union) (1886) 56 L. J. M. C. 8; 18 Q. B. D. 81; 55 L. T. 825; 35 W. R. 110; 51 J. P. 420.—C.A. *See* judgment of Esher, M.R.

Reg. v. Haslam (1851) 17 Q. B. 220; 15 Jur. 972.—Q.B., referred to.

Chidley v. West Ham Overseers (1874) 32 L. T. 486.—Q.B., discussed.

Tyne Boiler Works Co. v. Longbenton Overseers (or Tynemouth Union) (1886) 56 L. J. M. C. 8; 18 Q. B. D. 81; 55 L. T. 825; 35 W. R. 110; 51 J. P. 420.—C.A.

LINDLEY, L.J.—The only case that seems to me to present any difficulties is *Chidley v. West Ham*. But I think that the true view of that case is that it was decided on the ground that the tanks in question had been rated as mere personal property. I do not understand the case as deciding that they could not have been taken into account at all in fixing the rateable value of the premises. It would have been absurd to suppose on the facts stated that they would not have passed by a demise of the premises.

Chidley v. West Ham Overseers, commented on.

Reynolds v. Ashby (1902) 72 L. J. K. B. 51; [1903] 1 K. B. 87; 87 L. T. 640; 51 W. R. 405.

—C.A. COLLINS, M.R., ROMER and MATHEW, L.JJ.

COLLINS, M.R.—That was a rating case. It was commented upon by the C.A. in *Tyne Boiler Works Co. v. Longbenton Overseers* (*supra*), and if it is to be supported, it must be, I think, on the grounds on which it was there distinguished, namely, that the matters in question in that case had been rated, not as enhancing the value of the realty, but as personal chattels.

Laing v. Bishopwearmouth (1878) 47 L. J. M. C. 41; 3 Q. B. D. 299; 37 L. T. 781; 26 W. R. 351.—Q.B.D., *referred to*.

Tyne Boiler Works Co. v. Longbenton Overseers (or Tynemouth Union) (1886) 56 L. J. M. C. 8; 18 Q. B. D. 81; 55 L. T. 825; 35 W. R. 110; 51 J. P. 420.—C.A. **ESHER, M.R., LINDLEY and LOPES, L.JJ.**

Tyne Boiler Works Co. v. Longbenton Overseers (1886) 56 L. J. M. C. 8; 18 Q. B. D. 81; 55 L. T. 825; 35 W. R. 110; 51 J. P. 420.—C.A., *referred to*.

Reynolds v. Ashby (1902) 72 L. J. K. B. 51; [1903] 1 K. B. 87; 87 L. T. 640; 51 W. R. 405.—C.A.

Tyne Boiler Works Co. v. Longbenton Overseers, *followed*.

Crockett v. Northampton Assessment Committee (1902) 72 L. J. K. B. 320.—**ALVERSTON, C.J., DARLING and CHANNELL, JJ.**

Reg. v. Aylesford Union (1872) 26 L. T. 618.—Q.B., *distinguished*.

Clark v. Fisherton-Angar Overseers (or Alderbury Union) (1880) 50 L. J. M. C. 33; 6 Q. B. D. 139; 29 W. R. 334; 45 J. P. 358.—**FIELD and BOWEN, JJ.**

FIELD, J.—The appellant proposed to show that by reason of the price of provisions, &c. it was impossible to carry on business at a profit. It was put thus: "I buy as cheap and sell as dear as I can, but I cannot afford a higher rent than 400l." Now is evidence of this kind admissible? In *Reg. v. Verrall* (*infra*) the very point was raised and evidence of the profits derived from the use of certain land as a race-course was held admissible, not as an absolute test, but as a material element in determining the value of such land. That was the converse of the present case, but the same principle applies. It seems to me that *Reg. v. Verrall* in no way conflicts with the decision in *Reg. v. North Aylesford*, where all that was held was that evidence of a particular mode of carrying on business was inadmissible to show the value of the premises.—p. 34.

Reg. v. Verrall (1875) 45 L. J. M. C. 29; 1 Q. B. D. 9; 33 L. T. 379; 24 W. R. 139.—Q.B.D., *applied*.

Clark v. Fisherton-Angar Overseers (or Alderbury Union) (1880) 50 L. J. M. C. 33; 6 Q. B. D. 139; 29 W. R. 334; 45 J. P. 358.—**FIELD and BOWEN, JJ.** See extract, *supra*.

Reg. v. Verrall and Clark v. Fisherton-Angar Overseers (or Alderbury Union), *followed*.
Mersey Docks v. Birkenhead Assessment Committee (1899) 69 L. J. Q. B. 260; [1900] 1 Q. B. 143; 81 L. T. 798; 48 W. R. 259; 64 J. P. 36.—C.A. **SMITH, COLLINS and WILLIAMS, L.JJ.**

Rex v. Tomlinson (1829) 7 L. J. (o.s.) M. C. 61; 9 B. & C. 163; 4 M. & Ry. 169.—K.B., *distinguished*.

Smith v. Birmingham Corporation (1883) 52 L. J. M. C. 81; 85; 11 Q. B. T. 195; 203; 49 L. T. 25; 31 W. R. 788; 47 J. P. 615.—Q.B.D.

Rex v. Lower Mitton (1829) 8 L. J. (o.s.) M. C. 57; 9 B. & C. 310; 4 M. & Ry. 711.—K.B., *applied*.

G. E. Ry. v. Haughley Overseers (1866) L. R. 1 Q. B. 666, 683; 35 L. J. M. C. 229; 12 Jur. (N.S.) 596; 14 L. T. 548; 14 W. R. 779.—Q.B.

Reg. v. Wells (1867) 36 L. J. M. C. 109; L. R. 2 Q. B. 542; 8 B. & S. 607; 16 L. T. 790; 15 W. R. 1059.—Q.B., *adopted*.

Dewsbury Waterworks Board v. Penistone Union (1885) 55 L. J. M. C. 28; 16 Q. B. D. 585, 596; 54 L. T. 592.—**MANISTY and SMITH, JJ.**; affirmed. (1886) 55 L. J. M. C. 121; 17 Q. B. D. 384; 54 L. T. 592; 34 W. R. 622; 50 J. P. 644.—C.A.

Rex v. Adames (1832) 2 L. J. M. C. 90; 4 B. & Ad. 61; 1 N. & M. 662.—K.B., *followed*. **Gainsborough Union v. Welch** (1871) 25 L. T. 589; S. C. *nom. Reg. v. Gainsborough Union*, 41 L. J. M. C. 1; L. R. 7 Q. B. 64; 20 W. R. 250.—Q.B.; *considered*. **Dobbs v. Grand Junction Waterworks Co.** (1882) 52 L. J. Q. B. 90; 10 Q. B. D. 337; 47 L. T. 504.—C.A. [reversed H.L. (E.)].

Reg. v. Gainsborough Union (1871) 41 L. J. M. C. 1; L. R. 7 Q. B. 64; 25 L. T. 589; 20 W. R. 250.—Q.B., *followed*.

Reg. v. Smith (1885) 55 L. J. M. C. 49, 52; 54 L. T. 431; 50 J. P. 215.—**CAVE and WILLS, JJ.**

Reg. v. Dodd (1866) 6 B. & S. 903; L. R. 1 Q. B. 16; 12 Jur. (N.S.) 159; S. C. *nom.*

Reg. v. Bilston Overseers, 35 L. J. M. C. 97; 13 L. T. 327; 14 W. R. 83.—Q.B., *distinguished*.

Sheffield Waterworks Co. v. Bennett (1872) 41 L. J. Ex. 233; L. R. 7 Ex. 409, 422; 27 L. T. 203.—EX.; affirmed. (1873) 42 L. J. Ex. 121; L. R. 8 Ex. 196; 28 L. T. 509; 21 W. R. 686.—EX. CH.

Devonshire (Duke) v. The Barrow Hæmatite Steel Co. (1877) 46 L. J. Q. B. 435; 2 Q. B. D. 286; 36 L. T. 355; 25 W. R. 469.—C.A., *approved and followed*.

Chaloner v. Bolckow (1878) 47 L. J. Q. B. 562; 3 App. Cas. 933; 39 L. T. 134; 26 W. R. 511.—H.L. (E.).

B. LIABILITY OF PARTICULAR OWNERS AND OCCUPIERS.

Promoters of Undertakings.

London Corporation v. St. Andrew's, Holborn (1867) 36 L. J. M. C. 95; L. R. 2 C. P. 574; 16 L. T. 665; 15 W. R. 928.—C.P., *dicta followed*.

Wheeler v. M. B. W. (1869) 38 L. J. Ex. 165; L. R. 4 Ex. 303; 20 L. T. 984.—EX.

London Corporation v. St. Andrews, Holborn. See

Bristol Governors v. Bristol Corporation (1886) 18 Q. B. D. 549; 56 L. T. 641.—**WILLS and GRANTHAM, JJ.**; on appeal, (1887) 56 L. J. Q. B.

320; 18 Q. B. D. 549; 56 L. T. 641; 35 W. R. 619; 51 J. P. 676.—C.A.

Wheeler v. Metropolitan Board of Works (1869) 38 L. J. Ex. 165; L. R. 4 Ex. 303; 20 L. T. 984.—EX., *dicta considered*.

Stratton v. M. B. W. (1874) 44 L. J. M. C. 33, 39; L. R. 10 C. P. 76, 85; 31 L. T. 673; 23 W. R. 447.—C.P.: **Bristol Governors v. Bristol Corporation** (1886) 18 Q. B. D. 549, 557; 56 L. T. 641.—**WILLS and GRANTHAM, JJ.**, on appeal (1887) 56 L. J. Q. B. 320; 18 Q. B. D. 549; 56 L. T. 641; 35 W. R. 619; 51 J. P. 676.—C.A. **ESHER, M.R., BOWEN and FRY, L.JJ.**

Stratton v. Metropolitan Board of Works (1874) 44 L. J. M. C. 33; L. R. 10 C. P. 76; 31 L. T. 673; 23 W. R. 447.—C.P., *applied*.

Bristol Governors v. Bristol Corporation (1887) 56 L. J. Q. B. 320; 18 Q. B. D. 549, 561; 56 L. T. 641; 35 W. R. 619; 51 J. P. 676.—C.A. **ESHER, M.R., BOWEN and FRY, L.JJ.**

Stratton v. Metropolitan Board of Works, *discussed*.

Putney Overseers v. L. & S. W. Ry. (1891) 60 L. J. Q. B. 438; [1891] 1 Q. B. 440; 64 L. T. 280; 39 W. R. 291; 55 J. P. 422.—C.A. **ESHER, M.R., BOWEN and FRY, L.JJ.**

BOWEN, L.J.—I think an interpretation can easily be placed on the language used in that case to prevent our being driven to the supposition that it was intended that, should the houses happen to be unoccupied during the last part of the last rate before the company took them, thereupon the company are to escape all liability under this section [sect. 133 of the Lands Clauses Act, 1845] in respect of these houses.

Farmer v. L. & N. W. Ry. (1888) 20 Q. B. D. 788; 59 L. T. 542; 36 W. R. 590.—**FIELD and WILLS, JJ.**, *discussed*.

Islington Borough Council v. London School Board (1903) 72 L. J. K. B. 677; [1903] 2 K. B. 354; 89 L. T. 53; 52 W. R. 115; 1 L. G. R. 704.—C.A. **WILLIAMS, ROMER and STIRLING, L.JJ.**, affirming (1902) 71 L. J. K. B. 852; [1902] 2 K. B. 701; 87 L. T. 177; 51 W. R. 255; 67 J. P. 18.—**WRIGHT, J.**

Putney Overseers v. L. & S. W. Ry. (1891) 60 L. J. Q. B. 438; [1891] 1 Q. B. 440; 64 L. T. 280; 39 W. R. 291; 55 J. P. 422.—C.A., *followed*.

St. Leonard, Shoreditch, Vestry v. L. C. C. (1895) 65 L. J. Q. B. 615; [1895] 2 Q. B. 104; 15 R. 516; 72 L. T. 802; 43 W. R. 598; 59 J. P. 423.—**RUSSELL, C.J. and CHARLES, J.**

Crown and Public Property.

De la Beche v. St. James, Westminster (1855) 24 L. J. M. C. 74; 4 E. & B. 385; 3 C. L. R. 448; 1 Jur. (N.S.) 375; 3 W. R. 161.—Q.B., *followed*.

Reg. v. McCann (1868) 37 L. J. M. C. 25, 33; L. R. 3 Q. B. 141, 147; 9 B. & S. 33; 17 L. T. 643; 16 W. R. 397.—Q.B.: *affirmed*, (1868) 37 L. J. M. C. 123; L. R. 3 Q. B. 677; 19 L. T. 115; 16 W. R. 985.—EX. CH.

Reg. v. Harrowgate Commrs. (1850) 20 L. J. M. C. 25; 15 Q. B. 1012; 4 New. Sess. Cas. 319; 15 Jur. 422.—Q.B., *dictum applied*.

Essendon Corporation v. Blackwood (1877) 45 L. J. P. C. 98, 105; 2 App. Cas. 574, 588; 36 L. T. 625; 25 W. R. 834.—P.C.

Reg. v. Worcestershire JJ. (1839) 9 L. J. M. C. 17; 11 A. & E. 57; 3 P. & D. 8; 1 Arn. & H. 80.—Q.B., *applied*.

Bray v. Lancashire JJ. (1889) 57 L. J. M. C. 57; 22 Q. B. D. 484, 493; 59 L. T. 438.—**POLLOCK, M. and HAWKINS, J.**: affirmed, 58 L. J. M. C. 54; 22 Q. B. D. 484; 37 W. R. 392; 53 J. P. 499.—C.A. **ESHER, M.R., BOWEN and FRY, L.JJ.**

Reg. v. Shepherd (1841) 10 L. J. M. C. 44; 1 Q. B. 170; 4 P. & D. 534; 5 Jur. 432.—Q.B., *distinguished*.

Bedfordshire JJ. v. St. Paul, Bedford (1852) 21 L. J. M. C. 228; 7 Ex. 650.—EX.

Reg. v. Shepherd, *adopted*.

Coomber v. Berks JJ. (1883) 53 L. J. Q. B. 239; 9 App. Cas. 61, 73; 50 L. T. 405; 32 W. R. 525; 48 J. P. 421.—H.L. (E.).

Reg. v. Ponsonby (1842) 11 L. J. M. C. 65; 3 Q. B. 14; 1 G. & D. 713; 6 Jur. 642.—Q.B., *considered and held inapplicable*.

Att.-Gen. v. Dakin (1870) 39 L. J. Ex. 113, 121; L. R. 4 H. L. 338, 359; 23 L. T. 1; 18 W. R. 1111.—H.L. (E.).

KEATING, J. (in answering the question of their lordships):—All that was held there was that the occupation by the visitors in Hampton Court Palace was whilst it continued beneficial, within the statute of Elizabeth, so long as the sovereign did not actually reside; and the ground was stated by Lord Denman to be, that if the owner of premises goes abroad, permitting a friend to occupy under the superintendence of the domestics of the house during his absence, the friend and not the owner would be rateable. A strong proposition undoubtedly, but not touching the present case.—p. 121.

Reg. v. Manchester Overseers (1854) 23 L. J. M. C. 48; 3 E. & B. 336; 2 C. L. R. 974; 18 Jur. 267.—Q.B., *adopted*.

Coomber v. Berks JJ. (1883) 53 L. J. Q. B. 239; 9 App. Cas. 61, 73; 50 L. T. 405; 32 W. R. 525; 48 J. P. 421.—H.L. (E.).

Gambier v. Lydford Overseers (1854) 3 E. & B. 346; 23 L. J. M. C. 69; 2 C. L. R. 951; 18 Jur. 352; 2 W. R. 226.—Q.B., *approved*.

Martin v. West Derby Assessment Committee (1883) 11 Q. B. D. 145; 52 L. J. M. C. 66; 31 W. R. 489; 47 J. P. 500.—C.A.

COLERIDGE, C.J.—It is most important that in rating cases, where a line has been drawn by competent authority which is plain and intelligible to the persons who have to exercise the duties of rating, and which has been assented to in a variety of cases, we should adhere to some such line, unless we see some very good reason for differing from it. Now, it appears to me that such a line has been drawn plainly, and so that overseers can clearly act upon it, in *Gambier v. Overseers of Lydford*. That case has decided, that where there are public buildings—like a prison, station-house, or buildings of that description—all occupied together, not by any

individual personally, but by some public body as representing the Crown, who hold the whole as the Crown's building, or for the purpose of the government of the country, the Court will not look at whether this or that particular or set of rooms, is or is not occupied, so as to give a benefit to the persons who occupy, but if such room or rooms form an integral part of a whole which in itself is not rateable, the persons who so occupy are not rateable.—p. 150.

Gambier v. Lydford Overseers, followed.

Showers v. Chelmsford Assessment Committee (1890) 60 L. J. M. C. 1 : [1891] 1 Q. B. 339, 344; 63 L. T. 529, 532; 39 W. R. 174; 55 J. P. 8.—DAY and LAWRENCE, JJ., affirmed, (1891) 60 L. J. M. C. 55; [1891] 1 Q. B. 339; 64 L. T. 755; 39 W. R. 231.—C.A.

Smith v. Birmingham Union (1857) 26 L. J.

M. C. 105; 7 El. & Bl. 483; 3 Jur. (N.S.) 769; 5 W. R. 496.—Q.B., *applied*.

Coomber v. Berks JJ. (1883) 53 L. J. Q. B. 239; 9 App. Cas. 61, 73; 50 L. T. 405; 32 W. R. 525; 48 J. P. 421.—H.L. (E.); and Bray v. Lancashire JJ. (1889) 57 L. J. M. C. 57; 22 Q. B. D. 484, 493; 59 L. T. 438.—POLLOCK, B. and HAWKINS, J., affirmed, 58 L. J. M. C. 54; 22 Q. B. D. 484; 37 W. R. 392; 53 J. P. 499.—C.A.

Reg. v. Stewart (1858) 27 L. J. M. C. 81;
8 El. & Bl. 360; 4 Jur. (N.S.) 187; 6 W. R. 35.—Q.B., *applied*.

Coomber v. Berks JJ. (1883) 53 L. J. Q. B. 239; 9 App. Cas. 61, 73; 50 L. T. 405; 32 W. R. 525; 48 J. P. 421.—H.L. (E.); Nicholson v. Holborn Assessment Committee (1886) 56 L. J. M. C. 54; 18 Q. B. D. 161, 166; 55 L. T. 775; 35 W. R. 230; 51 J. P. 341.—DENMAN and HAWKINS, JJ.; and Bray v. Lancashire JJ. (1889) 57 L. J. M. C. 57; 22 Q. B. D. 484, 489; 59 L. T. 438.—POLLOCK, B. and HAWKINS, J., affirmed, 58 L. J. M. C. 54; 22 Q. B. D. 484; 37 W. R. 392; 53 J. P. 499.—C.A.

Lancashire JJ. v. Stretford Overseers (1858)
27 L. J. M. C. 209; El. Bl. & El. 225;
4 Jur. (N.S.) 1274.—Q.B., *adopted*.

Coomber v. Berks JJ. (1883) 53 L. J. Q. B. 239; 9 App. Cas. 61, 73; 50 L. T. 405; 32 W. R. 525; 48 J. P. 421.—H.L. (E.).

Reg. v. St. Martin's, Leicester (1867) 36
L. J. M. C. 99; L. R. 2 Q. B. 493; 8 B. &
S. 536; 16 L. T. 625; 15 W. R. 1096.—Q.B.,
commented upon.

Martin v. West Derby Union (1883) 52 L. J. M. C. 66; 11 Q. B. D. 145; 31 W. R. 489; 47 J. P. 500.—C.A.

BOWEN, L.J.—The observation I have to make with regard to *Reg. v. St. Martin's, Leicester*, is very short—if that case is inconsistent with *Gambier v. Lydford Overseers (supra)*; then it was wrongly decided—but if it is not inconsistent, then it does not affect the present case.—p. 70.

Lancashire JJ. v. Cheetham Overseers (1867)

37 L. J. M. C. 12; L. R. 3 Q. B. 14; 8 B. & S. 548; 16 W. R. 124.—Q.B., *adopted*.
Bray v. Lancashire JJ. (1889) 57 L. J. M. C. 57; 22 Q. B. D. 484, 494; 59 L. T. 438.—Q.B.D.; 58 L. J. M. C. 54; 22 Q. B. D. 484; 37 W. R. 392; 53 J. P. 499.—C.A.

Nicholson v. Holborn Union (1886) 56

L. J. M. C. 54; 18 Q. B. D. 161; 55

L. T. 775; 35 W. R. 230; 51 J. P. 341.

—DENMAN and HAWKINS, JJ., *discussed*.

Worcestershire County Council v. Worcester Union (1897) 66 L. J. Q. B. 323; [1897] 1 Q. B. 480; 76 L. T. 138; 45 W. R. 309; 61 J. P. 244.—C.A.

ESHER, M.R.—The rule which governs the present case is that laid down by Lord Cairns in *Greig v. Edinburgh University (infra, col. 2753)*. . . . He states the rule thus, "The Crown not being named in the English or Scotch statutes on the subject of assessment, and not being bound by statute when not expressly named, any property which is in the occupation of the Crown, or of persons using it exclusively in and for the service of the Crown, is not rateable to the relief of the poor." In the case before us the premises were not used exclusively for the service of the Crown, and so do not come within the exemption, and are therefore rateable. It is said that the decision in *Nicholson v. Holborn Union* is opposed to this view. I do not think it necessary at present to determine whether that is the case; but if it is that decision must be taken as overruled.

Pearson v. Holborn Union Assessment Com-

mittee (1893) 62 L. J. M. C. 77; [1893]

1 Q. B. 389; 5 R. 290; 63 L. T. 351; 57

J. P. 169.—Q.B.D., *distinguished*.

Westminster Vestry v. Hoskins (1899) [1899] 2 Q. B. 474.—Q.B.D.

Pearson v. Holborn Union, adopted.

Hornsey Urban Council v. Hennell (1902) 71 L. J. K. B. 479; [1902] 2 K. B. 73; 76 L. T. 423; 50 W. R. 521; 66 J. P. 613.—K.B.D.

Showers v. Chelmsford Union (1891) 60 L. J.

M. C. 55; [1891] 1 Q. B. 339; 64 L. T.

755; 39 W. R. 231.—C.A., *referred to*.

Cross v. West Derby Union (1900) 81 L. T. 645; 64 J. P. 182.—K.B.D.

Showers v. Chelmsford Union and Cross v.

West Derby Union, observation adopted.

Monmouth Overseers v. Monmouth County Council (1902) 87 L. T. 65.—K.B.D.

Amherst (Lord) v. Sommers (1788) 2 Term

Rep. 372; 1 R. R. 497.—K.B.

Principle applied, Reg. v. McCann (1868).—Q.B. (see col. 2745); Coomber v. Berkshire JJ. (1883) 53 L. J. Q. B. 239; 9 App. Cas. 61, 73; 50 L. T. 405; 32 W. R. 525; 48 J. P. 421.—H.L. (E.); distinguished, Bray v. Lancashire JJ. (1889).—Q.B.D. (see col. 2753).

Rex v. Salter's Load Sluice (1792) 4 Term

Rep. 730.—K.B., *overruled*.

Jones v. Mersey Docks (1865) 35 L. J. M. C. 1; 11 H. L. Cas. 443; 20 C. B. (N.S.) 56; 12 L. T. 643; 13 W. R. 1069.—H.L. (E.).

WESTBURY, L.C.—After considering the above case and the other cases mentioned below, continued: At last in *Tyne Commissioners v. Chilton* the Court of Queen's Bench recurred to that which is, in my opinion, the true principle, namely, that the only ground of exemption from the statute of Elizabeth is that which is furnished by the rule that the Sovereign is not bound by that statute; and that consequently when valuable property (that is, property capable of yielding a net rent above what is required for its maintenance), is sought to be

exempted on the ground that it is occupied by bare trustees for public purposes, the public purposes must be such as are required and created by the government of the country, and are therefore to be deemed part of the use and service of the Crown.—p. 24.

Reg. v. Liverpool Inhabitants (1827) 7 B. & C. 61; 9 D. & R. 789.—K.B., *considered*.

Tyne Improvement Commissioners v. Chirton Overseers (1861) 1 E. & E. 516; 5 Jur. (N.S.) 865; 28 L. J. M. C. 180; 7 W. R. 242.—Q.B.

CROMPTON, J.—The decision in this case, I believe, created as much surprise as any decision in Westminster Hall, but the principle of which was adopted generally by the Courts. However, we considered that case and all the other cases upon the point (as to the liability of public property to poor rates) in *Birkenhead Dock Trustees v. Birkenhead Overseers* (2 El. & Bl. 148), and we gave judgment there upon the ground that the purposes of the occupation, though public to some extent, were purposes which benefited only a section of the public. I had some difficulty at the time in distinguishing an occupation producing a benefit to only one section of the public, as in *Reg. v. Liverpool*; a benefit to one particular town; however, I think, that we laid down the proper rule.—p. 526.

Reg. v. Liverpool Inhabitants, overruled.

Jones v. Mersey Docks, Mersey Docks v. Cameron (1865) 11 H. L. Cas. 443; 35 L. J. M. C. 1; 20 C. B. (N.S.) 56; 11 Jur. (N.S.) 746; 12 L. T. 643; 13 W. R. 1069.—H.L. (E.). See extract, *supra*, col. 2748; and *Mersey Docks v. Gibbs* (1866) 35 L. J. Ex. 225; L. R. 1 H. L. 93, 108; 11 H. L. Cas. 686; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.—H.L. (E.).

Bristol Governors v. Wait (1836) 5 L. J. M. C. 113; 5 A. & E. 1; 6 N. & M. 383.—K.B.

Approved, **Jones v. Mersey Docks** (1865).—H.L. (E.) (*supra*): *adopted*, London County Council v. Erith Churchwardens (1893).—H.L. (E.) [*supra*, col. 2740].

Reg. v. Birkenhead Dock Trustees (or **Birkenhead Dock Trustees v. Birkenhead Overseers**) (1852) 21 L. J. M. C. 209; 2 E. & B. 148; 17 Jur. 162.—*approved*.

Jones v. Mersey Docks, Mersey Docks v. Cameron (1865) 11 H. L. Cas. 443; 35 L. J. M. C. 1; 20 C. B. (N.S.) 56; 11 Jur. (N.S.) 746; 12 L. T. 643; 13 W. R. 1069.—H.L. (E.).

Reg. v. Liverpool Corporation (1839) 8 L. J. Q. B. 179; 9 A. & E. 435, and **Reg. v. Exminster** (1840) 12 A. & E. 2; 9 L. J. M. C. 108; 4 P. & D. 69.—Q.B., *overruled*.

Jones v. Mersey Docks, Mersey Docks v. Cameron (1865) 11 H. L. Cas. 443; 35 L. J. M. C. 1; 20 C. B. (N.S.) 56; 11 Jur. (N.S.) 746; 12 L. T. 643; 13 W. R. 1069.—H.L. (E.). See extract, *supra*, col. 2748.

Tyne Improvement Commissioners v. Chirton Overseers (1859) 28 L. J. M. C. 131; 1 El. & El. 516; 5 Jur. (N.S.) 865; 7 W. R. 242.—Q.B., *confirmed*.

Jones v. Mersey Docks (1865) 11 H. L. Cas. 443; 35 L. J. M. C. 1; 20 C. B. (N.S.) 56; 11 Jur. (N.S.) 746; 12 L. T. 643; 13 W. R. 1069.—H.L. (E.). See extract, *supra*, col. 2748.

Tyne Improvement Commissioners v. Chirton Overseers. See

Coomber v. Berkshire JJ. (1883) 53 L. J. Q. B. 239; 9 App. Cas. 61, 74; 50 L. T. 405; 32 W. R. 525; 48 J. P. 421.—H.L. (E.); **Mersey Docks and Harbour Board v. Lucas** (1883) 53 L. J. Q. B. 4; 8 App. Cas. 891, 901; 49 L. T. 781; 32 W. R. 34; 48 J. P. 212.—H.L. (E.).

Tyne Improvement Commissioners v. Chirton Overseers, dictum adopted.

Bray v. Lancashire JJ. (1889) 57 L. J. M. C. 57; 22 Q. B. D. 484, 489; 59 L. T. 438.—POLLOCK, B. and HAWKINS, J., affirmed, 58 L. J. M. C. 54; 22 Q. B. D. 484; 37 W. R. 392; 53 J. P. 499.—C.A. **ESHER, M.R., BOWEN and FRY, L.JJ.**

Glyde Navigation Trustees v. Adamson (1865) 4 Macq. 931.—H.L. (SC.)

Followed, **Leith Harbour and Docks Commissioners v. Inspector of Poor** (1866) L. R. 1 H. L. Sc. 17.—H.L. (SC.); *principle applied*, **Greig v. Edinburgh University** (1868) L. R. 1 Sc. App. 348.—H.L. (SC.); **Coomber v. Berkshire JJ.** (1883) 53 L. J. Q. B. 239; 9 App. Cas. 61, 75; 50 L. T. 405; 32 W. R. 525; 48 J. P. 421.—H.L. (E.); *referred to*, **Income Tax Commissioners v. Pemsel** (1891) [1891] A. C. 531, 552; 55 J. P. 805.—H.L. (E.).

Jones v. Mersey Docks (or **Mersey Docks v. Cameron**) (1865) 35 L. J. M. C. 1; 11 H. L. Cas. 443; 20 C. B. (N.S.) 56; 11 Jur. (N.S.) 746; 12 L. T. 643; 13 W. R. 1069.—H.L. (E.), *followed*.

Leith Harbour Commissioners v. Poor Inspector (1866) L. R. 1 H. L. (Sc.) 17.—H.L. (SC.) [The principle of these two cases being the same and not to be distinguished.]

Jones v. Mersey Docks, explained and limited.

Reg. v. St. Martin's, Leicester (1867) L. R. 2 Q. B. 493; 36 L. J. M. C. 99; 8 B. & S. 536; 16 L. T. 625; 15 W. R. 1096.—Q.B.

MELLOR, J.—On reading the *Mersey Docks Cases*, one cannot fail to see that, although the decision did produce a great revolution in the subject of rating, yet the time had arrived finally to decide between conflicting principles, for the cases as to the exemption from rateability of buildings occupied for public purposes had been so eaten away by the decisions in the time of Lord Campbell, that it required only a touch to destroy them, and this was done in the House of Lords by tracing the exemption to its true foundation, viz. the maxim that the Crown was not bound, not being named in the statute 43 Eliz. c. 2 . . . When you look at this classification of cases [*i.e.*, the classification given by Lord Cranworth in *Jones v. Mersey Docks*] it clearly was not intended to affect such cases as profess to be decided on the ground that in effect the Crown was in occupation by public servants carrying out the purposes of the government of the country. The Queen is the fountain of justice to all the subjects of the realm, and buildings which are necessarily occupied for the purposes of administering justice, and for cognate objects are within the exception as buildings really occupied for the discharge of duties arising out of the prerogatives of the

Crown. In the present case the purposes of the occupation are so bound up with the administration of justice, that I think we cannot distinguish the present from cases which were not intended to be affected by the opinion of the judges delivered in the *Mersey Docks Cases*, nor, as it appears to me, by the judgment of the House of Lords.—p. 500.

COCKBURN, C.J. and SHEE, J. to the same effect.

Jones v. Mersey Docks, followed.

Reg. v. Sherford (1867) 36 L. J. M. C. 113; L. R. 2 Q. B. 503; 8 B. & S. 596; 16 L. T. 663; 15 W. R. 1035.—Q.B.; Lancashire J.J. v. Cheetnam Overseers (1867) L. R. 3 Q. B. 14; 37 L. J. M. C. 12; 8 B. & S. 548; 16 W. R. 124.—Q.B.

Jones v. Mersey Docks, considered and followed.

Reg. v. McCann (1868) L. R. 3 Q. B. 141; 37 L. J. M. C. 25; 9 B. & S. 83; 17 L. T. 643; 16 W. R. 397.—Q.B. (affirmed, EX. CH. *supra*, col. 2745).

BLACKBURN, J.—It is on this principle (the exemption from rate of property occupied by or for the Crown) that a servant of the Crown who had taken a lease of premises to be used as barracks, as in *Lord Anherst v. Lord Summers* (2 T. R. 372), was held not liable to be rated; and this principle extends to the case of a person in occupation of premises, whether as servant or trustee for the Crown, and so far from being overruled in the case of *Mersey Docks*, this principle was affirmed.—p. 146.

Jones v. Mersey Docks, considered.

Reg. v. Oldham Corporation (1886) L. R. 3 Q. B. 474; 37 L. J. M. C. 169; 9 B. & S. 202; 18 L. T. 240; 16 W. R. 789.—Q.B.

MELLOR, J.—It is said that the only exemption that could be contended for was that created by the decisions which had been overruled by *Jones v. Mersey Docks*, and that when those cases fell the exemption fell with them; but that is not so; the legislature chose to alter what was then supposed to be law as to corporate property in general, and expressly provided also that certain property should be exempt.—p. 477.

Jones v. Mersey Docks, applied.

Greig v. Edinburgh University (1868) L. R. 1 H. L. (Sc.) 848, 350.—H.L. (Sc.); Reg. v. Rhymney Ry. (1869) 38 L. J. M. C. 75, 78; L. R. 4 Q. B. 276, 283; 10 B. & S. 198; 17 W. R. 530.—Q.B.; Att.-Gen. v. Dakin (1870) 39 L. J. Ex. 113, 121; L. R. 4 H. L. 338, 360; 23 L. T. 1; 18 W. R. 1111.—H.L. (E.); Metropolitan Board of Works v. West Ham (1870) 40 L. J. M. C. 30, 34; L. R. 6 Q. B. 193, 197; 23 L. T. 490; 19 W. R. 246.—Q.B.; Att.-Gen. v. Black (1871) 40 L. J. Ex. 194, 197; L. R. 6 Ex. 308, 310; 25 L. T. 207; 19 W. R. 1114.—EX. CH.

Jones v. Mersey Docks, distinguished.

Morgan v. Crawshay (1871) 40 L. J. M. C. 202, 207, 209; L. R. 5 H. L. 304, 316; 24 L. T. 889; 20 W. R. 554.—H.L. (E.).

Jones v. Mersey Docks, followed.

Reg. v. West Derby (1875) 44 L. J. M. C. 98; L. R. 10 Q. B. 283; 32 L. T. 400.—Q.B.; St. Thomas's Hospital (Governors) v. Lambeth Over-

seers (*or* Stratton) (1875) 45 L. J. M. C. 23; L. R. 7 H. L. 477; 23 W. R. 882.—H.L. (E.); *affirming* 30 L. T. 37.—EX. CH.

Jones v. Mersey Docks, explained.

Essendon Corporation v. Blackwood (1877) 46 L. J. P. C. 98; 2 App. Cas. 574; 36 L. T. 623; 25 W. R. 834.—P.C.

SIR M. E. SMITH (for the Court) says of the above case that it determined in effect that except in the case of the Crown, a liability to be rated attached upon every occupation from which benefit is derived, although the occupation was for purposes which might be deemed to be of a public nature.—p. 104.

Jones v. Mersey Docks, distinguished.

Hare v. Putney Overseers (1881) 50 L. J. M. C. 81; 7 Q. B. D. 223; 45 L. T. 337; 29 W. R. 721; 46 J. P. 100.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.

BRETT, L.J.—Then it is said that this case resembles *Jones v. Mersey Docks*. The question is whether it resembles most that case or the cases of the main sewers of the M. B. W., which are not liable to be assessed to the rates, and I think that the resemblance is to these latter cases. I am of opinion that, both on the ground that there is no occupation of the bridge by the Metropolitan Board, and no beneficial occupation, the Metropolitan Board are not liable to be rated in respect of this bridge.—p. 85.

Jones v. Mersey Docks, distinguished.

Reg. v. Curzon (1882) 46 L. T. 159; 30 W. R. 521; 47 J. P. 37.—HUDDLESTON, B. and BOWEN, J. HUDDLESTON, B.—There the question was whether an occupation was beneficial; here we have to consider whether there was by the liquidator any occupation at all.

Jones v. Mersey Docks, considered and applied.

Martin v. West Derby Union (1883) 52 L. J. M. C. 66; 11 Q. B. D. 145, 149; 31 W. R. 489; 47 J. P. 500.—C.A. COLERIDGE, C.J., BRETT and BOWEN, L.JJ.; Coomber v. Berkshire J.J. (1883) 53 L. J. Q. B. 239; 9 App. Cas. 61; 50 L. T. 405; 32 W. R. 525; 48 J. P. 421.—H.L. (E.).

Jones v. Mersey Docks, approved and followed.

Reg. v. West Bromwich School Board (1883) 53 L. J. M. C. 67; 13 Q. B. D. 929.—COLERIDGE, C.J., STEPHEN and MATHEW, JJ.; affirmed, 53 L. J. M. C. 153; 13 Q. B. D. 929; 52 L. T. 164; 32 W. R. 866; 48 J. P. 808.—C.A. BRETT, M.R., BOWEN and FRY, L.JJ. *See extract, infra*, col. 2756.

Jones v. Mersey Docks, adopted.

Mersey Docks and Harbour Board v. Lucas (1883) 53 L. J. Q. B. 4; 8 App. Cas. 891; 49 L. T. 781; 32 W. R. 34; 48 J. P. 212.—H.L. (E.).

Jones v. Mersey Docks, applied.

Dewsbury Waterworks Board v. Penistone Union (1885) 16 Q. B. D. 585; 54 L. T. 592.—MANISTY and SMITH, JJ.; affirmed, (1886) 55 L. J. M. C. 121; 17 Q. B. D. 384; 54 L. T. 592; 34 W. R. 622; 50 J. P. 644.—C.A.

Jones v. Mersey Docks, referred to.

Dublin Corporation v. McAdam (1887) 20 L. R. Ir. 497.—EX. D.; and *see post*, col. 2753.

Jones v. Mersey Docks (*supra*), *considered and applied*.

Tunnicliffe v. Birkdale Overseers (1888) 20 Q. B. D. 450; 59 L. T. 190; 36 W. R. 360; 52 J. P. 452.—C.A.

Jones v. Mersey Docks, *observations applied*.

Bray v. Lancashire JJ. (1889) 57 L. J. M. C. 57; 22 Q. B. D. 484, 489; 59 L. T. 438.—POLLOCK, B. and HAWKINS, J.: affirmed, 58 L. J. M. C. 54; 22 Q. B. D. 484, 489; 37 W. R. 392; 53 J. P. 499.—C.A. ESHER, M.R., BOWEN AND FRY, L.JJ.

Jones v. Mersey Docks, *referred to*.

Dillon v. Haverfordwest Corporation (1891) 60 L. J. Q. B. 477; [1891] 1 Q. B. 575; 64 L. T. 202; 39 W. R. 478; 55 J. P. 392.—POLLOCK, B. and CHARLES, J.; and Income Tax Commissioners v. Pemsel (1891) [1891] A. C. 531; 55 J. P. 805.—H.L. (E.).

Jones v. Mersey Docks, *referred to*.

London County Council v. Erith Overseers (1893).—H.L. (E.) [*supra*, col. 2740].

Jones v. Mersey Docks, *applied*.

Middlesex County Council v. St. George's, Hanover Square (1896) 66 L. J. Q. B. 101; [1897] 1 Q. B. 64; 75 L. T. 464; 45 W. R. 215; 61 J. P. 38.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

Jones v. Mersey Docks, *discussed*.

Waterford Union Guardians v. Barton [1896] 2 Ir. R. 538.—EX. D.; Harte v. Holmes [1898] 2 Ir. R. 656.—Q.B.D.

Jones v. Mersey Docks, *applied and explained*.

Mersey Docks and Harbour Board v. Birkenhead Union (1901) 70 L. J. K. B. 584; [1901] A. C. 175; 84 L. T. 542; 49 W. R. 610; 65 J. P. 579.—H.L. (E.).

LORD DAVEY.—In that case, although it is quite true that the question which was put to the learned judges by the House, and the question which was decided, was whether the hereditament was rateable at all, yet in answering that question, *ex necessitate* the consideration of the question was involved upon what basis the rating should be. The argument used was that there was no beneficial occupation, and it was held to be rateable because there was a beneficial occupation. I conceive that in principle, and impliedly (as I think has been held in subsequent cases which have come before the Courts), what was really decided was that notwithstanding the restriction upon the application of the profits resulting from carrying on that business on the hereditament, the profits so derived were a legitimate element in arriving at the value of the beneficial occupation which was to be the subject of rating.

Greig v. Edinburgh University (1868) L. R.

1 H. L. (Sc.) 348.—H.L. (Sc.), *followed*.
St. Thomas's Hospital Governors v. Lambeth Overseers (*or* Stratton) (1875) 45 L. J. M. C. 23; L. R. 7 H. L. 477; 23 W. R. 882.—H.L. (E.); affirming 30 L. T. 37.—EX. CH.

Greig v. Edinburgh University, *observations adopted*.

Coomber v. Berks JJ. (1883) 53 L. J. Q. B. 239; 9 App. Cas. 61, 68; 50 L. T. 405; 32 W. R. 525; 48 J. P. 421.—H.L. (E.).

Greig v. Edinburgh University, *applied*.

Mersey Docks and Harbour Board v. Llanellian

Overseers (1884) 14 Q. B. D. 770, 782; 51 L. T. 62.—COLERIDGE, C.J. and MATHEW, J.; (affirmed, C.A., *post*, col. 2768); Tunnicliffe v. Birkdale Overseers (1888) 20 Q. B. D. 450, 453; 59 L. T. 190; 36 W. R. 360; 52 J. P. 452.—C.A.; Bray v. Lancashire JJ. (1889) 58 L. J. M. C. 54; 22 Q. B. D. 484, 498; 37 W. R. 392; 53 J. P. 499.—C.A.; Worcestershire C. C. v. Worcester Union (1897) 66 L. J. Q. B. 323; [1897] 1 Q. B. 480; 76 L. T. 138; 45 W. R. 309; 61 J. P. 244.—C.A. See extract, *supra*, col. 2748.

Reg. v. M. B. W. (1868) 38 L. J. M. C. 24; L. R. 4 Q. B. 15; 19 L. T. 384; 17 W. R. 527.—Q.B., *followed*.

M. B. W. v. West Ham (1870) 40 L. J. M. C. 30; L. R. 6 Q. B. 193; 23 L. T. 490; 19 W. R. 246.—Q.B.

Reg. v. M. B. W., *adopted*.

Worcester Corporation v. Droitwich Assessment Committee, 45 L. J. M. C. 81, 85; 2 Ex. D. 49, 58; 34 L. T. 288.—EX. D.; affirmed, (1876) 46 L. J. M. C. 241; 2 Ex. D. 49; 36 L. T. 186; 25 W. R. 336.—C.A.

Reg. v. M. B. W., *explained and applied*.

Tyne Coal Co. v. Wallsend Overseers (1877) 46 L. J. M. C. 185, 188; 35 L. T. 854.—C.P.D.

• **Reg. v. M. B. W.**, *observation adopted*.

Hare v. Putney Overseers (1881) 50 L. J. M. C. 81; 7 Q. B. D. 223, 233; 45 L. T. 337; 29 W. R. 721; 46 J. P. 100.—C.A.

Reg. v. M. B. W., *applied*.

West Bromwich School Board v. West Bromwich Overseers (1884) 53 L. J. M. C. 153; 13 Q. B. D. 929, 943; 52 L. T. 164; 32 W. R. 866; 48 J. P. 808.—C.A.; Mersey Docks and Harbour Board v. Llanellian Overseers (1884) 14 Q. B. D. 770, 782; 51 L. T. 62.—COLERIDGE, C.J. and MATHEW, J. (affirmed, C.A.; *post*, col. 2768).

Reg. v. M. B. W., *referred to*.

London County Council v. Erith Churchwardens (1893).—H.L. (E.) (*supra*, col. 2740).

Reg. v. M. B. W., *applied*.

Ystradfydwg Sewage Board v. Newport Assessment Committee (1901) 70 L. J. K. B. 518; [1901] 1 K. B. 406; 84 L. T. 40.—C.A.

Metropolitan Board of Works v. West Ham

(1870) 40 L. J. M. C. 30; L. R. 6 Q. B. 193; 23 L. T. 490; 19 W. R. 246.—Q.B., *applied*.

Worcester Corporation v. Droitwich Assessment Committee (1876) 45 L. J. M. C. 81, 85; 2 Ex. D. 49, 58; 34 L. T. 288.—EX. D., (affirmed, 46 L. J. M. C. 241; 2 Ex. D. 49; 36 L. T. 186; 25 W. R. 336.—C.A.); Tyne Coal Co. v. Wallsend Overseers (1877) 46 L. J. M. C. 185, 188; 35 L. T. 854.—C.P.D.; Hare v. Putney Overseers (1881) 7 Q. B. D. 223, 234; 50 L. J. M. C. 81; 45 L. T. 337; 29 W. R. 721; 46 J. P. 100.—C.A.; West Bromwich School Board v. West Bromwich Overseers (1884) 53 L. J. M. C. 153; 13 Q. B. D. 929, 938; 52 L. T. 164; 32 W. R. 866; 48 J. P. 808.—C.A.; Mersey Docks and Harbour Board v. Llanellian Overseers (1884) 14 Q. B. D. 770, 782; 51 L. T. 62.—COLERIDGE, C.J. and MATHEW, J., (affirmed, 54 L. J. Q. B. 49; 14 Q. B. D. 770; 52 L. T. 118; 33 W. R. 97; 5 Asp. M. C. 358; 49 J. P. 164.—C.A.

Metropolitan Board of Works v. West Ham, discussed.

Burton-on-Trent Corporation v. Eggington Overseers (or Burton Union) (1889) 59 L. J. M. C. 1 : 24 Q. B. D. 197 : 62 L. T. 412 : 38 W. R. 181 : 54 J. P. 453.—C.A.

ESHER, M.R.—Now the question of whether the occupying tenant could be taken into consideration as a possible hypothetical tenant was never raised for decision till *Reg. v. London School Board* [supra, col. 2737]. It is said the point might have been raised for decision in *M. B. W. v. West Ham*, but even if it had been put before the Court, there was this peculiarity in the case, that it had been left to the Court to draw inferences of fact, and the Court, by the inference they drew, shut themselves out from deciding the point, because the inference they drew was that the sewer was incapable of beneficial occupation. That is a finding which is contrary to what is found in this case.

Metropolitan Board of Works v. West Ham, referred to.

London County Council v. Erith Overseers (1893).—H.L. (E.) (supra, col. 2740).

Metropolitan Board of Works v. West Ham, disapproved.

Ystradgofwg, &c., Sewage Board v. Newport Assessment Committee (1901) 70 L. J. K. B. 318 : [1901] 1 K. B. 406 : 84 L. T. 40.—C.A.

Worcester Corporation v. Droitwich Union Assessment Committee (1876) 46 L. J. M. C. 241 : 2 Ex. D. 49 : 36 L. T. 186 : 25 W. R. 336.—C.A., distinguished.

Chorlton-upon-Medlock Overseers v. Chorlton Union (1882) 51 L. J. Q. B. 458 : 47 L. T. 96 : 46 J. P. 535.—MANISTY and CAVE, JJ.

Worcester Corporation v. Droitwich Union Assessment Committee, followed.

Peterborough Corporation v. Stamford Union (1883) 31 W. R. 949.—Q.B.D.

Worcester Corporation v. Droitwich Union Assessment Committee, distinguished.

West Bromwich School Board v. West Bromwich Overseers (1884) 53 L. J. M. C. 153 : 13 Q. B. D. 929, 936 : 52 L. T. 164 : 32 W. R. 866 : 48 J. P. 808.—C.A. See extract, *infra*.

Worcester Corporation v. Droitwich Union Assessment Committee, adopted.

Mersey Docks and Harbour Board v. Llanellian Overseers (1884) 14 Q. B. D. 770, 782 : 51 L. T. 62.—COLERIDGE, C. J. and MATHEW, J. (affirmed, C.A.).

Worcester Corporation v. Droitwich Union Assessment Committee, distinguished.

Horn v. Sleaford Rural Council (1898) 67 L. J. Q. B. 724 : [1898] 2 Q. B. 358 : 78 L. T. 722 : 46 W. R. 555.—Q.B.D.

Chorlton-upon-Medlock Overseers v. Chorlton Union (1882) 51 L. J. Q. B. 458 : 47 L. T. 96 : 46 J. P. 535.—Q.B.D., adopted and observed upon.

West Bromwich School Board v. West Bromwich Overseers (1884) 53 L. J. M. C. 153 : 13 Q. B. D. 929, 941, 943 : 52 L. T. 164 : 32 W. R. 866 : 48 J. P. 808.—C.A.

Chorlton-upon-Medlock Overseers v. Chorlton Union, adopted.

Dewsbury and Heckmondwicke Waterworks Board v. Penistone Union (1885) 55 L. J. M. C.

28 : 16 Q. B. D. 585, 595 : 54 L. T. 592.—MANISTY and SMITH, JJ. (affirmed, C.A.).

Peterborough Corporation v. Stamford Union, (1883) 31 W. R. 949.—Q.B.D., distinguished.

West Bromwich School Board v. West Bromwich Overseers (or Reg. v. West Bromwich School Board) (1883) 53 L. J. M. C. 67 : 13 Q. B. D. 929.—Q.B.D., affirmed. 53 L. J. M. C. 153 : 13 Q. B. D. 929 : 52 L. T. 164 : 32 W. R. 866 : 48 J. P. 808.—C.A.

MATHEW, J. We cannot yield to Mr. Anstie's argument without saying that the H. L. were wrong in *Jones v. Mersey Docks*, (supra, col. 2750). The cases which he cited in support of his argument are distinguishable. They were cases where the property in question could have no value to any occupier save for any right to levy sums of money, and any such right was limited to levying the amount requisite for maintaining the property.—p. 71.

*Charitable Institutions.***York Lunatic Asylum (or Rex) v. St. Giles, York (1832) 1 L. J. M. C. 30 : 3 B. & Ad. 573.—K.B., discussed.**

Waterford Union Guardians v. Barton [1896] 2 Ir. R. 538.—EX.D.

Congreve v. Upton Overseers (1861) 33 L. J. M. C. 83 : 4 B. & S. 857 : 10 Jur. (N.S.) 538 : 9 L. T. 684 : 12 W. R. 403.—Q.B., applied. Japson v. Gribble (1876) 45 L. J. Ex. 502 : 1 Ex. D. 151 : 34 L. T. 493 : 24 W. R. 460.—EX.D.

Congreve v. Upton Overseers, approved.

Wilson v. Farron (1883) 48 J. P. 361.—CT. OF SESS.

Reg. v. Wilson (1840) 12 A. & E. 94 : 4 P. & D. 130 : 9 L. J. M. C. 100.—Q.B., commented upon.

Reg. v. Baptist Missionary Society (1849) 10 Q. B. 884 : 18 L. J. M. C. 194 : 3 New Sess. Cas. 555 : 13 Jur. 748.—Q.B.

COLERIDGE, J.—*Reg. v. Wilson*, if to be supported at all, must be supported on the ground that the person rated did not occupy the premises.—p. 892.

[And see per CROMPTON, J., in *Reg. v. Licensed Victuallers' Society* (1861) 1 B. & S. 71, 76.]

Schools.

Reg. v. Sterrey (1840) 9 L. J. M. C. 105 : 12 A. & E. 84 : 4 P. & D. 122.—Q.B.

Magee College Trustees v. Commissioners of Valuation (1868) 1r. R. 4 C. L. 438.—Q.B., discussed.

Waterford Union Guardians v. Barton (1896) 2 Ir. R. 538.—EX.D.

Sheppard v. Bradford Overseers (1864) 33 L. J. M. C. 182 : 16 C. B. (N.S.) 369 : 10 Jur. (N.S.) 799 : 10 L. T. 421 : 12 W. R. 867.—C.P., held overruled.

Reg. v. West Derby (1875) 44 L. J. M. C. 98 : L. R. 10 Q. B. 283 : 32 L. T. 400.—Q.B.

Sheppard v. Bradford Overseers, overruled.**Reg. v. West Derby, referred to.**

Tunnicliffe v. Birkdale Overseers (1888) 20 Q. B. D. 450 : 59 L. T. 190 : 36 W. R. 360 : 52 J. P. 452.—C.A. ESHER, M.R., FRY and LOPES, JJ.

ESHER, M.R.—*Sheppard v. Bradford* has been cited, in which it was held that a reformatory

school substantially similar to that now in question was not rateable. This case was decided before the *Mersey Docks Case* (*supra*, col. 2750) and there does not appear to have been any long series of cases on the subject in which that decision was acted on, or any continued course of practice founded on the decision which has been recognised or uncontested for a long period. It seems to me, therefore, that *Sheppard v. Bradford* must be considered as overruled by the *Mersey Docks Case* unless the buildings there in question could be brought within the strict rule laid down by the H. L. In *Reg. v. West Derby* Lord Blackburn seems to have treated it as overruled.—p. 455.

Literary and Scientific Institutions.

Purvis v. Traill (1849) 18 L. J. M. C. 57; 3 Ex. 344; 3 New Sess. Cas. 459.—EX., *observation adopted*.
Inland Revenue Commissioners v. Forrest (1890) 15 App. Cas. 334, 340; 63 L. T. 36; 39 W. R. 33; 54 J. P. 772.—H.L. (E.).

Birmingham Overseers v. Shaw (1849) 18 L. J. M. C. 89; 10 Q. B. 868; 3 New Sess. Cas. 445; 13 Jur. 357.—Q.B., *followed*.
Williams, Ex parte (1853) 22 L. J. M. C. 125; 2 El. & Bl. 84; 17 Jur. 763.—Q.B.

Birmingham Overseers v. Shaw, *approved*.
Reg. v. Hannam (1886) 34 W. R. 335.—C.A.

Birmingham Overseers v. Shaw, *discussed*.
New University Club, In re (1887) 56 L. J. Q. B. 462; 18 Q. B. D. 720; 56 L. T. 909; 35 W. R. 774.—HAWKINS and SMITH, JJ.

Birmingham Overseers v. Shaw, *considered and adopted*.
Inland Revenue Commissioners v. Forrest (1890) 15 App. Cas. 334, 339; 63 L. T. 36; 39 W. R. 33; 54 J. P. 772.—H.L. (E.).

Birmingham Overseers v. Shaw, *observations adopted*.
Bates v. Plumstead Overseers (1895) 64 L. J. M. C. 127; 72 L. T. 393; 59 J. P. 118.—WILLS and WRIGHT, JJ.

Birmingham Overseers v. Shaw, *applied*.
Baglan Bay Tin Plate Co. v. John (1895) 72 L. T. 805.—CHARLES and WRIGHT, JJ.

Birmingham Overseers v. Shaw, *disapproved*.
Savoy Overseers v. Art Union of London (1896) 65 L. J. M. C. 161; [1896] A. C. 296; 74 L. T. 497; 45 W. R. 34; 60 J. P. 660.—H.L. (E.).

LORD HERSCHELL.—This judgment [the judgment in the above case] appears to me to lose sight of the fact that what has to be construed is the combination "voluntary contributions," and not merely the word "voluntary" alone, or in some other combination. It may be that this word is ordinarily used as the antithesis to "compulsory," though in legal parlance it is quite commonly employed to describe that which is gratuitous and without consideration. But putting aside this legal acceptance of the word, I cannot think that "voluntary contributions" in the Statute means the same thing as "voluntary payments," or that an institution can properly be said to be supported by voluntary contributions where these are the price paid for

a purchase, whether of goods or advantages, merely because the person making the payment was under no obligation to do so.

Birmingham Overseers v. Shaw, *adopted*.
Westminster City Council v. Army and Navy Auxiliary Co-operative Supply Association (1902) 71 L. J. K. B. 546; [1902] 2 K. B. 125; 87 L. T. 78; 50 W. R. 631; 66 J. P. 727.—K.B.D.

Birmingham Overseers v. Shaw, *referred to*.
Att.-Gen. v. McCormack [1903] 2 Ir. R. 517.—K.B.

Reg. v. Brandt (1851) 20 L. J. M. C. 119; 16 Q. B. 462; 15 Jur. 223.—Q.B., *considered and adopted*.

Inland Revenue Commissioners v. Forrest (1890) 15 App. Cas. 334, 339; 63 L. T. 36; 39 W. R. 33; 54 J. P. 772.—H.L. (E.).

Reg. v. Brandt (*supra*); **Reg. v. Manchester Overseers** (1851) 16 Q. B. 449; 20 L. J. M. C. 113; 15 Jur. 219.—Q.B.; **Reg. v. Gaskell** (1851) 21 L. J. M. C. 29; 16 Q. B. 472; 15 Jur. 1156.—Q.B., *referred to*.
Savoy Overseers v. Art Union of London (1896) 65 L. J. M. C. 161; [1896] A. C. 296; 74 L. T. 497; 45 W. R. 34; 60 J. P. 660.—H.L. (E.).

Russell Institution v. St. Giles-in-the-Fields Vestry (1854) 23 L. J. M. C. 65; 3 El. & Bl. 406; 2 C. L. R. 755; 18 Jur. 597; 2 W. R. 169.—Q.B., *considered*.

New University Club, In re (1887) 56 L. J. Q. B. 462; 18 Q. B. D. 720, 729; 56 L. T. 909; 35 W. R. 774.—HAWKINS and SMITH, JJ.

Russell Institution v. St. Giles-in-the-fields Vestry, *considered and adopted*.

Inland Revenue Commissioners v. Forrest (1890) 15 App. Cas. 334, 338; 63 L. T. 36; 39 W. R. 33; 54 J. P. 772.—H.L. (E.).

Russell Institution v. St. Giles-in-the-fields Vestry, *referred to*.

Savoy Overseers v. Art Union of London (1896) 65 L. J. M. C. 161; [1896] A. C. 296; 74 L. T. 497; 45 W. R. 34; 60 J. P. 660.—H.L. (E.): and see *Russell Institution*, In re, *Figgins v. Baghino* (1898) 67 L. J. Ch. 411; [1898] 2 Ch. 72; 78 L. T. 588.—NORTH, J.

Marylebone Vestry (or Reg.) v. Zoological Society of London (1854) 23 L. J. M. C. 139; 3 El. & Bl. 807; 2 C. L. R. 766; 18 Jur. 786; 2 W. R. 491.—Q.B., *discussed*.

New University Club, In re (1887) 56 L. J. Q. B. 462; 18 Q. B. D. 720; 56 L. T. 909; 35 W. R. 774.—HAWKINS and SMITH, JJ.

Marylebone Vestry v. Zoological Society, *considered and adopted*.

Inland Revenue Commissioners v. Forrest (1890) 15 App. Cas. 334, 338; 63 L. T. 36; 39 W. R. 33; 54 J. P. 772.—H.L. (E.).

Marylebone Vestry v. Zoological Society, *applied*.

Savoy Overseers v. Art Union of London (1896).—H.L. (E.) (*infra*, col. 2760).

St. Anne, Westminster, Overseers v. Linnean Society (or Linnean Society v. St. Anne, Westminster, Overseers) (1854) 23 L. J. M. C. 148; 3 El. & Bl. 793; 2 C. L. R. 761; 18 Jur. 859; 2 W. R. 516.—Q.B., *considered*.

New University Club, In re (1887) 56 L. J.

Q. B. 462; 18 Q. B. D. 720, 730; 56 L. T. 909; 35 W. R. 774.—HAWKINS and SMITH, JJ.

St. Anne, Westminster, Overseers v. Linnean Society, considered and adopted.
Inland Revenue Commissioners v. Forrest (1890) 15 App. Cas. 334, 339; 63 L. T. 36; 39 W. R. 33; 54 J. P. 772.—H.L. (E.).

St. Anne, Westminster, Overseers v. Linnean Society, referred to.
Savoy Overseers v. Art Union of London (1896) 65 L. J. M. C. 161; [1896] A. C. 296; 74 L. T. 497; 45 W. R. 34; 60 J. P. 660.—H.L. (E.).

Bradford Library v. Bradford Overseers (1858) 28 L. J. M. C. 73; 1 E.L. & E.L. 88; 5 Jur. (N.S.) 513; 7 W. R. 36.—Q.B., discussed.

New University Club, In re (1887) 56 L. J. Q. B. 462; 18 Q. B. D. 720; 56 L. T. 909; 35 W. R. 774.—HAWKINS and SMITH, JJ.

Bradford Library v. Bradford Overseers, disapproved.

Savoy Overseers v. Art Union of London (1896) 65 L. J. M. C. 161; [1896] A. C. 296; 74 L. T. 497; 45 W. R. 34; 60 J. P. 660.—H.L. (E.).

Bradford Library v. Bradford Overseers, referred to.

Manchester Corporation v. McAdam (1896) 65 L. J. Q. B. 672; [1896] A. C. 500; 75 L. T. 229.—H.L. (E.).

Liverpool Library v. Liverpool Corporation (1860) 29 L. J. M. C. 221; 5 H. & N. 526; 2 L. T. 325; 8 W. R. 498.—EX. considered.

New University Club, In re (1887) 56 L. J. Q. B. 462; 18 Q. B. D. 720, 731; 56 L. T. 909; 35 W. R. 774.—HAWKINS and SMITH, JJ.

Liverpool Library v. Liverpool Corporation, distinguished.

Sion College v. London Corporation (1900) 69 L. J. Q. B. 766; [1900] 2 Q. B. 381; 83 L. T. 76.—GRANTHAM and CHANNELL, JJ.

CHANNELL, J.—I must assume . . . that the fact that the exemption there was under a public Act is sufficient to distinguish that case from the present.

Reg. v. Institution of Civil Engineers (1879) 49 L. J. M. C. 34; 5 Q. B. D. 48; 42 L. T. 145; 28 W. R. 253; 44 J. P. 265.—FIELD and MANISTY, JJ., inapplicable.

Inland Revenue Commissioners v. Forrest (1890) 15 App. Cas. 334, 347; 63 L. T. 36; 39 W. R. 33; 54 J. P. 772.—H.L. (E.).

LORD WATSON.—These provisions (*i.e.*, the provisions of 6 & 7 Vict. c. 36 on which the above case was decided), appear to me to differ so much, both in their subject-matter and scope, from the exempting enactments with which we have to deal in this case, that little or no assistance can be derived from them or from the decisions which followed upon them, in construing the [Customs and Inland Revenue] Act of 1885.

Reg. v. Institution of Civil Engineers, observations applied.

Royal College of Music v. Westminster Vestry (1897) [1898] 1 Q. B. 304, 312.—Q.B.D. (affirmed C.A., *infra*).

Art Union of London v. Savoy Overseers (1894) 63 L. J. M. C. 253; [1894] 2 Q. B. 609; 9 R. 690; 71 L. T. 40; 42 W. R. 690; 59 J. P. 20.—C.A. SMITH, L.J. dissenting; reversed nom. **Savoy Overseers v. Art Union of London** (1896) 65 L. J. M. C. 161; [1896] A. C. 296; 74 L. T. 497; 45 W. R. 34; 60 J. P. 660.—H.L. (E.).

Art Union of London v. Savoy Overseers, applied.
Att.-Gen. v. Ellis (1895) 64 L. J. Q. B. 813; [1895] 2 Q. B. 466; 73 L. T. 190, 350; 44 W. R. 13.—Q.B.D.

Art Union of London v. Savoy Overseers, distinguished and observations adopted.
Royal College of Music v. Westminster Vestry (1898) 67 L. J. Q. B. 540; [1898] 1 Q. B. 809; 78 L. T. 441; 62 J. P. 357.—C.A.

Royal College of Music v. Westminster Vestry (supra), dictum considered.

Jenner Institute v. St. George's, Hanover Square, Assessment Committee (1900) 69 L. J. Q. B. 814; 83 L. T. 344.—Q.B.D.

Reg. v. York Corporation (1837) 6 L. J. M. C. 121; 6 A. & E. 419; 1 N. & P. 539.—K.B., distinguished.

Lincoln Corporation v. Holmes Common (1867) 36 L. J. M. C. 73, 77; L. R. 2 Q. B. 482, 489; 8 B. & S. 344; 16 L. T. 739; 15 W. R. 786.—Q.B.

Lincoln Corporation v. Holmes Common (supra).

Distinguished. Reg. v. Rhymney Ry. (1869) 38 L. J. M. C. 75, 78; L. R. 4 Q. B. 276, 284; 10 B. & S. 198; 17 W. R. 530.—Q.B.: *dictum referred to*, London County Council v. Lambeth Churchwardens (1896) 65 L. J. M. C. 148; [1896] 2 Q. B. 25; 74 L. T. 605; 44 W. R. 621; 60 J. P. 470.—C.A.

Reg. v. Salisbury (Marquis) (1838) 7 L. J. M. C. 110; 8 A. & E. 716; 3 N. & P. 476; 1 W. W. & H. 444.—Q.B., considered.
L. & N. W. Ry. v. Buckmaster (1875) 44 L. J. M. C. 180; L. R. 10 Q. B. 444; 33 L. T. 329; 24 W. R. 16.—EX. CH.

Canals.

Reg. v. Grand Junction Canal (1859) 7 W. R. 597.—Q.B., discussed.

Grand Junction Canal v. Hemel Hempstead (1870) L. R. 6 Q. B. 173; 40 L. J. M. C. 25; 24 L. T. 228; 19 W. R. 443.—Q.B.

MELLOR, J.—It is true that Cockburn, C.J., in *Reg. v. Glamorganshire Canal*, seems to have disapproved of the decision of Lord Campbell, C.J., and Erle, J., in *Reg. v. Grand Junction Canal*; but I think that there is a distinction between the two cases. I do not think that Lord Campbell, C.J., and Erle, J., intended to say that the land occupied by the canal was always to be rated at the value of purely agricultural land, which Cockburn, C.J., in *Reg. v. Glamorganshire Canal*, appears to have thought they intended, but at the increased value of surrounding land as determined from time to time by circumstances. If the land lying near becomes of more value by a new mode of cultivation being adopted, or by a different use being made of it, as being used as a market garden, or by buildings being erected in the neighbourhood, then the rateable value of the canal will be determined by the increased rateable value of the land lying near.—p. 178.

Reg. v. Glamorganshire Canal Co. (1860) 29 L. J. M. C. 238; 3 El. & El. 186; 6 Jur. (N.S.) 1146; 2 L. T. 694; 8 W. R. 690.
—Q.B., *considered and distinguished*.

Grand Junction Canal Co. v. Hemel Hempstead Overseers (1870) 40 L. J. M. C. 25; L. R. 6 Q. B. 173; 24 L. T. 228; 19 W. R. 443.—Q.B. *See extract, supra*.

Reg. v. Glamorganshire Canal Co. *not applied*.
Warwick and Birmingham Canal Co. v. Birmingham Union (1872) 27 L. T. 487.—Q.B.

Peto v. West Ham (1859) 4 E. & E. 144; 28 L. J. M. C. 240; 7 W. R. 586.—Q.B., *discussed*.

Reg. v. Neath Canal Navigation Co. (1871) 40 L. J. M. C. 193; L. R. 6 Q. B. 707.—Q.B.

Peto v. West Ham, *questioned*.

Reg. v. Neath Canal Navigation Co. (*supra*), *preferred*.

Reg. v. Midland Ry. (1875) L. R. 10 Q. B. 389; 44 L. J. M. C. 137; 32 L. T. 753; 23 W. R. 921.
—Q.B.

BLACKBURN, J.—Now, it has been argued that we are not bound by the *Neath Case*, for this reason, it is said it is in conflict with the *West Ham Case*, and if it is in conflict we have to decide which of the two we will follow. I think it may very well not be in conflict with the *West Ham Case*, because I think that the *West Ham Case* may be considered as supported on one of the two grounds which I have referred to. But, supposing that was not so, supposing that we had overruled the *West Ham Case*, we have now to consider which of the two is the best decision; and so looking at it for the reasons I have already intimated, I think, not only is the *Neath Case* the last, but also it is the best. I cannot come to the conclusion that, in considering sect. 33 of the Lighting and Watching Act we can say that, in the words, "houses, buildings, and property other than land," and "land," the antithesis is between land in its natural state, or in an agricultural state, and land in which any money has been invested for commercial purposes: I think the distinction is between land, which is the general word, and land which has been built upon. Such property is either a house or building, or something which for any reason is not a building—a house or things *ejusdem generis*; and I think neither a railway nor a canal could be considered as a building in that sense. For that reason I think we should follow the *Neath Case*, both as being the last and as being, in fact, the best decision of the two; and the result is that the order of the sessions must be amended by reducing the rate.

Peto v. West Ham; Reg. v. Neath Canal Navigation Co.; and Reg. v. Midland Ry. (*supra*), *distinguished*.

Southwark and Vauxhall Water Co. v. Hampton Urban Council (1898) 68 L. J. Q. B. 207; [1899] 1 Q. B. 273; 80 L. T. 1; 47 W. R. 177; 63 J. P. 100.—C.A. SMITH, RIGBY and COLLINS, L.J.; affirmed on this point *nom.* Hampton Urban Council *v.* Southwark and Vauxhall Water Co. (1899) 69 L. J. Q. B. 72; [1900] A. C. 3; 81 L. T. 547; 48 W. R. 209; 64 J. P. 260.—H.L. (E.). LORDS HALSBURY, L.C., MACNAGHTEN and ROBERTSON.

HELD—that an artificial reservoir was "land

covered with water," for the purpose of assessment in the proportion of one-fourth under the Public Health Act, 1875, s. 211, sub-s. 1 (b).

SMITH, L.J.—I have already pointed out that *Peto v. West Ham* arose under the words "property other than land," in the General Lighting and Watching Act, 1833, and the same remark applies to *Reg. v. Neath* and *Reg. v. Midland Ry.*

Rex v. Kingswinford (1827) 6 L. J. (O.S.) M. C. 3; 7 B. & C. 236; 1 M. & Ry. 20; 31 R. R. 181.—K.B., *applied*.

G. E. Ry. v. Haughley Overseers (1866) 35 L. J. M. C. 229, 234; L. R. 1 Q. B. 666, 683; 12 Jur. (N.S.) 596; 14 L. T. 548; 14 W. R. 779.—Q.B.; and **Hull Docks Co. v. Sealcoates Union** (1894)—C.A. *See post*, col. 2767.

Waterworks.

Rex v. Manchester and Salford Waterworks Co. (1823) 1 B. & C. 630; 3 D. & R. 20.—K.B.: **Rex v. Shrewsbury Trustees** (1832) 3 B. & Ad. 216.—K.B., *referred to*.

Redington v. Millar (1888) 24 L. R. Ir. 65.—C.A.

Redington v. Millar, 22 L. R. Ir. 78.—Q.B.D., O'BRIEN, J. *dissenting; reversed*, (1888) 24 L. R. Ir. 65.—C.A.

Redington v. Millar, *followed*.
Ennis Town Commissioners v. Macbeth [1897] 2 Ir. R. 552.—Q.B.D.

Rex v. Chelsea Waterworks Co. (1833) 2 L. J. M. C. 98; 5 B. & Ad. 156; 2 N. & M. 767.—K.B., *followed*.

Holywell Union v. Halkyn District Mines Drainage Co. (1894) 64 L. J. M. C. 113; [1895] A. C. 117; 11 R. 98; 71 L. T. 818; 59 J. P. 566.—H.L. (E.).

Reg. v. Southwark and Vauxhall Water Co. (1856) 6 El. & Bl. 1008; 3 Jur. (N.S.) 411; 5 W. R. 71.—Q.B., *followed*.

Reg. v. Midland Ry. (1875) 44 L. J. M. C. 137; L. R. 10 Q. B. 389, 392; 32 L. T. 753; 23 W. R. 921.—Q.B.

Reg. v. Birmingham Waterworks Co. (1861) 1 B. & S. 84; 4 L. T. 242.—Q.B., *followed*.

Reg. v. Newport Dock Co. (or Newport Dock Co. v. Newport Local Board) (1862) 2 B. & S. 708; 31 L. J. M. C. 266; 9 Jur. (N.S.) 73; 6 L. T. 456.—Q.B.; **East London Waterworks Co. v. Leyton Sewer Authority** (1871) 40 L. J. M. C. 190; L. R. 6 Q. B. 669; 20 W. R. 95.—Q.B.

Reg. v. Birmingham Waterworks Co.; Reg. v. Newport Dock Co. (or Newport Dock Co. v. Newport Local Board) (*supra*); and **East London Waterworks v. Leyton Sewer Authority** (*supra*), *approved*.

Southwark and Vauxhall Water Co. v. Hampton Urban Council (1898) 68 L. J. Q. B. 207; [1899] 1 Q. B. 273; 80 L. T. 1; 47 W. R. 177; 63 J. P. 100.—C.A., affirmed on this point in H.L. (*see supra*, col. 2761).

Reg. v. Mile End Old Town Overseers (1847) 16 L. J. M. C. 184; 10 Q. B. 208; 3 New Sess. Cas. 13; 11 Jur. 985.—Q.B., *followed*.
Sheffield United Gaslight Co. v. Sheffield Overseers (or *Reg. v. Sheffield United Gaslight Co.*)

(1863) 32 L. J. M. C. 169; 4 B. & S. 135; 9 Jur. (N.S.) 623; 8 L. T. 692; 11 W. R. 1064.—Q.B.; Reg. v. South Staffordshire Waterworks Co. (1885) 55 L. J. M. C. 88; 16 Q. B. D. 359, 368; 54 L. T. 782; 34 W. R. 242; 50 J. P. 20.—C.A.

Reg. v. West Middlesex Waterworks Co. (1858) 28 L. J. M. C. 135; 1 El. & El. 716; 5 Jur. (N.S.) 1139.—Q.B.

Followed, Sheffield United Gaslight Co. v. Sheffield Overseers (or Reg. v. Sheffield United Gaslight Co.) (1863) 32 L. J. M. C. 169; 4 B. & S. 135; 9 Jur. (N.S.) 623; 8 L. T. 692; 11 W. R. 1064.—Q.B.; *principle applied*, Pimlico Tramway Co. v. Greenwich (1873) 43 L. J. M. C. 29; L. R. 9 Q. B. 9, 15; 29 L. T. 605; 22 W. R. 87.—Q.B.; *observations adopted*, Reg. v. South Staffordshire Waterworks Co. (1885) 55 L. J. M. C. 88; 16 Q. B. D. 359, 372; 54 L. T. 782; 34 W. R. 242; 50 J. P. 20.—C.A.; Holywell Union v. Halkyn Drainage Co. (1894) 64 L. J. M. C. 113; [1895] A. C. 117; 71 L. T. 818; 59 J. P. 566.—H.L. (N.); *principle adopted*, Liverpool Corporation v. Llanfyllin Assessment Committee (1899).—C.A. (*infra*).

Liverpool Corporation v. Llanfyllin Assessment Committee, 78 L. T. 835.—RIDLEY and PHILLIMORE, JJ.; *reversed*, (1899) 68 L. J. Q. B. 762; [1899] 2 Q. B. 14; 80 L. T. 667; 63 J. P. 452.—C.A. SMITH, WILLIAMS and ROMER, L.J.

Liverpool Corporation v. Llanfyllin Assessment Committee (*supra*, in C.A.), *distinguished*.

New River Co. v. Hertford Union (1901) 70 L. J. K. B. 740; [1901] 2 K. B. 620; 85 L. T. 132; 49 W. R. 619; 65 J. P. 726.—RIDLEY and BIGHAM, JJ.

Navigable River.

Rex v. Mersey and Irwell Navigation Co. (1829) 7 L. J. (O.S.) M. C. 70; 4 M. & Ry. 84; 9 B. & C. 85.—K.B., *followed*.

Doncaster Union v. Manchester, Sheffield and Lincolnshire Ry. (1894) 6 R. 280; 71 L. T. 585; [1895] A. C. 133, n.—H.L. (E.).

Manchester, Sheffield and Lincolnshire Ry. v. Doncaster Union (1893) 69 L. T. 350; 57 J. P. 792.—LAWRANCE and COLLINS, JJ.; *reversed nom.* Doncaster Union v. Manchester, Sheffield and Lincolnshire Ry.—C.A.; *the latter decision affirmed*, (1894) [1895] A. C. 133, n.; 6 R. 280; 71 L. T. 585.—H.L. (E.).

Moorings.

Forrest v. Greenwich Overseers (1858) 27 L. J. M. C. 96; 8 El. & Bl. 890; 4 Jur. (N.S.) 480; 6 W. R. 279.—Q.B., *distinguished*.

Cory v. Greenwich Churchwardens (1872) 41 L. J. M. C. 142; L. R. 7 C. P. 499, 504; 27 L. T. 150.—Q.B.

Forrest v. Greenwich Overseers, *dictum adopted*.

Cory v. Bristow (1877) 2 App. Cas. 262, 275; 46 L. J. M. C. 273; 36 L. T. 595; 25 W. R. 383.—H.L. (E.); **Reg. v. St. Pancras Assessment Committee** (1877) 46 L. J. M. C. 243; 2 Q. B. D. 581, 585; 37 L. T. 126; 25 W. R. 827.—Q.B.D.

Watkins v. Gravesend and Milton (or Milton-next-Gravesend) Overseers (1863) 37 L. J. M. C. 73; L. R. 3 Q. B. 350; 18 L. T. 601; 16 W. R. 1059.—Q.B., *distinguished*.

Cory v. Greenwich Churchwardens (1872) 41 L. J. M. C. 142, 144; L. R. 7 C. P. 499, 503; 27 L. T. 150.—C.P.

Watkins v. Gravesend and Milton Overseers, *applied*.

Wells v. Kingston-upon-Hull Corporation (1875) 44 L. J. C. P. 257, 268; L. R. 10 C. P. 402, 412; 32 L. T. 615; 23 W. R. 562.—C.P.

Watkins v. Gravesend and Milton Overseers, *distinguished and questioned*.

Cory v. Bristow (1877) 46 L. J. M. C. 273; 2 App. Cas. 262, 272; 36 L. T. 595; 25 W. R. 383.—H.L. (E.).

CAIRNS, L.C.—That case turns entirely upon this, that the owner of the hulk, who was the person rated, was not in occupation of these moorings. The moorings were not his—the moorings were the moorings of the conservators. . . . Be that case correctly decided or not, it has no bearing upon the facts of the present case, where your lordships find moorings . . . belonging to the appellants, used by the appellants, and used by the appellants alone.

Watkins v. Gravesend and Milton Overseers, *observations adopted*.

Reg. v. St. Pancras Assessment Committee (1877) 46 L. J. M. C. 243; 2 Q. B. D. 581, 587; 37 L. T. 126; 25 W. R. 827.—Q.B.D.

Watkins v. Gravesend and Milton Overseers, *distinguished*.

Lancashire Telephone Co. v. Manchester Overseers (1884) 53 L. J. M. C. 195; 13 Q. B. D. 700, 705; 51 L. T. 160; 32 W. R. 922.—MATHEW and DAX, JJ.; *affirmed*, 54 L. J. M. C. 63; 14 Q. B. D. 267; 52 L. T. 793; 33 W. R. 203; 49 J. P. 724.—C.A. BRETT, M.R. and LINDLEY, L.J.

Cory v. Greenwich Overseers (1872) 41 L. J. M. C. 142; L. R. 7 C. P. 499; 27 L. T. 150.—C.P., *distinguished*.

Cory v. Bristow (1877) 46 L. J. M. C. 273; 2 App. Cas. 262, 271; 36 L. T. 595; 25 W. R. 383.—H.L. (E.).

Cory v. Bristow, 44 L. J. M. C. 153; L. R. 10 C. P. 504; 32 L. T. 797; 23 W. R. 615.—C.P.; *reversed*, (1875) 45 L. J. M. C. 145; 1 C. P. D. 54; 33 L. T. 624; 24 W. R. 336.—C.A.; *the latter decision affirmed*, (1877) 46 L. J. M. C. 273; 2 App. Cas. 262; 36 L. T. 595; 25 W. R. 383.—H.L. (E.).

Cory v. Bristow, *distinguished*.

Reg. v. St. Pancras Assessment Committee (1877) 46 L. J. M. C. 243; 2 Q. B. D. 581, 585; 37 L. T. 126; 25 W. R. 827.—Q.B.D.; **Smith v. Lambeth Assessment Committee** (1882) 52 L. J. M. C. 1; 10 Q. B. D. 327; 48 L. T. 57; 47 J. P. 244.—C.A. BAGGALLAY, BRETT and LINDLEY, L.JJ.; *affirming* 31 W. R. 31.

Cory v. Bristow, *followed*.

Lancashire Telephone Co. v. Manchester Overseers (1884) 54 L. J. M. C. 63; 14 Q. B. D. 267; 52 L. T. 793; 33 W. R. 203; 49 J. P. 724.—C.A.—BRETT, M.R. and LINDLEY, L.J.; *and see post*.

Cory v. Bristow (*supra*), *referred to*.
Thames Conservators v. Inland Revenue Commissioners (1886) 56 L. J. Q. B. 181; 18 Q. B. D. 279, 284; 56 L. T. 198; 35 W. R. 274.—Q.B.D.

Cory v. Bristow, *applied*.
Taylor v. Pendleton Overseers (1887) 56 L. J. M. C. 146; 19 Q. B. D. 288, 295; 57 L. T. 530; 35 W. R. 762; 51 J. P. 613.—WILLS and GRANTHAM, JJ.

Cory v. Bristow, *referred to*.
Holywell Union v. Halkyn Drainage Co. (1894) 64 L. J. M. C. 113; [1895] A. C. 117; 71 L. T. 818; 59 J. P. 566.—H.L. (E.).

Docks and Wharves.

Reg. v. Kingston-upon-Hull Dock Co. (No. 1)
(1845) 1 New Sess. Cas. 627; 7 Q. B. 2; 14 L. J. M. C. 114; 9 Jur. 442.—Q.B., *distinguished*.

Reg. v. Berwick Assessment Committee (1885) 55 L. J. M. C. 84; 16 Q. B. D. 493; 54 L. T. 159; 5 Asp. M. C. 532; 50 J. P. 71.—CAVE and WILLS, JJ.

CAVE, J.—In that case certain dues were given to the dock company in respect of the charges and expenses they had been at in making the docks, and these dues were of the same amount, and were equally payable whether the ships entered the docks, the property of the company, or merely entered the harbour, which was not the property of the company, without going into the docks at all. The docks were the sole meritorious cause of the company's right to the dues, and it was held that the dues were not the less earned by the docks where the ship actually entered the docks, because the ship must have paid the same amount if it had not entered the docks at all. In the present case the wet dock is not the sole meritorious cause of the commissioners' right to the dues. On the contrary, the commissioners have executed and maintain works in the harbour by which ships using the harbour are directly benefited, and seeing that all ships entering the harbour pay a certain and uniform rate whether they enter the wet dock or not, while those which enter the wet dock pay an additional rate of 2*d.* a ton, from which those who do not enter it are free, and seeing that the former rate was always payable even before the wet dock was made, while the additional rate only came into operation when the wet dock was completed, the inference is, in my judgment, irresistible that the additional 2*d.* a ton alone is earned by the wet dock, and that the dues which all vessels pay alike, whether they enter the wet dock or not, are earned by the works carried out and maintained by the commissioners in the harbour, and cannot be taken into account in rating the docks, because they are not earned by the wet dock, nor is the wet dock in any way the meritorious cause of them.—p. 86.

Reg. v. Kingston-upon-Hull Dock Co. (No. 1), *principle applied*.

Blyth Harbour Commissioners v. Newsham and South Blyth Overseers (1894) 63 L. J. M. C. 274; [1894] 2 Q. B. 675; 9 R. 618; 71 L. T. 34; 59 J. P. 4.—C.A.

Reg. v. Kingston-upon-Hull Dock Co. (No. 1), *observations applied*.

Lancaster Port Commissioners v. Barrow-in-Furness Overseers (1896) 66 L. J. Q. B. 90;

[1897] 1 Q. B. 166; 73 L. T. 358; 61 J. P. 21.—GRANTHAM and KENNEDY, JJ.

Reg. v. Kingston-upon-Hull Dock Co. (No. 2)
(1852) 18 Q. B. 325; 21 L. J. M. C. 153; 7 Railw. Cas. 836; 16 Jur. 543.—Q.B., *distinguished*.

Mersey Docks v. Liverpool Overseers (1872) L. R. 7 Q. B. 643; 41 L. J. M. C. 161; 26 L. T. 868; 20 W. R. 827.—Q.B.

COCKBURN, C.J.—The *Hull Dock Case* undoubtedly establishes this—that where there is a series of docks all lying contiguous to one another, and forming part of one entire concern, and toll is taken for the right to enter into and have the benefit of any of that series or general system of docks and dock accommodation, you cannot apply the parochial principle of rating, but must have recourse to the acreage principle. But the language of all the judges in that case. I think, goes entirely to this, that you are not to resort to the acreage principle, except, *ex necessitate*, where you really cannot apply the other. If this case were on all fours with the *Hull Dock Case*, I do not know—as it has stood for eighteen years—that it would be right to overrule it; certainly not without further consideration. But this case appears to me to be plainly distinguishable, as the docks on the one side and the other of the Mersey do not appear to me to come within the designation of one series or system of docks.—p. 649.

Reg. v. Kingston-upon-Hull Dock Co. (No. 2), *commented on*.

Sculcoates Union v. Hull Docks Co. (1894) 64 L. J. M. C. 49; [1895] A. C. 136; 11 R. 74; 71 L. T. 642; 43 W. R. 623; 59 J. P. 612.—H.L. (E.).

LORD HERSCHELL.—It seems to me, therefore, that theoretically the method contended for by the appellants is the wrong one. I quite feel the force of the arguments they have addressed to your lordships—very able arguments—with a view to showing that, although it may not be theoretically accurate, it is the best practical measure of the value of a dock in a particular parish. That was the conclusion arrived at by the Court of Queen's Bench in *Reg. v. Hull Dock Co.*; but there all the learned judges admitted that it was not the plan which ought to be adopted if you were able to ascertain what were the earnings of the docks in the particular parishes; that you only resorted to it from necessity, because it was not possible to ascertain the earnings of the particular docks, and so arrive at the rateable value. At a later date, *The Mersey Docks v. Liverpool* (*supra*) came before the Courts; and the Court of Q. B.—differently constituted, no doubt, from the Court which decided *The Hull Dock Case*—held that the method which had been sanctioned in *The Hull Dock Case* was not to be applied in the case of the Liverpool and Birkenhead docks. The learned judges there came to the conclusion that the method which the Q. B. had pronounced theoretically incorrect, but only practically employed because it was impossible otherwise to arrive at the rateable value, was a wrong one; and they considered that there was no real difficulty in arriving substantially at the true result by looking to see what proportion of the dock earnings was attributable to a particular part of their dock system, dependent as that would be upon the amount of traffic which went to one set of docks as compared with another. In *The*

Hull Case, Lord Campbell, in the course of the argument, suggested that the question would have been the same if the docks had not been altogether on the Humber, but had been, some on the Humber and some on the Tyne. That was the very question, or the sort of question, which had to be considered in *The Mersey Docks Case*, except that the docks were on the same river; but the river there was a mile broad. But between *The Mersey Docks Case* and the case now before your lordships, I am unable to see the slightest distinction. If we decide this case as the appellants ask us to do, we inevitably overrule *The Mersey Docks Case*. I am not prepared to do so, I think the decision in *The Mersey Docks Case* was right, and I am quite ready myself to adhere to it in all respects.—pp. 51, 52.

Mersey Docks and Harbour Board v. Liverpool Overseers (1872) 41 L. J. M. C. 161; L. R. 7 Q. B. 643; 26 L. T. 868; 20 W. R. 827.—Q.B.; and **Mersey Docks and Harbour Board v. Birkenhead Overseers** (1873) 42 L. J. M. C. 141; L. R. 8 Q. B. 445; 29 L. T. 454; 21 W. R. 913.—Q.B., followed.

Sculcoates Union v. Hull Docks Co. (1894) 64 L. J. M. C. 49; [1895] A. C. 136; 11 R. 74; 71 L. T. 642; 43 W. R. 623; 59 J. P. 612.—H.L. (E.). See extract, *supra*.

Mersey Docks and Harbour Board v. Birkenhead Overseers, applied.
N. E. Ry. v. York Union (1900) 69 L. J. Q. B. 376; [1900] 1 Q. B. 733; 82 L. T. 201.—Q.B.D.

Hull Docks Co. v. Sculcoates Union (1894) 63 L. J. M. C. 279; [1894] 2 Q. B. 69; 70 L. T. 742; 42 W. R. 595; 58 J. P. 800.—C.A.; partly affirmed and partly reversed *nom.* **Sculcoates Union v. Hull Docks Co.** (1894) 64 L. J. M. C. 49; [1895] A. C. 136; 11 R. 74; 71 L. T. 642; 43 W. R. 623; 59 J. P. 612.—H.L. (E.).

Sculcoates Union v. Hull Docks Co. (*supra*, in H.L.), applied.
London and India Docks v. Poplar Union (1900) 83 L. T. 371; 64 J. P. 820.—Q.B.D.

Reg. v. Morrison (1852) 22 L. J. M. C. 14; 1 E. & B. 150; 17 Jur. 485.—Q.B., held inapplicable.
Tyne Pontoons Co. v. Tynemouth Union (1897) 76 L. T. 782.—CAVE and RIDLEY, JJ.

Mersey Docks and Harbour Board v. Liverpool Overseers (1873) 43 L. J. M. C. 33; L. R. 9 Q. B. 84; 29 L. T. 454; 22 W. R. 184.—Q.B.

Referred to, **Reg. v. L. & N. W. Ry.** (1874) L. R. 9 Q. B. 134, 144; 29 L. T. 910; 22 W. R. 263; S. C. *nom.* **Reg. v. Bedford Union**, 43 L. J. M. C. 81.—Q.B.; applied, **Dodds v. South Shields Assessment Committee** (1895) 64 L. J. Q. B. 508; [1895] 2 Q. B. 133; 14 R. 422; 72 L. T. 645; 43 W. R. 532; 59 J. P. 452.—C.A.; inapplicable, **St. Asaph (Dean) v. Llanrhaeadr Union** (1897) 66 L. J. Q. B. 267; [1897] 1 Q. B. 511; 76 L. T. 42.—C.A.: principle applied, **Cartwright v. Sculcoates Union** (1900) 69 L. J. Q. B. 403; [1900] A. C. 150; 82 L. T. 157.—H.L. (E.).

• *Wayleave.*

Rex v. Jolliffe (1877) 2 Term Rep. 90; 1 R. R. 437.—K.B., approved.
Pimlico Tramway Co. v. Greenwich Union O.C.

(1873) 43 L. J. M. C. 29, 31; L. R. 9 Q. B. 9, 13; 29 L. T. 605; 22 W. R. 87.—Q.B.

Lighthouses.

Rex v. Tynemouth (1810) 12 East 46; 11 R. R. 328.—K.B., followed.
Lancaster Port Commissioners v. Barrow-in-Furness Overseers (1896) 66 L. J. Q. B. 90; [1897] 1 Q. B. 166; 75 L. T. 358; 61 J. P. 21.—GRANTHAM and KENNEDY, JJ.

Rex v. Coke (1827) 5 L. J. (O.S.) M. C. 8; 5 B. & C. 797; 8 D. & R. 666; 29 R. R. 408.—K.B., discussed.
Holderness (Lady) v. Carmarthen (Marquess) (1784) 1 Bro. C. C. 377.—L.C., referred to.
Att.-Gen. v. Jones (1849) 19 L. J. Ch. 266; 1 Mac. & G. 574; 1 H. & Tw. 493; 14 Jur. 379.—L.C.

Rex v. Coke, observations adopted.
Christmas, In re, Martin v. Lacon (1886) 55 L. J. Ch. 878; 33 Ch. D. 332, 343; 55 L. T. 197; 34 W. R. 779; 50 J. P. 759.—C.A.

Rex v. Coke and Rex v. Fowke (1826) 5 B. & C. 814; 9 D. & R. 120; 29 R. R. 417.—K.B., followed.

Lancaster Port Commissioners v. Barrow-in-Furness Overseers (1896) 66 L. J. Q. B. 90; [1897] 1 Q. B. 166; 75 L. T. 358; 61 J. P. 21.—GRANTHAM and KENNEDY, JJ.

Mersey Docks and Harbour Board v. Llanellian Overseers, 51 L. T. 62; 33 W. R. 97; 5 Asp. M. C. 248.—COLERIDGE, C.J. and MATHEW, J.; varied, (1884) 54 L. J. Q. B. 49; 14 Q. B. D. 770; 52 L. T. 118; 33 W. R. 97; 49 J. P. 164; 5 Asp. M. C. 358.—C.A.

Mersey Docks and Harbour Board v. Llanellian Overseers, explained.
Gilbert v. Trinity House Corporation (1886) 56 L. J. Q. B. 85; 17 Q. B. D. 795; 35 W. R. 30.—DAY and WILLS, JJ.

Mersey Docks and Harbour Board v. Llanellian Overseers, inapplicable.
Burton-upon-Trent Corporation v. Eggington Overseers (or Burton-upon-Trent Union) (1889) 59 L. J. M. C. 1; 24 Q. B. D. 197, 209; 62 L. T. 412; 38 W. R. 181; 54 J. P. 453.—C.A.

Mersey Docks and Harbour Board v. Llanellian Overseers, overruled in effect.
London County Council v. Erith Churchwardens (1893) 63 L. J. M. C. 9; [1893] A. C. 562; 6 R. 22; 69 L. T. 725; 42 W. R. 330; 57 J. P. 821.—H.L. (E.).

HERSCHELL, L.C.—Now if land is “struck with sterility in any and everybody’s hands” (the phrase used in the above case), whether by law or by its inherent condition, so that its occupation is, and would be, of no value to any one, I should quite agree that it cannot be rated to the relief of the poor. But I must demur to the view that the question whether profit (by which I understand is meant pecuniary profit) can be derived from the occupation by the occupier is a criterion which determines whether the premises are rateable, and at what amount they should be assessed. . . . The possibility of making a pecuniary profit is not in my opinion the test whether the occupation is of value.

Mersey Docks and Harbour Board v. Llanellian Overseers, *considered*.
Lancaster Port Commissioners v. Barrow-in-Furness Overseers (1896) 66 L. J. Q. B. 90; [1897] 1 Q. B. 166; 75 L. T. 358; 61 J. P. 21.—Q.B.

Railways.

Reg. v. Walsall Overseers, 48 L. J. M. C. 57; 4 Q. B. D. 141; 40 L. T. 47.—C.A.; *reversed nom.* **Walsall Overseers v. L. & N. W. Ry.** (1879) 48 L. J. M. C. 166; 4 App. Cas. 467; 41 L. T. 106; 28 W. R. 52.—H.L. (E.).

Reg. v. L. & S. W. Ry. (1842) 11 L. J. M. C. 93; 1 Q. B. 558; 2 G. & D. 49; 2 Railw. Cas. 629; 6 Jur. 686.—Q.B., *adopted*.

G. E. Ry. v. Haughley Overseers (1866) 35 L. J. M. C. 229, 234; L. R. 1 Q. B. 666, 683; 12 Jur. (N.S.) 596; 14 L. T. 548; 14 W. R. 779.—Q.B.

Reg. v. L. B. & S. C. Ry. (1851) 20 L. J. M. C. 124; 15 Q. B. 813; 6 Railw. Cas. 440; 15 Jur. 372.—Q.B., *adopted*.

G. E. Ry. v. Haughley (1866) 35 L. J. M. C. 229; L. R. 1 Q. B. 666, 683; 12 Jur. (N.S.) 596; 14 L. T. 548; 14 W. R. 779.—Q.B.; **East London Ry. v. Whitechurch** (1874) 43 L. J. M. C. 159; L. R. 7 H. L. 81, 92; 30 L. T. 412; 22 W. R. 665.—H.L. (E.).

Reg. v. G. W. Ry. (1852) 21 L. J. M. C. 84; 15 Q. B. 1085; 7 Railw. Cas. 130; 16 Jur. 217.—Q.B., *distinguished*.

North and South Western Ry. v. Brentford Union (1887) 56 L. J. M. C. 101; 18 Q. B. D. 740, 759; 57 L. T. 429.—C.A.; remitted to arbitrator, (1888) 58 L. J. M. C. 95; 13 App. Cas. 592; 60 L. T. 274.—H.L. (E.).

FRY, L.J.—Then we are told that there is a general practice in the case of railways which ought to govern this case; that this line has become an integral part of the lines of the three companies; and where that is the case the principle laid down in *Reg. v. G. W. Ry.* applies. I cannot see that there is any such general principle as alleged applicable to the present case. There has been, as it seems to me, no absorption of this line in the lines of the other companies. It remains for many purposes distinct and capable of being separately let to a possible tenant. The Court, in *Reg. v. G. W. Ry.*, seems to have despaired of any satisfactory mode of applying the test given by the Act, and to have acted on the view that in that case the mode adopted was the only possible mode of determining the rent; but here a different mode of proceeding is open.

Reg. v. L. & S. W. Ry., *applied*.

Mersey Docks and Harbour Board v. Birkenhead Assessment Committee (1899) 69 L. J. Q. B. 260; [1900] 1 Q. B. 143; 81 L. T. 798; 48 W. R. 259.—C.A.

S. E. Ry. v. Dorking Overseers (1854) 23 L. J. M. C. 84; 3 El. & Bl. 491; 2 C. L. R. 633; 7 Railw. Cas. 877; 18 Jur. 672.—Q.B., *applied*.

Reg. v. L. & N. W. Ry. (1874) L. R. 9 Q. B. 134, 147; 29 L. T. 910; 22 W. R. 263; S. C. *nom.* **Reg. v. Bedford Union**, 43 L. J. M. C. 81, 84.—Q.B.

Reg. v. Midland Ry. (1855) 4 El. & Bl. 958; 3 C. L. R. 682; 3 W. R. 415; S. C. *nom.* **Midland Ry. v. Chesterfield Lighting Commissioners**, 1 Jur. (N.S.) 797.—Q.B., *distinguished*.

Reg. v. Neath Canal Co. (1871) 40 L. J. M. C. 193, 195; L. R. 6 Q. B. 707, 711.—Q.B.

Reg. v. Midland Ry., *applied*.

Reg. v. Midland Ry. (1875) 44 L. J. M. C. 137; L. R. 10 Q. B. 389; 32 L. T. 753; 23 W. R. 921.—Q.B.

L. & N. W. Ry. v. Cannock Overseers (1863) 9 L. T. 325.—Q.B., *commented upon*.

G. W. Ry. v. Pontypridd Union (*or Reg. v. Llantrissant*) (1869) 38 L. J. M. C. 93, 96; L. R. 4 Q. B. 354; 20 L. T. 364; 17 W. R. 671.—Q.B. *See extract, infra*.

G. E. Ry. v. Haughley Churchwardens (1866) 35 L. J. M. C. 229; L. R. 1 Q. B. 666; 12 Jur. (N.S.) 596; 14 L. T. 548; 14 W. R. 779.—Q.B., *followed*.

G. W. Ry. v. Pontypridd Union (*or Reg. v. Llantrissant*) (1869) L. R. 4 Q. B. 354, 357; 38 L. J. M. C. 93, 96; 20 L. T. 364; 17 W. R. 671.—Q.B.

MELLOR, J.—The question we asked is, whether the fact that the railway in the parish of Llantrissant contributes additional traffic to the Great Western Railway is to cause it to be rated to something in addition to the profit which the railway itself earns. This question is decided in principle by the *Haughley Case*, and I abide by what I said in that case. I think it must be taken that the Lord Chief Justice, in the *Haughley Case*, did not quite adhere to the suggestion he threw out in the *Cannock Case* (*L. & N. W. Railway Co. v. Cannock, supra*). I do not believe there was any difference of opinion between us in the *Haughley Case*, and certainly what I expressed in that case I abide by in the present case, that the rateable value in each parish of a line of railway passing through several parishes must depend on the actual earnings of the part of the railway within the particular parish, deducting the actual expenses of that part.—p. 357.

G. E. Ry. v. Haughley Churchwardens, *applied*.

Reg. v. South Staffordshire Waterworks Co. (1885) 16 Q. B. D. 359, 364.—MATHEW and SMITH, JJ., affirmed, 55 L. J. M. C. 88; 16 Q. B. D. 359; 54 L. T. 782; 34 W. R. 242; 50 J. P. 20.—C.A.

Reg. v. Metropolitan District Ry. (1871) 40 L. J. M. C. 113; L. R. 6 Q. B. 698.—Q.B., *overruled*.

East London Ry. v. Whitechurch (1874) L. R. 7 H. L. 81; 43 L. J. M. C. 159; 30 L. T. 412; 22 W. R. 665.—H.L. (E.).

CAIRNS, L.C.—I will add also this, that, inasmuch as a case which was decided in the Court of Queen's Bench, the case of *Reg. v. Metropolitan District Railway*, was much commented on at your lordship's bar, I cannot avoid saying that, having carefully considered that case, I am obliged to admit that the view I have offered to your lordships of this section [128 of the East London Railway Act] is inconsistent with the view taken in that case. It is true that that case proceeded upon the construction, not of this Act of Parliament, but of an Act of

Parliament which contains words not precisely identical, but words which appear to me to be in substance the same; and I am bound to admit that the view which I certainly entertain of this clause, and which I ask your lordships to adopt, is a view which must supersede the view taken by the Court of Queen's Bench in that case.—p. 89.

Reg. v. L. & N. W. Ry., Kempston Rate, In re (1874) L. R. 9 Q. B. 134; 29 L. T. 910; 22 W. R. 263; *S. C. nom. Reg. v. Bedford Union Assessment Committee*, 43 L. J. M. C. 81.—Q.B., *applied*.

L. & N. W. Ry. v. Irthlingborough Churchwardens (1876) 35 L. T. 327.—Q.B.D.; **Lancaster Port Commissioners v. Barrow-in-Furness Overseers** (1896) 66 L. J. Q. B. 90; [1897] 1 Q. B. 166; 75 L. T. 358; 61 J. P. 21.—GRANTHAM and KENNEDY, JJ.

Whitechurch v. East London Ry., 41 L. J. M. C. 133; L. R. 7 Ex. 248; 26 L. T. 635; 20 W. R. 705.—EX.; *reversed*, (1872) 42 L. J. M. C. 13; L. R. 7 Ex. 424; 27 L. T. 494; 21 W. R. 28.—EX. CH.; *the latter decision reversed nom.* **East London Ry. v. Whitechurch** (1874) 43 L. J. M. C. 159; L. R. 7 H. L. 81; 30 L. T. 413; 22 W. R. 665.—H.L. (E.).

South Wales Ry. v. Swansea Local Board (1854) 24 L. J. M. C. 30; 4 El. & Bl. 189; 3 C. L. R. 18; 1 Jur. (N.S.) 326; 3 W. R. 23.—Q.B.

Applied, **N. E. Ry. v. Tynemouth Corporation** (1868) 37 L. J. M. C. 183; L. R. 3 Q. B. 723; 9 B. & S. 616.—Q.B.; *considered*, **L. & N. W. Ry. v. Llandudno Improvement Commissioners** (1896) 66 L. J. Q. B. 232; [1897] 1 Q. B. 287; 75 L. T. 659; 45 W. R. 350; 61 J. P. 55.—POLLOCK, B. and WILLS, J.

Adamson v. Edinburgh and Glasgow Ry. (1855) 2 Macq. H. L. 331; 15 Dunlop, 537.—H.L. (SC.), *dictum concurred in*.

Duncan v. Scottish North Eastern Ry. (1870) L. R. 2 H. L. (SC.) 20.—H.L. (SC.).

LORDS HATHERLEY, L.C. and WESTBURY cited with approval the following passage from the Lord President's (Lord Colonsay's) judgment in the above case:—"The Poor Law Act prescribes a mode of assessing railways different from that prescribed as to any other kind of lands and heritages. It deals with railways as a whole, and apportiones the annual value according to the number of miles in each parish, not according to the annual value of the land occupied in each, nor according to the proportion of traffic in each, nor according to the profit on the amount received as compared with the expense of working in each. The actual value, positive or relative, of the part of the railway situated within each parish is excluded from the inquiry."

Adamson v. Edinburgh and Glasgow Ry., principle applied.

L. & N. W. Ry. v. Llandudno Improvement Commissioners (1896) 66 L. J. Q. B. 232; [1897] 1 Q. B. 287; 75 L. T. 659; 45 W. R. 350; 61 J. P. 55.—POLLOCK, B. and WILLS, J.

Altrincham Union v. Cheshire Lines Committee (1885) 15 Q. B. D. 597; 50 J. P. 85.—C.A., *referred to*.

Dewsbury and Heckmondwike Waterworks Board v. Penistone Union (1885) 55 L. J. M. C.

28; 16 Q. B. D. 585, 595; 54 L. T. 592.—MANISTY and SMITH, JJ., *affirmed*, (1886) 55 L. J. M. C. 121; 17 Q. B. D. 384; 54 L. T. 592; 34 W. R. 622; 50 J. P. 644.—C.A. *ESHER, M.R., BOWEN and FRY, L.JJ.

Tramways.

Pimlico Tramway Co. v. Greenwich Union (1873) 43 L. J. M. C. 29; L. R. 9 Q. B. 9; 29 L. T. 605; 22 W. R. 87.—Q.B., *followed*. **Holywell Union v. Halkyn District Mines Drainage Co.** (1894) 64 L. J. M. C. 113; [1895] A. C. 117; 11 R. 98; 71 L. T. 818; 59 J. P. 566.—H.L. (E.).

Pimlico Tramway Co. v. Greenwich Union, approved.

Melbourne Tramway and Omnibus Co. v. Fitzroy Corporation (1900) 70 L. J. P. C. 1; [1901] A. C. 153; 83 L. T. 442.—P.C. LORDS HOBHOUSE, MACNAGHTEN and LINDLEY, SIR R. COUCH, and SIR H. STRONG.

Telegraph Companies.

Electric Telegraph Co. v. Salford Overseers (1855) 24 L. J. M. C. 146; 11 Ex. 181; 1 Jur. (N.S.) 733; 3 W. R. 518.—EX., *commented on*.

Smith v. Lambeth Assessment Committee (1882) 52 L. J. M. C. 1, 3; 10 Q. B. D. 327; 48 L. T. 60; 47 J. P. 244.—C.A. BAGGALLAY, BRETT and LINDLEY, L.JJ.; *affirming* 31 W. R. 31.—FIELD and CAVE, JJ.

[In the report in the Law Journal (52 L. J. M. C. 1), Brett, L.J. is stated to have said: "If it were necessary I should desire to say that I reserve my opinion on *Electric Telegraph Co. v. Salford Overseers*."]

Electric Telegraph Co. v. Salford Overseers, followed.

Paris and New York Telegraph Co. (or Compagnie Francaise de Télégraphie) v. Penzance Union (1884) 53 L. J. M. C. 189; 12 Q. B. D. 552, 559; 50 L. T. 790; 32 W. R. 859; 48 J. P. 693.—COLERIDGE, C.J. and CAVE, J.; **Lancashire Telephone Co. v. Manchester Overseers**, 13 Q. B. D. 700; 51 L. T. 160.—MATHEW and DAY, JJ., *affirmed* (1884) 54 L. J. M. C. 63; 14 Q. B. D. 267; 52 L. T. 793; 33 W. R. 203; 49 J. P. 724.—C.A. BRETT, M.R., and LINDLEY, L.J.; **Taylor v. Pendleton Overseers** (1887) 56 L. J. M. C. 146; 19 Q. B. D. 288, 295; 57 L. T. 530; 35 W. R. 762; 51 J. P. 613.—WILLS and GRANTHAM, JJ.

Lancashire Telephone Co. v. Manchester Overseers (1884) 54 L. J. M. C. 63; 14 Q. B. D. 267; 52 L. T. 793; 33 W. R. 203.—C.A., *applied*.

Taylor v. Pendleton Overseers (1887) 56 L. J. M. C. 146; 19 Q. B. D. 288, 295; 57 L. T. 530; 35 W. R. 762; 51 J. P. 613.—WILLS and GRANTHAM, JJ.

Lancashire Telephone Co. v. Manchester Overseers, followed.

Holywell Union v. Halkyn District Mines Drainage Co. (1894) 64 L. J. M. C. 113; [1895] A. C. 117; 11 R. 98; 71 L. T. 818; 59 J. P. 566.—H.L. (E.).

Mines.

Rex v. Alderbury Overseers (1801) 1 East 534.—**K.B.**, *adopted*.
Reg. v. Whaddon (1875) 44 L. J. M. C. 73, 79; L. R. 10 Q. B. 230, 242; 32 L. T. 633; 23 W. R. 653.—**Q.B.**

Lead Smelting Co. v. Richardson (1762) 3 Burr. 1341; 1 W. Bl. 389.—**K.B.**, *considered and adopted*.

Morgan v. Crawshay (1871) 40 L. J. M. C. 202, 208; L. R. 5 H. L. 304, 314; 24 L. T. 889; 20 W. R. 554.—**H.L. (E.)**. See extract, *infra*.

Reg. v. St. Austell (1822) 5 B. & Ald. 693; 1 D. & R. 351; 24 R. R. 534.—**K.B.**, *inapplicable*.

Roads v. Trumpington Overseers (1870) L. R. 6 Q. B. 56, 64; 40 L. J. M. C. 35; 23 L. T. 821.—**Q.B.**

Rex v. St. Austell, *followed*.

Van Mining Co. v. Llanidloes Overseers (1876) 45 L. J. M. C. 138; 1 Ex. D. 310; 34 L. T. 692.—**EX. D.**

Rex v. Sedgley (1831) 9 L. J. (o.s.) M. C. 61; 2 B. & Ad. 65.—**K.B.**, *referred to*.
Bell v. Wilson (1866) 35 L. J. Ch. 337; L. R. 1 Ch. 303; 12 Jur. (N.S.) 263; 14 L. T. 115; 14 W. R. 493.—**L.JJ.**

Rex v. Sedgley, *applied*.

Cleveland (Duchess) v. Meyrick (1867) 37 L. J. Ch. 125; 17 L. T. 238; 16 W. R. 104.—**MALINS, V.-C.**; and **Morgan v. Crawshay** (1871) 40 L. J. M. C. 202; L. R. 5 H. L. 304, 314; 24 L. T. 889; 20 W. R. 554.—**H.L. (E.)**.

Rex v. Brettell (1832) 1 L. J. M. C. 46; 3 B. & Ad. 424.—**K.B.**, *referred to*.

Bell v. Wilson (1866) 35 L. J. Ch. 337; L. R. 1 Ch. 303; 12 Jur. (N.S.) 263; 14 L. T. 115; 14 W. R. 493.—**L.JJ.**

Rex v. Brettell, *applied*.

Cleveland v. Meyrick (1867) 37 L. J. Ch. 125, 128; 17 L. T. 238; 16 W. R. 104.—**V.-C.**

Reg. v. Todd (1840) 10 L. J. M. C. 14; 12 A. & E. 816; 4 P. & D. 335; 1 Arn. & H. 100; 5 Jur. 407.—**Q.B.**, *explained*.

Morgan v. Crawshay (1871) 40 L. J. M. C. 202, 208; L. R. 5 H. L. 304, 318; 24 L. T. 889; 20 W. R. 554.—**H.L. (E.)**.

LORD CHELMSFORD.—The cases of *Crease v. Sawle* and *Reg. v. Todd*, cited in the argument, are not opposed to that decision (*Lead Smelting Co. v. Richardson, supra*). It was not held in either of these cases that the tin mine in the one case, or the lead mine in the other, was rateable, but that the lessors receiving by way of render a certain proportion of the ore in an unmanufactured state, were rateable to the relief of the poor in respect to the ore delivered to them.

Crease v. Sawle (1842) 2 Q. B. 862; 2 G. & D. 812.—**EX. CH.**, *commented upon*.

Roads v. Trumpington Overseers (1870) 40 L. J. M. C. 35, 43; L. R. 6 Q. B. 56; 23 L. T. 821.—**Q.B.**

Crease v. Sawle, *explained*.

Morgan v. Crawshay (1871) 40 L. J. M. C. 202, 208; L. R. 5 H. L. 304, 314; 24 L. T. 889; 20 W. R. 554.—**H.L. (E.)**. See extract, *supra*.

Crease v. Sawle, *approved*.

Coomber v. Berks JJ. (1883) 53 L. J. Q. B. 239; 9 App. Cas. 61, 75; 50 L. T. 405; 32 W. R. 525; 48 J. P. 421.—**H.L. (E.)**.

Crease v. Sawle, *followed*.

Reg. (or Manchester Overseers) v. Headlam (1888) 57 L. J. M. C. 89; 21 Q. B. D. 96; 52 J. P. 517.—**WILLS and GRANTHAM, JJ.**

Crease v. Sawle, *adopted*.

Westminster Corporation v. Army and Navy Co-operative Supply, Ltd. (1902) 71 L. J. K. B. 546; [1902] 2 K. B. 125; 87 L. T. 78.—**K.B.D.**

Thursby v. Briercliffe (1894) 64 L. J. M. C. 66; [1895] A. C. 32; 11 R. 38; 71 L. T. 849; 59 J. P. 180.—**H.L. (E.)**, *distinguished*.

Southwark and Vauxhall Water Co. v. Hampton Urban Council (1898) 68 L. J. Q. B. 207; [1899] 1 Q. B. 273; 80 L. T. 1; 47 W. R. 177; 63 J. P. 100.—**C.A.**; *affirmed on this point in H.L.* (see *supra*, col. 2761).

Rex v. Parrot (1794) 5 Term Rep. 593.—**K.B.**; and **Rex v. Granville (Lord)** (1829) 7 L. J. (o.s.) M. C. 89; 9 B. & C. 188; 4 M. & Ry. 171.—**K.B.**, *referred to*.

Commissioner of Valuation v. Clonbrook Coal Co. [1896] 2 Ir. R. 560, 568.—**ANDREW and MURPHY, JJ.**

Rex v. Attwood (1827) 5 L. J. (o.s.) M. C. 47; 6 B. & C. 277; 9 D. & R. 328; 30 R. R. 280.—**K.B.**, *explained*.

Commissioner of Valuation v. Clonbrook Coal Co. [1896] 2 Ir. R. 560.

Rex v. Bilston (1826) 5 L. J. (o.s.) M. C. 32; 5 B. & C. 851; 8 D. & R. 734.—**K.B.**, *questioned*.

Talargoch Mining Co. v. St. Asaph Union (1868) L. R. 3 Q. B. 478; 37 L. J. M. C. 149; 9 B. & S. 210; 18 L. T. 711; 16 W. R. 860.—**Q.B.**

Rex v. Bilston, *distinguished*.

Reg. v. M. B. W. (1868) 38 L. J. M. C. 24; L. R. 4 Q. B. 15; 19 L. T. 348; 17 W. R. 527.—**Q.B.**

Rex v. Bilston, *disapproved*.

Guest v. East Dean Overseers (1872) 41 L. J. M. C. 129; L. R. 7 Q. B. 334; 26 L. T. 422; 20 W. R. 332.

COCKBURN, C.J.—That case (*Rex v. Bilston*) is not, to my mind, a satisfactory one, and seems contrary to general principles. The ground taken by Bayley, J. was that the engine in question was really part of the mine. On the other hand, it is said by Holroyd, J. that the engine was not profitable, but burthensome, except as it concerned the mine itself. The reasons of Littledale, J. are not given.

Rex v. Bilston and Guest v. East Dean Overseers, *observed on*.

Kittow v. Liskeard Union (1874) L. R. 10 Q. B. 7; 44 L. J. M. C. 23; 31 L. T. 601; 23 W. R. 72.—**Q.B.**

BLACKBURN, J.—There was an idea at one time arising from a *dictum* of Mr. Justice Bayley, in *Rex v. Bilston*, that, because a mine was not rateable, other things held and occupied along with it also were not rateable, going apparently on some notion, that they were either part of the

mine, or that, the mine not being rateable, it was illegal to rate them when occupied in connection with that mine. I certainly understood in the case which has been cited of *Guest v. East Dean*, we distinctly said and held, and if not, I am prepared to hold now, that there was a mistake; and that where there was an exclusive occupation of land, although for the purpose of assisting to work a mine which is not rateable itself, that land was as much rateable as if it were occupied for the purpose of a canteen, or for the purpose of delivering water, either of which is not of itself rateable. Then in all those cases, the value of the thing is to be ascertained in the way which was the difficulty in the case of *Guest v. East Dean*, in which we principally considered how the *quantum* was to be got at.—p. 13.

Kittow v. Liskeard Union (1874) 44 L. J. M. C. 23; L. R. 10 Q. B. 7; 31 L. T. 601; 23 W. R. 72.—Q.B., *explained and distinguished*.

Smith v. Lambeth Assessment Committee (1882) 51 L. J. M. C. 106; 9 Q. B. D. 595; 31 W. R. 31.—FIELD and CAVE, JJ., affirmed, 52 L. J. M. C. 1; 10 Q. B. D. 327; 48 L. T. 57; 47 J. P. 244.—C.A.

Rex v. Bedworth (1807) 8 East 387; 9 R. R. 476.—K.B., *approved*.

Farnham Flint Co. v. Farnham Union (1900) 70 L. J. K. B. 130; [1901] 1 K. B. 272; 83 L. T. 660; 65 J. P. 102.—C.A.

Gas Works.

Rex v. St. Nicholas, Gloucester (1783) 1 Term Rep. 723, n.—K.B.; and **Rex v. Hogg** (1787) 1 Term Rep. 721; Cald. 266; 1 R. R. 375.—K.B., *observed upon*.

Tyne Boiler Works Co. v. Longbenton Overseers (1886) 56 L. J. M. C. 8; 18 Q. B. D. 81, 94; 55 L. T. 825; 35 W. R. 110; 51 J. P. 420.—C.A.

Rex v. Hogg, *dictum adopted*.

Income Tax Commissioners v. Pemsel (1891) 61 L. J. Q. B. 265; [1891] A. C. 531, 548; 65 L. T. 621.—H.L. (E.).

Woodlands.

Rex v. Mirfield (1808) 10 East 219.—K.B., *applied*.

Fitzhardinge (Lord) v. Prichett (1867) 36 L. J. M. C. 49, 52; L. R. 2 Q. B. 135, 142; 8 B. & S. 216; 15 L. T. 502; 15 W. R. 640.—Q.B.

Rex v. Mirfield, *distinguished*.

Reg. v. Abney Park Cemetery Co. (1873) 42 L. J. M. C. 124, 128; L. R. 8 Q. B. 515, 520; 29 L. T. 174; 21 W. R. 847.—Q.B.

BLACKBURN, J.—A different mode has been adopted in the anomalous case of saleable underwoods. *Rex v. Mirfield* was a case of that kind, and the Court held that though such underwoods be cut only once in twenty-one years, they were liable to be assessed every year. . . . That principle is quite exceptional, and in the present case [where the question was whether in assessing a cemetery company, plots of land sold by it during the year could be taken into account] it is much better to suppose that what was the annual value in one year would be a guide to the probable annual value in another year.

Rex v. Mirfield, *referred to*.

Dashwood v. Magniac (1891) [1891] 3 Ch. 306.—CHITTY, J., affirmed C.A.

Reg. v. Narberth (North) Inhabitants (1839)

8 L. J. M. C. 46; 9 A. & E. 815; 1 P. & D.—590.—Q.B., *dicta adopted*.
Fitzhardinge (Lord) v. Prichett (1867) 36 L. J. M. C. 49, 52; L. R. 2 Q. B. 135, 143; 8 B. & S. 216; 15 L. T. 502; 15 W. R. 640.—Q.B.

Rights connected with Land.

Colebrooke v. Tickell (1836) 5 L. J. K. B.

180; 4 A. & E. 916; 6 N. & M. 483; 2 H. & W. 23.—K.B., *applied*.
Ingram v. Drinkwater (1875) 44 L. J. P. C. 83; 86; 32 L. T. 746.—P.C.

Reg. v. Neville (1846) 15 L. J. M. C. 33; 8

Q. B. 452.—Q.B., *applied*.
Ingram v. Drinkwater (1875) 44 L. J. P. C. 83; 32 L. T. 746.—P.C.

Reg. v. Thurlstone (1859) 28 L. J. M. C.

106; 1 El. & El. 502; 5 Jur. (N.S.) 820; 7 W. R. 192.—Q.B., *observed upon*.

Reg. v. Battle Union (1866) L. R. 2 Q. B. 8; 36 L. J. M. C. 1; 8 B. & S. 12; 15 L. T. 180; 15 W. R. 57.—Q.B.

COCKBURN, C.J.—If we were dealing with a case in which the owner of the soil had reserved to himself, upon granting a lease of it, the right to take game as against the tenant, or if he had by a valid grant severed the right to take game, which is otherwise incident to the occupation of the soil, and conveyed it to some other person, and then after having divested the soil of that incident, let the land to a tenant subject to the right thus granted, *Reg. v. Thurlstone* would be an authority to show that the occupier is not liable to be rated in respect of the annual value which arises from the right to take game. If that point had now arisen for the first time, I confess I should have hesitated in coming to the conclusion which the Court arrived at in *Reg. v. Thurlstone*, though I agree that the case is one of great difficulty and nicety.—p. 12.

Reg. v. Thurlstone, *commented on*.

Reg. v. Rhymney Ry. (1869) 38 L. J. M. C. 75; L. R. 4 Q. B. 276; 10 B. & S. 198; 17 W. R. 530.—Q.B.

MELLOR, J. (for the Court).—*Reg. v. Thurlstone*, in which the value of game reserved was deducted from the rate of the occupier of the land, has been considered as of somewhat doubtful authority.—p. 78.

Reg. v. Thurlstone, *referred to*.

Kenrick v. Guildsfield Overseers (1879) 49 L. J. M. C. 27; 5 C. P. D. 41; 41 L. T. 624; 28 W. R. 372.—C.P.D. See extract, *infra*.

Hilton and Walkerfield Overseers v. Bowes

Overseers (1866) 35 L. J. M. C. 137; L. R. 1 Q. B. 359; 13 L. T. 512; 14 W. R. 368.—Q.B., *distinguished*.

Reg. v. Rhymney Ry. (1869) 38 L. J. M. C. 75, 78; L. R. 4 Q. B. 276, 284; 10 B. & S. 198; 17 W. R. 530.—Q.B.

Reg. v. Battle Union, Sussex (1866) 36 L. J.

M. C. 1; L. R. 2 Q. B. 8; 8 B. & S. 12; 15 L. T. 180; 15 W. R. 57.—Q.B., *adopted*.

Reg. v. Rhymney Ry. (1869) 38 L. J. M. C. 75; L. R. 4 Q. B. 276, 284; 10 B. & S. 198; 17 W. R. 530.—Q.B.

Reg. v. Battle Union, Sussex, distinguished.

Kenrick v. Guildsfield Overseers (1879) 49 L. J. M. C. 27; 5 C. P. D. 41; 41 L. T. 624; 28 W. R. 372.—C.P.D.

LINDLEY, J.—But it is said that it is not so, because, under similar circumstances, *Reg. v. Battle, Sussex*, the right of sporting was held not to be severed, but when we look at the authority the point does not seem to have been decided. The point there decided is that before this Act Mrs. Curling might have been rated. In the course of the argument the L.C.J. certainly describes the right of sporting as separated from the occupation, and in the judgment he appears to treat the right as severed, though not severed as in *Reg. v. Thurlstone* (*supra*). That case, *Reg. v. Battle, Sussex*, does not appear to me to be authority for holding that when the owner of the land demises the right of sporting by an irrevocable deed there is no severance.—p. 29.

Rex v. Churchill (1825) 4 B. & C. 750; 6 D. & R. 635; 28 R. R. 473.—K.B., observations adopted.

Johnson v. Barnes (1873) 42 L. J. C. P. 259; L. R. 8 C. P. 527, 532; 29 L. T. 65.—EX. CH.

Rex v. New River Co. (1813) 1 M. & S. 503; 14 R. R. 514.—K.B., principle adopted.

Reg. v. L. & N. W. Ry. (1874) L. R. 9 Q. B. 134, 145; 29 L. T. 910; 22 W. R. 263; S. C., *nom. Reg. v. Bedford Union* 43 L. J. M. C. 81.—Q.B.

Rex v. New River Co., inapplicable.

New River Co. v. Hertford Assessment Committee (1902) 71 L. J. K. B. 827; [1902] 2 K. B. 597; 87 L. T. 360; 51 W. R. 49; 66 J. P. 724.—C.A. COLLINS, M.R., MATHEW and HARDY, L.JJ.

MATHEW, L.J.—It was urged that the value to the New River Co. of the water passing into the channel should be taken into account. The intake, it was said, was analogous to the spring in *Rex v. New River Co.*, and therefore the sum of 3,180l. might properly be treated as the annual value of the water passing over the intake from the river Lea. But the hypothetical tenant would have no right to interfere with the flow of water for any other purpose than that of measurement. The analogy of the spring wholly failed: for the owners of the spring would have no independent right to the water, and the value of the water to them would, therefore, be properly taken into account.

New River Co. v. Hertford Assessment Committee (1901) 70 L. J. K. B. 740; [1901] 2 K. B. 620; 85 L. T. 132; 49 W. R. 619.—RIDLEY and BIGHAM, JJ.; reversed, (1902) 71 L. J. K. B. 827; [1902] 2 K. B. 597; 87 L. T. 360; 51 W. R. 49; 66 J. P. 724.—C.A. COLLINS, M.R., MATHEW and HARDY, L.JJ.

Burton v. St. Giles' and St. George's Assessment Committee (1900) 69 L. J. Q. B. 184; [1900] 1 Q. B. 389; 82 L. T. 24; 48 W. R. 222; 64 J. P. 213.—GRANTHAM and CHANNELL, JJ. See

Burton v. St. Giles's, Bloomsbury, Vestry (1900) 70 L. J. Q. B. 127; [1901] 1 Q. B. 650; 84 L. T. 30; 49 W. R. 334; 65 J. P. 167.—MATHEW, J.

Tithes.

Reg. v. Capel (1840) 12 Ad. & E. 382, 412; 9 L. J. M. C. 65.—Q.B.; and **Esdaile v. City of London Union** (1887) 56 L. J. M. C. 149; 19 Q. B. D. 431; 57 L. T. 749; 35 W. R. 722; 51 J. P. 564. See

Tithe Rent-charge (Rates) Act, 1899 (62 & 63 Vict. c. 17), s. 1.

Reg. v. Christopherson (1885) 55 L. J. M. C. 1; 16 Q. B. D. 7; 53 L. T. 804; 34 W. R. 86; 50 J. P. 212.—C.A., explained and distinguished.

Dewsbury Waterworks Board v. Penistone Assessment Committee (1886) 55 L. J. M. C. 121; 17 Q. B. D. 384; 54 L. T. 592; 34 W. R. 622; 50 J. P. 644.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

ESHER, M.R.—Then the second point consisted in likening this case to *Reg. v. Christopherson*, in which the rector of a parish received an income independently of tithes. In that case we held that it was very much the same thing as if a tenant was by other means a rich man; in such a case his riches derived *alimunde* would not be an advantage or a disadvantage to the business which he was carrying on: they would be no part of the business. Those riches would be a wholly independent thing. In the present case the very thing—the rate in aid—which is to prevent a loss in the carrying on of the appellants' business is an advantage to the business itself: it is an advantage to the land which they are using for the purpose of their business.

Reg. v. Christopherson, referred to.

Esdaile v. City of London Union (1887) 56 L. J. M. C. 149; 19 Q. B. D. 431, 436; 57 L. T. 749; 35 W. R. 722; 51 J. P. 564.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Reg. v. Christopherson. See

Tithe Rent-charge (Rates) Act, 1899 (62 & 63 Vict. c. 17), s. 1.

Reg. v. Goodchild (or **Goodchild v. St. John, Hackney, Trustees**) (1858) 27 L. J. M. C. 233; El. Bl. & El. 1; 6 W. R. 800.—Q.B., limited.

Wheeler v. Birmingham Overseers (1861) 1 B. & S. 709; 31 L. J. M. C. 57; 8 Jur. (N.S.) 304; 5 L. T. 345; 10 W. R. 57.—Q.B.

COCKBURN, C.J.—I agree with my brother, Blackburn, that the principle laid down in *The Hackney and Lamberhurst Tithe Rent-Charges* (*supra*, *Goodchild v. St. John, Hackney*), as to allowing a deduction in respect of the stipend of a curate ought not to be extended. Where the incumbent, not being in the position of a voluntary pluralist, is so circumstanced that his duties cannot be discharged by one man, then there is some reason for the exception to the general rule but only in such a case ought any part of the tithe rent charge to be withdrawn from local taxation.—p. 726.

Reg. v. Goodchild, limited (as in previous case).

Lawrence v. Tolleshunt Knights Overseers (1862) 2 B. & S. 533; 31 L. J. M. C. 148; 10 W. R. 620.—Q.B.

Reg. v. Goodchild, adopted.

Scriven-with-Tentergate Overseers v. Fawcett (1863) 32 L. J. M. C. 161; 11 W. R. 689.—Q.B.

Reg. v. Goodchild, held overruled.

Reg. v. Sherford (1867) L. R. 2 Q. B. 503; 36 L. J. M. C. 113; 8 B. & S. 596; 16 L. T. 663; 15 W. R. 1035.—Q.B.

MELLOR, J. (for the Court).—Although we might have thought that the *Hackney Case* had not been based upon a sound application of the true principles of the law of rating, we should have thought it unwise to depart from it after it had been followed in so many subsequent cases. Since then, however, the case of *The Mersey Docks* (35 L. J. M. C. 1; 11 H. L. Cas. 443) has been decided by the House of Lords, which, as it appears to us, has not only set us free from the authority of the *Hackney Case* but has in effect overruled it, by placing the law of rating property to the poor rate upon principles entirely inconsistent with it.—p. 509.

Reg. v. Goodchild, observed upon.

Reg. v. Rhymney Ry. (1869) 38 L. J. M. C. 75, 78; L. R. 4 Q. B. 276, 283; 10 B. & S. 198; 17 W. R. 530.—Q.B.; *Mersey Docks v. Liverpool Overseers* (1878) 43 L. J. M. C. 33; L. R. 9 Q. B. 84, 98; 29 L. T. 454; 22 W. R. 184.—Q.B.

Reg. v. Goodchild, applied.

St. Asaph (Dean) v. Llanrhaidr-yn-Mochnant Overseers (1897) 66 L. J. Q. B. 267; [1897] 1 Q. B. 511; 76 L. T. 42; 45 W. R. 374; 61 J. P. 213.—C.A.; and see *Tithe Rent-charge (Rates) Act, 1899* (62 & 63 Vict. c. 17), s. 1.

Wheeler v. Burmington Overseers (1860) 29

L. J. M. C. 175, n.; 6 Jur. (N.S.) 698; 2 L. T. 171; 8 W. R. 412.—Q.B., referred to.

Reg. v. Sherford (1867) 36 L. J. M. C. 113; L. R. 2 Q. B. 503, 508; 8 B. & S. 596; 16 L. T. 663; 15 W. R. 1035.—Q.B.

*Tals.***Lewis v. Swansea Overseers** (1855) 25 L. J.

M. C. 33; 5 El. & Bl. 508; 1 Jur. (N.S.) 1108; 4 W. R. 13.—Q.B., principle applied.

Blyth Harbour Commissioners v. Newsham Churchwardens (1894) 63 L. J. M. C. 274; [1894] 2 Q. B. 675; 9 R. 618; 71 L. T. 34; 59 J. P. 4.—C.A. ESHER, M.R., KAY and SMITH, L.JJ.

Rex v. Bell (1816) 5 M. & S. 221; 17 R. R. 315.—K.B., principle applied.

London Corporation v. St. Sepulchre Overseers (1871) L. R. 7 Q. B. 333, n.—Q.B.

Rex v. Bell, referred to.

Bedford (Duke) v. St. Paul's, Covent Garden (1881) 51 L. J. M. C. 41, 45; 45 L. T. 616; 30 W. R. 411; 46 J. P. 581.—Q.B.D.

Rex v. Bell, considered.

London Corporation v. Greenwich Union (1883) 48 L. T. 437; 47 J. P. 420.—Q.B.D.

Roberts v. Aylesbury Overseers (1853) 22

L. J. M. C. 34; 1 El. & Bl. 423; 17 Jur. 236.—Q.B., considered.

London Corporation v. Greenwich Union (1883) 48 L. T. 437; 47 J. P. 420.—HUDDLESTON, B. and NORTH, J.

Bedford (Duke) v. St. Paul's, Covent Garden

(1881) 51 L. J. M. C. 41; 45 L. T. 616;

30 W. R. 411; 46 J. P. 581.—Q.B.D., referred to.

London Corporation v. Greenwich Union (1883) 48 L. T. 437; 47 J. P. 420.—HUDDLESTON, B. and NORTH, J.; *Newcastle (Duke) v. Worksop Urban Council* (1902) 71 L. J. Ch. 487; [1902] 2 Ch. 145, 160; 86 L. T. 405.—FARWELL, J.

*Statutory Exemptions.***Mitchell v. Fordham** (1827) 5 L. J. (o.s.)

M. C. 79; 6 B. & C. 274; 9 D. & R. 335.

—K.B., applied.

Rex v. London Gas Light Co. (1828) 6 L. J. (o.s.) M. C. 113; 8 B. & C. 54; 2 M. & Ry. 12.—K.B.

Rex v. London Gaslight and Coke Co., applied.

Sion College v. London Corporation (1901) 70 L. J. K. B. 369; [1901] 1 Q. B. 617; 84 L. T. 133; 49 W. R. 361; 65 J. P. 324.—C.A.; and *Cork (Earl) v. Cork County Council* [1903] 2 Ir. R. 490, 497.—K.B.D.

4. PROCEEDINGS.

Att.-Gen. v. Heelis (1824) 2 L. J. (o.s.) Ch.

189; 2 Sim. & S. 67; 25 R. R. 153.—V.-C., adopted.

Goodman v. Saltash Corporation (1882) 52 L. J. Q. B. 193, 197; 7 App. Cas. 633, 642; 48 L. T. 239; 31 W. R. 293; 47 J. P. 276.—H.L. (E.); *Att.-Gen. v. Dartmouth Corporation* (1883) 48 L. T. 933.—CHITTY, J.

Att.-Gen. v. Heelis, referred to.

St. Botolph (without Bishopsgate) Estates, In re (1887) 56 L. J. Ch. 691; 35 Ch. D. 142, 150; 56 L. T. 884; 35 W. R. 688.—NORTH, J.; *Webster v. Southey* (1887) 56 L. J. Ch. 785; 36 Ch. D. 9, 22; 56 L. T. 879; 35 W. R. 622; 52 J. P. 36.—KAY, J.

Att.-Gen. v. Heelis, adopted.

Christchurch Inclosure Act, In re (1888) 57 L. J. Ch. 564; 38 Ch. D. 520, 531; 58 L. T. 327.—C.A.

Att.-Gen. v. Heelis, referred to.

Income Tax Commissioners v. Pemsel (1891) 61 L. J. Q. B. 265; [1891] A. C. 531; 65 L. T. 621; 55 J. P. 805.—H.L. (E.).

Lamplugh v. Norton (1889) 58 L. J. Q. B. 279; 22 Q. B. D. 452; 37 W. R. 422; 53 J. P. 389.—C.A. See now

Tithe Act, 1891 (54 & 55 Vict. c. 8), s. 6 (1).

Richards v. Kidderminster Overseers (1896)

65 L. J. Ch. 502; [1896] 2 Ch. 212; 74 L. T. 483; 44 W. R. 505.—NORTH, J., distinguished.

Marriage, Neave & Co., In re (1896) 65 L. J. Ch. 839; [1896] 2 Ch. 663; 75 L. T. 169; 45 W. R. 42; 60 J. P. 805.—C.A.

RIGBY, L.J.—In the case before NORTH, J. (*Richards v. Kidderminster Overseers*) it was held that sect. 16 applied; that there had been a change of occupation. We have nothing to do with that case at all. It is a case absolutely different from the present. It was a case in which on the terms of a deed—it may be similar to that which exists in this case; but the deed in this case has nothing to do with the point—but on the terms of a deed before him, and relying

at any rate upon one particular part of that deed, the company were to remain in possession until a certain event, and upon that event possession was given up. He held perfectly rightly in that case that there was a change of occupation with the necessary result. True it is that in that case there are some words which seem to say that the case of a distress under these statutes falls within the same principle as the case of an execution. I do not know whether the matter was argued or not before North, J. It was not in the least necessary to hold anything of the kind, for as has been pointed out, there was an actual conveyance of the goods—an assignment of the goods—to other persons, and that was relied upon. At any rate if these words are treated as a considered judgment with reference to the position of overseers and their right to distrain under these Acts, we are constrained to say that, in our opinion, that cannot be supported.—p. 845.

Richards v. Kidderminster Overseers. See Pref. rental Payments in Bankruptcy Amendment Act, 1897 (60 & 61 Vict. c. 19).

Reg. v. Kent JJ. (1867) 16 L. T. 672.—BAIL COURT, *explained*.

Reg. v. London JJ., Bayne, Ex parte (1899) 68 L. J. Q. B. 383; [1899] 1 Q. B. 532; 80 L. T. 286; 47 W. R. 316; 63 J. P. 388.—LAWRANCE and CHANNELL, JJ.

CHANNELL, J. (for the Court).—That was an appeal under 17 Geo. 2, c. 38, s. 7; and it only decided that there could be no appeal under that section on grounds applicable to an appeal against the rate. The decision was not that no appeal lay under that section where the distress was in the place of assessment, and it does not seem to us that either judge thought that was so.

Reg. v. Kingston-upon-Thames JJ. (1858) 27 L. J. M. C. 199; El. Bl. & El. 256; 4 Jur. (N.S.) 758; 6 W. R. 551.—Q.B., *applied*.

Bates v. Plumstead Overseers (1895) 64 L. J. M. C. 127; 72 L. T. 393; 59 J. P. 118.—WILLS and WRIGHT, JJ.

Reg. (or Manchester Overseers) v. Headlam (1888) 57 L. J. M. C. 89; 21 Q. B. D. 96; 52 J. P. 517.—WILLS and GRANTHAM, JJ., *considered*.

New Ross Union v. Byrne (1892) 30 L. R. Ir. 160.—Q.B.D.

Reg. (or Manchester Overseers) v. Headlam, *referred to*.

Westminster Corporation v. Army and Navy Co-operative Supply Association (1902) 71 L. J. K. B. 546; [1902] 2 K. B. 125; 87 L. T. 78; 50 W. R. 631.—K.B.D.

Batkin, In re (1856) 25 L. J. M. C. 126.—BAIL COURT, *applied*.

Edney v. Smallbones (1869) 21 L. T. 506.—SIR R. PHILLIMORE.

Reg. v. Price (1880) 49 L. J. M. C. 49; 5 Q. B. D. 300; 42 L. T. 439; 28 W. R. 615; 44 J. P. 248.—Q.B.D., *referred to*.

Reg. v. London Corporation (1887) 57 L. T. 491.—COLERIDGE, C.J. and DENMAN, J.; Allen (Elizabeth), *In re* (1894) 63 L. J. M. C. 267; [1894] 2 Q. B. 924; 43 W. R. 141.—Q.B.D.; and Southwark and Vauxhall Water Co. v. Hampton Urban Council (1898) [1899] 1 Q. B. 273; 47 W. R. 177; 63 J. P. 100.—C.A.

Peppercorn v. Hofman (or Hopman) (1843) 12 L. J. Ex. 270; 9 M. & W. 618.—EX., *applied*.
Dillon v. O'Brien (1887) 2 L. R. Ir. 300; 16 Cox C. C. 245.—EX. CH.

Stevens v. Evans (1761) 1 W. Bl. 284; 2 Burr. 1152.—K.B., *referred to*.
Danby v. Watson (1877) 46 L. J. M. C. 179, 181; 36 L. T. 412; 25 W. R. 464.—C.P.D.

Rex v. Benn (1795) 6 Term Rep. 198.—K.B., and **Harper v. Carr** (1797) 7 Term Rep. 270; 4 R. R. 440.—K.B., *referred to*.
Bonaker v. Evans (1850) 20 L. J. Q. B. 137; 16 Q. B. 163; 15 Jur. 460.—EX. CH.

Novello v. Toogood (1823) 1 L. J. (O.S.) K. B. 181; 1 B. & C. 554; 2 D. & R. 833; 25 R. R. 507.—K.B., *discussed and applied*.
Parkinson v. Potter (1835) 55 L. J. Q. B. 153; 16 Q. B. D. 152; 53 L. T. 818; 34 W. R. 215; 50 J. P. 470.—MATHEW and WILLS, JJ.

Milward v. Caffin (1780) 2 W. Bl. 1330.—C.P., *questioned on one point*.
Harper v. Carr (1797) 7 T. R. 270; 4 R. R. 440.—K.B.

Milward v. Caffin, followed.
Bristol Overseers v. Wait (1834) 1 A. & E. 264; 3 N. & M. 359; 3 L. J. M. C. 71.—K.B.

Milward v. Caffin, applied.
Charleton v. Alway (1840) 9 L. J. Q. B. 237; 11 A. & E. 993; 3 P. & D. 818.—Q.B.; Luton Local Board v. Davis (1860) 2 El. & El. 678; 29 L. J. M. C. 173; 6 Jur. (N.S.) 580; 2 L. T. 172; 8 W. R. 411.—Q.B.; and Rhymney Ry. v. Price (1867) 16 L. T. 394.—Q.B.

Milward v. Caffin, referred to.
Reg. v. Hannam (1886) 34 W. R. 355.—C.A.

Milward v. Caffin, observed upon.
Reg. (or Manchester Overseers) v. Headlam (1888) 57 L. J. M. C. 89; 21 Q. B. D. 96; 52 J. P. 517.—WILLS and GRANTHAM, JJ.
WILLS, J. (for the Court).—The description in the rate (in the above case) could not be satisfied without including something which the person rated did not occupy, and the rate was therefore bad.

Milward v. Caffin, discussed and applied.
New Ross Union v. Byrne (1892) 30 L. R. Ir. 160.—Q.B.D.

Sabourin v. Marshall (1832) 3 B. & Ad. 440.—K.B., *applied*.
Rhymney Ry. v. Price (1867) 16 L. T. 394, 395.—Q.B.

Weaver v. Price (1833) 1 L. J. M. C. 90; 3 B. & Ad. 409.—K.B., *referred to*.
Bristol Overseers v. Wait (1834).—K.B. (*infra*).

Weaver v. Price, distinguished.
Allen v. Sharp (1848) 17 L. J. Ex. 209; 2 Ex. 352.—EX.

Bristol Overseers v. Wait (1834) 3 L. J. M. C. 71; 1 A. & E. 264; 3 N. & M. 359.—K.B., *applied*.
Rhymney Ry. v. Price (1867) 16 L. T. 394.—Q.B.

Bristol Overseers v. Wait, discussed.

Reg. (or Manchester Overseers) v. Headlam (1888) 57 L. J. M. C. 89; 21 Q. B. D. 96, 100; 52 J. P. 517.—WILLS and GRANTHAM, JJ.

Bristol Overseers v. Wait, adopted.

Baglan Bay Tin Plate Co. v. John (1895) 72 L. T. 805.—CHARLES and WRIGHT, JJ.

Reg. v. Bradshaw (1860) 29 L. J. M. C. 176; 2 El. & El. 836; 6 Jur. (N.S.) 629; 8 W. R. 435.—Q.B., *approved*.

Reg. v. Hannam (1886) 34 W. R. 355.—C.A.

Reg. v. Bradshaw, applied.

Baglan Bay Tin Plate Co. v. John (1895) 72 L. T. 805.—CHARLES and WRIGHT, JJ.

L. & N. W. Ry. v. Bedford (1852) 17 Q. B. 978.—Q.B., *followed*.

Leicester Waterworks Co. v. Cropstone Overseers (1875) 44 L. J. M. C. 92; 32 L. T. 567.—Q.B.

Reg. v. L. & N. W. Ry. (or Sutton Coldfield Overseers) (1874) 43 L. J. M. C. 57; L. R. 9 Q. B. 153; 29 L. T. 840; 22 W. R. 324.—Q.B., *applied*.

L. & N. W. Ry. v. Irthlingborough Churchwardens (1876) 35 L. T. 327.—Q.B.D.

Reg. v. L. & N. W. Ry. (1877) 46 L. J. M. C. 102.—Q.B.D., *applied*.

Monmouth Corporation v. Monmouth Overseers (1878) 38 L. T. 612, 618.—C.P.D.

Reg. v. L. & N. W. Ry. (*supra*, Q.B.D.); *affirmed nom.* Reg. v. Walsall Overseers, 47 L. J. Q. B. 711; 3 Q. B. D. 457; 38 L. T. 665; 26 W. R. 705.—C.A. BRAMWELL and COTTON, L.JJ. *dissenting; the latter decision reversed nom.* Walsall Overseers v. L. & N. W. Ry. (1878) 48 L. J. Q. B. 65; 4 App. Cas. 30; 39 L. T. 453; 27 W. R. 189.—H.L. (E.).

Walsall Overseers v. L. & N. W. Ry. (*supra*, in H.L.), *distinguished*.

Reg. (or Hinton) v. Swindon New Town Local Board (1880) 49 L. J. Q. B. 522; 42 L. T. 614; 28 W. R. 80; 44 J. P. 505.—C.A.

COTTON, L.J. (for the Court).—There the Divisional Court had given leave to appeal; there the Divisional Court was held to be exercising an original and not merely a consultative jurisdiction; and the facts of the case were held to bring it within sect. 19 (4) and not within sect. 45 of the Judicature Act. Can that be said to be the case here? We think not. In the present case the Q. B. D. was not exercising its well-known jurisdiction of supervising the orders of inferior Courts, but the case came before that Division as it were by accident; that is, the case could under sub-sect. 7 of sect. 269 of the Public Health Act, 1875, have been heard and decided in any of the Common Law Divisional Courts, so that this case was an appeal from an inferior Court within sect. 45 of the Judicature Act. It was therefore an appeal to the High Court; it has been determined in one of the Divisional Courts of the High Court, and the determination of such an appeal by such a Court is by the statute final, unless special leave to appeal is given. No such leave has been given in this case . . . and this appeal must on that ground be dismissed.—p. 523.

Walsall Overseers v. L. & N. W. Ry., applied.

Illingworth v. Bulmer East Highway Board (1884) 53 L. J. M. C. 60; 32 W. R. 451.—C.A. (*see extract ante*, vol. i., col. 33); Holborn Union v. Chertsey Union (1885) 54 L. J. M. C. 137; 15 Q. B. D. 76, 79; 53 L. T. 656; 33 W. R. 698; 50 J. P. 36.—C.A. BRETT, M.R. BAGGALLAY and BOWEN, L.JJ.; Russell, in re (1888) 22 L. R. Ir. 487, 496.—EX. D.

Walsall Overseers v. L. & N. W. Ry., dictum adopted.

Cox v. Hakes (1890) 60 L. J. Q. B. 89; 15 App. Cas. 506, 541; 63 L. T. 392; 39 W. R. 145; 17 Cox C. C. 158; 54 J. P. 820.—H.L. (E.).

Walsall Overseers v. L. & N. W. Ry., referred to.

Kent County Council, In re and Ex parte (1891) 60 L. J. Q. B. 435; [1891] 1 Q. B. 725; 65 L. T. 213; 39 W. R. 465; 55 J. P. 647.—C.A. HALSBURY, L.C., ESHER, M.R. and FRY, L.J.; Knight v. The Tabernacle Permanent Building Society (1892) 41 W. R. 35.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.; Barnardo v. Ford, Gossage's Case (1892) 61 L. J. Q. B. 728; [1892] A. C. 326; 1 R. 17; 67 L. T. 1; 41 W. R. 333; 56 J. P. 629.—H.L. (E.).

Walsall Overseers v. L. & N. W. Ry., applied.

Harvey v. Copeland (1892) 32 L. R. Ir. 419, 429.—C.A.; Reg. v. Sheehan [1898] 2 Ir. R. 683.—Q.B.D.; Reg. v. Irish Land Commission [1899] 2 Ir. R. 399.—C.A.

Rex v. Sussex JJ. (1812) 15 East 206; 13 R. R. 447.—K.B., *adopted*.

Reg. v. Surrey JJ. (1880) 50 L. J. M. C. 10, 15; 6 Q. B. D. 100, 109.—MANISTY and BOWEN, JJ.

Reg. v. Biggleswade Union (1869) 21 L. T. 494.—C.P., *adopted*.

Liverpool United Gas Light Co. v. Everton Overseers (1871) L. R. 6 C. P. 414, 419; 40 L. J. M. C. 104, 107; 23 L. T. 813; 19 W. R. 412.—C.P.; Reg. (or Williams) v. Westminster Union (1876) 45 L. J. M. C. 117; 1 Q. B. D. 503; 34 L. T. 795.—Q.B.D.

Liverpool United Gas Co. v. Everton Overseers (1871) 40 L. J. M. C. 104; L. R. 6 C. P. 414; 23 L. T. 813; 19 W. R. 412.—C.P., *considered*.

Reg. v. Surrey JJ. (1880) 50 L. J. M. C. 10; 6 Q. B. D. 100, 107.—MANISTY and BOWEN, JJ.

Liverpool United Gas Co. v. Everton Overseers, *discussed and applied*.

Reg. v. Longe (1897) 66 L. J. Q. B. 278.—WRIGHT and BRUCE, JJ.

Liverpool United Gas Light Co. v. Everton Overseers, *referred to*.

Reg. v. De Grey (1900) 69 L. J. Q. B. 341; [1900] 1 Q. B. 521; 82 L. T. 324; 48 W. R. 348; 64 J. P. 375.—CHANNELL and BUCKNILL, JJ. *See extract infra*.

Reg. v. Kent JJ., L. C. & D. Ry., *Ex parte* (1899) 80 L. T. 622.—Q.B.D., *not followed*.

Reg. v. De Grey; King's Lynn Docks Co., *Ex*

parte (1900) 69 L. J. Q. B. 341 : [1900] 1 Q. B. 521 : 82 L. T. 324 ; 48 W. R. 348 ; 64 J. P. 375.—CHANNELL and BUCKNILL, JJ.

CHANNELL, J.—The real question is whether the decision of Darling, J. and myself in *Reg. v. Kent JJ.*, was right. In the present case the rule was obtained before Darling, J. and myself, and I think that I have his authority, from what passed then, to say that he would concur in the view I am about to express. In *Reg. v. Kent JJ.*, two points were decided. . . . The second point decided in that case was that in an appeal from a poor rate the service of proper notice was a condition precedent to the appeal being heard or entertained. The decision upon that point was given *per incuriam*. It was in fact a mistake. It arose from our attention not having been called to the fact that there is a difference in this respect between an appeal from a poor rate under the Act of Geo. II. [the Poor Relief Act, 1743] and other appeals, and that in the case of poor rates, by what Erle, J. called an established malpractice, the appeal must be respited, although the proper notices have not been given. We, by mistake, referred to *Reg. v. Eyre* [1857 ; 26 L. J. M. C. 125], which is not in point. By a curious coincidence *Reg. v. Eyre* is reported three times in the same volume, and we appear to have referred to the report at p. 125 of vol. 26 of the "Law Journal Reports" (Common Law), which had nothing to do with the case before us, although the reports at pp. 14 and 121 were relevant. Under these circumstances we are not bound by *Reg. v. Kent JJ.* Nor, in my opinion, would any other judges be bound to follow the decision in that case. It would be apparent to them that the three strong decisions in *Shrewsbury Ry. v. Leominster Overseers* (1857, 21 J. P. 149) ; *Liverpool United Gas Co. v. Ervinton* (1871 ; 40 L. J. M. C. 104 ; L. R. 6 C. P. 414) ; and *Reg. v. Surrey JJ.* (1880 ; 50 L. J. M. C. 10 ; 6 Q. B. D. 100), were not drawn to our attention, and I therefore think that they would hold themselves not bound by the decision ; and whether that is so or not, I think it clear that I am at liberty to say that I am not bound by it. That being so, the Recorder had, in my opinion, jurisdiction to entertain, and was bound to entertain the appeals, even if the proper notices were not given. No specific application was made to him to enter and respite the appeals, and in many cases that omission would be fatal and a ground for refusing a *mandamus*. But in the present case the application was unnecessary, as it had been expressly held in *Reg. v. Kent JJ.*, that the appeals could not be entertained, and that an application to respite must be refused. It might be possible to distinguish *Reg. v. Kent JJ.*, on the ground that it was a decision under sect. 52 of the Local Government Act, 1894, and that that section refers to a transfer under the Act and not under an order of the Local Government Board. But I prefer to hold that our decision upon the second point in that case was wrong, and that, therefore, the *mandamus* must go.—p. 343.

Reg. v. G. W. Ry. (1869) 38 L. J. M. C. 89 ; L. R. 4 Q. B. 323 ; 10 B. & S. 318 ; 20 L. T. 481 ; 17 W. R. 670.—Q.B., *observed upon and distinguished.*

Reg. v. Wiltshire JJ. (1879) 48 L. J. M. C. 142 ; 4 Q. B. D. 326 ; 40 L. T. 681.—COCKBURN, C.J. and LOPES, J.

Reg. v. G. W. Ry., questioned.

Reg. v. Denbighshire JJ. (1885) 15 Q. B. D. 451 ; 54 L. J. M. C. 142 ; 53 L. T. 389 ; 33 W. R. 784.

COLERIDGE, C.J.—But that case (*Reg. v. Great Western Railway*) has come under the consideration of two Courts subsequently, of one in June, 1871, and of the other in May, 1879, before the late Lord Chief Justice, and Lopes, J. In both these cases *Reg. v. Great Western Railway* was apparently brought to the attention of the Court, and the Court in both cases considered and dealt with that case, and, as it appears to me—I do not like to say overruled it, but—intimated a very grave doubt whether it was right. . . . I think the two later cases rightly pointed out the construction we are now putting on the enactment as the true one. It is enough if the rate is made in conformity with the list which exists, and the appellant, prior to appealing against the rate, has applied to the assessment committee, and not got the relief he deems just.—p. 455.

MATHEW, J. to the same effect.

Reg. v. G. W. Ry., applied.

Rex v. Essex JJ. (1901) 71 L. J. K. B. 148 ; [1902] 1 K. B. 180 ; 85 L. T. 678 ; 50 W. R. 188 ; 66 J. P. 261.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Reg. v. Derbyshire JJ. (1871) 25 L. T. 43 ; 19 W. R. 934.—BAIL COURT ; *Reg. v. Wiltshire JJ.* (1879) 48 L. J. M. C. 142 ; 4 Q. B. D. 326 ; 40 L. T. 681.—Q.B.D., *followed.*

Reg. v. Denbighshire JJ. (1885) 54 L. J. M. C. 142 ; 15 Q. B. D. 451 ; 53 L. T. 389 ; 33 W. R. 784.—COLERIDGE, C.J. and MATHEW, J.

Reg. v. Derbyshire JJ. and Reg. v. Wiltshire JJ., distinguished.

Rex v. Essex JJ. (1901) 71 L. J. K. B. 148 ; [1902] 1 K. B. 180 ; 85 L. T. 678 ; 50 W. R. 188 ; 66 J. P. 261.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Reg. v. Denbighshire JJ. (1885) 54 L. J. M. C. 142 ; 15 Q. B. D. 451 ; 53 L. T. 389 ; 33 W. R. 784.—COLERIDGE, C.J. and MATHEW, J., *inapplicable.*

Reg. v. Essex JJ. (1894) 64 L. J. M. C. 39 ; [1895] 1 Q. B. 38 ; 71 L. T. 832 ; 43 W. R. 183 ; 59 J. P. 68 ; 14 R. 90.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

RIGBY, L.J.—Then it is said that in *Reg. v. Denbighshire JJ.*, it was laid down that to go before the assessment committee once was a sufficient compliance with the statutory condition precedent which is found in sect. 1 [of the Union Assessment Committee Amendment Act, 1864]. Supposing that is so how does it affect this case? We should be holding in direct contradiction to what appears to be the fact if we were to hold that the conditions of sect. 2 had been complied with.

Reg. v. Denbighshire JJ., distinguished.

Rex v. Essex JJ. (1901) 71 L. J. K. B. 148 ; [1902] 1 K. B. 180 ; 85 L. T. 678 ; 50 W. R. 188 ; 66 J. P. 261.—LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Rex v. Newbury (1791) 4 Term Rep. 475.—K.B., *adopted.*

Reg. v. Surrey JJ. (1892) 61 L. J. M. C. 200 ; [1892] 2 Q. B. 719 ; 67 L. T. 266 ; 41 W. R. 79 ;

17 Cox C. C. 547; 56 J. P. 742.—COLERIDGE, C.J. and CAVE, J.

Rex v. Brooke (1829) 8 L. J. (O.S.) M. C. 33; 9 B. & C. 915; 4 M. & Ry. 719.—K.B., *distinguished*.

Reg. v. Kent JJ. (1870) 40 L. J. M. C. 76, 79; L. R. 6 Q. B. 132, 137; 19 W. R. 205.—Q.B.

Reg. v. Cambridgeshire JJ. (1850) 1 L. M. & P. 47; 19 L. J. M. C. 130; 4 New-Sess. Cas. 87.—BAIL COURT, *questioned*.

Reg. v. Kent JJ. (1870) L. R. 6 Q. B. 132; 40 L. J. M. C. 76; 19 W. R. 205.—Q.B.

COCKBURN, C.J.—No doubt Sir William Erle in this case seems to have held, that where there was an appeal on the ground that several persons were under-rated, and some had had notice and some not, it was not competent to the appellant to abandon his appeal as to some and go on as to the others. It is difficult to understand or maintain such a proposition; and, with the greatest respect to Sir William Erle, I cannot assent to such a doctrine, I cannot but think that learned judge for once must have been wrong.—p. 136.

Rex v. Wilts JJ. (1828) 6 L. J. (O.S.) M. C. 97; 8 B. & C. 380; 2 M. & Ry. 401.—K.B., *adopted*.

Reg. v. Surrey JJ. (1880) 50 L. J. M. C. 10, 15; 6 Q. B. D. 100, 109.—MANISTY and BOWEN, JJ.

Reg. v. Eyre (1857) 26 L. J. M. C. 121; 7 EL. & BL. 609; 3 Jur. (N.S.) 910; 5 W. R. 532.—Q.B., *adopted*.

Reg. v. Surrey JJ. (1880) 50 L. J. M. C. 10, 15; 6 Q. B. D. 100, 109.—MANISTY and BOWEN, JJ.

Reg. v. Eyre, considered.

Reg. v. De Grey, King's Lynn Docks Co., Ex parte (1900) 69 L. J. Q. B. 341; [1900] 1 Q. B. 521; 82 L. T. 324; 48 W. R. 348; 64 J. P. 375.—CHANNELL and BUCKNILL, JJ. *See extract, supra*, col. 2785.

Reg. v. Aylesford (or North Aylesford) Guardians (1872), 37 J. P. 148.—Q.B., *explained*.

Clark v. Fisherton-Angar Overseers (or Alderbury Union) (1880) 6 Q. B. D. 139; 50 L. J. M. C. 33; 29 W. R. 334; 45 J. P. 358.—Q.B.D.

FIELD, J.—As for *Reg. v. North Aylesford Union*, when you look into it, all that the Court decide is, that in their judgment the question went, not to show what was the value of the hereditaments to let, but what the particular mode of carrying on the business by the appellant was, and whether this particular and personal mode of carrying on the business ought to increase the amount of the rate.—p. 143.

Dodds v. South Shields Assessment Committee (1895) 64 L. J. Q. B. 508; [1895] 2 Q. B. 133; 72 L. T. 645; 14 R. 422; 43 W. R. 532; 59 J. P. 452.—C.A., *principle applied*.

L. C. C. and City of London Brewery Co., In re (1897) 67 L. J. Q. B. 382; [1898] 1 Q. B. 387; 77 L. T. 463; 61 J. P. 308.—WRIGHT and KENNEDY, JJ.

Dodds v. South Shields Assessment Committee, explained.

Cartwright v. Saulcoates Union (1900) 69 L. J. Q. B. 403; [1900] A. C. 150; 82 L. T. 157; 48 W. R. 394; 64 J. P. 229.—H.L. (E.).

[The distinction referred to in the above case between exceptional and ordinary cases involves

no principle of law, though it may be a convenient rule of practice.]

Dodds v. South Shields Assessment Committee, referred to.

Bradford-on-Avon Union v. White (1898) [1898] 2 Q. B. 630.—Q.B.D.; and **Mersey Docks and Harbour Board v. Birkenhead Assessment Committee** (1899) 69 L. J. Q. B. 260; [1900] 1 Q. B. 143, 150; 81 L. T. 798.—C.A.

Reg. v. Huntley (1854) 23 L. J. M. C. 106; 3 EL. & BL. 172; 2 C. L. R. 246; 18 Jur. 745.—Q.B., *followed*.

Gay v. Mathews (1863) 33 L. J. M. C. 14; 4 B. & S. 425; 9 Jur. (N.S.) 716; 8 L. T. 674; 11 W. R. 922.—EX. CH.

Reg. v. Cambridge (Recorder) (1858) 27 L. J. M. C. 160; 8 EL. & BL. 637; 4 Jur. (N.S.) 334; 6 W. R. 80.—Q.B., *distinguished*.

Colonial Bank of Australasia v. Willan (1874) 43 L. J. P. C. 39; L. R. 5 P. C. 417, 443; 30 L. T. 237; 22 W. R. 516.—P.C.

Reg. v. Cambridge (Recorder), principle recognised.

Reg. v. Farrant (1887) 57 L. J. M. C. 17; 20 Q. B. D. 58, 61; 57 L. T. 880; 36 W. R. 184; 52 J. P. 116.—STEPHEN and CHARLES, JJ.

Leicester Waterworks Co. v. Barrow-on-Soar Union (1878) 48 L. J. M. C. 41; 4 Q. B. D. 18; 39 L. T. 624; 27 W. R. 364.—Q.B.D., *adopted*.

Eaton v. Basker (1880) 50 L. J. Q. B. 194; 6 Q. B. D. 201; 44 L. T. 61.—STEPHEN, J.; *affirmed in part, reversed in part*, (1881) 50 L. J. Q. B. 444; 7 Q. B. D. 529; 44 L. T. 703.—C.A.

Reg. v. Yorkshire (W.B.) JJ. (1865) 34 L. J. M. C. 142; 6 B. & S. 531; 12 Jur. (N.S.) 162.—Q.B., *referred to*.

West London Extension Ry. v. Fulham Union (1870) L. R. 5 Q. B. 361, 363; 39 L. J. Q. B. 178; 22 L. T. 523.—Q.B.

Reg. v. Yorkshire (W.B.) JJ., applied.

Reg. v. Middlesex JJ. (1871) 40 L. J. M. C. 109; L. R. 6 Q. B. 220, 222; 24 L. T. 131; 19 W. R. 744.—Q.B.

5. COUNTY RATES.

Reg. v. East Looe (1862) 31 L. J. M. C. 245; 3 B. & S. 20; 8 Jur. (N.S.) 1128; 6 L. T. 748; 10 W. R. 866.—Q.B., *followed*.

Reg. v. Dover (Recorder) (1884) 32 W. R. 876; 49 J. P. 86.—DAY and SMITH, JJ.

Reg. v. Essex Inhabitants (1792) 4 Term Rep. 591; 2 R. R. 470.—K.B., *applied*.

Wildes v. Russell (1866) 35 L. J. M. C. 241; L. R. 1 C. P. 722, 738; 16 L. T. 478; 12 Jur. (N.S.) 645; 14 W. R. 796.—C.P.; **Reg. v. White (or Sibly, Ex parte)** (1884) 54 L. J. M. C. 23; 14 Q. B. D. 358; 52 L. T. 116; 33 W. R. 248; 49 J. P. 294.—C.A.

Reg. v. Essex Inhabitants, inapplicable.

Reg. v. Glamorgan County Council (1899) 68 L. J. Q. B. 1047; [1899] 2 Q. B. 536; 81 L. T. 372; 48 W. R. 112; 64 J. P. 115.—C.A.

Rex v. Staffordshire JJ. (1837) 6 L. J. M. C. 65; 6 A. & E. 84; 1 N. & P. 260.—K.B., *adopted*.

Mutter v. Eastern and Midlands Ry. (1888) 57 L. J. Ch. 615; 38 Ch. D. 92, 106; 59 L. T. 117; 36 W. R. 401.—C.A.

RECEIVER.

Whitfield, Ex parte (1742) 2 Atk. 315, *referred to*.

Salisbury (Marquis) and Ecclesiastical Commissioners, In re (1876) 45 L. J. Ch. 250; 2 Ch. D. 29, 41; 34 L. T. 5; 24 W. R. 380.—C.A.

Fripp v. Chard Ry. (1853) 22 L. J. Ch. 1084; 11 Hare 241; 1 Eq. R. 508; 17 Jur. 887; 1 W. R. 477.—V.-C., *followed*.

Griffin v. Bishop's Castle Ry. (1867) 16 L. T. 345; 15 W. R. 1058.—WOOD, V.-C.

Barton v. Rock (1856) 22 Beav. 81, 376.—M.R. *See* Court of Probate Act, 1857 (20 & 21 Vict. c. 77), ss. 70, 71.

Barton v. Rock, distinguished.
Grimston v. Timms (1870) 22 L. T. 646; 18 W. R. 747.—MALINS, V.-C.

Spurgin v. White (1860) 2 Hiff. 473; 7 Jur. (N.S.) 15; 3 L. T. 609; 9 W. R. 266.—V.-C., *followed*.
Collison v. Warren (1901) 70 L. J. Ch. 382; [1901] 1 Ch. 812; 84 L. T. 482.—BUCKLEY, J.; *affirmed*, C.A.

Sargant v. Read (1876) 45 L. J. Ch. 206; 1 Ch. D. 600.—JESSEL, M.R., *referred to*.
Lloyd, In re, Allan v. Lloyd (1879) 12 Ch. D. 447, 451; 41 L. T. 171; 28 W. R. 8.—C.A.

Sargant v. Read, adopted.
Taylor v. Neate (1888) 57 L. J. Ch. 1044; 39 Ch. D. 538; 60 L. T. 179; 37 W. R. 190.—CHITTY, J.

Sargant v. Read, distinguished.
Carter v. Fey (1894) 63 L. J. Ch. 723; [1894] 2 Ch. 541; 7 R. 358; 70 L. T. 786.—C.A.; *affirming* KEKEWICH, J.

LINDLEY, L.J.—The defendant's claim is not for any relief arising out of or incidental to the relief sought to be obtained by the plaintiff in his action. In this respect the case differs from *Sargant v. Read*, which was an action for dissolution of a partnership and for taking the partnership accounts, and Sir G. Jessel there held that the defendant was entitled to give a cross notice of motion in the plaintiff's action for the appointment of a receiver. It differs also from *Porter v. Lopes (infra)*, which was a partition action, and there the defendant was held entitled to move for a receiver for the protection of the property.

Sargant v. Read and Carter v. Fey, principle applied.
Collison v. Warren (1901) 70 L. J. Ch. 382; [1901] 1 Ch. 812; 84 L. T. 482.—BUCKLEY, J., *affirmed*, C.A.

Porter v. Lopes (1877) 7 Ch. D. 353; 37 L. T. 824.—JESSEL, M.R., *explained*.
Saxton v. Bartley (1879) 48 L. J. Ch. 519, 521; 27 W. R. 615.—BACON, V.-C.

Porter v. Lopes, referred to.
Belcher v. Williams (1890) 45 Ch. D. 510; 63 L. T. 673; 39 W. R. 266.—NORTH, J.

Porter v. Lopes, distinguished.
Carter v. Fey (1894) 63 L. J. Ch. 723; [1894] 2 Ch. 541; 7 R. 358; 70 L. T. 786.—C.A. *See* extract, *supra*.

Porter v. Lopes, referred to.
Hexter v. Pearce (1899) 69 L. J. Ch. 146; [1900] 1 Ch. 341; 82 L. T. 109; 48 W. R. 330.—FARWELL, J.; *and see* *Collison v. Warren* (1901) 70 L. J. Ch. 382; [1901] 1 Ch. 812; 84 L. T. 482.—BUCKLEY, J.; *affirmed*, C.A.

Anon. v. Jolland (1802) 8 Ves. 72; 6 R. R. 229.—L.C.

Observed upon, **British Mutual Investment Co. v. Cobbold** (1875) 44 L. J. Ch. 332; L. R. 19 Eq. 627; 32 L. T. 251; 23 W. R. 487.—HALL, V.-C.; *applied*, **Dixon v. Wilkinson** (1859) 4 De G. & J. 508; 4 Drew. 614; 5 Jur. (N.S.) 1063; 7 W. R. 624.—L.J.; *referred to*, **Dangar's Trusts, In re** (1889) 58 L. J. Ch. 815; 41 Ch. D. 178, 191; 60 L. T. 491; 37 W. R. 651.—STIRLING, J.

Davis v. Marlborough (Duke) (1818) 2 Swanst. 108, 118.—L.C., *referred to*.
O'Rourke v. Bolingbroke (1877) 2 App. Cas. 814, 822; 26 W. R. 239.—H.L. (IR.).

Davis v. Marlborough (Duke), adopted.
Fry v. Lane (1888) 58 L. J. Ch. 113; 40 Ch. D. 312, 320; 60 L. T. 12; 37 W. R. 135.—KAY, J.

Neate v. Pink (1846) 15 Sim. 450.—V.-C.: *varied*, (1851) 3 Mac. & G. 476; 21 L. J. Ch. 574; 16 Jur. 69.—L.C., *explained and limited*.
Brocklebank v. East London Ry. (1879) 12 Ch. D. 839; 48 L. J. Ch. 729; 41 L. T. 205; 28 W. R. 30.

FRY, J.—*Neate v. Pink* was a very peculiar case, and its very peculiarity seems to me to indicate that there is no such general rule as has been insisted upon. There the suit was instituted by some persons who were entitled under the will of J. H., who was the owner of one moiety of a plantation in Jamaica; the other moiety belonged to two persons named F. and Y. Receivers and managers of the testator's estates had been appointed by the Court, proceedings were taken in the Court of Chancery in Jamaica to give effect to the proceedings in the suit in this country, and the receivers who had been appointed by the Court in this country were let into possession of the testator's moiety of the plantation, and took possession of the other moiety also. They made profits on their reception of both moieties, and therefore the fund which was in Court resulting from the working of the plantation represented, as to some portion of it, property which the receivers had no right whatever to receive, and in respect of which there was a perfectly good equitable claim on the part of the owners of that property to be repaid. The persons against whom they had that right were officers of the Court, who had in effect under the direction or acquiescence of the Court, entered on the property. They had, in another action, been found to be liable to F. and Y. in respect of the use and occupation of their moiety, and being so liable, they were entitled, under the circumstances, to an indemnity out of the fund in Court. The Court took a short course, and

gave to the persons who had a right against the receivers a right against the fund out of which the receivers were entitled to an indemnity. That case was determined upon its very special circumstances . . . The very language in which the judgments of the Vice-Chancellor and the Lord Chancellor are couched indicates that there is no general principle giving to every person who is interested in having money paid to him by a receiver a right of access to the Court in the way contended for.—p. 844.

Neate v. Pink, explained and distinguished.

Hand v. Blow (1900, 1901) 70 L. J. Ch. 687; [1901] 2 Ch. 721, 728; 82 L. T. 750.—STIRLING, J.; *affirmed*, 70 L. J. Ch. 687; [1901] 2 Ch. 721; 85 L. T. 156; 50 W. R. 5.—C.A.

STIRLING, J.—Then there was also cited the remarkable case of *Neate v. Pink* . . . It seems to me, looking at the whole of the facts [see last extract], that the Court came to the conclusion that this leasehold interest in the moiety of the plantation must be treated as belonging to A. B.'s (the testator's) estate, and, once that conclusion is arrived at, there is no difficulty in applying the principle laid down in the Irish case (*Bulfe v. Blake*, 1 Ir. Ch. R. 365, 367) to which I have referred. It was a material circumstance in that case that the landlords had recovered judgment in Jamaica against the receivers for the rent which was due, so that the Jamaica Courts showed that they treated the relation of landlord and tenant as existing between the owners of that moiety of the property and the receivers. If that were so there would be clearly a right of indemnity to the receivers out of the estate, and the Court might well have applied that equity and paid the money directly out of the fund. But here again I think that the case is distinguishable because no claim has been made by the company against the receiver or any one else.

Fuggle v. Bland (1883) 11 Q. B. D. 711.—Q.B.D., *followed*.

Westhead v. Riley (1883) 53 L. J. Ch. 1153; 25 Ch. D. 413, 414; 49 L. T. 776; 32 W. R. 273.—CHITTY, J.

Stilwell (or Stitwell) v. Williams (1821) Jac. 280; 6 Madd. 49; 23 R. R. 56.—J.C., *discussed*.

Carrow v. Ferrior (1868) 37 L. J. Ch. 569; L. R. 3 Ch. 724, n.; 18 L. T. 65, 806; 16 W. R. 454, 922.—L.JJ.

Bainbrigge v. Baddeley (1850) 20 L. J. Ch. 189; 13 Beav. 355.—M.R.; *reversed*, (1851) 3 Mac. & G. 413.—L.C.

Bainbrigge v. Baddeley. See

Talbot (Earl) v. Hope-Scott (1858) 27 L. J. Ch. 273; 4 K. & J. 96; 4 Jur. (N.S.) 1172; 6 W. R. 269.—WOOD, V.-C.

Bainbrigge v. Baddeley, considered.

Carrow v. Ferrior (1868) 37 L. J. Ch. 569; L. R. 3 Ch. 719, 729; 18 L. T. 65, 806; 16 W. R. 454, 922.—L.JJ. (*see infra*).

Mordaunt v. Hooper (1756) Amb. 311.—L.C., *questioned*.

Carrow v. Ferrior (1868) 37 L. J. Ch. 569; L. R. 3 Ch. 729; 18 L. T. 65, 806; 16 W. R. 454, 922.—L.JJ.

WOOD, L.J.—*Mordaunt v. Hooper* seems of all

the old authorities most to support the contention of the respondents, but it cannot, I think, be relied upon.—p. 581.

Talbot (Earl) v. Hope-Scott (1858) 27 L. J. Ch. 273; 4 Kay & J. 96, 139; 4 Jur. (N.S.) 1172; 6 W. R. 269, *confirmed*.

Carrow v. Ferrior (1868) 37 L. J. Ch. 569, 581; L. R. 3 Ch. 719, 728; 18 L. T. 65, 806; 16 W. R. 454, 922.—L.JJ.

Talbot (Earl) v. Hope-Scott, no longer law.

Berry v. Keen (1882) 51 L. J. Ch. 912.—C.A. *See next case.*

Carrow v. Ferrior, 37 L. J. Ch. 569; L. R. 3 Ch. 719; 18 L. T. 65, 806; 16 W. R. 454, 922.—L.JJ., *no longer law.*

Berry v. Keen (1882) 51 L. J. Ch. 912.—C.A. JESSEL, M.R.—The cases cited are no longer law, as they have been overruled by sect. 25 of the Judicature Act, 1873.—p. 912.

Dunn v. Ferrior (1868) 37 L. J. Ch. 569; L. R. 3 Ch. 719; 18 L. T. 65, 806; 16 W. R. 454, 922.—L.JJ., *no longer law.*

Berry v. Keen (1882) 51 L. J. Ch. 912.—C.A. *See last case.*

Nothard v. Proctor (1875) 45 L. J. Ch. 302; 1 Ch. D. 4; 33 L. T. 709.—C.A., *followed*.

Vickers v. Stevens (1881) 44 L. T. 679, 680; 29 W. R. 562.—BACON, V.-C.

Metcalfe v. York (Archbishop) (1836) 6 L. J. Ch. 65; 1 Myl. & C. 547; 6 Sim. 224.—L.C., *referred to*.

Montagu v. Sandwich (Earl) (1886) 55 L. J. Ch. 925; 32 Ch. D. 525, 539; 54 L. T. 502.—C.A.

Metcalfe v. York (Archbishop), applied.

Tailby v. Official Receiver (1888) 58 L. J. Q. B. 75; 13 App. Cas. 523, 548; 60 L. T. 162; 37 W. R. 513.—H.L. (E.).

LORD MACNAGHTEN.—In [that case in] 1811 an incumbent charged his benefice with an annuity and covenanted that if he should be preferred to any other benefice he would charge it with the annuity. . . . In 1814 the incumbent was preferred to another living. In 1817 charges on ecclesiastical benefices were prohibited by 57 Geo. 3, c. 99. No legal charge upon the new living had been executed before that Act passed. A question afterwards arose between the person entitled to the annuity and judgment creditors in possession under a sequestration. It was argued for the judgment creditors that as specific performance would be in contravention of the statute, the equitable title must fail. . . . But the L.C. was of opinion . . . that there was an equitable charge independently of the covenant to execute a legal charge. It was then said for the defendants that all equitable charges rest upon specific performance and the right to have a legal charge. Lord Cottenham, however, replied, "This is by no means so," and he affirmed the V.-C.'s judgment giving effect to the equitable charge.

Bord v. Tollemache (1862) 1 N. R. 177, *not applied*.

Southern Ry., In re, Robson, Ex parte (1885) 17 L. R. Ir. 121.—C.A.

Hawkins v. Gathercole (1855) 24 L. J. Ch. 332; 6 De G. M. & G. 1; 1 Jur. (N.S.) 481.—L.JJ., *principle applied*.

Burder v. O'Neill (1863) 9 Jur. (N.S.) 1109; 9 L. T. 232.—DR. LUSHINGTON.

Hawkins v. Gathercole, commented on.

Norwich (Bishop) v. Pearce (1868) 37 L. J. Ecc. 90; L. R. 2 A. & E. 281.—ARCHES.

Hawkins v. Gathercole, considered and adopted.

Garnett v. Bradley (1878) 48 L. J. Ex. 186; 3 App. Cas. 944, 950; 39 L. T. 261; 26 W. R. 698.—H.L. (E.).

Hawkins v. Gathercole, referred to.

Meredith, In re, Chick, Ex parte (1879) 11 Ch. D. 731, 740.—C.A.

Hawkins v. Gathercole, applied.

Bradlaugh v. Clarke (1883) 52 L. J. Q. B. 505; 8 App. Cas. 354; 48 L. T. 681; 31 W. R. 677; 47 J. P. 405.—H.L. (E.).

Hawkins v. Gathercole, considered, and principle applied.

Seward v. Vera Cruz (1884) 54 L. J. Adm. 9; 10 App. Cas. 59, 68; 52 L. T. 474; 33 W. R. 477; 5 Asp. M. C. 386; 49 J. P. 324.—H.L. (E.).

Hawkins v. Gathercole, applied.

McBean v. Deane (1885) 55 L. J. Ch. 19; 30 Ch. D. 520, 524; 53 L. T. 701; 33 W. R. 924.—CHITTY, J.

Hawkins v. Gathercole, observations adopted.

Eastman Photographic Materials Co. v. Comptroller General of Patents (1898) 67 L. J. Ch. 628; [1898] A. C. 571, 575; 79 L. T. 195; 47 W. R. 152.—H.L. (E.).

Hawkins v. Gathercole, adopted.

Kennedy v. Campbell (1898) [1899] 1 Ir. R. 59, 62.—KENNY, J.

Peek v. Trimisaran Coal and Iron Co. (1876)

45 L. J. Ch. 281; 2 Ch. D. 115; 24 W. R. 361.—M.R., followed.

Campbell v. Lloyds Bank (1889) 58 L. J. Ch. 424.—CHITTY, J.

Peek v. Trimisaran Coal and Iron Co., followed.

Makins v. Ibbotson & Sons (1890) 60 L. J. Ch. 164; [1891] 1 Ch. 133; 63 L. T. 515; 39 W. R. 73; 2 Meg. 371.—KAY, J.

Campbell v. Lloyds Bank (1889) 58 L. J. Ch. 424; [1891] 1 Ch. 133, n.—CHITTY, J., followed.

Makins v. Ibbotson (1890) 60 L. J. Ch. 164; [1891] 1 Ch. 133; 63 L. T. 515; 39 W. R. 73; 2 Meg. 371.—KAY, J.

Neate v. Marlborough (Duke) (1838) 3 My. & C. 407; 9 Sim. 60.—L.C., referred to.

Benham v. Keane (1861) 31 L. J. Ch. 129; 3 De G. F. & J. 318; 8 Jur. (N.S.) 604; 5 L. T. 439; 10 W. R. 67.—L.JJ.

Neate v. Marlborough (Duke), discussed.

Anglo-Italian Bank v. Davies (1878) 47 L. J. Ch. 833; 9 Ch. D. 275; 39 L. T. 244; 27 W. R. 3.—C.A.

JESSEL, M.R.—Lord Cottenham in *Neate v. Marlborough (Duke)* felt bound by the prior authorities, and decided that that useless and absurd form by which the creditor could not get the estate must be followed, and that the bill failed for not having alleged it. Still the substance of the case was that the judgment creditor had exercised his option to take the defendant's

land, and that he could not get at it because the defendant's interest was of an equitable nature, which could not be reached except by the assistance of the Court of Equity; and when he showed that he had exercised his option, and was in the position of a man who would have got the land at law if the estate had been legal, he was entitled to the assistance of the Court of Equity by interlocutory application if the estate was equitable.—p. 836.

Neate v. Marlborough (Duke), observed upon.

Watkins, In re, Evans, Ex parte (1879) 13 Ch. D. 252; 49 L. J. Bk. 7; 41 L. T. 565; 28 W. R. 127.—C.A.

BAGGALLAY, L.J.—I also concur in what was said by the M.R. [in *Anglo-Italian Bank v. Davies*, see *supra*] with reference to *Neate v. Marlborough (Duke)*.—p. 260.

Neate v. Marlborough (Duke), recognised.

Cadogan v. Lyric Theatre (1894) 63 L. J. Ch. 775; [1894] 3 Ch. 338; 7 R. 594; 71 L. T. 8.—C.A.

Clarke v. Clarke (1873) 42 L. J. P. 72;

L. R. 3 P. 57.—P., referred to.

Oliver v. Lowther (1880) 42 L. T. 47; 28 W. R. 381.—MALINS, V.-C.

Hatton v. Haywood (1874) 43 L. J. Ch. 372;

L. R. 9 Ch. 229; 30 L. T. 279; 22 W. R. 356.—L.C. and L.JJ., approved and followed.

Watkins, In re, Evans, Ex parte (1879) 49 L. J. Bk. 7; 13 Ch. D. 252; 41 L. T. 565; 28 W. R. 127.—C.A.

Hatton v. Haywood, applied.

Pope, In re (1886) 55 L. J. Q. B. 522; 17 Q. B. D. 743, 751; 55 L. T. 369; 34 W. R. 693.—C.A., and Thompson v. Gill (1903) 72 L. J. K. B. 411; [1903] 1 K. B. 760; 88 L. T. 714; 51 W. R. 484.—C.A.

Edwards v. Edwards (1876) 1 Ch. D. 454;

33 L. T. 633; 24 W. R. 201.—V.-C.; reversed, 45 L. J. Ch. 391; 2 Ch. D. 291; 34 L. T. 472; 24 W. R. 713.—C.A.

Edwards v. Edwards, explained.

Watkins, In re, Evans, Ex parte (1879) 13 Ch. D. 252; 49 L. J. Bk. 7; 41 L. T. 565; 28 W. R. 127.—C.A.

JAMES, L.J.—The only point decided in *Edwards v. Edwards* was that it was not a contempt of Court for an execution creditor to seize chattels after an order had been made by the Chancery Division appointing a receiver on his giving security, but before the security had been given or possession taken. The case related to chattels, not to land.—p. 255.

Edwards v. Edwards, distinguished.

Smart v. Flood (1883) 49 L. T. 467.—NORTH, J.

Edwards v. Edwards, applied.

Roberts, In re, Evans v. Roberts (1887) 56 L. J. Ch. 952; 36 Ch. D. 196, 202; 57 L. T. 79; 35 W. R. 684; 51 J. P. 757.—KAY, J.; Fahey v. Tobin [1901] 1 Ir. R. 511.—C.A.

Anglo-Italian Bank v. Davies (1878) 47 L. J. Ch. 833; 9 Ch. D. 275; 39 L. T. 244; 27 W. R. 3.—C.A., followed.

Bryant v. Bull (1878) 10 Ch. D. 153; 48 L. J. Ch. 325; 39 L. T. 470; 27 W. R. 246.—BACON, V.-C.

Anglo-Italian Bank v. Davies, approved and followed.

Watkins, In re, Evans, Ex parte (1879) 13 Ch. D. 252; 49 L. J. Bk. 7; 41 L. T. 565; 28 W. R. 127.—C.A.

THESIGER, L.J.—I may add, though it is not necessary absolutely to decide the point, that I most cordially assent to what was said by the Master of the Rolls in *Anglo-Italian Bank v. Davies*, that the issuing of a writ of elegit in the case of an equitable interest is a useless and absurd form.—p. 259.

Anglo-Italian Bank v. Davies, applied.

Oliver v. Lowther (1880) 42 L. T. 47; 28 W. R. 381.—MALINS, V.-C.

Anglo-Italian Bank v. Davies, observed upon.

Smith v. Cowell (1880) 50 L. J. Q. B. 38; 6 Q. B. D. 75; 43 L. T. 528; 29 W. R. 227.—C.A.

BAGGALLAY, L.J.—*Anglo-Italian Bank v. Davies* shows that the old process still exists; but the M.R. evidently thought that the exercise of the jurisdiction by motion was the preferable way, although, as it was not there necessary to decide it, he did not give judgment on that point.—p. 40.

Anglo-Italian Bank v. Davies, followed.

Westhead v. Riley (1883) 53 L. J. Ch. 1153; 25 Ch. D. 413; 49 L. T. 776; 32 W. R. 273.—CHITTY, J.

Anglo-Italian Bank v. Davies, applied.

Pope, In re (1886) 17 Q. B. D. 743, 745; 55 L. T. 268.—DAY and WILLS, JJ.; affirmed, 55 L. J. Q. B. 522; 17 Q. B. D. 743; 55 L. T. 369; 34 W. R. 693.—C.A.

Anglo-Italian Bank v. Davies, referred to.

Whiteley, In re, Whiteley v. Learoyd (1887) 56 L. T. 846, 848.—KAY, J.

Anglo-Italian Bank v. Davies, considered and held inapplicable.

Holmes v. Millage (1893) 62 L. J. Q. B. 380; [1893] 1 Q. B. 551, 555; 4 R. 332; 68 L. T. 205; 41 W. R. 354; 57 J. P. 551.—C.A.

LINDLEY, L.J.—The principle on which alone the order in this case could be supported before the Judicature Acts is well explained by Cotton, L.J. in *Anglo-Italian Bank v. Davies*; it is that Courts of Equity gave relief where a legal right existed and there were legal difficulties which prevented the enforcement of that right at law. But the existence of a legal right is essential to the exercise of this jurisdiction. The judgment creditor here has a legal right to be paid his debt, but not out of the future earnings of his debtor; and the Court of Chancery had no jurisdiction to prevent him from earning his living or from receiving his earnings, unless he had himself assigned or charged them.

Anglo-Italian Bank v. Davies, adopted.

Thompson v. Gill (1903) 72 L. J. K. B. 411; [1903] 1 K. B. 760, 766; 88 L. T. 714; 51 W. R. 484.—C.A.

Bryant v. Bull (1878) 48 L. J. Ch. 325; 10 Ch. D. 153; 39 L. T. 470; 27 W. R. 246.—V.-C., applied.

Oliver v. Lowther (1880) 42 L. T. 47; 28 W. R. 381.—MALINS, V.-C.

Watkins, In re, Evans, Ex parte (1879) 49

L. J. Bk. 7; 13 Ch. D. 252; 41 L. T. 565; 28 W. R. 127.—C.A., referred to.
Smart v. Flood (1883) 49 L. T. 467.—NORTH, J.

Watkins, In re, Evans, Ex parte, applied.

Pope, In re (1886) 17 Q. B. D. 743, 745; 55 L. T. 268.—DAY and WILLS, JJ.; affirmed, 55 L. J. Q. B. 522; 17 Q. B. D. 743; 55 L. T. 369; 34 W. R. 693.—C.A.

Watkins, In re, Evans, Ex parte, applied.

Whiteley, In re, Whiteley v. Learoyd (1887) 56 L. T. 846, 848.—KAY, J.

Watkins, In re, Evans, Ex parte, referred to.

Shepherd, In re, Atkins v. Shephard (1889) 59 L. J. Ch. 83; 43 Ch. D. 131; 62 L. T. 337; 38 W. R. 133.—C.A.

Watkins, In re, Evans, Ex parte, distinguished.

Fahey v. Tobin [1901] 1 Ir. R. 511, 518.—C.A.

Watkins, In re, Evans, Ex parte, observations approved and explained.

Thompson v. Gill (1903) 72 L. J. K. B. 411; [1903] 1 K. B. 760; 88 L. T. 714; 51 W. R. 484.—C.A.

V. WILLIAMS, L.J.—I believe the view so taken by James, L.J., to be the right mode of regarding equitable execution, and I do not think that it is really inconsistent with anything that was said in *Shepherd, In re* (*infra*, col. 2797) or *Harris v. Beauchamp* (*infra*, col. 2797) with regard to the circumstances under which and the procedure by which equitable execution can be obtained. It is quite plain, in my opinion, that James, L.J., regarded equitable execution as substantially a form of execution; execution which a Court of Equity enables a judgment creditor to obtain where legal execution is not available.

Smith v. Cowell (1880) 50 L. J. Q. B. 38; 6 Q. B. D. 75; 43 L. T. 528; 29 W. R. 227.—C.A., explained and distinguished.

Manchester and Liverpool District Banking Co. v. Parkinson (1888) 58 L. J. Q. B. 262; 22 Q. B. D. 173, 175; 37 W. R. 264.—C.A.

ESHER, M.R.—It is said that that section [s. 25 of the Judicature Act, 1873] gives the Court power to do what neither a Court of law nor a Court of Equity could have done before the Act; and *Smith v. Cowell* seems to show that to be so, but the condition is that it shall appear to the Court to be just or convenient that the order (for appointment of a receiver) should be made.

Smith v. Cowell, considered and adopted.

Holmes v. Millage (1893) 62 L. J. Q. B. 380; [1893] 1 Q. B. 551; 4 R. 332; 68 L. T. 205; 41 W. R. 354; 57 J. P. 551.—C.A.

Salt v. Cooper (1880) 50 L. J. Ch. 529; 16 Ch. D. 544; 43 L. T. 682; 29 W. R. 553.

—C.A., referred to.

Wills v. Luff (1888) 57 L. J. Ch. 563; 38 Ch. D. 197; 36 W. R. 571.—CHITTY, J.

Salt v. Cooper, adopted.

Brereton v. Edwards (1888) 21 Q. B. D. 226, 229; 60 L. T. 5; 37 W. R. 47.—Q.B.D.

Salt v. Cooper, applied.

Holmes v. Millage (1893) 62 L. J. Q. B. 380; [1893] 1 Q. B. 551, 555; 4 R. 332; 68 L. T. 205; 41 W. R. 354; 57 J. P. 551.—C.A. LINDLEY and BOWEN, L.JJ.

Salt v. Cooper, discussed.

Harris v. Beauchamp [1894] 63 L. J. Q. B. 480; [1894] 1 Q. B. 801; 9 R. 653; 70 L. T. 633; 42 W. R. 451.—C.A. ESHER, M.R., LOPES and DAVEY, L.JJ.; *reversing* COLERIDGE, C.J. and COLLINS, J.

DAVEY, L.J. (for the Court).—But that case affords no warrant for saying that the equitable jurisdiction now possessed by all branches of the High Court, and exercisable in the action, differed from or exceeded the old equitable jurisdiction.

Salt v. Cooper. See

Manning v. Mullins (1896) [1898] 2 Ir. R. 40.—C.A.

Manchester and Liverpool District Banking

Co. v. Parkinson (1888) 58 L. J. Q. B.

262; 22 Q. B. D. 173; 37 W. R. 264.—

C.A., *distinguished*.

Hartley, In re, Nuttall v. Whittaker (1892) 66 L. T. 588.—NORTH, J.

Manchester and Liverpool District Banking

Co. v. Parkinson, *applied*.

Holmes v. Millage (1893) 62 L. J. Q. B. 380; [1893] 1 Q. B. 551, 557; 4 R. 332; 68 L. T. 205; 41 W. R. 354; 57 J. P. 551.—C.A. LINDLEY and BOWEN, L.JJ.

Manchester and Liverpool District Banking

Co. v. Parkinson, *referred to*.

McNulty, In re, McKenna v. Harley (1893) 31 L. R. Ir. 391.—PROBATE.

Shephard, In re, Atkins v. Shephard (1889)

59 L. J. Ch. 83; 43 Ch. D. 131; 62 L. T. 337; 38 W. R. 133.—C.A., *discussed*.

Blackman v. Frysh (1891) 60 L. J. Ch. 666; [1892] 3 Ch. 209; 64 L. T. 590; 39 W. R. 520.

—KEKEWICH, J.; *second point affirmed*, [1892] 3 Ch. 209.—C.A. LINDLEY, LOPES and SMITH, L.JJ.

Shephard, In re, Atkins v. Shephard, adopted.

O'Donovan v. Goggin (1892) 30 L. R. Ir. 579, 584.—Q.B.D.

Shephard, In re, Atkins v. Shephard, adopted.

Holmes v. Millage (1893) 62 L. J. Q. B. 380; [1893] 1 Q. B. 551; 4 R. 332; 68 L. T. 205; 41 W. R. 354; 57 J. P. 551.—C.A. LINDLEY and BOWEN, L.JJ.

Shephard, In re, Atkins v. Shephard, approved and applied.

Harris v. Beauchamp (1894) 63 L. J. Q. B. 480; [1894] 1 Q. B. 801; 9 R. 653; 70 L. T. 633; 42 W. R. 45.—C.A. ESHER, M.R., LOPES and DAVEY, L.JJ.

DAVEY, L.J.—In *Shephard, In re*, the true nature and proper application of what is commonly called equitable execution was defined by the Court.

Shephard, In re, Atkins v. Shephard, distinguished.

Minter v. Kent, Sussex and General Land Society (1895) 72 L. T. 186.—C.A. ESHER, M.R. and RIGBY, L.J.

Shephard, In re, Atkins v. Shephard, applied.

Manning v. Mullins (1896) [1898] 2 Ir. R. 34.—C.A.

Shephard, In re, Atkins v. Shephard, applied.

Croshaw v. Lyndhurst Ship Co. (1897) 66 L. J. Ch. 576; [1897] 2 Ch. 154; 76 L. T. 553; 45 W. R. 570.—STIRLING, J.

Shephard, In re, Atkins v. Shephard, referred to.

Ellis v. Wadeson (1899) 68 L. J. Q. B. 604; [1899] 1 Q. B. 714; 80 L. T. 508; 47 W. R. 420.—C.A. SMITH, COLLINS and ROMER, L.JJ.

Shephard, In re, Atkins v. Shephard, and Harris v. Beauchamp (supra, col. 2797), considered and distinguished.

Thompson v. Gill (1903) 72 L. J. K. B. 411; [1903] 1 K. B. 760; 88 L. T. 714; 51 W. R. 484.—C.A. WILLIAMS, STIRLING and MATHEW, L.JJ.

STIRLING, L.J.—I think that all the Court meant to decide in that case was what has been called equitable execution, which, they said with perfect accuracy, should properly be called equitable relief, was not governed by the same rules as legal execution in the strict sense of the term.

Holmes v. Millage (1893) 62 L. J. Q. B. 380; [1893] 1 Q. B. 551; 4 R. 332; 68 L. T. 205; 41 W. R. 354; 57 J. P. 551.—C.A., *applied*.

Cadogan v. Lyric Theatre (1894) 63 L. J. Ch. 775; [1894] 3 Ch. 338; 7 R. 594; 71 L. T. 8.—C.A. HERSCHELL, L.C., LINDLEY and DAVEY, L.JJ.

Holmes v. Millage, distinguished and principle applied.

Manning v. Mullins (1896) [1898] 2 Ir. R. 34.—C.A.

Holmes v. Millage, *explained and followed*. Johnson, In re [1898] 2 Ir. R. 551.—Q.B.D.

Holmes v. Millage, inapplicable.

Picton v. Cullen [1900] 2 Ir. R. 618.—C.A.

Cadogan v. Lyric Theatre (1894) 63 L. J.

Ch. 775; [1894] 3 Ch. 338; 7 R. 594; 71

L. T. 8.—C.A., *referred to*.

Johnson, In re [1898] 2 Ir. R. 551.—Q.B.D.

Webb v. Stenton (1883) 52 L. J. Q. B. 584; 11 Q. B. D. 518; 49 L. T. 432.—C.A., *followed*.

Booth v. Traill, Hayson, In re (1883) 53 L. J. Q. B. 24; 12 Q. B. D. 8, 10; 49 L. T. 471; 32 W. R. 122.—COLERIDGE, C.J., and STEPHEN, J.

Webb v. Stenton, applied.

Macdonald v. Tacquah Gold Mines Co. (1884) 53 L. J. Q. B. 376; 13 Q. B. D. 535, 537; 51 L. T. 210; 32 W. R. 760.—C.A. BRETT, M.R., BOWEN and FRY, L.JJ.

Hitchen v. Birks (1870) L. R. 10 Eq. 471; 23 L. T. 335; 18 W. R. 1015.—M.R., *adopted*.

Parkin v. Seddons (1873) L. R. 16 Eq. 34; 42 L. J. Ch. 470; 28 L. T. 353; 21 W. R. 538.—V.-C.

Stanger Leathes v. Stanger Leathes, W. N. (1882) 71, *approved and followed*.

Coney, In re, Coney v. Bennett (1885) 54 L. J. Ch. 1130; 29 Ch. D. 993; 52 L. T. 961; 33 W. R. 701.—CHITTY, J.

Levasseur v. Mason and Barry (1891) 60 L. J. Q. B. 659; [1891] 2 Q. B. 73; 64 L. T. 761; 39 W. R. 596.—C.A., *considered and applied*.

Anglesey (Marquis), In re, De Glave (Countess) v. Gardner (1903) 72 L. J. Ch. 782; [1903] 2 Ch. 727; 52 W. R. 124.—SWINFEN EADY, J.

Riches v. Owen (1868) L. R. 3 Ch. 820; 16 W. R. 1072.—L.J.J., *considered*.

Bell v. Bird (1868) L. R. 6 Eq. 635, 639.—V.-C.

Riches v. Owen, *distinguished*.

Martin v. Powning (1869) 38 L. J. Ch. 212; L. R. 4 Ch. 356.—L.J.J.

Riches v. Owen, *not applied*.

Stone v. Thomas (1870) 39 L. J. Ch. 168; L. R. 5 Ch. 219, 224; 22 L. T. 359; 18 W. R. 385.—HATHERLEY, L.C.

Foxwell v. Van Grutten (1896) 66 L. J. Ch. 53; [1897] 1 Ch. 64; 75 L. T. 368.—C.A., *considered*.

John v. John (1898) 67 L. J. Ch. 616; [1898] 2 Ch. 573; 79 L. T. 362; 47 W. R. 52.—C.A. LINDLEY, M.R., CHITTY and COLLINS, L.J.J.

Drewry v. Barnes (1826) 5 L. J. (O.S.) Ch. 47; 3 Russ. 94; 27 R. R. 20.—M.R., *considered*.

Preston v. Great Yarmouth Corporation (1872) 41 L. J. Ch. 310, 317; L. R. 7 Ch. 657, n.; 26 L. T. 235.—BACON, V.-C. (affirmed.—L.J.J.).

Evelyn v. Evelyn (1750) 2 Dick. 800.—L.C.; and **Milbank v. Revett** (1817) 2 Mer. 405.—M.R. for L.C., *questioned*.

Tyson v. Fairclough (1824) 2 Sim. & S. 142; 25 R. R. 175.

LEACH, V.-C.—*Evelyn v. Evelyn* is but a word, and does not explain the nature of the estate; and *Milbank v. Revett*, which was very shortly and very loosely argued, considers that the principles which are applied to partners are applicable also to tenants in common, which probably would not have been the opinion if the case had been more fully argued.—p. 144.

Hopkins v. Worcester and Birmingham Canal Navigation Co. (1868) 37 L. J. Ch. 729; L. R. 6 Eq. 437.—V.-C., *followed*.

Postlethwaite v. Maryport Harbour Trustees (1869) 20 L. T. 138.—V.-C.

Hopkins v. Worcester and Birmingham Canal Navigation Co., *distinguished*.

Preston v. Great Yarmouth Corporation (1872) 41 L. J. Ch. 310, 317; L. R. 7 Ch. 657, n.; 26 L. T. 235.—V.-C.; *affirmed*, L. R. 7 Ch. 655; 41 L. J. Ch. 760; 27 L. T. 87; 20 W. R. 875.—L.J.J.

Gray v. Chaplin (1825) 2 Sim. & S. 267.—V.-C.; S. C. (1826) 2 Russ. 137; 26 R. R. 22.—L.C., *discussed*.

Bedford (Duke) v. Ellis (1900) 70 L. J. Ch. 102; [1901] A. C. 1; 83 L. T. 686.—H.L. (E.).

O.C.

Potts v. Warwick and Birmingham Canal Co. (1853) 1 Kay 142.—V.-C., *followed*.

Ames v. Birkenhead Dock Co. (1855) 24 L. J. Ch. 540; 20 Beav. 332; 1 Jur. (N.S.) 529; 3 W. R. 381.—M.R.; **Gardner v. L. C. & D. Ry.** (1867) 36 L. J. Ch. 323, 327; L. R. 2 Ch. 201, 213; 13 L. T. 552.—L.J.J.; and **Blaker v. Herts and Essex Waterworks Co.** (1889) 58 L. J. Ch. 497; 41 Ch. D. 399, 406; 1 Meg. 217; 60 L. T. 776; 37 W. R. 601.—KAY, J.

De Winton v. Brecon Corporation (1859) 28 L. J. Ch. 598; 26 Beav. 533; 5 Jur. (N.S.) 822.—M.R., *followed*.
Gardner v. L. C. & D. Ry. (1867) 36 L. J. Ch. 323, 327; L. R. 2 Ch. 201, 213; 15 L. T. 552.—L.J.J.

Boehm v. Wood (1820) 2 Jac. & W. 236; 22 R. R. 109.—L.C., *followed*.
Gibbs v. David (1875) 44 L. J. Ch. 770, 772; L. R. 20 Eq. 373, 377; 33 L. T. 298; 23 W. R. 786.—MALINS, V.-C.

Boehm v. Wood (1823) T. & R. 332, 334.—M.R. and L.C., *distinguished*.
Cooch v. Walden (1877) 46 L. J. Ch. 639.—HALL, V.-C.

White v. Smale (1855) 22 Beav. 72.—M.R., *followed*.
Clark v. Rivers (Lord) (1867) L. R. 5 Eq. 91; 17 L. T. 166; 16 W. R. 123.—V.-C.

White v. Smale, *distinguished*.
Carrow v. Ferrior (1868) 37 L. J. Ch. 569; L. R. 3 Ch. 719; 18 L. T. 65, 806; 16 W. R. 454, 922.—L.J.J.

WOOD, L.J.—In *White v. Smale* there were no tenants, and it was difficult to obtain any on account of the numerous owners of rent-charges with powers of distress, and the conflict was between these persons. That case is quite different from the present.—p. 581.

White v. Smale. See
Dawkins v. Penrhyn (Lord) (1877) 6 Ch. D. 318, 321; 37 L. T. 80.—C.A. [affirmed.—H.L. (E.).]

Abbott v. Stratton (1846) 3 Jo. & Lat. 605; 9 Ir. Eq. R. 233.—L.C.

Not applied, **Holland v. Cork & Kinsale Ry.** (1868) Ir. R. 2 Eq. 417.—M.R.; *applied*, **Agra & Masterman's Bank v. Barry** (1869) Ir. R. 3 Eq. 443.—M.R.

Day v. Croft (1840) 9 L. J. Ch. 287; 2 Beav. 488; 4 Jur. 429.—M.R., *held over-ruled*.

Prior v. Bagster (1887) 57 L. T. 760.
STIRLING, J.—The question of the remuneration of a receiver was discussed by Lord Langdale in *Day v. Croft*, where it is suggested that *prima facie* such remuneration should be 5 per cent. But I have made inquiry as to the present practice, and find that the rule mentioned by Lord Langdale no longer exists. A chief clerk of great experience has informed me that 3 per cent. is the common amount, or 5 per cent. in cases of difficulty; if there were a scale 3 per cent. would be nearer the amount than 5 per cent.; 10 per cent. has been allowed but only in very rare cases. Where there is a manager there

is no scale, but each case is decided on its merits.—p. 761.

Malcolm v. O'Callaghan (1837) 3 Myl. & Cr. 52; 41 Jur. 838.—L.C., *cited in argument*.
Harris v. Sleep (1897) 66 L. J. Ch. 596; [1897] 2 Ch. 80; 76 L. T. 670; 45 W. R. 680.—C.A.

Potts v. Leighton (1808) 15 Ves. 273.—L.C., *followed*.
Harris v. Sleep (1897) 66 L. J. Ch. 596; [1897] 2 Ch. 80; 76 L. T. 670; 45 W. R. 680.—C.A.
 LINDLEY, LOPES and RIGBY, L.JJ.

Randfield v. Randfield (No. 1) (1859) 7 W. R. 651.—V.-C., *applied*.
Yorkshire Banking Co. v. Mullan (1887) 56 L. J. Ch. 562; 35 Ch. D. 125; 56 L. T. 399; 35 W. R. 593.—CHITTY, J.

Randfield v. Randfield (No. 2) (1860) 30 L. J. Ch. 18; 1 Dr. & Sm. 310.—V.-C.: *reversed*, (1861) 3 De G. F. & J. 766; 31 L. J. Ch. 113; 8 Jur. (N.S.) 161; 5 L. T. 698.—L.C.

Randfield v. Randfield (No. 2), *adopted*.
Walmsley v. Mundy (1884) 53 L. J. Q. B. 304; 13 Q. B. D. 807, 816; 50 L. T. 317; 32 W. R. 602.—C.A. BRETT, M.R., BAGGALLAY and LINDLEY, L.JJ.

Ames v. Birkenhead Dock Trustees (1835) 24 L. J. Ch. 540; 20 Beav. 332; 1 Jur. (N.S.) 529; 3 W. R. 381.—M.R., *explained*.

Davies v. Thomas (1900) 69 L. J. Ch. 643; [1900] 2 Ch. 462; 83 L. T. 11; 49 W. R. 68.—C.A.

ALVERSTONE, M.R.—It was also urged that a receiver appointed by an order in lunacy stands in the same position as a receiver appointed by the Court of Chancery, and that it would be a contempt of Court for the plaintiff to pursue his claim, and *Ames v. Birkenhead Dock Trustees* was cited as showing that any interference with such a receiver without the leave of the Court would not be permitted. There the Court, at the suit of a mortgagee, had appointed a receiver of the rates and tolls and of the rents of the property of the defendants; and it was held that a judgment creditor of the defendants was not entitled, without the leave of the Court, to interfere with the receiver's collection of those tolls, and that such interference would be a contempt of Court, even though the order appointing him might be erroneous. In my opinion that decision has no application to an order appointing a receiver to get in the property of a lunatic. I think neither of the two orders in lunacy has any operation to deprive the plaintiff of any rights which he possessed [as vendor to a lien for unpaid purchase-money.]

Sutton, In re, Sutton v. Rees (1863) 32 L. J. Ch. 437; 1 N. R. 464; 9 Jur. (N.S.) 556; 8 L. T. 343; 11 W. R. 413.—V.-C., *commented upon*.

Mayhew, In re, Till, Ex parte (1873) L. R. 16 Eq. 97; 42 L. J. Bk. 84; 21 W. R. 574.

BACON, C.J.—*Sutton v. Rees* is a case which does not hold out any encouragement to a landlord to be forbearing.—p. 98.

Mayhew, In re, Till, Ex parte (1873) 42 L. J. Bk. 84; L. R. 16 Eq. 97; 21 W. R. 574.—C.J., *explained*.

Mead, In re, Cochrane, Ex parte (1875) L. R. 20 Eq. 282; 44 L. J. Bk. 87; 23 W. R. 726.

BACON, C.J.—*Ex parte Till* decided simply this: A landlord, having by law a right to distrain for rent due to him, the bankruptcy law has curtailed that right only in one respect, by limiting the amount for which he can distrain to a year's rent. But for that the common law remains unchanged, and it remains as a law paramount, and the law relating to bankruptcy has plainly recognised that right, so that the landlord, whenever there is a bankruptcy, shall have a right to distrain, but shall not exercise that right for more than one year's rent. What has that to do with the appointment of a receiver? The receiver takes the whole of the bankrupt's property, but he takes it subject to the paramount right of the landlord to distrain for that amount. *Ex parte Till* carries it no further than that.—p. 288.

Armstrong v. Armstrong (1871) L. R. 12 Eq. 614; 25 L. T. 199; 19 W. R. 971.—V.-C., *followed*.

Joseph v. Goode (1875) 23 W. R. 225.—M.R.

Balfe v. Blake (1850) 1 Ir. Ch. R. 365; and **Jacobs v. Van Boelen** (1889) 34 Sol. J. 97, *discussed and principle not applied*.

Hand v. Blow (1900—1) 70 L. J. Ch. 687; [1901] 2 Ch. 721, 728; 85 L. T. 156; 50 W. R. 5.—STIRLING, J.; affirmed, C.A. RIGBY, COLLINS and ROMER, L.JJ.

STIRLING, J.—But on what does that (the principle of the above cases) depend? It depends on the principle that the officer of the Court, being placed in the position of a tenant, is bound to do as a just and honest tenant would. How does that apply to this case? Here the position of the officer of the Court is not that of a tenant, but of a sub-tenant, and, as I have said, it is perfectly clear that a sub-tenant is entitled as between himself and the lessor to occupy upon the terms upon which the lessee has granted him the lease, and that he is not bound to pay or perform the covenants which are contained in the head-lease.

Owen & Co. v. Cronk (1895) 64 L. J. Q. B. 288; [1895] 1 Q. B. 265; 14 R. 229; 2 Manson, 115.—C.A., *referred to*.

Hale, In re, Lilley v. Foad (1899) 68 L. J. Ch. 517; [1899] 2 Ch. 107; 80 L. T. 827; 47 W. R. 579.—BYRNE, J.; affirmed, C.A.

Gaskell v. Gosling (1896) 65 L. J. Q. B. 435; [1896] 1 Q. B. 669; 74 L. T. 674.—C.A.; *reversed nom.* **Gosling v. Gaskell** (1897) 66 L. J. Q. B. 848; [1897] A. C. 575; 77 L. T. 314.—H.L. (E.).

Hills v. Reeves (1882) 30 W. R. 439.—KAY, J.; affirmed, (1883) 31 W. R. 209.—C.A.

Hills v. Reeves, distinguished.

Sacker, In re and Ex parte (1888) 58 L. J. Q. B. 4; 22 Q. B. D. 179, 184; 60 L. T. 344; 37 W. R. 204.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.
 LOPES, L.J.—*Hills v. Reeves* was entirely different from the present case. There the receiver was in possession of certain title-deeds

as a bailee, and he sued by virtue of the special property which as bailee he had in them. He did not sue as receiver.

Courand v. Hammer (1846) 9 Beav. 3.—M.R., *followed*.

Batten v. Wedgwood Coal and Iron Co. (1884) 54 L. J. Ch. 686; 28 Ch. D. 317, 324; 52 L. T. 212; 33 W. R. 203.—PEARSON, J.

Sharp v. Wright (1866) L. R. 1 Eq. 684; 14 L. T. 246; 14 W. R. 552.—M.R., *distinguished*.

Metropolitan Coal Consumers Association, *In re*. **Grieb's Case** (1890) 59 L. J. Ch. 532; 45 Ch. D. 606, 609; 62 L. T. 561; 38 W. R. 462.—KEKEWICH, J.

[**HELD**—that the above case, in which it was decided that a solicitor appearing for the receiver in an action and also for one of the parties should be allowed on taxation only one copy of the receiver's accounts, had no application where the plaintiffs in two separate actions against the same defendant, for the same object, were represented by the same solicitor; but that each plaintiff was entitled to separate allowances for copies of documents, though they might have been used in the other action.]

Bell's Estate, In re, Foster v. Bell (1870) L. R. 9 Eq. 172; 21 L. T. 781; 18 W. R. 369.—V.-C., *applied*.

Gent, In re, Gent-Davis v. Harris (1888) 58 L. J. Ch. 162; 40 Ch. D. 190, 194; 60 L. T. 355; 37 W. R. 151.—NORTH, J.

Suffield and Watts, In re, Brown, Ex parte (1888) 20 Q. B. D. 693; 58 L. T. 911; 36 W. R. 303.—C.A., *followed*.

Crown Bank, In re (1890) 59 L. J. Ch. 739; 44 Ch. D. 634, 648; 62 L. T. 823; 38 W. R. 666. NORTH, J.

Suffield and Watts, In re, Brown, Ex parte, inapplicable.

Humphreys, In re, Roberts, Ex parte (1897) 14 Times L. R. 68.—WRIGHT, J.

RELIGION.

Harrison v. Southcote (1751) 1 Atk. 528.—L.C., *referred to*.

United States v. M'Rae (1867) 36 L. J. Ch. 722; L. R. 4 Eq. 327; 16 L. T. 691.—WOOD, V.-C.; *affirmed in part, reversed in part*, (1867) 37 L. J. Ch. 129; L. R. 3 Ch. 79; 17 L. T. 428; 16 W. R. 377.—CHELMSFORD, L.C.

Harrison v. Southcote and United States v. M'Rae, distinguished.

Derbyshire County Council, In re (1896) 65 L. J. Q. B. 557; [1896] 2 Q. B. 297; 74 L. T. 747; 45 W. R. 3; 60 J. P. 757.—C.A. **ESHER, M.R. and SMITH, L.J.**; *affirmed nom.* **Derby Corporation v. Derbyshire County Council** (1897) 66 L. J. Q. B. 701; [1897] A. C. 550; 77 L. T. 107; 46 W. R. 48; 62 J. P. 4.—H.L. (E.).

Sorresby v. Hollins (1740) 9 Mod. 221.—L.C., *applied*.

London University v. Yarrow (1857) 26 L. J. Ch. 430; 1 De G. & J. 72; 3 Jur. (N.S.) 421.—L.C. and L.JJ.

Sorresby v. Hollins, adopted.

Holburne, In re, Coates v. Mackillop (1885) 53 L. T. 212, 215.—CHITTY, J.

Sorresby v. Hollins, referred to.

Piercy, In re, Whitwham v. Piercy (1898) 67 L. J. Ch. 297; [1898] 1 Ch. 565; 78 L. T. 277; 46 W. R. 503.—C.A. **LINDLEY, M.R. RIGBY and WILLIAMS, L.JJ.**

O'Fallon v. Dillon (1804) 2 Sch. & Lef. 13.—L.C., *referred to*.

Newcastle (Duke), In re, Padwick, Ex parte (1869) 39 L. J. Ch. 68; L. R. 8 Eq. 700, 707; 21 L. T. 343; 18 W. R. 8.—M.R.

Moore v. Butler (1805) 2 Sch. & Lef.—249.—L.C., *referred to*.

Codrington v. Lindsay (1872) L. R. 8 Ch. 578, 590; S. C. 42 L. J. Ch. 526; 28 L. T. 177; 21 W. R. 182.—L.C. and L.JJ.

M'Carthy v. M'Carthy (1847) 9 Ir. Eq. R. 620.—L.C.; *varied nom.* **Fulham v. M'Carthy** (1848) 1 H. L. Cas. 703; 9 Ir. Eq. R. 620; 12 Jur. 757 H.L. (IR.).

M'Carthy v. M'Carthy, disapproved.

Allcard v. Skinner (1887) 36 Ch. D. 145; 56 L. J. Ch. 1052; 57 L. T. 61; 36 W. R. 251.—KEKEWICH, J.; *affirmed*, C.A.

KEKEWICH, J.—The other case—**M'Carthy v. M'Carthy**—reported in the H.L. under the name of **Fulham v. M'Carthy**—is really of no value at all. The L.C. of Ireland (who, I sec, was not Lord St. Leonards) had made a strange decree for somewhat strange reasons, and it was reversed in the H.L. without discussion of the merits of the case. Lord Brougham, it is true, referred to a question said by him to be one of difficulty, which is not foreign to the present case; but he did so only for the purpose of saying that he would not express any opinion on it.—p. 160.

Dickson's Trust, Ex parte (1850) 20 L. J. Ch. 33; 1 Sim. (N.S.) 37; 15 Jur. 482.—V.-C., *adopted*.

Powell v. Boggis (1866) 35 L. J. Ch. 472, 474.—M.R.

Dickson's Trust, In re, discussed.

Evanturel v. Evanturel (1874) 43 L. J. P. C. 58; L. R. 6 P. C. 1, 30; 31 L. T. 105; 23 W. R. 32.—P.C.

Dickson's Trust, In re, discussed.

Hodgson v. Halford (1879) 48 L. J. Ch. 548; 11 Ch. D. 959, 966; 27 W. R. 545.—HALL, V.-C.

Whyte v. Meade (1840) 2 Ir. Eq. R. 420.—EX. EQ., *distinguished*.

Allcard v. Skinner (1887) 56 L. J. Ch. 1052; 56 Ch. D. 145; 57 L. T. 61; 36 W. R. 251.—C.A. **COTTON, LINDLEY and BOWEN, L.JJ.**

LINDLEY, L.J.—In **Whyte v. Meade** a gift to a convent was set aside, but the gift was the result of coercion clearly proved.

Cocks v. Manners (1871) 40 L. J. Ch. 640; L. R. 12 Eq. 574; 24 L. T. 869; 19 W. R. 1053.—V.-C., *applied*. *And see col. 2805.*

Joy, In re, Purday v. Johnson (1888) 60 L. T. 175; 5 Times L. R. 117.—CHITTY, J.

Cocks v. Manners (*supra*), *discussed*.

Macduff, In re, Macduff v. Macduff (1896) 65 L. J. Ch. 700; [1896] 2 Ch. 451, 474; 74 L. T. 706; 45 W. R. 154.—C.A. LINDLEY, LOPES and RIGBY, L.JJ.

RIGBY, L.J.—The particular convent in that case was a set of religious people who met together, but who abstained even from good works as regards the outside public, and they did not attempt to proselytise or even to attend to the sick and to the poor, and it was held that the gift to such a society could not be called a charity. It was only a gift to particular men and women who happened at the particular moment to form part of it.

Cocks v. Manners, *applied*.

Laffan and Downes' Contract, In re [1897] 1 Ir. R. 469, 473.—M.R.

Cocks v. Manners, *inapplicable*.

Paden v. Finlay [1898] 1 Ir. R. 423, 430.—M.R.

Att.-Gen. v. Pearson (1817) 3 Mer. 353; 17

R. R. 100.—L.C., *referred to*.
Shore v. Wilson (1839) 4 St. Tr. (N.S.) 1370.—H.L. (E.).

Att.-Gen. v. Pearson, *explained and applied*.

Att.-Gen. v. Bunce (1868) 37 L. J. Ch. 697; L. R. 6 Eq. 563, 571; 18 L. T. 742.—V.-C.; Att.-Gen. v. St. John's Hospital, Bath (1876) 45 L. J. Ch. 420; 2 Ch. D. 554, 565; 34 L. T. 563; 24 W. R. 913.—V.-C.

Att.-Gen. v. Pearson, *referred to*.

Reg. v. Ramsay (1883) 48 L. T. 733, 738; 1 Cab. & E. 126; 15 Cox C. C. 231.—COLERIDGE, C.J.

Att.-Gen. v. Pearson, *observations explained*.

Att.-Gen. v. Anderson (1888) 57 L. J. Ch. 543, 549; 58 L. T. 726; 36 W. R. 714.—KEKEWICH, J.

Trebec v. Keith (1742) 2 Atk. 498.—L.C., *considered and applied*.

Mackonochie v. Penzance (Lord) (1881) 50 L. J. Q. B. 611, 615; 6 App. Cas. 424; 44 L. T. 479; 29 W. R. 633; 45 J. P. 584.—H.L. (E.).

Barnes v. Shore (1845) 1 Rob. Ecc. Rep.

382; 11 Jur. 887; S. C. 15 L. J. Q. B. 296; 8 Q. B. 640; 10 Jur. 688.—ARCHES, *considered and applied*.

Combe v. Edwards (1878) 3 P. D. 103, 136; 39 L. T. 295.—LORD PENZANCE.

Barnes v. Shore, *considered and adopted*.

Mackonochie v. Penzance (Lord) (1881) 50 L. J. Q. B. 611; 6 App. Cas. 424, 435; 44 L. T. 479; 29 W. R. 633; 45 J. P. 584.—H.L. (E.).

RENT CHARGE.**Stafford (Earl) v. Buckley** (1750) 2 Ves. sen. 170.—L.C., *distinguished*.

Wynch, Ex parte (1854) 5 De G. M. & G. 188, 226; 23 L. J. Ch. 930; 18 Jur. 659.—L.C. and L.JJ.

Stafford (Earl) v. Buckley, *observed upon*.

Maharaja Fattahsangji v. Dessai Killiaurajji (1873) L. R. 1 Ind. App. 34, 49.—P.C.

Stafford (Earl) v. Buckley, *applied*.

Rivett-Carnac's Will, In re (1885) 54 L. J. Ch. 1074; 30 Ch. D. 136, 141; 53 L. T. 81; 33 W. R. 837.—CHITTY, J.

Murray v. Thorniley (1846) 15 L. J. C. P.

155; 2 C. B. 217; 10 Jur. 270; 1 Lutw. Reg. Cas. 496; Barr. & Arn. 742.—C.P., *followed*.

Heelis v. Blain (1864) 34 L. J. C. P. 88; 18 C. B. (N.S.) 90; 1 H. & R. 189; 11 Jur. (N.S.): 18; 11 L. T. 480; 13 W. R. 262.—C.P.; and Webster v. Ashton-under-Lyne; Orme's Case (1872) 42 L. J. C. P. 38; L. R. 8 C. P. 281; 27 L. T. 652; 21 W. R. 171; 2 Hopw. & C. 60.—C.P. (*see vol. i., col. 977*).

Murray v. Thorniley, *distinguished*.

Druitt v. Christchurch Overseers (1883) 12 Q. B. D. 365, 367; 53 L. J. Q. B. 177; 32 W. R. 371; Colt. 328.—Q.B.D.

Cromwel's (Lord) Case (1601) 2 Co. Rep. 69.

—C.P., *applied*.
Gilbertson v. Richards (1860) 29 L. J. Ex. 213; 5 H. & N. 453; 6 Jur. (N.S.) 672.—EX. CH.

Milnes v. Branch (1816) 5 M. & S. 411; 17

R. R. 373.—K.B., *discussed and applied*.
Haywood v. Brunswick, &c., Building Society (1881) 51 L. J. Q. B. 73; 8 Q. B. D. 403; 45 L. T. 699; 30 W. R. 299; 46 J. P. 356.—C.A.

Brediman's Case (1607) 6 Rep. 56, b.—C.P.;

Ongel's Case (1586) 4 Rep. 48, b.—C.P.;
Lillingston's Case (1608) 7 Rep. 38, a.—C.P.;
Cutts v. West (1556) Dyer, fol. 141 b., pl. 47; Lambert v. Austin (1593) Cro. Eliz. 332.—K.B.;
Bingham and Parkhurst's Case (1628) Litt. Rep. 93.—EX.;
and Dunsh v. Smith (1647) Aleyn's R. 62.—K.B., *considered*.

Herbage Rents, Greenwich, In re, Charity Commissioners v. Green (1896) 65 L. J. Ch. 871; [1896] 2 Ch. 811; 75 L. T. 148; 45 W. R. 74.—STIRLING, J. *See extract, col. 2808*.

Thursby v. Plant (1669) 1 Wms. Saund. 237.

—K.B.;
Pine v. Leicester (Countess) (1613) Hobart's Rep. 37; and Livingston v. Jefferson, 1 Brockenborough's Rep. 203, *considered and followed*.
Whitaker v. Forbes (1875) 45 L. J. C. P. 140; 1 C. P. D. 51; 33 L. T. 582; 24 W. R. 241.—C.A.

Thursby v. Plant. *See*

Blackburn Benefit Building Society, In re, Graham, Ex parte (1889) 59 L. J. Ch. 183; 42 Ch. D. 343, 347; 61 L. T. 745; 38 W. R. 178; 2 Meg. 1.—C.A.

Eton College v. Beauchamp and Riggs

(1668) Ch. Cas. 121.—M.R., *applied*.
Crawford v. Annaly (1889) 23 L. R. Ir. 113.—M.R.

Varley v. Leigh (1848) 17 L. J. Ex. 289; 2

Ex. 446.—EX., *considered*.
Thomas v. Sylvester (1873) 42 L. J. Q. B. 237; L. R. 8 Q. B. 368, 371; 29 L. T. 290; 21 W. R. 912.—Q.B.

Varley v. Leigh, *approved and applied*.

Christie v. Barker (1884) 53 L. J. Q. B. 537, 541, 543.—C.A.

Varley v. Leigh. *See*

Herbage Rents, Greenwich, In re, Charity Commissioners v. Green (1896) 65 L. J. Ch. 871; [1896] 2 Ch. 811; 75 L. T. 148; 45 W. R. 74.—STIRLING, J.

Thomas v. Sylvester (1873) 42 L. J. Q. B. 237; L. R. 8 Q. B. 368; 29 L. T. 290; 21 W. R. 912.—Q.B., *followed*.

Whitaker v. Forbes (1875) 44 L. J. C. P. 332; L. R. 10 C. P. 583, 585; 33 L. T. 258.—C.P.: *affirmed*, 45 L. J. C. P. 140; 1 C. P. D. 51; 33 L. T. 582; 24 W. R. 241.—C.A.

Thomas v. Sylvester, *referred to*.

Adnam v. Sandwich (Earl) (1877) 46 L. J. Q. B. 612; 2 Q. B. D. 485.—Q.B.D.

Thomas v. Sylvester, *followed*.

Booth v. Smith (1883) 51 L. T. 395; 47 J. P. 759.—DAY and SMITH, JJ.

Thomas v. Sylvester, *followed*.

Christie v. Barker (1884) 53 L. J. Q. B. 537.—C.A.

Thomas v. Sylvester, *applied*.

Crawford v. Annaly (1889) 23 L. R. Ir. 113, 115.—M.R.

Thomas v. Sylvester, *considered and distinguished*.

Swift v. Kelly (1889) 24 L. R. Ir. 478.—C.A.

NAISH, L.J.—The fact . . . that in the present case there is immediately following the grant of the annuity a limitation taking effect under the Statute of Uses, of a term of 100 years, which has precedence of the ultimate limitation to the freeholder, establishes a distinction between this case and that of *Thomas v. Sylvester*, the effect of which we have to consider. *Thomas v. Sylvester* may be taken as establishing that if there were no term, and if the freehold reversioner were in possession in the pernaney of the rents and profits, an action of debt would lie against him. . . . But where there was an antecedent term, the freeholder . . . was so far from being regarded as an owner, that he was considered a mere stranger. . . . It is said, however, that here he is in possession—in the pernaney of rents and profits. I ask, however, in what capacity this possession and pernaney is enjoyed at law? Clearly as tenant at will, or, it may be, bailiff of the tennor; and if it be a possession *under* and not *over*, the term, I do not see how *Thomas v. Sylvester* rules the case. The possession there was of a different character from that here. The possession at law was that of the freeholder—here it is not. . . . I am therefore of opinion that the possession of the defendant here is wholly different from that of the defendant in *Thomas v. Sylvester*. In the latter case he had at law large and extensive rights, and, having these, was held liable to a personal action. Here there are no corresponding rights—a fact arising from a particular remedy and security, namely, a trust term having been created with the consent, or on the stipulation, it must be taken, of the jointress, for the purpose of protecting the jointure.—pp. 490, 491.

Thomas v. Sylvester, *explained and followed*.

Blackburn Benefit Building Society, In re. Graham, Ex parte (1889) 59 L. J. Ch. 183; 42 Ch. D. 343; 61 L. T. 745; 38 W. R. 178; 2

Meg. l.—C.A. ESHER, M.R., COTTON and FRY, L.JJ.

COTTON, L.J.—Undoubtedly an action for debt may be brought against the terretenant for a rent-charge. That was decided in *Thomas v. Sylvester*. It is not that there is any charge on them on account of their holding the land, but only that when the land is vested in any one he contracts a liability to pay the rent-charge while he holds the land.

Thomas v. Sylvester, *followed*.

Searle v. Cooke (1890) 59 L. J. Ch. 259; 43 Ch. D. 519; 62 L. T. 211.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

Thomas v. Sylvester, *discussed*.

Sligo, Leitrim and Northern Ry. v. Whyte (1893) 31 L. R. Ir. 316.—M.R.; and Odium v. Thompson (1893) 31 L. R. Ir. 394.—V.-C.

Thomas v. Sylvester, *referred to*.

Pertwee v. Townsend (1896) 65 L. J. Q. B. 659; [1896] 2 Q. B. 129; 75 L. T. 104.—COLLINS, J.

Thomas v. Sylvester, *considered and distinguished*.

Herbage Rents, Greenwich, In re, Charity Commissioners v. Green (1896) 65 L. J. Ch. 871; [1896] 2 Ch. 811; 75 L. T. 148; 45 W. R. 74.

STIRLING, J., after considering *Thomas v. Sylvester* and the above cases dealing with it, said: In all these cases, however, the action was brought against the owner in fee of the land, and the question whether a tenant for years is liable to an action for debt is one on which I have been unable to find any reported authority, and I feel compelled, therefore, to enter into the consideration of the law as found in the more ancient authorities.—p. 877.

Thomas v. Sylvester, *not applied*.

Gorringe v. Land Improvement Society (1898) [1899] 1 Ir. R. 142.

PORTER, M.R.—*Thomas v. Sylvester* does ~~not~~ apply to this case. If there is anything plain it is that there was [here] no loan in the ordinary sense. . . . The rent-charge was not to be a security to the defendants for an advance. It was to be their own sole and absolute property. This is in substance a purchase of a rent-charge to be created in part by means of the purchase money to be paid for it.—p. 155.

Thomas v. Sylvester, *adopted*.

Darlow v. Shuttleworth (1902) 71 L. J. K. B. 460; [1902] 1 K. B. 721, 729; 86 L. T. 524; 50 W. R. 668; 66 J. P. 516.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Booth v. Smith (No. 1) (1883) 51 L. T. 395; 47 J. P. 759.—DAY and SMITH, JJ., *principle applied*.

Pertwee v. Townsend (1896) 65 L. J. Q. B. 659; [1896] 2 Q. B. 129; 75 L. T. 104.—COLLINS, J.

Booth v. Smith (No. 2) (1884) 54 L. J. Q. B. 119; 51 L. T. 742; 33 W. R. 142.

—C.A., *distinguished*.

Tuffnell v. O'Donohue (1896) [1897] 1 Ir. R. 360.—CHATTERTON, V.-C.

Willoughby v. Willoughby (1848) 4 Q. B. 687; 12 L. J. Q. B. 281.—Q.B., *distinguished*.

Christie v. Barker (1884) 53 L. J. Q. B. 537.—C.A. BRETT, M.R., BOWEN and FRY, L.JJ.

FRY, L.J.—The only observation I would make with regard to *Willoughby v. Willoughby*, which was pressed upon us as an authority is that it does not appear to me to be inconsistent with the present decision. The Court there found an absence of any expression that the persons by whom the rents were to be paid were the persons against whom the remedies were to be directed, and upon that ground came to the conclusion that an action of debt would not lie against the defendant. But the words which were wanting there are present here, the reasoning in *Willoughby v. Willoughby* does not therefore apply.—p. 543.

Christie v. Barker (1884) 53 L. J. Q. B. 537.—C.A.

Searle v. Cooke (1889) 59 L. J. Ch. 259; 43 Ch. D. 519, 528; 62 L. T. 211.—C.A.

• **Christie v. Barker**, *principle applied*.

Pertwee v. Townsend (1896) 65 L. J. Q. B. 659; [1896] 2 Q. B. 129; 75 L. T. 104.—C.A.

Christie v. Barker, *referred to*.

Odum v. Thompson (1893) 31 L. R. Ir. 394, 402.—V.-C.

Christie v. Barker, *considered*.

Herbage Rents, Greenwich, In re, Charity Commissioners v. Green (1896) 65 L. J. Ch. 871; [1896] 2 Ch. 811; 75 L. T. 148; 45 W. R. 74.—STIRLING, J.

Blackburn Benefit Building Society, In re (1889) 59 L. J. Ch. 183; 42 Ch. D. 343; 61 L. T. 745; 38 W. R. 178; 2 Meg. 1.—C.A., *observations applied*.

Odum v. Thompson (1893) 31 L. R. Ir. 394.—V.-C.

Blackburn Benefit Building Society, In re, *considered and distinguished*.

Herbage Rents, Greenwich, In re, Charity Commissioners v. Green (1896) 65 L. J. Ch. 871; [1896] 2 Ch. 811; 75 L. T. 148; 45 W. R. 74.—STIRLING, J. See extract, *supra*, col. 2808.

Crawford v. Annaly (1889) 23 L. R. Ir. 113, *applied*.

Sligo, Leitrim and Northern Ry. v. Whyte (1893) 31 L. R. Ir. 316, 321.—PORTER, M.R.

Swift v. Kelly (1889) 24 L. R. Ir. 107.—Q.B.D.: *reversed*, 24 L. R. Ir. 478.—C.A.

Swift v. Kelly, *adopted*.

Irish Land Commission v. Scannel (1891) 30 L. R. Ir. 287, 291.—HOLMES, J.

Swift v. Kelly, *discussed and applied*.

Sligo, Leitrim and Northern Ry. v. Whyte (1893) 31 L. R. Ir. 316.

PORTER, M.R.—The question then arises as to the applicability of the principle in *Swift v. Kelly*. Is he [the defendant, who was owner of an estate subject to outstanding mortgages], within the decision of *Swift v. Kelly* a "person of the profits" of the land on which the rent-charge is charged, and as such personally liable? . . . He is in possession; and in equity would be considered the owner of the estate, subject to

the incumbrances; but his legal position is that he is a mere tenant at will, or a bailiff to the mortgages . . . It must be remembered that the only freehold estate in the lands was in the defendant in *Swift v. Kelly*, the outstanding estate being a term of years. And, therefore, I think the decision of the C. A. [in that case] applies to the present with fourfold force.—pp. 321, 322.

Swift v. Kelly, *discussed*.

Odum v. Thompson (1893) 31 L. R. Ir. 394.—V.-C.

Swift v. Kelly, *adopted*.

Pertwee v. Townsend (1896) 65 L. J. Q. B. 659; [1896] 2 Q. B. 129; 75 L. T. 104.—COLLINS, J.

Swift v. Kelly, *considered and distinguished*.

Herbage Rents, Greenwich, In re, Charity Commissioners v. Green (1896) 65 L. J. Ch. 871; [1896] 2 Ch. 811; 75 L. T. 148; 45 W. R. 74.—STIRLING, J. See extract, *supra*, col. 2808.

Searle v. Cooke (1890) 59 L. J. Ch. 259; 43 Ch. D. 519; 62 L. T. 211.—C.A., *discussed*.

Odum v. Thompson (1893) 31 L. R. Ir. 394. CHATTERTON, V.-C.—Another case may be also referred to—*Searle v. Cooke*—which more nearly approaches the present. It was there held on the authority of *Thomas v. Sylrester* that the defendant was personally liable for the arrears of a rent-charge accrued during his occupancy of the land on which it was charged, and so far it is an authority for plaintiff . . . On appeal, Cotton, L.J. states that it was admitted that the tenant was in possession of all the land subject to the rent-charges, and that the rents were sufficient to pay the rent-charges. This must be taken as according with the view of Kay, J. (in the Court below), and as an opinion that the sufficiency of the rents was the ground for the personal claim being made for payment without an inquiry (as to the rents and profits).—p. 402.

Searle v. Cooke, *dicta explained*.

Pertwee v. Townsend (1896) 65 L. J. Q. B. 659; [1896] 2 Q. B. 129; 75 L. T. 104.

COLLINS, J.—The *dicta* cited in argument of the then Mr. Justice Kay and of Lord Justice Cotton in *Searle v. Cooke* respectively, must, I think, be read in reference to the subject matter of the claim, which was mainly one for equitable relief.—p. 661.

Searle v. Cooke, *considered and distinguished*.

Herbage Rents, Greenwich, In re, Charity Commissioners v. Green (1896) 65 L. J. Ch. 871; [1896] 2 Ch. 811; 75 L. T. 148; 45 W. R. 74.—STIRLING, J. See extract, *supra*, col. 2808.

Odum v. Thompson (1893) 31 L. R. Ir. 394.

—V.-C., *questioned*.

Pertwee v. Townsend (1896) 65 L. J. Q. B. 659; [1896] 2 Q. B. 129; 75 L. T. 104.

COLLINS, J.—In *Odum v. Thompson* the V.-C. further relied on the analogy of an executor's position who has actually entered, and who is sued as assignee of the term, and who is nevertheless allowed to plead that the profits fall short of the rent, and to measure his liability accordingly. . . . But I cannot think that the exceptional position of an executor presents any analogy to that of a complete legal assignee like the defendant in this case.—p. 662.

Pertwee v. Townsend (1896) 65 L. J. Q. B. 659; [1896] 2 Q. B. 129; 75 L. T. 104.—COLLINS, J., *approved, but distinguished*.
Herbage Rents, Greenwich, In re, Charity Commissioners v. Green (1896) 65 L. J. Ch. 871; [1896] 2 Ch. 811; 75 L. T. 148; 45 W. R. 74.—STIRLING, J. *See extract, supra*, col.

White v. James (1858) 28 L. J. Ch. 179; 26 Beav. 191; 4 Jur. (N.S.) 1,214; 7 W. R. 35.—M.R., *applied*.
Hall v. Hurt (1861) 2 J. & H. 76.—WOOD, V.-C.: and **Horton v. Hall** (1874) L. R. 17 Eq. 437; 22 W. R. 391.—V.-C.

White v. James, followed.
Scottish Widows' Fund v. Craig (1882) 51 L. J. Ch. 363, 366; 20 Ch. D. 208; 30 W. R. 463.—HALL, V.-C.

White v. James, referred to.
Sandeman v. Rushton (1891) 61 L. J. Ch. 186; 66 L. T. 180.—KEKEWICH, J.

Bailey v. Badham (1885) 54 L. J. Ch. 1,067; 30 Ch. D. 84; 53 L. T. 13; 33 W. R. 770; 49 J. P. 660.—BACON, V.-C., *referred to*.
Searle v. Cooke, 59 L. J. Ch. 259; 43 Ch. D. 519; 61 L. T. 189; 37 W. R. 730.—KAY, J.; *affirmed*, (1890) 59 L. J. Ch. 259; 43 Ch. D. 519; 62 L. T. 211.—C.A.

Stainer v. Nisbitt (1846) 3 Jo. & Lat. 447; 9 Ir. Eq. R. 96.—SUGDEN, L.C., *applied*.
Hassard v. Fowler (1892) 32 L. R. Ir. 49.—Q.B.D.

Thorndike v. Allington (1667) 1 Ch. Cas. 79.—M.R., *applied*.
Alms Corn Charity, In re, Charity Commissioners v. Bode (1901) 71 L. J. Ch. 76; [1901] 2 Ch. 750; 85 L. T. 533.—STIRLING, J.

Butt's Case (1600) 7 Co. Rep. 23, a.—C.P.; and **Kimp v. Cruwees** (1695) 2 Lutw. 1573.—C.P., *applied*.
Saffery v. Elgood (1834) 3 L. J. K. B. 151; 1 A. & E. 191; 3 N. & M. 346.—K.B.

Butt's Case, followed.
Gillman's Estate, In re (1875) Ir. R. 10 Eq. 92.—FLANAGAN, J.

Gough v. Howarde (1615) 3 Bulstr. 121.—K.B., *commented on*.
Gillman's Estate, In re (1875) Ir. R. 10 Eq. 92.—FLANAGAN, J.

Anon (1740) 2 Atk. 61.—L.C., *applied*.
Gilligan v. National Bank [1901] 2 Ir. R. 513, 543.—Q.B.D.

REPLEVIN.

Churchward v. Johnson (1889) 54 J. P. 326.—Q.B.D., *discussed and followed*.
Masters v. Fraser (1902) 85 L. T. 611; 66 J. P. 100.—Q.B.D.

Chamberlain, Ex parte (1804) 1 Sch. & Lef. 320.—L.C.; and **Wilson's Bankruptcy, In re** (1804) 1 Sch. & Lef. 320, n.—L.C., *applied*.

Mennie v. Blake (1856) 25 L. J. Q. B. 399; 6 El. & Bl. 842; 2 Jur. (N.S.) 953; 4 W. R. 739.—Q.B.

Shannon v. Shannon, applied.

Mellor v. Leather (1853) 22 L. J. M. C. 76; 1 El. & Bl. 619; 17 Jur. 709.—Q.B.; **Mennie v. Blake** (1856) 25 L. J. Q. B. 399; 6 El. & Bl. 842; 2 Jur. (N.S.) 953; 4 W. R. 739.—Q.B.

George v. Chambers (1843) 12 L. J. M. C. 94; 11 M. & W. 149; 2 D. (N.S.) 783; 7 Jur. 836.—EX., *applied*.
Allen v. Sharp (1848) 17 L. J. Ex. 209, 211; 5 Ex. 352.—EX.; and **Mellor v. Leather** (1853) 22 L. J. M. C. 76; 1 El. & Bl. 619; 17 Jur. 709.—Q.B.

George v. Chambers, followed.
Rhymney Ry. v. Price (1867) 16 L. T. 394.—Q.B.

Wilson v. Weller (1819) 1 Br. & B. 57; 3 Moore 294.—C.P., *distinguished*.
Rhymney Ry. v. Price (1867) 16 L. T. 394.—Q.B.

SHEE, J.—Marshall v. Pitman (post) . . . and **Wilson v. Weller** . . . are clearly distinguishable, the facts necessary to found the jurisdiction being in both cases unquestioned.—p. 395.

Marshall v. Pitman (1833) 2 L. J. M. C. 33; 9 Bing. 595; 2 M. & Scott 745.—C.P., *approved and followed*.
Birmingham Churchwardens v. Shaw (1849) 18 L. J. M. C. 89; 10 Q. B. 868, 883; 3 New Sess. Cas. 445; 13 Jur. 357.—Q.B.

Marshall v. Pitman, distinguished.
Rhymney Ry. v. Price (1867) 16 L. T. 394.—Q.B. *See extract, supra*.

Att.-Gen. v. Brown (1818) 1 Swanst. 265.—L.C., *referred to*.

Att.-Gen. v. Mid Kent Ry. (1867) L. R. 3 Ch. 100, 104.—L.J.; **St. Botolph Without Bishops-gate Estates, In re** (1887) 56 L. J. Ch. 691; 35 Ch. D. 142, 150; 56 L. T. 884; 35 W. R. 688.—NORTH, J. *And see* "CHARITY," Vol. I., col. 332.

Sells v. Hoare (1823) 2 L. J. (O.S.) C. P. 56; 1 Bing. 401; 8 Moore 451; 1 Car. & P. 28.—C.P., *distinguished*.

Glyn v. Thomas (1856) 25 L. J. Ex. 125; 11 Ex. 870; 2 Jur. (N.S.) 378; 4 W. R. 363.—EX. CH.

COLERIDGE, J.—In Sells v. Hoare it is true that a rule was refused to disturb a verdict for a shilling damages, where the goods taken under a distress had not been sold in consequence of an arrangement between the parties; but there the action was for an excessive distress, and an excessive distress was proved, and there was, therefore, a good right of action; and it may well be, that the arrangement coming subsequently, the circumstances of which are not stated, may not have defeated the right of action, and the plaintiff only recovered a shilling. This, therefore, does not interfere with the general and well-known rule.—p. 127.

Tancred v. Leyland (1851) 20 L. J. Q. B. 316; 16 Q. B. 669; 15 Jur. 394.—EX. CH., *discussed and applied*. *And see* col. 2813.

Glyn v. Thomas (1856) 25 L. J. Ex. 125; 11 Ex. 870; 2 Jur. (N.S.) 378; 4 W. R. 363.—EX. CH.

Tancred v. Leyland (*supra*), *followed*.
French v. Phillips (1856) 26 L. J. Ex. 82; 1 H. & N. 564; 2 Jur. (N.S.) 1169; 5 W. R. 114.—EX. CH.

Reg. v. Williams (1850) 19 L. J. M. C. 126.—C.C.B., *adopted*.
Jones v. Johnson (1850) 20 L. J. M. C. 11; 5 Ex. 862.—EX.

Alchorne v. Gomme (1824) 2 L. J. (O.S.) C. P. 118; 2 Bing. 54; 9 Moore 180.—C.P., *questioned*.
Pope v. Biggs (1829) 7 L. J. (O.S.) K. B. 246; 9 B. & C. 245; 4 Man. & Ry. 193.

PARKE, J.—*Alchorne v. Gomme* is an authority the other way; but the pleadings in that case do not, perhaps, sufficiently raise the question now under consideration; and by the form of those pleadings the attention of the Court seems to have been principally directed to the consideration of the effect of the alleged attornment by the tenant to the mortgagee, which, in the view I have taken of the subject in this case, appears to me to be immaterial, the notice given by the mortgagee being sufficient to determine the authority of the mortgagor, and to entitle the mortgagee to receive, whether the tenant attorned or not.—p. 258.

Middleton v. Bryan (1814) 3 M. & S. 155.—K.B., *approved and applied*.
Dix v. Groom (1880) 49 L. J. Ex. 430; 5 Ex. D. 91; 28 W. R. 370.—LUSH, J. and POLLOCK, B.

Rogers v. Pitcher (1815) 1 Marsh. 541; 6 Taunt. 202.—C.P., *adopted*.
Doe d. Lord v. Crago (1848) 17 L. J. C. P. 263; 6 C. B. 90.—C.P.

Rogers v. Pitcher. See
Carlton v. Bowcock (1884) 51 L. T. 659.—CAVE, J.

Rogers v. Birkmire (1736) Cas. t. Hard. 245; 2 Str. 1040.—K.B.; and **Bedford v. Sutton Coldfield** (1858) 27 L. J. C. P. 105; 3 C. B. (N.S.) 449; 4 Jur. (N.S.) 133.—C.P., *distinguished*.

Phillips v. Whitsed (1859) 29 L. J. Q. B. 164; 2 El. & El. 804; 6 Jur. (N.S.) 727; 2 L. T. 278; 8 W. R. 494.—Q.B.

COCKBURN, C.J.—No one disputes the proposition that you cannot distrain on close A. for rent due on close B. and *vice versa*; but if there be rent due on both, and no more taken upon each than is due in respect of each, then you may avow so as to set the matter right. In . . . **Bedford v. Sutton Coldfield**, there is a manifest distinction, because the aggregate rent-charge being charged in separate sums on the separate properties, the owner of the rent-charge had distrained on one for the whole. **Rogers v. Birkmire** is to the same effect.—p. 166.

Bedford v. Sutton Coldfield, *referred to*.
Hyde v. Berners (1889) 5 Times L. R. 406.—STEPHEN, J.

Hool v. Bell (1697) 1 Ld. Raym. 172, *approved and applied*.
Prescott v. Boucher (1832) 3 B. & Ad. 849.—

K.B.; **Saffery v. Elgood** (1834) 3 L. J. K. B. 151; 1 A. & E. 191; 3 N. & M. 346.—K.B.; **Johnson v. Faulkner** (1842) 11 L. J. Q. B. 193; 2 Q. B. 925; 2 G. & D. 184.—Q.B.

Hool v. Bell, *adopted*.
Swift v. Kelly (1888) 24 L. R. Ir. 107, 115.—Q.B.D.

Miller v. Green (1831) 2 Cr. & J. 142; 1 L. J. Ex. 51; 2 Tyr. 1; 8 Bing. 92; 1 M. & Scott 199.—EX. CH., *distinguished*.
Johnson v. Faulkner (1842) 11 L. J. Q. B. 193; 2 Q. B. 925; 2 G. & D. 184.—Q.B.

Saffery v. Elgood (1834) 3 L. J. K. B. 151; 1 A. & E. 191; 3 N. & M. 346.—K.B., *applied*.
Johnson v. Faulkner (1842) 11 L. J. Q. B. 193; 2 Q. B. 925; 2 G. & D. 184.—Q.B.

James v. Salter (1836) 5 L. J. C. P. 112; 3 Bing. (N. C.) 544; 4 Scott 168.—C.P. (*see* S. C. 1 M. & Rob. 501), *adopted*.
Magdalen Hospital Governors v. Knotts (1878) 47 L. J. Ch. 726; 8 Ch. D. 709, 727; 38 L. T. 624; 26 W. R. 646.—C.A., *affirmed on one point*, (1879) 48 L. J. Ch. 579; 4 App. Cas. 324; 40 L. T. 466; 27 W. R. 602.—H.L. (E.).

James v. Salter, *approved*.
Irish Land Commission v. Grant (1884) 10 App. Cas. 14; 52 L. T. 228; 33 W. R. 357.—H.L. (IR.).

James v. Salter, *considered and applied*.
Howitt v. Harrington (Earl) (1893) 62 L. J. Ch. 571; [1893] 2 Ch. 497; 3 R. 568; 68 L. T. 703; 41 W. R. 664.—STIRLING, J.

James v. Salter, *applied*.
Devon's (Earl) **Settled Estates**, *In re*, **White v. Devon** (Earl) (1896) 65 L. J. Ch. 810; [1896] 2 Ch. 562; 75 L. T. 178; 45 W. R. 25.—CHITTY, J.

James v. Salter, *applied*.
Jones v. Withers (1896) 74 L. T. 572.—C.A. LINDLEY, KAY and SMITH, L.JJ.

Owen v. De Beauvoir (1847) 16 M. & W. 547; 11 Jur. 458.—EX.; *affirmed nom.* **De Beauvoir v. Owen** (1850) 19 L. J. Ex. 177; 5 Ex. 166.—EX. CH.

De Beauvoir v. Owen.
Referred to, **Maharana Fattahsangji Jaswat-sangji v. Dessai Kallianrai Hekoomutrai** (1873) L. R. 1 Ind. App. 34, 54.—P.C.; *considered*, **Zouche** (Lord) *v.* **Dalbiac** (1875) 44 L. J. Ex. 109; L. R. 10 Ex. 172, 177; 33 L. T. 221; 23 W. R. 564.—EX.; *approved*, **Irish Land Commission v. Grant** (1884) 10 App. Cas. 14, 27; 52 L. T. 228; 33 W. R. 357.—H.L. (IR.); *applied*, **Howitt v. Harrington** (Earl) (1893) 62 L. J. Ch. 571; [1893] 2 Ch. 497; 3 R. 568; 68 L. T. 703; 41 W. R. 664.—STIRLING, J.; *referred to*, **Jones v. Withers** (1896) 74 L. T. 572.—C.A.; *observed upon*, **Irish Land Commission v. Jenkin** (1888) 24 L. R. Ir. 40, 47.—Q.B.D., O'BRIEN, J. dissenting.

Payne v. Esdaile (1889) 58 L. J. Ch. 299; 13 App. Cas. 613; 59 L. T. 568; 37 W. R.

- 273: 53 J. P. 100.—H.L. (E.): **Howitt v. Harrington (Earl)** (1893) 62 L. J. Ch. 571; [1893] 2 Ch. 407; 68 L. T. 708; 41 W. R. 664; 3 R. 568.—**STIRLING, J.**, *referred to*.
Jones v. Withers (1896) 74 L. T. 572.—C.A.
Roulston v. Clarke (1795) 2 H. Bl. 563.—C.P., *impugned*.
Evans v. Robins (1868) 11 L. T. 211, 214; 2 H. & C. 410; 33 L. J. Ex. 68; 10 Jur. (N.S.) 473; 12 W. R. 604.—EX. CH.
Pollitt v. Forrest (1847) 17 L. J. Q. B. 291; 11 Q. B. 949; 12 Jur. 560.—EX. CH., *referred to*.
Evans v. Robins (1863) 11 L. T. 211, 214.—EX. CH. (*supra*).
Phillips v. Berryman (1783) 3 Dougl. 286; 1 Selw. N. P. 679.—K.B., *principle not applied*.
Brunsdon v. Humphrey (1884) 53 L. J. Q. B. 476; 14 Q. B. D. 141, 147; 51 L. T. 529; 32 W. R. 944; 49 J. P. 4.—C.A.; **COLERIDGE, C.J.** dissenting.
Gibbs v. Cruikshank (1873) 42 L. J. C. P. 273; L. R. 8 C. P. 454; 28 L. T. 735; 21 W. R. 734.—C.P., *applied*.
Smith v. Enright (1893) 63 L. J. Q. B. 220; 69 L. T. 724.—**CHARLES and WRIGHT, JJ.**
Gardiner v. Williamson (1831) 9 L. J. (O.S.) K. B. 233; 2 B. & Ad. 336.—K.B., *followed*.
Neale v. Mackenzie (1837) 6 L. J. Ex. 263; 1 M. & W. 747; 1 Gale 119.—EX. CH.
 57; 22 Q. B. D. 484, 490; 59 L. T. 438.—**POLLOCK, B.** and **HAWKINS, J.**; affirmed, 58 L. J. M. C. 54; 22 Q. B. D. 484, 490; 37 W. R. 392; 53 J. P. 499.—C.A. **ESHER, M.R.**, **BOWEN** and **FRY, L.JJ.**
Coomber v. Berkshire JJ. and Bray v. Lancashire JJ., *discussed*.
Harte v. Holmes [1898] 2 Ir. R. 656, 664.—Q.B.D.
Coomber v. Berkshire JJ., *referred to*.
Hornsey Urban Council v. Hennell (1902) 71 L. J. K. B. 479; [1902] 2 K. B. 73, 81; 86 L. T. 423; 50 W. R. 521; 66 J. P. 613.—**ALVERSTONE, C.J.**, **DARLING** and **CHANNELL, JJ.**
Bent v. Roberts (1877) 47 L. J. Ex. 112; 3 Ex. D. 66; 37 L. T. 673; 26 W. R. 128.—EX. D., *applied*.
Coomber v. Berkshire JJ. (1882) 51 L. J. Q. B. 297; 9 Q. B. D. 17, 27; 30 W. R. 779; 46 J. P. 629.—**GROVE, J.** and **HUDDLESTON, B.**; affirmed, 52 L. J. Q. B. 81; 10 Q. B. D. 267; 47 L. T. 687; 31 W. R. 356; 47 J. P. 164.—C.A. **BAGGALLAY, BRETT**, and **LINDLEY, L.JJ.**; and H.L. (*supra*, col. 2815).
Att.-Gen. v. Black (1871) 40 L. J. Ex. 89; L. R. 6 Ex. 78; 24 L. T. 370; 19 W. R. 416.—EX.; *affirmed*, 40 L. J. Ex. 194; L. R. 6 Ex. 308; 25 L. T. 207; 19 W. R. 1114.—EX. CH., *considered*.
Glasgow Water Commissioners v. Solicitor of Inland Revenue (1875) 2 Rettie 708.—CT. OF SESS.
Att.-Gen. v. Black, *discussed*.
Mersey Docks v. Lucas (1883) 53 L. J. Q. B. 4; 8 App. Cas. 891, 911; 49 L. T. 781; 32 W. R. 34; 48 J. P. 212.—H.L. (E.).
Att.-Gen. v. Black, *applied*.
Glasgow Water Commissioners v. Miller (1886) 13 Rettie 489.—CT. OF SESS.; **Dublin Corporation v. McAdam** (1887) 20 L. R. Ir. 497, 512.—C.A.; **Sowrey v. Lynn Mooring Commissioners** (1887) 2 Tax Cas. 201.—**SMITH** and **GRANTHAM, JJ.**
Att.-Gen. v. Black, *referred to*.
Att.-Gen. v. McCormack [1903] 2 Ir. R. 517.—K.B.D.
Att.-Gen. v. Scott (1873) 28 L. T. 302; 21 W. R. 265.—EX., *applied*.
Glasgow Water Commissioners v. Miller (1886) 13 Rettie 489.—CT. OF SESS.
Glasgow Water Commissioners v. Solicitor of Inland Revenue (1875) 2 Rettie 708.—CT. OF SESS., *distinguished*.
Mersey Docks v. Lucas (1883) 53 L. J. Q. B. 4; 8 App. Cas. 891; 49 L. T. 781; 32 W. R. 34; 48 J. P. 212.—H.L. (E.); **Paddington Burial Board v. Inland Revenue Commissioners** (1884) 53 L. J. Q. B. 224; 13 Q. B. D. 9, 14; 32 W. R. 551; 48 J. P. 311.—**DAY** and **SMITH, JJ.** See *post*, col. 2817.
Glasgow Water Commissioners v. Solicitor of Inland Revenue, *explained*.
Dublin Corporation v. McAdam (1887) 20 L. R. Ir. 497, 512.—EX. D. And see col. 2817.
Glasgow Water Commissioners v. Solicitor of Inland Revenue, *not applied*.
Sowrey v. Lynn Mooring Commissioners (1887) 2 Tax Cas. 201.—**SMITH** and **GRANTHAM, JJ.**

REVENUE.

1. INCOME AND PROPERTY TAX.
2. INHABITED HOUSE DUTY.
3. LAND TAX.
4. PROBATE DUTY.
5. LEGACY DUTY.
6. SUCCESSION DUTY.
7. ACCOUNT STAMP DUTY.
8. ESTATE DUTY.
9. BODIES CORPORATE AND UNINCORPORATE.
10. CUSTOMS AND EXCISE.
11. STAMPS.

1. INCOME AND PROPERTY TAX.

- Coomber v. Berkshire JJ.** (1884) 53 L. J. Q. B. 239; 9 App. Cas. 61; 50 L. T. 405; 32 W. R. 525; 48 J. P. 421.—H.L. (E.), *followed*.
Nicholson v. Holborn Union (1886) 56 L. J. M. C. 54; 18 Q. B. D. 161; 55 L. T. 775; 35 W. R. 230; 51 J. P. 341.—**DENMAN** and **HAWKINS, JJ.**
Coomber v. Berkshire JJ., *explained and dicta questioned*.
Tunncliffe v. Birkdale (1888) 20 Q. B. D. 450, 454; 59 L. T. 190; 36 W. R. 360; 52 J. P. 452.—C.A. **ESHER, M.R.**, **FRY** and **LOPES, L.JJ.**
Coomber v. Berkshire JJ., *discussed*.
Bray v. Lancashire JJ. (1889) 57 L. J. M. C.

Glasgow Water Commissioners v. Solicitor of Inland Revenue (*supra*), *followed*.
Harris v. Irvine Corporation (1900) 2 Fraser 1080.—CT. OF SESS.

Mersey Docks and Harbour Board v. Lucas (1883) 53 L. J. Q. B. 4; 8 App. Cas. 891; 49 L. T. 781; 32 W. R. 34; 48 J. P. 212.—H. L. (E.); *affirming* (1881) 51 L. J. Q. B. 114; 46 J. P. 388.—C.A. JESSEL, M.R., BRETT and COTTON, L.J.; *which varied* 50 L. J. Q. B. 449; 44 L. T. 645; 29 W. R. 606; 45 J. P. 713.—GROVE and LINDLEY, JJ., *referred to*.

Last v. London Assurance Corporation (1884) 53 L. J. Q. B. 325; 12 Q. B. D. 389, 400; 50 L. T. 534; 32 W. R. 702.—DAY, J.: A. L. SMITH, J. dissenting; and 54 L. J. Q. B. 4; 14 Q. B. D. 239, 243; 52 L. T. 604; 33 W. R. 207; 49 J. P. 564.—C.A. BRETT, M.R. and COTTON, L.J.: LINDLEY, L.J. dissenting (C.A. reversed, H.L. *post*, col. 2829).

Mersey Docks and Harbour Board v. Lucas, *applied*.

Paddington Burial Board v. Inland Revenue Commissioners (1884) 53 L. J. Q. B. 224; 13 Q. B. D. 9, 14; 50 L. T. 211; 32 W. R. 551; 48 J. P. 311.—DAY and A. L. SMITH, JJ.

A. L. SMITH, J.—**Glasgow Water Commissioners v. Solicitor of Inland Revenue** (*supra*, col. 2816) . . . is distinguishable. There the scheme of the local Act was that the corporation were never to make any profit at all. In this case the burial board are entitled to charge any fees they think proper, and in the course of their business they make a profit. When once you have the fact that a profit is made, it is taxable under the Income Tax Act, and since *Mersey Docks v. Lucas* it must be taken to be wholly immaterial what is the destination of such profit—whether it is appropriated to the benefit of one or more persons, or retained for the benefit of the person who makes it.—p. 14.

DAY, J. also discussed *Glasgow, &c. Commissioners v. Solicitor of Inland Revenue*.

Mersey Docks and Harbour Board v. Lucas, *principle applied*.

Glasgow Water Commissioners v. Miller (1886) 13 Rettie 489.—CT. OF SESS.

Glasgow Water Commissioners v. Miller, *followed*.

Allan v. Hamilton Waterworks Commissioners (1887) 14 Rettie 485.—CT. OF SESS.

Mersey Docks and Harbour Board v. Lucas, *referred to*.

Glasgow Water Commissioners v. Miller, *approved and applied*.

Dublin Corporation v. M'Adam (1887) 20 L. R. Ir. 497, 513.—EX. D.

Mersey Docks and Harbour Board v. Lucas, *applied*.

Sowrey v. Lynn Harbour Mooring Commissioners (1887) 2 Tax Cas. 201.—A. L. SMITH and GRANTHAM, JJ.

Mersey Docks and Harbour Board v. Lucas, *referred to*.

Dublin Corporation v. M'Adam and Glasgow Water Commissioners v. Miller, *discussed and applied*.

Dillon v. Haverfordwest Corporation (1891) 60 L. J. Q. B. 477; [1891] 1 Q. B. 575, 580; 64 L. T. 202; 39 W. R. 478; 55 J. P. 392.—POLLOCK, B. and CHARLES, J.

Mersey Docks and Harbour Board v. Lucas, *followed*.

Glasgow Water Commissioners v. Miller, *referred to*.
Harris v. Irvine Corporation (1900) 2 Fraser 1080.—CT. OF SESS.

Blake v. London Corporation (1887) 56 L. J. Q. B. 424; 19 Q. B. D. 79; 36 W. R. 791.—C.A. ESHER, M.R., FRY and LOPES, L.J.; *approved but distinguished*.

Needham v. Bowers (1888) 21 Q. B. D. 436, 442; 59 L. T. 404; 37 W. R. 125.—HUDDLESTON, B. and CHARLES, J.

Blake v. London Corporation, *referred to*.

Reg. v. Income Tax Commissioners (1888) 58 L. J. Q. B. 196; 22 Q. B. D. 296, 304; 59 L. T. 832; 37 W. R. 294; 5 Times L. R. 12.—COLERIDGE, C.J., GRANTHAM, J. dissenting; reversed C.A. (*post*).

Blake v. London Corporation, *discussed*.

Charterhouse School Governors v. Lamargue (1890) 59 L. J. Q. B. 495; 25 Q. B. D. 121, 127; 62 L. T. 907; 38 W. R. 776; 54 J. P. 790.—POLLOCK, B. and HAWKINS, J.

Blake v. London Corporation, *approved*.

Cawse v. Nottingham Lunatic Asylum (1891) 60 L. J. Q. B. 485; [1891] 1 Q. B. 585, 590; 65 L. T. 155; 39 W. R. 461; 55 J. P. 582.—POLLOCK, B. and CHARLES, J.

Reg. v. Income Tax Commissioners (1888)

58 L. J. Q. B. 196; 22 Q. B. D. 296; 60 L. T. 446; 37 W. R. 294; 53 J. P. 198; 5 Times L. R. 163.—C.A.: (*affirmed*, H.L. (*post*)). *distinguished*.

Charterhouse School Governors v. Lamargue (*supra*).

Reg. v. Income Tax Commissioners, *followed*.

Bootham Ward Strays. In re, Inland Revenue Commissioners v. Scott (1892) 61 L. J. Q. B. 432; [1892] 2 Q. B. 152; 67 L. T. 173; 40 W. R. 632; 56 J. P. 580, 632.—C.A.

Reg. v. Income Tax Commissioners, *discussed*.

Southwell v. Royal Holloway College (1895) 64 L. J. Q. B. 791; [1895] 2 Q. B. 487; 15 R. 533; 73 L. T. 183; 44 W. R. 315; 59 J. P. 503.—GRANTHAM and CHARLES, JJ.

Income Tax Commissioners v. Pemsel

(1891) 61 L. J. Q. B. 265; [1891] A. C. 531; 65 L. T. 621; 55 J. P. 805.—H. L. (E.). HALSBURY, L.C. and LORD BRAMWELL dissenting; *affirming* S. C. *nom. Reg. v. Income Tax Commissioners* (*supra*), *referred to*.

Waterford Union Guardians v. Barton [1896] 2 Ir. R. 538, 547.—EX. D.

Income Tax Commissioners v. Pemsel, *considered*.

Buck, In re, Bruty v. Mackay (1896) 65 L. J. Ch. 881; [1896] 2 Ch. 727, 733; 75 L. T. 312; 45 W. R. 106; 60 J. P. 775.—KEKEWICH, J.

Income Tax Commissioners v. Pemsel, *referred to*.

Glass v. Patterson [1902] 2 Ir. R. 660, 667.—K.B.D.; **London County Council v. South Metropolitan Gas Co.** (1903) 72 L. J. Ch. 536; [1903] 2 Ch. 532, 538; 88 L. T. 623; 52 W. R. 45; 1 L. G. R. 541.—JOYCE, J.; *affirmed*, 73 L. J. Ch. 136; [1904] 1 Ch. 76.—C.A. *And see* "CHARITY," Vol. i., col. 324.

Andrews v. Bristol Corporation (1892) 61 L. J. Q. B. 715; 5 K. 7; 67 L. T. 618; 56 J. P. 615.—WRIGHT and COLLINS, JJ., *approved*.

Manchester Corporation v. McAdam (1895) 64 L. J. Q. B. 401; [1895] 1 Q. B. 673; 43 W. R. 438.—C.A. LINDLEY and RIGBY, L.JJ.; ESHER, M.R. dissenting; reversed, *post*.

Andrews v. Bristol Corporation, *referred to*.
Manchester Corporation v. McAdam, *reversed*.

Manchester Corporation v. McAdam (1896) 65 L. J. Q. B. 672; [1896] A. C. 500; 75 L. T. 229; 61 J. P. 100.—H.L. (E.); HAINSBURY, L.C. dissenting.

LORD HERSCHELL.—In the Q. B. D. the case was concluded by a previous decision of the same Court relating to a free library at Bristol—*Andrews v. Bristol Corporation*. In the C. A., Lindley and Rigby, L.JJ. were of opinion that the appellants were not entitled to the exemption claimed; the M.R. arrived at the contrary conclusion. The learned judges who formed the majority considered that the Corporation of Manchester, even in its character of library authority, could not properly be called a "literary institution." Lindley, L.J. was of opinion, further, that a library supported by rates could not be a literary institution within the meaning of the Income Tax Act.—p. 675.

Manchester Corporation v. McAdam, *applied*.
Inland Revenue v. Dundee Magistrates (1897) 24 Rottie 930.—CT. OF SESS.

Addie v. Solicitor of Inland Revenue (1875) 12 Scott. L. R. 274; 1 Tax Cas. 1.—CT. OF SESS.

Approved, **Forder v. Andrew Handyside & Co.** (1876) 45 L. J. Ex. 809; 1 Ex. D. 233; 35 L. T. 62; 24 W. R. 764.—EX. D.; *discussed*, **Coltress Iron Co. v. Black** (1881) 51 L. J. Q. B. 626; 6 App. Cas. 815, 327; 45 L. T. 145; 29 W. R. 717; 46 J. P. 20.—H.L. (SC.). EARL CAIRNS, LORDS PENZANCE and BLACKBURN; *principle applied*, **Morant v. Wheal Greville Mining Co.** (1894) 71 L. T. 758.—WRIGHT and COLLINS, JJ.

Forder v. Handyside (1876) 45 L. J. Ex. 809; 1 Ex. D. 233; 35 L. T. 62; 24 W. R. 764.—EX. D., *not applied*.

Knowles v. McAdam (1877) 47 L. J. Ex. 139; 3 Ex. D. 23, 31; 37 L. T. 795; 26 W. R. 114.—EX. D.

Forder v. Handyside, *discussed*.

Lawless v. Sullivan (1881) 6 App. Cas. 373; 50 L. J. P. C. 33; 44 L. T. 897; 29 W. R. 917.—P.C.; reversing 2 Canada Supreme Court Reports 117.

SIR M. SMITH (for self, SIR B. PEACOCK, SIR R. COLLIER and SIR R. COUCH).—In *Forder v. Handyside* it was held that, under the provisions of the English Property and Income Tax Act, 5 & 6 Vict. c. 35, s. 100, Case 1, Rule 3 (1), a company carrying on the business of iron-founders could not deduct from the net profits of the year a sum of money which had been set aside, in accordance with the terms of its deed of association, as a reserve fund for the purpose of meeting the depreciation of buildings and machinery. It is clear that, under the English Act, losses connected with or arising out of any business during the year would form a deduction

from the profits, and in the very case referred to the repairs of buildings and machinery were allowed, as being a proper deduction from the net profits. Their lordships are at a loss to see how this case lends any support to the judgment, unless, indeed, the assumption of the Chief Justice that the losses of the business are to be treated as a loss of capital, and not of income, were tenable.—p. 384.

Forder v. Handyside, *distinguished*.

Coltress Iron Co. v. Black (1881) 6 App. Cas. 315; 51 L. J. Q. B. 626; 45 L. T. 145; 29 W. R. 717; 46 J. P. 20.—H.L. (SC.). EARL CAIRNS, LORDS PENZANCE and BLACKBURN.

LORD BLACKBURN.—In *Forder v. Handyside* the Ex. D. came to a conclusion as to repairs, estimated but not actually incurred, which, whether it was right or wrong, is no longer, since 41 Vict. c. 15, s. 12, to apply. And as there is no question in the case at bar as to repairs, it is unnecessary to inquire whether it was right or wrong.—p. 338.

Forder v. Handyside, *applied*.

Gillatt v. Colquhoun (1884) 33 W. R. 258, 261; 2 Tax Cas. 76.—GROVE and A. L. SMITH, JJ.

Forder v. Handyside, *adhered to*.

Smith v. Westinghouse Brake Co. (1885) 4 Times L. R. 649; 3 Tax Cas. 357.—HUDDLESTON, B. and CHARLES, J.

Knowles v. McAdam (1877) 47 L. J. Ex. 139; 3 Ex. D. 23; 37 L. T. 795; 26 W. R. 114.

—EX. D., *distinguished*.

Watney v. Musgrave (1880) 5 Ex. D. 241; 49 L. J. Ex. 493; 42 L. T. 690; 28 W. R. 491; 44 J. P. 268.—KELLY, C.B. and HAWKINS, J.

KELLY, C.B.—That was a case of the depreciation of the property which had been leased to the parties occurring in the course of the production and by reason of the production of the article itself.—p. 245.

Knowles v. McAdam, *overruled*.

Coltress Iron Co. v. Black (1881) 51 L. J. Q. B. 626; 6 App. Cas. 315, 325; 45 L. T. 145; 29 W. R. 717; 46 J. P. 20.—H.L. (SC.). EARL CAIRNS, LORDS PENZANCE and BLACKBURN. *See* the addresses at length.

Knowles v. McAdam, *referred to*.

Broughton Coal Co. v. Kirkpatrick (*post*).

Coltress Iron Co. v. Black.

Referred to, **Lambert v. Neuchatel Asphalte Co.** (1882) 51 L. J. Ch. 882; 47 L. T. 73; 30 W. R. 913.—BACON, V.-C.; *applied*, **Gillatt v. Colquhoun** (1884) 33 W. R. 258, 260; 2 Tax Cas. 76.—GROVE and A. L. SMITH, JJ.

Coltress Iron Co. v. Black, *applied*.

Broughton Coal Co. v. Kirkpatrick (1884) 14 Q. B. D. 491; 54 L. J. Q. B. 268; 33 W. R. 278; 49 J. P. 119.—GROVE and A. L. SMITH, JJ.

GROVE, J.—In my view, the decision of the House of Lords in *Coltress Iron Co. v. Black*, which virtually overruled the decision in *Knowles v. McAdam* [*supra*], was to the effect that "profits" must be taken to mean that which the mine-owner in any given year puts in his pocket, or could, if he chose, put in his pocket, minus the expenditure. He cannot go back and take into account the profit and loss account for

a series of previous years. . . . I think that the question here is, whether, when the mine has become a profitable concern, the lessees can deduct antecedent losses from the profits of their particular year in respect of which the tax is sought to be imposed. The House of Lords, in *Coltress Iron Co. v. Black*, have decided in principle that they cannot, and that case seems to me directly in point.* . . . The only distinction between this case and *Coltress Iron Co. v. Black* is, that there is a payment in advance under a bargain with the landlord, whilst in that case there were losses merely which the lessees had incurred by exhausting their capital. I do not think that distinction is material.—pp. 496, 498.

Coltress Iron Co. v. Black.

Referred to, Colquhoun v. Brooks (1889) 59 L. J. Q. B. 53; 14 App. Cas. 493, 505; 61 L. T. 578; 38 W. R. 289; 54 J. P. 277.—H.L. (E.); Gresham Life Assurance Society v. Styles (1892) 62 L. J. Q. B. 41; [1892] A. C. 309, 314; 67 L. T. 479; 41 W. R. 270; 56 J. P. 709.—H.L. (E.): *principle applied*, Morant v. Wheal Grenville Mining Co. (1894) 71 L. T. 748.—WRIGHT and COLLINS, JJ.; *referred to*, Commissioner of Valuation v. Clonbrook Coal Co. [1896] 2 Ir. R. 560, 570.—ANDREW and MURPHY, JJ.

Broughton Coal Co. v. Kirkpatrick (1884) 14 Q. B. D. 491; 54 L. J. Q. B. 268 (*supra*, col. 2820), *distinguished*.

Gillatt v. Colquhoun (1884) 33 W. R. 258; 2 Tax Cas. 76 (*supra*, col. 2820).

Stevens v. Bishop (1888) 57 L. J. Q. B. 283; 20 Q. B. D. 442; 58 L. T. 669; 36 W. R. 421; 52 J. P. 548.—C.A. ESHER, M.R., FRY and LOPES, L.JJ., *considered*.

Norfolk (Duke) v. Lamarque (1890) 59 L. J. Q. B. 119; 24 Q. B. D. 485; 62 L. T. 153; 38 W. R. 382; 54 J. P. 327.—POLLOCK, B. and HAWKINS, J.

Denby v. Moore (1817) 1 B. & Ald. 123; 18 R. R. 444.—K.B.

Applied, Andrew v. Hancock (1819) 1 Br. & B. 37; 3 Moore 278; 21 R. R. 579.—C.P.; *distinguished*, Hales v. Freeman (1819) 1 Br. & B. 391; 4 Moore 21; 21 R. R. 663.—C.P.: *referred to*, Stubbs v. Parsons (1820) 3 B. & Ald. 516.—BAYLEY and HOLROYD, JJ.; *discussed*, Smith v. Alsop (1824) M'Clel. 623; 13 Price 823.—EX.; *referred to*, Cumming v. Bedborough (1846) 15 M. & W. 438.—EX.

Denby v. Moore, *distinguished*.

Stubbs v. Parsons (*supra*), *observations applied*.

Lamb v. Brewster (1879) 4 Q. B. D. 220; 48 L. J. Q. B. 277.—Q.B.D.; *affirmed*, 48 L. J. Q. B. 421; 4 Q. B. D. 607; 40 L. T. 537; 27 W. R. 478.—C.A. BRETT, COTTON and THESIGER, L.JJ.

MELLOR, J.—What was there [*Denby v. Moore*] held was that when a tenant does not take the opportunity of deducting the [property] tax, but goes on without any claim to deduct paying the full rent for a series of years, and no arrangement is made with the landlord, then the right to deduct is gone, and the payments so made by the tenant in excess of the rent he was bound to pay are voluntary payments, and cannot be recovered back. In the present case the tenant claims to deduct at a time when he is entitled so to do, and by arrangement between

himself and the landlord he abstains from insisting on such deduction, and the landlord promises to pay him afterwards. . . . It is obvious that such an arrangement is not within the scope of of the *dicta* of the judges in *Denby v. Moore*. The next case in which a similar question arose was *Stubbs v. Parsons*. Holroyd, J., there says: "The occupier has, as it seems to me, a lien on the next rent given him by the Legislature for the land tax paid by him; but if he parts with the rent without making the deduction he loses his lien, and has only his remedy by action or set-off." It seems clear from these observations that, if this is the correct principle, a contract between the tenant and the landlord, that if the tenant gives up his lien the landlord will subsequently repay the amount, is a contract for a perfectly valid consideration.—p. 222.

FIELD, J.—I am at a loss to discover, notwithstanding those expressions [*Denby v. Moore*] what fraud on the revenue there can be in such an agreement as this. At the time when that case was decided much looser ideas prevailed as to supposed frauds on statutes than at the present time. Now such notions are brought much more closely to the text of the positive language used in the statutes.—p. 223.

Denby v. Moore, *principle applied*.

Wilson v. Burne (1888) 24 L. R. Ir. 14, 31.—Q.B.D.; *affirmed*, (1889), C.A. ASHBOURNE, L.C., FITZGIBBON, BARRY and NAISH, L.JJ.

Denby v. Moore and Cumming v. Bedborough (1846) 15 M. & W. 438.—EX., *principle approved but not applied*.

Glasgow Tramways and Omnibus Co. v. Glasgow Corporation (1897) 24 Rettie 628.—LORD ORDINARY; *affirmed*, CT. OF SESS.

Glasgow Tramway and Omnibus Co. v. Glasgow Corporation (*supra*); *reversed nom.* Glasgow Corporation v. Glasgow Tramway and Omnibus Co. [1898] A. C. 631.—H.L. (SC.). HAYSBURY, L.C., LORDS WATSON, HERSCHELL and SHAND.

Fuller v. Abbott (1811) 4 Taunt. 105.—C.P.; and **Readshaw v. Balders** (1811) 4 Taunt. 57.—C.P., *applied*.
Tinckler v. Prentice (1812) 4 Taunt. 549; 13 R. R. 684.—C.P.

Franklin v. Carter (1845) 14 L. J. C. P. 241; 1 C. B. 750; 3 D. & L. 213; 9 Jur. 874.—C.P., *referred to*.
Cumming v. Bedborough (1846) 15 M. & W. 438.—EX.

Att.-Gen. v. Borrodale (1814) 1 Price 148.—EX., *referred to*.

Att.-Gen. v. M'Cormack [1903] 2 Ir. R. 517.—K.B.D.

Rex v. Cook (1790) 3 Term Rep. 519.—K.B. *discussed*.

Clerk v. Dumfries Commissioners of Supply (1880) 7 Rettie 1157.—CT. OF SESS., *disapproved*.

Coomber v. Berkshire JJ. (1883) 9 App. Cas. 61; 53 L. J. Q. B. 239; 50 L. T. 405; 32 W. R. 525; 48 J. P. 421.—H.L. (E.).*

LORD BLACKBURN.—In *Rex v. Cook* the general principle as to the constitution of statutes imposing charges as containing an exemption of the Crown was laid down. That was a case raising the question whether the duty on post-horses was exigible in respect of post-horses

carrying an express from the Governor of Portsmouth to one of Her Majesty's Principal Secretaries of State, which was not on any private business whatever, but wholly related to the public concerns of this kingdom. It was held that it was not exigible (p. 65). . . . There [*Clerk v. Dumfries Commissioners of Supply*] the question was whether the commissioners of supply were chargeable with income tax in respect of police stations erected under the 20 & 21 Vict. c. 72. If there be any difference between such police stations in Scotland erected by commissioners of supply, and those erected by the county authorities in England, it has not been pointed out, and I have not discovered it. The decision was that they were chargeable; and it certainly seems to me that the decision in the case at bar, at least so far as regards the police stations, and that Scotch decision, cannot both be right. It must be for your lordships to determine which you will follow. . . . I have great respect for the opinion of the Lord President, and he having said (though without giving his reasons) that in his opinion the poor-rate cases are not applicable, I have reconsidered the reasons which make me think them in point: and I have been unable to change my opinion. It seems to me that it is not material whether the assessment statute imposing any tax does so, like the Poor-rate Acts, for a local purpose, or like the statute imposing a duty on post-horses, considered in *Ree v. Codd*, or the income-tax, for an imperial purpose. In each case there is an implied exemption on the ground of prerogative.—pp. 70-71.

St. Andrew's Hospital, Northampton v. Shearsmith (1887) 19 Q. B. D. 624; 57 L. T. 413; 35 W. R. 811.—COLERIDGE, C.J. and FIELD, J., *followed*.

Needham v. Bowers (1888) 21 Q. B. D. 436; 59 L. T. 404; 37 W. R. 125.—HUDDLESTON, B. and CHARLES, J.

Colquhoun v. Brooks (1889) 59 L. J. Q. B. 53; 14 App. Cas. 493; 61 L. T. 518; 38 W. R. 289; 54 J. P. 277; 5 Times L. R. 728.—H. L. (E.). HALSBURY, L.C., LORDS FITZGERALD, HERSCHELL and MACNAGHTEN: *affirming* (1888) 57 L. J. Q. B. 439; 21 Q. B. D. 52; 59 L. T. 661; 36 W. R. 657; 52 J. P. 645.—C.A. ESHER, M.R. and LOPES, L.J.: *FRY, L.J. dissenting (which reversed)* (1887) 19 Q. B. D. 400; 57 L. T. 455.—STEPHEN, J.; WILLS, J. *dissenting*, *distinguished*.

London Bank of Mexico v. Apthorpe (1890) [1891] 1 Q. B. 383; 64 L. T. 416; 55 J. P. 454.—STEPHEN and CHARLES, JJ.; and (1891) 60 L. J. Q. B. 653; [1891] 2 Q. B. 378; 65 L. T. 601; 39 W. R. 564.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Colquhoun v. Brooks, *followed*.

Bartholomay Brewery Co. of Rochester v. Wyatt (1893) 62 L. J. Q. B. 525; [1893] 2 Q. B. 499, 500; 5 R. 564; 69 L. T. 561; 42 W. R. 173; 58 J. P. 133.—CAVE and WRIGHT, JJ.

Colquhoun v. Brooks, *distinguished*.

San Paulo (Brazilian) Ry. v. Carter (1895) 65 L. J. Q. B. 161; [1896] A. C. 31; 73 L. T. 538; 44 W. R. 336; 60 J. P. 452.—H. L. (E.); *affirming* 64 L. J. Q. B. 379; [1895] 1 Q. B. 580; 72 L. T. 244; 43 W. R. 399; 60 J. P. 84.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.; who had reversed (1894) 43 W. R. 109.—V. WILLIAMS and WRIGHT, JJ.

LORD DAVEY.—The business of the appellant company is not, on the facts stated in the case, entirely or exclusively carried on abroad, and therefore *Colquhoun v. Brooks*, on which the appellants' counsel relied, is no sufficient authority for the proposition which they maintained. . . . In my opinion, therefore, the case is outside both the decision and the reasoning of the noble and learned lords who gave judgment in *Colquhoun v. Brooks*, because I find that every one of those noble and learned lords confined their observations to a case in which the business was entirely carried on abroad.—p. 165.

LORD WATSON also discussed *Colquhoun v. Brooks*.

San Paulo (Brazilian) Ry. v. Carter, *applied*. **Apthorpe v. Peter Schoenhofen Brewery Co.** (1898) 79 L. T. 98; 62 J. P. 452; 14 Times L. R. 370.—WRIGHT and CHANNELL, JJ.; *affirmed*, C.A., *post*.

Colquhoun v. Brooks (*supra*) *not applied*. **San Paulo (Brazilian) Ry. v. Carter**, *principle applied*.

Apthorpe v. Peter Schoenhofen Brewery Co. (1899) 80 L. T. 395; 4 Tax Cas. 41; 15 Times L. R. 245.—C.A. A. L. SMITH, COLLINS and ROMER, L.JJ.

San Paulo (Brazilian) Ry. v. Carter, *discussed and distinguished*.

Commissioners of Taxation v. Kirk (1900) 69 L. J. P. C. 87; [1900] A. C. 588, 594; 83 L. T. 4.—P.C.

LORD DAVEY (for the Court).—In *San Paulo Ry. v. Carter* all that the H. L. had to decide was whether a company with a head office in London, from which the board of directors governed the operations of the company in Brazil, did not exercise a business in England. It would have been difficult to say in that case that the profits or income were not to some extent, at any rate, earned in Brazil.—p. 89.

Colquhoun v. Brooks, *applied*. **London County Council v. Att.-Gen.** (1900) 70 L. J. K. B. 77; [1901] A. C. 26, 48; 83 L. T. 605; 49 W. R. 686; 65 J. P. 227.—H. L. (E.).

Colquhoun v. Brooks and San Paulo (Brazilian) Ry. v. Carter, *discussed*.

Rex v. Commissioners of Taxes, Clerkenwell (1901) 70 L. J. K. B. 1010; [1901] 2 K. B. 879, 886; 85 L. T. 503; 65 J. P. 724.—C.A. A. L. SMITH, M.R., V. WILLIAMS and STIRLING, L.JJ.; **Kodak, Ltd. v. Clark** (1902) 71 L. J. K. B. 791; [1902] 2 K. B. 450, 457; 87 L. T. 99; 51 W. R. 75.—PHILLIMORE, J. (*affirmed* C.A.; *see post*, col. 2825).

Bartholomay Brewery Co. of Rochester v. Wyatt (1893) 62 L. J. Q. B. 525; [1893] 2 Q. B. 499; 5 R. 564; 69 L. T. 561; 42 W. R. 173; 58 J. P. 133.—CAVE and WRIGHT, JJ.

Followed, **Denver Hotel Co. v. Andrews**; **San Paulo Ry. v. Carter** (1894) 43 W. R. 109.—Q.B.D. (*reversed* C.A. and H.L., *supra*); *considered overruled*, **Apthorpe v. Peter Schoenhofen Brewery Co.** (1898) 79 L. T. 98; 62 J. P. 452; 14 Times L. R. 370.—WRIGHT and CHANNELL, JJ.; *affirmed* (1899) 80 L. T. 395.—C.A. (*supra*); *not followed*, **St. Louis Breweries v. Apthorpe** (1898) 79 L. T. 551; 4 Tax Cas. 111; 15 Times L. R. 112.—WILLS and BRUCE, JJ.; *explained*, **Kodak, Ltd. v. Clark** (1902) 71 L. J. K. B. 791;

[1902] 2 K. B. 450, 458; 87 L. T. 99; 51 W. R. 75.—PHILLIMORE, J.

Apthorpe v. Peter Schoenhofen Brewery Co.
(*supra*).

Followed, Frank Jones Brewing Co. v. Apthorpe (1898) 15 Times L. R. 113; 4 Tax 6.—WILLS and BRUCE, JJ.; *referred to*, Rex v. Commissioners of Taxes, Clerkenwell [1901] 2 K. B. 879, 893 (*supra*, col. 2824); *considered*, Kodak, Ltd. v. Clark [1902] 2 K. B. 450, 462 (*post*).

Frank Jones Brewing Co. v. Apthorpe,
followed.

United States Brewing Co. v. Apthorpe (1898) 4 Tax Cas. 17.—WILLS, J.

Frank Jones Brewing Co. v. Apthorpe and United States Brewing Co. v. Apthorpe,
considered.

Kodak, Ltd. v. Clark (1902) 71 L. J. K. B. 791; [1901] 2 K. B. 450, 458; 87 L. T. 99; 51 W. R. 75.—PHILLIMORE, J.; *affirmed*, (1903) 72 L. J. K. B. 369; [1903] 1 K. B. 505; 88 L. T. 155; 51 W. R. 459; 67 J. P. 213.—C.A.

St. Louis Breweries v. Apthorpe (*supra*,
col. 2824), *considered*.

Rex v. Commissioners of Taxes, Clerkenwell [1901] 2 K. B. 879, 893 (*supra*, col. 2824); Kodak, Ltd. v. Clark [1902] 2 K. B. 450, 461 (*supra*).

Scottish Mortgage Co. of New Mexico v. McKelvie (or Inland Revenue Commissioners) (1886) 14 Rettie 98; 24 Scott. L. R. 87; 2 Tax Cas. 165.—CT. OF SESS.

Distinguished, Forbes v. Scottish Widows Fund and Life Assurance Society; Forbes v. Scottish Provident Institution (1895) 23 Rettie 322; 33 Scott. L. R. 228; 3 Tax Cas. 443.—CT. OF SESS.; *discussed*, Norwich Union Fire Insurance Co. v. Magee (1896) 73 L. T. 733; 44 W. R. 384.—WRIGHT and KENNEDY, JJ.; *applied*, Gresham Life Assurance Society v. Bishop (1900) 70 L. J. K. B. 298; [1901] 1 K. B. 153, 164; 83 L. T. 654; 65 J. P. 4.—C.A.; *distinguished*, Standard Life Assurance Co. v. Allan (1901) 3 Fraser 805; 4 Tax Cas. 446.—CT. OF SESS.; *discussed and distinguished*, Gresham Life Assurance Co. v. Bishop (1902) 71 L. J. K. B. 618; [1902] A. C. 287.—H.L. (E.) (*post*, col. 2826).

Forbes v. Scottish Widows Fund and Life Assurance Society and Forbes v. Scottish Provident Institution (*supra*), *distinguished*.

Universal Life Assurance Society v. Bishop (1899) 68 L. J. Q. B. 962; 81 L. T. 422; 64 J. P. 5.—GRANTHAM and KENNEDY, JJ.

Forbes v. Scottish Provident Institution,
distinguished.

Denver Hotel Co. v. Andrews (1894) 43 W. R. 109.—Q.B.D. (*see* col. 2824), *referred to*.

Gresham Life Assurance Society v. Bishop (1900) 70 L. J. K. B. 298; [1901] 1 K. B. 153, 164; 83 L. T. 654; 65 J. P. 4.—C.A.; *affirming* (1899) 68 L. J. Q. B. 967; 81 L. T. 442; 64 J. P. 7.—GRANTHAM and KENNEDY, JJ.

Forbes v. Scottish Provident Institution,
followed.

Gresham Life Assurance Co. v. Bishop, *discussed*.

Standard Life Assurance Co. v. Allan (1901) 3 Fraser 805, 874; 38 Scott. L. R. 628.—CT. OF SESS.

Gresham Life Assurance Society v. Bishop,
reversed.

Forbes v. Scottish Provident Institution and Standard Life Assurance Co. v. Allan, *explained and approved*.

Gresham Life Assurance Society v. Bishop (1902) 71 L. J. K. B. 618; [1902] A. C. 287; 86 L. T. 693; 50 W. R. 593; 66 J. P. 755.—H.L. (E.).

Norwich Union Fire Insurance Co. v. Magee (1896) 73 L. T. 733; 44 W. R. 384.—WRIGHT and KENNEDY, JJ., *followed*.

Universal Life Assurance Society v. Bishop (1899) 68 L. J. Q. B. 962; 81 L. T. 422; 64 J. P. 5.—GRANTHAM and KENNEDY, JJ.

Att.-Gen. v. Sully (1859) 28 L. J. Ex. 320; 4 H. & N. 769.—EX.; *reversed nom.* **Sully v. Att.-Gen.** (1860) 29 L. J. Ex. 464; 5 H. & N. 711; 6 Jur. (N.S.) 1018; 2 L. T. 439; 8 W. R. 472.—EX. CH.

Sully v. Att.-Gen., *explained and distinguished*.

Att.-Gen. v. Alexander (1874) 44 L. J. Ex. 3; L. R. 10 Ex. 20, 32; 31 L. T. 694; 23 W. R. 255.—EX.

CLEASBY, D.—Mr. Matthews treated *Sully v. Att.-Gen.* as if it had decided that where a person living in England carried on business as partner of a firm whose chief place of business was in America, the firm did not "reside" in England; but, in fact, the case did not decide that. The decision that the defendant was exempt was on the ground that no business was carried on in England within the meaning of the schedule. That case has, therefore, no bearing, because, in the present case, the bank does carry on business in England.—p. 8.

Sully v. Att.-Gen.

Discussed, Cesena Sulphur Co. v. Nicholson (1876) 45 L. J. Ex. 321; 1 Ex. D. 428, 446; 35 L. T. 275; 25 W. R. 71.—EX. D.; *distinguished*, Erichsen v. Last (1881) 50 L. J. Q. B. 570; 7 Q. B. D. 12, 17; 45 L. T. 285.—EX. D. (*see post*, col. 2827); *discussed*, Pommery v. Apthorpe (1886) 56 L. J. Q. B. 155, 159; 56 L. T. 24; 38 W. R. 307.—DENMAN and HAWKINS, JJ.; Colquhoun v. Brooks (1887) 19 Q. B. D. 400, 411; 57 L. T. 455.—STEPHEN and WILLS, JJ. (*see supra*, col. 2823); *approved*, Werle v. Colquhoun (1888) 57 L. J. Q. B. 323; 20 Q. B. D. 753, 759; 58 L. T. 756; 36 W. R. 613; 52 J. P. 644.—C.A.; *discussed*, Grainger v. Gough (1896) 65 L. J. Q. B. 410; [1896] A. C. 325; 74 L. T. 435; 44 W. R. 561; 60 J. P. 692.—H.L. (E.) (*post*, col. 2828); Commissioners of Taxation v. Kirk (1900) 69 L. J. P. C. 87; [1900] A. C. 588, 593; 83 L. T. 4.—P.C. (*see post*, col. 2828); **Att.-Gen. v. McCormack** [1903] 2 Ir. R. 517.—K.B.D.

Att.-Gen. v. Alexander (1874) 44 L. J. Ex. 3; L. R. 10 Ex. 20; 31 L. T. 694; 23 W. R. 285.—EX., *discussed*.

Cesena Sulphur Co. v. Nicholson (1876) 45 L. J. Ex. 321; 1 Ex. D. 428, 453; 35 L. T. 275; 25 W. R. 71.—KELLY, C.B. and HUDDLESTON, B.; Gilbertson v. Fergusson (1879) 49 L. J. Ex. 536; 5 Ex. D. 57, 70.—EX. D.; KELLY, C.B. dissenting.

Att.-Gen. v. Alexander, *considered*.

Erichsen v. Last (1879) 7 Q. B. D. 12; 50 L. J. Q. B. 570; 45 L. T. 285.—Q.B.D. *affirmed*, (1881) 51 L. J. Q. B. 86; 8 Q. B. D. 414; 45 L. T. 703; 30 W. R. 301; 46 J. P. 357.—C.A.

LINDLEY, J.—I do not think *Att.-Gen. v. Alexander* and *Gilbertson v. Fergusson* (*post*)

have much bearing upon the matter. The facts in those cases were peculiar. In the former the question was whether the corporation could be said to be "resident" in England under 16 & 17 Vict. c. 84, s. 2. and in the latter whether the corporation could be taxed on money remitted to this country for the payment of dividends.—p. 17.

Att.-Gen. v. Alexander, *referred to*.

Att.-Gen. v. McCormack [1903] 2 Ir. R. 517.—K.B.D.

Gilbertson v. Fergusson (1879) 49 L. J. Ex. 536; 5 Ex. D. 57; 42 L. T. 816.—EX. D. KELLY, C.B., *dissenting*; *affirmed*. (1881) 7 Q. B. D. 562; 46 L. T. 10.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.

Gilbertson v. Fergusson, *considered*.

Erichsen v. Last (1879) 50 L. J. Q. B. 570; 7 Q. B. D. 12; 45 L. T. 285.—Q.B.D. (*see supra*, col. 2826).

Cesena Sulphur Co. v. Nicholson; Calcutta Jute Mills Co. v. Nicholson (1876) 45 L. J. Ex. 821; 1 Ex. D. 428; 35 L. T. 275; 25 W. R. 71.—KELLY, C.B. and HUDDLESTON, B.

Followed, **Imperial Continental Gas Association v. Nicholson** (1877) 37 L. T. 717.—KELLY, C.B. and HUDDLESTON, B.; *discussed and approved*, **Colquhoun v. Brooks** (1887) 19 Q. B. D. 400, 412; 57 L. T. 455.—STEPHEN and WILLS, JJ. and (1889) 59 L. J. Q. B. 53; 14 App. Cas. 493, 510; 61 L. T. 518; 38 W. R. 289; 54 J. P. 277; 5 Times L. R. 728.—H.L. (E.).

Cesena Sulphur Co. v. Nicholson; Calcutta Jute Mills Co. v. Nicholson, *commented on and not applied*.

London Bank of Mexico v. Apthorpe (1890) [1891] 1 Q. B. 383; 64 L. T. 416; 55 J. P. 454.—STEPHEN and CHARLES, JJ.; *affirmed*. C.A. (*see supra*, col. 2828).

Cesena Sulphur Co. v. Nicholson, *referred to*.

Apthorpe v. Peter Schoenhofen Brewery Co. (1899) 80 L. T. 395; 4 Tax Cas. 41; 15 Times L. R. 245.—C.A. A. L. SMITH, COLLINS and ROMER, L.JJ.

Cesena Sulphur Co. v. Nicholson, *discussed*.

Att.-Gen. v. Jewish Colonisation Association (1900) 69 L. J. Q. B. 692; [1900] 2 Q. B. 556, 570; 82 L. T. 679; 49 W. R. 59; 64 J. P. 426.—D.; *affirmed*, 70 L. J. K. B. 101; [1901] 1 K. B. 123, 147; 83 L. T. 561; 49 W. R. 230; 65 J. P. 21.—C.A.

Imperial Continental Gas Association v. Nicholson (1877) 37 L. T. 717.—EX. *commented on and not applied*.

London Bank of Mexico v. Apthorpe (1890) [1891] 1 Q. B. 383; 64 L. T. 416; 55 J. P. 454.—STEPHEN and CHARLES, JJ.; *affirmed*, C.A. (*see supra*, col. 2823).

Erichsen v. Last (1881) 51 L. J. Q. B. 86;

8 Q. B. D. 414; 45 L. T. 703; 30 W. R. 301; 46 J. P. 357.—C.A. JESSEL, M.R., BRETT and COTTON, L.JJ., *discussed*.

Pommery v. Apthorpe (1886) 56 L. J. Q. B. 155, 159; 56 L. T. 24; 35 W. R. 307.—DENMAN and HAWKINS, JJ. *Ant see post*.

Tischler v. Apthorpe (1885) 52 L. T. 814; 33 W. R. 548; 49 J. P. 372.—MATHEW and SMITH, JJ., *followed*.

Pommery v. Apthorpe (1886) 56 L. J. Q. B. 155, 159; 56 L. T. 24; 35 W. R. 307.—DENMAN and HAWKINS, JJ.

Erichsen v. Last (*supra*), *followed*.

Tischler v. Apthorpe and Pommery v. Apthorpe, *approved*.

Werle v. Colquhoun (1888) 57 L. J. Q. B. 323; 20 Q. B. D. 753, 759; 58 L. T. 756; 36 W. R. 613; 52 J. P. 644.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Erichsen v. Last, Tischler v. Apthorpe and Pommery v. Apthorpe, *distinguished*.

Grainger v. Gough (1896) 65 L. J. Q. B. 410; [1896] A. C. 325; 74 L. T. 435; 44 W. R. 561; 60 J. P. 692.—H.L. (E.); LORD MORRIS, *dissenting*.

Werle v. Colquhoun (1888) 57 L. J. Q. B. 323; 20 Q. B. D. 753; 58 L. T. 756; 36 W. R. 613; 52 J. P. 644.—C.A., *distinguished*.

Grainger v. Gough (1896) 65 L. J. Q. B. 410; [1896] A. C. 325; 74 L. T. 435; 44 W. R. 561; 60 J. P. 692.—H.L. (E.); LORD MORRIS *dissenting*; reversing (1894) 64 L. J. Q. B. 193; [1895] 1 Q. B. 71; 14 R. 9; 71 L. T. 802; 43 W. R. 184; 59 J. P. 84.—C.A. ESHER, M.R., LOPES and A. L. SMITH, L.JJ.

Tindal, In re (1897) 18 N. S. W. L. R. 378.—SUPREME COURT, *overruled*.

Grainger v. Gough, *explained*.

Commissioners of Taxation v. Kirk (1900) 69 L. J. P. C. 87; [1900] A. C. 588, 593; 83 L. T. 4.—P.C.

LORD DAVEY (for self, HALSBURY, L.C., LORDS MACNAGHTEN, ROBERTSON and LINDLEY).—The fallacy of the judgment of the Supreme Court in this and in *Tindal's Case* is in leaving out of sight the initial stages, and fastening their attention exclusively on the final stage in the production of the income. . . . The language used in the English judgments must of course, be understood with reference to the cases then under consideration. In *Sully v. At.-Gen.* (*supra*, col. 2826) and in *Grainger v. Gough* the question was whether the person sought to be charged was exercising a trade in this country within the meaning of the Acts. In the former case it was decided that the mere purchase of goods in this country for the purpose of enabling a person to trade in America did not constitute the exercise of a trade here; while in *Grainger v. Gough* it was held on the facts there found, that the sale by a French firm in France to English customers did not constitute the exercise of a trade in England. In such cases the place where the profits come home to the trader may be a very good test of the place where the trade is carried on. But these cases do not appear to their lordships to have much to do with a case such as the one before them, where a business is admittedly carried on in this country.—p. 89.

Grainger v. Gough, *referred to*.

Badische Anilin und Soda Fabrick v. Thompson (1902) 20 Rep. Pat. Cas. 422.—C.A.

Last v. London Assurance Corporation (1884) 53 L. J. Q. B. 325; 12 Q. B. D. 389; 50 L. T. 534; 32 W. R. 702.—DAY, J.; SMITH, J.

dissenting; affirmed, (1884) 54 L. J. Q. B. 4; 14 Q. B. D. 389; 52 L. T. 604; 33 W. R. 207.—C.A. LINDLEY, L.J. *dissenting*; C.A. *reversed*, (1885) 55 L. J. Q. B. 92; 10 App. Cas. 438; 53 L. T. 634; 34 W. R. 233.—H.L. (E.); LORD BRAMWELL *dissenting*.

Last v. London Assurance Corporation.

Distinguished, Broughton Coal Co. v. Kirkpatrick (1884) 54 L. J. Q. B. 268; 14 Q. B. D. 491, 498; 33 W. R. 278; 49 J. P. 119.—GROVE and A. L. SMITH, JJ.; *considered*, Clerical, Medical and General Life Assurance Society v. Carter (1888) 57 L. J. Q. B. 614; 21 Q. B. D. 339; 52 L. T. 827; 37 W. R. 124.—CHARLES and MANISTY, JJ. (affirmed, C.A., *see post*).

Last v. London Assurance Corporation, distinguished.

New York Life Insurance Co. v. Styles (1889) 59 L. J. Q. B. 291; 14 App. Cas. 381; 61 L. T. 201.—H.L. (E.).

Last v. London Assurance Corporation and New York Insurance Co. v. Styles, considered.

Equitable Life Assurance Society of the United States v. Bishop (1899) 69 L. J. Q. B. 252; [1900] 1 Q. B. 177; 81 L. T. 693; 48 W. R. 341.—C.A.; *affirming* (1899) 68 L. J. Q. B. 772; [1899] 2 Q. B. 439; 80 L. T. 728; 47 W. R. 556. DARLING and CHANNELL, JJ.

New York Insurance Co. v. Styles, distinguished.

Scottish Widows' Fund and Life Assurance Co. v. Inland Revenue (1900) 3 Fraser 129, 132.—CT. OF SESS.

Clerical, Medical and General Life Assurance Society v. Carter (1888) 57 L. J. Q. B. 614; 21 Q. B. D. 339; 37 W. R. 124.—CHARLES and MANISTY, JJ.; *affirmed*, (1889) 58 L. J. Q. B. 224; 22 Q. B. D. 444; 37 W. R. 346; 53 J. P. 276; 5 Times L. R. 291.—C.A.

Clerical, Medical and General Life Assurance Society v. Carter, principle applied.

London County Council v. Grove (1896) 44 W. R. 599.—POLLOCK, B. and BRUCE, J.; *affirmed*, (1897) 45 W. R. 279; 61 J. P. 52.—C.A.

Clerical, Medical and General Life Assurance Society v. Carter, explained.

Leeds Benefit Building Society v. Mallandine (1897) 66 L. J. Q. B. 813; [1897] 2 Q. B. 402, 409; 77 L. T. 122; 61 J. P. 675.—C.A.

Clerical, Medical and General Life Assurance Society v. Carter, referred to.

Scottish Widows' Fund and Life Assurance Society v. Inland Revenue (1900) 3 Fraser 129.—CT. OF SESS.

Inland Revenue v. Strang (1878) 15 Scott. L. R. 704; S. C. *nom. Strong, In re*, 1 Tax Cas. 207.—LORD ORDINARY, *distinguished and commented on*.

Turner v. Cuxson (or Cuxon) (1888) 58 L. J. Q. B. 131; 22 Q. B. D. 150; 60 L. T. 382; 37 W. R. 254; 53 J. P. 148.—COLERIDGE, C.J. and MANISTY, J.

Inland Revenue v. Strang, commented on and not followed.

Turner v. Cuxson (or Cuxon), applied.

Herbert v. McQuade (1901) 70 L. J. K. B. 725; [1901] 2 K. B. 761, 770; 84 L. T. 661; 65 J. P. 376.—KENNEDY and PHILLIMORE, JJ.

Inland Revenue v. Strang, approved.

Turner v. Cuxson (or Cuxon), distinguished.

Herbert v. McQuade, reversed.

Herbert v. McQuade (1902) 71 L. J. K. B. 884; [1902] 2 K. B. 631, 647; 87 L. T. 349; 66 J. P. 692.—C.A.

Inland Revenue v. Fairleigh (or Farie) (1878) 16 Scott. L. R. 189.—CT. OF SESS., *referred to*.

Ryhope Coal Co. v. Foyer (1881) 7 Q. B. D. 485, 492; 45 L. T. 404; 30 W. R. 87; 1 Tax Cas. 343.—GROVE and LINDLEY, JJ.

Ryhope Coal Co. v. Foyer, referred to.

Ferguson v. Aikin (1898) 4 Tax Cas. 36.—EX. (SC.); Watson v. Lothian (1902) 4 Tax Cas. 441; 4 Fraser 795.—EX. (SC.).

Ryhope Coal Co. v. Foyer, Ferguson v. Aikin, and Watson v. Lothian, referred to.

Bell v. National Provincial Bank of England (1903) 72 L. J. K. B. 590; [1903] 2 K. B. 249, 261; 88 L. T. 840; 67 J. P. 329.—RIDLEY, J.; *reversed*, 73 L. J. K. B. 142; [1904] 1 K. B. 149.—C.A.

Muat v. Shaw Stewart (1890) 17 Rettie 371.—CT. OF SESS., *distinguished*.

Scottish Widows' Fund and Life Assurance Society v. Inland Revenue (1900) 3 Fraser 129, 136.—CT. OF SESS.

Reg. v. Port of Southampton Commissioners (1869) L. R. 4 H. L. 5.—H.L., *discussed*.

Lawless v. Sullivan (1881) 50 L. J. P. C. 33; 6 App. Cas. 373, 384; 44 L. T. 897; 29 W. R. 917.—P.C.

Watson v. Royal Insurance Co. (1895) 65 L. J. Q. B. 132; [1896] 1 Q. B. 41; 73 L. T. 524; 44 W. R. 89; 59 J. P. 822.—C.A.; *reversing* WILLIAMS, J.; WRIGHT, J. *dissenting; affirmed on other grounds, nom. Royal Insurance Co. v. Watson* (1896) 66 L. J. Q. B. 1; [1897] A. C. 1; 75 L. T. 334; 61 J. P. 404.—H.L. (E.).

Imperial Fire Insurance Co. v. Wilson (1876) 35 L. T. 271.—EX. D., *discussed*.

Last v. London Assurance Corporation (1884) 53 L. J. Q. B. 325; 12 Q. B. D. 389, 400; 50 L. T. 534; 32 W. R. 702.—DAY and A. L. SMITH, JJ.; *affirmed*, C.A., but *reversed*, H.L. (*see supra*, col. 2828).

Cook v. Knott (1887) 4 Times L. R. 164; 2 Tax Cas. 246.—POLLOCK, B. and HAWKINS, J., *followed*.

Revell v. Elsworth Brothers & Co. (1890) 55 J. P. 392; 3 Tax Cas. 12.—STEPHEN and CHARLES, JJ.

Watney v. Musgrave (1880) 49 L. J. Ex. 493; 5 Ex. D. 241; 42 L. T. 690; 28 W. R. 491; 44 J. P. 268.—EX. D., *discussed*.

Reid's Brewery Co. v. Male (1891) 60 L. J. Q. B. 340; [1891] 2 Q. B. 1; 64 L. T. 294; 39 W. R. 459; 55 J. P. 216.—POLLOCK, B. and CHARLES, J.

Watney v. Musgrave, principle applied.

Brickwood Coal Co. v. Reynolds (1897) 77 L. T. 31.—POLLOCK, B. and RIDLEY, J.: *affirmed*, C.A. (*see post*, col. 2831).

Watney v. Musgrave, approved.

Brickwood & Co. v. Reynolds (1897) 67 L. J. Q. B. 26; [1898] 1 Q. B. 95 (*post*).

Gillatt v. Colquhoun (1884) 33 W. R. 258; 2 Tax Cas. 76.—GROVE and A. L. SMITH, JJ.; and Smith v. Westinghouse Brake Co. (1888) 4 Times L. R. 649; 2 Tax Cas. 357, *referred to*.

Reid's Brewery Co. v. Male (1891) 60 L. J. Q. B. 340; [1891] 2 Q. B. 1; 64 L. T. 294; 39 W. R. 459; 55 J. P. 216.—POLLOCK, B. and CHARLES, J.

Reid's Brewery Co. v. Male, distinguished.

Brickwood & Co. v. Reynolds (1897) 77 L. T. 31.—POLLOCK, B. and RIDLEY, J.; affirmed, 67 L. J. Q. B. 26; [1898] 1 Q. B. 95; 77 L. T. 456.—C.A. (*post*).

Russell v. Town and County Bank (1888) 53 L. J. P. C. 8; 13 App. Cas. 418; 59 L. T. 481; 53 J. P. 244.—H.L. (SC.). LORDS HERSCHELL, FITZGERALD and MACNAGHTEN; affirming S. C. *nom. Town and County Bank v. Inland Revenue* (1887) 14 Rettie 528.—CT. OF SESS., *referred to*.

Tennant v. Smith (1892) 61 L. J. P. C. 11; [1892] A. C. 150; 66 L. T. 327; 56 J. P. 596; 19 Rettie 1.—H.L. (SC.).

Russell v. Town and County Bank, discussed.

Brickwood & Co. v. Reynolds (1897) 67 L. J. Q. B. 26; [1898] 1 Q. B. 95; 77 L. T. 456; 46 W. R. 130.—C.A.

A. L. SMITH, L.J.—I quite agree with what my brother Hawkins said in *Watney v. Musgrave* (*supra*, col. 2830). He says: "Here there are two distinct things, the trade of brewer and the public-house, and the expense incurred in respect of the latter cannot be deducted from the profit of the former." When a brewer is making up his balance of profits and gains he places to credit on the one side the beer and other articles and commodities which he has sold and obtained money for; on the other side he places to debit the necessary outgoings for earning that money, and the difference between the two would be, as Lord Herschell pointed out in the House of Lords in *Russell v. Town and County Bank*, the balance of gains and profits on which he would have to pay income tax. What the company are now suggesting they can do is this: That, inasmuch as they foster and keep up the independent trade of the publican, their tenant (and of course the better his trade is kept up the more beer will he probably buy from the brewers, his landlords), the cost of repairing his house is to be a deduction from the gains of the brewers. I am clearly of opinion that that argument is ill-founded and cannot prevail.—p. 30. RIGBY and COLLINS, L.JJ. concurred.

Russell v. Town and County Bank, explained.

Commissioners of Taxation v. Antill [1902] A. C. 422; 71 L. J. P. C. 81; 86 L. T. 783.—P.C.

LORD MACNAGHTEN (for self, LORDS DAVEY, ROBERTSON, LINDLEY and SIR F. NORTH).—Their lordships may observe that *Russell v. Town and County Bank*, on which Owen, J. relied, has little or no bearing on the question. It merely decided that banking premises used by a bank for the purposes of its business were not

used as a "dwelling-house" within the meaning of one of the Rules under Sched. D., although an official of the bank was required to reside there.—p. 427.

Alexandria Waterworks (or Water Co.) v.

Musgrave (1883) 52 L. J. Q. B. 349; 11 Q. B. D. 174; 49 L. T. 287; 32 W. R. 146.—C.A. BRETT, M.R., GOTTON and BOWEN, L.JJ., *rule of construction in, applied*.
Gresham Life Assurance Society v. Styles (1890) 59 L. J. Q. B. 584; 25 Q. B. D. 351, 353; 63 L. T. 411; 38 W. R. 696.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Alexandria Waterworks Co. (or Water Co.)

v. Musgrave, distinguished.

Mersey Loan and Discount Co. v. Wootton (1887) 2 Tax Cas. 316.—POLLOCK, B. and HAWKINS, J., *referred to*.

Gresham Life Assurance Society v. Styles (1892) 62 L. J. Q. B. 41; [1892] A. C. 309, 325; 67 L. T. 479; 41 W. R. 270; 56 J. P. 709.—H.L. (E.).

HALSBURY, L.C.—The C. A. seem to have been impressed by the decision in *Alexandria Water Co. v. Musgrave*. With the decision in that case I am not disposed to agree, though I am not quite certain I am able to adopt the reasoning, which, to some extent, appears to depend upon a distinction between the words "gains" and "profits"—a distinction which I cannot assent to; but, upon the facts, I think I should have come to the same conclusion, since, to put it very plainly, in that case it was a claim to deduct the company's debts for borrowed capital and diminish the amount of the profits of the trading.—p. 44.

LORD WATSON.—An annuity to the widow of a deceased partner, interest on capital advanced by a partner, or upon money borrowed for the purposes of the business, are truly payable out of profits earned, and therefore ought not to be deducted in estimating the income yielded by the business. On that ground I agree with the decision in *Alexandria Water Co. v. Musgrave*, although I am unable to concur in all the reasons which were assigned for it. But the business of the appellants consists in employing their trading capital to pay annuities, as the counterpart of the consideration given by the annuitant, and the annuities are payable out of stock, and not out of business profits.—p. 46.

LORD HERSCHELL.—The payments of interest to the debenture-holders [*Alexandria Waterworks Co. v. Musgrave*] were made out of the profits. These were ascertained by deducting from the moneys earned the expenses incurred in earning them; and of these expenses the payments to the debenture-holders formed no part. A portion of the capital was raised by shares, and another portion by debentures. There was no more reason why interest on the debenture capital should be deducted from the profits, than interest on the share capital. . . . It is by no means clear that the case was not within the prohibition of the 3rd rule [Income Tax Act, 1842, s. 100, Sched. D.]. Although it does not appear to me that the view of the present case which I have placed before your lordships is inconsistent with the decision in *Alexandria Waterworks Co. v. Musgrave*, I think it is in conflict with *Mersey Loan Co. v. Wootton*; but the reasoning which has led me to my

present conclusion applies equally to the facts of that case.—p. 49. LORDS MORRIS and FIELD concurred.

Gresham Life Assurance Co. v. Styles, 24 Q. B. D. 500; 62 L. T. 464; 38 W. R. 480.—POLLOCK, B. and HAWKINS, J.; *affirmed*, (1890) 59 L. J. Q. B. 584; 25 Q. B. D. 351; 63 L. T. 411; 38 W. R. 696.—C.A. Esher, M.R., LINDLEY and LOPES, L.J.J.; *the latter decision reversed*, (1892) 62 L. J. Q. B. 41; [1892] A. C. 309; 67 L. T. 479; 41 W. R. 270; 56 J. P. 709.—H.L. (E.).

Gresham Life Assurance Co. v. Styles.

Principles applied, Anglo-Continental Guano Works v. Bell (1894) 10 R. 161.—MATHEW and CAVE, JJ.; London County Council v. Grove (1896) 44 W. R. 599.—POLLOCK, B. and BRUCE, J.; (affirmed, 1897) 45 W. R. 279; 61 J. P. 52.—C.A. Esher, M.R., LOPES and RIGBY, L.J.J.).

Gresham Life Assurance Society v. Styles, referred to.

Watson v. Royal Insurance Co. (1895) 65 L. J. Q. B. 132; [1896] 1 Q. B. 41; 73 L. T. 524; 44 W. R. 89; 59 J. P. 822.—C.A.

Att.-Gen. v. London County Council (1899) 69 L. J. Q. B. 241; [1900] 1 Q. B. 192; 81 L. T. 698; 48 W. R. 294; 64 J. P. 68.—C.A.; which *affirmed*, 68 L. J. Q. B. 823; [1899] 2 Q. B. 226; 80 L. T. 767.—DAY and LAURANCE, JJ.; *reversed nom.* London County Council v. Att.-Gen. (1900) 70 L. J. Ch. 77; [1901] A. C. 26; 83 L. T. 605; 49 W. R. 686; 65 J. P. 227.—H.L. (E.).

Att.-Gen. v. London County Council, dictum referred to.

Hudson v. Gribble (1903) 72 L. J. K. B. 242; [1903] 1 K. B. 517, 526; 88 L. T. 186; 51 W. R. 457; 67 J. P. 85; 1 L. G. R. 292.—C.A.

Blake v. Imperial Brazilian Ry. (1884) 2 Tax Cas. 58.—C.A., *applied*.

Nizam's State Ry. v. Wyatt (1890) 59 L. J. Q. B. 430; 24 Q. B. D. 548, 554; 62 L. T. 765.—POLLOCK, B. and HAWKINS, J.

Nizam's State Ry. v. Wyatt, discussed and applied.

Scoble v. Secretary of State for India (1903) 72 L. J. K. B.; [1903] 1 K. B. 494, 503.—C.A. v. WILLIAMS, STIRLING and MATHEW, L.J.J.; *affirmed*, H.L. (*see post*, col. 2836).

Colquhoun v. Heddon, 59 L. J. Q. B. 142; 24 Q. B. D. 491; 62 L. T. 155; 38 W. R. 366; 54 J. P. 392.—POLLOCK, B. and HAWKINS, J.; *affirmed*, (1890) 59 L. J. Q. B. 465; 25 Q. B. D. 129; 62 L. T. 853; 38 W. R. 545.—C.A. Esher, M.R. and LOPES, L.J., FRY, L.J., *doubting*.

Colquhoun v. Heddon, dicta applied.

Adam v. British and Foreign Steamship Co. (1898) 67 L. J. Q. B. 844; [1898] 2 Q. B. 430; 79 L. T. 31.—DARLING, J.

Colquhoun v. Heddon, referred to.

Davidson v. Hill (1901) 70 L. J. K. B. 788; [1901] 2 K. B. 606, 612; 85 L. T. 118; 49 W. R. 630.—KENNEDY and PHILLIMORE, JJ.

Tennant v. Smith (1891) 18 Rettie 428.—CT OF SESS.; *reversed*, (1892) 61 L. J. P. C. 11

[1892] A. C. 150; 66 L. T. 327; 56 J. P. 596; 19 Rettie 1.—H.L. (SC.).

Tennant v. Smith, followed.

Inland Revenue v. Sutherland (1894) 21 Rettie 753.—CT. OF SESS.

Tennant v. Smith and Inland Revenue v. Sutherland, distinguished.

Inland Revenue v. Fry (1895) 22 Rettie 422.—CT. OF SESS.

Tennant v. Smith, applied.

Att.-Gen. v. Beech (1898) 67 L. J. Q. B. 585; [1898] 2 Q. B. 147, 150; 78 L. T. 584; 46 W. R. 435; 62 J. P. 371.—C.A.; *affirmed*, 68 L. J. Q. B. 130; [1899] A. C. 53; 79 L. T. 565; 47 W. R. 257; 63 J. P. 116.—H.L. (E.).

Tennant v. Smith, referred to.

Herbert v. McQuade (1901) 70 L. J. K. B. 725; [1901] 2 K. B. 761, 770; 84 L. T. 661; 65 J. P. 376.—KENNEDY and PHILLIMORE, JJ.; *reversed*, C.A. (*supra*, col. 2830); Att.-Gen. v. Selborne (Earl) (1901) 71 L. J. K. B. 289, 297; [1902] 1 K. B. 388, 399; 85 L. T. 714; 50 W. R. 210; 66 J. P. 132.—C.A.; Att.-Gen. v. Eastbourne Corporation (1901) [1902] 1 K. B. 403, 408; 71 L. J. K. B. 181; 85 L. T. 745; 50 W. R. 161; 66 J. P. 36.—C.A.; *affirmed* [1904] A. C. 155; 73 L. J. K. B. 259; 90 L. T. 99; 52 W. R. 577; 68 J. P. 393; 2 L. G. R. 789; 20 T. L. R. 252.—H.L. (E.).

Wall v. Wall (1847) 16 L. J. Ch. 305; 15 Sim. 513; 11 Jur. 403.—SHADWELL, V.-C.; and **Lethbridge v. Thurlow** (1851) 21 L. J. Ch. 538; 15 Beav. 334.—M.R., *applied*.

Sadler v. Rickards (1858) 4 K. & J. 302; 6 W. R. 532.—WOOD, V.-C.

Lethbridge v. Thurlow, not applied.

Lovat (Lord) v. Leeds (Duchess) (1862) 31 L. J. Ch. 503; 2 Dr. & Sm. 62.—L.C. (*post*).

Sadler v. Rickards, Wall v. Wall, and Lethbridge v. Thurlow, discussed.

Gleadow v. Leatham (1882) 52 L. J. Ch. 102; 22 Ch. D. 269, 272; 48 L. T. 264; 31 W. R. 269.—KAY, J.

Turner v. Mullineux (1861) 1 J. & H. 334.—WOOD, V.-C., *applied*.

Lovat (Lord) v. Leeds (Duchess) (1862) 31 L. J. Ch. 503; 2 Dr. & Sm. 62; 6 L. T. 307; 10 W. R. 397.—WESTBURY, L.C.

Turner v. Mullineux, discussed.

Abadam v. Abadam (1864) 33 L. J. Ch. 593; 33 Beav. 475; 10 Jur. (N.S.) 505; 10 L. T. 53; 12 W. R. 615.—ROMILLY, M.R.

Turner v. Mullineux and Abadam v. Abadam, discussed.

Gleadow v. Leatham (1882) 52 L. J. Ch. 102; 22 Ch. D. 269, 272; 48 L. T. 264; 31 W. R. 269.—KAY, J.

Turner v. Mullineux, applied.

Buckle, *In re*, Williams v. Marson (1893) 63 L. J. Ch. 330; [1894] 1 Ch. 286; 7 R. 72; 70 L. T. 115; 42 W. R. 229.—C.A.

Turner v. Mullineux and Gleadow v. Leatham, referred to.

Parker-Jervis, *In re*, Salt v. Locker (1898) 67 L. J. Ch. 682; [1898] 2 Ch. 643, 652; 79 L. T. 403; 47 W. R. 147.—KEKEWICH, J.

Turner v. Mullineux and Buckle, In re, Williams v. Marson (*supra*, col. 2834), *distinguished*.

Birks, In re, Kenyon v. Birks (1899) 68 L. J. Ch. 319; [1899] 1 Ch. 703, 709; 80 L. T. 257; 47 W. R. 374.—KEKEWICH, J.; reversed, 69 L. J. Ch. 124; [1900] 1 Ch. 417; 81 L. T. 741.—C.A.

Festing v. Taylor, 31 L. J. Q. B. 36; 8 Jur. N. S. 190; 5 L. T. 826; 10 W. R. 246; 3 B. & S. 217.—Q.B.; reversed, (1862) 32 L. J. Q. B. 41; 3 B. & S. 235; 9 Jur. (N.S.) 44; 7 L. T. 429; 11 W. R. 70.—EX. CH.

Festing v. Taylor, 31 L. J. Q. B. 36, *referred to*.

Lovat (Lord) v. Leeds (Duchess) (1862) 2 Dr. & Sm. 62.—L.C. (*post*); **Gleadow v. Leatham** (1882) 52 L. J. Ch. 102; 22 Ch. D. 269, 271.—KAY, J. (*post*).

Lovat (Lord) v. Leeds (Duchess) (1862) 31 L. J. Ch. 503; 2 Dr. & Sm. 62; 6 L. T. 307; 10 W. R. 897.—V.-C., S. C. (1862) 7 L. T. 36.—WESTBURY, L.C., *followed*.

Bannerman's Estate, In re, Bannerman v. Young (1882) 21 Ch. D. 105; 51 L. J. Ch. 449.

HALL, V.-C.—I find in this case very much the same language as was used in *Lovat (Lord) v. Leeds (Duchess)*, and there Kindersley, V.-C., was of opinion that there was no difficulty in speaking of income-tax as a tax "affecting the hereditaments," that it literally fell within those words, giving to them their technical and proper construction. To my mind, it is perfectly plain that the trustees deducting income-tax from the annuities, as they have in fact done, have thereby rendered them to the plaintiff, not as clear yearly sums "free from all deductions . . . whatsoever" according to the language of the will.—p. 110.

Lovat (Lord) v. Leeds (Duchess), *referred to*.

Pearth v. Marriott (1882) 51 L. J. Ch. 821; 22 Ch. D. 182, 188; 46 L. T. 170; 30 W. R. 884.—BACON, V.-C.; reversed, C.A. (*see post*).

Lovat (Lord) v. Leeds (Duchess) and Bannerman's Estate, In re, Bannerman v. Young, *not applied*.

Gleadow v. Leatham (1882) 52 L. J. Ch. 102; 22 Ch. D. 269; 48 L. T. 264; 31 W. R. 269.—KAY, J.

Pearth v. Marriott (1882) 51 L. J. Ch. 821; 46 L. T. 800; 30 W. R. 884.—BACON, V.-C.; reversed, (1882) 52 L. J. Ch. 221; 22 Ch. D. 182; 48 L. T. 170; 31 W. R. 68.—C.A. JESSEL, M.R. and COTTON, L.J.

Mosse v. Salt (1863) 32 L. J. Ch. 756; 32 Beav. 269.—ROMILLY, M.R., *not followed*.

Goslings and Sharpe v. Blake (1888) 22 Q. B. D. 153, 156; 53 J. P. 87.—COLERIDGE C.J. and MANISTY, J.; reversed, C.A. (*post*, col. 2836).

Mosse v. Salt, *explained and followed*.

Stewart v. Stewart (1891) 27 L. R. Ir. 351.—PORTER, M.R.

Dinning v. Henderson (1850) 19 L. J. Ch. 273; 3 DeG. & Sm. 702; 14 Jur. 1038.—KNIGHT BRUCE, V.-C., *discussed*.

Bebb v. Bunny (1854) 1 K. & J. 216; 1 Jur. (N.S.) 203.—WOOD, V.-C.

Dinning v. Henderson and Bebb v. Bunny, *followed*.

Goslings and Sharpe v. Blake (1888) 22 Q. B. D. 153, 156; 60 L. T. 329; 37 W. R. 774; 53 J. P. 87.—COLERIDGE, C.J. and MANISTY, J.

Bebb v. Bunny, *distinguished*.

Dinning v. Henderson, *commented on*.

Goslings and Sharpe v. Blake, *reversed*.

Goslings and Sharpe v. Blake (1889) 58 L. J. Q. B. 446; 23 Q. B. D. 324; 61 L. T. 311; 37 W. R. 774.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ. *See judgments at length*.

Henley & Co., In re, 88 B. T. 742.—MALINS, V.-C.; reversed. (1878) 48 L. J. Ch. 147; 9 Ch. D. 469; 39 L. T. 53; 26 W. R. 885.—C.A. JAMES, BRETT and COTTON, L.JJ.

Henley & Co., In re, *explained*.

Oriental Bank Corporation, In re, The Crown, Ex parte (1884) 28 Ch. D. 643; 54 L. J. Ch. 327; 52 L. T. 170.

CHITTY, J.—It is settled law that on the construction of the Companies Act, 1862, the Crown is not bound; the Crown not being named, and there being no necessary implication arising from the Act itself by which the Crown's prerogative is affected or taken away. That is the short statement of the decision of the C.A. in *Henley & Co., In re*.—p. 647.

Oriental Bank Corporation, In re, The Crown, Ex parte, *applied*.

Art Engraving Co., In re (1889) 60 L. T. 381; 5 Times L. R. 275.—KAY, J.

Currie v. Goold (1817) 2 Madd. 163.—V.-C., *followed*.

Turner, Ex parte, Lascelles, In re (1864) 11 L. T. 352; 13 W. R. 104.—HOLROYD, COMMISSIONER.

Foley v. Fletcher (1858) 28 L. J. Ex. 100; 3 H. & N. 769; 5 Jur. (N.S.) 342; 7 W. R. 141.—EX., *referred to*.

Direct United States Cable Co. v. Anglo-American Telegraph Co. (1877) 46 L. J. P. C. 71; 2 App. Cas. 394, 412; 36 L. T. 265.—P.C.; **Clerical Medical and General Life Assurance Society v. Carter** (1888) 57 L. J. Q. B. 614; 21 Q. B. D. 339; 37 W. R. 124.—CHARLES and MANISTY, JJ.; (affirmed, (1889) 58 L. J. Q. B. 224; 22 Q. B. D. 444; 37 W. R. 346; 56 J. P. 276; 5 Times L. R. 291.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.).

Foley v. Fletcher, *distinguished*.

Scoble v. Secretary of State for India (1902) 71 L. J. K. B. 727; [1902] 2 K. B. 413; 87 L. T. 396.—PHILLIMORE, J.

Foley v. Fletcher, *discussed and applied*.

Scoble v. Secretary of State for India, *reversed*.

Scoble v. Secretary of State for India (1903) 72 L. J. K. B. 215; [1903] 1 K. B. 494, 502; 88 L. T. 144; 51 W. R. 580.—C.A. V. WILLIAMS, STIRLING and MATHEW, L.JJ.; affirmed nom. **Secretary of State for India v. Scoble** (1903) 72 L. J. K. B. 617; [1903] A. C. 299; 89 L. T. 1; 51 W. R. 675.—H.L. (E.).

Att.-Gen. v. Lancashire and Yorkshire Ry.
(1863) 83 L. J. Ex. 163; 2 H. & C. 792;
10 Jur. (N.S.) 705; 10 L. T. 95; 13 W. R.
8.—EX. *referred to*.
Att.-Gen. v. McCormack [1903] 2 Ir. R. 517.
520.—GIBSON and BOYD, JJ.

Davies v. Fitton (1842) 2 Dr. & War. 225; 4
Ir. Eq. R. 612.—L.C., *applied*.
Colbron v. Travers (1862) 31 L. J. C. P. 257;
12 C. B. (N.S.) 181; 8 Jur. (N.S.) 1105; 6 L. T.
287; 10 W. R. 603.—C.P.: **May v. Platt** (1900)
69 L. J. Ch. 357; [1900] 1 Ch. 616; 83 L. T.
123; 48 W. R. 617.—FARWELL, J. *And see ante*,
col. 1833.

Gaskell v. King (1809) 11 East 165; 14 R. R.
462.—K.B., *followed*.
Wigg v. Shuttleworth (1810) 13 East 87.—
K.B.; **Fuller v. Abbott** (1811) 4 Taunt. 105.
—K.B.

Gaskell v. King, *referred to*.
Pickering v. Ilfracombe Ry. (1868) 37 L. J.
C. P. 118, 123; L. R. 3 C. P. 235, 250; 17 L. T.
650; 16 W. R. 458.—C.P.

**Sowrey v. Lynn Harbour Mooring Commis-
sioners** (1887) 2 Tax Cas. 201.—A. L. SMITH
and GRANTHAM, JJ. On question of costs *see*
Bowers v. Harding (1891) 60 L. J. Q. B. 474;
[1891] 1 Q. B. 560, 566; 64 L. T. 201; 39 W. R.
558; 55 J. P. 376.—POLLOCK, B. and CHARLES, J.

2. INHABITED HOUSE DUTY.

Riley v. Read (1879) 48 L. J. Ex. 437; 4
Ex. D. 100; 27 W. R. 414.—KELLY, C.B.
and POLLOCK, B., *discussed and dis-
tinguished*.
London Library v. Carter (1890) 62 L. T. 466.
—POLLOCK, B. and HAWKINS, J.

**Edinburgh Life Assurance Co. v. Solicitor of
Inland Revenue** (1875) 12 Scott. L. R. 275;
2 Rettie 394.—C.T. OF SESS., *disting-
uished and not applied*.
**Chartered Mercantile Bank of India, London
and China v. Wilson** (1877) 47 L. J. Ex. 153; 3
Ex. D. 108, 115.—EX. D. (*post*); **Scottish
Widows' Fund and Life Assurance Society v.
Inland Revenue** (1900) 3 Fraser, 129, 135.—C.T.
OF SESS.

Evans and Finch's Case (1638) Cro. Car. 473.
—K.B.
Discussed, **Att.-Gen. v. Mutual Tontine West-
minster Chambers Association** (1876) 45 L. J.
Ex. 886; 1 Ex. D. 469, 477; 35 L. T. 224; 24
W. R. 996.—C.A.; **Yorkshire Insurance Co. v.
Clayton** (1881) 51 L. J. Q. B. 82; 8 Q. B. D.
421, 423.—C.A. (*post*, col. 2838); *referred to*,
Rogers v. Hosegood (1899) 69 L. J. Ch. 59;
[1900] 2 Ch. 388, 393; 81 L. T. 515; 48 W. R.
202.—FARWELL, J. (affirmed, C.A., *post*, col. 2838).

Rusby v. Newson (1875) 44 L. J. Ex. 143;
L. R. 10 Ex. 322; 39 L. T. 19; 23 W. R.
632.—EX. KELLY, C.B., *doubting*.
Explained, **Chartered Mercantile Bank of
India, London and China v. Wilson** (1877) 47
L. J. Ex. 153; 3 Ex. D. 108, 116; 38 L. T. 254;
26 W. R. 265.—EX. D. (CLEASBY, B., *dissenting*);
discussed, **Chapman v. Royal Bank of Scotland**
(1881) 50 L. J. Q. B. 670; 7 Q. B. D. 136, 141;
45 L. T. 215; 30 W. R. 81; 46 J. P. 38.—

HUDDLESTON, B. and HAWKINS, J.: **Grant v.
Langston** (1900) 69 L. J. P. C. 66; [1900] A. C.
383, 401; 82 L. T. 629; 64 J. P. 644.—H.L.
(SC.).

**Att.-Gen. v. Mutual Tontine Westminster
Chambers Association** (1876) 1 Ex. D.
469.—C.A. JESSEL, M.R., COLERIDGE, C.J.
and POLLOCK, B., *discussed*.
Chapman v. Royal Bank of Scotland (1881) 50
L. J. Q. B. 670; 7 Q. B. D. 136, 141 (*supra*,
col. 2837); **Yorkshire Fire and Life Insurance
Co. v. Clayton** (1881) 51 L. J. Q. B. 82; 8
Q. B. D. 421; 45 L. T. 697; 30 W. R. 174.—C.A.
JESSEL, M.R., BRETT and COTTON, L.J.J.; **Grant
v. Langston** (1900) 69 L. J. P. C. 66; [1900]
A. C. 383; 82 L. T. 629; 64 J. P. 644.—H.L. (SC.).
HALSBURY, L.C. LORDS MACNAGHTEN, MORRIS,
DAVEY and BRAMPTON.

**Att.-Gen. v. Mutual Tontine Westminster
Chambers Association**, *discussed*.
Rogers v. Hosegood (1899) 69 L. J. Ch. 59;
[1900] 2 Ch. 388; 81 L. T. 515; 48 W. R. 202.—
FARWELL, J.: *affirmed* (1900) 69 L. J. Ch. 652;
[1900] 2 Ch. 388; 83 L. T. 186; 48 W. R. 659.—
C.A.

**Att.-Gen. v. Mutual Tontine Westminster
Chambers Association**, *followed*.
Kimber v. Adnams (1900) 69 L. J. Ch. 296;
[1900] 1 Ch. 412; 82 L. T. 136; 48 W. R. 322.—
COZENS-HARDY, J.; *affirmed*, C.A.

Yorkshire Fire Insurance Co. v. Clayton
(1881) 51 L. J. Q. B. 82; 8 Q. B. D. 421;
45 L. T. 697; 30 W. R. 174.—C.A.,
followed.
Chapman v. Royal Bank of Scotland (1881)
50 L. J. Q. B. 670; 7 Q. B. D. 136; 45 L. T.
215; 30 W. R. 81; 46 J. P. 38.—HUDDLESTON, B.
and HAWKINS, J.

**Yorkshire Fire Insurance Co. v. Clayton and
Chapman v. Royal Bank of Scotland**,
applied.
Hoddinot v. Home and Colonial Stores (1896)
65 L. J. Q. B. 291; [1896] 1 Q. B. 169; 74 L. T.
79; 44 W. R. 285; 60 J. P. 262.—WRIGHT and
KENNEDY, JJ.

Yorkshire Fire Insurance Co. v. Clayton,
distinguished.
Corke v. Brims (1883) 10 Rettie 1128; 48 J. P.
376.—C.T. OF SESS.

**Yorkshire Fire Insurance Co. v. Clayton
and Chapman v. Royal Bank of Scotland**,
considered.
Grant v. Langston (1900) 69 L. J. P. C. 66;
[1900] A. C. 383, 393, 397; 82 L. T. 629; 64
J. P. 644.—H.L. (SC.).

Chapman v. Royal Bank of Scotland, *dis-
cussed and distinguished*.
London and Westminster Bank v. Smith (1902)
87 L. T. 244; 67 J. P. 229.—H.L. (E.).

Russell v. Coutts (1881) 9 Rettie 261; 19
Scott. L. R. 197; 1 Tax Cas. 469.—C.T.
OF SESS., *distinguished*.
Corke v. Brims (1883) 10 Rettie 1128; 48 J. P.
376.—C.T. OF SESS.

Russell v. Coutts, *followed*.
Clerk v. British Linen Co. (1885) 49 J. P.
825.—C.T. OF SESS.

Russell v. Coutts, considered.

Grant v. Langston (1900) 69 L. J. P. C. 66; [1900] A. C. 383; 82 L. T. 629; 64 J. P. 644.—H.L. (SC.); reversing 25 Rettle 1040.—CT. OF SESS.

Russell v. Coutts, adopted.

London and Westminster Bank v. Smith (1901) 85 L. T. 747; 66 J. P. 163.—C.A.; affirmed, H.L. (E.), *post*.

Cork v. Brims (1883) 10 Rettle 1128: 48

J. P. 376.—CT. OF SESS., *distinguished*.
Clerk v. British Linen Co. (1885) 49 J. P. 825.—CT. OF SESS.

Cork v. Brims, principle applied.

Smiles v. Crooke (1886) 50 J. P. 696.—CT. OF SESS.

Grant v. Langston (supra), distinguished.

London and Westminster Bank v. Smith (1901) 85 L. T. 747; 66 J. P. 163.—C.A. COLLINS, M.R., STIRLING and MATHEW, L.JJ., affirmed, *post*.

Grant v. Langston, discussed and distinguished.

London and Westminster Bank v. Smith (1902) 87 L. T. 244; 67 J. P. 229.—H.L. (E.). HALSBURY, L.C., LORDS MACNAGHTEN, BRAMPTON and LINDLEY.

LORD BRAMPTON.—In *Grant v. Langston* one roof covered two distinct houses, the one being solely occupied for trade, and therefore not assessable, the other being solely used for the residential purposes of the trader: the latter was clearly and purely an inhabited house, and was therefore properly assessed.—p. 246.

Cases decided by Judges sitting in Serjeants' Inn, held not binding.

Jepson v. Gribble (1876) 1 Ex. D. 151; 45 L. J. Ex. 502; 34 L. T. 493; 24 W. R. 460.—EX. D.

HUDDLESTON, B.—With regard to the cases referred to as having been decided by the judges in Serjeants' Inn, I have no doubt that the records existing in the Inland Revenue Office have been accurately drawn up; but I protest against its being supposed that those cases are binding on us as decisions. The reasons for the decisions are not given, the records have not the guarantee of a reporter known to the public, and they are never laid before the public so as to be discussed, and to enable any mistakes which there may be in the reports to be detected.—p. 156.

Jepson v. Gribble, approved.

Wilson v. Fasson (1883) 48 J. P. 361.—CT. OF SESS.

Needham v. Bowers (1888) 21 Q. B. D. 436;

59 L. T. 404; 37 W. R. 125.—HUDDLESTON, B. and CHARLES, J., *discussed*.

Charterhouse School Governors v. Lamargue (1890) 59 L. J. Q. B. 495; 25 Q. B. D. 121, 127; 62 L. T. 907; 38 W. R. 776; 54 J. P. 790.—POLLOCK, B. and HAWKINS, J.

Needham v. Bowers and Charterhouse School Governors v. Lamargue, distinguished.

Cawse v. Nottingham Lunatic Asylum [1891] 1 Q. B. 585; 60 L. J. Q. B. 485; 65 L. T. 155; 39 W. R. 461; 55 J. P. 582.

POLLOCK, B.—In that case (*Needham v. Bowers*) the Court held that the institution, being wholly self-supporting, was not exempt as a hospital within the meaning of the exemption with which we are now dealing. We have no occasion whatever to quarrel with that decision, nor can we say that it governs the decision in the present case, because the whole force of that decision is that the hospital was supported wholly out of payments made by patients, which is very different from the facts in the present case. . . . It may be that for a few years a hospital may flourish by reason of taking those fees; it may be that a few years hence those fees will be less; the important point to consider is that the original eleemosynary character of the institution is not blotted out, but still exists. That is the distinction which arises between this case and the *Charterhouse Case*.—p. 590.

CHARLES, J.—The character of this institution differs from the character of the institution which was under consideration in *Needham v. Bowers*, in this respect, that whereas in *Needham v. Bowers* the institution was maintained wholly out of the payment by patients, and had no charitable endowment whatever, in this case there is a charitable endowment which amounts to many hundreds a year.—p. 592.

Needham v. Bowers, referred to.**Cawse v. Nottingham Lunatic Asylum, approved.****Charterhouse School Governors v. Lamargue, applied.**

Southwell v. Royal Holloway College (1895) 64 L. J. Q. B. 791; [1895] 2 Q. B. 487; 15 R. 533; 73 L. T. 183; 44 W. R. 315; 59 J. P. 503.—GRANTHAM and CHARLES, JJ.

Yewens v. Noakes (1880) 6 Q. B. D. 530;

50 L. J. Q. B. 132; 44 L. T. 128; 28 W. R. 562; 45 J. P. 8.—C.A., *explained*.

Rolfe v. Hyde (1881) 6 Q. B. D. 673; 50 L. J. Q. B. 481; 44 L. T. 775; 45 J. P. 632.—Q.B.D.

LINDLEY, J.—Reliance has been placed on the judgment in *Yewens v. Noakes*, but I do not think it is any authority against the exemption which is now claimed. I am not prepared to say what my decision would be if the opinions of the commissioners were not before me, but I think the facts are wholly different from those in *Yewens v. Noakes*. There the clerk lived in the house with his wife, children, and servant, and Thesiger, L.J., says, "The present is not upon the facts stated to us by the commissioners, the case of an ordinary caretaker, but of a man who occupies with his wife and family a considerable portion of the sitting-rooms and bedrooms of the dwelling, and occupies them not merely with his wife and family, but with a servant, for the purpose of attending upon him and his family." Further on the L.J. says that there is another ground for allowing the appeal that the legislature, in using the term servant, uses it in its ordinary and popular sense as a menial or domestic servant. But this opinion is extra-judicial, and he further says that, with reference to the difficulty there must be of drawing the line between cases under the Act, the commissioners must decide the point, and if they had found as a fact that the caretaker was a servant the Court would not be justified in interfering.—p. 675. *And see post*, col. 2841.

Yewens v. Noakes (*supra*), *applied*.
Wootten v. Rolfe (1881) 47 L. T. 252.—GROVE and LOPES, JJ.

Yewens v. Noakes, *distinguished*.

Wootten v. Rolfe and **Rolfe v. Hyde** (*supra*, col. 2840), *referred to*.
City Bank v. Lash (1881) 47 L. T. 254.—GROVE and LOPES, JJ. *See now*, 44 Vict. c. 12, s. 24.

Cheape v. Kinnmont (1888) 2 Tax Cas. 418: 16 Rottie 144; 26 Scottish L. R. 103.—CT. OF SESS., *approved and followed*.
Lambton v. Kerr (1895) 64 L. J. Q. B. 749: [1895] 2 Q. B. 233, 237; 15 R. 475; 43 W. R. 541; 59 J. P. 775.

GRANTHAM, J.—Looking, therefore, at the building as a whole, I am clearly of opinion that the case comes within the decision in the Scotch case of *Cheape v. Kinnmont*, where it was held that in the case of hunt kennels and the dwellings of hunt servants they must all be looked at together as one set of buildings, although there was no communication between the dwellings used by the hunt servants and the buildings occupied by the hounds and the other buildings occupied for the purposes of the hunt.—p. 751. CHARLES, J. to the same effect.

Cheape v. Kinnmont and Young v. Douglas (1879) 1 Tax Cas. 227.—CT. OF SESS., *explained and applied*.

Browne v. Furtado (1903) 73 L. J. K. B. 296: [1903] 1 K. B. 723, 732; 88 L. T. 309; 67 J. P. 161.—C.A. *And see* Inland Revenue v. Edinburgh Corporation (1903) 5 Fraser. 875.—CT. OF SESS.

Clifton College v. Thompson (1896) 65 L. J. Q. B. 231; [1896] 1 Q. B. 432; 74 L. T. 168; 44 W. R. 410; 60 J. P. 599.—WRIGHT and KENNEDY, JJ., *followed*.

Charterhouse School v. Gayler (1896) 65 L. J. Q. B. 233; [1896] 1 Q. B. 437; 74 L. T. 171; 44 W. R. 412; 60 J. P. 326.—WRIGHT and KENNEDY, JJ.

3. LAND TAX.

Chelsea Waterworks v. Bowley (1851) 20 L. J. Q. B. 520; 17 Q. B. 358; 15 Jur. 1129.—Q.B., *distinguished*.

Reg. v. East London Waterworks (1852) 21 L. J. M. C. 174; 18 Q. B. 705; 16 Jur. 711.—Q.B. *And see* Waterloo Bridge Co. v. Cull (*post*, col. 2843).

Chelsea Waterworks v. Bowley, *referred to*.
Charing Cross Bridge Co. v. Mitchell (1855) 4 El. & Bl. 549; 24 L. J. Q. B. 249; 1 Jur. (N.S.) 608; 3 W. R. 378.—EX. CH.

CAMPBELL, C.J.—The attempt there was to rate the company as occupiers of land.—p. 560.

Chelsea Waterworks v. Bowley, *discussed*.

Reg. v. East London Waterworks, *commented on*.

Metropolitan Ry. v. Fowler (1891) 61 L. J. Q. B. 193; [1892] 1 Q. B. 165; 65 L. T. 772; 40 W. R. 306.—C.A. *ESHER, M.R. and KAY, L.J.*; LOPES, L.J., *dissenting*; affirmed, H.L., *post*.

Chelsea Waterworks v. Bowley and **Reg. v. East London Waterworks Co.**, *distinguished*.

Metropolitan Ry. v. Fowler (1893) 62 L. J. Q. B. 553; [1893] A. C. 416; 1 R. 264; 69 L. T. 390; 42 W. R. 270; 57 J. P. 756.—H.L. (R.)

HERSCHELL, L.C.—In that case [*Chelsea Waterworks v. Bowley*] it was decided, upon

the terms of the particular statute relating to the waterworks then in question, that the water company, in respect of their right to lay pipes for the purpose of carrying a stream of water through certain lands, had no interest in the lands, but had only an easement over them. It is quite unnecessary to inquire whether, upon the true construction of the Waterworks Act in relation to the facts of that case, a correct conclusion was arrived at in determining that the water company possessed an easement only. It is certainly a little difficult to reconcile some of the expressions used in that case with those used in *Reg. v. East London Waterworks Co.* I do not propose to enter upon any further discussion of those cases, because the *ratio decidendi* in *Chelsea Waterworks v. Bowley* was distinctly this, whether right or wrong, that the water company had no greater rights than those which are possessed by a person entitled to an easement, and that they had no interest in the land. If in the present case the right of the railway company was an easement only, I should be quite ready to follow the decision in *Chelsea Waterworks v. Bowley*, and to hold that that easement could not be made subject to the payment of land tax. But . . . the railway company have not merely an easement . . . they are the owners of a hereditament.—p. 555. LORD ASHBORNE to the same effect.

Metropolitan Ry. v. Fowler, *referred to*.

Halkyn District Drainage Co. v. Holywell Union (1893) 9 R. 779; 69 L. T. 705.—C.A.

Metropolitan Ry. v. Fowler, *applied*.

Farmer v. Waterloo and City Ry. [1895] 1 Ch. 527; 64 L. J. Ch. 338; 13 R. 306; 72 L. T. 225; 43 W. R. 363.

KEKEWICH, J.—What is the meaning of enabling the company to “appropriate and use the subsoil and under-surface”? The definition of the word “appropriate” is to be found in *Metropolitan Ry. v. Fowler*, towards the end of the speech of the L.C., and also in the speech of Lord Watson, who says: “To appropriate, according to its natural meaning, is to take and keep a thing by exclusive right; and, as I construe their Act, the authority which it confers upon the company is, to take and exclusively possess as much of the subsoil below highways as may be required for the purposes of the undertaking.” While dealing with that case, I may add that the H. L. held, as a natural consequence, that what the company had taken was “land.” . . . However, translating the word “appropriate” in the way that Lord Watson translates it, it really comes to the same thing as purchase—taking the subsoil for the company’s exclusive possession; that is to say, excluding all others and making it their own.—p. 532.

Vauxhall Bridge Co. v. Sawyer (1851) 20 L. J. Ex. 304; 6 Ex. 504.—EX., *followed*.

Charing Cross Bridge Co. v. Mitchell (1855) 24 L. J. Q. B. 249; 4 El. & Bl. 549; 1 Jur. (N.S.) 608; 3 W. R. 378.—EX. CH. *And see* col. 2843.

Vauxhall Bridge Co. v. Sawyer and **Charing Cross Bridge Co. v. Mitchell**, *distinguished*.

Triton v. Nicholls (1856) 5 W. R. 24.—Q.B.

Charing Cross Bridge Co. v. Mitchell, *distinguished*.

New River Co. v. Hertford Land Tax Commissioners (1857) 2 H. & N. 129; 26 L. J. Ex. 281; 5 W. R. 611.—EX.

POLLOCK, C.B. (for the Court).—Assuming, therefore, that the land tax has been redeemed, we think the governor and company are not liable in respect of the springs, as we consider the redemption relieves the land and all its natural production and profits from further tax, although it may be that it was not known at the time of the redemption that they existed. The hereditament there was an entirely new one, created by an Act of Parliament, and not any part of the natural production and profit of the soil.—p. 143.

Vauxhall Bridge Co. v. Sawyer (*supra*), *referred to*.

Waterloo Bridge Co. v. Cull (or Coward) (1858) 1 El. & El. 213; 29 L. J. Q. B. 10; 5 Jur. (N.S.) 1288.—EX. CH.; affirming 28 L. J. Q. B. 70; 5 Jur. (N.S.) 464; 7 W. R. 87.—Q.B.

CAMPBELL, C.J. (for the Court).—The redemption of the land tax, as to part of the property is immaterial, as the tolls are a separate tenement from the land; *Vauxhall Bridge Co. v. Sawyer*, *Chelsea Waterworks Co. v. Bowley* (*supra*, col. 2841).—p. 243.

Waterloo Bridge Co. v. Cull (or Coward), *distinguished*.

Carr v. Fowle (1893) 62 L. J. Q. B. 177; [1893] 1 Q. B. 251; 5 Ll. 163; 68 L. T. 123; 41 W. R. 365; 57 J. P. 136.—**DAY and COLLINS, JJ.** **COLLINS, J.**—*Waterloo Bridge Co. v. Coward* did not decide that the words "other rate, charge, or assessment" could not include land tax, as the words in that case were "any parochial rates or assessments whatever." The word "other" was wide enough to include land tax.—p. 179.

Harrison v. Bulcock (1788) 1 H. Bl. 68.—K.B.

All Souls College v. Costar (1804) 3 B. & P. 635.—C.P.

Att.-Gen. v. Hill (1836) 6 L. J. Ex. 105; 2 M. & W. 160.—EX., *discussed*.

Colchester (Lord) v. Kewney (1866) 35 L. J. Ex. 204; L. R. 1 Ex. 308; 4 H. & C. 445; 12 Jur. (N.S.) 743; 14 L. T. 888; 14 W. R. 994.—EX.; affirmed, (1867) 36 L. J. Ex. 172; L. R. 2 Ex. 253; 16 L. T. 463; 15 W. R. 930.—EX. CH.

Colchester (Lord) v. Kewney, *discussed*.

Rabbits v. Cox (1877) 3 Q. B. D. 307, 313; 25 W. R. 594.—C.A. **JAMES, BAGGALLAY, BRAMWELL and BRETT, L.JJ.**; reversing 46 L. J. Q. B. 207; 35 L. T. 834; 25 W. R. 252.—**COCKBURN, C.J.** and **LUSH, J.**; C.A., affirmed nom. **Cox v. Rabbits**, (1878) 47 L. J. Q. B. 385; 3 App. Cas. 473; 38 L. T. 430; 26 W. R. 483.—H.L. (E.).

Colchester (Lord) v. Kewney, and Cox v. Rabbits, Rabbits v. Cox, *discussed and applied*.

St. Thomas's Hospital v. Hudgell (1900) 70 L. J. K. B. 115; [1901] 1 Q. B. 364, 381; 83 L. T. 677; 65 J. P. 149.

WILLS, J.—The view that the exemption [from land tax] is confined to lands belonging to the hospitals at the date when the Act making the tax perpetual was passed was taken by the Court of Ex. Ch. in *Colchester (Lord) v. Kewney*, in which decision no notice was taken of sec. 29 of the Land Tax Act, 1797. The effect of that section was considered in *Cox v. Rabbits*, where it was decided that the land exempt in 1693 as then being the site of a hospital preserved its exemption after its sale by the hospital.—p. 126.

Williams v. Pritchard (1790) 4 Term Rep. 2; 2 R. R. 310.—K.B.

Followed, **Eddington v. Borman** (1790) 4 Term Rep. 4.—K.B.; *approved but not applied*, **Perchard v. Heywood** (1800) 8 Term Rep. 468.—K.B.; *referred to*, **Reg. v. Wexford Corporation** (1886) 18 L. R. Ir. 119.—Q.B.; *applied*, **Sion College v. London Corporation**.—Q.B.D. and C.A. (*post*).

Perchard v. Heywood (*supra*).

Distinguished, **Rex v. London Gas Light, &c., Co.** (1828) 8 B. & C. 54; 2 Man. & R. 12; 6 L. J. (O.S.) M. C. 113.—K.B.; *discussed*, **Sion College v. London Corporation** (1900) 69 L. J. Q. B. 766; [1900] 2 Q. B. 581, 585; 83 L. T. 76.—Q.B.D.; and (1901) 70 L. J. K. B. 369; [1901] 1 K. B. 617, 621; 84 L. T. 133; 49 W. R. 361; 65 J. R. 324.—C.A.

Doe d. Blewitt v. Phillips (1841) 10 L. J. Q. B. 68; 1 Q. B. 84; 4 P. & D. 562.—Q.B., and **Beaden v. King** (1852) 9 Hare 449; 22 L. J. Ch. 111.—**WIGRAM, V.-C.**, *not applied*.

Whidborne v. Ecclesiastical Commissioners (1877) 47 L. J. Ch. 129; 7 Ch. D. 375; 37 L. T. 346.—**HALL, V.-C.**

Doe d. Rochester (Bishop) v. Bridges (1831) 1 B. & Ad. 847; 9 L. J. (O.S.) K. B. 113.—K.B.

Approved and applied, **Lamplough v. Norton** (1889) 58 L. J. Q. B. 279; 22 Q. B. D. 452; 37 W. R. 422; 53 J. P. 389.—C.A.; **Olegg, Parkinson & Co. v. Early** (or **Earby**) **Gas Co.** (1896) 65 L. J. Q. B. 339; [1896] 1 Q. B. 592; 44 W. R. 606.—Q.B.D.; *dictum adopted*, **Pasmore v. Oswaldtwistle Urban District Council** (1898) 67 L. J. Q. B. 635; [1898] A. C. 387, 394; 78 L. T. 569; 62 J. P. 628.—H.L. (E.).

Doe d. Rochester (Bishop) v. Bridges, *dictum approved*.

Johnston and Toronto Type Foundry Co. v. Consumers' Gas Co. of Toronto (1898) 67 L. J. P. C. 33; [1898] A. C. 447; 78 L. T. 270.—P.C.; **Devonport Corporation v. Tozer** (1902) 71 L. J. Ch. 754; [1902] 2 Ch. 182, 193; 86 L. T. 612.—**JOYCE, J.**; affirmed, 72 L. J. Ch. 411; [1903] 1 Ch. 759; 88 L. T. 113; 1 L. G. R. 421.—C.A.

Grover v. Hugell (1827) 3 Russ. 428; 27 R. R. 103.—M.R.

Discussed and not applied, **Beaden v. King** (1852) 22 L. J. Ch. 111; 9 Hare, 497.—V.-C.; *principle applied*, **Guest v. Smythe** (1870) L. R. 5 Ch. 553, n.—**ROMILLY, M.B.**; (reversed, 89 L. J. Ch. 536; L. R. 5 Ch. 551; 22 L. T. 563; 18 W. R. 742.—**GIFFARD, L.J.**).

Cousins v. Harris (1848) 17 L. J. Q. B. 273; 12 Q. B. 726; 12 Jur. 835.—Q.B., *referred to*.

Kilderbee v. Ambrose (1854) 10 Ex. 454; 24 L. J. Ex. 49; 3 C. L. R. 181.—EX.

ALDERSON, B.—That case does not go to the extent that a sale of the estate would be compelled, but only that it would be allowed.—p. 465.

Cousins v. Harris, *explained and distinguished*.

Skene v. Cook (1902) 71 L. J. K. B. 446; [1902] 1 K. B. 682; 86 L. T. 319; 50 W. R. 506.—C.A.

Blundell v. Stanley (1849) 18 L. J. Ch. 300 ; 3 De G. & Sm. 433 ; 13 Jur. 998.—**KNIGHT-BRUCE, V.-C., discussed.**
Bulkeley v. Hope (1855) 24 L. J. Ch. 356 ; 1 K. & J. 482 ; 1 Jur. (N.S.) 864 ; 3 W. R. 360.—**WOOD, V.-C.**

Blundell v. Stanley, applied.
Neave v. Moorsom (1866) 36 L. J. Ch. 274 ; L. R. 3 Eq. 91 ; 12 Jur. (N.S.) 913 ; 15 W. R. 51.—**ROMILLY, M.R.**

Bradbury v. Wright (1781) 2 Dougl. 624.—**K.B., referred to.**
Musgrave v. Emmerson (1847) 16 L. J. Q. B. 174 ; 10 Q. B. 326 ; 11 Jur. 732.—**Q.B.**

Bradbury v. Wright and Bennett v. Womack (1828) 6 L. J. (O.S.) K. B. 175 ; 7 B. & C. 627 ; 1 Man. & Ry. 624 ; 3 Car. & P. 96 ; 31 E. R. 270.—**K.B., followed.**
Parish v. Sleeman (1860) 29 L. J. Ch. 96 ; 1 De G. F. & J. 326 ; 6 Jur. (N.S.) 385 ; 8 W. R. 166.—**CAMPBELL, L.C.**

• **Parish v. Sleeman**, 29 L. J. Ch. 53 ; 1 Giff. 238 ; 5 Jur. (N.S.) 1198.—**V.-C. ; reversed, (1860)** 29 L. J. Ch. 96 ; 1 De G. F. & J. 326 ; 6 Jur. (N.S.) 385 ; 8 W. R. 166 ; 1 L. T. (O.S.) 506.—**L.C.**

Parish v. Sleeman, distinguished.
Jeffrey v. Neale (1870) 40 L. J. C.P. 191 ; L. R. 6 C. P. 240 ; 24 L. T. 362 ; 19 W. R. 700.—**C.P.**

Patchett v. Bancroft (1797) 7 Term Rep. 367 ; 4 R. R. 465.—**K.B., applied.**
Simpkin v. Robinson (1881) 45 L. T. 221.—**POLLOCK, B. and HAWKINS, J.**
POLLOCK, B.—It seems to me to be sufficient for the actual decision of the present case to say that it is brought within the decision in *Patchett v. Bancroft* . . . , in which it was held, in an action of trespass for taking the plaintiff's cattle and which was tried at York, that the person whose cattle were taken could not, if the distress-warrant was regular, and the conduct of the officers who executed the warrant was right, go behind the warrant, because, the power of distress being legal, those who executed the warrant were entitled to execute it, and justified in so doing. It was further held too, in that case, that the judgment of the Commissioners of Land Tax, on appeal to them, is conclusive in an action of trespass brought against an officer for levying under a warrant of distress. It is to be observed that in that case the Court treated the proceedings as a judgment by the Commissioners of Land Tax, and it may be well also to observe, in passing, that in . . . *Holborn Land Tax Assessment, In re* (post), on an application being made to the Ct. of Ex. for an order or mandamus to the Commissioners of Land Tax to cause the proper charge on a particular division to be equally assessed, that Court held, after a very long argument and great consideration, that they had no power to interfere, and upon this ground, namely, that the Commissioners of Land Tax were the constituted authority who had under the statute to deal with the matter in question, and that their authority was like the authority of any other Court and could not be appealed against, except under the provisions of some statute which had so provided.—p. 224.

Patchett v. Bancroft and Simpkin v. Robinson, referred to.
Att.-Gen. v. McCormack [1903] 2 Ir. R. 517.—**GIBSON and BOYD, JJ.**

Att.-Gen. v. Sewell (1838) 7 L. J. Ex. 245 ; 4 M. & W. 77 ; 6 D. P. C. 673 ; 6 Car. & P. 376 ; 1 H. & H. 262.—**EX., referred to.**
Att.-Gen. v. McCormack [1903] 2 Ir. R. 517.—**GIBSON and BOYD, JJ.**

Holborn Land Tax Assessment, In re (1850) 5 Ex. 548.—**EX., referred to.**
Simpkin v. Robinson (1881) 45 L. T. 221.—**POLLOCK, B. and HAWKINS, J. See supra,** col. 2845.

Yeo v. Leman (1743) 2 Strange 1191 ; **S. C. nom. Yaw v. Leman**, 1 Wils. 31.—**K.B., followed.**
Hyde v. Hill (1789) 3 Term Rep. 377.—**K.B.**

Yeo v. Leman and Hyde v. Hill, explained.
Watson v. Home (1827) 7 B. & C. 285 ; 1 Man. & R. 191 ; 6 L. J. (O.S.) K. B. 73 ; 31 R. R. 200.—**K.B.**

Yeo v. Leman and Hyde v. Hill, explained and applied.
Ward v. Const (1830) 10 B. & C. 635 ; 5 Man. & R. 402 ; 8 L. J. (O.S.) K. B. 291.—**K.B.**

BAILEY, J.—This construction of the Act is in conformity with *Yeo v. Leman* and *Hyde v. Hill* ; for, although improvements were there made after the leases had been granted, and the land tax was on that ground raised, they establish this principle—that of the land tax imposed on any premises, the landlord is to bear a part only in proportion to the rent that he receives.—p. 649.

PARKE, J.—None of the cases cited at the Bar are precisely in point, except the *nisi prius* case of *Whitfield v. Brandwood* (post), but as the noble and learned lord who decided that case has since inclined to a different opinion, on the first impression of the present case, and as the point in the case cited was not afterwards fully discussed before the Court, I do not rely upon that as a decisive authority. The dicta, however, of Lord Kenyon and Buller, J. in *Hyde v. Hill*, are in favour of this construction of the Act of Parliament, and that construction is so consistent with reason and justice that it ought to be adopted. The result is, that the lessor is bound to pay such proportion only of the land tax as the reserved rent bears to the total annual value.—p. 653.

Whitfield v. Brandwood (1818) 2 Stark. 440 ; 20 R. R. 712.—**ABBOTT, C.J., not relied on.**
Ward v. Const. See supra.

Watson v. Home (1827) 6 L. J. (O.S.) K. B. 73 ; 7 B. & C. 285 ; 1 Man. & Ry. 191 ; 31 R. R. 200.—**K.B., referred to.**
Ward v. Const. See supra.

Watson v. Home, followed.
Smith v. Humble (1854) 15 C. B. 321 ; 3 C. L. R. 225.—**C.P.**

Charleton v. Alway (1840) 9 L. J. Q. B. 237 ; 11 A. & E. 993 ; 3 P. & D. 818.—**Q.B., distinguished.**
Allen v. Sharp (1848) 17 L. J. Ex. 209 ; 2 Ex. 352.—**EX.**

Charlton v. Alway (1840) 9 L. J. Q. B. 237; 11 A. & E. 993; 3 P. & D. 618.—Q.B., *referred to*.

New Ross Union Guardians *v.* Byrne (1892) 30 L. R. Ir. 160.—Q.B.D.; Att.-Gen. *v.* McCormack [1903] 2 Ir. R. 517.—K.B.D. GIBSON and BOYD, JJ.

Allen v. Sharp (1848) 17 L. J. Ex. 209; 2 Ex. 352.—EX., *referred to*.
Att.-Gen. *v.* McCormack [1903] 2 Ir. R. 517.—GIBSON and BOYD, JJ.

Andrew v. Hancock (1819) 1 Br. & B. 37; 3 Moore 278; 21 R. R. 569.—C.P.

Distinguished, Haley *v.* Freeman (1819) 1 Br. & B. 391; 4 Moore 21; 21 R. R. 663.—C.P.: *discussed*, Smith *v.* Alsop (1824) M'Clel. 623; 13 Price 823.—EX.; *applied*, Dawes *v.* Thomas (1892) 61 L. J. Q. B. 482; [1892] 1 Q. B. 414; 66 L. T. 451; 40 W. R. 305; 56 J. P. 326.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Andrew v. Hancock and Spragg v. Hammond (1820) 4 Moore 481; 2 Br. & B. 59.—C.P., *principle approved but not applied*.

Glasgow Tramway and Omnibus Co. *v.* Glasgow Corporation (1897) 24 Rettie 628.—LORD ORDINARY: affirmed, CT. OF SESS.: reversed nom. Glasgow Corporation *v.* Glasgow Tramway and Omnibus Co. [1898] A. C. 631.—H.L. (SC.). HALSBURY, L.C., LORDS WATSON, HERSCHEL and SHAND (*supra*, col. 2822).

Foss v. Racine (1838) 8 L. J. Ex. 38; 4 M. & W. 419; 7 D. P. C. 53; 8 Car. & P. 699.—EX.

See TAXES, Act 1880, s. 86.

Westminster Land Tax Commissioners, In re (1746) Parker 74.—EX., *explained*.

Holborn Land Tax Assessment, *In re* (1850) 5 Ex. 548.—EX.

Pym, Ex parte (1851) 20 L. J. Q. B. 211; 15 Jur. 190; S. C. *nom.* Reg. *v.* Land Tax Commissioners, 16 Q. B. 381.—CAMPBELL, C.J., COLERIDGE and WIGHTMAN, JJ.

Reg. v. Land Tax Commissioners (1853) 22 L. J. Q. B. 386; 2 El. & Bl. 694; 18 Jur. 285; 1 W. R. 479.—Q.B., *referred to*.

Waterloo Bridge Co. *v.* Cull (*or* Coward) (1858) 1 El. & El. 213; 29 L. J. Q. B. 10; 5 Jur. (N.S.) 1288.—EX. CH.

ERLE, J.—*Reg. v. Land Tax Commissioners* shows that the proportion in which the different parishes contribute to the Division cannot be altered.—p. 242.

Reg. v. Land Tax Commissioners, discussed.

Colchester (Lord) *v.* Kewney (1866) 35 L. J. Ex. 204; L. R. 1 Ex. 368, 378; 4 H. & C. 445; 12 Jur. (N.S.) 743; 14 L. T. 888; 14 W. R. 994.—EX.; affirmed, EX. CH. *See supra*, col. 2843.

Reg. v. Land Tax Commissioners.

Applied, Reg. *v.* Land Tax Commissioners (1877) 36 L. T. 374.—COCKBURN, C.J. and MELLOR, J.; *referred to*, St. Thomas's Hospital *v.* Hudgeell (1900) 70 L. J. Q. B. 115; [1901] 1 Q. B. 364, 369; 33 L. T. 677; 65 J. P. 149.—WILLS, J.

Blandford (Marchioness) v. Marlborough (Duke) (1743) 2 Atk. 542.—L.C., *commented on*.

Floyer *v.* Bankes (1863) 33 L. J. Ch. 1; 3 De

G. J. & S. 306; 3 N. R. 16; 9 Jur. (N.S.) 1255; 9 L. T. 353; 12 W. R. 28.—WESTBURY, L.C.*

4. PROBATE DUTY

Doe d. Richard v. Evans (1847) 16 L. J. Q. B. 305; 10 Q. B. 476; 11 Jur. 609.—Q.B., *applied*.

Att.-Gen. *v.* Partington (1862) 1 H. & C. 457; 10 Jur. (N.S.) 617.—EX.: Partington *v.* Att.-Gen. (1869) 38 L. J. Ex. 205; L. R. 4 H. L. 100, 116; 21 L. T. 370.—H.L. (E.). LORD WESTBURY dissenting on one point.

Thynne v. Protheroe (1814) 2 M. & S. 553.

—K.B., *referred to*.

Rogers *v.* James (1816) 2 Marsh. 423; 7 Taunt. 147.—C.P.: Howard *v.* Prince (1847) 10 Beav. 312.—LANGDALE, M.R.

Feary v. Stephenson (1838) 1 Beav. 42.—

M.R., *order followed*.

Jones *v.* Howells (1843) 12 L. J. Ch. 365; 2 Hare 342.—WIGRAM, V.-C.

Jones v. Howells, applied.

Lord *v.* Colvin (1867) 36 L. J. Ch. 354; L. R. 3 Eq. 737; 16 L. T. 53; 15 W. R. 485.—MALINS, V.-C.

Christian v. Devereux (1841) 12 Sim. 264.—

V.-C., *applied*.

Lord *v.* Colvin (1867) 36 L. J. Ch. 354; L. R. 3 Eq. 737, 741; 16 L. T. 53; 15 W. R. 485.—MALINS, V.-C.

Hunt v. Stevens (1810) 3 Taunt. 113.—C.P.

Followed, Carr *v.* Roberts (1831) 1 L. J. K. B. 33; 2 B. & Ad. 905.—K.B.; *explained*, Att.-Gen. *v.* Hope (1834) 1 Cr. M. & R. 530; 4 Tyrw. 878; 2 Cl. & F. 84; 8 Bligh (N.S.) 44.—H.L. (E.). *applied*, Att.-Gen. *v.* Bouwens (1838) 7 L. J. Ex. 297; 4 M. & W. 171; 1 H. & H. 319.—EX.

Cox v. Allingham (1822) Jacob. 514.—M.R., *followed*.

Doe d. Edwards *v.* Gunning (1837) 6 L. J. Q. B. 229; 7 A. & E. 240; 2 N. & P. 260; W. & D. 460.—K.B.; Doe d. Bassett *v.* Mew (1837) 7 A. & E. 240; 2 N. & P. 266, n.—K.B.

Cook v. Gregson (1856) 25 L. J. Ch. 706; 3

Drew 547; 2 Jur. (N.S.) 510; 4 W. R. 581.—V.-C.

Approved, Att.-Gen. *v.* Brunning (1860) 30 L. J. Ex. 379, 384; 8 H. L. Cas. 243 (*post*); *referred to*, Power, *In re* (1901) 70 L. J. Ch. 778; [1901] 2 Ch. 659, 664 (*post*, col. 2890).

Att.-Gen. v. Brunning (1859) 28 L. J. Ex.

125; 4 H. & N. 94; 7 W. R. 308.—EX.; *reversed*, (1860) 30 L. J. Ex. 379; 8 H. L. Cas. 243; 6 Jur. (N.S.) 1083; 8 W. R. 362.—H.L. (E.).

Att.-Gen. v. Brunning.

Applied, Att.-Gen. *v.* Partington (1862) 1 H. & C. 457; 10 Jur. (N.S.) 617.—EX.; (affirmed, (1864) 33 L. J. Ex. 281; 3 H. & C. 193; 10 Jur. (N.S.) 825; 10 L. T. 751; 13 W. R. 54.—EX. CH.; affirmed on this point, H.L. *supra*); Lord *v.* Colvin (1867) 36 L. J. Ch. 354; L. R. 3 Eq. 737, 741; 16 L. T. 53; 15 W. R. 485.—MALINS, V.-C.; *referred to*, Perry's Executors *v.* Reg. (1868) L. R. 4 Ex. 27, 30; 19 L. T. 520; 17 W. R. 382.—EX. *And see post*, col. 2849.

Att.-Gen. v. Brunning (*supra*), *considered*.
De Lancey v. Inland Revenue Commissioners (1870) 1 L. R. 5 Ex. 102; 39 L. J. Ex. 76; 22 L. T. 239; 18 W. R. 468.—EX. CH.

BOVILL, C.J.—The question afterwards arose in the Ct. of Ex. in *Att.-Gen. v. Brunning*, as to the effect of a contract by a deceased person to sell real estate, and where the Crown sought to enforce its claim to probate duty on the purchase money. The Ct. of Ex. concurred with the view of Lord Langdale in *Matson v. Swift* (8 Beav. 368, *see post*, col. 2850), and held that probate duty was not payable, and although their judgment was reversed on appeal, the opinions expressed in the House of Lords on the reversal did not interfere with the doctrine for which I now cite the case. The ground on which the decision was overruled was, that the testator had sold his land by a binding contract, which contract was in fact carried out, and the purchase-money actually paid over to the executor, who was entitled to receive and did receive it as executor, and under the probate as part of the personal estate of the deceased.—p. 108.

Att.-Gen. v. Brunning, *discussed*.

Forbes v. Steven (1870) L. R. 10 Eq. 178, 189 (*post*, col. 2850); *Att.-Gen. v. Lomas* (1873) L. R. 9 Ex. 29, 34 (*post*, col. 2850); *Att.-Gen. v. Murray* (1887) 20 L. R. 1r. 124.—C.A.; *Nunn's Estate*, In re (1893) [1894] 1 Ir. R. 252.—MONROE, J.

Att.-Gen. v. Brunning, *applied*.

Att.-Gen. v. Hubbuck (1884) 53 L. J. Q. B. 146; 13 Q. B. D. 275; 50 L. T. 374.—C.A.; *Att.-Gen. v. Ailesbury* (Marquis) (1888) 57 L. J. Q. B. 83; 12 App. Cas. 672, 684; 58 L. T. 192; 36 W. R. 737.—H.L. (E.); *Att.-Gen. v. New York Breweries Co.* (1897) 67 L. J. Q. B. 86; [1898] 1 Q. B. 205; 78 L. T. 61; 46 W. R. 193; 62 J. P. 132.—C.A. (affirmed, H.L. *See post*, col. 2853).

Att.-Gen. v. Brunning, *discussed*.

Power, In re, *Stone*, In re, *Acworth v. Stone* (1901) 70 L. J. Ch. 778; [1901] 2 Ch. 664; 49 W. R. 678.—BYRNE, J. (*see post*, col. 2891); *Dixon*, In re, *Penfold v. Dixon* (1901) 71 L. J. Ch. 96; [1902] 1 Ch. 248, 251; 85 L. T. 622; 50 W. R. 203.—BUCKLEY, J.

Att.-Gen. v. Sudeley (Baron) (1895) 64 L. J. Q. B. 753; [1895] 2 Q. B. 526; 73 L. T. 256; 43 W. R. 700; 59 J. P. 791; 15 R. 573.—RUSSELL OF KILLOWEN, C.J. and CHARLES, J.; *reversed*, (1896) 65 L. J. Q. B. 281; [1896] 1 Q. B. 354; 74 L. T. 91; 44 W. R. 340; 60 J. P. 260.—C.A. LOPES and KAY, L.J.J.; *ESHER, M.R. dissenting*; C.A. *affirmed nom.* *Sudeley (Baron) v. Att.-Gen.*—H.L. (E.), *post*.

Sudeley (Baron) v. Att.-Gen. (1896) 66 L. J. Q. B. 21; [1897] A. C. 11; 75 L. T. 398; 45 W. R. 305.—H.L. (E.), *applied*.

Smyth, In re, *Leach v. Leach* (1897) 67 L. J. Ch. 10; [1898] 1 Ch. 89; 77 L. T. 514; 46 W. R. 104.—ROMER, J.

Sudeley (Baron) v. Att.-Gen., *commented on*.
Tevlin v. Gilsenan (1901) [1902] 1 Ir. R. 514, 529.—C.A.; *reversing* [1901] 1 Ir. R. 429.—V.C.

Gunn, In Goods of (1884) 53 L. J. P. 107; 9 P. D. 242; 33 W. R. 169; 49 J. P. 72.—HANNEN, P., *applied*.

Att.-Gen. v. Ailesbury (Marquis) (1887) 57

L. J. Q. B. 83; 12 App. Cas. 672, 696; 58 L. T. 192; 36 W. R. 737.—H.L. (E.); *Att.-Gen. v. Dodd* (1894) 63 L. J. Q. B. 319; [1894] 2 Q. B. 150, 155; 10 R. 177; 70 L. T. 660; 42 W. R. 524; 58 J. P. 526.—Q.B.D.

Matson v. Swift (1845) 14 L. J. Ch. 354; 8

Beav. 368; 9 Jur. 921.—M.R., *approved*.

Custance v. Bradshaw (1845) 14 L. J. Ch. 358; 4 Hare 315; 9 Jur. 486.—WIGRAM, V.-C.

Matson v. Swift and Custance v. Bradshaw, *distinguished*.

Att.-Gen. v. Brunning (1860) 30 L. J. Ex. 379; 8 H. L. Cas. 243; 6 Jur. (N.S.) 1083; 8 W. R. 362.—H.L. (E.).

Matson v. Swift, *not applied*.

Lord v. Colvin (1867) L. R. 3 Eq. 737; 36 L. J. Ch. 354; 16 L. T. 53; 15 W. R. 485.

MALINS, V.-C.—The decision in *Matson v. Swift* . . . turned upon the fact of there not having been any conversion of the real estate of the testator in his lifetime, and has, therefore, no application to this case.—p. 743.

Matson v. Swift, *referred to*.

De Lancey v. Inland Revenue Commissioners (1870) 39 L. J. Ex. 76; L. R. 5 Ex. 102, 106.—EX. CH. *See supra*, col. 2849.

Matson v. Swift and Custance v. Bradshaw (*supra*), *commented on*.

Forbes v. Steven (1870) 39 L. J. Ch. 485; L. R. 10 Eq. 178, 189; 22 L. T. 703; 18 W. R. 686.—JAMES, V.-C.

Matson v. Swift and Custance v. Bradshaw, *distinguished*.

Att.-Gen. v. Lomas (1873) 43 L. J. Ex. 32; L. R. 9 Ex. 29, 34; 29 L. T. 749; 22 W. R. 188.—EX.

Custance v. Bradshaw, *dissented from*.

Att.-Gen. v. Hubbuck (1884) 13 Q. B. D. 275; 53 L. J. Q. B. 146; 50 L. T. 374.—C.A. **BRETT, M.R., COLERIDGE, C.J. and BOWEN, L.J.**

BRETT, M.R.—I will duly say that a great many cases have been cited with none of which will I deal except with *Custance v. Bradshaw*. I am of opinion that in a Court of law *Custance v. Bradshaw* ought never to be cited again as an authority.—p. 289.

Matson v. Swift, *disapproved*.

Att.-Gen. v. Ailesbury (Marquis) (1887) 57 L. J. Q. B. 83; 12 App. Cas. 672, 695.—H.L. (E.). *See post*, col. 2851.

Att.-Gen. v. Lomas (1873) 43 L. J. Ex. 32; L. R. 9 Ex. 29; 29 L. T. 749; 22 W. R. 188.—EX., *considered*.

Att.-Gen. v. Ailesbury (Marquis) (1887) 57 L. J. Q. B. 83; 12 App. Cas. 672, 696.—H.L. (E.), *post*, col. 2851.

Att.-Gen. v. Lomas, *referred to*.

Att.-Gen. v. Dodd (1894) 63 L. J. Q. B. 319; [1894] 2 Q. B. 150, 156 (*supra*). *And see* "CONVERSION," vol. i., col. 682.

Att.-Gen. v. Hubbuck (1883) 52 L. J. Q. B. 464; 10 Q. B. D. 488; 48 L. T. 608.—Q.B.D.; *affirmed* (1884) 53 L. J. Q. B. 146; 13 Q. B. D. 275; 50 L. T. 374.—C.A.

Att.-Gen. v. Hubbuck, *not applied*.

Att.-Gen. v. Ailesbury (Marquis) (1886) 55 L. J. Q. B. 257; 16 Q. B. D. 408, 429; 54 L. T.

921; 34 W. R. 261.—C.A.; reversing (1885) 54 L. J. Q. B. 324; 14 Q. B. D. 895; 52 L. T. 809; 33 W. R. 731.—MATHEW and A. L. SMITH, JJ.

Att.-Gen. v. Hubbuck, principle applied.

Att.-Gen. v. Ailesbury (Marquis) (C.A.), reversed.

Att.-Gen. v. Ailesbury (Marquis) (1887) 57 L. J. Q. B. 83; 12 App. Cas. 672, 684; 58 L. T. 192; 36 W. R. 737.—H.L. (E.).

Att.-Gen. v. Hubbuck, observations applied.

Nunn's Estate, In re (1893) [1894] 1 Ir. R. 252.—MONROE, J.

Palmer v. Whitmore (1832) 5 Sim. 178.—V.-C., followed.

Att.-Gen. v. Staff (1833) 3 L. J. Ex. 6; 2 Cr. & M. 124; 4 Tyr. 14.—EX.

Palmer v. Whitmore and Att.-Gen. v. Staff distinguished.

Vandiest v. Fynmore (1834) 6 Sim. 570.—SHADWELL, V.-C.

Att.-Gen. v. Staff; Palmer v. Whitmore; and Vandiest v. Fynmore, discussed.

Platt v. Routh (1840) 10 L. J. Ex. 105; 6 M. & W. 756.—EX.

Platt v. Routh (1840) 10 L. J. Ex. 105; 6 M. & W. 756.—EX.; S. C. (1841) 10 L. J. Ch. 131; 3 Beav. 257.—LANGDALE, M.R.; *the latter decision affirmed nom. Drake v. Att.-Gen.* (1848) 10 Cl. & F. 257.—L.C., with the JUDGES.

Platt v. Routh, observed on.

Philbrick's Settlement, In re (1865) 34 L. J. Ch. 368; 5 N. R. 502; 11 Jur. (N.S.) 558; 12 L. T. 261; 13 W. R. 570.

ROMILLY, M.R.—The expression in the judgment in *Platt v. Routh*, that the executor could not have administered any part of the apporportioned property, only meant that, "but for the will exercising the power," the executor could not have administered.—p. 369.

Platt v. Routh; Drake v. Att.-Gen., referred to.

Hoskins' Trusts, In re (1877) 46 L. J. Ch. 274; 5 Ch. D. 229, 233.—MALINS, V.-C.; S. C. 46 L. J. Ch. 817; 6 Ch. D. 281; 35 L. T. 935; 25 W. R. 779.—C.A. (*See post*, col. 2891).

Platt v. Routh; Drake v. Att.-Gen., distinguished.

Byron's Settlement, In re, Williams v. Mitchell (1891) 60 L. J. Ch. 807; [1891] 3 Ch. 474; 65 L. T. 218; 40 W. R. 11.—KEKEWICH, J.

Platt v. Routh; Drake v. Att.-Gen., considered.

Power, In re, Stone, In re (1901) 70 L. J. Ch. 778; [1901] 2 Ch. 659, 663; 85 L. T. 400; 49 W. R. 678.—BYRNE, J. (*See post*, col. 2891).

Att.-Gen. v. Higgins (1857) 26 L. J. Ex. 403; 2 H. & N. 339.—EX., adopted.

Ewing, In goods of (1881) 50 L. J. P. 11; 6 P. D. 19, 23; 44 L. T. 278; 29 W. R. 474; 45 J. P. 376.—HANNEN, P.

Att.-Gen. v. Higgins, referred to.

Att.-Gen. v. Sudeley (Baron) [1895] 2 Q. B. 526, 530 (*supra*, col. 2849); and [1896] 1 Q. B. 354, 361 (*supra*, col. 2849).

Att.-Gen. v. Higgins, applied.

Att.-Gen. v. New York Breweries Co. (1897) 67 L. J. Q. B. 86; [1893] 1 Q. B. 205; 78 L. T. 61; 46 W. R. 193; 62 J. P. 132.—C.A.

Att.-Gen. v. Jones (1849) 19 L. J. Ch. 266; 1 Mac. & G. 574; 1 H. & Tw. 495; 14 Jur. 379.—L.C., referred to.

David, In re, Buckley v. Lifeboat Institution (1889) 58 L. J. Ch. 542; 41 Ch. D. 177.—NORTH, J.; affirmed, 59 L. J. Ch. 87; 43 Ch. D. 27; 62 L. T. 141; 38 W. R. 162.—C.A. *And see* "CHARITY," vol. i., col. 340.

Att.-Gen. v. Dimond (1831) 1 Cr. & J. 356;

1 Tyrw. 243; 9 L. J. (O.S.) Ex. 90.—EX.; S. C. (1838) 7 L. J. Ex. 297; 4 M. & W. 171.—EX., commented on.

Att.-Gen. v. Hope (1834) 1 Cr. M. & R. 530; 4 Tyrw. 878; 2 Cl. & F. 84; 8 Bligh (N.S.) 44.—H.L. (E.).

Att.-Gen. v. Dimond, explained.

Arnold v. Arnold (1837) 6 L. J. Ch. 218; 2 Myl. & Cr. 256; 1 Jur. 255.—COTTENHAM, L.C.; **Att.-Gen. v. Bouwens (1838)** 7 L. J. Ex. 297; 4 M. & W. 171; 1 H. & H. 319.—EX.

Att.-Gen. v. Dimond, discussed.

Att.-Gen. v. Sudeley (Baron) (1896) 65 L. J. Q. B. 281; [1896] 1 Q. B. 354, 360; 74 L. T. 91; 44 W. R. 340; 60 J. P. 260.—C.A. LOPES and KAY, L.J.J.; ESHER, M.R., dissenting.

ESHER, M.R.—In *Att.-Gen. v. Dimond* the testator was a creditor of the French Government for 32,727 francs of Rentes at five per cent. These were only payable by the French Government, the debtor in France, and payment could only be obtained by some act done in France. It was for that reason held that the debt, the asset, was not such an asset as was liable to pay probate duty in England.—p. 285.

Att.-Gen. v. Dimond, discussed.

Smelting Co. of Australia v. Inland Revenue Commissioners (1896) 66 L. J. Q. B. 137; [1897] 1 Q. B. 175; 75 L. T. 534; 45 W. R. 203; 61 J. P. 116.—C.A.

Att.-Gen. v. Dimond, applied.

Att.-Gen. v. New York Breweries Co. (1897) 67 L. J. Q. B. 86; [1898] 1 Q. B. 205, 219; 78 L. T. 61; 46 W. R. 193; 62 J. P. 132.—C.A.; Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd. (1901) 70 L. J. K. B. 677; [1901] A. C. 217, 238; 84 L. T. 729; 49 W. R. 603.—H.L. (E.).

Att.-Gen. v. Hope (1834) 2 Cl. & F. 84; 8 Bligh (N.S.) 44; 1 Cr. M. & R. 530; 4 Tyrw. 878.—H.L. (E.).

Explained and distinguished, Att.-Gen. v. Bouwens (1838) 7 L. J. Ex. 297; 4 M. & W. 171; 1 H. & H. 319.—EX.; followed, *Pearse v. Pearse (1838)* 9 Sim. 430.—SHADWELL, V.-C.; referred to, *Att.-Gen. v. Higgins (1857)* 26 L. J. Ex. 403; 2 H. & N. 339.—EX.

Att.-Gen. v. Hope, explained and applied.

Att.-Gen. v. Pratt (1874) 43 L. J. Ex. 108; L. R. 9 Ex. 140; 30 L. T. 531; 22 W. R. 615.—EX.

Att.-Gen. v. Hope, referred to.

Murray, In goods of (1896) 65 L. J. P. 49; [1896] P. 65, 71; 44 W. R. 414.—BARNES, J.

Att.-Gen. v. Hope, discussed.

Att.-Gen. v. Sudeley (Baron) (1896) 65 L. J. Q. B. 281; [1896] 1 Q. B. 354; 74 L. T. 91; 44 W. R. 340; 60 J. P. 260.—C.A.

ESHER, M.R.—In *Att.-Gen. v. Hope*, in 1834, it was held in the H. L. that goods in America at the date of the death of the testator, sent there by the testator for sale by his agents, and

debts, both simple and contract debts, due to him in America, and money in American funds, were not liable to probate duty here, although all would eventually come to the hands of the executors here. . . . In *Att.-Gen. v. Bouwens* (*post*) Dutch bonds due to the testator were held liable, but it was because they were payable in England.—p. 285.

Att.-Gen. v. Hope (*supra*).

Applied, *Att.-Gen. v. New York Breweries Co.* (1897) 67 L. J. Q. B. 86; [1897] 1 Q. B. 205, 219 (*post*); *referred to*, *Power, In re, Stone, In re, Acworth v. Stone* (1901) 70 L. J. Ch. 778; [1901] 2 Ch. 659, 663; 85 L. T. 400; 49 W. R. 678.—BYRNE, J.; *Dixon*. In *re, Penfold v. Dixon* (1901) 71 L. J. Ch. 96; [1902] 1 Ch. 248, 251; 85 L. T. 622; 50 W. R. 203.—BUCKLEY, J.

Att.-Gen. v. Bouwens (1838) 7 L. J. Ex. 287; 4 M. & W. 171; 1 H. & H. 319.—EX., *distinguished*.

Crouch v. Credit Foncier of England (1873) 42 L. J. Q. B. 183; L. R. 8 Q. B. 374, 384; 29 L. T. 259; 21 W. R. 946.—Q.B.

• **Att.-Gen. v. Bouwens**, *applied*.

Att.-Gen. v. Pratt (1874) 43 L. J. Ex. 108; L. R. 9 Ex. 140; 30 L. T. 531; 22 W. R. 615.—EX.

Att.-Gen. v. Bouwens, *referred to*.

Goolwin v. Roberts (1875) 44 L. J. Ex. 157; L. R. 10 Ex. 337, 341.—EX. CH.: affirmed (1876) 45 L. J. Ex. 748; 1 App. Cas. 476; 35 L. T. 179; 24 W. R. 987.—H.L. (E.).

Att.-Gen. v. Bouwens, *followed*.

Stern v. Reg. (1896) 65 L. J. Q. B. 240; [1896] 1 Q. B. 211; 73 L. T. 752; 44 W. R. 302.—WRIGHT and KENNEDY, JJ.

Att.-Gen. v. Bouwens, *explained*.

Att.-Gen. v. Sudeley (Baron) (1896) 65 L. J. Q. B. 281; [1896] 1 Q. B. 354 (*see supra*, col. 2849).

Att.-Gen. v. Bouwens.

Discussed, *Sineltong Co. of Australia v. Inland Revenue Commissioners* (1896) 66 L. J. Q. B. 137; [1897] 1 Q. B. 175; 75 L. T. 534; 45 W. R. 203; 61 J. P. 116.—C.A.; *applied*, *Att.-Gen. v. New York Breweries Co.* (1897) 67 L. J. Q. B. 86; [1898] 1 Q. B. 205, 226.—C.A.; affirmed, H.L. (E.), *post*.

Att.-Gen. v. New York Breweries Co. (1897)

66 L. J. Q. B. 447; [1897] 1 Q. B. 738; 76 L. T. 721; 45 W. R. 606.—WILLS and GRANTHAM, JJ.; *reversed*, (1897) 67 L. J. Q. B. 86; [1898] 1 Q. B. 205; 78 L. T. 61; 46 W. R. 193; 62 J. P. 132.—C.A., *the latter decision affirmed nom.* *New York Breweries Co. v. Att.-Gen.* (1898) 68 L. J. Q. B. 135; [1899] A. C. 62; 79 L. T. 568; 48 W. R. 32; 63 J. P. 179.—H.L. (E.).

Perry's Executors v. Reg. (1868) L. R. 4

Ex. 27; 19 L. T. 520; 17 W. R. 382; **S. C. nom. Bacon v. Reg.**, 38 L. J. Ex. 5.—EX., *adopted*.

Ewing, In goods of (1881) 50 L. J. P. 11; 6 P. D. 19, 21; 44 L. T. 278; 29 W. R. 474; 45 J. P. 376.—HANNEN, P.

Perry's Executors v. Reg., *distinguished*.

Lord Advocate v. Bogie (1894) 63 L. J. P. C. 85; [1894] A. C. 83; 6 R. 98; 70 L. T. 533.—H.L. (SC.), *followed*.

Att.-Gen. v. Lloyd (1894) 15 R. 277; 64 L. J. Q. B. 365; [1895] 1 Q. B. 496.

COLLINS, J.—I think the case is concluded by *Lord Advocate v. Bogie*. It seems to me the result of Lord Herschell's opinion is that it is not competent for any private person to turn property coming into existence after the death of an individual into a part of his personal estate at the time he died. It is competent for the Legislature to do so, and it has done so in the case of the children or other issue of the testator. That is the difference between this case and *Perry's Executors v. Reg.*—p. 279. WRIGHT, J. to the same effect.

Perry's Executors v. Reg., *applied*.

Lord Advocate v. Bogie and *Att.-Gen. v.*

Lloyd, *discussed*.

Scott, In re (1899) 69 L. J. Q. B. 121; [1900] 1 Q. B. 372, 387; 81 L. T. 610; 48 W. R. 205; 64 J. P. 25.—Q.B.D.; affirmed, C.A., *post*.

Perry's Executors v. Reg., *applied*.

Lord Advocate v. Bogie, *not applied*.

Scott, In re (1900) 70 L. J. Q. B. 66; [1901] 1 Q. B. 228, 238; 83 L. T. 613; 49 W. R. 178; 65 J. P. 84.—C.A.

Bell v. Master in Equity of Supreme Court

of Victoria (1877) 2 App. Cas. 560; 36 L. T. 936.—P.C., *applied*.
Armstrong v. Wilkinson (1878) 47 L. J. P. C. 31; 3 App. Cas. 355, 365; 38 L. T. 185; 26 W. R. 559.—P.C.

• **Att.-Gen. v. Smith** (1892) 62 L. J. Q. B. 288;

[1892] 2 Q. B. 289; [1893] 1 Q. B. 239; 4 R. 233; 66 L. T. 857; 68 L. T. 6; 40 W. R. 671; 41 W. R. 245; 56 J. P. 758; 57 J. P. 339.—Q.B.D. and C.A., *applied*.
Nunn's Estate, In re (1893) [1894] 1 Ir. R. 252.

MONROE, J.—The meaning to be attached to the words "the person acting in the administration of such estate and effects" was elaborately argued in *Att.-Gen. v. Smith*. There executors had certain pictures valued for the purpose of probate. They duly filed their affidavit, paying duty on the amount of the valuation, and distributing the estate according to their duty. It was afterwards discovered that the pictures were worth much more than the amount of the valuation, though the executors acted with perfect *bona fides*; and the Commissioners of Inland Revenue sought to compel them to bring in a further affidavit, and pay the additional duty. The Court, however, held that once the administration of the assets had been completed the executors were no longer "persons acting in the administration of the estate and effects," and if there was no person acting in the administration, the Inland Revenue could not be called upon to repay any sums they might have received in excess, nor could they, if too little duty had been paid, recover the amount unpaid from the executors. The duty was, in such case, lost, and the Crown was without remedy.—p. 257.

Att.-Gen. v. Smith, *referred to*.

Wallen v. Lister (1894) 63 L. J. M. C. 61; [1894] 1 Q. B. 312, 317; 10 R. 127; 70 L. T. 348; 42 W. R. 318; 58 J. P. 283.—Q.B.D.

Reg. v. Stamps and Taxes Commissioners

(1846) 16 L. J. Q. B. 75; 9 Q. B. 637; 11 Jur. 365.—Q.B.

Discussed, *Reg. v. Stamps and Taxes Commissioners* (1849) 18 L. J. Q. B. 201; 13 Jur. 624.—Q.B.; *Webster, In goods of* (1859) 1 L. T. 45.—EX. *See now* 57 & 58 Vict. c. 30, s. 7 (4).

Percival v. Reg. (1864) 33 L. J. Ex. 289; 3 H. & C. 217; 10 Jur. (N.S.) 1059; 10 L. T. 622; 12 W. R. 966.—EX.—*referred to*.
Reg. v. Inland Revenue Commissioners v. Nathan, Ex parte (1883-1884) 53 L. J. Q. B. 229; 12 Q. B. D. 461; 51 L. T. 46; 32 W. R. 513; 48 J. P. 452.—Q.B.D.; reversed, C.A.

Lord Advocate v. Hagart (1872) L. R. 2 H. L. (SC.) 217.—H.L. (SC.), *distinguished*.
Moir's Trustees v. Lord Advocate (1874) 1 Rettie 345, 351.—CT. OF SESS.

Lord Advocate v. Hagart and Moir's Trustees v. Lord Advocate, distinguished.
Marshall's Executors v. Lord Advocate (1874) 1 Rettie 847, 851.—CT. OF SESS.

Lord Advocate v. Hagart; Moir's Trustees v. Lord Advocate and Marshall's Executors v. Lord Advocate, approved.
Att.-Gen. v. Murray (1887) 20 L. R. Ir. 124, 145.—C.A.

Att.-Gen. v. Holford (1815) 1 Price 426; 16 R. R. 737.—EX.—*referred to*.

Advocate-General v. Ramsay's Trustees, (1823) 2 Cr. M. & R. 224, n.; 4 L. J. Ex. 311.—EX. (SC.).

Att.-Gen. v. Holford and Advocate-General v. Ramsay's Trustees, not applied.
Evans, In re (1835) 4 L. J. Ex. 201; 2 Cr. M. & R. 206; 5 Tyr. 660.—EX.

Advocate-General v. Ramsay's Trustees, discussed.
Att.-Gen. v. Mangles (1839) 5 M. & W. 120; 2 H. & H. 74; 3 Jur. 281.—EX.

5. LEGACY DUTY.

Att.-Gen. v. Jones (1817) 3 Price 368.—EX.; WOOD, B., *dissenting—disapproved*.
Brown v. Advocate-General (1852) 1 Macq. H. L. 79.—H.L. (SC.).
ST. LEONARDS, L.C.—That case is quite wrong.—p. 85. *And see* "CHARITY," vol. i., col. 343.

Att.-Gen. v. Jones, discussed.
Robinson, In goods of (1867) 36 L. J. P. 93; L. R. 1 P. 384, 387; 17 L. T. 19.—WILDE, SIR J.

Att.-Gen. v. Jackson (1831) 1 L. J. Ex. 21; 2 Cr. & J. 101; 2 Tyrw. 50.—EX.

Followed, Stow v. Davenport (1833) 5 B. & Ad. 359; 2 N. & M. 805; 39 R. R. 508.—K.B.; *applied*, **De Hoghton, In re** [1895] 2 Ch. 517 (*post*).

Stow v. Davenport, referred to.
Shirley v. Ferrers (Earl) 12 L. J. Ch. 111; 1 Ph. 167; 6 Jur. 1047.—L.C., *considered*.
De Hoghton, In re, De Hoghton v. De Hoghton (1895) 64 L. J. Ch. 590; [1895] 2 Ch. 517; 43 W. R. 630.—STIRLING, J.; affirmed, C.A., *post*.

Shirley v. Ferrers (Earl), distinguished.
De Hoghton, In re, De Hoghton v. De Hoghton (1896) 65 L. J. Ch. 528; [1896] 1 Ch. 855; 74 L. T. 297; 44 W. R. 550.—C.A.

A. L. SMITH, L.J.—The point in *Clitheroe Estate, In re* [(1885) 55 L. J. Ch. 107; 31 Ch. D. 135.—C.A. *see* "SETTLED LAND," *post*, col. 3081] was whether the trustees of a term created by the will of the late Duke of Buccleuch were entitled to effectually exercise the powers of sale contained in the will without the consent of Lord Henry Scott, who was tenant for life of the settled estates, and it was held that they could not do so, for by the Settled Land Act of 1882, his consent was

necessary; but it appears to me that this was no decision upon a taxing Act, nor in my opinion do the provisions of the Settled Land Act, which undoubtedly gives largely extended powers to a tenant for life, really affect the question now in hand. That Act was passed *ad hoc intuitu*, and not for the purpose of affecting a taxing Act. The Crown sought to rely upon *Shirley v. Ferrers (Earl)*, in which Lord Lyndhurst, when L.C., held that sums to be annually applied by trustees of a term of 500 years out of the rents and profits of an estate towards the maintenance of a minor were not chargeable with legacy duty, he holding that for legacy duty to become payable under the Act (which was an Act for this purpose the same as the 8 & 9 Vict. c. 76, s. 4) there must be that which is a charge upon the estate of another, or in other words a person is not to pay legacy duty upon coming into the enjoyment of an estate which is his own. Lord Lyndhurst in that case held that the allowance payable to Caroline Shirley was payable to her for maintenance, to which in any event she was entitled, and consequently it could not be said that the allowance did not come out of her own estate; and this is where I think the present case differs from that. Nor does the case cited by the respondents of *Strangways, In re, Hickley v. Strangways* [(1886) 56 L. J. Ch. 195; 34 Ch. D. 423.—C.A. *See* "SETTLED LAND," *post*, col. 3082], apply to this case, for there by the terms of the will the tenant for life took no estate or interest in possession until the termination of the term thereby created.—p. 534.
LORD HERSCHELL to the same effect.
RIGBY, L.J. dissented.

Att.-Gen. v. Pickard (1838) 7 L. J. Ex. 188; 3 M. & W. 552; 1 H. & H. 174.—EX.; affirmed *nom.* **Pickard v. Att.-Gen.** (1840) 9 L. J. Ex. 329; 6 M. & W. 348.—EX. CH.

Pickard v. Att.-Gen., principle applied.
Att.-Gen. v. Henniker (Lord) (1852) 21 L. J. Ex. 293; 7 Ex. 331.—EX.; affirmed *nom.* **Henniker (Lord) v. Att.-Gen.**, 22 L. J. Ex. 41; 8 Ex. 257; 16 Jur. 1143.—EX. CH.

Pickard v. Att.-Gen. and Att.-Gen. v. Henniker (Lord), followed.
Sweeting v. Sweeting (1853) 22 L. J. Ch. 441; 1 Drew. 331; 17 Jur. 123; 1 W. R. 122.—KINDERSLEY, V.-C.

Pickard v. Att.-Gen., referred to.
Att.-Gen. v. Hertford (Marquis) (1845) 14 L. J. Ex. 266; 14 M. & W. 284.—EX.

Att.-Gen. v. Hertford (Marquis), applied.
Att.-Gen. v. Hertford (Marquis) (1849) 18 L. J. Ex. 332; 3 Ex. 70.—EX.

Att.-Gen. v. Hertford (Marquis) [18 L. J. Ex. 332], *applied*.

Att.-Gen. v. Theobald (1890) 24 Q. B. D. 557; 62 L. T. 768; 38 W. R. 527.—Q.B.D.

Forbes v. Steven (1870) 39 L. J. Ch. 485; L. R. 10 Eq. 178; 22 L. T. 703; 18 W. R. 686.—JAMES, V.-C., *distinguished*.

Att.-Gen. v. Lomas (1873) 43 L. J. Ex. 32; L. R. 9 Ex. 29, 34; 29 L. T. 749; 22 W. R. 188.—EX.; **Ewing, In goods of** (1881) 50 L. J. P. 11; 6 P. D. 19, 23; 44 L. T. 278; 29 W. R. 474; 45 J. P. 376.—HANNEN, P.; **Att.-Gen. v. Hubbuck** (1883) 10 Q. B. D. 488, 497 (affirmed, C.A.; *see* col. 2850); **Att.-Gen. v. Ailesbury (Marquis)** (1887) 57 L. J. Q. B. 83; 12 App. Cas. 672, 696; 58 L. T. 192; 36 W. R. 737.—H.L. (E.).

Forbes v. Stevens (*supra*), *followed*.

Stokes, *In re*, Stokes *v.* Ducroz (1890) 62 L. T. 176; S. C. *nom.* Stokes *v.* Ducroz, 36 W. R. 535; 6 Times L. R. 154.—NORTH, J.

Chatfield v. Berchtoldt (1871) 41 L. J. Ch. 115; L. R. 12 Eq. 464; 25 L. T. 121; 20 W. R. 53.—BACON, V.-C.; *reversed*, (1872) 41 L. J. Ch. 255; L. R. 7 Ch. 192; 26 L. T. 207; 20 W. R. 401.—JAMES and MELLISH, L.JJ.

Ewin (or Ewing), In re (1830) 1 Cr. & J. 151; 1 Tyrw. 92; 9 L. J. (O.S.) Ex. 37.—EX., *distinguished*.

Att.-Gen. *v.* Forbes (1834) 2 Cl. & F. 48; 8 Bligh 15; 3 Tyrw. 982.—H.L. (IR.).

Ewin, In re, *referred to*.

Att.-Gen. *v.* Hope (1834) 2 Cl. & F. 84; 8 Bligh (N.S.) 44; 1 Cr. M. & R. 530; 4 Tyrw. 878.—H.L. (E.).

Ewin, In re, *principle applied*.

Thomson *v.* Advocate-General (1845) 12 Cl. & F. 1; 9 Jur. 217.—H.L. (SC.).

Ewin, In re, *referred to*.

Att.-Gen. *v.* Napier (1851) 20 L. J. Ex. 173; 6 Ex. 217; 15 Jur. 253.—PARKE and ALDERSON, BB.; Att.-Gen. *v.* Giles (1860) 29 L. J. Ex. 176; 5 H. & N. 255; 1 L. T. 553; 8 W. R. 342.—EX.

Ewin, In re.

Applied, Wallop's Trust, *In re* (1864) 33 L. J. Ch. 351; 1 De G. J. & S. 656; 3 N. R. 679; 10 Jur. (N.S.) 328; 10 L. T. 174; 12 W. R. 587.—L.JJ.; *referred to*, Blackwood *v.* Reg. (1882) 52 L. J. P. C. 10; 8 App. Cas. 82, 93; 48 L. T. 441; 31 W. R. 645.—P.C.

Thomson v. Advocate-General (1845) 12 Cl. & F. 1; 9 Jur. 217.—H.L. (SC.), *applied*.

Att.-Gen. *v.* Napier (1851) 20 L. J. Ex. 173; 6 Ex. 217 (*supra*); Wallop's Trust, *In re* (1864) 33 L. J. Ch. 351; 1 De G. J. & S. 656 (*supra*).

Thomson v. Advocate-General, *referred to*.

Wallace *v.* Att.-Gen. (1865) 35 L. J. Ch. 124; L. R. 1 Ch. 1; 11 Jur. (N.S.) 937; 13 L. T. 480; 14 W. R. 116.—CRANWORTH, L.C.; Badart's Trusts, *In re* (1870) 39 L. J. Ch. 645; L. R. 10 Eq. 288; 24 L. T. 13; 18 W. R. 885.—MALINS, V.-C.

Thomson v. Advocate-General, *not applied*.

Ripley v. Waterworth (1802) 7 Ves. 425.—L.C., *referred to*.

Chatfield *v.* Berchtoldt (1872) 41 L. J. Ch. 255; L. R. 7 Ch. 192; 26 L. T. 267; 20 W. R. 401.—JAMES and MELLISH, L.JJ.

Thomson v. Advocate-General.

Discussed, Att.-Gen. *v.* Campbell (1872) 41 L. J. Ch. 611; L. R. 5 H. L. 524 (*see post*, col. 2868).—H.L. (E.); Lyall *v.* Lyall (1872) 42 L. J. Ch. 195; L. R. 15 Eq. 1; 27 L. T. 530; 21 W. R. 34.—ROMILLY, M.R.; *principle applied*, Tootal's Trusts, *In re* (1883) 52 L. J. Ch. 664; 23 Ch. D. 532; 48 L. T. 816; 31 W. R. 653.—CHITTY, J.; *discussed*, Goodman's Trusts, *In re* (1881) 50 L. J. Ch. 425; 17 Ch. D. 266, 285; 44 L. T. 527; 29 W. R. 586.—C.A.; Colquhoun *v.* Brooks (1887) 19 Q. B. D. 400, 408; 57 L. T. 445.—STEPHEN, J., WILLS, J., *dissenting* (*see ante*, col. 2823).

Thomson v. Advocate-General, *explained*.

Lawson *v.* Inland Revenue Commissioners (1895) [1896] 2 Ir. R. 418.—EX. D.

PALLES, C.B.—The property in question here is so situate as not to be subject to probate duty; and in that sense is, and for the pur-

poses of this case I treat it as being, "situate out of the United Kingdom," although, in a sense, it has no *situs* of its own. But if, before the [Finance] Act [1894], legacy duty was payable in respect of it, estate duty is now payable. Thus the question is, would legacy duty have been payable before the Act upon these mortgages of foreign property? I was surprised to hear it stated that, to the present, there had not been any decision upon this question. This seems extraordinary, considering the large number of mortgages of foreign railways which are held by persons domiciled in London. If the debts secured by the mortgages were not charged upon real estate, admittedly they would have been liable to legacy duty. The basis of the decision of the H.L. in *Thomson v. Advocate-General* is contained in the following sentence of the opinion of the Judges, as delivered by Tindal, C.J.: "We cannot consider that any distinction can be properly made between debts due to a testator from persons resident in the country in which the testator is domiciled at the time of his death, and debts due to him from debtors resident in another and a different country; but that all such debts do equally form part of the personal property of the testator or intestate, and must all follow the same rule, namely, the law of the domicile of the testator or intestate."—p. 434.

Thomson v. Advocate-General.

Approved, Harding *v.* Queensland Commissioners of Stamps (1898) 67 L. J. P. C. 144; [1898] A. C. 769; 79 L. T. 42.—P.C.; *referred to*, Att.-Gen. *v.* Jewish Colonization Association (1900) [1901] 1 Q. B. 123, 138.—C.A. (*post*, col. 2870).

Thomson v. Advocate-General and Harding v. Queensland Commissioners of Stamps, *referred to*.

Lambe *v.* Manuel (1902) 72 L. J. P. C. 17; [1903] A. C. 68, 72; 87 L. T. 460.—P.C.

Bruce, In re (1832) 1 L. J. Ex. 153; 2 Cr. & J. 436; 2 Tyrw. 475.—EX.

Applied, Thomson *v.* Advocate-General (1845) 12 Cl. & F. 1; 9 Jur. 217.—H.L. (SC.); Wallop's Trust, *In re* (1864) 33 L. J. Ch. 351; 1 De G. J. & S. 656; 3 N. R. 679; 10 Jur. (N.S.) 328; 10 L. T. 174; 12 W. R. 587.—L.JJ.; *explained*, Stepney Election Petition, *In re*, Isaacson *v.* Durant (1886) 55 L. J. Q. B. 331; 17 Q. B. D. 54, 61; 54 L. T. 684; 34 W. R. 547.—Q.B.D.

Att.-Gen. v. Napier (1851) 20 L. J. Ex. 173; 6 Ex. 217; 15 Jur. 253.—EX.

Discussed, Wallace *v.* Att.-Gen. (1865) 35 L. J. Ch. 124; L. R. 1 Ch. 1, 6; 11 Jur. (N.S.) 937; 13 L. T. 480; 14 W. R. 116.—CRANWORTH, L.C.; *adopted*, Blackwood *v.* Reg. (1882) 52 L. J. P. C. 10; 8 App. Cas. 82, 93; 48 L. T. 441; 31 W. R. 645.—P.C.; *explained*, Tootal's Trusts, *In re* (1883) 52 L. J. Ch. 664; 23 Ch. D. 532; 48 L. T. 816; 31 W. R. 653.—CHITTY, J.; *referred to*, Colquhoun *v.* Brooks (1887) 19 Q. B. D. 400, 409 (*supra*, col. 2857).

Capdevielle, In re (1864) 33 L. J. Ex. 306; 2 H. & C. 985; 10 Jur. (N.S.) 1155; 12 W. R. 1110.—EX., *followed*.

Badart's Trusts, *In re* (1870) 39 L. J. Ch. 645; L. R. 10 Eq. 288, 297; 24 L. T. 13; 18 W. R. 885.—MALINS, V.-C. *And see* "INTERNATIONAL LAW," vol. i., col. 1375.

Jackson v. Forbes (1832) 1 L. J. Ex. 159; 2 Cr. & J. 382; 2 Tyrw. 355.—EX.; *affirmed nom.* **Att.-Gen. v. Forbes** (or **Jackson**) (1834) 2 Cl. & F. 48; 8 Bligh 15; 3 Tyrw. 982.—H.L. (E.).

Att.-Gen. v. Forbes (or **Jackson**).

Referred to, **Att.-Gen. v. Hope** (1834) 2 Cl. & F. 84; 8 Bligh (N.S.) 44; 1 Cr. M. & R. 530; 4 Tyrw. 878.—H.L. (E.): *applied*, **Arnold v. Arnold** (1837) 6 L. J. Ch. 218; 2 My. & Cr. 256; 1 Jur. 255.—COTTENHAM, L.C.; *discussed*, **Shirley v. Ferrers** (Earl) (1842) 12 L. J. Ch. 111; 1 Ph. 167; 6 Jur. 1047.—COTTENHAM, L.C.; **Att.-Gen. v. Napier** (1851) 20 L. J. Ex. 173; 6 Ex. 217; 15 Jur. 253.—EX.; *Tootal's Trusts*, **In re** (1883) 52 L. J. Ch. 664; 23 Ch. D. 532, (*supra*, col. 2858); **Colquhoun v. Brooks** (1887) 19 Q. B. D. 400, 408 (*supra*, col. 2857).

Att.-Gen. v. Cockerell (1814) 1 Price 165; 15 R. R. 707.—EX., and **Att.-Gen. v. Beatson** (1819) 7 Price 560; 15 R. R. 707.—EX.

Distinguished, **Hay v. Fairlie** (1826) 1 Russ. 117.—GIFFORD, M.R.; **Bruce, *In re* (1832) 1 L. J. Ex. 153; 2 Cr. & J. 436; 2 Tyrw. 475.—EX.; **Att.-Gen. v. Forbes** (or **Jackson**) (1834) 2 Cl. & F. 48 (*supra*).—H.L.; *referred to*, **Att.-Gen. v. Hope** (1834) 2 Cl. & F. 84; 1 Cr. M. & R. 530; 4 Tyrw. 878; 8 Bligh (N.S.) 44.—H.L. (E.); *not applied*, **Arnold v. Arnold** (1837) 6 L. J. Ch. 218; 2 Myl. & Cr. 256; 1 Jur. 255: *treated as overruled*, **Thomson v. Advocate-General** (1845) 12 Cl. & F. 1; 9 Jur. 217.—H.L. (SC.).**

Logan v. Fairlie (1825) 2 Sim. & S. 284; 3 L. J. (O.S.) Ch. 152; 25 R. R. 208.—V.-C., *distinguished*.

Hay v. Fairlie (1826) 1 Russ. 117.—GIFFORD, M.R.; **Bruce, *In re* (1832) 2 Cr. & J. 436; 2 Tyrw. 475; 1 L. J. Ex. 153.—EX.; **Att.-Gen. v. Forbes** (or **Jackson**) (1834) 2 Cl. & F. 48 (*supra*).**

Logan v. Fairlie, *discussed and not applied*. **Arnold v. Arnold** (1837) 6 L. J. Ch. 218; 2 Myl. & Cr. 256; 1 Jur. 255.—COTTENHAM, L.C.

Arnold v. Arnold.

Discussed, **Thomson v. Advocate-General** (1845) 12 Cl. & F. 1; 9 Jur. 217.—H.L. (SC.): *distinguished*, **Att.-Gen. v. Napier** (1851) 20 L. J. Ex. 173; 6 Ex. 217; 15 Jur. 253.—PARKE and ALDERSON, BB.; *applied*, **Wallop's Trust**, *In re* (1864) 33 L. J. Ch. 351; 1 De G. J. & S. 656; 3 N. R. 679; 10 Jur. (N.S.) 328; 10 L. T. 174; 12 W. R. 587.—L.J.J.; *referred to*, **Goodman's Trusts**, *In re* (1881) 50 L. J. Ch. 425; 17 Ch. D. 266, 286; 44 L. T. 527; 29 W. R. 586.—C.A. (LUSH, L.J., dissenting).

Cholmondeley, In re (1832) 2 L. J. Ex. 65; 1 Cr. & M. 149; 3 Tyrw. 10; 33 R. R. 601.—EX., *referred to*.

Att.-Gen. v. Hertford (Marquis) (1845) 14 L. J. Ex. 266; 14 M. & W. 284.—EX.

Sweeting v. Sweeting (1853) 22 L. J. Ch. 441; 1 Drew. 381; 17 Jur. 123; 1 W. R. 122.—KINDERSLEY, V.-C., *referred to*.

Att.-Gen. v. Cullen (1863) 14 Ir. C. L. R. 137.—EX.; *affirmed nom.* **Cullen v. Att.-Gen.** (1866) L. R. 1 H. L. 190; 12 Jur. (N.S.) 531; 14 L. T. 644; 14 W. R. 869.—H.L. (IR.).

Williamson v. Advocate-General (1843) 10 Cl. & F. 1; 13 Sim. 153.—H.L. (E.), *followed*.

Att.-Gen. v. Lomas (1873) 43 L. J. Ex. 32; L. R. 9 Ex. 29; 29 L. T. 749; 22 W. R. 188.—EX.

Hobson v. Neale (1853) 22 L. J. Ex. 175; 8 Ex. 368.—EX.; S. C. (1853) 17 Beav. 178; M.R., *principle applied*. **Harding v. Harding** (1861) 2 Giff. 597; 7 Jur. (N.S.) 906.—V.-C.

Hobson v. Neale [17 Beav. 178], 185, *referred to*.

Armstrong v. Wilkinson (1878) 47 L. J. P. C. 31; 3 App. Cas. 355, 370; 38 L. T. 185; 26 W. R. 559.—P.C.

Evans, In re (1835) 4 L. J. Ex. 201; 2 Cr. M. & R. 206; 5 Tyr. 660.—EX.

Distinguished, **Williamson v. Advocate-General** (1843) 10 Cl. & F. 1.—H.L. (SC.); *held overruled*, **Att.-Gen. v. Simcox** (1848) 18 L. J. Ex. 61; 1 Ex. 749.—EX.

Evans, In re, *held overruled*.

Att.-Gen. v. Metcalfe (1851) 6 Ex. 26; 20 L. J. Ex. 329.—EX.

PARKE, B.—*Evans, In re* must now be considered as overruled by **Att.-Gen. v. Simcox** (*supra*), as to the meaning of the term direct. If the will permits the executors to sell the real estate, and they sell it, the legacy duty is payable, in the same way as it would have been if there had been an express direction to sell the real estate.—p. 43.

Att.-Gen. v. Mangles (1839) 5 M. & W. 120; 2 H. & H. 74; 3 Jur. 281.—EX., *principle applied*.

Att.-Gen. v. Simcox (1848) 18 L. J. Ex. 61; 1 Ex. 749.—EX.

Att.-Gen. v. Mangles, *explained*.

Att.-Gen. v. Ailesbury (Marquis) (1885) 54 L. J. Q. B. 324; 14 Q. B. D. 895, 903; 52 L. T. 809; 33 W. R. 731.—MATHEW and A. L. SMITH, JJ.; reversed, (1886) 55 L. J. Q. B. 257; 16 Q. B. D. 408.—C.A.; but restored, (1887) 57 L. J. Q. B. 83; 12 App. Cas. 672.—H.L. See *supra*, col. 2851.

De Lancey v. Inland Revenue Commissioners

or **De Lancey's Succession, In re** (1869) 39 L. J. Ex. 76; L. R. 5 Ex. 102; 22 L. T. 239; 18 W. R. 468.—EX. CH., *not applied*.

Badart's Trusts, In re (1870) L. R. 10 Eq. 288, 295; 39 L. J. Ch. 645; 24 L. T. 13; 18 W. R. 885.—MALINS, V.-C.

De Lancey v. Inland Revenue Commissioners, *treated as overruled*.

Att.-Gen. v. Dodd (1894) 63 L. J. Q. B. 319; [1894] 2 Q. B. 150, 156; 10 R. 177; 70 L. T. 660; 42 W. R. 524; 58 J. P. 526.—MATHEW and CAVE, JJ.

Franklin's (or **Francklin's**) **Charity, In re** (1829) 3 Y. & J. 544; 3 Sim. 147.—V.-C., *discussed*.

Wilkinson, In re (1834) 3 L. J. Ex. 236; 1 Cr. M. & R. 142; 4 Tyrw. 513.—EX.; and S. C. *nom.* **Att.-Gen. v. Nash** (1836) 5 L. J. Ex. 289; 1 M. & W. 237; 1 Tyrw. & G. 584.—EX. CH., *affirming ex.*

Franklin's Charity, In re, and **Wilkinson**

In re (or **Att.-Gen. v. Nash**), *distinguished*. **Att.-Gen. v. Fitzgerald** (1843) 13 Sim. 83; 7 Jur. 569.—SHADWELL, V.-C. And see col. 2861.

Franklin's Charity, In re (*supra*), referred to.
Wilkinson, In re (or **Att.-Gen. v. Nash** (*supra*), not applied.
 Griffiths, In re (1845) 15 L. J. Ex. 130; 14 M. & W. 510.—EX.

Wilkinson, In re (or **Att.-Gen. v. Nash**), not followed.
 Pearce, In re (1857) 24 Beav. 491.—ROMILLY, M.R.

Franklin's Charity, In re, referred to.
Wilkinson, In re (or **Att.-Gen. v. Nash**), commented on.
 Parker, In re (1859) 29 L. J. Ex. 66; H. & N. 666; 5 Jur. (N.S.) 1058; 7 W. R. 600.—EX.

Wilkinson, In re (or **Att.-Gen. v. Nash**), not followed.
 Harris v. Howe (Earl) (1861) 30 L. J. Ch. 612; 29 Beav. 261; 7 Jur. (N.S.) 333; 9 W. R. 404.—ROMILLY, M.R.; referred to, **Att.-Gen. (Ireland) v. Cullen** (1863) 14 Ir. C. L. R. 137.—EX.; affirmed nom. **Cullen v. Att.-Gen. (Ireland)** (1866) L. R. 1 H. L. 190; 12 Jur. (N.S.) 531; 14 L. T. 644; 14 W. R. 869.—H.L. (IR.); CRANWORTH, L.C., LORDS CHELMSFORD and WESTBURY.

Wilkinson, In re (or **Att.-Gen. v. Nash**), not applied.
Att.-Gen. v. Delaney (1876) Ir. R. 10 C. L. 104.—EX.

Att.-Gen. v. Fitzgerald (1843) 13 Sim. 83; 7 Jur. 569.—V.-C., approved and applied.
 Griffiths, In re (1845) 15 L. J. Ex. 130; 14 M. & W. 510.—EX.; Lyall v. Paton (1856) 25 L. J. Ch. 746.—KINDERSLEY, V.-C.; Parker, In re (1859) 29 L. J. Ex. 66; 4 H. & N. 666; 5 Jur. (N.S.) 1058; 7 W. R. 600.—EX.

Griffiths, In re (1845) 15 L. J. Ex. 130; 14 M. & W. 510.—EX., discussed and approved.
 Parker, In re (1859) 29 L. J. Ex. 66; 4 H. & N. 666; 5 Jur. (N.S.) 1058; 7 W. R. 600.—EX.

Parker, In re, referred to.
Att.-Gen. v. Delaney (1876) Ir. R. 10 C. L. 104.—EX.

Cullen v. Att.-Gen. (Ireland) (1866) L. R. 1 H. L. 190; 12 Jur. (N.S.) 531; 14 L. T. 644; 14 W. R. 869.—H.L. (IR.).

Discussed, **Kenny v. Att.-Gen.** (1883) 11 L. R. Ir. 253, 257.—SULLIVAN, M.R.: not applied, **Reg. v. Income Tax Commissioners** (1888) 59 L. J. Q. B. 196; 22 Q. B. D. 296, 303; 60 L. T. 446; 37 W. R. 294; 53 J. P. 198; 5 Times L. R. 12.—COLERIDGE, C.J., GRANTHAM, J. dissenting.

Att.-Gen. v. Bagot (1861) 13 Ir. C. L. R. 48.—EX., approved and applied.
Reg. (Pensel) v. Income Tax Commissioners (1888) 59 L. J. Q. B. 196; 22 Q. B. D. 296; 60 L. T. 446; 37 W. R. 294; 53 J. P. 198; 5 Times L. R. 163.—C.A. ESHER, M.R., FRY and LOPES, L.J.; affirmed, H.L. (E.) (*post*, col. 2862).

Dundee Magistrates v. Dundee Presbytery (1861) 4 Macq. 228.—H.L. (SC.), adopted.
Reg. (Pensel) v. Income Tax Commissioners (1888) 58 L. J. Q. B. 196; 22 Q. B. D. 296, 313.—C.A. (*supra*).

Dundee Magistrates v. Dundee Presbytery, referred to.
Income Tax Commissioners v. Pensel (1891) 61 L. J. Q. B. 265; [1891] A. C. 531, 561; 65 L. T. 621, 55 J. P. 805.—H.L. (E.). See "CHARITY," vol. i., col. 324 and *ante*, col. 2818.

Att.-Gen. v. Hope (1868) Ir. R. 2 C. L. 368. EX.; PIGOT, C.B., dissenting; applied.
Att.-Gen. v. Delaney (1875) Ir. R. 10 C. L. 104.—EX.

Att.-Gen. v. Hope and Att.-Gen. v. Delaney, approved and followed.
Kenny v. Att.-Gen. (1883) 11 L. R. Ir. 253, 259.—SULLIVAN, M.R.

Att.-Gen. v. Delaney.
 Referred to, Bradshaw v. Jackman (1887) 21 L. R. Ir. 12.—PORTER, M.R.; not applied, Perry v. Tuomey (1888) 21 L. R. Ir. 480.—PORTER, M.R.; referred to, **Reg. v. Inland Revenue Commissioners** (1888) 58 L. J. Q. B. 196; 22 Q. B. D. 296; 60 L. T. 446; 37 W. R. 294; 53 J. P. 198.—C.A. ESHER, M.R., FRY and LOPES, L.J. (*see supra*, col. 2861): approved, **Healy v. Att.-Gen.** [1902] 1 Ir. R. 342.—CHATTERTON, V.-C.

Kehoe v. Wilson (1880) 7 L. R. Ir. 10.—CHATTERTON, V.-C., discussed.
 Perry v. Tuomey (1888) 21 L. R. Ir. 480.—PORTER, M.R.

Kehoe v. Wilson, explained.
Perry v. Tuomey, referred to.
Healy v. Att.-Gen. [1902] 1 Ir. R. 342.—CHATTERTON, V.-C. [Theobald on Wills (4th ed.) 301 (5th ed.) 329, commented on].

Att.-Gen. v. Manners (Lady) (1815) 1 Price 411.—EX.
 Applied, **Att.-Gen. v. Wood** (1828) 2 Y. & J. 290.—EX. (*see post*, col. 2863); referred to, **Att.-Gen. v. Loscombe** (1860) 29 L. J. Ex. 305; 5 H. & N. 564.—EX.

Hill v. Atkinson (1816) 3 Price, 399, 400; 2 Meriv. 45.—ELDON, L.C., questioned.
Att.-Gen. v. Wood (1828) 2 Y. & J. 290.—EX.
 ALEXANDER, C.B.—Against **Att.-Gen. v. Manners** (*supra*) has been cited a case at a subsequent period, determined by Lord Eldon, for whose decisions I have certainly the utmost respect, knowing, as I do, how very much they were considered, and upon what a sound knowledge of the law all those decisions are founded. It is not the case itself that can be justly cited against that former decision, for that comes under circumstances so strikingly different, that it affords a marked distinction, and shows it did not come within the spirit of this Act of Parliament, but the language found in the report of the case by Mr. Price, in which Lord Eldon says, that appropriation means payment. Now, if I were disposed to give the utmost effect to these words, to the utmost extent that the counsel for the defendant could desire, I should not think myself at liberty to consider that which is but an *obiter dictum*, and not necessary to the decision of that case, an authority sufficient to overrule that which was actually done by this Court, upon great consideration. But I do not think, even giving full effect to those words, that such a consequence should follow. All that the L.C. says is, that a transfer by an executor to himself as trustee is an appropriation of the legacy.

It has been so held for a considerable length of time. For particular purposes unquestionably, it is an appropriation. If an executor transfer into his own name as trustee, the amount of a particular legacy, and act upon that transfer, that is an appropriation as against many persons, and in particular as against himself. But the question here is, whether that Act so done is to be considered as a delivery of the legacy as against the revenue, and this Act of Parliament; whether it is a retainer, or a satisfaction, or a discharge.—p. 301.

Hill v. Atkinson.

Applied, Coombe v. Trist (1835) 1 Myl. & Cr. 69.—COTTENHAM, L.C.; *referred to*, Att.-Gen. v. Giles (1860) 29 L. J. Ex. 176; 5 H. & N. 255; 1 L. T. 553; 8 W. R. 342.—EX.

Hill v. Atkinson and Coombe v. Trist, principle applied.

Att.-Gen. v. Wood (*supra*, col. 2862), *referred to*.

Att.-Gen. v. Loscombe (1860) 29 L. J. Ex. 305; 5 H. & N. 564.—EX.

Cornwallis' (Earl) Estate, In re (1856) 25 L. J. Ex. 149; 11 Ex. 580; 4 W. R. 711.—EX.

Applied, Bell v. Master in Equity of Supreme Court of Victoria (1877) 2 App. Cas. 560, 566; 36 L. T. 936.—P.C.; *discussed*, Joy, In re, Lalor v. Jones (1880) 5 L. R. Ir. 282.—WARREN, J.

Att.-Gen. v. Partington (1863) 1 H. & C. 457; 10 Jur. (N.S.) 617.—EX.; *affirmed*, (1864) 33 L. J. Ex. 281; 3 H. & C. 193; 10 Jur. (N.S.) 825; 10 L. T. 751; 13 W. R. 54.—EX. CH.; *the latter decision affirmed nom.* **Partington v. Att.-Gen.** (1869) 38 L. J. Ex. 205; L. R. 4 H. L. 100; 21 L. T. 370.—H.L. (E.).

Partington v. Att.-Gen., applied.

Lord v. Colvin (1867) 36 L. J. Ch. 354; L. R. 3 Eq. 737; 16 L. T. 53; 15 W. R. 485.

MALINS, V.C.—In *Att.-Gen. v. Partington* it was decided by the Ct. of C. P. that probate or administration duty must be calculated, not only on the principal money which constituted the property at the time of the death, but also on the accumulation of interest between the death and the grant of probate or letters of administration.—p. 358.

Partington v. Att.-Gen., applied.

Harding, In goods of (1872) 41 L. J. P. 65; L. R. 2 P. 394; 26 L. T. 668; 20 W. R. 615.—LORD PENZANCE.

Partington v. Att.-Gen., referred to.

Bell v. Master in Equity of Supreme Court of Victoria (1877) 2 App. Cas. 560; 36 L. T. 936.—P.C.

Partington v. Att.-Gen., principle applied.

Joy, In re, Lalor v. Jones (1880) 5 L. R. Ir. 282.—WARREN, J.; O'Neill (Lord), In re (1886) 20 L. R. Ir. 73, 90.—EX. D.; Colquhoun v. Brooks (1888) 57 L. J. Q. B. 439; 21 Q. B. D. 52, 62; 59 L. T. 661; 36 W. R. 657; 52 J. P. 645.—C.A. ESHER, M.R. and LOPES, L.J.; FRY, L.J. dissenting; *affirmed*, H.L. (*ante*, col. 2823).

Partington v. Att.-Gen., referred to.

Smart v. Tranter (1888) 58 L. J. Ch. 183; 40 Ch. D. 165, 168; 59 L. T. 890; 37 W. R. 213.—

O.C.

KAY, J.: reversed, (1890) 59 L. J. Ch. 363; 43 Ch. D. 587; 62 L. T. 356; 38 W. R. 530.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

Partington v. Att.-Gen., referred to.

Massereene (Viscount) v. Inland Revenue Commissioners (1899) [1900] 2 Ir. R. 138, 150.—Q.B.D.; Att.-Gen. v. De Préville (1899) 69 L. J. Q. B. 283; [1900] 1 Q. B. 223, 230; 81 L. T. 690; 48 W. R. 193.—C.A.

Partington v. Att.-Gen., observations applied.

Att.-Gen. v. Selborne (Earl) (1901) 71 L. J. K. B. 289; [1902] 1 K. B. 388, 396; 85 L. T. 714; 50 W. R. 210; 66 J. P. 132.—C.A.

Att.-Gen. v. Dardier (1883) 52 L. J. Q. B.

329; 11 Q. B. D. 16; 48 L. T. 582; 31 W. R. 499; 47 J. P. 484.—Q.B.D., distinguished and not applied.

Att.-Gen. v. Smith and Cocks [1892] 2 Q. B. 289; 66 L. T. 857; 40 W. R. 671; 56 J. P. 758.—D.; *affirmed*, 62 L. J. Q. B. 228; [1893] 1 Q. B. 239; 4 R. 233; 68 L. T. 6; 41 W. R. 245; 57 J. P. 389.—C.A.

Sammon, In re (1838) 3 M. & W. 381.—EX. *See*

Crown Suits Act, 1865, s. 56, and Inland Revenue Act, 1870.

Bignold v. Giles (1859) 4 Drew. 343; 28

L. J. Ch. 233; 7 W. R. 99.—KINDERSLEY, V.C.

Approved, Att.-Gen. v. Giles (1860) 29 L. J. Ex. 176; 5 H. & N. 255; 1 L. T. 553.—EX.; *discussed*, Forster's Estate, In re (1889) 23 L. R. Ir. 269, 277.—MONROE, J.

Bryan v. Mansion (1857) 26 L. J. Ch. 510;

3 Jur. (N.S.) 473; 5 W. R. 433.—GRANWORTH, L.C., principle applied.

Att.-Gen. v. Bruce (1901) 70 L. J. K. B. 767; [1901] 2 K. B. 391; 85 L. T. 114; 49 W. R. 519; 65 J. P. 329.—KENNEDY and PHILLIMORE, JJ.

Noel v. Henley (Lord) (1819) 7 Price 241,

253; 26 R. R. 660.—EX. CH., *discussed*.

Louch v. Peters (1834) 3 L. J. Ch. 167; 1 Myl. & K. 489.—COTTENHAM, L.C.; Att.-Gen. v. Giles (1860) 29 L. J. Ex. 176; 5 H. & N. 255; 1 L. T. 553.—EX. *And see* "APPEAL," vol. i., col. 29.

Att.-Gen. v. Cavendish (1810) Wightw. 82;

12 R. R. 716.—EX.; and **Thomas v.**

Montgomery (1827) 5 Russ. 502.—L.C., *referred to*.

Att.-Gen. v. Giles (1860) 29 L. J. Ex. 176; 5 H. & N. 255; 1 L. T. 553.—EX.

Warbrick v. Varley (No. 1) (1861) 30 Beav.

241.—ROMILLY, M.R., *applied*.

Robins, In re, Nelson v. Robins (1888) 58 L. T. 382.

NORTH, J.—*Warbrick v. Varley* is an authority that the meaning of the words "free of all charges" which, if they stood alone, would mean free of legacy duty, could not be cut down by the fact that another legacy was given "free of duty." I think that case applies here.—p. 382.

Warbrick v. Varley (*supra*), *referred to*.
Macdonald's Trustees v. Aberdeen Magistrates
 (1902) 4 Fraser 907.—CT. OF SESS.

Heath v. Nugent (1860) 29 Beav. 226.—
 ROMILLY, M.R., *followed*.

Wilkins, In re, Wilkins v. Rotherham (1884)
 54 L. J. Ch. 188; 27 Ch. D. 703; 33 W. R. 42.—
 PEARSON, J.

Foster v. Ley (1835) 5 L. J. C. P. 17; 2
 Bing. N. C. 269; 1 Hodges 326; 2 Scott
 438.—C.P.

Distinguished, Gude v. Mumford (1837) 2
 Y. & C. 448.—EX.; *referred to*, **Williamson v.**
Naylor (1838) 3 Y. & C. 208, 212.—ALDERSON, B.

Hales v. Freeman (1819) 4 Moore 21;
 1 Br. & B. 391; 21 R. R. 663.—C.P.,
referred to.

Stow v. Davenport (1833) 2 N. & M. 805; 5
 B. & Ad. 359.—K.B.

Hales v. Freeman, commented on.

Gude v. Mumford (1837) 2 Y. & C. 448.—EX.

Barksdale v. Gilliat (1818) 1 Swanst. 562;
 18 R. R. 139.—ELDON, L.C., *observed upon*.
Smith v. Anderson (1828) 4 Russ. 352; 6 L. J.
 (o.s.) Ch. 105; 28 R. R. 122.—M.R.

Barksdale v. Gilliat, explained.

Smith v. Anderson, dictum dissented from.
Louch v. Peters (1834) 3 L. J. Ch. 167; 1 Myl.
 & K. 489.—L.C.

Barksdale v. Gilliat, applied.

Watson v. Arundell (1877) Ir. R. 11 Eq. 53,
 74.—C.A.

Barksdale v. Gilliat, referred to.

Grainger, In re, Dawson v. Higgins (1900) 69
 L. J. Ch. 789; [1900] 2 Ch. 756, 764; 83 L. T.
 209; 48 W. R. 673.—C.A.; reversed (1901) 71
 L. J. Ch. 132; [1902] A. C. 1; 85 L. T. 763; 50
 W. R. 337.—H.L. (E.).

Gude v. Mumford (1837) 2 Y. & C. 448.—
 EX., *followed*.

Baily v. Boulton (1851) 21 L. J. Ch. 277; 14
 Beav. 595; 15 Jur. 1049.—ROMILLY, M.R.

Gude v. Mumford and Baily v. Boulton,
referred to.

Pridie v. Field (1854) 19 Beav. 497.—
 ROMILLY, M.R.

Sanders v. Kiddell (1835) 5 L. J. Ch.
 29; 7 Sim. 536.—SHADWELL, V.-C.

Distinguished, Marris v. Burton (1840) 9 L. J.
 Ch. 573; 11 Sim. 161.—SHADWELL, V.-C.; **Baily**
v. Boulton (*supra*); *explained and applied*, **Pridie**
v. Field (*supra*); *referred to*, **Saunders, In re,**
Saunders v. Gore (*post*).

Marris v. Burton (*supra*), *distinguished*.

Baily v. Boulton (1851) 21 L. J. Ch. 277; 14
 Beav. 595; 15 Jur. 1049.—ROMILLY, M.R.

Marris v. Burton, distinguished.

Banks v. Braithwaite (1863) 32 L. J. Ch. 35;
 7 L. T. 149; 10 W. R. 612.

KINDERSLEY, V.-C.—There it was not merely
 a gift of dividends of stock, but an annuity
 which was to be made good out of other parts
 of the property.—p. 36.

Marris v. Burton, referred to.

Saunders, In re, Saunders v. Gore (1897) 67
 L. J. Ch. 55; [1898] 1 Ch. 17; 77 L. T. 450; 46
 W. R. 180.—C.A.

Haynes v. Haynes (1853) 3 De G. M. & G.
 590; 1 W. R. 204.—L.J., *applied*.

Wilks v. Groom (1856) 2 Jur. (N.S.) 798; 4
 W. R. 637.—KINDERSLEY, V.-C.

Haynes v. Haynes, applied.

Banks v. Braithwaite (1863) 32 L. J. Ch.
 35; 10 W. R. 612.—KINDERSLEY, V.-C.,
considered.

Cole's Will, In re (1869) L. R. 8 Eq. 271; 22
 L. T. 221.

MALINS, V.-C.—It is settled by **Haynes v.**
Haynes that when a testator gives a clear
 annuity that is to be construed as an annuity
 free from duty, and in this case the testator
 has, in effect, given a clear yearly sum of 100l.
 to this charity. In **Banks v. Braithwaite** there
 was a direction to retain so much stock as should
 be sufficient to realize the clear yearly income
 of 150l., and to pay, not an annuity, but the
 dividends of the stock. Here the direction is to
 pay such income or yearly sum, that is to say,
 the clear income or yearly sum of 100l. Whether
Banks v. Braithwaite is consistent with **Haynes**
v. Haynes, it is unnecessary for me to consider;
 I am bound to follow the latter, which is the
 decision of the C. A., and in the good sense of
 which, moreover, I entirely concur. I think
 that decision governs the present case, and I am,
 therefore, of opinion that this legacy was given
 free of duty.—p. 271.

Haynes v. Haynes, applied.

Currie, In re, Bjorkman v. Kimberley (Lord)
 (1888) 57 L. J. Ch. 743; 59 L. T. 200; 36 W. R.
 752.—KAY, J.

Banks v. Braithwaite (*supra*) *questioned and*
not applied.

Haynes v. Haynes, referred to.

Currie, In re, Bjorkman v. Kimberley,
reasoning in approved.

Saunders, In re, Saunders v. Gore (1897) 67
 L. J. Ch. 55; [1898] 1 Ch. 17; 77 L. T. 450; 46
 W. R. 180.—C.A.

LINDLEY, M.R.—I am not going through the
 authorities, but with reference to **Banks v.**
Braithwaite, I must say that I should not have
 construed the document there in question as
 Kindersley, V.-C. did. There a testator gave the
 residue of his personal estate to trustees upon
 trust to set apart 10,000l. Consols, and pay the
 dividends to his sister for life, and after her
 decease to retain so much of the said sum as
 should be sufficient to realise the clear yearly
 income of 150l.; and he directed the trustees to
 pay the dividends and other income of the stock
 so directed to be retained by them to his nephew.
 I should have read that as a gift of a clear
 yearly income of 150l. to the nephew. How-
 ever, I see the difference between that case and
 this, because there was a difficulty in working out
 the principle which I should have endeavoured
 to apply with regard to certain rates of duties.
 Here we are not embarrassed by that at all.
 This is a simple appointment to E. Saunders of
 this sum. It appears to me that on the true con-
 struction of this document, the case of **Banks v.**
Braithwaite and others like it do not apply.—
 p. 56.

CHITTY, L.J.—With regard to legacies, the
 authorities have settled that where a legacy is
 given to one person so that only one rate of duty
 is payable, and the legacy given is a clear sum of
 money, the legatee takes free of duty. It is

sufficient to refer to *Haynes v. Haynes* for that proposition. . . . It might be said that the word "clear," or the word "net," in this instrument refers to those expenses only [*i.e.*, expenses of administration]. I think that would be a very narrow construction. That was not the construction which was adopted by Kay, J. in *Currie, In re*, where he had to deal with an appointment under a general power of so much of the trust funds as should be of the clear value of 1,000*l.*, and he held, and I agree with his reasoning, that that was an appointment of a sum of 1,000*l.* clear of all the trustees' expenses, and clear also of the legacy or succession duty. . . . The case is not the same as that by which Stirling, J. considered himself bound—*Banks v. Braithwaite*. . . . I must confess that I myself should on the construction of the will there have arrived at a different conclusion from that which the V.-C. arrived at. . . . I understand the reasoning of the V.-C., but I think it is too fine, if I may say so, to make it applicable to that case. . . . I think that the case is not governed by *Banks v. Braithwaite*, whatever may be said of that case. —pp. 57, 58.

V. WILLIAMS, L.J., who concurred with some hesitation on the construction of the document in question, referred to *Banks v. Braithwaite*, but expressed no opinion on its correctness.

Currie, In re, distinguished.

Chisholm, *In re, Goddard v. Brodie* (1902) 71 L. J. Ch. 289; [1902] 1 Ch. 457; 86 L. T. 183.—KEKEWICH, J.

Shaftesbury (Earl) v. Marlborough (Duke) (1835) 7 Sim. 237. —SHADWELL, V.-C., *applied*.

Johnstone v. Harrowby (Earl) (1859) 29 L. J. Ch. 145; 1 De G. F. & J. 183; 6 Jur. (N.S.) 153; 1 L. T. 390; 8 W. R. 105.—WOOD, V.-C.

Shaftesbury (Earl) v. Marlborough (Duke), *referred to*.

Boddington, *In re, Boddington v. Clairat* (1884) 53 L. J. Ch. 475; 25 Ch. D. 685; 50 L. T. 761; 32 W. R. 448.—C.A.

Chatteris v. Young (1827) 2 Russ. 183; 26 R. R. 44.—L.C.; *affirming* (1821) 6 Madd. 30.—V.-C., *explained*.

Byne v. Currey (1834) 2 Cr. & M. 603; 3 L. J. Ex. 177; 4 Tyrw. 479.—EX.

LYNDHURST, C.B.—In that case, the legacy to the husband, after a legacy to the wife had lapsed by her death, was not a substitution in the sense in which it is used in cases of this kind. It was held to be a substantive bequest.—p. 608.

Byne v. Currey, discussed.

Sealy, *In re, Tomkins v. Tucker* (1901) 85 L. T. 451.—FARWELL, J.

Early v. Benbow (1846) 2 Coll. 354; 10 Jur. 280.—KNIGHT BRUCE, V.-C.

Explained and not applied, *Donnellan v. O'Neill* (1871) Ir. R. 5 Eq. 523, 532.—M.R.; *discussed*, *Sealy, In re, Tomkins v. Tucker (supra)*.

Anslay v. Cotton (1846) 16 L. J. Ch. 55.—COTTENHAM, L.C., *discussed and followed*. Johnston, *In re, Cockerell v. Essex (Earl)* (1884) 26 Ch. D. 538; 53 L. J. Ch. 645; 52 L. T. 44; 32 W. R. 634.—CHITTY, J.

Att.-Gen. v. Rowsell (1844), 36 Ch. D. 67, n.—EX.; cited in Tilsley's "Treatise on the Stamp Acts," 2nd ed. p. 685, *applied*.

Att.-Gen. v. Abdy (1862) 32 L. J. Ex. 9; 1 H. & C. 266, 297 (*post*, col. 2879); Pocock's Policy, *In re* (1871) L. R. 6 Ch. 449, n.—MALINS, V.-C.; (affirmed, 40 L. J. Ch. 681; L. R. 6 Ch. 445; 25 L. T. 233; 19 W. R. 801.—L.J.J.); Phillips' Insurance, *In re* (1883) 52 L. J. Ch. 441; 23 Ch. D. 235, 245; 48 L. T. 81; 31 W. R. 511.—C.A.; *Urquhart v. Butterfield* (1887) 56 L. J. Ch. 938; 36 Ch. D. 55, 73.—NORTH, J. (*post*, col. 2879).

6. SUCCESSION DUTY.

Att.-Gen. v. Fitzjohn (1857) 27 L. J. Ex. 79; 2 H. & N. 465; 5 W. R. 876.—EX., *discussed and applied*.

Att.-Gen. v. Middleton (Lord) (1858) 27 L. J. Ex. 229; 3 H. & N. 125; 6 W. R. 300.—EX.

Wileox v. Smith (1857) 26 L. J. Ch. 596; 4 Drew. 40; 3 Jur. (N.S.) 604; 5 W. R. 667.—KINDERSLEY, V.-C., *approved*.

Att.-Gen. v. Middleton (Lord) (*supra*); *referred to*, **Att.-Gen. v. Noyes** (1881) 51 L. J. Q. B. 185; 8 Q. B. D. 125, 131; 45 L. T. 520; 30 W. R. 434.—GROVE, J.; LINDLEY, J. dissenting; (reversed, C.A.).

Att.-Gen. v. Gell (1865) 34 L. J. Ex. 145; 3 H. & C. 615; 11 Jur. (N.S.) 566; 12 L. T. 461; 13 W. R. 900.—EX., *commented on, but followed*.

Ring v. Jarman (1872) 41 L. J. Ch. 535; L. R. 14 Eq. 357, 363; 26 L. T. 690; 20 W. R. 744. See S. C. 21 W. R. 213.—L.JJ.

WICKENS, V.-C.—The Succession Duty Act has in some cases received an interpretation . . . which seems not very consistent with the old canons of construction as applied to statutes laying burthens on the subject. But I am not at liberty to dissent from a decision of the Ct. of Ex., upon the ground of my not being able personally to agree with it. Of course, if I found that the case had been insufficiently argued before the Ct. of Ex., that might have enabled me to feel more free than I do. But in *Att.-Gen. v. Gell*, all the arguments which have been adduced before me in this case, and which arguments, if it were *res integra*, I should have thought were unanswerable, were brought before the Ct. of Ex. very fully and very ably; and it is clear that they were . . . carefully considered by the Court. Again, I might feel myself more free if it appeared that to follow the decision of *Att.-Gen. v. Gell* in this case, would be to give to the principle that the Ct. of Ex. laid down there, an extension that they never contemplated. But it appears that this particular application, or one which was an *à fortiori* one, was contemplated, and that they were willing not to disavow it.—p. 537.

Wallace v. Att.-Gen. (1865) 35 L. J. Ch. 124; L. R. 1 Ch. 1; 11 Jur. (N.S.) 937; 13 L. T. 480; 14 W. R. 116.—CRANWORTH, L.C.

Distinguished, *Badart's Trusts, In re* (1870) 39 L. J. Ch. 645; L. R. 10 Eq. 288; 24 L. T. 13; 18 W. R. 885.—MALINS, V.-C.; *applied*, *Callanane v. Campbell* (1871) 40 L. J. Ch. 195; L. R. 11 Eq. 378, 381; 24 L. T. 175; 19 W. R. 406.—ROMILLY, M.R.

Wallace v. Att.-Gen., commented on.

Callanane v. Campbell, varied.

Att.-Gen. v. Campbell (1872) 41 L. J. Ch. 611; L. R. 5 H. L. 524; 21 W. R. 34 n.—H.L. (E.).

HATHERLEY, L.C.—The difference between *Thomson v. Advocate-General* ((1845) 12 Cl. & F. 11.—H.L., *ante*, col. 2857) and this case is perfectly plain and manifest. The difference is exactly the same between this case and . . . *Wallace v. Att.-Gen.* In each of those cases you had to deal with a fund which was to be administered, and which was in the course of administration, before the person in whom the duty of administering it was imposed had cleared himself and discharged himself of that duty. In those cases, he being a foreigner (we must take him to be a foreigner, because the original owner of the property was a foreigner) you could not claim duties leviable under English Acts of Parliament from that person when you would have to pursue him before a foreign tribunal. But when the duties which have been imposed upon him involve the placing of the money here in funds within the functions of the judicature of this country, and when you find those funds in a state involving succession from one individual to another, then the duty has accrued, and you proceed to levy it.—p. 613.

LORD WESTBURY to the same effect. LORDS CHELMSFORD and COLONSAY concurred.

Att.-Gen. v. Campbell (*supra*), followed.

Wallace v. Att.-Gen., discussed.

Lyllall v. Lyllall (1872) 42 L. J. Ch. 195; L. R. 15 Eq. 115; 27 L. T. 530; 21 W. R. 34.

ROMILLY, M.R.—*Att.-Gen. v. Campbell* was heard *ex parte*, no one appearing for the respondent, and though the point on which I mainly relied was only slightly alluded to by one of the counsel in the argument before the H. L. and was not noticed in their Lordships' judgment, yet the judgment they did pronounce does appear exactly to apply to the case now before me.—p. 200. [His lordship then discussed *Wallace v. Att.-Gen.* and *Thomson v. Advocate-General* and continued:] As, however, the decision of the H. L. in *Att.-Gen. v. Campbell* was unqualified and decisive, and as it clearly appears to me to govern every case of a settlement made in English form and, consequently to govern the case before me, I have no option but to follow it, and accordingly I shall make an order to the effect that the Court being of opinion that, according to the decision in *Att.-Gen. v. Campbell*, succession duty is payable in this case, order the same to be paid, and order the residue of the fund to be paid to the petitioner.—p. 204.

Att.-Gen. v. Campbell, referred to.

Cigala's Settlement Trusts, In re (1878) 47 L. J. Ch. 166; 7 Ch. D. 351, 356; 38 L. T. 439; 26 W. R. 257.—JESSEL, M.R. See *post*, col. 2871.

Wallace v. Att.-Gen., referred to.

Goodman's Trusts, In re (1887) 50 L. J. Ch. 425; 17 Ch. D. 266, 286; 44 L. T. 527; 29 W. R. 586.—C.A. JAMES and COTTON, L.J.J.; LUSH, L.J. dissenting. See "EXECUTOR AND ADMINISTRATOR," vol. i., col. 1407.

Att.-Gen. v. Campbell, *Wallace v. Att.-Gen.* and *Cigala's Settlement Trusts*, In re (*supra*), discussed.

Colquhoun v. Brooks (1887) 19 Q. B. D. 400, 407; 57 L. T. 455.—STEPHEN, J.; WILLS, J. dissenting; reversed, C.A. See *post*.

Att.-Gen. v. Campbell, referred to.

Colquhoun v. Brooks (1888) 57 L. J. Q. B. 439; 21 Q. B. D. 52, 62; 59 L. T. 661; 36 W. R. 657;

52 J. P. 645.—C.A., FRY, L.J. dissenting; affirmed, (1889) 59 L. J. Q. B. 53; 14 App. Cas. 493; 61 L. T. 518; 38 W. R. 289; 54 J. P. 277; 5 Times L. R. 728.—H.L. (E.).

Wallace v. Att.-Gen., *Att.-Gen. v. Campbell* and *Cigala's Settlement Trusts*, In re, explained and principle applied.

Att.-Gen. v. Felce (1894) 10 Times L. R. 337.—MATHEW and CAVE, JJ.

Cigala's Settlement Trusts, In re, referred to.

Smyth, In re, Leach v. Leach (1898) 67 L. J. Ch. 10; [1898] 1 Ch. 89, 94; 77 L. T. 514; 46 W. R. 104.—ROMER, J.

Wallace v. Att.-Gen., referred to.

Harding v. Queensland Stamps Commissioners (1898) 67 L. J. P. C. 144; [1898] A. C. 769, 772; 79 L. T. 42.—P.C.

Wallace v. Att.-Gen., *Att.-Gen. v. Campbell*, *Cigala's Settlement Trusts*, In re, and *Att.-Gen. v. Felce* (*supra*), discussed.

Att.-Gen. v. Jewish Colonization Association (1900) 69 L. J. Q. B. 692; [1900] 2 Q. B. 556, 565; 82 L. T. 679; 49 W. R. 59; 64 J. P. 426.—RIDLEY and DARLING, JJ.; affirmed, *post*.

Wallace v. Att.-Gen. and *Att.-Gen. v. Campbell*, applied.

Cigala's Settlement Trusts, In re, followed.

* *Att.-Gen. v. Felce*, referred to.

Att.-Gen. v. Jewish Colonization Association (1900) 70 L. J. Q. B. 101; [1901] 1 Q. B. 123, 132; 83 L. T. 561; 49 W. R. 230; 65 J. P. 21.—C.A. See judgments at length.

Wallace v. Att.-Gen., referred to.

Lambe v. Manuel (1902) 72 L. J. P. C. 17; [1903] A. C. 68, 72; 87 L. T. 460.—P.C.

Lovelace's Settlement, In re, 5 Jur. (N.S.) 428; 7 W. R. 401.—WOOD, V.-C.; reversed, (1859) 28 L. J. Ch. 489; 4 De G. & J. 340; 5 Jur. (N.S.) 694; 7 W. R. 575.—L.J.J.

Lovelace's Settlement, In re, followed.

Barker, In re (1861) 30 L. J. Ex. 404; 7 H. & N. 109; 7 Jur. (N.S.) 1061; 5 L. T. 206.—EX.; *Wallop's Trusts*, In re (1864) 33 L. J. Ch. 351; 1 De G. J. & S. 656; 3 N. R. 679; 10 Jur. (N.S.) 328; 10 L. T. 174; 12 W. R. 587.—L.J.J.

Lovelace's Settlement, In re, explained and applied.

Chapman's Trusts, In re (1865) 2 H. & M. 447; 11 Jur. (N.S.) 708; 13 L. T. 144.

WOOD, V.-C.—The rules, settled by *Lovelace's* case, and *Wallop's* case (*supra*) amount to this: that, where a general power is given and exercised, the appointee is a person taking in succession to the appointor; and the appointor is also a successor to the donor of the power.—p. 450.

Lovelace's Settlement, In re, distinguished.

Wallace v. Att.-Gen. (1865) 35 L. J. Ch. 124; L. R. 1 Ch. 1, 9; 11 Jur. (N.S.) 937; 13 L. T. 480; 14 W. R. 116.—CRANWORTH, L.C.; *Att.-Gen. v. Upton* (1866) 35 L. J. Ex. 138; L. R. 1 Ex. 224, 228; 4 H. & C. 336; 12 Jur. (N.S.) 469; 14 L. T. 334; 14 W. R. 752.—EX.

Lovelace's Settlement, In re.

Recognised, *Cigala's Settlement Trusts* (1878) 47 L. J. Ch. 166; 7 Ch. D. 351, 356; 38 L. T. 439; 26 W. R. 257.—JESSEL, M.R. (see *post*, col. 2871); *dictum commented on*, *Charlton v. Att.-Gen.* (1879) 49 L. J. Ex. 86; 4 App. Cas. 427, 445; 40 L. T. 760; 27 W. R. 921.—H.L. (E.);

explained, Att.-Gen. v. Mitchell (1881) 50 L.J. Q. B. 406; 6 Q. B. D. 548, 555; 44 L. T. 580; 29 W. R. 683; 45 J. P. 618.—Q.B.D.

Lovelace's Settlement, In re, *discussed*.

Att.-Gen. v. Jewish Colonization Association (1900) 69 L. J. Q. B. 692; [1900] 2 Q. B. 556, 565; 82 L. T. 679; 49 W. R. 59; 64 J. P. 426.—RIDLEY and DARLING, JJ.; and (1900) 70 L. J. K. B. 101; [1901] 1 K. B. 123, 138; 83 L. T. 561; 49 W. R. 230; 65 J. P. 21.—C.A. A. L. SMITH, M.R., COLLINS and STIRLING, L.JJ. See judgments at length.

Wallop's Trust, In re (1864) 33 L. J. Ch. 351; 1 De G. J. & S. 656; 3 N. R. 679; 10 Jur. (N.S.) 328; 10 L. T. 174; 12 W. R. 587.—L.JJ., *referred to*.

Wallace v. Att.-Gen. (1865) 35 L. J. Ch. 124; L. R. 1 Ch. 1, 9 (*supra*, col. 2863); Badart's Trusts, In re (1870) 39 L. J. Ch. 645; L. R. 10 Eq. 288, 293; 24 L. T. 13; 18 W. R. 885.—MALINS, V.-C.; Lyall v. Lyall (1872) 42 L. J. Ch. 195; L. R. 15 Eq. 1, 9; 27 L. T. 530; 21 W. R. 34.—ROMILLY, M.R.: Att.-Gen. v. Jewish Colonization Association (1900) 69 L. J. Q. B. 692; [1900] 2 Q. B. 556, 564.—Q.B.D.; and 70 L. J. K. B. 101; [1901] 1 K. B. 123, 139.—C.A. (*supra*).

Smith's Trusts, In re, (1864) 10 L. T. 598; 12 W. R. 933.—STUART, V.-C., *followed*.

Badart's Trusts, In re (1870) 39 L. J. Ch. 645; L. R. 10 Eq. 288, 297; 24 L. T. 13; 18 W. R. 885.—MALINS, V.-C.

Smith's Trusts, In re, and Badart's Trusts, In re, *discussed*.

Lyall v. Lyall (1872) 42 L. J. Ch. 195; L. R. 15 Eq. 1, 9; 27 L. T. 530; 21 W. R. 34.—ROMILLY, M.R.

Lyall v. Lyall, *recognised*.

Cigala's Settlement Trusts, In re (1878) 7 Ch. D. 351; 47 L. J. Ch. 166; 38 L. T. 439; 26 W. R. 257.

JESSEL, M.R.—In *Lovelace's Settlement, In re* (*supra*, col. 2870) before the L.JJ., and in *Att.-Gen. v. Campbell* (L. R. 5 H. L. 524, *supra*, col. 2868) and *Lyall v. Lyall*, it was held that a foreigner might be liable to pay succession duty—that the mere circumstance of a man being a foreigner was not sufficient to exempt him.—p. 356.

Badart's Trusts, In re, and Lyall v. Lyall, *discussed*.

Att.-Gen. v. Jewish Colonization Association (1900) 69 L. J. Q. B. 692; [1900] 2 Q. B. 556, 566.—Q.B.D. (*supra*).

Saltoun (Lord) v. Lord Advocate (1860) 3 Macq. 659; 6 Jur. (N.S.) 713; 8 W. R. 565.—H.L. (SC.).

Referred to, Att.-Gen. v. Upton (1866) L. R. 1 Ex. 224, 230; 35 L. J. Ex. 138; 4 H. & C. 336; 12 Jur. (N.S.) 489; 14 L. T. 334; 14 W. R. 752.—EX.; Cowley's (Earl) Succession, In re (1866) 35 L. J. Ex. 177; L. R. 1 Ex. 288; 12 Jur. (N.S.) 607; 14 L. T. 663; 14 W. R. 836.—EX.; De Lancey, In re (1869) 38 L. J. Ex. 193; L. R. 4 Ex. 345, 351.—EX. (affirmed, (1870) 39 L. J. Ex. 76; L. R. 5 Ex. 102; 22 L. T. 239; 18 W. R. 468.—EX. CH.); *applied*, Fryer v. Morland (1876) 45 L. J. Ch. 817; 3 Ch. D. 675, 680; 35 L. T. 458; 25 W. R. 21.—JESSEL, M.R.; *discussed*,

Zetland (Earl) v. Lord Advocate (1878) 3 App. Cas. 505; 38 L. T. 297; 26 W. R. 725.—H.L. (SC.).

Saltoun (Lord) v. Lord Advocate and Zetland (Earl) v. Lord Advocate, *discussed*.

Charlton v. Att.-Gen. (1879) 49 L. J. Ex. 86; 4 App. Cas. 427, 440; 40 L. T. 760; 27 W. R. 921.—H.L. (E.).

Saltoun (Lord) v. Lord Advocate, *considered*.

Income Tax Commissioners v. Pemsel (1891) 61 L. J. Q. B. 265; [1891] A. C. 531, 535; 65 L. T. 621; 55 J. P. 805.—H.L. (E.).

Saltoun (Lord) v. Lord Advocate, *principle applied*.

Macfarlane v. Lord Advocate [1894] A. C. 291; 6 R. 237.—H.L. (SC.). HERSCHELL, L.C., LORDS WATSON, ASHBOURNE, MACNAGHTEN, MORRIS, SHAND and RUSSELL.

LORD WATSON.—This is a taxing statute applicable equally to real estate in Scotland and in England; and, following the principles which were laid down by the noble and learned lords who decided *Saltoun (Lord) v. Advocate-General*, it is clear that if the interest of an heir of entail can by any fair interpretation be brought within the words "estate of inheritance" it ought to be so brought.—p. 307.

Braybrooke (Lord) v. Att.-Gen. (1861) 31 L. J. Ex. 177; 9 H. L. Cas. 150; 7 Jur. (N.S.) 751; 4 L. T. 218; 9 W. R. 601.—H.L. (E.); *varying S. C. nom.* Att.-Gen. v. Braybrooke (Lord) (1860) 29 L. J. Ex. 283; 5 H. & N. 488; 5 W. R. 471.—EX.

Considered, Barker, In re (1861) 30 L. J. Ex. 404; 7 H. & N. 109; 9 Jur. (N.S.) 1061; 5 L. T. 206.—EX.; Peyton, In re (1861) 31 L. J. Ex. 50; 7 H. & N. 265; 7 Jur. (N.S.) 921; 5 L. T. 313; 9 W. R. 838.—EX.; *applied*, Att.-Gen. v. Abdy (1862) 32 L. J. Ex. 9; 1 H. & C. 266, 296; 8 Jur. (N.S.) 798; 6 L. T. 756.—EX.; *not applied*, Att.-Gen. v. Gardner (1863) 32 L. J. Ex. 84; 1 H. & C. 639; 9 Jur. (N.S.) 281; 7 L. T. 682; 11 W. R. 378.—EX.; *commented on*, Att.-Gen. v. Upton (1866) 35 L. J. Ex. 138; 4 H. & N. 336; L. R. 1 Ex. 224, 230; 12 Jur. (N.S.) 489; 14 L. T. 334; 14 W. R. 732.—EX.; *applied*, Att.-Gen. v. Cecil (1870) 39 L. J. Ex. 201; L. R. 5 Ex. 263, 273; 23 L. T. 20; 18 W. R. 949.—EX.

Braybrooke (Lord) v. Att.-Gen. and Att.-Gen. v. Floyer (1862) 31 L. J. Ex. 404; 9 H. L. Cas. 477; 9 Jur. (N.S.) 1; 7 L. T. 47; 10 W. R. 762.—H.L. (E.), *followed*.

Inland Revenue Commissioners v. Harrison (1874) 43 L. J. Ex. 138; L. R. 7 H. L. 1; 30 L. T. 274; 22 W. R. 556.—H.L. (E.).

Braybrooke (Lord) v. Att.-Gen. and Att.-Gen. v. Floyer, *applied*.

Le Marchant v. Inland Revenue Commissioners (1875) 44 L. J. Ex. 216; L. R. 10 Ex. 292.—EX.; CLEASBY, B. dissenting; affirmed, (1876) 45 L. J. Ex. 247; 1 Ex. D. 185; 34 L. T. 152; 24 W. R. 853.—C.A.

Braybrooke (Lord) v. Att.-Gen. and Att.-Gen. v. Floyer, *discussed and distinguished*.

Att.-Gen. v. Charlton (1876) 45 L. J. Ex. 354; 1 Ex. D. 204, 212; 34 L. T. 503; 24 W. R. 788.—EX. D. And see *post*, col. 2873.

Braybrooke (Lord) v. Att.-Gen. (*supra*),
Att.-Gen. v. Floyer (*supra*), and Att.-Gen.
v. Smythe (1862) 31 L. J. Ex. 404; 9 H. L.
Cas. 497.—H.L. (E.), *discussed*.
Att.-Gen. v. Charlton (*supra*), *reversed*.
Att.-Gen. v. Charlton (1877) 2 Ex. D. 398,
407; 46 L. J. Ex. 750; 37 L. T. 211; 26 W. R.
154.—C.A.; BRAMWELL, L.J. dissenting.

Braybrooke (Lord) v. Att.-Gen., Att.-Gen.
v. Floyer and Att.-Gen. v. Smythe,
***followed*.**

Att.-Gen. v. Charlton (C.A.), *affirmed*.
Charlton v. Att.-Gen. (1879) 4 App. Cas. 427;
49 L. J. Ex. 86; 40 L. T. 760; 27 W. R. 921.—
H.L. (E.).

CAIRNS, L.C.—I look upon the construction of the 2nd section (Succession Duty Act, 16 & 17 Vict. c. 51) as to cases coming within it, as completely and finally settled by the cases in this House . . . and especially by the cases of *Braybrooke* and *Floyer*, and as no longer open to controversy.—p. 437.

LORD HATHERLEY.—Now whatever difficulties might have surrounded this case . . . as regards the first portion, namely, whether or not this case falls within the 2nd section or the 4th section, appear to me to be covered by the authorities which have been mentioned, that is to say, the three cases in this House . . . namely *Braybrooke's Case*, *Floyer's Case*, and *Smythe's Case* . . . No doubt *Floyer's Case* was not overlooked in the decision of subsequent cases. It is referred to in those decisions, and the case seems to have been altogether well considered. If that case be law which we must hold it to be, as being a decision of this House, then I apprehend, the matter is settled. This case falls within the 2nd section, and consequently, according to *Floyer's Case* especially, does not fall within the 4th.—p. 442.

Braybrooke (Lord) v. Att.-Gen., *referred to*.
Att.-Gen. v. Dowling (1880) 49 L. J. Ex. 621;
5 Ex. D. 139, 152.—EX. D.; *affirmed*, 50 L. J.
Q. B. 192; 6 Q. B. D. 177; 44 L. T. 234; 29
W. R. 327; 45 J. P. 422.—C.A.

Att.-Gen. v. Floyer, Charlton v. Att.-Gen.
(*supra*), and Att.-Gen. v. Smythe (*supra*),
***applied*.**

Att.-Gen. v. Mitchell (1881) 50 L. J. Q. B. 406;
6 Q. B. D. 548, 554 (*post*, col. 2874).

Braybrooke (Lord) v. Att.-Gen., *applied*.

Att.-Gen. v. Floyer, *referred to*.
O'Neill (Lord), *In re* (1886) 20 L. R. Ir. 73, 91.
—EX. D.

Braybrooke (Lord) v. Att.-Gen., Att.-Gen.
v. Floyer, Att.-Gen. v. Smythe (*supra*),
and Charlton v. Att.-Gen., *principle*
***applied*.**

Att.-Gen. v. Chapman (1891) 60 L. J. Q. B.
602; [1891] 2 Q. B. 526; 65 L. T. 119; 40 W. R.
79.—DENMAN and WILLS, JJ.

Charlton (Lord) v. Att.-Gen., *discussed*.

Wolverton (Baron) v. Att.-Gen. [1898] A. C.
535, 557 (*post*, col. 2875); Att.-Gen. v. Selborne
(Earl) [1902] 1 K. B. 388, 397 (*post*, col. 2874).

Braybrooke (Lord) v. Att.-Gen., *discussed*.

Att.-Gen. v. Floyer, *applied*.

Att.-Gen. v. Wolverton (Baron) (1896) 65 L. J.
Q. B. 610; [1896] 2 Q. B. 389, 398; 75 L. T. 71.
—Q.B.D.; *affirmed*, C.A., *post*.

Braybrooke (Lord) v. Att.-Gen., *discussed*.

Att.-Gen. v. Wolverton (Baron) (1896) 66 L. J.
Q. B. 202; [1897] 1 Q. B. 231; 75 L. T. 569; 45
W. R. 236; 61 J. P. 148.—C.A. (*reversed*, H.L. (E.),
***post*); Att.-Gen. v. Dodington (1897) 66 L. J. Q. B.**
441; [1897] 1 Q. B. 722, 733; 76 L. T. 557; 45
W. R. 476.—Q.B.D.; (*affirmed*, 66 L. J. Q. B.
684; [1897] 2 Q. B. 373; 77 L. T. 299; 45
W. R. 657; 61 J. P. 644.—C.A.); *referred to*,
Wolverton (Baron) v. Att.-Gen. (1898) 67 L. J.
Q. B. 829; [1898] A. C. 535, 557.—H.L. (E.)
(*see post*, col. 2875); Cowley (Earl) v. Inland
Revenue Commissioners (1899) 68 L. J. Q. B.
435; [1899] A. C. 198, 216; 80 L. T. 361; 47
W. R. 525; 63 J. P. 436.—H.L. (E.); Att.-Gen.
v. Selborne (Earl) (1901) 71 L. J. K. B. 289;
[1902] 1 K. B. 388, 401; 85 L. T. 714; 50 W. R.
210; 66 J. P. 132.—C.A. *And see* Donelan's
Estate, *In re* (1901) [1902] 1 Ir. R. 109.—C.A.

Barker, *In re* (1861) 30 L. J. Ex. 404; 7
H. & N. 109; 7 Jur. (N.S.) 1061; 5 L. T.
206.—EX.

***Not applied*, Att.-Gen. v. Gardner (1863) 32**
L. J. Ex. 84; 1 H. & C. 639; 9 Jur. (N.S.) 281;
7 L. T. 682; 11 W. R. 378.—EX.; *commented on*,
Att.-Gen. v. Upton (1866) 35 L. J. Ex. 138; 4
H. & C. 336; L. R. 1 Ex. 224, 228; 12 Jur. (N.S.)
489; 14 L. T. 334; 14 W. R. 732.—EX.; *applied*,
Att.-Gen. v. Mitchell (1881) 50 L. J. Q. B.
406; 6 Q. B. D. 548; 44 L. T. 580; 29 W. R.
683; 45 J. P. 618.—Q.B.D.

Peyton, *In re* (1861) 31 L. J. Ex. 50; 7 H.
& N. 265; 7 Jur. (N.S.) 921; 5 L. T. 313;
9 W. R. 838.—EX.; BRAMWELL, B. *dis-*
***senting*.**

***Referred to*, Att.-Gen. v. Cecil (1870) 39 L. J.**
Ex. 201; L. R. 5 Ex. 263, 273; 23 L. T. 20; 18
W. R. 949.—EX.; *discussed*, Wolverton (Baron)
v. Att.-Gen. (1898) 67 L. J. Q. B. 829; [1898]
A. C. 535, 544.—H.L. (E.) (*post*, col. 2875).

Att.-Gen. v. Upton (1866) 35 L. J. Ex. 138;
L. R. 1 Ex. 224; 4 H. & C. 336; 12 Jur.
(N.S.) 489; 14 L. T. 334; 14 W. R. 732.
—EX.

***Discussed*, Att.-Gen. v. Charlton (1876) 45**
L. J. Ex. 354; 1 Ex. D. 204, 216; 34 L. T. 505;
24 W. R. 788.—EX. (*reversed*, C.A., *post*);
***applied*, Grenfell v. Inland Revenue Commis-**
sioners (1876) 45 L. J. Ex. 465; 1 Ex. D. 242,
250; 34 L. T. 426; 24 W. R. 582.—EX. D.;
***distinguished*, Att.-Gen. v. Charlton (1877) 46**
L. J. Ex. 750; 2 Ex. D. 398, 410.—C.A. (*see*
***supra*, col. 2873).**

Att.-Gen. v. Upton, *distinguished*.

Att.-Gen. v. Mitchell (1881) 6 Q. B. D. 548;
50 L. J. Q. B. 406; 44 L. T. 580; 29 W. R. 683;
45 J. P. 618.—GROVE and LINDLEY, JJ.

LINDLEY, J.—*Att.-Gen. v. Upton* was a case where s. 4 [Succession Duty Act, 1853] applied, and the Court held that s. 4 makes the donee of a general power who exercises it owner for a certain purpose, and makes the appointee claim through him, but we have nothing to do with that decision here.—p. 556.

Att.-Gen. v. Cecil (1870) 39 L. J. Ex. 201;
L. R. 5 Ex. 263; 23 L. T. 20; 18 W. R.
949.—EX.

***Followed*, Charlton v. Att.-Gen. (1879) 49 L. J.**
Ex. 86; 4 App. Cas. 427, 440; 40 L. T. 760; 27

W. R. 921.—H.L. (E.); *principle applied*, Att.-Gen. v. Wolverton (Baron) (1896) 65 L. J. Q. B. 610; [1896] 2 Q. B. 389, 399; 75 L. T. 71.—Q.B.D.; and (1897) 66 L. J. Q. B. 202; [1897] 1 Q. B. 231.—C.A. (*post*); *distinguished*, Wolverton (Baron) v. Att.-Gen. (1898) 67 L. J. Q. B. 829; [1898] A. C. 535, 556.—H.L. (*see post*).

Att.-Gen. v. Rushton (1864) 33 L. J. Ex. 184; 2 H. & C. 812; 9 L. T. 832.—EX., *commented on*.

Att.-Gen. v. Littledale (1870) 39 L. J. Ex. 207; L. R. 5 Ex. 275, 278; 23 L. T. 192; 18 W. R. 1036.—EX.; affirmed, 40 L. J. Ex. 241; L. R. 5 H. L. 290; 24 L. T. 921; 20 W. R. 473.—H.L. (E.).

Solicitor-General v. Law Reversionary Interest Society (1873) 42 L. J. Ex. 146; L. R. 8 Ex. 233; 28 L. T. 769; 21 W. R. 854.—EX., *distinguished*.

Att.-Gen. v. Mander (1896) 65 L. J. Q. B. 246; 74 L. T. 103; 44 W. R. 413.—Q.B.D.

WRIGHT, J.—It is needless to say that we do not in the slightest degree differ from anything laid down in *Solicitor-General v. Law Reversionary Interest Society*. That case is entirely different, as there the succession did not take place until after the Law Reversionary Society had become the alienee of the whole estate of the reversioner.—p. 249. KENNEDY, J. concurred.

Solicitor-General v. Law Reversionary Interest Society, *discussed*.

Wolverton (Baron) v. Att.-Gen. (*post*); Att.-Gen. v. Northumberland (Duke) (1903) 71 L. J. K. B. 442; [1903] 2 K. B. 71, 80 (*post*, col. 2877).

Att.-Gen. v. Wolverton (Baron) (1896) 65 L. J. Q. B. 610; [1896] 2 Q. B. 389; 75 L. T. 71.—POLLOCK B. and BRUCE J.; *reversed*, (1897) 66 L. J. Q. B. 202; [1897] 1 Q. B. 231; 75 L. T. 569; 45 W. R. 236; 61 J. P. 148.—C.A.; *the latter decision reversed nom.*, Wolverton (Baron) v. Att.-Gen. [1898] A. C. 535.—H.L. (E.). (*post*).

Cooper and Allen's Contract, *In re* (1876) 46 L. J. Ch. 133; 4 Ch. D. 802; 35 L. T. 890; 25 W. R. 301.—JESSEL, M.R., *disapproved*.

Wolverton (Baron) v. Att.-Gen. (1898) 67 L. J. Q. B. 829; [1898] A. C. 535; 79 L. T. 58; 47 W. R. 97; 62 J. P. 708.—H.L. (E.).

HALSBURY, L.C.—“Succession” in the Act means not the act of succeeding, but property chargeable with duty under the Act, and, as Bramwell B. pointed out in *Pryton, In re* (*supra*, col. 2874), property may escape the tax for all time by always passing *inter vivos*.—p. 832.

LORD HERSCHELL.—In *Solicitor-General v. Law Reversionary Interest Society* (*supra*) the Ct. of Ex. laid down certain conclusions as established on a consideration of the various sections of the Act. They held that, though the duty is not payable until the time of actual enjoyment of the property, “the title to the succession dates from the disposition, and there is never any title to the property free from the duty,” and that a person who has had a succession conferred upon him cannot, by parting with it, prevent it from being a succession. The only case which affords any support to the idea that a new succession can take the place of an old one is *Cooper and Allen's Contract, In re*. . . I cannot see how the reasoning of the learned judge establishes that in the case

before him there could be only one succession duty payable, and that in respect of the new succession . . . It was, however, argued for the Crown that Att.-Gen. v. Cecil (*supra*, col. 2874) was an authority in favour of their contention that s. 15 was inapplicable. I do not think so. . . There may have been some divergence in the reasons given by the learned judges in the case which I have been considering for the conclusion at which they arrived, but there is nothing really inconsistent with the construction which I have put upon s. 15. On the contrary, according to the report of the case in the Law Journal, which is fuller than in the Law Reports, Kelly, C.B. said: “If the charge had been made or the term had been created out of the original succession, it would have come strictly within the words of this section of the Act,” that is, s. 15, “and would have created no new succession at all.” In *Braybrooke v. Att.-Gen.* (*supra*, col. 2872), Lord Wensleydale said that s. 15 was meant to meet the simple case of a person having a right to a succession within the meaning of the Act totally alienating that right to another person before the succession opens, or carving out a derivative interest from it, in which case the section provides that the assignee or the person having the derivative title shall stand on the same footing as the assignor. But if there is something different from a mere transfer of the interest or a part of it, if there is a title conferring a new succession in any other person, then s. 15 does not apply. In Att.-Gen. v. Yelverton (*post*, col. 2877), Martin, B., in delivering the judgment of the majority of the Court, said of s. 15: “It seems to us to refer to a species of property different from that on which the duty is claimed in the present case—that is to say, a reversionary property, in respect of which the assignor would have been liable to duty, but which he has assigned.” There is thus a considerable weight of judicial opinion in support of the views I have expressed.—pp. 835—9.

LORD MACNAGHTEN.—There was, no doubt, one point which came under discussion in connection with the Succession Duty Act on which Martin, B. did differ from Lord Wensleydale, but that point had no reference to s. 15. The point of difference, as explained very fully by Lord Selborne in *Charlton v. Att.-Gen.* (*supra*, col. 2873), was a point upon the general principles of law applicable to the execution of powers. On that Lord Wensleydale differed, not only from Martin, B., but also from Lord Cranworth in the H.L. The report of Att.-Gen. v. Cecil in the Law Journal seems to be more accurate than that in the Law Reports. The expression attributed to Martin, B. in the Law Reports, in which Lord Esher and Rigby, L.J., discover a difference of opinion between that learned Judge and Lord Wensleydale, and on which to some extent their judgment is based, is not to be found in the report in the Law Journal. In the corresponding passage in the Law Journal Martin, B. actually expresses his concurrence with Lord Wensleydale, referring obviously to the passage in *Braybrooke v. Att.-Gen.*, where the noble and learned lord deals with s. 15.—p. 841.

Cooper and Allen's Contract, *In re*, *not followed*.

Att.-Gen. v. Northumberland (Duke) [1903] 2 K. B. 71, 80 (*post*).

Wolverton (Baron) v. Att.-Gen. (*supra*, col. 2875).

Referred to, Att.-Gen. v. Selborne (Earl) (1901) 71 L. J. K. B. 289; [1902] 1 K. B. 388, 397; 85 L. T. 714; 50 W. R. 210; 66 J. P. 132.—C.A.; *reasoning in, applied*, Att.-Gen. v. Northumberland (Duke) (1903) 72 L. J. K. B. 442; [1903] 2 K. B. 71, 82; 88 L. T. 600; 67 J. P. 140.—RIDLEY, J.; affirmed, [1904] 1 K. B. 762.—C.A.

Att.-Gen. v. Yelverton (1861) 30 L. J. Ex. 333; 7 H. & N. 306; 7 Jur. (N.S.) 1250; 5 L. T. 451.—EX.; BRAMWELL, B. *dissenting*.

Explained, Att.-Gen. v. Floyer (1862) 31 L. J. Ex. 404; 9 H. L. Gas. 477; 9 Jur. (N.S.) 1; 7 L. T. 47; 10 W. R. 762.—H.L. (E.); *adhered to*, Att.-Gen. v. Abdy (1862) 32 L. J. Ex. 9; 1 H. & C. 266, 296; 8 Jur. (N.S.) 798; 6 L. T. 756.—EX.; *applied*, Att.-Gen. v. Gardner (1863) 32 L. J. Ch. 84; 1 H. & C. 639; 9 Jur. (N.S.) 281; 7 L. T. 682; 11 W. R. 378.—EX.

Att.-Gen. v. Yelverton, *referred to*.

Att.-Gen. v. Gell (1865) 34 L. J. Ex. 145; 3 H. & C. 615; 11 Jur. (N.S.) 566; 12 L. T. 461; 13 W. R. 900.—EX.; *Wolverton (Baron) v. Att.-Gen.* (1898) 67 L. J. Q. B. 829; [1898] A. C. 535.—H.L. (E.) (*supra*, col. 2875).

Att.-Gen. v. Gardner (*supra*), *distinguished*.

Att.-Gen. v. Rushton (1864) 2 H. & C. 812; 33 L. J. Ex. 184; 9 L. T. 832.—EX.

Att.-Gen. v. Gardner, *referred to*.

Att.-Gen. v. Gell (*supra*).

Lord Advocate v. Fleming (or Robertson) (1897) 66 L. J. P. C. 41; [1897] A. C. 145; 76 L. T. 125; 45 W. R. 674; 61 J. P. 692.—H.L. (SC.), *not applied*.

Att.-Gen. v. Robinson (1900) [1901] 2 Ir. R. 67.—Q.B.D.

PALLES, C.B.—*Lord Advocate v. Fleming*, which was much relied on for the defendants, would have been in point had the present case turned on Clause (c.) [Finance Act, 1894, s. 2], as it was decided upon the Customs and Inland Revenue Acts of 1881 and 1889, parts of which are incorporated in that Clause, but it has no bearing whatever upon the liability to duty under Clause (d.), which is the question here. The *ratio decidendi* there was that as from 1883 until the father's death in 1890 the policies had been, in fact, kept up by the daughter, and not by the father, they were not "kept up by the father for the benefit of the daughter," within the meaning of the statutes.—p. 90.

Att.-Gen. v. Baker (1859) 4 H. & N. 19.—EX., *referred to*.

Fryer v. Morland (1876) 45 L. J. Ch. 817; 3 Ch. D. 675, 684; 35 L. T. 458; 25 W. R. 21.—M.R.; and Att.-Gen. v. Rathdonnell (Baron) (1893) 32 L. R. Ir. 574, 591.—EX. D.

Jenkinson, In re (1857) 26 L. J. Ch. 241; 24 Beav. 64; 3 Jur. (N.S.) 279; 5 W. R. 301.—ROMILLY, M.R.

Approved and applied, Att.-Gen. v. Yelverton (1861) 30 L. J. Ex. 333; 7 H. & N. 306; 7 Jur. (N.S.) 1250; 5 L. T. 451.—EX.; (BRAMWELL, B. *dissenting*); *distinguished*, Ramsay's Settlement, In re (1861) 30 L. J. Ch. 849; 30 Beav. 75; 7 Jur. (N.S.) 1225; 5 L. T. 166; 9 W. R. 910.—ROMILLY, M.R.; *explained*, Att.-Gen. v. Floyer (1862) 31 L. J. Ex. 404; 9 H. L. Gas. 477; 9 Jur. (N.S.) 1; 7 L. T. 47; 10 W. R. 762.—H.L. (E.).

Jenkinson, In re, *applied*.

Fryer v. Morland (1876) 45 L. J. Ch. 817; 3 Ch. D. 675, 684; 35 L. T. 458; 25 W. R. 21.—JESSEL, M.R.

Jenkinson, In re, *referred to*.

Lord Advocate v. Sidgwick (1877) 4 Rettie 815, 830.—CT. OF SESS.; Att.-Gen. v. Rathdonnell (Baron) (1893) 32 L. R. Ir. 574, 591.—EX. D.

Ramsay's Settlement, In re (1861) 30 L. J. Ch. 849; 30 Beav. 75; 7 Jur. (N.S.) 1225; 5 L. T. 166; 9 W. R. 910.—ROMILLY, M.R., *discussed and applied*.

Lord Advocate v. Sidgwick (*supra*), *decision, but not reasoning in toto, approved*.

Att.-Gen. v. Rathdonnell (Baron) (1893) 32 L. R. Ir. 574, 591.—EX. D.

Cooper v. Trewby (1860) 28 Beav. 194; 8 W. R. 299.—M.R., *followed and approved*.

Langham and Langham Hotel Co., In re (1890) 60 L. J. Ch. 110; 39 W. R. 156.—C.A.

Harding v. Harding (1861) 2 Giff. 597; 7 Jur. (N.S.) 906.—V.-C., *referred to*.

Att.-Gen. v. Noyes (1881) 51 L. J. Q. B. 135; 8 Q. B. D. 125, 131; 45 L. T. 520; 30 W. R. 434.—LINDLEY, J.; GROVE, J. *dissenting*; reversed, C.A. JESSEL, M.R., BRETT and COTTON, L.JJ.

Lord Advocate v. McDonald (1862) 24 Dunlop 1175.—CT. OF SESS., *referred to*.

Att.-Gen. v. Noyes (1881) 51 L. J. Q. B. 135; 8 Q. B. D. 125, 131.—Q.B.D. (*supra*).

Att.-Gen. v. Robertson (1893) 62 L. J. Q. B. 282; [1893] 1 Q. B. 293; 4 R. 260; 68 L. T. 371; 41 W. R. 241; 57 J. P. 421.—C.A., *not applied*.

Att.-Gen. v. Wood (1897) 66 L. J. Q. B. 522; [1897] 2 Q. B. 102, 110; 76 L. T. 654; 45 W. R. 663.—V. WILLIAMS and WRIGHT, JJ.

Att.-Gen. v. Robertson, *referred to*.

Finance Act, 1894, and Studdert, In re (1899) [1900] 2 Ir. R. 281, 293.—Q.B.D.; affirmed, 70 L. J. P. C. 41; [1901] A. C. 208.—H.L. (IR.). *See post*, col. 2886.

Floyer v. Banks (1863) 33 L. J. Ch. 1; 3 De G. J. & S. 306; 3 N. R. 16; 9 Jur. (N.S.) 1255; 9 L. T. 853; 12 W. R. 28.—L.C.

Dictum followed, Fryer v. Morland (1876) 45 L. J. Ch. 817; 3 Ch. D. 675, 684; 35 L. T. 458; 25 W. R. 21.—JESSEL, M.R.; Lord Advocate v. Sidgwick (*supra*); Att.-Gen. v. Wolverton (Baron) [1896] 2 Q. B. 389, 400 (*supra*, col. 2875).

Fryer v. Morland (1876) 45 L. J. Ch. 817; 3 Ch. D. 675; 35 L. T. 458; 25 W. R. 21.—JESSEL, M.R.

Referred to, Att.-Gen. v. Charlton (1877) 2 Ex. D. 398, 407 (*supra*, col. 2873); *principle applied*, Att.-Gen. v. Dowling (1880) 49 L. J. Ex. 621; 5 Ex. D. 139, 148; 42 L. T. 378; 28 W. R. 673.—EX. D. (affirmed, 50 L. J. Q. B. 192; 6 Q. B. D. 177; 44 L. T. 234; 29 W. R. 327; 45 J. P. 422.—C.A.).

Fryer v. Morland, *distinguished and dictum adopted*.

Lord Advocate v. McKersies (1881) 19 Scott L. R. 438.—LORD FRASER.

Fryer v. Morland, *referred to*.

Lord Advocate v. McKersies, *applied*.

Crossman v. Reg. (1886) 56 L. J. Q. B. 241; 18 Q. B. D. 256, 266.—Q.B.D. (*post*, col. 2883).

Fryer v. Morland, distinguished.

De Rechberg v. Beeton (1888) 57 L. J. Ch. 1090; 38 Ch. D. 192; 59 L. T. 56; 36 W. R. 682.—CHITTY, J.

Fryer v. Morland, explained.

Att.-Gen. v. Montefiore (1888) 21 Q. B. D. 461, 465; 59 L. T. 534; 37 W. R. 237.—CHARLES and MANISTY, JJ. (see post, col. 2880).

Fryer v. Morland, discussed.

Att.-Gen. v. Wolverton (Baron) (1896) 65 L. J. Q. B. 610; [1896] 2 Q. B. 389, 396 (*supra*, col. 2875).

Fryer v. Morland, distinguished.

Att.-Gen. v. Brown (1898) 77 L. T. 591; 46 W. R. 145; 62 J. P. 19.—C.A. A. L. SMITH, RIGBY and COLLINS, L.JJ.; affirmed, H.L. (E.) (post, col. 2888).

Fryer v. Morland, referred to.

Att.-Gen. v. Hawkins (1900) 70 L. J. Q. B. 195; [1901] 1 Q. B. 285, 296; 83 L. T. 531; 49 W. R. 320; 64 J. P. 791.—KENNEDY and PHILLIMORE, JJ. See post, col. 2889.

Berrington v. Scott (1875) 32 L. T. 125.—EX., referred to.

Finance Act, 1894, and Studdert, In re (1899) [1900] 2 Ir. R. 281.—Q.B.D.; affirmed, (1901) 70 L. J. P. C. 41; [1901] A. C. 208; 84 L. T. 700; 49 W. R. 657.—H.L. (IR.).

Att.-Gen. v. Abdy (1862) 1 H. & C. 266; 32 L. J. Ex. 9; 8 Jur. (N.S.) 798; 6 L. T. 756.—EX., distinguished.

Macleay's Trusts, In re (1874) L. R. 19 Eq. 274; 44 L. J. Ch. 145; 31 L. T. 632; 23 W. R. 206. JESSEL, M.R.—I think that the Guardian Life Office are the assignees of the policy within the 17th section of the Succession Duty Act, and consequently no duty is payable by them. It appears to me that the point was decided by the unanimous opinion of the Ct. of Ex. in *Att.-Gen. v. Abdy*, although that case was a totally different one from this. There a testator had bequeathed the sum assured to his sister. A previous decision had determined that such a bequest was not liable to legacy duty, but it was decided that there was no such exemption under the Succession Duty Statute, and accordingly the fund was held liable to succession duty. That is all that was decided in that case, but in arriving at that conclusion every Judge treated this as an ordinary policy of insurance.—p. 283.

Att.-Gen. v. Abdy, dictum explained.

Urquhart v. Butterfield (1887) 56 L. J. Ch. 938; 36 Ch. D. 55, 73; 57 L. T. 589.—NORTH, J.; reversed on one point, 57 L. J. Ch. 521; 37 Ch. D. 357; 57 L. T. 780; 36 W. R. 376.—C.A. And see "FRIENDLY SOCIETY," vol. i. col. 1169.

Lord Advocate v. Roberts' Trustees (1857) 20 Dunlop 449.—LORD ORDINARY (EX.), discussed.

Higgins, In re, Day v. Turnell (1885) 55 L. J. Ch. 235; 31 Ch. D. 142; 54 L. T. 199; 34 W. R. 81.—C.A. HALSBURY, L.C., LINDLEY and FRY, L.JJ.

Lord Advocate v. Roberts' Trustees, followed.

Att.-Gen. v. Montefiore (post, col. 2880).

Higgins, In re, Day v. Turnell, discussed and not applied.

Currie, In re, Bjorkman v. Kimberley (Lord) (1888) 57 L. J. Ch. 743; 59 L. T. 200; 36 W. R. 752.—KAY, J.

Higgins, In re, Day v. Turnell, discussed.

Att.-Gen. v. Montefiore (1888) 21 Q. B. D. 461; 59 L. T. 534; 37 W. R. 237.

CHARLES, J.—In *Higgins, In re*, in which the parties, probably regarding the point as long settled, consented that the case should be argued on the assumption that succession duty was payable on the fund, it is true that a doubt was expressed in the C.A. as to whether *Lord Advocate v. Roberts' Trustees (supra)* and *Micklethwait, In re (post, col. 2881)* had decided the question, but the Court did not overrule or even dissent from *Lord Advocate v. Roberts' Trustees*. *Micklethwait, In re*, was a decision on s. 38 of the Act. *Fryer v. Morland (supra, col. 2878)* only decides that the Act does not apply to a conveyance on sale.—p. 465.

MANISTY, J. to the same effect.

Cuddon v. Cuddon (1876) 46 L. J. Ch. 257; 4 Ch. D. 583; 25 W. R. 341.—JESSEL, M.R., applied.

Att.-Gen. v. Aberdare (Lord) (1892) 61 L. J. Q. B. 615; [1892] 2 Q. B. 684; 67 L. T. 588; 56 J. P. 806.—WRIGHT and COLLINS, JJ.

Warner's Settled Estates, In re; Warner to Steel (1881) 50 L. J. Ch. 542; 17 Ch. D. 711; 45 L. T. 37; 29 W. R. 726.—JESSEL, M.R., referred to.

Att.-Gen. v. Selborne (Earl) (1901) 71 L. J. K. B. 289; [1902] 1 K. B. 388; 85 L. T. 714; 50 W. R. 210; 66 J. P. 132.—C.A. COLLINS, M.R., STIRLING and MATHEW, L.JJ.

Att.-Gen. v. Selborne (Earl), referred to.

Walpole's Marriage Settlement, In re, Thompson v. Walpole (1903) 72 L. J. Ch. 522; [1903] 1 Ch. 928, 932; 88 L. T. 419; 51 W. R. 587.—JOYCE, J.

Beresford Succession, In re (1856) 5 Ir. C. L. R. 409.—EX., not followed.

Elwes, In re (1858) 28 L. J. Ex. 46; 3 H. & N. 719; 4 Jur. (N.S.) 1153.—EX.

Elwes, In re.

Followed, Cowley's (Earl) Succession, In re (1866) 35 L. J. Ex. 177; L. R. 1 Ex. 288; 12 Jur. (N.S.) 607; 14 L. T. 663; 14 W. R. 836; 4 H. & C. 476.—EX.; *referred to*, Att.-Gen. v. Robinson (1900) [1901] 2 Ir. R. 67, 83.—Q.B.D.

Inland Revenue Commissioners v. Harrison (1874) 43 L. J. Ex. 138; L. R. 7 H. L. 1; 30 L. T. 274; 22 W. R. 559.—H.L. (E.), applied.

Le Marchant v. Inland Revenue Commissioners (1876) 45 L. J. Ch. 247; 1 Ex. D. 185; 34 L. T. 152; 24 W. R. 858.—C.A. CAIRNS, L.C., COLE-RIDGE, C.J. and MELLISH, L.J.; affirming (1875) 44 L. J. Ex. 216; L. R. 10 Ex. 292; 33 L. T. 50.—EX.; CLEASBY, B. dissenting.

Inland Revenue Commissioners v. Harrison, referred to.

Cowley (Earl) v. Inland Revenue Commissioners (1899) 68 L. J. Q. B. 435; [1899] A. C. 198, 216; 80 L. T. 361; 47 W. R. 525; 63 J. P. 436.—H.L. (E.).

Le Marchant v. Inland Revenue Commissioners (supra), applied.

O'Neill (Lord), In re (1886) 20 L. R. Ir. 73, 91.—EX. D.

Micklethwait (or Micklethwaite), In re, (1855) 25 L. J. Ex. 19; 11 Ex. 452.—EX., *questioned*.
Att.-Gen. v. Sibthorp (1858) 28 L. J. Ex. 9; 3 H. & N. 424; 6 W. R. 774.—EX.

Micklethwait, In re, approved.
Att.-Gen. v. Sibthorp, overruled.
Braybrooke (Lord) v. Att.-Gen. (1861) 31 L. J. Ex. 177; 9 H. L. Cas. 150; 7 Jur. (N.S.) 741; 4 L. T. 218; 9 W. R. 601.—H.L. (E.); **Charlton v. Att.-Gen.** (1879) 49 L. J. Ex. 86; 4 App. Cas. 427, 447; 40 L. T. 760; 27 W. R. 921.—H.L. (E.).

Micklethwait, In re, referred to.
Att.-Gen. v. Montefiore (1888) 21 Q. B. D. 461, 465; 59 L. T. 534; 37 W. R. 237.—**CHARLES and MANISTY, JJ.** (*see supra*, col. 2880); **Tennant v. Smith** (1892) 61 L. J. P. C. 11; [1892] A. C. 150; 66 L. T. 327; 56 J. P. 596.—H.L. (sc.); **Att.-Gen. v. Beech** (1898) 67 L. J. Q. B. 585; [1898] 2 Q. B. 147, 150.—C.A. (*post*, col. 2884); **Att.-Gen. v. Selborne (Earl)** (1901) 71 L. J. K. B. 289; [1902] 1 K. B. 388, 400; 85 L. T. 714; 50 W. R. 210; 66 J. P. 132.—C.A.

Chapman's Trusts, In re (1865) 2 H. & M. 447; 11 Jur. (N.S.) 708; 13 L. T. 144.—**WOOD, V.-C., adopted.**
Att.-Gen. v. Littledale (1870) 40 L. J. Ex. 241; L. R. 5 Ex. 282; 23 L. T. 192; 18 W. R. 1036.—EX.; affirmed, H.L. (*supra*, col. 2875).
CLEASBY, B.—We entirely adopt the view taken by Wood, V.-C., in *Chapman's Trusts, In re*, that when there are two successions to the same property, and legacy duty is payable when it comes into possession, only one duty is payable.—p. 282.

Chapman's Trusts, In re, referred to.
Att.-Gen. v. Cleave (1873) 31 L. T. 86.—EX.

Att.-Gen. v. Sefton (Earl) (1863) 32 L. J. Ex. 230; 2 H. & C. 362; 9 Jur. (N.S.) 1296; 8 L. T. 794.—EX., **MARTIN, B.** *dissenting; affirmed*, (1865) 11 H. L. Cas. 257; 5 N. R. 436; 12 L. T. 242.—H.L. (E.).

Att.-Gen. v. Sefton (Earl), distinguished and not applied.
Arden v. Wilson (1872) 41 L. J. C. P. 273; L. R. 7 C. P. 535, 544; 26 L. T. 887.—C.P.

Att.-Gen. v. Sefton (Earl), applied.
Reg. v. Abney Park Cemetery Co. (1873) L. R. 8 Q. B. 515; 42 L. J. M. C. 124; 29 L. T. 174.—Q.B.

BLACKBURN, J.—*Att.-Gen. v. Sefton (Earl)* established that for the purposes of succession duty the value of property must be calculated at the time when the succession happens; and upon a similar principle the value of property for the purposes of rating must be estimated at the time when the rate is made.—p. 519.

Att.-Gen. v. Sefton (Earl), discussed.
Att.-Gen. v. Robinson (1900) [1901] 2 Ir. R. 67, 79.—Q.B.D.

Haygarth's Trusts, In re (1883) 52 L. J. Ch. 416; 22 Ch. D. 545; 48 L. T. 24; 31 W. R. 316.—**BACON, V.-C., distinguished.**
Kenlis (Lord) v. Hodgson (1895) 64 L. J. Ch. 585; [1895] 2 Ch. 458; 13 R. 603; 72 L. T. 866.

KEKEWICH, J.—The question there was

whether the father, who had become entitled to his son's estate, was to pay a duty in respect of that son's interest, which was an interest in reversion expectant on the father's death; and the claim of the Crown . . . was for the duty on the whole of the fund in respect of the prospective succession of the son (or his estate) to the father, and the result was that it was argued, and successfully argued, that all that was claimed was duty in respect of the son's estate; and that if affidavit duty was to be paid on the son's estate, then no further duty was to be paid in respect of it by reason of the application of s. 41 of the [Customs and Inland Revenue] Act of 1881. That seems to me to have no application at all to what I have to deal with here. I am not dealing with prospective succession at all—in fact, the event has actually occurred.—p. 589.

7. ACCOUNT STAMP DUTY.

Att.-Gen. v. Worrall (1894) 64 L. J. Q. B. 141; [1895] 1 Q. B. 99; 14 R. 1; 71 L. T. 807; 43 W. R. 118; 59 J. P. 467.—C.A., *followed*.

Att.-Gen. v. Johnson (1902) 71 L. J. K. B. 187; [1902] 1 K. B. 416, 428; 86 L. T. 296; 50 W. R. 366; 66 J. P. 328.—**PHILLIMORE, J.**; and (1903) 72 L. J. K. B. 323; [1903] 1 K. B. 617, 624; 88 L. T. 445; 51 W. R. 487; 67 J. P. 113.—C.A., reversing **PHILLIMORE, J.**

Att.-Gen. v. Worrall and Att.-Gen. v. Johnson, followed.

Att.-Gen. v. Holden (1903) 72 L. J. K. B. 420; [1903] 1 K. B. 832; 88 L. T. 729; 51 W. R. 685; 67 J. P. 135.—**RIDLEY, J.**

Att.-Gen. v. Theobald (1890) 24 Q. B. D. 557; 62 L. T. 768; 38 W. R. 527.—**POLLOCK, B.** and **HAWKINS, J.**, *distinguished*.

Young v. Adams (1898) 67 L. J. P. C. 75; [1898] A. C. 469, 476; 78 L. T. 506.—P.C.

Att.-Gen. v. Theobald, applied.
Scott v. Craig's Representatives (1896) 24 Rottie 462.—**LORD ORDINARY**; affirmed, (1897) CT. OF SESS.

Att.-Gen. v. Chapman (1891) 60 L. J. Q. B. 602; [1891] 2 Q. B. 526; 65 L. T. 119; 40 W. R. 79.—**DENMAN and WILLS, JJ.**, *applied and judgment corrected*.

Att.-Gen. v. Gosling [1892] 1 Q. B. 545; 61 L. J. Q. B. 429; 66 L. T. 284; 40 W. R. 366; 56 J. P. 358.

WILLS, J. (for self and **HAWKINS, J.**)—We wish to point out, in order to avoid any confusion for the future, that by an inadvertence in the judgment in *Att.-Gen. v. Chapman*, "legacy" duty is spoken of, where the phrase should be "probate" duty. The correction is verbal, and in no way affects the reasoning of that decision.—p. 550.

Att.-Gen. v. Chapman, observations adopted.
Att.-Gen. v. Wendt (1895) 65 L. J. Q. B. 54; 15 R. 528; 73 L. T. 255; 43 W. R. 701.—**RUSSELL of KILLOWEN, C.J.** and **CHARLES, J.**

Att.-Gen. v. Chapman, approved.
Att.-Gen. v. Dodington (1897) 66 L. J. Q. B. 441; [1897] 1 Q. B. 722, 732; 76 L. T. 557; 45 W. R. 476.—**WILLS and WRIGHT, JJ.**; affirmed, (1897) 66 L. J. Q. B. 684; [1897] 2 Q. B. 373; 77 L. T. 299; 45 W. R. 657; 61 J. P. 644.—C.A.

Crossman v. Reg. (1886) 56 L. J. Q. B. 241; 18 Q. B. D. 256; 55 L. T. 848; 35 W. R. 303.—DENMAN and HAWKINS, JJ., followed.

Lord Advocate v. Wilson (1894) 21 Rottie 997.—CT. OF SESS.

Crossman v. Reg. and Att.-Gen. v. Gosling (*supra*, col. 2882), referred to.

Att.-Gen. v. Ellis (1895) 64 L. J. Q. B. 813; [1895] 2 Q. B. 466, 469; 15 R. 584; 73 L. T. 190, 350; 44 W. R. 13; 59 J. P. 774.—Q.B.D.

Crossman v. Reg., considered and applied.

Att.-Gen. v. Grey (Earl) (1898) 67 L. J. Q. B. 947; [1898] 2 Q. B. 534, 546; 79 L. T. 235; 47 W. R. 37.—C.A.; **Att.-Gen. v. Johnson** (1903) 72 L. J. K. B. 323; [1903] 1 K. B. 617, 623; 88 L. T. 445; 51 W. R. 487; 67 J. P. 113.—C.A.

Croft, In re, Deane v. Croft (1892) 61 L. J. Ch. 190; [1892] 1 Ch. 652; 66 L. T. 157; 40 W. R. 425.—KEKEWICH, J., discussed.

Bourne, In re, Martin v. Martin (1892) 62 L. J. Ch. 69; [1893] 1 Ch. 188; 3 R. 52; 67 L. T. 586; 41 W. R. 70.

STIRLING, J.—It was contended, however, that the present case is governed by *Croft, In re*. If I thought that that case were in point, I should consider it my duty to follow it; but in my opinion it is not in point. It relates to the duty imposed by s. 38 [Customs and Inland Revenue Act, 1881] upon voluntary settlements. It does not relate to the incidence of the duty as between specific and residuary legatees in the ordinary sense, but between appointees of various parts of a specific fund. In that case *Kekewich, J.*, came to the conclusion that in the absence of any provision by the Legislature as to the incidence of the duties, regard must be had to the intention of the testator. It seems to me that that general principle is not applicable as between specific and residuary legatees, and that the general principle laid down by Lord Selborne in *Robertson v. Broadbent* (53 L. J. Ch. 266; 8 App. Cas. 812) governs the case, and the specific legatees are entitled to their property free from the duty.—p. 71.

Croft, In re, Deane v. Croft, followed.

Shaw, In re, Tuckett v. Shaw (1894) 64 L. J. Ch. 283; [1895] 1 Ch. 343; 13 R. 185; 71 L. T. 873; 43 W. R. 315.—NORTH, J.

Bourne, In re, Martin v. Martin (*supra*), distinguished.

Orford (Countess), In re, Cartwright v. Del Balzo (Duc) (1895) 65 L. J. Ch. 253; [1896] 1 Ch. 257; 73 L. T. 681; 44 W. R. 383.—NORTH, J.

Croft, In re, Deane v. Croft and Bourne, In re, Martin v. Martin, discussed and not applied.

Foster, In re, Thomas v. Foster [1897] 1 Ch. 484; 66 L. J. Ch. 220; 76 L. T. 228; 45 W. R. 333.

KEKEWICH, J.—It seems to me that this case is one which is not covered by authority. *Croft, In re*, decided by myself, has been cited, but seems to me to have nothing to do with the present case. In the last edition of the work now known as *Hanson's "Death Duties,"* at p. 379, the principle on which *Croft, In re*, was decided is accurately stated; and it is shown also by the distinction taken in reference to it by *Stirling, J.*, in *Bourne, In re*, which case also

seems to me to have nothing to do with the present case, except for the observation of *Stirling, J.*, in the passage at p. 192, which has been cited: "In this Act" (*i.e.*, the Act of 44 & 45 Vict., c. 12), "there is not to be found any more than in the Probate Duty Acts, any intimation as to how the probate duty is to be paid." There is no doubt that it was not intended by the Act to decide questions between different parties. The object of the Act is to provide for levying duty for the Inland Revenue, and in an Act of that kind one does not expect to find rules as to administration of estates laid down, and, as a matter of fact, no such rules are laid down.—p. 487.

Att.-Gen. v. Jacobs-Smith (1894) 64 L. J. Q. B. 270; [1895] 1 Q. B. 472; 71 L. T. 725; 43 W. R. 253; 11 T. L. R. 65.—WRIGHT and COLLINS, JJ.; reversed, (1895) 64 L. J. Q. B. 605; [1895] 2 Q. B. 341; 14 R. 581; 72 L. T. 714; 43 W. R. 657; 59 J. P. 468; 11 T. L. R. 411.—C.A.

8. ESTATE DUTY.

Att.-Gen. v. Fairley (1897) 66 L. J. Ch. 454; [1897] 1 Q. B. 698; 76 L. T. 526; 45 W. R. 589.—V. WILLIAMS and KENNEDY, JJ., referred to.

Inland Revenue v. Stewart's Trustees (1898-9) 1 Fraser 416.—LORD ORDINARY, affirmed.—CT. OF SESS.

Att.-Gen. v. Fairley, considered.

Att.-Gen. v. Clarkson (1899) 69 L. J. Q. B. 81; [1900] 1 Q. B. 156; 81 L. T. 617; 48 W. R. 216.—C.A. LINDLEY, M.R., SIR F. JEUNE and ROMER, L.J. See now Finance Act, 1898 (61 & 62 Vict. c. 10), s. 4.

Inland Revenue v. Stewart's Trustees (*supra*) and **Att.-Gen. v. Clarkson**, referred to.

Watherston's Trustees v. Lord Advocate (1901) 3 Fraser 429.—CT. OF SESS.

Att.-Gen. v. Beech (1897) 66 L. J. Q. B. 800; [1897] 2 Q. B. 535; 77 L. T. 156; 46 W. R. 44; 61 J. P. 678.—POLLOCK, B.; and RIDLEY, J.; reversed, (1898) 67 L. J. Q. B. 585; [1898] 2 Q. B. 147; 78 L. T. 584; 46 W. R. 435; 62 J. P. 371.—C.A.; the latter decision affirmed, (1898) 68 L. J. Q. B. 130; [1899] A. C. 53; 79 L. T. 565; 47 W. R. 257; 63 J. P. 116.—H.L. (E.). And see *post*, col. 2885.

Att.-Gen. v. Beech [C.A.], referred to.

Att.-Gen. v. Grey (Earl) (1898) 67 L. J. Q. B. 947; [1898] 2 Q. B. 534, 540.—C.A. (*post*, col. 2886).

Att.-Gen. v. Beech, explained.

Cowley (Earl) v. Inland Revenue Commissioners (1899) 68 L. J. Q. B. 435; [1899] A. C. 198, 206; 80 L. T. 361; 47 W. R. 525; 63 J. P. 436.—H.L. (E.).

HALSBURY, L.C.—Your lordships have already held in *Att.-Gen. v. Beech* that when a tenant for life and the remainderman in fee combine so as to get complete command of the estate in fee, they may dispose of it as they will; and I am unable to comprehend why, when they grant a mortgage in fee, that transaction is capable of being dissected so as to prevent the union of the two estates, and by an artificial process resolve the estate into its original elements or into its original settlement and treat them as though no such new arrangement had been made at all.—p. 439.

LORD DAVEY to the same effect.

Att.-Gen. v. Beech (*supra*), *applied*.

Att.-Gen. v. De Préville (1899) 69 L. J. Q. B. 283; [1900] 1 Q. B. 223, 227; 81 L. T. 690; 48 W. R. 193.—C.A.

Att.-Gen. v. Beech, *referred to*.

Finance Act, 1894, and Studdert, In re (1899) [1900] 2 Ir. R. 281, 296.—Q.B.D.; and S. C. *nom.* Inland Revenue Commissioners v. Priestley, 70 L. J. P. C. 41; [1901] A. C. 208, 214; 84 L. T. 700; 49 W. R. 657.—H.L. (IR.); Lord Advocate v. MacLachlan (1899) 1 Fraser 917.—CT. OF SESS.

Att.-Gen. v. Beech, *not applied*.

Att.-Gen. v. Montagu (Lord) (1902) 71 L. J. K. B. 333; [1902] 1 K. B. 429, 438; 86 L. T. 57; 50 W. R. 270; 66 J. P. 277.—PHILLIMORE, J.; reversed, C.A. (*post*), but restored, H.L. (*post*, col. 2886).

Att.-Gen. v. Beech, *referred to*.

Att.-Gen. v. Montagu (Lord) (1903) 72 L. J. K. B. 258; [1903] 1 K. B. 483, 490; 88 L. T. 120; 51 W. R. 326; 67 J. P. 93.—C.A.

Cowley (Earl), In re (1897) 66 L. J. Q. B. 656; [1897] 2 Q. B. 47; 76 L. T. 576; 45 W. R. 538; 61 J. P. 694.—POLLOCK, B. and BRUCE, J.; reversed, (1897) 67 L. J. Q. B. 256; [1898] 1 Q. B. 355; 77 L. T. 668; 46 W. R. 222; 62 J. P. 147.—C.A.; *the latter decision reversed in part nom.* Cowley (Earl) v. Inland Revenue Commissioners (1899) 68 L. J. Q. B. 435; [1899] A. C. 198; 80 L. T. 361; 47 W. R. 525; 63 J. P. 436.—H.L. (E.).

Cowley (Earl), In re, *approved*.

Att.-Gen. v. Beech (1898) 67 L. J. Q. B. 585; [1898] 2 Q. B. 147; 78 L. T. 584; 46 W. R. 435; 62 J. P. 371.—C.A.; affirmed, (1898) 68 L. J. Q. B. 130; [1899] A. C. 53; 79 L. T. 565; 47 W. R. 257; 63 J. P. 116.—H.L. (E.).

Cowley (Earl) v. Inland Revenue Commissioners, *not applied*.

Att.-Gen. v. De Préville (1899) 69 L. J. Q. B. 283; [1900] 1 Q. B. 223, 229; 81 L. T. 690; 48 W. R. 193.—C.A.

Cowley (Earl) v. Inland Revenue Commissioners, *referred to*.

Lord Advocate v. MacLachlan (1899) 1 Fraser 917.—CT. OF SESS.

Cowley (Earl) v. Inland Revenue Commissioners, *commented on*.

Att.-Gen. v. Dobree (1899) 69 L. J. Q. B. 223; [1900] 1 Q. B. 442, 450; 81 L. T. 607; 48 W. R. 413; 64 J. P. 24.—DARLING and CHANNELL, JJ.

Cowley (Earl) v. Inland Revenue Commissioners, *referred to*.

Att.-Gen. v. Hawkins (1900) 70 L. J. Q. B. 195; [1901] 1 Q. B. 285, 295; 83 L. T. 531; 49 W. R. 320; 64 J. P. 791.—KENNEDY and PHILLIMORE, JJ.

Cowley (Earl) v. Inland Revenue Commissioners, *applied*.

Vernon, In re (1900) 70 L. J. Q. B. 202; [1901] 1 Q. B. 297, 303; 83 L. T. 535; 49 W. R. 192.—KENNEDY and PHILLIMORE, J.

Cowley (Earl) v. Inland Revenue Commissioners, *referred to*.

Inland Revenue Commissioners v. Priestley (1901) 70 L. J. P. C. 41; [1901] A. C. 208, 214.—

H.L. (IR.) (*see post*, col. 2887); **Att.-Gen. v. Montagu** (Lord) [1902] 1 K. B. 429, 430 (*post*).

Cowley (Earl) v. Inland Revenue Commissioners, *applied*.

Att.-Gen. v. Montagu (Lord) [1903] 1 K. B. 483, 490.—C.A. (*post*).

Att.-Gen. v. Wood (1897) 66 L. J. Q. B. 522; [1897] 2 Q. B. 102; 76 L. T. 654; 45 W. R. 663.—Q.B.D., *discussed*.

Finance Act, 1894, and Studdert, In re (1899) [1900] 2 Ir. R. 281, 291.—Q.B.D.; affirmed *nom.* Inland Revenue Commissioners v. Priestley.—H.L. (*post*). *See* Finance Act, 1898, s. 14.

Att.-Gen. v. Strange, 77 L. T. 362; 61 J. P. 728.—V. WILLIAMS and KENNEDY, JJ.; reversed, (1898) 67 L. J. Q. B. 629; [1898] 2 Q. B. 39; 78 L. T. 516.—C.A.

Att.-Gen. v. Grey (Earl) (1898) 67 L. J. Q. B. 947; [1898] 2 Q. B. 534; 79 L. T. 235; 47 W. R. 37.—C.A., *referred to*.

Att.-Gen. v. De Préville (1899) 69 L. J. Q. B. 283; [1900] 1 Q. B. 223, 229; 81 L. T. 690; 48 W. R. 193.—C.A.

Att.-Gen. v. Grey (Earl), *affirmed*; Grey (Earl) v. Att.-Gen. (1900) 69 L. J. Q. B. 308; [1900] A. C. 124; 82 L. T. 62; 48 W. R. 383.—H.L. (E.).

Att.-Gen. v. Grey (Earl), Grey (Earl) v. Att.-Gen., *not applied*.

Att.-Gen. v. Johnson (1902) 71 L. J. K. B. 187; [1902] 1 K. B. 416; 86 L. T. 296; 50 W. R. 366; 66 J. P. 328.—PHILLIMORE, J.; reversed, C.A. (*post*).

Grey (Earl) v. Att.-Gen., *applied*.

Att.-Gen. v. Johnson (1903) 72 L. J. K. B. 323; [1903] 1 K. B. 617, 625.—C.A. (*supra*, col. 2882).

Att.-Gen. v. De Préville (1899) 68 L. J. Q. B. 832; [1899] 2 Q. B. 238; 63 J. P. 568.—DAY and LAWRANCE, JJ.; reversed, (1899) 69 L. J. Q. B. 283; [1900] 1 Q. B. 223; 81 L. T. 266, 690; 48 W. R. 193.—C.A. *See* Finance Act, 1898, s. 11.

Att.-Gen. v. De Préville, *referred to*.

Att.-Gen. v. Montagu [1902] 1 K. B. 429, 438.—PHILLIMORE, J. (*see post*).

Att.-Gen. v. Montagu (Lord) (1902) 71 L. J. K. B. 333; [1902] 1 K. B. 429; 86 L. T. 57; 50 W. R. 270; 66 J. P. 277.—PHILLIMORE, J.; reversed, (1903) 72 L. J. K. B. 258; [1903] 1 K. B. 483; 88 L. T. 120; 51 W. R. 326; 67 J. P. 93.—C.A.; restored and C.A. reversed (1904) [1904] A. C. 316.—H.L. (E.).

Att.-Gen. v. Dodington (1897) 66 L. J. Q. B. 441, 684; [1897] 2 Q. B. 373; 77 L. T. 299; 45 W. R. 657; 61 J. P. 644.—C.A., *discussed and applied*.

Finance Act, 1894, and Studdert, In re (1899) [1900] 2 Ir. R. 281, 288, 400.—Q.B.D. and C.A.; affirmed *nom.* Inland Revenue Commissioners v. Priestley.—H.L. (*post*).

Att.-Gen. v. Dodington, *dicta approved*.

Inland Revenue Commissioners v. Priestley (1901) 70 L. J. P. C. 41; [1901] A. C. 208; 84 L. T. 700; 49 W. R. 657.—H.L. (IR.); affirming S. C. *nom.* Finance Act, 1894, and Studdert, In re (1899) [1900] 2 Ir. 281, 400.—Q.B.D. and C.A. (IR.).

HALSBURY, L.C.—In this case I entirely agree with the judgment which was given by Rigby, L.J., in *Att.-Gen. v. Dodington*, and I agree with the learned judges in Ireland, who have taken the same view. It only remains to say that I shall move that this appeal be dismissed. I have the less hesitation in speaking of it thus compendiously, because I think it would be impossible to answer and difficult to improve upon the judgment given by the Chief Baron in Ireland. It appears to me that he has exactly expounded the construction of the question and the logical effect of the language, and the only thing that one feels a difficulty about is that there is a certain amount of want of logic, considering the reasoning both in that and in the *Dodington Case*, in the money having been paid for duty upon the death of Mr. Studdert. But here, as there, there is no cross-appeal. The result is that we must leave the matter as it stands. I have no hesitation in expressing my own opinion that Rigby, L.J., was right in that particular, and, had the question so arisen, I should have unhesitatingly agreed to a judgment which would have gone to the full extent.—p. 43.

LORD MACNAGHTEN.—I entirely agree with the views expressed by Rigby, L.J., in *Att.-Gen. v. Dodington*, which have the approval of the L.C.B. and Holmes, L.J., and I am compelled to dissent from the construction placed upon the Act by FitzGibbon and Walker, L.J.J., a construction which seems to me calculated to reproduce the difficulties which I had thought were cleared away by the decisions of this House in *Att.-Gen. v. Beech* (col. 2884) and *Cowley (Earl) v. Inland Revenue Commissioners* (col. 2885).—p. 45.

LORD DAVEY to the same effect.

Orford (Countess) In re, Cartwright v. De Balzo (Duc) (1895) 65 L. J. Ch. 253; [1896] 1 Ch. 257; 73 L. T. 681; 44 W. R. 383.—NORTH, J.

Applied, Hill's Settlement Trusts, In re, Hill v. Equitable Reversionary Interest Society (1896) 75 L. T. 477.—STIRLING, J.; *observed upon*, Chisholm, In re, Goddard v. Brodie (1902) 71 L. J. Ch. 289; [1902] 1 Ch. 457, 465; 86 L. T. 183.—KEKEWICH, J.; *explained*, Berry v. Gaukroger (1903) 72 L. J. Ch. 435; [1903] 2 Ch. 116, 124; 88 L. T. 521; 51 W. R. 449.—C.A.

Gray, In re, Gray v. Gray (1896) 65 L. J. Ch. 462; [1896] 1 Ch. 620; 74 L. T. 275; 44 W. R. 406; 60 J. P. 314.—NORTH, J., *applied*.

Chisholm, In re, Goddard v. Brodie (1902) 71 L. J. Ch.; [1902] 1 Ch. 457, 466; 86 L. T. 183.—KEKEWICH, J.

Meyrick, In re, Meyrick v. Hargreaves (1897) 66 L. J. Ch. 33; [1897] 1 Ch. 99; 75 L. T. 621; 45 W. R. 120.—CHITTY, J., *referred to*.

Berry v. Gaukroger [1903] 2 Ch. 116, 127; 72 L. J. Ch. 435; 88 L. T. 521; 51 W. R. 449.—C.A.

Webber, In re, Gribble v. Webber (1896) 65 L. J. Ch. 544; [1896] 1 Ch. 914; 74 L. T. 244; 44 W. R. 489.—NORTH, J., *applied*.

Gibbs, In re, Thorne v. Gibbs (1898) 67 L. J. Ch. 282; [1898] 1 Ch. 625, 628; 78 L. T. 289; 46 W. R. 477.—STIRLING, J.

Webber, In re, Gribble v. Webber, explained.

Maryon-Wilson, In re, Wilson v. Maryon

Wilson (1899) 68 L. J. Ch. 580; [1899] 2 Ch. 489, 494; 81 L. T. 73; 47 W. R. 685.—KEKEWICH, J.; reversed, C.A. (*post*).

Webber, In re, Gribble v. Webber, disapproved.

Maryon-Wilson, In re, Wilson v. Maryon-Wilson (1900) 69 L. J. Ch. 310; [1900] 1 Ch. 565; 82 L. T. 171; 48 W. R. 338.—C.A. LINDLEY, M.R., RIGBY and WILLIAMS, L.J.J.; reversing S. C., *supra*. See now 59 & 60 Vict. c. 28, s. 19. And see St. Albans (Duke) In re (*post*).

Parker-Jervis, In re, Salt v. Locker (1898) 67 L. J. Ch. 682; [1898] 2 Ch. 643; 79 L. T. 403; 47 W. R. 145.—KEKEWICH, J., *applied*.

St. Albans (Duke) In re, Loder v. St. Albans (1900) 69 L. J. Ch. 863; [1900] 2 Ch. 873, 881; 49 W. R. 74.—STIRLING, J.

Maryon-Wilson, In re, Wilson v. Maryon-Wilson (1900) 69 L. J. Ch. 310; [1900] 1 Ch. 565; 82 L. T. 171; 48 W. R. 338.—C.A.; reversing KEKEWICH, J. (*supra*), *referred to*.

Lewis, In re, Lewis v. Smith (1900) 69 L. J. Ch. 406; [1900] 2 Ch. 176; 82 L. T. 291; 48 W. R. 426.—KEKEWICH, J.

Maryon-Wilson, In re, Wilson v. Maryon-Wilson, applied.

St. Albans (Duke), In re, Loder v. St. Albans (1900) 69 L. J. Ch. 863; [1900] 2 Ch. 873; 49 W. R. 74.—STIRLING, J.

Lord Advocate v. Fife (Earl) (1883) 11 Rettie 222.—CT. OF SESS., *approved but distinguished*.

Att.-Gen. v. Hawkins (1900) 70 L. J. Q. B. 195; [1901] 1 Q. B. 285; 83 L. T. 531; 49 W. R. 320; 64 J. P. 791.—KENNEDY and PHILLIMORE, JJ. See *post*.

Att.-Gen. v. Brown (1897) 45 W. R. 446.—WILLIAMS and KENNEDY, JJ.; reversed, (1898) 77 L. T. 591; 46 W. R. 145; 62 J. P. 19.—C.A. A. L. SMITH, RIGBY and COLLINS, L.J.J.; the latter decision affirmed *nom.* Brown v. Att.-Gen. (1898) 79 L. T. 572.—H.L. (E.).

Brown v. Att.-Gen. (1898) 79 L. T. 572.—H.L. (E.), *principle applied*.

Att.-Gen. v. Hawkins (1900) 70 L. J. Q. B. 195; [1901] 1 Q. B. 285; 83 L. T. 531; 49 W. R. 320; 64 J. P. 791.

KENNEDY, J.—It was there [*Lord Advocate v. Fife (Earl)* (*supra*)] found that there was an actual assignment to the son of the policies. Under a distinct bargain, by which the father was relieved of considerable difficulty, the son took over the policies, or, in other words, became assignee of them. Although he could not at the time actually realise, he would have had the right, as my brother Phillimore has pointed out, to deal with the policies by way of surrender as he pleased. That is not the case here. *Brown v. Att.-Gen.* seems to me to throw some light upon the principle by which such cases as this ought to be decided—namely, that if the transaction is in substance a purchase, the duty is not payable; but that if it is in substance a family arrangement or settlement by which a benefit passes on the death of the deceased, the duty is payable. . . . It was there held that the transaction was a family arrangement, and that the duty was payable. It seems to me that this is a still

stronger case, inasmuch as there was here, so to speak, no attempt at a purchase, but merely a benefit conferred upon the remainderman by way of compensation for a benefit conferred by him upon the tenant for life. . . . As appears from the very full judgment of my brother Channell in that case [*Att.-Gen. v. Dobree (post)*], two separate points were there decided. The first was that a policy of life assurance falls within sect. 2 sub sect. (1) (*d*) of the [Finance] Act. To that extent we follow that case. The other point upon which the decision really rests was that the exemption from duty in sect. 3 did not apply. As regards that point, I agree that the decision is in no way binding upon us here, because there was there unquestionably an element which does not exist here. In that case the only original consideration was the consideration of marriage, which had been held not to be a consideration in money or money's worth. That case, therefore, could not be treated as an authority turning upon the operations of sect. 3. It is not a decision in any way covering this case, because here, if there be any consideration, it is not marriage, but the benefits which the defendant conferred upon his father by concurring with him in the acts which cut off the entail and made the other arrangements possible.—p. 199.

PHILLIMORE, J.—The decision of the Ct. of Sess. upon the facts (which decision I in no sense desire to quarrel with, as it seems to me a perfectly right one upon the facts as well as the law) brings *Lord Advocate v. Fife (Earl)* into line with *Fryer v. Morland (ante, p. 2878)*. Here there is no purchase at all. . . . I say nothing about *Att.-Gen. v. Dobree*—it would not be proper that I should unless to assent to it; but it seems to me to have no bearing upon this case, and therefore I pronounce no opinion upon it.—p. 201.

Att.-Gen. v. Dobree (1900) 69 L. J. Q. B. 223; [1900] 1 Q. B. 442; 81 L. T. 607; 48 W. R. 413; 64 J. P. 24.—Q.B.D.

Approved and applied, Att.-Gen. v. Robinson (1900) [1901] 2 Ir. R. 67, 91.—Q.B.D.; *not applied, Att.-Gen. v. Hawkins* (1900) 70 L. J. Q. B. 195; [1901] L. Q. B. 285; 83 L. T. 531; 49 W. R. 320; 64 J. P. 791.—Q.B.D. See *supra*.

Att.-Gen. v. Dobree and Att.-Gen. v. Robinson (*supra*), *followed*.

Att.-Gen. v. Murray (1903) 72 L. J. K. B. 208; [1903] 2 K. B. 64; 88 L. T. 474; 51 W. R. 572; 67 J. P. 133.—RIDLEY, J.

Att.-Gen. v. Hawkins (*supra*), *referred to*.

Att.-Gen. v. Montagu (Lord) [1902] 1 K. B. 429, 430.—PHILLIMORE, J. (see *supra*, col. 2886).

Att.-Gen. v. Murray (*supra*), *reversed*, 73 L. J. K. B. 66; [1904] 1 K. B. 165.—C.A.

Cullen v. Att.-Gen. for Ireland (1866) L. R. 1 H. L. 190; 12 Jur. (N.S.) 531; 14 L. T. 644; 14 W. R. 869.—H.L. (IR.), *dictum of LORD WESTBURY followed*.

Maddock, In re, Llewelyn v. Washington (1901) 70 L. J. Ch. 660; [1901] 2 Ch. 372; 85 L. T. 12.

KEKEWICH, J.—Plaintiff's counsel has cited to me a *dictum* of Lord Westbury in *Cullen v. Att.-Gen. for Ireland*. Defendant's counsel truly says that the case before the House of Lords does not touch the present, as in the case cited it was

a question whether duty was payable under certain Acts of Parliament, and it was disposed of on the construction of those particular Acts. . . . Lord Westbury lays down a general principle, and one about which there can be no doubt, in these words—he says: "The title of the party claiming under the secret trust, or claiming by virtue of that personal confidence, is a title *dehors* the will, and which cannot be correctly termed testamentary." I accept that as an exposition of the law upon that particular point.—p. 661.

Cullen v. Att.-Gen. for Ireland, observed on.

Maddock, In re, Llewelyn v. Washington (1902) 71 L. J. Ch. 567; [1902] 2 Ch. 220, 225; 86 L. T. 644; 50 W. R. 598.—C.A.; reversing S. C., *supra*. And see *ante*, col. 2861.

Culverhouse, In re, Cook v. Culverhouse (1896) 65 L. J. Ch. 484; [1896] 2 Ch. 251; 74 L. T. 244; 44 W. R. 489.—KEKEWICH, J., *explained*.

Treasure, In re, Wild v. Stanham (1900) 69 L. J. Ch. 751; [1900] 2 Ch. 648; 83 L. T. 142; 48 W. R. 696.

KEKEWICH, J.—It was attempted to distinguish that case [*Culverhouse, In re*] on the ground that there the direction was to pay the testamentary expenses of another person. That is true, and the distinction is of importance with reference to one of the points argued and decided in that case; but as regards the point with which I am dealing here, my judgment was based entirely on the reasoning that, as payment of estate duty was essential to obtaining a grant of probate, that duty must be considered as much a testamentary expense as any other payment necessary or properly incurred by the executors for that purpose.—p. 753.

Clemow, In re, Yeo v. Clemow (1900) 69 L. J. Ch. 523; [1900] 2 Ch. 182; 82 L. T. 550; 48 W. R. 541.—KEKEWICH, J., *followed*.

Treasure, In re, Wild v. Stanham (1900) 69 L. J. Ch. 751; [1900] 2 Ch. 648; 83 L. T. 142; 48 W. R. 696.—KEKEWICH, J.

Clemow, In re.

Distinguished, Sharman, In re, Wright v. Sharman (1901) 70 L. J. Ch. 671; [1901] 2 Ch. 280; 84 L. T. 859.—KEKEWICH, J. (see *post*, col. 2892); *applied, Fearnside, In re, Baines v. Chadwick* [1903] 1 Ch. 250, 258 (see *post*, col. 2892).

Treasure, In re, not followed on one point.

Moore, In re, Moore v. Moore (1901) 70 L. J. Ch. 321; [1901] 1 Ch. 691; 49 W. R. 373.—BUCKLEY, J.

Treasure, In re, distinguished.

Sharman, In re, Wright v. Sharman (1901) 70 L. J. Ch. 671; [1901] 2 Ch. 280 (*supra*).

Treasure, In re, followed.

Moore, In re, Moore v. Moore, dissented from.

Maddock, In re, Llewelyn v. Washington (1901) 70 L. J. Ch. 660; [1901] 2 Ch. 372; 85 L. T. 12.—KEKEWICH, J.

Treasure, In re, followed.

Moore, In re, dissented from.

Power, In re, Stone, In re, Aeworth v. Stone (1901) 70 L. J. Ch. 778; [1901] 2 Ch. 659; 85 L. T. 400; 49 W. R. 678.

BURNES, J.—In *Treasure, In re, Kekewich, J.* held that the appointed fund does not under such

circumstances [*i.e.*, where a general power of appointment by will over a fund has been exercised] pass to the executors "as such;" but there was another ground of decision—namely, that the duty fell within the description of "testamentary expenses," which were directed to be paid out of residue, and consequently that, although the fund did not pass to the executor "as such," the duty fell to be paid out of residue. In *Moore, In re*, Buckley, J. declined to follow the opinion expressed by Kekewich, J., and held, in a case where there was no direction as to payment of testamentary expenses, that the appointed fund did pass to the executor "as such," and that the estate duty was on that ground payable out of residue. The point again came before Kekewich, J. in *Maddock, In re* (*supra*), there being no direction as to payment of testamentary expenses, when, as I am informed, without fresh argument, he adhered to his opinion as expressed in *Treasure, In re*, notwithstanding the decision in *Moore, In re*. . . Prior to the passing of the Probate Duty Act, 1860, property over which the deceased had a general power of appointment only was not subject to probate duty. This was decided in *Drake v. Att.-Gen.*, affirming the decisions of Lord Langdale in *Platt v. Routh* [*ante*, col. 2851]. . . Lord Langdale's decision in *Platt v. Routh* was in accordance with the decision of the Ct. of Ex. . . It is, I think, quite clear that the appointed property was considered not to pass to the executor *virtute officii* or "as such." Kindersley, V.-C., in *Cook v. Gregson* [(1896) 25 L. J. Ch. 706; 3 Drew, 547; 2 Jur. (N.S.) 510 (*ante*, col. 2848)], in considering the difference between what are legal and what are equitable assets says that "every item of property come to the hands of the executor which he has recovered, or had a right to recover, merely *virtute officii*, *i.e.*, which he would have had a right to recover if the testator had merely appointed him executor without saying anything about his property or the application thereof" is legal assets. Lord Chelmsford, in *Att.-Gen. v. Brunning* [*ante*, col. 2848], expressly approves of this passage. In the last mentioned case the question was whether or not money paid to an executor under a contract for sale of land entered into by the testator was legal or equitable assets. And Lord Cranworth observes, ". . . what an administrator is entitled to recover as administrator, *virtute officii*, can never be equitable assets." Lord Cranworth also points out that foreign assets were not liable to probate duty, not being recoverable by virtue of the English probate; and when they come to the hands of the executor they do come because he has established a title in a foreign jurisdiction. In *Davies' Trusts, In re* [(1871) 41 L. J. Ch. 97; L. R. 13 Eq. 163; see "POWERS," *ante*, col. 2202] Wickens, V.-C., states it as settled law that a testator who has a general power of appointment directing payment of his debts without more, and appointing an executor, makes the appointed fund liable in aid of his own assets for payment of his debts; and he expresses his opinion that the same rule would apply though no executor were appointed. I think that it is also established that the appointment of executor without more would not make the funds assets—*Davies' Trusts, In re*, and *Thurston, In re* [(1886) 55 L. J. Ch. 564; 32 Ch. D. 508; see "POWERS," *ante*, col. 2204]. . . I do not think that by the [Finance] Act it was intended, or that the

effect of the section under discussion [sect. 9, subsect. 1] is to convert equitable into legal assets or to cause property to pass to his executor *virtute officii*, which had not previously so passed; nor, as I have said, do I believe that James, L.J., in *Hoskin's Trusts, In re* [(1877) 46 L. J. Ch. 817; 6 Ch. D. 281; see "POWERS," *ante*, col. 2214], meant to decide or to express an opinion which would have a similar result.—pp. 781, 783.

Treasure, In re, and Mooke, In re, referred to. Fearnside, *In re*, Baines v. Chadwick (1902) 72 L. J. Ch. 200; [1903] 1 Ch. 250, 257 (*post*).

Maddock, In re, Llewelyn v. Washington (1901) 70 L. J. Ch. 660; [1901] 2 Ch. 372; 85 L. T. 12.—KEKEWICH, J., *followed*.

Power, In re, Stone, In re, Acworth v. Stone (1901) 70 L. J. Ch. 778; [1901] 2 Ch. 659; 85 L. T. 400; 49 W. R. 678.—BYRNE, J., *see supra*, col. 2891.

Maddock, In re, reversed on one point, (1902) 71 L. J. Ch. 567; [1902] 2 Ch. 220; 86 L. T. 644; 50 W. R. 598.—C.A.

Maddock, In re, referred to. Fearnside, *In re*, Baines v. Chadwick (1902) 72 L. J. Ch. 200; [1903] 1 Ch. 250, 257 (*post*).

Power, In re, Stone, In re, Acworth v. Stone (1901) 70 L. J. Ch. 778; [1901] 2 Ch. 659; 85 L. T. 400; 49 W. R. 678.—BYRNE, J., *referred to*.

Dixon, In re, Penfold v. Dixon (1901) 71 L. J. Ch. 96; [1902] 1 Ch. 248, 257; 85 L. T. 622; 50 W. R. 203.—BUCKLEY, J.; Fearnside, *In re*, Baines v. Chadwick (1902) 72 L. J. Ch. 200; [1903] 1 Ch. 250, 257; 88 L. T. 57; 51 W. R. 186.—SWINFEN EADY, J.

Dixon, In re, Penfold v. Dixon (1901) 71 L. J. Ch. 96; [1902] 1 Ch. 248; 85 L. T. 622; 50 W. R. 203.—BUCKLEY, J., *referred to*.

Fearnside, In re, Baines v. Chadwick (1902) 72 L. J. Ch. 200; [1903] 1 Ch. 250, 257; 88 L. T. 57; 51 W. R. 186.—SWINFEN EADY, J.

Jolley, In re, Neal v. Jolley (1901) 17 Times L. R. 244.—JOYCE, J., *applied*.

Palmer, In re, Palmer v. Rose-Innes (1900) 35 L. J. N. C. 48; W. N. (1900) 9.—BUCKLEY, J., *followed*.

Sharman, In re, Wright v. Sharman (1901) 70 L. J. Ch. 671; [1901] 2 Ch. 280, 283; 84 L. T. 859. KEKEWICH, J.—In *Clemow, In re* (*supra*, col. 2890), . . . the only question that arose was in respect of personal estate, and with respect to the estate duty which it was necessary for the executors to pay in order to obtain probate of the will. Again, in *Treasure, In re* (*supra*, col. 2890), there was only personal estate in question. . . The point must have been considered by Joyce, J. in *Jolley, In re*, though he seems to have been dealing specially with the particular facts of that case when giving his decision, and did not lay down any general law. . . But, so far as it is an authority upon the point before me, it is an authority in favour of the real estate bearing its own estate duty, notwithstanding a direction to pay the testamentary expenses. Applying that to the present case, . . . I must hold that "testamentary expenses" do not include the estate duty payable in respect of real estate. . . Counsel for the residuary legatees has called my attention on this point to *Palmer, In re*, where Buckley, J. decides this

point exactly. He says "that the language of sect. 9, sub-sect. 1, of the Finance Act, 1894, must be construed with reference to the law as it stood at that time, and not in accordance with the provisions of the Land Transfer Act 1897. Therefore, the real estate did not 'pass to the executor,' and it was charged with a rateable part of the estate duty." That case is only reported as a note at present, and I take it that now it will not find its way into any more permanent report; but it is very plainly stated by the learned judge, and I think it my duty to follow it without question.—p. 672.

9. BODIES CORPORATE AND UNINCORPORATE.

New University Club, In re (1887) 56 L. J. Q. B. 462; 18 Q. B. D. 720; 56 L. T. 909; 35 W. R. 774.—**HAWKINS** and **A. L. SMITH, JJ.**, *approved, but distinguished.*

Incorporated Council of Law Reporting, In re (1888) 58 L. J. Q. B. 90; 22 Q. B. D. 279, 287; 60 L. T. 505; 37 W. R. 382; 53 J. P. 119.—**COLERIDGE, C.J.** and **MANISTY, J.**

New University Club, In re, referred to.

Att.-Gen. v. Ellis (1895) 64 L. J. Q. B. 813; [1895] 2 Q. B. 466, 470; 15 R. 584; 73 L. T. 350; 44 W. R. 13; 59 J. P. 774.—**Q.B.D.**; **Savoy Overseers v. Art Union of London** (1896) 65 L. J. M. C. 161; [1896] A. C. 296; 74 L. T. 497; 45 W. R. 34; 60 J. P. 660.—**H.L. (E.)**.

Incorporated Council of Law Reporting, In re (*supra*), *not applied.*

British Institute of Preventive Medicine v. Styles (1895) 11 Times L. R. 432.—**Q.B.D.**

Institution of Civil Engineers, In re (1887) 56 L. J. Q. B. 576; 19 Q. B. D. 610.—**COLERIDGE, C.J.** and **FIELD, J.**; *reversed*, (1888) 57 L. J. Q. B. 353; 20 Q. B. D. 621; 59 L. T. 282; 36 W. R. 598; 52 J. P. 549.—**C.A.**; *the latter decision affirmed nom.* **Inland Revenue Commissioners v. Forrest** (1890) 60 L. J. Q. B. 281; 15 A. C. 334; 63 L. T. 36; 39 W. R. 33; 54 J. P. 772.—**H.L. (E.)**, **HALSBURY, L.C.**, *dissenting.*

Institution of Civil Engineers, In re, discussed.

Sully v. Royal College of Surgeons, Edinburgh (1892) 19 Rettie 751.—**CT. OF SESS.**; **Royal College of Music v. Westminster Vestry** (1897) 67 L. J. Q. B. 80; [1898] 1 Q. B. 304, 312; 77 L. T. 627; 62 J. P. 53.—**HAWKINS** and **CHANNELL, JJ.**; (affirmed, 67 L. J. Q. B. 540; [1898] 1 Q. B. 809; 78 L. T. 441; 62 J. P. 357.—**C.A.**).

Inland Revenue Commissioners v. Forrest (*supra*), *referred to.*

Savoy Overseers v. Art Union of London (1896) 65 L. J. M. C. 161; [1896] A. C. 296.—**H.L. (E.)** (*supra*).

Inland Revenue Commissioners v. Forrest, distinguished.

Royal College of Surgeons, In re (1899) 68 L. J. Q. B. 613; [1899] 1 Q. B. 871, 877; 80 L. T. 611; 47 W. R. 452.—**C.A.**

Society of Writers to the Signet v. Inland Revenue Commissioners (1886) 14 Rettie 34.—**CT. OF SESS.**

Approved and applied. **New University Club, In re** (1887) 56 L. J. Q. B. 462; 18 Q. B. D. 720, 728.—**Q.B.D. (supra)**; *approved and distinguished.* **Inland Revenue Commissioners v. Forrest** (1890) 60 L. J. Q. B. 281; 15 A. C. 334, 349 (*supra*).

Society of Writers to the Signet v. Inland Revenue Commissioners, discussed.
Sully (or Inland Revenue) v. Royal College of Surgeons, Edinburgh (1892) 19 Rettie 751.—**CT. OF SESS.**

Society of Writers to the Signet v. Inland Revenue Commissioners, applied.
Royal College of Surgeons, In re (1899) 68 L. J. Q. B. 613; [1899] 1 Q. B. 871, 884; 80 L. T. 611; 47 W. R. 452.—**C.A.**

Sully v. Royal College of Surgeons, Edinburgh (1892) 19 Rettie 751.—**CT. OF SESS., approved.**

Manchester Corporation v. McAdam (1895) 64 L. J. Q. B. 401, 403; [1895] 1 Q. B. 673; 43 W. R. 438; 72 L. T. 349; 59 J. P. 261; 14 R. 313.—**C.A.**, **RSEER, M.R.**, *dissenting*; *reversed*, 65 L. J. Q. B. 672; [1896] A. C. 500 (*see ante*, col. 2819).

Glasgow Tailors (Incorporation) v. Inland Revenue Commissioners (1888) 14 Rettie 729; 14 Scott. L. R. 516.—**CT. OF SESS., approved.**

Linen and Woollen Drapers' &c. Institution, In re (1888) 58 L. T. 499.—**POLLOCK, B.** and **HAWKINS, J.**; **Royal College of Surgeons, In re** (1899) 68 L. J. Q. B. 613; [1899] 1 Q. B. 871, 883; 80 L. T. 611; 47 W. R. 452.—**C.A.**

10. CUSTOMS AND EXCISE.

Leah v. Minns (1883) 47 J. P. 198.—**POLLOCK** and **HUDDLESTON, BB.**, *commented on.*
Howorth v. Minns (1886) 56 L. T. 316; 51 J. P. 7.—**DENMAN** and **HAWKINS, JJ.**

Purdy v. Smith (1859) 28 L. J. M. C. 150; 1 El. & El. 511; 5 Jur. (N.S.) 912; 7 W. R. 306.—**Q.B.**, *dissented from.*
Williams v. Lear (1872) 41 L. J. M. C. 76; L. R. 7 Q. B. 235; 25 L. T. 906.

LUSH, L.J. (for self and **HANNEN, J.**).—The origin and meaning of the term [taxed cart] appear to have been overlooked by this Court in deciding **Purdy v. Smith**, where it was held that a taxed cart meant simply a carriage upon which a tax had been paid. It is clear to us that such was never the meaning of the term, and we cannot therefore follow that decision.—p. 78.

Guyer v. Reg. (1889) 58 L. J. M. C. 81; 23 Q. B. D. 100; 60 L. T. 824; 37 W. R. 586; 16 Cox C. C. 657; 53 J. P. 436.—**Q.B.D.**, **MANISTY, J.**, *dissenting.*

Distinguished. **Robertson v. Johnson** (1892) 62 L. J. M. C. 1; [1892] 1 Q. B. 129, 134; 5 R. 108; 67 L. T. 560; 41 W. R. 223; 57 J. P. 39; 17 Cox C. C. 580.—**Q.B.D.**; *reasoning in applied.* **Purdey v. Eccles** (1892) 62 L. J. M. C. 27; [1893] 1 Q. B. 52; 5 R. 52; 67 L. T. 713; 41 W. R. 125; 17 Cox C. C. 594; 57 J. P. 38.—**MATHEW** and **BRUCE, JJ.** *See* 56 & 57 Vict. c. 7, s. 2.

Yelland v. Vincent (1883) 47 J. P. 230.—**POLLOCK** and **HUDDLESTON, BB.**
Yelland v. Winter (1885) 55 L. T. 912; 34 W. R. 121; 50 J. P. 38.

HUDDLESTON, B.—The justices have found that he is a servant who, being *bond fide* employed in some other capacity, is partially employed in the capacity of groom. A man may be said to be employed partially in a capacity when

he is in a continuous service, in which particular periods of the day are allotted to particular duties. If he is employed as a groom, then he does not do the work of a groom occasionally only, that constitutes the difference between this case and that of *Yelland v. Vincent*. In *Yelland v. Vincent* the justices found that the individual in question was a servant who was *bonâ fide* employed by the respondent in the capacity of yardman on the respondent's farm, and that he was also *bonâ fide* employed by the respondent in the capacity of groom, and that he was in fact both yardman and groom, and was responsible for and performed the duties of each office. There the justices did not find that the servant was only "occasionally and partially" employed, and the finding being that he was *bonâ fide* employed, the exemption did not apply. In the present case the justices find that the servant was a person who being *bonâ fide* employed by the respondent in some other capacity, was partially employed by him in the capacity of groom. I therefore think that the decision of the justices was correct.—p. 913. CAVE and WILLS, JJ. agreed.

London Corporation v. Parkinson (1850) 10 C. B. 228.—C.P., *applied*.

Fullwood v. Akerman (1862) 11 C. B. (N.S.) 737, 743.—C.P.

Att.-Gen. v. Lamplough (1877) 37 L. T. 247; 25 W. R. 753.—EX.; KELLY, C.B. *dissenting*; *reversed*, (1878) 47 L. J. Ex. 555; 3 Ex. D. 214; 38 L. T. 87; 26 W. R. 323.—C.A.

Taylor v. Oram (1862) 31 L. J. M. C. 252; 1 H. & C. 370; 8 Jur. (N.S.) 748; 7 L. T. 68; 10 W. R. 800.—EX.; and **Muir v. Keay** (1875) 44 L. J. M. C. 143; L. R. 10 Q. B. 594; 23 W. R. 700.—Q.B., *discussed*.

Howes v. Inland Revenue Board (1876) 46 L. J. M. C. 15; 1 Ex. D. 385, 389; 35 L. T. 584; 24 W. R. 897.—EX.D.; CHEASBY, B. *dissenting*; affirmed, C.A.; BAGGALLAY, L.J. *dissenting*.

Stuchbery v. Spence (1886) 55 L. J. M. C. 141; 51 J. P. 181.—WILLS and GRANTHAM, JJ., *referred to*.

Hepple v. Brumby (1896) 60 J. P. 792.—GRANTHAM and WRIGHT, JJ.

Att.-Gen. v. Green (1817) 4 Price 224.—EX. *Referred to*, **Att.-Gen. v. Bailey** (1846) 16 L. J. Ex. 63; 16 M. & W. 74.—EX.; *distinguished*, **Att.-Gen. v. Bailey** (1847) 17 L. J. Ex. 9; 1 Ex. 281.—EX.

Att.-Gen. v. Bailey, *applied*.

Bailey v. Harris (1849) 18 L. J. Q. B. 115; 12 Q. B. 905; 13 Jur. 341.—Q.B.

Wetherell v. Jones (1832) 1 L. J. K. B. 139; 3 B. & Ad. 221.—K.B., *principle applied*.

Bailey v. Harris (1849) 18 L. J. Q. B. 115; 12 Q. B. 905; 13 Jur. 341.—Q.B.

Wetherell v. Jones, *distinguished*.

Scott v. Brown, Doering, McNab & Co. (1892) 61 L. J. Q. B. 738; [1892] 2 Q. B. 724, 729; 41 W. R. 116.—Q.A. LINDLEY, LOPES and A. L. SMITH, L.JJ.

Att.-Gen. v. Fort (1804) 8 Price 364, n.—EX., *referred to*.

Rex v. Giles (1820) 8 Price 364.—EX.; **Att.-Gen. v. Trueman** (1843) 13 L. J. Ex. 70; 11 M. & W. 694.—EX.

O.C.

Lancashire v. Staffordshire JJ. (1857) 26 L. J. M. C. 171; S. C. *nom.* Reg. v. Lancashire, 7 El. & Bl. 839; 3 Jur. (N.S.) 1095; 5 W. R. 658.—Q.B.; ERLE, J. *dissenting, followed*.

Jones v. Whittaker (1870) 39 L. J. M. C. 139; L. R. 5 Q. B. 541; 22 L. T. 535; 18 W. R. 1197.—Q.B.

MELLOR, J.—I am of opinion, on the authority of *Reg. v. Lancashire*, that beer does not fall within the description of "exciseable liquor." . . . I think this case must be governed by the rule laid down in *Reg. v. Lancashire*, that in order to be excisable, a liquor must pay an excise duty.—p. 543.

RIGOTT, B., to the same effect.

Ritchie v. Smith (1848) 6 C. B. 462; 18 L. J. C. P. 9; 13 Jur. 63.—C.P.; and **Gas Light and Coke Co. v. Turner** (1840) 6 Bing. (N.C.) 324; 9 L. J. Ex. 336; 8 Scott 609.—EX. CH., *distinguished*.

Feret v. Hill (1854) 23 L. J. C. P. 185; 15 C. B. 207; 2 C. L. R. 1366; 18 Jur. 1014; 2 W. R. 493.—C.P.

Stewart v. Denton (1785) 2 Chit. 456; 4 Dougl. 219.—K.B., *applied*.

Bothamley v. Sherson (1875) 44 L. J. Ch. 589, 591; L. R. 20 Eq. 304, 309; 33 L. T. 150; 23 W. R. 848.—BOMILLY, M.R.

Johnson v. Hudson (1809) 11 East 180.—K.B., *approved, and principle applied*.

Smith v. Mawhood (1845) 15 L. J. Ex. 149; 14 M. & W. 452.—EX.

Smith v. Mawhood.

Distinguished, **Ritchie v. Smith** (1848) 18 L. J. C. P. 9; 6 C. B. 462, 472; 13 Jur. 63.—C.P. *principle applied*, **Bailey v. Harris** (1849) 18 L. J. Q. B. 115; 12 Q. B. 905; 13 Jur. 341.—Q.B.

Smith v. Mawhood, *applied*.

Melliss v. Shirley Local Board (1885) 55 L. J. Q. B. 143; 16 Q. B. D. 446, 452; 53 L. T. 810; 34 W. R. 187; 50 J. P. 214.—C.A.

COTTON, L.J.—In *Smith v. Mawhood*, Alderson, B., said, "The question is, does the legislature mean to prohibit the act done or not? If it does, whether it be for the purposes of revenue or otherwise, then the doing of the act is a breach of the law, and no right of action can arise out of it."—p. 452.

Att.-Gen. v. Key (1830) 1 Cr. & J. 159.—K.B.; *affirmed*, (1831) 2 Cr. & J. 2.—EX. CH.

Att.-Gen. v. Key, *discussed*.

Att.-Gen. v. Greaves (1835) 5 L. J. Ex. 56; 2 C. M. & R. 669; 1 Tyr. & G. 48.—EX.

Att.-Gen. v. Tomsett (1834) 4 L. J. Ex. 171; 2 Cr. M. & R. 170; 1 Gale 147; 5 Tyrw. 514.—EX., *approved*.

Att.-Gen. v. Greaves (1835) 5 L. J. Ex. 56; 2 Cr. M. & R. 669; 1 Tyrw. & G. 48.—EX.

Newman v. Jones (1886) 55 L. J. M. C. 113; 17 Q. B. D. 132, 137; 55 L. T. 327; 50 J. P. 373.—S.C. *nom.* **Newman v. Leach** 2 T. L. R. 600.—Q.B.D., *considered*.

Bond v. Evans (1888) 57 L. J. M. C. 105; 21 Q. B. D. 249; 59 L. T. 411; 36 W. R. 767; 52 J. P. 613.—Q.B.D.

Thomson v. Thomson (1802) 7 Ves. 470; 6 R. R. 151.—GRANT, M.R., *applied*.
Sykes v. Beadon (1879) 48 L. J. Ch. 522, 532; 11 Ch. D. 170, 193; 40 L. T. 243; 27 W. R. 464.—JESSEL, M.R.

Waymell v. Reed (1794) 5 Term Rep. 599; 2 R. R. 675.—K.B., *referred to*.
Pellicat v. Angell (1835) 4 L. J. Ex. 326; 2 Cr. M. & R. 311; 1 Gale 187; 5 Tyrw. 945.—EX.

Thomas v. Withers (1760) 5 Term Rep. 117.—K.B.; and **Hennel v. Perry** (1776) 5 Term Rep. 117; 2 R. R. 561.—K.B., *referred to*.

Wilkins v. Despard (1793) 5 Term Rep. 112.—K.B.

Hennel v. Perry, *applied*.
The Annandale (1877) 46 L. J. Adm. 68; 2 P. D. 179, 185; 36 L. T. 259.—SIR R. PHILLIMORE.

Holman v. Johnson (1775) Cowp. 341.—K.B.
Distinguished, **Clugas v. Penaluna** (1791) 4 Term Rep. 466; 2 R. R. 442.—K.B.; *doubted*, **Bernard v. Reed** (1794) 1 Esp. 91.—KENYON, C.J.

Holman v. Johnson.
Distinguished, **Waymell v. Reed** (1794) 5 Term Rep. 599; 2 R. R. 675.—K.B.; *applied*, **Bristow v. De Sequeville** (1850) 19 L. J. Ex. 289; 5 Ex. 275; 3 Car. & K. 64; 14 Jur. 674.—EX.; *dictum adopted*, **Taylor v. Chester** (1869) 38 L. J. Q. B. 225; L. R. 4 Q. B. 309, 314; 21 L. T. 359.—Q.B.

Holman v. Johnson, *applied*.
Scott v. Brown (1892) 61 L. J. Q. B. 738; [1892] 2 Q. B. 724, 728; 41 W. R. 116.—C.A.

Holman v. Johnson.
Not applied, **Thomas, In re. Jaquess v. Thomas** (1894) 63 L. J. Q. B. 572; [1894] 1 Q. B. 747, 750; 9 R. 299; 70 L. T. 567.—Q.B.D.; *applied*, **Gedge v. Royal Exchange Assurance Corporation** (1900) 69 L. J. Q. B. 506; [1900] 2 Q. B. 214, 220; 82 L. T. 463; 9 Asp. M. C. 57; 5 Com. Cas. 229.—KENNEDY, J. *And see* vol. i., col. 758.

Bennett v. Clough (1818) 1 B. & Ald. 461; 13 R. R. 352.—K.B., *applied*.
Sissons v. Dixon (1826) 5 B. & C. 758; 8 D. & R. 526; 4 L. J. (o.s.) K.B. 299.—K.B.

Kite and Lane's Case (1822) 1 B. & C. 101; S.C. *nom.* **Kite, Ex parte**, 2 D. & R. 212.—K.B., *distinguished*.
Nunn, In re (1828) 8 B. & C. 644; 3 M. & Ry. 75.—K.B.

Krans, Ex parte (1823) 1 B. & C. 258; 2 D. & R. 411; 25 R. R. 389.—K.B., *referred to*.
Reg. v. Mount (1875) 44 L. J. P. C. 58; L. R. 6 P. C. 283, 305; 32 L. T. 279; 23 W. R. 572.—P.C.; **Terraz, Ex parte** (1878) 48 L. J. Ex. 214; 4 Ex. D. 63, 67; 39 L. T. 502; 27 W. R. 170.—EX. D. *And see* **Watson's Case** (*post*).

Beeching, Ex parte (1825) 4 B. & C. 136; 6 D. & R. 209; 28 R. R. 224.—K.B., *referred to*.
Watson's Case (1839) 9 A. & E. 731; S. C. *nom.* **Rex v. Wixon**, 8 L. J. Q. B. 129; S. C. *nom.* **Reg. v. Batcheldor**, 1 P. & D. 516; 2 W. W. & H. 19.—Q.B. *And see* 3 St. Tr. (N.S.) 963, 973.

Att.-Gen. v. Radloff (1854) 23 L. J. Ex. 240; 10 Ex. 84; 2 C. L. R. 1116; 18 Jur. 555;

2 W. R. 566.—EX., **PLATT and MARTIN, BB.** *dissenting, discussed*.
Att.-Gen. v. Bradlaugh (1885) 54 L. J. Q. B. 205; 14 Q. B. D. 667, 688; 52 L. T. 589; 33 W. R. 673; 49 J. P. 500.—C.A.

Att.-Gen. v. Radloff, *referred to*.
Att.-Gen. v. McCormack [1903] 2 Ir. R. 517.—K.B.D., **GIBSON and BOYD, JJ.**

Greenway v. Hurd (1792) 4 Term Rep. 553.—K.B., *followed*.
Waterhouse v. Keen (1825) 4 B. & C. 200; 6 D. & R. 257.—K.B.

Bostock v. Saunders (1773) 2 W. Bl. 912; 3 Wils. 434.—C.P., *overruled*.
Cooper v. Booth (1785) 3 Esp. 135; 4 Dougl. 339; 1 Term Rep. 535 n.—K.B.

11. STAMPS.

Diplock v. Hammond (1854) 23 L. J. Ch. 550; 5 De G. M. & G. 320; 2 W. R. 500.—L.JJ. (*see* vol. i. col. 80); **Buck v. Robson** (1878) 48 L. J. Q. B. 250; 3 Q. B. D. 686; 39 L. T. 325; 26 W. R. 804.—Q.B.D. (*see* vol. i. col. 80; and **Fisher v. Calvert** (1879) 27 W. R. 301.—JESSEL, M.R., *applied*.
Adams v. Morgan (*post*).

Buck v. Robson.
Explained, **Walker v. Bradford Old Bank** (*post*); *distinguished*, **London Clearing Bankers v. Inland Revenue Commissioners** (1896) 65 L. J. Q. B. 372; [1896] 1 Q. B. 542, 549; 74 L. T. 209; 44 W. R. 516; 60 J. P. 404.—C.A.

Shellard, Ex parte, Adams, In re, (1873) 43 L. J. Bk. 3; L. L. R. 17 Eq. 109; 29 L. T. 621; 22 W. R. 152.—BACON, C.J. (*see* vol. i. col. 80), *not binding*.
Adams v. Morgan (1883) 14 L. R. Ir. 140.—C.A.

Brice v. Bannister (1878) 47 L. J. Q. B. 722; 3 Q. B. D. 569; 38 L. T. 739; 26 W. R. 670.—C.A., *referred to*.
British Waggon Co. v. Lea (1880) 49 L. J. Q. B. 321; 5 Q. B. D. 149, 154; 42 L. T. 437; 28 W. R. 349; 44 J. P. 440.—COCKBURN, C.J. and **MANISTY, J.**

Brice v. Bannister, *applied*.
Adams v. Morgan (1883) 14 L. R. Ir. 140.—C.A.

Brice v. Bannister, *explained*.
Walker v. Bradford Old Bank (1884) 53 L. J. Q. B. 280; 12 Q. B. D. 511, 516; 32 W. R. 645.—W. WILLIAMS and A. L. SMITH, JJ.

Brice v. Bannister, *distinguished*.
Percival v. Dunne (1885) 54 L. J. Ch. 570; 29 Ch. D. 128, 132; 52 L. T. 320.—BACON, V.-C.

Brice v. Bannister, *referred to*.
Drew v. Josolyne (1887) 56 L. J. Q. B. 490; 18 Q. B. D. 590, 596; 57 L. T. 5; 35 W. R. 570.—C.A. **ESHER, M.R.**, **BOWEN and FRY, L.JJ.** *And see* "ASSIGNMENT," vol. i. cols. 80, 81.

Rex v. Ridgwell Inhabitants (1827) 6 B. & C. 665; 9 D. & R. 678; 5 L. J. (o.s.) M. C. 67.—K.B.

Principle applied, **Freeman v. Inland Revenue Commissioners** (1871) 40 L. J. Ex. 85; L. R. 6 Ex. 101; 24 L. T. 323; 19 W. R. 590.—EX.; *approved*, **Limmer Asphalte Co. v. Inland Revenue Commissioners** (1872) 41 L. J. Ex. 106; L. R. 7 Ex. 211; 26 L. T. 633; 20 W. R. 610.—EX.

- Beeching v. Westbrook** (1841) 10 L. J. Ex. 464; 8 M. & W. 411; 1 D. (N.S.) 118.—EX.
- Principle applied*, **Fancourt v. Thorne** (1846) 15 L. J. Q. B. 344; 9 Q. B. 312; 10 Jur. 639.—Q.B.; **Knight v. Barber** (1846) 16 L. J. Ex. 18; 16 M. & W. 66; 2 Car. & K. 333; 10 Jur. 929.—EX.
- Beeching v. Westbrook and Knight v. Barber**, *referred to*.
- Clay v. Crofts** (1851) 20 L. J. Ex. 361.—EX. See Stamp Act, 1891 (54 & 55 Vict. c. 39); "AGREEMENT."
- Vollans v. Fletcher** (1847) 16 L. J. Ex. 173; 1 Ex. 20.—EX., *followed*.
- Wiley v. Parratt** (1848) 18 L. J. Ex. 82; 3 Ex. 211.—EX.; **Clay v. Crofts** (1851) 20 L. J. Ex. 361.—PARKE and MARTIN, BB.
- Wiley v. Parratt**. *Referred to*, **Moore v. Garwood** (1849) 19 L. J. Ex. 15; 4 Ex. 681.—EX. CH.; *discussed and applied*, **Ward v. Londesborough** (Lord) (1852) 12 C. B. 252.—C.P.
- Mowatt v. Londesborough** (Lord) (1854) 23 L. J. Q. B. 177; 3 El. & Bl. 307.—Q.B., *referred to*.
- Tautz v. Archdale** (1895) 11 Times L. R. 452.—KENNEDY, J.
- Mullett v. Huchison** (1828) 7 B. & C. 639; 1 Man. & R. 522; 3 Car. & P. 92; 6 L. J. (O.S.) K. B. 176.—K.B., *discussed*.
- Doe d. Frankis v. Frankis** (1840) 9 L. J. Q. B. 177; 11 A. & E. 792; 3 P. & D. 565.—Q.B.; **Blackwell v. McNaughtan** (1841) 1 Q. B. 127.—Q.B.
- Mullett v. Huchison and Doe d. Frankis v. Frankis** (*supra*), *referred to*.
- Semple v. Steinau** (1853) 22 L. J. Ex. 224; 8 Ex. 622; 17 Jur. 628.—EX.
- Doe d. Lambourn v. Pedgriph** (1830) 4 C. & P. 312.—TENTERDEN, C.J., *referred to*.
- Chadwick v. Clarke** (1845) 14 L. J. C. P. 233; 1 C. B. 700; 9 Jur. 539.—C.P.
- Wharton v. Walton** (1845) 14 L. J. Q. B. 321; 7 Q. B. 474.—Q.B.
- Not applied*, **Mayfield v. Robinson** (1845) 14 L. J. Q. B. 265; 7 Q. B. 486; 9 Jur. 826.—Q.B.; *applied*, **Lovelock v. Franklyn** (1847) 16 L. J. Q. B. 182; 8 Q. B. 371, 381; 11 Jur. 1035.—Q.B.
- Lovelock v. Franklyn**. *Referred to*, **Frost v. Knight** (1872) 41 L. J. Ex. 78; L. R. 7 Ex. 111; 26 L. T. 77; 20 W. R. 471.—EX. CH.; **Société Générale de Paris v. Milders** (1883) 49 L. T. 55.—FIELD, J.
- Melanotte v. Teasdale** (1844) 13 L. J. Ex. 358; 13 M. & W. 216.—EX., *applied*.
- Taylor v. Steele** (1847) 16 L. J. Ex. 177; 16 M. & W. 665; 11 Jur. 806.—EX.
- Shepherd v. Wheble** (1838) 8 Q. & P. 534.—ABINGER, C.B., *commented on*.
- Cox v. Bailey** (1843) 6 Man. & G. 193; 6 Scott (N.S.) 798.—C.P., *referred to*.
- Wrigley v. Smith** (1834) 3 L. J. K. B. 116; 5 B. & Ad. 1117; 3 N. & M. 181.—K.B., *explained*.
- Taylor v. Steele** (1847) 16 L. J. Ex. 177; 16 M. & W. 665; 11 Jur. 806.—EX.
- Moffat v. Edwards** (1841) Car. & M. 16.—PATERSON, J., *applied*.
- Mitchell v. Westover** (1850) 14 Jur. 816.—C.P.
- Yates v. Evans** (1892) 61 L. J. Q. B. 446; 66 L. T. 532; 56 J. P. 565.—Q.B.D., *approved*.
- Kirkwood v. Carroll** (1903) 72 L. J. K. B. 208; [1903] 1 K. B. 531; 88 L. T. 52; 51 W. R. 374.—C.A.
- Yeo v. Dawe** (1885) 53 L. T. 125; 33 W. R. 739.—C.A. BOWEN, L.J. *dissenting; reversing* 32 W. R. 203.—Q.B.D., *approved but not applied*.
- Mortgage Insurance Corporation v. Inland Revenue Commissioners** (*see post*).
- **Yeo v. Dawe**, *discussed*.
- Smith v. Dean** (1900) 69 L. J. Q. B. 331; 81 L. T. 775.—Q.B.D. (*post*).
- British India Steam Navigation Co. v. Inland Revenue Commissioners** (1881) 50 L. J. Q. B. 517; 7 Q. B. D. 165; 44 L. T. 373; 29 W. R. 610.—GROVE and LINDLEY, JJ., *approved but not applied*.
- Mortgage Insurance Corporation v. Inland Revenue Commissioners** (1888) 21 Q. B. D. 352; 57 L. J. Q. B. 630; 36 W. R. 833.—C.A.
- ESHER, M.R.—I should be sorry if it were supposed that we are interfering with any of the cases cited to us. But I may be allowed to say that what I am reported to have said in *Yeo v. Dawe* (*supra*) as to the parties not intending the document to be a promissory note, meant nothing more than that the intention of the parties is an element to be taken into account in considering what is the nature of the document. I should also be sorry to derogate in any way from the reasoning in *British India Steam Navigation Co. v. Inland Revenue Commissioners*. I do not think that either of those cases govern the present case.—p. 355.
- British India Steam Navigation Co. v. Inland Revenue Commissioners**, *not applied*.
- Brown, Shipley & Co. v. Inland Revenue Commissioners** (1895) 64 L. J. M. C. 209; [1895] 2 Q. B. 240.—GRANTHAM and CHARLES, JJ.; *reversed*, C.A. (*post*, col. 2917). *And see* "COMPANY," vol. i., col. 465.
- Mortgage Insurance Corporation v. Inland Revenue Commissioners**, *discussed*.
- Smith v. Dean** (1900) 69 L. J. Q. B. 331; 81 L. T. 775.
- GRANTHAM, J.—The definition of "promissory note" in sect. 33 of the Stamp Act, 1891, and in the corresponding section of the former Stamp Act of 1870, has been so drawn as to include documents which are not usually regarded as promissory notes. The leaning of the judges has been towards a restrictive interpretation of it. In *Yeo v. Dawe* (*supra*) the Court (Bowen, L.J. dissenting) held that the document there in question did not come within the section. In *Mortgage Insurance Corporation v. Inland Revenue Commissioners* it was laid down that the section does not apply to the document where the promise to pay money is part of a contract containing other stipulations. . . . It seems to me that the words "on the day of the transfer of the licence" only fix the time of payment, and do not amount to an additional stipulation

within the meaning of the judgments in *Mortgage Insurance Corporation v. Inland Revenue Commissioners*.—p. 332. CHANNELL, J. concurred.

Doe d. Linsey v. Edwards (1836) 5 L. J. K. B. 238; 5 A. & E. 95; 6 N. & M. 633; 2 H. & W. 139.—K.B., *applied*.
Doe d. Wright v. Smith (1838) 7 L. J. Q. B. 158; 8 A. & E. 255; 3 N. & P. 335; 2 Jur. 854.—Q.B.

Morris v. Dixon (1836) 5 L. J. K. B. 153; 4 A. & E. 845; 6 N. & M. 438; 2 H. & W. 57.—K.B., *distinguished*.
Jones v. Ryder (1838) 7 L. J. Ex. 216; 4 M. & W. 32; 1 H. & H. 256.—EX.

Tomkins v. Ashby (1827) 6 B. & C. 541; 9 D. & R. 543; 5 L. J. (o.s.) K. B. 246.—K.B., *applied*.
Mullett v. Hutchison (or Hutchinson) (1828) 7 B. & C. 639; 1 Man. & R. 522; 3 Car. & P. 92; 7 L. J. (o.s.) K. B. 176.—K.B.

Tomkins v. Ashby, *referred to*.
Blackwell v. M'Naughtan (1841) 1 Q. B. 127.—Q.B. **Marshall v. Powell** (1846) 16 L. J. Q. B. 5; 9 Q. B. 779; 11 Jur. 61.—Q.B.

Latham v. Rutley (1824) Ry. & M. 13.—ABBOTT, C.J.; and **Chadwick v. Sills** (1823) R. & M. 15.—HOLROYD, J., *referred to*.

Doe d. Marlow v. Wiggins (1843) 12 L. J. Q. B. 177; 4 Q. B. 367; 3 G. & D. 504; 7 Jur. 529.—Q.B.; **Cox v. Bailey** (1843) 6 Man. & G. 193; 6 Scott (N.R.) 798.—C.P.

Latham v. Rutley, *principle applied*.
Hill v. Ranson (1843) 12 L. J. C. P. 275; S. C. *nom. Hill v. Ramm*, 5 Man. & G. 789; 6 Scott (N.R.) 571.—C.P.

Chadwick v. Sills (*supra*) *referred to*.
Baldwin v. Alsager (1844) 14 L. J. Ex. 34; 13 M. & W. 365.—EX.

Chadwick v. Sills; Latham v. Rutley; and Baldwin v. Alsager, *applied*.
Semple v. Steinau (1853) 22 L. J. Ex. 224; 8 Ex. 622; 17 Jur. 628.—EX.

Dawson v. Macdonald (1836) 6 L. J. Ex. 10; 2 M. & W. 26; 2 Gale 215.—EX., *applied*.
Field v. Woods (1837) 6 L. J. K. B. 209; 7 A. & E. 114; 2 N. & P. 117; W. W. & D. 482; 6 D. P. C. 23; 8 Car. & P. 52; 1 Jur. 496.—K.B.

Dawson v. Macdonald and Field v. Woods, *applied*.
Maynard v. Consolidated Kent Collieries Corporation [1903] 2 K. B. 121, 131; 72 L. J. K. B. 681; 88 L. T. 676; 52 W. R. 117.—C.A.

Josephs v. Pebrer (1824) 1 Car. & P. 341.—LITTLEDALE, J., *followed*.
Tomkins v. Savory (1829) 9 B. & C. 704; 4 Man. & R. 538; 7 L. J. (o.s.) K. B. 334.—K.B.

Vaughton v. Brine (1840) 9 L. J. C. P. 326; 1 Scott (N.R.) 258; 1 Man. & G. 359.—C.P., *referred to*.
Bethell v. Blencowe (1841) 10 L. J. C. P. 243; 3 Scott (N.R.) 568; 3 Man. & G. 119.—C.P.

Vaughton v. Brine and Lucas v. Beach (1840)

1 Man. & G. 417; 1 Scott (N.R.) 350.—C.P., *applied*.
Beeching v. Westbrook (1841) 10 L. J. Ex. 464; 8 M. & W. 411; 1 D. (N.S.) 18.—EX.

Vaughton v. Brine, *applied*.
Knight v. Barber (1846) 16 L. J. Ex. 18; 16 M. & W. 66; 2 Car. & K. 333; 10 Jur. 929.—EX.; **Ward v. Londesborough (Lord)** (1852) 12 C. B. 252.—C.P.

Edgar v. Blick (1816) 1 Stark. N. P. C. 464.—ELLENBOROUGH, C.J., *distinguished*.
Bowen v. Fox (1828) 2 Man. & R. 167; 6 L. J. (o.s.) K. B. 235.—K.B.

Edgar v. Blick, *applied*.
Carlill v. Carbolic Smoke Ball Co. (1892) 61 L. J. Q. B. 696; [1892] 2 Q. B. 484; 56 J. P. 656.—HAWKINS, J.; affirmed, C.A. (*see post*).

Drant v. Browne (1825) 3 L. J. (o.s.) K. B. 111; 3 B. & C. 665; 5 D. & R. 582.—K.B., *distinguished*.
Bowen v. Fox (1828) 6 L. J. (o.s.) K. B. 235; 2 Man. & R. 167.—K.B.

Drant v. Brown, *not applied*.
Chanter v. Dickenson (1843) 12 L. J. C. P. 147; 5 Man. & G. 253; 6 Scott (N.R.) 182; 2 D. (N.S.) 838; 7 Jur. 89.—C.P.

Drant v. Browne, *applied*.
Hudspeth v. Yarnold (1850) 19 L. J. C. P. 321; 9 C. B. 621; 14 Jur. 581.—C.P.; and **Ward v. Londesborough (Lord)** (1852) 12 C. B. 252.—C.P.

Chaplin v. Clarke (1849) 4 Ex. 407.—EX., *referred to*.
Moore v. Garwood (1849) 19 L. J. Ex. 15; 4 Ex. 681.—EX. CH.

Moore v. Garwood, *applied*.
Hudspeth v. Yarnold (1850) 19 L. J. C. P. 321; 9 C. B. 621; 14 Jur. 581.—C.P.

Chaplin v. Clarke (*supra*) and **Moore v. Garwood**, *discussed and applied*.
Ward v. Londesborough (Lord) (1852) 12 C. B. 252.—C.P.

Chaplin v. Clarke, *approved*.
Ward v. Londesborough (Lord), *approved and applied*.
Mowatt v. Londesborough (Lord) (1854) 23 L. J. Q. B. 177; 3 El. & Bl. 307.—Q.B.

Chaplin v. Clarke; Hudspeth v. Yarnold (*supra*); and **Clay v. Crofts** (1851) 20 L. J. Ex. 361.—EX., *applied*.
Carlill v. Carbolic Smoke Ball Co. (1892) 61 L. J. Q. B. 696; [1892] 2 Q. B. 484; 56 J. P. 665.—HAWKINS, J.; affirmed, C.A. (*see ante*, vol. i., col. 643).

Brewer v. Palmer (1800) 3 Esp. 212.
Referred to, **Ramsbottom v. Tunbridge** (1814) 2 M. & S. 434; 15 R. R. 304.—K.B.; *applied*, **Hughes v. Budd** (1840) 8 D. P. C. 478.—Q.B.

Ramsbottom v. Tunbridge (*supra*); and **Ramsbottom v. Mortley** (1814) 2 M. & S. 445; 15 R. R. 302.—K.B., *not applied*.
Doe d. Marlow v. Wiggins (1843) 12 L. J. Q. B. 177; 4 Q. B. 367; 3 G. & D. 504; 7 Jur. 529.—Q.B.

Ramsbottom v. Mortley, followed.

Glover v. Hackett (1857) 26 L. J. Ex. 416; 2 H. & N. 487; 3 Jur. (N.S.) 1083; 5 W. R. 881.—EX.

Rex v. Pendleton Inhabitants (1812) 15 East 449.—K.B., *dictum overruled.*

Buxton v. Cornish (1844) 12 M. & W. 426; 13 L. J. Ex. 91; 1 D. & L. 585; 8 Jur. 46.—EX.

[BAYLEY, J., in *Rex v. Pendleton*, says: "Though we cannot look at the unstamped instrument for the purpose of proving by it any agreement between the parties; for such is the general import of the Stamp Acts; yet the Court may look at it to see whether it applies to other evidence of a contract between them. As if a contract in writing be made, not stamped, for the sale and delivery of certain goods on certain terms, the Court in an action for the non-delivery of goods upon a contract proved by parol evidence only, may look at the instrument to see whether it applies to the goods then sought to be recovered for: and if those goods were not included in the contract, parol evidence may be received of the contract sought to be recovered upon. So here, the Court might look at the instrument to see the duration of the first contract under it, in order to guide them in receiving parol evidence of the subsequent service, to which it did not apply."—p. 455.]

ABINGER, C.B.—The practice has prevailed in Westminster Hall ever since I have known it, and before every judge for the last quarter of a century, that, in an action for work and labour, though the counsel stated that he was proceeding for some extra work, yet, if it appeared on cross-examination that the work was done under a contract in writing, the judge immediately stopped him from giving evidence of the contract. I think I can remember hundreds of cases where that has occurred, and where it has never been disputed. We are now asked to disturb this practice merely on the *obiter dictum* of a judge. If we were to do so the law would become every day more and more unsettled.—p. 428.

PARKE, B.—*Vincent v. Cole* (M. & M. 257; (1828) 3 C. & P. 481; 38 R. R. 688) must be considered as overruling the *dictum* of Bayley, J., in *Rex v. Pendleton*.—p. 430.

Schultz v. Astley (1836) 5 L. J. C. P. 130; 2 Bing. (N.C.) 544; 2 Scott 815.—C.P.

Commented on, Stoessiger v. S. E. Ry. (1854) 23 L. J. Q. B. 293; 3 El. & Bl. 549, 556; 2 C. L. R. 1595; 18 Jur. 605; 2 W. R. 375.—Q.B.; *applied, Harvey v. Cane* (1876) 34 L. T. 64, 66; 24 W. R. 400.—C.P.D.; *discussed, Baxendale v. Bennett* (1878) 47 L. J. Q. B. 674; 3 Q. B. D. 525, 532; 26 W. R. 899.—C.A., BAGGALLAY, BRAMWELL, and BRETT, JJ.; *London and South Western Bank v. Wentworth* (1880) 49 L. J. Q. B. 657; 5 Ex. D. 96, 102; 42 L. T. 188; 28 W. R. 516.—EX.D.

Schultz v. Astley, referred to.

Nash v. De Freville (1900) 69 L. J. Q. B. 484; [1900] 2 Q. B. 72, 89; 82 L. T. 642; 48 W. R. 434.—C.A.

Reed v. Deere (1827) 7 B. & C. 261; 2 C. & P. 624; 31 R. R. 190.—K.B.

Distinguished, Jones v. Jones (1833) 2 L. J. Ex. 249; 1 Cr. & M. 721; 3 Tyrw. 890.—EX.; *applied, Atherstone v. Bostock* (1841) 10 L. J. C. P. 113; 2 Man. & G. 511; 2 Scott (N.B.) 637; 1 Drink. 96.—C.P.

Ames v. Hill (1800) 2 B. & P. 150.—C.P., *followed.*

Reardon v. Swaby (1803) 4 East 187.—K.B.

Rogers v. James (1816) 7 Taunt. 147; 2 Marsh. 425.—C.P.; and **Pitman v. Humphrey** (1832) 2 Tyrw. 500.—EX., *discussed and applied.*

Rose v. Tomblinson (1834) 3 D. P. C. 49.—LITTLEDALE, J.

Rex v. Reeks (1726) 2 Stra. 716; Ld. Raym. 1445; 1 Barnard. 8.—K.B., *distinguished.*

Bowen v. Ashley (*post*).

Bowen v. Ashley (1805) 1 Bos. & P. (N.B.) 274.—C.P., *not applied.*

Goodson v. Forbes (1815) 6 Taunt. 171; 1 Marsh. 525.—C.P.

Bowen v. Ashley, principle applied.

Ramsbottom v. Davis (1839) 8 L. J. Ex. 80; 4 M. & W. 584; 7 D. P. C. 173.—EX.

Baker v. Jardine (1784) 13 East 235.—K.B.; and **Davis (or Bristol Dock Co.) v. Williams** (1811) 13 East 232.—K.B., *discussed and applied.*

Goodson v. Forbes (1815) 6 Taunt. 171; 1 Marsh. 525.—C.P.

Davis (or Bristol Dock Co.) v. Williams, principle applied.

Ramsbottom v. Davis (1839) 8 L. J. Ex. 80; 4 M. & W. 584; 7 D. P. C. 173.—EX.

Rex v. St. Pauls, Bedford (1795) 6 Term. Rep. 452.—K.B., *distinguished.*

Rex v. Enderby Inhabitants (1831) 2 B. & Ad. 205; 9 L. J. (O.S.) M. C. 80.—K.B.

Rex v. Enderby Inhabitants (1831) 2 B. & Ad. 205; 9 L. J. (O.S.) M. C. 80.—K.B.

Applied, Wilson v. Smith (1844) 13 L. J. Ex. 113; 1 D. & L. 633.—EX.; *referred to, Cox v. Bailey* (1843) 6 Man. & G. 193; 6 Scott (N.B.) 798.—C.P.; *Liddiard v. Gale* (1850) 19 L. J. Ex. 160; 4 Ex. 816.—EX.

Liddiard v. Gale, followed.

Rowland v. Lazarus (1859) 1 F. & F. 466.—COCKBURN, C.J.

Liddiard v. Gale.

See 54 & 55 Vict. c. 39, Sched. I.

Remon v. Hayward (1835) 4 L. J. K. B. 64; 2 A. & E. 666.—Q.B., *not applied.*

Doe d. Marlow v. Wiggins (1843) 12 L. J. Q. B. 177; 4 Q. B. 367; 3 G. & D. 504; 7 Jur. 529.—Q.B.

Pinner v. Arnold (1835) 5 L. J. Ex. 1; 2 Cr. M. & R. 613; 1 Tyrw. & G. 1; 1 Gale 271.—EX., *commented on.*

Chanter v. Dickinson (1843) 12 L. J. C. P. 147; 5 Man. & G. 253; 6 Scott (N.B.) 182; 2 D. (N.S.) 838; 8 Jur. 89.—C.P.

Pinner v. Arnold and West Middlesex Waterworks v. Suwerkropp (1829) Moo. & M. 408; 4 C. & P. 87.—TENTERDEN, C.J., *applied.*

Gurr v. Scudds (1855) 11 Ex. 190; 3 W. R. 457.—EX.

Venning v. Leckie (1810) 13 East 7; 12 R. R. 292.—K.B., *applied*.
Marson v. Short (1835) 4 L. J. C. P. 270; 2 Bing. (N.C.) 118; 2 Scott 243; 1 Hodges 260.—C.P. *And see ante*, col. 2036.

South v. Finch (1837) 3 Bing. (N.C.) 506; 4 Scott 293.—C.P., *principle applied*.
Chanter v. Dickinson (1843) 12 L. J. C. P. 147; 5 Man. & G. 253; 6 Scott (N.R.) 182; 2 D. (N.S.) 838; 7 Jur. 89.—C.P.

Hughes v. Budd (1840) 8 D. P. C. 478.—Q.B.
Referred to, **Knight v. Barber** (1846) 16 L. J. Ex. 18; 16 M. & W. 66; 2 Car. & K. 333; 10 Jur. 929.—EX.; *applied*, **Gurr v. Scudds** (1855) 11 Ex. 190; 3 W. R. 457.—EX.

Curry v. Edensor (1790) 3 Term Rep. 524.—K.B.

Referred to, **Buxton v. Bedall** (1803) 3 East 303.—K.B.; *not applied*, **Warrington v. Furber** (1807) 8 East 242; 6 Esp. 89.—K.B.; *distinguished*, **Smith v. Cator** (1819) 2 B. & Ald. 73.—K.B.; *referred to*, **Rein v. Lane** (1867) 36 L. J. Q. B. 81; 8 B. & C. 83; L. R. 2 Q. B. 144; 15 L. T. 466; 15 W. R. 345.—Q.B.

Smith v. Cator (*supra*), *distinguished*.
Southgate v. Bohn (1846) 16 L. J. Ex. 50; 16 M. & W. 34.—EX.

Smith v. Cator, *distinguished*.
Chaffield v. Cox (1852) 18 Q. B. 321; 21 L. J. Q. B. 279; 16 Jur. 594.—Q.B.
CAMPBELL, C.J.—There the agreement was between principal and factor, not between vendor and purchaser, as here.—p. 324.

Smith v. Cator, *referred to*.
Rein v. Lane (1867) 36 L. J. Q. B. 81; 8 B. & S. 83; L. R. 2 Q. B. 144; 15 L. T. 466; 15 W. R. 345.—Q.B.

Buxton v. Bedall (1803) 3 East 303.—K.B., *held overruled*.
Pinner v. Arnold (1835) 5 L. J. Ex. 1; 2 Cr. M. & R. 613; 1 Tyrw. & G. 1; 1 Gale 271.—EX.

Buxton v. Bedall, *distinguished*.
Marson v. Short (1835) 4 L. J. C. P. 270; 2 Bing. (N.C.) 111; 2 Scott 243; 1 Hodges 260.—C.P.

Hughes v. Breeds (1826) 2 C. & P. 159.—**ABBOTT, C.J.**; and **Wilks v. Atkinson** (1815) 6 Taunt. 11; 1 Marsh. 412.—C.P., *applied*.
Pinner v. Arnold (1835) 5 L. J. Ex. 1; 2 Cr. M. & R. 613; 1 Tyrw. & G. 1; 1 Gale 271.—EX.

Forsyth v. Jervis (1816) 1 Stark. 437; 18 R. R. 804.—K.B., *applied*.
Marson v. Short (1835) 4 L. J. C. P. 270; 2 Bing. (N.C.) 118; 2 Scott 243; 1 Hodges 260.—C.P.

Attwood v. Small (1827) 7 B. & C. 390; 1 M. & R. 246.—K.B., *discussed*.
Bacon v. Simpson (1837) 7 L. J. Ex. 34; 3 M. & W. 78.—EX.

Wilson v. Zulueta (1849) 19 L. J. Q. B. 49; 14 Q. B. 405; 14 Jur. 366.—Q.B., *distinguished*.
Mahoney v. Kekule (1854) 23 L. J. C. P. 54; 14 C. B. 390; 2 C. L. R. 343; 18 Jur. 313; 2 W. R. 155.—C.P.

Leeds v. Burrows (1801) 12 East 1.—K.B., *principle applied*.
Sheldon v. Cox (1824) 3 B. & C. 420; 5 D. & R. 277.—K.B. *And see vol. i., col. 67.*

Barker v. Smart (or **Smarm**) (1841) 10 L. J. Ex. 200; 7 M. & W. 590; 9 D. P. C. 211.—EX., *referred to*.
Daines v. Heath (1847) 3 C. B. 938.—C.P.
Knights Deep, Lim. v. Inland Revenue Commissioners (1898) 68 L. J. Q. B. 125; [1899] 1 Q. B. 345, 350; 79 L. T. 704; 47 W. R. 415; 63 J. P. 147.—**WILLS and BRUCE, JJ.**; (reversed, (1899) 69 L. J. Q. B. 66; [1900] 1 Q. B. 217; 81 L. T. 625; 48 W. R. 198.—C.A.).

Scott v. Alsopp (1816) 2 Price 20.—EX., *distinguished*.
Lloyd v. Heathcote (1833) 2 L. J. Ex. 162; 1 Cr. & M. 336; 3 Tyrw. 309.—EX.

Attree v. Anscomb (1813) 2 M. & S. 88.—K.B., *disapproved but followed*.
Toovey v. Simpson (1839) 3 Jur. 1173.—LITTLEDALE, J.

Attree v. Anscomb, *commented on*.
Toovey v. Simpson, *referred to*.
Winchester Corn Exchange Co. v. Gillingham (1843) 12 L. J. Q. B. 159; 3 G. & D. 567; 4 Q. B. 475; 7 Jur. 326.—Q.B.

Limmer Asphalte Paving Co. v. Inland Revenue Commissioners (1872) 41 L. J. Ex. 108; L. R. 7 Ex. 211; 26 L. T. 633; 20 W. R. 610.—EX., *followed*.

Sweetmeat Automatic Delivery Co. v. Inland Revenue Commissioners (*post*); **National Telephone Co. v. Inland Revenue Commissioners** [1899] 1 Q. B. 250.—C.A. (*post* col. 2907).

Thames Conservators v. Inland Revenue Commissioners (1886) 56 L. J. Q. B. 181; 18 Q. B. D. 279; 56 L. T. 198; 35 W. R. 274.—**DENMAN and HAWKINS, JJ.**, *distinguished*.

Sweetmeat Automatic Delivery Co. v. Inland Revenue Commissioners, **Jones v. Same** (1894) 15 R. 136; 64 L. J. Q. B. 84; [1895] 1 Q. B. 484; 71 L. T. 763; 43 W. R. 318.—**WRIGHT and COLLINS, JJ.**
COLLINS, J.—In that case [*Thames Conservators' case*] there was no instrument under seal.—p. 145.

Thames Conservators v. Inland Revenue Commissioners, *commented on*.
National Telephone Co. v. Inland Revenue Commissioners [1899] 1 Q. B. 250.—C.A. (*see post*, col. 2907).

Jones v. Inland Revenue Commissioners, **Sweetmeat Automatic Delivery Co. v. Same**, *approved and distinguished*.
Clifford v. Inland Revenue Commissioners (1896) 65 L. J. Q. B. 582; [1896] 2 Q. B. 187; 74 L. T. 699; 45 W. R. 14.

POLLOCK, B.—In each case it was held that the agreement was a security for a sum of money at stated periods for an indefinite period, and that the stated periods were annual. I entirely agree with these decisions. In *Jones v. Inland Revenue Commissioners*, the agreement that an annual sum was to be paid; and in *Sweetmeat Automatic Delivery Co. v. Inland Revenue Commissioners*, the words "yearly rent" occur in the

agreement. In those cases there was no difficulty in applying the Act [Stamp Act 1891] to those payments and agreements. But in the present case the only payment we find contemplated is a weekly payment.—p. 586. BRUCE, J. concurred.

Jones v. Inland Revenue Commissioners,
approved and followed.

National Telephone Co. v. Inland Revenue Commissioners (1898) 68 L. J. Q. B. 222; [1899] 1 Q. B. 250; 47 W. R. 247.—C.A.; affirmed, (1899) 69 L. J. Q. B. 43; [1900] A. C. 1; 81 L. T. 546; 48 W. R. 210; 64 J. P. 420.—H.L. (E.).

COLLINS, L.J.—I confess that I was startled at the outset of the case by hearing that I was a party to a decision—*Jones v. Inland Revenue Commissioners*—which did not on its *prima-facie* statement commend itself to my judgment; but now that I have heard the argument, and had the opportunity of reading the judgment, I cannot see any escape from the decision I arrived at there. I have nothing further to add to what I said in that case, except that in citing *Taylor v. Pendleton Overseers* (1887) 56 L. J. M. C. 146; 19 Q. B. D. 288, in that case I was obviously making a mistake and confounding it with *Thames Conservators v. Inland Revenue Commissioners* (*supra*). All that I said there had reference to that case, and not to *Taylor v. Pendleton Overseers*; and I must say that, after reading again the decision in *Thames Conservators v. Inland Revenue Commissioners*, I think that that decision is open to the observations which I ventured to make upon it in *Jones v. Inland Revenue Commissioners*.—p. 227.

[NOTE.—The correction has reference to the report of *Jones v. Inland Revenue Commissioners* in the Law Reports [1895] 1 Q. B. 484, at p. 495. In the Law Journal Reports (64 L. J. Q. B. 98) the observations of COLLINS, J. (at p. 90) are correctly attributed to *Thames Conservators v. Inland Revenue Commissioners*.]

Jones v. Inland Revenue Commissioners,
referred to.

Jackson v. Inland Revenue Commissioners (1902) 87 L. T. 269.—PHILLIMORE, J.

Jones v. Inland Revenue Commissioners and National Telephone Co. v. Inland Revenue Commissioners,
explained.

British Oil and Cake Mills v. Inland Revenue Commissioners (1903) 72 L. J. K. B. 312; [1903] 1 K. B. 689, 697; 88 L. T. 526; 51 W. R. 388; 67 J. P. 145.—C.A.

Clifford v. Inland Revenue Commissioners
(supra, col. 2906), distinguished.

Lewis v. Inland Revenue Commissioners (1898) 67 L. J. Q. B. 694; [1898] 2 Q. B. 290; 78 L. T. 745.—WRIGHT and PHILLIMORE, JJ.

Lewis v. Inland Revenue Commissioners,
referred to.

Clifford v. Inland Revenue Commissioners,
discussed and followed.

Jackson v. Inland Revenue Commissioners (1902) 87 L. T. 269.—PHILLIMORE, J.

Quin v. King (1836) 5 L. J. Ex. 140; 1 M. & W. 42; 4 D. P. C. 736; 1 Gale 407.—EX., *distinguished.*

Walmesley v. Brierly (1836) 1 M. & Rob. 529.—PARKER, B.

Walmesley v. Brierly, applied.

Hartley v. Maunson (1842) 11 L. J. C. P. 199; 4 Man. & G. 172; 1 D. (N.S.) 711.—C.P.

Lopez v. De Tastet (1819) 3 Taunt. 712.—C.P., *followed.*

Annandale v. Pattison (1829) 9 B. & C. 919; 8 L. J. (O.S.) K. B. 66.—K.B.

Dickson v. Cass (1830) 1 B. & Ad. 343; 8 L. J. (O.S.) K. B. 396.—K.B., *distinguished.*

Doe d. Scruton v. Snaith (1832) 1 L. J. C. P. 59; 8 Bing. 146; 1 M. & Scott. 230.—C.P.; Paddon v. Bartlett (1834) 4 L. J. K. B. 65; 2 A. & E. 9; 4 N. & M. 1.—K.B.; Doe d. Mercer v. Bragg (1838) 7 L. J. Q. B. 263; 3 A. & E. 620; 3 N. & P. 644.—Q.B.

Dickson v. Cass.

Doubted. Barker v. Smark (1841) 10 L. J. Ex. 200; 7 M. & W. 590; 9 D. P. C. 211.—EX.; *commented on.* Wroughton v. Turtle (1843) 13 L. J. Ex. 57; 11 M. & W. 561; 1 D. & L. 473.—EX.; *overruled.* Frith v. Rotherham (1846) 15 L. J. Ex. 133; 15 M. & W. 39; 10 Jur. 208.—EX.

Rein v. Lane (1867) 36 L. J. Q. B. 81; 1 L. R. 2 Q. B. 144; 8 B. & S. 83; 15 L. T. 466; 15 W. R. 345.—Q.B., *distinguished.*

Horsey v. Graham (1869) 39 L. J. C. P. 58, 62; L. R. 5 C. P. 9, 13; 21 L. T. 530; 18 W. R. 141.—C.P.

Lea v. Bracken (1893) 63 L. J. Q. B. 96; [1894] 1 Q. B. 114; 9 R. 92; 69 L. T. 668; 42 W. R. 196.—C.A. *See*

Customs and Inland Revenue Act, 1898 (61 & 62 Vict. 46), s. 7.

Glasgow and South Western Ry. v. Inland Revenue Commissioners (1886) 13 Rottie 480.—CT. OF SESS.; LORD SHAND *dissenting*; *reversed nom.* **Inland Revenue Commissioners v. Glasgow and South Western Ry.** (1887) 56 L. J. P. C. 82; 12 App. Cas. 315; 57 L. T. 570; 36 W. R. 241.—H.L. (SC.).

Inland Revenue Commissioners v. Glasgow and South Western Ry., referred to.

Inland Revenue Commissioners v. Angus & Co. (1889) 23 Q. B. 579; 61 L. T. 832; 38 W. R. 3.—C.A.

HALSBURY, L.C.—In order that sect. 70 [Stamp Act, 1870] may apply, the property must be actually transferred by the instrument itself, not merely by virtue of an equitable doctrine. In *Inland Revenue Commissioners v. Glasgow and South Western Ry.* it was held that, upon the sale of business premises to a railway company, a sum given by the jury as compensation for loss of business was part of the commission for the sale of the premises, and was therefore liable to *ad valorem* duty.—p. 588.

Furness Ry. (or Ulverstone and Lancaster Ry.) v. Inland Revenue Commissioners

(1864) 33 L. J. Ex. 173; 2 H. & C. 855; 10 Jur. (N.S.) 1133; 10 L. T. 161; 13 W. R. 10.—EX., *followed.*

G. W. Ry. v. Inland Revenue Commissioners (1893) 63 L. J. Q. B. 405; [1894] 1 Q. B. 507; 9 R. 122; 70 L. T. 86; 42 W. R. 211; 58 J. P. 397.—C.A.

G. W. Ry. v. Inland Revenue Commissioners
(supra), applied.

Coats, Ltd. v. Inland Revenue Commissioners

(1897) 66 L. J. Q. B. 434; [1897] 1 Q. B. 778.—WILLS and GRANTHAM, JJ.; and 66 L. J. Q. B. 732; [1897] 2 Q. B. 423; 77 L. T. 270; 46 W. R. 1; 61 J. P. 693.—C.A.

Foster (John) & Sons v. Inland Revenue Commissioners (1893) 63 L. J. Q. B. 173; [1894] 1 Q. B. 516; 9 R. 161; 69 L. T. 817; 42 W. R. 259; 58 J. P. 444.—C.A.; *reversing CAVE, J.; WRIGHT, J. dissenting; approved.*

Wilson (John) & Son v. Inland Revenue Commissioners (1895) 23 Rottie 18.—CT. OF SESS.

Foster (John) & Sons v. Inland Revenue Commissioners, *applied.*

Coats, Ltd. v. Inland Revenue Commissioners (1897) 66 L. J. Q. B. 434, 732; [1897] 1 Q. B. 778; [1897] 2 Q. B. 423 (*supra*).

Foster (John) & Sons v. Inland Revenue Commissioners, and Coats, Ltd. v. Inland Revenue Commissioners, *referred to.*

G. N. Ry. v. Inland Revenue Commissioners (1899) 68 L. J. Q. B. 978; [1899] 2 Q. B. 652; 81 L. T. 335; 48 W. R. 170; 64 J. P. 21.—**DARLING and PHILLIMORE, JJ.**; affirmed, (1900) 70 L. J. K. B. 336; [1901] 1 Q. B. 416; 84 L. T. 183; 49 W. R. 261; 65 J. P. 275.—C.A.

Huntington v. Inland Revenue Commissioners (1896) 65 L. J. Q. B. 297; [1896] 1 Q. B. 442; 74 L. T. 28; 44 W. R. 300.—**WRIGHT and KENNEDY, JJ.** See Finance Act, 1898 (61 & 62 Vict. c. 10), s. 6.

Rex v. Long Buckby Inhabitants (1805) 7 East 45; 8 R. R. 595.—K.B.; and **Crisp v. Anderson** (1815) 1 Stark. 35; 18 R. R. 744.—**ELLENBOROUGH, C.J.**, *referred to.*

Pooley v. Goodwin (1835) 4 A. & E. 94; 5 N. & M. 466; 1 H. & W. 567.—K.B., *applied.*

Hart v. Hart (1841) 11 L. J. Ch. 9; 1 Hare 1; 5 Jur. 1007.—**WIGRAM, V.-C.**

Crisp v. Anderson, *approved and applied.*

Hart v. Hart, *referred to.*

Crowther v. Solomons (1848) 18 L. J. C. P. 92; 6 C. B. 758.—C.P.

Crisp v. Anderson, Pooley v. Goodwin, Hart v. Hart, and Crowther v. Solomons, *referred to.*

Closmadenc v. Carrel (1856) 25 L. J. C. P. 216; 18 C. B. 36; 2 Jur. (N.S.) 474; 4 W. R. 547.—C.P.

Hart v. Hart, Crowther v. Solomons, Pooley v. Goodwin, Rex v. Long Buckby, and Closmadenc v. Carrel, *approved.*

Marine Investment Co. v. Havside (1872) 42 L. J. Ch. 173; L. R. 5 H. L. 624, 631.—H.L. (R.).

LORD CAIRNS.—The law with regard to the presumption to be made as to the stamping of lost instruments appears to me to be stated correctly in a sentence in the book of Mr. Taylor on Evidence [4th. ed. p. 153], in which all the authorities which have been referred to to-day are collected. Mr. Taylor says: "If secondary evidence is tendered to prove the contents of an instrument which is either lost or retained by the opposite party after notice to produce it, the

Court will presume that the original was duly stamped unless some evidence to the contrary is given." The cases which have been referred to at the bar are here collected in a foot-note. They are *Hart v. Hart*, *Crowther v. Solomons*, *Pooley v. Goodwin*, *Rex v. Long Buckby*, and *Closmadenc v. Carrel*.—p. 175.

Potter v. Inland Revenue Commissioners (1854) 23 L. J. Ex. 345; 10 Ex. 147; 18 Jur. 778; 2 W. R. 561.—EX.

Approved, **Limmer Asphalte Paving Co. v. Inland Revenue Commissioners** (1872) 41 L. J. Ex. 106; L. R. 7 Ex. 211, 215; 26 L. T. 633; 20 W. R. 610.—EX.; *explained*, **Inland Revenue Commissioners v. Angus & Co.** (1889) 23 Q. B. D. 579, 596; 61 L. T. 832; 38 W. R. 3.—C.A. (affirming 53 J. P. 435.—Q.B.D.).

Inland Revenue Commissioners v. Angus & Co., *distinguished.*

Troup v. Inland Revenue Commissioners (1891) 7 Times L. R. 610.—**DENMAN and WILLS, JJ.**

Potter v. Inland Revenue Commissioners, *referred to.*

Smelting Co. of Australia v. Inland Revenue Commissioners [1896] 2 Q. B. 179, 184 (*post*, col. 2912).

Potter v. Inland Revenue Commissioners, *explained.*

Inland Revenue Commissioners v. Angus & Co., *referred to.*

West London Syndicate v. Inland Revenue Commissioners (1898) 67 L. J. Q. B. 956; [1898] 2 Q. B. 507; 79 L. T. 289; 47 W. R. 125.—C.A. **A. L. SMITH and V. WILLIAMS, L.JJ.**; **RIGBY, L.J.** dissenting on one point, **A. L. SMITH and RIGBY, L.JJ.**, **V. WILLIAMS** dissenting on the other point. **V. WILLIAMS, L.J.**—I understand *Potter v. Inland Revenue Commissioners* to mean that where real estate and the goodwill connected with it are conveyed by separate deeds they are both liable to *ad valorem* duty—p. 968. See judgment at length.

Potter v. Inland Revenue Commissioners, and Inland Revenue Commissioners v. Angus & Co., *applied.*

Danubian Sugar Factories v. Inland Revenue Commissioners (1900) 70 L. J. Q. B. 211; [1901] 1 Q. B. 245; 84 L. T. 101; 65 J. P. 212.—C.A.

Potter v. Inland Revenue Commissioners, and Inland Revenue Commissioners v. Angus & Co., *discussed.*

Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd. (1901) 70 L. J. K. B. 677; [1901] A. C. 217, 230; 84 L. T. 729; 49 W. R. 603.—H.L. (R.) (*see post*, col. 2912).

Christie v. Inland Revenue Commissioners (1866) 36 L. J. Ex. 11; L. R. 2 Ex. 66; 4 H. & C. 664; 15 L. T. 282; 15 W. R. 258.—EX., *followed.*

Phillips v. Inland Revenue Commissioners (1867) 36 L. J. Ex. 199; L. R. 2 Ex. 399, 400; 16 L. T. 839.—EX.

Christie v. Inland Revenue Commissioners, and Phillips v. Inland Revenue Commissioners, *distinguished.*

MacLeod v. Inland Revenue Commissioners (1885) 12 Rottie 1045.—CT. OF SESS.

LORD PRESIDENT INGLIS.—The second case

[*Phillips v. Inland Revenue Commissioners*] does not require any particular consideration, because it follows as a matter of course upon the first [*Christie v. Inland Revenue Commissioners*]; but the first certainly requires attention, and it appears to me that it differs from the present in a very essential respect . . . The retiring partners in that case got no portion of the co-estate whatever, whereas here Mr. Wilson obtains a subject—one half of the co-estate—of the value of 8,000*l.* No part of the co-estate in *Christie's Case* was retained by or given to either of the retiring partners. What they got was cash and nothing else—cash or its equivalent in a security for money. . . Indeed, I think the general principle upon which the C.B. proceeds there is just that which I am proposing to adopt in the present case. He says, "In all these cases it appears to me that the substance of the transaction is alone to be considered upon the question whether the instrument is liable to the stamp duty under the statute, and the substance of this transaction collected from the pleas certainly seems to me to be a sale by Mr. Black to Mr. Christie of Mr. Black's interest in the plaintiffs property for the sum of 110,000*l.*" This is exactly the view I take of the present case, and the present, I think, differs from that just in the very respect which constitutes the distinction between a sale and a division.—p. 1049.

LORD SHAND, to the same effect.

Lord Advocate v. Galloway (1884) 11 Rettie 541.—CT. OF SESS., followed.

Lord Advocate v. McCourt (1893) 20 Rettie 488.—CT. OF SESS.

Inland Revenue Commissioners v. Todd (1898) 67 L. J. P. C. 42; [1898] A. C. 399; 78 L. T. 571.—H.L. (SC.). See Finance Act, 1898 (61 & 62 Vict. c. 10), s. 6.

Denn d. Manifold v. Diamond (1825) 4 B. & C. 243; 6 D. & R. 328; 3 L. J. (O.S.) K. B. 211; 28 R. R. 237.—K.B.

Applied, *Massy v. Nanny* (1837) 6 L. J. C. P. 185; 3 Bing. (N.C.) 478; 4 Scott 258.—C.P.; referred to, *Vauxhall Bridge Co. v. Sawyer* (1851) 20 L. J. Ex. 304; 6 Ex. 504.—EX.; approved, Att.-Gen. v. Bradbury (1851) 21 L. J. Ex. 12; 7 Ex. 97; 16 Jur. 130.—EX.; applied, *Henniker v. Henniker* (1852) 22 L. J. Q. B. 94; 1 El. & Bl. 54; 17 Jur. 436.—Q.B.; Beresford Succession, In re (1855) 5 Ir. C. L. R. 409.—EX. And see *Huntington v. Inland Revenue Commissioners* [1896] 1 Q. B. 422; 65 L. J. Q. B. 297; 74 L. T. 28; 44 W. R. 300.—WRIGHT and KENNEDY, JJ.

Plymouth Great Western Dock Co. v. Inland Revenue Commissioners (1853) 22 L. J. Ex. 183; 8 C. nom. Gill, In re, 8 Ex. 376.—EX. See 16 & 17 Vict. c. 59, s. 11.

Warren v. Howe (1823) 2 B. & C. 281; 3 D. & R. 494; 2 L. J. (O.S.) K. B. 8.—K.B., and *Blandy v. Herbert* (1829) 9 B. & C. 396; 7 L. J. (O.S.) K. B. 223.—K.B., explained.

Caldwell v. Dawson (1850) 5 Ex. 1; 14 Jur. 316.—EX.

West London Syndicate v. Inland Revenue Commissioners (1897) 67 L. J. Q. B. 218; [1898] 1 Q. B. 226.—GRANTHAM and CHANNELL, JJ.; affirmed and reversed in part, (1898) 67 L. J. Q. B. 956; [1898] 2

Q. B. 507; 79 L. T. 289; 47 W. R. 125.

—C.A. (see *supra*, col. 2910), dictum of CHANNELL, J. approved.

Chesterfield Brewery Co. v. Inland Revenue Commissioners (1898) 68 L. J. Q. B. 204; [1899] 2 Q. B. 7, 12; 79 L. T. 559; 47 W. R. 320.

WILLS, J.—I think . . . that the view which CHANNELL, J. entertained . . . is correct, that where there is a declaration of trust which creates as part of the consideration, and part of that which is given to the person in whose favour the declaration is made, an equitable interest, it falls within the language of sect. 54 [Stamp Act, 1891], and makes the instrument a "conveyance on sale."—p. 205. BRUCE, J. concurred.

West London Syndicate v. Inland Revenue Commissioners.

Referred to, *Baglioni v. Cavalli* (1900) 83 L. T. 500; 49 W. R. 236.—COZENS-HARDY, J.; distinguished, *Muller & Co.'s Margarine, Ltd. v. Inland Revenue Commissioners* [1900] 1 Q. B. 310 (*post*); considered, *Danubian Sugar Factories, Ltd. v. Inland Revenue Commissioners* [1901] 1 Q. B. 245 (*post*, col. 2913).

Smelting Co. of Australia v. Inland Revenue

Commissioners (1896) 66 L. J. Q. B. 137; [1897] 1 Q. B. 175; 75 L. T. 534; 45

W. R. 203; 61 J. P. 116.—C.A. (affirming 65 L. J. Q. B. 513; [1896] 2 Q. B. 179.—

POLLOCK, B. and BRUCE, J.), distinguished.

Muller & Co.'s Margarine, Ltd. v. Inland Revenue Commissioners (1899) 69 L. J. Q. B. 291; [1900] 1 Q. B. 310, 318; 81 L. T. 667.—C.A.; which reversed 68 L. J. Q. B. 797; 81 L. T. 228.—DAY and LAURANCE, JJ.; C.A., affirmed *nom.* *Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd.* (1901) 70 L. J. K. B. 677; [1901] A. C. 217; 84 L. T. 729; 49 W. R. 603.—H.L. (E.) HALSBURY, L.C. dissenting.

A. L. SMITH, L.J.—We were much pressed with *Smelting Co. of Australia v. Inland Revenue Commissioners*, which at first sight appears to be contrary to this view, because it was there held that a sole licence to use in a district of New South Wales an invention protected by a patent granted in that colony was "property" within this sub-section [sect. 59, sub-sect. 1, Stamp Act, 1891], but did not come within the exception of "property locally situate out of the United Kingdom." But that was a mere personal right attached to no premises at all, and the Court therefore held that it was not locally situate out of the United Kingdom. . . . [After referring to the judgment of Esher, M.R. in that case the L. J. continued]. But I do not think that Lord Esher intended these words to apply to a case where property was incident to other property which was tangible and locally situate, and to say that such property so incident was not locally situate. On the contrary, in my judgment, the observations were made in relation to the case which he had to decide.—p. 296.

COLLINS, L.J.—It is obvious from that decision [*Smelting Co. of Australia v. Inland Revenue Commissioners*] that it is not the place where the right is exercised is the test whether the right has a local situation. . . . There [*West London Syndicate v. Inland Revenue Commissioners* (*supra*)] the majority of the Court held that the goodwill of the business of a hotel proprietor was severable and severed from the hotel in which it was carried on, and to which *prima facie* it might

seem to be annexed. They gathered this from the document in which the different subject-matters of the sale were set out and sold. And although on the face of the document the "lease and goodwill" were measured together at one lump sum, the Court nevertheless arrived at the conclusion that the goodwill was severed from the premises, and allowed the duty to be charged accordingly. It seems at first sight difficult to distinguish that case from the present, because here the goodwill is separately named in the agreement as one of the subject-matters sold; but when that case is looked into more closely it will be seen that the vendor there was the tenant of the leasehold premises, to which *prima facie* the goodwill might be thought to be annexed, and that, not having the right to assign the premises without the consent of his landlord, he had not in fact assigned them at all, but had put himself under an obligation to constitute some person a trustee of them for the purchaser of the goodwill. So there was in that case technically and strictly a sale of the goodwill apart from the premises. But in the case before us there is one lump sum charged for the sale of the premises on which the business is carried on, and for the other subject-matters comprised in the sale. They are all sold for one lump sum, and it is clear that *prima facie* the goodwill is annexed to the premises, and there is nothing on the face of the document to suggest that it is not. Therefore we have in this case that element which was wanting both in *Smelting Co. of Australia v. Inland Revenue Commissioners* and in *West London Syndicate v. Inland Revenue Commissioners*—namely, that this right of goodwill, which would be incorporeal if it were not annexed to something, is absolutely annexed to a hereditament situate out of the United Kingdom.—p. 297.

V. WILLIAMS, L.J.—It was said that the effect of the decision [*Smelting Co. of Australia v. Inland Revenue Commissioners*] was that nothing could have a local situation unless it was a physical, tangible thing. I do not agree. The observations made in that case, which it was said had that effect, were appropriate to the case then to be decided. . . . With regard to *West London Syndicate v. Inland Revenue Commissioners*, I would point out that in that case it was held that the goodwill of the business was not only severable from the leasehold premises on which it was carried on, but had been severed by the conduct of the parties. At the time of that decision, I had the misfortune to differ from the other members of the Court, because I thought that whatever the parties had done intending to sever the goodwill from the leasehold of the hotel, as they had not expressly done so, we ought not to hold that they had done so, because on looking at the lease, which was produced, it contained a contract not to carry on business elsewhere than on the leasehold premises. I thought that to infer in those circumstances that the parties intended to sever the goodwill for the purposes of their contract was to infer that they intended to commit a breach of contract, when there was another construction open to us.—p. 298.

Smelting Co. of Australia v. Inland Revenue Commissioners, applied.

Muller and Co.'s Margarine, Ltd. v. Inland Revenue Commissioners (1899) 69 L. J. Q. B. 291; [1900] 1 Q. B. 310; 81 L. T.

667.—C.A. (*supra*, col. 2912), *discussed and distinguished*.

Danubian Sugar Factories, Ltd. v. Inland Revenue Commissioners (1900) 70 L. J. Q. B. 211; [1901] 1 Q. B. 245, 249; 84 L. T. 101; 65 J. P. 212.—C.A.; reversing RIDLEY and DARLING, JJ.

A. L. SMITH, M.R.—I cannot distinguish the present case from that of *Smelting Co. of Australia v. Inland Revenue Commissioners*, in which this Court held that an agreement for the sale of a licence to use an Australian patent—that is, of the benefit of a contract—was not an agreement for the sale of property locally situated out of the United Kingdom. It is true that in *Muller & Co.'s Margarine v. Inland Revenue Commissioners* we held in this Court that goodwill which was attached to a manufactory situated abroad was property locally situated out of the United Kingdom, and therefore not within sect. 59 of the Stamp Act, 1891; but we did not, nor indeed could we, dissent from *Smelting Co. of Australia v. Inland Revenue Commissioners*, theretofore decided, for we were bound by it. The learned judges in the Q. B. Division were of opinion that the case of *Muller & Co.'s Margarine v. Inland Revenue Commissioners* decided the present, but in my opinion it did not; for the sale of a goodwill attached to premises abroad is very different from the sale of merely the benefit of a contract, which is the present case.—p. 214.

COLLINS and STIRLING, L.JJ., to the same effect. See the judgments at length.

Smelting Co. of Australia v. Inland Revenue Commissioners, considered.

Muller & Co.'s Margarine, Ltd. v. Inland Revenue Commissioners, affirmed.

Inland Revenue Commissioners v. Muller & Co.'s Margarine, Ltd. (1901) 70 L. J. K. B. 677; [1901] A. C. 217; 84 L. T. 729; 49 W. R. 603.—H. L. (E.), HALSBURY, L.C. dissenting.

Wells (or Wills) v. Bridge (1849) 18 L. J. Ex. 384; 4 Ex. 193.—EX., *referred to*.

Freeman v. Inland Revenue Commissioners (1871) 40 L. J. Ex. 85; L. R. 6 Ex. 101; 24 L. T. 323; 19 W. R. 590.—EX.

Gatty v. Fry (1877) 46 L. J. Ex. 605; 2 Ex. D. 265; 36 L. T. 182; 25 W. R. 305.—EX. D., *distinguished*.

Clarke v. Roche (1877) 47 L. J. Q. B. 147; 3 Q. B. D. 170, 172; 37 L. T. 633; 26 W. R. 112.—COCKBURN, C.J. and MELLOR, J.

Gatty v. Fry, followed.

Hitchcock v. Edwards (1889) 60 L. T. 636.—CAVE, J. *And see* "BILLS OF EXCHANGE," vol. i., col. 218.

Clayton v. Burtenshaw (1826) 5 B. & C. 41; 7 D. & R. 800.—K.B., *distinguished*.

Wilson v. Smith (1844) 13 L. J. Ex. 113; 12 M. & W. 401; 1 D. & L. 633.—EX.

PARKE, B.—That case is not in point, as the instrument there was held not to amount to a lease, as no term was stated.—p. 114.

Walker v. Giles (1849) 15 L. J. C. P. 323; 6 C. B. 662; 13 Jur. 588.—C.P., *applied*.

Thorn v. Croft (1866) 36 L. J. Ch. 68; L. R. 3 Eq. 193; 15 L. T. 205; 15 W. R. 54; 31 J. P. 356.—WOOD, V.-C. *And see ante*, col. 1917.

Walker v. Giles, commented on.

Royal Liver Friendly Society v. Inland Revenue Commissioners (*or* Royal Liver Friendly Society, *In re*) (1870) 39 L. J. Ex. 37; L. R. 5 Ex. 78, 80; 21 L. T. 721; 18 W. R. 349.—EX.

Schumann v. Weatherhead (1801) 1 East 537.—K.B., *distinguished*.

Jones v. Jones (1833) 2 L. J. Ex. 249; 1 Cr. & M. 721; 3 Tyrw. 890.—EX.

Australasian Mortgage and Agency Co. v. Inland Revenue Commissioners (1888) 16 Rettle 64.—CT. OF SESS., *applied*.

Rothschild and Sons v. Inland Revenue Commissioners [1894] 2 Q. B. 142; 10 R. 204; 70 L. T. 667; 42 W. R. 542; 58 J. P. 399.—MATHEW and CAYE, JJ. See 57 & 58 Vict. c. 30, s. 40.

Grenfell v. Inland Revenue Commissioners (1876) 45 L. J. Ex. 465; 1 Ex. D. 242; 34 L. T. 426; 24 W. R. 582.—EX. D.

Applied, Chicago Ry. Terminal Elevator Co. v. Inland Revenue Commissioners (1896) 75 L. T. 157; 45 W. R. 138.—POLLOCK, B. and BRUCE, J.; (affirmed, 75 L. T. 572; 45 W. R. 242 (C.A.)); *discussed*, Baring v. Inland Revenue Commissioners (1897) 67 L. J. Q. B. 44; [1898] 1 Q. B. 78; 77 L. T. 353; 46 W. R. 98; 61 J. P. 822.—C.A. ESHER, M.R.; KAY and A. L. SMITH, L.JJ. (affirmed *nom.* Revelstoke (Lord) v. Inland Revenue Commissioners (1898) 67 L. J. Q. B. 855; [1898] A. C. 565; 79 L. T. 227; 62 J. P. 740.—H.L. (E.); *referred to*, Brown v. Inland Revenue Commissioners (1900) 17 Times L. R. 177.—C.A. A. L. SMITH, M.R.; COLLINS and STIRLING, L.JJ. See 54 & 55 Vict. c. 39, s. 82 (1) (b) ii.

Corder v. Drakeford (1811) 3 Taunt. 382.—MANSFIELD, C.J. and LAWRENCE, J., *referred to*.

Wharton v. Walton (1845) 14 L. J. Q. B. 321; 7 Q. B. 474.—Q.B.

Mott v. Turnage (1856) 1 F. & F. 6.—CRESSWELL, J., *not applied*.

Golden v. Taylor (1860) 2 F. & F. 110.—BYLES, J.

Paul v. Meek (1828) 2 Y. & J. 116; 31 R. R. 559.—EX., *referred to*.

Hughes v. Clark (1851) 10 C. B. 905; 15 Jur. 430.—C.P.

Duck v. Braddyll (1824) M'Clel. 217; 13 Price 455.—EX.

Applied, Doe d. Kettle v. Lewis (1830) 10 B. & C. 673; 8 L. J. (o.s.) K. B. 300.—K.B.; *referred to*, Mackenzie, *In re*, Hertfordshire (Sheriff), *Ex parte* (1899) 68 L. J. Q. B. 1003; [1899] 2 Q. B. 566; 81 L. T. 214.—C.A. LINDLEY, M.R., JEUNE, P. and ROMER, L.J.

Price v. Thomas (1831) 2 B. & Ad. 218; S.C. *nom.* Pratt v. Thomas, 4 C. & P. 554.—K.B., *distinguished*.

Wharton v. Walton (1845) 14 L. J. Q. B. 321; 7 Q. B. 474.—Q.B.

Boone v. Mitchell (1822) 1 L. J. (o.s.) K. B. 25; 1 B. & C. 18.—K.B., *commented on*.

Att.-Gen. v. Brown (1849) 3 Ex. 662; 18 L. J. Ex. 336.—EX.

PARKE, B.—That case was clearly the result of an imperfect reading of the Act of Parliament.—p. 668.

Bolton v. Inland Revenue Commissioners (1870) 39 L. J. Ex. 51; 21 L. T. 720; 18 W. R. 351; S.C. *nom.* Bolton's Lease, *In re*, L. R. 5 Ex. 82.—EX., *discussed*.

British Electric Traction Co. v. Inland Revenue Commissioners (1901) 71 L. J. K. B. 92; [1902] 1 K. B. 441; 85 L. T. 663; 50 W. R. 280; 66 J. P. 83.—C.A. COLLINS, M.R., STIRLING and MATHEW, L.JJ. See Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 77, sub-s. 2.

Doe d. Higginbotham v. Hobson (1823) 3 D. & R. 186.—K.B., *discussed*.

Reed v. Wilmot (1831) 7 Bing. 577; 5 M. & P. 553; 9 L. J. (o.s.) C. P. 176.—C.P.

Buckworth v. Simpson (1835) 4 L. J. Ex. 104; 1 Cr. M. & R. 834; 5 Tyrw. 344; 1 Gale 38; 40 R. R. 739.—EX., *applied*.

Deakin v. Penniall (1848) 17 L. J. Ex. 217; 2 Ex. 320.—EX.

Buckworth v. Simpson.

Discussed, Elliott v. Johnson (1866) 36 L. J. Q. B. 44; L. R. 2 Q. B. 120, 124; 8 B. & S. 225; 15 W. R. 253.—Q.B.; Cornish v. Stubbs (1870) 39 L. J. C. P. 202; L. R. 5 C. P. 334, 339; 22 L. T. 21; 18 W. R. 547.—C.P.; Smith v. Eggington (1874) 43 L. J. C. P. 140; L. R. 9 C. P. 145, 157; 30 L. T. 521.—C.P.; Phillips v. Miller (1875) 44 L. J. C. P. 265; L. R. 10 C. P. 420, 425; 32 L. T. 638; 23 W. R. 834.—EX. CH.

Buckworth v. Simpson, referred to.

Ramage v. Womack (1899) 69 L. J. Q. B. 40; [1900] 1 Q. B. 116; 81 L. T. 526.—WRIGHT, J.; Manchester Brewery Co. v. Coombes (1900) 70 L. J. Ch. 814; [1901] 2 Ch. 608, 615.—FARWELL, J.

Boase v. Jackson (1822) 6 Moore 480; 3 Br. & B. 185.—C.P.

Explained, Coster v. Cowling (1831) 7 Bing. 456; 5 M. & P. 399.—C.P.; *applied*, Blount v. Pearman (1834) 4 L. J. C. P. 149; 1 Scott 55; 1 Bing. (N.C.) 408.—C.P.

Rowell v. Inland Revenue Commissioners (1897) 66 L. J. Q. B. 528; [1897] 2 Q. B. 194.—V. WILLIAMS and KENNEDY, JJ., *discussed*.

Knights Deep v. Inland Revenue Commissioners (1898) 68 L. J. Q. B. 125; [1899] 1 Q. B. 345; 79 L. T. 704; 47 W. R. 415; 63 J. P. 147.—WILLS and BRUCE, JJ.

Knights Deep v. Inland Revenue Commissioners, reversed.**Rowell v. Inland Revenue Commissioners, approved.**

Knights Deep v. Inland Revenue Commissioners (1899) 69 L. J. Q. B. 66; [1900] 1 Q. B. 217; 81 L. T. 625; 48 W. R. 198.—C.A.

A. L. SMITH, L.J.—My brother Wills, in the Court below, dealt with *Rowell v. Inland Revenue Commissioners*; but when that case is looked at, it will be seen that there debentures of 100*l.* each were issued by a company, each of which contained a promise by the company, at a specified date, to pay to the registered holder for the time being 100*l.*, "together with a premium thereon at 7*l.* 10*s.*," and the Court held, and, in my opinion, correctly held, that each debenture was a security for 107*l.* 10*s.*—p. 68. V. WILLIAMS, L.J. concurred.

Texas Land and Cattle Co. v. Inland Revenue Commissioners (1888) 16 Rottie 69; 26 Scott L. R. 49.—CT. OF SESS., *not applied*.

Brown, Shipley & Co. v. Inland Revenue Commissioners (1895) 64 L. J. M. C. 209; [1895] 2 Q. B. 240.—GRANTHAM and CHARLES, JJ.

Brown, Shipley & Co. v. Inland Revenue Commissioners, *reversed*.

Texas Land and Cattle Co. v. Inland Revenue Commissioners, *definition in adopted*.

Brown, Shipley & Co. v. Inland Revenue Commissioners [1895] 2 Q. B. 598; 64 L. J. M. C. 241; 14 B. 661; 73 L. T. 377.—C.A. ESHER, M.R., KAY and A. L. SMITH, L.JJ.

ESHER, M.R.—The expression "marketable security" has been judicially explained by Lord Shand in *Texas Land and Cattle Co. v. Inland Revenue Commissioners*, as meaning "securities of such a description as to be capable, according to the use and practice of stock markets, of being there sold and bought." That definition, which I adopt, has been satisfied in the present case, and I have no doubt that this instrument is a marketable security, and liable as such to the higher duty.—p. 600.

Chicago Ry. Terminal Elevator Co. v. Inland Revenue Commissioners (1896) 75 L. T. 572; 45 W. R. 242.—C.A., *distinguished*.

Brown v. Inland Revenue Commissioners (1899) 16 Times L. R. 94.—DARLING and CHANNELL, JJ.; *reversed*, C.A. (*post*).

Imperial Rubber Co., In re, Bush's Case (1874) 43 L. J. Ch. 772; L. R. 9 Ch. 554; 30 L. T. 737; 22 W. R. 699.—L.JJ.

Explained, Grenfell v. Inland Revenue Commissioners (1876) 45 L. J. Ex. 465; 1 Ex. D. 242, 250; 34 L. T. 426; 24 W. R. 582.—EX. D.; *principle applied*, Ambrose Lake Tin and Copper Mining Co., In re, Clarke's Case (1878) 47 L. J. Ch. 696; 3 Ch. D. 635, 639; 38 L. T. 587; 26 W. R. 601.—C.A. COCKBURN, C.J., JAMES, COTTON and THESIGER, L.JJ.; *distinguished*, Chicago Railway Terminal Elevator Co. v. Inland Revenue Commissioners (1896) 75 L. T. 157; 45 W. R. 138.—POLLOCK, B. and BRUCE, J. (affirmed, C.A., *supra*). *And see* "COMPANY," vol. i., col. 497.

Baring v. Inland Revenue Commissioners (1897) 67 L. J. Q. B. 44; [1898] 1 Q. B. 78; 77 L. T. 353; 46 W. R. 98; 61 J. P. 822.—C.A. ESHER, M.R., KAY and A. L. SMITH, L.JJ.; *affirmed nom. Revelstoke* (Lord) v. Inland Revenue Commissioners (1898) 67 L. J. Q. B. 855; [1898] A. C. 565; 79 L. T. 227; 62 J. P. 740.—H.L. (E.).

Revelstoke (Lord) v. Inland Revenue Commissioners, *distinguished*.

Brown v. Inland Revenue Commissioners (1899) 16 Times L. R. 94.—DARLING and CHANNELL, JJ.; *reversed*, C.A. (*post*).

Brown v. Inland Revenue Commissioners (*supra*); *reversed*, (1900) 17 Times L. R. 177.—C.A.

Robinson v. Macdonnell (1816) 5 M. & S. 228.—K.B.

Applied, Duck v. Braddyl (1824) M'Clel. 217; 13 Price 455.—EX; *referred to*, Holroyd v. Marshall (1862) 33 L. J. Ch. 193; 10 H. L. Cas. 191, 216; 9 Jur. (N.S.) 218; 7 L. T. 172; 11

W. R. 171.—H.L. (E.); *Morris v. Delobbel-Flipo* (1892) 61 L. J. Ch. 518; [1892] 2 Ch. 352; 66 L. T. 320; 40 W. R. 492.—STIRLING, J.

Downes v. Richardson (1822) 5 B. & Ald. 674; 1 D. & R. 332; 24 R. R. 522.—K.B.

Applied, Scholfield v. Lonsborough (Earl) 63 L. J. Q. B. 649; [1894] 2 Q. B. 660, 666; 10 R. 376; 71 L. T. 86.—CHARLES, J. (affirmed, C.A. and H.L. *See* vol. i., col. 220); *not applied*, Chicago Ry. Terminal Elevator Co. v. Inland Revenue Commissioners (1896) 75 L. T. 157; 45 W. R. 138.—POLLOCK, B. and BRUCE, J. (affirmed, C.A., *supra*, col. 2917); *referred to*, Brown v. Inland Revenue Commissioners (1900) 17 Times L. R. 177.—C.A.

Mowatt v. Castle Steel and Ironworks Co. (1886) 34 Ch. D. 58; 55 L. T. 645.—C.A.

Explained, Chicago Ry. Terminal Elevator Co. v. Inland Revenue Commissioners (1896) 75 L. T. 157; 45 W. R. 138 (*supra*, col. 2917); *not applied*, Robinson v. Montgomeryshire Brewery Co. (1896) 65 L. J. Ch. 915; [1896] 2 Ch. 841, 849; 3 Manson 279.—V. WILLIAMS, J.

Franklin v. Neate (1833) 14 L. J. Ex. 59; 13 M. & W. 481.—EX., *referred to*.

Attenborough, In re (1855) 25 L. J. Ex. 22; 11 Ex. 461.—EX.

Harris v. Birch (1842) 11 L. J. Ex. 219; 9 M. & W. 591; 1 D. (N.S.) 899.—EX.

Applied, Attenborough, In re (1855) 25 L. J. Ex. 22; 11 Ex. 461.—EX.; *discussed*, Sewell v. Burdick (1884) 54 L. J. Q. B. 126; 10 App. Cas. 74, 80; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.).

Butts v. Swan (1820) 2 Br. & B. 78.—C.P., *distinguished*.

Wise v. Charlton (1836) 6 L. J. K. B. 80; 4 A. & E. 786; 6 N. & M. 364; 2 H. & W. 49.—K.B.

Watson v. Macquire (1848) 5 C. B. 836.—C.P., *applied*.

Canning (Viscount) v. Raper (1852) 22 L. J. Q. B. 87; 1 EL. & BL. 164; 17 Jur. 390.—EX.

Pruessing v. Ing (1821) 4 B. & Ald. 204; 23 R. R. 253.—K.B., *applied*.

Doe d. Scruton v. Smith (1832) 1 L. J. C. P. 59; 8 Bing. 146; 1 M. & Scott 230.—C.P.

Pruessing v. Ing, *referred to*.

Doe d. Merceron v. Bragg (1838) 7 L. J. Q. B. 263; 8 A. & E. 620; 3 N. & P. 644.—Q.B.

Pruessing v. Ing, *not applied*.

Barker v. Smark (1841) 10 L. J. Ex. 200; 7 M. & W. 590; 9 D. P. C. 211.—EX.

Halse v. Peters (1831) 1 L. J. K. B. 2; 2 B. & Ad. 807.—K.B., *not applied*.

Doe d. Merceron v. Bragg (1838) 7 L. J. Q. B. 263; 8 A. & E. 620; 3 N. & P. 644.—Q.B.

Halse v. Peters, *discussed*.

Wroughton v. Turtle (1843), 13 L. J. Ex. 57; 11 M. & W. 561; 1 D. & L. 472.—EX.

Halse v. Peters, *questioned*.

Wroughton v. Turtle, *followed*.
Lawrance v. Boston (1851) 21 L. J. Ex. 49; 7 Ex. 28.—EX.

PARKE, B.—It may be doubtful whether *Halse v. Peters* is good law.—p. 50.

Doe d. Scruton v. Smith (1832) 1 L. J. C. P. 59; 8 Bing. 146; 1 M. & Scott 230.—C.P.
Applied, **Doe d. Merceron v. Bragg** (1838) 7 L. J. Q. B. 263; 8 A. & E. 620; 3 N. & P. 644.—Q.B.; *referred to*, **Barker v. Smark** (1841) 10 L. J. Ex. 200; 7 M. & W. 590; 9 D. P. C. 211.—EX.; *distinguished*, **Wroughton v. Turtle** (1843) 13 L. J. Ex. 57; 11 M. & W. 561; 1 D. & L. 473.—EX.

Paddon v. Bartlett (1834) 4 L. J. K. B. 65; 2 A. & E. 9; 4 N. & M. 1.—K.B., *referred to*.

Barker v. Smark (1841) 10 L. J. Ex. 200; 7 M. & W. 590; 9 D. P. C. 211.—EX.

Doe d. Merceron v. Bragg (1838) 7 L. J. Q. B. 263; 8 A. & E. 620; 3 N. & P. 644.—Q.B., *discussed*.

Wroughton v. Turtle (1843) 13 L. J. Ex. 57; 11 M. & W. 561; 1 D. & L. 473.—EX.

Chandos (Marquis) v. Inland Revenue Commissioners (1851) 20 L. J. Ex. 269; 6 Ex. 464.—EX.

Followed, **Stamp Duty on Gill's Conveyance, In re** (1853) 8 Ex. 376, 380, n.—EX.; *discussed*, **Mortimore v. Inland Revenue Commissioners** (1864) 33 L. J. Ex. 263; 2 H. & C. 838; 10 Jur. (N.S.) 868; 10 L. T. 655.—EX.; **Inland Revenue Commissioners v. City of Glasgow Bank Liquidators** (1881) 8 Rettie 389.—CT. OF SESS.

Mortimore v. Inland Revenue Commissioners (*supra*), *applied*.

Inland Revenue Commissioners v. City of Glasgow Bank Liquidators, *referred to*.

Swayne v. Inland Revenue Commissioners (1898) 68 L. J. Q. B. 234; [1899] 1 Q. B. 335; 80 L. T. 56; 47 W. R. 300.—BRUCE and WILLS, J.J.; *affirmed*, (1899) 69 L. J. Q. B. 63; [1900] 1 Q. B. 172; 81 L. T. 623; 48 W. R. 197.—C.A. A. L. SMITH, COLLINS and V. WILLIAMS, L.J.J.

Doe d. Bartley v. Gray (1835) 4 L. J. K. B. 197; 3 A. & E. 89; 4 N. & M. 719; 1 Har. & W. 235.—K.B.

Applied, **Doe d. Barnes v. Rowe** (1838) 4 Bing. (N.C.) 737.—C.P.; *distinguished*, **Lant v. Pearce** (1839) 7 L. J. Q. B. 135; 8 A. & E. 248; 3 N. & P. 329.—Q.B.; *referred to*, **Doe d. Snell v. Tom** (1843) 12 L. J. Q. B. 264; 4 Q. B. 615; 3 G. & D. 637; 7 Jur. 847.—Q.B.; *referred to*, **Brown v. Pegg** (1844) 13 L. J. Q. B. 270; 6 Q. B. 1; 8 Jur. 954.—Q.B.; *discussed*, **Doe d. Crawley v. Gutteridge** (1848) 17 L. J. Q. B. 99; 11 Q. B. 409; 12 Jur. 51.—Q.B.

Doe d. Barnes v. Rowe (*supra*), *explained*.

Humberston v. Jones (1847) 16 L. J. Ex. 293; 16 M. & W. 763; 11 Jur. 337.—EX.

Doe d. Barnes v. Rowe, *discussed*.

Doe d. Crawley v. Gutteridge (1848) 17 L. J. Q. B. 99; 11 Q. B. 409; 12 Jur. 51.—Q.B.

Lant v. Pearce (1839) 7 L. J. Q. B. 135; 8 A. & E. 248; 3 N. & P. 329.—Q.B., *referred to*.

Brown v. Pegg (1844) 13 L. J. Q. B. 270; 6 Q. B. 1; 8 Jur. 954.—Q.B.

Brown v. Pegg, *applied*.

Humberston v. Jones (1847) 16 L. J. Ex. 293; 16 M. & W. 763; 11 Jur. 337.—EX.

Brown v. Pegg and Humberston v. Jones, *principle applied*.

Doe d. Crawley v. Gutteridge (1848) 17 L. J. Q. B. 99; 11 Q. B. 409; 12 Jur. 51.—Q.B.

Wale v. Inland Revenue Commissioners (1879) 48 L. J. Ex. 574; 1 Ex. D. 270; 41 L. T. 433; 27 W. R. 916.—KELLY, C.B. and POLLOCK, B., *applied*.

Humphreys v. Inland Revenue Commissioners (1899) 81 L. T. 199.—DARLING and PHILLIMORE, J.J.

City of London Brewery Co. v. Inland Revenue Commissioners, 67 L. J. Q. B. 239; [1898] 1 Q. B. 408; 78 L. T. 39.—GRANTHAM and CHANNELL, J.J.; *reversed*, (1898) 68 L. J. Q. B. 62; [1899] 1 Q. B. 121; 79 L. T. 648; 47 W. R. 216.—C.A.

Scholey v. Walsby (1790) Peake 34.—KENTON, C.J., *doubted*.

Phillips v. Warren (1845) 14 L. J. Ex. 280; 14 M. & W. 379; 9 Jur. 930.—ALDERSON and ROLFE, BB.

Lucas v. Jones (1844) 13 L. J. Q. B. 208; 5 Q. B. 949; D. & M. 774; 8 Jur. 422.—Q.B., *principle applied*.

Gingell v. Purkins (1850) 19 L. J. Ex. 129; 4 Ex. 720, 726.—EX.

James v. Catherwood (1823) 3 D. & R. 190.—K.B., *applied*.

Bristow v. De Sequeville (1850) 19 L. J. Ex. 289; 5 Ex. 275; 3 Car. & K. 64; 14 Jur. 674.—EX.

Evans v. Prothero (1850) 20 L. J. Ch. 448; 2 Mac. & G. 319; 15 Jur. 113.—L.C. S. C. (1852) 21 L. J. Ch. 772; 1 De G. M. & G. 572.—L.C.

Applied, **Reg. v. Overton** (1854) 23 L. J. M. C. 29; Dears. C. C. 308; 18 Jur. 134; 2 W. R. 228; 6 Cox C. C. 227.—C.C.R.; **Walker v. Atkinson** (1859) 1 F. & F. 465.—CROWDER, J.; *referred to*, **Morgan, Ex parte, Simpson, In re**, (1876) 45 L. J. Bk. 36; 2 Ch. D. 72, 83; 34 L. T. 329; 24 W. R. 414.—C.A.; *discussed*, **Odell, Ex parte, Walden, In re** (1878) 48 L. J. Bk. 1; 10 Ch. D. 76, 84; 39 L. T. 333; 27 W. R. 274.—C.A.

Evans v. Prothero, *distinguished*.

Whiting v. Loomes (1881) 50 L. J. Ch. 463; 17 Ch. D. 10; 44 L. T. 721; 29 W. R. 435.—C.A.

COTTON, L.J.—In **Evans v. Prothero** a receipt was admitted, although not duly stamped, as evidence of a contract, not as anything that required a stamp under the Act of Parliament, but as something that did not require a stamp under that Act. Here, if this is required by the purchaser, it must be required as something that does require a stamp, and the stamp it bears is not sufficient. So in the case of the document which contained an assent to a certain deed [**Rutty v. Benthall**, *see post*]. It was not required as a deed or power of attorney, but simply to prove the written assent to what had been done.—p. 12. *And see* "EVIDENCE," vol. i., col. 1038.

Rutty v. Benthall (1867) 36 L. J. C. P. 194; L. R. 2 C. P. 488; 16 L. T. 287; 15 W. R. 744.—C.P., *distinguished*.

Whiting v. Loomes (*see supra*).

Whiting v. Loomes (1880) 49 L. J. Ch. 617; 14 Ch. D. 822.—JESSEL, M.R.; *affirmed*, (1881) 50 L. J. Ch. 463; 17 Ch. D. 10; 44 L. T. 721; 29 W. R. 435.—C.A. *And see post*, col. 2921.

Whiting to Loomes (*supra*), *distinguished*.

Birkbeck Freehold Land Co., *Ex parte* (1888) 24 Ch. D. 119; 52 L. J. Ch. 777; 49 L. T. 265; 31 W. R. 716.

PEARSON, J.—I think this is a totally different case from *Whiting to Loomes*. In that case the deed which was left unstamped was a mortgage deed, and as I gather from the judgment of Jessel, M.R., it was a mortgage for a term. The deed was a valid mortgage deed which had been acted upon, and you could not make the mortgagee a party to the conveyance without being obliged to show subsequently why he was there and what his interest was. Not only so, but the M.R. expressly said that the purchaser had a right to be able to use the term afterwards, if necessary, as a protection to him. As I understand the decision of the M.R. it went mainly upon this, not only that the mortgage was a valid deed, but that it might possibly, and not improbably, be of use to the purchaser, and that he was entitled to have it as a shelter in case any mischief should arise afterwards. I do not find anything different in the judgments of the C.A.; they seemed to have endorsed what the M.R. had to have adopted his line of argument, and to have confirmed his decision on the grounds upon which he based it. In the present case I find nothing of the same kind.—p. 124.

Whiting to Loomes, *principle applied*.

Maynard v. Consolidated Kent Collieries Corporation (1903) 72 L. J. K. B. 681; [1903] 2 K. B. 121, 131; 88 L. T. 676; 52 W. R. 117.—C.A.

Smith v. Kelby (1803) 4 Esp. 249.—ELLENBOROUGH, C.J., *report commented on*.

Millen v. Dent (1847) 16 L. J. Q. B. 374; 10 Q. B. 846; 11 Jur. 818.—Q.B.

Grey v. Smith (1808) 1 Camp. 387.—ELLENBOROUGH, C.J., *applied*.

Millen v. Dent (*supra*).

Rex v. Castle Morton Inhabitants (1820) 3 B. & Ald. 588; 22 R. R. 493.—K.B., *discussed*.

Matheson v. Ross (1849) 2 H. L. Cas. 286; 13 Jur. 307; 6 Bell 374.—H.L. (SC.).

Rex v. Hall (1821) 3 Stark. 67.—BAYLEY, J., and *Hawkins v. Warre* (1825) 3 B. & C. 690; 5 D. & R. 512.—K.B., *discussed*.

Matheson v. Ross (*supra*).

Brooks v. Davies (1825) 2 C. & P. 186.—BEST, C.J., *applied*.

Millen v. Dent (1847) 16 L. J. Q. B. 374; 10 Q. B. 846; 11 Jur. 818.—Q.B.

Brooks v. Davies, *discussed*.

Matheson v. Ross (1849) 2 H. L. Cas. 286; 13 Jur. 307; 6 Bell 374.—H.L. (SC.).

Jardine v. Payne (1831) 1 B. & Ad. 663; 9 L. J. (O.S.) K. B. 129.—K.B., *discussed*.

Matheson v. Ross (*supra*).

Tebbutt v. Ambler (1839) 9 C. & P. 60.—DENMAN, C.J.; *Horne v. Redfearn* (1838) 7 L. J. C. P. 214; 4 Bing. (N.C.) 433; 6 Scott 260; 2 Jur. 376.—C.P.; *Goodyear v. Simpson* (1845) 15 L. J. Ex. 191; 15 M. & W. 16.—EX., *discussed*.

Matheson v. Ross (1849) 2 H. L. Cas. 286; 13 Jur. 307; 6 Bell 374.—H.L. (SC.).

Matheson v. Ross.

Distinguished, *Parmiter v. Parmiter* (1861) 30 L. J. Ch. 508; 3 De. G. F. & J. 461; 3 L. T. 799.—L.J.; *explained*, *Adams v. Morgan* (1882) 12 L. R. Ir. 1.—EX. D. *And see* "EVIDENCE," vol. i., cols. 1038, 1039.

Adams v. Morgan, *affirmed on different grounds* (1883) 14 L. R. Ir. 140.—C.A.

Onslow v. Inland Revenue Commissioners (1890) 24 Q. B. D. 584.—POLLOCK, B. and HAWKINS, J.; *affirmed*, 60 L. J. Q. B. 138; [1891] 1 Q. B. 239; 64 L. T. 211; 39 W. R. 373.—C.A. LINDLEY, BOWEN and FRY, L.JJ.

Onslow v. Inland Revenue Commissioners, *applied*.

Masserene (Viscount) v. Inland Revenue Commissioners (1899) [1900] 2 Ir. R. 138.—Q.B.D.

Alsayer and Gindici v. Inland Revenue Commissioners (1864) 33 L. J. Ex. 161; S. C. *nom.* Alsager, *In re*, 2 H. & C. 969; 10 Jur. (N.S.) 828; 10 L. T. 238; 12 W. R. 477.—EX.

Reg. v. Kelk (1840) 9 L. J. Q. B. 362; 12 A. & E. 559; 4 P. & D. 185.—Q.B.

Referred to, *Roberts v. Elliott* (1843) 11 M. & W. 527.—EX.; *applied*, *Walker v. Remmett* (1846) 15 L. J. C. P. 174; 2 C. B. 850; 10 Jur. 380.—C.P.

Barrs v. Digby (1805) 1 B. & P. (N.B.) 281.—C.P., *applied*.

Henllan, *Ex parte* (1819) 7 Price 594.—EX.

Att.-Gen. to Prince of Wales v. St. Aubyn (1811) Wightw. 167; 12 R. R. 118 n.—EX.

Applied, *Att.-Gen. v. London Corporation* (1845) 14 L. J. Ch. 305.—LANGDALE, M.R.; *referred to*, *Att.-Gen. v. Barker* (1872) 41 L. J. Ex. 57; L. R. 7 Ex. 177, 182; 26 L. T. 34; 20 W. R. 509.—EX.; *Stanley of Alderley (Lord) v. Wild & Son* (1899) 69 L. J. Q. B. 318; [1900] 1 Q. B. 256, 260; 84 L. T. 14; 40 W. R. 242.—C.A. *And see ante*, col. 2389.

Att.-Gen. v. London Corporation (*supra*), *not approved*.

Att.-Gen. v. Halling (1846) 16 L. J. Ex. 303; 15 M. & W. 687.—EX.

Att.-Gen. v. Halling, *explained*.

Att.-Gen. v. Edmunds (1868) 37 L. J. Ch. 706; L. R. 6 Eq. 381, 391; 18 L. T. 505.—GIFFARD, V.-C.

Cawthorne v. Campbell (1790) 1 Anstr. 205, n.—EX.

Applied, *Smith v. Cameron* (1845) 9 Jur. 405.—EX.; *Adams v. Fremantle* (1848) 17 L. J. Ex. 312; 2 Ex. 453; 6 D. & L. 10.—EX.; *referred to*, *Stanley of Alderley (Lord) v. Wild & Son* (1899) 69 L. J. Q. B. 318; [1900] 1 Q. B. 256; 84 L. T. 14; 48 W. R. 242.—C.A.

Bereholt v. Candy (1718) Bunbury 34.—EX., *not applied*.

Adams v. Fremantle (1848) 17 L. J. Ex. 312; 2 Ex. 453; 6 D. & L. 10.—EX.

Att.-Gen. v. Ruck (1856) 14 Ex. 763.—EX.; *affirmed nom.* *Ruck v. Att.-Gen.* (1858) 27 L. J. Ex. 313; 3 H. & N. 208; 4 Jur. (N.S.) 167; 6 W. R. 283.—EX. CH.

Ruck v. Att.-Gen., *discussed*.
Att.-Gen. v. Henley (1858) 8 Ir. C. L. R. 267.—EX.

Att.-Gen. v. Clerc (1844) 14 L. J. Ex. 82; 12 M. & W. 640.—EX., *referred to*.
Att.-Gen. v. M'Cormack [1903] 2 Ir. R. 517.—GIBSON and BOYD, JJ.

Reg. v. Thompson (1851) 20 L. J. M. C. 183; 16 Q. B. 832; 15 Jur. 654; Dears. C. C. 3.—Q.B., *discussed*.

Reg. v. Manning (1883) 53 L. J. M. C. 85; 12 Q. B. D. 241, 243; 51 L. T. 121; 32 W. R. 720; 48 J. P. 536.—Q.B.D.; Rex v. Plummer (1902) 71 L. J. K. B. 805; [1902] 2 K. B. 339, 343; 86 L. T. 836; 51 W. R. 137; 66 J. P. 647.—C.C.R.

Rex v. Hardy (1794) 24 St. Tr. 816.—K.B., *principle applied*.

Att.-Gen. v. Briant (1846) 15 L. J. Ex. 265; 15 M. & W. 169.—EX.; Marks v. Buyfus (1890) 59 L. J. Q. B. 479; 25 Q. B. D. 494, 498; 38 W. R. 705.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.

Watson's Case (1817) 32 St. Tr. 98.—K.B., *explained and principle applied*.

Att.-Gen. v. Briant (1846) 15 L. J. Ex. 265; 15 M. & W. 169.—EX.

Rex v. Hornblower (1822) 11 Price 29.—EX., *commented on and not applied*.

Reg. v. Ryle (1841) 11 L. J. Ex. 234; 9 M. & W. 227; 1 D. (N.S.) 431; 6 Jur. 238.—EX. *And see* Beaufort (Duke) v. Crawshay (*post*).

Reg. v. Ryle, *referred to*.

Att.-Gen. v. Briant (1846) 15 L. J. Ex. 265; 15 M. & W. 169.—EX.; Beaufort (Duke) v. Crawshay (1866) 35 L. J. C. P. 342; L. R. 1 C. P. 699, 708; 1 H. & R. 638; 12 Jur. (N.S.) 709; 14 L. T. 729; 14 W. R. 989.—C.P.

Att.-Gen. v. Metropolitan Ry., 42 L. T. 93.—KELLY, C.B. and STEPHEN, J.; *reversed*, (1880) 5 Ex. D. 218; 42 L. T. 342; 28 W. R. 376.—C.A. JESSEL, M.R., BAGGALLAY and COTTON, L.JJ.

Reg. v. Eaves (1870) 39 L. J. M. C. 70; L. R. 5 Ex. 75; 21 L. T. 829.—EX., *referred to*.

Reg. v. Wicklow JJ. (1892) 30 L. R. Ir. 465.—Q.B.D.

Gwillim v. Daniel, *followed and approved*.
Leeming v. Snaith, *discussed*.
McConnel v. Murphy (1870) L. R. 5 P. C. 203, 217; 28 L. T. 713; 21 W. R. 609.—P.C.

Gwillim v. Daniel and Leeming v. Snaith, *discussed*.

Morris v. Levison (1876) 1 C. P. D. 155; 45 L. J. C. P. 409; 34 L. T. 576; 24 W. R. 517.—C.P.D.

ARCHIBALD, J.—*Gwillim v. Daniel and Leeming v. Snaith* . . . related to the sale of goods; and in the former case the words "say from 1,000 to 1,200 gallons" were regarded as mere words of expectation; but in the latter case it was held that the words "say not less than 100 packs" were not mere words of expectation, but amounted to a contract. The nature of the subject-matter must be considered in determining what meaning is to be attributed to such expressions. The cases with regard to the sale of goods do not throw much light on the present case. This contract is for the charter of a ship, and the relative positions of the charterer and the shipowner must be considered. The charterer can hardly be expected to be so well aware of the capacity of the vessel as the shipowner. Taking this into consideration, I come to the conclusion that the words "say about" in this charter are not words of expectation but of contract.—p. 158.

Borrowman v. Drayton (1876) 46 L. J. Ex. 273; 2 Ex. D. 15; 35 L. T. 727; 24 W. R. 194.—C.A. COCKBURN, C.J., JAMES and MELLISH, L.JJ. and BAGGALLAY, J.A., *distinguished and not applied*.

Caffin v. Aldridge (1895) 1 Com. Cas. 181.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Attwood v. Emery (1856) 26 L. J. C. P. 73; 1 C. B. (N.S.) 110; 5 W. R. 19.—C.P., *distinguished*.

Bergheim v. Blaenavon Iron and Steel Co. (1875) 44 L. J. Q. B. 92; L. R. 10 Q. B. 319; 32 L. T. 451; 23 W. R. 618.—Q.B.

Attwood v. Emery, *commented on*.

Hydraulic Engineering Co. v. McHaffie (1878) 4 Q. B. D. 670; 27 W. R. 221.—C.A.

BRAMWELL, L.J.—The defendants contend that this contract is to be construed as if it merely bound them to deliver the gun "as soon as possible;" and it was upon this ground that the judgment of Field, J. proceeded: but the defendants in effect contend that these words must be construed as meaning "as soon as I possibly can." I cannot agree with this argument: to do a thing "as soon as possible" means to do it within a reasonable time, with an undertaking to do it in the shortest practicable time. In *Attwood v. Emery* the expressions of eminent judges seem to favour a different view as to the construction of the words "as soon as possible." . . . Every customer knows at the time of giving the order that the manufacturer or tradesman may have other orders on hand; and I do not think that *Attwood v. Emery* goes further than this, and it does not seem to me to be a decision against the plaintiffs. If, however, it is an authority in favour of the defendants, I cannot agree with it.—p. 673.

BRETT, L.J.—I do not think that *Attwood v. Emery* decided anything which cannot be fully

SALE OF GOODS.

1. THE CONTRACT.
2. STATUTE OF FRAUDS.
3. WHEN PROPERTY PASSES.
4. WARRANTIES AND SALE BY SAMPLE.
5. PERFORMANCE OF CONTRACT.
6. DISCHARGE AND BREACH OF CONTRACT.
7. RIGHTS OF UNPAID VENDOR.

1. THE CONTRACT.

Gwillim v. Daniel (1835) 4 L. J. Ex. 174; 2 Cr. M. & R. 61; 5 Tyrw. 644; 1 Gale 143.—EX., *distinguished*.

Leeming v. Snaith (1851) 20 L. J. Q. B. 164; 16 Q. B. 275; 15 Jur. 988.—Q.B.; COLERIDGE, J. dissenting.

adopted. It was there held that the delay on the part of the plaintiffs was to be excused by reason of the size of their business, and by the circumstance that they had several orders on hand. I think that the direction to the jury in that case was correct, and that the verdict was properly found.—p. 675.

COTTON, L.J. to the same effect.

Armitage v. Insole (1850) 19 L. J. Q. B. 202; 14 Q. B. 728.—Q.B., *applied*.
Sutherland v. Allhusen (1866) 14 L. T. 666.—EX.

Armitage v. Insole, *distinguished*.
Hobson v. Riordan (1886) 20 L. R. Ir. 255, 271.—C.A. NAISH, L.C., PORTER, M.R. and FITZGIBBON, L.J.

Armitage v. Insole, *not applied*.
Budgett v. Binnington (1890) 60 L. J. Q. B. 1; 25 Q. B. D. 326; 63 L. T. 493; 39 W. R. 13.—Q.B.D.; affirmed, 60 L. J. Q. B. 4; [1891] 1 Q. B. 35; 63 L. T. 742; 39 W. R. 131; 6 Asp. M. C. 592.—C.A.

Sutherland v. Allhusen (1866) 14 L. T. 666.—EX., *distinguished*.
Hobson v. Riordan (1886) 20 L. R. Ir. 255, 271.—C.A.

Gattorno v. Adams (1862) 12 C. B. (N.S.) 560.—C.P., *referred to*.
Lloyd v. Guibert (1865) 35 L. J. Q. B. 74; L. R. 1 Q. B. 115, 126; 6 B. & S. 100; 13 L. T. 602.—EX. CH.

Hawes v. Forster (1834) 1 M. & Rob. 368.—K.B., *explained*.
Thornton v. Charles (1842) 11 L. J. Ex. 302; 9 M. & W. 802, 807.—EX.

PARKE, B.—*Hawes v. Forster* underwent much discussion in the King's Bench when I was a member of that Court, and there was some difference of opinion between the judges, but ultimately, it went down for a new trial, in order to ascertain whether there was any usage or custom of trade which makes the broker's note evidence of the contract. In that case there was a signed entry in the book, which incorporated the terms, making the contract void in the event of the non-arrival of the goods within a certain time. The bought and sold notes which were delivered to the parties, omitted that clause. Certainly it was the impression of part of the Court, that the contract entered in the book was the original contract, and that the bought and sold notes did not constitute the contract. The jury found that the bought and sold notes were evidence of the contract, but on the ground . . . that the bought and sold notes, being delivered to each of the parties after signing the entry in the book, constituted evidence of a new contract made between the parties on the footing of those notes. That case may be perfectly correct; but it does not decide, that if the bought and sold notes disagree, or there be a memorandum in the book made according to the intention of the parties, that that memorandum, signed by the broker, would not be good evidence to satisfy the Statute of Frauds. However, it is not necessary to pronounce a decided opinion on that part of the case, because I think, if there has been a

delivery, it is clear it was a delivery in pursuance of the contract of the broker, and then it would bind the parties within the statute.—p. 304.

Hawes v. Forster, *explained*.
Townend v. Drakeford (1843) 1 Car. & K. 20.—DENMAN, C.J.

Hawes v. Forster and Thornton v. Charles (*supra*), *discussed*.
Sievewright v. Archibald (1851) 20 L. J. Q. B. 529; 17 Q. B. 103; 15 Jur. 947.—Q.B.

Hawes v. Forster, *approved*.
Paxton v. Crofts (1864) 33 L. J. C. P. 189; 16 C. B. (N.S.) 11; 10 L. T. 34; 12 W. R. 553.—C.P.

Thornton v. Charles (*supra*), *referred to*.
Mollett v. Robinson (1872) 41 L. J. C. P. 65, 80; L. R. 7 C. P. 84, 108; 26 L. T. 207; 20 W. R. 544.—EX. CH.; reversed, 44 L. J. C. P. 362; L. R. 7 H. L. 802; 33 L. T. 544.—H.L. (E.).

Ford v. Yates (1841) 10 L. J. C. P. 117; 2 Man. & G. 549; 2 Scott N. R. 545.—C.P., *explained*.
Lockett v. Nicklin (1848) 2 Ex. 93; 19 L. J. Ex. 403.—EX.

PARKE, B.—That case is based upon the supposition that there was a memorandum entered into by the broker contracting for both parties, but it was not so.

ALDERSON, B.—In that case there could have been no contract, for the memorandum only contained the name of the defendant's agent.—p. 98. PLATT, B. concurred.

Ford v. Yates and Lockett v. Nicklin, *referred to*.
Mahalen v. Dublin and Chapelized Distillery Co. (1877) Ir. R. 11-C. L. 83.—Q.B. *And see* Sale of Goods Act, 1893, s. 38.

Yates v. Pym (1816) 6 Taunt. 446; 16 R. R. 653.—C.P., *referred to*.
Parker v. Palmer (1821) 4 B. & Ald. 387; 23 R. R. 313.—K.B.; **Powell v. Horton** (1836) 5 L. J. C. P. 204; 2 Bing. (N.C.) 668; 3 Scott 110; 2 Hodges 12.—C.P.

Yates v. Pym, *discussed*.
Humfrey v. Dale (1857) 26 L. J. Q. B. 137; 7 El. & Bl. 266; 3 Jur. (N.S.) 213.—Q.B.; affirmed, (1858) 27 L. J. Q. B. 390; El. Bl. & El. 1004; 5 Jur. (N.S.) 191; 6 W. R. 854.—EX. CH.

Macdonald v. Longbottom (1859) 28 L. J. Q. B. 293; 1 El. & Bl. 977.—Q.B.; affirmed, (1860) 29 L. J. Q. B. 266; 1 El. & Bl. 987; 6 Jur. (N.S.) 724; 2 L. T. 606; 8 W. R. 614.—EX. CH.
Applied, **Newell v. Radford** (1867) 37 L. J. C. P. 1; L. R. 3 C. P. 52, 54; 17 L. T. 118; 16 W. R. 97.—C.P.; **Heffield v. Meadows** (1869) L. R. 4 C. P. 596, 600; 20 L. T. 746.—C.P.; *discussed*, **Buxton v. Rust** (1872) 41 L. J. Ex. 173; L. R. 7 Ex. 279, 281; 17 L. T. 210; 20 W. R. 1014.—EX. CH.; *principle applied*, **Cunningham v. Dunn** (1878) 48 L. J. C. P. 62; 3 C. P. D. 443, 449; 38 L. T. 631; 3 Asp. M. C. 359.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.

Macdonald v. Longbottom, applied.

McCullin v. Gilpin (1881) 6 Q. B. D. 516; 44 L. T. 914; 29 W. R. 408; 45 J. P. 828.—C.A.

The Court (BRAMWELL, BAGGALLAY and BRETT, L.JJ.), referring to *Macdonald v. Longbottom* and *Acebal v. Levy* (10 Bing. 376, *post*, col. 2928), observed that parol evidence was admissible and desirable to explain the ambiguity of the agreement.—p. 517.

Macdonald v. Longbottom, referred to.

Bank of New Zealand v. Simpson (1900) 69 L. J. P. C. 22; [1900] A. C. 182; 82 L. T. 102; 48 W. R. 591.—P.C.; Krell v. Henry (1903) 72 L. J. K. B. 794; [1903] 2 K. B. 740, 754; 89 L. T. 328.—C.A.

Pym v. Campbell (1856) 25 L. J. Q. B. 277;

6 Bl. & Bl. 370; 2 Jur. (N.S.) 641; 4 W. R. 528.—Q.B., *discussed*.

Rogers v. Hadley (*post*); Guardhouse v. Blackburne (1866) 35 L. J. P. 116; L. R. 1 P. 109, 115; 12 Jur. (N.S.) 278; 14 L. T. 69; 14 W. R. 463.—SIR J. WILDE; *applied*, Clever v. Kirkman (*post*). *And see* "EVIDENCE," vol. i. col. 1035.

Rogers v. Hadley (1863) 32 L. J. Ex. 241;

2 H. & C. 227; 9 Jur. (N.S.) 898; 9 L. T. 292; 11 W. R. 1074.—EX., *approved*.

Kempson v. Boyle (1865) 34 L. J. Ex. 191; 3 H. & C. 763; 11 Jur. (N.S.) 832; 14 W. R. 15.—EX.

Rogers v. Hadley, applied.

Clever v. Kirkman (1875) 33 L. T. 672; 24 W. R. 159.—C.P.

Wilson v. Hart (1817) 7 Taunt. 295; 1

Moore 45.—C.P., *distinguished*.

Higgins v. Senior (1841) 11 L. J. Ex. 199; 8 M. & W. 834.—EX.

Wilson v. Hart, referred to.

Dale v. Humfrey (1858) 27 L. J. Q. B. 390; El. Bl. & El. 1004; 5 Jur. (N.S.) 191; 6 W. R. 854.—EX. CH.

Wilson v. Hart, discussed.

Armstrong v. Stokes (1872) 41 L. J. Q. B. 253; L. R. 7 Q. B. 598, 606; 26 L. T. 872; 21 W. R. 52.—Q.B.

BLACKBURN, J. (for the Court).—It is right, in order to avoid misapprehension, to say that the phrase, repeatedly used by the counsel for the plaintiff, that the vendor has a right to follow the goods is, in our opinion, calculated to mislead. There are cases, such as that of *Wilson v. Hart*, to which such a phrase would be applicable, but these, as is pointed out in 2 Sm. L. C. (5th ed., p. 332), proceed on the ground of fraud. In the absence of fraud, unless the person receiving the goods is a party to the contract on which the goods were sold, the vendor has no right to follow them.—p. 257.

Wilson v. Hart, referred to.

Maspons v. Mildred (1882) 51 L. J. Q. B. 604; 9 Q. B. D. 530, 544; 47 L. T. 318; 30 W. R. 862; —C.A. JESSEL, M.R., LINDLEY and Bowen, L.JJ.: *affirmed*, 53 L. J. Q. B. 33; 8 App. Cas. 874; 32 W. R. 125.—H.L. (E.).

Trueman v. Loder (1840) 9 L. J. Q. B. 165;

11 A. & E. 589; 3 P. & D. 567.—Q.B., *discussed*, and not *applied*.

Humfrey v. Dale (1857) 26 L. J. Q. B. 137; 7 El. & Bl. 266; 3 Jur. (N.S.) 213.—Q.B., *affirmed* nom. Dale v. Humfrey.—EX. CH. (*supra*). *And see* vol. i. col. 1036.

O.C.

Trueman v. Loder.

Referred to, Calder v. Dobell (1871) 40 L. J. C. P. 224; L. R. 6 C. P. 486, 490; 25 L. T. 129; 19 W. R. 978.—EX. CH.; Guillemin, Ex parte, Oriental Bank Corporation, In re, (1884) 54 L. J. Ch. 322; 28 Ch. D. 634, 640; 52 L. T. 167.—CHITTY, J.; Durant v. Roberts and Keighley Maxsted & Co. (1900) 69 L. J. Q. B. 382; [1900] 1 Q. B. 629; 82 L. T. 217; 48 W. R. 476.—C.A. COLLINS and ROMER, L.JJ.; A. L. SMITH, L.J. *dissenting*; (reversed nom. Keighley Maxsted & Co. v. Durant (1901) 70 L. J. K. B. 662; [1901] A. C. 240; 84 L. T. 777.—H.L. (E.)).

Brown v. Byrne (1854) 23 L. J. Q. B. 313;

3 El. & Bl. 703; 2 C. L. R. 1599; 18 Jur. 700; 2 W. R. 471.—Q.B.

Referred to, Humfrey v. Dale (1857) 26 L. J. Q. B. 137; 7 El. & Bl. 266; 3 Jur. (N.S.) 213.—Q.B. (*affirmed*, EX. CH., *supra*, col. 2927); *principle applied*, Lucas v. Bristow (1858) 27 L. J. Q. B. 364; El. Bl. & El. 907; 5 Jur. (N.S.) 68; 6 W. R. 685.—Q.B.; *discussed*, Mahalen v. Dublin and Chapelizod Distillery Co. (1877) Ir. R. 11 C. L. 83.—Q.B.

Field v. Lelean (1861) 30 L. J. Ex. 168; 6

H. & N. 617; 7 Jur. (N.S.) 918; 4 L. T. 121; 9 W. R. 387.—EX. CH., *referred to*.

Mahalen v. Dublin and Chapelizod Distillery Co. (*supra*).

Thornton v. Meux (1827) M. & M. 43; 31

R. R. 711.—ABBOTT, C.J., *discussed*.

Sievwright v. Archibald (1851) 20 L. J. Q. B. 529; 17 Q. B. 103; 15 Jur. 947.—Q.B.

Acebal v. Levy (1834) 3 L. J. C. P. 98; 10

Bing. 376; 4 M. & Scott 217.—C.P.

Referred to, Goodman v. Griffiths (1857) 26 L. J. Ex. 145; 1 H. & N. 574; 5 W. R. 369.—EX.; *explained and applied*, Jeffcott v. North British Oil Co. (1873) Ir. R. 8 C. L. 17.—EX.; *applied*, McCullin v. Gilpin (1881) 6 Q. B. D. 516, 517.—C.A. (*see supra*, col. 2927).

Staunton v. Wood (1851) 16 Q. B. 638; 15

Jur. 1123.—Q.B., *distinguished*.

Hudson v. Hill (1874) 43 L. J. C. P. 273; 30 L. T. 555.—C.P.

COLERIDGE, C.J.—In *Staunton v. Wood*, a specific time was fixed by the agreement of the parties to the contract.—p. 277.

Spartali v. Benecke (1850) 19 L. J. C. P.

293; 10 C. B. 212.—C.P.

Distinguished, Godts v. Rose (1855) 25 L. J. C. P. 61; 17 C. B. 229; 1 Jur. (N.S.) 1173; 4 W. R. 129.—C.P.; *referred to*, Field v. Lelean (1861) 6 H. & N. 617, 626 (*supra*); Mahalen v. Dublin and Chapelizod Distillery Co. (1877) Ir. R. 11 C. L. 83.—Q.B. *And see* "EVIDENCE," vol. i. col. 1037.

Howes v. Ball (1827) 7 B. & C. 481; 1 Man.

& R. 228; 6 L. J. (O.S.) K. B. 106; 31 R. R. 256.—K.B., *distinguished*.

Walker v. Clyde (1861) 10 C. B. (N.S.) 381.—C.P.

Howes v. Ball.

Referred to, Donald v. Suckling (1866) 35 L. J. Q. B. 232; L. R. 1 Q. B. 585, 613; 7 B. & S. 783; 12 Jur. (N.S.) 795; 14 L. T. 772; 15 W. R. 13.—Q.B. (SHEE, J. *dissenting*); Sewell v. Burdick (1884) 54 L. J. Q. B. 126; 10 App. Cas. 74, 95; 52 L. T. 415; 33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.).

Hodgson v. Davies (1810) 2 Campb. 530; 11 R. R. 789.—ELLENBOROUGH, C.J., *discussed*.

Hurfrey v. Dale (1857) 26 L. J. Q. B. 137; 7 El. & Bl. 266; 3 Jur. (N.S.) 213.—Q.B.; affirmed *nom.* Dale v. Hurfrey.—EX. CH. (*supra*, col. 2927).

Fry v. Hill (1817) 7 Taunt. 397; 18 R. R. 512.—C.P., *referred to*.

Ramchurn Mullick v. Luchmeechund Radakissen (1854) 9 Moore P. C. 46.—P.C.

Price v. Rees (1848) 12 L. J. Ex. 372; 11 M. & W. 576.—EX., *principle applied*.

Smethurst v. Taylor (1844) 14 L. J. Ex. 86; 12 M. & W. 545.—EX.

Reid v. Teakle (1853) 22 L. J. C. P. 161; 13 C. B. 627; 17 Jur. 841.—C.P., *referred to*.

Moylan v. Nolan (1865) 17 Ir. C. L. R. 427, 442.—Q.B.; **Remmington v. Broadwood** (1902) 18 T. L. R. 270.—C.A.

Manby v. Scott (1663) 1 Sid. 109; 1 Levinz 4; 1 Mod. 124; 2 Sm. L. C. (11th ed. p. 446)—EX. CH., *referred to*.

Moylan v. Nolan (*supra*); **Baseley (or Bazeley) v. Forster** (1868) 37 L. J. Q. B. 237; L. R. 3 Q. B. 559, 564; 18 L. T. 756.—Q.B.; COCKBURN, C.J. dissenting.

Manby v. Scott, *discussed*.

Beale v. Arabin (1877) 36 L. T. 249.—GROVE and DENMAN, JJ.

Manby v. Scott, *referred to*.

Wilson v. Glossop (1887) 56 L. J. Q. B. 434; 19 Q. B. D. 379, 381; 36 W. R. 77; 51 J. P. 805. **MATHEW and CAVE, JJ.**; affirmed, (1888) 57 L. J. Q. B. 161; 20 Q. B. D. 354; 58 L. T. 707; 36 W. R. 296; 52 J. P. 246.—C.A. **ESHER, M.R., FRY and LOPES, L.JJ.**

Manby v. Scott, *referred to*.

Rhodes, In re, Rhodes v. Rhodes (1890) 59 L. J. Ch. 298; 44 Ch. D. 94, 107; 62 L. T. 342; 38 W. R. 385.—C.A.

Harris v. Morris (1801) 4 Esp. 41.—KENYON, L.C., *applied*.

Wilson v. Glossop (1887) 56 L. J. Q. B. 434; 19 Q. B. D. 379, 384.—Q.B.D. (*supra*).

Harris v. Morris, *explained*.

Wilson v. Glossop (1888) 57 L. J. Q. B. 20 Q. B. D. 354, 358.—C.A. (*supra*).

Biffin v. Bignell (1862) 31 L. J. Ex. 189; 7 H. & N. 877; 8 Jur. (N.S.) 647; 6 L. T. 248; 10 W. R. 322.—EX., *principle applied*.

Eastland v. Burchell (1878) 47 L. J. Q. B. 500; 3 Q. B. D. 432, 437; 38 L. T. 568; 27 W. R. 290.—Q.B.D.

Biffin v. Bignell, *discussed*.

Latter v. Braddell (1880) 50 L. J. C. P. 166, 169.—C.P.D.

Eastland v. Burchell (1878) 47 L. J. Q. B. 500; 3 Q. B. D. 432; 38 L. T. 568; 27 W. R. 290.—MELLOR and LUSH, JJ., *applied*.

Wilson v. Glossop (1888) 57 L. J. Q. B. 20 Q. B. D. 354, 357.—C.A. (*supra*).

Ruddock v. Marsh (1857) 1 H. & N. 601; 5 W. R. 359.—EX., *explained and commented on*.

Debenham v. Mellon (1880) 49 L. J. Q. B. 497; 5 Q. B. D. 394, 399; 42 L. T. 577; 28 W. R. 501.—C.A.; affirmed, H.L. (*post*, col. 2930).

Jolly v. Rees (1864) 33 L. J. C. P. 177; 15 C. B. (N.S.) 628; 10 Jur. (N.S.) 319; 10 L. T. 299; 12 W. R. 478.—C.P.

Referred to, **Moylan v. Nolan** (1865) 17 Ir. C. L. R. 427, 442.—Q.B.; **Harrison v. Grady** (1865) 13 L. T. 369.—C.P.; *explained*, **Wallis v. Biddick** (1873) 22 W. R. 76.—BLACKBURN and QUAIN, JJ.; *distinguished*, **Beale v. Arabin** (1877) 36 L. T. 249.—GROVE and DENMAN, JJ.

Jolly v. Rees, *approved*.

Debenham v. Mellon (1880) 49 L. J. Q. B. 497; 5 Q. B. D. 394, 401; 42 L. T. 577; 28 W. R. 501.—C.A., affirmed (*post*).

Jolly v. Rees, *approved and applied*.

Moylan v. Nolan (1865) 17 Ir. C. L. R. 427.—Q.B., *explained and not applied*.

Debenham v. Mellon (1880) 6 App. Cas. 24; 50 L. J. Q. B. 155; 43 L. T. 673; 29 W. R. 141; 45 J. P. 252.—H.L. (E.).

SELBORNE, L.C.—My lords, you are asked in this case to review the decision of the Court of C.P. in 1864, in *Jolly v. Rees*, the correctness of which, as far as I know, has not been seriously controverted since that time. The point determined was one of much importance; namely, that the question, whether a wife has authority to pledge her husband's credit, is to be treated as one of fact, upon the circumstances of each particular case, whatever may be the presumption arising from any particular state of circumstances.—p. 31.

LORD BLACKBURN, who also discussed and approved of *Jolly v. Rees*, said: The case in Ireland [*Moylan v. Nolan*] . . . seems, as far as I could see by a slight glance, to be a case where the husband had assented to the contracts in such a way that he could not deny them afterwards. With that we have nothing at present to do.—p. 37.

LORD WATSON also approved of *Jolly v. Rees*.

Jolly v. Rees and Debenham v. Mellon, *Applied*, **Remmington v. Broadwood** (1902) 18 T. L. R. 270.—C.A.; **Morel Bros. v. Westmoreland (Earl)** (1902) 72 L. J. K. B. 66; [1903] 1 K. B. 64, 73; 87 L. T. 635; 51 W. R. 290.—C.A.; affirmed, 73 L. J. K. B. 98; [1904] A. C. 11.—H.L. (E.).

Ferguson v. Carrington (1829) 9 B. & C. 59; 3 Car. & P. 457; 7 L. J. (O.S.) K. B. 139.—K.B., *approved*.

Strutt v. Smith (1834) 3 L. J. Ex. 357; 1 Cr. M. & R. 312; 4 Tyrw. 1019.—EX.

Hoskins v. Duperoy (1808) 9 East 498; 6 Esp. 58.—K.B., *referred to*.

Glass v. Patterson [1902] 2 Ir. R. 660, 680.—K.B.D.; **KENNY, J.** dissenting.

Mussen v. Price (1803) 4 East 147.—K.B.

Applied, **Dutton v. Solomonson** (1803) 3 B. & P. 532; 7 R. R. 833.—C.P.; *referred to*, **Hickling v. Hardey (or Hardy)** (1817) 1 Moore 61; 7 Taunt. 312.—C.P.; **Rugg v. Weir** (1864) 16 C. B. (N.S.) 471.—C.P.; *explained*, **Anderson v. Carlisle Horse Clothing Co. (post, col. 2931)**; *referred to*, **Jefferson v. Querner** (1874) 30 L. T. 847.—Q.B.; *applied*, **Rabe v. Otto (post, col. 2931)**.

Nickson v. Jepson (1817) 2 Stark. 227.—ELLENBOROUGH, C.J., *distinguished*.

Paul v. Dod (or Dodd) (1846) 15 L. J. C. P. 177; 2 C. B. 800; 10 Jur. 335.—C.P.

Nickson v. Jepson and Paul v. Dod (or Dodd), *discussed*.
Rugg v. Weir (1864) 16 C. B. (N.S.) 471.—C.P.
Rugg v. Weir, *approved*.
Anderson v. Carlisle Horse Clothing Co. (1870) 21 L. T. 760.—COCKBURN, C.J.
Anderson v. Carlisle Horse Clothing Co.
Applied, **Rabe v. Otto** (1903) 89 L. T. 562; 20 T. L. R. 27.—KENNEDY, J.
Brooke v. White (1805) 1 B. & P. (N.R.) 330.—C.P., *discussed*.
Hoskins v. Duperoy (1808) 9 East 498; 6 Esp. 58.—K.B.; **Helps v. Winterbottom** (1831) 2 B. & Ad. 431; 9 L. J. (O.S.) K. B. 258.—K.B.
Brooke v. White and Helps v. Winterbottom, *referred to*.
Rugg v. Weir (1864) 16 C. B. (N.S.) 471.—C.P.
Bartholomew v. Markwick (1864) 33 L. J. C. P. 145; 15 C. B. (N.S.) 711; 10 Jur. (N.S.) 615; 9 L. T. 651; 12 W. R. 314.—C.P., *not applied*.
Wayne's Merthyr Steam Coal and Iron Co. v. Morewood (1877) 46 L. J. Q. B. 746.—LUSH, J.
Webb v. Fairman (1838) 7 L. J. Ex. 140; 3 M. & W. 473; 6 D. P. C. 549.—EX., *referred to*.
Isaacs v. Royal Insurance Co. (1870) 39 L. J. Ex. 189; L. R. 5 Ex. 296, 300; 22 L. T. 681; 18 W. R. 982.—EX.; **Ry. Sleepers Supply Co., In re** (1885) 54 L. J. Ch. 720; 29 Ch. D. 204, 207; 52 L. T. 731; 33 W. R. 595.—CHITTY, J. See 56 & 57 Vict. c. 71, s. 10 (2).
 2. STATUTE OF FRAUDS.
Rondeau v. Wyatt (1792) 2 H. Bl. 63.—K.B., *approved and applied*.
Towers v. Osborne (1721) 1 Stra. 506.—PRATT, C.J., *discussed*.
Cooper v. Elston (1796) 7 Term Rep. 14.—K.B.
Rondeau v. Wyatt, *referred to*.
Bailey v. Sweeting (1861) 9 C. B. (N.S.) 843 (*post*, col. 2933).
Kenworthy v. Schofield (1824) 2 B. & C. 945; 4 D. & R. 566; 2 L. J. (O.S.) K. B. 175; 26 R. R. 600.—K.B., *discussed*.
N. Staffordshire Ry. v. Peek (1860) 29 L. J. Q. B. 97; El. Bl. & El. 986, 1001.—Q.B.; 6 Jur. (N.S.) 370; 1 L. T. 407; 8 W. R. 364.—EX. CH.; reversed nom. **Peek v. N. Staffordshire Ry.** (1863) 32 L. J. Q. B. 241; 10 H. L. Cas. 473; 9 Jur. (N.S.) 914; 8 L. T. 768; 11 W. R. 1025.—H.L. (E.). See vol. i. cols. 304–307.
Kenworthy v. Schofield, *observation adopted*.
Mahalen v. Dublin and Chapelizod Distillery Co. (1877) Ir. R. 11 C. L. 83.—Q.B.
Kenworthy v. Schofield, *applied*.
Rishton v. Whatmore (1878) 8 Ch. D. 467; 47 L. J. Ch. 629; 26 W. R. 837.
HALL, V.-C.—It is plain upon the authorities, such as **Kenworthy v. Schofield** and **Peirce v. Corf** (L. R. 9 Q. B. 210, *post*, col. 2939), that it is impossible to use an entry in an auctioneer's book for the purpose of proving a contract for sale within the Statute of Frauds, unless such entry comprises such a reference to the conditions of sale subject to which the property was sold, as to identify them, upon production, as being the conditions mentioned in the entry.—p. 458.
Kenworthy v. Schofield, *referred to*.
Maddison v. Alderson (1883) 52 L. J. Q. B. 737; 8 App. Cas. 467, 488; 49 L. T. 303; 31 W. R. 820.—H.L. (E.).

Kenworthy v. Schofield and N. Staffordshire Ry. v. Peek (col. 2931), *referred to*.
Oliver v. Hunting (1890) 59 L. J. Ch. 255; 44 Ch. D. 205, 208; 62 L. T. 108; 38 W. R. 618.—KEKEWICH, J.

Humble v. Mitchell (1839) 9 L. J. Q. B. 29; 11 A. & E. 205; 3 P. & D. 141; 2 Railw. Cas. 70.—Q.B., *discussed*.
Colonial Bank v. Whinney (1885) 30 Ch. D. 261, 283; 53 L. T. 272; 33 W. R. 852.—C.A.; **FRY, L.J.** dissenting; reversed, *post*.

Humble v. Mitchell, *referred to*.
Colonial Bank v. Whinney (1886) 11 App. Cas. 426; 56 L. J. Ch. 43; 55 L. T. 362; 34 W. R. 705; 3 Morrell 207.—H.L. (E).
LORD BLACKBURN.—Shares are not within sect. 17 of the Statute of Frauds, because they do not pass by delivery. **Lord Denman**, in **Humble v. Mitchell**, thought choses in action a proper phrase to express that idea.—p. 439.

De Fries v. Littlewood (1845) 9 Jur. 988.—Q.B., *discussed and not applied*.
Heseltine v. Siggers (1848) 18 L. J. Ex. 166; 1 Ex. 856.—EX.

Heseltine v. Siggers, *referred to*.
Goodwin v. Roberts (1875) 44 L. J. Ex. 147; L. R. 10 Ex. 337, 342; 23 W. R. 915.—EX. CH.; affirmed, (1876) 45 L. J. Ex. 748; 1 App. Cas. 476; 35 L. T. 179; 24 W. R. 987.—H.L. (E.).

Watson v. Spratley (1854) 24 L. J. Ex. 53; 10 Ex. 222; 2 C. L. R. 1434; 2 W. R. 627.—EX.

Followed, **Powell v. Jessop** (1856) 25 L. J. C. P. 199; 18 C. B. 336; 4 W. R. 465.—C.P.; *referred to*, **Webber v. Lee** (1882) 51 L. J. Q. B. 485; 9 Q. B. D. 315, 317; 47 L. T. 215; 30 W. R. 866; 47 J. P. 4.—BOWEN, J.; **Watson v. Black** (1885) 55 L. J. Q. B. 31; 16 Q. B. D. 270, 278; 54 L. T. 17; 34 W. R. 274.—GROVE and CAVE, JJ.

Watts v. Friend (1830) 10 B. & C. 446; 8 L. J. (O.S.) K. B. 181.—K.B., *distinguished*.
Williams v. Burgess (1839) 8 L. J. Q. B. 286; 10 A. & E. 499; 2 P. & D. 422.—Q.B.

Bryan v. Lewis (1826) Ryan & M. 386.—ABBOTT, C.J., *doubted*.
Wells v. Porter (1836) 5 L. J. C. P. 250; 2 Bing. (N. C.) 722, 731; 2 Scott 141; 2 Hodges 42.—C.P.

Bryan v. Lewis, *disapproved*.
Wells v. Porter, *approved*.
Hibblewhite v. M'Morine (1839) 5 M. & W. 462; 8 L. J. Ex. 271; 3 Jur. 509.

PARKE, B.—I have always entertained considerable doubt and suspicion as to the correctness of Lord Tenterden's doctrine in **Bryan v. Lewis**; it excited a good deal of surprise in my mind at the time, and, when examined, I think it is untenable. I cannot see what principle of law is at all affected by a man's being allowed to contract for the sale of goods, of which he has not possession at the time of the bargain, and has no reasonable expectation of receiving. Such a contract does not amount to a wager, inasmuch as both the contracting parties are not cognisant of the fact that the goods are not in the vendor's possession; and even if it were a wager, it is not

illegal, because it has no necessary tendency to injure third parties. The dictum of Lord Tenterden certainly was not a hasty observation thrown out by him, because it appears from *Lorymer v. Smith* (*post*, col. 2982) that he had entertained and expressed similar notions four years before. He did not, indeed, in that case, say that such a contract was void, only that it was of a kind not to be encouraged; and the strong opinion he afterwards expressed appears to have gradually formed in his mind during the interval, and was no doubt confirmed by the effects of the unfortunate mercantile speculations throughout the country about that time. There is no indication in any of the books of such a doctrine having ever been promulgated from the bench until *Lorymer v. Smith* in the year 1822; and there is no case which has since been decided on that authority. Not only, then, was the doubt expressed by Bosanquet, J., in *Wells v. Porter* well founded, but the doctrine is clearly contrary to law.—p. 466. See Sale of Goods Act, 1893, s. 15 (2) (c).

Bryan v. Lewis (*supra*), referred to.
Fricker v. Hardy (1878) 48 L. J. Q. B. 289; 4 Q. B. 685, 688; 39 L. T. 595; 27 W. R. 158.—Q.B.D., affirmed, C.A.

Bill v. Bament (1841) 11 L. J. Ex. 81; 9 M. & W. 36.—EX.

Distinguished, **Acraman v. Morrice** (1849) 19 L. J. C. P. 57; 8 C. B. 449; 14 Jur. 69.—C.P.; referred to, **Gibson v. Holland** (1865) 35 L. J. C. P. 5; L. R. 1 C. P. 1, 8; H. & R. 1; 11 Jur. (N.S.) 1022; 13 L. T. 293; 14 W. R. 86.—C.P.; discussed and applied, **Lucas v. Dixon** (1889) 58 L. J. Q. B. 161; 22 Q. B. D. 357, 359; 37 W. R. 370.—C.A. **ESHER, M.R., BOWEN and FRY, L.JJ.**; referred to, **Holland, In re, Gregg v. Holland** (1902) 71 L. J. Ch. 518; [1902] 2 Ch. 360, 383; 86 L. T. 542; 50 W. R. 575; 9 Manson 259.—C.A. (*see post*, col. 2940).

Bailey v. Sweeting (1861) 30 L. J. C. P. 150; 9 C. B. (N.S.) 843; 9 W. R. 273.—C.P., distinguished and not applied.

Forster v. Rowland (1861) 7 H. & N. 103; 30 L. J. Ex. 396.—EX.

MARTIN, B.—I agree with the Court of C. P. in *Bailey v. Sweeting*, that all that the statute requires is written evidence of the contract, and that there may be a note or memorandum of the contract, sufficient to satisfy the statute, which when written was not intended to operate as a contract. But the memorandum must be "signed by the party, or by his agent lawfully authorised."—p. 107.

CHANNELL, B.—That case merely decided that where one of the parties to a contract has stated in writing the particulars of it, that statement may be evidence against him sufficient to satisfy the statute, though in the same writing he repudiates his liability. But this case is distinguishable: in *Bailey v. Sweeting*, the document was not in the nature of a proposal. Here the parties were still negotiating when the letter of the 18th May was written, and, therefore, the principle which governed *Bailey v. Sweeting* has no application.—p. 108.

Bailey v. Sweeting.
Approved, **M'Lean v. Nicholl** (1861) 7 Jur. (N.S.) 999; 4 L. T. 863; 9 W. R. 811.—EX.; distinguished, **Smith v. Hudson** (1865) 34 L. J. Q. B. 145; 6 B. & S. 431, 449; 11 Jur. (N.S.) 623;

12 L. T. 377; 13 W. R. 683.—Q.B.; applied, **Gibson v. Holland** (1865) 35 L. J. C. P. 5; L. R. 1 C. P. 1, 8;—C.P. (*supra*, col. 2933); **Wilkinson v. Evans** (1866) 35 L. J. C. P. 224; L. R. 1 C. P. 407, 410; 1 H. & R. 552; 12 Jur. (N.S.) 600; 14 W. R. 963.—C.P.; distinguished, **Caregan v. Richards** (1866) 15 L. T. 252.—EX.; applied, **Buxton v. Rust** (1872) 41 L. J. Ex. 173; L. R. 7 Ex. 279, 281; 27 L. T. 210; 20 W. R. 1014.—EX. CH.; referred to, **Lucas v. Dixon** (1889) 58 L. J. Q. B. 161; 22 Q. B. D. 357, 362; 37 W. R. 370.—C.A.; applied, **Hoyle, In re, Hoyle v. Hoyle** (1892) 62 L. J. Ch. 182; [1893] 1 Ch. 84, 99; 2 R. 145; 67 L. T. 674; 41 W. R. 81.—C.A.

Bailey v. Sweeting, discussed.

Holland, In re, Gregg v. Holland (1902) 71 L. J. Ch. 518, 526; [1902] 2 Ch. 360, 382; 86 L. T. 542; 50 W. R. 575.—C.A. (*see post*, col. 2940).

Hoadly v. M'Laine (1834) 3 L. J. C. P. 162; 10 Bing. 482; 4 M. & Scott 340.—C.P., referred to.

Valpy v. Gibson (1847) 4 C. B. 837.—C.P.; **Joyce v. Swan** (1864) 17 C. B. (N.S.) 84.—C.P.; **Sanderson v. Graves** (1875) 44 L. J. Ex. 210, 214; L. R. 10 Ex. 234, 237; 33 L. T. 269; 23 W. R. 797.—EX.

Spicer v. Cooper (1841) 10 L. J. Q. B. 241; 1 Q. B. 424; 1 G. & D. 52; 5 Jur. 1036.—Q.B.

Referred to, **Sarl v. Bourdillon** (1856) 26 L. J. C. P. 78; 1 C. B. (N.S.) 188; 2 Jur. (N.S.) 1208; 5 W. R. 196.—C.P.; applied, **Newell v. Radford** (1867) 37 L. J. C. P. 1; L. R. 3 C. P. 52; 17 L. T. 118; 16 W. R. 97.—C.P.

Newell v. Radford, applied.

Sheers v. Thimbleby (1897) 76 L. T. 709.—C.A. **ESHER, M.R., LOPES and CHITTY, L.JJ.**

Newell v. Radford, referred to.

Holland, In re, Gregg v. Holland (1902) 71 L. J. Ch. 518; [1902] 2 Ch. 360, 385; 86 L. T. 542; 50 W. R. 575.—C.A.

STIRLING, L.J.—It is no doubt necessary that the note or memorandum to satisfy the statute must show who the parties to the agreement are, but they need not be named or specifically described as such; it is sufficient if, by reasonable intendment, it can be inferred from the document who they are—see *Newell v. Radford*.—p. 528.

Elmore v. Kingscote (1826) 5 B. & C. 583; 8 D. & R. 343; 29 R. R. 341.—K.B.

Applied, **Acebal v. Levy** (1834) 3 L. J. C. P. 98; 10 Bing. 376; 4 M. & Scott 217.—C.P.; explained, **Hoadly v. M'Laine** (1834) 3 L. J. C. P. 162; 10 Bing. 482; 4 M. & Scott 340.—C.P.; referred to, **Ashcroft v. Morrin** (1842) 4 Man. & G. 450; 6 Jur. 783.—C.P.

Ashcroft v. Morrin, referred to.

Joyce v. Swann (1864) 17 C. B. (N.S.) 84.—C.P.

Vandenbergh v. Spooner (1866) 35 L. J. Ex. 201; L. R. 1 Ex. 316; 4 H. & C. 519; 14 L. T. 707; 14 W. R. 843.—EX., **BRAMWELL, B. doubting, observed ex.**

Newell v. Radford (1867) 37 L. J. C. P. 1; L. R. 3 C. P. 52; 17 L. T. 118; 16 W. R. 97.

BOVILL, C.J.—*Vandenbergh v. Spooner* does not apply.

WILLES, J.—I own I have considerable difficulty in understanding *Vandenbergh v. Spooner*;

the meaning, however, seems to be that in a document worded, "D. Spooner agrees to buy the whole of the lots of marble purchased by J. Vandenberg, and now lying at Lyne Cobb, at one shilling per foot," the Court construed the words "purchased by J. Vandenberg," to be an indication or description of the marble sold, and not of the seller. That seems to be an extreme case.—p. 2.

BYLES and KEATING, JJ. to the same effect.

Vandenberg v. Spooner, *referred to*.

Jones Brothers v. Joyner (1900) 82 L. T. 768.
—DARLING and BUCKNILL, JJ.

Egerton v. Mathews (1805) 6 East 307; 2 Smith 398; 8 R. R. 489.—K.B.

Applied, Allen v. Bennett (1810) 3 Taunt. 169; 12 R. R. 633.—K.B.; *discussed*, Sievwright v. Archibald (1851) 20 L. J. Q. B. 529; 17 Q. B. 108; 15 Jur. 947.—Q.B.; *applied*, Sarl v. Bourdillon (1856) 26 L. J. C. P. 78; 1 C. B. (N.S.) 188; 2 Jur. (N.S.) 1208; 5 W. R. 196.—C.P.

Sarl v. Bourdillon (*supra*), *discussed*.

Mahalen v. Dublin and Chapelized Distillery Co. (1877) Ir. R. 11 C. L. 83.—Q.B.; Jones Brothers v. Joyner (1900) 82 L. T. 768.—Q.B.D.

Champion v. Plummer (1805) 1 B. & P. (N.R.) 252; 5 Esp. 240; 8 R. R. 795.—MANSFIELD, C.J.

Applied, Allen v. Bennet (1810) 3 Taunt. 169; 12 R. R. 633.—K.B.; *referred to*, Gale v. Wells (1824) 1 C. & P. 338.—BEST, C.J.; *applied*, Graham v. Musson (1839) 8 L. J. C. P. 324; 5 Bing. (N.C.) 603; 7 Scott 769.—C.P.; *considered*, Warner v. Willington (*post*); Jones Brothers v. Joyner (1900) 82 L. T. 768.—Q.B.D.

Allen v. Bennet (1810) 3 Taunt. 169; 12 R. R. 633.—K.B., *adopted*.

Warner v. Willington (1856) 25 L. J. Ch. 662; 3 Drew. 523, 530; 2 Jur. (N.S.) 433; 4 W. R. 531.—V.C.; Ridgway v. Wharton (1857) 27 L. J. Ch. 46; 6 H. L. Cas. 238, 257; 4 Jur. (N.S.) 173; 5 W. R. 840.—H.L. (E.).

Allen v. Bennet, *referred to*.

Long v. Millar (1879) 48 L. J. C. P. 596; 4 C. P. D. 450, 456; 41 L. T. 306; 27 W. R. 720.—C.A.; Jones Brothers v. Joyner (1900) 82 L. T. 768.—DARLING and BUCKNILL, JJ.

Saunderson v. Jackson (1800) 2 B. & P. 238; 3 Esp. 180; 5 R. R. 382.—ELDON, C.J.

Applied, Allen v. Bennet (1810) 3 Taunt. 169; 12 R. R. 633.—K.B.; Jackson v. Lowe (1822) 7 Moore 219; 1 Bing. 9; 25 R. R. 567.—C.P.; Hoadly v. M'Laine (1834) 3 L. J. C. P. 162; 10 Bing. 482; 4 M. & Scott 340.—C.P.; *distinguished*, Squire v. Campbell (1836) 6 L. J. Ch. 41; 1 Myl. & Cr. 459.—COTTENHAM, L.C.; *applied*, Johnson v. Dodgson (1837) 6 L. J. Ex. 185; 2 M. & W. 653.—EX.; Dyas v. Stafford (1881) 7 L. R. Ir. 590.—CHATTERTON, V.-C. *And see* "CONTRACT," vol. i. col. 653.

Schneider v. Norris (1814) 2 M. & S. 286; 15 R. R. 825.—K.B., *referred to*.

Jackson v. Lowe (1822) 7 Moore 219; 1 Bing. 9; 25 R. R. 567.—C.P.

Schneider v. Norris, *applied*.

Johnson v. Dodgson (1837) 6 L. J. Ex. 185; 2 M. & W. 653.—EX.; Tourret v. Cripps (1879) 48 L. J. Ch. 567; S. C. nom. Torret v. Cripps

27 W. R. 706.—HALL, V.-C.; Dyas v. Stafford (1881) 7 L. R. Ir. 590.—CHATTERTON, V.-C. *And see* "CONTRACT," vol. i. col. 654. *And see* Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 4, 60.

Graham v. Musson (1839) 8 L. J. C. P. 324; 5 Bing. (N.C.) 603; 7 Scott 769.—C.P.

Followed, Graham v. Fretwell (1841) 11 L. J. C. P. 41; 3 Man. & G. 368; 4 Scott (N.R.) 25.—C.P.; *explained*, Mews v. Carr (1856) 26 L. J. Ex. 39; 1 H. & N. 484.—EX.

Graham v. Musson, *distinguished*.

Johnson v. Dodgson (1837) 6 L. J. Ex. 185; 2 M. & W. 653.—EX., *followed*.

Durrell v. Evans (1862) 31 L. J. Ex. 337; 1 H. & C. 174; 9 Jur. (N.S.) 104; 7 L. T. 97; 10 W. R. 665.—EX. CH.; reversing (1861) 30 L. J. Ex. 254; 7 Jur. (N.S.) 585; 4 L. T. 254; 9 W. R. 638; S. C. nom. Darrell v. Evans, 6 H. & N. 660.—EX.

CROMPTON, J.—*Graham v. Musson* turned on the nature of the signature by the clerk when he signed his own name: he did not sign the name of the defendant Musson, and in signing his own name he meant to sign as his employer's, the plaintiff's, agent, and not as the defendant's. If he had signed Musson's name the case would have been within the authority of *Bird v. Boulter* (*post*, col. 2938), and it may be that even as it was there was evidence to go to the jury.—p. 343.

BLACKBURN, J.—*Graham v. Musson* is not at all inconsistent with *Johnson v. Dodgson*.—p. 345.

MELLOR, J. to the same effect. BYLES and KEATING, JJ. concurred.

Durrell (or Darrell) v. Evans, *distinguished*.

Murphy v. Boese (1875) L. R. 10 Ex. 126; 44 L. J. Ex. 40; 32 L. T. 122; 23 W. R. 474.

BRAMWELL, B.—It was held in that case [*Durrell v. Evans*] that the factor signed the paper on behalf of the buyer, and that this paper was intended to be a memorandum of the contract. I said in the Court below, not that the memorandum was an invoice, but that I could not see how the factor was authorized to sign on behalf of the buyer, but the Ex. Ch. thought that there was evidence that the defendant meant the paper to be a memorandum of the contract. What they had to consider was, whether the paper before them had the defendant's name written upon it by an agent on his behalf. And they thought that there was evidence that the factor was the agent of the buyer, because the buyer took a share in the preparation of the contract, and said, in effect, to the factor, "Write it down in such a way." If that decision is wrong, it is wrong in deciding that what the factor was asked to do made him the agent of the buyer, whereas it might be said that the buyer was only suggesting a correction to him, and treating him as the agent of the seller.—p. 128.

PIGOTT, B. to the same effect.

POLLOCK, B.—Therefore the present case is not within this exceptional rule. The case to which it has the nearest analogy is that of *Durrell v. Evans*, and it is remarkable that when that case came before the Court of Ex., Lord Penzance seems to have drawn the conclusion that what was done was nothing more than what occurs in making out and giving an invoice. I am bound to say that I agree with his reasoning, and I will

apply it to the present case. I think *Durrell v. Evans* can only be supported if it decides that the agency did not commence till after the memorandum was written out, and that will distinguish it from the facts before us.—p. 131.

Sharman v. Brandt (1871) 40 L. J. Q. B. 312; L. R. 6 Q. B. 720; 19 W. R. 956.—Q.B., *referred to*.

Tetley v. Shand (1871) 25 L. T. 658, 662; 20 W. R. 206.—C.P.

Wright v. Dannah (1809) 2 Campb. 203;

11 R. R. 693.—C.J., *approved*.

Farebrother v. Simmons (1822) 5 B. & Ald. 333; 24 R. R. 399.—K.B.

Wright v. Dannah and Farebrother v. Simmons, *distinguished*.

Bird v. Boulter (1833) 4 B. & Ad. 443; 1 N. & M. 313.—K.B.

DENMAN, C.J.—I think this case is distinguishable from *Wright v. Dannah* and *Farebrother v. Simmons*; and it appears to me that the clerk was not acting merely as an automaton, but as a person known to all engaged in the sale, and employed by any who told him to put down his name.—p. 446.

TAUNTON, J.—I very much agree with my brother Littledale as to the difficulty in *Farebrother v. Simmons*. But there is no necessity to overrule that case. The C. J. there says, in the close of his judgment: "*Wright v. Dannah* fortifies the conclusion at which I have arrived, viz., that the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third person, and not the other contracting party on the record." It is a sufficient distinction between that case and this, that in the former the auctioneer, whose signature was relied upon, was the party suing; here the signature is by a third person. I would, however, go farther than this.—p. 447.

Thornton v. Kempster (1814) 5 Taunt. 786; 1 Marsh. 355; 15 R. R. 658.—K.B., *referred to*.

Cowie v. Remfrey (1846) 5 Moore P. C. 232; 3 Moore Ink. App. 448; 10 Jur. 789.—P.C.

Thornton v. Kempster and Rucker v. Cammeyer (1794) 1 Esp. 105.—KENTON, C.J., *discussed*.

Pitts v. Beckett (1845) 14 L. J. Ex. 358; 13 M. & W. 743.—EX., *referred to*.

Sievwright v. Archibald (1851) 20 L. J. Q. B. 529; 17 Q. B. 103; 15 Jur. 947.—Q.B.; ERLE, J. dissenting.

Heyman v. Neale (1809) 2 Campb. 337.—

LENBOROUGH, C.J.; and **Grant v.**

Fletcher (1826) 5 B. & C. 436; 8 D. & R. 59; 29 R. R. 286.—K.B., *referred to*.

Henderson v. Barnewall (1827) 1 Y. & J. 387; 30 R. R. 799.—EX.

Goom v. Affalo (1826) 6 B. & C. 117; 9 D. & R. 148; 5 L. J. (o.s.) K. B. 31; 30 R. R. 262.—K.B., *referred to*.

Henderson v. Barnewall (1827) 1 Y. & J. 387; 30 R. R. 799.—EX.; **Sievwright v. Archibald** (1851) 20 L. J. Q. B. 529; 17 Q. B. 103; 15 Jur. 947.—Q.B.; ERLE, J. dissenting.

Sievwright v. Archibald (*supra*).—

Principle applied, *Fisenden v. Levy* (1863) 11 W. R. 259.—Q.B.; *distinguished*, *Parton v.*

Crofts (1864) 33 L. J. C. P. 189; 16 C. B. (N.S.) 11; 10 L. T. 34; 12 W. R. 553.—C.P.; *principle applied*, *Jeffcott v. North British Oil Co.* (1873) 1 R. 8 C. L. 17.—C.P.; *referred to*, *Lucas v. Dixon* (1889) 58 L. J. Q. B. 161; 22 Q. B. D. 357, 362; 37 W. R. 370.—C.A. **ESHER, M.R., BOWEN and FRY, L.JJ.**

Sievwright v. Archibald, *adopted*.

Hoyle, In re, Hoyle v. Hoyle (1892) 62 L. J. Ch. 182; [1893] 1 Ch. 84; 2 R. 145; 67 L. T. 674; 41 W. R. 81.—C.A. **LINDLEY, BOWEN and A. L. SMITH, L.JJ.**

Simon v. Metivier (or Motivos) (1766) 1 W.

Bl. 599; 3 Burr. 1921.—K.B., *discussed*.

Hinde v. Whitehouse (1806) 7 East 588; 3 Smith 528; 8 R. R. 676.—K.B.

Simon v. Metivier, *commented on*.

Emmerson v. Heelis (1809) 2 Taunt. 38; 11 R. R. 520.—K.B.; **Maddison v. Alderson** (1883) 52 L. J. Q. B. 737; 8 App. Cas. 467, 484; 49 L. T. 303; 31 W. R. 820.—H.L. (E.).

Hinde v. Whitehouse (1806) 7 East 558; 3 Smith 528; 8 R. R. 676.—K.B.

Referred to, **Emmerson v. Heelis** (*supra*); *applied*, **Kenworthy v. Schofield** (1824) 2 B. & C. 945; 4 D. & R. 556; 2 L. J. (o.s.) K.B. 175; 26 R. R. 600.—K.B.; *discussed*, **North Staffordshire Ry. v. Peek** (1860) 29 L. J. Q. B. 97; El. Bl. & El. 986; 6 Jur. (N.S.) 370; 1 L. T. 407; 8 W. R. 364.—Q.B.; (*reversed*, H.L., *supra*, col. 2931); *applied*, **Carruthers v. Payne** (1828) 5 Bing. 270; 2 M. & P. 429; 7 L. J. (o.s.) C. P. 84; 30 R. R. 592.—C.P.; *referred to*, **Alexander v. Gardner** (1835) 4 L. J. C. P. 223; 1 Bing. (N.C.) 671; 1 Scott 281, 630; 3 D. P. C. 146; 1 Hodges 147.—C.P.; *applied*, **Furley (or Turley) v. Bates** (1863) 33 L. J. Ex. 43; 2 H. & C. 200; 10 Jur. (N.S.) 368; 10 L. T. 35; 12 W. R. 438.—EX.; *adopted*, **Sweeting v. Turner** (1871) 41 L. J. Q. B. 78; L. R. 7 Q. B. 310; 25 L. T. 796; 20 W. R. 185.—Q.B.; *considered*, **Peirce v. Corf** (1874) 43 L. J. Q. B. 52; L. R. 9 Q. B. 210; 29 L. T. 919; 22 W. R. 299.—Q.B. (*see post*, col. 2939); *referred to*, **Oliver v. Hunting** (1890) 59 L. J. Ch. 255; 44 Ch. D. 205, 208; 62 L. T. 108; 38 W. R. 618.—KEKEWICH, J.

Emmerson v. Heelis (1809) 2 Taunt. 38; 11 R. R. 5.—K.B.

Distinguished, **Baldevy v. Parker** (1823) 2 B. & C. 37; 3 D. & R. 220; 1 L. J. (o.s.) K. B. 229; 26 R. R. 260.—K.B.; *referred to*, **Kenworthy v. Schofield** (1824) 2 B. & C. 945; 4 D. & R. 556; 2 L. J. (o.s.) K. B. 175; 26 R. R. 600.—K.B.; *dictum qualified*, **Evans v. Roberts** (1826) 5 B. & C. 829; 8 D. & R. 611; 4 L. J. (o.s.) K.B. 313; 29 R. R. 421.—K.B.; *referred to*, **Murphy v. Boese** (1875) 44 L. J. Ex. 40; L. R. 10 Ex. 126, 131; 32 L. T. 122; 23 W. R. 474.—EX.

Emmerson v. Heelis, *considered and applied*.

Bell v. Balls (1897) 66 L. J. Ch. 397; [1897] 1 Ch. 663; 76 L. T. 254; 45 W. R. 378.—STIRLING, J.

Bird v. Boulter (1833) 4 P. & Ad. 443; 1 N. & M. 313.—K.B., *discussed*.

Durrell v. Evans (1862) 31 L. J. Ex. 337; 1 H. & C. 174; 9 Jur. (N.S.) 104; 7 L. T. 97; 10 W. R. 665.—EX. CH.

Bird v. Boulter, distinguished.

Pearce v. Corf (1874) 43 L. J. Q. B. 52; L. R. 9 Q. B. 210, 215; 29 L. T. 919; 22 W. R. 299.

BLACKBURN, J.—The ordinary usage is for the auctioneer to sign, and he generally does, still if the auctioneer had a sales ledger in which all the conditions of sale were copied out, and were to sign that, such a signature might be binding. It is, however, quite clear that such a signature, if made by the auctioneer's clerk, would not under ordinary circumstances be binding, although there may be circumstances in which it would, such as those in *Bird v. Boulter*, where there was evidence that the clerk was seen by all the parties to make the entries. But here there is nothing to show that the sales ledger was open or known to the bidders, and upon inspection it appears that there are ciphers in it, which would seem to show that it was not so known. The defendant's clerk in fact was signing for his master's information, not as agent for the bidders. However, even supposing that the clerk had authority to bind the bidder by his signature, I can find no sufficient reference in the sales ledger to the conditions of sale. In *Hinde v. Whitehouse* (*supra*, col. 2938), it is said by Lord Ellenborough that "the mere writing on the catalogue, not being by any reference incorporated with the conditions of sale, is not a memorandum of a bargain under those conditions of sale."—p. 54. QUAIN and ARCHIBALD, JJ. concurred.

Bird v. Boulter, explained and approved.

Dyas v. Stafford (1881) 7 L. R. Ir. 590.—CHATTERTON, V.-C.

Bird v. Boulter, referred to.

Roberts, In re, Evans v. Roberts (1887) 56 L. J. Ch. 952; 36 Ch. D. 196, 201; 57 L. T. 79; 35 W. R. 684; 51 J. P. 757.—KAY, J.

Pearce v. Corf (supra), followed.

Rishton v. Whatmore (1878) 47 L. J. Ch. 629; 8 Ch. D. 467; 26 W. R. 827.—HALL, V.-C.

Pearce v. Corf, discussed.

Megaw v. Molloy (1878) 2 L. R. Ir. 530, 539.—C.A.; Dyas v. Stafford (*supra*).

Pearce v. Corf, discussed and distinguished.

Wylson v. Dunn (1887) 56 L. J. Ch. 855; 34 Ch. D. 569, 574; 56 L. T. 192; 35 W. R. 405; 51 J. P. 452.—KEKEWICH, J.

Pearce v. Corf, considered and applied.

Bell v. Balls (1897) 66 L. J. Ch. 397; [1897] 1 Ch. 663; 76 L. T. 254; 45 W. R. 378.—STIRLING, J.

Leather Cloth Company v. Hieronimus (1875)

44 L. J. Q. B. 54; L. R. 10 Q. B. 140; 32 L. T. 307; 23 W. R. 593.—Q.B., referred to. Hickman v. Haynes (1875) 44 L. J. C. P. 353, 360; L. R. 10 C. P. 598; 32 L. T. 873; 23 W. R. 872.—C.P.

Stewart v. Eddowes, Hudson v. Stewart

(1874) 43 L. J. C. P. 204; L. R. 9 C. P. 311; 30 L. T. 333; 22 W. R. 534.—C.P., referred to.

Dartford Union Guardians v. Trickett (1888) 59 L. T. 754, 756; 53 J. P. 277.—POLLOCK, B.; affirmed (1889) 5 T. L. R. 619.—C.A.

Soames v. Spencer (1822) 1 D. & R. 32; 24

R. R. 631.—K.B., applied. Maclean v. Dunn (1828) 4 Bing. 722; 1 M. & P. 761; 6 L. J. (o.s.) C. P. 184; 29 R. R. 714.—C.P.

Soames v. Spencer, referred to.

Durant & Co. v. Roberts and Keighley Maxsted & Co. (1900) 69 L. J. Q. B. 382; [1900] 1 Q. B. 629; 82 L. T. 217; 48 W. R. 476.—C.A. COLLINS and ROMER, L.JJ.; A. L. SMITH, L.J. dissenting [see judgment of latter]; C.A., reversed.—H.L., post.

Soames v. Spencer, discussed and not applied.

Keighley Maxsted & Co. v. Durant (1901) 70 L. J. K. B. 662; [1901] A. C. 240; 84 L. T. 777.—H.L. (E.).

Goode v. Job (1858) 28 L. J. Q. B. 1.—Q.B.,

referred to. Lucas v. Dixon (1889) 22 Q. B. D. 357, 360.—C.A. (post).

Gibson v. Holland (1865) 35 L. J. C. P. 5;

L. R. 1 C. P. 1; 1 H. & R. 1; 11 Jur. (N.S.) 1022; 13 L. T. 293; 14 W. R. 86.—C.P.

Referred to, Lucas v. Dixon (1889) 58 L. J. Q. B. 161; 22 Q. B. D. 357, 362; 37 W. R. 370.—C.A.; Crowe v. Menton (1891) 27 L. R. Ir. 519, 523.—Q.B.D.; applied, Hoyle, In re, Hoyle v. Hoyle (1892) 62 L. J. Ch. 182; [1892] 1 Ch. 84, 99; 2 R. 145; 67 L. T. 674; 41 W. R. 81.—C.A.

Lucas v. Dixon, Gibson v. Holland, and

Hoyle, In re, Hoyle v. Hoyle, discussed and applied.

Holland, In re, Gregg v. Holland (1902) 71 L. J. Ch. 518; [1902] 2 Ch. 360, 383; 86 L. T. 542; 50 W. R. 575.—C.A.

STIRLING, L.J.—It is also established as regards many of the contracts within sects. 4 and 17 [Statute of Frauds], that the note or memorandum referred to in these sections need not be contemporaneous with the contract, but is sufficient if it comes into existence before the commencement of the action to enforce the contract; see *Bill v. Bament* (11 L. J. Ex. 81; 9 M. & W. 36, *supra*, col. 2933); *Bailey v. Sweeting* (30 L. J. C. P. 150; 9 C. B. (N.S.) 843, *supra*, col. 2933); and *Lucas v. Dixon*. These decisions are based on the language of the statute. . . . In *Lucas v. Dixon* it is pointed out by Fry, L.J., that, where the plaintiff wishes to avail himself of a memorandum which comes into existence after the commencement of the action, he can only do so by discontinuing the action and commencing another. So that a memorandum coming into existence after the commencement of the action is only available if the plaintiff is in a position to discontinue. The note or memorandum need not be given for valuable consideration, nor have any particular form; a letter by the party sought to be charged to a third party—*Bailey v. Sweeting*, and *Gibson v. Holland*; an affidavit—*Barkworth v. Young* (26 L. J. Ch. 153; 4 Drew. 1); and even a will—*Hoyle, In re, Hoyle v. Hoyle*—have each been accepted by the Courts as sufficient.—p. 526.

Powell v. Divett (1812) 15 East 29; 13

R. R. 358.—K.B. Discussed and applied, Davidson v. Cooper (1843) 12 L. J. Ex. 467; 13 M. & W. 343.—EX. CH.; referred to, Sievwright v. Archibald (1851) 20 L. J. Q. B. 529; 17 Q. B. 103; 15 Jur. 947.—Q.B.; adopted, White v. Benekendorff (1873) 29 L. T. 475.—C.P.; referred to, Pattinson v. Luckley (1875) 44 L. J. Ex. 180, 183; L. R. 10 Ex. 330, 334; 33 L. T. 360.—EX.

Rowe v. Osborne (1815) 1 Stark. N. P. 140; 18 R. R. 754.—G.J., *distinguished*.
Cowie v. Remfry (1846) 5 Moore P. C. 232; 3 Moore Ind. App. 448; 10 Jur. 789.—P.C.
 DR. LUSHINGTON for self, BUCOLEUGH (DUKE), LORD BROUGHAM, and KNIGHT BRUCE, V.-C.; T. P. LEIGH dissenting.—In *Rowe v. Osborne* the note delivered to the vendor was actually signed by the purchaser; the note or contract afterwards sent to the purchaser differed from it. Lord Ellenborough held that the note signed by the purchaser constituted the real contract. The principle, upon which Lord Ellenborough so ruled, is not stated, but we apprehend it must have been this, that the signature clearly evidenced the consent of the purchaser to buy on the terms stated in the document. . . . Here, the note received no signature from the party.—p. 249.

Rowe v. Osborne, *referred to*.
Sievwright v. Archibald (1851) 20 L. J. Q. B. 529; 17 Q. B. 103; 15 Jur. 947.—Q.B.
Cowie v. Remfry (*supra*), *disapproved*.
Heyworth v. Knight (1864) 33 L. J. C. P. 298; 17 C. B. N. S. 293, 311; 10 Jur. (N.S.) 866.—C.P.
 WILLES, J.—As to custom to contract by bought and sold notes in this trade, there was no evidence; the case, therefore, does not fall strictly within that of *Cowie v. Remfry*, to which I referred in the course of the argument. Had it done so, I should have been prepared to say that I agree with the dissenting judge, and not with the other members of the judicial committee who pronounced that judgment. I apprehend, that, if that case had come before a common law court, it would have been decided in conformity with the decision of the Supreme Court. It never could have been held by a court accustomed to deal with commercial matters, where a document in writing had been assented to by the seller and corrected and initialled by the buyer, that, because a subsequent note was delivered somewhat differing from the former, therefore there was no contract between the parties. I cannot consent, with all respect for so high a tribunal, to be bound by that decision.—p. 310. ERLE, C.J. and BYLES, J. concurred.

Moore v. Campbell (1854) 23 L. J. Ex. 310; 10 Ex. 323; 2 C. L. R. 1084.—EX., *followed*.
French v. Patton (1807-8) 9 East 351; 1 Campb. 72; 9 R. R. 571.—K.B., *discussed*.
Noble v. Ward (1867) 36 L. J. Ex. 91, 92; L. R. 2 Ex. 135; 15 L. T. 672; 15 W. R. 520.—EX. CH.

Moore v. Campbell, *referred to*.
Tyers v. Rosedale and Ferryhill Iron Co. (1873) 42 L. J. Ex. 185, 190; L. R. 8 Ex. 305, 316; 29 L. T. 751; 21 W. R. 793.—EX.; reversed, (1895) 44 L. J. Ex. 130; L. R. 10 Ex. 195; 33 L. T. 56; 23 W. R. 871.—EX. CH.

Coats v. Chaplin (1842) 11 L. J. Q. B. 315; 3 Q. B. 483; 2 G. & D. 552; 6 Jur. 1123.—Q.B., *referred to*.

Bailey v. Sweeting (1861) 30 L. J. C. P. 150 (*ante*, col. 2933); **Felthouse v. Bindley** (1862) 31 L. J. C. P. 204 (*post*, col. 2942).

Garbutt v. Watson (1822) 5 B. & Ald. 613; 1 D. & R. 219.—K.B., *applied*.

Groves v. Buck (1814) 3 M. & S. 178.—K.B., *held overruled*.

Smith v. Surman (1829) 9 B. & C. 561; 4 Man. & R. 455; 7 L. J. (O.S.) K. B. 296; 33 R. R. 259.—K.B.

Smith v. Surman (*supra*).

Discussed, **Wright v. Percival** (1839) 8 L. J. Q. B. 258.—Q.B.; *considered*, **Morton v. Tibbett** (1850) 19 L. J. Q. B. 382; 15 Q. B. 428; 14 Jur. 669.—Q.B.; *distinguished*, **Wilkinson v. Evans** (1866) 35 L. J. C. P. 224; L. R. 1 C. P. 407, 411; 1 H. & R. 552; 12 Jur. (N.S.) 600; 14 W. R. 963.—C.P. (*see post*, col. 2943); **Marshall v. Green** (1875) 45 L. J. C. P. 153; 1 C. P. D. 35, 40; 33 L. T. 404; 24 W. R. 175.—C.P.

Smith v. Neale (1837) 26 L. J. C. P. 143; 2 C. B. (N.S.) 67; 3 Jur. (N.S.) 516; 5 W. R. 563.—C.P.

Commented on, **Felthouse v. Bindley** (1862) 11 C. B. (N.S.) 369; 31 L. J. C. P. 204; 6 L. T. 157; 10 W. R. 423.—C.P.; (*affirmed*, (1863) 7 L. T. 835; 11 W. R. 429.—EX. CH.); *applied*, **Watts v. Ainsworth** (1862) 1 H. & C. 83; 31 L. J. Ex. 448; 6 L. T. 252.—EX.; *approved*, **Reuss v. Picksley** (1866) 35 L. J. Ex. 218; L. R. 1 Ex. 342.—EX. CH. (*post*); *referred to*, **Buxton v. Rust** (1872) 41 L. J. Ex. 173; L. R. 7 Ex. 279.—EX. CH. (*post*); *distinguished and not applied*, **New Eberhardt Co., In re, Menzies, Ex parte** (1889) 59 L. J. Ch. 73; 43 Ch. D. 118, 129.—C.A. (*see post*).

Reuss v. Picksley (1866) 35 L. J. Ex. 218; L. R. 1 Ex. 342; 4 H. & C. 538; 12 Jur. (N.S.) 628; 15 L. T. 25; 14 W. R. 924.—EX. CH., *referred to*.

Buxton v. Rust (1872) 41 L. J. Ex. 173; L. R. 7 Ex. 279, 280; 27 L. T. 210; 20 W. R. 1014.—EX. CH.

Reuss v. Picksley, *applied*.

Dartford Union Guardians v. Trickett (1888) 59 L. T. 754, 756; 53 J. P. 277.—POLLOCK, B.; *affirmed*, (1889) 5 T. L. R. 619.—C.A.

Reuss v. Picksley, *distinguished and not applied*.

New Eberhardt Co., In re, Menzies, Ex parte (1889) 43 Ch. D. 118; 59 L. J. Ch. 73; 62 L. T. 301; 38 W. R. 97; 1 Meg. 441.—C.A.

BOWEN, L.J.—The cases on the Statute of Frauds can have nothing to do with it [Companies Act, 1867, s. 25], and it would not follow because the documents would be held to be a contract or memorandum within the Statute of Frauds, that therefore it is a contract which fulfils the requirements of a different section in a different Act. *Reuss v. Picksley* and . . . *Smith v. Neale* (*supra*) were not decisions that the document amounted to a contract, but only that it amounted to the memorandum of a contract. We are bound by *Reuss v. Picksley*, and that no doubt pushed the literal construction of the Statute of Frauds to a limit beyond which it would, perhaps, not be easy to go; but unless we found the language of the Statute of Frauds repeated in this section, we should not be bound by *Reuss v. Picksley*; and if we were to follow it, we should be following that which has not a real analogy.—p. 129.

Reuss v. Picksley, *applied*.

Filby v. Hounsell (1896) 65 L. J. Ch. 852; [1896] 2 Ch. 737, 740; 75 L. T. 270.—ROMER, J.

Cooper v. Smith (1812) 15 East 103; 13 R. R. 397.—K.B., *applied*.

Richards v. Porter (1827) 6 B. & C. 437; 9 D. & R. 497; 5 L. J. (O.S.) K. B. 175.—K.B.; **Acebal v. Levy** (1834) 3 L. J. C. P. 98; 10 Bing. 376; 4 M. & Scott 217.—C.P. *And see* col. 2943.

Richards v. Porter (*supra*), *applied*.

Archer v. Baynes (1850) 20 L. J. Ex. 54; 5 Ex. 625.—EX.

Richards v. Porter, Cooper v. Smith (*supra*), and **Archer v. Baynes**, *distinguished*.

Wilkinson v. Evans (1866) 35 L. J. C. P. 224; L. R. 1 C. P. 407; 1 H. & R. 552; 12 Jur. (N.S.) 600; 14 W. R. 963.—C.P.

ERLE, C.J.—Both in *Richards v. Porter* and *Cooper v. Smith*, the letters complain of the goods not being in time, and the defendants there said, there is another term which has not been fulfilled, so that there was clearly a term of the contract in dispute; and in both those cases there were two writings of two different contracts. So, again, in *Smith v. Surman* (*supra*, col. 2942), the defendant alleged that there was another term in the contract, viz., that the trees should be sound and good; and in *Archer v. Baynes*, that the flour ought to have been according to sample. So that in all these cases a necessity arose for oral evidence to determine the dispute.—p. 225.

Wilkinson v. Evans, *distinguished*.

Caragan v. Richards (1866) 15 L. T. 252.—EX.

Wilkinson v. Evans, *applied*.

Buxton v. Rust (1872) 41 L. J. Ex. 173; L. R. 7 Ex. 279, 281; 27 L. T. 210; 20 W. R. 1014.—EX. CH.; **Hoyle, In re**, **Hoyle v. Hoyle** (1892) 62 L. J. Ch. 182; [1893] 1 Ch. 84, 99; 2 R. 145; 67 L. T. 674; 41 W. R. 81.—C.A.

Jackson v. Lowe (1822) 1 Bing. 9; 7 Moore 219; 25 R. R. 267.—C.P., *followed*.

Coe v. Duffield (1822) 7 Moore 252.—C.P.

Walker v. Nussey (1847) 16 L. J. Ex. 120; 16 M. & W. 302; 11 Jur. 23.—EX., *followed*.

Norton v. Davison (1809) 68 L. J. Q. B. 265; [1899] 1 Q. B. 401; 80 L. T. 139; 47 W. R. 275.—C.A. **HALSBURY, L.C.**, **A. L. SMITH** and **CHITTY, L.JJ.**

Blenkinsop v. Clayton (1817) 7 Taunt. 597; 1 Moore 323; 18 R. R. 602.—C.P., *distinguished*.

Tempest v. Fitzgerald (1820) 3 B. & Ald. 680; 22 R. R. 526.—K.B.

Blenkinsop v. Clayton, *referred to*.

Morton v. Tibbett (1850) 19 L. J. Q. B. 382; 15 Q. B. 428; 14 Jur. 669.—Q.B.; **Coombs v. Bristol and Exeter Ry.** (1858) 27 L. J. Ex. 401; 3 H. & N. 510, 518; 6 W. R. 725.—EX.

Morton v. Tibbett (1850) 19 L. J. Q. B. 382 15 Q. B. 428; 14 Jur. 669.—Q.B.

Decision approved, **Hunt v. Hecht** (1853) 22 L. J. Ex. 293; 8 Ex. 814.—EX.; *applied*, **Meredith v. Meigh** (1853) 22 L. J. Q. B. 401; 2 El. & Bl. 364; 17 Jur. 649; 1 W. R. 368.—Q.B.; *referred to*, **Parker v. Wallis** (1855) 5 El. & Bl. 21; 3 W. R. 417.—Q.B.; *explained*, **Hart v. Bush** (1858) 27 L. J. Q. B. 271; El. Bl. & El. 494; 4 Jur. (N.S.) 633.—Q.B.; *commented on*, **Coombs v. Bristol and Exeter Ry.** (1858) 27 L. J. Ex. 401; 3 H. & N. 510, 518; 6 W. R. 725.—EX.

Morton v. Tibbett, *approved*.

Currie v. Anderson (1860) 29 L. J. Q. B. 87; 2 El. & El. 592; 6 Jur. (N.S.) 442; 8 W. R. 274.—Q.B.; **Cusack v. Robinson** (1861) 30 L. J.

Q. B. 261; 1 B. & S. 299; 7 Jur. (N.S.) 542; 4 L. T. 506; 9 W. R. 735.—Q.B.

Morton v. Tibbett, *referred to*.

Castle v. Sworder (1861) 30 L. J. Ex. 310; 6 H. & N. 828; 8 Jur. (N.S.) 233; 4 L. T. 865; 9 W. R. 697.—EX. CH.; **Smith v. Hudson** (1865) 34 L. J. Q. B. 145; 6 B. & S. 431; 11 Jur. (N.S.) 622; 12 L. T. 377; 13 W. R. 683.—Q.B.; **Grimoldby v. Wells** (1875) 44 L. J. C. P. 203; L. R. 10 C. P. 391, 394; 32 L. T. 490; 23 W. R. 524.—C.P.

Morton v. Tibbett.

Approved and followed, **Kibble v. Gough** (1878) 38 L. T. 204.—C.A. **BRAMWELL, BAGGALLAY** and **THESIGER, L.JJ.**; *referred to*, **Hopton v. McCarthy** (1882) 10 L. R. Ir. 266.—Q.B.D. **FITZGERALD** and **BARRY, JJ.**; *discussed*, **Page v. Morgan** (1885) 54 L. J. Q. B. 431; 15 Q. B. D. 228; 53 L. T. 126; 33 W. R. 793.—C.A. **BRETT, M.R.**, **BAGGALLAY** and **BOWEN, L.JJ.**; *distinguished*, **Taylor v. Smith** (1892) 61 L. J. Q. B. 331; [1893] 2 Q. B. 65; 67 L. T. 39; 40 W. R. 486.—C.A. (*see post*, col. 2945).

Hunt v. Hecht (1853) 22 L. J. Ex. 293; 8 Ex. 814.—EX.

Adhered to, **Coombs v. Bristol and Exeter Ry.** (1858) 27 L. J. Ex. 401; 3 H. & N. 510, 518; 6 W. R. 725.—EX.; *applied*, **Smith v. Hudson** (1865) 34 L. J. Q. B. 145; 6 B. & S. 431; 11 Jur. (N.S.) 622; 12 L. T. 377; 13 W. R. 683.—Q.B. (*see post*, col. 2948); *referred to*, **Taylor v. Smith** (1892) 61 L. J. Q. B. 331; [1893] 2 Q. B. 65; 40 W. R. 486.—C.A. (*post*, col. 2945).

Kibble v. Gough, (1878) 38 L. T. 204.—C.A. **BRAMWELL, BRETT** and **COTTON, L.JJ.**, *distinguished*.

Rickard v. Moore (1878) 38 L. T. 841.—C.A. **BRAMWELL, BAGGALLAY** and **THESIGER, L.JJ.**

BRAMWELL, L.J.—It is said that this case cannot be distinguished from *Kibble v. Gough*. If that were so, I should be inclined to say that *Kibble v. Gough* was wrongly decided. But I think there are several points of difference between the two cases. In *Kibble v. Gough*, the jury found that there was in fact an acceptance of the goods by the defendant. The goods were brought in a waggon to the defendant's place of business. His foreman looks at them, and takes them in, adding that they are "not equal to sample." If the defendant himself had been there the result would have been the same. The goods were actually taken out of the plaintiff's cart and received and put in the defendant's premises, with what hardly amounted to more than a grumble on the foreman's part; more goods were sent the next day, and were also taken in, and the second and a third instalment received. It is impossible to say that was a case in which the jury might not find that there was sufficient evidence of acceptance to take the case out of the Statute of Frauds, though possibly there was not sufficient evidence of acceptance to prevent the defendant's objections to the goods as not equal to sample. To show that, it is quite enough to read the judgment of Cotton, L.J.—p. 842.

Kibble v. Gough, *followed*.

Rickard v. Moore, *discussed*.

Page v. Morgan (1885) 54 L. J. Q. B. 431; 15 Q. B. D. 228; 53 L. T. 126; 33 W. R. 793.—C.A. *See post*, col. 2945.

BRETT, M.R.—The counsel for the defendant placed reliance on the case of *Richard v. Moore*. It is alleged that in that case Lord Bramwell doubted the correctness of what he had said in the previous case of *Kibble v. Gough*. However that may be, it is quite clear that that case cannot overrule *Kibble v. Gough*.—p. 232.

BAGGALLAY, L.J.—When *Richard v. Moore* comes to be examined, there are various points of difference which are adverted to in the judgments, and there is also the most important distinction adopted by Thesiger, L.J., in giving judgment, namely, that whereas in *Kibble v. Gough* the jury found that the goods were equal to sample, in *Richard v. Moore* the jury found that they were not equal to sample.—*Ib.*

BOWEN, C.J. to the same effect.

Kibble v. Gough and Page v. Morgan (*supra*, col. 2944), *distinguished*.

Taylor v. Smith (1892) [1893] 2 Q. B. 65; 61 L. J. Q. B. 331; 67 L. T. 39; 40 W. R. 486.—C.A. **LORD HERSCHELL, LINDLEY and KAY, L.JJ.**

LORD HERSCHELL.—"Acceptance" is not used in the statute according to its common acceptation, and in what sense it is used has never been determined. The plaintiffs in support of the view that there has been an acceptance, rely on *Morton v. Tibbett* (15 Q. B. 423, *supra*, col. 2943), and . . . *Kibble v. Gough* and *Page v. Morgan*. In the two latter cases, the action was tried by a jury, and the question before the C. A. was not whether there had been an acceptance, but whether there was evidence of acceptance to go to the jury, and the Court held that there was. *Page v. Morgan* was most relied on, where the law was laid down by Bowen, L.J., in these terms: "Having regard to the mischief, at which the statute was aimed, it would appear a natural conclusion that the acceptance contemplated by the statute was such a dealing with the goods as amounts to a recognition of the contract." In that case the goods, which consisted of bags of flour, had been taken in part into the defendant's mill, and he there opened some of them for examination. It was held that there was evidence to go to the jury that he had accepted the goods. In the present case, the question is not whether there was evidence on which a jury might find acceptance, but whether the judge was wrong in finding that there had not been an acceptance. . . . In *Page v. Morgan*, the purchaser had some of the sacks taken into his mill; here the goods were only landed at Kenworthy's wharf, and the defendant gave no directions as to dealing with them. In *Page v. Morgan*, after some of the sacks had been taken into the defendant's mill, the defendant there opened them. In the present case, all that appears is that the goods were at the carrier's wharf, and the defendant there looked at them.—p. 71.

Taylor v. Smith, referred to.

Abbott & Co. v. Wolsey (1895) 64 L. J. Q. B. 587; [1895] 2 Q. B. 97; 14 R. 455; 72 L. T. 581; 43 W. R. 513; 59 J. P. 500.—C.A. **ESHER, M.R., A. L. SMITH and RIGBY, L.JJ.**

Taylor v. Smith, commented on and not applied.

Taylor v. G. E. Ry. (1901) 70 L. J. K. B. 499; [1901] 1 Q. B. 774, 778; 84 L. T. 770; 49 W. R. 431; 6 Com. Cas. 121.

BIGHAM J.—That case [*Taylor v. Smith*] was

dealt with by the Court as merely involving a question of fact. This appears from an examination of the judgments. I see by a foot note that the case was reported about a year after it was decided "in deference to representations from various quarters." I think the editor would have done well to have resisted those representations, for the case declares no principle of law, and is, in my opinion, of no general application.—p. 502.

Cusack v. Robinson (1861) 30 L. J. Q. B. 261; 1 B. & S. 299; 7 Jur. (N.S.) 542; 4 L. T. 506; 9 W. R. 735.—Q.B., *distinguished*.

Bolton v. Lancashire and Yorkshire Ry. (1866) 35 L. J. C. P. 137, 140; L. R. 1 C. P. 431, 438; 12 Jur. (N.S.) 317; 13 L. T. 764; 14 W. R. 430.—C.P.

Cusack v. Robinson, referred to.

Reuss v. Picksley (1866) 35 L. J. Ex. 218, 223; L. R. 1 Ex. 342, 352; 4 H. & C. 588; 12 Jur. (N.S.) 628; 15 L. T. 25; 14 W. R. 924.—EX. CH.; *Kibble v. Gough* (1878) 38 L. T. 204, 206.—C.A.

Cusack v. Robinson, distinguished.

Roberts, In re. Evans v. Roberts (or Thomas) (1887) 56 L. J. Ch. 952; 36 Ch. D. 196, 200; 57 L. T. 79; 35 W. R. 684; 51 J. P. 757.—KAY, J.

Smith v. Hudson (1865) 34 L. J. Q. B. 145; 6 B. & S. 431; 11 Jur. (N.S.) 622; 12 L. T. 377; 13 W. R. 683.—Q.B., *discussed and not applied*.

Bell, In re. Clarke, Ex parte (1877) 47 L. J. Bk. 33, 36; 37 L. T. 509.—BACON, C.J.

Nicholle v. Plume (1824) 1 C. & P. 272.—BEST, C.J., *referred to*.

Edan v. Dudfield (1841) 1 Q. B. 302; 4 P. & D. 656; 5 Jur. 317.—Q.B.

Phillips v. Bistolli (1824) 2 B. & C. 511; 3 D. & R. 822; 2 L. J. (O.S.) K. B. 116; 26 R. 433.—K.B.

Not applied, Maberley v. Sheppard (1833) 2 L. J. C. P. 181; 10 Bing. 99; 3 M. & Scott 436.—C.P.; *distinguished, Tomkinson v. Staight* (1856) 17 C. B. 698; 25 L. J. C. P. 85; 2 Jur. (N.S.) 354; 4 W. R. 299.—C.P.

Harman v. Reeve (1856) 25 L. J. C. P. 257; 18 C. B. 587; 4 W. R. 599.—C.P., *referred to*.

Savage v. Canning (1867) Ir. R. 1 C. L. 434; 16 W. R. 133.—C.P.

Howe v. Palmer (1820) 3 B. & Ald. 321.—K.B., *referred to*

Hanson v. Armitage (1822) 5 B. & Ald. 557; 1 D. & R. 128; 24 R. R. 478.—K.B.

Howe v. Palmer, distinguished.

Pettit v. Mitchell (1842) 12 L. J. C. P. 9, 13; 4 Man. & G. 819; 5 Scott (N.R.) 721; Car. & M. 424; 6 Jur. 1016.—C.P.

Howe v. Palmer, discussed and approved.

Morton v. Tibbett (1850) 19 L. J. Q. B. 382; 15 Q. B. 428; 14 Jur. 669.—Q.B.

CAMPBELL, C.J. (for the Court).—*Howe v. Palmer* . . . we clearly think was well decided, although we cannot concur in all the reasons given for the decision. There, the only evidence of acceptance and receipt was, that the agent of the vendor who had verbally sold to the defendant twelve bushels of tares, part of a larger

quantity in the vendor's possession, had measured off twelve bushels of the tares and set them apart for the purchaser. According to the contract, they were to remain in the possession of the vendor till called for. The purchaser, therefore, neither had accepted nor received the goods.—p. 385.

Salter v. Woollams (1841) 10 L. J. C. P. 145; 2 Man. & G. 650; 3 Scott (N.R.) 59.—C.P.; *referred to*.

Wood v. Baxter (1883) 49 L. T. 45, 48.—W. WILLIAMS and A. L. SMITH, JJ.

Bentall v. Burn (1824) 3 B. & C. 423; R. & M. 107; 5 D. & R. 284; 3 L. J. (o.s.) K. B. 42; 27 R. R. 391.—K.B., *principle applied*.

Farina v. Home (1846) 16 L. J. Ex. 73; 16 M. & W. 119.—EX.

Farina v. Home.

Approved, **Saunders v. Topp** (1849) 18 L. J. Ex. 374; 4 Ex. 390.—EX.; *applied*, **Meredith v. Meigh** (1853) 22 L. J. Q. B. 401; 2 El. & El. 364; 17 Jur. 649; 1 W. R. 368.—Q.B.; *doctrine approved*, **Robertson and Baxter v. Inglis** (1897) 24 Rette 758.—CT. OF SESS.

Norman v. Phillips (1845) 14 L. J. Ex. 306; 14 M. & W. 277; 9 Jur. 832.—EX.

Distinguished, **Saunders v. Topp** (1849) 18 L. J. Ex. 374; 4 Ex. 390.—EX.; *discussed*, **Morton v. Tibbett** (1850) 19 L. J. Q. B. 382; 15 Q. B. 428; 14 Jur. 669.—Q.B.; *referred to*, **Hunt v. Hecht** (1853) 8 Ex. 814; 22 L. J. Ex. 293.—EX.; *applied*, **Coombs v. Bristol and Exeter Ry.** (1858) 5 H. & N. 510; 27 L. J. Ex. 401; 6 W. R. 725.—EX.; *followed*, **Hopton v. McCarthy** (1882) 10 L. R. Ir. 266.—Q.B.D. FITZGERALD and BARRY, JJ.; *referred to*, **Taylor v. Smith** (1892) 61 L. J. Q. B. 331; [1892] 2 Q. B. 65; 67 L. T. 39; 40 W. R. 486.—C.A.

Bushel v. Wheeler (1844) 8 Jur. 532; 15 Q. B. 442, n.—Q.B.

Followed, **Norman v. Phillips** (1845) 14 L. J. Ex. 306; 14 M. & W. 277; 9 Jur. 832.—EX.; *approved*, **Morton v. Tibbett** (1850) 19 L. J. Q. B. 382; 15 Q. B. 428; 14 Jur. 669.—Q.B.; *applied*, **Meredith v. Meigh** (1853) 22 L. J. Q. B. 401; 2 El. & Bl. 364; 17 Jur. 649; 1 W. R. 368.—Q.B.; *referred to*, **Taylor v. Smith** (1892) 61 L. J. Q. B. 331; [1893] 2 Q. B. 65; 67 L. T. 39; 40 W. R. 486.—C.A.

Meredith v. Meigh (*supra*).

Referred to, **Coombs v. Bristol and Exeter Ry.** (1858) 3 H. & N. 518; 27 L. J. Ex. 401; 6 W. R. 725.—EX.; *dicta approved and applied*, **Currie v. Anderson** (1860) 29 L. J. Q. B. 87; 2 El. & El. 592; 6 Jur. (N.S.) 442; 8 W. R. 274.—Q.B.; *referred to*, **Castle v. Swarder** (1861) 30 L. J. Ex. 310; 6 H. & N. 828; 8 Jur. (N.S.) 233; 4 L. T. 865; 9 W. R. 697.—EX. CH.; **Smith v. Hudson** (1865) 34 L. J. Q. B. 145, 151; 6 B. & S. 431; 11 Jur. (N.S.) 622; 12 L. T. 377; 13 W. R. 683.—Q.B.

Hanson v. Armitage (1822) 5 B. & Ald. 577; 1 D. & R. 128; 24 R. R. 478.—K.B.

Applied, **Nicholle v. Plume** (1824) 1 C. & P. 272.—BEST, C.J.; *commented on*, **Harris v. Matthews** (1839) 3 W. R. 1192.—LITTLEDALE, J.; *distinguished*, **Saunders v. Topp** (1849) 18 L. J. Ex. 374; 4 Ex. 390.—EX.; *considered*, **Morton v. Tibbett** (1850) 19 L. J. Q. B. 382; 15 Q. B. 428; 14 Jur. 669.—Q.B.; *approved*, **Meredith v. Meigh**

(1853) 22 L. J. Q. B. 401; 2 El. & Bl. 364; 17 Jur. 649; 1 W. R. 368.—Q.B.; *referred to*, **Hunt v. Hecht** (1853) 8 Ex. 814; 22 L. J. Ex. 293.—EX.; *approved*, **Coombs v. Bristol, &c., Ry.** (1858) 3 H. & N. 518; 27 L. J. Ex. 401; 6 W. R. 725.—EX.

Hart v. Sattley (1814) 3 Campb. 528.—ELLENBOROUGH, C.J., *distinguished*.

Coats v. Chaplin (1842) 11 L. J. Q. B. 315; 3 Q. B. 488, 491; 2 G. & D. 552; 6 Jur. 1123.—Q.B.

Hart v. Sattley, *approved*.

Morton v. Tibbett (1850) 19 L. J. Q. B. 382; 15 Q. B. 428; 14 Jur. 669.—Q.B.

Hart v. Sattley, *held overruled*.

Meredith v. Meigh (1853) 2 El. & Bl. 364; 22 L. J. Q. B. 401; 17 Jur. 649.

CAMPBELL, C.J.—The first consideration is, whether, where no ship is named by the vendee, but the goods are ordered to be sent by sea, the mere delivery on board a ship unnamed by the vendee, and the signing by the master of that ship of a bill of lading to carry the goods for the vendee, is a sufficient acceptance and receipt. I think it is not, and that the case of *Hart v. Sattley* must be considered overruled, and not law.—p. 370.

Hart v. Sattley, *no longer law*.

Hart v. Bush (1858) 27 L. J. Q. B. 271; El. Bl. & El. 494; 4 Jur. (N.S.) 638.—Q.B.

Hart v. Bush, *discussed*.

Currie v. Anderson (1860) 29 L. J. Q. B. 87; 2 El. & El. 592; 6 Jur. (N.S.) 442; 8 W. R. 274.—Q.B.

Hart v. Bush, *applied*.

Smith v. Hudson (1865) 34 L. J. Q. B. 145; 6 B. & S. 431; 11 Jur. (N.S.) 622; 12 L. T. 377; 13 W. R. 683.—Q.B.

COCKBURN, C.J.—*Hart v. Bush* and *Hunt v. Hecht* (22 L. J. Ex. 293; 8 Ex. 814, *supra*, col. 204), are conclusive authorities to show that a delivery to the railway company was not a receipt and acceptance by the buyer.—p. 151.

Currie v. Anderson (*supra*), *referred to*.

Kibble v. Gough (1878) 38 L. T. 804, 206.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.

Elliott v. Pybus (1834) 3 L. J. C. P. 182; 10 Bing. 512; 4 M. & Scott 389.—C.P., *distinguished*.

Beaumont v. Brengeri (1847) 5 C. B. 301.—C.P.

Chaplin v. Rogers (1801) 1 East 192; 6 R. R. 249.—K.B.

Distinguished, **Blenkinsop v. Clayton** (1817) 1 Moore 328; 7 Taunt. 597; 18 R. R. 602.—C.P.; **Howe v. Palmer** (1820) 3 B. & Ald. 321.—K.B.; **Smith v. Surman** (1829) 9 B. & C. 561; 4 M. & Ry. 455; 7 L. J. (o.s.) K. B. 296.—K.B.; **Maberley v. Sheppard** (1833) 2 L. J. C. P. 181; 10 Bing. 99; 3 M. & Scott 436.—C.P.

Chaplin v. Rogers, *approved*.

Morton v. Tibbett (1850) 19 L. J. Q. B. 382; 15 Q. B. 428; 14 Jur. 669.—Q.B.

CAMPBELL, C.J. (for the Court).—In *Chaplin v. Rogers*, where a stack of hay being sold by parol to the defendant, he, without paying for it or removing it, resold a part of it to another person who took it away, and the jury found that the defendant had accepted and received the stack of hay, Lord Kenyon said, "The question was specifically

left to the jury, whether or not there was an acceptance of the hay by the defendant, and they have found that there was, which puts an end to any question of law. Here the defendant dealt with this commodity afterwards as if it were in his actual possession, for he sold part of it to another person."—p. 387.

Chaplin v. Rogers (*supra*), *applied*.
Marshall v. Green (1875) 45 L. J. C. P. 153, 155; 1 C. P. D. 35, 41; 33 L. T. 404; 24 W. R. 175.—C.P.D.

Chapman v. Morton (1843) 12 L. J. Ex. 292; 11 M. & W. 534.—EX., *discussed*.
Loder v. Kekulé (1857) 27 L. J. C. P. 27; 3 C. B. (N.S.) 128; 4 Jur. (N.S.) 93; 5 W. R. 884.—C.P.

Hodgson v. Le Bret (1808) 1 Campb. 233.—ELLENBOROUGH, C.J.

Commented on, Elliott v. Thomas (1838) 7 L. J. Ex. 129; 3 M. & W. 170.—EX.; *referred to*, Saunders v. Topp (1849) 18 L. J. Ex. 374; 4 Ex. 390.—EX.; *held overruled*, Kealy v. Tenant (1861) 13 Ir. C. L. R. 394.—Q.B. *See* Sale of Goods Act, 1893, s. 35.

Anderson v. Scott (1806) 1 Campb. 235, n.—ELLENBOROUGH, C.J., *not applied*.
Proctor v. Rixon (1826) 2 C. & P. 532; 31 R. R. 693.—BEST, C.J.

Anderson v. Scott, *questioned*.
Saunders v. Topp (1849) 4 Ex. 390; 18 L. J. Ex. 374.—EX.

ALDERSON, B.—I do not agree with *Anderson v. Scott*, which I think required fuller consideration. There the acceptance was independent of any receipt, and that is not sufficient to satisfy the statute.—p. 395.

Anderson v. Scott, *explained*.
Goodall v. Skelton (1794) 2 H. Bl. 316.—C.P., *applied*.

Boulter v. Arnott (1833) 2 L. J. Ex. 97; 1 Cr. & M. 333; 3 Tyrw. 267.—EX.

Wright v. Lawes (1801) 4 Esp. 82.—KENYON, C.J., *referred to*.

James v. Griffin (1837) 6 L. J. Ex. 241; 2 M. & W. 623.—EX.

Wright v. Lawes, *followed*.
Stevenson v. Newnham (1853) 22 L. J. C. P. 110; 13 C. B. 285; 17 Jur. 600.—EX. CH.

Harman v. Fishar (or Fisher) (1774) Cowp. 117.—K.B., *applied*.

Barnes v. Freeland (1794) 6 Term Rep. 80; 3 R. R. 125.—K.B.

Harman v. Fishar, *referred to*.
Neate v. Ball (*post*, col. 2950); Stubbins, Ex parte, Wilkinson, In re (1880) 50 L. J. Ch. 547; 17 Ch. D. 58, 62; 44 L. T. 877; 29 W. R. 653.—BACON, C.J. (affirmed, (1881).—C.A.).

Atkin v. Barwick (1718) 1 Str. 165; 10 Mod. 432; Fort. 353.—K.B.

Commented on and explained, Harman v. Fishar (*supra*); *principle applied*, Salte v. Field (1793) 5 Term Rep. 211; 2 R. R. 568.—K.B.

Atkin v. Barwick and **Salte v. Field**, *distinguished*.

Smith v. Field (1793) 5 Term Rep. 402; 2 R. R. 630.—K.B.

Atkin v. Barwick, **Salte v. Field** and **Smith v. Field**, *distinguished*.

Barnes v. Freeland (*post*, col. 2950).

Atkin v. Barwick, *commented on*.
Neate v. Ball (1801) 2 East 117; 6 R. R. 401.—K.B.

Atkin v. Barwick, *discussed*.
Salte v. Field (*supra*), *distinguished*.
Richardson v. Goss (1802) 3 B. & P. 127; 6 R. R. 727.—C.P.

Atkin v. Barwick, *applied*.
Salte v. Field and **Smith v. Field** (*supra*), *discussed*.

Bartram v. Farebrother (*post*).

Salte v. Field, *referred to*.
Guillemin, Ex parte, Oriental Bank Corporation, In re (1884) 54 L. J. Ch. 322; 28 Ch. D. 634, 640; 52 L. T. 167.—CHITTY, J.

Barnes v. Freeland (1794) 6 Term Rep. 80; 3 R. R. 125.—K.B., *principle not applied*.

Bartram v. Farebrother (1828) 4 Bing. 579; 1 M. & P. 515; 6 L. J. (o.s.) C. P. 125; 29 R. R. 639.—C.P.

Hurry v. Mangles (1808) 1 Campb. 452; 10 R. R. 727.—C.J., *distinguished*.
Miles v. Gorton (1834) 3 L. J. Ex. 155; 2 Cr. & M. 504; 4 Tyrw. 295.—EX.

Nicholson v. Bower (1858) 28 L. J. Q. B. 97; 1 El. & El. 172; 5 Jur. (N.S.) 246.—Q.B., *explained*.

Taylor v. G. E. Ry. (1901) 70 L. J. K. B. 495; [1901] 1 Q. B. 774; 84 L. T. 770; 49 W. R. 431; 6 Com. Cas. 121.

BIGHAM, J.—As to *Nicholson v. Bower*, it was an issue to try whether certain wheat was the property of the plaintiff, who was the assignee of one Pavitt, a bankrupt, or the property of the defendant, who had sold the wheat to Pavitt. Pavitt had not complied with the requirements of the statute, so that the contract of sale never was enforceable against him; and it seems to have been decided that on this ground there was no binding contract between the vendor and the vendee, and that therefore the property never legally vested in the buyer. If that is the true ground of the decision I do not think it was right; nor do I think it is in accordance with the later cases decided under the statute. The seller had sold the goods and was clearly bound by the contract; and the buyer had bought the goods, although he could not be sued for the price if he chose to insist upon the statutory defence. In such circumstances, it would not be true to say that the property had not passed. I think, however, upon a careful examination of the facts of the case, the decision may be justified on the supposition that before the assignee's title could be said to have arisen the vendor and vendee had rescinded the contract, so that the property had reverted in the former; and this appears to have been the ground upon which the judgment of Erle, J., proceeded.—p. 503.

Carter v. Toussaint (1822) 5 B. & Ald. 855; 1 D. & R. 515; 24 R. R. 589.—K.B., *considered*.

Beaumont v. Brengeri (1847) 5 C. B. 301.—C.P.; **Morton v. Tibbett** (1850) 19 L. J. Q. B. 382; 15 Q. B. 428; 14 Jur. 669.—Q.B.; **Marvin v. Wallace** (or Wallis) (1856) 25 L. J. Q. B. 369; 6 El. & Bl. 726, 735; 2 Jur. (N.S.) 689; 4 W. R. 611.—Q.B.

Carter v. Toussaint, *questioned*.
Castle v. Swarder (1861) 6 H. & N. 828; 30 L. J. Ex. 310; 8 Jur. (N.S.) 233; 4 L. T. 865;

9 W. R. 697.—EX. CH.: reversing (1860) 29 L. J. Ex. 236; 5 H. & N. 281; 1 L. T. 483.—EX. COCKBURN, C.J.—*Carter v. Toussaint* has always appeared to me a startling case.—p. 834.

Castle v. Swords.

Referred to, Hopton v. McCarthy (1882) 10 L. R. Ir. 266.—Q.B.D.: *distinguished*, Roberts. In re, Evans v. Roberts (or Thomas) (1887) 56 L. J. Ch. 952; 36 Ch. D. 196, 200; 59 L. T. 79; 85 W. R. 684; 51 J. P. 757.—KAY, J.

Tempest v. Fitzgerald (1820) 3 B. & Ald. 680; 22 R. R. 526.—K.B.

Distinguished, Studdy v. Sanders (1826) 5 B. & C. 628; 8 D. & R. 403.—K.B.; *discussed*, Elliott v. Pybus (1834) 3 L. J. C. P. 182; 10 Bing. 512; 4 M. & Scott 389.—C.P.; Morton v. Tibbett (1850) 19 L. J. Q. B. 382, 385; 15 Q. B. 428; 14 Jur. 669.—Q.B.; *applied*, Holmes v. Hoskins (1854) 9 Ex. 753; 2 W. R. 376.—EX.

Maberley v. Sheppard (1833) 2 L. J. C. P. 181; 10 Bing. 99; 3 M. & Scott 436.—C.P., *referred to*.

Edan v. Dudfield (1841) 1 Q. B. 302; 4 P. & D. 656; 5 Jur. 317.—Q.B.; Bushel v. Wheeler (1844) 8 Jur. 532; 15 Q. B. 442, n.—Q.B.

Edan v. Dudfield.

Approved and applied, Lillywhite v. Devereux (1846) 15 M. & W. 285.—EX.; *referred to*, Taylor v. Wakefield (*post*).

Marvin v. Wallis (or Wallace) (1856) 25 L. J. Q. B. 369; 6 El. & Bl. 726; 2 Jur. (N.S.) 689; 4 W. R. 611.—Q.B., *referred to*. Taylor v. Wakefield (1856) 6 El. & Bl. 705; 2 Jur. (N.S.) 1086.—Q.B.

Elmore v. Stone (1809) 1 Taunt. 458; 10 R. R. 578.—C.P., *questioned*.

Howe v. Palmer (1820) 3 B. & Ald. 321.—K.B. BAYLEY, J.—In *Elmore v. Stone*, the buyer directed expense to be incurred: and the directing of that expense was considered evidence of an acceptance on his part. * That case goes as far as any case ought to go, and I think we ought not to go one step beyond it. There is this distinction between that case and this, that there an expense was incurred on account and by direction of the buyer; here there is none. But I must say, however, that I doubt the authority of that decision.—p. 324.

Elmore v. Stone, distinguished.

Carter v. Toussaint (1822) 5 B. & Ald. 855; 1 D. & R. 515; 24 R. R. 589.—K.B.

Elmore v. Stone, held overruled.

Proctor v. Jones (1826) 2 C. & P. 532; 31 R. R. 693.—BEST, C.J.

Elmore v. Stone.

Distinguished, Smith v. Surman (1829) 9 B. & C. 561; 4 M. & Ry. 455; 7 L. J. (o.s.) K. B. 296.—K.B.; *discussed*, Wright v. Percival (1839) 8 L. J. Q. B. 258.—Q.B.; *Edan v. Dudfield* (1841) 1 Q. B. 302; 4 P. & D. 656; 5 Jur. 317.—Q.B.; *Beaumont v. Brengeri* (1847) 5 C. B. 301.—C.P.; *distinguished*, Holmes v. Hoskins (1854) 9 Ex. 753; 2 W. R. 376.—EX.; *applied*, Marvin v. Wallis (1856) 25 L. J. Q. B. 369; 6 El. & Bl. 726, 733; 2 Jur. (N.S.) 689; 4 W. R. 611.—Q.B.

Baldev v. Parker (1823) 2 B. & C. 37; 3 D. & R. 220; 1 L. J. (o.s.) K. B. 229; 26 R. R. 260.—K.B., *not applied*.

Maberley v. Sheppard (1833) 2 L. J. C. P. 181; 10 Bing. 99; 3 M. & Scott 436.—C.P.

Baldev v. Parker, referred to.

Elliott v. Thomas (1838) 7 L. J. Ex. 129; 3 M. & W. 170.—EX.

Baldev v. Parker and Elliott v. Thomas, applied.

Bigg v. Whisking (1853) 17 C. B. 195; 2 C. L. R. 617.—C.P.

Baldev v. Parker, referred to.

Sarl v. Bourdillon (1856) 26 L. J. C. P. 78; 1 C. B. (N.S.) 188; 2 Jur. (N.S.) 1208; 5 W. R. 196.—C.P.

Rhode v. Thwaites (1827) 6 B. & C. 388; 9 D. & R. 293; 5 L. J. (o.s.) K. B. 163; 30 R. R. 363.—K.B.

Distinguished, Atkinson v. Bell (1828) 8 B. & C. 277; 2 M. & Ry. 292; 6 L. J. (o.s.) K. B. 258.—K.B.; *principle applied*, Alexander v. Gardner (1835) 4 L. J. C. P. 223; 1 Bing. (N.C.) 671; 1 Scott 281, 630; 3 D. P. C. 146; 1 Hodges 147.—C.P.; *distinguished*, Beaumont v. Brengeri (1847) 5 C. B. 301.—C.P.; *referred to*, Acraman v. Morrice (1849) 19 L. J. C. P. 57; 8 C. B. 449; 14 Jur. 69.—C.P.; *Campbell v. Mersey Docks and Harbour Board* (1863) 14 C. B. (N.S.) 412; 8 L. T. 245; 11 W. R. 596.—C.P.

Rhode v. Thwaites, discussed.

Crane v. London Dock Co. (1864) 33 L. J. Q. B. 224; 5 B. & S. 313; 10 Jur. (N.S.) 984; 10 L. T. 372; 12 W. R. 745.—Q.B.

BLACKBURN, J.—In *Rhodes v. Thwaites*, HOBROLD, J., lays down what is the principle: he says, "I am of opinion that the selection of the sixteen hogsheads by the plaintiff, and the adoption of that act by the defendant, converted that which before was a mere agreement to sell into an actual sale, and the property in the sugars passed to the defendant." But that property passes by virtue of the previous agreement. It relates back to the previous contract, which was made out of market overt, because it was made in another place; and in the present case it was made out of market overt, because the goods were not there present.—p. 231.

Thompson v. Maceroni (1824) 3 B. & C. 1; 4 D. & R. 619.—K.B., *discussed*.

Elliott v. Thomas (1838) 7 L. J. Ex. 129; 3 M. & W. 170.—EX.

Holderness v. Shackles (1828) 8 B. & C. 618; 3 Man. & R. 25; D. & L. 203; 7 L. J. (o.s.) K. B. 80; 32 R. R. 496.—K.B., *applied*.

Green v. Briggs (1847) 17 L. J. Ch. 323; 6 Hare 395; 12 Jur. 326.—V.C.

Walker v. Dixon (1817) 2 Stark. 281.—ELLENBOROUGH, C.J., *nonsuit held to be set aside*.

Oxendale v. Wetherell (1829) 9 B. & C. 386; 4 Man. & R. 429; 7 L. J. (o.s.) K. B. 264.—K.B.

Walker v. Dixon, Oxendale v. Wetherell, and Waddington v. Oliver (1805) 2 B. & P. N. R. 61; 9 R. R. 614.—C.P., *referred to*.

Kingdom v. Cox (1848) 17 L. J. C. P. 155; 5 C. B. 522; 12 Jur. 336.—C.P.

Oxendale v. Wetherell, approved.

Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co. (1886) 56 L. J. C. P. 19; 12 App. Cas. 128; 56 L. T. 173; 35 W. R. 636; 6 Asp. M. C. 94.—P.C.

Champion v. Shortt (1807) 1 Campb. 53

10 R. R. 631.—ELLENBOROUGH, C.J., *approved but distinguished*.
 Tarling v. O'Riordan (1878) 2 L. R. Ir. 82.—C.A.
 Price v. Lea (1823) 1 B. & C. 156; 2 D. & R. 295.—K.B., *discussed*.
 Elliott & Thomas (1838) 7 L. J. Ex. 129; 3 M. & W. 170.—EX.
 Kent v. Huskinson (1802) 3 B. & P. 233; 6 R. R. 777.—C.P., *distinguished*.
 Anderson v. Hodgson (1818) 5 Price 630.—EX.; Jackson v. Lowe (1822) 1 Bing. 9; 7 Moore 219; 25 R. R. 567.—C.P.

3. WHEN PROPERTY PASSES.

Lindsay v. Cundy (1876) 45 L. J. Q. B. 381; 1 Q. B. D. 348; 34 L. T. 314; 24 W. R. 730.—Q.B.D.; *reversed*, (1877) 46 L. J. Q. B. 233; 2 Q. B. D. 96; 36 L. T. 345; 25 W. R. 417; 3 Cox C. C. 583.—C.A. MELLISH, L.J., BRETT and AMPHLETT, J.J.A.; *latter decision affirmed nom.* Cundy v. Lindsay (1878) 47 L. J. Q. B. 481; 3 App. Cas. 459; 38 L. T. 573; 26 W. R. 406.—H.L. (E.). CAIRNS, L.C., LORDS HATHERLEY, PENZANCE and GORDON.

Lindsay v. Cundy, not applied.

Reed, In re, Barnett, Ex parte (1876) 3 Ch. D. 123; 45 L. J. Bk. 120; 34 L. T. 664; 24 W. R. 904.

BACON, C.J.—*Lindsay v. Cundy* has no sort of application, for there the defendant was a *bona fide* purchaser of the goods from the person to whom they were sent by mistake.—p. 125.

Lindsay v. Cundy, applied.

Moyce v. Newington (1878) 48 L. J. Q. B. 125; 4 Q. B. D. 32, 36; 39 L. T. 535; 27 W. R. 319.—Q.B.D.

Lindsay v. Cundy, explained.

Reg. v. Central Criminal Court JJ. (1886) 25 L. J. M. C. 183; 17 Q. B. D. 598, 601; 55 L. T. 486; 50 J. P. 727.—COLERIDGE, C.J. and CAVE, J.; *affirmed*.—C.A. (*post*).

Lindsay v. Cundy, not applied.

Reg. v. Central Criminal Court JJ. (1886) 56 L. J. M. C. 25; 18 Q. B. D. 314, 321; 56 L. T. 352; 35 W. R. 243; 16 Cox C. C. 196; 51 J. P. 229.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Lindsay v. Cundy, discussed.

Vilmon v. Bentley (1886) 56 L. J. Q. B. 128; 18 Q. B. D. 314, 328; 56 L. T. 318; 35 W. R. 328; 51 J. P. 436.—C.A.

Lindsay v. Cundy, discussed and approved.

Vilmon v. Bentley, *affirmed*.
 Bentley v. Vilmon (1887) 57 L. J. Q. B. 18; 12 App. Cas. 471, 478; 57 L. T. 854; 36 W. R. 481; 52 J. P. 68.—H.L. (E.). *And see col. 2955.*

Reg. v. Horan (1871) Ir. R. 6 C. L. 293.—Q.B., *referred to*.

Bentley v. Vilmon (1887) 12 App. Cas. 471, 482.—H.L. (E.) (*supra*).

Cundy v. Lindsay (1878) 47 L. J. Q. B. 481; 3 App. Cas. 459; 38 L. T. 573; 26 W. R. 406.—H.L. (E.), *referred to*.

Bentley v. Vilmon (1887) 12 App. Cas. 471, 478.—H.L. (E.) (*supra*).

Cundy v. Lindsay, applied.

Babcock v. Lawson (1879) 48 L. J. Q. B. 524; 4 Q. B. D. 394, 398; 27 W. R. 866.—COCKBURN, C.J., and MELLOR, J., *affirmed* (1880) 49

L. J. Q. B. 408; 5 Q. B. D. 284; 42 L. T. 289; 27 W. R. 591.—C.A. BRAMWELL, BAGGALLAY and THESIGER, L.JJ.

Cundy v. Lindsay, principle applied.

International Society of Auctioneers and Valuers, In re, Baillie's case (1897) 67 L. J. Ch. 81; [1898] 1 Ch. 110; 77 L. T. 523; 46 W. R. 187; 4 Manson 303.

WRIGHT, J.—It seems to me that the case is within the principle of *Cundy v. Lindsay*, and that Baillie is entitled to repudiate on the ground that there was no contract between him and the company. The circumstances show that there was not a contract which was voidable on the ground of misrepresentations made to him, but something which was void *ab initio*—in other words, no contract at all. . . . The only remaining point, assuming I am right on the first point, is whether the observations in *Cundy v. Lindsay* apply in the case where the contract as here is in writing. It is said that in such a case a person cannot deny that there is a contract, but in *Cundy v. Lindsay* there appears to have been a so-called contract in writing; but whether that is so or not, in my judgment the principle of that case applies. Here there is not a contract in writing, because there never was a contract at all—a consensus *ad idem*. The so-called contract was only part of the machinery to defraud.—p. 83.

Cundy v. Lindsay, applied.

G. W. Ry. v. London and County Banking Co. (1901) 70 L. J. K. B. 915, 918; [1901] A. C. 414; 85 L. T. 152; 5 W. R. 50; 6 Com. Cas. 275.—H.L. (E.); Farquharson Brothers v. King & Co. (1902) 71 L. J. K. B. 667; [1902] A. C. 325, 337; 86 L. T. 810; 51 W. R. 94.—H.L. (E.).

Cuming v. Brown (1807—8) 1 Campb. 104;

9 East 506; 9 R. R. 608.—C.J. and K.B., *discussed*.

Bateman v. Green (1867) Ir. R. 2 C. L. 166.—Q.B.

Thompson v. Pettitt (1849) 16 L. J. Q. B. 162;

10 Q. B. 101; 11 Jur. 748.—Q.B., *applied*.
 Horsfall v. Key (1848) 17 L. J. Ex. 266; 2 Ex. 778.—EX.

Hardman v. Booth (1863) 32 L. J. Ex. 105;

1 H. & C. 803; 9 Jur. (N.S.) 81; 7 L. T. 638; 11 W. R. 239.—EX.

Followed, Fowler v. Hollins (1870) 19 W. R. 180.—Q.B.; *affirmed*, (1872) 41 L. J. Q. B. 277; L. R. 7 Q. B. 616; 27 L. T. 168; 20 W. R. 868.—EX. CH. and H.L., *post*; *referred to*, Cole v. North Western Bank (1875) 44 L. J. C. P. 233, 242; L. R. 10 C. P. 354, 373; 32 L. T. 733.—EX. CH.; *approved and followed*, Hollins v. Fowler (1875) 44 L. J. Q. B. 169; L. R. 7 H. L. 757; 33 L. T. 73.—H.L. (E.). CAIRNS, L.C., LORDS CHELMSFORD, HATHERLEY and O'HAGAN, with the Judges (affirming S.C., *supra*); *explained*, Lindsay v. Cundy (1876) 45 L. J. Q. B. 381; 1 Q. B. D. 348; 24 W. R. 730.—Q.B.D. (*reversed*, C.A., *post*); *referred to*, Arnold v. Cheque Bank (1876) 45 L. J. C. P. 562, 564; 1 C. P. D. 578, 585; 34 L. T. 729; 24 W. R. 759.—C.P.D.

Hardman v. Booth, followed.

Lindsay v. Cundy (1877) 2 Q. B. D. 96; 46 L. J. Q. B. 233; 36 L. T. 345; 25 W. R. 417; 13 Cox C. C. 583.—C.A.

MELLISH, L.J. (for self, BRETT and AMPHLETT, J.J.A.).—The Q. B. D. [*Lindsay v. Cundy*

(*supra*)] held that the action could not be maintained, on the ground that there was a sale of the handkerchiefs by the plaintiffs to Blenkarn, which could not be set aside as against the defendants, who were *bonâ fide* purchasers from Blenkarn without notice of his fraud, and that the case was not within 24 & 25 Vict. c. 96, s. 100. In giving judgment Blackburn, J., says: "The first question that arises is one of fact, were these goods, which were originally the property of the plaintiffs, Messrs. Lindsay & Co., obtained from them by fraud, so that the property passed from them under a contract, though a contract under certain circumstances liable to be avoided; or did the property never pass from the plaintiffs at all? Upon that question reliance was placed on *Hardman v. Booth*, and that case unquestionably lays down very good law. The question for us is whether the facts are the same, and whether we ought to draw the same inference from the facts that the Ct. of Ex. did in *Hardman v. Booth*. That case lays down the law, that where a person has sold goods to A.B., or has been led to believe that he has sold them to A.B., and delivered them as he supposes to A.B., and the person who has led him into that belief receives and carries off the goods and disposes of them to another—there has not been a selling to the person who fraudulently represents himself to be a servant or agent of the supposed purchaser, A.B., and he cannot confer a good title on anyone else, the property never having been vested in him." We entirely agree with this statement of the law, but we cannot agree with the conclusion which the Court below has drawn from the facts. The true result of the facts seems to us to be that Blenkarn falsely pretended that the firm writing the letters and ordering the goods was the well-known firm of Blenkiron & Sons, and that the plaintiffs believing this pretence to be true, and that they were delivering the goods to the well-known firm of Blenkiron & Sons, delivered them to Blenkarn; and if this is a correct description of the facts the case is brought directly within the rule established by *Hardman v. Booth*.—p. 99.

Hardman v. Booth, *followed.

Cundy v. Lindsay (1878) 47 L. J. Q. B. 481; 3 App. Cas. 459, 467; 38 L. T. 573; 26 W. R. 406.—H.L. (E.); affirming S.C., *supra*.

Bentley v. Vilmont (1887) 57 L. J. Q. B. 18; 12 App. Cas. 471; 57 L. T. 854; 36 W. R. 481; 52 J. P. 68.—H.L. (E.), *referred to*.

Payne v. Wilson (1895) 64 L. J. Q. B. 328; [1895] 1 Q. B. 653; 15 R. 233; 72 L. T. 110; 43 W. R. 250.—POLLOCK, B. and GRANTHAM, J.

Payne v. Wilson.

Reversed, 65 L. J. Q. B. 150; [1895] 2 Q. B. 537; 15 R. 239, n.; 73 L. T. 12; 43 W. R. 657.—C.A.

Babcock v. Lawson (1879) 48 L. J. Q. B. 524; 4 Q. B. D. 394; 27 W. R. 866.—COCKBURN, C.J. and MELLOR, J.; affirmed, (1880); 49 L. J. Q. B. 408; 5 Q. B. D. 284; 42 L. T. 289; 27 W. R. 591.—C.A. BRAMWELL, BAGGALLAY and THESIGER, L.JJ.

Babcock v. Lawson, *referred to*.

Nash v. De Freville (1900) 65 L. J. Q. B. 484; [1900] 2 Q. B. 72; 82 L. T. 612; 48 W. R. 434.

—C.A. A. L. SMITH, COLLINS and ROMER, L.JJ.; Farquharson Brothers v. King & Co. (1902) 71 L. J. K. B. 667; [1902] A. C. 325; 86 L. T. 810; 51 W. R. 94.—H.L. (E.).

Bowes v. Foster (1858) 27 L. J. Ex. 262; 2 H. & N. 779; 4 Jur. (N.S.) 95; 6 W. R. 257.—EX., *discussed*.

Lee v. Lancashire and Yorkshire Ry. (1871) L. R. 6 Ch. 527, 535; 25 L. T. 77; 19 W. R. 729.—L.JJ.

Bowes v. Foster, *applied*.

Taylor v. Bowers (1876) 46 L. J. Q. B. 39; 1 Q. B. D. 291, 298; 34 L. T. 938; 24 W. R. 499.

—C.A. JAMES and MELLISH, L.JJ., BAGGALLAY, J.A. and GROVE, J.

Mirabita v. Imperial Ottoman Bank (1878)

47 L. J. Ex. 418; 3 Ex. D. 164; 38 L. T. 597.—C.A., *principle applied*.

Dupont v. British South Africa Co. (1901) 18 Times L. R. 24.—KENNEDY, J.

Joyce v. Swann (1864) 17 C. B. (N.S.) 84.

—C.P.

Discussed, *Seagrave v. Union Marine Insurance Co.* (1866) 35 L. J. C. P. 172; L. R. 1 C. P. 305, 316; H. & R. 302; 12 Jur. (N.S.) 358; 14 L. T. 479; 14 W. R. 690.—C.P.; *applied*, *Williams v. Cohen* (1871) 25 L. T. 300, 303.—EX.; *approved*, *Anderson v. Morice* (1876) 46 L. J. C. P. 11; 1 App. Cas. 713, 742; 35 L. T. 566; 25 W. R. 14.—H.L. (E.).

Pease v. Gloahoe, The Marie Joseph (1866)

35 L. J. P. C. 66; L. R. 1 P. C. 219; 3 Moore P.C. (N.S.) 556; 12 Jur. (N.S.) 677; 15 L. T. 6; 15 W. R. 201; B. & Lush. 449.—P.C.; *reversing* 12 L. T. 236; 13 W. R. 112.—ADM., *discussed and not applied*.

Bateman v. Green (1867) Ir. R. 2 C. L. 166.

—Q.B.

Pease v. Gloahoe, The Marie Joseph, *referred to*.

The Argentina (1867) L. R. 1 A. & E. 370, 376; 16 L. T. 743.—ADM.

Pease v. Gloahoe, *discussed*.

Oakes, Ex parte, Overend Gurney & Co., In re (1867) 36 L. J. Ch. 233, 250; L. R. 3 Eq. 576, 629; 15 L. T. 652; 15 W. R. 397.—MALINS, V.-C.; affirmed nom. *Overend Gurney & Co.*, In re, *Oakes v. Turquand* (1867) 36 L. J. Ch. 949; L. R. 2 H. L. 325; 16 L. T. 808; 15 W. R. 1201.—H.L. (E.).

Moakes v. Nicolson (1865) 34 L. J. C. P.

273; 19 C. B. (N.S.) 290; 12 L. T. 573.—C.P., *discussed*.

Shepherd v. Harrison (1871) 40 L. J. Q. B. 148, 153; L. R. 5 H. L. 116, 127; L. R. 5 H. L. 116; 24 L. T. 857; 20 W. R. 1.—H.L. (E.); *Gabarrow (or Gabarron) v. Kreeft* (1875) 44 L. J. Ex. 238, 243; L. R. 10 Ex. 274, 281; 33 L. T. 365; 24 W. R. 146; 3 Asp. M. C. 36.—EX. *And see vol. i. col. 221*.

Groning v. Mendham (1816) 1 Stark. 257;

5 M. & S. 189.—K.B., *questioned*.

Allen v. Cameron (1833) 3 Tyrw. 907; 2 L. J. Ex. 263; 1 Cr. & M. 832.

BAYLEY, B.—*Poulton v. Lattimore* (1829) 9 B. & C. 259; 4 Man. & R. 208; 7 L. J. K. B. 225; 32 R. R. 673.—K.B.) seems to have shaken that case.—p. 941.

Bailey v. Culverwell (1828) 2 Man. & R. 564, 566; 8 B. & C. 448; D. & L. 176; 7 L. J. (O.S.) K. B. 19.—K.B., *questioned*.
Dixon v. Yates (1833) 5 B. & Ad. 313; 2 L. J. K. B. 198; 2 N. & M. 177; 39 R. R. 489.—K.B.
PARKE, J.—The general doctrine that the property in chattels passes by a contract of sale to a vendee without delivery is questioned in *Bailey v. Culverwell* in a note by the reporters; but I apprehend the rule is correct as confined to a bargain for a specific chattel.—p. 340.

Bailey v. Culverwell, referred to.

Meyerstein v. Barber (1866) 36 L. J. C. P. 48; L. R. 2 C. P. 38, 51.—C.P.; affirmed, (1867) 36 L. J. C. P. 289; L. R. 3 C. P.—EX. CH. and (1870) 39 L. J. C. P. 187; L. R. 4 H. L. 317; 22 L. T. 808; 18 W. R. 1041.—H.L. (E.).

WILLES, J.—Ever since the judgment of Lord Wensleydale, when Parke, J., in *Dixon v. Yates* (*supra*), it has never been doubted that by the law of the land the sale of specific goods passes the property in those goods, notwithstanding the cavil of the late learned Serjeant Manning in the well-known note to *Bailey v. Culverwell*.—p. 56.

Crawcour, Ex parte, Robertson, In re (1878)

47 L. J. Bk. 94; 9 Ch. D. 419; 39 L. T. 12; 26 W. R. 733.—C.A. JESSEL, M.R., JAMES and BRETT, L.JJ.

Crawcour v. Salter (1881) 51 L. J. Ch. 495; 18 Ch. D. 30, 47; 45 L. T. 62.—MALINS, V.-C.; affirmed, C.A. JAMES, BAGGALLAY and LUSH, L.JJ.

Crawcour v. Salter, not applied.

Brooks, Ex parte (*or* Pickering, *Ex parte*), **Fowler, In re** (1883) 23 Ch. D. 261, 266; 48 L. T. 453; 31 W. R. 833; 47 J. P. 470.—C.A. JESSEL, M.R., BAGGALLAY and LINDLEY, L.JJ.

Crawcour v. Salter, applied.

Turquand, Ex parte, Parkes, In re (1885) 54 L. J. Q. B. 242; 14 Q. B. D. 636, 638; 53 L. T. 579; 33 W. R. 437.—CAVE, J.; affirmed, C.A. SELBORNE, L.C., BRETT, M.R., and LINDLEY, L.J.

Furley (or Turley) v. Bates (1863) 33 L. J. Ex. 43; 2 H. & C. 200; 10 Jur. (N.S.) 368; 10 L. T. 35; 12 W. R. 438.—EX.; POLLOCK, C.B. and MARTIN, B.

Applied, **Kershaw v. Ogden** (1865) 34 L. J. Ex. 159; 3 H. & C. 717; 11 Jur. (N.S.) 642; 12 L. T. 573; 13 W. R. 755.—EX.; *referred to*, **Martineau v. Kitching** (1872) 41 L. J. Q. B. 227, 234; L. R. 7 Q. B. 436, 449; 26 L. T. 336; 20 W. R. 769.—Q.B.

Tarling v. Baxter (1827) 6 B. & C. 360; 9 D. & R. 272; 5 L. J. (O.S.) K. B. 164; 30 R. R. 355.—K.B., *referred to*.

Martindale v. Smith (1841) 10 L. J. Q. B. 155; 1 Q. B. 389; 1 G. & D. 1; 5 Jur. 932.—Q.B.

Gilmour v. Supple (1858) 11 Moore P. C. 551; 6 W. R. 445.—P.C., *discussed*.

Anderson v. Morice (1875) 44 L. J. C. P. 341, 348; L. R. 10 C. P. 609, 618; 32 L. T. 355; 24 W. R. 30.—EX. CH.; QUAIN, J. dissenting; affirmed.—H.L., *post*.

Gilmour v. Supple, referred to.

Anderson v. Morice (1876) 46 L. J. C. P. 11; 1 App. Cas. 713, 749; 35 L. T. 566; 25 W. R. 14.—H.L. (E.). LORDS CHELMSFORD and HATHERLEY; LORDS O'HAGAN and SELBORNE dissenting.

Falk v. Fletcher (1865) 34 L. J. C. P. 146; 18 C. B. (N.S.) 403; 11 Jur. (N.S.) 176; 13 W. R. 346.—C.P.

Discussed, **Gabarow (or Gabarron) v. Kreeft** (1875) 44 L. J. Ex. 238, 242; L. R. 10 Ex. 274, 280; 33 L. T. 365; 24 W. R. 146; 3 Asp. M. C. 36.—EX.; KELLY, C.B. dissenting; *distinguished*, **Jones v. Hough** (1879) 49 L. J. Ex. 211; 5 Ex. D. 115, 122; 42 L. T. 108; 4 Asp. M. C. 248.—C.A. COCKBURN, C.J., BRAMWELL, COTTON and THESIGER, L.JJ.; *referred to*, **Cassaboglou v. Gibb** (1883) 52 L. J. Q. B. 538; 11 Q. B. D. 797, 807; 48 L. T. 850; 32 W. R. 138.—C.A. BRETT, M.R., LINDLEY and FRY, L.JJ.

Stock v. Inglis (1882) 52 L. J. Q. B. 30; 9 Q. B. D. 708, 721; 47 L. T. 416; 31 W. R. 455; 4 Asp. M. C. 576.—FIELD, J.; *reversed*, (1884) 53 L. J. Q. B. 356; 12 Q. B. D. 564; 51 L. T. 449; 5 Asp. M. C. 294.—C.A. BRETT, M.R., BAGGALLAY and LINDLEY, L.JJ., C.A.; *affirmed nom.* **Inglis v. Stock** (1885) 54 L. J. Q. B. 582; 10 App. Cas. 263; 52 L. T. 821; 33 W. R. 877; 5 Asp. M. C. 422.—H.L. (E.). SELBORNE, L.C., LORDS BLACKBURN, WATSON and FITZGERALD.

North British and Mercantile Insurance Co.

v. Moffatt (1871) 41 L. J. C. P. 1; L. R. 7 C. P. 25; 25 L. T. 662; 20 W. R. 114.—C.P., *referred to*.

Martineau v. Kitching (1872) 41 L. J. Q. B. 227, 238; L. R. 7 Q. B. 436, 457; 26 L. T. 336; 20 W. R. 769.—Q.B.

Langton v. Waring (1865) 18 C. B. (N.S.)

315; 11 L. T. 633; 13 W. R. 347.—C.P., *referred to*.

Young v. Matthews (1866) 36 L. J. C. P. 61; L. R. 2 C. P. 127; 15 L. T. 182.—C.P.

Cunliffe v. Harrison (1851) 20 L. J. Ex.

325; 6 Ex. 903.—EX.

Approved, but distinguished, **Levy v. Green** (1857) 27 L. J. Q. B. 111; 8 El. & Bl. 573.—Q.B.; COLERIDGE and ERLE, JJ. dissenting (non suit affirmed, *post*); *applied*, **Levy v. Green** (1859) 28 L. J. Q. B. 319; 1 El. & Bl. 969; 5 Jur. (N.S.) 1245; 7 W. R. 486.—EX. CH.; *referred to*, **Boswell v. Kilborn** (1862) 15 Moore P. C. 509; 8 Jur. (N.S.) 443; 6 L. T. 79; 10 W. R. 517.—P.C.; *discussed*, **Shannon v. Barlow** (1864) 15 Ir. C. L. R. 478.—C.P.; CHRISTIAN, J., dissenting.

Aldridge v. Johnson (1857) 26 L. J. Q. B.

296; 7 El. & Bl. 885; 8 Jur. (N.S.) 913; 5 W. R. 703.—Q.B.

Discussed and applied, **Langton v. Higgins** (1859) 28 L. J. Ex. 252; 4 H. & N. 402; 7 W. R. 489.—EX.; *distinguished*, **Jenner v. Smith** (1869) L. R. 4 C. P. 270, 276.—KEATING and BRETT, JJ.

Aldridge v. Johnson and Langton v. Higgins

(*supra*), *referred to*.

Heilbutt v. Hickson (1872) 41 L. J. C. P. 228, 234; L. R. 7 C. P. 438, 450; 27 L. T. 336; 20 W. R. 1055.—C.P.

Aldridge v. Johnson and Langton v. Higgins,

explained and approved.

Anderson v. Morice (1876) 1 App. Cas. 713, 740; 46 L. J. C. P. 11; 35 L. T. 566; 25 W. R. 14.—H.L. (E.) (*see supra*, col. 2957).

LORD O'HAGAN, after discussing *Aldridge v. Johnson* and *Langton v. Higgins*, continued: It seems to me that these cases, if they were

well decided, and I see no reason to call their authority in question, go far to sustain the view of the Court of C.P. on the point I am considering. They establish that the filling of the sacks and bottles amounted to an appropriation of their contents to the persons to whom they respectively belonged. And they establish farther, that, in the case of a partial delivery, although all the goods, which are the subject of an integral contract, have not been delivered, there may, in certain circumstances, be such an appropriation of a portion as to pay the property in it. According to Lord Campbell [in *Aldridge v. Johnson*], at the moment when the barley was put into the sacks, "the property in each sackful vested," that is, there was a successive vesting, sack by sack; and whether one only, or a hundred, had been filled, the contents of each of them passed *eo instanti* to the purchaser. Bramwell, B. [in *Langton v. Higgins*] gives a reading on this decision in his own judgment, and applies it to demonstrate that "though only a portion of the oil had been put into the bottles," and "the plaintiff was not bound to take a part only," nevertheless it vested either conclusively or on the exercise of the option.—pp. 739, 740.

Woodley v. Coventry (1863) 32 L. J. Ex. 185; 2 H. & C. 164; 9 Jur. (N.S.) 548; 8 L. T. 249; 11 W. R. 599.—EX.

Applied, **Knights v. Wiffen** (1870) 40 L. J. Q. B. 51; L. R. 5 Q. B. 660, 665; 23 L. T. 610; 19 W. R. 244.—Q.B.; *referred to*, **Dixon v. Kennaway** [1900] 1 Ch. 833, 840; 69 L. J. Ch. 501; 82 L. T. 527; 7 Manson 446.—FARWELL, J.

Stedman v. Gooch (1793) 1 Esp. 3.—KENYON, C.J.; **Puckford v. Maxwell** (1794) 6 Term Rep. 52.—K.B.; and **Owenson v. Morse** (1796) 7 Term Rep. 64.—K.B., *discussed*.

Dutton v. Solomonson (1803) 3 B. & P. 582, 584; 7 R. R. 883.—C.P. *And see* **Belshaw v. Bush** (1852) 22 L. J. C. P. 24; 11 C. B. 191.—C.P.

Dutton v. Solomonson.

Not applied, **Brooke v. White** (1805) 1 B. & P. (N.R.) 330.—C.P.; *commented on*, **Anderson v. Hodgson** (1818) 5 Price 330.—EX.; *distinguished*, **Coats v. Chaplin** (1842) 11 L. J. Q. B. 315; 2 G. & D. 552; 6 Jur. 1123.—Q.B.; **Coombs v. Bristol and Exeter Ry.** (1858) 27 L. J. Ex. 401; 3 H. & N. 510, 518; 6 W. R. 725.—EX.; *referred to*, **Rugg v. Weir** (1864) 16 C. B. (N.S.) 471.—C.P.; *applied*, **Rabe v. Otto** (1903) 89 L. T. 562; 20 T. L. R. 27.—KENNEDY, J.

Fragano v. Long (1825) 4 B. & C. 219; 6 D. & R. 283; 3 L. J. (O.S.) K. B. 177.—K.B., *principle applied*.

Alexander v. Gardner (1835) 4 L. J. C. P. 223; 1 Bing. (N.C.) 671; 1 Scott 281, 630; 3 D. P. C. 146; 1 Hodges 147.—C.P.

Fragano v. Long, *referred to*.

Pearson, Ex parte, Wiltshire Iron Co., In re (1868) L. R. 3 Ch. 443, 451; 18 L. T. 40; 16 W. R. 441.—L.JJ.

Fragano v. Long, *applied*.

Castle v. Playford (1872) 41 L. J. Ex. 44; L. R. 7 Ex. 98, 100; 26 L. T. 315; 20 W. R. 440.—EX. CH.

BLACKBURN, J.—No doubt it was provided that the defendant should pay for the rice on the ship's arrival, and according to what was

delivered and paid out. And it is quite clear here, that the ship and cargo having gone to the bottom of the sea, neither of those things can come to pass. In *Fragano v. Long* and *Alexander v. Gardner* (*supra*, col. 2959) it was held that this did not matter, but that if the property did perish before the time for payment came (the time being dependant upon delivery), and the delivery was prevented by the destruction of the property, the defendant must pay a sum equivalent.—p. 46.

Fragano v. Long, *referred to*.

Anderson v. Morice (1875) 44 L. J. C. P. 341, 344; L. R. 10 C. P. 609, 613; 32 L. T. 355; 24 W. R. 30.—EX. CH.; **QUAIN, J.** dissenting; affirmed, H.L. (E.) (*supra*, col. 2958).

Harwood v. Lester (1804) 3 B. & P. 617.—C.P., *approved*.
Copeland v. Lewis (1817) 2 Stark. 33.—ELLENBOROUGH, C.J.

Anderson v. Clark (1824) 2 Bing. 20; 27 R. R. 544.—C.P., *explained and principle applied*.

Bryans v. Nix (*post*).

Bruce v. Wait (1837) 7 L. J. Ex. 17; 3 M. & W. 15.—EX., *distinguished*.
Bryans v. Nix (1839) 8 L. J. Ex. 137; 4 M. & W. 775; 1 H. & H. 480.—EX.

Bruce v. Wait and Bryans v. Nix, *distinguished*.

Evans v. Nichol (1841) 11 L. J. C. P. 6; 3 Man. & G. 614; 4 Scott (N.R.) 43; 5 Jur. 1110.—C.P.

Bryans v. Nix, *referred to*.

Gattorno v. Adams (1862) 12 C. B. (N.S.) 560.—C.P.; **Calcutta and Burmah Steam Navigation Co. v. De Mattos** (1864) 33 L. J. Q. B. 214, 219; 10 L. T. 246; 12 W. R. 560.—EX. CH.

Bryans v. Nix, *discussed*.

Pearson, Ex parte, Wiltshire Iron Co., In re (1868) L. R. 3 Ch. 443, 448; 18 L. T. 40; 16 W. R. 441.—L.JJ.

Ogle v. Atkinson (1814) 5 Taunt. 759; 1 Marsh. 323; 15 R. R. 647.—EX. CH., *referred to*.

Schotsmans v. Lancashire and Yorkshire Ry. (1865) L. R. 1 Eq. 349, 357; 35 L. J. Ch. 100; 16 L. T. 189; 15 W. R. 537.—**ROMILLY, M.R.** (reversed, (1867) 36 L. J. Ch. 361; L. R. 2 Ch. 332—L.C. and L.JJ., see *post*, col. 3034); **Gabarrow (or Gabarron) v. Kreeft** (1875) 44 L. J. Ex. 238; L. R. 10 Ex. 274, 278; 33 L. T. 365; 24 W. R. 146; 3 Asp. M. C. 36.—EX.; **KELLY, C.B.** dissenting.

Tregelles v. Sewell (1862) 7 H. & N. 574.—EX. and EX. CH., *discussed*.

Calcutta and Burmah Steam Navigation Co. v. DeMattos (1863) 32 L. J. Q. B. 322, 330; 11 W. R. 1024.—Q.B.; and (1864) 33 L. J. Q. B. 214, 220; 10 L. T. 246; 12 W. R. 560.—EX. CH.

Tregelles v. Sewell, *referred to*.

Heilbutt v. Hickson (1872) 41 L. J. C. P. 228, 234; L. R. 7 C. P. 438, 450; 27 L. T. 336; 20 W. R. 1035.—C.P.

Tregelles v. Sewell, *principle applied*.

Dupout v. British South Africa Co. (1901) 18 Times L. R. 24.—KENNEDY, J.

Calcutta and Burmah Steam Navigation Co. v. De Mattos, De Mattos v. Calcutta, &c., Co. (1864) 33 L. J. Q. B. 214; 10 L. T. 246; 12 W. R. 560.—EX. CH.; *reversing* (1863) 32 L. J. Q. B. 322, 330; 11 W. R. 1024.—Q.B., *applied*.

Dupont v. British South Africa Co. (1901) 18 Times L. R. 24.—KENNEDY, J.

Coze v. Harden (1803) 4 East 211; 1 Smith 20; 7 R. R. 576.—K.B.

Distinguished, Morison v. Gray (1824) 2 Bing. 260; 9 Moore 484; 3 L. J. (o.s.) C. P. 261; 27 R. R. 224.—C.P.; **Brandt v. Bowlby** (1831) 1 L. J. K. B. 14; 2 B. & Ad. 932, 936; 36 R. R. 796.—K.B.; *referred to*, **Seagrave v. Union Marine Insurance Co.** (1866) 35 L. J. C. P. 172; L. R. 1 C. P. 305, 315 (*post*); *discussed*, **Bateman v. Green** (1867) 1r. R. 2 C. L. 166.—Q.B.; **Shepherd v. Harrison** (1871) 40 L. J. Q. B. 148, 152; L. R. 5 H. L. 116, 126; 24 L. T. 857; 20 W. R. 1.—H.L. (E.).

Browne v. Hare (1859) 29 L. J. Ex. 6; 4 H. & N. 822; 5 Jur. (N.S.) 711; 7 W. R. 619.—EX. CH.

Referred to, **Currie v. Anderson** (1860) 29 L. J. Q. B. 87; 2 El. & El. 592; 6 Jur. (N.S.) 442; 8 W. R. 274.—Q.B.; **Green v. Sichel** (1860) 29 L. J. C. P. 213; 7 C. B. (N.S.) 747; 6 Jur. (N.S.) 827; 2 L. T. 745; 8 W. R. 663.—C.P.; *explained*, **Castle v. Sworder** (1861) 30 L. J. Ex. 310; 6 H. & N. 828; 8 Jur. (N.S.) 233; 4 L. T. 303; 9 W. R. 697.—EX.; *referred to*, **Joyce v. Swan** (1864) 17 C. B. (N.S.) 84.—C.P.; **Seagrave v. Union Marine Insurance Co.** (1866) 35 L. J. C. P. 172, 174; L. R. 1 C. P. 305, 315; H. & R. 302; 12 Jur. (N.S.) 358; 14 L. T. 479; 14 W. R. 690.—C.P.; **Heilbutt v. Hickson** (1872) 41 L. J. C. P. 228, 234; L. R. 7 C. P. 438, 450; 27 L. T. 336; 20 W. R. 1035.—C.P.; *discussed*, **Ogg v. Shuter** (1875) 44 L. J. C. P. 161; L. R. 10 C. P. 159, 164; 32 L. T. 114; 23 W. R. 319.—C.P. (*reversed*, 45 L. J. C. P. 44; 1 C. P. D. 47; 33 L. T. 492; 24 W. R. 100.—C.A.); *referred to*, **Garbarrow (or Garbarron) v. Kreeft** (1875) 44 L. J. Ex. 238; L. R. 10 Ex. 274, 284; 33 L. T. 365; 24 W. R. 146; 3 Asp. M. C. 36.—EX.; **KELLY, C.B.** dissenting.

Browne v. Hare, applied.

Inglis v. Stock (1885) 10 App. Cas. 263; 54 L. J. Q. B. 582; 52 L. T. 821; 33 W. R. 877; 5 Asp. M. C. 42.—W.L. (E.).

SELBORNE, L.C.—In the present case, I see no reason to doubt that the difficulty arising from the confusion of parcels—material only to the settlement of the amounts payable by the plaintiff to his two vendors—if not solved by consent (or by arbitration, for which each contract provided) would have been soluble by principles of law, applied to the facts and to the terms of the contract. The necessity for doing this, and the fact that it had not been done at the time of the loss, do not, in my opinion, sufficiently distinguish the case from *Browne v. Hare* and the earlier authorities to the same effect. The goods were, by the act of the vendors, separated from the bulk of all other goods belonging to them; they were shipped "free on board" in what (for that purpose) was the purchaser's ship, under two contracts so to deliver them.—p. 267.

Dixon v. Bovill (1856) 3 Macq. 1; 2 Jur. (N.S.) 933; 4 W. R. 815.—H.L. (SC.).

GRANWORTH, L.C., referred to.

Mackenzie v. Dunlop (1856) 3 Macq. 21;

2 Jur. (N.S.) 957; 41 W. R. 815.—H.L. (SC.); **Crouch v. Credit Foncier** (1873) 42 L. J. Q. B. 183; L. R. 8 Q. B. 374, 381; 29 L. T. 259; 21 W. R. 946.—Q.B.

Dixon v. Bovill, discussed.

Goodwin v. Roberts (1875) 44 L. J. Ex. 157; L. R. 10 Ex. 337, 356.—EX. CH., affirmed, *post*.

COCKBURN, C.J. (for the Court).—In *Dixon v. Bovill*, where the note was "to deliver so much iron when required to the party lodging this document with me," there was neither a promise to bearer, nor was there any proof whatever of any usage whereby such notes were dealt with as negotiable. The case has, therefore, with reference to its facts, no bearing on the present.—p. 167.

Dixon v. Bovill, referred to.

Goodwin v. Roberts (1876) 45 L. J. Ex. 748; 1 App. Cas. 476, 494; 35 L. T. 179; 24 W. R. 987.—H.L. (E.); **Bechuanaland Exploration Co. v. London Trading Bank** (1898) 67 L. J. Q. B. 986, 991; [1898] 2 Q. B. 658, 670; 79 L. T. 270.—KENNEDY, J. See "NEGOTIABLE INSTRUMENT" (*ante*, col. 1983).

Godts v. Rose (1855) 25 L. J. C. P. 61; 17 C. B. 229; 1 Jur. (N.S.) 1173; 4 W. R. 129.—C.P., *applied*.

Campbell v. Mersey Docks and Harbour Board (1863) 14 C. B. (N.S.) 412; 8 L. T. 245; 11 W. R. 596.—C.P.

Townley v. Crump (1835) 5 L. J. K. B. 14; 4 A. & E. 58; 5 N. & M. 606; 1 H. & W. 564.—K.B., *distinguished*.

Pearson v. Dawson (1858) 27 L. J. Q. B. 248; El. Bl. & El. 448; 4 Jur. (N.S.) 1015.—Q.B.

Waring v. Cox (1808) 1 Campb. 369.—ELLENBOROUGH, C.J., *distinguished*.

Morison v. Gray (1824) 2 Bing. 260; 9 Moore, 484; 3 L. J. (o.s.) C. P. 261; 27 R. R. 224.—C.P.

Waring v. Cox, referred to.

Johnston v. Orr Ewing (1882) 61 L. J. Ch. 797; 7 App. Cas. 219, 228; 46 L. T. 216; 30 W. R. 417.—H.L. (E.).

Harman v. Anderson (1809) 2 Campb. 243; 11 R. R. 706.—ELLENBOROUGH, C.J. and K.B., *discussed*.

Lucas v. Dorrien (1817) 7 Taunt. 278; 1 Moore 29; 18 R. R. 480.—C.P.

Harman v. Anderson, applied.

Hawes v. Watson (1824) 2 B. & C. 540; 4 D. & R. 22; R. & M. 6; 2 L. J. (o.s.) K. B. 83; 26 R. R. 448.—K.B.; **Swanwick v. Sothorn** (1839) 9 A. & E. 895; 1 P. & D. 648.—Q.B.

Harman v. Anderson, distinguished.

Lackington v. Atherton (1844) 13 L. J. C. P. 140; 7 Man. & G. 360; 8 Scott (N.R.) 38; 8 Jur. 406.—C.P.

Withers v. Lyss (1815) 4 Camp. 237; Holt, N. P. 18; 16 R. R. 781.—GIBBS, C.J.; and **Lucas v. Dorrien** (1817) 7 Taunt. 278; 1 Moore 29; 18 R. R. 480.—C.P., *not applied*.

Lackington v. Atherton (1844) 13 L. J. C. P. 140; 7 Man. & G. 360; 8 Scott (N.R.) 38; 8 Jur. 406.—C.P.

Stonard v. Dunkin (1810) 2 Campb. 344; 11 R. R. 724.—ELLENBOROUGH, C.J., *discussed and applied*.

Hawes v. Watson (1824) 2 B. & C. 540; 4 D. & R. 22; R. & M. 6; 2 L. J. (o.s.) K. B. 83; 26 R. R. 448.—K.B., *approved but distinguished*; Biddle v. Bond, 34 L. J. Q. B. 137; 6 B. & S. 225 (*post*).

Stonard v. Dunkin, *applied*.

Knights v. Wiffen (1870) 40 L. J. Q. B. 51; L. R. 5 Q. B. 660, 665; 23 L. T. 610; 19 W. R. 244.—Q.B.

MELLOR, J.—The facts show conclusively that upon the presentment of the [delivery] order the defendant consented to hold the barley for the plaintiff instead of Maris, and agreeing that there was a sufficient change by the plaintiff of his position in consequence, I think the observations of Lord Ellenborough, in *Stonard v. Dunkin*, that whatever the rule may be between buyer and seller, it is clear a defendant cannot say to a plaintiff, "The property is not yours," after acknowledging to hold it to his account, apply strictly to the question before us.—p. 54.

Stonard v. Dunkin, *approved and applied*.

Henderson & Co. v. Williams (1894) 64 L. J. Q. B. 308; [1895] 1 Q. B. 521, 531; 14 R. 375; 72 L. T. 98; 43 W. R. 274.—C.A. LORD HALSBURY, LINDLEY and A. L. SMITH, L.JJ.

Gillett v. Hill (1834) 3 L. J. Ex. 145; 2 Cr. & M. 530; 4 Tyrw. 290.—EX., *followed*.

Knights v. Wiffen (1870) 40 L. J. Q. B. 51, 54; L. R. 5 Q. B. 660, 666 (*supra*).

Hawes v. Watson (1824) 2 B. & C. 540; 4 D. & R. 22; R. & M. 6; 2 L. J. (o.s.) K. B. 83; 26 R. R. 448.—K.B.

Not applied, **Swanwick v. Sothorn** (1839) 9 A. & E. 895; 1 P. & D. 648.—Q.B.; *applied*, **Woodley v. Coventry** (1863) 32 L. J. Ex. 185; 2 H. & C. 164; 9 Jur. (N.S.) 548; 8 L. T. 249; 11 W. R. 599.—EX.; *approved but distinguished*, **Biddle v. Bond** (1865) 34 L. J. Q. B. 137; 6 B. & S. 225; 11 Jur. (N.S.) 425; 12 L. T. 178; 13 W. R. 561.—Q.B.; *in principle applied*, **Knights v. Wiffen** (1870) 43 L. J. Q. B. 51; L. R. 5 Q. B. 660; 23 L. T. 610; 19 W. R. 244.—Q.B.

Hawes v. Watson, *dictum approved*.

Golding, Davis & Co., Ex parte, Knight, In re (1880) 13 Ch. D. 628; 42 L. T. 270; 28 W. R. 481.—C.A.

JAMES, L.J.—The point has been the subject of decision over and over again, and the rule seems to me to have been most accurately expressed by Best, J. in *Hawes v. Watson*. He says: It appears to me, too, that if we consider the principle upon which the right of stoppage *in transitu* is founded, it cannot extend to such a case as the present. The vendee has the legal right to the goods the moment the contract is executed, but there still exists in the vendor an equitable right to stop them *in transitu*, which he may exercise at any time before the goods get actually into the possession of the vendee, provided the exercise of that right does not interfere with the rights of third persons.—p. 634.

Hawes v. Watson, *approved and applied*.

Henderson & Co. v. Williams (1894) 64 L. J. Q. B. 308; [1895] 1 Q. B. 521, 531.—C.A. (*supra*).

Hawes v. Watson, *referred to*.

Dixon v. Kennaway & Co. (1900) 69 L. J. Ch. 501; [1900] 1 Ch. 833; 82 L. T. 527; 7 Manson 446.—FARWELL, J.

Glyn, Mills & Co. v. East and West India Dock Co. 49 L. J. Q. B. 303; 5 Q. B. D. 129; 42 L. T. 90; 28 W. R. 444.—FIELD, J.; *reversed*, (1880) 50 L. J. Q. B. 62; 6 Q. B. D. 475; 43 L. T. 584.—C.A.; *latter decision affirmed*, (1882) 52 L. J. Q. B. 146; 7 App. Cas. 591; 47 L. T. 309; 31 W. R. 201; 4 Asp. M. C. 580.—H.L. (E.).

Glyn, Mills & Co. v. East and West India Dock Co., *discussed*.

Burdick v. Sewell (1883) 52 L. J. Q. B. 428; 10 Q. B. D. 363, 368; 48 L. T. 705; 31 W. R. 796; 5 Asp. M. C. 79.—FIELD, J.; (*reversed*, 53 L. J. Q. B. 399; 13 Q. B. D. 159; 51 L. T. 453; 32 W. R. 740.—C.A.; but restored H.L. (*post*)); **Sanders v. Maclean** (1883) 52 L. J. Q. B. 481; 11 Q. B. D. 327, 344; 49 L. T. 462; 31 W. R. 698; 5 Asp. M. C. 160.—C.A. BRETT, M.R., COTTON and BOWEN, L.JJ.; **Sewell v. Burdick** (1884) 54 L. J. Q. B. 126; 10 App. Cas. 74, 78; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.).

Glyn, Mills & Co. v. East and West India Dock Co., *referred to*.

Leduc v. Ward (1888) 57 L. J. Q. B. 379; 20 Q. B. D. 475, 480; 58 L. T. 908; 36 W. R. 537; 6 Asp. M. C. 290.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Zwinger v. Samuda (1817) 7 Taunt. 265; 1

Moore 12; Holt N. P. 395; 18 R. R. 476.

—C.P., *referred to*.

Henderson & Co. v. Williams (1894) 64 L. J. Ch. 308; [1895] 1 Q. B. 521; 14 R. 375; 72 L. T. 98; 43 W. R. 274.—C.A.

Spear v. Travers (1815) 4 Campb. 251.—GIBBS, C.J., *discussed*.

Lucas v. Dorrien (1817) 7 Taunt. 278; 1 Moore 29; 18 R. R. 480.—C.P.

Knights v. Wiffen (1870) 40 L. J. Q. B. 51; L. R. 5 Q. B. 660; 23 L. T. 610; 19 W. R. 244.—Q.B., *discussed*.

Simm v. Anglo-American Telegraph Co. (1879) 49 L. J. Q. B. 392; 5 Q. B. D. 188, 204; 42 L. T. 37; 28 W. R. 290; 44 J. P. 280.—C.A.; **Kingston-upon-Hull Corporation v. Harding** (1892) 62 L. J. Q. B. 55; [1892] 2 Q. B. 494; 4 R. 7; 67 L. T. 539; 41 W. R. 19; 57 J. P. 85.—C.A.; **Foster v. Tyne Pontoon and Dry Docks Co.** (1893) 63 L. J. Q. B. 50, 55.—COLLINS, J.

Knights v. Wiffen, *applied*.

Henderson & Co. v. Williams (1894) 64 L. J. Ch. 308; [1895] 1 Q. B. 521, 531.—C.A. (*supra*).

Knights v. Wiffen, *adopted*.

Dixon v. Kennaway & Co. (1900) 69 L. J. Ch. 501; [1900] 1 Ch. 833; 82 L. T. 527; 7 Manson 446.

FARWELL, J.—The proposition which is advanced in *Knights v. Wiffen* and referred to in *Foster v. Tyne Pontoon and Dry Docks Co.* (*supra*) comes, I think, to this—if the broker is insolvent at the date of action brought, then it lies on the defendant to show that no money ever could have been recovered against him, and that consequently the plaintiff has not suffered by resting on his position. I think that is what Blackburn, J., meant in *Knights v. Wiffen* when he said, "If the plaintiff had been met by a refusal on the part of the defendant, he could

have gone to Maris"—the bankrupt—"and have demanded back his money; very likely he might not have derived much benefit if he had done so, but he had a right to do it." Collins, J., in *Foster v. Tyne Pontoon, &c. Co.*, referring to Blackburn, J.'s decision, says: "No doubt in *Knights v. Wiffen* it was assumed that there was prejudice to the plaintiff, though no evidence appears to have been given at the trial as to the solvency of the plaintiff's vendor at the date of the representation; but I think that this must be treated as an inference of fact, and not of law." As I understand that, he meant that the onus of proof to the contrary must have rested on the defendant.—p. 505.

Knights v. Wiffen (*supra*), *applied*.

Monarch Motor Car Co. v. Pease (1903) 19 Times L. R. 148.—WALTON, J.

Whitehouse v. Frost (1810) 12 East 614; 11 R. R. 491.—K.B.

Distinguished, *Wallace v. Breeds* (1811) 13 East 522; 1 Rose 109; 12 R. R. 423.—K.B.; *questioned*, *Austen v. Craven* (1811) 4 Taunt. 644; 1 Marsh. 4, n.; 13 R. R. 714.—C.P.

Whitehouse v. Frost, *referred to*.

Austen v. Craven, *followed*.

White v. Wilks (1813) 5 Taunt. 176; 1 Marsh. 2; 14 R. R. 735.—C.P.

HEATH, J.—We do not pretend to reconcile *Austen v. Craven* with *Whitehouse v. Frost*; it would be impossible so to do; and unless the plaintiff can overthrow that case, it is impossible to grant a new trial here.—p. 179.

Whitehouse v. Frost, *distinguished*.

Busk v. Davis (1814) 2 M. & S. 397; 1 Marsh. 258, n.; 5 Taunt. 622, n.; 15 R. R. 288.—K.B.

Wallace v. Breeds (1811) 13 East 522; 1 Rose 109; 12 R. R. 423.—K.B.

Applied, *Busk v. Davis* (1814) 2 M. & S. 397 (*post*); *discussed*, *Gilmour v. Supple* (1858) 11 Moore P. C. 551; 6 W. R. 445.—P.C.

Busk v. Davis (1814) 2 M. & S. 397; 1 Marsh. 258, n.; 5 Taunt. 622, n.; 15 R. R. 288.—K.B.

Applied, *Shepley v. Davis* (1814) 5 Taunt. 617; 1 Marsh. 252; 15 R. R. 598.—C.P.; *referred to*, *Swanwick v. Sothern* (*post*); *Acraman v. Morrice* (*post*); *Boswell v. Kilborn* (1862) 15 Moore P. C. 309; 8 Jur. (N.S.) 443; 6 L. T. 79; 10 W. R. 517.—P.C.

Shepley v. Davis, *referred to*.

Swanwick v. Sothern (1839) 9 A. & E. 895; 1 P. & D. 648.—Q.B.

Shepley v. Davis and White v. Wilks (1813) 5 Taunt. 176; 1 Marsh. 2; 14 R. R. 735.—K.B., *referred to*.

Acraman v. Morrice (1849) 19 L. J. C. P. 57; 8 C. B. 449; 14 Jur. 69.—C.P.

Swanwick v. Sothern (*supra*), *referred to*.

Acraman v. Morrice (*supra*); *Gilmour v. Supple* (1858) 11 Moore P. C. 551; 6 W. R. 445.—P.C.

Rugg v. Minett (1809) 11 East 210; 10 R. R. 475.—K.B.

Referred to, *Busk v. Davis* (1814) 2 M. & S. 397; 1 Marsh. 258, n.; 5 Taunt. 622, n.; 15 R. R. 288.—K.B.; *distinguished*, *Tansley v. Turner* (1835) 4 L. J. C. P. 272; 2 Scott 238; 2 Bing. (N.C.) 151; 1 Hodges, 267.—C.P.; *principle*

applied, *Acraman v. Morrice* (1849) 19 L. J. C. P. 57; 8 C. B. 449; 14 Jur. 69.—C.P.; *considered*, *Gilmour v. Supple* (1858) 11 Moore P. C. 551; 6 W. R. 445.—P.C.; *referred to*, *Campbell v. Mersey Docks and Harbour Board* (1863) 14 C. B. (N.S.) 412; 8 L. T. 245; 11 W. R. 596.—C.P.

Rugg v. Minett and Zagury v. Furnell (1809) 2 Campb. 240; 11 R. R. 704.—

ELLENBOROUGH, C.J., *principle explained*.

Furley (or Turley) v. Bates (1863) 33 L. J. Ex. 43; 2 H. & C. 200, 210; 10 Jur. (N.S.) 368; 10 L. T. 35; 12 W. R. 438.—EX.

CHANNELL, B. (for the Court).—In *Hanson v. Meyer* (6 East 614; *see post*), the weighing was to precede the delivery, and was a condition precedent to the purchaser's right to take possession and to a complete present right of property. . . . In *Rugg v. Minett* a duty remained to be performed by the sellers, and Lord Ellenborough stated the test to be, whether everything had been done by the sellers which lay upon them to perform in order to put the goods in a deliverable state; and Bayley, J., in effect, adopted the same test. *Zagury v. Furnell* is an authority to the same effect. There it was the duty of the seller to count the skins in each bale, and the price was a certain sum per dozen skins.—p. 46.

Rugg v. Minett, *referred to*.

Anderson v. Morrice (1876) 46 L. J. C. P. 11; 1 App. Cas. 713, 749; 35 L. T. 566; 25 W. R. 14.—H.L. (E.). LORDS O'HAGAN and SELBORNE dissenting.

Rugg v. Minett, *not applied*.

Elphick v. Barnes (1880) 5 C. P. D. 321; 49 L. J. C. P. 698; 29 W. R. 131; 44 J. P. 651.

DENMAN, J.—*Rugg v. Minett* . . . does not appear to me to apply, because that was not a case in which the buyer of the goods which were destroyed had any option as to whether he should become the purchaser or not, but, at the time of the destruction of the goods, he had by virtue of the bargain and of what had passed become the absolute owner of the goods in respect of which he was held liable.—p. 324.

Hanson v. Meyer (1805) 6 East 614; 2 Smith 670; 8 R. R. 572.—K.B.

Applied, *Rugg v. Minett* (1809) 11 East 210; 10 R. R. 475.—K.B.; *distinguished*, *Stoveld v. Hughes* (1811) 14 East 308; 12 R. R. 528.—K.B.; *Hawes v. Watson* (1824) 2 B. & C. 540; 4 D. & R. 22; R. & M. 6; 2 L. J. (O.S.) K. B. 83; 26 R. R. 448.—K.B.; *applied*, *Simmons v. Swift* (1826) 5 B. & C. 857; 8 D. & R. 693; 5 L. J. (O.S.) K. B. 10; 29 R. R. 438.—K.B.; *distinguished*, *Tansley v. Turner* (1835) 4 L. J. C. P. 272; 2 Bing. (N.C.) 161; 2 Scott 238; 1 Hodges 267.—C.P.; *referred to*, *Swanwick v. Sothern* (1839) 9 A. & E. 895; 1 P. & D. 648.—Q.B.; *Acraman v. Morrice* (1849) 19 L. J. C. P. 57; 8 C. B. 449; 14 Jur. 69.—C.P.; *discussed*, *Gilmour v. Supple* (1858) 11 Moore P. C. 551; 6 W. R. 445.—P.C.; *principle explained*, *Furley (or Turley) v. Bates* (1863) 33 L. J. Ex. 43, 46; 2 H. & C. 200, 210.—EX. (*see supra*); *referred to*, *Campbell v. Mersey Docks and Harbour Board* (1863) 14 C. B. (N.S.) 412; 8 L. T. 245; 11 W. R. 596.—C.P.; *Chalmers, Ex parte, Edwards, In re* (1873) L. R. 8 Ch. 289, 291; 42 L. J. Bk. 37; 28 L. T. 325; 21 W. R. 349.—SELBORNE,

L.C., JAMES and MELLISH, L.J.J.; *distinguished*. Catling, Ex parte, Chadwick, In re (1873) 29 L. T. 431.—BACON, C.J.

Simmons v. Swift (1826) 5 B. & C. 857; 8 D. & R. 693; 5 L. J. (O.S.) K. B. 10; 29 R. R. 438.—K.B.

Approved, Alexander v. Gardner (1835) 4 L. J. C. P. 223; 1 Bing. (N.C.) 671; 1 Scott 281, 630; 3 D. P. C. 146; 1 Hodges 147.—C.P.; *distinguished*, Scott v. England (1844) 14 L. J. Q. B. 43; 2 D. & L. 520; 9 Jur. 87.—PATTESON, J.; *referred to*, Logan v. Le Mesurier (1847) 11 Moore P. C. 116; 11 Jur. 1091.—P.C.; *distinguished*, Gilmore v. Supple (1858) 11 Moore P. C. 551; 6 W. R. 445.—P.C.; *principle explained*, Furley (or Turley) v. Bates (1863) 33 L. J. Ex. 43, 46; 2 H. & C. 200, 210; 10 Jur. (N.S.) 368; 10 L. T. 35; 12 W. R. 438.—EX.

Simmons v. Swift, *distinguished*.

Martineau v. Kitching (1872) 41 L. J. Q. B. 227; L. R. 7 Q. B. 486, 450; 26 L. T. 336; 20 W. R. 769.—Q.B.

COCKBURN, C.J.—The case is clearly distinguishable from *Simmons v. Swift*. Here, the price is agreed on between the parties provisionally on their estimate of the quantity the “fillings” contain, and how can it be said, after the estimated price has been paid at “prompt,” that because the exact sum has to be afterwards ascertained, the property is to remain in the seller, and not to be transferred to the buyer?—p. 235.

Logan v. Le Mesurier (1847) 6 Moore P. C. 116; 11 Jur. 1091.—P.C.

Distinguished, Gilmore v. Supple (1858) 11 Moore P. C. 551; 6 W. R. 445.—P.C.; *approved*, Langton v. Higgins (1859) 28 L. J. Ex. 252; 4 H. & N. 402; 7 W. R. 489.—EX.; *applied*, Furley (or Turley) v. Bates (1863) 33 L. J. Ex. 43; 2 H. & C. 200, 211; 10 Jur. (N.S.) 368; 10 L. T. 35; 12 W. R. 438.—EX.

4. WARRANTIES AND SALES BY SAMPLE.

Dickenson v. Naul (1833) 4 B. & Ad. 638; 1 N. & M. 721.—K.B., *principle applied*.

Allen v. Hopkins (1844) 13 L. J. Ex. 316; 13 M. & W. 94.—EX.

Allen v. Hopkins, *not applied*.

Morley v. Attenborough (*post*). *And see ante*, col. 2488.

Morley v. Attenborough (1849) 18 L. J. Ex. 148; 3 Ex. 500; 13 Jur. 282.—EX., *considered*.

Sims (or Simms) v. Marryat (1851) 17 Q. B. 281; 20 L. J. Q. B. 454.

CAMPBELL, C.J.—I do not think it necessary to inquire what the law would be in the absence of an express warranty. On that point the law is not in a satisfactory state. The decision in *Morley v. Attenborough* was that a pawnbroker, selling an unredeemed pledge as such, did not warrant the title of the pawnor. Of that decision I approve: but a great many questions, beyond the mere decision, arise on the very able judgment of the learned Baron in that case, which I fear must remain open to controversy. It may be that the learned Baron is correct in saying that, on a sale of personal property, the maxim

of *caveat emptor* does by the law of England apply: but if so there are many exceptions stated in the judgment which well-nigh eat up the rule. Executory contracts are said to be excepted: so are sales in retail shops, or where there is a usage of trade: so that there may be difficulty in finding cases to which the rule would practically apply.—p. 290.

Morley v. Attenborough.

Referred to, Hall v. Conder (1857) 2 C. B. (N.S.) 22, 40 (*post*, col. 2978): *not applied*, Buddle v. Green (1857) 27 L. J. Ex. 33.—EX.; *referred to*, Emmerton v. Mathews (1862) 31 L. J. Ex. 139; 7 H. & N. 586; 8 Jur. (N.S.) 61; 5 L. T. 681; 10 W. R. 346.—EX.; *explained*, Eichholz (or Eicholtz) v. Bannister (1864) 34 L. J. C. P. 105; 17 C. B. (N.S.) 708; 11 Jur. (N.S.) 15; 12 L. T. 76; 13 W. R. 96.—C.P.

Morley v. Attenborough, *applied*.

Eichholz (or Eicholtz) v. Bannister, *not applied*.

Chapman v. Speller (1850) 19 L. J. Q. B. 239; 14 Q. B. 621; 14 Jur. 652.—Q.B., *referred to*.

Bagueley v. Hawley (1867) 36 L. J. C. P. 328; L. R. 2 C. P. 625; 17 L. T. 116.—C.P.; WILLES, J. dissenting.

Morley v. Attenborough, *discussed and principle applied*.

Eichholz (or Eicholtz) v. Bannister, *not applied*.

Chapman v. Speller, *explained*.

Sims (or Simms) v. Marryat (1851) 17 Q. B. 281; 20 L. J. Q. B. 454.—Q.B., *referred to*. Dorab Ally Khan v. Abdool Azceez (1878) L. R. 5 Ind. App. 116.—P.C.

SIR J. COLVILLE (for the P.C.).—The law of England as to implied warranty of title in chattels sold was until lately, if it is not still, in some uncertainty. The more modern cases are collected by Mr. Benjamin in his work on Sales, 2nd Ed., pp. 511 *et seq.* In *Sims v. Marryat*, Lord Campbell, when commenting on Parke, B.'s judgment in *Morley v. Attenborough*, after saying that the law was not in a satisfactory state, observed [*see extract, supra*, col. 2967]. One of the latest expositions of the law on this point is to be found in *Eichholz v. Bannister*, which was decided in 1864. In that case Erle, C.J., is reported to have said: “I decide, in accordance with the current of authorities, that if the vendor of a chattel at the time of the sale either by words affirms that he is the owner, or by his conduct gives the purchaser to understand that he is such owner, then it forms part of the contract, and if it turns out in fact that he is not the owner the consideration fails, and the money so paid by the purchaser can be recovered back.” This passage, it is to be observed, although contained in the report in the Law Journal, is not to be found, *tutidem verbis*, in the regular report. The actual decision, however, in which all the judges concurred, was that on the sale of goods in an open shop or warehouse there is an implied warranty on the part of the seller that he is the owner of the goods, and if it turns out otherwise the buyer may recover back the price as money paid as on a consideration that has failed. A rule of this kind cannot, of course, be applied to a sale of goods by the sheriff under a *fi. fa.*, because what the sheriff professes to sell is only the right, title, and interest, whatever that may

be, of the judgment debtor, and this was the express ground of the decision in *Chapman v. Speller* where the case is treated as an exception to the general rule. It would seem, however, that, even according to the principles laid down in *Morley v. Attenborough*, which, of the modern cases, is most favourable to the application of the maxim *cuveat emptor*, the sheriff may reasonably be held to undertake by his conduct that he is acting within his jurisdiction. In that case, though it was decided that on a sale by a pawnbroker of an article pawned with him as an unredeemed pledge there is no implied warranty of the pawnor's title, the judgment of Parke, B. seems to assume that the pawnbroker does warrant that the article has been pledged with him, and has become irredeemable. The learned judge says: "In our judgment it appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking anything more than that the subject of sale is a pledge, and irredeemable, and that he is not cognizant of any defect of title to it." So, too, it may be inferred from *Hall v. Conder* (26 L. J. C. P. 138; 2 C. B. (N.S.) 22, see *post*, col. 2978) that although upon the sale of a patent there is no implied warranty that the patent is valid and indefeasible, it would be reasonable to hold that there is an implied warranty that letters patent for the alleged invention have been regularly issued under the Great Seal. Their lordships think that upon a similar principle the sheriff may be held to undertake by his conduct that he has seized and put up for sale the property sold in the exercise of his jurisdiction; although when he has jurisdiction he does not in any way warrant that the judgment debtor has a good title to it, or guarantee that the purchaser shall not be turned out of possession by some person other than the judgment debtor.—p. 126.

Morley v. Attenborough and Eichholz v. Bannister (*supra*, col. 2968), *referred to*.
Wood v. Baxter (1883) 49 L. T. 45.—W. WILLIAMS and A. L. SMITH, JJ.

Morley v. Attenborough and Eichholz v. Bannister, *applied*.
Raphael & Sons v. Burt & Co. (1884) 1 Cab. & E. 325.

STEPHEN, J. [approving statement of law in Benjamin on Sales, Bk. iv. Pt. ii. cap. i. sec. 2].

Eichholz v. Bannister, *applied*.
Reg. v. Sampson (1885) 52 L. T. 772; 49 J. P. 807.—C.C.R. See 56 & 57 Vict. c. 71, ss. 11 (1) (c); 12 (1); 55.

Johnson v. Raylton (1881) 50 L. J. Q. B. 753; 7 Q. B. D. 438; 45 L. T. 374.—C.A.
BRETT and COTTON, L.J.J.; BRAMWELL, L.J. *dissenting on one point; adopted*.
Starey v. Chilworth Gunpowder Co. (1889) 59 L. J. M. C. 13; 24 Q. B. D. 90, 95; 62 L. T. 73; 38 W. R. 204; 54 J. P. 436; 17 Cox C. C. 55.—COLERIDGE, C.J. and MATHEW, J. See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14 (b).

Power v. Wells (1778) Cowper 818; 1 Dougl. 24, n.—K.B.

Referred to, **Weston v. Downes** (1778) 1 Dougl. 23.—K.B.; *applied*, **Payne v. Whale** (1806) 7 East 274; 3 Smith 130.—K.B.; *referred to*, **Gompertz v. Denton** (1832) 2 L. J. Ex. 82; 1 Cr. & M. 207; 3 Tyrw. 233; 1 D. P. C. 623.—K.B.

Powell v. Edmunds (1810) 12 East 6; 11 R. R. 316.—K.B., *distinguished*.
Brett v. Clowser (1880) 5 C. P. D. 376, 385.—DENMAN, J.

Laing v. Fidgeon (1815) 4 Campb. 169; 16 R. R. 589.—GIBBS, C.J. *affirmed*, 6 Taunt. 108.—C.P.

Principle applied, **Jones v. Bright** (1829) 5 Bing. 533; 3 M. & P. 155; 7 L. J. (O.S.) C. P. 213; 30 R. R. 728.—C.P.; *referred to*, **Jones v. Just** (1868) 37 L. J. Q. B. 89; L. R. 3 Q. B. 197, 203; 9 B. & S. 141; 18 L. T. 208; 16 W. R. 643.—Q.B.; **Randall v. Newson** (1877) 46 L. J. Q. B. 259; 2 Q. B. D. 102, 106; 36 L. T. 164; 25 W. R. 313.—C.A. KELLY, C.B., MELLISH, L.J., BRETT and AMPHLETT, J.J.A.; **Wallis v. Russell** [1902] 2 Ir. R. 585, 605, 619.—C.A. (see *post*, col. 2986).

Turner v. Mucklow (1862) 8 Jur. (N.S.) 870; 6 L. T. 690; 10 W. R. 668.—EX.

Distinguished, **Jones v. Just** (1868) 37 L. J. Q. B. 89, 94; L. R. 3 Q. B. 197, 205 (*supra*); *referred to*, **Wallis v. Russell** [1902] 2 Ir. R. 585, 620.—C.A. ASHBORNE, L.C., FITZGIBBON and HOLMES, L.J.J.

Bigge v. Parkinson (1862) 31 L. J. Ex. 301; 7 H. & N. 955; 8 Jur. (N.S.) 1014; 7 L. T. 92; 10 W. R. 349.—EX. CH.

Referred to, **Jones v. Just** (1868) 37 L. J. Q. B. 89, 94; L. R. 3 Q. B. 197, 203 (*supra*); **Mody v. Gregson** (1868) 38 L. J. Ex. 12, 14; L. R. 4 Ex. 49, 53; 19 L. T. 458; 17 W. R. 176.—EX. CH.; *not applied*, **Readhead v. Midland Railway** (1869) 38 L. J. Q. B. 169, 173; L. R. 4 Q. B. 379, 386; 9 B. & S. 519; 20 L. T. 628; 17 W. R. 737.—EX. CH.; *applied*, **Beer v. Walker** (1877) 46 L. J. C. P. 677, 679; 37 L. T. 278; 25 W. R. 880.—C.P.; *distinguished*, **McClelland v. Stewart** (1883) 12 L. R. Ir. 125.—DOWSE, B. and ANDREWS, J.; *referred to*, **Wallis v. Russell** (1901—2) [1902] 2 K. B. 585, 594, 617.—PALLES, C.B. and ANDREWS, J.; *apd* C.A.

Josling v. Kingsford (1863) 32 L. J. C. P. 94; 13 C. B. (N.S.) 447; 9 Jur. (N.S.) 947; 7 L. T. 790; 11 W. R. 377.—C.P., *referred to*.
Jones v. Just (1868) 37 L. J. Q. B. 89, 94; L. R. 3 Q. B. 197, 204 (*supra*); *discussed*, **Mody v. Gregson** (1868) 38 L. J. Ex. 12, 15; L. R. 4 Ex. 49, 56 (*supra*); **Randall v. Newson** (1877) 46 L. J. Q. B. 259; 2 Q. B. D. 102, 108; 36 L. T. 164; 25 W. R. 313.—C.A.

Josling v. Kingsford, *applied*.
Rook v. Hopley (1878) 47 L. J. M. C. 118; 3 Ex. D. 209, 212; 38 L. T. 649; 26 W. R. 663.—KELLY, C.B. and POLLOCK, B.

Jones v. Just (1868) 37 L. J. Q. B. 89; L. R. 3 Q. B. 197; 9 B. & S. 141; 18 L. T. 208; 16 W. R. 643.—Q.B.

Referred to, **Mody v. Gregson** (1868) 38 L. J. Ex. 12, 13; L. R. 4 Ex. 49, 52 (*supra*); **Randall v. Newson** (1877) 46 L. J. Q. B. 259; 2 Q. B. D. 102, 109 (*supra*); *not applied*, **Wilson v. Finch-Hatton** (1877) 46 L. J. Ex. 489; 2 Ex. D. 336, 344; 36 L. T. 473; 25 W. R. 537.—EX. D.; *applied*, **Smith v. Baker** (1878) 40 L. T. 261.—GROVE and LOPES, J.J.; **Wilson v. Dunville** (1879) 4 L. R. Ir. 249.—EX. D.; **Johnson v. Raylton** (1881) 50 L. J. Q. B. 753; 7 Q. B. D. 438, 450; 45 L. T. 375.—C.A. BRETT and COTTON, L.J.J.; BRAMWELL, L.J. *dissenting*.

Jones v. Just, discussed.

Drummond v. Van Ingen (1887) 12 App. Cas. 284; 56 L. J. Q. B. 563; 57 L. T. 1; 36 W. R. 20.—H.L. (E.). EARL OF SELBORNE, LORDS HERSCHELL and MACNAGHTEN; affirming C.A. ESHER, M.R. and FRY, L.J.

LORD HERSCHELL.—It was laid down in *Jones v. Bright* (*post*, col. 2973), that where goods are ordered of a manufacturer for a particular purpose, he implied by warrants that the goods he supplies are fit for that purpose. This view in law has been constantly acted upon from the time of that decision. . . . It is equally well settled that upon a sale of goods of a specified description, which the purchaser has no opportunity of examining before the sale, the goods must not only answer the specific description, but must be merchantable under that description. This doctrine was laid down in *Jones v. Just*, where all previous authorities on the point were reviewed. In *Mody v. Gregson* (*see post*, col. 2980) the decision in *Jones v. Just* was approved of and acted upon, and it was further held that the implied warranty that the goods supplied are merchantable was not absolutely excluded by the fact that the goods were sold by sample, and that the bulk precisely corresponded with it, but was only excluded as regards those matters which the purchaser might, by due diligence in the use of all ordinary and usual means, have ascertained from an examination of the sample. I think the law enunciated in these cases is sound and not open to doubt.—p. 290.

Jones v. Just, not applied.**Drummond v. Van Ingen, discussed.**

Jones v. Padgett (1890) 24 Q. B. D. 650; 59 L. J. Q. B. 261; 62 L. T. 934; 38 W. R. 782.

COLERIDGE, C.J.—There is no doubt that if a manufacturer sells an article which he knows is bought for a particular purpose, he impliedly warrants that it is fit for that particular purpose. That is a principle which was established some sixty years ago in *Jones v. Bright* (*post*, col. 2973), and has been acted upon ever since. But the present case is not within that rule, because nothing was mentioned to the seller as to the particular purpose for which this cloth was bought, and there was nothing to fix him with knowledge of that purpose. . . . But then it is said that *Drummond v. Van Ingen* in the H.L. carries the law further than *Jones v. Bright*. In my opinion that is not so. There was no intention on the part of the Lords to extend the old rule. Lord Macnaghten expressly said that he did not go beyond it; so also did Lord Selborne. And Lord Herschell, on whose judgment special reliance has been placed, was particularly careful to explain that he did not intend to carry the doctrine farther.—p. 652.

ESHER, M.R.—Then is there any authority which establishes that where goods are ordered by a woollen merchant of a cloth manufacturer the latter must be taken to know that they may be ordered to be sold to tailors? The case referred to in the H.L. is no authority for such a proposition, for there the goods were ordered under the designation of "coatings," which necessarily imported that they were to be made up into coats, and therefore the facts of that case came within the precise terms of the fourth rule in *Jones v. Just*. . . . The Lords decided that case on the ground that it came within the fourth proposition in *Jones v. Just*, which proposition

they held to be applicable to a case in which the goods were bought by sample. But here there is no evidence to bring the case within that proposition.—p. 655.

Jones v. Just, considered.**Drummond v. Van Ingen, discussed and applied.**

Wallis v. Russell (1901—2) [1902] 2 Ir. R. 585, 593, 603.—K.B.D. and C.A.

Randall v. Newson (1877) 46 L. J. Q. B. 259; 2 Q. B. D. 102; 36 L. T. 164; 25 W. R. 313.—C.A.; reversing (1876) 45 L. J. Q. B. 364; 34 L. T. 327.—Q.B.D., applied.

Smith v. Baker (1878) 40 L. T. 261.—GROVES and LOPES, JJ.

Randall v. Newson, referred to.

Hyman v. Nye (1881) 6 Q. B. D. 685, 687; 44 L. T. 919; 45 J. P. 554.—LINDLEY and MATHEW, JJ.

Randall v. Newson, considered.

Wallis v. Russell [1902] 2 Ir. R. 585.—C.A. FITZGIBBON, L.J.—*Randall v. Newson* was the case of a carriage pole, and the Ex. Ch., reversed the Q.B. which had applied between buyer and seller the principle which *Readhead's Case* (38 L. J. Q. B. 169; L. R. 4 Q. B. 379, *see ante*, col. 2667) had laid down for carrier and passenger. Brett, L.J., held the seller liable for a defect which "no care or skill could discover," on the general principle that, if the subject-matter of a bargain of purchase and sale be a commercial commodity, the undertaking is that the thing delivered "shall be that commodity, saleable or merchantable."—p. 620.

Hyman v. Nye (1881) 6 Q. B. D. 685; 44 L. T. 919; 45 J. P. 554.—LINDLEY and MATHEW, JJ., referred to.

Robertson v. Amazon Tug and Lighterage Co. (1881) 51 L. J. Q. B. 68; 7 Q. B. D. 598, 604; 46 L. T. 146; 30 W. R. 308; 4 Asp. M. C. 496.—C.A. BRAMWELL, L.J. dissenting; Burrell v. Tuohy [1898] 2 Ir. R. 291, 294.—Q.B.D.

Young v. Cole (1837) 6 L. J. C. P. 201; 3 Bing. (N.C.) 724; 4 Scott 489; 3 Hodges 126.—C.P., followed.

Gompertz v. Bartlett (1853) 23 L. J. Q. B. 65; 2 El. & Bl. 849, 854; 2 C. L. R. 395; 18 Jur. 266; 2 W. R. 43.—Q.B.; *Gurney v. Womersley* (1854) 24 L. J. Q. B. 46; 4 El. & Bl. 133; 3 C. L. R. 3; 1 Jur. (N.S.) 328.—Q.B.

Young v. Cole, discussed and not applied.

Hall v. Conder (1857) 26 L. J. C. P. 188; 2 C. B. (N.S.) 22, 42; 3 Jur. (N.S.) 366.—EX.; affirmed, 26 L. J. C. P. 288; 2 C. B. (N.S.) 53; 3 Jur. (N.S.) 963; 5 W. R. 742.—EX. CH.

Young v. Cole, distinguished.

Raphael & Sons v. Burt & Co. (1884) 1 Cab. & E. 325, 328.—STEPHEN, J. (*see post*, col. 2973).

Gompertz v. Bartlett (supra).

Followed, *Gurney v. Womersley* (1854) 4 El. & Bl. 133, 142 (*supra*); not applied, *Hall v. Conder* (1857) 2 C. B. (N.S.), 22, 41 (*supra*).

Gompertz v. Bartlett and Gurney v. Womersley (supra), referred to.

Kennedy v. Panama, New Zealand, and Australian Royal Mail Co. (1867) 36 L. J. Q. B. 260;

L. R. 2 Q. B. 580, 587; 8 B. & S. 571; 17 L. T. 62; 15 W. R. 1039.—Q.B.

BLACKBURN, J. (for the Court).—In *Gompertz v. Bartlett and Gurney v. Womersley* . . . the person who had honestly sold what he thought a bill without recourse to him, was nevertheless held bound to return the price on its turning out that the supposed bill was a forgery in the one case, and void under the Stamp Laws in the other; in both cases the ground of the decision being that the thing handed over was not the thing paid for.—p. 363.

Gompertz v. Bartlett and Gurney v. Womersley, applied.

Megaw v. Molloy, (1878) 2 L. R. Ir. 530, 541.—C.A.

Gompertz v. Bartlett, applied.

Leeds and County Bank v. Walker (1883) 52 L. J. Q. B. 590; 11 Q. B. D. 84, 87; 47 J. P. 502.—DENMAN, J.

Gompertz v. Bartlett, discussed.

Joliffe v. Baker (1883) 52 L. J. Q. B. 609; 11 Q. B. D. 255, 272; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.—Q.B.D.

Gompertz v. Bartlett and Westropp v. Solomon (1849) 19 L. J. C. P. 1; 8 C. B. 345; 13 Jur. 1104.—C.P., distinguished.

Raphael & Sons v. Burt & Co. (1884) 1 Cab. & E. 325.

STEPHEN, J.—A failure of consideration arises, ~~where the thing bargained for is not delivered~~; such is the case if a forged document is sold instead of a genuine one: *Westropp v. Solomon*; or a Guantamela bond, not recognised by the government as binding, for one which is so recognised: *Young v. Cole* (*supra*, col. 2972); or a bill purporting to be drawn abroad, and so to be a foreign bill, which was in fact drawn in London and was unavailable for want of a stamp: *Gompertz v. Bartlett*.—p. 328.

Gray v. Cox (1825) 1 B. & C. 108; 6 D. & R. 200; 1 Car. & P. 184; 28 R. R. 769.—K.B.; and see S. C. 5 B. & C. 458; 8 D. & R. 200.—K.B.

Discussed, *Jones v. Bright* (1829) 5 Bing. 533; 3 M. & P. 155; 7 L. J. (o.s.) C. P. 213; 30 R. R. 728.—C.P.; *Brown v. Edgington* (1841) 10 L. J. C. P. 66; 2 Man. & G. 279; 2 Scott (N.R.) 496; 1 Drink. 106.—C.P.; *not applied*, *Chalmers v. Harding* (1868) 17 L. T. 571, 574.—EX.

Gray v. Cox, discussed.

Randall v. Newson (1877) 2 Q. B. D. 102; 46 L. J. Q. B. 259; 36 L. T. 164; 25 W. R. 313.—C.A.

BRETT, J.A. (for the Court).—In *Gray v. Cox*, in 1825, the case was decided on a variance; but Abbott, C.J., stated that he was of opinion "that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose." The commodity ordered was copper for sheathing the ship "Coventry." It was proved that no defect could be discovered by inspection of the article, and it was admitted that the defendants were ignorant of the defective quality of the copper. It is obvious that Lord Teuterden did not consider the seller relieved by reason of the defect being latent.—p. 106.

Jones v. Bright (1829) 5 Bing. 533; 3 M. & P. 155; 7 L. J. (o.s.) C. P. 213; 30 R. R. 728.—C.P.

Approved but distinguished, *Chanter v. Hopkins* (1838) 8 L. J. Ex. 14; 4 M. & W. 399; 1

H. & H. 377; 3 Jur. 58.—EX.; *applied*, *Brown v. Edgington* (1841) 10 L. J. C. P. 66; 2 Man. & G. 279; 2 Scott (N.R.) 496; 1 Drink. 106.—C.P.; *discussed*, *Turner v. Mucklow* (1862) 8 Jur. (N.S.) 870; 6 L. T. 690; 10 W. R. 668.—EX.; *Readhead v. Midland Ry.* (1867) 36 L. J. Q. B. 181, 185; L. R. 2 Q. B. 412, 419.—Q.B. (affirmed, EX. CH. See "RAILWAY," ante, col. 2667); *not applied*, *Chalmers v. Harding* (1868) 17 L. T. 571, 574.—EX.; *referred to*, *Jones v. Just* (1868) 37 L. J. Q. B. 89, 93; L. R. 3 Q. B. 197, 203; 9 B. & S. 141; 18 L. T. 208; 16 W. R. 643.—Q.B.; *discussed*, *Randall v. Newson* (1877) 46 L. J. Q. B. 259; 2 Q. B. D. 102, 107; 36 L. T. 164; 25 W. R. 313.—C.A.; *Drummond v. Van Ingen* (1887) 12 App. Cas. 284, 290.—H.L. (E.) (see *supra*, col. 2971); *principle not applied*, *Jones v. Padgett* (1890) 24 Q. B. D. 650, 652.—COLERIDGE, C.J. and Esher, M.R., (*supra*, col. 2971); *applied*, *Wallis v. Russell* (1901—2); [1902] 2 Ir. R. 535.—K.B.D. and C.A. (see *post*, col. 2986).

Bluet v. Osborne (1816) 1 Stark. 384; 18 R. R. 785.—ELLENBOROUGH, C.J.

Explained, *Jones v. Bright* (1829) 5 Bing. 533; 3 M. & P. 155; 7 L. J. (o.s.) C. P. 213; 30 R. R. 728.—C.P.; *not applied*, *Shepherd v. Pybus* (1842) 11 L. J. C. P. 101; 3 Man. & G. 868; 4 Scott (N.R.) 434.—C.P.

Brown v. Edgington (1841) 10 L. J. C. P. 66; 2 Man. & G. 279; 2 Scott (N.R.) 496; 1 Drink. 106.—C.P.

Applied, *Shepherd v. Pybus* (*supra*); *Readhead v. Midland Ry.* (1867) 36 L. J. Q. B. 181, 184; L. R. 2 Q. B. 412, 418.—Q.B. (*supra*).

Brown v. Edgington and Shepherd v. Pybus, discussed.

Jones v. Just (1868) 37 L. J. Q. B. 89, 93; L. R. 3 Q. B. 197, 203; 9 B. & S. 141; 18 L. T. 208; 16 W. R. 643.—Q.B.

Brown v. Edgington, referred to.

Randall v. Newson (1877) 46 L. J. Q. B. 269; 2 Q. B. D. 102, 107; 36 L. T. 164; 25 W. R. 313.—C.A.

Brown v. Edgington, discussed and applied.

Wallis v. Russell (1901—1902) [1902] 2 Ir. R. 585, 598, 605.—K.B.D. and C.A.

Ollivant (or Oliphant) v. Bayley (1843) 13 L. J. Q. B. 34; 5 Q. B. 288; 1 D. & M. 373; 7 Jur. 1130.—Q.B., referred to.

Camac v. Warriner (1845) 1 C. B. 356; 9 Jur. 162.—C.P.; *Parsons v. Sexton* (1847) 16 L. J. C. P. 181; 4 C. B. 899; 11 Jur. 849.—C.P.; *applied*, *Dawson v. Collis* (1851) 20 L. J. C. P. 116; 10 C. B. 523; 2 L. M. & P. 14.—C.P.

Ollivant (or Oliphant) v. Bayley and Parsons v. Sexton, referred to.

Mallan v. Radcliff (or Radloff) (1864) 17 C. B. (N.S.) 588; 10 Jur. (N.S.) 1132; 11 L. T. 381; 13 W. R. 139.—C.P.

Ollivant (or Oliphant) v. Bayley, discussed.

Jones v. Just (1868) 37 L. J. Q. B. 89; L. R. 3 Q. B. 197, 202 (see *post*, col. 2978).

Wieler v. Schilizzi (1856) 25 L. J. C. P. 89;

17 C. B. 619; 4 W. R. 209.—C.P., referred to. *Jones v. Just* (1868) 37 L. J. Q. B. 89, 94; L. R. 3 Q. B. 197, 204; 9 B. & S. 141; 18 L. T. 208; 16 W. R. 643.—Q.B.; *Randall v. Newson* (1877) 46 L. J. Q. B. 269; 2 Q. B. D. 102, 107; 36 L. T. 164; 25 W. R. 313.—C.A.

Levy v. Langridge (1838) 7 L. J. Ex. 387; 4 M. & W. 337; 1 H. & H. 325.—EX. CH.; affirming **S. C. nom. Langridge v. Levy** (1837) 6 L. J. Ex. 137; 2 M. & W. 519.—EX., discussed.

Eastwood v. Bain (1858) 28 L. J. Ex. 74; 3 H. & N. 738; 7 W. R. 90.—EX.; **Barry v. Croskey** (1860) 2 J. & H. 1, 17.—WOOD, V.-C.

Levy v. Langridge, applied.

Swift v. Winterbotham (1873) 42 L. J. Q. B. 111, 119; L. R. 8 Q. B. 244, 252; 28 L. T. 338; 21 W. R. 562.—Q.B., reversed on one point nom. **Swift v. Jewsbury**, 43 L. J. Q. B. 56; L. R. 9 Q. B. 301; 30 L. T. 31; 22 W. R. 319.—EX. CH.

Levy v. Langridge, explained and distinguished.

Wilkinson v. Downton (1897) 66 L. J. Q. B. 493; [1897] 2 Q. B. 57; 76 L. T. 493; 45 W. R. 525.—WRIGHT, J. See "DAMAGES," vol. i., col. 813.

Levy v. Langridge, referred to.

Tallerman v. Dowsing Radiant Heat Co. (1899) 68 L. J. Ch. 618, 620; [1900] 1 Ch. 1, 6; 48 W. R. 146.—STIRLING, J.; see S. C. 69 L. J. Ch. 46.—C.A. And see S. C. nom. **Levy v. Langridge**, "NEGLIGENCE" (ante, col. 1962).

Longmeid v. Holliday (1851) 20 L. J. Ex. 430; 6 Ex. 761.—EX., discussed and distinguished.

George v. Skivington (1869) 39 L. J. Ex. 8; L. R. 5 Ex. 1; 21 L. T. 495; 18 W. R. 118.—EX.

Longmeid v. Holliday, referred to.

Francis v. Cockrell (1870) 39 L. J. Q. B. 113, 117; L. R. 5 Q. B. 184, 194; 21 L. T. 203; 18 W. R. 668.—Q.B.; affirmed, 39 L. J. Q. B. 291; L. R. 5 Q. B. 501; 10 B. & S. 850; 23 L. T. 466; 18 W. R. 1205.—EX. CH.

Longmeid v. Holliday, not applied.

Lawrence v. Jenkins (1873) 42 L. J. Q. B. 147; L. R. 8 Q. B. 274, 278; 28 L. T. 406; 21 W. R. 577.—Q.B.

Longmeid v. Holliday, discussed.

Heaven v. Pender (1883) 11 Q. B. D. 503; 52 L. J. Q. B. 702; 49 L. T. 357; 47 J. P. 709.—C.A. **BRETT, M.R., COTTON and BOWEN, L.J.J.**; **BRETT, M.R.**—In **Longmeid v. Holliday** a lamp was sold to the plaintiff to be used by his wife. The jury were not satisfied that the defendant knew of the defect in the lamp. If he did there was fraud; if he did not, there seems to have been no evidence of negligence.—p. 514.

Verne v. Weber (1856) 25 L. J. Ex. 326; 1 H. & N. 311.—EX., referred to.

Simond v. Braddon (1857) 26 L. J. C. P. 198; 2 C. B. (N.S.) 324; 3 Jur. (N.S.) 719; 5 W. R. 594.—C.P.

Gorissen v. Perrin (1857) 27 L. J. C. P. 29; 2 C. B. (N.S.) 681; 3 Jur. (N.S.) 867; 5 W. R. 709.—C.P., applied.

Corkling v. Massey (1873) 42 L. J. C. P. 153; L. R. 8 C. P. 395, 490; 28 L. T. 636; 21 W. R. 680; 1 Asp. M. C. 18.—C.P.

Shepherd v. Kain (1821) 5 B. & Ald. 240; 24 R. R. 344.—K.B.

Distinguished and not applied. **Freeman v. Baker** (1833) 3 L. J. K. B. 17; 5 B. & Ald. 797;

2 N. & M. 446; 5 Car. & P. 473.—K.B.; *approved but distinguished*, **Taylor v. Bullen** (1850) 20 L. J. Ex. 21; 5 Ex. 779.—EX.; *referred to*, **Kirkpatrick v. Gowan** (1875) Ir. R. 9 C. L. 521.—EX.; *followed*, **Cowdy v. Thomas** (1876) 36 L. T. 22, 26.—KELLY, C.B. and **HUDDESTON, B.**

Kain v. Old (1824) 2 B. & C. 627; 4 D. & R. 52; 2 L. J. (o.s.) K. B. 102; 26 R. R. 497.—K.B.

Approved. **Jones v. Bright** (1829) 5 Bing. 533; 3 M. & P. 155; 7 L. J. (o.s.) C. P. 213; 30 R. R. 728.—C.P.; *distinguished and not applied*, **Freeman v. Baker** (1833) 3 L. J. K. B. 17.—K.B. (post); *not followed*, **Edward Lloyd, Ltd. v. Sturgeon Falls Pulp Co.** (1901) 85 L. T. 162.—BRUCE and **PHILLIMORE, JJ.**

Freeman v. Baker (1833) 3 L. J. K. B. 17; 5 B. & Ald. 797; 2 N. & M. 446; 5 Car. & P. 475.—K.B., discussed.

Taylor v. Bullen (1850) 20 L. J. Ex. 21; 5 Ex. 779.—EX.

Mellish v. Motteux (1792) Peake 115.—KENYON, C.J., *disapproved*.

Baglehole v. Walters (post).

Baglehole v. Walters (1811) 3 Campb. 154; 13 R. R. 778, 780.—ELLENBOROUGH, C.J.

Approved. **Pickering v. Dowson** (1813) 4 Taunt. 779.—C.P.; *principle applied*, **Bywater v. Richardson** (1834) 3 L. J. K. B. 164; 1 A. & E. 508; 3 N. & M. 748.—K.B.; *discussed*, **Ward v. Hobbs** (1877) 47 L. J. Q. B. 90; 3 Q. B. D. 150, 161; 37 L. T. 654; 26 W. R. 151.—C.A.

Baglehole v. Walters, approved.

Bodger v. Nichols (1873) 28 L. T. 441.—Q.B., discussed.

Ward v. Hobbs (1878) 4 App. Cas. 13; 48 L. J. C. P. 231; 40 L. T. 73; 27 W. R. 114.—H.L. (E.).

CAIRNS, L.C.—I observe that in . . . **Bodger v. Nichols**, coming on appeal, I think from a decision of a County Court judge. . . Lord Blackburn (or, as he then was Blackburn, J.) seems to have thrown out an opinion that in a case of that kind, there being nothing upon one side in the shape of statement or negotiation, and there being simply the fact of a man sending diseased animals to a public market to be sold, that must be held to be a representation by conduct that the animals were free from disease, and that the person so sending them might be liable for the consequences of that representation, if it turned out to be untrue. My lords, I repeat that I desire, so far as I am concerned, to hold myself unpledged, if such a case had to be considered. But that, as it seems to me, is not the case which your lordships have now to consider.—p. 22.

LORD O'HAGAN.—The legal result is stated very plainly by Lord Ellenborough in the familiar case of **Baglehole v. Walters**, the authority of which has never, so far as I know, been called in question: "Where an article is sold with all faults I think it is quite immaterial how many belonged to it within the knowledge of the seller, unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser. The very object of introducing such a stipulation is to put the purchaser on his guard, and to throw upon him the burden of examining all faults, both secret and

apparent. . . " Now, the defendant in this case did precisely what was held by Lord Ellenborough to protect a vendor against liability for all faults, "secret or apparent."—p. 27.
 LORD SELBORNE concurred with some reluctance.

Baglehole v. Walters (*supra*), *referred to*.
Gorton v. Macintosh (1882) 31 W. R. 232.—DENMAN and NORTH, JJ.

Ward v. Hobbs, 46 L. J. Q. B. 473; 2 Q. B. D. 331; 36 L. T. 511; 25 W. R. 585.—MELLOR and LUSH, JJ.; *reversed*, (1877) 47 L. J. Q. B. 90; 3 Q. B. D. 150; 37 L. T. 654; 26 W. R. 151.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.; C.A. *affirmed*, (1878) 48 L. J. Q. B. 281; 4 App. Cas. 13; 40 L. T. 73; 27 W. R. 114.—H.L. (E.).

Ward v. Hobbs, *referred to*.
Peters v. Planner (1895) 11 Times L. R. 169, 170.—HAWKINS, J.; *Gill v. McDowell* (1902) [1903] 2 Ir. R. 463, 469.—K.B.D.; *Clarke v. Army and Navy Co-Operative Society, Ltd.* (1902) 72 L. J. K. B. 153; [1903] 1 K. B. 155, 166; 88 L. T. 1.—C.A. COLLINS, M.B., ROMER and MATHEW, L.JJ.

Schneider v. Heath (1813) 3 Campb. 506; 14 R. R. 506.—MANSFIELD, C.J., *discussed*.
Ward v. Hobbs (1877) 47 L. J. Q. B. 90; 3 Q. B. D. 150, 162; 37 L. T. 654; 26 W. R. 151.—C.A.; *affirmed*, H.L. (*see supra*).

Beer v. Walker (1877) 46 L. J. C. P. 677; 37 L. T. 278; 25 W. R. 880.—GROVES and LOPES, JJ., *discussed*.
Smith v. Baker (1878) 40 L. T. 261.—GROVE and LOPES, JJ.

Beer v. Walker, *followed*.
Burrows v. Smith (1894) 10 Times L. R. 246.—MATHEW and COLLINS, JJ.

Beer v. Walker and Burrows v. Smith, *discussed and applied*.
Wallis v. Russell [1902] 2 Ir. R. 585, 618.—C.A. ASHBORNE, L.C., FITZGIBBON, WALKER and HOLMES, L.JJ.

Emmerton v. Matthews (1862) 31 L. J. Ex. 139; 7 H. & N. 586; 8 Jur. (N.S.) 61; 5 L. T. 681; 10 W. R. 346.—EX.

Discussed, *Jones v. Just* (1868) 37 L. J. Q. B. 89; L. R. 3 Q. B. 197, 202; 9 B. & S. 141; 18 L. T. 208; 16 W. R. 643.—Q.B.; *Ward v. Hobbs* (1877) 46 L. J. Q. B. 473; 2 Q. B. D. 331, 334; 36 L. T. 511; 25 W. R. 585.—MELLOR and LUSH, JJ.; (*reversed* C.A. *See supra*); *explained and applied*, *Smith v. Baker* (1878) 40 L. T. 261.—GROVE and LOPES, JJ.; *Wallis v. Russell* (1901-1902) [1902] 2 Ir. R. 585, 595, 604.—K.B.D. and C.A.

Burnby v. Bollett, (1847) 17 L. J. Ex. 190; 16 M. & W. 644; 11 Jur. 827.—EX.

Discussed, *Turner v. Mucklow* (1862) 8 Jur. (N.S.) 870; 6 L. T. 690; 10 W. R. 668 EX.; *Emmerton v. Matthews* (1862) 31 L. J. Ex. 139; 7 H. & N. 586; 8 Jur. (N.S.) 61; 5 L. T. 681; 10 W. R. 346.—EX.; *referred to*, *Smith v. Baker* (1878) 40 L. T. 261.—GROVE and LOPES, JJ.; *distinguished*, *Wallis v. Russell* (1901-1902) [1902] 2 Ir. R. 585, 595, 616.—K.B.D. and C.A.

Smith v. Baker (1878) 40 L. T. 261.—GROVE and LOPES, JJ., *referred to*.
Wallis v. Russell [1902] 2 Ir. R. 585, 604.—C.A.

Wren v. Holt, *The Times*, 18th Nov., 1901.—WILLS, J.; *affirmed*, (1903) 72 L. J. K. B. 340; [1903] 1 K. B. 610; 88 L. T. 282; 51 W. R. 435; 67 J. P. 191.—C.A., *discussed*.

Wallis v. Russell [1902] 2 Ir. R. 585, 606.—C.A. ASHBORNE, L.C., FITZGIBBON, WALKER and HOLMES, L.JJ.

Chanter v. Leese (1838) 8 L. J. Ex. 58; 4 M. & W. 295; 1 H. & H. 224.—EX.; *affirmed*, (1840) 9 L. J. Ex. 327; 5 M. & W. 698.—EX. CH.

Chanter v. Leese, *distinguished and not applied*.

Hall v. Conder (1857) 26 L. J. C. P. 138; 2 C. B. (N.S.) 22; 3 Jur. (N.S.) 366.—C.P.; *affirmed*, 26 L. J. C. P. 288; 2 C. B. (N.S.) 53; 3 Jur. (N.S.) 963; 5 W. R. 742.—EX. CH.

Chanter v. Hopkins (1838) 8 L. J. Ex. 14; 4 M. & W. 399; 1 H. & H. 378; 3 Jur. 58.—EX.

Referred to, *Shepherd v. Pybus* (1842) 11 L. J. C. P. 101; 3 Man. & G. 868; 4 Scott (N.R.) 434.—C.P.; *Camac v. Warriner* (1845) 1 C. B. 356; 9 Jur. 162.—C.P.; *applied*, *Parsons v. Sexton* (1847) 16 L. J. C. P. 181; 4 C. B. 899; 11 Jur. 849.—C.P.; *Prideaux v. Bunnett* (1857) 1 C. B. (N.S.) 613.—C.P.; *referred to*, *Emmerton v. Matthews* (1862) 31 L. J. Ex. 139; 7 H. & N. 586; 8 Jur. (N.S.) 61; 5 L. T. 681; 10 W. R. 346.—EX.; *discussed*, *Stucley v. Baily* (1862) 31 L. J. Ex. 483; 1 H. & C. 405; 10 W. R. 720.—EX.; *applied*, *Hall v. Conder* (1857) 26 L. J. C. P. 138; 2 C. B. (N.S.) 22, 41; 3 Jur. (N.S.) 366.—C.P.; (*affirmed*, *post*.—EX. CH.).

Chanter v. Hopkins, *discussed*.

Jones v. Just (1868) 37 L. J. Q. B. 89; L. R. 3 Q. B. 197, 202; 9 B. & S. 141; 18 L. T. 208; 16 W. R. 643.—Q.B.

MELLOR, J. (for the Court).—Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required for a particular purpose, still, if the known, described and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.—*Chanter v. Hopkins*, *Oliphant v. Bayley* (13 L. J. Q. B. 34; 5 Q. B. 288, *see supra*, col. 2974).—p. 93.

Chanter v. Hopkins, *approved and followed*.
Chalmers v. Harding (1868) 17 L. T. 571.—EX.

Chanter v. Hopkins, *referred to*.

Osborn v. Hart (1871) 23 L. T. 851; 19 W. R. 331.—EX.; *Reg. v. Middleton* (1873) 42 L. J. M. C. 73; L. R. 2 C. C. R. 38, 45; 28 L. T. 777; 12 Cox. C. C. 260, 417.—C.C.R.; *Edward Lloyd, Ltd. v. Sturgeon Falls Pulp Co., Ltd.* (1901) 85 L. T. 162.—BRUCE and PHILLIMORE, JJ.; *Wallis v. Russell* (1901-1902) [1902] 2 Ir. R. 585, 595.—Q.B.D.; *affirmed*, C.A.

Hall v. Conder (1857) 26 L. J. C. P. 138; 2 C. B. (N.S.) 22; 3 Jur. (N.S.) 366.—C.P.; *affirmed*, 26 L. J. C. P. 288; 2 C. B. (N.S.) 53; 3 Jur. (N.S.) 963; 5 W. R. 742.—EX. CH.

Hall v. Conder, *referred to*.

Smith v. Neale (1857) 26 L. J. C. P. 143, 148; 2 C. B. (N.S.) 67; 3 Jur. (N.S.) 516; 5 W. R. 563.—C.P.

Hall v. Conder, *discussed and applied*.
Dorab Ally Khan v. Abdool Azeez (1878) L. R.
 5 Ind. App. 127.—P.C. (*see ante*, col. 2969).

Jendwine v. Slade (1797) 2 Esp. 572; 5 R. R.
 754.—KENYON, C.J., *distinguished*.
Power v. Barham (1836) 5 L. J. K. B. 88;
 4 A. & E. 473; 6 N. & M. 62; 7 Car. & P. 356;
 1 H. & W. 683; 1 M. & Rob. 507.—K.B.

Jendwine v. Slade and Power v. Barham,
discussed and not applied.
Gee v. Lucas (1867) 16 L. T. 357.—EX.

Hill v. Gray (1816) 1 Stark. 434; 18 R. R.
 802.—ELLENBOROUGH, C.J., *distinguished*.
Keates v. Cadogan (Earl) (1851) 20 L. J. C. P.
 76; 10 C. B. 591; 15 Jur. 428.—C.P.

Hill v. Gray and Keates v. Cadogan (Earl)
discussed.
Peck v. Gurney (1873) 43 L. J. Ch. 19, 34;
 L. R. 6 H. L. 377, 390; 22 W. R. 29.—H.L. (E.).

Cave v. Coleman (1828) 3 Man. & R. 2; 7
 L. J. (O.S.) K. B. 25; 32 R. R. 709.—K.B.,
applied.
Hopkins v. Tanqueray (1854) 23 L. J. C. P.
 162; 15 C. B. 130; 2 C. L. R. 842; 18 Jur. 608;
 2 W. R. 475.—C.P.

Hopkins v. Tanqueray, *approved*.
Stucley v. Baily (1862) 31 L. J. Ex. 483;
 1 H. & C. 405; 10 W. R. 720.—EX.

Richardson v. Brown (1823) 8 Moore 338;
 1 Bing. 344; 2 L. J. (O.S.) C. P. 7; 25 R. R.
 648.—C.P., *applied*.
Budd v. Fairman (1831) 1 L. J. C. P. 16;
 8 Bing. 48; 1 M. & Scott 74; 5 Car. & P. 78.—C.P.

Budd v. Fairman, *discussed*.
Mallan v. Radloff (*or* Radcliff) (1864) 17 C. B.
 (N.S.) 588; 10 Jur. (N.S.) 1132; 11 L. T. 381; 13
 W. R. 139.—C.P.

Budd v. Fairman, *followed*.
Anthony v. Halstead (1877) 37 L. T. 433.—
 GROVE and LINDLEY, JJ.

GROVE, J.—**Budd v. Fairman**, is very clearly
 in point. There the words were, "Received of
 B. 10% for a grey four-year-old colt, warranted
 sound," and that was held not to be a warrant
 that it was four years old. That case cannot be
 distinguished from the present.—p. 434.

Garment v. Barrs (1798) 2 Esp. 673, *dis-*
approved.

Jones v. Cowley (1825) 6 D. & R. 533; 4
 B. & C. 445; 3 L. J. (O.S.) K.B. 263.—K.B.

BAYLEY, J.—It is indeed extremely difficult to
 distinguish this case from *Garment v. Barrs*, but
 I must confess that I was never perfectly satisfied
 with the reasoning of Eyre, C.J., in that case.
 He there lays it down, that in order to constitute
 a variance, the injury under which the horse
 laboured must be of a permanent nature, and
 not one arising from a temporary accident. If
 that reasoning is correct, the warranty in many
 cases will be contingent, and will ultimately
 prove either general or qualified, according as
 the injury eventually turns out to be permanent
 or temporary. I think the nature of a warranty
 cannot depend upon such a question; it must, in
 my opinion, depend entirely upon the question,

what was the understanding and intention of the
 parties at the time when the contract was made.
 —p. 535.

Helyear v. Hawke (1803) 5 Esp. 72.—
 ELLENBOROUGH, C.J., *rule in, not applied*.
Brady v. Todd (1861) 30 L. J. C. P. 223; 9
 C. B. (N.S.) 592, 604; 7 Jur. (N.S.) 827; 4 L. T.
 212; 9 W. R. 483.—C.P.

Woodin v. Burford (1834) 3 L. J. Ex. 75;
 2 Cr. & M. 391; 4 Tyrw. 264.—EX.,
discussed.

Howard v. Sheward (1866) 36 L. J. C. P.
 42; L. R. 2 C. P. 148; 12 Jur. (N.S.)
 1015; 15 L. T. 183; 15 W. R. 45.—C.P.,
applied.

Bakery v. Bates (1885) 52 L. T. 620; 1 Times
 L. R. 311.

HUDDESTON, B.—In *Woodin v. Burford* . . .
 a distinction is pointed out between the warranty
 given by a person intrusted to sell an article and
 that given by one merely intrusted to deliver it,
 and that in the latter case an express authority
 to warrant must be shown. . . . In *Howard v.*
Sheward it was expressly held that the agent
 or servant of a horse-dealer has an implied
 authority to bind his principal or master by a
 warranty, even though (unknown to the buyer)
 he has express orders not to warrant.—p. 621.

Chandeler v. Lopus (1603) Cro. Jac. 4; 1
 Dyer. 75 a.—EX. CH.

Not applied, **Jones v. Bright** (1829); 5 Bing.
 533, 545; 3 M. & P. 155; 7 L. J. (O.S.) C. P.
 213; 30 R. R. 728.—C.P.; *referred to*, **Smith v.**
Chadwick (1884) 53 L. J. Ch. 873; 9 App. Cas.
 187, 195; 50 L. T. 697; 32 W. R. 687; 48 J. P.
 644.—H.L. (E.). *And see* vol. i. col. 1166.

Bank of Scotland v. Watson (1813) 1 Dow,
 40; 14 R. R. 11.—H.L. (SC.). ELDON,
 L.C. and LORD REDESDALE, *referred to*.
Yorkshire Banking Co. v. Beatson (1880) 49
 L. J. C. P. 380; 5 C. P. D. 109, 127; 42 L. T.
 455; 28 W. R. 879.—C.A.

Smith v. Hughes (1871) 40 L. J. Q. B. 221;
 L. R. 6 Q. B. 597; 25 L. T. 329; 19 W. R.
 1059.—Q.B.

Rule in, applied, **Kirkpatrick v. Gowan** (1875)
 Ir. R. 9 C. L. 521.—EX.; *referred to*, **Pope v.**
Buenos Ayres New Gas Co. (1892) 8 Times L. R.
 753.—C.A.; *applied*, **Ewing and Lawson v.**
Hanbury & Co. (1900) 16 Times L. R. 140.—
 MATHEW, J.; **Gill v. McDowell** (1902) [1903] 2
 Ir. R. 463.—K.B.D.; **Scott v. Coulson** (1903) 72
 L. J. Ch. 223; [1903] 1 Ch. 453, 455; 88 L. T.
 12; 51 W. R. 394.—KEKEWICH, J.; (affirmed,
 72 L. J. Ch. 600; [1903] 2 Ch. 249; 88 L. T.
 653.—C.A.).

Towerson v. Aspatria Agricultural Co-
operative Society, 25 L. T. 297.—EX.; *reversed*,
 (1872) 27 L. T. 276.—EX. CH.

Mody v. Gregson (1868) 38 L. J. Ex. 12;
 L. R. 4 Ex. 49; 19 L. T. 458; 17 W. R.
 176.—EX. CH.

Referred to, **Smith v. Baker** (1878) 40 L. T.
 261, 262.—GROVE and LOPES, JJ.; **Gorton v.**
Macintosh (1882) 31 W. R. 232.—DENMAN and

NORTH, JJ.; *approved*, *Drummond v. Van Ingen* (1887) 56 L. J. Q. B. 563; 12 App. Cas. 284; 57 L. T. 1; 36 W. R. 20.—H.L. (E.) (*see supra*, col. 2971); *referred to*, *Haines, Batchelor & Co. v. Firminger* (1885) 2 Times L. R. 107.—GROVE, J.; *Sleigh v. Tyser* (1900) 69 L. J. Q. B. 626; [1900] 2 Q. B. 333, 338; 82 L. T. 804; 5 Com. Cas. 271.—BIGHAM, J.

Mody v. Gregson, discussed.

Wallis v. Russell [1902] 2 Ir. R. 585.—C.A.
FITZGIBBON, L.J.—Sect. 15 [Sale of Goods Act, 1893] enacts that in "the case of a contract for sale by sample there is an implied condition—(a) that the bulk shall correspond with the sample in quality; (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; and (c) that the goods shall be free from any defect, rendering them unmerchantable which would not be apparent on reasonable examination of the sample." This is the law laid down by *Mody v. Gregson*, adopted and explained by the H. L. in *Drummond v. Van Ingen* (*supra*). If Miss Donovan, finding that boiled crabs only were to be had, had taken a boiled crab as a sample to the plaintiff, and she had sent back for "two crabs like that," the defendant would have been responsible for the undiscoverable defect under s. 15. How can his responsibility under s. 14 (1) be different when she bid him send her "two nice fresh crabs for her tea?"—p. 615.

Parkinson v. Lee (1802) 2 East 314; 6 R. R. 429.—K.B., *discussed*.

Gardiner v. Gray (1815) 4 Campb. 144; 16 R. R. 764, *applied*.

Jones v. Bright (1829) 5 Bing. 533, 545; 3 M. & P. 155; 7 L. J. (O.S.) C. P. 218; 30 R. R. 728.—C.P.

Parkinson v. Lee, referred to.

Budd v. Fairmaner (1831) 1 L. J. C. P. 16; 8 Bing. 48; 1 M. & Scott 74; 5 Car. & P. 78.—C.P.

Gardiner v. Gray, applied.

Powell v. Horton (1836) 5 L. J. C. P. 204; 2 Bing. (N.C.) 668; 2 Hodges 12; 3 Scott 110.—C.P.

Parkinson v. Lee, considered and not applied.

Gardiner v. Gray, applied.

Shepherd v. Pybus (1842) 11 L. J. C. P. 101; 3 Man. & G. 868; 4 Scott N. R. 434.—C.P.

Parkinson v. Lee, referred to.

Emmerton v. Mathews (1862) 31 L. J. Ex. 139; 7 H. & N. 586; 8 Jur. (N.S.) 61; 5 L. T. 681; 10 W. R. 346.—EX.

Parkinson v. Lee, discussed.

Gardiner v. Gray, approved and applied.

Jones v. Just (1868) 37 L. J. Q. B. 89, 93; L. R. 3 Q. B. 197, 202; 9 B. & S. 141; 18 L. T. 208; 16 W. R. 643.—Q.B.

Gardiner v. Gray and Parkinson v. Lee, discussed.

Mody v. Gregson (1868) 38 L. J. Ex. 12, 13; L. R. 4 Ex. 49, 52; 19 L. T. 458; 17 W. R. 176.—EX. CH.

Parkinson v. Lee, commented on.

Gardiner v. Gray, explained and applied.

Randall v. Newson (1877) 46 L. J. Q. B. 259; 2 Q. B. D. 102; 36 L. T. 164; 25 W. R. 313.—C.A.
BRETT, J.A. (for the Court).—It is sufficient

to say of it [*Parkinson v. Lee*] that, either it does not determine the extent of a seller's liability on the contract, or it has been overruled. . . . In *Gardiner v. Gray* the contract was for the purchase and sale of "waste silk." The silk was imported, and the bulk had not been seen either by the defendant, the seller, or the plaintiff, the buyer. . . . The decision, therefore, is that the commodity offered and delivered must answer the description of it and be saleable waste silk. The principle is that the commodity offered must answer the description of it in the contract.—p. 106.

Parkinson v. Lee, applied.

Smith v. Baker (1878) 40 L. T. 261.—GROVE and LOPES, JJ.

Parkinson v. Lee, referred to.

Gardiner v. Gray, applied.

Wallis v. Russell [1902] 2 Ir. R. 585, 619.—C.A. ASHBOURNE, L.C., FITZGIBBON, WALKER and HOLMES, L.JJ. (*see post*, col. 2986).

Meyer v. Everth (1814) 4 Campb. 22; 15 R. R. 722.—ELLENBOROUGH, C.J., *referred to*.

Allan v. Lake (1852) 18 Q. B. 560.—Q.B.

Parker v. Palmer (1821) 4 B. & Ald. 387; 23 R. R. 313.—K.B., *referred to*.

Syers v. Jonas (1848) 2 Ex. 111.—EX.; *Heilbutt v. Hickson* (1872) 41 L. J. C. P. 223, 236; L. R. 7 C. P. 438, 452; 27 L. T. 336; 20 W. R. 1035.—C.P.

Nichol v. Godts (1854) 23 L. J. Ex. 314; 10 Ex. 191.—EX.

Approved, *Josling v. Kingsford* (1863) 32 L. J. C. P. 94; 13 C. B. (N.S.) 447; 9 Jur. (N.S.) 947; 7 L. T. 790; 11 W. R. 377.—C.P.; *discussed*, *Jones v. Just* (1868) 37 L. J. Q. B. 89, 94; L. R. 3 Q. B. 197, 204; 9 B. & S. 141; 18 L. T. 208; 16 W. R. 643.—Q.B.

Nichol v. Godts, considered.

Mody v. Gregson (1868) 38 L. J. Ex. 12; L. R. 4 Ex. 49, 56; 19 L. T. 458; 17 W. R. 176.—EX. CH.

WILLES, J. (for the Court).—In *Nichol v. Godts*, where the sale was of foreign refined rape oil, warranted only equal to sample, and the jury found that the oil tendered was the same as the sample, but that it was not foreign refined rape oil, but a mixture of foreign rape oil and another oil, it was held by the Court that the sample must be considered as referring to quality only, and could not control the contract in respect of the essential character of the article to be delivered.—p. 15.

Nichol v. Godts, discussed.

Randall v. Newson (1877) 46 L. J. Q. B. 259; 2 Q. B. D. 102, 108; 36 L. T. 164; 25 W. R. 313.—C.A.

Lorymer (or Lorimer) v. Smith (1822) 1 B. & C. 1; 2 D. & R. 23; 1 L. J. (O.S.) K. B. 7.—K.B., *dictum disapproved*.

Hibblewhite v. M'Morine (1839) 8 L. J. Ex. 271; 5 M. & W. 462; 3 Jur. 509.—EX. *See ante*, col. 2933.

Lorymer v. Smith, distinguished.

Pettit v. Mitchell (1842) 12 L. J. C. P. 9, 13; 4 Man. & G. 819; 5 Scott (N.R.) 721; Car. & M. 424; 6 Jur. 1016.—C.P.

Syers v. Jonas (1848) 2 Ex. 111.—EX., *referred to.*

Harnor v. Groves (1855) 24 L. J. C. P. 53; 15 C. B. 667; 3 C. L. R. 406; 3 W. R. 168.—C.P.; **Azmar v. Casella** (1867) 36 L. J. C. P. 124; L. R. 2 C. P. 431.—C.P. (affirmed, 36 L. J. C. P. 263; L. R. 2 C. P. 677; 16 L. T. 571; 15 W. R. 998.—EX. CH.); **Mahalen v. Dublin and Chapelized Distillery Co.** (1877) Ir. R. 11 C. L. 83.—Q.B. *And see* vol. i. col. 1037.

Jones v. Bowden (1813) 4 Taunt. 847; 14 R. R. 683.—C.P., *discussed.*

Curtis v. Peek (1864) 13 W. R. 230.—EX.

Buchanan v. Parnshaw (1788) 2 Term Rep. 745.—K.B.

Distinguished. **Best v. Osborn** (1825) 2 C. & P. 74; R. & M. 290.—BEST, C.J.: *referred to*, **Chapman v. Gwyther** (1866) 35 L. J. Q. B. 142; L. R. 1 Q. B. 463, 466; 7 B. & S. 417; 14 L. T. 477; 14 W. R. 671.—Q.B.

Chapman v. Gwyther, *referred to.*

Moore v. Harris (1876) 1 App. Cas. 318; 45 L. J. P. C. 55; 34 L. T. 519; 24 W. R. 887; 3 Asp. M. C. 173.—P.C.

SIR R. SMITH (for the Court).—None of the cases cited at the bar bear a close analogy to the present. The decisions relating to conditions common on the sales of horses, providing that the liability on the warranty shall cease at a certain date, were referred to, in which it has been held that latent defects are within them (*see Smart v. Hyde, post*; **Chapman v. Gwyther**).—p. 329.

Chapman v. Gwyther, *referred to.*

Gorton v. Macintosh (1882) 31 W. R. 232.—DENMAN and NORTH, JJ. (*see post*).

Latham v. Rutley (1823) 2 B. & C. 20; 3 D. & R. 211; 1 L. J. (O.S.) K. B. 225.—K.B., *distinguished.*

Smart v. Hyde (1841) 10 L. J. Ex. 479; 8 M. & W. 723; 1 D. (N.S.) 60.—EX.

Smart v. Hyde, *considered.*

McCance v. L. & N. W. Ry. (1861) 31 L. J. Ex. 65; 7 H. & N. 477; 7 Jur. (N.S.) 1304; 5 L. T. 587; 10 W. R. 154.—EX. (affirmed, Ex. Ch., *see ante*, col. 2691); **Moore v. Harris** (*supra*).

Bywater v. Richardson (1834) 3 L. J. K. B. 164; 1 A. & E. 508; 3 N. & M. 748.—K.B.

Discussed. **Humfrey v. Dale** (1857) 26 L. J. Q. B. 137; 7 El. & Bl. 266; 3 Jur. (N.S.) 213.—Q.B. (affirmed, 27 L. J. Q. B. 390; El. Bl. & El. 1004; 5 Jur. (N.S.) 191; 6 W. R. 854.—EX. CH.); *not applied*, **Gorton v. Macintosh** (1882) 31 W. R. 232.—DENMAN and NORTH, JJ.

Gorton v. Macintosh, *reversed*, W. N. (1883) 103.—C.A. BRETT, M.R., LINDLEY and FRY, L.JJ.

Bolden v. Brogden (1838) 2 M. & Rob. 113.—COLERIDGE, J., *dissented from.*

Coates v. Stephens (1838) 2 M. & Rob. 157.—PARKE, B.; **Kiddell v. Burnard** (*post*).

Coates v. Stephens, *approved and applied.*

Kiddell v. Burnard (1842) 11 L. J. Ex. 268; 9 M. & W. 668; 1 Car. & M. 291; 6 Jur. 327.—EX.

Kiddell v. Burnard, *dicta not applied.*

Holiday v. Morgan (1858) 28 L. J. Q. B. 9; 17 El. & El. 1; 5 Jur. (N.S.) 69; 7 W. R. 7.—Q.B.

Elton v. Brogden (1815) 4 Campb. 281.—ELLENBOROUGH, C.J., *approved.*

Shillitoe v. Claridge (1816) 2 Chitt. 425.—K.B.

Margetson v. Wright (1831) 5 M. & P. 606.—C.P. *See* S. C. (1832) 1 L. J. C. B. 128; 8 Bing. 454; 1 M. & Scott 622.—C.P., *not applied.*

Watson v. Denton (1835) 7 C. & P. 85.—TINDAL, C.J.

Dickinson v. Follett (1833) 1 M. & Rob. 299.—ALDERSON, J., *applied.*

Brown v. Elkington (1841) 10 L. J. Ex. 336; 8 M. & W. 132.—EX.

Brown v. Elkington, *discussed.*

Bailey v. Forrest (1845) 2 C. & K. 131.—CRESWELL, J.

Lewis v. Peake (1816) 7 Taunt. 153; 2 Marsh. 431; 17 R. R. 475.—C.P., *not applied.*

Hammond v. Bussey (1887) 57 L. J. Q. B. 58; 20 Q. B. D. 79, 91.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

Fielder v. Starkin (1788) 1 H. Bl. 17; 2 R. R. 700.—C.P.

Approved but not applied. **Adam v. Richards** (1795) 2 H. Bl. 573; 3 R. R. 568.—C.P.: *approved and applied.* **Pateshall v. Tranter** (1835) 4 L. J. K. B. 162; 3 A. & E. 103; 4 N. & M. 649; 1 H. & W. 178.—K.B.: *discussed.* **Poulton v. Lattimore** (1829) 9 B. & C. 259; 4 M. & Ry. 203; 7 L. J. (O.S.) K. B. 225.—K.B.

Poulton v. Lattimore, *referred to.*

Dawson v. Collis (1851) 20 L. J. C. P. 116; 10 C. B. 523; 2 L. M. & P. 14.—C.P. (*see post*, col. 2986).

Poulton v. Lattimore and Adam v. Richards (1795) 2 H. Bl. 573; 3 R. R. 568.—C.P., *discussed.*

Heilbutt v. Hickson (1872) 41 L. J. C. P. 228; L. R. 7 C. P. 438, 452; 27 L. T. 336; 20 W. R. 1035.—C.P.; BRETT, J. *dissenting.*

BOVILL, C.J.—In some cases, however, such as where the goods are utterly valueless, the dealing with them by the purchaser has been held not to affect his right to reject and to refuse to pay anything for them, as in **Poulton v. Lattimore**, where the purchaser had seen some and sold other parts of certain clover seed, which had been warranted as new growing seed, but the whole of which turned out to be totally unproductive and useless. In determining what is a reasonable time for rejecting the goods, the conduct of the seller may be taken into consideration, as where by a subsequent misrepresentation he has induced the purchaser to prolong the trial.—**Adam v. Richards**.—p. 235.

Heilbutt v. Hickson, *explained and confirmed.*

Grimoldby v. Wells (1875) 44 L. J. C. P. 203, 208; L. R. 10 C. P. 391, 395; 32 L. T. 490; 23 W. R. 524.—C.P. *See* judgment of BRETT, J.

Heilbutt v. Hickson, *principle applied.*

Drummond v. Van Ingen (1887) 56 L. J. Q. B. 563; 12 App. Cas. 284, 299; 57 L. T. 1; 36 W. R. 20.—H.L.(E.).

Head v. Tattersall (1871) 41 L. J. Ex. 4; L. R. 7 Ex. 7; 25 L. T. 631; 20 W. R. 115.

—EX., *principle applied*.

Elphick v. Barnes (1880) 49 L. J. C. P. 698; 5 C. P. D. 321, 325; 29 W. R. 139; 14 J. P. 651. —DENMAN, J. [Benjamin on Sales, 2nd ed., p. 483, approved].

Couston v. Chapman (1872) L. R. 2 H. L. Sc. 250, *explained*.

Lucy v. Moufflet (1860) 29 L. J. Ex. 110; 5 H. & N. 229.—EX., *approved*.

Grimoldby v. Wells (1875) 44 L. J. C. P. 203; 32 L. T. 490; L. R. 10 C. P. 391; 23 W. R. 524.

COLERIDGE, C.J.—The decision in that case [*Couston v. Chapman*], so far as I understand it, appears to be perfectly right. . . . All that was meant by it was that there must be some unequivocal act by the purchaser to show that he does not take the goods, and that what was done by the purchaser in that case was very slight, and was not enough for that purpose. It is true that the head note in the report of that case would seem to show that it was the duty of the purchaser when the goods are not conformable to sample to place them in neutral custody, if the vendor does not acquiesce in their being at his risk and disposal, but that does not appear to have formed any part of the judgment, and what the learned lords must have meant by what they said was, that if the purchaser had done that, it would have been an unequivocal act of rejection of the goods by him. Then, in *Lucy v. Moufflet*, both Martin and Bramwell, B.B. expressly state that it is not necessary for the purchaser to send back the article which he has rejected. In that case there had been a sale of a quantity of cider, and the question was whether the using a larger quantity of it than was necessary for the mere purpose of tasting it had, under the circumstances of that case, taken away the purchaser's right to reject it. The Ct. of Ex. thought that it had not.—p. 206.

Grimoldby v. Wells, *distinguished and not applied*.

Perkins v. Bell (1892) 62 L. J. Q. B. 91; [1893] 1 Q. B. 193; 4 R. 212; 67 L. T. 792; 41 W. R. 195.—C.A., LINDLEY, BOWEN and A. L. SMITH, L.JJ.

Heyworth v. Hutchinson (1867) 36 L. J. Q. B. 270; L. R. 2 Q. B. 447.—Q.B., *referred to*.

Green & Co. and Balfour, Williamson & Co., In re (1890) 63 L. T. 97, 99.—KAY, J.; affirmed, 63 L. T. 325.—C.A. COTTON, FRY and LOPES, L.JJ. [KAY, J., approved of, Chitty on Contracts, 8th ed., p. 425, 12th ed. p. 505. *And see* Benjamin on Sales, 4th ed., p. 936.]

Street v. Blay (1831) 2 B. & Ad. 456; 36 R. R. 626.—K.B.

Applied, **Gompertz v. Denton** (1832) 2 L. J. Ex. 82; 1 Cr. & M. 207; 3 Tyrw. 233; 1 D. P. C. 623.—EX.; *Allen v. Cameron* (1833) 2 L. J. Ex. 263; 1 Cr. & M. 832; 3 Tyrw. 907.—EX.; *referred to*, **Pateshall v. Tranter** (1835) 4 L. J. K. B. 162; 3 A. & E. 103; 4 N. & M. 649; 1 H. & W. 178.—K.B.; *explained*, **Mondel v. Steel** (1841) 10 L. J. Ex. 426; 8 M. & W. 858; 1 D. (N.S.) 1.—EX.; *applied*, **Parsons v. Sexton** (1847) 16 L. J. C. P. 181; 4 C. B. 899; 11 Jur. 849.—C.P.; *referred to*, **Syers v. Jonas** (1848) 2 Ex. 111. EX.; *explained and followed*, **Murray v. Mann**

(1848) 17 L. J. Ex. 256; 2 Ex. 538; 12 Jur. 634.—EX.

Street v. Blay, *discussed*.

Dawson v. Collis (1851) 20 L. J. C. P. 116; 10 C. B. 523, 531; 2 L. M. & P. 14.—C.P.

JERVIS, C.J.—I am inclined to think that the correct principle to be derived from *Street v. Blay* is, that in the sale of a specific enumerated article, the buyer has no right to say that the article does not correspond with the description given, and, therefore, to repudiate the contract. The remedy in such cases is to bring an action on the warranty, or to get a reduction of damages.—p. 117.

MAULE, J.—I think the principle applied in *Street v. Blay* ought to be extended, and that it is just and convenient to hold that the proper remedy is that which the parties expressly provide for, namely, an action on the warranty, or a reduction of damages, as in *Allen v. Cumeron* (2 L. J. Ex. 263; 1 Cr. & M. 832), and in other cases.—p. 118.

GRESSWELL, J.—Where there is a sale of an individual chattel, there the vendee can only defend himself altogether by a cross-action, as in *Poulton v. Lattimore* (9 B. & C. 259, *supra*, col. 2984), or partly by a reduction of damages. I apprehend that the rule in Smith's Leading Cases (vol. ii. p. 15) does not mean that *Street v. Blay* and *Poulton v. Lattimore*, decided the three points there mentioned, but only that these three points might be inferred from the decision.—p. 118.

Street v. Blay, *referred to*.

Bannerman v. White (1861) 31 L. J. C. P. 28; 10 C. B. (N.S.) 844; 8 Jur. (N.S.) 282; 4 L. T. 740; 9 W. R. 784.—C.P.; *Kennedy v. Panama, New Zealand and Australian Royal Mail Co.* (1867) 36 L. J. Q. B. 260, 263; L. R. 2 Q. B. 580, 587; 8 R. & S. 571; 17 L. T. 62; 15 W. R. 1039.—Q.B.; *Heilbutt v. Hickson* (1872) 41 L. J. C. P. 228, 235; L. R. 7 C. P. 438, 451; 27 L. T. 336; 20 W. R. 1035.—C.P.; *Loughnan v. Barry* (1872) Ir. R. 6 C. L. 437.—C.P.; *Green & Co. and Balfour, Williamson & Co.*, In re (1890) 63 L. T. 97.—KAY, J. (affirmed, 63 L. T. 325.—C.A.). *And see* 56 & 57 Vict. c. 71, s. 53.

O'Kell v. Smith (1815) 1 Stark. 107; 18 R. R. 752.—BAYLEY, J.

Applied, **Jones v. Bright** (1829) 5 Bing. 533; 3 M. & P. 155; 7 L. J. (O.S.) C. P. 213; 30 R. R. 728.—C.P.; *referred to*, **Street v. Blay** (1831) 2 B. & Ad. 456; 36 R. R. 626.—K.B.; *Heilbutt v. Hickson* (1872) 41 L. J. Q. B. 228; L. R. 7 C. P. 438, 452; 27 L. T. 336; 20 W. R. 1035.—C.P.

O'Kell v. Smith, *referred to*.

Wallis v. Russell [1902] 2 Ir. R. 585.—C.A. ASHBOURNE, L.C., FITZGIBBON, WALKER and HOLMES, L.JJ.

FITZGIBBON, L.J.—In *Gardiner v. Gray* (4 Campb. 144, *ante*, col. 2981), *Laing v. Fidgeon* (6 Taunt. 108, *ante*, col. 2970), *Jones v. Bright* (*ante*, col. 2973), and *O'Kell v. Smith*, the seller was held "bound to furnish a commodity that will answer the purpose for which it is sold." The goods sold were "waste silk," "saddles," "copper for sheathing a ship," and "copper pans," yet no one suggested that it was material to particularise the purpose for which they were required further than by making it known to the seller. How can a purchase of

"saddles" to be ridden on, be "a particular purpose," if a purchase of crabs to be eaten is not?—p. 619.

Fisher v. Samuda (1808) 1 Campb. 190.—ELLENBOROUGH, C.J.

Not applied. Jones v. Bright (1829) 5 Bing. 533, 547; 3 M. & P. 155; 7 L. J. (o.s.) C. P. 213; 30 R. R. 728, 734.—C.P.; *distinguished.* Davis v. Hedges (1871) 40 L. J. Q. B. 276; L. R. 6 Q. B. 687; 25 L. T. 155; 20 W. R. 60.—Q.B.; *commented on.* Randall v. Newson (1877) 46 L. J. Q. B. 259; 2 Q. B. D. 102, 106; 36 L. T. 164; 25 W. R. 813.—C.A.

Curtis v. Hannay (1800) 3 Esp. 82.—C.J., *disapproved.*

Street v. Blay (1831) 2 B. & Ad. 456; 36 R. R. 626.—K.B.

TENTERDEN, C.J. (for the Court).—Lord Eldon, in *Curtis v. Hannay*, is reported to have said, that "he took it to be clear law, that if a person purchases a horse which is warranted sound, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; or he might return the horse and bring an action to recover the full money paid; but in the latter case, the seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value;" and he proceeds to say, that if it were in a worse state than it would have been if returned immediately after the discovery, the purchaser would have no defence to an action for the price of the article. It is to be implied that he would have a defence in case it were returned in the same state, and in a reasonable time after the discovery. This dictum has been adopted in Mr. Starkie's excellent work on the Law of Evidence, Part IV., p. 645; and it is there said that a vendee may, in such a case, rescind the contract altogether by returning the article and refuse to pay the price, or recover it back if paid. It is, however, extremely difficult, indeed impossible, to reconcile this doctrine with those cases in which it has been held, that where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and re-vest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorising the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether.—p. 461.

Curtis v. Hannay, *disapproved.*

Head v. Tattersall (1871) 41 L. J. Ex. 4; L. R. 7 Ex. 7, 10; 25 L. T. 631; 20 W. R. 112.—EX.

Hopkins v. Logan (1839) 8 L. J. Ex. 218; 5 M. & W. 241; 7 D. P. C. 360.—EX.; and **Roscorla v. Thomas** (1842) 11 L. J. Q. B. 214; 3 Q. B. 234; 2 G. & D. 508; 6 Jur. 929.—Q.B., *referred to.*

Elderton v. Emmens (1848) 17 L. J. C. P. 317; 6 C. B. 160, 174; 12 Jur. 728.—EX. CH.

Roscorla v. Thomas, *distinguished.*

Tanner v. Moore (1846) 15 L. J. Q. B. 391; 9 Q. B. 1; 11 Jur. 11.—Q.B.

Hands v. Burton (1808) 9 East 349.—K.B., *applied.*

Saxty v. Wilkin (1843) 12 L. J. Ex. 381; 11 M. & W. 622; 1 D. & L. 281; 7 Jur. 704.—EX.

Reg. v. Henson (1824) Dears. C. C. 24.—C.C.R., *distinguished.*

Hill v. Balls (1857) 27 L. J. Ex. 45; 2 H. & N. 299; 3 Jur. (N.S.) 572; 5 W. R. 740.—EX.

Reg. v. Henson, *referred to.*

Ward v. Hobbs (1877) 2 Q. B. D. 331; 46 L. J. Q. B. 473; 36 L. T. 511; 25 W. R. 585.—Q.B.D.; reversed, C.A. and H.L. (*see ante*, col. 2977).

MEMOR, J. (for self and LUSH, J.).—It is an indictable offence at common law to bring a glandered horse into a public place to the danger of infecting the people there.—p. 334.

Hill v. Balls (1857) 27 L. J. Ex. 45; 2 H. & N. 299; 3 Jur. (N.S.) 592; 5 W. R. 740.

—EX., *distinguished and not applied.*

Mullett v. Mason (1866) 35 L. J. C. P. 299, 301; L. R. 1 C. P. 559, 563; 1 H. & R. 779; 12 Jur. (N.S.) 547; 14 L. T. 558; 14 W. R. 898.—C.P.; Penton v. Murdock (1870) 22 L. T. 371; 18 W. R. 382.—C.P.

Hill v. Balls, *distinguished.*

Mullett v. Mason, *followed.*

Smith v. Green (1875) 1 C. P. D. 92; 45 L. J. C. P. 28, 30; 33 L. T. 572; 24 W. R. 142.—C.P.

BRETT, J.—In *Hill v. Balls*, which was the case of a sale of a glandered horse by auction at a repository, it seems to have been considered that the infecting of other horses was not to be taken to be the natural consequence of the sale of a diseased animal, so as to bring the case within the rule we are dealing with. That case was decided upon a demurrer to declaration which contained no allegation of either false representation or warranty.—p. 96.

Smith v. Green, *applied.*

Randall v. Newson (1877) 46 L. J. Q. B. 259; 2 Q. B. D. 102, 111; 36 L. T. 164; 25 W. R. 813.—C.A.

Price v. Morgan (1836) 6 L. J. Ex. 18; 2 M. & W. 53.—EX., *applied.*

Smith v. Brown (1836), 6 L. J. Ex. 216; 2 M. & W. 851; 5 D. P. C. 736.—EX., *not applied.*

Allen v. Pink (1838) 7 L. J. Ex. 206; 4 M. & W. 140; 1 H. & H. 207.—EX.

Green v. Greenbank (1816) 2 Marsh. 485; 17 R. R. 529.—C.P., *applied.*

Alton v. Midland Ry. (1865) 34 L. J. C. P. 292; 19 C. B. (N.S.) 213; 11 Jur. (N.S.) 672; 12 L. T. 703; 13 W. R. 918.—C.P.

ERLE, C.J.—That was an action for a deceitful warranty of a horse, and a plea of infancy was upheld, because the substantial ground of action was contract, and the plaintiff could not, by declaring in tort, render a person liable who would not have been liable on his promise.—p. 296.

Bridge v. Wain (1816) 1 Stark. 504; 18 R. R. 815.—C.J. and K.B., *referred to.*

Elbinger Actien Gesellschaft v. Armstrong (1874) 43 L. J. Q. B. 211; L. R. 9 Q. B. 473, 476; 30 L. T. 871; 23 W. R. 127.—Q.B.

BLACKBURN, J. (for the Court).—In *Bridge v.*

Wain, where the contract was to supply scarlet cuttings in China, and the articles supplied were not scarlet cuttings, Lord Ellenborough ruled that the plaintiffs were entitled to the value of scarlet cuttings in China.—p. 213.

Bridge v. Wain (*supra*), *referred to*.

Hinde v. Liddell (1875) L. R. 10 Q. B. 265, 269; 44 L. J. Q. B. 105; 32 L. T. 449; 23 W. R. 650.—Q.B.

Randall v. Roper (or *Raper*) (1858) 27 L. J. Q. B. 266; El. Bl. & El. 84; 4 Jur. (N.S.) 662; 6 W. R. 445.—Q.B.; WIGHTMAN *doubting*; *referred to*.

Mullett v. Mason (1866) 35 L. J. C. P. 299, 301; L. R. 1 C. P. 559; 1 H. & R. 779; 12 Jur. (N.S.) 547; 14 L. T. 558; 14 W. R. 898.—C.P.

Randall v. Raper, *explained*.

Smith v. Green (1875) 1 C. P. D. 92; 45 L. J. C. P. 28, 30; 33 L. T. 572; 24 W. R. 142.—C.P. COLERIDGE, C.J.—There was no fraud there [*Randall v. Raper*]; but the defendant sold seed which turned out to be of a kind different from that which he warranted it to be, and the plaintiff having sown it and a wrong crop having come up, he was held entitled to recover the difference in value of the crop as it was and as it ought to have been.—p. 94.

Randall v. Raper, *referred to*.

English and Scottish Trust Co. v. Flatau (1887) 36 W. R. 238.—A. L. SMITH and CHARLES, JJ. *And see* "DAMAGES," vol. i. col. 816.

Ashworth v. Wells (1898) 14 Times L. R. 170.—DAY and LAWRENCE, JJ.; *affirmed with a variation*, 14 Times L. R. 227.—C.A.

5. PERFORMANCE OF CONTRACT.

Startup v. Macdonald (1843) 12 L. J. Ex. 477; 6 Man. & G. 593; 7 Scott (N. R.) 269; 64 R. R. 810, n.—EX. CH.; DENMAN, C.J. *dissenting*; *referred to*.

Coddington v. Paleologo (1867) 36 L. J. Ex. 73; L. R. 2 Ex. 193, 197; 15 L. T. 581; 15 W. R. 961.—MARTIN and BRAMWELL, BB. *dissenting*.

Coddington v. Paleologo, *discussed and applied*.

Corcoran v. Proser (1873) 22 W. R. 222.—EX. CH. (IR.).

Pordage v. Cole (1669) 1 Wms. Saund. 319, l.—K.B.

Applied, *Lloyd v. Lloyd* (1837) 2 Myl. & Cr. 192, 204; 5 L. J. Ch. 191; 6 L. J. Ch. 135.—L.C. and V.-C.; *referred to*, *Elderton v. Emmens* (1848) 17 L. J. C. P. 307, 309; 6 C. B. 160, 175; 12 Jur. 728.—EX. CH.; *approved*, *Marsden v. Moore* (1859) 28 L. J. Ex. 288; 4 H. & N. 500.—EX.; *explained*, *Hoare v. Rennie* (1859) 29 L. J. Ex. 73; 5 H. & N. 19; 8 W. R. 80.—EX.

Pordage v. Cole, *referred to*.

Churchward v. Reg. (1865) L. R. 1 Q. B. 173, 195; 14 L. T. 57.—Q.B.; *Paynter v. James* (1867) L. R. 2 C. P. 348, 375; 15 L. T. 660; 15 W. R. 493.—C.P. (affirmed, 1868) 18 L. T. 449; 16 W. R. 768.—EX. CH.; *Button v. Thompson* (1869) 38 L. J. C. P. 225, 229; L. R. 4 C. P. 330, 343; 20 L. T. 568; 17 W. R. 1069.—C.P. (BRETT, J. *dissenting*); *Bradford v. Williams* (1872) 41 L. J. Ex. 164, 165; L. R. 7 Ex. 259, 261; 26 L. T. 641; 20 W. R. 782.—EX.; *Robinson v. Mollett* (1875)

44 L. J. C. P. 362, 369; L. R. 7 H. L. 802, 814; 33 L. T. 544.—H.L. (E.), with the JUDGES; *Bettini v. Gye* (1876) 45 L. J. Q. B. 209; 1 Q. B. D. 183, 187; 34 L. T. 246; 24 W. R. 551.—Q.B.D.

Pordage v. Cole, *followed*.

Simpson v. Crippin (1872) 42 L. J. Q. B. 28; L. R. 8 Q. B. 14, 17 (*post*, col. 2991).

Pordage v. Cole, *distinguished*.

Honck v. Muller (1881) 7 Q. B. D. 92; 50 L. J. Q. B. 529; 45 L. T. 202; 29 W. R. 830.—C.A.; BRETT, L.J. *dissenting*.

BRAMWELL, L.J.—*Pordage v. Cole* has absolutely nothing to do with the case. That was an action on a specialty. This is not.—p. 100.

Pordage v. Cole, *referred to*.

Mersey Steel and Iron Co. v. Naylor (1884) 9 App. Cas. 434; 53 L. J. Q. B. 497; 53 L. T. 637; 32 W. R. 989.—H.L. (E.).

LORD BLACKBURN.—The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to *Pordage v. Cole* [1 Wms. Saund. 548, ed. 1871]), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct."—p. 443.

Pordage v. Cole, *referred to*.

Ebbw Vale Steel, Iron and Coal Co. v. Blaina Iron and Tinplate Co. (1901) 6 Com. Cas. 33.—C.A.

COLLINS, L.J.—Ever since the date of *Pordage v. Cole* it has been the common contention that a single breach in a contract for delivery of goods in instalments precludes the party in default from insisting upon further performance by the other party. The object of this clause is to declare that what was contended in former cases is intended in this.—p. 36.

Boone (or Bone) v. Eyre (1777) 2 W. Bl. 1312; 1 H. Bl. 273, n; 2 R. R. 768.—C.P.

Discussed, *St. Albans (Duke) v. Shore* (1789) 1 H. Bl. 270.—C.P.; *Glazebrook v. Woodrow* (1799) 8 Term Rep. 366; 4 R. R. 700.—K.B.; *applied*, *Fothergill v. Walton* (1818) 8 Taunt. 576, 583; 2 Moore 630; 20 R. R. 567.—C.P.; *Franklin v. Miller* (1836) 4 A. & E. 599, 605.—K.B.; *Lloyd v. Lloyd* (1837) 2 Myl. & Cr. 192, 204; 6 L. J. Ch. 135.—L.C.; *not applied*, *Chanter v. Leese* (1840) 9 L. J. Ex. 327; 4 M. & W. 698.—EX. CH.; *explained*, *Hoare v. Rennie* (1859) 29 L. J. Ex. 73; 5 H. & N. 19; 8 W. R. 80.—EX.; *referred to*, *MacAndrew v. Chapple* (1866) 35 L. J. C. P. 281, 284; L. R. 1 C. P. 643, 648; 12 Jur. (N.S.) 567; 14 L. T. 556; 14 W. R. 891.—C.P.; *doctrine not applied*, *Witson v. Finch-Hatton* (1877) 46 L. J. Ex. 489; 2 Ex. D. 336, 345; 36 L. T. 473; 25 W. R. 537.—EX. D.; *Bastin v. Bidwell* (1881) 18 Ch. D. 238, 245; 44 L. T. 742.—KAY, J.; *referred to*, *Inman Steamship Co. v. Bischoff* (1882) 52 L. J. Q. B. 169; 7 App. Cas. 670, 673; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6.—H.L. (E.).

Boone v. Eyre, *applied*.

Société Générale de Paris v. Milders (1883) 49 L. T. 55.

FIELD, J.—If the breach on the part of the plaintiff has caused him damage he must sue for

it on his contract in a separate action, and not set up the performance of the contract by the plaintiff as a condition precedent to the performance of his part of the contract, as was held in the old case of *Boone v. Eyre*.—p. 59.

Withers v. Reynolds (1831) 1 L. J. K. B. 30; 2 B. & Ad. 882.—K.B.

Not applied, *Clarke v. Burn* (1866) 14 L. T. 439.—EX.; *upheld*, *Jonassohn v. Young* (1863) 32 L. J. Q. B. 385; 4 B. & S. 296; 11 W. R. 962.—Q.B.; *approved*, *Bradford v. Williams* (1872) 41 L. J. Ex. 164; L. R. 7 Ex. 259, 261; 26 L. T. 641; 20 W. R. 782.—EX.; *followed*, *Chalmers. Ex parte, Edwards, In re* (1872) 42 L. J. Bk. 2, 4; 21 W. R. 133.—BACON, C.J. (affirmed, (1873) 42 L. J. Bk. 37; L. R. 8 Ch. 289; 28 L. T. 325; 21 W. R. 349.—C.A. SELBORNE, L.C., JAMES and MELLISH, L.JJ.; *discussed and applied*, *Corcoran v. Proser* (1873) 22 W. R. 222.—EX. CH. (IR.); *approved*, *Freeth v. Burr* (1874) 43 L. J. C. P. 91, 93; L. R. 9 C. P. 208, 214.—C.P. (*see post*, col. 2992); *followed*, *Bloomer v. Bernstein* (1874) 43 L. J. C. P. 375; L. R. 9 C. P. 588; 31 L. T. 306; 23 W. R. 238.—C.P.

Withers v. Reynolds, *discussed*.

Mersey Steel and Iron Co. v. Naylor (1882) 51 L. J. Q. B. 576; 9 Q. B. D. 648, 658; 47 L. T. 369; 31 W. R. 83.—C.A. (affirmed, *post*).

Withers v. Reynolds, *approved but not applied*.

Mersey Steel and Iron Co. v. Naylor (1884) 53 L. J. Q. B. 497; 9 App. Cas. 434, 442.—H.L. (E.). *See post*, col. 2993.

Withers v. Reynolds, *referred to*.

Cornwall v. Henson (1900) 69 L. J. Ch. 581, 585; [1900] 2 Ch. 298.—C.A. *See post*, col. 2995.

Withers v. Reynolds, *applied*.

Rhymney Ry. v. Brecon and Merthyr Tydfil Junction Ry. (1900) 69 L. J. Ch. 813; 83 L. T. 111; 49 W. R. 116.—C.A. ALVERSTONE, M.R., RIGBY and COLLINS, L.JJ.

Hoare v. Rennie (1859) 29 L. J. Ex. 73; 5 H. & N. 19; 8 W. R. 80.—EX., *considered*.

Jonassohn v. Young (1863) 32 L. J. Q. B. 385; 4 B. & S. 296; 11 W. R. 962.—Q.B.

Hoare v. Rennie, *applied*.

Bradford v. Williams (1872) 41 L. J. Ex. 164, 165; L. R. 7 Ex. 259, 261; 26 L. T. 641; 20 W. R. 782.—EX.

Hoare v. Rennie, *questioned*.

Jonassohn v. Young, *referred to*.

Simpson v. Crippin (1873) 42 L. J. Q. B. 28; L. R. 8 Q. B. 14; 27 L. T. 546; 21 W. R. 141.
BLACKBURN, J.—The contract in the present case is not exactly the same as in *Hoare v. Rennie*. I gather from the L. J. R. that the reasons given by Pollock, C.B., and Watson, B., were not very satisfactory to Channell, B. It is difficult to discover what was the principle of the decision (p. 32). *Hoare v. Rennie* was much observed upon in *Jonassohn v. Young*. I cannot say that it was overruled, because this Court (the Q. B.) assumed that time was of the essence of the contract. It is difficult to see how they could have done so, and I do not think that I am bound by their decision in *Hoare v. Rennie*. If we have misunderstood *Hoare v. Rennie*, our judgment may be corrected

by a Court of Error.—p. 33. MELLOR and LUSH, JJ. concurred.

Jonassohn v. Young, *discussed and applied*.

Corcoran v. Proser (1873) 22 W. R. 222.—EX. CH. (IR.).

Hoare v. Rennie (*supra*), *explained*.

Jonassohn v. Young, *referred to*.

Freeth v. Burr (1874) 43 L. J. C. P. 91; L. R. 9 C. P. 208, 214; 29 L. T. 773; 22 W. R. 370.—C.P.

COLERIDGE, C.J.—The Ct. of Ex. thought that in *Hoare v. Rennie* where time was of the essence of the contract, and where by the non-delivery of part of the goods the whole object of the contract had been frustrated, such non-performance amounted to a rescission of the contract, and set the other party to it free. And that case was so put by the great authority of Crompton, J. in the subsequent case of *Jonassohn v. Young*, where he says it is to be supported on the ground that the breach frustrated the whole contract. Then in *Withers v. Reynolds* (*supra*, col. 2991), where the action was for non-delivery of hay, a non-payment was held to put an end to the contract, because, as was said by Patterson, J., such non-payment was, under the circumstances of that case, an intimation that the purchaser did not intend to complete the contract, and on that ground the case was upheld by Wightman, J. in *Jonassohn v. Young*.—p. 93.

Jonassohn v. Young, *discussed*.

Reuter v. Sala (1879) 48 L. J. C. P. 492; 4 C. P. D. 239, 253; 40 L. T. 476; 27 W. R. 631.—C.A. *See judgment of BRETT, L.J., dissenting*.

Hoare v. Rennie (*supra*), *approved and applied*.

Honck v. Muller (1881) 7 Q. B. D. 92; 50 L. J. Q. B. 529; 45 L. T. 202; 29 W. R. 830.—C.A.

BRAMWELL, L.J.—*Hoare v. Rennie* is in point. The same thing was decided a few days ago in *Englehart v. Bosanquet* [unreported]. It was there held that on a sale of 2,000 tons of sugar to come in two ships when the first ship was not equal to contract, the buyer was not bound to take the other. But it is said that *Hoare v. Rennie* has been overruled by *Simpson v. Crippin* (42 L. J. Q. B. 28; L. R. 8 Q. B. 14; *see post*, col. 2993). That is not so. That decision was quite right. The case was distinguishable from *Hoare v. Rennie*, for the contract had been part performed and could not therefore be undone. One may express a respectful agreement with what the learned judges said in *Simpson v. Crippin*, viz., that they did not understand *Hoare v. Rennie*.—p. 100.

BAGGALLAY, L.J.—If, then, the decision in *Simpson v. Crippin* is to be considered as conflicting with that in *Hoare v. Rennie*, and I think it was so considered by the judges who decided it, I am bound to say that I adopt the principles enunciated in the latter case as being more in accordance with reason and justice than those upon which the former was expressed to be decided. . . . I may mention that in *Bradford v. Williams* (41 L. J. Ex. 164; L. R. 7 Ex. 259; *see post*, col. 2993), which was decided in the early part of the same year as *Simpson v. Crippin*, *Hoare v. Rennie* was quoted and recognised, and the principles upon which it was

decided adopted. *Bradford v. Williams* was mentioned in argument in *Simpson v. Crippin*, but was not noticed in any of the judgments.—p. 102.

BRETT, J., who dissented, said:—In my opinion *Hoare v. Rennie* was wrongly decided, and I prefer *Simpson v. Crippin*.—p. 105.

Hoare v. Rennie, discussed.

Mersey Steel and Iron Co. v. Naylor (1882) 51 L. J. Q. B. 576; 9 Q. B. D. 648, 658; 47 L. T. 369; 31 W. R. 83.—C.A.; and (1884) 53 L. J. Q. B. 497; 9 App. Cas. 434, 444.—H.L. (E.) (*see post*, col. 2994); *Cornwall v. Henson* (1900) 69 L. J. Ch. 581, 585; [1900] 2 Ch. 298, 303.—C.A. *See post*, col. 2995.

Bradford v. Williams (1872) 41 L. J. Ex. 164; L. R. 7 Ex. 259; 26 L. T. 641; 20 W. R. 782.—EX., *referred to*.

Hudson v. Hill (1874) 43 L. J. C. P. 273, 281; 30 L. T. 555.—C.P.; *Honck v. Muller* (1881) 7 Q. B. D. 92, 102; 50 L. J. Q. B. 529.—C.A. *See supra*, col. 2992.

Simpson v. Crippin (1872) 42 L. J. Q. B. 28; L. R. 8 Q. B. 14; 27 L. T. 546; 21 W. R. 141.—Q.B.

Applied, *Corcoran v. Proser* (1873) 22 W. R. 222.—EX. CH. (IR.); *distinguished*, *Reuter v. Sala* (1879) 48 L. J. C. P. 492; 4 C. P. D. 239, 246; 40 L. T. 476; 27 W. R. 631.—C.A. (BRETT, L.J. dissenting); *considered*, *Honck v. Muller* (1881) 7 Q. B. D. 92, 100; 50 L. J. Q. B. 529.—C.A. (*see supra*, col. 2992); *referred to*, *Mersey Steel and Iron Co. v. Naylor* (1882) 51 L. J. Q. B. 576; 9 Q. B. D. 648, 658; 47 L. T. 369; 31 W. R. 83.—C.A. (affirmed, H.L. (E.)), (*post*); *Cornwall v. Henson* (1900) 69 L. J. Ch. 581; [1900] 2 Ch. 298, 303.—C.A. *See post*, col. 2995.

Freeth v. Burr (1874) 43 L. J. C. P. 91; L. R. 9 C. P. 208; 29 L. T. 773; 22 W. R. 870.—C.P., *referred to*.

Morgan v. Bain (1874) L. R. 10 C. P. 15, 23; 44 L. J. C. P. 47; 31 L. T. 616; 23 W. R. 239.—C.P.

Freeth v. Burr, approved.

Mersey Steel and Iron Co. v. Naylor (1882) 51 L. J. Q. B. 576; 9 Q. B. D. 648; 47 L. T. 669; 31 W. R. 80.—C.A. (affirmed, *post*).

Freeth v. Burr, approved.

Mersey Steel and Iron Co. v. Naylor (1884) 9 App. Cas. 434; 53 L. J. Q. B. 497; 51 L. T. 637; 32 W. R. 989.—H.L. (E.).

SELBORNE, L.C.—I am content to take the rule as stated by Lord Coleridge in *Freeth v. Burr*, which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part.—p. 438.

LORD BLACKBURN.—I myself have no doubt that *Withers v. Reynolds* [1 L. J. K. B. 30; 2 B. & Ad. 882 (*supra*, col. 2991)] correctly lays down the law to this extent, that where there is

a contract which is to be performed in future, if one of the parties has said to the other in effect, "If you go on and perform your side of the contract I will not perform mine" (in *Withers v. Reynolds* it was, "You may bring your straw, but I will not pay you upon delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you,"), that in effect amounts to saying, "I will not perform the contract." In that case the other party may say, "You have given me distinct notice that you will not perform the contract. I will not wait until you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract." That was settled in *Hochster v. De la Tour* [22 L. J. Q. B. 455; 2 El. & Bl. 678; *see* "CONTRACT," vol. i., col. 670], in the Q. B., and has never been doubted since; because there is a breach of the contract although the time indicated in the contract has not arrived. That is the law as laid down in *Withers v. Reynolds*. In *Freeth v. Burr* it was also so laid down.—p. 442.

LORD BRAMWELL.—I cannot tell why *Honck v. Muller* (*post*) and *Hoare v. Rennie* (*supra*, col. 2991) should be brought forward upon this occasion. I do not think I said in *Honck v. Muller* what Sir G. Jessel [9 Q. B. D. 658] supposed me to have said, namely, that "in no case where the contract has been part performed could one party rely on the refusal of the other to go on." If I did say so I recall it, because I do not think so; it depends on the nature of the contract and the circumstances of the case. What I was busy upon in that case was in showing that there had been no performance at all there, and that in truth what the plaintiff was seeking to do was to make the defendant accept the performance of something entirely different from what had been agreed upon, and I think in that opinion I was right. But what has that to do with this case? Suppose I was wrong, what then? Suppose *Honck v. Muller* was wrongly decided, how does it bear upon this case? Not in the least. Nor, indeed, does *Hoare v. Rennie*, which, in my opinion, was decided upon the considerations which I have mentioned and which I think should be supported.—p. 446.

Honck v. Muller (1881) 50 L. J. Q. B. 529; 7 Q. B. D. 92; 45 L. T. 202; 29 W. R. 830.—C.A. BRAMWELL and BAGGALLAY, L.JJ.; BRETT, L.J. dissenting, *referred to*.

Société Générale de Paris v. Milders (1883) 49 L. T. 55, 59.—FIELD, J.

Honck v. Muller, commented on.

Mersey Steel and Iron Co. v. Naylor (1882) 51 L. J. Q. B. 576; 9 Q. B. D. 648, 657; 47 L. T. 669; 31 W. R. 80.—C.A.; and (1884) 53 L. J. Q. B. 497; 9 App. Cas. 434, 444.—H.L. (E.). *See supra*.

Honck v. Muller, referred to.

Cornwall v. Henson (1900) 69 L. J. Ch. 581, 585; [1900] 2 Ch. 298.—C.A. *See post*, col. 2995.

Franklin v. Miller (1836) 4 A. & E. 599.—K.B.

Applied, *Corcoran v. Proser* (1873) 22 W. R. 222.—EX. CH. (IR.); *referred to*, *Ellis v. Pond* (1897) 67 L. J. Q. B. 345; [1898] 1 Q. B. 426, 450; 78 L. T. 125.—C.A.; *Cornwall v. Henson* [1900] 2 Ch. 298 (*post*, col. 2995).

Weaver v. Sessions (1815) 6 Taunt. 154; 1 Marsh, 505.—C.P.; and **Ehrensperger v. Anderson** (1848) 18 L. J. Ex. 132; 3 Ex. 148.—EX., *applied*.

Concoran v. Proser (*supra*, col. 2994).

Lovatt v. Hamilton (1839) 5 M. & W. 639, 644.—EX., *applied*.

Johnson v. Macdonald (1842) 12 L. J. Ex. 99; 9 M. & W. 600; 6 Jur. 264.—EX.

Mersey Steel and Iron Co. v. Naylor (1884) 53 L. J. Q. B. 497; 9 App. Cas. 434; 51 L. T. 637; 32 W. R. 989.—H.L. (E.).

Referred to, **Société Générale de Paris v. Milders** (1883) 49 L. T. 55, 58.—FIELD, J.; *applied*, **Eberle's Hotels and Restaurant Co. v. Jonas** (1887) 56 L. J. Q. B. 278; 18 Q. B. D. 459, 467; 35 W. R. 467.—C.A.; *discussed*, **Pratt v. Inman** (1889) 59 L. J. Ch. 274; 43 Ch. D. 175, 182; 61 L. T. 760; 38 W. R. 200.—CHITTY, J.; **Dickinson v. Fanshaw** (1892) 8 Times L. R. 271.—C.A.

Mersey Steel and Iron Co. v. Naylor.

Referred to on question of set-off, **Sovereign Life Assurance Co. v. Dodd** (1892) 61 L. J. Q. B. 364; [1892] 1 Q. B. 405, 411; 66 L. T. 614; 40 W. R. 443.—CHARLES, J. (affirmed C.A. See "COMPANY, vol. 1, col. 608); *applied*, **Christie v. Taunton** (1893) 62 L. J. Ch. 385; [1893] 2 Ch. 175, 184; 3 R. 404; 68 L. T. 638; 41 W. R. 475.—STIRLING, J.; *discussed*, **Hett Maylor & Co., In re** (1894) 10 Times L. R. 412.—CHITTY, J.; *not applied*, **Auriferous Properties, Ltd. (No. 2)** (1898) 67 L. J. Ch. 574, 575; [1898] 2 Ch. 428; 79 L. T. 71; 47 W. R. 75; 5 Manson 260.—WRIGHT, J.; *referred to*, **Daintrey, In re, Mant, Ex parte** (1899) 69 L. J. Q. B. 207; [1900] 1 Q. B. 546; 82 L. T. 239; 7 Manson 107.—C.A.

Mersey Steel and Iron Co. v. Naylor, *referred to*.

Cornwall v. Henson (1900) 69 L. J. Ch. 581; [1900] 2 Ch. 298; 82 L. T. 735; 49 W. R. 42.—C.A.

COLLINS, L.J.—It is clear law that the breach of one of several stipulations does not of itself prove such a declaration of intention [to repudiate all rights and obligations under the contract]. Whatever doubt there may have been arising out of cases like **Withers v. Reynolds** (*supra*, col. 2991) and **Hoare v. Rennie** (*supra*, col. 2991), where the Court held that a breach was evidence of entire refusal of the contract, according to **Franklin v. Miller** (*supra*, col. 2994), **Simpson v. Crippin** (*supra*, col. 2993), and **Mersey Steel and Iron Co. v. Naylor**, where the whole subject was debated, the law is now clearly this, that the breach of one stipulation does not carry with it even an implication of an intention to rescind the whole contract, though in point of law it may do so if the circumstances ground such an inference. But the further the parties have advanced in the performance of the contract, the less possible it becomes to draw the inference that the party failing in performance really intended to renounce the contract.—p. 585.

Mersey Steel and Iron Co. v. Naylor, *distinguished*.

Ebbw Vale Steel, Iron and Coal Co. v. Blaina Iron and Tinplate Co. (1901) 6 Com. Cas. 33.—C.A.

A. L. SMITH, M.R.—These contracts contain a condition which I do not remember to have seen before—namely, that payment on due date is to

be a condition precedent to future deliveries. In **Mersey Steel and Iron Co. v. Naylor** it was held that non-payment for one delivery under a contract for delivery in instalments, did not of itself justify the vendor in refusing to make any further deliveries according to the terms of the contract.—p. 35. *And see* "CONTRACT," vol. i. col. 672.

Alexander v. Vanderzee (1872) L. R. 7 C. P. 530; 20 W. R. 871.—EX. CH.; **KELLY, C.B.** *doubting; considered and applied*.

Ashworth v. Redford (1873) 43 L. J. C. P. 37; L. R. 9 C. P. 20.—C.P.

KEATING, J.—A somewhat similar question arose in this Court in the recent case of **Alexander v. Vanderzee**. There the defendant contracted for a quantity of Danubian maize, "for shipment in June and [or] July, 1869." . . . The learned judge left it to the jury to say whether the cargoes in question were "June shipments" in the ordinary business sense of the term; and they found that they were.—p. 21.

BRETT, J.—But a phrase, though not grammatically accurate, may have an intelligible mercantile meaning; and it seems to me that **Alexander v. Vanderzee** is an authority to show that the mercantile meaning, as distinguished from the grammatical meaning, is a question for the jury.—p. 22.

GROVE, J. *doubted*.

Alexander v. Vanderzee, *considered and not applied*.

Bowes v. Shand (1877) 2 App. Cas. 455; 46 L. J. Q. B. 224, 561; 36 L. T. 857; 25 W. R. 780.—H.L. (E.).

CAIRNS, L.C.—The C. A. in the present case appears to have thought that there was some rule of general application laid down by the decision of **Alexander v. Vanderzee**, in the Ex. Ch., and that that rule was binding, or ought to have been held binding, on the Court below in the present case. My lords, I do not find that there was anything that could be called a rule laid down in **Alexander v. Vanderzee**. . . . The case, therefore, of **Alexander v. Vanderzee**, in the first place, laid down no general rule; it proceeded on the finding of the jury in that particular case, and, whether it laid down a rule or not, the rule would not be applicable to a case like the present, in which the facts are different from the facts which occurred there.—pp. 466, 467.

LORD HATHERLEY.—I pass altogether from **Alexander v. Vanderzee**, because, for the reasons which have been already assigned, it appears to me to be distinguishable from this case, and to have laid down no rule whatsoever which can be usefully applied to the case now to be decided.—p. 472.

Shand v. Bowes (1876) 45 L. J. Q. B. 507; 1 Q. B. D. 470; 34 L. T. 795; 24 W. R. 734.—Q.B.D.; *reversed*, (1877) 46 L. J. Q. B. 201; 2 Q. B. D. 112; 36 L. T. 161; 25 W. R. 291.—C.A.; *the latter decision reversed and the former restored nom.* **Bowes v. Shand** (1877) 46 L. J. Q. B. 561; 2 App. Cas. 455; 36 L. T. 857; 25 W. R. 780.—H.L. (E.).

Bowes v. Shand, *referred to*.

West Ham Union v. St. Matthew, Bethnal Green (1896) 65 L. J. M. C. 201, 207; [1896] A. C. 477, 489; 75 L. T. 286; 60 J. P. 740.—H.L. (E.); **Goodbody & Co., and Balfour, Williamson & Co.,**

In re (1899) 82 L. T. 484; 9 Asp. M. C. 69; 5 Com. Cas. 59, 69.—C.A. A. L. SMITH, COLLINS and V. WILLIAMS, L.JJ.

Gath v. Lees (1865) 3 H. & C. 558.—EX., *distinguished*.

Borrowman v. Free (1878) 4 Q. B. D. 500; 48 L. J. Q. B. 65.—C.A.

BRAMWELL, L.J.—In *Gath v. Lees*, cotton "was to be delivered at seller's option in August or September, 1864." The seller elected to exercise that option in August, and notice that it would be so exercised was accepted by the buyers. The sellers had a right to exercise that option; but in this case, upon the defendant's hypothesis, the plaintiffs by naming the *Charles Platt*, exercised their option in an improper manner: therefore they had a right to withdraw their tender, and to exercise it in a proper manner. That case shows that this action is maintainable.—p. 503.

BRETT and **COTTON, L.JJ.**, to the same effect.

Hickman v. Haynes (1875) 44 L. J. C. P. 358; L. R. 10 C. P. 598; 32 L. T. 873; 23 W. R. 872.—C.P., *referred to*.

Plevins v. Downing (1876) 45 L. J. C. P. 695, 696; 1 C. P. D. 220, 226; 35 L. T. 263.—C.P.D.

Cockerell v. Aucompte (1857) 26 L. J. C. P. 194; 2 C. B. (N.S.) 440; 3 Jur. (N.S.) 844; 5 W. R. 633.—C.P.

Discussed, **De Vries v. Corner** (1865) 13 L. T. 636, 638; 14 W. R. 262.—C.P.; *distinguished*, **Overton v. Hewett** (1886) 3 Times L. R. 246, 248.—**WILLS** and **GRANTHAM, JJ.**

Tanvaco (or Tamvaco) v. Lucas (1859) 28 L. J. Q. B. 150; 1 El. & El. 581; 5 Jur. (N.S.) 731; 1 L. T. 161.—Q.B., *distinguished*.

Ireland v. Livingstone (1866) 36 L. J. Q. B. 50; L. R. 2 Q. B. 99, 104; 15 W. R. 152.—Q.B.; reversed, (1870) 39 L. J. Q. B. 282; L. R. 5 Q. B. 516.—C.A.; but affirmed, (1872) 41 L. J. Q. B. 201; L. R. 5 H. L. 395; 27 L. T. 79.—H.L. (E.).

COCKBURN, C.J. (in the Q. B.).—I should be most unwilling to cast a shadow of doubt on the correctness of the decision of this Court in *Tanvaco v. Lucas*, and if the words in this contract, "50 tons more or less of no moment," &c., were a limitation as to quantity, this case would have been directly in point. But . . . I think that they were not intended as a limitation of the quantity which the plaintiffs were authorised to buy on behalf of the defendant, but simply to prevent them from being fettered in the event of their finding a vessel able to carry more or less than the precise quantity of 500 tons.—p. 54.

Thornton v. Simpson (1816) 6 Taunt. 556; 2 Marsh. 267; Holt N. P. 164.—C.P., *not applied*.

Borrowman v. Free (1878) 48 L. J. Q. B. 65; 4 Q. B. D. 500, 504.—C.A.

Hayward v. Seongall (1890) 2 Campb. 56; 11 R. R. 602.—**ELLENBOROUGH, C.J.**, *distinguished*.

Fischel v. Scott (1854) 15 C. B. 69; 2 C. L. R. 1774.—C.P.

Fischel v. Scott, *distinguished*.

Gorissen v. Perrin (1857) 2 C. B. (N.S.) 681; 27 L. J. C. P. 29; 3 Jur. (N.S.) 867; 5 W. R. 709.—C.P. **COCKBURN, C.J.** (for the Court).—There was not in *Fischel v. Scott* any positive adjudication of the Court. Observations were thrown out during the discussion on that case by individual

members of the Court, upon which the counsel for the plaintiff elected to amend. But what is still more material is, that the facts of the present case are plainly distinguishable from those in *Fischel v. Scott*. In the latter case the defendant had taken upon himself to sell the goods, trusting to their coming consigned to him. . . . Here, the bales of gambier, on the arrival of which the plaintiff in his second count relies, never were expected by the defendants to come consigned to them, nor did they affect to deal with them.—p. 33.

Brandt v. Lawrence (1876) 1 Q. B. D. 344; 46 L. J. Q. B. 237; 24 W. R. 749.—C.A., *distinguished*.

Reuter v. Sala (1879) 4 C. P. D. 239; 48 L. J. C. P. 492; 40 L. T. 476; 27 W. R. 631.—C.A.

COTTON, L.J.—But it is urged that the decision in *Brandt v. Lawrence* has given a judicial interpretation of these words, "per vessel or vessels," in a contract which would otherwise be entire and indivisible. I cannot consider *Brandt v. Lawrence* as laying down a general rule of construction, but merely as deciding that the words in that case having regard to the words, "*Honch* or vessels," was divisible. [His lordship proceeded to compare the facts of the two *supra*, at length.]—p. 250.

THE SHERIFF, L.J., to the same effect.—*See also* **BRETT, L.J.**, who dissented, after dissenting in *Brandt v. Thomas*, at length, *see* p. 255, cono case. —The contract . . . now before us differs from that in *Brandt v. Lawrence*, but it differs very little as to the terms of payment from the other cited cases. That difference as to the periods of payment makes no difference in the reasons given for the decisions in those cases, in which the stipulation as to the payment was not noticed, and in *Brandt v. Thomas* it is not even reported.—p. 258.

Reuter v. Sala, *referred to*.

Lomas & Co. v. Barff, Ltd., Frangopulo & Co. v. Lomas & Co. (1901) 17 Times L. R. 437.—**KENNEDY, J.**

Frangopulo & Co. v. Lomas & Co., *reversed*; (1902) 18 Times L. R. 461.—C.A. **COLLINS, M.R.**, **BOMER** and **MATHEW, L.JJ.**

Hart v. Mills (1846) 15 L. J. Ex. 200; 15 M. & W. 85.—EX., *approved but distinguished*.

Levy v. Green (1857) 8 El. & Bl. 573; 27 L. J. Q. B. 111.—Q.B.; **COLERIDGE** and **ERLE, JJ.** dissenting; nonsuit affirmed, (1859) 1 El. & El. 969; 28 L. J. Q. B. 319; 5 Jur. (N.S.) 1245; 7 W. R. 480.—EX. CH.

Levy v. Green, *followed*.

Shannon v. Barlow (1864) 15 Ir. C. L. R. 478.—C.P.; **CHRISTIAN, J.** dissenting.

Levy v. Green, *applied*.

Shannon v. Barlow, *referred to*. **Tarling v. O'Riordan** (1878) 2 L. R. Ir. 82.—C.A.

Pettit v. Mitchell (1842) 12 L. J. C. P. 9; 4 Man. & G. 819; 5 Scott N. R. 721; Car. & M. 424; 6 Jur. 1016.—C.P., *distinguished*.

Isherwood v. Whitmore (1843) 12 L. J. Ex. 318; 11 M. & W. 347; 2 D. (N.S.) 548; 7 Jur. 535.—EX.

PARKE, B.—There it is clear that there was an

agreement between the parties, that the lots sold were to be taken away by the purchaser, without any further inspection.—p. 319.

Azémar v. Casella (1867) 36 L. J. C. P. 124; L. R. 2 C. P. 431.—C.P.; *affirmed*, 36 L. J. C. P. 263; L. R. 2 C. P. 677; 16 L. T. 571; 15 W. R. 998.—EX. CH. *And see* **Vigers v. Sanderson** (1901) 70 L. T. K. B. 383; [1901] 1 K. B. 608; 84 L. T. 464; 49 W. R. 411; 6 Com. Cas. 99.—BIGHAM, J.

Scotthorn v. South Staffordshire Ry. (1853) 22 L. J. Ex. 121; 8 Ex. 341; 17 Jur. 214; 1 W. R. 154.—EX., *referred to*.

L. & N. W. Ry. v. Bartlett (1861) 31 L. J. Ex. 92; 7 H. & N. 400; 8 Jur. (N.S.) 58; 5 L. T. 399; 10 W. R. 109.—EX., *applied*.
Cork Distilleries Co. v. Great S. & W. (Ir.) Ry. (1871) Ir. R. 5 C. L. 177, 185.—EX. CH. (*post*).

L. & N. W. Ry. v. Bartlett.

Distinguished, **Metcalfe v. Britannia Ironworks Co.** (1876) 45 L. J. Q. B. 887; 1 Q. B. D. 613, 631; 35 L. T. 759.—Q.B.D. (*affirmed*, 46 L. J. Q. B. 443; 2 Q. B. D. 423; 36 L. T. 451; 25 W. R. 720.—C.A. *See* "SHIPPING," *post*, col. 3326); *adopted*, **Bethell v. Clark** (1887) 19 Q. B. D. 553, 560; 57 L. T. 627; 36 W. R. 185.—Q.B.D. (*affirmed*, 57 L. J. Q. B. 302; 20 Q. B. D. 615; 59 L. T. 808; 36 W. R. 611; 6 Asp. M. C. 346.—C.A.).

Cork Distilleries Co. v. Great S. & W. (Ir.) Ry. (1874) L. R. 7 H. L. 269.—H.L. (IR.), *affirming* (1871) Ir. R. 5 C. L. 177.—EX. CH., *which reversed* (1870) Ir. R. 4 C. L. 349.—Q.B.

Distinguished, **Metcalfe v. Britannia Ironworks Co.** (1876) 1 Q. B. D. 613, 631 (*supra*); *referred to*, **Pontifex v. Midland Ry.** (1877) 47 L. J. Q. B. 28; 3 Q. B. D. 23, 27; 37 L. T. 403; 26 W. L. 209.—Q.B.D.

Bevington v. Everett (1877) *The Times*, 13th Apl., 1877, p. 11, *applied*.

Bevington v. Dale (1902) 7 Com. Cas. 112.—KENNEDY, J.

G. DISCHARGE AND BREACH OF CONTRACT.

King v. Parker (1876) 34 L. T. 887.—KELLY, C.B. and POLLOCK, B., *discussed*.

De Oleager v. West Cumberland Iron and Steel Co. (1879) 4 Q. B. D. 472; 48 L. J. Q. B. 753; 41 L. T. 342; 27 W. R. 870.—Q.B.D.

LUSH, J., (for the Court).—**King v. Parker** we cannot regard as a satisfactory decision upon this point. The main point raised and argued was whether the strike itself put an end to the contract. The Court held that it did not, and from that opinion, looking to the terms of the contract, we see no reason to dissent. The question whether it was too late, having regard to all the circumstances, for the seller to insist on delivery, was certainly raised, but does not appear to have been pressed, and the C.B. gives no opinion upon the point.—p. 476.

Ashmore & Son v. Cox (1898) 68 L. J. Q. B. 72; [1899] 1 Q. B. 436.—RUSSELL OF KILLOWEN, C.J., *principle not applied*.

Nickoll v. Ashton (1900) 69 L. J. Q. B. 640; [1900] 2 Q. B. 298, 303; 82 L. T. 761; 5 Com. Cas. 252.—MATHEW, J.

Nickoll v. Ashton, *affirmed*, (1901) 70 L. J. K. B. 600; [1901] 2 K. B. 126; 84 L. T. 804; 49 W. R. 513; 6 Com. Cas. 150; 17 Times L. R.

467.—C.A. A. L. SMITH, M.R. and ROMER, L.J.; V. WILLIAMS, L.J. *discussing*.

Nickoll v. Ashton, *referred to*.

Krell v. Henry (1903) 72 L. J. K. B. 794; [1903] 2 K. B. 740, 748; 89 L. T. 328.—C.A.

Att.-Gen. v. Stewards (1901) 18 Times L. R. 131.—H.L. (E.); *reversing* 17 Times L. R. 117.—C.A., *referred to*.

Berk v. International Explosives Co. (1901) 7 Com. Cas. 20.—WALTON, J.

Griffiths v. Perry (1859) 28 L. J. Q. B. 204; 1 El. & El. 680; 5 Jur. (N.S.) 1076.—Q.B., *discussed*.

Chalmers, Ex parte, Edwards, In re (1872) 42 L. J. Bk. 2, 5.—BACON, C.J. (*affirmed, post*).

Griffiths v. Perry, *approved*.

Chalmers, Ex parte, Edwards, In re (1873) 42 L. J. Bk. 37; L. R. 8 Ch. 239, 292; 28 L. T. 325; 21 W. R. 349.—C.A.

MELLISH, L.J., agreed with what Crompton, J. said in **Griffiths v. Perry** that the mere fact of the insolvency of the purchaser did not put an end to the contract.—p. 37.

Chalmers, Ex parte, Edwards, In re (1873)

42 L. J. K. B. 37; L. R. 8 Ch. 239; 28 L. T. 325; 21 W. R. 349.—C.A., *principle applied*.
Morgan v. Bain (1874) 44 L. J. C. P. 47, 51; L. R. 10 C. P. 15; 31 L. T. 616; 23 W. R. 239.—C.P.

Chalmers, Ex parte, Edwards, In re, and

Morgan v. Bain, *discussed and not applied*.
Phoenix Bessemer Steel Co., In re, Carnforth Hæmatite Iron Co., Ex parte (1876) 46 L. J. Ch. 115; 4 Ch. D. 108, 112; 35 L. T. 776; 25 W. R. 187.—JESSEL, M.R.; *affirmed*, C.A.

Chalmers, Ex parte, Edwards, In re, and

Morgan v. Bain, *referred to*.
Associated Portland Cement Manufacturers, Ltd. v. Tolhurst (1902) 71 L. J. K. B. 949; [1902] 2 K. B. 660, 671; 87 L. T. 465; 51 W. R. 81.—C.A.; *affirmed nom.* **Tolhurst v. Associated Portland Cement Manufacturers, Ltd.**, (1903) 72 L. J. K. B. 834; [1903] A. C. 414; 89 L. T. 196; 52 W. R. 143.—H.L. (E.).

COLLINS, M.R.—Liquidation of itself clearly does not involve inability to carry out the contract, though it certainly may, coupled with other circumstances, such as those mentioned in **Chalmers, Ex parte, Edwards, In re, and Morgan v. Bain**, ground an inference that the liquidating company has renounced the contract. Here there does not seem to me to be sufficient evidence to justify any such inference. At the time when these actions were brought and tried the company were in possession of assets undistributed amounting to a very large sum, and could in no sense be described as insolvent, even if inadequacy without more could be treated as equivalent to a repudiation of the contract, as it clearly could not. *See Chalmers, Ex parte*. Insolvency alone could at most entitle the person called on to deliver to refuse to do so, except on cash terms. *See Morgan v. Bain and Stapleton, Ex parte (see post)*.—p. 957.

Stapleton, Ex parte, Nathan, In re (1879)

10 Ch. D. 586; 40 L. T. 14; 27 W. R. 327.—C.A., *referred to*.

Tolhurst v. Associated Portland Cement Manufacturers, Ltd. (1902) 71 L. J. K. B. 949, 958; [1902] 2 K. B. 660, 671.—C.A. (*supra*). *And see* on question of costs of appeal, vol. i., cols. 184 and 611.

Associated Portland Cement Manufacturers, Ltd. v. Tolhurst (1901) 70 L. J. K. B. 1036; [1901] 2 K. B. 811.—**MATHEW, J.**; *reversed*, C.A. *See supra*, col. 3000.

Phoenix Bessemer Steel Co., In re, Carnforth Hæmatite Iron Co., Ex parte (1876) 46 L. J. Ch. 715; 4 Ch. D. 108; 35 L. T. 776; 25 W. R. 187.—C.A., *discussed*.

Mersey Steel and Iron Co. v. Naylor (1882) 9 Q. B. D. 648; 51 L. J. Q. B. 576; 47 L. T. 369; 31 W. R. 88.—C.A.; affirmed, H.L. *See supra*, col. 2995.

JESSEL, M.R.—That [*Phoenix Bessemer Steel Co., In re*] was an action founded on a contract for selling goods on credit. . . . The only point argued was whether the persons who were entitled to the credit were insolvent in such a way, and to such an extent, that the vendors had a right to say, "we will not sell except for cash." That was the only point argued. Nobody argued that upon the refusal of the vendors to sell without cash, and when the answer is, "we must decline to take the iron," the vendors were released from the contract. I held that they were not when the case came originally before me at the Rolls; the C. A. affirmed that decision. That was the case of a contract that had been performed to a very considerable extent.—p. 658.

Sanders v. Maclean (1883) 52 L. J. Q. B. 481; 11 Q. B. D. 327; 49 L. T. 462; 31 W. R. 698; 5 Asp. M. C. 160.—C.A., *referred to*.

Cederberg v. Borries, Craig & Co. (1885) 2 Times L. 201.—**GROVE, J.**; *Cahn v. Pockett's Bristol Channel Steam Packet Co.* (1899) 68 L. J. Q. B. 515; [1899] 1 Q. B. 643; 80 L. T. 269; 47 W. R. 422; 8 Asp. M. C. 516.—C.A.

Clough v. L. & N. W. Ry. (1871) 41 L. J. Ex. 17; L. R. 7 Ex. 26; 25 L. T. 708; 20 W. R. 189.—EX. CH., *referred to*.

Morrison v. Universal Marine Insurance Co. (1873) 42 L. J. Ex. 115, 118; L. R. 8 Ex. 197, 203; 21 W. R. 774.—EX. CH.; *Rankin v. Potter* (1873) 42 L. J. C. P. 169, 186; L. R. 6 H. L. 83, 119; 29 L. T. 142; 22 W. R. 1.—H.L. (E.) with the JUDGES; *Reg. v. Middleton* (1873) 42 L. J. M. C. 73, 77; L. R. 2 C. C. 38, 44; 28 L. T. 777; 12 Cox C. C. 417.—C.O.B.

Clough v. L. & N. W. Ry., applied.

Erlanger v. New Sombrero Phosphate Co. (1878) 3 App. Cas. 1218; 48 L. J. Ch. 73; 39 L. T. 269; 27 W. R. 65.—H.L. (E.).

LORD BLACKBURN.—The contract was not void, but only voidable at the election of the company. In *Clough v. L. & N. W. Ry.*, in the judgment of the Ex. Ch. it is said, "We agree that the contract continues valid till the party defrauded has determined his election by avoiding it. In such cases (*i.e.* of fraud) the question is, Has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? Or, Has he elected to avoid it? or, Has he made no election? We think that so long as he has made no election he retains the right to determine it either way; subject to this, that if, in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind." It is, I think, clear on principles of general justice, that as a condition to a rescission there must be a *restitutio in integrum*. The parties must be put in *statu quo*.—p. 1278.

Clough v. L. & N. W. Ry.

Applied, **Wakefield and Barnsley Banking Co. v. Normanton Local Board** (1881) 44 L. T. 697, 699; 45 J. P. 601.—C.A., *referred to*.

Sandys, Ex parte, Ry. Time Tables Publishing Co., In re (1889) 58 L. J. Ch. 504; 42 Ch. D. 98, 107; 61 L. T. 94; 37 W. R. 581; 1 Meg. 208.—**STIRLING, J.** (*reversed*, C.A.); *Aaron's Reefs, Ltd. v. Twiss* (1896) 65 L. J. P. C. 54; [1896] A. C. 273, 290; 74 L. T. 794.—H.L. (IR.) (affirming [1895] 2 Ir. R. 207.—C.A.); *Cornwall v. Henson* (1900) 69 L. J. Ch. 581; [1900] 2 Ch. 298, 303; 82 L. T. 735; 49 W. R. 42.—C.A. *And see* "FRAUD, &c.," vol. i. col. 1163.

Horsfall v. Thomas (1862) 31 L. J. Ex. 322; 1 H. & C. 90; 8 Jur. (N.S.) 721; 6 L. T. 462; 10 W. R. 650.—EX.; at *nisi prius* 2 F. & F. 785, *distinguished*.

Archbold v. Howth (Lord) (1866) Ir. R. 1 C. L. 608, 629.—C.P.

Horsfall v. Thomas, dissented from.

Smith v. Hughes (1871) 40 L. J. Q. B. 221; 25 L. T. 329; L. R. 6 Q. B. 597, 605; 19 W. R. 1059. **COCKBURN, C.J.**—*Horsfall v. Thomas*, if that case can be considered good law, is an authority in point. In that case, a gun, which had been manufactured for a purchaser, had, when delivered, a defect in it, which afterwards caused it to burst, yet it was held that, although the manufacturer, instead of making the purchaser acquainted with the defect, had resorted to a contrivance to conceal it, as the buyer had had an opportunity of inspecting the gun, and had accepted it without doing so, and had used it, it was not competent for him to avoid the contract on the ground of fraud. This decision has, however, been questioned, and, altogether dissenting from it, I notice it only to say that my opinion in the present case has been in no degree influenced by its authority.—p. 226.

Noble v. Adams (1816) 2 Marsh. 366; 7 Taunt. 59; Holt N. P. 248; 17 R. R. 445.—C.P.

Distinguished, **Harris v. Lunell** (1819) 4 Moore 10; 1 Br. & B. 390; 21 R. R. 662.—C.P.; *referred to*, **Bristol (Earl) v. Wilmore** (1823) 1 B. & C. 514; 2 D. & M. 755; 1 L. J. (O.S.) K. B. 178; 25 R. R. 488.—K.B.; *Load v. Green* (1846) 15 L. J. Ex. 113; 15 M. & W. 216; 10 Jur. 163.—EX.; *commented on*, **White v. Garden** (1851) 20 L. J. C. P. 166; 10 C. B. 919; 15 Jur. 630.—C.P.

Noble v. Adams, distinguished.

Shackleton, In re, Rhodes, Ex parte (1875) 44 L. J. Bk. 52; L. R. 10 Ch. 447, n.; 32 L. T. 102; 23 W. R. 303.—**BACON, C.J.**, affirmed nom. **Shackleton, In re, Whittaker, Ex parte**, 44 L. J. Bk. 91; L. R. 10 Ch. 446; 32 L. T. 443; 23 W. R. 555.—L.JJ.

BACON, C.J.—The only facts I have before me in this case are that a trader has gone into a place where a public auction was held, and has become the purchaser of certain goods. . . . In *Noble v. Adams* and *Load v. Green* (*post*, col. 3004) the jury had found as a fact that fraud had been committed, but here nothing of the kind is shown.—p. 53.

Bristol (Earl) v. Wilmore (1823) 1 B. & C. 514; 2 D. & R. 755; 1 L. J. (O.S.) K. B. 178; 25 R. R. 488.—K.B., *referred to*.

Dixon v. Hewetson (1867) 16 L. T. 295.—**WILLES, J.**

Kingsford v. Merry (1856) 25 L. J. Ex. 166; 11 Ex. 577.—EX.; *reversed*, (1856) 26 L. J. Ex. 83; 1 H. & N. 503; 3 Jur. (N.S.) 68; 5 W. R. 151.—EX. CH.

Kingsford v. Merry, *explained and followed*.
Higgon v. Burton (1857) 26 L. J. Ex. 342; 5 W. R. 683.—EX.

BRAMWELL, B.—This case is even stronger in favour of the plaintiffs than that of *Kingsford v. Merry*, which I may observe that the Court of error really determined on the same principles as this Court, though that has not been understood, and only came to a different decision by reason of a different statement of the facts.—p. 344.

Kingsford v. Merry.

Principle applied, **Pease v. Gloahec**, The Marie Joseph (1866) 35 L. J. P. C. 66; L. R. 1 P. C. 219, 229; 15 L. T. 6; 15 W. R. 201.—P.C.; Overend, Gurney & Co., In re, Oakes and Peek. Ex parte (1867) 36 L. J. Ch. 233, 250; L. R. 3 Eq. 576, 629.—MALINS, V.-C. (affirmed nom. Overend, Gurney & Co., In re, Oakes v. Turquand (1867) 36 L. J. Ch. 949; L. R. 2 H. L. 325; 16 L. T. 808; 16 W. R. 1201.—H.L. (E.)); **Fuentes v. Montis** (1868) 37 L. J. C. P. 137, 142; L. R. 3 C. P. 268, 282; 18 L. T. 21.—C.P. (affirmed, 38 L. J. C. P. 95; L. R. 4 C. P. 93; 19 L. T. 364; 17 W. R. 208.—EX. CH.); *referred to*, **Loughnan v. Barry** (1872) Ir. R. 6 C. L. 457.—C.P.; *adopted*, **Cole v. North-Western Bank** (1875) 44 L. J. C. P. 233, 242; L. R. 10 C. P. 354, 373; 32 L. T. 733.—EX. CH.; *referred to*, **Johnson v. Credit Lyonnais** (1877) 47 L. J. C. P. 241; 3 C. P. D. 32, 40; 37 L. T. 657; 26 W. R. 195.—C.A. (*see post*, col 3006).

Kingsford v. Merry, *principle applied*.

Stone v. City and County Bank (1878) 3 C. P. D. 282; 47 L. J. C. P. 681; 38 L. T. 9.—C.A.

BRAMWELL, C.J.—I doubt whether a [defrauded] shareholder is liable [to the creditors of the company] on the ground of estoppel. I think his liability depends on a principle similar to that upon which the decision in *Kingsford v. Merry* proceeded. It was there held that if the owner of goods sells them owing to a fraudulent representation, and if before he discovers the fraud another person acquires some claim to them, he cannot afterwards rescind the contract. And I think it clear upon the authorities that whenever the rights of other persons intervene, a contract to take shares, though induced by fraud, cannot be rescinded.—p. 308.

Kingsford v. Merry, *discussed*.

Henderson v. Williams (1894) 64 L. J. Q. B. 308; [1895] 1 Q. B. 521; 72 L. T. 98; 43 W. R. 274; 14 R. 375.—C.A. **LORD HALSBURY, LINDLEY and A. L. SMITH, L.JJ.**

Kingsford v. Merry, *referred to*.

Farquharson Brothers v. King (1901) 70 L. J. K. B. 985, 991; [1901] 2 K. B. 697, 709; 85 L. T. 264; 49 W. R. 673.—C.A. **A. L. SMITH, M.B. and V. WILLIAMS, L.J.**; **STIRLING, L.J.** dissenting; *reversed*, (1902) 71 L. J. K. B. 667; [1902] A. C. 325; 86 L. T. 810; 51 W. R. 94.—H.L. (E.).

Parker v. Patrick (1793) 5 Term Rep. 175.

—K.B., *questioned*.

Peer v. Humphrey (1835) 4 L. J. K. B. 100; 2

A. & E. 495, 499; 4 N. & M. 430; 1 H. & W. 28; 41 R. R. 471.—K.B.

Parker v. Patrick, *followed*.

Stevenson v. Newnham (1853) 22 L. J. C. P. 110; 13 C. B. 285; 17 Jur. 600.—EX. CH.

PARKE, B.—The fraud only gives a right to rescind. In the first instance, the property passes in the subject-matter. An innocent purchaser from the fraudulent possessor may acquire an indisputable title to it, though it is voidable between the original parties. This was decided in the recent case of *White v. Garden* (*see post*), and had been so before in *Parker v. Patrick*, by Mr. Justice Story's decision [1 Sumner, p. 309], by Lord Kenyon in *Wright v. Lawes* [4 Esp. 82], and in *Load v. Green* (*post*) and *Campbell v. Fleming* (*post*).—p. 114. *See now* Sale of Goods Act, 1893, s. 24.

Campbell v. Fleming (1834) 3 L. J. K. B. 136; 1 A. & E. 40; 3 N. & M. 834.—K.B., *followed*.

Stevenson v. Newnham (*supra*); **Duncan, In re, Terry v. Sweeting** (1899) 68 L. J. Ch. 253; [1899] 1 Ch. 387, 391; 80 L. T. 322; 47 W. R. 379.—ROMER, J.

Load v. Green (1846) 15 L. J. Ex. 113; 15 M. & W. 216; 10 Jur. 163.—EX.

Discussed, **Belcher v. Bellamy** (1848) 17 L. J. Ch. 219; 2 Ex. 303, 310.—EX.; **White v. Garden** (1851) 20 L. J. C. P. 166; 10 C. B. 919; 15 Jur. 630.—C.P.; *followed*, **Stevenson v. Newnham** (1853) 22 L. J. C. P. 110, 114; 13 C. B. 285; 17 Jur. 600.—EX. CH. *See supra*.

Load v. Green, *approved and distinguished*.

Smith v. Hudson (1865) 34 L. J. Q. B. 145; 6 B. & S. 431; 11 Jur. (N.S.) 623; 12 L. T. 377; 13 W. R. 683.—Q.B.

COCKBURN, C.J.—Now comes the question whether these goods were left in the order and disposition, and I think *Load v. Green* quite disposes of that question. I approve of that case. There must be a consent of the seller that the buyer should be considered merely ostensible owner; but here, I think, the consent was to his being vendee.—p. 151.

BLACKBURN, J. to the same effect.

Load v. Green, *referred to*.

Reynolds v. Bowley (1867) L. R. 2 Q. B. 478, 474; 36 L. J. Q. B. 247; 8 B. & S. 406; 16 L. T. 532; 15 W. R. 813.—EX. CH.

Load v. Green, *distinguished*.

Shackleton, In re, Rhodes, Ex parte (1875) 44 L. J. Bk. 52; L. R. 10 Ch. 447, n.; 32 L. T. 102; 23 W. R. 303.—BACON, C.J. (*see supra*, col. 3002).

Load v. Green, *referred to*.

Rutter v. Everett (1895) 64 L. J. Ch. 845; [1895] 2 Ch. 872, 880; 13 R. 719; 73 L. T. 82; 44 W. R. 104; 2 Manson 371.—STIRLING, J.

White v. Garden (1851) 20 L. J. C. P. 166; 10 C. B. 919; 15 Jur. 630.—C.P.

Followed, **Stevenson v. Newnham** (1853) 22 L. J. C. P. 110, 114; 13 C. B. 285; 17 Jur. 600.—EX. CH. (*see supra*); Overend Gurney & Co., In re, Oakes and Peek, Ex parte (1866) 36 L. J. Ch. 233, 250; L. R. 3 Eq. 576, 629.—MALINS, V.-C. (affirmed, H.L. (E.)), *supra*, col. 3003; **Babcock v. Lawson** (1879) 48 L. J. Q. B. 524; 4 Q. B. D. 394, 400; 27 W. R. 866.—Q.B.D. (affirmed, (1880) 49 L. J. Q. B. 408; 5

Q. B. D. 284; 42 L. T. 289; 28 W. R. 591.—C.A.); *referred to*, Ward, *In re*, and *Ex parte* (1882) 51 L. J. Ch. 752; 20 Ch. D. 356, 364; 47 L. T. 106; 30 W. R. 560.—C.A.; *principle not interfered with*, Dentley v. Vilmont (1887) 57 L. J. Q. B. 18; 12 App. Cas. 471, 483; 57 L. T. 854; 36 W. R. 481; 52 J. P. 68.—H.L. (E.).

Stevenson v. Newnham (1853) 22 L. J. C. P. 110; 13 C. B. 285; 17 Jur. 600.—EX. CH.; EARL, J. *dissenting*.

Applied, Marks v. Feldman (1869) 38 L. J. Q. B. 220; L. R. 4 Q. B. 481, 485.—Q.B. (reversed, 39 L. J. Q. B. 101; L. R. 5 Q. B. 275; 10 B. & S. 371.—EX. CH.); *not applied*, Clough v. L. & N. W. Ry. (1871) 41 L. J. Ex. 17, 23; L. R. 7 Ex. 26, 33; 25 L. T. 708; 20 W. R. 189.—EX. CH.; *referred to*, Rayner, *Ex parte*, Johnson, *In re* (1872) 41 L. J. Bk. 26, 30; 26 L. T. 306; 20 W. R. 456.—BACON, V.-C. (affirmed, L. R. 7 Ch. 325.—L.J.J.): Butcher, *Ex parte*, Meldrum, *In re* (1874) 43 L. J. Bk. 98, 101; L. R. 9 Ch. 595, 599; 30 L. T. 482; 22 W. R. 721.—L.J.J.; *applied*, Clark, *In re*, Beardmore, *Ex parte* (1894) 63 L. J. Q. B. 806; [1894] 2 Q. B. 393; 3 R. 498; 70 L. T. 751; 1 Manson, 207.—Q.B.D. (reversed, C.A.); *referred to*, Quinn v. Leathem (1901) 70 L. J. P. C. 76, 83; [1901] A. C. 493, 508; 85 L. T. 289; 50 W. R. 139; 65 J. P. 708.—H.L. (IR.).

Ormrod v. Huth (1845) 14 L. J. Ex. 366; 14 M. & W. 651.—EX. CH., *discussed*.

Morley v. Attenborough (1849) 18 L. J. Ex. 148; 3 Ex. 500; 13 Jur. 282.—EX.

PARKE, B. (for the Court).—From the authorities in our law, to which may be added the opinion of Tindal, C.J., in *Ormrod v. Huth*, it would seem that there is no implied warranty of title in the sale of goods if there is no fraud. A vendor is not liable for the bad title unless there is an express warranty, or an equivalent to it by declaration or conduct, and the question in each case, where there is no warranty in express terms, will be whether there are such circumstances as to be equivalent to such a warranty.—p. 152.

Ormrod v. Huth.

Distinguished, Osborn v. Hart (1871) 23 L. T. 851, 853; 19 W. R. 331.—EX.; *referred to*, Dickson v. Reuter's Telegraph Co. (1877) 46 L. J. C. P. 197; 2 C. P. D. 62, 68; 35 L. T. 842; 25 W. R. 272.—C.P.D. (affirmed, 47 L. J. C. P. 1; 3 C. P. D. 1; 37 L. T. 370; 26 W. R. 23.—C.A.); Jolliffe v. Baker (1883) 52 L. J. Q. B. 609; 11 Q. B. D. 255, 270; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.—Q.B.D.

Hill v. Perrott (1810) 3 Taunt. 274.—C.P., *approved and applied*.

Abbotts v. Barry (1820) 5 Moore, 98; 2 Br. & B. 369.—C.P.

Hill v. Perrott and Abbotts v. Barry, *referred to*.

Nicol v. Hennessey (1896) 44 W. R. 284.—COLLINS, J.

Higgins v. Burton (1857) 26 L. J. Ex. 342; 5 W. R. 683.—EX., *distinguished*.

Johnson v. Credit Lyonnais Co. (1877) 3 C. P. D. 32; 47 L. J. C. P. 241; 37 L. T. 657.—C.A.

COCKBURN, C.J.—The present question was not before the Court in *Higgins v. Burton*, the question there being whether a person who had bought goods in the name of A., fraudulently

representing himself as A.'s agent, and had thus obtained possession of the goods, could pledge them so as to give a title to the pledgee as against the real owner. And it was held, following *Kingsford v. Merry* [11 Ex. 577 (*supra*, col. 3003)] that he could.—p. 40.

Higgins v. Burton, *applied*.

Cundy v. Lindsay (1878) 47 L. J. Q. B. 481; 3 App. Cas. 459, 468; 38 L. T. 573; 26 W. R. 406; 14 Cox C. C. 93.—H.L. (E.).

Higgins v. Burton, *applied*.

G. W. Ry. v. London and County Banking Co. (1901) 70 L. J. K. B. 915; [1901] A. C. 414, 420; 85 L. T. 152; 50 W. R. 50; 6 Com. Cas. 275.—H.L. (E.).

LORD DAVEY.—In *Higgins v. Burton*, one Dix, pretending to be agent for one FitzGibbon, obtained goods from the plaintiff and pledged them to the defendant. It was held that the plaintiff could recover the goods from the defendant before any notice of the fraud or disaffirmance of the transaction. And in *Cundy v. Lindsay* (*supra*), the same principle was affirmed in this House.—p. 918.

Watson v. Peache (1834) 4 L. J. C. P. 49; 1 Bing. (N. C.) 327; 1 Scott 149.—C.P. *referred to*.

Marnar v. Banks (1867) 17 L. T. 197; 16 W. R. 62.—C.P.; **Cooke v. Hemming** (1868) 37 L. J. C. P. 179, 188; L. R. 3 C. P. 334, 353; 18 L. T. 772; 16 W. R. 903.—C.P.; **Watkins, Ex parte**, Couston, *In re* (1873) 42 L. J. Bk. 50; L. R. 8 Ch. 520, 532; 28 L. T. 793; 21 W. R. 530.—L.C. and L.J.J. See "BANKRUPTCY," vol. i. col. 142.

Hale v. Saloon Omnibus Co. (1859) 28 L. J. Ch. 777; 4 Drew. 492; 7 W. R. 316.—

KINDERSLEY, V.-C., *referred to*.

Cooper, Ex parte, Baum, *In re* (1878) 48 L. J. Bk. 54; 10 Ch. D. 313, 321; 39 L. T. 523; 27 W. R. 299.—C.A.; **North-Central Wagon Co. v. Manchester, Sheffield and Lincolnshire Ry.** (1887) 56 L. J. Ch. 609; 35 Ch. D. 191, 208; 56 L. T. 755; 35 W. R. 443, 447.—C.A.

Bloomer v. Bernstein (1874) 43 L. J. C. P. 375; L. R. 9 C. P. 588; 31 L. T. 306; 23 W. R. 238.—C.P., *referred to*.

Morgan v. Bain (1874) 44 L. J. C. P. 47, 50; L. R. 10 C. P. 15, 23; 31 L. T. 616; 23 W. R. 239.—C.P.

Martindale v. Smith (1841) 10 L. J. Q. B. 155; 1 Q. B. 389; 1 G. & D. 1; 5 Jur. 932.—Q.B., *explained and applied*.

Page v. Cowasjee Eduljee (1866) L. R. 1 P. C. 127; 12 Jur. (N.S.) 361; 14 L. T. 176.—P.C.

LORD CHELMSFORD (for self, SIR J. COLVILLE and SIR E. V. WILLIAMS).—There is no case to be found in the books where, after a sale and complete delivery of a chattel, and the price not paid, the vendor's taking the property out of the purchaser's possession has been held to amount to a rescission of the contract. *Martindale v. Smith*, and other cases, have determined that, where there is an agreement to purchase property, to be paid for at a future time, and the money is not paid at the day, the property remaining in the possession of the vendor, he has no right to sell it, and if he does the purchaser may maintain trover against him. . . . But the authorities are uniform on this point, that if before actual delivery the vendor re-sells the

property while the purchaser is in default, the re-sale will not authorise the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it which may be still due.—p. 145.

Kennedy v. Panama, New Zealand, and Australian Royal Mail Co. (1867) 36 L. J. Q. B. 260; L. R. 2 Q. B. 580; 17 L. T. 62; 8 B. & S. 571.—Q.B.

Applied, **Corcoran v. Proser** (1873) 22 W. R. 222.—EX. CH. (IR.); **Sharpley v. Louth, & Co. Ry.** (1876) 46 L. J. Ch. 259; 2 Ch. D. 663, 681; 35 L. T. 71.—MALINS, V.-C.; *approved*, **Mackay v. Dick** (1881) 6 App. Cas. 251, 265; 29 W. R. 541.—H.L. (SC.).

Kennedy v. Panama, & Co., referred to.

Newbigging v. Adam (1886) 34 Ch. D. 582; 56 L. J. Ch. 275; 55 L. T. 794; 35 W. R. 597.—C.A.

BOWEN, L.J.—At common law it has always been considered that misrepresentations which strike at the root of the contract are sufficient to avoid the contract on the ground explained in **Kennedy v. Panama, & Co. Royal Mail Co.**; but when you come to consider what is the exact relief to which a person is entitled in a case of misrepresentation, it seems to me to be this, and nothing more, that he is entitled to have the contract rescinded, and entitled accordingly to all the incidences and consequences of such rescission.—p. 592.

Kennedy v. Panama, & Co., referred to.

Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate [1899] 2 Ch. 392, 415; 68 L. J. Ch. 699; 81 L. T. 354; 48 W. R. 74.—ROMER, J.; affirmed, C.A.; **RIGBY, J.** dissenting.

Noble v. Ward (1866) 35 L. J. Ex. 81; L. R. 1 Ex. 117; 4 H. & C. 149; 12 Jur. (N.S.) 167; 13 L. T. 639; 14 W. R. 397.—EX.; *affirmed*. (1867) 36 L. J. Ex. 91; L. R. 2 Ex. 135; 15 L. T. 672; 15 W. R. 520.—EX. CH., *explained*.

Hickman v. Haynes (1875) 44 L. J. C. P. 358; L. R. 10 C. P. 598, 603; 32 L. T. 873; 23 W. R. 871.—C.P.

COLERIDGE, C.J. (for the Court).—**Noble v. Ward** merely shows that a parol agreement to extend the time for performing a contract in writing, and required so to be by the Statute of Frauds, does not rescind, vary, or in any way affect such written contract, and cannot in point of law be substituted for it.—p. 360.

Noble v. Ward, applied.

Hussey v. Horne Payne (1878) 8 Ch. D. 670, 675; 47 L. J. Ch. 751; 38 L. T. 341, 543; 26 W. R. 532, 703.—MALINS, V.-C. (reversed, C.A.); (1879) 4 App. Cas. 311; 48 L. J. Ch. 846; 41 L. T. 1; 27 W. R. 585.—H.L. (E.).

Grounsell v. Lamb (1886) 5 L. J. Ex. 154; 1 M. & W. 352.—EX., *distinguished*.

Fitt v. Cassanet (1842) 4 Man. & G. 898; 12 L. J. C. P. 70; 5 Scott N. R. 902; 6 Jur. 1125.—C.P.

Biggerstaff v. Rowatt's Wharf (1896) 65 L. J. Ch. 536; [1896] 2 Ch. 93; 74 L. T. 473; 44 W. R. 536.—C.A.

Applied, **Bank of Syria, In re, Owen and Ashworth's Claim** (1900) 69 L. J. Ch. 412, 413; [1900] 2 Ch. 272, 278; 83 L. T. 165.—WRIGHT, J. (affirmed, 70 L. J. Ch. 82; [1901] 1 Ch. 115; 83 L. T. 547; 49 W. R. 100; 8 Manson 105.—C.A.); *dictum applied*, **Nelson & Co. v. Faber** (1903) 72 L. J. K. B. 771, 774; [1903] 2 K. B. 367, 376;

89 L. T. 21.—JOYCE, J. *And see* "COMPANY," vol. i. col. 446.

Swain v. Shepherd (or Shepperd) (1834) 4 M. & Rob. 223.

Applied, **Coats v. Chaplin** (1842) 11 L. J. Q. B. 315; 3 Q. B. 483, 489; 2 G. & D. 552; 6 Jur. 1123.—Q.B.; *approved*, **Coombs v. Bristol, & Co., Ry.** (*post*).

Coats v. Chaplin.

Not applied, **Crouch v. G. N. Ry.** (*post*); *referred to*, **Coombs v. Bristol and Exeter Ry.** (*post*). *And see ante*, col. 2941.

Davis v. James (1770) 5 Burr. 2680.—K.B., *discussed*.

G. W. Ry. v. Bagge (*post*).

Dawes v. Peck (1788) 8 Term Rep. 330; 3 Esp. 12; 4 R. R. 675.—K.B.

Not applied, **Crouch v. G. N. Ry.** (1856) 25 L. J. Ex. 137; 11 Ex. 742.—EX.; *applied*, **Coombs v. Bristol, & Co., Ry.** (*post*).

Dawes v. Peck, discussed.

G. W. Ry. v. Bagge (1885) 15 Q. B. D. 625; 54 L. J. Q. B. 599; 53 L. T. 225; 34 W. R. 45.—COLERIDGE, C.J. and MATHEW, J.

COLERIDGE, C.J.—In **Dawes v. Peck** it was carefully pointed out that the liability is a question of circumstances, and in that particular case the Court came to the conclusion that the contract for carriage was made with the consignee.—p. 627.

Coombs v. Bristol and Exeter Ry. (1858) 27 L. J. Ex. 401; 3 H. & N. 510; 6 W. R. 725.—EX.

Distinguished, **Mead v. S. E. Ry.** (1870) 18 W. R. 735.—C.P.; *referred to*, **Hopton v. McCarthy** (1882) 10 L. R. Ir. 266.—Q.B.D.; **Pontifex v. Hartley** (1892) 8 T. L. R. 657.—CHARLES, J.; **Murphy v. Midland G. W. (Ir.) Ry.** (1902) [1903] 2 Ir. R. 5, 23.—K.B.D.

Hornby v. Lacy (1817) 6 M. & S. 166; 18 R. R. 345.—K.B., *rule in adopted*.

Fawkes v. Lamb (1862) 31 L. J. Q. B. 98; 8 Jur. (N.S.) 385; 10 W. R. 348.—BLACKBURN, J., *applied*.

Bramble v. Spiller (1870) 21 L. T. 672; 18 W. R. 316.—C.P.

Boulton v. Jones (1857) 27 L. J. Ex. 117; 2 H. & N. 564; 3 Jur. (N.S.) 1156; 6 W. R. 107.—EX., *discussed*.

British Waggon Co. v. Lea (1880) 5 Q. B. D. 149; 49 L. J. Q. B. 321; 42 L. T. 437; 28 W. R. 349; 44 J. P. 440.—Q.B.D.

COCKBURN, C.J.—Where goods are ordered of a particular manufacturer, another who has succeeded to his business, cannot execute the order, so as to bind the customer, who has not been made aware of the transfer of the business, to accept the goods. The latter is entitled to refuse to deal with any other than the manufacturer whose goods he intended to buy. For this **Boulton v. Jones** is a sufficient authority.—p. 152.

Boulton v. Jones, followed.

Grierson, Oldham & Co., Ltd. v. Forbes, Maxwell & Co., Ltd. (1895) 22 Rettie 812.—CT. OF SESS.

Grierson, Oldham & Co., Ltd. v. Forbes, Maxwell & Co., Ltd., referred to.

International Fibre Syndicate v. Dawson (1900) 2 Fraser & 36.—LORD ORDINARY; affirmed, CT. OF SESS.

Cornish v. Abington (1859) 28 L. J. Ex. 262; 4 H. & N. 549; 7 W. R. 504.—EX., *applied*.

Thomas v. Brown (1876) 1 Q. B. D. 714; 45 L. J. Q. B. 811, 815; 35 L. T. 237; 24 W. R. 821.—**MELLOR** and **QUAIN**, JJ.

MELLOR, J.—I feel no doubt that the case comes within the rule laid down in *Cornish v. Abington*, that, "if any person by actual expressions, or by a course of conduct, so conducts himself that another may reasonably infer the existence of an agreement or licence, and acts upon such inference, whether the former intends that he should do so or not, the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."—p. 722.

Cornish v. Abington, *referred to*.

Sarat Chunder Dey v. Gopal Chunder Laha (1892) L. R. 19 Ind. App. 203; 217.—P.C.; **Henderson v. Williams** (1894) 64 L. J. Q. B. 308; [1895] 1 Q. B. 521, 533; 72 L. T. 98; 43 W. R. 274; 14 R. 375.—C.A.

Atkinson v. Bell (1828) 8 B. & C. 277; 2 M. & Ry. 298; 6 L. J. (O.S.) K. B. 258.—K.B.

Explained and applied, **Elliott v. Pybus** (1834) 3 L. J. C. P. 182; 10 Bing. 512; 3 M. & Scott 389.—C.P.; *distinguished*, **Scott v. England** (1844) 14 L. J. Q. B. 43; 2 D. & L. 520; 9 Jur. 87.—**PATTESON, J.**; *dictum commented on*, **Grafton v. Armitage** (1845) 15 L. J. C. P. 20, 21; 2 C. B. 336, 339; 9 Jur. 1039.—C.P.; **Clay v. Yates** (1856) 25 L. J. Ex. 237, 238; 1 H. & N. 73; 2 Jur. (N.S.) 908; 4 W. R. 557.—EX.

Atkinson v. Bell, *decision approved and applied*.

Lee v. Griffin (1861) 30 L. J. Q. B. 252; 1 B. & S. 272, 275; 7 Jur. (N.S.) 1302; 4 L. T. 546; 9 W. R. 702.—Q.B.

CROMPTON, J.—*Clay v. Yates* (*supra*), turned . . . upon the peculiar circumstances of the case. I have some doubt upon the propriety of the decision.—p. 253.

HILL, J.—I think the decision in *Clay v. Yates* perfectly correct, according to the particular subject matter of the contract in that case, which was not a case of a chattel ordered by one of another, thereafter to be made by the one, and afterwards to be delivered to the other. . . . In my opinion, *Atkinson v. Bell* is good law, subject only to the objection to the dictum of Bayley, J., which has been repudiated by Maule and Erle, JJ., in *Grafton v. Armitage* (*supra*). . . . The proposition of Bayley, J., that where a person has bestowed work and labour on his own materials he cannot maintain an action for work and labour, is certainly not universally true; and Tindal, C.J., as well as the other members of the Court, in *Grafton v. Armitage*, repudiated that doctrine and explained that Bayley, J. must be regarded as speaking with reference to the particular circumstances of the case then before the Court; and the same view was taken by the Ct. of Ex. in *Clay v. Yates*; but the decision in *Bell v. Atkinson* was regarded as good law by Tindal, C.J., and by other learned judges, viz., that when the subject of the contract is goods to be sold and delivered, a count for work and labour cannot be sustained: that is directly applicable to the present case.—p. 253.

BLACKBURN, J.—In *Atkinson v. Bell*, had the contract been carried out, it would have resulted in the sale of the machine; and in *Grafton v. Armitage*, Tindal, C.J. observed of that case, "The substance of the contract was, goods to be sold and delivered by the one party to the other." Taking that as the true criterion, *Atkinson v. Bell*, *Grafton v. Armitage* and *Clay v. Yates* are not inconsistent, but the last case comes very near the line. Here, if the teeth had been delivered and accepted, the contract for the sale of a chattel would have been complete.—p. 254.

Atkinson v. Bell, *referred to*.

Xenos v. Wickham (1867) 36 L. J. C. P. 313, 321; L. R. 2 H. L. 296, 316; 16 L. T. 800; 16 W. R. 38.—H.L. (E.), with the JUDGES.

Alexander v. Gardner (1835) 4 L. J. C. P. 223; 1 Bing. N. C. 671; 1 Scott 281, 630; 3 D. P. C. 146; 1 Hodges 147.—C.P., *referred to*.

Castle v. Playford (1872) 41 L. J. Ex. 44, 46; L. R. 7 Ex. 98, 100; 26 L. T. 315; 20 W. R. 440.—EX. CH.; **Martineau v. Kitchin** (1872) 41 L. J. Q. B. 227; L. R. 7 Q. B. 436, 455; 26 L. T. 836; 29 W. R. 769.—Q.B.; **Heilbutt v. Hickson** (1872) 41 L. J. C. P. 228, 234; L. R. 7 C. P. 438, 460; 27 L. T. 336; 20 W. R. 1005.—C.P.; **BRETT, J.** *dissenting*.

Merten v. Adcock (1803) 4 Esp. 251.—**ELLENBOROUGH, C.J.**, *differs from*.

Hagedorn v. Laing (1815) 6 Taunt. 162; 1 Marsh. 514.—C.P.

Merten v. Adcock, *overruled*.

Lamond v. Devalle (or Davall) (*post*).

Hagedorn v. Laing and Maclean v. Dunn (1828) 4 Bing. 722; 1 Moore & P. 761; 6 L. J. (O.S.) C. P. 184; 29 R. R. 714.—C.P., *referred to*.

Lamond v. Devalle (or Davall) (1847) 16 L. J. Q. B. 136; 9 Q. B. 1036, 1032; 11 Jur. 266.

DENMAN, C.J.—[In *Merten v. Adcock* (*supra*), a vendor recovered for goods bargained and sold after a resale.] The ruling at Nisi Prius in this case is contrary to the opinion of Gibb, C.J., expressed in *Hagedorn v. Laing*; and in *Maclean v. Dunn* the action for damages for the loss on resale is spoken of as the proper course, where the power of resale is exercised without an express stipulation for it.—p. 137.

Lamond v. Devalle (or Davall), *referred to*.

Rogers v. Hadley (1863) 32 L. J. Ex. 241, 251; 2 H. & C. 227; 9 Jur. (N.S.) 898; 9 L. T. 292; 11 W. R. 1074.—EX.

Cotterell (or Cottrell) v. Apsey (1815) 6

Taunt. 322; 1 Marsh. 581.—C.P., *applied*. **Clark v. Bulmer** (1843) 12 L. J. Ex. 463; 11 M. & W. 243, 250; 1 D. & L. 367.—EX.

PARKE, B. (for the Court).—*Cotterell v. Apsey* and *Tripp v. Armitage* [(1839) 8 L. J. Ex. 107; 4 M. & W. 687; 1 H. & H. 442; 3 Jur. 249.—EX. See "BANKRUPTCY," vol. i. col. 134] are authorities that materials used, or intended to be used, in the construction of a fixed building, cannot be deemed goods sold and delivered; and there is no difference between the erection of this sort of fixture and any other building: the proper form of count is in *indebitatus assumpsit*, for work, labour, and materials, or for erecting and constructing an engine.—p. 467.

Clark v. Bulmer, *distinguished*.
 Beaumont v. Brengeri (1847) 5 C. B. 301.—C.P.

Slack v. Lowell (1810) 3 Taunt. 157.—C.P.,
referred to.

Harrison v. Allen (1824) 2 Bing. 4; 9 Moore 28;
 1 Car. & P. 235; 2 L. J. (o.s.) C. P. 97.—C.P.

Bailey v. Gouldsmith (1791) Peake 56.—
 KENYON, C.J., *referred to*.

Bianchi v. Nash (1836) 5 L. J. Ex. 252; 1 M.
 & W. 545; 1 Tyr. & G. 916.—EX.

Bailey v. Gouldsmith, *applied*.
 Beverley v. Lincoln Gas Light and Coke Co.
 (1837) 7 L. J. Q. B. 113; 6 A. & E. 829; 2 N. &
 P. 283; Moss v. Sweet (1851) 20 L. J. Q. B. 167;
 16 Q. B. 493; 15 Jur. 536.—Q.B.

Lyons v. Barnes (1817) 2 Stark. 39—ELLEN-
 BOROUGH, C.J., *questioned*.

Bianchi v. Nash (1836) 1 M. & W. 545; 5 L. J.
 Ex. 252; 1 Tyr. & G. 916.—EX.

ABINGER, C.B.—That is only a Nisi Prius deci-
 sion, and the facts certainly do not seem to me
 to warrant the judgment.—p. 546.

Lyons v. Barnes, *held overruled*.
 Johnson v. Kirkaldy (1840) 4 Jur. 988; 1 Arn.
 & H. 7.

DENMAN, C.J.—Probably *Lyons v. Barnes* has
 been misunderstood; it is in effect overruled in
Studdy v. Sanders [(1826) 5 B. & C. 628; 8 D.
 & R. 403; 4 L. J. (o.s.) K. B. 290.—K.B.]—
 p. 988.

Lyons v. Barnes, *commented on*.
 Moss v. Sweet (1851) 20 L. J. Q. B. 167; 16
 Q. B. 493; 15 Jur. 536.—Q.B.

Bianchi v. Nash (1836) 5 L. J. Ex. 252; 1
 M. & W. 545; 1 Tyr. & G. 916.—EX.,
applied.

Beverley v. Lincoln Gas Light and Coke Co.
 (1837) 7 L. J. Q. B. 113; 6 A. & E. 829; 2 N. &
 P. 283.—Q.B.

**Bianchi v. Nash and Beverley v. Lincoln
 Gas Light and Coke Co.**, *distinguished*.
 Iley v. Frankenstein (1844) 8 Scott (N. R.) 839.
 —C.P.

Beverley v. Lincoln Gas Light and Coke Co.
Applied, Moss v. Sweet (1851) 20 L. J. Q. B.
 167; 16 Q. B. 493; 15 Jur. 536.—Q.B.; *referred
 to*, Ecclesiastical Commissioners v. Merrill (1869)
 38 L. J. Ex. 93, 96; L. R. 4 Ex. 162, 168; 20
 L. T. 573; 17 W. R. 676.—EX. *And see* "COR-
 PORATION," vol. i. col. 714.

Iley v. Frankenstein (1844) 8 Scott (N. R.)
 839.—C.P., *questioned*.

Moss v. Sweet (1851) 16 Q. B. 493; 20 L. J.
 Q. B. 167; 15 Jur. 536.—Q.B.

PATTESON, J.—There must have been some-
 thing peculiar in the facts of *Iley v. Franken-*
stein; or it must be misreported. It seems there
 to be put that the goods were returnable on the
 demand of the seller if the vendee did not sell
 them; and it is stated that the proper form of
 action would have been for not returning the
 goods pursuant to the contract. According to
 my experience, goods delivered on sale or return
 are returnable at the option of the buyer.—
 p. 494.

COLERIDGE, J.—Our judgment is consistent
 both with principle and with the authorities,

except *Iley v. Frankenstein*, which has probably
 been misunderstood.—p. 495.

Moss v. Sweet (1851) 20 L. J. Q. B. 167; 16
 Q. B. 493; 15 Jur. 536.—Q.B., *com-*
mented on.

Ray v. Barker (1879) 4 Ex. D. 279; 48 L. J.
 Ex. 569; 41 L. T. 265; 27 W. R. 745.—C.A.

BRAMWELL, L.J.—I cannot say that this case
 is concluded by *Moss v. Sweet*. In that case the
 defendant either might have returned the goods,
 or was prevented from returning them by his
 own act, that is, by selling them. In the pre-
 sent case the defendant is unable to return the
 earrings by the dishonest act of another person;
 and the Ct. of Q. B. did not decide that if the
 failure to return, within a reasonable time, goods
 received "on sale or return" arose from the
 wrongful act of another person, the person
 receiving them is to be deemed to have bought
 them: nevertheless, although this point was not
 decided, I incline to think that the person
 receiving goods on those terms, must, under all
 circumstances, either return them within a
 reasonable time or pay for them.—p. 282.

Moss v. Sweet, *dictum discussed but not
 applied*.
 Elphick v. Barnes (1880) 49 L. J. C. P. 698; 5
 C. P. D. 321, 325; 29 W. R. 139; 44 J. P. 651.
 —DENMAN, J. *See* judgment at length.

Moss v. Sweet, *observations applied*.
 Ornstein v. Alexandra Furnishing Co. (1895)
 12 Times L. R. 128.—COLLINS, J.

Sheldon v. Cox (1824) 3 B. & C. 420; 5 D. &
 R. 277.—K.B., *applied*.

Bull v. Parker (1842) 12 L. J. Q. B. 93; 2
 D. (N.S.) 345; 7 Jur. 283.—WIGHTMAN, J.

Ingram v. Shirley (1816) 1 Stark. 185.—
 ELLENBOROUGH, C.J., *explained*.

Harrison v. Luke (1845) 14 L. J. Ex. 248; 14
 M. & W. 139.—EX.

Penney v. Porter (1801) 2 East 2.—K.B.,
distinguished.

Shipman v. Saunders (1783) 2 East 4, n.,
referred to.

Thornton v. Jones (1816) 6 Taunt. 381; 2
 Marsh. 287; Holt N. P. 164.—C.P.

Bowdell v. Parsons (1808) 10 East 359.—
 K.B., *discussed*.

Frost v. Knight (1870) 39 L. J. Ex. 227, 230;
 L. R. 5 Ex. 322, 328; 23 L. T. 714; 19 W. R. 77.
 —EX.; reversed, EX. CH. *See* "CONTRACT,"
 vol. i. col. 670.

Morton v. Lamb (1797) 7 Term Rep. 125;
 4 R. R. 395.—K.B., *discussed and ex-*
plained.

Rawson v. Johnson (1801) 1 East 203; 6 R. R.
 252.—K.B.

Morton v. Lamb, *referred to*.
Rawson v. Johnson, *approved*.
 Waterhouse v. Skinner (1801) 1 B. & P. 447.
 —C.P.

Rawson v. Johnson, *referred to*.
 Squier v. Hunt (1816) 3 Price 68.—EX.

Dixon v. Fletcher (1837) 3 M. & W. 146.—
 EX., *referred to*.

Levy v. Green (1859) 28 L. J. Q. B. 319; 1
 El. & El. 969; 5 Jur. (N.S.) 1245; 7 W. R. 486.
 —EX. CH.

Raffles v. Wichelhaus (1864) 32 L. J. Ex. 160; 2 H. & C. 906.—EX., *referred to*.
Smith v. Hughes (1871) 40 L. J. Q. B. 231; L. R. 6 Q. B. 597, 609; 25 L. T. 329; 19 W. R. 1059.—Q.B.

HANNEN, J.—It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. Thus, if two persons enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, has a different person or ship in his mind, no contract would exist between them—*Raffles v. Wichelhaus*.—p. 228.

Raffles v. Wichelhaus, explained.
 Van Praagh v. Everidge (1902) 71 L. J. Ch. 598; [1902] 2 Ch. 266; 87 L. T. 42.—KEKEWICH, J.

Borrowman v. Rossel (1864) 33 L. J. C. P. 111, 112, n.; 16 C. B. (N.S.) 58; 10 Jur. (N.S.) 679; 10 L. T. 236; 12 W. R. 580.—C.P., *referred to*.

Nicoll v. Bell (1875) 32 L. T. 815.—Q.B.

Goodchild v. Pledge (1836) 5 L. J. Ex. 176; 1 M. & W. 363; 2 Gale 7; 5 D. P. C. 89.—EX., *explained*.

Bussey v. Barnett (1842) 11 L. J. Ex. 211; 9 M. & W. 312; 1 D. (N.S.) 646.—EX.

ALDERSON, B.—Undoubtedly, when goods are delivered on credit, a debt arises as soon as they are delivered; and this is what Parke, B. means in *Goodchild v. Pledge*.—p. 212.

Bussey v. Barnett, disapproved.

Littlechild v. Banks (1845) 7 Q. B. 739; 14 L. J. Q. B. 356; 9 Jur. 1096.—Q.B.

PATTESON, J.—According to *Bussey v. Barnett*, if there was a ready money payment, there never was a debt. I cannot agree in that law.—p. 740.

Fricker v. Thomlinson (1840) 1 Man. & G. 772.—C.P., *referred to*.

Lucas v. Dixon (1889) 22 Q. B. D. 357; 58 L. J. Q. B. 161; 37 W. R. 370.—C.A.

BOWEN, L.J.—There is a great deal of authority at common law that a memorandum coming into existence after action brought is not available to the plaintiff under sect. 17 [Statute of Frauds]. In *Fricker v. Thomlinson* there was no decision, but Maule, J. expressed an opinion on the point.—p. 361. *And see ante*, col. 2940.

Wilks v. Atkinson (1815) 1 Marsh. 412; 6 Taunt. 11.—K.B., *applied*.

Squier v. Hunt (1816) 3 Price 68.—EX.

Hollingham v. Head (1858) 27 L. J. C. P. 241; 4 C. B. (N.S.) 388; 4 Jur. (N.S.) 379; 6 W. R. 442.—C.P., *referred to*.

Lansdowne v. Connor (1889) 24 L. R. Ir. 50, 57.—Q.B.D.

Greaves v. Ashlin (1813) 3 Campb. 426; 14 R. R. 771.—ELLENBOROUGH, C.J., *applied*.

Ford v. Yates (1841) 10 L. J. C. P. 117; 2 Man. & G. 549; 2 Scott (N.R.) 645.—C.P. *See Sale of Goods Act, 1893, s. 37.*

Brown v. Muller (1872) 41 L. J. Ex. 214; L. R. 7 Ex. 319; 27 L. T. 272; 21 W. R. 18.—EX., *considered*.

Roper v. Johnson (1873) 42 L. J. C. P. 65, 67;

L. R. 8 C. P. 167, 177; 28 L. T. 296; 21 W. R. 384.—C.P. *See "DAMAGES,"* vol. i. cols. 816, 817.

Brown v. Muller, distinguished.

Dunkirk Colliery Co. v. Lever (1879) 41 L. T. 633.—C.A. *See post*.

Brown v. Muller, referred to.

Michael v. Hart (1902) 71 L. J. K. B. 265, 271; [1902] 1 K. B. 482.—C.A. (*post*).

Roper v. Johnson (1873) 42 L. J. C. P. 65; L. R. 8 C. P. 167; 28 L. T. 296; 21 W. R. 384.—C.P.

Referred to, **Tyers v. Rosedale and Ferryhill Iron Co.** (1875) 44 L. J. Ex. 130, 133; L. R. 10 Ex. 195, 199; 33 L. T. 56; 23 W. R. 871.—EX. CH.; *distinguished*, **Dunkirk Colliery Co. v. Lever** (1879) 4 L. T. 633.—C.A. (*see post*); *referred to*, **Johnstone v. Milling** (1886) 55 L. J. Q. B. 162; 16 Q. B. D. 460, 471; 54 L. T. 629; 34 W. R. 238; 50 J. P. 694.—Q.B.D. (*see "CONTRACT,"* vol. i. col. 672); **Roth & Co. v. Taysen** (1895) 73 L. T. 628; 8 Asp. M. C. 120; 1 Com. Cas. 240; and (1896) 1 Com. Cas. 306.—C.A.

Roper v. Johnson, discussed.

Michael v. Hart & Co. (1902) 71 L. J. K. B. 265; [1902] 1 K. B. 482; 86 L. T. 474; 50 W. R. 308.—C.A.

COLLINS, M.R.—A question nearer that discussed in this case was raised in *Roper v. Johnson*. There the action was for the breach of a contract to sell to the plaintiffs, coal to be delivered during the months of May, June, July, and August, 1872. The defendant, soon after the contract was entered into, intimated his determination not to perform it, and it was agreed that the repudiation of the contract was accepted by the plaintiffs, at all events on July 3rd, when they brought the action for non-performance of it. . . . It seems to me that the question discussed in that case arose in consequence of the plaintiffs bringing their action before the period for completion of the contract had expired, the inference to be drawn from that fact being that the plaintiffs had elected to treat the repudiation of the contract as a breach of it. The possible measure of damages suggested by the defendant would not have arisen if the plaintiffs had not elected to treat the repudiation of the contract by the defendant as a final breach, by bringing their action before the period fixed for the completion of the contract, and it does not arise where, as in this case, the plaintiff has not treated the repudiation of the contract by the defendants as a breach, but has insisted on the performance of the contract. This view of the law is also very clearly put by the M.R. (Lord Esher) in *Johnstone v. Milling* (*supra*).—p. 269.

And see "DAMAGES," vol. i. col. 817.

Dunkirk Colliery Co. v. Lever (1879) 41 L. T. 633.—C.A. **JAMES, BAGGALLAY and THESIGER, L.JJ.**; *affirmed with a variation nom. Lever v. Dunkirk Colliery Co.* (1880) 43 L. T. 706.—H.L. (E.).

Roth & Co. v. Taysen (1895) 73 L. T. 628; 8 Asp. M. C. 120; 1 Com. Cas. 240.—**MATHEW, J.**; *affirmed*, (1896) 1 Com. Cas. 306.—C.A. **ESHER, M.R., LOPES and RIGBY, L.JJ.**

Roth & Co. v. Taysen, applied.

Nickoll v. Ashton, Edridge & Co. (1900) 69 L. J. Q. B. 640; [1900] 2 Q. B. 298, 305; 82

L. T. 761; 5 Com. Cas. 252.—C.A. MATHEW, J.; affirmed, (1901) 70 L. J. K. B. 600; [1901] 2 K. B. 126; 84 L. T. 804; 49 W. R. 513; 6 Com. Cas. 150; 9 Asp. M. C. 209; 17 T. L. R. 487.—C.A.; V. WILLIAMS, L.J. dissenting.

Featherston v. Wilkinson (1873) 42 L. J. Ex. 78; L. R. 8 Ex. 122; 28 L. T. 448; 21 W. R. 442.—EX., *principle applied*.

Whiteman v. Hawkins (1878) 4 C. P. D. 13. 19; 39 L. T. 629; 27 W. R. 262.—DENMAN and LINDLEY, L.JJ. See judgment of former.

Stead v. Dawber (1839) 9 L. J. Q. B. 101; 10 A. & E. 57; 2 P. & D. 101.—Q.B., *considered*.

Marshall v. Lynn (1840) 9 L. J. Ex. 126, 128; 6 M. & W. 109, 117.—EX.

Stead v. Dawber, *not applied*.

Marshall v. Lynn, *referred to*.

Martindale v. Smith (1841) 10 L. J. Q. B. 155; 1 Q. B. 389; 1 G. & D. 1; 5 Jur. 932.—Q.B.

Stead v. Dawber and Marshall v. Lynn, *discussed*.

Noble v. Ward (1866) L. R. 1 Ex. 117, 121; 35 L. J. Ex. 81, 83; 4 H. & C. 149; 12 Jur. (N.S.) 167; 13 L. T. 639; 14 W. R. 397.—EX.; and (1867) L. R. 2 Ex. 135, 138; 36 L. J. Ex. 91; 15 L. T. 672; 15 W. R. 520.—EX. CH.

Stead v. Dawber and Marshall v. Lynn, *distinguished and not applied*.

Ogle v. Vane (Earl) (1867) 36 L. J. Q. B. 175, 177; L. R. 2 Q. B. 275, 281; 7 B. & S. 855; 15 W. R. 564.—Q.B.; affirmed, EX. CH. See *post*, col. 3016.

Stead v. Dawber and Marshall v. Lynn, *referred to*.

Tyers v. Rosedale and Ferryhill Iron Co. (1873) 42 L. J. Ex. 185, 190; L. R. 8 Ex. 305, 316; 29 L. T. 751; 21 W. R. 793.—EX.; reversed, EX. CH. (*post*, col. 3016).

Marshall v. Lynn, *referred to*.

Sanderson v. Graves (1875) 44 L. J. Ex. 210, 214; L. R. 10 Ex. 234, 237; 33 L. T. 269; 23 W. R. 797.—EX.

Stead v. Dawber and Marshall v. Lynn, *discussed*.

Hickman v. Haynes (1875) 44 L. J. C. P. 358; L. R. 10 C. P. 598, 604; 32 L. T. 873; 23 W. R. 872.—C.P.

COLERIDGE, C.J. (for the Court).—In *Stead v. Dawber* there was a written agreement for the delivery of goods on a particular day, and a subsequent verbal agreement for their delivery on a later specified day; and the Court came to the conclusion that the parties intended to substitute the latter verbal agreement for the previous written agreement. But in the case now before the Court, there was no fresh agreement at all for the delivery of the twenty-five tons which can be regarded as having been substituted for the original written contract. There was nothing more than a waiver by the defendant of a delivery by the plaintiff in June of the last twenty-five tons of iron; and it should seem that in *Stead v. Dawber*, the Court would have been in favour of the plaintiff if they had come to the conclusion that there had been no substitution of one agreement for another. *Marshall v. Lynn* was a somewhat similar case decided on similar grounds.—p. 360.

Ogle v. Vane (Earl) (1867) 36 L. J. Q. B. 175; L. R. 2 Q. B. 275; 7 B. & S. 855; 15 W. R. 564.—Q.B.; affirmed, (1868) 37 L. J. Q. B. 77; L. R. 3 Q. B. 272; 9 B. & S. 182; 16 W. R. 463.—EX. CH.

Ogle v. Vane (Earl), *not applied*.

British Columbia, &c., Saw Mills Co. v. Nettleship (1868) 37 L. J. C. P. 235; L. R. 3 C. P. 499, 509; 18 L. T. 604.—C.P.

WILLES, J.—There, after breach, there was an express agreement.—p. 242.

Ogle v. Vane (Earl), *distinguished*.

Tyers v. Rosedale and Ferryhill Iron Co. (1873) L. R. 8 Ex. 305; 42 L. J. Ex. 185, 191; 29 L. T. 751; 21 W. R. 793.—EX. (reversed, EX. CH. *post*); **Llansamlet Tin Plate Co., Ex parte, Voss, In re** (1873) L. R. 16 Eq. 155, 158.—BACON, C.J.

Ogle v. Vane (Earl), *discussed and applied*.

Hickman v. Haynes (1875) 44 L. J. C. P. 358; L. R. 10 C. P. 598, 606; 32 L. T. 873; 23 W. R. 872.—C.P.

COLERIDGE, C.J. (for the Court).—The distinction between a substitution of one agreement for another and a voluntary forbearance to deliver at the request of another was pointed out and recognised in *Ogle v. Vane (Earl)*. In that case the plaintiff sued the defendant for not delivering iron pursuant to a written contract, and the plaintiff sought to recover as damages the difference between the contract price of the iron and the market price, not at the time of the defendant's breach, but at a later time, the plaintiff having been induced to wait by the defendant, and having waited for his convenience. It was contended that the plaintiff was in fact suing for the breach of a new verbal agreement for delivery at a later date than that fixed by the original agreement; but the Court held otherwise, and that, as the plaintiff had merely forbore to press the defendant, and had not bound himself by any fresh agreement, the plaintiff could sue on the original agreement, and obtain larger damages than he could have obtained if he had not waited to suit the defendant's convenience. . . . In that case the request for forbearance was made by the vendor after the contract had been broken; in this case the request for time was made by the purchaser both before and after the time for completing the contract had expired; but this distinction does not appear to us to be material—see *Tyers v. Rosedale and Ferryhill Iron Co. (post)*.—p. 361.

Ogle v. Vane (Earl).

Discussed, **Hamilton v. Magill** (1885) 12 L. R. Ir. 186.—EX. D.; *applied*, **Shaw's Brow Iron Co. v. Birchgrove Steel Co.** (1889) 6 Times L. R. 50.—C.A.; *principle explained*, **Wilson v. London and Globe Finance Corporation** (1897) 14 Times L. R. 15.—C.A.

Tyers v. Rosedale and Ferryhill Iron Co. (1873) 42 L. J. Ex. 185; L. R. 8 Ex. 305; 29 L. T. 751.—EX.; **MARTIN, B. dissenting; reversed**, (1875) 44 L. J. Ex. 130; L. R. 10 Ex. 195; 33 L. T. 56; 23 W. R. 871.—EX. CH.

Tyers v. Rosedale and Ferryhill Iron Co., *considered*.

Hickman v. Haynes (1875) 44 L. J. C. P. 358, 360; L. R. 10 C. P. 598, 604 (*supra*).

Hadley v. Baxendale (1854) 9 Ex. 341; 23 L. J. Ex. 179; 2 C. L. R. 517; 18 Jur. 358; 2 W. R. 302.—EX.; and **G. W. Ry. v. Redmayne** (1866) L. R. 1 C. P. 329.—C.P. *applied*.
Black v. Baxendale (1847) 17 L. J. Ex. 50; 1 Ex. 410.—EX., *commented on*.
Woodger v. G. W. Ry. (1867) 36 L. J. C. P. 177, 179; L. R. 2 C. P. 318, 321; 15 L. T. 579; 15 W. R. 383.—C.P.

Hadley v. Baxendale, *explained and applied*.
Cory v. Thames Ironworks Co. (1868) 37 L. J. Q. B. 68; L. R. 3 Q. B. 181, 189; 17 L. T. 495; 16 W. R. 457.—Q.B.

COCKBURN, C.J.—I think that the true principle [*Hadley v. Baxendale*] is that, although where the buyer has sustained loss from the non-delivery of an article, the seller cannot be called upon to pay damages which could not fairly have been within his contemplation, although such damages, in point of fact, were sustained, still, if the seller contemplated a minor loss, it is just and reasonable that he should pay it.—p. 70.

BLACKBURN, J. to the same effect.

Hadley v. Baxendale, *rule in applied*.
Engel v. Fitch (1868) 37 L. J. Q. B. 147; L. R. 3 Q. B. 323.—Q.B.; and (1869) 38 L. J. Q. B. 304; L. R. 4 Q. B. 659, 668; 10 B. & S. 738; 17 W. R. 894.—EX.—CH.

Hadley v. Baxendale, *discussed*.

Sawdon v. Andrew (1874) 30 L. T. 23, 25.—EX.

Hadley v. Baxendale, *referred to*.

Bain v. Fothergill (1874) 43 L. J. Ex. 243, 250; L. R. 7 H. L. 158, 177; 31 L. T. 387; 23 W. R. 261.—H.L. (E.), with the JUDGES;
Baxendale v. L. C. & D. Ry. (1874) 44 L. J. Ex. 20, 27; L. R. 10 Ex. 35, 45; 32 L. T. 330; 23 W. R. 167.—EX. CH.; **Hobbs v. L. & S. W. Ry.** (1875) 44 L. J. Q. B. 49, 51; L. R. 10 Q. B. 111, 117; 32 L. T. 352; 23 W. R. 520.—Q.B.

Hadley v. Baxendale, *not applied*.

Bradshaw v. Lancashire and Yorkshire Ry. (1875) 44 L. J. C. P. 148, 151; L. R. 10 C. P. 189, 193; 31 L. T. 847; 23 W. R. 310.—C.P.

Hadley v. Baxendale, *applied*.

Smith v. Green (1875) 45 L. J. C. P. 28, 30; 1 C. P. D. 92, 94; 33 L. T. 572; 24 W. R. 142.—C.P.D.; **Sanders v. Stuart** (1876) 45 L. J. C. P. 682, 684; 1 C. P. D. 326, 328; 35 L. T. 870; 24 W. R. 949.—C.P.D.; **Wilson v. General Iron Screw Colliery Co.** (1877) 47 L. J. Q. B. 239, 240; 37 L. T. 789.—Q.B.D.; **Smith v. Day** (1882) 21 Ch. D. 421, 428; 48 L. T. 54; 31 W. R. 187.—C.A.; **Hamilton v. Magill** (1883) 12 L. R. Ir. 186.—EX. D.

Hadley v. Baxendale, *not applied*.

Skinner v. City of London Marine Insurance Corporation (1885) 54 L. J. Q. B. 437; 14 Q. B. D. 882, 887; 53 L. T. 191; 33 W. R. 628.—C.A.

Hadley v. Baxendale.

Referred to, **Grebert-Borquis v. Nugent** (1885) 54 L. J. Q. B. 511; 15 Q. B. D. 85, 89.—C.A.; *applied*, **Williams v. Peel River Land Co.** (1886) 55 L. T. 689, 693.—C.A.; **White v. Peto** (1888) 58 L. T. 710, 713.—KAY, J.; *not applied*, **Marsh v. Joseph** (1896) [1897] 1 Ch. 213, 231; 74 L. T. 412; 44 W. R. 462.—KEKEWICH, J. (varied, 66 L. J. Ch. 128; [1897] 1 Ch. 213; 75 L. T. 358; 45 W. R. 209.—C.A.). *And see* "DAMAGES." vol. i. col. 808.

Cory v. Thames Ironworks Co. (1868) 37 L. J. Q. B. 68; L. R. 3 Q. B. 181; 17 L. T. 495; 16 W. R. 457.—Q.B., *applied*.
Cambrian Steam Packet Co., Ex parte, Trent and Humber Co., In re (1868) 37 L. J. Ch. 686, 689; L. R. 6 Eq. 396.—GIFFARD, V.-C.; varied, 38 L. J. Ch. 38; L. R. 4 Ch. 112; 19 L. T. 465; 17 W. R. 181.—CAIRNS, L.C.

Cory v. Thames Ironworks Co., *referred to*.
British Columbia, &c., Saw-mill Co. v. Nettleship (1868) 37 L. J. C. P. 235, 242; L. R. 3 C. P. 499, 509; 18 L. T. 604; 16 W. R. 1046.—C.P.; **Elbinger Actien-Gesellschaft v. Armstrong** (1874) 43 L. J. Q. B. 211, 213; L. R. 9 Q. B. 473, 477; 30 L. T. 871; 23 W. R. 127.—Q.B.

Cambrian Steam Packet Co., Ex parte, Trent and Humber Co., In re (1868) 37 L. J. Ch. 686; L. R. 6 Eq. 396.—GIFFARD, V.-C.; varied, 38 L. J. Ch. 38; L. R. 4 Ch. 112; 19 L. T. 465; 17 W. R. 181.—CAIRNS, L.C.

Cambrian Steam Packet Co., Ex parte, Trent and Humber Co., In re, *referred to*.
Albert Life Assurance Co., In re, Cooke and Edwards' Claim (or Cook's Policy) (1870) 39 L. J. Ch. 257; L. R. 9 Eq. 703, 706; 22 L. T. 92; 18 W. R. 426.—JAMES, V.-C.; **Northern Counties of England Fire Insurance Co., In re, Macfarlane's Claim** (1880) 50 L. J. Ch. 273; 17 Ch. D. 337, 341; 44 L. T. 299.—JESSEL, M.R.; **The Argentino** (1888) 13 P. D. 191, 203.—C.A.; **ESHER M.R.** dissenting (affirmed, H.L. (E.), *post*).

Wilson v. General Iron Screw Colliery Co. (1877) 47 L. J. Q. B. 239; 37 L. T. 789.—Q.B.D., *referred to*.

The Argentino (1888) 58 L. J. P. 1; 13 P. D. 191, 203; 59 L. T. 914; 37 W. R. 210; 6 Asp. M. C. 278, 348.—C.A.; affirmed, (1890) 59 L. J. P. 17; 14 App. Cas. 519; 61 L. T. 706; 6 Asp. M. C. 433.—H.L. (E.).

Danube and Black Sea Ry. v. Xenos (1861) 31 L. J. C. P. 84; 11 C. B. (N.S.) 152; 5 L. T. 527.—C.P.; affirmed, (1862) 31 L. J. C. P. 284; 13 C. B. (N.S.) 825; 8 Jur. (N.S.) 439; 10 W. R. 320.—EX. CH.

Danube and Black Sea Ry. v. Xenos, *discussed and applied*.

Frost v. Knight (1872) 41 L. J. Ex. 78; L. R. 7 Ex. 111, 112; 26 L. T. 77; 20 W. R. 471.—EX. CH.
BYLES, J.—The Court of Error in *Danube and Black Sea Ry. v. Xenos* has laid it down that an absolute unconditional renunciation of a contract before the time of performance amounts to a breach, at the election of the promisee.—p. 82.

Danube and Black Sea Ry. v. Xenos, *applied*.
Corcoran v. Proser, (1873) 22 W. R. 222.—EX. CH. (IR.).

Danube and Black Sea Ry. v. Xenos, *referred to*.

Roper v. Johnson (1873) 42 L. J. C. P. 65; L. R. 8 C. P. 167, 177; 28 L. T. 297; 21 W. R. 384.—C.P.; **Hudson v. Hill** (1874) 43 L. J. C. P. 273, 281; 30 L. T. 555.—C.P.; **Metcalfe v. Britannia Ironworks Co.** (1876) 45 L. J. Q. B. 837, 850; 1 Q. B. D. 613, 634; 35 L. T. 759.—Q.B.D.; **COCKBURN, C.J.** dissenting (affirmed, (1877) 46 L. J. Q. B. 443; 2 Q. B. D. 423; 36 L. T. 451; 25 W. R. 720.—C.A.). **Société Générale de Paris v. Milders** (1883) 49 L. T. 55,

57.—FIELD, J.; Johnstone v. Milling (1886) 55 L. J. Q. B. 162; 16 Q. B. D. 460, 470; 54 L. T. 629; 34 W. R. 238; 50 J. P. 694.—C.A. See CONTRACT, vol. i. col. 671.

Leigh v. Paterson (1818) 8 Taunt. 540; 2 Moore 588; 20 R. R. 552.—C.P.; and **Startup v. Cortazzi** (1835) 4 L. J. Ex. 218; 5 Tyrw. 697; 2 Cr. M. & R. 165.—EX., *approved and applied*.

Phillipotts v. Evans (1839) 9 L. J. Ex. 33; 5 M. & W. 475.—EX.

PARKE, B.—The proper principle is laid down in *Leigh v. Paterson*, where, as in the present case, the defendant gave notice that he would not fulfil his contract. The contract was, notwithstanding, held, and properly so, to continue open and obligatory on both parties. . . . In *Startup v. Cortazzi* the defendant had agreed to deliver a quantity of linseed, and part of the purchase-money had been paid in advance. The defendant gave notice that the contract would not be fulfilled; and it was held that the plaintiff was entitled, in the way of damages, to the repayment of his advance, with interest, and also to the difference between the contract price and the price when the linseed ought to have been delivered.—p. 33.

Leigh v. Paterson and Startup v. Cortazzi, *discussed*.

Hochster v. De la Tour (1853) 22 L. J. Q. B. 455, 459; 2 EL. & BL. 678; 17 Jur. 972; 1 W. R. 469.—Q.B.; **Frost v. Knight** (1870) 39 L. J. Ex. 227, 231; L. R. 5 Ex. 322, 331; 23 L. T. 714; 19 W. R. 77.—EX.; **MARTIN, B.** dissenting (reversed, EX. CH. See *post*, and "CONTRACT," vol. i. col. 670).

Phillipotts v. Evans (1839) 9 L. J. Ex. 33; 5 M. & W. 475.—EX., *approved*.

Ripley v. McClure (1849) 18 L. J. Ex. 419, 425; 4 Ex. 345.—EX.

Phillipotts v. Evans and Ripley v. McClure, *explained*.

Cort v. Ambergate, &c. Ry. (1851) 20 L. J. Q. B. 460, 466; 17 Q. B. 127; 15 Jur. 877.—Q.B.

Phillipotts v. Evans and Ripley v. McClure, *discussed*.

Hochster v. De La Tour (1853) 22 L. J. Q. B. 455, 459; 2 EL. & BL. 678; 17 Jur. 972; 1 W. R. 469.—Q.B.; **Frost v. Knight** (1870) 39 L. J. Ex. 227, 232; L. R. 5 Ex. 322, 332; 23 L. J. 714; 19 W. R. 77.—EX.; **MARTIN, B.** dissenting (reversed, *post*).

Phillipotts v. Evans and Ripley v. McClure, *referred to*.

Frost v. Knight (1872) 41 L. J. Ex. 78, 79; L. R. 7 Ex. 111, 113; 26 L. T. 77; 20 W. R. 471.—EX. CH.

Ripley v. McClure and Cort v. Ambergate, &c. Ry. (*supra*), *applied*.

Byrne v. Van Tienhoven (1880) 49 L. J. C. P. 316; 5 C. P. D. 344, 350; 42 L. T. 371; 44 J. P. 667.—LINDLEY, J.

France v. Gaudet (1871) 40 L. J. Q. B. 121; L. R. 6 Q. B. 199; 19 W. R. 622.—Q.B., *distinguished*.

Horne v. Midland Ry. (1873) 42 L. J. C. P. 59; L. R. 8 C. P. 131, 139; 28 L. T. 812; 21 W. R. 481.—EX. CH.; **LUSH, J.** and **PIGOTT, B.** dissenting.

MARTIN, B.—The plaintiffs no doubt lost

what they sued for, but it seems to me they are only entitled to ordinary damages. One test is to suppose the goods [shoes] were burnt, and in such case I cannot see that the plaintiffs could recover four shillings a pair, but think they could recover only the value of the shoes at the time when they were burnt. As respects *France v. Gaudet*, the champagne case, the action there was between vendor and vendee, and further, there is, I think, little analogy in the cases on this subject, and each case must stand on its own grounds.—p. 61.

France v. Gaudet, *referred to*.

The Star of India (1876) 1 P. D. 466; 45 L. J. Adm. 102; 35 L. T. 407; 25 W. R. 377.

SIR R. PHILLIMORE.—In the more recent case of *France v. Gaudet* the distinction, between an action of contract for the recovery of damages and an action against a wrongdoer, appears to have been very clearly taken.—p. 472.

France v. Gaudet, *not applied*.

Johnson v. Hook (1883) 31 W. R. 812; 1 Cab. & E. 89.—STEPHENS, J.

France v. Gaudet, *discussed*.

McNeill v. Richards (1898) [1899] 1 Ir. R. 79, 85.—PORTER, M.R.

Horn (or Horne) v. Midland Ry. (1873) 42 L. J. C. P. 59; L. R. 8 C. P. 131; 28 L. T. 312; 21 W. R. 481.—EX. CH.; **LUSH, J.**

and **PIGOTT, B.** dissenting; *not applied*.
Larios v. Bonany y Gurety (1873) L. R. 5 P. C. 346, 358.—P.C.

Horn (or Horne) v. Midland Ry., *referred to*.

Elbinger Actien-Gesellschaft v. Armstrong (1874) 43 L. J. Q. B. 211, 214; L. R. 9 Q. B. 473, 479; 30 L. T. 871; 23 W. R. 127.—Q.B.; **The Parana** (1876) 1 P. D. 452, 463; 35 L. T. 32; 24 W. R. 264.—**SIR R. PHILLIMORE**; and (1877) 2 P. D. 118, 120; 36 L. T. 388; 25 W. R. 596.—C.A.; **Couper v. Richards** (1887) 3 Times L. R. 739.—**FIELD** and **MANISTY, J.J.**; **Duckham Brothers v. G. W. Ry.** (1899) 80 L. T. 774, 776.—**DARLING, J.**

Coventry v. G. E. Ry. (1883) 52 L. J. Q. B. 694; 11 Q. B. D. 776; 49 L. T. 641.—C.A., *principle applied*.

Seton v. Lafone (1886) 56 L. J. Q. B. 164; 18 Q. B. D. 139, 144; 35 W. R. 347.—**DENMAN, J.**; and (1887) 56 L. J. Q. B. 416; 19 Q. B. D. 68, 71; 57 L. T. 547; 35 W. R. 749.—C.A.

Valpy v. Oakeley (1851) 20 L. J. Q. B. 380; 16 Q. B. 941; 16 Jur. 38.—Q.B., *approved and applied*.

Griffiths v. Perry (1859) 28 L. J. Q. B. 204, 207; 1 EL. & EL. 630; 5 Jur. (N.S.) 1076.—Q.B.; **Chalmers, Ex parte, Edwards, In re** (1873) L. R. 8 Ch. 289, 292; 42 L. J. Bk. 37; 28 L. T. 325; 21 W. R. 349.—C.A.

Brookman v. Rothschild (1829) 7 L. J. (O.S.)

Ch. 163; 3 Sim. 153.—V.-C.; *affirmed nom.* **Rothschild v. Brookman** (1831) 5 Bligh (N.S.) 165; 2 Dow & Cl. 183; 30 R. R. 147.—**H.L.** (B.).

Brookman v. Rothschild, *commented on*.

Waddell v. Blockey (1879) 48 L. J. Q. B. 517; 4 Q. B. D. 678, 680; 41 L. T. 458; 27 W. R. 931.—Q.B.

BRAMWELL, L.J.—When a person has been induced to buy something by the fraud of the seller, if on discovering the fraud he is still in possession of the chattel, and can restore it in the same

state as when he obtained it, he can receive back the full price of the chattel. It may be that in the present case if the trustee of the bankrupt purchaser could have tendered back the rupee paper which the bankrupt had purchased, he could have recovered back the whole purchase-money, according to *Brookman v. Rothschild*. I do not say that he could, for I hope this case could have been distinguished from that, which, assuming as I do that it was right in law, was a decision that, in my opinion, worked most grievous and unreasonable injustice, in which money was simply taken out of the pocket of one person who was entitled to keep it, and put into that of another who had no right to have it. Perhaps if there could in any way have been a *restitutio in integrum* in this case, the plaintiff might have recovered the whole of the price. But it is not necessary to discuss that matter, for our decision is not founded on that consideration.—p. 519. *And see ante*, col. 2515.

Hydraulic Engineering Co. v. McHaffie (1878) 4 Q. B. D. 670; 27 W. R. 221.—C.A., *referred to*.

Hammond v. Bussey (1887) 57 L. J. Q. B. 58; 20 Q. B. D. 79, 97.—C.A.

Allen v. Cameron (1833) 2 L. J. Ex. 263; 1 Cr. & M. 832; 3 Tyrw. 907; 38 R. R. 624.—EX., *referred to*.

Dawson v. Collis (1851) 20 L. J. C. P. 116, 118; 10 C. B. 523; 2 L. M. & P. 14.—C.P.

7. RIGHTS OF UNPAID VENDOR.

Dixon v. Yates (1816) 1 Stark. 447.—ELLENBOROUGH, C.J.; and K.B., *referred to*.

Townley v. Crump (1835) 5 L. J. K. B. 14; 4 A. & E. 58; 5 N. & M. 606; 1 H. & W. 564.—K.B.

Dixon v. Yates (1833) 2 L. J. K. B. 198; 5 B. & Ad. 313; 2 N. & M. 177; 39 R. R. 489.—K.B.

Principle applied, **Lackington v. Atherton** (1844) 13 L. J. C. P. 140; 8 Scott (N. R.) 38; 7 Man. & G. 360; 8 Jur. 406.—C.P.; *distinguished*, **Scott v. England** (1844) 14 L. J. Q. B. 43; 2 D. & L. 520; 9 Jur. 87.—PATTERSON, J.; *discussed*, **Tanner v. Scovell** (1845) 14 L. J. Ex. 321; 14 M. & W. 28.—EX.; *referred to*, **Meyerstein v. Barber** (1866) 36 L. J. C. P. 48, 56; L. R. 2 C. P. 38, 51.—C.P. (affirmed, (1867) 36 L. J. C. P. 289; L. R. 3 C. P.—EX. CH. and (1873) 39 L. J. C. P. 187; L. R. 4 H. L. 317; 22 L. T. 808; 18 W. R. 1041.—H.L. (E.)); **Heilbutt v. Hickson** (1872) 41 L. J. C. P. 228, 234; L. R. 7 C. P. 438, 450; 27 L. T. 336; 20 W. R. 1035.—C.P.

Dixon v. Yates, *referred to*.

Kemp v. Falk (1882) 7 App. Cas. 573; 52 L. J. Ch. 167; 47 L. T. 454; 31 W. R. 125; 5 Asp. M. C. 1.—H.L. (E.).

LORD BLACKBURN.—There it is said that the delivery of a part is a delivery of the whole. . . I had always understood the law upon that point to have been agreed law, which nobody ever doubted since an elaborate judgment in *Dixon v. Yates*, by Lord Wensleydale, who was then Parke, J. The rule I had always understood, from that time down to the present, to be that the delivery of a part may be a delivery of the whole if it is so intended, but that it is not such

a delivery unless it is so intended, and I rather think that the onus is upon those who say that it was so intended.—p. 586.

Wait v. Baker (1848) 17 L. J. Ex. 307; 2 Ex. 1.—EX.

Referred to, **Van Casteel v. Booker** (1848) 18 L. J. Ex. 9; 2 Ex. 691.—EX.; *approved and applied*, **Jenkyns v. Brown** (1849) 19 L. J. Q. B. 286; 14 Q. B. 496.—Q.B.; **Turner v. Liverpool Docks Trustees** (1851) 20 L. J. Ex. 393, 400; 6 Ex. 543.—EX. CH.; *referred to*, **Joyce v. Swann** (1864) 17 C. B. (N.S.) 84.—C.P.; **Pearson, Ex parte, Wiltshire Iron Co., In re** (1868) 37 L. J. Ch. 554, 556; L. R. 3 Ch. 443, 448; 18 L. T. 38, 423; 16 W. R. 682.—L.J.J.; **Heilbutt v. Hickson** (1872) 41 L. J. C. P. 228, 234; L. R. 7 C. P. 438, 450; 27 L. T. 336; 20 W. R. 1035.—C.P. (BRETT, J., dissenting); **Gabarron (or Gabarrow) v. Kreeft** (1875) 44 L. J. Ex. 238, 243; L. R. 10 Ex. 274, 280; 38 L. T. 365; 24 W. R. 146; 3 Asp. M. C. 36.—EX.; *discussed and distinguished*, **Mirabita v. Imperial Ottoman Bank** (1878) 47 L. J. Ex. 418; 3 Ex. D. 164, 169; 38 L. T. 597.—C.A.

Van Casteel v. Booker (1849) 18 L. J. Ex. 9; 2 Ex. 691.—EX.

Approved and applied, **Jenkyns v. Brown** (1849) 19 L. J. Q. B. 286; 14 Q. B. 496.—Q.B.; **Turner v. Liverpool Docks Trustees** (1851) 20 L. J. Ex. 393, 400; 6 Ex. 543.—EX. CH.; **Schotsmans v. Lancashire and Yorkshire Ry.** (1867) 36 L. J. Ch. 361, 363; L. R. 2 Ch. 332, 336; 16 L. T. 189; 15 W. R. 537.—CHELMSFORD, L.C. and CAIRNS, L.J.; *discussed and distinguished*, **Berndtson v. Strang** (1867) 36 L. J. Ch. 879, 885; L. R. 4 Eq. 481, 489; 16 L. T. 583; 15 W. R. 1168.—WOOD, v.-c. (varied, L.C. *See post*, col. 3024); *rule in applied*, **Ogg v. Shuter** (1875) 44 L. J. C. P. 161; L. R. 10 C. P. 159, 165; 32 L. T. 114; 23 W. R. 319.—C.P. (reversed, 45 L. J. C. P. 44; 1 C. P. D. 47; 33 L. T. 492; 24 W. R. 100.—C.A.); *referred to*, **Gabarrow (or Gabarron) v. Kreeft** (1875) 44 L. J. Ex. 238, 243; L. R. 10 Ex. 274, 281; 38 L. T. 365; 24 W. R. 146; 3 Asp. M. C. 36.—EX.; *approved*, **Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co.** (1886) 56 L. J. P. C. 19; 12 App. Cas. 128, 139; 56 L. T. 173; 35 W. R. 636; 6 Asp. M. C. 94.—P.C.

Miles v. Gorton (1834) 3 L. J. Ex. 155; 2 Cr. & M. 504; 4 Tyrw. 295; 39 R. R. 820.—EX., *discussed*.

Tanner v. Scovell (1845) 14 L. J. Ex. 321; 14 M. & W. 28.—EX.; **Griffiths v. Perry** (1859) 28 L. J. Q. B. 204; 1 El. & El. 680; 5 Jur. (N.S.) 1076.—Q.B.; **Chalmers, Ex parte, Edwards, In re** (1873) L. R. 8 Ch. 289, 292; 42 L. J. Bk. 37; 28 L. T. 325; 21 W. R. 349.—L.C. and L.J.J.

Miles v. Gorton, *adopted*.

Grice v. Richardson (1877) 3 App. Cas. 319; 47 L. J. P. C. 48; 37 L. T. 677; 26 W. R. 358.—P.C.

SIR B. PEACOCK (for the Court).—The question in this case arises from the circumstance that the appellants filled the double character of vendors and warehousemen. . . The question then comes, was the arrangement that warehouse rent was to be paid equivalent to actual delivery, so as to prevent the vendors from having their right of lien. That point seems to have been determined in *Miles v.*

Gorton. . . In this case the goods, whilst in the warehouse, though rent was payable for them, remained in the possession of the appellants; and their lordships are of opinion that as the goods remained in the possession of the vendors, and no actual delivery had been made to the purchasers, the vendor's lien revived upon the insolvency of the vendees.—p. 323, 324.

Jenkyins v. Brown (1849) 19 L. J. Q. B. 286; 14 Q. B. 496.—Q.B.; *referred to*.

Sewell v. Burdick (1884) 10 App. Cas. 74, 80; 54 L. J. Q. B. 126; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.).

Bunney v. Poyntz (1833) 2 L. J. K. B. 55; 4 B. & Ad. 568; 1 N. & M. 229; 38 R. R. 309.—K.B., *discussed*.

Tanner v. Scovell (1845) 14 L. J. Ex. 321; 14 M. & W. 28, 37.—EX.

POLLOCK, C.B.—In *Bunney v. Poyntz*, part delivery of a portion of a haystack, with intent to separate that from the remainder, was held not to be sufficient [to put an end to the right of stoppage *in transitu*].—p. 324.

Bunney v. Poyntz, referred to.

Cooper, Ex parte, McLaren, In re (1879) 11 Ch. D. 68, 76; 48 L. J. Bk. 49; 40 L. T. 105; 27 W. R. 518.—C.A.

M'Ewan v. Smith (1849) 2 H. L. Cas. 809; 13 Jur. 265.—H.L. (SC.), *discussed*.

Gunn v. Bolckow, Vaughan & Co. (1875) 44 L. J. Ch. 734, n.; L. R. 10 Ch. 497, n.—BACON, V.-C.; *reversed*, (1875) 44 L. J. Ch. 732; L. R. 10 Ch. 491; 32 L. T. 781; 23 W. R. 739.—L.JJ.

M'Ewan v. Smith, referred to.

Cole v. North Western Bank (1875) 44 L. J. C. P. 233; L. R. 10 C. P. 354, 373; 32 L. T. 733.—EX. CH.

BLACKBURN, J.—It has been repeatedly decided that a sale or pledge of a delivery order or other document of title (not being a bill of lading) by the vendee does not defeat the unpaid vendor's rights, because the vendee is not intrusted as an agent.—*Jenkyins v. Osborne* [13 L. J. C. P. 196; 7 Man. & G. 478, *see* "SHIPPING," *post*, col. 3327] and *M'Ewan v. Smith*.—p. 242.

M'Ewan v. Smith, distinguished.

Pooley v. G. E. Ry. (1876) 34 L. T. 537, 540.—EX. D.

M'Ewan v. Smith, applied.

Gillman, Spencer & Co. v. Carbutt & Co. (1889) 61 L. T. 281; 37 W. R. 437.—C.A. **ESHER, M.R., FRY and LOPES, L.JJ.**

Ogg v. Shuter, 44 L. J. C. P. 161; L. R. 10 C. P. 159; 32 L. T. 114; 23 W. R. 319.—C.P.; *reversed*, (1875) 45 L. J. C. P. 44; 1 C. P. D. 47; 33 L. T. 492; 24 W. R. 100.—C.A.

Ogg v. Shuter, discussed.

Mirabita v. Imperial Ottoman Bank (1878) 47 L. J. Ex. 418; 3 Ex. D. 164, 169; 38 L. T. 597.—C.A. *See judgments at length.*

Milgate v. Kebble (1841) 10 L. J. C. P. 277; 3 Man. & G. 100; 3 Scott N. R. 358.—C.P., *discussed*.

Donald v. Suckling (1866) 35 L. J. Q. B. 232; L. R. 1 Q. B. 585, 616; 12 Jur. (N.S.) 795; 14

L. T. 772; 15 W. R. 13.—Q.B.; **SHEE, J.** dissenting.

BLACKBURN, J.—*Bloxham v. Sanders* [1 B. & C. 941] and *Milgate v. Kebble* are cases of unpaid vendors, and therefore are not authorities directly applicable to a case of pledge. But the position of a partially unpaid vendor who irregularly sells the goods, which have only been partially paid for, is very analogous to that of a pledgee, and in *Milgate v. Kebble*, Tindall, J., is reported to have used language that seemed to indicate that in his opinion a pledgor could not have maintained trover any more than the vendee in that case.—p. 249.

Spalding v. Ruding (1843) 12 L. J. Ch. 503; 6 Beav. 376.—LANGDALE, M.R.

Followed, **Berndtson v. Strang** (1867) 36 L. J. Ch. 879; L. R. 4 Eq. 481, 486; 16 L. T. 583; 15 W. R. 1168.—WOOD, V.-C. (varied, L.C., *see post*; *discussed*, **Pigott v. Pigott** (1867) 37 L. J. Ch. 116, 119; L. R. 4 Eq. 549, 561; 16 L. T. 766.—WOOD, V.-C.; *followed*, **Coventry v. Gladstone** (1868) 37 L. J. Ch. 492, 494; L. R. 6 Eq. 44, 48; 16 W. R. 837.—WOOD, V.-C.; *considered*, **Rodger v. Comptoir d'Escompte** (1869) 38 L. J. P. C. 30; 5 Moore P. C. (N.S.) 538; L. R. 2 P. C. 393, 407; 21 L. T. 33; 17 W. R. 468.—P.C. (*see* "SHIPPING," *post*, col. 3330).

Spalding v. Ruding, principle applied.

Golding, Davis & Co., Ex parte, Knight, In re (1880) 13 Ch. D. 628; 42 L. T. 270; 48 W. R. 481.—C.A.; **Falk, Ex parte, Kiell, In re** (1880) 14 Ch. D. 446, 457; 42 L. T. 780; 28 W. R. 785; 4 Asp. M. C. 280.—C.A.

Spalding v. Ruding, principle applied.

Falk, Ex parte, Kiell, In re, affirmed.

Kemp v. Falk (1882) 7 App. Cas. 573; 52 L. J. Ch. 167; 47 L. T. 454; 31 W. R. 125; 5 Asp. M. C. 1.—H.L. (E.).

SELBORNE, L.C.—*Wertzinthus, In re* [(1833) 3 L. J. K. B. 56; 5 B. & Ad. 817.—K.B. (*see* "SHIPPING," *post*, col. 3376)] and *Spalding v. Ruding* clearly establish that the right of stoppage *in transitu* is not discharged absolutely by an indorsement of a bill of lading by way of security or pledge, but that it remains, in equity at all events (and that is quite enough for the present purpose), as it was before, subject to a charge in favour of the indorsee of the bill of lading, which must be paid off, and which being paid off, the person entitled to, and exercising, the right of stoppage *in transitu* stands in exactly the same position as to everybody else as if there had been no security, and no pledge, and no indorsement of the bill of lading.—p. 576.

LORDS BLACKBURN and WATSON to the same effect.

Spalding v. Ruding and Kemp v. Falk, referred to.

Sewell v. Burdick (1884) 54 L. J. Q. B. 126; 10 App. Cas. 74, 85; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.).

Berndtson (or Berndston) v. Strang (1867) 36 L. J. Ch. 879; L. R. 4 Eq. 481; 16 L. T. 583; 15 W. R. 1168.—WOOD, V.-C.; *varied* (1868) 37 L. J. Ch. 665; L. R. 3 Ch. 588; 19 L. T. 40; 16 W. R. 1025.—CATRNS, L.C. *And see post*, col. 3025.

Berndtson v. Strang, applied.

Fraser v. Wilt (1868) L. R. 7 Eq. 64, 71; 19 L. T. 440; 17 W. R. 92.—ROMILLY, M.R.

Berndtson v. Strang (*supra*), *referred to*.

Rodger v. Comptoir d'Escompte (1869) 38 L. J. P. C. 39; L. R. 2 P. C. 393, 404; 5 Moore P. C. (N.S.) 538; 21 L. T. 33; 17 W. R. 468.—P.C.; Latham v. Chartered Bank of India, &c. (1874) 43 L. J. Bk. 642; L. R. 17 Eq. 205, 216; 29 L. T. 795.—BACON, V.-C. ^

Berndtson v. Strang, *explained and applied*.

Rosevear China Clay Co., Ex parte, Cock, In re (1879) 11 Ch. D. 560; 48 L. J. Q. B. 100; 40 L. T. 730; 27 W. R. 591.—C.A.; reversing BACON, C.J.

JAMES, L.J.—With all respect for the decision of the C.J., I am of opinion that this case cannot be distinguished from the authorities which have been referred to, in particular that of *Berndtson v. Strang*. The authorities show that the vendor has a right to stop *in transitu* until the goods have actually got home into the hands of the purchaser, or of someone who receives them in the character of his servant or agent. . . . It is admitted that if it had been mentioned in the original contract for sale that the goods were to be carried to Glasgow the present case could not have been distinguished from *Berndtson v. Strang*, but it is said that the fact that no ultimate destination was mentioned affords a distinction. It seems to me, however, that the mere fact that the port of destination was left uncertain, or was changed after the contract for sale, can make no difference.—p. 568.

BRETT, L.J.—In *Berndtson v. Strang* the test put by Lord Cairns is, whether the goods have been delivered only to a carrier, although he may have been named by the purchaser. There the ship had been chartered by the purchaser, and therefore, when the goods were placed on board there was a constructive delivery to him. Yet, because the goods were in the hands of the shipowner as carrier, it was held that the transit was not over until that carriage was over.—p. 570.

COTTON, L.J. to the same effect.

Berndtson v. Strang, *referred to*.

Bethell v. Clark (1888) 57 L. J. Q. B. 302; 20 Q. B. D. 615, 620; 59 L. T. 808; 36 W. R. 611; 6 Asp. M. C. 346.—C.A.

O'Sullivan, In re, Ferd, Baller & Co., Ex parte (1891) 61 L. J. Q. B. 228; 66 L. T. 619.—WILLIAMS and COLLINS, JJ.; *reversed*, (1892) 67 L. T. 464.—C.A.

Snee v. Prescott (1743) 1 Atk. 245; 6 East 28, n.—L.C.

Commented on, Lickbarrow v. Mason (1787) 2 Term Rep. 63; 1 H. Bl. 357; 6 East 21; 1 R. R. 425.—K.B.; *approved*, Ellis v. Hunt (1789) 3 Term Rep. 464; 1 R. R. 743.—K.B.; *referred to*, Feise v. Wray (1802) 3 East 93; 6 R. R. 551.—K.B.; Westzinthus, In re (1833) 3 L. J. K. B. 56; 5 B. & Ad. 817; 2 N. & M. 644.—K.B.

Kinloch v. Craig (1789–90) 3 Term Rep. 119, 783; 1 R. R. 664.—K.B., *distinguished*. Bryans v. Nix (1839) 8 L. J. Ex. 137; 4 M. & W. 775; 1 H. & H. 480.—EX.

Hodgson v. Loy (1797) 7 Term Rep. 440; 4 R. R. 483.—K.B., *applied*.

Feize v. Wray (1802) 3 East 93; 6 R. R. 551.—K.B.

ELLENBOROUGH, C.J., said *Hodgson v. Loy* showed that a part payment did not destroy the vendor's rights of stopping *in transitu*; it only

reduced the equitable lien *pro tanto*, when he got the goods into his possession.—p. 103.

Hodgson v. Loy, *distinguished*.

Stoveld v. Hughes (1811) 14 East 308; 12 R. R. 523.—K.B.; Nichols v. Hart (1831) 5 C. & P. 179.—TINDAL, C.J.

Hodgson v. Loy, *referred to*.

Schotsmans v. Lancashire and Yorkshire Ry. (1867) 36 L. J. Ch. 361, 366; L. R. 2 Ch. 332, 340; 16 L. T. 189; 15 W. R. 537.—L.C. and L.JJ.

Pennell v. Alexander (1854) 23 L. J. Q. B.

171; 3 El. & Bl. 283; 18 Jur. 627.—Q.B., *applied*.

Southwell v. Bowditch (1876) 45 L. J. C. P. 374; 1 C. P. D. 100, 104; 34 L. T. 133; 25 W. R. 275.—C.P.D.; *reversed*, 45 L. J. C. P. 630; 1 C. P. D. 374; 35 L. T. 196; 24 W. R. 838.—C.A.

Clay v. Harrison (1829) 10 B. & C. 99; 2

Man. & R. 17; Ll. & W. 104; 8 L. J. (O.S.)

K. B. 90; 33 R. R. 304.—K.B., *referred to*.

Edwards v. Brewer (1837) 6 L. J. Ex. 135; 2 M. & W. 375.—EX.

Clay v. Harrison, and Holst v. Pownal

(1794) 1 Esp. 240; 2 B. & P. 461, n.—C.P.,

see 5 R. R. 658, n., *referred to*.

James v. Griffin (1837) 6 L. J. Ex. 241; 2 M. & W. 623, 632.—EX. ABINGER, C.B. dissenting.

Holst v. Pownal, *overruled*.

L. & N. W. Ry. v. Bartlett (1861) 31 L. J. Ex. 92; 7 H. & N. 400; 8 Jur. (N.S.) 58; 5 L. T. 399; 10 W. R. 109.—EX.

Vertue v. Jewell (1814) 4 Campb. 31.—

ELLENBOROUGH, C.J., and K.B., *discussed*.

Leask v. Scott (1877) 2 Q. B. D. 376, 380; 46

L. J. Q. B. 576; 36 L. T. 784; 25 W. R. 654.—C.A. *See* "SHIPPING."

Litt v. Cowley (1816) 7 Taunt. 169; 2—

Marsh, 457; Holt N.P. 338; 17 R. R. 482.

—C.P., *referred to*.

Whitehead v. Anderson (1842) 11 L. J. Ex. 157; 9 M. & W. 518.—EX.

Whitehead v. Anderson, *applied*.

Wentworth v. Outhwaite (1843) 12 L. J. Ex. 172; 10 M. & W. 436.—EX.; Bolton v. Lancashire and Yorkshire Ry. (1866) 35 L. J. C. P. 137; L. R. 1 C. P. 431, 438; 12 Jur. (N.S.) 317; 13 L. T. 764; 14 W. R. 430.—C.P.; Coventry v. Gladstone (No. 2) (1868) 37 L. J. Ch. 492, 495; L. R. 6 Eq. 44, 49; 16 W. R. 837.—WOOD, V.-C.; Gibbes, Ex parte, Whitworth, In re (1875) 45 L. J. Bk. 10; 1 Ch. D. 101, 111; 33 L. T. 479; 24 W. R. 298.—BACON, C.J.

Whitehead v. Anderson, *explained*.

Falk, Ex parte, Kiehl, In re (1880) 14 Ch. D. 446; 42 L. T. 780; 28 W. R. 785; 4 Asp. M. C. 280.—C.A.; affirmed, H.L., *supra*, col. 3024.

JAMES, L.J.—That is not a judicial decision that any such duty [to communicate the notice with reasonable diligence to the master] is imposed on the shipowner; it is only a decision that, at the most, he could be under no further obligation.—p. 450.

Whitehead v. Anderson, *applied*.

Bethell v. Clark (1887) 19 Q. B. D. 553; 57 L. T. 627; 36 W. R. 185.—MATHEW and CAVE, JJ.; affirmed, (1888) 57 L. J. Q. B. 302; 20

Q. B. D. 615; 59 L. T. 808; 36 W. R. 611; 6 Asp. M. C. 346.—C.A.

MATHEW, J.—The further point was made that the notice to stop was insufficient, because it had been served on the owners and not on the master of the ship. But the notice had been given to the owners under such circumstances as enabled them to communicate with the master, and prevent a delivery contrary to the terms of the notice to stop—*Whitehead v. Anderson*.—p. 560.

Coates v. Railton (1827) 6 B. & C. 422; 9 D. & R. 593; 5 L. J. (O.S.) K. B. 209; 30 R. R. 385.—K.B., *discussed*.

Kendall v. Marshall (1883) 11 Q. B. D. 356; 52 L. J. Q. B. 313; 48 L. T. 951; 31 W. R. 597.—C.A.

BRETT, L.J.—*Coates v. Railton* is somewhat difficult of explanation; perhaps it may be explained on the same grounds as some other decisions; but if it cannot, I think the decision wrong.—p. 366.

COTTON, L.J.—This is a fresh transit, not from the seller to the buyer, but by or from the buyer. The principle is laid down by Bayley, J., in *Coates v. Railton*, where he says: "It is a general rule that where goods are sold to be sent to a particular destination named by the vendee, the right of the vendor to stop them continues until they arrive at that place of destination."—p. 367.

BOWEN, L.J.—In *Coates v. Railton* several cases were cited by Bayley, J., in the course of his judgment, and the principle to be deduced from them is that, where goods are sold to be sent to a particular destination, the *transitus* is not at an end until the goods have reached the place named by the vendee to the vendor as their destination.—p. 369.

Coates v. Railton, *referred to*.

Bethell v. Clark (1888) 20 Q. B. D. 615, 619; 57 L. J. Q. B. 302; 59 L. T. 808; 36 W. R. 611; 6 Asp. M. C. 346.—C.A.

Golding, Davis & Co., Ex parte, Knight, In re (1880) 13 Ch. D. 628; 42 L. T. 270; 48 W. R. 481.—C.A., *approved and followed*.

Falk, Ex parte, Kiell, In re (1880) 14 Ch. D. 446; 42 L. T. 780; 28 W. R. 785; 4 Asp. M. C. 280.—C.A. (affirmed, H.L., *post*).

JAMES, L.J.—Whether that decision was right or wrong, it appears to me that it is binding upon us, and it is not less binding on me because I was a party to it. It is a decision of the C. A., and it is not open to be re-heard merely because the Court now consists in part of the same judges. It appears to me that it is impossible to distinguish between the present case and *Golding, Davis & Co., Ex parte*.—p. 454.

BAGGALLAY, L.J.—I desire to add that the doubts which, in *Golding, Davis & Co., Ex parte*, I said that I had entertained during the argument turned entirely upon the special circumstances of that case. My doubt was whether the goods had not been delivered at Liverpool to Knight & Son and then started on a fresh *transitus*. Upon consideration, I was satisfied that that was not the right view of the facts.—p. 454.

BRAMWELL, L.J.—There is the decision in *Golding, Davis & Co., Ex parte*, which seems to me to be exactly in point. I am not going to

shelter myself under the authority of that case. In my opinion it was rightly decided.—p. 456.

Golding, Davis & Co., Ex parte, Knight, In re, *not considered*.

Kemp v. Falk (1882) 7 App. Cas. 573, 581; 52 L. J. Ch. 167; 47 L. T. 454; 31 W. R. 125; 5 Asp. M. C. 1.—H.L. (E.).

LORD BLACKBURN.—We have no occasion to consider whether *Golding, Davis & Co., Ex parte*, was well or ill decided, because no point relating to it arises here.—p. 581.

LORD WATSON to the same effect.

Golding, Davis & Co., Ex parte, Knight, In re, *principle applied*.

Bellamy v. Davey (1891) 60 L. J. Ch. 778; [1891] 3 Ch. 540; 65 L. T. 308; 40 W. R. 118.—ROMER, J.; appeal dismissed by consent, W. N. (1891) 192.

Watson, Ex parte, Love, In re (1877), 46 L. J. Bk. 97; 5 Ch. D. 35; 36 L. T. 75; 25 W. R. 489.—C.A., *explained and applied*.

Kendall v. Marshall (1883) 52 L. J. Q. B. 313; 11 Q. B. D. 356, 366, 369; 48 L. T. 951; 31 W. R. 597.—C.A.

Watson, Ex parte, Love, In re, *distinguished*.

Miles, Ex parte, Isaacs, In re (1885) 15 Q. B. D. 39; 54 L. J. Q. B. 566.—C.A.

BRETT, M.R.—It seems to me that *Watson, Ex parte*, was decided upon the assumption that the purchaser, having made his arrangements for the transit, directed the vendor to send the goods, according to those arrangements, straight from the place of manufacture to Shanghai. There was nothing more to be done as to the transit after the vendor had directed the goods to be conveyed to Shanghai to the person to whom they were to be delivered there. It was assumed that the vendor in that case knew, not only that the goods were to go to Shanghai, but that they were to be delivered to a specified firm there. From the moment, therefore, that the goods left the vendor's hands until they arrived at the place of business of that firm in Shanghai they would be in transit, without the necessity of any new order from the purchaser.—p. 46.

LINDLEY, L.J.—In *Watson, Ex parte*, there was a bargain between the buyer and the seller that the goods should go straight to a specified firm at Shanghai, and that that destination should be stated in the bill of lading. The seller could have obtained an injunction to prevent the goods from going elsewhere.—p. 47.

Watson, Ex parte, Love, In re, *referred to*.

Bethell v. Clark (1887) 19 Q. B. D. 533, 559; 57 L. T. 627; 36 W. R. 185.—MATHEW and CAVE, JJ. (*see post*, col. 3036); affirmed, C.A. (*supra*, col. 3026).

Coventry v. Gladstone (1868) 37 L. J. Ch. 492; L. R. 4 Eq. 493; 16 W. R. 837.—WOOD, V.-C., *applied*.

Banco de Lima v. Anglo-Peruvian Bank (1878) 8 Ch. D. 160; 38 L. T. 130.

MALINS, V.-C.—The general proposition that a bill of lading passes the property has been long settled. One of the cases cited on the present occasion on that subject is *Coventry v. Gladstone*,

where that doctrine is expressly laid down.—p. 171.

Wiseman v. Vandeputt (1690) 2 Vern. 203, *discussed*.

Lickbarrow v. Mason (1787) 2 Term Rep. 63.—K.B. *See post*.

Godfrey v. Furzo (1733) 3 P. Wms. 185.—L.C., *commented on*.

Lickbarrow v. Mason (1793) 4 Bro. P. C. 57; 6 Term Rep. 131; 1 R. R. 425.—H.L. (E.).

Godfrey v. Furzo, *referred to*.

The Figlia Maggiore (1868) 37 L. J. Adm. 52; L. R. 2 A. & E. 106, 111; 18 L. T. 532.—SIR R. PHILLIMORE; **Harris v. Truman** (1881) 50 L. J. Q. B. 633; 7 Q. B. D. 340, 356; 45 L. T. 255; 30 W. R. 135.—Q.B.D. (affirmed, (1852) 51 L. J. Q. B. 338; 9 Q. B. D. 264; 46 L. T. 844; 30 W. R. 533.—C.A.).

Godfrey v. Furzo, *referred to*.

Burdick v. Sewell (1883) 10 Q. B. D. 363; 52 L. J. Q. B. 428; 48 L. T. 705; 31 W. R. 796; 5 Asp. M. C. 79.—FIELD, J.; reversed, C.A., but restored, H.L. (E.) (*post*, col. 3030).

FIELD, J.—Lord King held [*Godfrey v. Furzo*] that no property passed by the indorsement of the bill of lading.—p. 375. *See* judgment at length.

Lickbarrow v. Mason (1787) 2 Term Rep. 63; 6 East 27, n. (a).—K.B.; reversed, 1 H. Bl. 357; 5 Term Rep. 367, 638; 2 H. Bl. 211.—EX. CH.; but restored, (1793) 4 Bro. P. C. 27; 6 Term Rep. 131; 1 R. R. 425; 1 Sm. L. C. (10th ed. p. 674).—H.L. (E.).

Lickbarrow v. Mason, *referred to*.

Haille v. Smith (1796) 1 B. & P. 563.—EX. CH.; **Westzinthus**, *In re* (1833) 3 L. J. K. B. 56; 5 B. & Ad. 817; 2 N. & M. 644; 39 R. R. 665.—K.B.; **Gurney v. Behrend** (1854) 23 L. J. Q. B. 265, 272; 3 El. & Bl. 622; 18 Jur. 856; 2 W. R. 425.—Q.B.

Lickbarrow v. Mason, *doctrine not applied*.

Griffiths v. Perry (1859) 1 El. & El. 680; 28 L. J. Q. B. 204; 5 Jur. (N.S.) 1076.—Q.B.

Lickbarrow v. Mason, *referred to*.

Bateman v. Green (1867) Ir. R. 2 C. L. 166.—Q.B.; **The Figlia Maggiore** (1868) 37 L. J. Adm. 52; L. R. 2 A. & E. 106, 111; 18 L. T. 532.—SIR R. PHILLIMORE; **Rodger v. Comptoir d'Escompte** (1869) 38 L. J. P. C. 30; L. R. 2 P. C. 393, 406; 5 Moore P. C. (N.S.) 538; 21 L. T. 33; 17 W. R. 468.—P.C.; **The Freedom** (1871) L. R. 3 P. C. 594, 598; 24 L. T. 452; 1 Asp. M. C. 136.—L.C.; **Hathesing v. Laing** (1873) L. R. 17 Eq. 92, 100; 43 L. J. Ch. 233; 29 L. T. 734.—BACON, V.-C.; **Chartered Bank of India, Australia, and China v. Henderson** (1874) L. R. 5 P. C. 501, 513; 30 L. T. 578.—P.C.

Lickbarrow v. Mason, *observed on*.

Goodwin v. Roberts (1875) 44 L. J. Ex. 157, 165; L. R. 10 Ex. 337, 352; 32 L. T. 199.—EX. CH.; affirmed, (1876) 45 L. J. Ex. 748; 1 App. Cas. 476; 35 L. T. 179; 24 W. R. 987.—H.L. (E.).

Lickbarrow v. Mason, *referred to*.

Arnold v. Cheque Bank (1876) 45 L. J. C. P. 562, 565; 1 C. P. D. 587; 34 L. T. 729; 24 W. R. 759.—C.P.D.

Lickbarrow v. Mason, *applied*.

Leask v. Scott (1877) 46 L. J. Q. B. 576; 2 Q. B. D. 376, 381; 36 L. T. 784; 25 W. R. 654; 3 Asp. M. C. 469.—C.A.

Lickbarrow v. Mason, *referred to*.

Rosevear China Clay Co., Ex parte, Cock, *In re* (1879) 48 L. J. Bk. 100; 11 Ch. D. 560, 570; 40 L. T. 730; 27 W. R. 591; 4 Asp. M. C. 144.—C.A.

Lickbarrow v. Mason, *dictum disapproved*.

Glyn v. East and West India Dock Co. (1880) 6 Q. B. D. 475; 50 L. J. Q. B. 62; 43 L. T. 584.—C.A.; affirmed, H.L. (E.), *post*.

BRETT, L.J. (dissenting).—A wrongful delivery to one of the copies of the bill cannot be an accomplishment of it intended by the contract, and is not, therefore, an accomplishment of it within the contract. This is contrary to the dictum of Dr. Lushington in the case of *The Tigress* (Brown & Lush. 38, *see* "SHIPPING," *post*, col. 3332). I must respectfully differ from that dictum; it was not necessary for Dr. Lushington carefully to consider the words. Neither was it for Lord Loughborough in *Lickbarrow v. Mason*. In both cases the observations are mere passing observations.—p. 488. *But see* the judgments of BRAMWELL and BAGGALLAY, L.JJ.

Lickbarrow v. Mason, *referred to*.

Glyn, Mills & Co. v. East and West India Dock Co. (1882) 52 L. J. Q. B. 146; 7 App. Cas. 591, 618; 47 L. T. 309.—H.L. (E.).

Lickbarrow v. Mason, *discussed*.

Burdick v. Sewell (1883) 52 L. J. Q. B. 428; 10 Q. B. D. 363, 371; 48 L. T. 705; 31 W. R. 796; 5 Asp. M. C. 79.—FIELD, J.; reversed, C.A. (*post*), but restored, H.L. (E.), *post*.

Lickbarrow v. Mason, *considered and applied*.

Cassaboglou v. Gibbs (1883) 52 L. J. Q. B. 538; 11 Q. B. D. 797, 806; 48 L. T. 850; 32 W. R. 138.—C.A. BRETT, M.R., LINDLEY and FRY, L.JJ.; **Burdick v. Sewell** (1884) 53 L. J. Q. B. 399; 13 Q. B. D. 159, 162; 51 L. T. 453; 32 W. R. 740.—C.A. BRETT, M.R. and BAGGALLAY, L.JJ.; BOWEN, L.J. dissenting (reversed, H.L., *post*).

Lickbarrow v. Mason, *discussed and explained*.

Sewell v. Burdick (1884) 54 L. J. Q. B. 156; 10 App. Cas. 74, 78; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.). *See* the speeches of the lords at length.

Lickbarrow v. Mason, *referred to*.

French's Estate, *In re* (1887) 21 L. R. Ir. 283, 336.—C.A.; **Bank of England v. Vagliano** (1891) 60 L. J. Q. B. 145; [1891] A. C. 107, 169; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.—H.L. (E.). LORDS BRAMWELL and FIELD dissenting.

Lickbarrow v. Mason, *approved and applied*.

Kelly v. Munster and Leinster Bank (1891) 29 L. R. Ir. 19.—C.A.

Lickbarrow v. Mason, *applied*.

Nash v. De Freville (1900) 69 L. J. Q. B. 484, 490; [1900] 2 Q. B. 72; 82 L. T. 642; 48 W. R. 434.—C.A.

Lickbarrow v. Mason, *dictum approved*.

Farquharson Brothers v. King & Co. (1901) 70 L. J. K. B. 985; [1901] 2 K. B. 697, 708; 85 L. T. 264; 49 W. R. 673.—C.A.; reversed, H.L. (E.) (*post*).

Lickbarrow v. Mason, principle discussed.

Rimmer v. Webster (1902) 71 L. J. Ch. 561, 563; [1902] 2 Ch. 163; 86 L. T. 491; 50 W. R. 517.—FARWELL, J.

Lickbarrow v. Mason, commented on.

Farquharson Brothers v. King & Co. (1902) 71 L. J. K. B. 667; [1902] A. C. 325, 340; 86 L. T. 810; 51 W. R. 94.—H.L. (E.).

LORD LINDLEY.—It is, of course, true that by employing Capon and trusting him as they did, the plaintiffs enabled him to transfer the timber to any one; in other words, the plaintiffs in one sense enabled him to cheat both themselves and others. In that sense every one who has a servant enables him to steal whatever is within his reach. But if the word "enable" is used in this wide sense, it is clearly untrue to say, as Ashurst, J. said in *Lickbarrow v. Mason* [2 Term Rep. 63; 1 H. Bl. 357; 1 Sm. L. C. (10th ed.) 674], "that, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Such a doctrine is far too wide, and the cases referred to in the argument and commented on by V. Williams, L.J. [in the C.A.] show that it cannot be relied upon without considerable qualification.—p. 676.

Leask v. Scott (1876) 46 L. J. Q. B. 329; 35 L. T. 903.—FIELD, J.; *reversed*, (1879) 46 L. J. Q. B. 576; 2 Q. B. D. 376; 36 L. T. 784; 25 W. R. 654; 3 Asp. M. C. 469.—C.A.

Dixon v. Baldwin (or Baldwin) (1804) 5 East 175; 7 R. R. 681.—K.B., referred to.

James v. Griffin (1837) 6 L. J. Ex. 241; 2 M. & W. 623, 633.—EX.; *applied*, Dodson v. Wentworth (1842) 12 L. J. C. P. 59, 61; 4 Man. & G. 1080; 5 Scott N. R. 821; 6 Jur. 1066.—C.P.; Wentworth v. Outhwaite (1842) 12 L. J. Ex. 172, 175; 10 M. & W. 436.—EX.; Coventry v. Gladstone (1868) L. R. 6 Eq. 44, 50; 37 L. J. Ch. 492; 16 W. R. 837.—WOOD, V.-C.; Gibbes, Ex parte, Whitworth, In re (1875) 1 Ch. D. 101, 110; 45 L. J. Bk. 10; 83 L. T. 479; 24 W. R. 298.—BACON, C.J.; Kendall v. Marshall (1883) 52 L. J. Q. B. 313; 11 Q. B. D. 356, 358; 48 L. T. 951; 31 W. R. 597.—C.A.; Miles, Ex parte, Isaacs, In re (1885) 54 L. J. Q. B. 566; 15 Q. B. D. 39, 44.—C.A. (*see post*, col. 3034); Bethell (or Bethel) v. Clark (1887—1888) 57 L. J. Q. B. 302; 19 Q. B. D. 553; 20 Q. B. D. 615, 619; 57 L. T. 627; 59 L. T. 808; 36 W. R. 185, 611; 6 Asp. M. C. 194, 346.—Q.B.D and C.A.

Dixon v. Baldwin (or Baldwin) and Bethell (or Bethel) v. Clark, approved and applied.**Hunter v. Beal, cited 3 Term Rep. 467, referred to.**

Lyons v. Hoffnung (1890) 15 App. Cas. 391; 59 L. J. P. C. 79; 63 L. T. 298.—P.C.

LORD HERSHELL (for self, LORD WATSON, SIR B. PHACOCK and SIR R. COUCH).—The test laid down by Lord Ellenborough in *Dixon v. Baldwin* appears clearly to cover such a case as this. Alluding to *Hunter v. Beal* [cited in *Ellis v. Hunt*, 3 Term Rep. 467] in which it was said that "the goods must come to the corporal touch of the vendees, in order to oust the right of stopping *in transitu*," Lord Ellenborough says that this was "a figurative expression, rarely, if ever, strictly true. If it be predicated of the vendee's own actual touch, or of the touch of any other person, it comes in each instance to

a question whether the party to whose touch it actually comes be an agent so far representing the principal as to make a delivery to him a full, effectual, and final delivery to the principal, as contra-distinguished from a delivery to a person virtually acting as a carrier or means of conveyance to or on the account of the principal in a mere course of transit towards him." . . . The law appears to their lordships to be very clearly and accurately laid down by the M.R. in *Bethell v. Clark*. He says: "When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu* and may be stopped." The present case appears to fall distinctly within the terms there employed.—p. 396.

Dixon v. Baldwin (or Baldwin) and Bethell v. Clark, rule in, referred to.

Gurney, In re, Hughes, Ex parte (1892) 67 L. T. 598.—WILLIAMS, J.

Dixon v. Baldwin (or Baldwin), referred to.

Taylor v. R. E. Ry. (1901) 70 L. J. K. B. 499, 501.—BIGHAM, J. (*post*, col. 3039).

Rosevear China Clay Co., Ex parte, Cock, In re (1879) 48 L. J. Bk. 108; 11 Ch. D. 560; 40 L. T. 730; 27 W. R. 591.—C.A., explained.

Kendal v. Marshall (1883) 11 Q. B. D. 356; 52 L. J. Q. B. 313; 48 L. T. 951; 31 W. R. 597.—C.A.

COTTON, L.J.—In *Rosevear China Clay Co., Ex parte*, the goods were put by the vendors on board a vessel chartered by the vendee at Fowey, the port named by him, the ultimate destination not being communicated to the vendors. But the master of the vessel received them only as carriers to a further point. Before the vessel started from the port of loading, the vendee committed an act of bankruptcy; and it was held in this Court that the vendors might lawfully stop the goods. In that case the putting the goods on board the vessel was an indication that the goods were to go on a voyage, which was not only unfinished but was not even begun. In that case the transit was not at an end; but Brett, L.J. and I guarded ourselves against extending the principle which we then acted upon to a case like this.—p. 367.

Rosevear China Clay Co., Ex parte, Cock, In re, and Ruck v. Hatfield (1822) 5 B. & Ald. 632; 24 R. R. 507.—K.B., followed.

Brindley v. Cilgwyn Slate Co., (1885) 55 L. J. Q. B. 67, 68.—MATHEW and A. L. SMITH, JJ.

Rosevear China Clay Co., Ex parte, applied.

Bethell v. Clark (1887) 19 Q. B. D. 553, 560; 57 L. T. 627; 36 W. R. 185; 6 Asp. M. C. 194.—MATHEW and CAVE, JJ.; affirmed, C.A. (*post*, col. 3033).

Kendal v. Marshall (1882) 46 L. T. 693; 46 J. P. 631.—MATHEW, J.; *reversed*, (1883) 52 L. J. Q. B. 313; 11 Q. B. D. 356; 48 L. T. 951; 31 W. R. 597.—C.A.

Kendal v. Marshall, applied.

Miles, Ex parte, Isaacs, In re (1885) 54 L. J. Q. B. 566; 15 Q. B. D. 39, 47.—C.A.; Brindley v. Cilgwyn Slate Co. (1885) 56 L. J. Q. B. 67, 69.

—MATHEW and A. L. SMITH, JJ.: *Bethell v. Clark* (1887) 19 Q. B. D. 553, 559; 57 L. T. 627; 36 W. R. 185; 6 Asp. M. C. 194.—MATHEW and CAVE, JJ.; and (1888) 57 L. J. Q. B. 302; 20 Q. B. D. 617, 619; 59 L. T. 808; 36 W. R. 611; 6 Asp. M. C. 346.—C.A.

Bolton v. Lancashire and Yorkshire Ry. (1866) 35 L. J. C. P. 137; L. R. 1 C. P. 431; 12 Jur. (N.S.) 317; 13 L. T. 764; 14 W. R. 430.—C.P., *referred to*.
Cooper, Ex parte, McLaren, In re (1879) 48 L. J. Bk. 49; 11 Ch. D. 68, 72; 40 L. T. 105; 27 W. R. 518.—C.A.

Mitchel v. Ede (1840) 9 L. J. Q. B. 187; 11 A. & E. 888; 3 P. & D. 513.—DENMAN, Q.J. (for Court) [*see judgment where earlier cases are distinguished*], *distinguished*.

Goodhart v. Lowe (1820) 2 J. & W. 349; 22 R. R. 164.—L.C., *explained*.

Schotsmans v. Lancashire and Yorkshire Ry. (1867) 36 L. J. Ch. 361; L. R. 2 Ch. 332; 16 L. T. 189; 15 W. R. 537.—C.A.

CHELMSFORD, L.C.—*Mitchel v. Ede* was . . . not a case of stoppage *in transitu*.—p. 363.

CAIRNS, L.J.—The question in it [*Mitchel v. Ede*] was, whether a Jamaica planter, who had promised to consign sugars to his London correspondent, to whom he was indebted, had, by shipping sugars on board a general ship of this correspondent, irrevocably appropriated them so as to pass the property and debar himself from altering their destination. It was necessary, therefore, to ascertain *quo animo* was the delivery made? And the Court, on a special case, held that the circumstance of the ship being a general ship, or a seeking ship, negatived the inference that the delivery was meant to pass the property. In that case the delivery to the owner of the ship was admitted, and the question was, whether the property passed. Here it is admitted that the property had passed to the purchaser, and the question is, was there a delivery? (p. 365) . . . In *Goodhart v. Lowe* some goods had been shipped on board a general ship in the London docks, and the plaintiff, an unpaid vendor of the particular goods, applied to Lord Eldon for an injunction to restrain the sailing of the ship, and for a *ne exeat regno* against the master. The application was to stop the *transitus* of the ship containing the goods of several persons upon a default of one; and it was to this view of the case that the general observations of Lord Eldon, on a motion *ex parte* for an injunction, are addressed. The bill in that case, at which I have looked, was not framed as a bill of an unpaid vendor to realise a lien or to take accounts; and it is, moreover, during the period since 1819, the date of that case, that the Courts have more clearly shown a disposition to hold that stoppage *in transitu* does not rescind the contract, in which case there would be no privity in a Court of equity between the parties, but only gives or restores to the vendor a lien for the price.—p. 366.

Mitchel v. Ede, referred to.
Berndtson v. Strang (1867) 36 L. J. Ch. 379, 382; L. R. 4 Eq. 481 (*post*, col. 3034).

Gibson v. Carruthers (1842) 11 L. J. Ex. 138; 8 M. & W. 321; 58 R. R. 713.—EX.; ABINGER, C.B. *dissenting*; *dictum approved*.
Schotsmans v. Lancashire and Yorkshire Ry. (1867) 36 L. J. Ch. 361, 362; L. R. 2 Ch. 332, 335; 16 L. T. 189; 15 W. R. 537.—C.A.

Gibson v. Carruthers, applied.

Berndtson v. Strang (1868) 37 L. J. Ch. 665, 667; L. R. 3 Ch. 588, 590; 19 L. T. 40; 16 W. R. 1025.—CAIRNS, L.C.: Rosevear China Clay Co., Ex parte, Cock, In re (1879) 48 L. J. Bk. 100; 11 Ch. D. 560, 569; 40 L. T. 730; 27 W. R. 591.—C.A.

Gibson v. Carruthers, referred to.

Kendal v. Marshall (1883) 52 L. J. Q. B. 313; 11 Q. B. D. 356, 368; 48 L. T. 951; 31 W. R. 597.—C.A.

Gibson v. Carruthers, referred to.

Cassaboglou v. Gibbs (1883) 11 Q. B. D. 797; 52 L. J. Q. B. 538; 48 L. T. 850; 32 W. R. 138.—C.A.

FRY, L.J.—This right to stop *in transitu* is explained by Lord Abinger in *Gibson v. Carruthers*, and whether founded on some principle of common law or of equity as discussed by Lord Abinger in that case, it is a right which the Courts have given effect to as a just and equitable right.—p. 806.

Gibson v. Carruthers, referred to.

Bailey v. Thurston (1902) 72 L. J. K. B. 36; [1903] 1 K. B. 137, 144; 88 L. T. 43; 51 W. R. 162; 10 Manson 1.—C.A.

Schotsmans v. Lancashire and Yorkshire Ry., 35 L. J. Ch. 100; L. R. 1 Eq. 349.—M.R.; *reversed*, (1867) 36 L. J. Ch. 361; L. R. 2 Ch. 332; 16 L. T. 189; 15 W. R. 537.—L.C. and L.J.

Schotsmans v. Lancashire and Yorkshire Ry., distinguished.

Berndtson v. Strang (1867) 36 L. J. Ch. 379, 385; L. R. 4 Eq. 481, 488; 16 L. T. 583; 15 W. R. 1168.—WOOD, V.-C.; *varied*, L.C. (*supra*, col. 3024).

Fowler v. M'Taggart (or Kymer) (1794-1797) 1 East 522, n.; 7 Term Rep. 442, n.; 4 R. R. 485; 7 R. R. 499.—K.B., *distinguished*.

Bohtlingk v. Inglis (1803) 3 East 381; 7 R. R. 490.—K.B.

Fowler v. M'Taggart (or Kymer), referred to.
Berndtson v. Strang (1847) 36 L. J. Ch. 379, 384; L. R. 4 Eq. 481, 491 (*supra*).

Inglis v. Usherwood (1801) 1 East 515.—K.B., *discussed*.

Bohtlingk v. Inglis (post).

Bohtlingk v. Inglis (1803) 3 East 381; 7 R. R. 490; S.C. *nom.* **Bohtlinck v. Schneider**, 3 Esp. 58.—K.B., *dictum discussed*.

Jackson v. Nichol (1839) 8 L. J. C. P. 294; 5 Bing. N. C. 619; 7 Scott 577.—C.P.

Bohtlingk v. Inglis, discussed.

Berndtson v. Strang (1867) 36 L. J. Ch. 379, 383; L. R. 4 Eq. 481, 489 (*supra*).

Miles, Ex parte, Isaacs, In re (1885) 54 L. J. Q. B. 566; 15 Q. B. D. 39.—C.A., *discussed*.

Bethell v. Clark (1887) 19 Q. B. D. 553, 559; 57 L. T. 627; 36 W. R. 185; 6 Asp. M. C. 194.—MATHEW and CAVE, JJ.; *affirmed*, (*post*).

Miles, Ex parte, Isaacs, In re, explained.

Bethell v. Clark (1888) 20 Q. B. D. 615; 57 L. J. Q. B. 302; 59 L. T. 808; 36 W. R. 611; 6 Asp. M. C. 346.—C.A.

ESHER, M.B.—In *Miles, Ex parte*, I cited the test laid down by Lord Ellenborough in *Dixon v.*

Baldwin [5 East 175 (*supra*, col. 3031)], where he says "the goods had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion, to communicate them to another substantive destination, and that without such orders they would continue stationary"; and, applying that rule to the case then before me, I held that the goods had in that case got to the end of their journey when they arrived at Southampton. That would not be the case here.—p. 619.

Rowe v. Pickford (1817) 1 Moore 526; 8 Taunt. 83; 19 R. R. 466.—C.P.

Distinguished, *Coates v. Railton* (1827) 6 B. & C. 422; 9 D. & R. 593; 5 L. J. (o.s.) K. B. 209; 30 R. R. 385.—K.B.; *Morley v. Hay* (1828) 3 Man. & R. 393; 7 L. J. (o.s.) K. B. 104.—K.B.; *referred to*, *James v. Griffin* (1837) 6 L. J. Ex. 241; 2 M. & W. 623, 633.—EX.; *Dodson v. Wentworth* (1842) 12 L. J. C. P. 59; 4 Man. & G. 1080; 5 Scott N. R. 821; 6 Jur. 1066.—C.P.

Cowasjee v. Thompson (1845) 5 Moore P. C. 165; 3 Moore Ind. App. 422.—P.C.

Applied, *Schotsmans v. Lancashire and Yorkshire Ry.* (1867) 36 L. J. Ch. 361, 365; L. R. 2 Ch. 332, 339; 16 L. T. 189; 15 W. R. 537.—L.C. and L.J.; *distinguished*, *Bernadton v. Strang* (1867) 36 L. J. Ch. 379, 385; L. R. 4 Eq. 481, 492; 16 L. T. 583; 15 W. R. 1068.—WOOD, V.-C. (varied, L.C., *supra*, col. 3033); *Hathesing v. Laing* (1873) 43 L. J. Ch. 233, 235; L. R. 17 Eq. 92, 100; 29 L. T. 734.—BACON, V.-C.

Richardson v. Goss (1802) 3 B. & P. 119; 6 R. R. 727.—C.P., and **Scott v. Pettit** (1803) 3 B. & P. 469; 7 R. R. 804.—C.P., *discussed and applied*.

Foster v. Frampton (1826) 6 B. & C. 107; 9 D. & R. 108; 2 Car. & P. 469; 5 L. J. (o.s.) K. B. 71; 80 R. R. 255.—K.B.

Richardson v. Goss and Scott v. Pettit, *discussed*.

Tucker v. Humphrey (1828) 4 Bing. 516; 1 M. & P. 378, n.; 6 L. J. (o.s.) C. P. 92.—C.P.

Richardson v. Goss, *discussed*.

Morley v. Hay (1828) 3 Man. & R. 393; 7 L. J. (o.s.) K. B. 104.—K.B.

Foster v. Frampton (1826) 5 B. & C. 107; 9 D. & R. 108; 2 Car. & P. 469; 5 L. J. (o.s.) K. B. 71; 80 R. R. 255.—K.B.

Discussed, *Tucker v. Humphrey* (1828) 6 L. J. (o.s.) C. P. 92; 4 Bing. 516; 1 M. & P. 378, n.—C.P.; *applied*, *Allan v. Gripper* (1832) 1 L. J. Ex. 71; 2 Cr. & J. 218; 2 Tyrw. 217; 37 R. R. 682.—EX.; *referred to*, *Whitehead v. Anderson* (1842) 11 L. J. Ex. 157; 9 M. & W. 518.—EX.

Tucker v. Humphrey (*supra*), *distinguished*.

Allan v. Gripper (*supra*), *applied*.

Dodson v. Wentworth (1842) 12 L. J. C. P. 59; 4 Man. & G. 1080; 5 Scott N. R. 821; 6 Jur. 1066.—C.P.

TINDAL, C.J.—The broad distinction between the case of *Tucker v. Humphrey* and the present is, that there, if the consignee did not apply for the goods, the wharfinger held them to the order of the vendor; but here the navigation company held the goods to the order of Wentworth. . . . The case is not distinguishable from *Allan v. Gripper*. . . though it appeared there that the

goods were deposited in the warehouse of the carrier, which makes the present case even stronger.—p. 61.

Wentworth v. Outhwaite (1842) 12 L. J.

Ex. 172; 10 M. & W. 436.—EX., *applied*.

Coventry v. Gladstone (No. 2) (1868) 37 L. J. Ch. 492; L. R. 6 Eq. 44, 50; 16 W. R. 837.—WOOD, V.-C.; *Chalmers. Ex parte, Edwards*, In re (1873) 42 L. J. Bk. 37; L. R. 8 Ch. 289, 292; 28 L. T. 325; 21 W. R. 349.—L.C. and L.J.

Wentworth v. Outhwaite, *discussed*.

Gibbes, Ex parte, Whitworth, In re (1875) 45 L. J. Bk. 10, 12; 1 Ch. D. 101, 110; 33 L. T. 479; 24 W. R. 298.—BACON, C.J.

Wentworth v. Outhwaite, *distinguished*.

Gibbes, Ex parte, Whitworth, In re, *explained*.

Barrow, Ex parte, Worsdell, In re (1877) 6 Ch. D. 783; 46 L. J. Bk. 71; 36 L. T. 325; 25 W. R. 466.

BACON, C.J.—The fact seems to be established that at the time the goods were shot out on the quay the purchaser had absconded, and any notice to him would have produced no result. . . . That makes the case very different from *Wentworth v. Outhwaite*. In that case not only was there an end of the *transitus*, but there had been actual possession. Carts had been sent to carry away one half of the flax, and the other half remained because the purchaser had not time enough or carts enough to carry it away. But the *transitus* was at an end, and he was the owner of the goods, and no other person alive, paid or unpaid, could claim the ownership. In . . . *Gibbes, Ex parte*, the goods upon their arrival at Liverpool were paid for by bills, not good bills, by reason of subsequent failure, but they were paid for. The goods arrived at Liverpool: the purchaser acquired a right from having accepted the bills, and performed the condition to demand from the shipmaster the delivery of the goods. He exercised that right, and I could not adopt the argument that after that they remained *in transitu*.—p. 788.

Smith v. Goss (1808) 1 Campb. 282; 10 R. R. 684.—C.J., *discussed*.

Bethell v. Clark (1887) 19 Q. B. D. 553; 57 L. T. 627; 36 W. R. 185; affirmed, (1888) 57 L. J. Q. B. 302; 20 Q. B. D. 615; 59 L. T. 808; 36 W. R. 611; 6 Asp. M. C. 846.—C.A.

MATHEW, J.—The numerous cases, from *Smith v. Goss* to *Watson, Ex parte* [5 Ch. D. 35 (*supra*, col. 3028)] in which the receipt of the goods by the agent has been held not to be a constructive delivery as the buyer indicates; it seems to me with equal clearness the existence and application of the rule. These authorities show that although the fact that a person has been named by the buyer to the seller to receive the goods is some evidence, it is by no means conclusive evidence that the receipt by that person is the end of the transit.—p. 559.

Slubey v. Heyward (1795) 2 H. Bl. 504; 3 R. R. 386.—C.P., *discussed*.

Hammond v. Anderson (1804) 1 B. & P. N. R. 69; 2 Campb. 243; 8 R. R. 763.—C. P.; *Hanson v. Meyer* (1805) 6 East 614; 2 Smith 670; 8 R. R. 572.—K.B. And see *post*, col. 3037.

Slubey v. Heyward (*supra*), *distinguished*.
Bunney v. Poyntz (1833) 2 L. J. K. B. 55; 4 B. & Ad. 568; 1 N. & M. 229; 38 R. R. 309.—K.B.

Slubey v. Heyward, *referred to*.
Miles v. Gorton (1834) 3 L. J. Ex. 155; 2 Cr. & M. 504; 4 Tyrw. 295; 39 R. R. 820.—EX.; **Tanner v. Scovell** (1845) 14 L. J. Ex. 321; 14 M. & W. 28.—EX.

Slubey v. Heyward, *distinguished*.
Cooper, Ex parte, McLaren, In re (1879) 11 Ch. D. 68; 48 L. J. Bk. 49; 40 L. T. 105; 27 W. R. 518.—C.A.

JAMES, L.J.—I do not know that it is necessary for us to lay down any general principle with regard to *Slubey v. Heyward* and *Hammond v. Anderson* [1 B. & P. N. R. 69 (*post*, col. 3038)] under what circumstances a delivery of part of a cargo is to be considered as a delivery of the whole, so as to put an end to the vendor's right of stoppage *in transitu*.—p. 72.

BRETT, L.J.—With regard to *Slubey v. Heyward* and *Hammond v. Anderson*, it seems to me that in the former case the ground of decision was that the captain of the ship had altered his position from that of a mere carrier, and had undertaken, with the consent of the assignees of the bill of lading, to hold the whole of the cargo for them; and in the latter case the wharfinger, who for a time had held for the persons who had put the goods into his hands, had altered his position, and with the consent of the person to whom the goods were transferred, had agreed to hold them no longer for the person who had put them into his hands, but for the vendee. In both cases there was an attornment by the person who held the goods, and unless something equivalent to an attornment is shown on the part of the carrier, so that he has altered his position from that of carrier, and holds them in another capacity, it seems to me the *transitus* cannot be at an end.—p. 74.

COTTON, L.J.—The judgment in *Slubey v. Heyward* does not say on what ground the case was decided, other than the special circumstances of the case. In *Hammond v. Anderson*, as has been already pointed out, there had been an actual weighing by the purchaser of the entirety of the cargo. How can a man weigh a thing that is not in his possession? That prevents any general proposition in favour of the appellant being drawn from those two cases. Then as to *Jones v. Jones* (*post*). It looks at first a little more like one which supports the general proposition which is put forward. But when it is examined it amounts only to this, that the Court came to the conclusion as a matter of fact that there was an intention to take the whole when part only was actually taken; and, that being so, it is only an authority that where a purchaser taking part shows an intention, acquiesced in by the carrier, to receive and take possession of the whole, that is a constructive possession of the whole by the acquiescence of both parties. It does not in any way support the proposition that the mere delivery of a part of the cargo, as in the present case, can be looked upon as a constructive delivery of the whole, or as putting the consignee in constructive possession of the whole, so as to defeat the vendor's right to stop *in transitu*, or the right of the consignee, if he so desires under the

circumstances, to put an end to the contract.—p. 77.

Slubey v. Heyward, *observed on*.
Falk, Ex parte, Kiell, In re (1880) 14 Ch. D. 446; 42 L. T. 780; 28 W. R. 785; 4 Asp. M. C. 280.—C.A.; affirmed nom. **Kemp v. Falk** (1882) 52 L. J. Ch. 167; 47 L. T. 454; 31 W. R. 125; 5 Asp. M. C. 1.—H.L. (E.).

BRAMWELL, L.J.—I cannot understand *Slubey v. Heyward*, because it appears that the sub-purchaser had paid for the goods, and on what ground there could be a stoppage *in transitu* as against him I am at a loss to see. The note of the case is a very loose one. The Court seems to have held that which, with great submission, appears to be a very doubtful proposition, that the carrier's duty had come to an end? As to *Hammond v. Anderson* (*post*), there is not a word in the judgments about delivery of part of the cargo being a constructive delivery of the whole. . . . The effect of the decision is shown by the short judgment of **Rooke, J.**, who said, "The facts of the case are too strong to be got over. The whole of the goods was paid for by one bill; a general order was given for the delivery of the whole, and the purchaser under that order went and took away a part; how could he more effectually change the possession?" It was a delivery of the whole cargo, because the wharfinger was holding the whole for the purchaser as his bailee and with a duty to him.—p. 455.

Hammond v. Anderson (1804) 1 B. & P. N. R. 69; 2 Campb. 243; 8 R. R. 763.—C.P.

Referred to, **Hanson v. Meyer** (1805) 6 East 614; 2 Smith 670; 8 R. R. 572.—K.B.; *applied*, **Swanwick v. Sothorn** (1839) 9 A. & E. 895; 1 P. & D. 648.—Q.B.; *discussed*, **Tanner v. Scovell** (1845) 14 L. J. Ex. 321; 14 M. & W. 28.—EX.; *distinguished*, **Cooper, Ex parte, McLaren, In re** (1879) 49 L. J. Bk. 49; 11 Ch. D. 68; 40 L. T. 105; 27 W. R. 518.—C.A. (*see supra*, col. 3037); *observed on*, **Falk, Ex parte, Kiell, In re** (1880) 14 Ch. D. 446, 455; 42 L. T. 780; 28 W. R. 785; 4 Asp. M. C. 280.—C.A. *See supra*.

Jones v. Jones (1841) 10 L. J. Ex. 481; 8 M. & W. 431.—EX., *discussed*.
Tanner v. Scovell (1845) 14 L. J. Ex. 321; 14 M. & W. 28.—EX.

Jones v. Jones, *distinguished*.
Cooper, Ex parte, McLaren, In re (1879) 48 L. J. Bk. 49; 11 Ch. D. 68; 40 L. T. 105; 27 W. R. 518.—C.A. *See supra*, col. 3037.

Tanner v. Scovell (1845) 14 L. J. Ex. 321; 14 M. & W. 28.—EX., *explained*.
Cooper, Ex parte, McLaren, In re (1879) 11 Ch. D. 68; 48 L. J. Bk. 49; 40 L. T. 105; 27 W. R. 518.—C.A.

COTTON, L.J.—*Tanner v. Scovell* was really only a decision that, where a consignee took part, intending to deal with it in separation from the rest of the cargo, under those circumstances the taking of part was not a taking of the whole.—p. 76.

Tanner v. Scovell, *referred to*.
Harcourt, In re, Danby v. Tucker (1883) 31 W. R. 578, 580.—**POLLOCK, B.**, for **PEARSON, J.**

Cooper, Ex parte, McLaren, In re (*supra*, col. 3038), *approved*.

Barrow, Ex parte, Worsdell, In re (1877) 46 L. J. Bk. 71; 6 Ch. D. 783; 36 L. T. 325; 25 W. R. 466.—BACON, C.J., *discussed*.

Taylor v. G. E. Ry. (1901) 70 L. J. K. B. 499; [1901] 1 K. B. 774; 84 L. T. 770; 49 W. R. 431; 6 Com. Cas. 121.

BIGHAM, J.—Two cases were relied upon by the defendants—*Cooper, Ex parte, McLaren, In re*, and *Barrow, Ex parte, Worsdell, In re*. The first laid down in clear terms that the *transitus* does not end until, by agreement between the carrier and the consignee, the former holds as warehouse-keeper for the latter. The second case, which involved only a question of fact, determined that in the particular circumstances of that case no such an agreement ought to be inferred. I fully accept the law laid down in the first case, and my decision in no way conflicts with it, for I have found the necessary agreement did exist; and as to the second case, I would point out that before any advice note could be served on the consignee he had absconded, and there were no facts which could justify a conclusion that the goods were being held for him otherwise than in transit.—p. 501. These cases are not referred to in the report in Law Reports.

James v. Griffin (1837) 6 L. J. Ex. 241; 2 M. & W. 623.—EX.

Referred to, Dodson v. Wentworth (1842) 12 L. J. C. P. 59; 4 Man. & G. 1080; 2 Scott N. R. 821; 6 Jur. 1066.—C.P.; *applied*, Bolton v. Lancashire and Yorkshire Ry. (1866) 35 L. J. C. P. 137; L. R. 1 C. P. 431, 438; 12 Jur. (N.S.) 317; 13 L. T. 764; 14 W. R. 430.—C.P.; *discussed*, Fraser v. Witt (1868) L. R. 7 Eq. 64, 70; 19 L. T. 440; 17 W. R. 92.—ROMILLY, M.R.

James v. Griffin, applied.

Rosevear China Clay Co., *Ex parte*, Cock, *In re* (1879) 11 Ch. D. 560; 48 L. J. Bk. 100; 40 L. T. 730; 27 W. R. 591.—C.A.

BRETT, L.J.—The distinction taken in *James v. Griffin* is between a constructive and an actual delivery to the purchaser, and Parke, B. says that if there is only a constructive delivery to the purchaser the transit is not over until the goods have been actually delivered to him or his agent.—p. 570.

Valpy v. Gibson (1847) 16 L. J. C. P. 241; 4 C. B. 837; 11 Jur. 826.—C.P., *distinguished*.

Rosevear China Clay Co., *Ex parte*, Cock, *In re* (1879) 11 Ch. D. 560; 48 L. J. Bk. 100; 40 L. T. 730; 27 W. R. 591.—C.A.

COTTON, L.J.—If the contract had been to deliver the clay to an agent of the purchaser at Fowey, it would have been a very different matter, the case would then have been like that of *Valpy v. Gibson*, in which the shipment was made by the purchaser, not by the vendor.—p. 572.

Valpy v. Gibson, principle applied.

Kendal v. Marshall (1883) 52 L. J. Q. B. 313; 11 Q. B. D. 356, 366; 48 L. T. 951; 31 W. R. 597.—C.A.

Valpy v. Gibson, applied.

Miles, *Ex parte*, Isaacs, *In re* (1885) 15 Q. B. D. 39; 54 L. J. Q. B. 566.—C.A.

BRETT, M.R.—The case seems to me also to be really within *Valpy v. Gibson*; that is, within that part of the judgment which has always been treated as an authority, and which almost exactly describes the present case. Wilde, C.J., said: "With regard to the right of stoppage *in transitu*, it appears to us, that, though the defendants knew the goods were to be sent to Valparaiso, and so informed Leech, Harrison & Co. when they forwarded them to Liverpool, yet that Leech, Harrison & Co. could not simply on that information forward the goods to Valparaiso, but that they held them subject to such orders as Brown might give as to forwarding them to Valparaiso or elsewhere; and the *transitus* was consequently at an end as soon as the goods came to the hands of Leech, Harrison & Co." It is true that this may be said to be only a *dictum*, because the learned C.J. afterwards gave another ground for his decision. But upon mercantile law a written judgment of Wilde, C.J., whether it is *dictum* or decision, is as strong an authority as you can well have, and the passage which I have read has always been treated as such.—p. 45.

Crawshay v. Bades (1823) 1 R. & C. 181; 2 D. & R. 288; 1 L. J. (O.S.) K. B. 90; 25 R. R. 348.—K.B., *distinguished*.

Allan v. Gripper (1832) 1 L. J. Ex. 71; 2 Cr. & J. 218; 2 Tyrw. 217.—EX.; Berdtsen v. Strang (1867) 36 L. J. Ch. 879; L. R. 4 Eq. 481, 490; 16 L. T. 583; 15 W. R. 1168.—WOOD, V.-C.; *varied*, (1868) L. R. 3 Ch. 588.—L.C. (*supra*, col. 3033).

Ellis v. Hunt (1789) 3 Term Rep. 464; 1 R. R. 743.—K.B., *referred to*.

Oppenheim v. Russell (1802) 3 B. & P. 42; 6 R. R. 604.—C.P.; Bohtlingk v. Inglis (1803) 3 East 381; 7 R. R. 490.—K.B.; Whitehead v. Anderson (1842) 11 L. J. Ex. 157; 9 M. & W. 518.—EX.; Berdtsen v. Strang (1867) L. R. 4 Eq. 481, *supra*.

Oppenheim v. Russell (*supra*), *referred to*.

Morley v. Hay (1828) 3 Man. & R. 393; 7 L. J. (O.S.) K. B. 104.—K.B.; Jackson v. Nichol (1839) 8 L. J. C. P. 294; 5 Bing. N. C. 509; 7 Scott 577.—C.P.

Heinekey v. Earle (1858) 28 L. J. Q. B. 79; 8 El. & Bl. 410; 4 Jur. (N.S.) 848; 6 W. R. 687.—EX. CH., *referred to*.

Nicholson v. Bower (1858) 28 L. J. Q. B. 97, 98; 1 El. & Bl. 172; 5 Jur. (N.S.) 246.—Q.B.

SCHOOL.

Phillips' Charity, In re, Newman, Ex parte (1845) 9 Jur. 959.—V.-C., *adopted*.

Smith v. Reg. (1878) 47 L. J. P. C. 51; 3 App. Cas. 614, 624; 38 L. T. 233.—P.C.

Fremington School, In re, Ward, Ex parte (1846) 10 Jur. 512.—V.-C. See S. C., 11 Jur. 421.—V.-C., *distinguished*.

Willis v. Child (1851) 20 L. J. Ch. 113; 13 Beav. 117; 15 Jur. 303.—M.R. And see col. 3041.

Fremington School, In re, Ward, Ex parte, *discussed*.

Hayman v. Rugby School Governors (1874) 43 L. J. Ch. 834, 848; L. R. 13 Eq. 28, 70; 30 L. T. 217; 22 W. R. 587.—MALINS, V.-C.

Fremington School, In re, Ward, Ex parte
(*supra*), *referred to*.
* **Smith v. Reg.** (1878) 47 L. J. P. C. 51; 3
App. Cas. 614; 38 L. T. 233.—P.C.

Wilkinson v. Malin (1832) 1 L. J. Ex. 234;
2 Tyr. 544; 2 C. & J. 636.—EX., *applied*.
Campten Charities, In re (1880) 49 L. J. Ch.
676, 682; 18 Ch. D. 310, 320; 45 L. T. 152.—
HALL, V.-C.; *reversed*, (1881) 50 L. J. Ch. 646;
18 Ch. D. 310; 45 L. T. 152; 30 W. R. 496.—
C.A. JESSEL, M.R., JAMES and LUSH, L.JJ.

Doe d. Davy v. Haddon (1783) 3 Doug. 310.
—K.B., *explained and distinguished*.
Wildes v. Russell (1866) 35 L. J. M. C. 241,
249; L. R. 1 C. P. 722, 742; 12 Jur. (N.S.) 645;
16 L. T. 478; 14 W. R. 796.—C.P.

Doe d. Davy v. Haddon, *discussed and*
applied.
Hayman v. Rugby School Governors (1874)
43 L. J. Ch. 834, 848; L. R. 18 Eq. 28; 30
L. T. 217; 22 W. R. 587.—MALINS, V.-C.

Reg. v. Darlington School Governors (1844)
14 L. J. Q. B. 67; 6 Q. B. 682; 9 Jur.
21.—EX. CH., *applied*.
Teather and Poor Law Commissioners, In re
(1850) 19 L. J. M. C. 70.—Q.B.

Reg. v. Darlington School Governors,
referred to.
Wildes v. Russell (1866) 35 L. J. M. C. 241,
249; L. R. 1 C. P. 722, 744; 12 Jur. (N.S.)
645; 14 W. R. 796.—C.P.

Reg. v. Darlington School Governors,
questioned.
Dean v. Bennett (1870) L. R. 6 Ch. 489; 40
L. J. Ch. 452; 24 L. T. 169; 19 W. R. 363.—L.C.
HATHERLEY, L.C.—This case undoubtedly
creates great difficulty. The Court there laid
great weight on the finding that the minister
was unfit, and said that there was no traverse
of the sound discretion; and if the meeting had
a sound discretion, and if they found that he
was unfit, in addition to the other things that
they had found, there was no fault in the
decision they had come to, and the decision
must be upheld. I cannot say I am altogether
satisfied with that reasoning, and I do not know
how far that case was determined upon the
point which arose upon the pleadings. If a
number of reasons are assigned by those who
are called upon to vote on a given subject,
and those reasons are not merely expressed as
arguments in the course of a debate, but are
averred as those upon which the decision is
founded, although the facts have never been
investigated, then it seems clear that the pro-
ceedings have been altogether erroneous, and
it cannot be said that we have got the true
mind and judgment of the body.—p. 493. . . .
Feeling, then, as I do, some doubt as to the
soundness of the *Darlington School Case*, and
that the conduct towards the defendant has
been oppressive, I do not consider myself
fettered by that case.—p. 496.

Reg. v. Darlington School Governors,
discussed and applied.
Hayman v. Rugby School Governors (1874) 43
L. J. Ch. 834; L. R. 18 Eq. 28; 30 L. T. 217;
22 W. R. 587.—MALINS, V.-C.

Reg. v. Darlington School Governors,
referred to.
Abergavenny (Marquis) v. Llandaff (Bishop)
(1888) 57 L. J. Q. B. 233; 20 Q. B. D. 460,
473; 58 L. T. 812; 36 W. R. 859.—HUDDLE-
STON, B.

Reg. v. Darlington School Governors,
adopted.
Reg. v. Bayly [1898] 2 Ir. R. 335, 347.—
Q.B.D., affirmed, C.A.

Dean v. Bennett (1870) 40 L. J. Ch. 452;
L. R. 6 Ch. 489; 24 L. T. 169; 19 W. R.
363.—L.C., *discussed and applied*.
Hayman v. Rugby School Governors (1874) 43
L. J. Ch. 834; L. R. 18 Eq. 28; 30 L. T. 217;
22 W. R. 587.—MALINS, V.-C.

Rex v. Warren (1776) Cowp. 370.—K.B.,
discussed.
Ramshay, Ex parte (1852) 21 L. J. Q. B. 238;
18 Q. B. 173; 16 Jur. 684.—Q.B.

Rex v. Gaskin (1799) 8 Term Rep. 209; 4
R. R. 633.—K.B., *referred to*.
Bonaker v. Evans (1850) 20 L. J. Q. B. 137;
16 Q. B. 163; 15 Jur. 460.—EX. CH.; and Aber-
gavenny (Marquis) v. Llandaff (Bishop) (1888)
57 L. J. Q. B. 233; 20 Q. B. D. 460; 58 L. T.
812; 36 W. R. 859.—HUDDLESTON, B.

Reg. v. Owen (1850) 19 L. J. Q. B. 490; 15
Q. B. 476; 14 Jur. 953.—Q.B., *discussed*.
Ramshay, Ex parte (1852) 21 L. J. Q. B. 238;
18 Q. B. 173; 16 Jur. 684.—Q.B.

Doe d. Childe v. Willis (1850) 5 Ex. 894; 20
L. J. Ex. 85.—EX. *See*
Willis v. Childe (1851) 20 L. J. Ch. 113; 13
Beav. 117; 15 Jur. 303.—M.R.

Doe d. Childe v. Willis, *referred to*.
Abergavenny (Marquis) v. Llandaff (Bishop)
(1888) 57 L. J. Q. B. 233; 20 Q. B. D. 460; 58
L. T. 812; 36 W. R. 859.—HUDDLESTON, B.

Willis v. Childe (1851) 20 L. J. Ch. 113;
13 Beav. 117; 15 Jur. 303.—M.R., *discussed*.
Hayman v. Rugby School Governors (1874) 43
L. J. Ch. 834, 850; L. R. 18 Eq. 28, 73; 30
L. T. 217; 22 W. R. 587.—MALINS, V.-C.

Willis v. Childe. *See*
Abergavenny (Marquis) v. Llandaff (Bishop)
(1888) 57 L. J. Q. B. 233; 20 Q. B. D. 460; 58
L. T. 812; 36 W. R. 859.—HUDDLESTON, B.

Ramshay, Ex parte (1852) 21 L. J. Q. B.
238; 18 Q. B. 173; 16 Jur. 684.—Q.B.,
referred to.
Abergavenny (Marquis) v. Llandaff (Bishop)
(1888) 57 L. J. Q. B. 233; 20 Q. B. D. 460; 58
L. T. 812; 36 W. R. 859.—HUDDLESTON, B.

Hayman v. Rugby School Governors (1874)
43 L. J. Ch. 834; L. R. 18 Eq. 28; 30
L. T. 217; 22 W. R. 587.—V.-C., *adopted*.
Abergavenny (Marquis) v. Llandaff (Bishop)
(1888).—HUDDLESTON, B. (*supra*).

Lane v. Norman (1891) 61 L. J. Ch. 149;
66 L. T. 83; 40 W. R. 268.—NORTH, J.,
distinguished.
Pottle v. Sharp (1896) 65 L. J. Ch. 908; 75
L. T. 265.—C.A. LINDLEY and SMITH, L.JJ.

Crisp v. Thomas, 62 L. T. 810; 54 J. P. 694.—**CHARLES, J.**: *reversed in part*, (1890) 63 L. T. 756; 55 J. P. 261.—**C.A. Esher, M.R., LOPES and KAY, L.JJ.**

Burnham National Schools, In re, Bates, Ex parte (1873) 43 L. J. Ch. 340; L. R. 17 Eq. 241; 29 L. T. 495; 22 W. R. 198.—**M.R., distinguished.**

Campden Charities, In re (1880) 49 L. J. Ch. 676, 682; 18 Ch. D. 310, 321; 45 L. T. 152.—**HALL, V.-C., reversed**, (1881) 50 L. J. Ch. 646; 18 Ch. D. 310; 45 L. T. 152; 30 W. R. 496.—**C.A. JESSEL, M.R., JAMES and LUSH, L.JJ.**

Rex v. Cockerton (1901) 70 L. J. K. B. 441; [1901] 1 K. B. 726; 84 L. T. 488; 49 W. R. 483; 65 J. P. 435.—**C.A., followed.**

Dyer v. London School Board (1902) 72 L. J. Ch. 10; [1902] 2 Ch. 768; 87 L. T. 225; 51 W. R. 84.—**C.A. SMITH, M.R., COLLINS and ROMER, L.JJ.**

Reg. v. Reed, 48 L. J. Q. B. 729; 4 Q. B. D. 477.—**Q.B.D.; reversed**, (1880) 49 L. J. Q. B. 600; 5 Q. B. D. 483; 42 L. T. 835; 28 W. R. 787; 44 J. P. 633.—**C.A.**

Murphy, In re, London School Board. Ex parte (1877) 46 L. J. M. C. 193; 2 Q. B. D. 397; 36 L. T. 698; 25 W. R. 536.—**Q.B.D., discussed.**

Saunders v. Richardson (1881) 50 L. J. M. C. 137; 7 Q. B. D. 388; 45 L. T. 319; 29 W. R. 800; 45 J. P. 782.—**Q.B.D.**

Richardson v. Saunders (1881) 50 L. J. M. C. 65; 6 Q. B. D. 313; 44 L. T. 474; 29 W. R. 631; 45 J. P. 344.—**C.P.D., overruled.**

Saunders v. Richardson (1881) 50 L. J. M. C. 137; 7 Q. B. D. 388; 45 L. T. 319; 29 W. R. 800; 45 J. P. 782.—**Q.B.D.**

COLERIDGE, C.J.—I think *Richardson v. Saunders* not rightly decided. It was a conviction under sect. 12 of the Act of 1876, and the judges held that physical attendance at the door of the school was sufficient. In my opinion, effective attendance—that is, attending to be instructed at a meeting—is what is intended. For the child to present itself at the door and walk away is not enough. If it were the consequences would be serious. Anyone might send children to the school day after day, and they would come back uneducated. Unwilling parents would entirely set aside the Acts of Parliament.—p. 139.

Saunders v. Richardson (1881) 50 L. J. M. C. 137; 7 Q. B. D. 388; 45 L. T. 319; 29 W. R. 800; 45 J. P. 782.—**Q.B.D., approved.**

London School Board v. Wright (1884) 12 Q. B. D. 578; 53 L. J. Q. B. 266; 50 L. T. 606; 32 W. R. 577; 48 J. P. 484.—**C.A.**

BAGGALLAY, L.J. (for the Court).—It must be assumed, then, at any rate for the purposes of the present appeal, that the defendant was able to pay the prescribed fees. Such being the position of the defendant, we are of opinion that it was his duty when sending his daughter to the James Street school, to provide her with the means of paying (or, in other words, to pay for her) the prescribed school fees, which, by sect. 17 of the Act of 1870, she was in terms required to pay; and that having neglected, or failed to

perform this duty, he did not *cause her to attend the school* within the intent and meaning of the Education Acts. This view of the duty of a parent able to pay in respect of the school fees payable for his child's attendance at a board school is in accordance with that expressed by all the five judges who decided the case of *Saunders v. Richardson* in the Queen's Bench. and is, in our opinion, supported by the language used in the Education Acts.—p. 585.

Saunders v. Richardson. principle applied.

London School Board v. Wood (1885) 54 L. J. M. C. 145, 146; 15 Q. B. D. 415, 417; 54 L. T. 88; 50 J. P. 54.—**COLERIDGE, C.J., GROVE, DENMAN and MATHEW, JJ.**

Saunders v. Crawford (1882) 51 L. J. Q. B. 460; 9 Q. B. D. 612; 46 L. T. 420; 46 J. P. 344.—**Q.B.D., not followed.**

Winyard v. Toogood, Hance v. Fortnum, (1882) 10 Q. B. D. 218; 52 L. J. M. C. 25; 48 L. T. 229; 31 W. R. 271; 47 J. P. 325.—**Q.B.D.**

COLERIDGE, C.J.—Certainly, in the present cases, if I thought the matter was fairly doubtful, or that the judgment under review could be maintained upon a fair construction of the Act, I should defer at once to the authority of the learned judges, and should affirm the magistrate's decision; but, with every deference, I am unable, after having heard the arguments, to see that this is anything but a perfectly clear case, and I am encouraged to say so, because I understand my learned brothers who decided *Saunders v. Crawford* are not now perfectly satisfied with their decision. I am of opinion that the decision of the magistrate in the first case before us was erroneous, and should be reversed. His decision was based upon the authority of *Saunders v. Crawford*, which he properly felt himself bound to follow; and, in my opinion, the decision in that case is itself erroneous.—p. 227. **FIELD HAWKINS, STEPHEN and WILLIAMS, JJ. agreed.**

Belper School Board v. Bailey (1882) 51 L. J. M. C. 91; 9 Q. B. D. 259; 46 J. P. 438.—**Q.B.D., distinguished.**

Hewett v. Thompson (1889) 58 L. J. M. C. 60; 60 L. T. 268; 53 J. P. 103.—**HUDDLESTON, B. and WILLS, J.**

London School Board v. Wright (1884) 53 L. J. Q. B. 266; 12 Q. B. D. 578; 50 L. T. 606; 32 W. R. 577; 48 J. P. 484.—**C.A., applied.**

London School Board v. Wood (1885) 54 L. J. M. C. 145, 146; 15 Q. B. D. 415, 417; 54 L. T. 88; 50 J. P. 54.—**COLERIDGE, C.J., GROVE, DENMAN and MATHEW, JJ.**

London School Board v. Harvey (1879) 48 L. J. M. C. 130; 4 Q. B. D. 451; 27 W. R. 786.—**Q.B.D., followed.**

Police Commissioner v. Donovan (1903) 72 L. J. K. B. 545; [1903] 1 K. B. 895; 88 L. T. 555; 67 J. P. 147.—**ALVERSTONE, C.J., WILLS and CHANNELL, JJ.**

SCIRE FACIAS.

Rex v. Miles (1767) 7 Term Rep. 367.—**K.B., applied.**

Rex v. Canterbury (Archbishop) (1902) 71 L. J. K. B. 932; [1902] 2 K. B. 503; 86 L. T. 450:

50 W. R. 476; 66 J. P. 455.—ALVERSTONE, C.J.,
WRIGHT and RIBLEY, JJ.

Eastern Archipelago Co. v. Reg. (1853) 23
L. J. Q. B. 82; 2 El. & Bl. 856; 2 C. L. R.
115; 18 Jur. 481; 2 W. R. 77.—EX. CH.

Dictum applied, Reg. v. Hughes (1866) 35 L. J.
P. C. 23, 27; L. R. 1 P. C. 81, 88; 12 Jur. (N.S.)
195; 14 L. T. 808; 14 W. R. 441.—P.C.; *adopted*,
Riche v. Ashbury Railway Carriage Co. (1874)
43 L. J. Ex. 177, 205; L. R. 9 Ex. 224, 264; 31
L. T. 339.—EX. CH., reversed nom. Ashbury
Railway Carriage Co. v. Riche (1875) 44 L. J.
Ex. 185; L. R. 7 H. L. 653; 33 L. T. 451;
24 W. R. 794.—H.L. (E.); *principle applied*,
Att.-Gen. (Duchy of Lancaster) v. Devonshire
(Duke) (1884) 54 L. J. Q. B. 271, 276; 14 Q. B. D.
195, 208; 33 W. R. 367.—MATHEW and DAY, JJ.

Barnewall v. Sutherland (1850) 19 L. J.
C. P. 290; 9 C. B. 380; 1 L. M. & P. 159; 14
Jur. 720.—C.P., *referred to*.
Pell v. Linnell (1868) 37 L. J. C. P. 191;
L. R. 3 C. P. 441; 18 L. T. 330.—C.P.

Phillipson (or Philipson) v. Egremont (Earl)
(1844) 14 L. J. Q. B. 25; 6 Q. B. 587.—
Q.B., *adopted*.

Ellis v. M'Henry (1871) 40 L. J. C. P. 109,
116; L. R. 6 C. P. 228, 239; 23 L. T. 861; 19
W. R. 503.—C.P.: Lec v. Bude and Torrington
Junction Ry. (1871) 40 L. J. C. P. 285, 289;
L. R. 6 C. P. 576, 581; 24 L. T. 827; 19 W. R.
954.—C.P.; Davis v. Morris (1883) 52 L. J.
Q. B. 401, 408; 10 Q. B. D. 436, 451.—W.
WILLIAMS, J.

Dodgson v. Scott (1848) 17 L. J. Ex. 321;
2 Ex. 457; 6 D. & L. 27.—EX., *adopted*.
Davis v. Morris (1883) 52 L. J. Q. B. 401, 409;
10 Q. B. D. 436, 451.—W. WILLIAMS, J.

Snooke v. Mattock (1836) 5 L. J. K. B. 206;
5 A. & E. 239; 6 N. & M. 783; 2 H. & W.
188.—K.B., *adopted*.

Burnaby v. Earle (1874) 43 L. J. Q. B. 209;
L. R. 9 Q. B. 490; 30 L. T. 760.—Q.B.

Tabor v. Edwards (1858) 27 L. J. C. P. 183;
4 Jur. (N.S.) 339.—C.P., *opinion adopted*.

Corner v. Sweet (1866) 35 L. J. C. P. 151, 154;
L. R. 1 C. P. 456, 463; 12 Jur. (N.S.) 413; 14
W. R. 584.—C.P.

**Att.-Gen. of Duchy of Lancaster v. Devon-
shire (Duke)** (1884) 54 L. J. Q. B. 271;
14 Q. B. D. 195; 33 W. R. 367.—Q.B.D.,
referred to.

**Att.-Gen. of Duchy of Lancaster v. L. & N.
W. Ry.** (1892) [1892] 3 Ch. 274.—C.A.

Farran v. Beresford (1843) 10 Cl. & F. 319.
—H.L. (IR). and Farrell v. Gleeson (1844)

11 Cl. & F. 702.—H.L. (IR.), *referred to*.
Irish Land Commission v. Junkin (1888) 24
L. R. Ir. 40.—Q.B.D. O'BRIEN, J. dissenting.

SCOTLAND.

Calvin's Case (1608—9) 7 Co. Rep. 1.

Observations applied, Queen Caroline's Claim
(1821) 1 St. Tr. (N.S.) 950, 983.—P.C.; *re-
ferred to*, Jephson v. Riera (1835) 3 St. Tr.

(N.S.) 591, 605.—P.C.; *applied*, Low v. Rout-
ledge (1865) 35 L. J. Ch. 114, 117; L. R. 1
Ch. 42, 47; 11 Jur. (N.S.) 939; 13 L. T. 421;
14 W. R. 90.—L.J.J.; *doctrine applied*, Reg.
v. Keyn (1876) 46 L. J. M. C. 17, 100; 2 Ex. D.
63, 236; 13 Cox C. C. 403.—C.C.R.; *referred to*,
De Geer v. Stone (1882) 52 L. J. Ch. 57, 60; 22 Ch.
D. 243, 251; 47 L. T. 434; 31 W. R. 241.—KAY, J.

Calvin's Case, dicta dissented from.

Isaacson v. Durant (Stepney Petition) (1886)
55 L. J. Q. B. 331; 17 Q. B. D. 54; 54 L. T.
684; 34 W. R. 547.—COLERIDGE, C.J., HAWKINS
and MATHEW, JJ.

Calvin's Case, discussed and applied.

Johnson, In re, Roberts v. Att.-Gen. (1903) 72
L. J. Ch. 682; [1903] 1 Ch. 821; 80 L. T. 161;
51 W. R. 444.—FARWELL, J.

Sanchar's (Baron) Case (1611) 9 Co. Rep.
117.—K.B.

Applied, Reg. v. Eyre (1868) L. R. 3 Q. B. 487;
37 L. J. M. C. 159; 9 B. & S. 329; 18 L. T. 511;
16 W. R. 754; 11 Cox C. C. 162.—Q.B.; *referred
to*, Rex v. Plummer (1902) 71 L. J. K. B. 805;
[1902] 2 K. B. 339; 86 L. T. 836; 51 W. R.
137; 66 J. P. 647.—WRIGHT, J.

Harvey v. Farquhar (1872) L. R. 2 H. L.

(SC.) 192.—H.L. (SC.), *dictum applied*.
Dawson v. Smart (1903) [1903] A. C. 457, 465;
89 L. T. 343.—H.L. (SC.).

Bowman v. Bowman [1899] A. C. 518.—H.L.
(SC.), *distinguished*.

Dawson v. Smart (1903) [1903] A. C. 457,
465; 89 L. T. 343.—H.L. (SC.).

Gray v. Fowlie (1847) 9 Ct. of Sess. Cas.
(2nd series) 811.—CT. OF SESS. (SC.),
affirmed.

**Rutherglen Parish Council v. Glasgow Parish
Council** (1902) [1902] A. C. 360; 86 L. T. 607;
51 W. R. 65.—H.L. (SC.).

SEA AND SEASHORE.

**Direct United States Cable Co. v. Anglo-
American Telegraph Co.** (1877) 46 L. J.
P. C. 71; 2 App. Cas. 394; 36 L. T. 265.—
P.C. See

Rex v. Pettit (1901) [1902] 2 Ir. R. 1.—K.B.D.

Att.-Gen. v. Johnson (1819) 2 Wils. Ch. 87;
18 R. R. 156.—L.C., *explained and not
applied*.

Soltan v. De Held (1851) 21 L. J. Ch. 153; 2
Sim. (N.S.) 133; 16 Jur. 326.—V.-C.

Att.-Gen. v. Johnson, observed upon.

Att.-Gen. v. Bradford Navigation Co. (1866)
35 L. J. Ch. 619, 621; L. R. 2 Eq. 71, 81; 14
L. T. 248; 14 W. R. 579.—WOOD, V.-C.

Att.-Gen. v. Johnson, applied.

Att.-Gen. v. Lonsdale (1868) 38 L. J. Ch. 335,
343; L. R. 7 Eq. 377, 388; 20 L. T. 64; 17
W. R. 219.—MALINS, V.-C.

Att.-Gen. v. Burridge (1822) 10 Price, 350;
24 R. R. 723.—EX., *applied*.

Att.-Gen. v. Lonsdale (1868) 38 L. J. Ch. 335,
344; L. R. 7 Eq. 377, 389; 20 L. T. 64; 17
W. R. 219.—MALINS, V.-C.

Att.-Gen. v. Parmeter (1822) 10 Price 378; 24 R. R. 723.—EX., *applied*.

Att.-Gen. v. Lonsdale (1868) 38 L. J. Ch. 335, 344; L. R. 7 Eq. 377, 389; 20 L. T. 64; 17 W. R. 219.—MALINS, V.-C.; **Att.-Gen. v. Simpson** (1901) [1901] 2 Ch. 671, 692.—**FARWELL, J.**, varied, 70 L. J. Ch. 828; [1901] 2 Ch. 671; 85 L. T. 325.—C.A.

Att.-Gen. v. Plymouth Corporation (1754) Wightw. 134; 12 R. R. 719.—EX., *referred to*.

Att.-Gen. for Prince of Wales v. Crossman (1866) 35 L. J. Ex. 215; L. R. 1 Ex. 381, 387; 4 H. & C. 568; 12 Jur. (N.S.) 712; 14 L. T. 856; 14 W. R. 996.—EX.

Att.-Gen. (Prince of Wales) v. St. Aubyn (1811) Wightw. 167; 12 R. R. 718, n.—EX., *referred to*.

Att.-Gen. (Prince of Wales) v. Crossman (1866) 35 L. J. Ex. 215; L. R. 1 Ex. 381; 4 H. & C. 568; 12 Jur. (N.S.) 712; 14 L. T. 856; 14 W. R. 996.—EX.

Gann v. Whitstable Free Fishers, 13 C. B. (N.S.) 853; 9 Jur. (N.S.) 1241; 9 L. T. 263; 11 W. R. 430.—EX. CH.; *reversed*, (1864) 11 H. L. Cas. 192; 35 L. J. C. P. 29; 20 C. B. (N.S.) 1; 12 L. T. 150; 13 W. R. 589.—H.L. (E.).

Gann v. Whitstable Free Fishers, *referred to*.

Gann v. Johnson (1869) L. R. 4 H. L. 265.—H.L. (E.).

Gann v. Whitstable Free Fishers, *affirmed*.

Foreman v. Whitstable Free Fishers (1869) 38 L. J. Q. B. 345; L. R. 4 H. L. 266; 21 L. T. 804; 18 W. R. 1046.—H.L. (E.).

Gann v. Whitstable Free Fishers, *applied*.

Reg. v. Keyn (1876) 46 L. J. M. C. 17, 29; 2 Ex. D. 63, 86; 13 Cox C. C. 403.—C.C.R.; and **Bristow v. Cornican** (1878) 3 App. Cas. 641.—H.L.

Gann v. Whitstable Free Fishers, *referred to*.

Petrie v. Rostrevor Owners [1898] 2 Ir. R. 556, 575.—C.A.

Whitstable Free Fishers v. Foreman (1867) 36 L. J. C. P. 273; L. R. 2 C. P. 688; 16 L. T. 747; 15 W. R. 1133.—C.P.; *affirmed*, (1868) 37 L. J. C. P. 305; L. R. 3 C. P. 578; 18 L. T. 734; 16 W. R. 1019.—EX. CH.; and *nom.* **Foreman v. Whitstable Free Fishers** (1869) L. R. 4 H. L. 266; 21 L. T. 804; 18 W. R. 1046.—H.L. (E.).

Foreman v. Whitstable Free Fishers, *applied*.

Brecon Markets Co. v. Neath and Brecon Ry. (1872) 41 L. J. C. P. 257, 262; L. R. 7 C. P. 555, 565.—C.P., *affirmed*, (1873) 42 L. J. C. P. 63; L. R. 8 C. P. 157.—EX. CH.

Foreman v. Whitstable Free Fishers, *adopted*.

Reg. v. Keyn (1876) 46 L. J. M. C. 17, 29; 2 Ex. D. 63, 86; 13 Cox C. C. 403.—C.C.R.

Alston's Estate, In re (1856) 5 W. R. 189.—V.-C., *explained*.

St. Pancras Burial Ground, In re (1866) L. R. 3 Eq. 173, 183; S. C., 36 L. J. Ch. 52; 14 W. R. 576.—WOOD, V.-C.

Att.-Gen. v. Hanmer, 27 L. J. Ch. 837; 4 Jur. (N.S.) 751; 6 W. R. 804.—V.-C.; *varied*, (1859) 5 Jur. (N.S.) 693.—L.J.

Att.-Gen. v. Hanmer, *referred to*.

Ecroyd v. Coulthard (1898) 67 L. J. Ch. 458; [1898] 2 Ch. 358; 78 L. T. 702.—C.A.

Hamilton v. Att.-Gen. for Ireland (1881) 9 L. R. Ir. 271.—C.A.

Applied, **Daly v. Murray** (1885) 17 L. R. Ir. 185, 199.—C.A.; *discussed*, **Boyd v. Phelan** (1886) 17 L. R. Ir. 538.—V.-C.

Daly v. Murray (1885) 17 L. R. Ir. 185.—C.A., *distinguished*.

O'Keeffe v. Walsh [1903] 2 Ir. R. 681, 716.—K.B.D.

Gray v. Bond (1821) 5 Moore 527; 2 Br. & B. 607; 23 R. R. 530.—C.P., *dictum adopted*.

Dalton v. Angus (1881) 50 L. J. Q. B. 689, 716; 6 App. Cas. 740, 773; 44 L. T. 844; 30 W. R. 191; 46 J. P. 132.—H.L. (E.).

Agnew v. Lord Advocate (1873) 11 Ct. of Sess. Cas. 3rd series, 309.—CT. OF SESS., *commented on*.

Lord Advocate v. Blantyre (Lord) (1879) L. R. 4 App. Cas. 770.—H.L. (SC.).

HATHERLEY, L.C.—Whether or not *Agnew's Case* be correctly decided (as to which I cannot say that I entertain much doubt), I apprehend that your lordships will not in this case be obliged to consider that question or to deliberate as to that point which was raised and decided in *Agnew's Case* adversely to the owner, namely, that he cannot rest upon his paper title, if I may so call it, without proving possession of that foreshore which he claims in cases when the definition of it is not strictly and clearly contained in the charter itself.—p. 794.

Calmady v. Rowe (1844) 6 C. B. 861.—C.P., *questioned*.

Walton-cum-Trimley Manor, In re, Tomline, Ex parte (1873) 28 L. T. 12, 14; 21 W. R. 475.—WICKENS, V.-C.

Blewett v. Tregonning (1885) 4 L. J. K. B. 223; 3 A. & E. 554; 5 N. & M. 234; 1 H. & W. 431.—K.B., *referred to*.

Sowerby v. Coleman (1867) 36 L. J. Ex. 57, 59; L. R. 2 Ex. 96, 99; 15 L. T. 667; 15 W. R. 451.—EX.

Blewett v. Tregonning, *distinguished*.

De la Warr (Earl) v. Miles (1881) 50 L. J. Ch. 754, 767; 17 Ch. D. 535, 597; 44 L. T. 487; 29 W. R. 809.—C.A. *See* vol. i. col. 807.

Blewett v. Tregonning, *adopted*.

Brocklebank v. Thompson (1903) 72 L. J. Ch. 626, 633; [1903] 2 Ch. 344, 354; 89 L. T. 209.—JOYCE, J.

Rex v. Yarborough (Lord) (1824) 3 B. & C. 91; 4 D. & R. 790.—K.B.; *affirmed*, (1828) 2 Bli. (N.S.) 147; 1 Dow. & Cl. 178; 5 Bing. 163; 27 R. R. 292.—H.L. (E.).

Rex v. Yarborough (Lord), *applied*.

Scrutton v. Brown (1825) 6 D. & R. 536; 4 B. & C. 485; 28 R. R. 344.—K.B.; *Foster v. Wright* (1878) 49 L. J. C. P. 97, 99; 4 C. P. D. 438, 446; 44 J. P. 7.—C.P.D.; and **Att.-Gen. v. Reeve** (1885) 1 Times L. R. 675.—COLERIDGE, C.J. and POLLOCK, B. *And see post*, col. 3049.

Rex v. Yarborough (Lord) (*supra*), *applied*.
Hindson v. Ashby (1896) 65 L. J. Ch. 515;
 [1896] 2 Ch. 1; 74 L. T. 327; 60 J. P. 484.—
 C.A. LINDLEY, KAY and SMITH, L.JJ.

Scrutton v. Brown (1825) 6 D. & R. 536; 4
 B. & C. 485; 28 R. R. 344.—K.B.,
applied.
Hindson v. Ashby (1896) 65 L. J. Ch. 515;
 [1896] 2 Ch. 1; 74 L. T. 327; 60 J. P. 484.—
 C.A. LINDLEY, KAY and SMITH, L.JJ.

Somerset (Duke) v. Fogwell (1826) 5 L. J.
 (o.s.) K. B. 49; 5 B. & C. 875; 8 D. & R.
 747; 29 R. R. 449.—K.B., *explained*.
Att.-Gen. v. Emerson (1891) 61 L. J. Q. B. 79;
 [1891] A. C. 649; 65 L. T. 564; 55 J. P. 709.—
 H.L. (E.). LORDS HERSCHELL, BRAMWELL, MAC-
 NAGHTEN and HANNEN.

LORD HERSCHELL.—It was argued . . . that
 there was no ground for such a presumption
 [namely, that the owner of a several fishery is
 the owner of the soil] in the case of tidal waters,
 the soil below which is *prima facie* in the Crown,
 and where a several fishery must have been the
 subject of a separate grant. In support of this
 distinction *Somerset (Duke) v. Fogwell*, was cited.
 But I do not think the judgment in that case
 warrants the proposition for which it was cited.—
 p. 81.

Somerset (Duke) v. Fogwell, *applied*.
Hindson v. Ashby (1896) 65 L. J. Ch. 515;
 [1896] 2 Ch. 1; 74 L. T. 327; 60 J. P. 484.—
 C.A. LINDLEY, KAY and SMITH, L.JJ.

Hull and Selby Ry., In re (1839) 8 L. J. Ex.
 260; 5 M. & W. 327.—EX., *considered and*
adopted.

Foster v. Wright (1878) 49 L. J. C. P. 97; 4
 C. P. D. 438, 446; 44 J. P. 7.—C.P.D.; **Att.-Gen.**
v. Reeve (1885) 1 Times L. R. 675.—COLERIDGE,
 C.J. and POLLOCK, B.

Att.-Gen. v. Emerson (1891) 61 L. J. Q. B.
 79; [1891] A. C. 649; 65 L. T. 564; 55
 J. P. 709.—H.L. (E.), *applied*.

Hindson v. Ashby (1896) 65 L. J. Ch. 515;
 [1896] 2 Ch. 1; 74 L. T. 327; 60 J. P. 484.—
 C.A. LINDLEY, KAY and SMITH, L.JJ.

Att.-Gen. v. Emerson, *applied*.
Hanbury v. Jenkins (1901) 70 L. J. Ch. 730;
 [1901] 2 Ch. 401; 49 W. R. 615; 65 J. P. 631.—
 BUCKLEY, J.

Lynn Corporation v. Turner (1774) Cowp. 86.
 —K.B., *applied*.

Ilchester v. Rashleigh (1889) 61 L. T. 477,
 480; 38 W. R. 104.—KEKEWICH, J.

Bagott v. Orr (1801) 2 Bos. & P. 472; 5 R. R.
 668, *distinguished*.

Blundell v. Catterall (1821) 5 B. & Ald. 268;
 24 R. R. 353.—K.B.

BAYLEY, J.—The case of *Bagott v. Orr* seems
 to me to conclude nothing on the right in ques-
 tion . . . The claim, in that case, was very
 different from the present; it was a claim for
 something serving to the sustenance of man, not
 a matter of recreation only—a claim to take
 when left by the water, what every subject had
 an undoubted right to have taken whilst they
 remained in the water; and upon that claim
 there was no regular judgment. But it would
 by no means follow, because all the king's
 subjects have a right to pick up fish on the shore,

that they have, therefore, a right to pass over the
 sea-shore for the purpose of bathing.—p. 307.

Blundell v. Catterall (1821) 5 B. & Ald. 268;
 24 R. R. 353.—K.B. *See*
Mace v. Philcox (1864) 33 L. J. C. P. 124; 15
 C. B. (N.S.) 600; 10 Jur. (N.S.) 680; 9 L. T. 766;
 12 W. R. 670.—C.P.

Blundell v. Catterall, *applied*.
Ilchester (Earl) v. Rashleigh (1889) 61 L. T.
 477; 38 W. R. 104.—KEKEWICH, J.

Blundell v. Catterall, *followed*.
Llandudno Urban Council v. Woods (1899) 68
 L. J. Ch. 623; [1899] 2 Ch. 705; 81 L. T. 170;
 48 W. R. 43; 63 J. P. 775.—COZENS-HARDY, J.

Beaufort (Duke) v. Swansea Corporation
 (1849) 3 Ex. 413.—EX., *referred to*.

Hastings Corporation v. Ivall (1874) L. R. 19
 Eq. 558, 581; 22 W. R. 724.—V.-C.; **Devonshire**
(Duke) v. Pattinson (1887) 57 L. J. Q. B. 189;
 20 Q. B. D. 263, 275; 58 L. T. 392; 52 J. P.
 276.—C.A.; **Sutton Harbour Improvement Co. v.**
Plymouth Guardians (1890) 6 Times L. R. 400.—
 CAVE and SMITH, JJ.

Att.-Gen. v. Chambers (1854) 4 De G. M. &
 G. 206; 23 L. J. Ch. 662; 18 Jur. 779; 2
 W. R. 636.—L.C., *dictum applied*.

Pearce v. Bunting (1896) 65 L. J. M. C. 131;
 [1896] 2 Q. B. 360; 75 L. T. 184; 60 J. P. 695.—
 CAVE and WILLS, JJ.

Att.-Gen. v. Chambers (1859) 4 De G. & J.
 55; 5 Jur. (N.S.) 745; 7 W. R. 404.—L.C.,
adopted.

Reg. v. Hughes (1866) 35 L. J. P. C. 23, 29;
 L. R. 1 P. C. 81, 92; 12 Jur. (N.S.) 195; 14 L. T.
 808; 14 W. R. 441.—P.C.; **Hastings Corporation**
v. Ivall (1874) L. R. 19 Eq. 558, 584; 22 W. R.
 724.—V.-C.

Att.-Gen. v. Chambers, *observed upon*.
Foster v. Wright (1878) 49 L. J. C. P. 97, 99;
 4 C. P. D. 438, 447; 44 J. P. 7.—C.P.D.

Att.-Gen. v. Chambers, *applied*.
Ilchester v. Rashleigh (1889) 61 L. T. 477; 38
 W. R. 104.—KEKEWICH, J.

Mace v. Philcox (1864) 33 L. J. C. P. 124; 15
 C. B. (N.S.) 600; 10 Jur. (N.S.) 680; 9 L. T.
 766; 12 W. R. 670.—C.P. *See*

Hastings Corporation v. Ivall (1874) L. R. 19
 Eq. 558, 584; 22 W. R. 724.—V.-C.

Pearce v. Bunting (1896) 65 L. J. M. C. 131;
 [1896] 2 Q. B. 360; 75 L. T. 184; 60 J. P.
 695.—Q.B.D., *disapproved*.

Thames Conservators v. Smeed, Dean & Co.
 (1897) 66 L. J. Q. B. 716; [1897] 2 Q. B. 334;
 77 L. T. 184; 45 W. R. 691.—C.A. ESHER, M.R.,
 SMITH and CHITTY, L.JJ.

SMITH, L.J.—In *Pearce v. Bunting* . . . my
 brother Cave relied greatly, and my brother Wills
 also to some extent, upon the fact that as no
 compensation was given by the statute it was
 improbable that private rights would be inter-
 fered with by the legislature, and this ordinarily
 is so; but *Goolden v. Thames Conservators* (not
 reported) in the H.L. indicates that these
 dredging powers are given to the conservators
 for navigation purposes, without compensation
 being also given to private owners for having
 their rights thus interfered with. . . . The
 question, as it seems to me, is not what soil has

been vested in the conservators, which my brother Cave field to be the question, but what powers of dredging and raising gravel and other substances, and of granting licences to others to do so, have been granted by the statute to the conservators whereby to preserve, improve, and maintain the navigation of the Thames.—p. 722.

Rex v. Pagham Level Commissioners (1828)
8 B. & C. 355; 2 Man. & Ry. 468.—K.B., *inapplicable*.

Att.-Gen. v. Lonsdale (Earl) (1868) 38 L. J. Ch. 335, 341; L. R. 7 Eq. 377, 387; 20 L. T. 64; 17 W. R. 219.—V.-C.

Rex v. Pagham Level Commissioners, applied.

Whalley v. Lancashire and Yorkshire Ry. (1884) 53 L. J. Q. B. 285; 13 Q. B. D. 131, 136; 50 L. T. 472; 32 W. R. 711; 43 J. P. 500.—C.A.

Keighley's Case (1609) 11 Co. Rep. 139 a, *recognised*.

Rex v. Somerset (1799) 8 Term Rep. 312; 4 R. R. 659.—K.B., and Rex v. Essex Sewers Commissioners (1823) 1 L. J. (o.s.) K. B. 169; 1 B. & C. 477; 2 D. & R. 700; 25 R. R. 467.—K.B.

Keighley's Case, inapplicable.

Hudson v. Tabor (1877) 46 L. J. Q. B. 463; 2 Q. B. D. 290; 36 L. T. 492; 25 W. R. 740.—C.A.

Keighley's Case, applied.

Nitro Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine's Dock Co. (1877) 9 Ch. D. 503, 518; 37 L. T. 330.—FRY, J., *varied*, (1878) 9 Ch. D. 503; 39 L. T. 330; 27 W. R. 267.—C.A.

Keighley's Case, followed.

Reg. v. Fobbing Commissioners (1885) 14 Q. B. D. 561; 54 L. J. M. C. 89; 52 L. T. 587; 33 W. R. 360.—C.A.; *affirmed*, H.L. (*infra*).

BRETT, M.R.—It seems to me that the proposition laid down in *Keighley's Case*, and adopted in *Rex v. Commissioners of Sewers for Somerset*, shows which way we ought to decide the present case. That proposition as laid down by Lord Coke, is as follows:—"If one is bound by prescription to repair a wall *contra fluxum maris*, and he keeps the wall in good repair, and of such height and as sufficient as it was accustomed, and by the sudden and unusual increase of water, salt or fresh, the walls are broken or the water overflows the walls, that in this case the Commissioners of Sewers ought to tax all such persons who hold any lands, &c., according to the quantity of their lands, &c., for no fault was in this case in him who ought to repair it." It seems to me that the effect of that proposition is that, where there is merely a prescription that lays on the frontagers the obligation to maintain and repair the wall, it applies to damages caused by the ordinary action of the sea, and the frontager who has been guilty of no default, and who has kept the wall in a fit state to resist the ordinary action of the sea, is not bound to bear the expense of repairing damages caused by an extraordinary tide. That proposition was adopted in *Rex v. Commissioners of Sewers for Somerset*.—p. 531.

Keighley's Case, followed.

Fobbing Commissioners v. Rex (1886) 11 App. Cas. 449; 56 L. J. M. C. 1; 55 L. T. 493; 34 W. R. 721; 51 J. P. 227.—H.L. (E.).

Rex v. Somerset Sewers Commissioners (1799) 8 Term Rep. 312; 4 R. R. 659.—K.B.; and **Rex v. Essex Sewers Commissioners** (1823) 1 L. J. (o.s.) K. B. 169; 1 B. & C. 477; 2 D. & R. 700; 25 R. R. 467.—K.B., *followed*.

Reg. v. Fobbing Sewers Commissioners (1885) 54 L. J. M. C. 89; 14 Q. B. D. 561; 52 L. T. 587; 33 W. R. 360.—C.A., *affirmed nom.* Fobbing Sewers Commissioners v. Reg. (1886) 56 L. J. M. C. 1; 11 App. Cas. 449; 55 L. T. 493; 34 W. R. 721; 51 J. P. 227.—H.L. (E.).

Reg. v. Leigh (1840) 10 A. & E. 398; 2 P. & D. 357.—Q.B., *considered*.

Reg. v. Essex Sewers Commissioners (1885) 54 L. J. M. C. 89; 14 Q. B. D. 561, 582; 52 L. T. 587; 33 W. R. 360; 49 J. P. 404.—C.A. BRETT, M.R., BAGGALLAY and LINDLEY, L.JJ.; *affirmed infra nom.* Fobbing Commissioners v. Reg.

Reg. v. Leigh, dicta explained.

Fobbing Sewers Commissioners v. Reg. (1886) 56 L. J. M. C. 1; 11 App. Cas. 449, 462; 55 L. T. 493; 34 W. R. 721; 51 J. P. 227.—H.L. (E.).

Reg. v. Warton (1862) 31 L. J. Q. B. 265; 2 B. & S. 719; 9 Jur. (N.S.) 325.—Q.B., *followed*.

Fobbing Sewers Commissioners v. Reg. (1886) 56 L. J. M. C. 1; 11 App. Cas. 449; 55 L. T. 493; 34 W. R. 721; 51 J. P. 227; 2 Times L. R. 750.—H.L. (E.).

Reg. v. Fobbing Sewers Commissioners (1884)

53 L. J. M. C. 113; 51 L. T. 227.—COLERIDGE, C.J. and CAVE, J.; *varied*, (1885) 54 L. J. M. C. 89; 14 Q. B. D. 561; 52 L. T. 587; 33 W. R. 360; 49 J. P. 404.—C.A. BRETT, M.R., BAGGALLAY and LINDLEY, L.JJ.; *the latter decision affirmed nom.* Fobbing Sewers Commissioners v. Reg. (1886) 56 L. J. M. C. 1; 11 App. Cas. 449; 55 L. T. 493; 34 W. R. 721; 51 J. P. 227; 2 Times L. R. 750.—H.L. (E.).

Fobbing Sewers Commissioners v. Reg. (1886)

56 L. J. M. C. 1; 11 App. Cas. 449; 55 L. T. 493; 34 W. R. 721; 51 J. P. 227.—H.L. (E.), *commented on*.

North v. Walthamstow Urban Council (1898) 67 L. J. Q. B. 972; 63 J. P. 836.—CHANNELL, J.

Henley v. Lyme Regis Corporation (1828)

5 Bing. 91; 6 L. J. (o.s.) C. P. 222; 30 R. R. 542.—C.P.; *affirmed nom.* Lyme Regis Corporation v. Henley (1832) 3 B. & Ad. 77; 3 M. & P. 278.—EX. CH., and (1834) 8 Bli. (N.S.) 690; 2 Cl. & F. 331; 1 Scott 29; 1 Bing. N. C. 222.—H.L. (E.).

Henley v. Lyme Regis Corporation, distinguished.

Gibson v. Preston Corporation (1870) 39 L. J. Q. B. 131; L. R. 5 Q. B. 218; 10 B. & S. 942; 22 L. T. 293; 18 W. R. 689.—Q.B.

Henley v. Lyme Regis Corporation, applied.

Winch v. Thames Conservators (1872) 41 L. J. C. P. 241; L. R. 7 C. P. 470; 27 L. T. 95.—C.P., *affirmed*, (1874) 43 L. J. C. P. 167; L. R. 9 C. P. 378; 31 L. T. 128; 22 W. R. 879.—EX. CH.

Henley v. Lyme Regis Corporation, dicta explained.

Hudson v. Tabor (1877) 2 Q. B. D. 290; 36 L. T. 492; 25 W. R. 740.—C.A. *and see post*, col. 3053.

Henley v. Lyme Regis Corporation (*supra*), *observations adopted*.
Bathurst Borough v. Macpherson (1879) 48 L. J. P. C. 61; 4 App. Cas. 256, 267.—P.C.

Henley v. Lyme Regis Corporation, *observations applied*.
Att.-Gen. v. Tomline (1879) 48 L. J. Ch. 593; 12 Ch. D. 214, 231; 40 L. T. 775.—FRY, J., affirmed, (1880) 49 L. J. Ch. 377; 14 Ch. D. 58; 42 L. T. 880; 28 W. R. 870; 44 J. P. 617.—C.A.

Hudson v. Tabor (1877) 46 L. J. Q. B. 463; 2 Q. B. D. 298; 36 L. T. 492; 25 W. R. 740.—C.A., *applied*.
Att.-Gen. v. Tomline (1880) 49 L. J. Ch. 377, 380; 14 Ch. D. 58, 65; 42 L. T. 880; 28 W. R. 870; 44 J. P. 617.—C.A.

Hudson v. Tabor, *applied*.
Rundle v. Hearle (1898) 67 L. J. Q. B. 741, 744; [1898] 2 Q. B. 83, 90; 78 L. T. 561; 46 W. R. 619.—RUSSELL, C.J. and RIDLEY, J.

Att.-Gen. v. Tomline (1880) 49 L. J. Ch. 377; 14 Ch. D. 58; 42 L. T. 880; 28 W. R. 870; 44 J. P. 617.—C.A., *distinguished*.
West Norfolk Farmers' Manure Co. v. Archdale (1886) 16 Q. B. D. 754; 55 L. J. Q. B. 230; 54 L. T. 561; 34 W. R. 401; 50 J. P. 500.—C.A.
ESHER, M.R.—I may say with regard to the case of *Att.-Gen. v. Tomline* it seems to me that the effect of it has been exaggerated, and that the doctrine there established, was meant to apply to natural protecting banks against the sea, and the waters of tidal rivers.—p. 758.

Rex v. Forty-nine Casks of Brandy (1836) 3 Hag. Adm. 257, 289.—ADM., *observations adopted*.
Reg. v. Keyn (1876) 46 L. J. M. C. 17, 25; 2 Ex. D. 63, 79; 13 Cox C. C. 403.—C.C.R.

Constable's (Sir H.) Case (1601) 5 Rep. 106, *considered and applied*.
Schiller, Cargo Ex. (1877) 2 P. D. 145; 36 L. T. 714.—C.A., affirming 46 L. J. Adm. 9.—ADM.

Constable's (Sir H.) Case, *applied*.
Gas Float Whitton No. 2 (1895) 65 L. J. Adm. 17; [1896] P. 42; 73 L. T. 698; 44 W. R. 263; 8 Asp. M. C. 110.—C.A. **ESHER, M.R.**, **LOPES** and **KAY, L.J.**, affirmed, **H.L.**

SEQUESTRATION.

Simmonds v. Kinnaird (Lord) (1799) 4 Ves. 735.—L.C., *discussed*.
Slade, In re, Slade v. Hulme (1881) 50 L. J. Ch. 729; 18 Ch. D. 653, 656; 45 L. T. 276; 30 W. R. 28.—FRY, J.

Hoare, In re, Nelson, Ex parte (1880) 49 L. J. Bk. 44; 14 Ch. D. 41; 42 L. T. 389; 28 W. R. 554.—C.A., *referred to*.
Slade, In re, Slade v. Hulme (1881) 50 L. J. Ch. 729; 18 Ch. D. 653, 656; 45 L. T. 276; 30 W. R. 28.—FRY, J.

Cridland, In re and Ex parte (1814) 3 V. & B. 100; 2 Rose 164; 13 R. R. 152.—L.C., *discussed*.
O'Reardon, In re, James, Ex parte (1873) 43 L. J. Bk. 13; L. R. 9 Ch. 74; 29 L. T. 761; 22 W. R. 196.—L.C. and L.J.
MELLISH, L.J.—In *Cridland, Ex parte*, Lord Eldon refused to supersede a joint commission on account of a previous separate commission in Ireland, against one of the bankrupts, but he gives no positive opinion as to the effect of, or as to the validity of the joint commission.—p. 15.

East of England Bank, In re, Hall, In re (1864) 10 Jur. (N.S.) 1093; 11 L. T. 410; 13 W. R. 128.—V.C., *followed*.
Miller v. Miller (1870) 39 L. J. Mat. 38; L. R. 2 P. & D. 54; 22 L. T. 418; 18 W. R. 585.—LORD PENZANCE.

Fenton v. Lowther (1787) 1 Cox Ch. 315.—L.C., *applied*.
Hyde v. Hyde (1888) 57 L. J. P. 89; 13 P. D. 166, 177; 59 L. T. 529; 36 W. R. 708.—C.A.

Hambllyn v. Ley (1743) 1 Dick. 94; 3 Swanst. 301, n.—L.C., *referred to*.
Hoare, In re, Hoare v. Owen (1892) 61 L. J. Ch. 541; [1892] 3 Ch. 94; 67 L. T. 45; 41 W. R. 105.—STIRLING, J.

Franciklyn v. Colhoun (1819) 3 Swanst. 276; 19 R. R. 204.—L.C., *followed*.
Ward v. Booth (1872) 41 L. J. Ch. 729, 732; L. R. 14 Eq. 195, 201; 27 L. T. 364; 20 W. R. 880.—M.R.

Franciklyn v. Colhoun, *referred to*.
Saull v. Browne (1874) 44 L. J. Ch. 1; L. R. 10 Ch. 64; 31 L. T. 493; 23 W. R. 50; 13 Cox C. C. 30.—L.C. and L.J.

Franciklyn v. Colhoun, *discussed*.
Slade, In re, Slade v. Hulme (1881) 50 L. J. Ch. 729; 18 Ch. D. 653; 45 L. T. 276; 30 W. R. 28.
FRY, J.—That case [*Franciklyn v. Colhoun*] is, of course, not precisely in point, for [here] the order nisi is not made against a stranger to the action, but was obtained by a stranger to the action. The next case is that of *Johnson v. Chippendall* (*infra*). That case throws very little light on the point; all that was determined was that the order could not be made against a stranger. It seems from that that *Franciklyn v. Colhoun* must be attributed to consent, or some special circumstance.—p. 730.

Johnson v. Chippendall (1828) 2 Sim. 55; 29 R. R. 58.—V.C., *followed*.
Ward v. Booth (1872) 41 L. J. Ch. 729, 732; L. R. 14 Eq. 195, 201; 27 L. T. 364; 20 W. R. 880.—M.R.

Johnson v. Chippendall, *discussed*.
Slade, In re, Slade v. Hulme (1881).—FRY, J. See *extragt, supra*.

M'Carthy v. Goold (1810) 1 Ball & B. 387.—L.C., *followed*.
Willcock v. Terrell (1878) 3 Ex. D. 323, 328.—COLERIDGE, C.J. and LINDLEY, J., affirmed, 3 Ex. D. 323; 39 L. T. 84.—C.A.; and **Lucas v. Harris** (1886) 56 L. J. Q. B. 15; 18 Q. B. D. 127, 136; 55 L. T. 658; 35 W. R. 112; 51 J. P. 261.—C.A.

Wilson v. Metcalfe (1839) 1 Beav. 260, 263; 8 L. J. Ch. 331; 3 Jur. 601.—M.R., *distinguished*.

Crispin v. Cumano (1869) 38 L. J. P. 28; L. R. 1 P. & D. 622, 627; 20 L. T. 150; 17 W. R. 535.—P.

Wilson v. Metcalfe, *distinguished*.

Hoare, In re, Nelson, Ex parte (1880) 49 L. J. Bk. 44; 14 Ch. D. 41, 48; 42 L. T. 389; 28 W. R. 554.—C.A.

COTTON, L.J.—In my opinion, in order to make the writ effectual, they [the sequestrators] must do something more, either, as in *Willcock v. Terrell*, by obtaining an injunction restraining the defendant from receiving the fund, or, as in *Wilson v. Metcalfe*, where an action was brought to make it effectual.—p. 47.

Wilson v. Metcalfe, *discussed*.

Slade, In re, Slade v. Hulme (1881) 50 L. J. Ch. 729; 18 Ch. D. 653; 45 L. T. 276; 30 W. R. 28.—FRY, J.

Ward v. Booth (1872) 41 L. J. Ch. 729; L. R. 14 Eq. 195; 27 L. T. 364; 20 W. R. 880.—M.R., *considered*.

Hoare, In re, Nelson, Ex parte (1880) 49 L. J. Bk. 44, 46; 14 Ch. D. 41, 46; 42 L. T. 389; 28 W. R. 554.—C.A.

BRETT, L.J.—*Ward v. Booth* in my opinion is against the respondent. In that case the M.R. seems to have thought that something more than the issue of the writ of sequestration ought to have been done to make it a charge on the property of the defendant.—p. 46.

Ward v. Booth, *discussed*.

Slade, In re, Slade v. Hulme (1881) 50 L. J. Ch. 729; 18 Ch. D. 625; 45 L. T. 276; 30 W. R. 28.—FRY, J.

SET-OFF.

Sapsford v. Fletcher (1792) 4 Term Rep. 511.—K.B.; and **Taylor v. Zamira** (1816)

2 Marsh. 220; 6 Taunt. 524; 16 R. R. 668.—C.P., *discussed and not applied*.

Andrew v. Hancock (1819) 3 Moore 278.—C.P.

Sapsford v. Fletcher and Taylor v. Zamira, *explained and distinguished*.

Stubbs v. Parsons (1820) 3 B. & Ald. 516.—K.B.

Sapsford v. Fletcher and Taylor v. Zamira, *followed*.

Carter v. Carter (1829) 7 L. J. (O.S.) C. P. 141; 5 Bing. 406; 2 M. & P. 723; 30 R. R. 677.—C.P.

Sapsford v. Fletcher and Taylor v. Zamira, *followed*.

Johnson v. Jones (1839) 8 L. J. Q. B. 124; 9 A. & E. 809; 1 P. & D. 641.—Q.B.

Sapsford v. Fletcher and Taylor v. Zamira, *distinguished*.

Davies v. Stacey (1840) 9 L. J. Q. B. 393; 12 A. & E. 506; 4 P. & D. 157.—Q.B.

Sapsford v. Fletcher and Taylor v. Zamira, *approved*.

Boodle v. Campbell (1844) 13 L. J. C. P. 142; 7 Man. & G. 386; 2 D. & L. 66; 8 Scott N. R. 108; 8 Jur. 475.—C.P.

Sapsford v. Fletcher and Taylor v. Zamira, *explained and distinguished*.

Graham v. Allsopp (1848) 18 L. J. Ex. 85; 8 Ex. 186.—EX.

ROLFE, B.—The principle on which these cases rest is this: the immediate landlord is bound to protect his tenant from all paramount claims, and when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of land in respect of which his rent is payable, to make payments which ought as between himself and his landlord to have been made by the latter he is considered as having been authorised by the landlord so to apply his rent.

Sapsford v. Fletcher and Taylor v. Zamira, *followed*.

Jones v. Morris (1849) 18 L. J. Ex. 477; 3 Ex. 742.—EX.

Sapsford v. Fletcher and Taylor v. Zamira, *observed upon*.

Bonner v. Tottenham and Edmonton Permanent Investment Building Society (1898) 68 L. J. Q. B. 114; [1899] 1 Q. B. 161; 79 L. T. 611; 47 W. R. 161.—C.A.

V. WILLIAMS, L.J.—I have only to add with regard to *Sapsford v. Fletcher, Taylor v. Zamira, Dawson v. Linton* (5 B. & Ald. 521), and *Ewall v. Partridge* (8 Term Rep. 308) . . . that each of these cases turned really on the contractual relations of the parties.—p. 122.

Dawson v. Linton (1822) 5 B. & Ald. 521.—K.B., *observed upon*.

Bonner v. Tottenham, &c., Building Society (1898).—C.A. (*supra*).

Carter v. Carter (1829) 7 L. J. (O.S.) C. P. 141; 5 Bing. 406; 2 M. & P. 723; 30 R. R. 677.—C.P., *distinguished*.

Davies v. Stacey (1840) 9 L. J. Q. B. 393; 12 A. & E. 506; 4 P. & D. 157.—Q.B.; **Graham v. Allsopp** (1848) 18 L. J. Ex. 85; 8 Ex. 186.—EX.

Graham v. Allsopp (1848) 18 L. J. Ex. 85; 8 Ex. 186.—EX., *followed*.

Jones v. Morris (1849) 18 L. J. Ex. 477; 3 Ex. 742.—EX.

Clarke v. Fell (1833) 2 L. J. K. B. 84; 4 B. & Ad. 404; 1 N. & M. 244.—K.B., *discussed and dictum applied*.

Deveze, In re, Barnett, Ex parte (1874) 43 L. J. Bk. 87; L. R. 9 Ch. 293; 29 L. T. 858; 22 W. R. 283.—L.C. and L.J.

Woodhams v. Newman (1849) 18 L. J. C. P. 213; 7 C. B. 654; 6 D. & L. 683; 13 Jur. 456.—C.P., *principle approved and applied*.

The Young James (1869) 39 L. J. Adm. 1; L. R. 3 A. & E. 1; 21 L. T. 397; 18 W. R. 52.—SIR R. PHILLIMORE.

Woodhams v. Newman, *referred to*.

Neale v. Clarke (1879) 4 Ex. D. 286; 41 L. T. 438.—EX. D.

Eyton v. Littledale (1849) 18 L. J. Ex. 369; 7 D. & L. 55; 4 Ex. 159.—EX., *discussed*.

Newington v. Levy (1870) 39 L. J. C. P. 384; L. R. 5 C. P. 607; 23 L. T. 70.—C.P. (affirmed).—EX. CH.)

Remington v. Stevens (1747) 2 Strange 1271.—K.B., *approved and applied*.
Rawley v. Rawley (1876) 45 L. J. Q. B. 675, 681; 1 Q. B. D. 460; 35 L. T. 191; 24 W. R. 995.—C.A.

Francis v. Dodsworth (1847) 17 L. J. C. P. 185; 4 C. B. 202.—C.P., *applied*.
Rawley v. Rawley (1876) 45 L. J. Q. B. 675, 680; 1 Q. B. D. 460, 464; 35 L. T. 191; 24 W. R. 995.—C.A.; **Smith, In re, Green v. Smith** (1883) 52 L. J. Ch. 411, 413; 22 Ch. D. 586, 591; 48 L. T. 154; 31 W. R. 413.—FRY, J.

Francis v. Dodsworth, *dictum applied*.
Smith v. Betty (1903) 72 L. J. K. B. 853; [1903] 2 K. B. 317; 89 L. T. 258; 52 W. R. 137.—C.A. COLLINS, M.R., STIRLING * and MATHEW, L.JJ.

Medlicott v. Bowes (1749) 1 Ves. sen. 207.—L.C., *explained and applied*.
Freeman v. Lomas (1851) 20 L. J. Ch. 564; 9 Hare 109; 15 Jur. 648.—V.C.; *and see* **Middleton v. Pollock, Nugee, Ex parte** (1875) 44 L. J. Ch. 584, 587; L. R. 20 Eq. 29, 35; 33 L. T. 240; 23 W. R. 766.—JESSEL, M.R.

Bishop v. Church (1751) 2 Ves. sen. 100, 371; 3 Atk. 691.—L.C., *followed*.
Middleton v. Pollock, Nugee, Ex parte (1875) 44 L. J. Ch. 584, 586; L. R. 20 Eq. 29, 34; 33 L. T. 240; 23 W. R. 766.—JESSEL, M.R.; **Beresford v. Browning** (1875) L. R. 20 Eq. 564, 572; 33 L. T. 118.—M.R. (affirmed, 45 L. J. Ch. 36; 33 L. T. 524; 24 W. R. 120.—C.A.); **Kinnaird v. Trollope** (1889) 58 L. J. Ch. 556; 42 Ch. D. 610; 60 L. T. 892.—STIRLING, J.

Whitaker v. Rush (1760) Amb. 407.—M.R., *referred to*.
Jones, In re, Christmas v. Jones (1897) 66 L. J. Ch. 439; [1897] 2 Ch. 190; 76 L. T. 454; 45 W. R. 598.—KEKEWICH, J.

Bottomley v. Brook (1782) 1 Term Rep. 621, and **Rudge v. Birch**, lb. 622, *overruled*.
Isberg v. Bowden (1853) 8 Ex. 852; 1 C. L. R. 722; 22 L. J. Ex. 322.—EX.
MARTIN, B. (for the Court).—The cases of **Bottomley v. Brook** and **Rudge v. Birch** must be considered as entirely overruled.—p. 860.

Williams v. Davies (1829) 2 Sim. 461.—V.C., *disapproved*.
Rawson v. Samuel (1839) 1 Cr. & Ph. 161, 179; S. C. 10 L. J. Ch. 214, 215; 3 Jur. 947.—L.C.

Williams v. Davies, *questioned*.
Stimson v. Hall, (1857) 1 H. & N. 831; 26 L. J. Ex. 212; 5 W. R. 367.—EX.
WATSON, B.—In all the cases referred to, with the exception of **Williams v. Davies**, there was some equitable ground for relief, and the answer to that case is, that Lord Cottenham, in his judgment in **Rawson v. Samuel** (*post*), does not give implicit faith to the correctness of the decision.—p. 836.

Williams v. Davies, *referred to*.
Middleton v. Pollock, Nugee, Ex parte (1875) 44 L. J. Ch. 584, 588; L. R. 20 Eq. 29, 36; 33 L. T. 240; 23 W. R. 766.—JESSEL, M.R. *See* extract, *post*, col. 3069.

Rawson v. Samuel (1839) 1 Cr. & Ph. 161, 178.—L.C.; S. C. 10 L. J. Ch. 214; 3 Jur. 947.—L.C., *distinguished but principle applied*.
Watson v. Mid Wales Ry. (1867) 36 L. J. C. P. 285; L. R. 2 C. P. 593; 17 L. T. 94; 15 W. R. 1107.—C.P.

WILLES, J.—To be sure there was an uncertainty existing in that case which makes it not in point; but Lord Cottenham went into the cases and denied the doctrine that mere cross-claims gave an equity, much less so when they are *in futuro*. It is necessary to show mutual credit.—p. 288.

Rawson v. Samuel, *explained and followed*.
Best v. Hill (1872) 42 L. J. C. P. 10; L. R. 8 C. P. 10; 27 L. T. 490; 21 W. R. 147.—C.P.

Rawson v. Samuel, *observations applied*.
Middleton v. Pollock, Nugee, Ex parte (1875) 44 L. J. Ch. 584, 588; L. R. 20 Eq. 29, 36; 33 L. T. 240; 23 W. R. 766.—JESSEL, M.R. *See* extract, *infra*, col. 3069.

Rawson v. Samuel, *not applied*.
National Bank of Scotland v. Dewhurst (1896) 1 Com. Cas. 318.

MATHEW, J.—He [counsel for the plaintiffs] relied upon **Rawson v. Samuel** and **Watson v. Mid-Wales Ry.** (*supra*). But it seems clear to me that Twcedy & Co. were not as between themselves and the owners of the vessels of the Trident Line entitled to call upon the owners for losses without giving credit for profits. . . . The set-off was not equitable, but legal, and the authorities relied upon by the plaintiffs' counsel do not apply.—p. 321.

Clark v. Cort (1840) 10 L. J. Ch. 113; Cr. & Ph. 154.—L.C., *applied*.
Thornton v. Maynard (1875) 44 L. J. C. P. 382; L. R. 10 C. P. 695, 699; 33 L. T. 433.—C.P.

Clark v. Cort, *observations considered and applied*.
Middleton v. Pollock, Nugee, Ex parte (1875) 44 L. J. Ch. 584, 588; L. R. 20 Eq. 29, 36; 33 L. T. 240; 23 W. R. 766.—JESSEL, M.R. *See* extract, *infra*, col. 3069.

Jones v. Mossop (1844) 13 L. J. Ch. 470; 3 Hare 568; 8 Jur. 1064.—V.C., *applied*.
Middleton v. Pollock, Nugee, Ex parte (1875) 44 L. J. Ch. 584; L. R. 20 Eq. 29, 35; 33 L. T. 240; 23 W. R. 766.—JESSEL, M.R.

Jones v. Mossop, *explained and principle applied*.
Willis, In re, Morier, Ex parte (1879) 12 Ch. D. 491, 496; 40 L. T. 792; 28 W. R. 235.—C.A.

Freeman v. Lomas (1851) 20 L. J. Ch. 564; 9 Hare 109; 15 Jur. 648.—V.C., *distinguished*.
Richardson v. Richardson (1867) L. R. 3 Eq. 686, 695; 15 W. R. 600.—WOOD, V.C.

Freeman v. Lomas, *dictum adopted*.
Stammers v. Elliott (1868) 37 L. J. Ch. 353; L. R. 3 Ch. 195, 199; 18 L. T. 1; 16 W. R. 489.—L.C.

Freeman v. Lomas, *followed*.
Middleton v. Pollock, Nugee, Ex parte (1875) 44 L. J. Ch. 584, 586; L. R. 20 Eq. 29, 34; 33 L. T. 240; 23 W. R. 766.—JESSEL, M.R.

- Middleton v. Pollock, Nugee, Ex parte** (1875) 44 L. J. Ch. 584; L. R. 20 Eq. 29; 33 L. T. 240; 23 W. R. 766.—M.R., *referred to*.
- Jones, In re, Christmas v. Jones (1897) 66 L. J. Ch. 439; [1897] 2 Ch. 190; 76 L. T. 454; 45 W. R. 598.—KEKEWICH, J.
- Willis, In re, Morier, Ex parte** (1879) 49 L. J. Bk. 9; 12 Ch. D. 491; 40 L. T. 792; 28 W. R. 235.—C.A., *discussed and applied*.
- Hett Maylor & Co., In re (1894) 10 Times L. R. 412.—CHITTY, J.
- Unity Joint Stock Banking Association v. King** (1858) 27 L. J. Ch. 585; 25 Beav. 72; 4 Jur. (N.S.) 1257; 6 W. R. 264.—M.R., *referred to*.
- Plimmer v. Wellington Corporation (1884) 53 L. J. P. C. 104, 110; 9 App. Cas. 699, 713; 51 L. T. 475; 49 J. P. 116.—P.C.
- Stephens, Ex parte** (1805) 11 Ves. 24.—L.C., *observed upon*.
- Jones v. Mossop (1844) 13 L. J. Ch. 470, 472; 3 Hare 568, 573; 8 Jur. 1064.—V.-C.
- Stephens, Ex parte, explained.**
- Middleton v. Pollock, Knight and Raymond, Ex parte (1875) 44 L. J. Ch. 618; L. R. 20 Eq. 515.—JESSEL, M.R. *See extract, infra*.
- Vulliamy v. Noble** (1817) 3 Mer. 593; 17 R. R. 143.—L.C. *See*
- Braithwaite v. Britain (1836) 1 Keen 206, 220.—M.R.
- Vulliamy v. Noble, applied.**
- Chapman v. Beckington (1842) 12 L. J. Q. B. 61; 3 Q. B. 703; 3 G. & D. 33; 7 Jur. 62.—Q.B.
- Vulliamy v. Noble, referred to.**
- Jones v. Mossop (1844) 13 L. J. Ch. 470, 472; 3 Hare 568, 573; 8 Jur. 1064.—V.-C.; Lodge v. Pritchard (1863) 32 L. J. Ch. 775, 777; 1 De G. J. & S. 610, 614; 9 Jur. (N.S.) 982; 9 L. T. 107; 11 W. R. 1086.—L.J.
- Vulliamy v. Noble, explained.**
- Middleton v. Pollock, Knight and Raymond, Ex parte (1875) L. R. 20 Eq. 515; 44 L. J. Ch. 618. JESSEL, M.R.—It is said that there is authority to show that if the debt sought to be set off was contracted by fraud a different rule prevails; that, although the separate debt of one of the joint creditors was not contracted by fraud, you can set off that against the debt of the joint creditors which was contracted by fraud. It is difficult to see on principle how you can be in a better position than if you had known the facts; and, if the facts had been known, there could be no such set-off. The decisions of Lord Eldon on the subject do not bear out the proposition at all.—p. 518. *See also judgment at length.*
- Gillespie v. Hamilton** (1818) 3 Mad. 251.—V.-C., *applied*.
- Chapman v. Beckington (1842) 12 L. J. Q. B. 61; 3 Q. B. 703; 3 G. & D. 33; 7 Jur. 62.—Q.B.
- Brown v. Tibbits** (1862) 31 L. J. C. P. 206; 11 C. B. (N.S.) 855; 6 L. T. 385; 10 W. R. 465.—C.B., *distinguished*.
- Rawley v. Rawley (1876) 45 L. J. Q. B. 675, 681; 1 Q. B. D. 460, 463; 35 L. T. 191; 24 W. R. 599.—C.A.
- Jones v. Moore** (1841) 4 Y. & C. Ex. 351.—EX., *applied*.
- Spence v. Union Marine Insurance Co. (1868) 37 L. J. C. P. 169, 174; L. R. 3 C. P. 427, 437; 18 L. T. 632; 16 W. R. 1010.—C.P.
- Makeham v. Crow** (1864) 15 C. B. (N.S.) 847.—C.P., *applied*.
- Booth v. Hutchinson (1872) 42 L. J. Ch. 492, 494; L. R. 15 Eq. 30, 34; 27 L. T. 600; 21 W. R. 116.—MALINS, V.-C.
- Meyer v. Dresser** (1864) 33 L. J. C. P. 289; 16 C. B. (N.S.) 646; 10 L. T. 612; 12 W. R. 983.—C.P., *referred to*.
- Grissell v. Bristowe (1868) 37 L. J. C. P. 89, 99; L. R. 3 C. P. 112, 123; 17 L. T. 564.—C.P., *reversed*, 38 L. J. C. P. 10; L. R. 4 C. P. 36; 19 L. T. 390; 17 W. R. 123.—EX. CH.
- Meyer v. Dresser, adopted.**
- Maspons v. Mildred (1882) 9 Q. B. D. 530, 543; 51 L. J. Q. B. 604; 47 L. T. 318; 30 W. R. 862.—C.A., *affirmed nom.* Mildred v. Maspons (1883) 53 L. J. Q. B. 33; 8 App. Cas. 874; 32 W. R. 125.—H.L. (E.).
- Fletcher v. Dyche** (1787) 2 Term Rep. 32; 1 R. R. 414.—K.B., *referred to*.
- Morley v. Inglis (1837) 7 L. J. C. P. 11; 5 Scott 314; 4 Bing. N. C. 58; 6 D. P. C. 202; 3 Hodges 270.—C.P.
- Fletcher v. Dyche, applied.**
- Bonsall v. Byrne (1868) 16 W. R. 372.—EX. (IR.).
- Cope v. Joseph** (1821) 9 Price 155.—EX.; and **Collins v. Wallis** (1826) 4 L. J. C. P. 88; 11 Moore 248.—C.P., *referred to*.
- Morley v. Inglis (1837) 7 L. J. C. P. 11; 5 Scott 314; 4 Bing. N. C. 58; 6 D. P. C. 202; 3 Hodges 270.—C.P.
- Thorpe v. Thorpe** (1832) 1 L. J. K. B. 170; 3 B. & Ad. 580.—K.B., *referred to*.
- Morley v. Inglis (1837) 7 L. J. C. P. 11; 5 Scott 314; 4 Bing. N. C. 58; 6 D. P. C. 202; 3 Hodges 270.—C.P.
- Hardcastle v. Netherwood** (1821) 5 B. & Ald. 93.—K.B.; and **Morley v. Inglis** (*supra*), *applied*.
- Crampton v. Walker (1860) 30 L. J. Q. B. 19; 3 El. & El. 321; 7 Jur. (N.S.) 43; 9 W. R. 98.—Q.B.
- Birch v. Depeyster** (1816) 4 Camp. 385, *referred to*.
- Hamilton v. Goold (1839) 1 Ir. L. R. 171.—Q.B.
- Birch v. Depeyster and Hamilton v. Goold, applied.**
- Crampton v. Walker (1860) 30 L. J. Q. B. 19; 3 El. & El. 321; 7 Jur. (N.S.) 43; 9 W. R. 98.—Q.B.
- Burrough v. Moss** (1830) 8 L. J. (O.S.) K. B. 287; 10 B. & C. 558; 5 M. & Ry. 296.—K.B., *approved*.
- Whitehead v. Walker (1842) 12 L. J. Ex. 28; 10 M. & W. 696; 7 Jur. 330.—EX. *See extract, ante*, vol. i. col. 201.
- Burrough v. Moss, applied.**
- Overend, In re, Swan, Ex parte (1868) L. R. 6 Eq. 344, 359; 16 W. R. 360; 18 L. T. 230.—MALINS, V.-C.

Burrough v. Moss, distinguished.

Anglo-Greek Steam Navigation and Trading Co., in re, Carralli, Ex parte (1869) L. R. 4 Ch. 174; 17 W. R. 244.—L.J.J. See extract, *infra*.

Burrough v. Moss, referred to.

Dublin and Rathcoole Ky., in re (1878) 1 L. R. Ir. 98.—V.-C.

Oulds v. Harrison (1854) 24 L. J. Ex. 66; 10 Ex. 572; 3 G. L. R. 353; 3 W. R. 160.—EX., *applied*.

Overend, in re, Swan, Ex parte (1868) L. R. 6 Eq. 344, 359; 16 W. R. 560; 18 L. T. 230.—MALINS, V.-C.

Oulds v. Harrison, distinguished.

Anglo-Greek Steam Navigation and Trading Co., in re, Carralli and Haggard's Claim (1869) L. R. 4 Ch. 174; 17 W. R. 244.—L.J.J.

SELWYN, L.J.—I think that *Oulds v. Harrison* and *Burrough v. Moss* (*supra*) . . . have no application to the case before us, as in neither of those cases was there any bankruptcy.—p. 176.

Holmes v. Kidd (1858) 28 L. J. Ex. 112; 3 H. & N. 891; 5 Jur. (N.S.) 295; 7 W. R. 108.—EX. CH., *applied*.

Overend, in re, Swan, Ex parte (1868) L. R. 6 Eq. 344, 360; 16 W. R. 560; 18 L. T. 230.—MALINS, V.-C.

Agra and Masterman's Bank v. Leighton (1866) 36 L. J. Ex. 33; L. R. 2 Ex. 56; 4 H. & C. 656.—EX.

Followed, Thornton v. Maynard (1875) 44 L. J. C. P. 382, 385; L. R. 10 C. P. 695, 699; 33 L. T. 433.—C.P.; *applied*, Girvin v. Grepe (1879) 49 L. J. Ch. 63; 13 Ch. D. 174; 41 L. T. 522; 28 W. R. 123.—JESSEL, M.R.; and Bankes v. Jarvis (1903) 72 L. J. K. B. 267; [1903] 1 K. B. 549; 88 L. T. 20; 51 W. R. 412.—K.B.D.

Mondel v. Steel (1841) 10 L. J. Ex. 426; 8 M. & W. 858; 1 D. (N.S.) 1.—EX.

Referred to, Gough v. Bertram (1857) 27 L. J. Ex. 53.—EX.; *approved but not applied*, Oastler v. Pound (1863) 7 L. T. 852; 11 W. R. 518.—Q.B.; *principle adopted*, Heyworth v. Hutchinson (1867) 36 L. J. Q. B. 270, 272; L. R. 2 Q. B. 447, 451.—Q.B.

Mondel v. Steel, discussed.

Davis v. Hodges (1871) 40 L. J. Q. B. 276; L. R. 6 Q. B. 687; 25 L. T. 155; 20 W. R. 60.—Q.B.

Mondel v. Steel, explained.

Towerson v. Agricultural Aspatia Co-operative Society (1872) 27 L. T. 276.—EX. CH.

WILLES, J.—The history of the law given by Lord Wensleydale in that case is unfortunately misreported. I see it is not set right in this copy of the volume of Meeson and Welsby, but I think it is in that of the Court of Common Pleas; but the statement of the principle of the case does clearly appear at the end of the judgment, where Parke, B., expresses himself as follows: "It must, however, be considered that in all these cases of goods sold and delivered with a warranty and work and labour, as well as the case of goods to be supplied according to a contract, the rule which has been found so convenient is established and that it is competent for the defendant in all of those not to set off, by a proceeding in the nature of a cross action, the amount of the damages which he has

sustained by a breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent, but no more." I cannot add to the words of Lord Wensleydale or improve upon them; they show how proper it is that all these matters should be so decided.—p. 280.

Parkes v. Smith (1850) 19 L. J. Q. B. 405; 15 Q. B. 297; 14 Jur. 761.—Q.B., *considered and applied*.

Comings v. Heard (1869) 39 L. J. Q. B. 9, 12; L. R. 4 Q. B. 669, 675; 10 B. & S. 606; 20 L. T. 975; 18 W. R. 61.—Q.B.

Collett v. Preston (1852) 15 Beav. 458.—M.R. *Followed*, Throckmorton v. Crowley (1866) L. R. 3 Eq. 196, 199.—V.-C.; *distinguished but principle approved*, Roberts v. Buée (1878) 47 L. J. Ch. 414; 8 Ch. D. 198; 26 W. R. 393.—HALL, V.-C.

Throckmorton v. Crowley (1866) L. R. 3 Eq. 196.—WOOD, V.-C.

Principle applied, Roberts v. Buée (1878) 47 L. J. Ch. 414; 8 Ch. D. 198; 26 W. R. 393.—HALL, V.-C.; *discussed and applied*, Harrauld, in re, Wilde v. Walford (1883) 52 L. J. Ch. 435.—FRY, J., *reversed*, C.A.

Mercer v. Graves (1872) 41 L. J. Q. B. 212; L. R. 7 Q. B. 499; 26 L. T. 551; 20 W. R. 605.—Q.B.

Referred to, Blakey v. Latham (1889) 41 Ch. D. 518, 522; 60 L. T. 624; 37 W. R. 569.—KAY, J.; North v. Stewart (1890) 15 App. Cas. 452, 463; 63 L. T. 718.—H.L. (sc.); *explained and not applied*, Knight, in re, Knight v. Gardner (1892) 61 L. J. Ch. 399; [1892] 2 Ch. 368, 373; 66 L. T. 646; 40 W. R. 460.—KEKEWICH, J.

Blakey v. Latham (1889) 41 Ch. D. 518; 60 L. T. 624; 37 W. R. 569.—KAY, J.; *affirmed*, 43 Ch. D. 23; 38 W. R. 193.—C.A.

Blakey v. Latham.

Applied, Hassell v. Stanley (1896) 65 L. J. Ch. 494; [1896] 1 Ch. 607; 74 L. T. 375; 44 W. R. 405.—CHITTY, J.; Goodfellow v. Gray (1899) 68 L. J. Q. B. 1032; [1899] 2 Q. B. 498; 81 L. T. 314.—C.A.; *followed*, David v. Rees (1904) 73 L. J. K. B. 729; [1904] 2 K. B. 435; 91 L. T. 244; 52 W. R. 579.—C.A.

Jenner v. Morris (1860) 1 Dr. & Sm. 218, 334; 3 L. T. 497; 9 W. R. 29.—V.-C.; *affirmed*, (1861) 30 L. J. Ch. 361; 3 De G. F. & J. 45; 7 Jur. (N.S.) 375; 3 L. T. 871; 9 W. R. 391.—L.C. and L.J.

Jenner v. Morris, recognised.

Deare v. Soutten (1869) L. R. 9 Eq. 151, 154; 21 L. T. 523; 18 W. R. 203.—M.R.

Schoole v. Noble (1788) 1 H. Bl. 23.

Distinguished, Holroyd v. Breare (1820) 4 B. & Ald. 43, 700.—K.B.; *followed*, George v. Elston (1835) 1 Bing. N. C. 513; 1 Scott 518; 1 Hodges 63; 3 D. P. C. 419; 4 L. J. C. P. 167.—C.P.; *discussed*, McCormack v. Ross [1894] 2 Ir. R. 545.—Q.B.D.

Simpson v. Hanley (1813) 1 M. & S. 696.—K.B., *overruled*.

Taylor v. Waters (1816) 2 Chit. 303; 5 M. & S. 103.—K.B.

Simpson v. Hanley and Peacock v. Jeffery (1809) 1 Taunt. 426.—C.P., *not law*.

Thompson v. Parish (1859) 28 L. J. C. P. 153; 5 C. B. (N.S.) 685; 5 Jur. (N.S.) 986; 7 W. R. 210.—C.P.

WILLIAMS, J.—*Simpson v. Hanley* was decided solely on the authority of *Peacock v. Jeffery*, which is clearly not law, for the attempt there was not to set off costs incurred in the same action, but an attempt by A. to set off a debt, the subject of a cross action by B. against the amount of a judgment for which he had taken B. in execution.—p. 155.

Beard v. McCarthy (1840) 9 D. P. C. 136.—Q.B., *overruled*.

Thompson v. Parish (1859) 5 C. B. (N.S.) 685; 28 L. J. C. P. 153; 5 Jur. (N.S.) 986; 7 W. R. 210.—C.P.

COCKBURN, C.J.—No doubt there is a case which directly militates against the course we propose to take, viz., *Beard v. McCarthy*. Although I entertain the most profound respect for the learned judge who decided that case, I cannot help thinking that he went further than can be supported by any authority or any principle, when he said that "taking the defendant in execution is the same as if the defendant had paid the debt and costs."—p. 692.

WILLIAMS, J.—In fact our decision in this case is little short of overruling the case of *Beard v. McCarthy*.—p. 695.

Simpson v. Lamb (1857) 26 L. J. Q. B. 121; 7 El. & El. 84; 3 Jur. (N.S.) 412; 5 W. R. 227.—Q.B., *distinguished*.

Anderson v. Radcliffe (1858) El. Bl. & El. 806; 29 L. J. Q. B. 128; 6 Jur. (N.S.) 578; 1 L. T. 487; 8 W. R. 283.—K.B.

Simpson v. Lamb, *followed*.

Hilton v. Woods (1867) 36 L. J. Ch. 941, 945; L. R. 4 Eq. 432, 439; 16 L. T. 736; 15 W. R. 1105.—MALINS, V.-C.

Simpson v. Lamb, *rule applied*.

Pittman v. Prudential Deposit Bank (1896) 13 Times L. R. 110.—C.A. **ESHER, M.R., LOPES and RIGBY, L.JJ.**

Atkins v. Amber (1796) 2 Esp. 493.—C.P., *questioned*.

Brumwell v. Spiller (1870) 21 L. T. 672.—C.P.

BOVILL, C.J.—The action is brought upon a contract of sale between the plaintiffs' principal and the defendant, the latter being aware throughout that the plaintiffs were mere agents, and it has long been settled that under such circumstances agents cannot sue. . . . There are many cases . . . in all of which I entirely concur, whilst I have considerable doubt about the only case which had any tendency the other way; that case is *Atkins v. Amber*, which is not very satisfactorily reported. If may be there was some special property in the goods in that case or some other reason for the ruling of Chief Justice Eyre, which does not apply here.

Rabone v. Williams (1785) 7 Term Rep. 360, n.; 4 R. R. 463, n.—K.B., *principle adopted*.

New Zealand Land Co. v. Ruston (1880) 49 L. J. Q. B. 842, 845; 5 Q. B. D. 474, 479; 43

L. T. 473.—Q.B.D., reversed nom. **New Zealand Land Co. v. Watson** (1881) 50 L. J. Q. B. 433; 7 Q. B. D. 374; 44 L. T. 675; 29 W. R. 694.—C.A.

George v. Clagett (1797) 7 Term Rep. 359; 4

R. R. 462.—K.B., *inapplicable*.

Gordon v. Ellis (1846) 15 L. J. C. P. 178; 2 C. B. 821; 3 D. & L. 803; 10 Jur. 359.—C.P.

George v. Clagett, *applied*.

Drakeford v. Piercy (1866) 7 B. & S. 515, 521; 14 L. T. 403.—Q.B.

George v. Clagett, *distinguished*.

Watson v. Mid Wales Ry. (1837) 36 L. J. C. P. 285, 288; L. R. 2 C. P. 593, 600; 17 L. T. 94; 15 W. R. 1107.—C.P. *

George v. Clagett, *principle applied*.

Spurr v. Cass (1870) 39 L. J. Q. B. 24; L. R. 5 Q. B. 656; 23 L. T. 409.—Q.B.

George v. Clagett, *approved*.

Turner v. Thomas (1871) L. R. 6 C. P. 610; 40 L. J. C. P. 271; 24 L. T. 879; 19 W. R. 1170.—C.P.

WILLES, J.—The law with respect to the right of set-off by a third person dealing with a factor who sells goods in his own name and afterwards becomes bankrupt, is well established by *George v. Clagett*. Where the factor sells in his own name to a third person who buys without notice that he is dealing with an agent, the latter has ordinarily a right to be put in the same position as if the factor was the real principal in the transaction, and may set up against the concealed principal any defence which he may have against the factor. That rule is founded on principles of common honesty. One who satisfies his contract with the person with whom he has contracted ought not to suffer by reason of its afterwards turning out that there was a concealed principal. He who has a set-off pays. *Solvit qui compensat* (2 Emerigon, 279). There can be no doubt as to the justice of the principle of *George v. Clagett*.—p. 613.

George v. Clagett, *explained and followed*.

Borries v. Imperial Ottoman Bank (1873) 43 L. J. C. P. 3; L. R. 9 C. P. 38; 29 L. T. 689; 22 W. R. 92.—C.P.

George v. Clagett, *referred to*.

Thornton v. Maynard (1875) 44 L. J. C. P. 382, 386; L. R. 10 C. P. 695, 700; 33 L. T. 433.—C.P.

George v. Clagett, *applied*.

Thackrah v. Fergusson (1877) 25 W. R. 307.—GROVE and DENMAN, JJ.

George v. Clagett, *principle recognised*.

Maspons v. Mildred (1882) 51 L. J. Q. B. 604, 610; 9 Q. B. D. 530, 544; 47 L. T. 318; 30 W. R. 862.—C.A., affirmed nom. **Mildred v. Maspons** (1883) 53 L. J. Q. B. 33; 8 App. Cas. 874; 32 W. R. 125.—H.L. (E.).

George v. Clagett, *not applied*.

Kaltenbach v. Lewis (1855) 55 L. J. Ch. 58; 10 App. Cas. 617; 53 L. T. 787; 34 W. R. 477.—H.L. (E.).

LORD WATSON.—I am at a loss to understand what right or interest the respondents had in the unpaid price of the "Beaconsfield" pepper at the time of Meyer's death other than arose from the lien which they had upon the pepper itself for their advance of 2,000*l.* They were not the purchasers of the pepper, and therefore not within the principle of *George v. Clagett*.—p. 62.

George v. Claggett, discussed.
Cooke v. Eshelby (1887) 56 L. J. Q. B. 505; 12 App. Cas. 271; 56 L. T. 673; 35 W. R. 629.—H.L. (E.).

George v. Claggett, considered and applied.
Christie v. Taunton (1893) 62 L. J. Ch. 385; [1893] 2 Ch. 175; 63 L. T. 638; 41 W. R. 475.—STIRLING, J.

George v. Claggett, followed.
Montague v. Forwood (1893) [1893] 2 Q. B. 350; 4 R. 579; 69 L. T. 371; 42 W. R. 124.—C.A.

Waring v. Fayenck (1807) 1 Campb. 85.—K.B., explained.
Armstrong v. Stokes (1872) 41 L. J. Q. B. 253, 258; L. R. 7 Q. B. 598, 606; 26 L. T. 872; 21 W. R. 52.—Q.B.

BLACKBURN, J.—Two cases of *Waring v. Fayenck* and *Kymer v. Swerercopp* (1 Campb. 109) which were tried . . . in 1807, are generally cited on this subject, without, as it seems to me, paying sufficient attention to the fact that Kenyon & Co., in consequence of whose insolvency the questions arose, were London brokers not commission merchants. A broker always professes to make a contract between two principals, and though in recent times the strictness of the rules has to some extent been relaxed, in 1807 a London broker was bound by his bond . . . to make known to "such person with whom the agreement is made the name of his principal, if required, and not to deal on his own account."—p. 258.

Carr v. Hinchliff (1825) 4 B. & C. 547; 7 D. & R. 42; 4 L. J. (O.S.) K. B. 5.—K.B., approved.

Maggs v. Ames (1828) 6 L. J. (O.S.) C. P. 75; 4 Bing. 474; 1 M. & P. 294.—C.P.

Carr v. Hinchliff, applied.
Drakeford v. Piercy (1866) 7 B. & S. 515, 521; 14 L. T. 403.—Q.B.; *Thackrah v. Fergusson* (1877) 25 W. R. 307.—GROVE and DENMAN, JJ.

Purchase v. Salter (1841) 1 Q. B. 197; 1 G. & D. 682; 10 L. J. Q. B. 81.—Q.B.; 8 C. 11 L. J. Ex. 433, referred to.

Borries v. Imperial Ottoman Bank (1873) L. R. 9 C. P. 38; 43 L. J. C. P. 3; 29 L. T. 689; 22 W. R. 92.—C.P.

Fish v. Kempton (1849) 18 L. J. C. P. 206; 7 C. B. 687; 13 Jur. 750.—C.P., adopted.

Grissell v. Bristowe (1868) 37 L. J. C. P. 89, 98; L. R. 3 C. P. 112, 127; 17 L. T. 564.—C.P., reversed, 38 L. J. C. P. 10; L. R. 4 C. P. 36; 19 L. T. 390; 17 W. R. 123.—EX. CH.; *New Zealand Land Co. v. Ruston* (1880) 49 L. J. Q. B. 842, 846; 5 Q. B. D. 474, 480; 43 L. T. 473.—Q.B.D., reversed (*see ante*, col. 2545); *Maspons v. Mildred* (1882) 51 L. J. Q. B. 604, 610; 9 Q. B. D. 530, 544; 47 L. T. 318; 30 W. R. 862.—C.A. [affirmed *nom. Mildred v. Maspons*.—H.L. (E.)]; *Cooke v. Eshelby* (1887) 56 L. J. Q. B. 505; 12 App. Cas. 271, 282; 56 L. T. 673; 35 W. R. 629.—H.L. (E.); and *Montagu v. Forwood* (1893) [1893] 2 Q. B. 350; 4 R. 579; 69 L. T. 371; 42 W. R. 124.—C.A.

Semenza v. Brinsley (1865) 34 L. J. C. P. 161; 18 C. B. (N.S.) 467; 11 Jur. (N.S.) 409; 12 L. T. 265; 13 W. R. 634.—C.P., dictum adopted.

Borries v. Imperial Ottoman Bank (1873) 43

L. J. C. P. 3; L. R. 9 C. P. 38; 29 L. T. 689; 22 W. R. 92.—C.P.

Semenza v. Brinsley, explained.
Henley, In re, Dixon, Ex parte (1876) 4 Ch. D. 133; 46 L. J. Bk. 20; 35 L. T. 644; 25 W. R. 105.—C.A.

BRETT, J.A.—It is true that Mr. Justice Willes, in *Semenza v. Brinsley*, states it to be necessary that the agent should have the authority of the principal for selling in his own name; but he was only dealing with a demurrer to a plea; and at the end of the judgment he says it was a great pity that the parties did not go on to try the facts; and if the facts had been tried, I have no doubt that as soon as he found that the agent was entrusted with the goods as a factor, he would have held that that proved authority given to him by the principal to sell in his own name, so far as anybody was concerned to whom some limitation of that authority was not disclosed.—p. 138.

Semenza v. Brinsley, referred to.
Maspons v. Mildred (1882) 51 L. J. Q. B. 604, 610; 9 Q. B. D. 530, 544; 47 L. T. 318; 30 W. R. 862.—C.A., affirmed. *See ante*, col. 3065.

Semenza v. Brinsley, explained and adopted.
Cooke v. Eshelby (1887) 56 L. J. Q. B. 505; 12 App. Cas. 271; 56 L. T. 673; 35 W. R. 629.—H.L. (E.).

Borries v. Imperial Ottoman Bank (1873), 43 L. J. C. P. 3; L. R. 9 C. P. 38; 29 L. T. 689; 22 W. R. 92.—C.P., referred to.
Cooke v. Eshelby (1887) 56 L. J. Q. B. 505; 12 App. Cas. 271, 278; 56 L. T. 673; 35 W. R. 629.—H.L. (E.).

Henley, In re, Dixon, Ex parte (1876) 46 L. J. Bk. 20; 4 Ch. D. 133; 35 L. T. 644; 25 W. R. 105.—C.A., applied.

Thackrah v. Fergusson (1877) 25 W. R. 307.—GROVE and DENMAN, JJ.; *Stevens v. Biller* (1883) 53 L. J. Ch. 249; 25 Ch. D. 31; 50 L. T. 36; 32 W. R. 419.—C.A.*

Cooke v. Eshelby (1887) 56 L. J. Q. B. 505; 12 App. Cas. 271; 56 L. T. 673; 35 W. R. 629.—H.L. (E.), principle applied.

Sheffield (Earl) v. London Joint Stock Bank (1888) 57 L. J. Ch. 986; 13 App. Cas. 333; 58 L. T. 735; 37 W. R. 33.—H.L. (E.).

Cooke v. Eshelby, dictum distinguished.
Cooper v. Strauss (1898) 14 Times L. R. 233.—KENNEDY, J.

Dresser v. Norwood, 14 C. B. (N.S.) 574; 10 Jur. (N.S.) 23.—C.P.; reversed, (1864) 34 L. J. C. P. 48; 10 Jur. (N.S.) 851; 11 L. T. 111; 12 W. R. 1030.—EX. CH.

Dresser v. Norwood, dictum adopted.
McCaull v. Strauss (1883) Cab. & E. 106, 111.—STEPHEN, J.

Blakesley v. Smallwood (1846) 15 L. J. Q. B. 185; 8 Q. B. 538; 10 Jur. 470.—Q.B., discussed.

Mardall v. Thellusson (1852) 21 L. J. Q. B. 410; 18 Q. B. 857; 17 Jur. 389.—Q.B.

Mardell v. Thellusson, overruled.
Rees v. Watts (1855) 25 L. J. Ex. 30; 11 Ex. 410; 1 Jur. (N.S.) 1023; 3 W. R. 575.—EX. CH.; affirming *S. C. nom. Watts v. Rees* (1854) 23 L. J. Ex. 238; 9 Ex. 696.—EX.

COLERIDGE, J. (for the Court).—Whether on the whole the decision [*Blakesley v. Smallwood*] was correct or not, is immaterial to the present argument, for it is only an authority to this extent, that an account stated by an executor as such must be taken to show a debt due from the testator to the other party; and against this it is clear that a debt due from that other party to the testator may be set off.—p. 32.

Mardell v. Thellusson (*supra*), *reversed*, (1857) 6 El. & Bl. 976; 3 Jur. (N.S.) 314; 5 W. R. 25.—EX. CH.

Lambarde v. Older (1853) 23 L. J. Ch. 18; 17 Beav. 542; 17 Jur. 1110; 2 W. R. 32.—M.R., *applied*.

Gregson, In re, Christison v. Bolam (1887) 57 L. J. Ch. 221; 36 Ch. D. 223, 227; 57 L. T. 250; 35 W. R. 803.—NORTH, J.

Rees v. Watts (1855) 25 L. J. Ex. 30; 11 Ex. 410; 1 Jur. (N.S.) 1023; 3 W. R. 575.—EX. CH., *applied*.

Newell v. National Provincial Bank of England (1876) 1 C. P. D. 496; 45 L. J. C. P. 285; 34 L. T. 533; 24 W. R. 458.—C.P.; and **Hallett v. Hallett** (1879) 49 L. J. Ch. 61; 13 Ch. D. 232; 41 L. T. 723; 28 W. R. 321.—FRY, J.

Rees v. Watts, referred to.

Gregson, In re, Christison v. Bolam (1887) 57 L. J. Ch. 221; 36 Ch. D. 223; 57 L. T. 250; 35 W. R. 803.—NORTH, J.

Rees v. Watts, discussed.

Watkins v. Lindsay (1898) 67 L. J. Q. B. 362; 5 Manson 25.

WRIGHT, J.—On the one side it is contended for the brokers that the case is one of mutual credits or dealings within sect. 38 of the [Bankruptcy] Act of 1883. On the other side the trustee contends . . . that, according to the doctrine established in ordinary administrations, *Rees v. Watts, Newell v. National Provincial Bank*, and *Gregson, In re*—a debt which did not become payable by the deceased in his lifetime, cannot be set off against a debt which became payable to him during his life. . . . I cannot find that the doctrine, or the authorities on which it rests have been recognised as applicable in bankruptcy where, as here, the claim on either side is a claim resulting from contractual dealings between the bankrupt and his creditor, and it seems to me that if the credits or dealings in question were mutual in their origin, it makes no difference in bankruptcy that there has, in respect of one of them, been a transmission of right in consequence of *Cronmire's* [the bankrupt's] death.—p. 363.

Newell v. National Provincial Bank of England (1876) 45 L. J. C. P. 285; 1 C. P. D. 496; 34 L. T. 533; 24 W. R. 458.—C.P.D., *applied*.

Hallett v. Hallett (1879) 49 L. J. Ch. 61; 13 Ch. D. 232, 235; 41 L. T. 723; 28 W. R. 321.—FRY, J.; **Gregson, In re, Christison v. Bolam** (1887) 57 L. J. Ch. 221; 36 Ch. D. 223; 57 L. T. 250; 35 W. R. 803.—NORTH, J.

Newell v. National Provincial Bank of England, discussed.

Watkins v. Lindsay (1898) 67 L. J. Q. B. 362; 5 Manson 25.—WRIGHT, J. See extract, *supra*.

Hallett v. Hallett (1879) 49 L. J. Ch. 61; 13 Ch. D. 232; 41 L. T. 723; 28 W. R. 321.

—FRY, J., *applied*.

Gregson, In re, Christison v. Bolam (1887) 57 L. J. Ch. 221; 36 Ch. D. 223, 227; 57 L. T. 250; 35 W. R. 803.—NORTH, J.

Hallett v. Hallett, distinguished.

Weston, In re, Davies v. Tagart (1900) 69 L. J. Ch. 555; [1900] 2 Ch. 164; 82 L. T. 591; 48 W. R. 467.

STIRLING, J.—There (*Hallett v. Hallett*) a policy of assurance on the life of Mr. Hallett was taken in the names of trustees, and a settlement was executed, by virtue of which the bonuses payable under the policy were to be held in trust for Mr. Hallett, and the money assured under the trusts of the settlement. The settlement in point of fact, contained a declaration that nothing therein contained should be construed to vest in the trustees any bonus or additions which might from time to time be declared on the policy of insurance, but the same and every part thereof should be from time to time paid to Hallett, his executors, administrators, and assigns, for his and their own use and benefit, and might be applied as he or they might direct. . . . That decision, therefore, was grounded on the view that the bonuses were not comprised in the settlement at all. That is entirely distinguishable from the present case, because, according to the view adopted by the learned judge, the property there in question was on terms excluded from the operation of the settlement. Here the deed contains an express trust in favour of Edward Weston.—p. 561.

Gregson, In re, Christison v. Bolam (1888) 57 L. J. Ch. 221; 36 Ch. D. 223; 57 L. T. 250; 35 W. R. 803.—NORTH, J., *discussed*.

Watkins v. Lindsay (1898) 67 L. J. Q. B. 362; 5 Manson 25.—WRIGHT, J. See extract, *supra*.

Luckie v. Bushby (1853) 22 L. J. C. P. 220; 13 C. B. 864; 1 C. L. R. 685; 17 Jur. 625; 1 W. R. 455.—C.P., *distinguished*.

Progress Assurance Company, In re, Bates, Ex parte (1870) 39 L. J. Ch. 496; 22 L. T. 430; 18 W. R. 722.—M.R.

ROMILLY, M.R. said that: It was true the right [of set off] did not arise till the amount . . . was ascertained, but no difficulty on that score remained [as here the amount due had been admitted]. The case of *Luckie v. Bushby* depended on the form of action, which was for unliquidated damages.—p. 497.

Stracey v. Decy (1789) 1 Esp. 469, n.; 7 Term Rep. 361, n.—K.B., *inapplicable*.

Gordon v. Ellis (1846) 15 L. J. C. P. 178; 2 C. B. 821; 3 D. & L. 803; 10 Jur. 339.—C.P.

Cavendish v. Geaves (1857) 27 L. J. Ch. 314; 24 Beav. 163; 3 Jur. (N.S.) 1086; 5 W. R. 615.—M.R., *approved but distinguished*.

Pellas v. Neptune Marine Insurance Co. (1879) 5 C. P. D. 34, 39; 49 L. J. C. P. 153; 42 L. T. 35; 28 W. R. 405.—C.A.

•**BRAMWELL, L.J.**—We fully agree with the principles laid down in that case; but the facts before us seem to go beyond them.

Hanson, Ex parte (1806) 12 Ves. 346; 8 R. R. 335.—L.C., *considered*.

Strong v. Foster (1856) 25 L. J. C. P. 106; 17 C. B. 201; 4 W. R. 151.—C.P.

Cochrane v. Green (1860) 30 L. J. C. P. 97; 9 C. B. (N.S.) 448; 7 Jur. (N.S.) 548; 3 L. T. 475; 9 W. R. 124.—C.P., *applied*.

Agra and Masterman's Bank v. Leighton (1866) 36 L. J. Ex. 33, 37; L. R. 2 Ex. 56, 65; 4 H. & C. 656.—Ex.; and **Thornton v. Maynard** (1875) 44 L. J. C. P. 382, 385; L. R. 10 C. P. 695, 698; 33 L. T. 433.—C.P.

Cochrane v. Green, *dicta disapproved*.

Middleton v. Pollock, Nugee, Ex parte (1875) L. R. 20 Eq. 29; 44 L. J. Ch. 584; 33 L. T. 240; 23 W. R. 766.

JESSEL, M.R.—The petitioner relied on a decision of the Court of Common Pleas (*Cochrane v. Green*), in which it was supposed, certainly by Williams, J., and probably by Erle, C.J., that the established rule of equity with reference to set-off is to look upon the beneficial owner as the real owner, and by injunction compel other Courts to recognise his rights, and to disregard the legal title of the trustee. They appear to have grounded their decision on *Clark v. Cort*, which the Lord Chief Justice says seems to be distinct authority that a Court of equity will allow the defendant, where the debt is due to a trustee for him by the plaintiff, to have all the benefit of a legal owner: in other words, the Court of equity will allow a set-off. If I may say so, with great respect to those learned judges, that is all right with one addition, which is, that it must have been a case where there was equitable jurisdiction. The mere fact of a cross-demand existing would not itself give equitable jurisdiction, nor the mere fact that one of the demands was held by a trustee, that is to say, that one of the demands, though still a legal demand, was, as regards beneficial ownership, the property of the person who was liable to the other demand. I never heard of a bill to enforce such a set-off, although there was a time when every possible device was resorted to in order to obtain an injunction to restrain an action at law. In *Clark v. Cort*, and in the next succeeding case of *Rawson v. Samuel* (Cr. & Ph. 154), Lord Cottenham does state the case exactly as I have mentioned it. He says (at p. 159): "The case, then, is not that of a mere assignee of a legal debt coming into equity to have the benefit of a set-off which he could not have at law. It is, therefore not necessary to decide what the Court would do in such a case, though the decision in *Williams v. Davies* (2 Sim. 461) goes much further than such a case would require." Then he goes on (at p. 160): "As equity recognises the assignee of a debt as the creditor, and as these demands, if both were recoverable at law, would be the subject of a set-off, so if equity has jurisdiction of the subject-matter it will enforce the set-off;" not that it will enforce the set-off without any special jurisdiction. He would have said, "so equity will enforce the set-off," if that were the doctrine; but he says, "so if equity has jurisdiction of the subject-matter," which is the condition precedent. It seems to me that that was not noticed by the learned judges in the Court of Common Pleas. When you come to *Rawson v. Samuel*, I think he puts that very plainly. He says (at p. 178): "We speak familiarly of equitable set-off as distinguished from the set-off at law, but it will be found that this equitable set-off exists in cases where the party

seeking the benefit of it can show some equitable ground for being protected against his adversaries' demand." Then he goes on (at p. 179): "Several cases were cited in support of the injunction, but in every one of them except *Williams v. Davies*"—which he disapproved of—"it will be found that the equity of the bill impeached the title to the legal demand." Therefore I am not able to assent to the doctrine laid down by the Court of Common Pleas; and if it had been necessary—which it is not—in this case to decide upon that ground, I should have thought I was following the decision of Lord Cottenham in deciding exactly the other way.—p. 35.

Cochrane v. Green, *distinguished*.

Willis, In re, Morier, Ex parte (1879) 49 L. J. Bk. 9, 13; 12 Ch. D. 491, 498; 40 L. T. 792; 28 W. R. 235.—C.A.

Elkin v. Baker (1862) 31 L. J. C. P. 177; 11 C. B. (N.S.) 526; 8 Jur. (N.S.) 915.—C.P., *explained and applied*.

Thornton v. Maynard (1875) 44 L. J. C. P. 382, 385; L. R. 10 C. P. 695, 699; 33 L. T. 433.—C.P.

Macfarlane v. Norris (1862) 31 L. J. Q. B. 245; 2 B. & S. 783; 9 Jur. (N.S.) 74; 6 L. T. 492.—Q.B., *adopted*.

Maspons v. Mildred (1882) 9 Q. B. D. 530, 548; 51 L. J. Q. B. 604; 47 L. T. 318; 30 W. R. 862.—C.A. [affirmed, H.L.]

Dickson v. Evans (1794) 6 Term Rep. 57; 3 R. R. 119.—K.B., *adopted*.

Milan Tramways Co., In re, Theys, Ex parte (1884) 25 Ch. D. 587, 594.—C.A.; **Gillespie, In re, Reid, Ex parte** (1885) 54 L. J. Q. B. 342; 14 Q. B. D. 965; 52 L. T. 692; 33 W. R. 707; 2 Morrell 100.—CAVE, J.

Dickson v. Evans, *discussed*.

Graham v. Belfast and N. Counties Ry. (1900), [1901] 2 Ir. R. 13.—Q.B.D. See judgment of PALLES, C.B., who dissented.

Dickson v. Evans, *referred to*.

Daintrey, In re, Mant, Ex parte (1899) 69 L. J. Q. B. 207, 210; [1900] 1 Q. B. 546, 550; 82 L. T. 239; 7 Manson 107.—WRIGHT and BIGHAM, JJ. (reversed, C.A.).

Smith v. Parkes (1852) 16 Beav. 115.—M.R., *distinguished*.

Watson v. Mid Wales Ry. (1867) 36 L. J. C. P. 285; L. R. 2 C. P. 593; 17 L. T. 94; 15 W. R. 1107.—C.P.

BOVILL, C.J.—In all the cases there was some qualification in the first contract, or some connection between the two transactions. The strangest case cited was *Smith v. Parkes*, but that decision went on the footing that both debts arose out of the same partnership transactions. That being the true principle, the case does not apply. Here there is an absolute debt by bond; no limitation by the subsequent instrument or otherwise; no lien, no charge, nothing to affect it; the transactions are quite unconnected. . . .—p. 288.

Smith v. Parkes, *discussed and dictum adopted*.

Newfoundland Government v. Newfoundland

Ry. (1888) 57 L. J. P. C. 35; 13 App. Cas. 199; 58 L. T. 285.—P.C.

Isberg v. Bowden (1853) 22 L. J. Ex. 322; 8 Ex. 852; 1 C. L. R. 722.—EX., *observations adopted*.

Christie v. Taunton (1893) 62 L. J. Ch. 385; [1893] 2 Ch. 175; 3 R. 404; 68 L. T. 638; 41 W. R. 475.—STIRLING, J.

Wilson v. Gabriel (1863) 4 B. & S. 243; 8 L. T. 502; 11 W. R. 803.—Q.B., *principles applied*.

Christie v. Taunton (1893) 62 L. J. Ch. 385; [1893] 2 Ch. 175; 3 R. 404; 68 L. T. 638; 41 W. R. 475.—STIRLING, J.

Watson v. Mid Wales Ry. (1867) 36 L. J. C.P. 285; L. R. 2 C.P. 593; 17 L. T. 94; 15 W. R. 1107.—C.P., *observed upon*.

Higgs v. Northern Assam Tea Co. (1869) 38 L. J. Ex. 233, 236; L. R. 4 Ex. 387, 396; 17 W. R. 1125.—EX.

Watson v. Mid Wales Ry., *principle applied*.

Harter v. Colman (1882) 51 L. J. Ch. 481, 483; 19 Ch. D. 630, 634; 46 L. T. 154; 30 W. R. 484.—FRY, J.

Watson v. Mid Wales Ry., *followed*.

Milan Tramways Co., In re, *Theys*, Ex parte (1882) 52 L. J. Ch. 29, 31; 22 Ch. D. 122, 126; 48 L. T. 213; 31 W. R. 107.—KAY, J., *affirmed*, (1884) 25 Ch. D. 587.—C.A.; **Newfoundland Government v. Newfoundland Ry.** (1888) 57 L. J. P. C. 85; 13 App. Cas. 199, 210; 58 L. T. 285.—P.C.

Watson v. Mid Wales Ry., *considered and applied*.

Christie v. Taunton (1893) 62 L. J. Ch. 385; [1893] 2 Ch. 175; 3 R. 404; 68 L. T. 638; 41 W. R. 475.

STIRLING, J.—I think that if the company were being sued by the bank, it would be entitled to be placed in the same position as it occupied relatively to Taunton on November 6, 1890, on which day Taunton was indebted to the company for calls payable on November 20, while the company was indebted to Taunton on the debentures which did not become payable until a later date. If, then, no winding-up had intervened, and Taunton, or the bank in Taunton's name, had sued on the debentures, the question would be whether the company could set off the debt which accrued due on November 3 (the date of the call), but did not actually become payable until November 20. Neither *Watson v. Mid Wales Ry.* nor *Wilson v. Gabriel* (supra) covers this point so far as actual decision goes; for, in the former, no debt had accrued due to the defendants at the date of the notice, and in the latter the debt at the date of the notice appears to have been both due and payable. I think, however, on the principles laid down by Blackburn, J. in *Wilson v. Gabriel*, the set-off ought to be admitted.

Watson v. Mid Wales Ry., *not applied*.

National Bank of Scotland v. Dewhurst (1896) 1 Com. Cas. 318, 321.—MATHEW, J. See extract, ante, col. 3058.

Higgs v. Northern Assam Tea Co. (1869) 38 L. J. Ex. 233; L. R. 4 Ex. 387; 17 W. R. 1125.—EX., *applied*.

Northern Assam Tea Co., In re (1870) 39

L. J. Ch. 829; L. R. 10 Eq. 458; 23 L. T. 639; 18 W. R. 1082.—M.R.; **South Essex Estuary Co.**, In re, *Chorley*, Ex parte (1870) 40 L. J. Ch. 153; L. R. 11 Eq. 157, 163; 19 W. R. 430.—V.-C.; **Sankey Brook Coal Co. v. Marsh** (1871) 40 L. J. Ex. 125; L. R. 6 Ex. 185, 189; 24 L. T. 479; 19 W. R. 1012.—EX.

Higgs v. Northern Assam Tea Co., *considered*.

Crouch v. Crédit Foncier (1873) 42 L. J. Q. B. 183; L. R. 8 Q. B. 371, 385; 29 L. T. 259; 21 W. R. 946.—Q.B.; **Hercules Insurance Co.**, In re, *Brunton's Claim* (1874) 44 L. J. Ch. 450; L. R. 19 Eq. 302, 319; 31 L. T. 747; 23 W. R. 286.—V.-C.; **Rouford Canal Co.**, In re, *Pocock's Claim* (1883) 52 L. J. Ch. 729; 24 Ch. D. 85, 91; 49 L. T. 118.—KAY, J.

Exchange Banking Co., In re, *Fliteroff's Case* (1882) 52 L. J. Ch. 217; 21 Ch. D.

519; 48 L. T. 86; 31 W. R. 174.—C.A.

Dicta adopted, **Guinness v. Land Corporation of Ireland** (1882) 52 L. J. Ch. 177; 22 Ch. D. 349, 380; 47 L. T. 517; 31 W. R. 341.—C.A.; *distinguished*, **Denham & Co.**, In re (1883) 25 Ch. D. 752; 50 L. T. 523; 32 W. R. 487.—CHITTY, J.; *distinguished*, **London Financial Association v. Kelk** (1884) 53 L. J. Ch. 1025; 26 Ch. D. 107; 50 L. T. 492.—C.A.; *referred to*, **Faure Electric Accumulator Co.**, In re (1888) 58 L. J. Ch. 48; 40 Ch. D. 141, 150; 54 L. T. 918; 37 W. R. 116.—KAY, J.; **Liverpool Household Stores Association**, In re (1890) 59 L. J. Ch. 616, 620; 62 L. T. 873; 2 Meg. 217.—KEKEWICH, J.; **Sharpe**, In re (1891) 61 L. J. Ch. 193; [1892] 1 Ch. 154; 65 L. T. 806; 40 W. R. 241.—C.A.; and **Balgeooley Distillery Co.**, In re (1886) 17 L. R. Ir. 239, 268.—C.A.; *dictum questioned*, **National Bank of Wales**, In re (1898) 68 L. J. Ch. 634; [1899] 2 Ch. 629, 646; 81 L. T. 363; 48 W. R. 99.—WRIGHT, J., *reversed*, C.A.; *applied*, **Moxham v. Grant** (1899) 69 L. J. Q. B. 97; [1900] 1 Q. B. 88, 94; 7 Mauns. 65.—C.A.; *dictum adopted*, **Towers v. African Tug Co.** (1904) 73 L. J. Ch. 395; [1904] 1 Ch. 558, 572; 90 L. T. 298; 52 W. R. 532.—C.A.

Chapple v. Durston (1830) 1 C. & J. 1.—EX., *adopted*.

Rawley v. Rawley (1876) 1 Q. B. D. 460, 469; 45 L. J. Q. B. 675; 35 L. T. 191; 24 W. R. 995.—C.A.

Chapple v. Durston, *referred to*.

Dingle v. Coppen (1898) 68 L. J. Ch. 337; [1899] 1 Ch. 726, 738; 79 L. T. 693; 47 W. R. 279.—BYRNE, J.

Coulson v. Jones (1806) 6 Esp. 50.—K.B., *overruled*.

Duncan v. Grant (1834) 4 Tyr. 818.—EX.

BOLLAND, B.—In determining the weight of the conflicting authorities, I am inclined to accede to Lord Tenterden's opinion (*Webber v. Penn. Ry. & M.* 413), as being more consistent with the words of the statute (2 Geo. 2, c. 22, s. 13), and not likely to have been expressed by him in the manner it was, had he not formed a deliberate opinion on the subject contrary to that of Lord Ellenborough in *Coulson v. Jones*.—p. 818.

SETTLED LAND.

1. SETTLEMENTS AND SETTLED ESTATES.
2. SALES.
3. LEASES.
4. DEDICATIONS.
5. PETITIONS.
6. TRUSTEES.
7. CAPITAL MONEY.

1. SETTLEMENTS AND SETTLED ESTATES.

Birtle's Settled Estates, In re (1863) 32 L. J. Ch. 439; 2 N. R. 252; 8 L. T. 408; 11 W. R. 739.—L.J.J., *referred to*.
Ailesbury (Marquis) and Iveagh (Lord), In re [1893] 2 Ch. 345 (*post*, col. 3074).—

Laing's Trusts, In re (1866) 35 L. J. Ch. 282; L. R. 1 Eq. 416; 12 Jur. (N.S.) 119; 14 L. T. 56; 14 W. R. 328.—WOOD, V.-C., *commented on*.

Searle's Settlement Trusts, In re (*or* **Searle, In re, Searle v. Baker**) (1900) 69 L. J. Ch. 712; [1900] 2 Ch. 829, 833; 83 L. T. 364; 49 W. R. 44.—KEKEWICH, J.

Liddell, In re, Liddell v. Liddell (1882) 52 L. J. Ch. 207; 31 W. R. 238.—FRY, J., *followed*.

Sparrow's Settled Estate, In re [1892] 1 Ch. 412; 61 L. J. Ch. 260; 66 L. T. 276; 40 W. R. 326.

NORTH, J.—I think the report of that case in the *Weekly Reporter* must be incorrect in stating that two only of the testator's children were infants. I think they must all have been infants.—p. 414.

[They were all infants. The report in the Law Journal agrees with this. *See note*.]

Shepherd's Settled Estate, In re (1869) 39 L. J. Ch. 173; L. R. 8 Eq. 571; 21 L. T. 525.—MALINS, V.-C., *dictum questioned*.

Bective Estate, In re (1891) 27 L. R. Ir. 364.

PORTER, M.R.—As to the contention that part of the estate being settled land, the whole is, it rests on nothing more than a *dictum* of Malins, V.-C., in *Shepherd's Settled Estate*, not necessary for the decision of the case; a *dictum*, too, in reference to another Act of Parliament (19 & 20 Vict. c. 120) where the language is essentially different ("including any such instruments affecting the estates of any one or more of such persons exclusively," sect. 1), and in a case where the estate was disposed of in undivided moieties, and not merely cumbered with annuities.—p. 368.

Meade's Settled Estates, In re [1897] 1 Ir. R. 121.—PORTER, M.R., *followed*.

Tibbit's Settled Estates, In re (1897) 66 L. J. Ch. 660; [1897] 2 Ch. 149; 77 L. T. 78; 46 W. R. 3.—NORTH, J.

Tibbit's Settled Estates, In re, and Meade's Settled Estates, In re, distinguished.

Powys-Keck and Hart's Contract, In re (1898) 67 L. J. Ch. 331; [1898] 1 Ch. 617; 78 L. T. 287; 46 W. R. 389.—STIRLING, J.

Tibbit's Settled Estates, In re, and Meade's Settled Estates, In re, distinguished.

Powys-Keck and Hart's Contract, In re, adhered to.

Du Cane and Nettlefold's Contract, In re

(1898) 67 L. J. Ch. 393; [1898] 2 Ch. 96, 104; 78 L. T. 458; 46 W. R. 523.

STIRLING, J.—The question which I have to decide is whether it is necessary that such trustees [*i.e.*, for the purpose of the Settled Land Acts] should be appointed, and in this respect it appears to me that the case differs from those which were cited by the advisers of the purchaser in their requisition—namely, *Tibbit's Settled Estates, In re*, and *Meade's Settled Estates, In re*, where the question was, as I conceive, simply this—whether a reasonable case had been made for the exercise of the jurisdiction which is conferred on the Court by sect. 38 of the Settled Land Act, 1882, by the appointment of trustees for the purposes of the Act.—p. 398.

Ailesbury (Marquis) and Iveagh (Lord), In re (1893) 62 L. J. Ch. 713; [1893] 2 Ch. 345; 3 R. 440; 69 L. T. 101; 41 W. R. 644.—STIRLING, J.

Referred to, on question of appointment of trustees, **Stamford (Earl), In re, Payner v. Stamford** (1895) 65 L. J. Ch. 134; [1896] 1 Ch. 288 (*post*, col. 3095); **Spencer's Settled Estates, In re** (1902) 72 L. J. Ch. 59; [1903] 1 Ch. 75, 82 (*post*, col. 3095).

Ailesbury (Marquis) and Iveagh (Lord), In re, distinguished.

Du Cane and Nettlefold's Contract, In re [1898] 2 Ch. 96, 101.—STIRLING, J. (*supra*).

Ailesbury (Marquis) and Iveagh (Lord), In re, and Du Cane and Nettlefold's Contract, In re, approved.

Mundy and Roper's Contract, In re (1898) 68 L. J. Ch. 135; [1899] 1 Ch. 275, 294; 79 L. T. 583; 47 W. R. 226.—C.A.

CHITTY, L.J. (for self and **LINDLEY, M.R., v. WILLIAMS, L.J.** doubting).—The judgment in that case [*Ailesbury (Marquis) and Iveagh (Lord), In re*] has been criticised by some learned writers, particularly in regard to the jointure of Maria, the dowager marchioness. But I think the judgment was right and founded on the true view of the statute. It was held that the settlement was made up of the series of deeds beginning with the deed of 1796 and ending with the deed of 1885, and that, treating these deeds as the settlement, the vendor, who was tenant for life in possession under the deed of 1885 only, had power to bind the jointure of the dowager marchioness which arose under the earlier deeds of the series—namely, those of 1796, 1826, and 1833—and also to bind the jointure of Lady Evelyn Riddell, which arose under the intermediate deed of 1863. It was, no doubt, a circumstance in that case that by the deed of 1885 the life estate of the marquis Ernest under the deed of 1863 was restored to him; and this circumstance in connection with sub-sect. 4 of sect. 2 [Settled Land Act, 1882] relating to the time of the settlement taking effect, was relied upon by the learned judge. But this circumstance would not have carried the compound settlement further back than the deed of 1863. He held, however, that the Savernake estate stood limited to uses in favour of various persons by way of succession under or by virtue of the series of deeds, and that the marchioness Maria was one of the persons taking under the series of deeds, although she did not take by way of succession to the vendor. . . . I see no inconsistency in holding that there may be at the same time a

more comprehensive settlement consisting of several deeds, and a less comprehensive settlement constituted by one of the deeds only. The language of sect. 2, sub-sect. 1: "Any instrument or any number of instruments," whereby the land "stands for the time being limited," justifies this conclusion. Had I been of a different opinion on this point I might have found some difficulty on the main questions involved in our present decision. The point, however, was decided by Stirling, J., in *Du Cane and Nettlefold's Contract, In re*. In his judgment in that case he said, "It is quite plain that one instrument may constitute a settlement, although it is to be admitted that several instruments may, under the same definition . . . also constitute a settlement." I agree with his reasoning and with his decision on this point.—p. 142.

Du Cane and Nettlefold's Contract, In re, followed.

Cornwallis-West and Munro's Contract. In re (1903) 72 L. J. Ch. 499; [1903] 2 Ch. 150; 88 L. T. 351; 51 W. R. 620.—FAIRWELL, J.

Mundy and Roper's Contract, In re, 78 L. T. 547.—KEKEWICH, J.; *reversed*, (1898) 68 L. J. Ch. 135; [1899] 1 Ch. 275; 79 L. T. 583; 47 W. R. 226.—C.A.

Mundy and Roper's Contract, In re.

Deferred to, Bath and Wells (Bishop), Ex parte [1899] 2 Ch. 138, 146 (*post*, col. 3076); *applied*, Att.-Gen. v. Owen; Att.-Gen. v. Coulson (1899) 68 L. J. Q. B. 779; [1899] 2 Q. B. 253, 263; 81 L. T. 121; 63 J. P. 611.—Q.B.D.

Mundy and Roper's Contract, In re, applied.

Campbell, In re (1901) 71 L. J. K. B. 160; [1902] 1 K. B. 113, 119; 85 L. T. 708.—C.A.

STIRLING, L.J.—The question is whether this property is, within the meaning of sect. 2, sub-sect. 1 of the Settled Land Act, 1882, property which "stands for the time being limited to or in trust for any persons" by way of succession." Now these words have been the subject of decision in the C. A. in *Mundy and Roper's Contract, In re*. There the C. A. came to the conclusion that jointures and portions limited to arise on the death of a tenant for life came within the meaning of those words.—p. 164.

Mundy and Roper's Contract, In re.

Considered, Barlow's Contract, In re (1902) 72 L. J. Ch. 214; [1903] 1 Ch. 382; 88 L. T. 84; 51 W. R. 399.—SWINFERN EADY, J.; *distinguished*, Cornwallis-West and Munro's Contract, In re (*supra*).

Att.-Gen. v. Owen, Att.-Gen. v. Coulson (*supra*).

Applied, St. Albans (Duke), In re (1900) 69 L. J. Ch. 863; [1900] 2 Ch. 873, 881 (*ante*, col. 2888); *approved*, Campbell, In re [1902] 1 K. B. 113, 123 (*supra*).

Campbell, In re (*supra*), applied.

Berry v. Gaukroger [1903] 2 Ch. 116, 122; 72 L. J. Ch. 319.—BUCKLEY, J.; *reversed*, C.A. (see *ante*, col. 2887).

Howard v. Shrewsbury (Earl) (1874) 43 L. J. Ch. 495; L. R. 17 Eq. 378; 29 L. T. 862; 22 W. R. 290.—JESSEL, M.R.

Applied, Crompton v. Jarratt (1885) 54 L. J. Ch. 1109; 30 Ch. D. 298, 309; 53 L. T. 603; 33 W. R. 913.—NORTH, J. (affirmed, C.A.); Durham (Earl), In re, Grey (Earl) v. Durham (Earl) (1887)

57 L. T. 164.—STIRLING, J. *And see* vol. i. col. 1300.

Knowles' Settled Estates, In re (1884) 54 L. J. Ch. 264; 27 Ch. D. 707; 51 L. T. 655; 33 W. R. 364.—PEARSON, J., *distinguished*.

Mead's Settled Estates, In re (1896) [1897] 1 Ir. R. 121.

PORTER, M.R.—This is not a derivative settlement, as in *Knowles' Settled Estates*, where the fee in remainder after a life estate, having been regularly appointed so as to vest in the object of the power was afterwards (next day) put in settlement upon an entirely new set of trusts. The latter constituted the "derivative settlement," and could not take effect until every trust in reference to the land contained in the original settlement was executed. The first settlement was complete and performed. The second was for conveyancing purposes an independent settlement, just as if the fee had been derived from some other source, though, of course, the original settlement was a vital part of the title.—p. 123.

Knowles' Settled Estates, In re, applied.

Du Cane and Nettlefold's Contract, In re [1898] 2 Ch. 96, 100 (*supra*, col. 3073).

Pocock and Pranker's Contract, In re

(1895) 65 L. J. Ch. 211; [1896] 1 Ch. 302; 73 L. T. 706; 44 W. R. 247.—STIRLING, J. *Applied*, Osborne to Bright's, Limited, In re (1902) 71 L. J. Ch. 285; [1902] 1 Ch. 335, 340; 86 L. T. 178; 50 W. R. 468.—KEKEWICH, J.

Byron's Charity, In re (1883) 53 L. J. Ch.

152; 23 Ch. D. 171; 48 L. T. 515; 31 W. R. 517.—FRY, J., *followed*.

Jesus Coll., Cambs., Ex parte (1884) 50

L. T. 583.—KAY, J., and Bethlehem and Bridewell Hospitals, In re (1885) 54 L. J. Ch. 1143; 30 Ch. D. 541; 53 L. T. 558.—CHITTY, J., *followed*.

Castle Bytham (Vicar) and Midland Ry., Ex parte, (1894) 64 L. J. Ch. 116; [1895] 1 Ch. 348, 354; 13 R. 24; 71 L. T. 606; 43 W. R. 156.—STIRLING, J. *And see* Martin and Varlow, In re (1894) 13 R. 189; 43 W. R. 247.—NORTH, J.

Castle Bytham (Vicar) and Midland Ry., Ex parte, observations approved and adopted.

Bath and Wells (Bishop), Ex parte (1899) 68 L. J. Ch. 524; [1899] 2 Ch. 138; 81 L. T. 69.

NORTH, J.—I have never heard of a case where the Settled Land Act has been held applicable to property of this nature, although it is no doubt true, as was said in the judgment of the C. A. in *Mundy and Roper's Contract, In re* (*supra*), that the Act ought to be construed in a spirit of wise and reasonable liberality. There is also *Castle Bytham (Vicar), Ex parte*, which I do not refer to for the purpose of disproving that a limitation to a bishop and his successors constitutes a settlement within the Settled Land Act—that is not contended for—but for the observation made by Stirling, J., that it was difficult to imagine that the Legislature, in passing the Settled Land Act, intended to repeal the Act of Elizabeth [13 Eliz. c. 20] so as to enable the alienation of ecclesiastical land, or to dispense in such cases with the consent of the Ecclesiastical Commissioners. It follows that if the Court were to accede to the present application

[to appoint trustees for the purposes of the Act] it would be introducing a precedent which would affect a wide area, and which would lead to the doing of what Stirling, J., said would be a strange result of the Settled Land Act.—p. 525.

Eastman's Settled Estates, In re (1898) 68 L. J. Ch. 122, n.; W. N. (1898) 170.—ROMER, J., *followed*.

Carne's Settled Estates, In re (1898) 68 L. J. Ch. 120; [1899] 1 Ch. 324; 79 L. T. 542; 47 W. R. 352.—NORTH, J.

Eastman's Settled Estates, In re, and Carne's Settled Estates, In re, applied.

Trenchard, In re, Ward v. Trenchard (1900) 16 Times L. R. 525.—BYRNE, J.

Trenchard, In re, Ward v. Trenchard, and Eastman's Settled Estates, In re, discussed.

Trenchard, In re, Trenchard v. Trenchard (1902) 71 L. J. Ch. 178; [1902] 1 Ch. 378, 383; 86 L. T. 196; 50 W. R. 266.

BUCKLEY, J.—On a previous application in reference to this same estate [*Trenchard, In re, Ward v. Trenchard*] Byrne, J. . . . has declared that the widow has the powers of a tenant for life under the Settled Land Act, and that she will not forfeit the benefits given her by the will by selling under such powers. In other words, she can sell; and if she sells she will be entitled as against the proceeds of sale to the same annual benefit (which must then be represented by money) as if she had not sold. This follows the decisions of Pearson, J., in *Paget's Settled Estates, In re* (*post*, col. 3078), and of North, J., in *Ames, In re* (col. 3078), and of North, J., again, in *Smith, In re* (col. 3078). The result of sect. 51 [Settled Land Act, 1882] is that the provision so far as it is a fetter upon the power of sale is void, and under sub-sect. 2 of that section a new estate is given to the beneficiary by virtue of the statute extending to a like interest in the proceeds of sale. But this having been insured, the words, "as far as," in sect. 51 are satisfied, and if there be a voluntary cesser of residence apart from sale, there is no reason why the testator's disposition should not have effect, inasmuch as that proviso does not tend to induce the tenant for life not to sell. This was the decision of North, J., in *Haynes, In re* (*post* col. 3078). It was argued that the decision of Romer, J., in *Eastman's Settled Estates, In re*, is inconsistent with this view. In my opinion that is not so. The summons did not go to the question of what the rights of the widow would be if she voluntarily ceased to reside apart from sale. The question whether the provision for the reduction of the annuity was void under sect. 51 was raised in connection with the question whether the applicant was entitled during widowhood to the income arising from the power of sale. That question, as it seems to me, was the only question which the learned judge answered. He did not decide that if she voluntarily ceased to reside the reduction of the annuity would not take effect.—p. 181.

Eastman's Settled Estates, In re, and Carne's Settled Estates, In re (*supra*, col. 3077), *followed*.

Llanover's (Baroness) Will, In re, Herbert v. Freshfield [1902] 2 Ch. 679; 51 W. R. 89.—SWINFEN EADY, J.

Llanover's (Baroness) Will, In re, Herbert v. Freshfield, affirmed with a variation, (1903) 72 L. J. Ch. 406; [1903] 2 Ch. 16; 88 L. T. 648; 51 W. R. 418.—C.A.

Ames, In re, Ames v. Ames (1893) 62 L. J. Ch. 685; [1893] 2 Ch. 479; 3 R. 538; 68 L. T. 787; 41 W. R. 505.—NORTH, J., *discussed*.

Eastman's Settled Estates, In re (1898) 68 L. J. Ch. 122, n.; W. N. (1898) 170.—ROMER, J.

Ames, In re, Ames v. Ames, referred to.

Trenchard, In re, Trenchard v. Trenchard [1902] 1 Ch. 378 (*see supra*, col. 3077).

Thompson's Will, In re (1888) 21 L. R. Ir.

107.—M.R.; and **Smith, In re, Grose-Smith v. Bridges (or Bridger)** (1899) 68

L. J. Ch. 198; [1899] 1 Ch. 331; 80 L. T.

218; 47 W. R. 357.—NORTH, J., *followed*.

Fitzgerald, In re, Brereton v. Day [1902] 1 Ir. R. 162.

PORTER, M.R.—*Thompson, In re*, is a direct authority on the point, and so is *Smith, In re*, which goes further than the present case, as there the provision which tended to prevent a sale of the settled land was contained in an instrument different from that under which the tenancy for life of the settled land was created.—p. 166.

Smith, In re, referred to.

Trenchard, In re, Trenchard v. Trenchard [1902] 1 Ch. 378, 383 (*see supra*, col. 3077).

Paget's Settled Estates, In re (1885) 55

L. J. Ch. 42; 30 Ch. D. 161; 53 L. T.

90; 33 W. R. 898.—PEARSON, J., *explained*.

Haynes, In re, Kemp v. Haynes (1887) 37 Ch. D. 306; 57 L. J. Ch. 519; 58 L. T. 14; 36 W. R. 321.

NORTH, J.—Under that [sect. 51 of the Settled Land Act, 1882] it seems to me clear that from the time at which a sale or disposition takes place the attempted fetter on the power of a tenant for life is removed, and that is what I consider Pearson, J. decided in *Paget's Settled Estates, In re*. He says: "It is impossible to say that this clause, which defeats the estate of the son, in case he fails to comply with the condition as to residence, does not tend to induce him to abstain from exercising the power of sale which is conferred on him by the Act. The condition is therefore made void by sect. 51, and, if the son exercises the power of sale, his interest in the proceeds of sale will, by virtue of sub-sect. 2, continue.—p. 309.

Paget's Settled Estates, In re, Haynes, In re,

Kemp v. Haynes and Brown's Will, In re

(1884) 53 L. J. Q. B. 920; 27 Ch. D. 179;

51 L. T. 196; 32 W. R. 894.—BACON, V.-C.,

applied.

Thompson's Will, In re (1888) 21 L. R. Ir. 109, 112.—M.R. (*see supra*).

Paget's Settled Estates, In re, discussed.

Eastman's Settled Estates, In re (1898) 68 L. J. Ch. 122, n.; W. N. (1898) 170.—ROMER, J.

Paget's Settled Estates, In re, referred to.

Haynes, In re, explained and followed.

Trenchard, In re, Trenchard v. Trenchard [1902] 1 Ch. 378, 383 (*supra*, col. 3077).

Taylor, Ex parte, Taylor v. Taylor (1875) 44 L. J. Ch. 727; L. R. 20 Eq. 297; 33 L. T. 89; 23 W. R. 947.—JESSEL, M.R., *applied*.

Brisley, In re, Fleming v. Brisley (1887) 56 L. T. 853, 855.—STIRLING, J.; Wythes, In re (*post*).

Taylor, Ex parte, Taylor v. Taylor, referred to. Richardson, In re, Richardson v. Richardson (1899) 69 L. J. Ch. 804, 807 (*see post*).

Bentley, In re, Wade v. Wilson (1885) 54 L. J. Ch. 782; 33 W. R. 610.—PEARSON, J.; and **Burnaby's Settled Estates, In re** (1889) 58 L. J. Ch. 664; 42 Ch. D. 621; 61 L. T. 22.—STIRLING, J., *followed*.

Wythes, In re, West v. Wythes (1893) 62 L. J. Ch. 663; [1893] 2 Ch. 369; 68 L. T. 520; 41 W. R. 375.—KEKEWICH, J.

Wythes, In re, West v. Wythes, dictum disapproved, but order followed.

Bagot's Settlement, In re, Bagot v. Kittoe (1893) 63 L. J. Ch. 515; [1894] 1 Ch. 177, 182; 8 R. 41; 70 L. T. 229; 42 W. R. 170.

CHITTY, J.—I am not disposed myself to say that the Settled Land Acts have abrogated the old cases.—p. 518.

Wythes, In re, West v. Wythes.

Referred to, Newen, In re (post); followed. Money-Kyrle's Settlement, In re (*post*).

Bagot's Settlement, In re, Bagot v. Kittoe, followed.

Peake's Settled Estates, In re (No. 1) (1893) 63 L. J. Ch. 109; 3 R. 722; [1893] 3 Ch. 420; 69 L. T. 281; 42 W. R. 125.—NORTH, J.; **S. C.** (No. 2) [1894] 3 Ch. 540; 8 R. 539; 71 L. T. 371; 42 W. R. 687.—NORTH, J., *commented on*.

Newen, In re, Newen v. Barnes (1894) 8 R. 309; 63 L. J. Ch. 763; [1894] 2 Ch. 297, 308; 70 L. T. 653; 43 W. R. 58; 58 J. P. 767.

KEKEWICH, J.—There is only one case I need say much about after *Bagot's Settlement, In re*, and that is *Peake's Settled Estates, In re*, in which it is said North, J., held, that the powers given by the Settled Estates Act, 1877, ought not to be given to ladies. It is quite possible to read the Weekly Notes [from which the case was cited] as meaning that; at the same time it is possible to read it otherwise. There is a discretion in the Court, and he exercised his discretion, in not doing what was asked. He declined to give the authority asked for to two ladies; I cannot read that as meaning he would not have listened to the application of ladies.—p. 317.

Bagot's Settlement, In re, Bagot v. Kittoe, discussed.

Richardson, In re, Richardson v. Richardson (1899) 69 L. J. Ch. 804; [1900] 2 Ch. 778, 784.

STIRLING, J.—Now unquestionably apart from the Settled Land Acts, the Court has a discretion, to direct the trustees to give up possession to the tenant for life, and I apprehend that that power may be exercised in favour of a tenant for life who is not a *cestui que trust*, but whose estate is subject to a term for securing incumbrances. [His lordship then referred to *Taylor v. Taylor (supra)* and *Bagot's Settlement, In re*, and said, as regards the latter:] That is a stronger case than the case before me.—p. 807.

Richardson, In re, Richardson v. Richardson, followed.

Money-Kyrle's Settlement, In re, Money-

Kyrle v. Money-Kyrle (1900) 59 L. J. Ch. 780; [1900] 2 Ch. 839, 843; 83 L. T. 74; 49 W. R. 44.—COZENS-HARDY, J.

2. SALES.

Adams' Settled Estates, In re (1878) 9 Ch. D. 116; 38 L. T. 887; 27 W. R. 110.—MALINS, V.-C., *not followed*.

Harvey's Settled Estate, In re (1882) 21 Ch. D. 123; 30 W. R. 697.

HALL, V.-C.—I have already, in *Simpson's Settled Estates, In re* [unreported, Feb., 1879], declined to follow *Adams' Settled Estates, In re*.—p. 124. . . . The conclusion to which I came in the case I have referred to was that a sale out of Court was not within the terms of the statute [Settled Estates Act, 1877].—p. 124.

Thompson's Settled Estates, In re, Green v. Thompson (1859) Johns. 418; 5 Jur. (N.S.) 1343.—WOOD, V.-C., *distinguished*.

Shepherd's Settled Estate, In re (1869) 39 L. J. Ch. 173; L. R. 8 Eq. 571, 573; 21 L. T. 525.

MALINS, V.-C.—In that case persons were actually in possession of one moiety of the estate. And the case of *Burdin's Will (post)* is no longer applicable, because the Amendment Act of 1864 (27 & 28 Vict. c. 45) makes the question whether an estate is "settled" or not depend on the state of circumstances at the time of the settlement taking effect, that is, in the present case, at the time of the testator's death.—p. 175.

Burdin's Will, In re (1859) 28 L. J. Ch. 840; 5 Jur. (N.S.) 1378; 2 L. T. 770.—L.JJ. (*affirming* 7 W. R. 711.—KINDERSLEY, V.-C.), *no longer applicable*.

Shepherd's Settled Estates, In re. *See supra*.

Burdin's Will, In re, distinguished.

Horn's Settled Estates, In re (1874) 29 L. T. 830.—MALINS, V.-C.

Taylor v. Poncia (1884) 53 L. J. Ch. 409; 25 Ch. D. 646; 50 L. T. 20; 32 W. R. 335.—PEARSON, J., *referred to*.

Harding's Settled Estate, In re (1890) 60 L. J. Ch. 277; [1891] 1 Ch. 60; 63 L. T. 593; 39 W. R. 118.—NORTH, J.

Cholmeley v. Paxton (1825) 3 Bing. 207; 11 Moore 17; 4 L. J. (O.S.) C. P. 41; 28 R. R. 619.—C.P.; *affirmed nom.* **Cockerell v. Cholmeley** (1830) 10 B. & C. 564; 5 M. & R. 509; 8 L. J. (O.S.) K. B. 197.—EX. CH.; **S. C.**, **Cockerell v. Cholmeley** (1832) 1 Cl. & F. 60; 8 Bligh (N.S.) 120.—H.L. (E.); *affirming* (1827) 3 Russ. 565.—BLDON, L.C.; and *see* (1830) 1 Russ. & M. 418; Tamllyn 435; 36 R. R. 10.—M.R., *distinguished and not applied*.

Doe d. Blewitt v. Phillips (1841) 10 L. J. Q. B. 68; 1 Q. B. 84; 4 P. & D. 562.—Q.B.

Cockerell v. Cholmeley (1832) 1 Cl. & F. 60.—H.L. (E.) (*supra*), *distinguished*.

Doe d. Strickland v. Woodward (1847) 17 L. J. Ex. 1; 1 Ex. 273.—EX.

Cholmeley v. Paxton (supra), Cockerell v. Cholmeley, applied.

Buckley v. Howell (1861) 30 L. J. Ch. 524; 29 Beav. 546.—ROMILLY, M.R. *And see post*, col. 3081 and col. 3089.

Cockerell v. Cholmeley (*supra*), *discussed and distinguished*.

Rutland's (Duke) Settled Estates, *In re*, Rutland (Duke) v. Bristol (Marquis) (1900) 69 L. J. Ch. 608; [1900] 2 Ch. 206.

BYRNE, J.—In *Cockerell v. Cholmeley* there was a power given to trustees to sell an estate with the consent of the tenant for life. The power was to sell any part either together or in parcels, and it was held that the trustees could not sell the estate exclusive of the timber growing upon it, leaving to the tenant for life power to sell the wood and underwood at separate prices. It was held that the power was not well executed, but that has no relation to the present case. I may mention that to decide otherwise would lead to a most extraordinary result, and one that never could have been thought of by the framer of this Settlement.—p. 605.

Edwards' Settlement, *In re* (1897) 66 L. J. Ch. 658; [1897] 2 Ch. 412; 76 L. T. 774.

—STIRLING, J., *referred to*.

Trenchard, *In re*, Ward v. Trenchard (1900) 16 Times L. R. 525.—BYRNE, J.

Jones, In re (1883) 52 L. J. Ch. 969; 24 Ch. D. 533; 48 L. T. 812.—BACON, V.-C.; *affirmed*, (1884) 53 L. J. Ch. 807; 26 Ch. D. 736; 50 L. T. 466; 32 W. R. 735.—C.A.

Jones, In re, *followed*.

Clitheroe Estate, *In re* (1885) 54 L. J. Ch. 401; 55 L. J. Ch. 107; 28 Ch. D. 387; 31 Ch. D. 135; 52 L. T. 294; 53 L. T. 733; 34 W. R. 169.—BACON, V.-C., and C.A.

Jones, In re, *distinguished*.

Strangways, *In re*, Hickley v. Strangways (1886) 56 L. J. Ch. 175; 34 Ch. D. 423, 432.—C.A. *See post*.

Jones, In re, *referred to*.

Annesley v. Woodhouse (1897) [1898] 1 Ir. R. 69, 72.—CHATTERTON, V.-C.

Jones, In re, *applied*.

Llanover's (Baroness) Will, *In re*, Herbert v. Freshfield (1893) 72 L. J. Ch. 406; [1903] 2 Ch. 16, 21; 88 L. T. 648; 51 W. R. 418.—C.A.

Clitheroe Estate, *In re* (1885) 54 L. J. Ch. 401; 28 Ch. D. 378; 52 L. T. 294.—BACON, V.-C.; *affirmed*, (1885) 55 L. J. Ch. 107; 31 Ch. D. 135; 53 L. T. 733; 34 W. R. 169.—C.A.

Clitheroe Estate, *In re*, *distinguished*.

Strangways, *In re*, Hickley v. Strangways (1886) 34 Ch. D. 423; 56 L. J. Ch. 195; 55 L. T. 714; 35 W. R. 83.—C.A.; *affirming* CHITTY, J.

COTTON, L.J.—*Jones, In re* (*supra*), was a case where the income of the tenant for life was, in fact, entirely exhausted by the previous charges under the settlement. There it was held that you must not look to see what the actual amount of the income is, but you must look at the settlement; and, in that case, the settlement, although it imposed charges on the estate previous to the tenancy for life, did give an immediate estate for life to Col. Grey, whose interest was then in possession, and who was entitled, subject to the trusts of the term to secure the charges, to the income should there be any. *Clitheroe Estate, In re*, was really the same thing, and the principle of Sir J. Hannen's

judgment is to be found at p. 140 [L. R.]. In my opinion it cannot be said here that this is an estate or interest in possession, subject only to certain trusts for accumulation. It is an estate or interest not in possession, but *in futuro*, in remainder, only to arise and to exist in possession when the term of twenty years has expired.—p. 432. SIR J. HANNEN and FRY, L.J. concurred.

Clitheroe Estate, *In re*, *dismissed and not applied*.

De Hoghton, *In re*, De Hoghton v. De Hoghton (1896) 65 L. J. Ch. 528; [1896] 1 Ch. 855, 861; 74 L. T. 297; 44 W. R. 550.—C.A. *See* "REVENUE," *ante*, col. 2855.

Clitheroe Estate, *In re*, *applied*.

Richardson, *In re*, Richardson v. Richardson (1900) 69 L. J. Ch. 804; [1900] 2 Ch. 778.—STIRLING, J.

Strangways, *In re*, Hickley v. Strangways (1886) 56 L. J. Ch. 195; 34 Ch. D. 423; 55 L. T. 714; 35 W. R. 83.—C.A., *distinguished*.

Williams v. Jenkins (1893) 62 L. J. Ch. 665; [1893] 1 Ch. 700; 3 R. 298; 68 L. T. 251; 41 W. R. 489.—KEKEWICH, J.

Strangways, *In re*, *not applied*.

De Hoghton, *In re*, De Hoghton v. De Hoghton (1896) 65 L. J. Ch. 528; [1896] 1 Ch. 855, 866; 74 L. T. 297; 44 W. R. 500.—C.A. *See* "REVENUE," *ante*, col. 2855.

Strangways, *In re*, *considered*.

Annesley v. Woodhouse (1897) [1898] 1 Ir. R. 69, 72.—CHATTERTON, V.-C.

Strangways, *In re*, *distinguished*.

Martyn, *In re*, Coode v. Martyn (1900) 69 L. J. Ch. 733; 83 L. T. 146.

KEKEWICH, J.—Now such estate as Mr. Martyn has is in possession subject to the term. He can assign or deal with it. That distinguishes this case from *Strangways, In re*, and other cases where the estate for life was only to be created under an executory trust at the end of the term; and it was held that the person entitled, not having any estate or interest in possession until the determination of the term, had not, during its continuance, the powers of a tenant for life. The term there had to run out entirely before the interest of the tenant for life could arise at all.—p. 735.

Atkinson, In re, Atkinson v. Bruce (1885) 55 L. J. Ch. 49; 30 Ch. D. 605; 53 L. T. 258; 33 W. R. 899.—PEARSON, J.; *affirmed*, (1886) 55 L. J. Ch. 49; 31 Ch. D. 577; 54 L. T. 403; 34 W. R. 445.—C.A.

Atkinson, In re, *principle applied*.

Horne's Settled Estate, *In re* (1888) 57 L. J. Ch. 790; 39 Ch. D. 84, 89; 59 L. T. 530; 37 W. R. 69.—NORTH, J.; *affirmed*, C.A. COTTON, FRY and LOPES, L.JJ.

Atkinson, In re, *referred to*.

Annesley v. Woodhouse (1897) [1898] 1 Ir. R. 69, 72.—CHATTERTON, V.-C.; Finance Act, 1894, and Studdert, *In re* (1899) [1900] 2 Ir. R. 281, 292.—Q.B.D. (*affirmed non*). Inland Revenue Commissioners v. Priestley (1901) 75 L. J. P. C. 41; [1901] A. C. 208; 84 L. T. 700; 49 W. R. 657.—H.L. (12.).

Vine v. Raleigh (1895) 65 L. J. Ch. 103; [1896] 1 Ch. 37; 73 L. T. 655; 44 W. R. 169.—CHITTY, J., *applied*.

Meade's Settled Estates, In re (1896) [1897] 1 Ir. R. 121, 123.—PORTER, M.R.; Bennet, In re, Bennet v. Bennet (1903) 72 L. J. Ch. 524; [1903] 2 Ch. 136, 142; 88 L. T. 683.—KEKEWICH, J.

Wheelwright v. Walker (1883) 52 L. J. Ch. 274; 23 Ch. D. 752; 48 L. T. 70; 31 W. R. 363.—PEARSON, J., *see* S. C. *nom.*

Walker's Trusts, In re (1883) 48 L. T. 632; 31 W. R. 716.—KAY, J., *discussed*.

Mogridge v. Clapp [1892] 3 Ch. 382; 61 L. J. Ch. 534; 67 L. T. 100; 40 W. R. 663.—C.A.

LINDLEY, L.J.—But then it is said that under sects. 38, 45 and 53 [Settled Land Act, 1882], Hoskins was guilty of a breach of trust in not obtaining the appointment of new trustees, and in not giving notice to them, and that this breach of trust affects the plaintiff's title. Now, I think that Hoskins ought to have followed the directions contained in those sections, and might, perhaps, have been restrained by the remainderman from granting a lease until he had done so, as in *Wheelwright v. Walker*. That, however, was a case of a sale, and the purchaser did not propose to pay the money into court. I also think that the omission to take these steps might prevent the tenant for life from obtaining specific performance against an unwilling lessee. But, assuming all this, the omission to take these steps does not, in my opinion, invalidate the title of a lessee who has acted in good faith. Sect. 45, sub-sect. 3, in my opinion, clearly protects him and his title.—p. 395. BOWEN, L.J. concurred.

KAY, L.J.—I cannot find that the Act makes the existence of such trustees a condition of the power of the tenant for life to grant the lease. There is an express provision that the lessee need not inquire whether notice has been given to them. If he knew there were no trustees, or that notice had not been given, probably he would be justified in refusing to complete, and the Court would not compel him to do so, and would even restrain the tenant for life from making a sale or lease under such circumstances: *Wheelwright v. Walker*.—p. 399.

Wheelwright v. Walker, referred to.

Fisher v. Grazebrook's Contract, In re (1898) 67 L. J. Ch. 613; [1898] 2 Ch. 660; 79 L. T. 268; 47 W. R. 58.—ROMER, J.

Collinge's Settled Estates, In re (1887) 57 L. J. Ch. 219; 36 Ch. D. 516; 57 L. T. 221; 36 W. R. 264.—NORTH, J., *not applied*.

Williams v. Jenkins (1894) 13 R. 92.—KEKEWICH, J.

Collinge's Settled Estates, In re, overruled.

Cooper v. Belsey (1899) 68 L. J. Ch. 258; [1899] 1 Ch. 639; 80 L. T. 69; 47 W. R. 443.—C.A.; affirming ROMER, J.

LINDLEY, M.R.—It is quite obvious that a slip, such as we are all liable to make, was made in *Collinge's Settled Estates, In re*, and that North, J. overlooked the definition of "land" in sect. 2, sub-sect. 10 [Settled Land Act, 1882].—p. 259. RIGBY and V. WILLIAMS, L.J.J. concurred.

Thomas v. Williams (1883) 52 L. J. Ch. 603; 24 Ch. D. 558; 49 L. T. 111; 31 W. R. 943.—BACON, V.-C., *discussed*.

Llewellyn, In re, Llewellyn v. Williams (1887)

57 L. J. Ch. 316; 37 Ch. D. 317, 327; 58 L. T. 152; 36 W. R. 347.—STIRLING, J.

Cardigan v. Curzon-Howe (1885) 55 L. J. Ch. 71; 30 Ch. D. 531; 53 L. T. 704; 33 W. R. 836.—CHITTY, J., *referred to*.

Sebright's Settled Estates, In re (1886) 56 L. J. Ch. 169; 33 Ch. D. 429, 439; 55 L. T. 570; 35 W. R. 49.—NORTH, J.; affirmed, C.A.

Cardigan v. Curzon-Howe, discussed.

Hampden v. Buckinghamshire (Earl) (1893) 62 L. J. Ch. 643; [1893] 2 Ch. 531, 543; 2 R. 419; 68 L. T. 695; 41 W. R. 516.—C.A.

LINDLEY, L.J.—It was decided in *Cardigan v. Curzon-Howe* that a tenant for life could sell, notwithstanding a decree for the execution of the trusts of the settlement; and this goes far to show that a suspended order for sale ought not to deprive the tenant for life of the power to mortgage conferred upon him by the statute [Settled Land Act, 1890, s. 11].—p. 648. BOWEN and LOPES, L.J.J. concurred.

Hampden v. Buckinghamshire (Earl), referred to.

Monson's (Lord) Settled Estates, In re (1898) 67 L. J. Ch. 176; [1898] 1 Ch. 427, 432; 78 L. T. 225; 46 W. R. 330.—ROMER, J.

Hampden v. Buckinghamshire (Earl), discussed and applied.

Richardson, In re, Richardson v. Richardson (1900) 69 L. J. Ch. 804; [1900] 2 Ch. 778, 790.

STIRLING, J.—Then another case in which, as far as I know, the Court has gone the furthest in controlling the discretion of the tenant for life is that of *Hampden v. Buckinghamshire (Earl)*. There there had been an order made for the sale of settled land which was heavily incumbered, but its operation was postponed for a time to give an opportunity of paying off the incumbrances. . . . Therefore the law as there laid down is that the tenant for life, acting *bonâ fide*, ought not to be interfered with unless the Court can see that, in spite of his honesty, he is acting unjustly towards those whose interests he is bound to protect.—p. 811.

Pares' Settled Estate, In re, (1897) not reported.—KEKEWICH, J., *followed*.

Clifford, In re, Scott v. Clifford (1901) 71 L. J. Ch. 10; [1902] 1 Ch. 87, 91; 85 L. T. 410; 50 W. R. 58.—BUCKLEY, J.

Beaumont's Settled Estates, In re (1888) 58 L. T. 916.—CHITTY, J., *rule in not applied*.

Radnor's (Earl) Will Trusts, In re (1890) 45 Ch. D. 402; 63 L. T. 191.—CHITTY, J.; affirmed, 59 L. J. Ch. 782; 45 Ch. D. 417.—C.A.

Radnor's (Earl) Will Trusts, In re, distinguished.

Ailesbury's (Marquis) Settled Estates, In re (1891) 61 L. J. Ch. 116; [1892] 1 Ch. 506; 65 L. T. 830; 40 W. R. 243.—C.A.

Radnor's (Earl) Will Trusts, In re, referred to.

Mogridge v. Clapp [1892] 3 Ch. 382; 61 L. J.

Ch. 534; 67 L. T. 100; 40 W. R. 663.—**KEKEWICH, J.**—affirmed, C.A.

KEKEWICH, J.—It is not necessary for me now to define the duties of a tenant for life when he is admitted to be in the position of a trustee. The matter was considered at some length by Chitty, J., and by the C.A. in *Radnor's (Earl) Will Trusts, In re*; but I find nothing there, or elsewhere, to show that the tenant for life is bound, as regards the purchaser, to have trustees to whom he can give notice.—p. 389.

Radnor's (Earl) Will Trusts, In re (*supra*, col. 3084), *referred to*.

Hampden v. Buckinghamshire (Earl) (1892-3) 62 L. J. Ch. 643; [1893] 2 Ch. 531; 2 R. 419; 68 L. T. 695; 41 W. R. 516.—**KEKEWICH, J.** (varied, C.A. **LINDLEY, BOWEN, and LOPES, L.JJ.**); **Featherstonhaugh's Estate, In re** (1898) 14 Times L. R. 167.—**NORTH, J.**; **Hope's Settled Estates, In re, Hope, In re, De Cetto v. Hope** [1899] 2 Ch. 679, 685; 68 L. J. Ch. 625; 81 L. T. 141; 47 W. R. 641.—**BYRNE, J.** (affirmed, C.A.).

Ailesbury's (Marquis) Settled Estates, In re, 65 L. T. 409.—**STIRLING, J.**; *reversed*, (1891) 61 L. J. Ch. 116; [1892] 1 Ch. 506; 65 L. T. 830; 40 W. R. 243.—C.A. **LINDLEY, BOWEN and FREY, L.JJ.**; *latter decision affirmed nom.* **Bruce v. Ailesbury (Marquis)** (1892) 62 L. J. Ch. 95; [1892] A. C. 356; 1 R. 37; 67 L. T. 490; 41 W. R. 318; 57 J. P. 164.—**H.L. (E.)**.

Ailesbury's (Marquis) Settled Estates, In re, considered.

Mogridge v. Clapp [1892] 3 Ch. 382; 61 L. J. Ch. 534; 67 L. T. 100; 40 W. R. 663.—C.A.

LINDLEY, L.J.—Even if the plaintiff had known that there were no trustees, it would not follow that his title would be bad. Of course, if the plaintiff had, by conniving at a breach of trust, done the remainderman an injury, he would personally be liable to him for it; but even then a purchaser from him would, I think, be safe. The observations of this Court on sect. 53 in *Ailesbury's (Marquis) Settled Estates, In re*, go far to show that the title would be good even if there were no trustees, and the purchaser or lessee knew, in fact, that such was the case.—p. 395.

Ailesbury's (Marquis) Settled Estates, In re, observations applied.

Sutherland (Dowager Duchess) v. Sutherland (Duke) (1893) 62 L. J. Ch. 946; [1893] 3 Ch. 169; 3 R. 650; 69 L. T. 186; 42 W. R. 13.—**ROMER, J.**

Ailesbury's (Marquis) Settled Estates, In re, referred to.

Chandler v. Bradley (1896) 66 L. J. Ch. 214; [1897] 1 Ch. 315, 323; 75 L. T. 581; 45 W. R. 296.—**STIRLING, J.**

Hope's Settlement, In re (1893) 9 Times L. R. 506; [1899] 2 Ch. 691, n.—**CHITTY, J.**, *approved*.

Ailesbury's (Marquis) Settled Estates, In re, observations explained.

Hope's Settled Estates, In re, De Cetto v. Hope (1899) 68 L. J. Ch. 625; [1899] 2 Ch. 679, 689; 81 L. T. 141; 47 W. R. 641.—C.A.; affirming **BYRNE, J.**

LINDLEY, M.R.—I think that Chitty, J. was quite right when he said in *Hope's Settlement, In*

re, that when a tenant for life applies under sect. 37 of the Act of 1882 for leave to sell heirlooms, there must be some reason to induce the Court to give its sanction, and the fact of the tenant for life having got himself into difficulties was not a circumstance which ought to have weight in deciding in favour of a sale. The observations that I made in *Ailesbury's (Marquis) Settled Estates, In re*, to which counsel have referred, as to the tenant for life being master of the situation, are, in my opinion, quite right. I was then addressing myself to a case under sect. 3 of the Act of 1882, and the tenant for life there was master of the situation in the sense that he could have ruined the estate by selling the whole of it, except the mansion house. But that is not this case. I was not addressing myself in the least to the question on whom the burden of proof is. I think that Chitty, J. was right when he said in *Hope's Settlement, In re*, that a person who comes to the Court under the Settled Land Acts must make out a case for a sale. I am not prepared to go the length of saying that the Court should sanction a sale merely because the tenant for life wants it, and in the present case I cannot see any reason for the sale of this diamond, except that this extravagant young tenant for life wishes it sold.—p. 628. **ROMER, L.J.** concurred.

Sebright's Settled Estates, In re (1886) 56 L. J. Ch. 169; 33 Ch. D. 429, 440; 55 L. T. 570; 35 W. R. 49.—C.A. **COTTON, LINDLEY and LOPES, L.JJ.**; *affirming* **NORTH, J.**, *dictum considered*.

Cardigan v. Curzon-Howe (1888) 58 L. J. Ch. 177; 40 Ch. D. 338; 60 L. T. 252; 37 W. R. 247.—**CHITTY, J.**; and (1889) 41 Ch. D. 375; 58 L. J. Ch. 436; 60 L. T. 723; 37 W. R. 247, 521.—C.A. **HALSBURY, L.C., COTTON and LINDLEY, L.JJ.**

HALSBURY, L.C.—I cannot understand the remarks of the learned judge as to the tenant for life selling the reversion.—p. 376.

And see **Connolly v. Keating** [1903] 1 Ir. R. 353.—**PORTER, M.R.**

Bruce v. Ailesbury (Marquis) (1892) 62 L. J. Ch. 95; [1892] A. C. 356; 1 R. 37; 67 L. T. 490; 41 W. R. 318; 57 J. P. 164.—**H.L. (E.)**, *explained*.

Ailesbury (Marquis) and Iveagh (Lord), In re (1893) 62 L. J. Ch. 713; [1893] 2 Ch. 345; 3 R. 440; 69 L. T. 101; 41 W. R. 644.

STIRLING, J.—It has been established by the decision of the House of Lords in this very case, —see *Bruce v. Ailesbury (Marquis)*—that the Settled Land Act of 1882 is founded on a broader policy and has a wider scope than the Settled Estates Acts. In the former Act it is said the well-being of settled land is the paramount object, in the latter the interests only of the persons interested under the settlement.—p. 717.

Bruce v. Ailesbury (Marquis), referred to.

Mundy and Roper's Contract, In re (1898) 68 L. J. Ch. 135; [1899] 1 Ch. 275, 288; 79 L. T. 583; 47 W. R. 226.—C.A. **LINDLEY, M.R., CHITTY and V. WILLIAMS, L.JJ.**; **Bath and Wells (Bishop), In re** [1899] 2 Ch. 138, 146; 68 L. J. Ch. 524; 81 L. T. 69.—**NORTH, J.**; **Att.-Gen. v. Owen**; **Att.-Gen. v. Coulson** (1899) 68 L. J. Q. B. 779; [1899] 2 Q. B. 253, 263; 81 L. T. 121; 63 J. P. 611.—**GRANTHAM and KENNEDY, JJ.**

Bruce v. Ailesbury (Marquis), considered.
Richardson, In re, Richardson v. Richardson
(1900) 69 L. J. Ch. 804; [1900] 2 Ch. 778, 793.—
STIRLING, J.

Bruce v. Ailesbury (Marquis), applied.
Aldam's Settled Estate, In re (1902) 71 L. J. Ch.
552; [1902] 2 Ch. 46, 56; 86 L. T. 510; 50
W. R. 500.—C.A.

COLLINS, M.R.—However this may be, I think
the provisions of the Settled Estates Act have
very little bearing on the construction of the
Settled Land Acts, which, as was explained in
Bruce v. Ailesbury (Marquis), rest on a very
different principle.—p. 556.

COZENS-HARDY, L.J.—This appeal raises ques-
tions of great importance as to the power of a
tenant for life under the Settled Land Act to
grant a mining lease. In considering the case, I
think I am entitled, and indeed bound, to have
regard to the policy of the Act as explained by the
House of Lords in *Bruce v. Ailesbury (Marquis)*,
and not to narrow or cut down the language used
in the Act so as to make it conform to decisions
given prior to the Act upon powers of leasing
conferred by other instruments.—p. 559.

Bruce v. Ailesbury (Marquis), applied.
Calverley's Settled Estates, In re (1903) 73
L. J. Ch. 25; [1904] 1 Ch. 150; 89 L. T. 500.—
FARWELL, J.

Rivett-Carnac's Will, In re (1885) 54 L. J.
Ch. 1074; 30 Ch. D. 136; 53 L. T. 81;
33 W. R. 837.—CHITTY, J., *considered*.
Aylesford's (Earl) Settled Estates, In re (1886)
55 L. J. Ch. 523; 32 Ch. D. 162; 54 L. T. 414;
34 W. R. 410.

BACON, V.-C.—[As to the term "land" includ-
ing as an incorporeal hereditament a dignity or
title of honour.]

Rivett-Carnac's Will, In re, referred to.
Hill (Viscount) v. Hill (Dowager Viscountess)
—(1897) 66 L. J. Q. B. 329; [1897] 1 Q. B. 483,
489; 76 L. T. 103; 45 W. R. 371.—C.A.

CHITTY, L.J.—Subject to the rule against
perpetuities, chattels may be settled to follow
the devolution of a dignity as in *Rivett-
Carnac, In re*.—p. 338.

Rivett-Carnac's Will, In re, referred to.
Cowley v. Cowley (1900) 69 L. J. P. 121;
[1900] P. 305, 310; 83 L. T. 218; 49 W. R. 19;
16 T. L. R. 563.—C.A. (affirmed, H.L. (E.), *ante*,
col. 1203).

3. LEASES.

Chawner's Settled Estates, In re (1892) 61
L. J. Ch. 331; [1892] 2 Ch. 192; 66 L. T.
745; 40 W. R. 558.—CHITTY, J., *referred to*.
Handman and Wilcox's Contract, In re (1902)
71 L. J. Ch. 263, 265; [1902] 1 Ch. 599; 86 L. T.
246.—C.A.

Hazle's Settled Estates, In re (1884) 53 L. J.
Ch. 574; 26 Ch. D. 428; 50 L. T. 530; 32 W. R.
701.—PEARSON, J.; *affirmed*, (1885) 54 L. J. Ch.
628; 29 Ch. D. 78; 52 L. T. 947; 33 W. R. 759.
—C.A.

Hazle's Settled Estates, In re, not applied.
Clitheroe Estate, In re (1885) 54 L. J. Ch.
401; 28 Ch. D. 378, 388.—BACON, V.-C.;
affirmed, C.A. *See supra*, col. 3081.

Hazle's Settled Estates, In re, observations
applied.

Atkinson, In re, Atkinson v. Bruce (1885) 55
O.C.

L. J. Ch. 49; 30 Ch. D. 605, 612; 53 L. T. 258;
33 W. R. 899.—PEARSON, J.; *affirmed*, C.A.
(*supra*, col. 3082).

Mogridge v. Clapp (1892) 61 L. J. Ch. 534;
[1892] 3 Ch. 382; 67 L. T. 100; 40 W. R.
663.—C.A.; *affirming*. KEKEWICH, J.,
observations not applied.

Chandler v. Bradley (1896) 66 L. J. Ch. 214;
[1897] 1 Ch. 315; 75 L. T. 581; 45 W. R. 296.—
STIRLING, J.

Mogridge v. Clapp, discussed.

Fisher and Grazebrook's Contract, In re (1898)
67 L. J. Ch. 613; [1898] 2 Ch. 660.

ROMER, J.—Sect. 22 [Settled Land Act, 1882]
presupposes the existence of trustees. This was
pointed out by Kay, J., as he then was, in *Hatten
v. Russell* (57 L. J. Ch. 425; 38 Ch. D. 334, *see
post*, col. 3096), where he said that "that option
cannot properly be exercised, and cannot really
be exercised at all, if there are no trustees." The
same point arose in *Mogridge v. Clapp*, and
there Kay, L.J., said that "by sect. 22 capital
moneys arising under the Act must be paid to
the trustees, or into Court, at the option of the
tenant for life. But he can only have such
option, *prima facie*, when there are trustees, so
that the purchaser could hardly pay his purchase
money without ascertaining that there were
trustees to whom it might be paid." I agree
that in this case if the purchaser were to pay
the money into Court in ignorance of the fact
that there are no trustees, he would get a good
title. But he has notice that there are no
trustees, and refuses to complete on that ground.
Such a title ought not, in my opinion, to be
forced upon him. As regards the observation of
Lindley, L.J., in *Mogridge v. Clapp*, that "even
if the plaintiff had known that there were no
trustees, it would not follow that his title would
be bad," it must be borne in mind that he was
there dealing with the case of a sale.—p. 613.

Mogridge v. Clapp, distinguished.

Handman and Wilcox's Contract, In re (1902)
71 L. J. Ch. 263; [1902] 1 Ch. 599; 86 L. T.
246.—C.A. V. WILLIAMS, STIRLING and COZENS-
HARDY, L.JJ.

V. WILLIAMS, L.J.—The title is doubtful
because there are really material facts which are
themselves in doubt—not merely facts which,
theoretically speaking, might be put in issue, as
was the case in *Mogridge v. Clapp*, and as was
pointed out by Lindley, M.R., there.—p. 266.

Chandler v. Bradley (1896) 66 L. J. Ch. 214;
[1897] 1 Ch. 315; 75 L. T. 581; 45 W. R.
296.—STIRLING, J., *explained*.

Handman and Wilcox's Contract, In re [1902]
1 Ch. 599, 603.—C.A. (*supra*).

Nugent v. Cuthbert (1822) Sugden on Real
Property, p. 475, *distinguished*.

Davies v. Davies (1888) 38 Ch. D. 499; 57
L. J. Ch. 1093; 58 L. T. 514; 36 W. R. 399.

KEKEWICH, J.—At first I was very much
puzzled by it [*Nugent v. Cuthbert*], because
there the master words were: "so that none
of the said leases were made dispensable of
waste by any express words." I do not think
that "any express words add" anything to the
power there, and I think that the exception as
to repair was "casualties of fire and war
excepted." On looking through the arguments
again, I find that there is an exception as regards
fire, and although strangely enough I see nothing

about war, I think it may be explained by a sentence in the respondent's argument, at p. 479, where it is said: "Besides, the exception was of that which did not amount to waste, for the word 'casualty' must be construed casualty without default of the tenant." I think the H. L. must have come to the conclusion that what was excepted was not waste. I do not think that that governs this case; but if it did, it would not cover the words "damage by tempest." I should still hold that the exception of fair wear and tear was obnoxious to the statute giving the power, and therefore that the lease is bad on that ground.—p. 505.

Newcastle's (Duke) Estates, In re (1883) 52 L. J. Ch. 645; 24 Ch. D. 129; 48 L. T. 779; 31 W. R. 782, *explained*.

Constable v. Constable (1886) 32 Ch. D. 233; 55 L. J. Ch. 491; 54 L. T. 608; 34 W. R. 470.

PEARSON, J.—But then there is sect. 56 [Settled Land Act, 1882], which I admit is to my mind a section very difficult to construe, but upon which I nevertheless was called upon to put a construction in a former case which came before me—a case from which there has been no appeal, and which therefore I am at liberty to consider for the present purpose as not being contested; and in construing that section in *Newcastle's (Duke) Estates, In re*, I came to the conclusion that the meaning of the latter part of sub-sect. 2 was this, that in all cases now where under a settlement the trustees have an absolute power of sale, they cannot exercise that power of sale without the consent of the tenant for life.—p. 237.

Buckley v. Howell (1861) 30 L. J. Ch. 524; 29 Beav. 546.—ROMILLY, M.R.; and

Dayrell v. Hoare (1840) 9 L. J. Q. B. 299; 12 A. & E. 356; 4 P. & D. 114.—Q.B., *principle applied*.

Nevill and Newell's Contract, In re (1899) 69 L. J. Ch. 94; [1900] 1 Ch. 90, 93; 81 L. T. 581; 48 W. R. 181.—KEKEWICH, J.

Dayrell v. Hoare, referred to.

Browne v. Peto (1899) 69 L. J. Q. B. 141; [1900] 1 Q. B. 346, 354.—BIGHAM, J.; affirmed, C.A. (*post*, col. 3090).

Dayrell v. Hoare, approved.

Buckley v. Howell, distinguished.

Nevill and Newell's Contract, In re (*supra*), *overruled*.

Gladstone, In re, Gladstone v. Gladstone (1900) 69 L. J. Ch. 455; [1900] 2 Ch. 101, 104; 82 L. T. 515; 48 W. R. 531.—C.A.; reversing COZENS-HARDY, J.

LINDLEY, M.R.—The Settled Land Act was passed to get rid of the old authorities, which curtailed the powers of a tenant for life, and to enable him to do what he could not do before; and I do not think any cases decided before the Act have any bearing as regards the present case. . . . It is plain, to my mind, that that decision [*Dayrell v. Hoare*] was right either under the old law or the new law. It decides that a power to let land does not give a power in a lease of part to impose a burden on the rest of it. That was the decision of that case, and the language of Littledale, J. does not apply to a case of this kind at all. I think that case was misunderstood by the learned judge who decided *Nevill and Newell's Contract, In re*. As to

Buckley v. Howell, that was a decision which applied to a sale and not to a lease, and, moreover, it was one which the Legislature thought ought to be got rid of, and an Act of Parliament—the Confirmation of Sales Act, 1862 [25 & 26 Vict. c. 108]—was passed for the purpose.—p. 457. RIGBY, L.J. to the same effect. COLLINS, L.J. concurred.

Dayrell v. Hoare and Buckley v. Howell, referred to.

Gladstone, In re, Gladstone v. Gladstone, applied.

Rutland's (Duke) Settled Estates, In re, Rutland (Duke) v. Bristol (Marquis) (1900) 69 L. J. Ch. 693; [1900] 2 Ch. 206, 208.

BYRNE, J.—With reference to the cases of *Dayrell v. Hoare* and *Buckley v. Howell*, those have been dealt with by the late M. R. (Sir N. Lindley) in *Gladstone, In re*, and I need add nothing more in reference to them. . . . When a tenant for life comes into possession, and he finds mining leases existing over a portion of the estate, is it to be said that he is not to be entitled to grant building leases if persons are willing to take building leases of the land under which those mines are? The case in my opinion is quite clear, and if any authority were wanted on the point, *Gladstone, n re*, affords such an authority.—p. 695.

Dayrell v. Hoare and Gladstone, In re, Gladstone v. Gladstone, distinguished.

Browne v. Peto (1899) 69 L. J. Q. B. 141; [1900] 1 Q. B. 346.—BIGHAM, J., *affirmed*.

Browne v. Peto (1900) 69 L. J. Q. B. 869; [1900] 2 Q. B. 653; 83 L. T. 303; 49 W. R. 324.—C.A.

A. L. SMITH, L.J.—*Dayrell v. Hoare* is no authority as to the true construction of sect. 18 of the [Conveyancing] Act of 1881, and the learned judges who decided that case and Sir N. Lindley in *Gladstone, In re*, were not dealing with what was the meaning of an express power to grant occupation leases of both corporeal and incorporeal hereditaments, which I have to deal with in this case.—p. 873.

V. WILLIAMS, L.J. to the same effect. HALSBURY, L.C. concurred.

Gladstone, In re, Gladstone v. Gladstone, referred to.

Aldam's Settled Estate, In re (1902) 71 L. J. Ch. 552; [1902] 2 Ch. 46, 53; 86 L. T. 510; 50 W. R. 500.—C.A. COLLINS, M.R., STIRLING and COZENS-HARDY, L.JJ.

Sutherland (Dowager Duchess) v. Sutherland (Duke) (1893) 62 L. J. Ch. 946;

[1893] 3 Ch. 169; 3 R. 650; 69 L. T. 186; 42 W. R. 13.—ROMER, J., *not applied*.

Browne v. Peto (1899) 69 L. J. Ch. 141; [1900] 1 Q. B. 346.—BIGHAM, J.; affirmed C.A. (*supra*).

BIGHAM, J.—It must be remembered that "land" is defined in the [Conveyancing] Act—see sect. 2, sub-sect. ii.—to include "tenements and hereditaments corporeal and incorporeal," and that it is any part of land so described that the mortgagor has power to lease. On this part of the case I was referred to the judgment of Romer, J., in *Sutherland (Dowager Duchess) v. Sutherland (Duke)*. The case does not, however, appear to me to be of any importance in

this connection. It was decided with reference to the supposed exercise of powers under the Settled Land Acts, 1882 and 1890, the provisions of which are quite different from those in the Act which I am now considering.—p. 144.

Sutherland (Dowager Duchess) v. Sutherland (Duke), referred to.

Handman and Wilcox's Contract, *In re* [1902] 1 Ch. 599; 71 L. J. Ch. 263, 264; 86 L. T. 246.—C.A. *v. WILLIAMS, STIRLING and COZENS-HARDY, L.JJ.*

Morris v. Rhydydefed Colliery Co. (1858) 28 L. J. Ex. 119; 3 H. & N. 885.—EX. CH., referred to.

Revelly's Settled Estates, *In re* (1863) 32 L. J. Ch. 812; 8 L. T. 450; 11 W. R. 744.—KINDERSLEY, V.-C.

Ridge, In re, Hellard v. Moody (1885) 55 L. J. Ch. 265; 31 Ch. D. 504; 54 L. T. 549; 34 W. R. 159.—C.A. HALSBURY, L.C., LINDLEY and FRY, L.JJ.; varying BACON, V.-C., referred to.

Chaytor's Settlement, *In re* (1900) 69 L. J. Ch. 837, 840; [1900] 2 Ch. 804, 809; 49 W. R. 125.—STIRLING, J.

Lonsdale (Earl) v. Lowther (1900) 69 L. J. Ch. 686; [1900] 2 Ch. 687; 83 L. T. 312.—FARWELL, J., applied.

Osborne and Bright's, *Lims.*, *In re* (1902) 71 L. J. Ch. 285, 287; [1902] 1 Ch. 335, 340; 86 L. T. 178; 50 W. R. 468.—KEKEWICH, J.

4. DEDICATIONS.

Gilbert (or Gibson), In re, (1862) cited 2 H. & M. 203.—STUART, V.-C., not followed.

Venour's Settled Estates, *In re, Venour v. Sellon* (1876) 45 L. J. Ch. 409, 412; 2 Ch. D. 522, 526; 24 W. R. 752.—M.R. *See post.*

Gilbert, In re, discussed.

Stanford v. Roberts (1882) 52 L. J. Ch. 50, 51; 48 L. T. 262.—KAY, J.

Hurle's Settled Estates, In re (1864) 2 H. & M. 196; 5 N. R. 167; 11 Jur. (N.S.) 78; 11 L. T. 592; 13 W. R. 171.—WOOD, V.-C., and Chambers's Settled Estates, In re (or Chambers, In re) (1860) 29 L. J. Ch. 924; 28 Beav. 653; 6 Jur. (N.S.) 1005; 8 W. R. 646.—ROMILLY, M.R., followed.

Venour's Settled Estates, *In re, Venour v. Sellon* (1876) 2 Ch. D. 522; 45 L. J. Ch. 409, 411; 24 W. R. 752.

JESSEL, M.R.—*Hurle's Settled Estates, In re, and Chambers, In re*, are clear and distinct authorities that the Court will not authorise a sale of a portion of the estate for raising moneys to make roads on building land, or authorise sale moneys to be so laid out. It is true that the learned judges who decided those cases did not consider the argument which has been addressed to me to-day; but that argument, if it is worth anything, must go to this extent, that the Court has the power which it was expressly decided in those cases not to have. Then it appears . . . that in an unreported case of *Gilbert, In re* (*supra*), Stuart, V.-C., directed money which happened to be in Court, subject to be laid out to the same uses as the building land, to be applied in making roads; but after the

decisions in *Drake v. Trefusis* (L. R. 10 Ch. 364; *see post*, col. 3108). and *Newman's Settled Estates, In re* (43 L. J. Ch. 702; L. R. 9 Ch. 381; *see post*, col. 3107), I think the circumstance of there being money in Court cannot influence the decision.—p. 525.

Venour's Settled Estates, In re, Venour v. Sellon, discussed.

Stanford v. Roberts (1882) 52 L. J. Ch. 50, 51; 48 L. T. 262.—KAY, J.

Venour's Settled Estates, In re, referred to.

Jesse v. Lloyd (1883) 48 L. T. 656, 659.—KAY, J. *See now* 39 & 40 Vict. c. 30.

Salisbury (Marquis) and Ecclesiastical Commissioners, In re (1875) 44 L. J. Ch. 541; L. R. 20 Eq. 527; 23 W. R. 824.—JESSEL, M.R.; reversed, (1876) 45 L. J. Ch. 250; 2 Ch. D. 29; 34 L. T. 5; 24 W. R. 380.—C.A. JAMES and MELLISH, L.JJ. and BLACKBURN, J.; BAGGALLAY, J.A. dissenting.

5. PETITIONS.

Grey v. Jenkins (1859) 26 Beav. 351.—ROMILLY, M.R., not applied.

Boughton, *In re* (1863) 9 L. T. 360; 12 W. R. 34.—ROMILLY, M.R.

Grey v. Jenkins, referred to:

Ives, *In re, Bailey v. Holmes* (1876) 3 Ch. D. 690; 24 W. R. 1068.—JESSEL, M.R. *See post*, col. 3093.

Beioley v. Carter (1868) 23 L. J. Ch. 92; 19 L. T. 472; 17 W. R. 130.—ROMILLY, M.R.; reversed, (1869) 38 L. J. Ch. 283; L. R. 4 Ch. 230; 20 L. T. 381; 17 W. R. 310.—SELWYN and GIFFARD, L.JJ.

Beioley v. Carter, applied.

Shepherd's Settled Estate, *In re* (1869) 39 L. J. Ch. 173, 174; L. R. 8 Eq. 571, 573; 21 L. T. 525.—MALINS, V.-C.

Beioley v. Carter, referred to.

Alexander v. Mills (1870) 40 L. J. Ch. 73, 75; L. R. 6 Ch. 124, 132; 24 L. T. 206; 19 W. R. 310.—JAMES and MELLISH, L.JJ.

Beioley v. Carter, approved and applied.

Bell v. Holtby (1873) 42 L. J. Ch. 266; L. R. 15 Eq. 178, 193; 28 L. T. 9; 21 W. R. 321.

MALINS, V.-C.—I entirely and most heartily concur in the judgment of the L.JJ. Selwyn and Giffard in *Beioley v. Carter*, where there was a doubt whether a sale could take place under the Settled Estates Act, because the consent of unborn persons could not be obtained. The M.R. thought a title could not be made, and the very circumstance of his thinking so created a doubt, but the L.JJ., having a contrary opinion, would not allow that the title was one of doubt, as it was the duty of the Court to remove such doubt.—p. 271.

Beioley v. Carter and Pott's Estate, In re (1866) 15 W. R. 29; L. R. 16 Eq. 631, n.

—M.R., applied.

Strutt's Trusts, *In re* (1873) 43 L. J. Ch. 69; L. R. 16 Eq. 629, 634; 21 W. R. 880.—MALINS, V.-C. *And see post*, col. 3093.

Beioley v. Carter and Pott's Estate, In re (*supra*, col. 3092), *not followed*.
Ives, In re, Bailey v. Holmes (*post*).

Eyre v. Saunders, Yeo, Ex parte (1859) 28 L. J. Ch. 439; 5 Jur. (N.S.) 703; 7 W. R. 366.—WOOD, V.-C., *commented on*.

Strutt's Trusts, In re (*supra*, col. 3092), *discussed*.

Ives, In re, Bailey v. Holmes (1876) 3 Ch. D. 690; S. C. *nom.* Bailey v. Holmes, 24 W. R. 1068.

JESSEL, M.R.—In *Eyre v. Saunders*, a case which, speaking with great respect, I do not understand, it was held that the power to give receipts put a trustee in the same position as if he were a beneficial owner. But the insertion of that power shows that he is only a trustee, and being so he has not a beneficial interest in the property. In *Pott's Estate, In re* (*supra*), the tenant for life was still living. . . . After these cases [*Eyre v. Saunders* and *Grey v. Jenkins, supra*, col. 3092] had been cited, the late M.R. is reported to have expressed the opinion that the concurrence of the parties beneficially interested was not necessary; but I am informed . . . that Lord Romilly subsequently declined to follow his own decision. The case of *Strutt's Trusts, In re*, was a very different one. There the gift was to a contingent class, which, as the V.-C. observed, could not be ascertained, and therefore falling within *Beioley v. Carter* (*supra*). But then the V.-C. proceeded to cite *Pott's Estate, In re*, and to give other reasons for his judgment, with which I cannot agree.—p. 692.

Bunbury, In re (1865) 11 Jur. (N.S.) 27.—L.C., *applied*.

Puxley, Ex parte (1868) Ir. R. 2 Eq. 237.—CHATTERTON, V.-C.

Taylor v. Taylor (1875) 45 L. J. Ch. 373; 1 Ch. D. 426.—**JESSEL, M.R.**; *affirmed*, (1876) 45 L. J. Ch. 848; 3 Ch. D. 145; 35 L. T. 450; 25 W. R. 279.—C.A. **JAMES and MELLISH, L.J.**, **BAGGALLAY, J.A.**

Taylor v. Taylor, distinguished.

Puxley, Ex parte (1868) Ir. R. 2 Eq. 237.—CHATTERTON, V.-C., *followed*.

Harris's Settled Estates, In re (1880) 42 L. T. 583; 25 W. R. 721.

MALINS, V.-C. [*Taylor v. Taylor*, distinguished on the ground that there the concurrence of all parties had not been obtained.]

Taylor v. Taylor, explained.

Vine v. Raleigh (1883) 24 Ch. D. 238, 242; 49 L. T. 440; 31 W. R. 855.—**CHITTY, J.**

Hooke's Estate, In re, W. N. (1875) 29.—**MALINS, V.-C.**, *followed*.

Cundee's Settled Estates, In re (1877) 37 L. T. 271.—**BACON, V.-C.**

Mewburn's Settled Estates, In re (1874) 22 W. R. 752.—**JESSEL, M.R.**, *principle approved and applied*.

Busfield, In re, Whaley v. Busfield (1886) 55 L. J. Ch. 467; 32 Ch. D. 123, 132; 54 L. T. 220; 34 W. R. 372.—C.A. **COTTON, BOWEN and FRY, L.JJ.**

Cleveland's (Duke) Harte Estate, In re (1861) 30 L. J. Ch. 862; 1 Dr. & Sm. 481; 7 Jur. (N.S.) 769; 2 L. T. 78; 9 W. R. 883.—**KINDERSLEY, V.-C.**, *approved*.

"Sexton Barns" Settled Estates, In re (1862) 6 L. T. 40; 10 W. R. 416.—**ROMILLY, M.R.**

Caddick's Settled Estates, In re (1859) 7 W. R. 334.—**STUART, V.-C.**, *discussed*.

Salisbury (Marquis) and Ecclesiastical Commissioners, In re (1876) 45 L. J. Ch. 250; 2 Ch. D. 29, 39; 34 L. T. 5; 24 W. R. 380.—C.A. **JAMES and MELLISH, L.JJ.** and **BLACKBURN, J.**, **BAGGALLAY, J.A.** dissenting.

Woolcombe, In re (1816) 1 Madd. 213; 16 R. R. 207.—V.-C.

Teynham v. Lennard (1724) 4 Bro. P. C. 302.—H.L. (E.).

Myerscough, Ex parte (1819) 1 J. & W. 152.—M.R.; and **Whitfield, Ex parte** (1742) 2 Atk. 315.—L.C., *discussed*.

Salisbury (Marquis) and Ecclesiastical Commissioners, In re (1876) 45 L. J. Ch. 250; 2 Ch. D. 29, 41; 34 L. T. 5; 24 W. R. 380.—C.A. *And see* **Brown's Will, In re, Brown's Settlement, In re** (1881) 18 Ch. D. 61, 76; 50 L. J. Ch. 724; 44 L. T. 757; 30 W. R. 171.—C.A.

Longstaffe's Settled Estates, In re (1860) 1 Dr. & Sm. 142; 8 W. R. 491.—**KINDERSLEY, V.-C.**, *followed*.

Feegan's Trusts, In re (1874) Ir. R. 8 Eq. 596.—**CHATTERTON, V.-C.**

Venner's Settled Estates, In re (1868) L. R. 6 Eq. 249; 16 W. R. 1033.—**ROMILLY, M.R.**, *dissented from*.

Clough's Estate, In re (1873) 42 L. J. Ch. 393; L. R. 15 Eq. 281, 284; 28 L. T. 261; 21 W. R. 452.—**JAMES, L.J.**, for V.-C.

Clough's Estate, In re, followed.

Crabtree's Settled Estates, In re (1875) 44 L. J. Ch. 261; L. R. 10 Ch. 201; 32 L. T. 349; 23 W. R. 761.—**JAMES and MELLISH, L.JJ.**

Hooper's Settled Estates, In re (1857) 5 W. R. 670.—**WOOD, V.-C.**, *followed*.

Manson's Settled Estates, In re (1857) 24 Beav. 221.—**ROMILLY, M.R.**

Manson's Settled Estates, In re, followed.

Foster's Settled Estates, In re (1857) 26 L. J. Ch. 836; 24 Beav. 222; 5 W. R. 726.—**ROMILLY, M.R.** *And see* S. C. 1 De G. & J. 386; 3 Jur. (N.S.) 833.—**KNIGHT-BRUCE and TURNER, L.JJ.**

Bendyshe, In re (1857) 26 L. J. Ch. 814; 3 Jur. (N.S.) 727; 5 W. R. 816.—**KINDERSLEY, V.-C.**, *dictum not followed*.

Lewis' Settled Estates, In re (1875) 24 W. R. 103.—**HALL, V.-C.**

Standish's Settled Estates, In re (1876) 25 W. R. 8.—**HALL, V.-C.**, *followed*.

Batt's Settled Estates, In re (1897) 45 W. R. 614.—**KEKEWICH, J.**

De Tabley's (Lord) Settled Estates, In re (1863) 8 L. T. 719; 11 W. R. 936.—**ROMILLY, M.R.**, *followed*.

Halliday's Settled Estates, In re (1871) 40 L. J. Ch. 687; L. R. 12 Eq. 199; 19 W. R. 966.—**MALINS, V.-C.**

Halliday's Settled Estates, In re, followed.

Thorne's Settled Estates, In re (1872) 26 L. T. 682; 20 W. R. 587.—**MALINS, V.-C.**

Halliday's Settled Estates, In re, followed.

Tessyman's Trusts, In re (1897) 77 L. T. 484.—**KEKEWICH, J.** [dispensing with the examination of a married woman whose interest was remote and represented by trustees.]

Broadwood's Settled Estates, In re (1872)

41 L. J. Ch. 349; L. R. 7 Ch. 323; 26 L. T. 650; 20 W. R. 458.—JAMES and MELLISH, L.J., *distinguished*.

Thorne's Settled Estates, In re (1872) 20 W. R. 587; 26 L. T. 682.

MALINS, V.-C. said he thought this case quite different from the one before the L.J.J., which was a case of a sale, and was like a petition for the payment of money out of Court. This was only a case of leasing powers which were really for the preservation of the estate.

Riddell v. Errington (1884) 26 Ch. D. 220; 50 L. T. 584; 32 W. R. 68.—PEARSON, J.; and **Harris's Settled Estates, In re** (1884) 54 L. J. Ch. 208; 28 Ch. D. 171; 51 L. T. 835; 33 W. R. 393.—PEARSON, J., *followed*.

Batt's Settled Estates, In re (1897) 66 L. J. Ch. 635; [1897] 2 Ch. 65; 45 W. R. 614.—KEKEWICH, J. *And see* "HUSBAND AND WIFE," vol. i. col. 1250.

Adam's Devised Estates, In re (1862) 6 L. T. 604.—WOOD, V.-C., *followed*.

Bower's Settled Estates, In re (1870) 23 L. T. 358; 18 W. R. 1085.—BACON, V.-C.

Adam's Devised Estates, In re, Bower's Settled Estates, In re, and Packer's Settled Estates, In re (1870) 39 L. J. Ch. 220.—MALINS, V.-C., *followed*.

Taylor's Settled Estates, In re (1872) 42 L. J. Ch. 504; L. R. 14 Eq. 557; 27 L. T. 335.—BACON, V.-C.

6. TRUSTEES.

Kemp's Settled Estates, In re (1883) 52 L. J. Ch. 950; 24 Ch. D. 485; 49 L. T. 231; 31 W. R. 930.—C.A. BRETT, M.R., COTTON and BOWEN, L.J.J., *referred to*.

Ray's Settled Estates, In re (1884) 53 L. J. Ch. 205; 25 Ch. D. 464, 471; 50 L. T. 80; 32 W. R. 458.—PEARSON, J.; Hughes v. Fanagan (1891) 30 L. R. Ir. 111.—C.A. PORTER, M.R., FITZGIBBON and BARRY, L.J.J.

Kemp's Settled Estates, In re, considered and applied.

Ailesbury (Marquis) and Iveagh (Lord), In re (1893) 62 L. J. Ch. 713; [1893] 2 Ch. 345; 3 R. 440; 69 L. T. 101; 41 W. R. 644.—STIRLING, J. (*ante*, col. 3074); Stamford (Earl), In re, Payne v. Stamford (1895) 65 L. J. Ch. 134; [1896] 1 Ch. 288, 298; 73 L. T. 559; 44 W. R. 249.—STIRLING, J.

Kemp's Settled Estates, In re, rule in, applied.

Stamford (Earl), In re, Payne v. Stamford, considered.

Hammond Spencer's Settled Estates, In re (1902) [1903] 1 Ch. 75; 72 L. J. Ch. 59; 88 L. T. 158; 51 W. R. 262.

BYRNE, J.—The result of *Stamford (Earl), In re*, is that the Court has undoubted jurisdiction, if it thinks it a proper case, to appoint the solicitor of the tenant for life [as a trustee]; but it is not the course of the Court to make an appointment of this kind, although Stirling, J. did it in one case [*Ailesbury (Marquis) and Iveagh (Lord), In re, supra*], and no doubt it would be done again in other cases if strong reasons were shown that that would be more beneficial than another appointment. I have considered the

question, and I do not see sufficient advantages to be derived from the appointment in this case to induce me to depart from the ordinary rule, which Stirling, J. refers to as follows: "The rule is laid down by the C.A. in *Kemp's Settled Estates, In re*, a case which arose upon an application for the appointment of trustees for the purposes of the Settled Land Act, 1882, under sect. 38 of that Act. Cotton, L.J. said this: 'The gentleman is no doubt a fit person to be a trustee, and the only objection to him is that he acts as solicitor for the tenant for life. Now the appointment of trustees is required to impose a check upon the extensive powers conferred by the Act upon the tenant for life, and sect. 44 contemplates the probability of there being differences between the trustees and the tenant for life. I have no doubt that Mr. Wood, as solicitor of the tenant for life, would advise him to the best of his ability, and recommend him to exercise his powers with a proper regard to the interests of the remaindermen. But solicitors, like judges, are fallible, and how could Mr. Wood, as one of the trustees, exercise a proper judgment on their behalf upon questions on which he had advised the tenant for life? It would be Mr. Wood as trustee putting a check upon Mr. Wood as solicitor to the tenant for life, and he would be placed in a false position.' Now that case lays down a rule of practice for the guidance of the Court, and it would not be right for me to depart from it."—p. 81.

Wilcock, In re (1887) 56 L. J. Ch. 757; 34 Ch. D. 508; 56 L. T. 629; 35 W. R. 450.—NORTH, J., *followed*.

Kane's Trusts, In re (1888) 21 L. R. Ir. 112.—PORTER, M.R.

Marlborough (Duke) v. Sartoris (1886) 56 L. J. Ch. 70; 32 Ch. D. 616; 55 L. T. 506; 35 W. R. 55.—CHITTY, J., *referred to*.

Radnor's (Earl) Will Trusts, In re (1890) 59 L. J. Ch. 782; 45 Ch. D. 402, 404; 63 L. T. 191.—CHITTY, J.; affirmed, C.A.

Marlborough (Duke) v. Sartoris.

Considered, Hughes v. Fanagan (*post*); *discussed and applied*, Mogridge v. Clapp (*post*).

Hatten v. Russell (1888) 57 L. J. Ch. 423; 38 Ch. D. 334; 58 L. T. 271; 36 W. R. 317.—KAY, J., *discussed*.

Bryant and Barningham's Contract, In re (1889) 59 L. J. Ch. 636; 44 Ch. D. 218, 219; 63 L. T. 20; 38 W. R. 469.—C.A.

Hatten v. Russell, considered.

Hughes v. Fanagan (1891) 30 L. R. Ir. 111.—C.A. PORTER, M.R., FITZGIBBON and BARRY, L.J.J.

Hatten v. Russell, discussed and applied.

Mogridge v. Clapp (1892) 61 L. J. Ch. 534; [1892] 3 Ch. 382, 386; 67 L. T. 100; 40 W. R. 663.—KEKEWICH, J.; affirmed, C.A. LINDLEY, BOWEN and KAY, L.J.J.

Hatten v. Russell and Hughes v. Fanagan (1891) 30 L. R. Ir. 111.—C.A., *referred to*.

Fisher and Grazebrook's Contract, In re (1898) 67 L. J. Ch. 613; [1898] 2 Ch. 660, 662; 79 L. T. 268; 47 W. R. 58.—ROMER, J. *See supra*, col. 3088.

Wright's Trusts, In re (1883) 53 L. J. Ch. 139; 24 Ch. D. 662.—NORTH, J., *form of order adopted*.
Simpson, In re, and Whitechurch, In re (1897) 66 L. J. Ch. 166; [1897] 1 Ch. 256; 76 L. T. 181; 45 W. R. 277.—C.A.; reversing NORTH, J.

7. CAPITAL MONEY.

Foster v. Foster (1875) 45 L. J. Ch. 301; 1 Ch. D. 588; 24 W. R. 185.—JESSEL, M.R., *referred to*.
Norton, In re, Norton v. Norton (1899) 69 L. J. Ch. 31; [1900] 1 Ch. 101, 105; 81 L. T. 724; 48 W. R. 1407.—BYRNE, J.; Morgan, *In re, Smith v. May* (1900) 69 L. J. Ch. 735; [1900] 2 Ch. 474, 478; 48 W. R. 670.—STIRLING, J. *And see* vol. i., col. 676, and *ante*, col. 2018.

Harrop's Trusts, In re (1883) 53 L. J. Ch. 137; 24 Ch. D. 717; 48 L. T. 937.—PEARSON, J.
Order followed, Wright's Trusts, In re (1883) 53 L. J. Ch. 139; 24 Ch. D. 662.—NORTH, J.; *discussed*, **Tempest v. Camoys** (Lord) (1888) 58 L. T. 221, 223; 52 J. P. 532.—CHITTY, J.

Coleridge's (Lord) Settlement, In re [1895] 2 Ch. 704; 13 R. 767; 73 L. T. 206; 44 W. R. 59.—CHITTY, J., *discussed*.
Hotham, In re, Hotham v. Doughty (1901) 71 L. J. Ch. 63; [1901] 2 Ch. 790; 85 L. T. 543; 50 W. R. 152.—COZENS-HARDY, J.

Coleridge's (Lord) Settlement, In re, referred to.
Hotham, In re, Hotham v. Doughty, followed.

Cleveland's (Duke) Settled Estates, In re (1902) 71 L. J. Ch. 763; [1902] 2 Ch. 350; 86 L. T. 678; 50 W. R. 508.

JOYCE, J.—That clause [Settled Land Act, 1882, s. 22, sub-s. 2] has been considered in various cases, and it was held in **Coleridge's (Lord) Settlement, In re**, that the tenant for life was entitled to choose the investments and the security on which the investments were to be made. But it was also decided in **Hotham, In re**, which I must take to be law at present, that in the case of a mortgage security, "when the trustees and the tenant for life act by different solicitors, it will rest with the solicitors for the trustees to do what is necessary with reference to the mortgage." That case being, as I understand, under appeal, I do not know what may happen with respect to it in the future, but at present I shall follow it. . . . In my opinion, the trustees may select their own solicitors and their own brokers. I agree with what Cozens-Hardy, J. decided in **Hotham, In re**.—pp. 765, 766.

Hotham, In re, Hotham v. Doughty, order varied (1902) 71 L. J. Ch. 789; [1902] 2 Ch. 575; 87 L. T. 112; 50 W. R. 692.—C.A.

Llewellyn, In re, Llewellyn v. Williams (1887) 57 L. J. Ch. 316; 37 Ch. D. 317; 58 L. T. 152; 36 W. R. 347.—STIRLING, J., *followed*.

Smith's Settled Estates, In re (1891) 60 L. J. Ch. 613; [1891] 3 Ch. 65; 64 L. T. 821; 39 W. R. 590.—KEKEWICH, J.

Beck, In re, Cartington Estate, In re (1883) 52 L. J. Ch. 815; 24 Ch. D. 608; 49 L. T.

95; 31 W. R. 910.—BACON, V.-C., *not followed on one point*.

Cardigan v. Curzon-Howe (No. 2) (1888) 40 Ch. D. 338; 58 L. J. Ch. 177; 60 L. T. 252; 37 W. R. 247; affirmed, (1889) 58 L. J. Ch. 436; 41 Ch. D. 375; 60 L. T. 723; 37 W. R. 521; 5 Times L. R. 412.—C.A.

CHITTY, J.—In that case [*Beck, In re*] it does appear that the V.-C. allowed the costs of the mortgagees of the tenant for life; but there is no decision on that point, and it is just one of those matters which might pass without any great consideration; and, as far as I can see, it was a case rather of a friendly nature. Although the point was mentioned to the V.-C., I cannot find any judgment of his which shows that his mind was drawn to the various parts of the Act bearing upon it. I think I am entitled, therefore, to say that that is not an authority for the point which has been fully argued before me.—pp. 343-4.

And see Connolly v. Keating [1903] 1 Ir. 353.—PORTER, M.R.

De la Warr's (Earl) Estates, In re (1881) 16 Ch. D. 587; 29 W. R. 350.—BACON, V.-C., *considered*.

Willan's Settled Estates, In re (1882) 45 L. T. 745; S. C. nom. **Twyford Abbey Settled Estates, In re**, 30 W. R. 268.—KAY, J.

Chaytor's Settled Estate Act, In re (1884) 53 L. J. Ch. 312; 25 Ch. D. 651; 50 L. T. 88; 32 W. R. 517.—PEARSON, J., *referred to*.

Stamford's (Earl) Settled Estates, In re (1889) 58 L. J. Ch. 849; 43 Ch. D. 84, 95; 61 L. T. 504.—STIRLING, J.

Marlborough's (Duke) Settlement, In re, Marlborough (Duke) v. Marjoribanks (1885) 54 L. J. Ch. 833; 30 Ch. D. 127; 53 L. T. 216; 33 W. R. 871.—CHITTY, J.; affirmed, (1886) 55 L. J. Ch. 339; 32 Ch. D. 1; 54 L. T. 914; 34 W. R. 377.—C.A.

Marlborough's (Duke) Settlement, In re, referred to.

Sebright's Settled Estates, In re (1886) 56 L. J. Ch. 169; 33 Ch. D. 429, 440; 55 L. T. 570; 35 W. R. 49.—NORTH, J.; affirmed, C.A.

Marlborough's (Duke) Settlement, In re, principle applied.

Stamford's (Earl) Estate, In re (1887) 56 L. T. 484.—STIRLING, J.

Marlborough's (Duke) Settlement, In re, referred to.

Clarke v. Thornton (1887) 56 L. J. Ch. 302; 35 Ch. D. 307, 313; 56 L. T. 294; 35 W. R. 603.—CHITTY, J.

Marlborough's (Duke) Settlement, In re.—C.A., applied.

Beaumont's Settled Estates, In re (1888) 58 L. T. 916.—CHITTY, J.

Marlborough's (Duke) Settlement, In re, not applied.

Radnor's (Earl) Will Trusts, In re (1890) 45 Ch. D. 402; 63 L. T. 191.—CHITTY, J.; affirmed, 59 L. J. Ch. 782; 45 Ch. D. 417.—C.A.

CHITTY, J.—A point strongly pressed against this application was the allegation that the earl has been driven to have recourse to a sale of the heirlooms by his own incumbrances. Now,

as a general rule, I think that the circumstance that the tenant for life has incumbered his life estate under the settlement ought to be excluded from consideration by the Court on a question of granting or refusing an order sanctioning a sale of heirlooms. I so held in *Marlborough's (Duke) Settlement, In re*, and *Beaumont's Settled Estates, In re (supra)*. But any such general rule has no application to the present case. The incumbrances created by the earl are on his life estate under an entirely different settlement. I cannot see how the fact that the tenant for life, apart from the settlement in question, is richer or poorer, is material.—p. 410.

Marlborough's (Duke) Settlement, In re, discussed.

Marlborough (Duke) and Queen Anne's Bounty, In re (1897) 66 L. J. Ch. 323; [1897] 1 Ch. 712; 76 L. T. 388; 45 W. R. 426.—ROMER, J.

Sudeley's (Lord) Settled Estates, In re

(1887) 57 L. J. Ch. 182; 87 Ch. D. 123; 58 L. T. 7; 36 W. R. 162.—KAY, J.

Egmont's (Lord) Settled Estates, In re (1890) 45 Ch. D. 395; 59 L. J. Ch. 768; 63 L. T. 608; 38 W. R. 762.—C.A.; reversing NORTH, J.

ESHER, M.R.—North, J., thought he was precluded, not indeed by the express terms, but by the logical result of the decision of Kay, J., in *Sudeley's (Lord) Settled Estate, In re*, from sanctioning the payment of part of the sum demanded for redemption—that part which has been called a “bonus.” . . . That case was not one of the redemption of a rent charge. It was asked that the trustees might pay out of capital moneys the instalments of the rent-charge as they should become due, including, that is, interest as well as principal. Kay, J., was of opinion that the interest was a debt due from the tenant for life, and that he could not authorise the trustees to pay it out of “capital moneys.” Even if he was right in that view, it does not, I think, affect the present case. But I will venture to say that I think he took too strict a view of the Settled Land Act, 1887. It is quite true that what he was asked to do did not come within the words “redeeming such rent-charge,” but I think it did come exactly within the words “or otherwise providing for the payment thereof.” I could not therefore agree with the decision in *Sudeley's (Lord) Settled Estates, In re*, even if it governed the present case. But I think it does not, for this is a case of redemption pure and simple.—p. 399.

LINDLEY, L.J. to the same effect. BOWEN, L.J. concurred.

Sudeley's (Lord) Settled Estates, In re.

Referred to, *Howard's Settled Estates, In re (post)*; *Verney's Settled Estates, In re (post)*.

Egmont's (Lord) Settled Estates, In re (supra), referred to.

Howard's Settled Estates, In re (1892) 61 L. J. Ch. 311; [1892] 2 Ch. 233; 67 L. T. 156; 40 W. R. 360.—STIRLING, J.

Egmont's (Lord) Settled Estates, In re, referred to.

Dalison's Settled Estate, In re (1892) 61 L. J. Ch. 712; [1892] 3 Ch. 522; 41 W. R. 15.—STIRLING, J.

Egmont's (Lord) Settled Estates, In re, applied.

Verney's Settled Estates, In re (1898) 67 L. J.

Ch. 243; [1898] 1 Ch. 508, 513; 78 L. T. 191; 46 W. R. 348.

KEKEWICH, J.—In *Egmont's (Lord) Settled Estates, In re*, the C. A. took the view, disapproving of Kay, J.'s decision in *Sudeley's (Lord) Settled Estates, In re (supra)* that the trustees of the estate were authorised by sect. 1 of the [Settled Land] Act of 1887, in making a payment out of capital in respect of a bonus which the tenant for life was bound to pay in order to redeem.—p. 246.

Knatchbull's Settled Estate, In re (1884) 54

L. J. Ch. 154; 27 Ch. D. 349; 51 L. T. 695; 33 W. R. 10.—PEARSON, J., *affirmed*, (1885) 54 L. J. Ch. 1168; 29 Ch. D. 588; 53 L. T. 284; 33 W. R. 569.—C.A. COTTON, LINDLEY and FRY, L.JJ.—

Knatchbull's Settled Estate, In re, referred to.

Sebright's Settled Estate, In re (1886) 56 L. J. Ch. 169; 33 Ch. D. 429, 439; 55 L. T. 570; 35 W. R. 49.—NORTH, J., *affirmed*, C.A.

Knatchbull's Settled Estate, In re, applied.

Leinster's (Duke) Settled Estate, In re (1889) 23 L. R. Ir. 152.—CHATTERTON, V.-C.

Knatchbull's Settled Estate, In re, referred to.

Egmont's (Lord) Settled Estates, In re (1890) 45 Ch. D. 395; 59 L. J. Ch. 768; 63 L. T. 608; 38 W. R. 762.—C.A.

LINDLEY, L.J.—That Act [Settled Land Acts (Amendment) Act, 1887] was passed to remedy a defect in the Act of 1882, which was brought to light in *Knatchbull's Settled Estate, In re*, in which this Court held that the word “incumbrances” did not include terminable rent charges.—p. 400.

Knatchbull's Settled Estate, In re, referred to.

Howard's Settled Estates, In re (1892) 61 L. J. Ch. 311; [1892] 2 Ch. 233; 67 L. T. 156; 40 W. R. 360.—STIRLING, J.; *Dalison's Settled Estate, In re* (1892) 61 L. J. Ch. 712; [1892] 3 Ch. 522; 41 W. R. 15.—STIRLING, J.; *Castle Bytham (Vicar) and Midland Ry., Ex parte* (1894) 64 L. J. Ch. 116; [1895] 1 Ch. 348, 356; 13 R. 24; 71 L. T. 606; 43 W. R. 156.—STIRLING, J. (*ante*, col. 3076).

Knatchbull's Settled Estate, In re, discussed.

Richardson, In re, Richardson v. Richardson (1900) 69 L. J. Ch. 804; [1900] 2 Ch. 778.

STIRLING, J.—There is no question that the Court has in certain cases exercised control over the tenant for life. One case much relied on on behalf of the remainderman is *Knatchbull's Settled Estate, In re*. There the tenant for life had, prior to the Settled Land Act, created charges for land drainage and improvements under the Improvement of Land Act, 1864, and these were repayable by instalments. In that case it was held that he was not entitled “under the Settled Land Act, sect. 21, sub-sect. 2, to have these charges paid out of the capital of the settled estates so as to relieve him from the payments of the instalments.” Part of the ground for that decision was that payment of the incumbrances in question did not fall within the terms of the section which is referred to.—p. 811.

Howard's Settled Estates, In re (1892) 61 L. J. Ch. 311; [1892] 2 Ch. 233; 67 L. T. 156; 40 W. R. 360.—STIRLING, J., *adhered to*.

Dalison's Settled Estate, In re (1892) 61 L. J. Ch. 712; [1892] 3 Ch. 522, 525; 41 W. R. 15.—STIRLING, J.

Dalison's Settled Estate, In re, followed.

Bristol's (Lord) Settled Estates, In re (1893) 62 L. J. Ch. 901; [1893] 3 Ch. 161; 3 R. 689; 69 L. T. 304; 42 W. R. 46.—KEKEWICH, J.

Dalison's Settled Estate, In re, applied.

Verney's Settled Estates, In re (1898) 67 L. J. Ch. 243; [1898] 1 Ch. 508, 513; 78 L. T. 191; 46 W. R. 348.

KEKEWICH, J.—I apprehend that under sect. 1 [Settled Land Act, 1887] the only alternative you have is that capital money may be expended in redeeming a rent charge "or otherwise providing for the payment thereof," and "shall be deemed to be applied in payment for an improvement authorised by the Act of 1882." That does not seem to me to point towards recouping a tenant for life payments which he has made out of his own moneys for reduction of interest. That is not the right construction of the Act, nor is it justified by authority, as appears from *Dalison's Settled Estate, In re*.—p. 246.

Hotchkin's Settled Estates, In re (1887)

56 L. J. Ch. 445; 35 Ch. D. 41; 56 L. T. 244; 35 W. R. 463.—C.A. COTTON, LINDLEY and LOPES, L.JJ., *distinguished*.

Bulwer Lytton's Will, In re, Knebworth Settled Estate, In re, Lytton's Estate, In re (1888) 38 Ch. D. 20; 57 L. J. Ch. 340; 59 L. T. 12; 36 W. R. 420.—C.A. HALSBURY, L.C., COTTON and BOWEN, L.JJ.; reversing STIRLING, J. in chambers (who had considered himself bound by *Hotchkin's Settled Estates, In re*).

COTTON, L.J.—It is not at all like *Hotchkin's Settled Estate, In re*, where the work was done without any scheme having been submitted either to the trustees or to the Court. The question we have to consider is whether the works which have been done, and in respect of which the additional expense not originally contemplated was incurred, are works which substantially fall within the terms of the scheme which was submitted to and approved by the trustees.—p. 23.

Hotchkin's Settled Estate, In re, discussed and not applied.

Howard's Settled Estates, In re (1892) 61 L. J. Ch. 311; [1892] 2 Ch. 233; 67 L. T. 156; 40 W. R. 360.—STIRLING, J.; *Millard's Settled Estates, In re* [1893] 3 Ch. 116 (*post*, col. 3102).

Hotchkin's Settled Estate, In re, referred to.

Dalison's Settled Estate, In re (1892) 61 L. J. Ch. 712; [1892] 3 Ch. 522; 41 W. R. 15.—STIRLING, J.

Tucker's Settled Estates, In re (1895) 64

L. J. Ch. 513; [1895] 2 Ch. 468; 12 R. 320; 72 L. T. 619; 43 W. R. 581.—C.A.; *varying* KEKEWICH, J., *distinguished*.

Lever, In re, Cordwell v. Lever (1896) 66 L. J. Ch. 66; [1897] 1 Ch. 32; 75 L. T. 383; 45 W. R. 172.

STIRLING, J.—Questions arising under the Settled Land Act as to ordinary repairs, as in *Tucker's Settled Estates, In re*, which was referred to, are of a totally different order. The result is that the trustee is to be recouped the expense [of work required to be done under the Public Health (London) Act, 1891] out of the corpus.—p. 67.

Tucker's Settled Estates, In re, and Lever, In re, Cordwell v. Lever, discussed.

Barney, In re, Harrison v. Barney (1894) 63 L. J. Ch. 676; [1894] 3 Ch. 562; 8 R. 459; 71 L. T. 180; 43 W. R. 105.—

STIRLING, J., *distinguished*.

Thomas, In re, Weatherall v. Thomas (1900) 69 L. J. Ch. 198; [1900 1] Ch. 319; 48 W. R. 409.

BYRNE, J.—In exercising such discretion [under sect. 15 of the Settled Land Act, 1882] the Court should endeavour to ascertain what is fair as between the tenant for life and remainderman, having regard to the nature of the work done, and in every case the question must depend on the circumstances—see *Tucker's Settled Estates, In re*. It is pointed out also in that case that the expenses in respect of matters which are incidental to the ordinary use and enjoyment of the property ought not to be thrown on the remainderman. I do not think that I ought to apply any different principle in determining the rights as between tenant for life and remainderman because the money has been expended by the trustees and not by the tenant for life. The case of *Barney, In re*, differs from the present, as there the property was freehold, and the testator had provided that the parties beneficially entitled to the rents and profits of any of his houses should see that the same should be kept, or that they should keep the same in good and absolute repair, and properly insured from fire, and there was not, as in *Clarke v. Thornton* (56 L. J. Ch. 302; 35 Ch. D. 307, *post*, col. 3103) a power to the trustees to expend money in improvements, nor as in this case in effect a provision that all the incidental expenses and outgoings occasioned by retaining the leaseholds unconverted should be deducted from rents and profits before the amount payable to the tenants for life should be ascertained. In *Lever, In re*, the property was leasehold, the case was not complicated by a clause as to incidental expenses and outgoings, and the money was paid under stress of actual proceedings under statutes. In both the last-mentioned cases the application was made, as in the present case, after the expenditure had been incurred.—p. 201.

Tucker's Settled Estates, In re, considered.

Norfolk's (Duke) Parliamentary Estates, In re, Norfolk (Duke) v. Herries (Lord) (1900) 69 L. J. Ch. 236, 238; [1900] 1 Ch. 461; 82 L. T. 613; 48 W. R. 328.—BYRNE, J. *See post*, col. 3103.

Round v. Turner, W. N. (1889) 38; 60 L. T. 379.—KAY, J., *approved*.

Millard's Settled Estates, In re (1893) 62 L. J. Ch. 761; [1893] 3 Ch. 116, 121; 2 R. 529; 69 L. T. 202; 41 W. R. 577.—C.A. LINDLEY, LOPES and A. L. SMITH, L.JJ.

Millard's Settled Estates, In re, explained.

Bristol's (Marquis) Settled Estates, In re (1893) 62 L. J. Ch. 901; [1893] 3 Ch. 161; 3

R. 689; 69 L. T. 304; 42 W. R. 46.—KEKEWICH, J.

Millard's Settled Estates, In re, and Bristol's (Marquis) Settled Estates, In re (1893) 62 L. J. Ch. 901; [1893] 3 Ch. 161; 3 R. 689; 69 L. T. 304; 42 W. R. 46.—KEKEWICH, J., *considered*.

Norfolk's (Duke) Estates, In re, Norfolk (Duke) v. Herries (Lord) (1900) 69 L. J. Ch. 236; [1900] 1 Ch. 461; 82 L. T. 613; 48 W. R. 328.

BYRNE, J.—It has already been determined in *Millard's Settled Estates, In re*, that a prospective order cannot be made by the Court authorising payment by the trustees for work to be done under an approved scheme out of moneys not in their hands at the time when the order is asked for. . . . This case does not decide the point now before me, although it has an important bearing upon it from the reasoning adopted, and I will mention particularly one passage in the M.R.'s judgment where he says: "What is wanted is protection—that is, protection for those interested in the land; and as practical men we know that to authorise a thing to be done is quite different from approving it when it has been done." . . . The case of *Bristol's (Lord) Settled Estates, In re*, was on an application made under sect. 15 of the [Settled Land] Act of 1890, and determined that a prospective order could not be made under that section to take effect upon moneys which might thereafter arise, but in the course of his judgment Kekewich, J., in considering the meaning of sect. 26 of the Act of 1882, makes some observations showing that in his view the use of the words "to be expended" points to moneys in hand. . . . *Tucker's Settled Estate, In re* (*supra*, col. 3101), also an application under the Act of 1890, deals with the principle upon which the Court ought to exercise its discretion in respect of allowing the tenant for life to be reimbursed moneys he has expended without first submitting a scheme. The observations which have been referred to of the M.R. and Lopes, L.J., in that case, about the duty of a tenant for life to submit a scheme, must be read in view of the fact that it appears by the report that there were no capital moneys available at the time the tenant for life made the expenditure. . . . I think the observation of the M.R. [*Millard's Settled Estates, In re*] is to be read with regard to the subject-matter of the case before him, and that he is dealing with the case of safeguards provided by the Act before payment can be actually made, and not with the case of approval of a scheme.—pp. 237, 239.

Millard's Settled Estates, In re, applied.

Standing v. Gray (1902) [4003] 1 Ir. R. 49, 57.—PORTER, M.R.

Ormrod's Settled Estate, In re (1892) 61 L. J. Ch. 651; [1892] 2 Ch. 318; 66 L. T. 845; 40 W. R. 490.—NORTH, J., *referred to*.

Bristol's (Lord) Settled Estates, In re (1893) 62 L. J. Ch. 901; [1893] 3 Ch. 161; 3 R. 689; 69 L. T. 304; 42 W. R. 46.—KEKEWICH, J.

Clarke v. Thornton (1887) 56 L. J. Ch. 302; 35 Ch. D. 307; 56 L. T. 294.—CHITTY, J.

Followed, **Stamford's (Lord) Estates, In re** (1887) 56 L. T. 484.—STIRLING, J.; *discussed*, **Stamford's (Earl) Settled Estates, In re** (1889)

58 L. J. Ch. 849; 43 Ch. D. 84, 96; 61 L. T. 504.—STIRLING, J.

Clarke v. Thornton and Stamford's (Lord) Estates, In re (1887) 56 L. T. 484.—STIRLING, J., *adhered to but not applied*. **Cardigan (Countess) v. Curzon-Howe** (1893) 9 Times L. R. 244.—CHITTY, J.

Clarke v. Thornton.

Adhered to and applied, **Gee, In re, Pearson-Gee v. Pearson** (1895) 64 L. J. Ch. 606; 11 Times L. R. 431.—CHITTY, J.; *discussed*, **Thomas, In re** (*post*); *distinguished*, **Partington, In re** (*post*).

Stamford's (Earl) Settled Estates, In re (1889) 58 L. J. Ch. 849; 43 Ch. D. 84; 61 L. T. 504.—STIRLING, J.

Approved, **Mundy's Settled Estates, In re** (1891) 60 L. J. Ch. 273; [1891] 1 Ch. 399, 409.—C.A. (*post*, col. 3139); *discussed*, **Thomas, In re, Weatherall v. Thomas** (1900) 69 L. J. Ch. 198, 201; [1900] 1 Ch. 319, 324. (*See supra*, col. 3102.)

Stamford's (Earl) Settled Estates, In re, distinguished.

Cardigan (Countess) v. Curzon-Howe (1893) 9 Times L. R. 244.—CHITTY, J., *followed*.

Partington, In re, Leigh v. Kane (1902) 71 L. J. Ch. 472; [1902] 1 Ch. 711; 86 L. T. 194; 50 W. R. 388.

BUCKLEY, J.—There was not in *Clarke v. Thornton* (*supra*), as there is here, a trust coming before the trust for the tenant for life and providing for payment of improvements out of income. There would have been such a trust if the trustees had proceeded or the Court had directed them to proceed in exercise of their power, an event which did not happen. That decision was followed by Stirling, J. in *Stamford's (Earl) Settled Estates, In re*; and again, in that case there was no trust for payment of improvements out of income before arriving at the amount payable to the tenant for life. The learned judge says that in *Clarke v. Thornton* "the will had thrown the improvements on the income." By this he meant, I think, that if they were provided for not under the Settled Land Acts, but by the exercise of the power in the will, they were thrown upon income, not that they were thrown by the will upon the income in any event. . . . These repairs and improvements cannot be provided for out of capital under the Settled Land Act, 1882, because they have been executed without first carrying in a scheme for their execution. The application must be made under sect. 15 of the Settled Land Act, 1890. Under that section there is a discretion in the Court—*Cardigan (Countess) v. Curzon-Howe*.—p. 474.

Houghton Estate, In re, or Cholmondeley's (Marquis) Settled Estate, In re (1885) 55 L. J. Ch. 37; 30 Ch. D. 102; 53 L. T. 196; 33 W. R. 869.—BACON, V.-C., *discussed*.

De Teissier's Settled Estates, In re (1893) 62 L. J. Ch. 552; [1893] 1 Ch. 153; 3 R. 103; 68 L. T. 275; 41 W. R. 184.—CHITTY, J., *approved*.

Gerard's (Lord) Settled Estate, In re [1893] 3 Ch. 252; 63 L. J. Ch. 23; 7 R. 227; 69 L. T. 393.—C.A.; *affirming* CHITTY, J.

LINDLEY, L.J.—I rather gather from the argument to the V.-C. by Mr. Martin that the agent's house in that case [*Houghton Estate, In re*] was

a farmhouse in which the agent lived, because he put it that it might come under clause ix. of sect. 25: "Farmhouses, offices, and out-buildings, and other buildings for farm purposes"; and the V.-C. seems to have thought so too. Of course, if that were so—if the agent's house was a farmhouse in which the agent was living—there is no difficulty about it; but if the agent's house in that case was what the agent's house in this case is to be—if the V.-C. meant to go that length—then I cannot say that his decision is in conformity with the Act of Parliament. I cannot find the building a new agent's house in any of the sub-sections of the Act which is before us. There remain the stables. There is nothing about stables in the Act of Parliament. . . . I think that [sect. 13, sub-sect. ii. of the Settled Land Act, 1890] might justify the expenditure of capital moneys in additions or alterations in stables if such additions or alterations were reasonably necessary or proper to enable the same to be let. But then I also agree with the view which has been taken by the Courts of first instance in other cases, that where there is no question of letting, you cannot spend capital for such purposes. Here Lord Gerard is not going to let this property, he is going to inhabit it himself; and I cannot differ from the construction put upon that sub-clause ii. in *De Teissier's Settled Estates, In re*, by Chitty, J., in which he says that there must be a present intention to let, if not an immediate prospect of letting, before any application under sub-sect. ii. can be properly made. I think that is a perfectly right and proper construction to be placed upon that particular clause.—pp. 259—260.

LOPES and A. L. SMITH, L.JJ. to the same effect.

De Teissier's Settled Estates, In re.

Followed, *De Tabley (Lord)*, *In re*, Leighton v. Leighton (1896) 75 L. T. 328.—NORTH, J.; *discussed*, *Hawker's Settled Estates, In re*, Duff v. Hawker (1897) 66 L. J. Ch. 341; 76 L. T. 286; 45 W. R. 440.—KEKEWICH, J.; *Montagu, In re* *Derbishire v. Montagu* (1897) 66 L. J. Ch. 345, 541; [1897] 1 Ch. 685; [1897] 2 Ch. 8; 76 L. T. 485; 45 W. R. 380, 594.—KEKEWICH, J. (affirmed, C.A. *See* "TRUST AND TRUSTEES").

De Teissier's Settled Estates, In re, and Gerard's (Lord) Settled Estate, In re

(*supra*, col. 3104), *observed on*.

Stanford, In re, *Stanford v. Roberts* (1901) 70 L. J. Ch. 203; [1901] 1 Ch. 440; 83 L. T. 756; 49 W. R. 315.

BUCKLEY, J.—*In De Teissier, In re*, Chitty, J., in the course of the judgment, says, "In my opinion there must be a present intention to let, if not an immediate prospect of letting, before any application under this sub-sect. ii. [Settled Land Act, 1890] can properly be made." And in *Gerard's Settled Estate, In re*, that sentence was read or referred to by each of the L.JJ. and approved, and I need hardly say that that is binding on me. But I do not think that in using those words the learned judge meant that there must be a present intention to find an immediate tenant. The facts in *De Teissier, In re*, and in *Gerard's Settled Estate, In re*, were that the tenant for life, who desired to have the money expended on the alterations, was in occupation of and intended to occupy the mansion-house, and was a person who had no

intention to let. And if one looks at the interlocutory remarks of Chitty, J., in *De Teissier, In re*, it will be seen that he was using the expression "present intention to let" in contradistinction to a case where there was no intention to let. He says, "Additions and alterations such as these I usually consider proper, and allow under this sub-sect. ii.; but before this section can apply, there must be an actual letting in contemplation. In the present case, the tenant for life proposes to occupy the house." He is there contrasting the intention to let with the intention to occupy. And in his judgment he says, "I think it is clear, that if the tenant for life is residing in the mansion-house, or contemplates residence there, as this tenant for life does, he cannot under this sub-section ask for capital money to be spent in making any additions to or alterations in the buildings." *In Gerard's Settled Estate, In re*, in the C.A., where the L.JJ. were approving of those observations, I find that interpretation of Chitty, J.'s words approved by something in the judgments of each of their lordships. . . . LOPES, L.J., says, "Then there is *De Teissier's Settled Estates, In re*, in which case Chitty, J., held that the meaning of this section was this, that the thing in question must at the time be in contemplation to be let." I do not understand that to mean that it must be in contemplation to be let at the moment, but a thing to be let as distinguished from a thing to be occupied. The present M.R. says, "In my judgment, unless there is a present intention for a letting which does not exist in this case, sub-sect. ii. does not apply." I understand him to mean a present intention to let as distinguished from an intention to occupy.—p. 205.

De Teissier's Settled Estates, In re, rule in, approved and applied.

Willis, In re, *Willis v. Willis* (1901) 71 L. J. Ch. 73; [1902] 1 Ch. 15; 85 L. T. 436; 50 W. R. 70.—C.A.

Gaskell's Settled Estates, In re (1894) 63 L. J. Ch. 243; [1894] 1 Ch. 485; 8 R. 67; 70 L. T. 554; 42 W. R. 219.—CHITTY, J.

Followed, *Clarke's Settlement, In re (post)*; *Blagrove's Settled Estates, In re (post)*.

Freake's Settlement, In re, Kinnaird (Lord) v. Freake (1901) 71 L. J. Ch. 20; [1902] 1 Ch. 97; 85 L. T. 454; 50 W. R. 237.—JOYCE, J., *not followed*.

Clarke's Settlement, In re (1902) 71 L. J. Ch. 593; [1902] 2 Ch. 327; 86 L. T. 653; 50 W. R. 585.—BUCKLEY, J.

Freake's Settlement, In re, not followed.

Clarke's Settlement, In re, commented on but followed.

Blagrove's Settled Estates, In re (1902) 87 L. T. 62.—JOYCE, J.

Freake's Settlement, In re, referred to.

Clarke's Settlement, In re, approved and principle applied.

Blagrove's Settled Estates, In re, affirmed.

Blagrove's Settled Estates, In re [1903] 1 Ch. 560; 72 L. J. Ch. 317, 318; 88 L. T. 253; 51 W. R. 437.—C.A.

COLLINS, M.R.—This is an appeal from a decision of Joyce, J. It virtually . . . is an appeal from a decision of Buckley, J., in *Clarke's Settlement, In re*, and the question is whether a

tenant for life is entitled out of the capital moneys, to have paid for him the expense of an electric installation. . . . It really comes to this : Is electric plant an addition to a building within the meaning of sect. 13 of the Settled Land Act, 1890? Buckley, J., has decided that it is not. Joyce, J., in an earlier case of *Trefusis's Settlement, In re*, without giving any reasons, allowed the expenditure out of capital for this purpose; but in this, a subsequent case, having Buckley, J.'s decision before him in *Clarke's Settlement, In re*, he elected to follow Buckley, J. . . . For my own part, I have great difficulty in differing from Buckley, J.'s view, which was based, not merely upon his own opinion, but upon an earlier decision of Chitty, J., in *Gaskell's Settled Estates, In re (supra)*, where, although the words "structural addition" are not used, the learned judge seems to have considered that an addition to a building must be, in its terms, something in the nature of a structural addition. This view Buckley, J. adopted, although he says, perfectly truly, that the word "structural" is not used in the Act, and that the word "addition" is capable of a good many meanings. . . . I agree entirely with the observations of Buckley, J., in *Clarke's Settlement, In re*, as to electric plant, and of Chitty, J., in *Gaskell's Settled Estates, In re*, as to hot water and heating apparatus. They completely cover this case, as it seems to me.—pp. 561—563.

ROMER, L.J.—I also agree with the reasoning and the decisions of Chitty, J., in *Gaskell's Settled Estates, In re*, and of Buckley, J., in *Clarke's Settlement, In re*, and I think the principle of the decisions in those cases governs the present. . . . I am bound to say that I do not quite see how the learned judge in the Court below came to allow the expense of the erection of the dynamo-house, seeing, as far as I am aware, that the house was some distance from the mansion-house. It is difficult to see at first sight how it could be said to be an addition to, or alteration in, the mansion-house, or any previously existing buildings; but that point is, fortunately, not before us.—pp. 563—564.

COZENS-HARDY, L.J. to the same effect as ROMER, L.J.

Johnson's Settlements, In re (1869) L. R. 8 Eq. 348—JAMES, V.-C., *followed*.

Leadbitter, *In re* (1882) 30 W. R. 378.—FRY, J.

Newman's Settled Estates, In re (1874) 43 L. J. Ch. 702; L. R. 9 Ch. 681; 31 L. T. 265.—JAMES and MELLISH, L.JJ., *explained and applied*.

Bethlem Hospital, *In re* (1875) 44 L. J. Ch. 406, 407; L. R. 19 Eq. 457, 460; 23 W. R. 644.—JESSEL, M.R.

Newman's Settled Estates, In re, explained and limited.

Drake v. Trefusis (1875) L. R. 10 Ch. 364, 366; 33 L. T. 85; 23 W. R. 762.—L.J.

Newman's Settled Estates, In re, applied.

Venour's Settled Estates, In re, Venour v. Sellon (1876) 2 Ch. D. 522; 45 L. J. Ch. 409, 411; 24 W. R. 752.

JESSEL, M.R.—Those cases [*Newman's Settled Estates, In re*, and *Drake v. Trefusis (post)*] decide that as regards money in Court under the Settled Estates Act and other Acts, the Court

will not allow it to be laid out otherwise than in the purchase of land except in one case, viz., the building of a house; and it is difficult to see how the exception arose. . . . It appears to me that the two cases to which I have referred show that the decisions as to laying out money in building are of this anomalous character. In *Newman's Settled Estates, In re*, the application was to apply a considerable sum in building a new house, and a small sum of 15l. 7s. 8d. in drainage. A number of cases were cited, and the application was allowed. . . . If nothing more had taken place I might have been embarrassed by the circumstance that the application was allowed in respect of drainage: but in *Drake v. Trefusis* the Court was asked to lay out money in both ways, that is, both in erecting new buildings and in repairs and permanent improvements of old buildings; and the case as regards the latter was very strong, because there had been a fire which destroyed a large part of the mansion-house on the estate, and it was proposed to apply the fund in reinstating it. But James, L.J., said: "We never intended to go further than this, that the expending money in building a house on a vacant piece of ground forming part of the settled property is in substance the same thing as buying a house; and that money to be invested in the purchase of real estate may therefore be properly applied in the erection of new buildings. Repairs and permanent improvements do not come within this principle. I am therefore of opinion that the proposed expenditure in reinstating the mansion cannot be sanctioned, nor any outlay in permanent improvements which do not put new buildings on the ground." That decides, therefore, that the only exception to laying out the money in the purchase of real estate is putting a new building on the ground; and it also decides that the rule applies where the money is held under the trusts of a will or settlement just as much so as when it arises under an Act of Parliament.—p. 526.

Newman's Settled Estates, In re, referred to.
Stanford v. Roberts (1882) 52 L. J. Ch. 50; 48 L. T. 262.—KAY, J.

Drake v. Trefusis (1875) L. R. 10 Ch. 364; 33 L. T. 85; 23 W. R. 762.—JAMES and MELLISH, L.JJ., *applied*.

Venour's Settled Estates, In re, Venour v. Sellon (1876) 45 L. J. Ch. 409, 411; 2 Ch. D. 522, 526; 24 W. R. 752.—JESSEL, M.R. (*see supra*, col. 3107, and *ante*, col. 3092); *Speer's Trusts, In re* (1876) 3 Ch. D. 262, 264; 24 W. R. 880.—BACON, V.-C.

Drake v. Trefusis, distinguished.

Donaldson v. Donaldson (1876) 3 Ch. D. 743, 748; 34 L. T. 900; 24 W. R. 1037.—BACON, V.-C.

Drake v. Trefusis, discussed.

Stanford v. Roberts (1882) 52 L. J. Ch. 50; 48 L. T. 262.—KAY, J.; *Jesse v. Lloyd* (1883) 48 L. T. 656, 659.—KAY, J.; *Conway v. Fenton* (1888) 58 L. J. Ch. 282; 40 Ch. D. 512, 515; 59 L. T. 928; 37 W. R. 156.—KEKEWICH, J.

Drake v. Trefusis, not applied.

Hale v. Shelldrake (1889) 60 L. T. 292, 295.—KEKEWICH, J. *And see post*, col. 3109.

Drake v. Trefusis (*supra*), explained.

Vine v. Raleigh [1891] 2 Ch. 13; 60 L. J. Ch. 675.—C.A.: affirming with an addition, CHITTY, J.

KAY, L.J.—*Drake v. Trefusis* has decided that spending money in erecting new buildings on the settled property is the same thing as buying land; capital money directed to be invested in the purchase of land may be expended in building a new house on the settled land.—p. 23.

Drake v. Trefusis, not applied.

Gerard's (Lord) Settled Estate, In re (1893) 63 L. J. Ch. 23; [1893] 3 Ch. 252, 257; 7 R. 227; 69 L. T. 393.—C.A.

Drake v. Trefusis, followed.

Arden, In re (1894) 70 L. T. 506.—C.A.

Drake v. Trefusis, referred to.

Montagu, In re, Derbyshire v. Montagu (1897) 66 L. J. Ch. 345; [1897] 1 Ch. 685; 45 W. R. 380.—KEKEWICH, J.; affirmed, C.A. (*see supra*, col. 3105).

And see Legh's Settled Estates, In re (1902) 71 L. J. Ch. 668; [1902] 2 Ch. 274; 86 L. T. 884; 50 W. R. 570; 66 J. P. 600.—KEKEWICH, J.

Mackenzie's Trusts, In re (1883) 52 L. J. Ch.

726; 23 Ch. D. 750; 48 L. T. 936; 31 W. R. 948.—CHITTY, J., followed.

Tennant, In re (1889) 40 Ch. D. 594; 58 L. J. Ch. 457; 60 L. T. 488; 37 W. R. 542.

NORTH, J.—A case was cited by Mr. Kirby, *Mackenzie's Trusts*, In re, in which Chitty, J., allowed money bequeathed to trustees on trust to be laid out in land in strict settlement, to be invested in debenture stock. He did so on the ground that the money was to be invested in the purchase of land, and if such investment had been made the land purchased could have been sold and the proceeds invested in the desired securities under the Settled Land Act; and as the result could be obtained by two processes he thought it might also be effected by one.—p. 595.

Mackenzie's Trusts, In re, and Tennant, In re, approved.

Mundy's Settled Estates, In re (1891) 60 L. J. Ch. 273; [1891] 1 Ch. 399, 409; 63 L. T. 311; 39 W. R. 209.—C.A. LINDLEY, LOPES and KAY, L.J.J.; varying NORTH, J.

Mundy's Settled Estates, In re, principle applied.

Byng's Settled Estates, In re (1892) 61 L. J. Ch. 511; [1892] 2 Ch. 219; 66 L. T. 754; 40 W. R. 457.—NORTH, J.

Mundy's Settled Estates, In re, considered.

Gee, In re, Pearson Gee v. Pearson (1895) 64 L. J. Ch. 606; 11 Times L. R. 431.—CHITTY, J.

Mundy's Settled Estates, In re, and Byng's Settled Estates, In re (*supra*), discussed and applied.

Monson's (Lord) Settled Estates, In re (1898) 76 L. J. Ch. 176; [1898] 1 Ch. 427, 430; 78 L. T. 25; 46 W. R. 330.

ROMER, J.—It was held in *Mundy's Settled Estates*, In re, by the C. A., that where an estate was settled by deed, and then subsequently, by a will, moneys were directed to be laid out in the purchase of land to be settled in the same way

as the estate, the moneys could be applied as capital money under the Act on improvements on the settled estate; the short ground of the decision being that the settlement and will constituted one settlement under sect. 2, sub-sect. 1, of the Act of 1882. Following the broad principle laid down in that case, North, J., in *Byng's Settled Estates*, In re, held, where land was settled by will, and then by deed money was settled in trust to purchase land to be settled on limitations identical with those of the will (though not by reference to the will), except that two terms of years were interposed, that, when the trusts of the terms became satisfied, the will and deed constituted one compound settlement, so that capital money arising under the deed could be applied in paying the cost of improvements on the land devised by the will. It follows from these cases that in the case before me, if estate A. had been subject to the mortgage and not estate B., the fresh mortgage to pay off might have been on estate B. But it is said that the converse does not hold good, and though estate B. ought to be used for the purposes of estate A., yet estate A. cannot be used for the purposes of estate B. It appears to me that this distinction is unsound.—p. 178.

Mundy's Settled Estates, In re, applied.

Coote, In re, Coote v. Cadogan (1899) 81 L. T. 535.—NORTH, J.

SETTLEMENT.

1. INFORMAL CONTRACTS TO SETTLE.
2. COVENANTS TO SETTLE.
3. VALIDITY, CONSIDERATION, AND EXECUTION.
4. PROPERTY SETTLED.
5. LIMITATIONS AND INTERESTS CREATED.
6. EXECUTED SETTLEMENTS, HOW ENFORCED.
7. RECTIFICATION OF ARTICLES AND SETTLEMENTS.
8. RESCISSION BY COURT.
9. REVOCATION.

1. INFORMAL CONTRACTS TO SETTLE.

Montacute (Viscountess) v. Maxwell (1720)

1 Str. 236; 1 P. Wms. 618; 1 Eq. Cas. Abr. 19; Prec. Ch. 526.—L.C. referred to. De Biel (Baron) v. Thompson (1841) 12 Cl. & F. 61, n.—L.C.; (affirmed non. Hammersley v. De Biel (Baron) H.L., *post*, col. 3111); Barkworth v. Young (1856) 26 L. J. Ch. 153; 4 Drew 1; 3 Jur. (N.S.) 34; 5 W. R. 156.—KINDERSLEY, V.-C.; Warden v. Jones (1857) 26 L. J. Ch. 427, 429.—M.R.; (affirmed, 2 De G. & J. 76; 3 Jur. (N.S.) 1459; 5 W. R. 446.—L.C.).

Montacute (Viscountess) v. Maxwell, discussed.

Holland, In re, Gregg v. Holland (1901) 70 L. J. Ch. 625; [1901] 2 Ch. 145, 150; 49 W. R. 476, reversed (*post*).

FARWELL, J.—*Montacute (Viscountess) v. Maxwell* was a case of fraud, the reduction of the agreement into writing having been prevented by the fraud and practices of the party

to be bound. In the report of the case in *Strange, Parker, L.C.*, says: "But such parol promise on marriage is sufficient consideration to support a settlement made agreeable to it after marriage. This has been frequently determined. So it is also sufficient consideration to establish a promise made in writing after marriage." Lord St. Leonards, in his work on Powers (8th ed.) p. 647, treats this as a mere dictum; and the editor of *Eden's Reports*, in a note at vol. i. p. 62, says that there is no decision to warrant such a dictum. The report of this case in *Peere Williams*, which was cited in *Warden v. Jones* [27 L. J. Ch. 190; 2 De G. & J. 76, *see post*, col. 3114], does not contain the second hearing of this case, in which this dictum is stated.—p. 626.

Montacute (Viscountess) v. Maxwell, referred to.

Holland, In re, *Gregg v. Holland* (1902) 71 L. J. Ch. 518, 524; [1902] 2 Ch. 360, 378; 86 L. T. 542; 50 W. R. 575; 9 Manson, 259.—C.A. V. WILLIAMS, STIRLING and COZENS-HARDY, L.J.J. *See post*, col. 3118.

Spicer v. Spicer (1857) 24 Beav. 365.—ROMILLY, M.R., *principle applied*.

Giacometti v. Prodgers (1872) L. R. 14 Eq. 253, 259; 27 L. T. 475; 20 W. R. 858.—MALINS, V.-C.; affirmed, (1873) L. R. 8 Ch. 338; 28 L. T. 432; 21 W. R. 375.—SELBORNE, L.C., JAMES and MELLISH, L.J.J.

Giacometti v. Prodgers, not applied.

Nicholson v. Carline (1874) 22 W. R. 819.—BACON, V.-C.

De Biel v. Thompson (1841) 3 Beav. 469.—LANGDALE, M.R., *not applied*.

Maunsell v. White (1844) 1 Jo. & Lat. 539; 7 Ir. Eq. R. 413.—SUGDEN, L.C.; affirmed, H.L. (*post*, col. 3119).

De Biel v. Thompson, affirmed, 12 Cl. & F. 64, n.—L.C. (*see post*, col. 3118); and *nom.* **Hammersley v. De Biel (Baron)** (1845) 12 Cl. & F. 45.—H.L. (E.).

De Biel v. Thompson, Hammersley v. De Biel (Baron).

Explained. *Lassence v. Tierney* (1849) 1 Mac. & G. 551; 2 H. & Tw. 115; 14 Jur. 182.—L.C.; *distinguished*, *Moorhouse v. Colvin* (1851) 21 L. J. Ch. 177; 15 Beav. 341.—M.R.: and (1852) 21 L. J. Ch. 782.—L.J.J.: *Maunsell v. White* (1854) 4 H. L. Cas. 1039.—H.L. (IR.), CRANWORTH, L.C. and LORD ST. LEONARDS: *principle applied*, *Bold v. Hutchinson* (1855) 24 L. J. Ch. 285; 3 Eq. R. 743; 1 Jur. (N.S.) 365.—M.R.; *discussed*, *Gulliver, In re, Stroughill v. Gulliver* (1856) 2 Jur. (N.S.) 700; 4 W. R. 684.—STUART, V.-C.; *Barkworth v. Young* (1856) 26 L. J. Ch. 153; 4 Drew 1; 3 Jur. (N.S.) 34; 5 W. R. 156.—KINDERSLEY, V.-C.; *distinguished*, *Warden v. Jones* (1857) 2 De G. & J. 76, 85.—L.C. (*see post*, col. 3114); *Cooper v. Wormald* (1859) 27 Beav. 266.—ROMILLY, M.R.; *Loxley v. Heath* (1860) 29 L. J. Ch. 213; 1 De G. F. & J. 489; 6 Jur. (N.S.) 436.—L.C. and L.J.J.; *applied*, *Duckett v. Gordon* (1860) 11 Ir. Ch. R. 181.—CUNACK SMITH, M.R.; *not applied*, *Goldie v. Townsend* (1860) 28 Beav. 445.—ROMILLY, M.R.; *Sands v. Soden* (1862) 31 L. J. Ch. 870; 10 W. R. 765.—KINDERSLEY, V.-C.;

applied, *Walford v. Gray* (1865) 11 Jur. (N.S.) 106.—STUART, V.-C.: (affirmed, 11 Jur. (N.S.) 473; 12 L. T. 437; 13 W. R. 761.—L.C.); *discussed*, *M'Askie v. M'Cay* (1868) Ir. R. 2 Eq. 447; 16 W. R. 1187.—WALSH, M.R.; *Dashwood v. Jermyn* (1879) 12 Ch. D. 776, 781; 27 W. R. 868.—BACON, V.-C.; *Allen, In re, Hingcs v. Allen* (1880) 49 L. J. Ch. 553, 555; 28 W. R. 533.—MALINS, V.-C.; *applied*, *Viret v. Viret* (1880) 50 L. J. Ch. 69; 17 Ch. D. 365, p.; 43 L. T. 493.—MALINS, V.-C.: *Badcock, In re, Kingdon v. Tagert* (1880) 17 Ch. D. 361, 366; 43 L. T. 688; 27 W. R. 278.—MALINS, V.-C.; *distinguished*, *Cobden v. Bagwell* (1886) 19 L. R. Ir. 150, 176.—PORTER, M.R.; *referred to*, *McManus v. Cooke* (1887) 56 L. J. Ch. 662; 35 Ch. D. 681, 691; 56 L. T. 900; 35 W. R. 754; 51 J. P. 708.—KAY, J.: *Johnstone v. Mappin* (1891) 60 L. J. Ch. 241; 64 L. T. 48.—EKEWICH, J. (*see post*, col. 3116); *discussed and applied*, *Synge v. Synge* (1894) 63 L. J. Q. B. 202; [1894] 1 Q. B. 466; 9 R. 265; 70 L. T. 221; 42 W. R. 309; 58 J. P. 396.—C.A.

Hammersley v. De Biel, discussed and distinguished.

Fickus, In re, *Farina v. Fickus* (1899) 69 L. J. Ch. 161, 163; [1900] 1 Ch. 331, 335; 81 L. T. 749; 48 W. R. 250.—COZENS-HARDY, J. *See post*, col. 3117.

Hammersley v. De Biel, discussed.

Holland, In re, *Gregg v. Holland* (1901) 70 L. J. Ch. 625; [1901] 2 Ch. 145, 151; 49 W. R. 476.

FARWELL, J.—With regard to *De Biel v. Thompson* and *Hammersley v. De Biel (Baron)*, I would point out, with all respect, that Lord Langdale did not decide the case on the ground that a subsequent memorandum would satisfy the Statute [of Frauds], but said that the subsequent letter was either a sufficient note to satisfy the statute or a sufficient adoption of an ante-nuptial contract purporting to have been entered into by his sons in writing on his behalf; and, further, that Lord Cottenham, in *Lassence v. Tierney* [1 Mac. & G. 551 (*see post*, col. 3115)], expressly stated that his judgment in *Hammersley v. De Biel (Baron)* turned on part performance by acts other than the mere marriage.—p. 627.

Hammersley v. De Biel, dicta followed.

Holland, In re, *Gregg v. Holland* (1902) 71 L. J. Ch. 518; [1902] 2 Ch. 360, 378; 86 L. T. 542; 50 W. R. 575; 9 Manson, 259.—C.A.; reversing S.C. (*supra*).

STIRLING, L.J.—Further, *Barkworth v. Young* [26 L. J. Ch. 153; 4 Drew 1 (*see post*, col. 3113)] is an express decision that a contract in consideration of marriage may be enforced against a party who has signed a written memorandum of it after the marriage. There is no decision to the contrary, and there is much authority in the shape of dictum in support of it. In particular, I think that, although it may be, as Farwell, J., says, that the ultimate decision in *Hammersley v. De Biel (Baron)* turned on part performance by acts other than the mere marriage, nevertheless, the judgments of Lord Langdale and Lord Cottenham do show that those learned judges were of opinion that a verbal ante-nuptial contract in consideration of marriage could be enforced if a proper memorandum in writing were signed after the

marriage.—p. 527. See also the judgments of V. Williams and Cozens-Hardy, L.J.J. *And see* "ESTOPPEL," vol. i. col. 1018.

Caton v. Caton (1865) 35 L. J. Ch. 292 L. R. 1 Ch. 137; 12 Jur. (N.S.) 171; 14 L. T. 34; 14 W. R. 267.—**GRANWORTH, L.C.**; *affirmed*, (1867) 36 L. J. Ch. 886; L. R. 2 H. L. 127.—**H.L. (E.)**, *referred to*.

Strahan v. Graham (1867) 16 L. T. 87, 89.—**MALINS, V.-C.**; **Garrett's Trusts**, In re (1870) 18 W. R. 684.—**MALINS, V.-C.**; **Kronheim v. Johnson** (1877) 47 L. J. Ch. 132; 7 Ch. D. 60, 67; 37 L. T. 751; 26 W. R. 142.—**FRY, J.**; **Viret v. Viret** (1880) 50 L. J. Ch. 69; 17 Ch. D. 365, n.; 43 L. T. 493.—**MALINS, V.-C.**; **Dyas v. Stafford** (1881) 7 L. R. Ir. 590.—**CHATTERTON, V.-C.**; **McManus v. Cooke** (1887) 56 L. J. Ch. 662; 35 Ch. D. 681, 693; 56 L. T. 900; 35 W. R. 754; 51 J. P. 708.—**KAY, J.** *And see post*, col. 3121, and "ESTOPPEL," vol. i. cols. 1018, 1020.

Hodgson v. Hutchenson (1712) 5 Vin. 522, Pl. 34.—**L.K.**, *referred to*.

De Biel v. Thompson (1841) 3 Beav. 469; 12 Cl. & F. 64, n.—**M.R.** and **L.C.**; *affirmed*, **H.L.** (*supra*, col. 3111).

Hodgson v. Hutchenson, *discussed and commented on*.

Holland, In re, **Gregg v. Holland** (1901) 70 L. J. Ch. 625; [1901] 2 Ch. 145; 49 W. R. 476; *reversed*, **C.A.** (*see post*).

FARWELL, J., after referring to the report of this case, said:—The first ground on which this was decided is that where the agreement is admitted by the answer the statute cannot be pleaded, and this was correct at that time, although it is no longer law; *see Moore v. Edwards* [(1798) 4 Ves. 23] and *Blagden v. Bradbear* [(1806) 1 Eq. Cas. Abr. 19; Prec. Ch. 526; 4 Str. 236; 1 P. Wms. 618]. The second ground is so concisely stated in the report that it is difficult to say what it really amounts to.—p. 626. *And see post* col. 3118.

Battersbee v. Farrington (1818) 1 Swanst. 106; 1 Wils. Ch. 88; 18 R. R. 32.—**M.R.**, *discussed*.

Holland, In re, **Gregg v. Holland** (1901) 70 L. J. Ch. 625, 630; [1901] 2 Ch. 145, 157; 49 W. R. 476.—**FARWELL, J.**; and (1902) 71 L. J. Ch. 518; [1902] 2 Ch. 360, 380; 86 L. T. 542; 50 W. R. 575; 9 Manson 259.—**C.A.**

Saunders v. Cramer (1842) 3 Dr. & War. 87; 5 Ir. Eq. R. 12; **S. C. nom. Greene v. Cramer**, 2 Con. & L. 54.—**SUGDEN, L.C.**, *not applied*.

Allen, In re, **Hincks v. Allen** (1880) 49 L. J. Ch. 553, 555; 28 W. R. 533.—**MALINS, V.-C.**

Barkworth v. Young (1856) 26 L. J. Ch. 153; 4 Drew 1; 3 Jur. (N.S.) 34; 5 W. R. 156.—**KINDERSLEY, V.-C.**

Discussed and distinguished, **Duckett v. Gordon** (1860) 11 Ir. Ch. R. 181.—**CUSACK SMITH, M.R.**; *not applied*, **Goldcutt v. Townsend** (1860) 28 Beav. 445.—**ROMILLY, M.R.**; *referred to*, **Brookman's Trusts**, In re (1869) L. R. 5 Ch. 182, 188; 39 L. J. Ch. 138; 22 L. T. 891; 18 W. R. 199.—**GIFFARD, L.J.**; *commented on*, **Trowell v.**

Shenton (1878) 47 L. J. Ch. 738; 8 Ch. D. 318, 324; 38 L. T. 369; 26 W. R. 837.—**C.A.** (*see post*, col. 3115); *referred to*, **Futcher v. Futcher** (1881) 50 L. J. Ch. 735, 736; 43 L. T. 306; 29 W. R. 884.—**FRY, J.**

Barkworth v. Young, *discussed*.

Lucas v. Dixon (1889) 58 L. J. Ch. 161; 22 Q. B. D. 357, 360; 37 W. R. 370.—**C.A.**

Barkworth v. Young, *disapproved*.

Holland, In re, **Gregg v. Holland** (1901) 70 L. J. Ch. 625, 627; [1901] 2 Ch. 145, 151; 49 W. R. 476.—**FARWELL, J.**; *reversed* (*post*).

Barkworth v. Young, *approved and followed*.

Holland, In re, **Gregg v. Holland** (1902) 71 L. J. Ch. 518, 524; [1902] 2 Ch. 360, 378.—**C.A.** *See supra*, col. 3112 and *post*, col. 3118. *And see* "CONTRACT," vol. i. col. 648.

Surcome v. Pinniger (1853) 3 De G. M. & G.

571, *distinguished and not applied*.

Gulliver, In re, **Stroughill v. Gulliver** (1856) 2 Jur. (N.S.) 700; 4 W. R. 684.—**STUART, V.-C.**; **Goldcutt v. Townsend** (1860) 28 Beav. 445.—**ROMILLY, M.R.**

Surcome v. Pinniger, *applied*.

Ungley v. Ungley (1876) 46 L. J. Ch. 189; 4 Ch. D. 73, 77; 35 L. T. 619; 25 W. R. 39.—**MALINS, V.-C.** (*affirmed*, (1877) 46 L. J. Ch. 854; 5 Ch. D. 887; 37 L. T. 52; 25 W. R. 733.—**C.A.**); **Sharman v. Sharman** (1893) 4 R. 124; 67 L. T. 834; 9 Times L. R. 101.—**C.A.** **LINDLEY, BOWEN** and **KAY, L.JJ.**

Surcome v. Pinniger, *dictum disapproved*.

Holland, In re, **Gregg v. Holland** (1901) 70 L. J. Ch. 625, 627; [1901] 2 Ch. 145, 157; 49 W. R. 476.—**FARWELL, J.**; *reversed* (*post*).

Surcome v. Pinniger, *dictum approved and followed*.

Holland, In re, **Gregg v. Holland** (1902) 71 L. J. Ch. 518, 524; [1902] 2 Ch. 360.—**C.A.** (*post*).

Warden v. Jones (1857) 26 L. J. Ch. 427; 23 Beav. 487; 2 De G. & J. 76; 3 Jur. (N.S.) 459; 5 W. R. 446.—**M.R.** and **L.C.**, *referred to*.

Goldcutt v. Townsend (1860) 28 Beav. 445.—**ROMILLY, M.R.**

Warden v. Jones, *applied*.

M'Askie v. M'Cay (1868) Ir. R. 3 Eq. 447; 16 W. R. 1187.—**WALSH, M.R.**; **Codrington v. Lindsay** (1872) 42 L. J. Ch. 526, 529; L. R. 8 Ch. 578, 588; 28 L. T. 177; 21 W. R. 182.—**C.A.** **SELBORNE, L.C.** and **L.JJ.** (*affirmed*, **H.L.**, *see post*, col. 3142); **Trowell v. Shenton** (1878) 47 L. J. Ch. 738; 8 Ch. D. 318, 324; 38 L. T. 369; 26 W. R. 837.—**C.A.** **JESSEL, M.R.**, **COTTON** and **THESSIGER, L.JJ.**

Warden v. Jones, *referred to*.

Whitehead, Ex parte, **Whitehead**, In re (1885) 54 L. J. Q. B. 240; 14 Q. B. D. 419, 424; 52 L. T. 597; 33 W. R. 471; 49 J. P. 405.—**C.A.**

Warden v. Jones, *discussed and approved*.

Holland, In re, **Gregg v. Holland** (1901) 70 L. J. Ch. 625, 628; [1901] 2 Ch. 145, 151; 49 W. R. 476.—**FARWELL, J.**; *reversed* (*post*).

Warden v. Jones, *considered*.

Holland, In re, **Gregg v. Holland** (1902) 71

L. J. Ch. 518; [1902] 2 Ch. 360, 376; 86 L. T. 542; 50 W. R. 575; 9 Manson 259.—C.A.

V. WILLIAMS, L.J.—*Warden v. Jones* does not seem to me to be an authority for the general proposition that a post-nuptial settlement reciting that it was made in pursuance of an ante-nuptial agreement cannot be good. In the first place, in *Warden v. Jones* there was no recital of such an ante-nuptial agreement, and although Lord Cranworth may have expressed the opinion that, assuming the existence of an antecedent parol agreement, it was not sufficient to satisfy the statute so as to give consideration to the settlement made after the marriage in pursuance of such agreement, this is a very different thing from deciding that the settlement would have been void against creditors if it had contained such a recital.—p. 523.

STIRLING, L.J.—*Spurgeon v. Collier* (1758) 1 Eden 55, *post*, col. 159 and *Warden v. Jones* appear to me to be consistent with the proposition that an ante-nuptial verbal contract may be enforced against a party to it who has after marriage signed a written memorandum of it, and also against a person identified in interest with him, as I take his trustee in bankruptcy to be when he sets up, as here, the same defence as the bankrupt himself might have set up. They certainly do not establish the contrary proposition, nor, as I think, do the *dicta* in the judgments cover it. *Truwell v. Shenton* (*supra*, col. 3113) was decided with reference to another statute and a different class of cases, but is relied on mainly for the observation of Sir G. Jessel, M.R., that *Warden v. Jones*, being subsequent in date to *Barkworth v. Young* [(1856) 26 L. J. Ch. 153; 4 Drew 1, *supra*, col. 3113], overrules it, but, as he expressly says, "so far as the two are inconsistent." As I have just said, I think there is no inconsistency between *Barkworth v. Young* and *Warden v. Jones*.—p. 527.

COZENS-HARDY, L.J.—A settlement, in no way referring to the parol contract, cannot be a note or memorandum thereof, nor can the marriage be regarded as a part performance sufficient to take the case out of the statute. This, as it seems to me, is all that was decided by Lord Cranworth in *Warden v. Jones*: and Lord Cranworth's *dictum*, upon which Farwell, J., relies, creates no difficulty when it is remembered that he was dealing with a case in which the plaintiff was asserting that the settlement was "void as against creditors," and was therefore in a better position than that of the settlor.—p. 529.

Lassence v. Tierney (1849) 1 Mac. & G. 551; 2 H. & Tw. 115; 14 Jur. 112.—L.C., *referred to*.

Warden v. Jones (1857) 26 L. J. Ch. 427, 429; 23 Beav. 487; 2 De G. & J. 76, 86; 3 Jur. (N.S.) 1459; 5 W. R. 446.—M.R. and L.C.; Goldieutt v. Townsend (1860) 26 Beav. 445.—ROMILEY, M.R.: Caton v. Caton (1866) L. R. 1 Ch. 137, 144; 35 L. J. Ch. 292; 12 Jur. (N.S.) 171; 14 L. T. 171; 14 W. R. 267.—CRANWORTH, L.C.; affirmed, H.L. (E.) (*see supra*, col. 3113); Cahill v. Martin (1881) 7 L. R. Ir. 361.—J.A.; FITZGIBBON, L.J. dissenting; affirming 5 L. R. Ir. 227.—V.C. (reversed, *post*); Cahill v. Cahill (1888) 8 App. Cas. 420, 437; 49 L. T. 605; 31 W. R. 861.—H.L. (IR.) (reversing C.A., *supra*); Maddison v. Alderson (1883) 52 L. J. Q. B. 737; 8 App. Cas. 467, 474; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.—H.L.

(E.); Hutchins' Estate, In re (1886) 19 L. R. Ir. 215, 223.—MONROE, J.: McManus v. Cooke (1887) 56 L. J. Ch. 662; 35 Ch. D. 681, 691; 56 L. T. 900; 35 W. R. 754; 51 J. P. 708.—KAY, J.

Lassence v. Tierney, *referred to*.

M'Intyre's Trustees' Estate, In re (1888) 21 L. R. Ir. 421.

MONROE, J.—It is now settled beyond all question that if a married woman, known to the other contracting parties to be rich, were to execute a deed, and then refuse to acknowledge it, her refusal to fulfil a contract which, by the express provisions of a statute she was not bound to fulfil, could not be considered a fraud on her part: *Lassence v. Tierney*, *Cahill v. Cahill* (*supra*, col. 3115).—p. 431.

Lassence v. Tierney, *applied*.

Johnstone v. Mappin (1891) 60 L. J. Ch. 241; 64 L. T. 48.

KEKEWICH, J.—Let me assume that Mr. Mappin stated in the plainest terms that he would allow his daughter 300*l.* a year—whether by way of advance against this or that is immaterial. What relief can be founded on such a statement? The plaintiffs rely on *Hammersley v. De Biel* [12 Cl. & F. 45, *supra*, col. 3111], but in truth it tells against them. There is no pretence here of writing required by the Statute of Frauds, and without that representations such as here alleged cannot be enforced unless the party to whom they were made has done something on the faith of them to justify the interference of the Court. This is clear from the decision of the H.L., apart from Lord Cottenham's lucid judgment in *Lassence v. Tierney*.—p. 243.

Lassence v. Tierney, *referred to*.

Holland, In re, *Gregg v. Holland* (1901) 70 L. J. Ch. 625, 627; [1901] 2 Ch. 145, 152; 49 W. R. 476.—FARWELL, J. (*see ante*, col. 3112); and (1902) 71 L. J. Ch. 518, 524; [1902] 2 Ch. 360; 86 L. T. 542; 50 W. R. 575; 9 Manson 259.—C.A.

Jorden v. Money (1854) 23 L. J. Ch. 865; 5 H. L. Cas. 185.—H.L. (E.); LORD ST.

LEONARDS *dissenting, referred to*.

Goldieutt v. Townsend (1860) 28 Beav. 445.—M.R.; M'Askie v. M'Cay (1868) Ir. R. 2 Eq. 447; 16 W. R. 1187.—WALSH, M.R.

Jorden v. Money, *discussed and applied*.

Mills v. Fox (1887) 57 L. J. Ch. 56; 37 Ch. D. 153, 163; 57 L. T. 792; 36 W. R. 219.—STIRLING, J.; Balkis Consolidated Co. v. Tomkinson (1893) 63 L. J. Q. B. 134; [1893] A. C. 396, 410; 1 K. 178; 69 L. T. 598; 42 W. R. 204.—H.L. (E).

Jorden v. Money, *referred to*.

Gillman v. Carbutt (1889) 37 W. R. 437, 439.—C.A.; Licenses Insurance Corporation and Guarantee Fund v. Lawson (1896) 12 Times L. R. 501.—ROMER, J.

Jorden v. Money, *principle applied*.

Fickus, In re, *Farina v. Fickus* (1899) 69 L. J. Ch. 161; [1900] 1 Ch. 331, 335; 81 L. T. 749; 48 W. R. 250.

COZENS-HARDY, J.—A mere representation that the writer intends to do something in the future is not, though the person to whom it is made relies upon it, sufficient to entitle that person to obtain specific performance or damages

There must be a contract in order to entitle the party to obtain any relief. This seems to me to result from the judgments of the H.L. in *Hammersley v. De Biel* (*supra*, col. 3111), *Jorden v. Money*, and *Maddison v. Alderson* [(1883) 52 L. J. Q. B. 737; 8 App. Cas. 467]. . . . It [the letter] is not, as in *Hammersley v. De Biel*, an "arrangement proposed" by the father, and stated by him "to be sufficient for the husband to act upon."—pp. 163, 164.

Jorden v. Money, *referred to*.

Whitechurch (George), *Lim. v. Cavanagh* (1901) 71 L. J. K. B. 400; [1902] A. C. 117, 130; 85 L. T. 349; 50 W. R. 218.—H.L. (E.); LORD ROBERTSON doubting. *And see* "ESTOPPEL," vol. i. col. 1018.

Laver v. Fielder (1862) 32 Lr J. Ch. 365; 32 Beav. 1; 1 N. R. 188; 9 Jur. (N.S.) 190; 7 L. T. 602; 11 W. R. 245.—ROMILLY, M.R., *referred to*.

Keays v. Gilmore (1874) Ir. R. 8 Eq. 290; 22 W. R. 465.—SULLIVAN, M.R.

Laver v. Fielder, *discussed*.

Allen, *In re*, *Hincks v. Allen* (1880) 49 L. J. Ch. 553, 556; 28 W. R. 533.—MALINS, V.-C.

Laver v. Fielder, *distinguished*.

Keays v. Gilmore (*supra*), *followed*.

Stephens v. Stephens (1886) 19 L. R. Ir. 190, 196.—CHATTERTON, V.-C.

Laver v. Fielder, *distinguished*.

Pickus, *In re*, *Farina v. Pickus* (1899) 69 L. J. Ch. 161; [1900] 1 Ch. 331, 335; 81 L. T. 749; 43 W. R. 250.

COZENS-HARDY, J.—It [the letter] is not, as in *Laver v. Fielder*, a statement that the writer would "adhere to" a "proposition" previously made. . . . The words are not "her share," as in *Laver v. Fielder*, which were held to mean the share to which the daughter would have been entitled in the event of intestacy. I think "a share" means "some share"—"some part." The testator has given Mrs. Farina 2,000*l.*, and has satisfied the obligation, if any, imposed by the letter.—p. 164.

Coverdale v. Eastwood (1872) 42 L. J. Ch. 118; L. R. 15 Eq. 121; 27 L. T. 646; 21 W. R. 216.—BACON, V.-C., *discussed*.

Alderson v. Maddison (1880) 49 L. J. Ex. 801; 5 Ex. D. 293, 300; 43 L. T. 349; 29 W. R. 105.—STEPHEN, J.; (reversed, *see post*, col. 3120); Allen, *In re*, *Hincks v. Allen* (1880) 49 L. J. Ch. 553, 555; 28 W. R. 533.—MALINS, V.-C.; Att.-Gen. *v. Murray* (1887) 20 L. R. Ir. 124.—C.A.

Alt v. Alt (1862) 32 L. J. Ch. 52; 4 Giff. 84; 8 Jur. (N.S.) 1075; 7 L. T. 266.—STUART, V.-C.

Discussed, Duckett *v. Thompson* (1883) 11 L. R. Ir. 424, 429.—V.-C.; *approved and applied*, Viret *v. Viret* (1880) 50 L. J. Ch. 69; 17 Ch. D. 365, n.; 43 L. T. 493.—MALINS, V.-C.

Alt v. Alt, *not applied*, *report commented on*.

Spicer, *In re*, *Spicer v. Spicer* (1901) 84 E. T. 195.—BUCKLEY, J.

Anandale, Ex parte, Curtis, In re (1834) 2 Mont. & A. 19; 4 Deac. & C. 511.—C.J., *applied*.

Mudge v. Rowan (1868) 37 Lr J. Ex. 79, 82;

L. R. 3 Ex. 85, 89; 17 L. T. 576; 16 W. R. 403.—EX.

King, In re, Sewell v. King (1870) 49 L. J. Ch. 73; 14 Ch. D. 179; 28 W. R. 344.—HALL, V.-C., *referred to*.

Richardson, *In re*, *Weston v. Richardson* (1882) 47 L. T. 514.—KAY, J.

Doe d. Jones v. Williams (1833) 5 B. & Ad. 783; 2 N. & M. 602; 39 R. R. 645.—K.B., *discussed*.

Hoban, *In re*, *Loneragan v. Hoban* (1895) [1896] 1 Ir. 401, 411.—PORTER, M.R.

Randall v. Morgan (1805) 12 Ves. 67; 8 R. R. 289.—M.R., *applied*.

Madox v. Nowlan (1824) Beat. 632.—MANNERS, L.C.

Randall v. Morgan, *referred to*.

Quinlan *v. Quinlan* (1834) Hayes & J. 785.—EQ. EX. (IR.); *De Biel* (Baron) *v. Thompson* (1841) 12 Cl. & F. 61, n.—L.C.; affirmed, H.L. (*ante*, col. 3111).

Randall v. Morgan and Quinlan v. Quinlan, *discussed and applied*.

Maunsell *v. White* (1844) 1 Jo. & Lat. 539; 7 Ir. Eq. R. 413.—SUGDEN, L.C.; affirmed, (1854) 4 H. L. Cas. 1039.—H.L. (IR.). CRANWORTH, L.C. and LORD ST. LEONARDS.

• **Randall v. Morgan**, *dictum commented on*.

Barkworth v. Young (1856) 26 L. J. Ch. 153; 4 Drew. 1; 3 Jur. (N.S.) 34; 5 W. R. 156.—KINDERSLEY, V.-C.

Randall v. Morgan, *referred to*.

Goldicutt *v. Townsend* (1860) 28 Beav. 445.—ROMILLY, M.R.

Randall v. Morgan, *dictum approved*.

Holland, *In re*, *Gregg v. Holland* (1901) 70 L. J. Ch. 625, 627; [1901] 2 Ch. 145, 151; 49 L. T. 476.—FARWELL, J.; reversed (*post*).

Randall v. Morgan, *discussed*.

Holland, *In re*, *Gregg v. Holland* (1902) 71 L. J. Ch. 518; [1902] 2 Ch. 340, 378; 86 L. T. 542; 50 W. R. 575; 9 Manson 259.—C.A.

V.-WILLIAMS, L.J.—Moreover, there is the opinion of Lord Cottenham in his judgment in *De Biel* (Baron) *v. Thompson* (*ante*, col. 3111), when that case was before him as L.C. . . . Lord Cottenham says: "I am aware that in *Randall v. Morgan* Sir W. Grant suggests a doubt, whether a written promise after marriage to perform a parol agreement made before could be enforced; but in *Hodgson v. Hutchinson* (*ante*, col. 3113), *Taylor v. Beech* [(1749) 1 Ves. sen. 297], and *Moravute v. Moravell* (*ante*, col. 3110), it was held that such a subsequent written promise would be binding within the statute." It does not seem to me that anything that was said by Lord Cottenham, in *Lassence v. Tierney* (*supra*, col. 3115), as the grounds of his decision in *Hammersley v. De Biel* (Baron) (*ante*, col. 3111), can get rid of what he said as a *dictum*, in which he deliberately differed from Sir W. Grant's doubt in *Randall v. Morgan*. It is to be observed that in the H.L. counsel abandoned the Statute of Frauds point. In my judgment the balance of authority, as well as reason, supports the view of Kindersley, V.-C., in *Barkworth v. Young* (*ante*, col. 3113).—p. 524.

Ainslie v. Medlycott (1803) 9 Ves. 13; 7 R. R. 135.—GRANT, M.R., *followed*.

Evans v. Wyatt (1862) 31 Beav. 217; 9 Jur. (N.S.) 499; 7 L. T. 86; 10 W. R. 813.—ROMILLY, M.R.

Neville v. Wilkinson (1782) 1 Bro. C. C. 543.—L.C., *discussed*.

Vauxhall Bridge Co. v. Spencer (Earl) (1821) Jacob 64; S. C. (1817) 2 Madd. 356.—ELDON, L.C.

Neville v. Wilkinson, *approved*.

Jorden v. Money (1854) 23 L. J. Ch. 865; 5 H. L. Cas. 185, 210.—H.L. (E.).

CRANWORTH, L.C.—In *Neville v. Wilkinson* an injunction was granted to restrain the enforcement of a demand, the party seeking to enforce it having falsely represented to the father of the lady while a marriage treaty was pending that there was no such demand existing.—p. 868.

Neville v. Wilkinson and Vauxhall Bridge Co. v. Spencer (Earl), *principle applied*.

Bold v. Hutchinson (1855) 24 L. J. Ch. 285; 3 Eq. R. 743; 1 Jur. (N.S.) 365.—ROMILLY, M.R.

Neville v. Wilkinson.

Distinguished, **Evans v. Wyatt** (1862) 31 Beav. 217; 9 Jur. (N.S.) 499; 7 L. T. 86; 10 W. R. 813.—ROMILLY, M.R.; *discussed*, **Luxmore v. Clifton** (1867) 17 L. T. 460, 461; 16 W. R. 265; *referred to*, **Mills v. Fox** (1887) 57 L. J. Ch. 56; 37 Ch. D. 153, 163; 57 L. T. 792; 36 W. R. 219.—STIRLING, J.

Maunsell v. Hedges (1854) 4 H. L. Cas. 1039.—H.L. (IR.). **CRANWORTH, L.C.** and **LORD ST. LEONARDS**; affirming **S. C. nom.**

Maunsell v. White (1844) 1 Jo. & Lat. 539; 7 Ir. Eq. R. 413.—SUGDEN, L.C.

Distinguished, **Bold v. Hutchinson** (1855) 24 L. J. Ch. 285; 3 Eq. R. 743; 1 Jur. (N.S.) 365.—M.R.; *discussed*, **Allen v. Allen** (1880) 49 L. J. Ch. 553, 556; 28 W. R. 533.—MALINS, V.-C.; **Alderson v. Maddison** (1880) 49 L. J. Ex. 801; 5 Ex. D. 293, 304; 43 L. T. 349; 29 W. R. 105.—STEPHEN, J. (*see post*, col. 3121); reversed (*post*, col. 3120).

Swift v. Grazebrook (1848) 12 Jur. 87.—SHADWELL, V.-C., *rule in, not applied*.

Moorhouse v. Colvin (1851) 21 L. J. Ch. 177; 15 Beav. 341.—M.R.; affirmed, (1852) 21 L. J. Ch. 782.—L.JJ.

Laugher's Case (1595) Co. Rep. 21 b;

S. C. nom. Eaton v. Laugher, Cro. Eliz.

398; **Eaton's Case**, T. Moore, 357; **Eton v.**

Laugher, Popham, 98.—K.B., *considered*.

Jones v. How (1850) 9 C. B. 1.—C.P.; confirmed, (1850) 19 L. J. Ch. 324; 7 Hare 267; 14 Jur. 145.—WIGRAM, V.-C.

Loxley v. Heath (1860) 29 L. J. Ch. 313; 1

De G. F. & J. 489; 6 Jur. (N.S.) 436.—L.C.

and L.JJ.; affirming (1859) 27 Beav. 523;

8 W. R. 314.—ROMILLY, M.R., *applied*.

Sands v. Soden (1862) 31 L. J. Ch. 870; 10 W. R. 765.

KINDERSLEY, V.-C.—*Loxley v. Heath* is a very similar case, where it was held that the settlement was complete, and there was nothing to be inferred from the letters, standing alone: that is exactly the case here.—p. 872.

O.C.

Loxley v. Heath, *discussed and applied*.

Badcock, In re, **Kingdon v. Tagert** (1880) 17 Ch. D. 361, 366; 43 L. T. 688; 29 W. R. 278.—MALINS, V.-C.

Luders v. Anstey (1799) 4 Ves. 501; 4 R. R. 276.—LOUGHBOROUGH, L.C.

Distinguished, **Quinlan v. Quinlan** (1834) Hayes & J. 785.—EQ. EX. (IR.); *referred to*, **Prole v. Soady** (1859) 29 L. J. Ch. 721; 2 Giff. 1; 5 Jur. (N.S.) 1382; 1 L. T. 309; 8 W. R. 131.—STUART, V.-C.

Luders v. Anstey, *explained*.

Alderson v. Maddison (1880) 5 Ex. D. 293; 49 L. J. Ex. 801; 43 L. T. 349; 29 W. R. 105; reversed (*see post*).

STEPHEN, J.—In *Luders v. Anstey* it was held that a letter, making a suggestion as to a settlement, followed by marriage under such circumstances as to imply the acceptance of the suggestion, may be a contract for a settlement.—p. 299.

Luders v. Anstey, *applied*.

Pickus, In re, **Farina v. Fickus** (1899) 69 L. J. Ch. 161, 163; [1900] 1 Ch. 331, 365; 81 L. T. 749; 48 W. R. 250.—COZENS-HARDY, J.

Walford v. Gray (1865) 5 N. R. 235; 11 Jur. (N.S.) 473; 11 L. T. 432; 13 W. R. 761.—C.A., *referred to*.

Thompson v. Thompson (1871) Ir. R. 6 Eq. 113.—CHATTERTON, V.-C.

Prole v. Soady (1859) 29 L. J. Ch. 721; 2 Giff. 1; 5 Jur. (N.S.) 1382; 1 L. T. 309; 8 W. R. 131.—STUART, V.-C., *discussed*.

Alderson v. Maddison (1880) 49 L. J. Ex. 801; 5 Ex. D. 293, 299; 43 L. T. 349; 29 W. R. 105.—STEPHEN, J.; reversed, (1881) 50 L. J. Q. B. 466; 7 Q. B. D. 174; 45 L. T. 334; 29 W. R. 556.—C.A.; latter decision affirmed, H.L. (*post*).

Prole v. Soady, *distinguished*.

Badcock, In re, **Kingdon v. Tagert** (1880) 17 Ch. D. 361; 43 L. T. 688; 29 W. R. 278.

MALINS, V.-C.—*Prole v. Soady* can hardly be considered as a very distinct authority, because the decision of Stuart, V.-C. was appealed from, and, as I well remember, the L.JJ., finding a difficulty, declined to decide it one way or the other, and said that there had better be a compromise, and a compromise was accordingly made. But there is a remarkable difference between that case and this, as Mr. Dickson, who was decided by Stuart, V.-C., to be bound by his contract to make the settlement upon Mrs. Prole, never made any subsequent settlement, though Mr. Prole did make a subsequent settlement. . . . I had lately before me . . . *First v. First* (*post*, col. 3121), where a letter was written the very day before the marriage, and then, without anything more having been done, the marriage took place. I could not do otherwise than come to the conclusion that the marriage had taken place upon the faith of the letter.—p. 365.

Prole v. Soady, *referred to*.

Maddison v. Alderson (1883) 52 L. J. Q. B. 737; 8 App. Cas. 467, 473; 49 L. T. 303; 31 W. R. 820.—H.L. (E.); affirming C.A. (*supra*).

See "ESTOPPEL," vol. i. col. 1020.

Viret v. Viret (1880) 50 L. J. Ch. 69; 17 Ch. D. 365, n.; 43 L. T. 493.—MALINS, V.-C., *referred to*.
Badcock, In re, **Kingdon v. Tagert** (*supra*).

Viret v. Viret, *applied*.
Spicer, In re, **Spicer v. Spicer** (1901) 84 L. T. 195.—BUCKLEY, J.

Dashwood v. Jermyn (1879) 12 Ch. D. 776; 27 W. R. 868.—BACON, V.-C., *discussed*.
Alderson v. Maddison (1880) 49 L. J. Ex. 801; 5 Ex. D. 293; 43 L. T. 849; 29 W. R. 105; reversed, C.A. (*see supra*, col. 3120).

STEPHEN, J.—Both **Lords Cranworth** and **St. Leonards** point out that in **Mawnsell v. Hedges** (*supra*, col. 3119) there was no contract at all, and they decide the case on that basis. The cases of **Caton v. Caton** [L. R. 2 H. L. 127, *ante*, col. 3113] and **Dashwood v. Jermyn** are illustrations of the same principle. Each is a case in which a promise to make a will, not amounting to a contract, was held to confer no rights upon the promisee after the death of the promisor.—p. 305.

Dashwood v. Jermyn, *applied*.
Ashwell and Nesbit, Limited v. Stanton (1900) 16 Times L. R. 399, 400.—DARLING and BUCKNILL, JJ.

M'Askie v. M'Cay (1868) Ir. R. 2 Eq. 447; 16 W. R. 1187.—WALSH, M.R., *referred to*.
Downes, In re [1898] 2 Ir. R. 302, 307.—BOYD, J.

Tweddle v. Atkinson (1861) 30 L. J. Q. B. 265; 1 B. & S. 393; 4 L. T. 468; 9 W. R. 781.—Q.B., *approved and applied*.
Gandy v. Gandy (1885) 54 L. J. Ch. 1154; 30 Ch. D. 57, 69; 53 L. T. 306; 33 W. R. 803.—C.A.

Tweddle v. Atkinson, *distinguished*.
Drimmie v. Davies (1898) [1899] 1 Ir. R. 176, 182.—C.A. FITZGIBBON, WALKER and HOLMES, L.J.

Tweddle v. Atkinson, *discussed*.
Drimmie v. Davies, *referred to*.
Kennedy v. Employers Liability Assurance Corporation [1901] 1 Ir. R. 301, 331.—C.A. WALKER, L.J. dissenting; reversing PORTER, M.R.

Kay v. Crook (1857) 3 Sm. & G. 407; 3 Jur. (N.S.) 104; 5 W. R. 220.—STUART, V.-C., *approved but not applied*.
Laver v. Fielder (1862) 32 L. J. Ch. 365; 32 Beav. 1, 7; 1 N. R. 188; 9 Jur. (N.S.) 190; 7 L. T. 602; 11 W. R. 245.

ROMILLY, M.R.—It was said that the words were too vague and ambiguous, and that no distinct meaning could be put upon them, and **Kay v. Crook** was referred to, in which a person promised to recognise his son, in common with the rest of his family, in the future provisions of his will, and it was held to be too vague to entitle him to any specific interest. It is not necessary to consider what the effect would have been in this case if the words had been "a share" instead of "her share" of the property.—p. 368. *See ante*, col. 3117.

Kay v. Crook.
Discussed, **Allen**, In re, **Hincks v. Allen** (1880) 49 L. J. Ch. 553, 555; 28 W. R. 533.—MALINS, V.-C.; *approved*, **Stephens v. Stephens** (1886) 19 L. R. Ir. 190.—CHATTERTON, V.-C.

2. COVENANTS TO SETTLE.

Jones v. Martin (1798) 6 Bro. P. C. 437; 5 R. R. 32.—H.L. (E.); *reversing* (1797) 3 Anstr. 882.—EX. *And see* 5 Ves. 266, n., and 8 Bro. P. C. 242.

Distinguished, **Lewis v. Madocks** (1803) 8 Ves. 150; 7 R. R. 10.—L.C. (*see* S. C. (1810) 17 Ves. 48.—L.C.): *discussed*, **Fortescue v. Hennah** (1812) 19 Ves. 67; 12 R. R. 137.—M.R.; *referred to*, **Eyre v. Monro** (1857) 26 L. J. Ch. 757; 3 K. & J. 305; 3 Jur. (N.S.) 584; 5 W. R. 470.—WOOD, V.-C.

Fortescue v. Hennah (1812) 19 Ves. 67; 12 R. R. 137.—M.R., *referred to*.
Ennis v. Smith (1839) Jones & C. 400.—EX. EQ. (IR.).

Fortescue v. Hennah, *discussed and distinguished*.
Parkin, In re, **Hill v. Schwarz** (1892) 62 L. J. Ch. 55; [1892] 3 Ch. 510, 517; 67 L. T. 77; 41 W. R. 120.—STIRLING, J.

Willis v. Black (1828) 4 Russ. 170; 7 L. J. (O.S.) Ch. 3.—LYNDHURST, L.C.; *reversing* (1824) 1 Sim. & S. 525; 2 L. J. (O.S.) Ch. 131.—V.-C., *not applied*.
Duckett v. Gordon (1860) 11 Ir. Ch. R. 181.—CUSACK SMITH, M.R.

Duckett v. Gordon, *not applied*.
Borrowes v. Borrowes (1872) Ir. R. 6 Eq. 368.—SULLIVAN, M.R.; **Weldon v. Bradshaw** (1873) Ir. R. 7 Eq. 168.—CHATTERTON, V.-C.

Needham v. Kirkman (1820) 3 B. & Ald. 531.—K.B.
Followed, **Needham v. Smith** (1828) 4 Russ. 318; 6 L. J. (O.S.) Ch. 107; 28 R. R. 107.—M.R.; *referred to*, **Ravenshaw v. Hollier** (*post*).

Needham v. Smith.
Referred to, **Ravenshaw v. Hollier** (1835) 4 L. J. Ch. 116.—LYNDHURST, L.C.; *approved*, **Brookman's Trusts**, In re (1869) 39 L. J. Ch. 138 (*post*).

Jones v. How (1850) 19 L. J. Ch. 324; 7 Hare 267; 14 Jur. 145.—WIGRAM, V.-C. (S. C. 9 C. B. 1.—C.P.).

Discussed, **Barkworth v. Young** (1856) 26 L. J. Ch. 153; 4 Drew. 1, 22; 3 Jur. (N.S.) 34; 5 W. R. 156.—KINDERSLEY, V.-C.; *disapproved and not followed*, **Brookman's Trusts**, In re (1869) 38 L. J. Ch. 585; L. R. 5 Ch. 186, n.; 17 W. R. 818.—MALINS, V.-C.

Jones v. How, *approved*.
Brookman's Trusts, In re, *reversed*.
Brookman's Trusts, In re (1869) 39 L. J. Ch. 138; L. R. 5 Ch. 182; 22 L. T. 891; 18 W. R. 199.
GIFFARD, L.J. said the subject-matter of the covenant could not be ascertained till the death of the covenantor, as it only dealt with the property of which he should be seised or possessed at his death; and, in addition to this it was obviously a contingent covenant which made it not so favourable for the respondents as was the state of things in **Jones v. How** and **Needham v. Smith** (*supra*), for in the event of there being children who should die in the lifetime of the daughter leaving issue, those children or their issue could take nothing, as the covenant was only to take effect in case E. A. Brookman should survive her father, or dying leave any child or children. The rule of law was perfectly plain that a person who

entered into a covenant of this kind was not bound to do more than to make a will in the terms of the covenant. . . . There was nothing in the covenant which bound the testator to make his will in such a way as would prevent a lapse.—p. 141.

Brookman's Trusts, In re, explained.

Brookman v. Smith (1871) 40 L. J. Ex. 161, 168; L. R. 6 Ex. 291, 302; 24 L. T. 625; 19 W. R. 1029.—EX.; affirmed, (1872) 41 L. J. Ex. 114; L. R. 7 Ex. 271; 26 L. T. 974; 20 W. R. 906.—EX. CH.

Graham v. Wickham (1863) 1 De G. J. & S. 474; 9 Jur. (N.S.) 702; 2 N. R. 410; 31 Beav. 447; 8 L. T. 679; 11 W. R. 109.—L.J.J.; affirming M.R., not applied.

Borrowes v. Borrowes (1872) Ir. R. 6 Eq. 368.—SULLIVAN, M.R.; Att.-Gen. v. Murray (1887) 20 L. R. Ir. 124, 132.—C.A. ASHBOURNE, L.C., FITZGIBBON and BARRY, L.J.J.

Logan v. Wienholt (1833) 1 Cl. & F. 611; 7 Bligh (N.S.) 1.—H.L. (E.), explained and principle not applied.

Powell's Trusts, In re (1856) 2 Jur. (N.S.) 799.—STUART, V.-C.

Logan v. Wienholt, referred to.

Eyre v. Munro (1857) 26 L. J. Ch. 757; 3 K. & J. 305, 309; 3 Jur. (N.S.) 584; 5 W. R. 870.—WOOD, V.-C.

Logan v. Wienholt and Eyre v. Munro, referred to.

Keays v. Gilmore (1874) Ir. R. 8 Eq. 290; 22 W. R. 465.—SULLIVAN, M.R.

Logan v. Wienholt, discussed.

Eyre v. Munro, distinguished.

Att.-Gen. v. Murray (1887) 20 L. R. Ir. 124.—C.A. ASHBOURNE, L.C., FITZGIBBON and BARRY, L.J.J.; reversing EX. D.

Freemoult (or Fremoult) v. Dedire (1718)

1 P. Wms. 429.—PARKER, L.C., applied.

Williams v. Lucas (1789) 2 Cox 160.—EX.

Freemoult v. Dedire, discussed.

Falkner v. O'Brien (1812) 2 Ball & B. 214.—MANNERS, L.C.; Ravenshaw v. Hillier (1835) 4 L. J. Ch. 119; 7 Sim. 16, n.—LYNDHURST, L.C.

Freemoult v. Dedire, commented on.

Falkner v. O'Brien, referred to.

Lyster v. Burroughs (1837) 1 Dr. & Wal. 139.—PLUNKET, L.C.

Freemoult v. Dedire, discussed.

Wellesley v. Wellesley (1839) 9 L. J. Ch. 21, 24; 4 Myl. & Cr. 561, 580.—L.C.

Freemoult v. Dedire, applied.

Mornington v. Keane (1858) 27 L. J. Ch. 791, 794; 2 De G. & J. 292, 315; 4 Jur. (N.S.) 981; 6 W. R. 434.—L.C. and L.J.J.

Freemoult v. Dedire, explained.

Montagu v. Sandwich (Earl) (1886) 32 Ch. D. 525; 55 L. J. Ch. 925; 54 L. T. 502.—C.A.

COTTON, L.J.—The C. [in Mornington v. Keane (*supra*)] says this: ". . . The observations in *Freemoult v. Dedire* render that case, as it appears to me, an important authority, as exhibiting the distinction between a covenant to charge specific lands and one to charge lands generally. There the testator had covenanted

to settle his lands in Romney Marsh, and also lands that should be of the value of 60*l.* per annum, upon his wife for her life; and it was held that the former part of the covenant created a charge, and that the latter did not." Why? Because it was not all his lands at a particular place but lands of the value of 60*l.* a year, and that could not be ascertained without evidence, and therefore left the lands indefinite.—p. 539.

Goodrick v. Shotbolt (1712) Pre. Ch. 333.

—L.K.

Applied, May v. Roper (1831) 4 Sim. 360, 363.—V.-C.; *discussed*, Miller v. Collins (1896) 65 L. J. Ch. 353; [1896] 1 Ch. 573, 592; 74 L. T. 122; 44 W. R. 466.—C.A.

* **Knight v. Calthorpe** (1685) 1 Vern. 347; 1 Eq. Cas. Abr. 33, pl. 16.—L.C. *not law*. Powell v. Grigby (1835) 3 Cl. & F. 103; 9 Bligh (N.S.) 646.—H.L. (E.); affirming S. C. *nom.* Grigby v. Powell (1832) 5 Sim. 290; 35 R. R. 164.—V.-C.

Knight v. Calthorpe, referred to.

Powell v. Grigby; Grigby v. Powell, explained.

Eyre v. Green (1846) 2 Coll. C. C. 527; 10 Jur. 384.—KNIGHT BRUCE, V.-C.

Shute, Ex parte (1833) 3 Deac. & C. 1.

—BK., applied.

Corr v. Corr (1878) 3 L. R. Ir. 438, n.—BALL, L.C.; varied, (1879) 3 L. R. Ir. 435.—C.A.

Smith v. Smith (1835) 1 Y. & C. 338.—

EX. EQ.; C.B., *discussed*.

Burridge v. Row (1842) 11 L. J. Ch. 369, 370; 1 Y. & C. C. C. 183, 192.—KNIGHT BRUCE, V.-C.; affirmed, L.C. (*see post*); Stack v. Royse (1861) 12 Ir. Ch. R. 246.—CUSACK SMITH, M.R.

Smith v. Smith, considered.

Weston, In re, Davies v. Tagart (1900) 69 L. J. Ch. 555; [1900] 2 Ch. 164, 167; 82 L. T. 591; 48 W. R. 467.

STIRLING, J.—In *Smith v. Smith* the husband, in contemplation of marriage, executed in favour of the trustees of his marriage settlement a bond, and also a mortgage of real estate by way of security for 15,000*l.*, to be held upon trusts under which he took the first life interest. He failed to pay the 15,000*l.* in accordance with the bond, and the mortgage was realised and provided less than 15,000*l.* It was held that the trustees were entitled to retain the income arising from the investment of the purchase-money until the whole of the 15,000*l.* should be made good.—p. 558.

Burridge v. Row (1842) 11 L. J. Ch. 369; 1 Y. & C. C. C. 183.—KNIGHT BRUCE, V.-C.; affirmed, (1844) 13 L. J. Ch. 173; 9 Jur. 299.—L.C. *And see* vol. i. col. 1347.

Burridge v. Row, discussed and applied.

Corr v. Corr (1879) 3 L. R. Ir. 435, 448.—C.A.; varying (1878) 3 L. R. Ir. 438, n.—BALL, L.C.

* **Burridge v. Row and Corr v. Corr, applied.** Weston, In re, Davies v. Tagart (1900) 69 L. J. Ch. 555; [1900] 2 Ch. 164, 167; 82 L. T. 591; 48 W. R. 467.

STIRLING, J.—*Burridge v. Row* was also a case of a marriage settlement. The trust property consisted of two sums of 5,000*l.*, one secured by

the covenant of the husband and policies of assurance on his life; the other by the bond of the father-in-law. The trusts of the former were for the wife for life, with remainder to the husband for life with an ultimate reversion in default of children of the marriage (which event happened) for the husband, his executors, administrators, and assigns. The husband became bankrupt, and the father-in-law purchased the husband's interest in the 5,000*l.* coming from the latter, and afterwards himself became bankrupt. It was held that the assignee in the bankruptcy of the father-in-law could not take any interest in the fund which had arisen from the policies brought into settlement by the husband without satisfying what was due under the father-in-law's bond. . . . *Corr v. Corr* was again a case of a marriage settlement, where a husband conveyed leaseholds to trustees and executed in their favour a bond for 2,000*l.*, being the amount of the wife's fortune which he had received. Under the trusts he took a first life interest determinable on bankruptcy—an event which happened. It was held by the C. A. that the trustees were entitled to retain the income of the leaseholds until the amount of the debt due to them on the bond was made good.—pp. 558, 559.

Monypenny v. Monypenny (1857) 27 L. J. Ch. 369; 4 K. & J. 174.—WOOD, V.-C., *BRAMWELL* and *WATSON*, BB., *applied*.
Kirwan v. Burchell (1859) 10 Ir. Ch. R. 63.
—CUSACK SMITH, M.R.

Monypenny v. Monypenny, *reversed*, (1859) 28 L. J. Ch. 303; 3 De G. & J. 572; 5 Jur. (N.S.) 233; 7 W. R. 276.—L.C.; *latter decision affirmed*, (1861) 31 L. J. Ch. 269; 9 H. L. 114.
—H. L. (E.); LORD ST. LEONARDS *dissenting*.

Monypenny v. Monypenny, *discussed*.
Minchin v. Minchin (1871) Ir. R. 5 Eq. 178, 190.—SULLIVAN, M.R.; *Thompson v. Thompson* (1871) Ir. R. 6 Eq. 113.—CHATTERTON, V.-C.; *Borrowes v. Borrowes* (1872) Ir. R. 6 Eq. 368.—SULLIVAN, M.R.

Monypenny v. Monypenny, *distinguished*.
Weldon v. Bradshaw (1873) Ir. R. 7 Eq. 168.
—CHATTERTON, V.-C.

Monypenny v. Monypenny, *considered*.
Sligo Leitrim and Northern Ry. v. Whyte (1893) 31 L. R. Ir. 316.

PORTER, M.R.—There was a claim against the assets of a testator who was a party to a marriage settlement, and he had granted an annuity or jointure charged upon certain lands to the intended wife, in case she should survive him and her husband. In the deed the testator described himself as entitled in fee simple to the lands charged, and he in fact thought he was owner in fee. He really had, however, only a life estate, as was discovered on the consideration of a difficult and obscure title after his death. Consequently the jointure was not charged on the lands at all, and therefore was incapable of enforcement against the lands. The deed did not contain any express covenant for title; but it did contain a proviso that it should be lawful to enter and distrain for the annuity; and, inasmuch as the grantor's estate having failed, the right to distrain did not exist, it was contended that the covenant was broken, and the jointress was entitled to come against

the personal estate; and the H. L. so held. They did not all agree. Lord St. Leonards, who dissented, treated the case as being a perfectly clear one, and stated his views with a fine arrogance and perfect confidence, saying that he was right, and regretting very much that his learned colleagues did not agree with him. But though he may have been right up till that time, he cannot be held to be so now, and the decision binds everyone. His judgment is mainly based on the fact that the deed in question was a marriage settlement, and that in such a document there is, by the settled practice of conveyancers, no covenant for title and no personal liability intended. But the H. L. decided that there was an express covenant, which was broken; and that the measure of damages was the amount of the arrears of the jointure. In that case it was held that the mere grant of an annuity—charged on the lands—gave the grantee a personal remedy.—p. 325.

Bash (or Bush) v. Dalway (1747) 3 Atk. 530; 1 Ves. sen. 19.—L.C., *explained*.
Ainslie v. Medlycott (1803) 9 Ves. 13; 7 R. R. 135.—GRANT, M.R.; *Honner v. Morton* (1828) 3 Russ. 65; 27 R. R. 15.—L.C.

Roundell v. Breary (1704) 2 Vern. 482.
—L.K. (and see 2 De G. & J. 319, n.), *discussed*.

Leacon v. Smith (1746) 3 Atk. 323, 327.—L.C.; *Ravenshaw v. Hollier* (1835) 4 L. J. Ch. 119; 7 Sim. 16, n.—LYNDHURST, L.C.; *Wellesley v. Wellesley* (1839) 9 L. J. Ch. 21, 24; 4 Myl. & Cr. 561, 581.—COTTENHAM, L.C.

Roundell v. Breary, *explained and corrected*.
Mornington v. Keane, (1858) 2 De G. & J. 292; 27 L. J. Ch. 791, 794; 4 Jur. (N.S.) 981; 6 W. R. 434.—L.C. and L.JJ.

CHELMSFORD, L.C.—The language ascribed to the Lord Keeper in that case is no doubt very strong. The Lord Keeper is reported to have been of opinion, that, although no lands were mentioned in the articles, yet the covenant should be a lien upon the land, whereof H. Breary was then seised, unless he had purchased and settled other lands within the time limited by the articles, and which were not settled on the second wife, who came in as a purchaser without notice. There appears, however, to me strong grounds for thinking, on a careful examination of the registrar's book, that the report is not accurate. There seems reason for thinking that the covenantor had taken steps to reduce the general covenant to a specific one. Moreover, this case has not the authority of a decision, owing to the circumstance that there was no decree except one by consent. I am not prepared to say, that in the absence of any other authority, even if there had been no explanation of this case, I should have felt myself bound by it.—p. 315.

Roundell v. Breary, *referred to*.
Montagu v. Sandwich (Earl) (1886) 55 L. J. Ch. 925; 32 Ch. D. 525, 539; 54 L. T. 502.
—C.A.

Wellesley v. Wellesley (1839) 9 L. J. Ch. 21; 4 Myl. & Cr. 561.—L.C., *referred to*.
Mornington v. Keane (1858) 27 L. J. Ch. 791; 2 De G. & J. 292; 4 Jur. (N.S.) 981; 6 W. R. 434.
—L.C. and L.JJ.

Mornington v. Keane, referred to.

Stack v. Royse (1861) 12 Ir. Ch. R. 246.—
OUSACK SMITH, M.R.; Montagu v. Sandwich
(Earl) (1886) 32 Ch. D. 525, 539; 55 L. J. Ch.
925; 54 L. T. 502.—C.A.

Mornington v. Keane, discussed.

Tailby v. Official Receiver (1888) 13 App. Cas.
548; 58 L. J. Q. B. 75; 60 L. T. 162; 37 W. R.
513.—H.L. (E.).

LORD MACNAGHTEN.—In *Mornington v. Keane*, Lord Mornington covenanted that he would, on or before a specified day, either by a charge on freehold estates in England or Wales, or by an investment in the funds, or by the best means which might be then in his power, secure the payment of an annuity to a trustee for his wife. The L.C. did not doubt that the covenant would entitle the covenantee to have it performed in specie, but still it was held by the Court that the covenant of itself created no lien on the covenantor's property.—p. 548.

Mornington v. Keane, approved and applied.

Bannatyne v. Ferguson (1895) [1896] 1 Ir. R. 149.—CHATTERTON V.-C. and C.A.

Pocock's Policy, In re (1871) 40 L. J. Ch. 681; L. R. 6 Ch. 445; 25 L. T. 233; 19 W. R. 801.—JAMES and MELLISH, L.JJ., discussed.

Scotney v. Lomer (1885) 54 L. J. Ch. 558; 29 Ch. D. 535, 544; 52 L. T. 747; 33 W. R. 635.—
NORTH, J.; affirmed, (1886) 55 L. J. Ch. 443;
31 Ch. D. 380; 54 L. T. 194; 34 W. R. 407.
—C.A.

Pocock's Policy, In re, disapproved.

Urquhart v. Butterfield (1887) 56 L. J. Ch. 938; 36 Ch. D. 55, 75; 57 L. T. 589.—NORTH, J.; reversed, C.A. (post).

Pocock's Policy, In re, approved.

Urquhart v. Butterfield (1888) 57 L. J. Ch. 521; 37 Ch. D. 357, 370; 57 L. T. 780; 36 W. R. 376.—C.A. COTTON, L.J., SIR J. HANNEN and LOPES, L.J.

Godsall (or Godsall) v. Webb (1838) 7 L. J. Ch. 103; 2 Feen 99.—LANGDALE, M.R., distinguished and not applied.

Dickinson v. Dillwyn (1869) 39 L. J. Ch. 266; L. R. 8 Eq. 546, 550; 22 L. T. 647; 17 W. R. 1112.
MALINS, V.-C.—In *Godsall v. Webb* the words were "during the life of the wife," and the question was whether they could be held to mean the joint lives of the husband and wife. I do not think, therefore, that that case applies, and it turns rather upon the obligation of the wife to keep up a policy of assurance for the benefit of volunteers.—p. 268.

Godsall v. Webb, referred to.

Carter v. Carter (1869) 39 L. J. Ch. 268; L. R. 8 Eq. 551, 555; 21 L. T. 194.—MALINS, V.-C.

Hill v. Trenery (1856) 23 Beav. 16.—ROMILLY, M.R.; and Beresford v. Beresford (1857) 23 Beav. 292.—M.R., discussed.

Wells, In re, Boyer v. Maclean (1903) 72 L. J. Ch. 513; [1904] 1 Ch. 818; 88 L. T. 365; 51 W. R. 521.—FARWELL, J.

Stephenson's Trusts, In re, Stephenson, Ex parte (1853) 3 De G. M. & G. 969.—L.JJ., distinguished.

Mainwaring's Settlement, In re (1866) L. R. 2 Eq. 487, 194; 14 W. R. 887.—WOOD, V.-C.

Stevens v. Van Voorst (1853) 17 Beav. 305.—ROMILLY, M.R.

Distinguished, Reid v. Kenrick (1855) 3 Eq. R. 1031 (post); Dickinson v. Dillwyn (1869) 39 L. J. Ch. 266; L. R. 8 Eq. 546, 550 (post); overruled, Edwards, In re, L. B. & S. C. Ry. Act, In re (1873) 43 L. J. Ch. 265; L. R. 9 Ch. 97, 100 (see post); referred to, Davenport v. Marshall (1901) 71 L. J. Ch. 29, 30; [1902] 1 Ch. 82, 85; 85 L. T. 340; 50 W. R. 39.—BUCKLEY, J.

Howell v. Howell (1833) 4 L. J. Ch. 242.—V.-C.

Applied, Dickinson v. Dillwyn (post); referred to, Carter v. Carter (post).

*** Reid v. Kenrick (1855) 24 L. J. Ch. 503; 3 Eq. R. 1031; 1 Jur. (N.S.) 897; 3 W. R. 530.—STUART, V.-C.**

Followed, Dickinson v. Dillwyn (post); referred to, Carter v. Carter (post); distinguished, D'Estampes' Settlement, In re, D'Estampes v. Crowe (1884) 53 L. J. Ch. 1117; 51 L. T. 502; 32 W. R. 973.—KAY, J.

Dickinson v. Dillwyn (1869) 39 L. J. Ch. 266; L. R. 8 Eq. 546; 22 L. T. 647; 17 W. R. 1112.—MALINS, V.-C., followed.

Carter v. Carter (1869) 39 L. J. Ch. 268; L. R. 8 Eq. 551, 555; 21 L. T. 194.—MALINS, V.-C.

Dickinson v. Dillwyn and Carter v. Carter, approved.

Edwards, In re, L. B. & S. C. Ry. Act, In re (1873) 43 L. J. Ch. 265; L. R. 9 Ch. 97; 29 L. T. 712; 22 W. R. 144.—L.JJ.

JAMES, L.J.—The primary object of a covenant to settle the future property of a wife is to prevent its falling under the sole control of the husband, and it, therefore, *primâ facie*, is to be supposed not to be intended to apply to property the wife's title to which does not accrue until after the husband's death. We have consulted the L.C. [Lord Selborne] on the case, and he agrees with us in the opinion that in the absence of any expressions showing that a covenant of this nature was intended to have a more extended operation it is to be construed as if the usual words, "during the said intended coverture," had been inserted. It appears to his lordship, as well as to us that the rule laid down in *Dickinson v. Dillwyn* and *Carter v. Carter* is to be followed, and not the rule which was acted upon in *Stevens v. Van Voorst* (supra).—p. 100.

Dickinson v. Dillwyn and Carter v. Carter.

Referred to, Agar v. George (1876) 2 Ch. D. 706, 708; 34 L. T. 487; 24 W. R. 696.—MALINS, V.-C.; followed, Coghlan, In re, Broughton v. Broughton (1894) 63 L. J. Ch. 671; [1894] 3 Ch. 76; 8 R. 384; 71 L. T. 186; 42 W. R. 634.—KEKEWICH, J. And see post, col. 3129.

Dickinson v. Dillwyn, principle applied.

Coles v. Coles (1901) 70 L. J. Ch. 324; [1901] 1 Ch. 711, 714; 84 L. T. 142.

JOYCE, J.—But I decide this case upon the ground on which Malins, V.-C. decided *Dickinson v. Dillwyn*. He says: "On the broad ground of intention, I am of opinion that the words of this covenant never could have been intended to apply to property which the wife should acquire from her husband."—p. 326.

Dickinson v. Dillwyn and Carter v. Carter (supra), referred to.
Davenport v. Marshall (1901) 71 L. J. Ch. 29, 31; [1902] 1 Ch. 82, 85; 85 L. T. 340; 50 W. R. 39.—BUCKLEY, J.

Edwards, In re, L. B. & S. C. Ry. Act, In re, (1873) 43 L. J. Ch. 265; L. R. 9 Ch. 97; 29 L. T. 712; 22 W. R. 144.—L.J.J.
Applied, **Alleyne v. Hussey** (1873) 22 W. R. 203.—HALL, V.-C.; **Holloway v. Holloway** (1877) 25 W. R. 575.—JESSEL, M.R.; *considered*, **Fisher v. Shirley** (1889) 59 L. J. Ch. 29; 43 Ch. D. 290, 294; 61 L. T. 668; 38 W. R. 70.—STIRLING, J.

Edwards, In re, followed,
Holloway v. Holloway, commented on.
Coghlan, In re, Broughton v. Broughton (1894) 63 L. J. Ch. 671; [1894] 3 Ch. 76; 8 R. 384; 71 L. T. 186; 42 W. R. 634.—KEKEWICH, J.

Edwards, In re, discussed and applied.
Davenport v. Marshall (1901) 71 L. J. Ch. 29; [1902] 1 Ch. 82, 85; 85 L. T. 340; 50 W. R. 39.
 BUCKLEY, J.—I have to determine what in this settlement is the meaning of the expression "during the said intended marriage." In **Edwards, In re**, the C. A. had to consider what was the true effect of a covenant to settle after-acquired property without any limit of time. The Court held that if no contrary intention appeared it ought to be construed as applying only to property acquired during the coverture. . . . The C. A. therefore laid it down that the object of a covenant of this description is to exclude the husband.—p. 31.

Graffey v. Humpage (1838) 8 L. J. Ch. 98; 1 Beav. 46; 3 Jur. 622.—LANGDALE, M.R.; affirmed *nom.* **Graffey v. Humpage** (1839) 3 Jur. 622.—COTTENHAM, L.C.

Referred to, **Hoare v. Hornby** (1843) 12 L. J. Ch. 151; 2 Y. & C. C. C. 121; 7 Jur. 424.—KNIGHT BRUCE, V.-C.; *distinguished*, **Otto v. Melvill (or Melville)** (1848) 17 L. J. Ch. 343; 2 De G. & Sm. 257; 12 Jur. 845.—KNIGHT BRUCE, V.-C.; *not applied*, **Andrews, In re** (1851) 1 Ir. Ch. L. 410.—CUSACK SMITH, M.R.; *applied*, **Blake, Ex parte, London Dock Co., In re** (1853) 16 Beav. 463.—ROMILLY, M.R.; *principle explained and distinguished*, **Acherley v. Du Moulin** (1855) 2 K. & J. 186.—WOOD, V.-C.; *commented on*, **Wilton v. Colvin** (1856) 25 L. J. Ch. 850; 3 Drew. 617 (*see post*, col. 3130); **Archer v. Kelly** (1860) 29 L. J. Ch. 911; 1 Dr. & Sm. 300; 6 Jur. (N.S.) 814; 8 W. R. 684.—KINDERSLEY, V.-C.; *followed*, **Hughes v. Young** (1862) 32 L. J. Ch. 137; 1 N. R. 166; 9 Jur. (N.S.) 376.—WOOD, V.-C.; **Hughes's Trust, In re** (1863) 4 Giff. 432.—STUART, V.-C.; **Hill, In re** (1863) 9 Jur. (N.S.) 942; 8 L. T. 825; 11 W. R. 930.—STUART, V.-C.

Graffey v. Humpage, followed.
Hughes's Trusts, In re (1864) 4 Giff. 432.
 STUART, V.-C.—The criticisms made on this case are not, in my opinion, well founded, and I do not feel myself justified, on such grounds, in shaking the authority of that case, which, in my opinion, is in accordance with the laws of this Court.—p. 436.

Graffey v. Humpage, distinguished.
Wyndham's Trusts, In re (1865) L. R. 1 Eq. 290.
 WOOD, V.-C.—**Graffey v. Humpage**, relied on by Mr. Turner in support of the claim of the

executor, is, however, distinguishable in what seem to me material points from the present case; it was a case of ante-nuptial settlement, and the apparent intention of the settlement was to give all future property which should accrue to the wife, or in her right, to her disposal; and Lord Langdale, admitting the difficulty thrown in his way by the words in that case, which were, "in case the intended wife, or the husband in her right, should at any time or times thereafter, during the said coverture, succeed to the possession of, or acquire any property," thought the effect of those words might be obviated by the construction which he suggested, that the inchoate right vested in the husband by the coverture, continued during the coverture, and was only completed by the death of the wife into a possessory right, which must have relation to the inchoate right. In the present case this principle is inapplicable, for the deed of December, 1854, refers only to property which should thereafter devolve on the wife during the joint lives of the husband and wife; it could not have been intended to refer to any property in right of the wife, which had already devolved; for if so, such property might have already been spent by the husband.—p. 293.

Graffey v. Humpage.
Followed, **Rose v. Cornish** (1867) 16 L. T. 786.—WOOD, V.-C.; *commented on*, **Clinton's Trust, In re, Holloway's Fund** (1872) 41 L. J. Ch. 191, 193; L. R. 13 Eq. 295, 307; 26 L. T. 159; 20 W. R. 326.—WICKENS, V.-C.; *referred to*, **Atkinson's Trusts, In re, Fitzroy, Ex parte** (1893) [1895] 1 Ir. R. 230.—PORTER, M.R. *And see* 45 L. J. Ch. 429, n.

James v. Durant (1839) 2 Beav. 177; S. C. *nom.* **James v. James**, 9 L. J. Ch. 85.—LANGDALE, M.R.

Referred to, **Hoare v. Hornby** (1843) 12 L. J. Ch. 151; 2 Y. & C. C. C. 121; 7 Jur. 424.—KNIGHT BRUCE, V.-C.; *distinguished*, **Otto v. Melvill (or Melville)** (1848) 17 L. J. Ch. 343; 2 De G. & Sm. 257; 12 Jur. 845.—KNIGHT BRUCE, V.-C. (*see post*, col. 3131); *not applied*, **Andrews, In re** (1851) 1 Ir. Ch. R. 410.—CUSACK SMITH, M.R.

James v. Durant, discussed and not applied.
Blake, Ex parte, London Dock Co., In re (1853), 16 Beav. 463.—ROMILLY, M.R.

James v. Durant, commented on.
Wilton v. Colvin (1856) 25 L. J. Ch. 850; 3 Drew. 617; 2 Jur. (N.S.) 867; 4 W. R. 759.—KINDERSLEY, V.-C.

[His lordship discusses all the cases at length. He speaks of **Graffey v. Humpage** (supra), as "a peculiar case," and "decided on a peculiar ground," and characterises Lord Langdale's reasoning as "subtle and ingenious," but "somewhat refined." **James v. Durant**, he says, was decided by Lord Langdale "on precisely the same ground and the same principle."]

James v. Durant, followed.
Hill, In re (1863) 9 Jur. (N.S.) 942; 8 L. T. 825; 11 W. R. 930.—STUART, V.-C.; **Hughes's Trusts, In re** (1863) 4 Giff. 432.—STUART, V.-C.

James v. Durant, commented on.
Clinton's Trusts, In re, Holloway's Fund (1872) 41 L. J. Ch. 191, 193; L. R. 13 Eq. 295, 307; 26 L. T. 159; 20 W. R. 326.—WICKENS, V.-C.

James v. Durant, *referred to*.

Atkinson's Trusts, In re (1898) [1895] 1 Ir. R. 230.—PORTER, M.R.

Otter v. Melville (or Melville) (col. 3130).

Not applied, Blake, Ex parte, London Dock Co., In re (1853) 16 Beav. 463.—M.R.; *approved*, Wilton v. Colvin (1856) 3 Drew. 617 (*post*, col. 3132); *explained and principle not applied*, Worsley's Trusts, In re (1867) 16 L. T. 826.—MALINS, V.-C.

Blythe v. Granville (1842) 12 L. J. Ch. 82; 13 Sim. 190; 6 Jur. 961.—SHADWELL, V.-C.

Referred to, Hoare v. Hornby (1843) 12 L. J. Ch. 151; 2 Y. & C. C. C. 121; 7 Jur. 424.—KNIGHT BRUCE, V.-C.; *distinguished*, Otter v. Melville (or Melville) (1848) 17 L. J. Ch. 343; 2 De G. & Sm. 257; 12 Jur. 845.—KNIGHT BRUCE, V.-C.; *discussed and applied*, Andrews, In re (1851) 1 Ir. Ch. R. 410.—CUSACK SMITH, M.R.; Blake, Ex parte, London Dock Co., In re (1853) 16 Beav. 463.—ROMILLY, M.R.

Blythe v. Granville, *questioned*.

Wilton v. Colvin (1856) 25 L. J. Ch. 850; 3 Drew. 617; 2 Jur. (N.S.) 867; 4 W. R. 759.—KINDERSLEY, V.-C.

Blythe v. Granville, *approved*.

Wilcox v. Smith (1857) 36 L. J. Ch. 596; 4 Drew. 40; 3 Jur. (N.S.) 604; 5 W. R. 667.—KINDERSLEY, V.-C.; MacLurean v. Lane (1858) 5 Jur. (N.S.) 56; 7 W. R. 135.—STUART, V.-C.

Blythe v. Granville, *discussed*.

Archer v. Kelly (1860) 29 L. J. Ch. 911; 1 Dr. & Sm. 300; 6 Jur. (N.S.) 814; 8 W. R. 684.—KINDERSLEY, V.-C.—I am very glad to have this opportunity of correcting an impression as to what I said in *Wilton v. Colvin* (*post*, col. 3132). In *MacLurean v. Lane* (*supra*), Stuart, V.-C. considered that I had expressed a doubt whether *Blythe v. Granville* was properly decided. Now, that was a case of a reversionary interest, and Sir L. Shadwell held, that it came within the meaning of the covenant; and I had not the smallest idea of intimating that I felt the smallest dissatisfaction with that decision, and I am of opinion that a reversion which falls into possession does come within the covenant. The objection I made applies to one part of the judgment, in which he says, "The covenant, therefore, plainly applies to that property which the wife would become entitled to as soon as the coverture took effect. The coverture was the futurity referred to; and immediately on the marriage taking place the wife became entitled to the property during the coverture." The reasoning, therefore, is, that though she was entitled before coverture, yet after coverture she is become entitled during coverture, and therefore there is a change of condition; and from that I ventured most respectfully to dissent. And this appears from the report of *Wilton v. Colvin* in the Law Journal. From that report of the case, it is clear, that the only observation I made intimating any dissent, related to that particular part.—p. 913.

Blythe v. Granville, *followed*.

Hill, In re (1863) 9 Jur. (N.S.) 942; 8 L. T. 825; 11 W. R. 930.—STUART, V.-C.

Blythe v. Granville, *considered*.

Clinton's Trusts, In re, Hollway's Fund (1872) 41 L. J. Ch. 191, 193; L. R. 13 Eq. 295, 307; 26 L. T. 159; 20 W. R. 326.—WICKENS, V.-C.;

Atkinson's Trusts, In re (1898) [1895] 1 Ir. R. 230.—PORTER, M.R.

Blake, Ex parte, London Dock Co., In re (1853) 16 Beav. 463.—M.R.

Questioned, Wilton v. Colvin (*post*); *followed*, Hill, In re (1863) 9 Jur. (N.S.) 942; 8 L. T. 825; 11 W. R. 930.—STUART, V.-C.

Wilton v. Colvin (1856) 25 L. J. Ch. 850; 3 Drew. 617; 2 Jur. (N.S.) 867; 4 W. R. 759.—V.-C., *explained*.

Archer v. Kelly (1860) 29 L. J. Ch. 911; 1 Dr. & Sm. 300; 6 Jur. (N.S.) 814; 8 W. R. 684.—KINDERSLEY, V.-C. *See supra*, col. 3131.

Wilton v. Colvin, *applied*.

Brown's Will, In re (1869) L. R. 7 Eq. 231, 235; 38 L. J. Ch. 316.—ROMILLY, M.R.

Wilton v. Colvin, *referred to*.

Churchill v. Denny (1875) 44 L. J. Ch. 578; L. R. 20 Eq. 534, 536; 23 W. R. 825.

JESSEL, M.R.—Now, to "become entitled" means to acquire, as Kindersley, V.-C., said in *Wilton v. Colvin*. "Does it not always mean acquiring title? When you find the words, 'shall become entitled,' you are always referring to some future interest, to the acquisition of some future title."—p. 579.

Hoare v. Hornby (1843) 12 L. J. Ch. 151; 2 Y. & C. C. C. 121; 7 Jur. 424.—KNIGHT BRUCE, V.-C.

Distinguished, Otter v. Melville (or Melville) (1848) 17 L. J. Ch. 343; 2 De G. & Sm. 257; 12 Jur. 845.—KNIGHT BRUCE, V.-C.; *explained*, Andrews, In re (1851) 1 Ir. Ch. R. 410.—CUSACK SMITH, M.R.; *distinguished*, Blake, Ex parte, London Dock Co., In re (1853) 16 Beav. 463.—ROMILLY, M.R.; *approved*, Wilton v. Colvin (1856) 25 L. J. Ch. 850; 3 Drew. 617; 2 Jur. (N.S.) 867; 4 W. R. 759.—KINDERSLEY, V.-C.; *explained and principle not applied*, Worsley's Trusts, In re (1867) 16 L. T. 826.—MALINS, V.-C.; *referred to*, Clinton's Trusts, In re, Hollway's Fund (1872) 41 L. J. Ch. 191, 193; L. R. 13 Eq. 295, 307; 26 L. T. 159; 20 W. R. 326.—WICKENS, V.-C.

Hoare v. Hornby, *discussed and approved*.

Williams v. Mercier (1884) 10 App. Cas. 1; 54 L. J. Q. B. 148; 52 L. T. 662; 33 W. R. 373; 49 J. P. 484.—H.L. (E).

SELBORNE, L.C.—Now far be it from me to say, that a context, or an intention discovered from those extrinsic facts and circumstances which are legitimately to be taken into account, might not lead to the conclusion, that what was meant was only that property, which the wife should afterwards acquire, and in which the husband should succeed to the rights or become subrogated to the rights so afterwards acquired by her. Many circumstances might justify such a conclusion. Authorities have been referred to in which such a conclusion was arrived at. I will mention one of them by way of illustration only—such a case as *Hoare v. Hornby*, where all the parties were contracting with each other with equal knowledge that the wife was then entitled under two known wills, the one English and the other American, and they expressly made the settlement of the property under the English will and said nothing whatever about the American, and there was a general covenant of this sort in words of futurity. I think it was a very reasonable thing at all events, even if

the words "if any," which are words of uncertainty, had not been added, to construe that as meaning only what the husband should acquire a right to by reason of an after-acquired title of the wife.—p. 7.

Hilbers v. Parkinson (1883) 53 L. J. Ch. 194; 25 Ch. D. 200; 49 L. T. 502; 32 W. R. 315.—PEARSON, J., *distinguished*.

Anstis, In re. Chetwynd v. Morgan (1886) 31 Ch. D. 596; 54 L. T. 742; 34 W. R. 483.—C.A.

LINDLEY, L.J.—The case is not like *Hilbers v. Parkinson*, where it was held that a covenant to settle after-acquired property did not extend to an estate tail, nor oblige the tenant in tail to convey the property to the trustees of the settlement for his life. In that case the interest of the tenant in tail was one and indivisible; and if the covenant did not extend to the estate tail, it could not extend to an inseparable part of it.—p. 605.

Hilbers v. Parkinson, referred to.

Mills v. Fox (1887) 57 L. J. Ch. 56; 37 Ch. D. 153, 166; 57 L. T. 792; 36 W. R. 219.—STIRLING, J.

Churchill v. Shepherd (1863) 33 Beav. 107.—M.R., *referred to*.

Atkinson's Trusts, In re, Fitzroy, Ex parte (1893) [1895] 1 Ir. R. 230.—PORTER, M.R.

Williams v. Mercier (1884) 54 L. J. Q. B. 148; 10 App. Cas. 1; 52 L. T. 662; 33 W. R. 373; 49 J. P. 484.—H.L. (E.), *distinguished*.

Garnett, In re, Robinson v. Gandy (1886) 33 Ch. D. 800; 55 L. J. Ch. 773; 55 L. T. 562.—C.A.; reversing in part (1885) 31 Ch. D. 648; 53 L. T. 756; 34 W. R. 434.—KAY, J.

COTTON, L.J.—Then reliance is placed by the trustees (respondents) on *Williams v. Mercier*. But, in my opinion, that case must have turned on this, that the covenant there was the only part of the instrument which could bring into settlement the property to which the wife was entitled at the date of the settlement. There were words in the settlement declaring the trusts of the money to arise from the sale of certain chattels, which refer to the settlement contained in the proviso as to that property to which the intended wife was then entitled, and that could not be found anywhere except in this covenant; and there being a great variance in the words their lordships held, affirming the C.A., that the covenant did apply to the then present property of the lady. The words of the settlement, but unfortunately not the whole of the settlement, are set out in the H.L.'s report, and there is also a reference to the trust of the money to arise from the sale of certain property. What I gather from the report, although the settlement is not set out, is confirmed by the recollection of Lindley, L.J., that there was nothing in the settlement, except the covenant, which could affect the then present property of the ladies. The interpretation of the covenant, and the fact I have last mentioned, are alluded to in the judgments both of Lord Blackburn and Lord Bramwell; and, I think, also alluded to by the then L.C., Lord Selborne. Having regard to the context, and having regard to the terms of the settlements, it was held to apply to property which the intended wife had at and immediately

before the date of the settlement. In my opinion that is not the true construction of this covenant and of this settlement, having regard not only to the covenant but to the contract.—p. 305. LINDLEY and LOPES, L.JJ. concurred.

Williams v. Mercier, considered.

Garnett, In re, Robinson v. Gandy, discussed and distinguished.

Atkinson's Trusts, In re, Fitzroy, Ex parte (1893) [1895] 1 Ir. R. 230.

PORTER, M.R.—*Williams v. Mercier* turned to a large extent upon the clause which provided for the application of the proceeds of the sale of after-acquired property in connection with the words "now is" occur, and which the lords regarded as throwing light upon otherwise ambiguous language. What the decision would have been without that clause it is not easy to say with complete certainty. There are expressions in the judgments I have read, which seem to point in different ways. But *Williams v. Mercier* came to be considered in *Garnett, In re, Robinson v. Gandy*. The facts of that case were peculiar. [The M.R. stated the facts and referred to the judgment of Cotton, L.J., and continued:] It therefore cannot be said that *Williams v. Mercier* is an authority for the proposition that *per se*, and without any context, the covenant would have bound property to which, at the date of the settlement, the intended wife was entitled. On the other hand, there is in the case before me no recital, as in *Robinson v. Gandy*, of an intention to settle "future" property.—pp. 242, 244.

Evans, Ex parte, Wass, In re (1852) 22

L. J. Bk. 5; 2 De G. M. & G. 948; 1 W. R. 69.—L.JJ., *not applied*.

Bishop, Ex parte, Tonnies, In re (1873) 42 L. J. Bk. 108, n.—BACON, C.J.; affirmed, 42 L. J. Bk. 107; 1 L. R. 8 Ch. 718; 28 L. T. 862; 21 W. R. 716.—L.JJ.

Ripley v. Woods (1828) 2 Sim. 165.—V.-C., *referred to*.

Hughes v. Young (1862) 32 L. J. Ch. 137; 1 N. R. 166; 9 Jur. (N.S.) 376.—WOOD, V.-C.

Jones' Will, In re (1876) 45 E. J. Ch. 428;

2 Ch. D. 362; 35 L. T. 25; 24 W. R. 697.—JESSEL, M.R., *distinguished and not applied*.

Michell's Trusts, In re (1877) 47 L. J. Ch. 12; 6 Ch. D. 618, 623.—MALINS, V.-C.; reversed, C.A. (*post*, col. 3138).

Jones' Will, In re, discussed.

Atkinson's Trusts, In re, Fitzroy, Ex parte (1893) [1895] 1 Ir. R. 230.—PORTER, M.R.

Green v. Ekins (1742) 2 Atk. 473.—L.C., *referred to*.

Shelley v. Shelley (1868) 37 L. J. Ch. 357, 360; L. R. 6 Eq. 540, 546; 16 W. R. 1036.—WOOD, V.-C.; *Chamberlayne v. Brockett* (1872) 42 L. J. Ch. 368; L. R. 8 Ch. 206, 212; 28 L. T. 248; 21 W. R. 299.—L.C. and L.JJ.

Butcher v. Butcher (1851) 14 Beav. 222.—ROMILLY, M.R.

Approved but not applied, Hammond v. Hammond (1854) 19 Beav. 29; 3 Eq. R. 119; 2 W. R. 36.—ROMILLY, M.R.; *discussed, Ramsden v. Smith* (1854) 23 L. J. Ch. 757, 759; 2 Drew. 298; 2 Eq. R. 660; 18 Jur. 566; 2 W. R. 435.—KINDERSLEY, V.-C.

Butcher v. Butcher, distinguished.

Young v. Smith (1865) L. R. 1 Eq. 180; 35 Beav. 87; 11 Jur. (N.S.) 963.

ROMILLY, M.R.—In *Butcher v. Butcher* the agreement was in the operative part of the deed, and I gave effect to it; and I should have done so here, but the circumstance that the agreement is contained in the recital sufficiently distinguishes the two cases.—p. 183.

Butcher v. Butcher, followed.

D'Estampes' Settlement, In re, D'Estampes v. Crowe (1884) 53 L. J. Ch. 1117, 1120; 51 L. T. 502; 32 W. R. 978.—KAY, J.

Butcher v. Butcher, discussed.

Haden, In re, Coling v. Haden (1898) 67 L. J. Ch. 428; [1898] 2 Ch. 220, 222.

STIRLING, J.—In *Butcher v. Butcher*, where the form of the covenant was this: It was agreed and declared by and between the parties, and the husband covenanted with the trustees, that in case any personal estate should at any time thereafter during the coverture come to or vest in the wife or her husband in her right the same should be "paid, assigned, or transferred by all proper parties;" it was held that any property coming to the wife, even although a reversionary interest in certain property to which the wife became entitled during the coverture for her separate use, and which did not fall into possession until after the death of the husband, was bound by the covenant.—p. 429.

Hughes' Trusts, In re (1863) 4 Giff. 432.—

STUART, V.-C., and *Rose v. Cornish* (1867) 16 L. T. 786.—WOOD, V.-C., *dissented from*.

Clinton's Trust, In re, Hollway's Fund, Weare, Ex parte (1872) 41 L. J. Ch. 191, 193; L. R. 13 Eq. 295, 308; 26 L. T. 159; 20 W. R. 326.—WICKENS, V.-C.

Clinton's Trusts, In re, Hollway's Fund, Weare, Ex parte, discussed.

Lane v. Oakes (1874) 30 L. T. 726, 728; 22 W. R. 709.—EX.

Clinton's Trusts, In re, referred to.

Commell v. Keith (1876) 45 L. J. Ch. 689; 3 Ch. D. 767, 773; 35 L. T. 29; 24 W. R. 633.—HALL, V.-C.

Clinton's Trusts, In re, explained.

Reid v. Reid (1886) 31 Ch. D. 402; 55 L. J. Ch. 294; 54 L. T. 100; 34 W. R. 332.—C.A.

COTTON, L.J.—The cases on marriage settlements give us no assistance when we look at the language used in the covenants. In *Clinton's Trusts, In re*, the words were, "become entitled." The principle laid down is that these words are satisfied if there is some change of some sort or other in the title, but the actual decision does not help us at all, for Wickens, V.-C. held, on the construction of the covenant, that the words "become entitled" must mean "become entitled in possession," and not otherwise.—p. 406.

Clinton's Trusts, In re, referred to.

Baupre's Trusts, In re (1888) 21 L. R. Ir. 397; —C.A.; Parsons, In re, Stockley v. Parsons (1890) 59 L. J. Ch. 666; 45 Ch. D. 51, 64; 62 L. T. 929; 38 W. R. 712.—KAY, J.

Clinton's Trusts, In re, considered.

Atkinson's Trusts, In re (1893) [1895] 1 Ir. R. 230.—PORTER, M.R.

Viant's Settlement Trusts, In re (1874) 43

L. J. Ch. 832; L. R. 18 Eq. 434; 30 L. T. 545; 22 W. R. 686.—BAQON, V.-C.

Not followed, Jones' Will, In re (1876) 45 L. J. Ch. 428, 429; 2 Ch. D. 362; 35 L. T. 25; 24 W. R. 697.—JESSEL, M.R., *see post*, col. 3139; *followed*, Hamilton v. James (1877) Ir. R. 11 Eq. 223.—CHATTERTON, V.-C.; *considered*, Michell's Trusts, In re (1877) 47 L. Ch. 12; 6 Ch. D. 618, 623.—MALINS, V.-C. (*see post*, col. 3138).

Viant's Settlement Trusts, In re, and

Hamilton v. James (*supra*), *referred to*. Atkinson's Trusts, In re (1893) [1895] 1 Ir. R. 230.—PORTER, M.R.

Ellison v. Elwin (1843) 13 Sim. 309; S. C.

nom. Elwin v. Williams, 12 L. J. Ch. 440; 7 Jur. 337.—V.-C., *applied*.

Borton v. Borton (1849) 18 L. J. Ch. 219; 16 Sim. 552; 13 Jur. 247.—SHADWELL, V.-C.

Young v. Smith (1865) L. R. 1 Eq. 180; 35

Beav. 87; 11 Jur. (N.S.) 963.—ROMILLY, M.R., *distinguished*.

Lee v. Lee (1876) 4 Ch. D. 175; 46 L. J. Ch. 81; 36 L. T. 138; 25 W. R. 225.

JESSEL, M.R.—In *Young v. Smith and Ramsden v. Smith* (2 Drew. 298, *post*, col. 3142) the covenant was to settle the after-acquired property of the wife, and the real question was, what property was included in the covenant. The property which was to be the subject of the covenant was described in general terms, and the question in both cases was whether the covenant was intended to apply to a legacy bequeathed to the wife subsequently to the marriage. But those cases have no application to the case now before me, where the property agreed to be settled is specifically described, and there is, therefore, no doubt whatever as to what property is included in this covenant. The agreement by the husband that he would settle this particular property was clearly binding on the wife, she having assented to it by being a party to the agreement.—p. 179.

Young v. Smith, distinguished.

De Ros' Trust, In re, Hardwicke v. Wilmot (1885) 55 L. J. Ch. 73; 31 Ch. D. 81, 86; 53 L. T. 524; 34 W. R. 36.—KAY, J.

Young v. Smith, referred to.

Buckland v. Buckland (1900) 69 L. J. Ch. 648; [1900] 2 Ch. 534, 540; 82 L. T. 759; 48 W. R. 637.—BUCKLEY, J.

Lee v. Lee (1876) 46 L. J. Ch. 81; 4 Ch. D.

175; 36 L. T. 138; 25 W. R. 225.—JESSEL, M.R.

Followed, De Ros' Trust, In re, Hardwicke v. Wilmot (1885) 55 L. J. Ch. 73; 31 Ch. D. 81, 88; 53 L. T. 524; 34 W. R. 36.—KAY, J.; *discussed*, Haden, In re, Coling v. Haden [1898] 2 Ch. 220 (*post*, col. 3137).

De Ros' Trust, In re, Hardwicke v. Wilmot

(*supra*), *applied*. Coghlan, In re, Broughton v. Broughton (1894) 63 L. J. Ch. 671; [1894] 3 Ch. 76; 8 R. 384; 71 L. T. 186; 42 W. R. 634.—KEKEVICH, J.

De Ros' Trust, In re (*supra*), *discussed*.

Haden, In re, Coling v. Haden (1898) 67 L. J. Ch. 428; [1898] 2 Ch. 220, 222.

STIRLING, J.—But the cases most resembling this are two. The first is *Lee v. Lee* (col. 3136), a decision of Sir G. Jessel. There by an ante-nuptial agreement which was signed by the intended husband and wife and the parents of the wife, the parents agreed to appoint a share of certain real estate (which was subject to their life interest and to the appointment of them and the survivor of them) to the daughter; and the husband agreed that he would settle such share as his wife might take in the property, either by appointment or in default of appointment. It was there held by the M.R. that notwithstanding that there was no express covenant on the part of the wife, nevertheless she was bound. . . . That was a case in which the property, which was the subject of the agreement, was the specific property of the wife. But in *De Ros' Trust, In re*, Kay, L.J. applied the same doctrine to a covenant which was expressed in general terms. The difference between that case and the present is this, that although the covenant was on the part of the husband alone, yet the acts which were to be done in pursuance of the covenant were expressly to be by the wife as well as the husband.—p. 429.

Atcherley v. Du Moulin (1855) 2 K. & J. 186.

—WOOD, V.-C.

Distinguished, Hughes v. Young (1862) 32 L. J. Ch. 137; 1 N. R. 166; 9 Jur. (N.S.) 376.—WOOD, V.-C.; *applied*, Dering v. Kynaston (1868) L. R. 6 Eq. 210, 214; 18 L. T. 346; 16 W. R. 819.—ROMILLY, M.R.; *not applied*, Hood v. Franklin (1873) L. R. 16 Eq. 496, 500; 21 W. R. 724.—MALINS, V.-C.

Atcherley v. Du Moulin, *not applied*.

Corumell v. Keith (1876) 3 Ch. D. 767; 45 L. J. Ch. 689, 692; 35 L. T. 29; 24 W. R. 633.

HALL, V.-C.—In *Atcherley v. Du Moulin* the language is not the same as in this case.—p. 773.

Atcherley v. Du Moulin, *applied*.

Parsons, In re, Stockley v. Parsons (1890) 45 Ch. D. 51; 59 L. J. Ch. 666; 62 L. T. 929; 38 W. R. 712.

KAY, J.—In *Atcherley v. Du Moulin* a marriage settlement contained a covenant to settle which the Court held included all property to which at the date of the settlement the wife was "entitled." At that date the wife was contingently entitled under a bequest to all the daughters of her father living at his death who should attain twenty-one or marry. The father died in 1854. This daughter had married in 1846, and her husband had died in 1851. Lord Hatherley held, that "although she had the transmissible contingent interest, she had nothing during the marriage which could be called property to which she was entitled." . . . "The word 'entitled' might be large enough to include a contingent interest;" but upon regarding the whole of the settlement, he thought in that case it did not.—p. 64.

Brooks v. Keith (1861) 1 Dr. & Sm. 462;

7 Jur. (N.S.) 482; 4 L. T. 541; 9 W. R. 565.—KINDERSLEY, V.-C., *considered*.

Allnutt, In re, Pott v. Brassey (1882) 22 Ch. D.

275; 52 L. J. Ch. 299; 48 L. T. 155; 31 W. R. 469.

CHITTY, J.—Another case that has been mentioned is that of *Brooks v. Keith*, where the question had reference to certain property which was given in such a manner as to render it, according to Kindersley, V.-C.'s judgment, doubtful whether, if the property was held to be included in the covenant, it would not be forfeited under the terms of the will. . . . The V.-C. . . . seems to have founded his decision upon the view that the assignment would create a forfeiture. . . . If that is the ground, as I rather think it was, of the V.-C.'s decision, I think it is a decision entirely consistent with principle. There is another ground which is not noticed in the judgment, though it is noticed in the text-books with reference to this question, namely, that the covenant there was so framed as to make it apply only so far as the husband was interested in the property. I take it that upon that form alone, although not referred to in the judgment, the decision might be supported.—p. 279.

Mitchell's Trusts, In re (1877) 47 L. J. Ch. 12; 6 Ch. D. 618.—MALINS, V.-C.; *reversed*, (1878) 9 Ch. D. 5; 38 L. T. 462; 26 W. R. 762.—C.A.

Mitchell's Trusts, In re, *referred to*.

Garnett, In re, Robinson v. Gandy (1885) 31 Ch. D. 648, 654; 53 L. T. 756; 34 W. R. 434.—KAY, J.; *reversed*, C.A. (*supra*, col. 3133).

Mitchell's Trusts, In re, *discussed and not applied*.

Middleton v. Andrews (1888) 21 L. R. Ir. 411, 419.—CHATTERTON, V.-C.

Corumell v. Keith (1876) 45 L. J. Ch. 689; 3 Ch. D. 767; 35 L. T. 29; 24 W. R. 633.

—HALL, V.-C., *discussed*.

Mitchell's Trusts, In re (1877) 6 Ch. D. 618, 625.—MALINS, V.-C. *See supra*.

Corumell v. Keith, *followed*.

Parsons, In re, Stockley v. Parsons (1890) 59 L. J. Ch. 666; 45 Ch. D. 51, 65; 62 L. T. 929; 38 W. R. 712.—KAY, J. *See post*, col. 3141.

Agar v. George (1876) 2 Ch. D. 706; 34 L. T. 487; 24 W. R. 696.—MALINS, V.-C., *explained and confirmed*.

Mitchell's Trusts, In re (1877) 6 Ch. D. 618, 624.—MALINS, V.-C. *See supra*.

Pedder's Settlement, In re (1870) 40 L. J. Ch. 77; 10 L. R. 10 Eq. 585.—JAMES, V.-C., *approved*.

Clinton's Trust, In re, Hollway's Fund (1872) 41 L. J. Ch. 191, 192; 13 L. R. 13 Eq. 295, 305; 26 L. T. 159; 20 W. R. 326.—WICKENS, V.-C.

Pedder's Settlement, In re, *distinguished*.

Viant's Settlement, In re (1871) 43 L. J. Ch. 832; 13 L. R. 18 Eq. 436, 442; 30 L. T. 540; 22 W. R. 686.

BACON, V.-C.—The property [*Pedder's Settlement, In re*] consisted of a vested remainder in land expectant on the death of a tenant for life who outlived the coverture, and James, L.J., then V.-C., observed, "This is not property with regard to which it can be averred that the husband or the wife did become seised or possessed of or entitled to it 'during the coverture.'"—p. 834.

Pedder's Settlement, In re, referred to.

Jones' Will, In re (1876) 45 L. J. Ch. 428; 2 Ch. D. 362, 364; 35 L. T. 25; 24 W. R. 697.

JESSEL, M.R.—I regret that a point which in *Pedder's Settlement, In re*, was treated by the Judge as virtually decided by authority should again have been opened to question by the decision in *Viant's Settlement (supra)*.—p. 429.

Pedder's Settlement, In re, referred to.

Cornmell v. Keith (1876) 45 L. J. Ch. 689, 692; 3 Ch. D. 767, 773; 35 L. T. 29; 24 W. R. 633.—HALL, V.-C.; *Michell's Trusts, In re* (1877) 47 L. J. Ch. 12; 6 Ch. D. 618, 622.—MALINS, V.-C.; reversed, C.A. (*supra*, col. 3138).

Creed v. Carey (1857) 7 Ir. Ch. R. 295.—L.C. and L.J., discussed.

Stack v. Royse (1861) 12 Ir. Ch. R. 246.—CUSACK SMITH, M.R.

Creed v. Carey, explained.

Clery v. Fitzgerald (1881) 7 L. R. Ir. 229, 243.—C.A. MAY, C.J., DEASY and FITZGIBBON, L.JJ.

Archer v. Kelly (1860) 29 L. J. Ch. 911; 1 Dr. & Sm. 300; 6 Jur. (N.S.) 814; 8 W. R. 684.—KINDENSLY, V.-C.

Commented on, Hill, In re (1863) 9 Jur. (N.S.) 942; 8 L. T. 825; 11 W. R. 930.—STUART, V.-C.; *distinguished*, Rose v. Cornish (1867) 16 L. T. 786.—WOOD, V.-C.; *applied*, Worsley's Trusts, In re (1867) 16 L. T. 826.—MALINS, V.-C.; Browne's Will, In re (1869) 38 L. J. Ch. 316, 318; L. R. 7 Eq. 231, 235.—ROMILLY, M.R.; *referred to*, Clinton's Trusts, In re, Holloway's Fund (1872) 41 L. J. Ch. 191, 193; L. R. 13 Eq. 295, 307; 26 L. T. 159; 20 W. R. 326.—WICKENS, V.-C.; Lane v. Oakes (1874) 30 L. T. 726, 728; 22 W. R. 709.—EX.

Archer v. Kelly, approved and followed.

Michell's Trusts, In re (1877) 6 Ch. D. 618; 47 L. J. Ch. 12.—V.-C.; reversed (*post*).

MALINS, V.-C.—But the decision which I intend to follow on the present occasion, and which seems to me to rest on the soundest principles, is . . . *Archer v. Kelly*. That was a case in which the wife was entitled at the date of the marriage "to a contingent interest in remainder in real estate, and was also entitled in possession to two sums of stock." That is a remarkable distinction, because the V.-C. held that with regard to the contingent interest in the real estate it was bound by the settlement, but the property to which she was entitled absolutely was not bound.—p. 627.

Archer v. Kelly, explained and not applied.

Michell's Trusts, In re (1878) 9 Ch. D. 5; 38 L. T. 462; 26 W. R. 762.—C.A.

COTTON, L.J.—What the Court said in *Archer v. Kelly* was this, that where the covenant is for the settlement of property to which the wife shall become entitled during the coverture, without saying more, than if property to which she was at the time of the marriage entitled in reversion falls into possession during coverture, she thereby becomes entitled within the meaning of the covenant . . . That does not apply to such a case as this; where the wife was contingently entitled to the property at the time of the marriage, and never during the coverture acquired an interest in possession.—p. 12.

Archer v. Kelly, referred to.

Garnett, In re, Robinson v. Gandy (1885) 31 Ch. D. 648, 654; 53 L. T. 756; 34 W. R. 434.

—KAY, J. (reversed, C.A., *supra*, col. 3133); Atkinson's Trusts, In re, Fitzroy, Ex parte (1893) [1895] 1 Ir. R. 230.—PORTER, M.R.

Mackenzie's Settlement, In re (1867) 36

L. J. Ch. 320; L. R. 2 Ch. 345; 16 L. T. 138; 15 W. R. 692.—TURNER and CAIRNS, L.JJ.

Commented on, Worsley's Trusts, In re (1867) 16 L. T. 826.—MALINS, V.-C.; Clinton's Trusts, In re, Holloway's Fund (1872) 41 L. J. Ch. 191; L. R. 13 Eq. 295, 306; 26 L. T. 159; 20 W. R. 326.—WICKENS, V.-C.; *applied*, Agar v. George (1874) 2 Ch. D. 706, 709; 34 L. T. 487; 24 W. R. 696.—MALINS, V.-C.; Cornmell v. Keith (1876) 45 L. J. Ch. 692; 3 Ch. D. 767, 773; 35 L. T. 29; 24 W. R. 633.—HALL, V.-C.; *explained*, Michell's Trusts, In re (1877) 47 L. J. Ch. 12; 6 Ch. D. 618, 624.—MALINS, V.-C. (reversed, C.A., *supra*, col. 3138).

Mackenzie's Settlement, In re, applied.

Jackson's Will, In re (1879) 13 Ch. D. 189; 49 L. J. Ch. 82; 41 L. T. 494; 28 W. R. 209.

JESSEL, M.R.—The authority which is certainly binding upon me is *Mackenzie's Settlement, In re*; and when that case is carefully considered it will be seen to be an authority that words like those [*i.e.*, in an ante-nuptial settlement, "that if at the time of the solemnisation of the intended marriage the wife shall be, or if at any time thereafter, and during the joint lives of the husband and wife, she, or her husband in her right, shall become beneficially entitled to any real or personal property, estate or effects, for any estate or interest whatsoever, then and in every such case the husband and wife and all other necessary parties shall, as soon as circumstances will permit," assure such property to the trustees in trust for sale, and to hold the proceeds upon the trusts thereinbefore declared of the wife's trust funds, "or as near thereto in all respects as the deaths of parties and other circumstances will admit"] do include a reversionary interest as distinguished from an interest in possession. [After referring to the facts of the case and quoting from the judgments of Turner and Cairns, L.JJ., his lordship continued:] So that this is an express decision that property to which the lady was entitled in reversion was covered by the words "property to which she now is entitled for any estate or interest whatsoever." It is not an express decision that defeasible reversions are within it; but there is a *dictum* of Turner, L.J.'s, not only as to vested, but contingent or executory interests, which shows what his opinion was upon the subject. The very point did come before me, though it does not appear to have been argued, in *Sweetapple v. Horlock* [(1879) 48 L. J. Ch. 660; 11 Ch. D. 745, 748.—See "POWERS," *ante*, col. 2207] . . . The words were not "so soon as circumstances will permit," but "after such interest shall fall into possession." Although the point was not argued, I certainly gave judgment upon it. There was a preceding power of appointment, and I said this: "Miss H. being thus entitled, in default of appointment by her father, to one-half of the settled property, married Mr. S., and being of age she and her intended husband entered into the following covenant with the trustees of their settlement." Then I

read it. "The words are: 'now is . . . interested in or entitled to any real property.'" I leave out all the other words. "She certainly then was interested in or entitled to a contingent reversionary interest." The word "contingent" I used inaccurately for "defeasible." The passage should therefore run: "She certainly then was interested in or entitled to a defeasible reversionary interest in real property under her father's and mother's settlement. Moreover, the covenant is to settle upon trusts, which show at once the parties contemplated reversionary property, because it directs what is to be done with any interest which shall 'fall into possession.'" So that I clearly considered that the reversionary interest was comprised under the words "now is,"—p. 198.

Mackenzie's Settlement, In re (*supra*), *applied*.

Parsons, In re, Stockley v. Parsons (1890) 45 Ch. D. 51; 59 L. J. Ch. 666; 62 L. T. 929; 38 W. R. 712.

KAY, J.—In *Mackenzie's Settlement, In re*, where the covenant included everything to which the wife was entitled at its date, and she was then entitled in reversion after the death of her mother to a share of Consols, and her mother died during the coverture, Turner, L.J., said in effect, "that if she was entitled contingently the covenant would reach it," *à fortiori* as she had a vested reversionary interest. This was followed in *Cornwall v. Keith* (*supra*, col. 3138), where the interest was in remainder expectant on the death of the wife without issue; this contingent reversionary interest was bound. It appears, therefore, that the Courts have hesitated to hold the word "entitled" in such a covenant to include a contingent reversionary interest under such a limitation as "to the children of A. living at his death," though now that would probably be held to be included. But this, so far as I know, is the furthest extent to which the construction of that familiar covenant has gone.—p. 65.

Taylor v. Dickenson (1826) 1 Russ. 521.—M.R., *discussed and approved*.

Smith v. Osborne (1857) 6 H. L. Cas. 375; 3 Jur. (N.S.) 1181; 6 W. R. 21.—H.L. (IR.).

Dering v. Kynaston (1868) L. R. 6 Eq. 210; 18 L. T. 346; 16 W. R. 819.—ROMILLY, M.R., *not applied*.

Agar v. George (1876) 2 Ch. D. 706, 709; 34 L. T. 487; 24 W. R. 696.—MALINS, V.-C.; *Cornwall v. Keith* (1876) 45 L. J. Ch. 689; 3 Ch. D. 767, 773; 35 L. T. 29; 24 W. R. 633.—HALL, V.-C.

Dering v. Kynaston, commented on.

Jackson's Will, In re (1879) 13 Ch. D. 189; 49 L. J. Ch. 82; 41 L. T. 499; 28 W. R. 209.

JESSEL, M.R.—*Dering v. Kynaston* is a very peculiar case. There the wife had an estate tail in remainder after other estates tail, and her interest happened to be a very remote one indeed. It was not a contingent interest, but a vested estate tail in remainder after the failure of several prior estates tail; and in the events which had happened it was most improbable that she would ever come into possession. That may have influenced Lord Romilly's decision.—p. 196.

Dering v. Kynaston, discussed.

Banks v. Small (1887) 56 L. J. Ch. 832; 36 Ch. D. 716, 725; 57 L. T. 292; 35 W. R. 765.—C.A.

Anderson v. Abbott (1857) 23 Beav. 457; 3 Jur. (N.S.) 833; 5 W. R. 381.—ROMILLY, M.R., *followed*.

Brown v. Brown (1866) L. R. 2 Eq. 481, 485; 14 L. T. 694.—ROMILLY, M.R.

Anderson v. Abbott and Brown v. Brown, referred to.

Codrington v. Lindsay (1872) 42 L. J. Ch. 526, 528; L. R. 8 Ch. 578, 587; 28 L. T. 177; 21 W. R. 182.—C.A., L.C. and L.J.; affirmed *nom.* Codrington v. Codrington (1875) 45 L. J. Ch. 660; L. R. 7 H. L. 854; 34 L. T. 221; 24 W. R. 648.—H.L. (B.). See "ELECTION," vol. i. col. 964.

Kane v. Kane (1880) 50 L. J. Ch. 72; 16 Ch. D. 207; 43 L. T. 667; 29 W. R. 212.

—HALL, V.-C., *followed*.

Berens' Settlement Trusts, In re, Berens v. Benyon (1888) 59 L. T. 626.—CHITTY, J.

Hammond v. Hammond (1854) 19 Beav. 29; 3 Eq. R. 119; 2 W. R. 36.—ROMILLY, M.R., *adhered to*.

Young v. Smith (1865) 35 Beav. 87; L. R. 1 Eq. 180; 11 Jur. (N.S.) 963.—ROMILLY, M.R.

Ramsden v. Smith (1854) 23 L. J. Ch. 757; 2 Drew. 298; 2 Eq. R. 660; 18 Jur. 566; 2 W. R. 435.—KINDERSLEY, V.-C.

Distinguished. Campbell v. Batubridge (1868) 37 L. J. Ch. 634; L. R. 6 Eq. 269, 273; 19 L. T. 254; 17 W. R. 5.—STUART, V.-C.; *not applied*, Lee v. Lee (1876) 46 L. J. Ch. 81; 4 Ch. D. 175, 179; 36 L. T. 138; 25 W. R. 225.—JESSEL, M.R. See *ante*, col. 3136.

Ramsden v. Smith, referred to.

Campbell's Policies, In re (1877) 6 Ch. D. 686; 46 L. J. Ch. 142; 25 W. R. 268.

HALL, V.-C.—In *Ramsden v. Smith* property given to the lady for her separate use was held not to be included, because from the language of the covenant all the acts which were to be done were either acts to be done by the husband alone, or by those he had a right to compel, or acts to the doing of which his concurrence was necessary.—p. 691.

Ramsden v. Smith, followed.

Dawes v. Tredwell (1881) 18 Ch. D. 354; 45 L. T. 118; 29 W. R. 793.—C.A.; reversing FRY, J.

JESSEL, M.R.—This case, as it seems to me, was concluded by authority binding on the learned judge in the Court below, and in my opinion the existence of the recital is no ground for distinguishing the case from *Ramsden v. Smith*, and the other authorities.—p. 361.

BAGGALLAY, L.J. to the same effect.

Ramsden v. Smith, discussed.

D'Estampes' Settlement, In re, D'Estampes v. Crowe (1884) 53 L. J. Ch. 1117, 1120; 51 L. T. 502; 32 W. R. 978.—KAY, J.

Ramsden v. Smith, applied.

Hancock v. Hancock (1887) 57 L. J. Ch. 65; 58 L. T. 49; 36 W. R. 166.—NORTH, J.; affirmed, (1888) 57 L. J. Ch. 396; 38 Ch. D. 78, 82; 58 L. T. 906; 36 W. R. 417.—C.A.

Grey v. Stuart (1860) 30 L. J. Ch. 884; 2 Giff. 898; 7 Jur. (N.S.) 989; 5 L. T. 200.

—**STUART, V.-C.**, *referred to*.

Portadown, Dungannon, and Omagh Junction Ry., in re, *Young, Ex parte* (1867) 1r. R. 1 Eq. 293; 15 W. R. 979.—**WALSH, M.R.**

Mainwaring's Settlement, In re (1866) L. R. 2 Eq. 487; 14 W. R. 887.—**WOOD, V.-C.**

Discussed, Portadown, Dungannon, and Omagh Junction Ry., in re (*supra*); *not followed*, **Allnutt, In re, Pott v. Brassey** (1882) 52 L. J. Ch. 299; 22 Ch. D. 275, 279; 48 L. T. 155; 31 W. R. 469.—**CHITTY, J.**

Mainwaring's Settlement, In re, observed on.

Allnutt, In re, Pott v. Brassey, approved.

Scholfield v. Spooner (1884) 26 Ch. D. 94; 53 L. J. Ch. 777; 51 L. T. 138; 32 W. R. 910.—**C.A.**
COTTON, L.J.—It was contended that *Mainwaring's Settlement, In re*, showed that we ought to give effect to the intention of the donor, if he has said that the property was not to come into settlement. Undoubtedly there are expressions used by the learned judge who decided that case which support such an argument, but what the decision comes to is this, that, looking to the trusts of what was in that case given to the lady, it was not property which could, on the true construction of the covenant, be considered coming within it.—p. 100.

BOWEN, L.J.—*Mainwaring's Settlement, In re*, decides no more than this, that property does not fall within the covenant to settle after-acquired property if it is given in such a way that it will not fit in with the trusts of the settlement.—p. 102.

FRY, L.J.—The same question arose for consideration in *Allnutt, In re*. Chitty, J. there cites the observation of Wood, V.-C. to this effect. "She therefore," that is the donor, "means to say, I do not intend this portion of my daughter's property to be comprised in her settlement; I intend that she shall take it upon this express condition, that it shall not be settled." Upon that Chitty, J. made this observation: "I respectfully dissent from that proposition, and I think I ought on principle to dissent from it, if it is meant that I am to regard the testator's intention when it is expressed in some manner which is not legally binding. Taking the whole judgment together, I think the V.-C. intended to decide, as a question of construction of the will, that the gift was such that it did not fall within the scope of the covenant, in other words, that it did not fit the covenant. That may be treated as a question simply of a construction of the will, and if so, of course the decision does not bind me in any way." In those observations of Chitty, J. I entirely concur.—p. 103.

Allnutt, In re, applied?

Crawshay, In re, Walker v. Crawshay (1891) 60 L. J. Ch. 583; [1891] 3 Ch. 176, 181; 65 L. T. 72; 39 W. R. 682.—**NORTH, J.**

Scholfield v. Spooner (*supra*), *referred to*.

Hewett, In re, Hewett v. Hallett (1893) 69 L. J. Ch. 182; [1894] 1 Ch. 362, 368; 8 R. 70; 70 L. T. 393; 42 W. R. 233.—**NORTH, J.**

Milford v. Peile (1854) 17 Beav. 602; 2 W. R. 181.—**M.R.**, *discussed*.

Ramsden v. Smith (1854) 23 L. J. Ch. 757; 2 Drew. 298; 2 Eq. R. 660; 18 Jur. 566; 2 W. R. 435.—**KINDERSLEY, V.-C.**; **Van Straubenzee, In re, Boustead v. Cooper** (1901) 70

L. J. Ch. 825; [1901] 2 Ch. 779, 782; 85 L. T. 541.—**COZENS-HARDY, J.**

Campbell v. Bainbridge (1868) 37 L. J. Ch. 634; L. R. 6 Eq. 269; 19 L. T. 254; 17 W. R. 5.—**STUART, V.-C.**, *discussed*.

D'Estampes' Settlement, In re, D'Estampes v. Crowe (1884) 53 L. J. Ch. 1117, 1121; 51 L. T. 502; 32 W. R. 978.—**KAY, J.**

Townshend v. Harrowby (1858) 27 L. J. Ch. 553; 4 Jur. (N.S.) 353; 6 W. R. 413.—**KINDERSLEY, V.-C.**, *distinguished*.

O'Connell, In re, Mawle v. Jagoe (1908) 72 L. J. Ch. 709; [1903] 2 Ch. 574; 89 L. T. 166; 52 W. R. 102.—**KEKEWICH, J.**

Willoughby v. Middleton (1862) 31 L. J. Ch. 683; 2 J. & H. 344.—**WOOD, V.-C.**

Referred to, **Coventry v. Coventry** (1863) 32 Beav. 612; 2 N. R. 349; 9 Jur. (N.S.) 613; 8 L. T. 819; 11 W. R. 868.—**ROMILLY, M.R.**; **Brown v. Brown** (1866) L. R. 2 Eq. 481, 485; 14 L. T. 694.—**M.R.**; *approved*, **De Serre v. Clarke** (1874) 43 L. J. Ch. 821; L. R. 18 Eq. 587; 31 L. T. 161; 23 W. R. 3.—**MALINS, V.-C.**; *discussed*, **D'Estampes' Settlement, In re, D'Estampes v. Crowe** (1884) 53 L. J. Ch. 1117, 1121; 51 L. T. 502; 32 W. R. 978.—**KAY, J.** *And see* "ELECTION," vol. i. col. 964.

Dawes v. Tredwell (1881) 18 Ch. D. 354; 45 L. T. 119; 29 W. R. 793.—**C.A.**, *discussed*.

D'Estampes' Settlement, In re, D'Estampes v. Crowe (*supra*); **De Ros' Trust, In re, Hardwicke v. Wilmot** (1885) 55 L. J. Ch. 73; 31 Ch. D. 81, 87; 53 L. T. 524; 34 W. R. 36.—**KAY, J.**; **Hancock v. Hancock** (1887) 57 L. J. Ch. 65; 58 L. T. 49; 36 W. R. 166.—**NORTH, J.** (affirmed, (1888) 57 L. J. Ch. 396; 38 Ch. D. 78, 82; 58 L. T. 906; 36 W. R. 417.—**C.A.**).

Dawes v. Tredwell, discussed.

Haden, In re, Coling v. Haden (1898) 67 L. J. Ch. 428; [1898] 2 Ch. 220, 222.

STIRLING, J.—In *Dawes v. Tredwell*, where the words were very similar [to the words of the covenant in *Butcher v. Butcher* (14 Beav. 222, *supra*, col. 8134)] except that the settlement was not to be by all proper parties, but the acts were only to be done by the husband, it was held that the property which came to the wife for her separate use was not bound by the covenant.—p. 429.

Smith v. Lucas (1881) 18 Ch. D. 531; 45 L. T. 460; 30 W. R. 451.—**JESSEL, M.R.**, *followed*.

Wilder v. Pigott (1882) 22 Ch. D. 263; 52 L. J. Ch. 141; 48 L. T. 112; 31 W. R. 377.

KAY, J.—The first question is, whether the wife could elect during her coverture to confirm the settlement. It seems clear from the decisions in many cases, of which *Barrow v. Barrow* ((1858) 27 L. J. Ch. 678; 4 K. & J. 409, *see post*, col. 3177) and *Smith v. Lucas* are examples, that she could so elect.—p. 267.

Smith v. Lucas, referred to.

Cahill v. Cahill (1883) 8 App. Cas. 420, 427; 49 L. T. 605; 31 W. R. 861.—**H.L. (IR.)**.

Smith v. Lucas, followed.

Wheatley, In re, Smith v. Spence (1884) 54 L. J. Ch. 201; 27 Ch. D. 606, 613; 51 L. T. 681; 33 W. R. 275.—**CHITTY, J.** *And see post*.

Smith v. Lucas (*supra*), referred to.

Vardon's Trusts, In re (1884) 54 L. J. Ch. 244; 28 Ch. D. 124, 135; 51 L. T. 884; 33 W. R. 297.—**KAY, J.**; reversed, C.A. (*post*, col. 3146).

Smith v. Lucas, considered.

Burnaby v. Equitable Reversionary Interest Society (1885) 28 Ch. D. 416; 54 L. J. Ch. 466; 52 L. T. 350; 33 W. R. 639.

PEARSON, J.—But I differ from Mr. Cookson's argument in another respect. He cited a passage in Sir G. Jessel's judgment in *Smith v. Lucas*, in order to show that the lady could not confirm this [deed], because she had no power of disposing of the reversionary interest during her coverture. To my mind the disabilities of infancy and the disabilities of coverture are very different. The disability of coverture is an absolute disability, in a case of this kind, to dispose of her reversionary interest. The disability of infancy goes no further than is necessary for the protection of the infant, it leaves the infant the power to make the deed in the first instance; but, for the protection of the infant, it gives the infant also the right to avoid that deed if the infant finds it right and proper so to do when the infant comes of age. Therefore, to begin with, the disabilities are not *in pari materia*. But, in addition to this, I do not think the M.R. meant to say that which Mr. Cookson thought he did say in his judgment. In that case the lady had executed a deed after she came of age and while she was under the disability of coverture, which deed purported to bind her as regarded her future acquired property. What the M.R. decided there was this—not that she could not confirm a deed which she had executed whilst she was an infant if it needed confirmation (which it did not), but that she could not, after she had been married and was under coverture, execute a deed by which she should bind herself for the future never to disturb the deed which had been executed while she was an infant, with regard to property which was then reversionary, and of which as a married woman she could not dispose. That is a very different proposition. That is merely saying this: What it is attempted to bind you by is an act which amounts (if it amounts to anything) to a disposal of your future property which, as a married woman, is something which you cannot do, and, if you cannot dispose of it, you cannot contract to dispose of it. He says this (p. 545): "I think that the power of disposal given to a married woman as regards her separate property is simply a power to dispose of existing property, and not a power by contract, or *quasi*-contract—for she cannot strictly contract—to dispose of other property while she is a married woman. In other words, I shall hold that the contract by a married woman, while married, to convey all her future-acquired separate estate will not bind that separate estate when acquired—that her power of disposition does not extend to that. It seems to follow that no confirmation by her of a settlement executed by her when an infant, and containing such a contract, will effectually bind her as regards the property not then acquired; that is, not in existence at the time of the confirmation. That disposes of the deed." But he admits that she can elect, a point which I really have not got to consider here, because, as I say, the deed remained unavowed and the deed remaining unavowed at the time of the death of

this lady, it bound her property, though it did not bind her personally.—p. 424.

Smith v. Lucas.

Referred to, Queade's Trusts, In re (1885) 54 L. J. Ch. 786, 791; 53 L. T. 74; 33 W. R. 816.—**CHITTY, J.**; approved, Vardon's Trusts, In re (1885) 55 L. J. Ch. 259; 31 Ch. D. 275, 281; 53 L. T. 895; 34 W. R. 185.—C.A. (*See* "ELECTION," vol. i. col. 964); referred to, Cooke v. Cooke (1887) 38 Ch. D. 202, 209; 59 L. T. 693; 36 W. R. 756.—**NORTH, J.**; commented on, Duncan v. Dixon (1890) 59 L. J. Ch. 437; 44 Ch. D. 211, 215; 62 L. T. 319; 38 W. R. 700.—**KEKEWICH, J.**

Smith v. Lucas, referred to.

Greenhill v. North British and Mercantile Insurance Co. (1893) 62 L. J. Ch. 918; [1893] 3 Ch. 474; 3 R. 674; 69 L. T. 526; 42 W. R. 91.—**STIRLING, J.**; Hodson's Settlement, In re, Williams v. Knight (1894) 63 L. J. Ch. 309; [1894] 2 Ch. 421; 8 R. 346; 71 L. T. 77; 42 W. R. 531.—**CHITTY, J.**; Clements v. L. & N. W. Ry. (No. 2) (1894) 63 L. J. Q. B. 837; [1894] 2 Q. B. 482, 493; 9 R. 641; 70 L. T. 896; 42 W. R. 663; 58 J. P. 818.—C.A.; Harle v. Jarman (1895) 64 L. J. Ch. 779; [1895] 2 Ch. 419, 426; 13 R. 610; 73 L. T. 20; 43 W. R. 618.—**NORTH, J.**

Smith v. Lucas, commented on.

Viditz v. O'Hagan (1899) 68 L. J. Ch. 553; [1899] 2 Ch. 569; 47 W. R. 571.—**COZENS-HARDY, J.**; reversed, (1900) 69 L. J. Ch. 507; [1900] 2 Ch. 87; 82 L. T. 480; 48 W. R. 516.—C.A. *See* "INTERNATIONAL LAW," vol. i. col. 1369.

Burnaby v. Equitable Reversionary Interest Society (*supra*, col. 3145), referred to.

Hodson's Settlement, In re, Williams v. Knight [1894] 2 Ch. 421 (*supra*).

Stonor's Trusts, In re (1883) 52 L. J. Ch. 776; 24 Ch. D. 195; 48 L. T. 963; 32 W. R. 413.—**PEARSON, J.**, distinguished.

Queade's Trusts, In re (1885) 54 L. J. Ch. 786; 53 L. T. 74; 33 W. R. 816.

CHITTY, J.—There [*Stonor's Trusts*, In re] there was an ante-nuptial agreement to settle after-acquired property, and the wife, when a *feme sole*, was bound by the contract. There was an exception as to property which was settled and limited to the separate use and disposal of the wife. In substance Pearson, J. held that the operation of sect. 5 (Married Women's Property Act, 1882) could not be so applied to the excepted property, as to bring in property which was not limited by any instrument to the separate use of the wife, but only gained the character of separate property by virtue of a subsequent Act of Parliament. In regard to the substance of the decision, if I may say so, it appears to me to have been right, because the learned judge had before him the case of a covenant by a married woman which bound the property. It was a question of construction, as I read the whole case, and he may have considered that it was not intended that she should take advantage of the subsequent general statute so as to assert that the property fell within the exception. There are some observations of the learned judge which point to the decision being on the general construction of sects. 5 and 19, but I have had this case very fully and carefully argued, and if it was intended, which I think it was not, by the

learned judge to give the wide and extensive meaning to sect. 19 which the respondent's argument before me would carry, then I should respectfully dissent from the judgment.—p. 790.

Stonor's Trusts, In re, approved.

Queade's Trusts, In re, referred to.

Whitaker, In re, Christian v. Whitaker (1887) 56 L. J. Ch. 251; 34 Ch. D. 227, 228; 56 L. T. 34; 35 W. R. 217.—C.A. COTTON, LINDLEY and LOPES, L.JJ.

Stonor's Trusts, In re, approved but distinguished.

Queade's Trusts, In re, disapproved.

Whitaker, In re, Christian v. Whitaker, applied.

Hancock v. Hancock (1888) 38 Ch. D. 78; 57 L. J. Ch. 65; 58 L. T. 49; 36 W. R. 166; affirmed, C.A. (post).

NORTH, J.—There was this distinction between that case [*Stonor's Trusts, In re*] and the present, that there the agreement was a joint one by the husband and the wife; the wife was bound by it as well as the husband. . . . The settlement [in *Queade's Trusts, In re*] was expressed in terms which were binding on both the husband and wife, but the wife was not in fact bound by it, because it was a post-nuptial settlement, and she was an infant at the time when it was executed. It was exactly the same thing as if there had been no agreement by the wife; and the case was thus distinguishable from *Stonor's Trusts, In re*. Chitty, J. held that the wife's share under the intestacy became by virtue of sect. 5 [Married Women's Property Act, 1882] her separate property, and that it was excepted from the settlement. . . . In that case [*Whitaker, In re*], by an ante-nuptial settlement executed in 1873, the husband and wife had jointly covenanted to settle any after-acquired property of the wife, except jewels, &c., or any sum not exceeding in each case the amount of 1,000*l.*, or any property settled to her separate use. Under the will of her father, who died in 1884, the wife became entitled to a sum of 10,000*l.*, which was not limited by the will to her separate use. The C. A. held that the operation of sect. 5 of the Act was modified by sect. 19, and that, reading the two sections together, the share taken by the wife under her father's will was not made by sect. 5 her separate estate so as to come within the exception in the covenant. There, no doubt, the covenant was a joint one by the husband and wife, and not a covenant by the husband alone, as in the present case. But, looking at the reasons given by the L.JJ. in their judgments, it seems to me that it would have made no difference in their decision if the covenant had been by the husband alone, and that I must arrive at a different conclusion from that of Chitty, J. in *Queade's Trusts, In re*.—p. 83. . . . Lopes, L.J., in giving judgment [*Whitaker, In re*], said: "I do not think there is any serious difficulty in deciding the point which is now before the Court. The testator here did not leave the property in question to the plaintiff for her separate use. Therefore the property in question is not within the exception in the marriage settlement, and was [not] subject to that settlement." The insertion of the word "not" (above placed in brackets) is evidently a clerical error; the L.J. clearly meant to say that the property was not within the exception, and was subject to the settlement.—p. 85.

Queade's Trusts, In re, and Whitaker, In re, referred to.

Hancock v. Hancock (1888) 57 L. J. Ch. 396; 38 Ch. D. 78; 58 L. T. 906; 36 W. R. 417.—C.A.

Hancock v. Hancock, applied.

Skelton, In re, Chancellor v. Brown (1891) 7 Times L. R. 638.—CHITTY, J.; Stevens v. Trevor-Garrick (1893) 62 L. J. Ch. 660; [1893] 2 Ch. 307; 3 R. 468; 69 L. T. 11; 41 W. R. 412.—CHITTY, J.

Queade's Trusts, In re, disapproved.

Hancock v. Hancock, referred to.

Stevens v. Trevor-Garrick, followed.

Buckland v. Buckland (1900) 69 L. J. Ch. 648; [1900] 2 Ch. 534, 538; 82 L. T. 759; 48 W. R. 637.

BUCKLEY, J.—In *Queade's Trusts, In re*, the settlement was a post-nuptial settlement made in the year 1847 between the wife, who was an infant, the husband, and the trustees. It contained an agreement and declaration by the parties, and a covenant by the husband that all future property of the wife should be settled. In 1883—that is to say, after the passing of the Married Women's Property Act, 1882—the wife became entitled as one of the next-of-kin to a share of undisposed of residuary estate. There, as here, the wife was at the date of the deed an infant, and there was therefore no settlement by her. Chitty, J. held that sect. 5 of the Act of 1882 was operative in those circumstances, and that the wife was entitled. In *Hancock v. Hancock* that case was disapproved. The C. A. held that according to its true construction sect. 19 of the Act of 1882 prevents sect. 5 from interfering with any settlement which would have bound the property if the Act had not been passed. The argument that "settlement" in sect. 19 must mean settlement which is binding upon the wife was advanced and failed. The settlement in that case did not contain any covenant by the wife or any joint declaration or agreement. Subsequently in *Stevens v. Trevor-Garrick*, Chitty, J. held that in a case where not sect. 5 of the Act, but sect. 2 was the relevant section, the principle of the decision of the C. A. was equally applicable. In this state of things it appears to me that the decision in *Queade's Trusts, In re*, is gone altogether. . . . The case therefore seems to me to be parallel with that of *Holles v. Carr* (post), referred to by Lord Romilly in *Young v. Smith* (post).—p. 650.

Holles v. Carr (1676) 3 Swanst. 638; Free.

C. C. 3.—L.K., distinguished.

Young v. Smith (1865) L. R. 1 Eq. 180; 35 Beav. 87; 11 Jur. (N.S.) 963.

ROMILLY, M.R.—In that case the deed would have been wholly inoperative as to the land comprised in it, if it had contained no covenant to levy a fine; and I have no doubt that when the intention is clearly expressed, the Court will hold the parties bound to do all things necessary to carry out the intention.—p. 183.

Holles v. Carr, applied.

Buckland v. Buckland (supra).

Prebble v. Boghurst (1818) 1 Swanst. 309, 580; 1 Wils. Ch. 161.—L.C., C.B. and C.J., referred to, Wellesley v. Wellesley (1839) 9 L. J. Ch. 21; 4 Myl. & Cr. 561, 577.—L.C.; distinguished, Hill v. Gomme (1839) 9 L. J. Ch. 54; 5 Myl. & Cr. 250; 4 Jur. 165.—L.C. And see post.

Prebble v. Boghurst (*supra*), referred to.
Maclurean v. Lane (*post*).

Maclurean v. Lane (1858) 5 Jur. (N.S.) 56;
7 W. R. 135.—STUART, V.-C., referred to.
Archer v. Kelly (1860) 29 L. J. Ch. 911;
1 Dr. & Sm. 300; 6 Jur. (N.S.) 814; 8 W. R. 694.
—KINDERSLEY, V.-C. (*ante*, col. 3139).

Maclurean v. Lane, distinguished.

Reid v. Reid (1885) 31 Ch. D. 402; 55 L. J. Ch. 294; 54 L. T. 100; 84 W. R. 332.—C.A.

COTTON, L.J.—Nor does *Maclurean v. Lane*, before Stuart, V.-C., in any way help us, because the language of the covenant in that case was materially different from the language of the section before us [Married Women's Property Act, 1882, s. 5], the covenant there speaking of an accruer of property, not an accruer of title.—p. 406.

Edye v. Addison (1863) 33 L. J. Ch. 132;
1 H. & M. 781; 3 N. R. 66; 9 Jur. (N.S.)
1320; 12 W. R. 98.—WOOD, V.-C., discussed
and applied.

Burn-Murdoch v. Charlesworth (1875) 23 W. R. 743.—HALL, V.-C.; **Ward v. Ward** (1880) 49 L. J. Ch. 409; 14 Ch. D. 506, 509; 42 L. T. 523; 28 W. R. 943.—JESSEL, M.R.

Att.-Gen. v. Bacchus (1821) 9 Price 30;
11 Price 547; 35 R. R. 746, n.—EX. EQ.,
applied.

Att.-Gen. v. Burnie (1830) 3 Y. & J. 531.—EX.

Att.-Gen. v. Bacchus, dictum not followed.

Atcheson v. Atcheson (1849) 18 L. J. Ch. 230;
11 Beav. 485, 490; 13 Jur. 665.—LANGDALE, M.R.

Att.-Gen. v. Bacchus, discussed.

Ward v. Ward (1880) 49 L. J. Ch. 409; 14 Ch. D. 506, 509; 42 L. T. 523; 28 W. R. 943.—JESSEL, M.R.

Hardey v. Green (1849) 18 L. J. Ch. 480;
12 Beav. 182; 13 Jur. 777.—LANGDALE,
M.R., considered and not applied.

Bolland, Ex parte, Clint, in re (1873) 43 L. J. Bk. 16; L. R. 17 Eq. 115; 29 L. T. 543; 22 W. R. 152.—BACON, C.J.

Hardey v. Green, explained and applied.

Clarke, In re, Coombe v. Carter (1887) 35 Ch. D. 109; 56 L. J. Ch. 642; 56 L. T. 467; 35 W. R. 388.—KAY, J.; affirmed, 36 Ch. D. 348; 56 L. J. Ch. 981.—C.A.

KAY, J.—In *Hardey v. Green*, by marriage articles it was agreed that all and singular the real and personal property then belonging to the intended wife, or in or to which she might thereafter become interested or entitled by any means whatsoever, should be settled, and that the settlement should contain a covenant on the part of the intended husband to settle all property to which he or the intended wife might become entitled. It was argued that the case was not one for specific performance; but Lord Langdale maintained the covenant, and directed performance of it as against the assignee of the husband, by conveyance of certain real property in Ireland to which the husband had become entitled since the marriage.—p. 113.

Hardey v. Green, followed.

Churston (Lord) v. Buller (1897) 77 L. T. 45.—STIRLING, J.; **Clough, Ex parte, Reis**, in re [1904] 2 K. B. 769, 779 (*post*).

Gubbins v. Gubbins (1825) 1 Dr. & Wal. 160, n.—L.C.

Commented on, **Creed v. Carey** (1857) 7 Ir. Ch. R. 295.—BRADY, L.C. and BLACKBURN, L.J.; *commented on but followed*, **Cleary v. Fitzgerald** (1880) 5 L. R. Ir. 351.—V.-C. (varied, C.A., *post*); *supposed decision as to registration overruled*, **Cleary v. Fitzgerald** (1881) 7 L. R. Ir. 229, 242.—C.A.

Cleary v. Fitzgerald, discussed.

French's Estate, in re (1887) 21 L. R. Ir. 283 291.—C.A.

Lyster v. Burroughs (1837) 1 Dr. & Wal. 149.

—PLUNKET, L.C.

Not applied, **Ennis v. Smith** (1839) Jones & C. 400.—EX. EQ. (IR.); *discussed*, **Stack v. Royse** (1861) 12 Ir. Ch. R. 246.—CUSACK SMITH, M.R. (affirmed, 13 Ir. Ch. R. 213.—C.A.).

Lyster v. Burroughs and Stack v. Royse.

Followed, **Galavan v. Dunne** (1879) 7 L. R. Ir. 144.—SULLIVAN, M.R.; *explained*, **Cleary v. Fitzgerald** (1881) 7 L. R. Ir. 229.—C.A.

Stack v. Royse, referred to.

Roche's Estate, in re (1890) 25 L. R. Ir. 58, 72.—MONROE, J.; affirmed, ib. 284.—C.A.

Lyster v. Burroughs, Stack v. Royse, and Galavan v. Dunne (*supra*), explained.

Bannatyne v. Ferguson (1895) [1896] 1 Ir. R. 149.—CHATTERTON, V.-C. and C.A.

Bolland, Ex parte, Clint, in re (1873) 43 L. J. Bk. 16; L. R. 17 Eq. 115; 29 L. T. 543; 22 W. R. 152.—BACON, C.J.

Commented on, **Galavan v. Dunne** (*supra*); *referred to*, **Bannatyne v. Ferguson** (1895) [1896] 1 Ir. R. 149.—C.A.; *overruled*, **Reis**, in re, **Clough, Ex parte** (1904) 73 L. J. K. B. 929; [1904] 2 K. B. 769, 776; 91 L. T. 529; 53 W. R. 122; 11 Manson 229; 20 T. L. R. 547.—C.A.

Randall v. Willis (1800) 5 Ves. 262; 5 R. R. 40.—L.C.

Distinguished, **Lewis v. Madocks** (1803) 8 Ves. 150.—ELDON, L.C.; (1810) 17 Ves. 48; 7 R. R. 10.—ELDON, L.C.; *referred to*, **Ennis v. Smith** (1839) Jones & C. 400.—EX. EQ. (IR.); *discussed and applied*, **Clarke, In re, Coombe v. Carter** (1887) 56 L. J. Ch. 642; 35 Ch. D. 109, 112; 56 L. T. 467; 35 W. R. 388.—KAY, J. (affirmed, 56 L. J. Ch. 981; 36 Ch. D. 348.—C.A.).

Lewis v. Madocks (1803) 8 Ves. 150.—L.C.; (1810) 17 Ves. 48; 7 R. R. 10.—L.C.

Referred to, **Fortescue v. Hennah** (1812) 19 Ves. 67; 12 R. R. 137.—M.R.; **Wellesley v. Wellesley** (1839) 9 L. J. Ch. 21; 4 Myl. & Cr. 561, 580.—L.C.; **White v. Anderson** (1850) 1 Ir. Ch. R. 419.—L.C.; *applied*, **St. Aubyn v. Humphreys** (1856) 22 Beav. 175.—M.R.; **Williams v. Thomas** (1862) 31 L. J. Ch. 674, 676; 2 Dr. & Sm. 29; 8 Jur. (N.S.) 250; 7 L. T. 184; 10 W. R. 417.—V.-C.; *considered*, **Bolland, Ex parte, Clint**, in re (1873) 43 L. J. Bk. 16; L. R. 17 Eq. 115, 119 (*supra*); *applied*, **Cave v. Cave** (1880) 49 L. J. Ch. 505; 15 Ch. D. 639, 647; 42 L. T. 730; 28 W. R. 793.—FRY, J.; **Clarke, In re, Coombe v. Carter** (1887) 56 L. J. Ch. 642; 35 Ch. D. 109, 112; 56 L. T. 467; 35 W. R. 388.—KAY, J. (affirmed, C.A., *supra*); *discussed*, **French's Estate**, in re (1887) 21 L. R. Ir. 283, 309.—C.A.; *referred to*, **Tailby v. Official Receiver** (1888) 58 L. J. Q. B. 75; 13 App. Cas. 523, 533; 60 L. T. 162; 37 W. R. 513.—H.L. (R.); *discussed and applied*, **Bendy, In re, Wallis v. Bendy** (1894) 64 L. J. Ch.

170; [1895] 1 Ch. 109; 13 R. 95; 71 L. T. 750; 43 W. R. 345.—KEKEWICH, J.

Lewis v. Madocks, *explained and not applied*.

Bendy, In re, Wallis v. Bendy, *not followed*.

Finlay v. Darling (1897) 66 L. J. Ch. 348; [1897] 1 Ch. 719; 76 L. T. 461; 45 W. R. 445.

ROMER, J.—*Lewis v. Madocks* seems on examination to have been decided on a covenant very different in substance from the present one. It was a covenant by a man to settle the whole of his personal estate, however acquired; and to such a covenant very different constructions apply. Lord Eldon did, in fact, point out that income received by the husband would not be bound by the covenant, but he did say also that if income became capitalised it seemed to him that it would become bound. I do not think that his decision went to this extent; but the expression of opinion to this effect is there. Nevertheless, that expression of opinion should, I think, be limited to the case before the Court—the case of a covenant which was very different from the present one. Further, I think that what Lord Eldon meant by “capital” was what was held by the covenantor in such a way as showed an intention on his part of making it subject to the covenant. But whether this be so or not, the covenant was wholly different to the present one, and the decision thereon is not binding on me in this case. . . . In the report of this case [*Bendy, In re*] in the Law Reports gives correctly all the facts, then, with great deference to Kekewich, J., I do not follow his reasoning; and if the case had come before me I should have decided it otherwise. But I cannot help thinking that there were circumstances in the case which do not appear in the report, and which induced the Court to decide the case as it was decided. There must have been some such circumstances, for I observe that one effect of the decision was that property which was expressly excepted from the settlement, and had been sold and reinvested, was thereby made subject to the settlement.—p. 349.

Lewis v. Madocks, *followed*.

Churston (Lord) v. Buller (1897) 77 L. T. 45.—STIRLING, J.; Clough, Ex parte, Reiss, In re (1904) 73 L. J. K. B. 929; [1904] 2 K. B. 769, 777; 91 L. T. 592; 53 W. R. 122; 11 Manson 229; 20 T. L. R. 547.—C.A.

Turcan, In re (1888) 58 L. J. Ch. 101; 40 Ch. D. 5; 59 L. T. 712; 37 W. R. 70.

—C.A., *referred to*.

Bendy, In re, Wallis v. Bendy (1894) 64 L. J. Ch. 170; [1895] 1 Ch. 109; 13 R. 95; 71 L. T. 750; 43 W. R. 345.—KEKEWICH, J.; Churston (Lord) v. Buller (1897) 77 L. T. 45.—STIRLING, J.; Lawrie v. West Hartlepool Thirds Indemnity Association (1899) 4 Com. Cas. 322.—PHILLIMORE, J.; Clough, Ex parte [1904] 2 K. B. 769, 782 (*supra*).

Parkin, In re, Hill v. Schwarz (1892) 62 L. J. Ch. 55; [1892] 3 Ch. 510; 67 L. T. 77; 41 W. R. 120.—STIRLING, J., *approved and applied*.

Lawley, In re, Zaiser v. Lawley (1902) 71 L. J. Ch. 787, 895; [1902] 2 Ch. 673, 799; 87 L. T. 536; 51 W. R. 150.—JOYCE, J. and C.A.; affirmed, *nom. Beyfus v. Lawley*, 72 L. J. Ch. 781; [1903] A. C. 411; 89 L. T. 309.—H.L. (R.).

O.C.

Hooper's Trust, In re (1865) 5 N. R. 462; 11 Jur. (N.S.) 478; 12 L. T. 137; 13 W. R. 710.—STUART, V.-C., *approved*.

Hood v. Franklin (1873) L. R. 16 Eq. 496, 499; 21 W. R. 724.—MALINS, V.-C.

Bower v. Smith (1871) L. R. 11 Eq. 279; 24 L. T. 118; 19 W. R. 339—*report in L. R. corrected*.

Steward v. Poppleton, W. N. (1877) 29.

JESSEL, M.R., observed that the report of *Bower v. Smith* in L. R. 11 Eq. 279, in which he himself was counsel, did not state that the will of the wife's father contained a gift over in default of appointment. The real facts were properly stated in 19 W. R. 399.

• **Bower v. Smith**, *followed*.

Steward v. Poppleton, *distinguished*.

Gerard (Lord), In re, Oliphant v. Gerard (1888) 58 L. T. 800.

NORTH, J.—There is a distinction pointed out in *Steward v. Poppleton*, namely, that in *Bower v. Smith* the gift over was to a stranger. But, if the power has first been exercised, I do not see what effect the gift over in default of appointment can have upon it. . . . There [*Steward v. Poppleton*] there was an absolute gift out and out to the wife, and the power of appointment was subject to her absolute interest. If in that case the words had been “to such use as she shall appoint, and subject thereto for her absolutely,” I should have considered it as conflicting with *Bower v. Smith*.—p. 801.

Bower v. Smith, *commented on*.

Steward v. Poppleton, *referred to*.

Middleton's Will, In re (1868) 16 W. R.

1107.—GIFFARD, V.-C., *followed*.

Davies, In re, Harrison v. Davies (1897) 66 L. J. Ch. 512; [1897] 2 Ch. 204.

KEKEWICH, J.—*Bower v. Smith* has nothing to do with this case, and for this reason, that I doubt whether, as reported, it has very much bearing upon this case; and, further than that, in *Steward v. Poppleton*, Sir G. Jessel, who was himself counsel for the defendant in *Bower v. Smith*, called attention to an inaccuracy of the report in the Law Reports, and pointed out that the will of the wife's father in that case contained a gift over in default of appointment. Read in that connection, it destroys any value of the case for the present purpose.—p. 514.

Bower v. Smith, *approved but not applied*.

Steward v. Poppleton, *followed*.

Gerard (Lord), In re, Oliphant v. Gerard (*supra*), *commented on*.

O'Connell, In re, Mawle v. Jagoe (1903) 72 L. J. Ch. 709; [1903] 2 Ch. 574, 580; 89 L. T. 166; 52 W. R. 102.—KEKEWICH, J.

Cunningham v. Moody (1748) 1 Ves. sen. 174.—L.C.

Applied, Doe v. Martin (1790) 4 Term Rep. 39, 64; 2 R. R. 324.—K.B.; Doe v. Hutton (1804) 3 B. & P. 643.—C.P.; *discussed*, Heron v. Stokes (1842) 4 Tr. Eq. R. 284; 1 Con. & L. 270; 2 Dr. & War. 89.—L.C. (varied, *nom. Stokes v. Heron* (1845) 12 Cl. & F. 161; 9 Jur. 563.—H.L. (R.)); *Standerling v. Hall* (*post*).

Binford v. Bawden (1792) 1 Ves. 512; 2 Ves. 38; 2 R. R. 162.—L.C.C., *discussed*.

Standerling v. Hall (1879) 48 L. J. Ch. 382; 11 Ch. D. 652, 654; 27 W. R. 749.—JESSEL, M.R.

Wilcocks v. Wilcocks (1706) 2 Vern. 558.—L.K., *discussed*.

Lechmere v. Carlisle (Earl) (1733) 3 P. Wms. 225.—M.R.; **Hamilton v. Jackson** (1845) 2 Jo. & Lat. 295, 299; 8 Ir. Eq. R. 195.—L.C.; **Killen v. Campbell** (1848) 10 Ir. Eq. R. 461.—L.C.C.

Lechmere v. Carlisle (Earl) (or **Lechmere**) (1733) 3 P. Wms. 211.—M.R.; and (1735) Cas. t. Talb. 80.—L.C.

Applied, **Deacon v. Smith** (1746) 3 Atk. 323.—L.C.; **Sowden v. Sowden** (1785) 1 Bro. C. C. 582; 1 Cox 165.—M.R.; *distinguished*, **Russell v. Smythies** (1786) 1 Cox 215.—EX.; *applied*, **Wilson v. Piggott** (1794) 2 Ves. 356; 2 R. L. 246.—M.R.; *referred to*, **Perry v. Phelps** (1810—11) 17 Ves. 173.—L.C.; *commented on*, **Pentland v. Stokes** (1812) 2 Ball & B. 68.—L.C.; *applied*, **Tubbs v. Broadwood** (1831) 2 Russ. & M. 487.—L.C.; *not applied*, **Cogan v. Stephens** (1835) 5 L. J. Ch. 17, 21; 1 Beav. 482, n.—M.R.; **Lyster v. Burroughs** (1837) 1 Dr. & Wal. 139.—L.C.; *applied*, **Barham v. Clarendon** (Earl) (1852) 10 Hare 126, 133; 17 Jur. 336; 1 W. R. 96.—TURNER, V.-C.

Lechmere v. Carlisle (Earl) (or **Lechmere**), *referred to*.

De Lancey's Succession, In re, **De Lancey v. Inland Revenue Commissioners** (1869) 38 L. J. Ex. 193, 199; L. R. 4 Ex. 345, 359; 21 L. T. 58.—EX. **BRAMWELL** and **CLEASBY**, BB. dissenting; affirmed, (1870) 39 L. J. Ex. 76; L. R. 5 Ex. 102; 22 L. T. 239; 18 W. R. 468.—EX. CH. *And see* **Raja Vellanki Venkata Rama Row v. Raja Papamma Row** (1898) 25 L. R. Ind. App. 84, 86.—P.C. *And see* vol. i. col. 677.

Sowden v. Sowden (1785) 1 Bro. C. C. 582; 1 Cox 165.—M.R., *discussed*.

Garthshore v. Chalie (1804) 10 Ves. 1; 7 R. R. 311.—L.C.; *not applied*, **Lench v. Lench** (1805) 10 Ves. 511.—M.R.; *referred to*, **Perry v. Phelps** (1810—11) 17 Ves. 173.—ELDON, L.C.

Tooke v. Hastings (1689) 2 Vern. 97.—L.C., *discussed*.

Deacon v. Smith (1746) 3 Atk. 323.—HARDWICKE, L.C.

Deacon v. Smith, *not applied*.

Lyster v. Burroughs (1837) 1 Dr. & Wal. 139.—PLUNKET, L.C.

Tooke v. Hastings and Deacon v. Smith, *referred to*.

Wellesley v. Wellesley (1839) 9 L. J. Ch. 21, 24; 4 Myl. & Cr. 561, 579.—L.C.

Deacon v. Smith, *referred to*.

Creed v. Carey (1857) 7 Ir. Ch. R. 295.—BRADY, L.C. and **BLACKBURN**, L.J.

Deacon v. Smith, *discussed*.

Mornington v. Keane (1858) 2 De G. & J. 292; 27 L. J. Ch. 791; 4 Jur. 981; 6 W. R. 434.—L.C. and L.J.

Hobson v. Trevor (1723) 2 P. Wms. 191.—L.C.; and **Chilliner v. Chilliner** (1754) 2 Ves. 528.—L.C., *applied*.

Roper v. Bartholomew (1823) 12 Price 796.—EX.

Hobson v. Trevor, *distinguished*.

Hill v. Gomme (1839) 9 L. J. Ch. 54; 5 Myl. & Cr. 250; 4 Jur. 165.—L.C.

Hobson v. Trevor, *referred to*.

Stack v. Royse (1861) 12 Ir. Ch. R. 246.—CUSACK SMITH, M.R.; affirmed, (1862) 13 Ir. Ch. R. 213.—C.A.

Eastwood v. Vinke (1731) 2 P. Wms. 613.—M.R.; and **Broughton v. Errington** (1773) 7 Bro. P. C. 461.—H.L. (E.), *referred to*.

Richardson v. Elphinstone (1794) 2 Ves. 463.—M.R.

Wathen v. Smith (1819) 4 Madd. 236, 325; 20 R. R. 302.—V.-C.

Explained, **Adams v. Lavender** (1824) M'Cle. & Y. 41; 29 R. R. 743.—C.B.; *principle applied*, **Power**, In re (1841) Fl. & G. 282.—O'LOGHLEN, M.R.; *impugned*, **Cole v. Willard** (1858) 25 Beav. 568; 4 Jur. (N.S.) 988; 6 W. R. 712.—M.R.; *discussed*, **Atkinson v. Littlewood** (1874) L. R. 18 Eq. 595, 605; 31 L. T. 225.—MALINS, V.-C.

Pearson v. Morgan (1788) 2 Bro. C. C. 384, 394.—BUTLER, J., for L.C.; **S. C.**, **Rickman v. Morgan** (1779) 1 Bro. C. C. 63.—L.C., *discussed*.

Merewether v. Shaw (1789) 2 Cox 124.—L.C.; **Thynne v. Glengall** (Earl) (1848) 2 H. L. Cas. 131, 155 (*post*).

Cole v. Willard (1858) 25 Beav. 568; 4 Jur. (N.S.) 988; 6 W. R. 712.—M.R., *referred to*.

Dawson v. Dawson (1867) L. R. 4 Eq. 504, 514.—WOOD, V.-C.

Cole v. Willard, *applied*.

Atkinson v. Littlewood (1874) L. R. 18 Eq. 595, 605; 31 L. T. 225.—MALINS, V.-C.

Pinchin v. Simms (1861) 30 Beav. 119.—M.R., *referred to*.

Dawson v. Dawson (1867) L. R. 4 Eq. 504, 514.—WOOD, V.-C.

Goodfellow v. Burchett (1693) 2 Vern. 298.—L.C., *discussed and principle applied*.

Devese v. Pontet (1785) 1 Cox 188; Pre. Ch. 240, n.; 1 R. R. 15.—KENYON, M.R.

Wood v. Wood (1844) 7 Beav. 183.—M.R., *applied*.

Betton's Trust Estates, In re (1871) L. R. 12 Eq. 553, 557; 25 L. T. 404; 19 W. R. 1052.—WICKENS, V.-C.

Blandy v. Widmore (1715) 2 Vern. 709; 1 P. Wms. 324.—M.R.; and **Lee v. D'Aranda** (1746—7) 1 Ves. sen. 1; 3 Atk. 419.—L.C., *distinguished*.

Barrett v. Beckford (1750) 1 Ves. sen. 519.—L.C.; **Hayes v. Mico** (1781) 1 Bro. C. C. 129.—L.C.

Blandy v. Widmore and Lee v. D'Aranda, *discussed*.

Devese v. Pontet (1785) 1 Cox 188; Pre. Ch. 240, n.—M.R.; **Kirkman v. Kirkman** (1786) 2 Bro. C. C. 95.—L.C.; **Richman (or Rickman) v. Morgan** (1788) 2 Bro. C. C. 394.—L.C.; **S. C.** (1779) 1 Bro. C. C. 63.—L.C.

Lee v. D'Aranda, *approved and applied*.

Richardson v. Elphinstone (1794) 2 Ves. 462.—M.R.

Blandy v. Widmore and Lee v. D'Aranda, *applied*.

Garthshore v. Chalie (1804) 10 Ves. 1; 7 R. R. 311.—L.C.

Blandy v. Widmore, *principle applied*.

Lee v. D'Aranda, *explained and approved*.

Goldsmid v. Goldsmid (1818) 1 Swanst. 211; 1 Wils. Ch. 140; 18 R. R. 60.—M.R.

Blandy v. Widmore and Lee v. D'Aranda, referred to.
Adams v. Lavender (1824) M'Cle. & Y. 41.—C.B.; *Glengall (Earl) v. Barnard* (1836) 6 L. J. Ch. 25; 1 Keen 769.—M.R. (affirmed *nom. Thynne v. Glengall (Earl)*, H.L. (*post*)).

Blandy v. Widmore and Lee v. D'Aranda, explained and not applied.
Lang v. Lang (1837) 6 L. J. Ch. 324; 8 Sim. 451; 1 Jur. 472.—SHADWELL, V.-C.

Blandy v. Widmore and Lee v. D'Aranda, discussed.
Salisbury v. Salisbury (1848) 17 L. J. Ch. 480; 6 Hare 526; 12 Jur. 671.—V.-C.; *Thynne v. Glengall (Earl)* (1848) 2 H. L. Cas. 131, 154; 12 Jur. 845.—H.L.

Blandy v. Widmore, principle applied.
Thacker v. Key (1869) L. R. 8 Eq. 408, 415.—JAMES, V.-C.

Blandy v. Widmore and Lee v. D'Aranda, principle explained and not applied.
Young v. Young (1871) Ir. R. 5 Eq. 615.—V.-C.

Blandy v. Widmore, principle not applied.
James v. Castle (1875) 33 L. T. 665.—HALL, V.-C.

**Barrett v. Beckford (1750) 1 Ves. sen. 519.—L.C., discussed.
Richman (or Rickman) v. Morgan (1779) 1 Bro. C. C. 63; (1788) 2 Bro. C. C. 394.—M.C.; *Devese v. Pontet* (1785) 1 Cox 188; Pre. Ch. 240, n.—M.R.; *Garthshore v. Chalie* (1804) 10 Ves. 1; 7 R. R. 311.—L.C.**

Barrett v. Beckford, explained and approved.
Goldsmid v. Goldsmid (1818) 1 Swanst. 211; 1 Wils. Ch. 140; 18 R. R. 60.—M.R.

Barrett v. Beckford, discussed.
Thynne v. Glengall (Earl) (1848) 2 H. L. Cas. 131, 155; 12 Jur. 805.—H.L. (E.).

Haynes v. Mico (1781) 1 Bro. C. C. 129.—L.C.

Referred to, *Devese v. Pontet* (1785) 1 Cox 188; Pre. Ch. 240, n.; 1 R. R. 15.—M.R.; applied, *Richardson v. Elphinstone* (1794) 2 Ves. 462.—M.R.; commented on, *Garthshore v. Chalie* (1804) 10 Ves. 1; 7 R. R. 311.—L.C.; not applied, *Goldsmid v. Goldsmid* (1818) 1 Swanst. 211; 1 Wils. Ch. 140; 18 R. R. 60.—PLUMER, M.R.

Haynes v. Mico, distinguished.
Wathen v. Smith (1819) 4 Madd. 325; 20 R. R. 302.—V.-C.

Haynes v. Mico, considered and applied.
Adams v. Lavender (1824) M'Cle. & Y. 41; 29 R. R. 743.—C.B.

Haynes v. Mico, discussed.
Horlock, in re, *Calham v. Smith* (1895) 64 L. J. Ch. 325; [1895] 1 Ch. 516, 520; 13 R. 356; 72 L. T. 223; 43 W. R. 410.—STIRLING, J.

Devese v. Pontet (*supra*).
 Commented on, *Garthshore v. Chalie* (*post*); not applied, *Goldsmid v. Goldsmid* (*post*); discussed, *Adams v. Lavender* (*post*).

Garthshore v. Chalie (1804) 10 Ves. 1; 7 R. R. 311.—ELDON, L.C.

Referred to, *Goldsmid v. Goldsmid* (1818) 1 Swanst. 211; 1 Wils. Ch. 140; 18 R. R. 60.—PLUMER, M.R.; *Wathen v. Smith* (1819) 4 Madd. 325; 20 R. R. 302.—V.-C.; discussed, *Adams v. Lavender* (1824) M'Cle. & Y. 41; 29 R. R. 743.—

C.B.; *Glengall (Earl) v. Barnard* (1836) 6 L. J. Ch. 25; 1 Keen 769.—M.R.; principle applied, *Power*, in re (1841) Fl. & G. 282.—O'LOGHLEN, M.R.; *Salisbury v. Salisbury* (1848) 17 L. J. Ch. 480; 6 Hare 526; 12 Jur. 671.—WIGGAM, V.-C.; *Garner v. Holmes* (1858) 8 Ir. Ch. R. 469.—L.C. (reversing 7 Ir. Ch. R. 412.—V.-C.).

Garthshore v. Chalie and Garner v. Holmes, followed.
Rowan v. Chute (1861) 13 Ir. Ch. R. 169.—BRADY, L.C.

Garthshore v. Chalie, referred to.
Patch v. Shore (1863) 32 L. J. Ch. 185; 2 Dr. & Sm. 589; 1 N. R. 157; 9 Jur. (N.S.) 63; 7 L. T. 554; 11 W. R. 142.—KINDERSLEY, V.-C.; *Willis v. Willis* (1865) 34 L. J. Ch. 313; 34 Beav. 340; 13 W. R. 77.—ROMILLY, M.R.

Garthshore v. Chalie, applied.
James v. Castle (1875) 33 L. T. 665.—HALL, V.-C.

Garthshore v. Chalie, referred to.
Lemon v. Mark (1898) [1899] 1 Ir. R. 416, 426.—PORTER, M.R.; affirmed, C.A.

Goldsmid v. Goldsmid (1818) 1 Swanst. 211; 2 Wils. Ch. 140; 18 R. R. 60.—M.R., discussed.

Adams v. Lavender (1824) M'Cle. & Y. 41; 29 R. R. 743.—C.B.; *Glengall (Earl) v. Barnard* (1836) 6 L. J. Ch. 25; 1 Keen 769.—M.R.; (affirmed, H.L., *post*); *Thynne v. Glengall (Earl)* (1848) 2 H. L. Cas. 131, 154; 12 Jur. 805.—H.L. (E.); *Salisbury v. Salisbury* (1848) 17 L. J. Ch. 480; 6 Hare 526; 12 Jur. 671.—V.-C.

Goldsmid v. Goldsmid, not applied.
Bannatyne v. Ferguson (1895) [1896] 1 Ir. R. 149, 161.—C.A.; reversing on one point CHATTERTON, V.-C.

Couch v. Stratton (1799) 4 Ves. 391; 4 R. R. 230.—L.C., followed.
Salisbury v. Salisbury (1845) 17 L. J. Ch. 480; 6 Hare 526; 12 Jur. 671.—WIGRAM, V.-C.; referred to, *Dwyers*, in re (1863) 13 Ir. Ch. R. 431, 441.—M.R.

Couch v. Stratton and Salisbury v. Salisbury, applied.
Young v. Young (1871) Ir. R. 5 Eq. 615.—V.-C.

Couch v. Stratton, applied.
James v. Castle (1875) 33 L. T. 665.—HALL, V.-C.

Couch v. Stratton, discussed.
Lemon v. Mark (1898) [1899] 1 Ir. R. 416, 425.—PORTER, M.R.; affirmed, C.A.

Simpson v. Gutteridge (1816) 1 Madd. 609; 16 R. R. 276.—V.-C.

Discussed, *Power v. Sheil* (1828) 1 Moll. 297, 312.—L.C.; *Heron v. Minors*, in re (1841) 17 Ir. Eq. R. 597; Fl. & K. 330, 335.—M.R.; *Dyke v. Rendall* (1852) 21 L. J. Ch. 905; 2 De G. M. & G. 209, 219; 16 Jur. 937.—L.C.; *Cooper v. Cooper* (1856) 6 Ir. Ch. R. 217, 225.—L.C.; *Pennefather v. Pennefather* (1872) Ir. R. 6 Eq. 171.—CHATTERTON, V.-C.

Corbet v. Corbet (1824) 1 Sim. & S. 612; 1 L. J. (O.S.) Ch. 26.—V.-C.; affirmed, (1828) 5 Russ. 254; 7 L. J. (O.S.) Ch. 9.—L.C., referred to.

Heron v. Minors, in re (1841) 3 Ir. Eq. R. 597; Fl. & K. 330.—M.R. And see *post*, col. 3157.

Corbet v. Corbet (*supra*), *referred to*.
Cooper v. Cooper (1856) 6 Ir. Ch. R. 217.—
 L.C., *discussed and applied*.
Pennefather v. Pennefather (1872) Ir. R. 6 Eq.
 171.—CHATTERTON, V.-C.

Power v. Sheil (1828) 1 Moll. 296, 311.—L.C.,
commented on.
Herons. Minors, In re (1841) 3 Ir. Eq. R. 589,
 597; Fl. & K. 380, 335.—M.R.

Power v. Sheil, *observations disapproved*.
Dyke v. Rendall (1852) 2 De G. M. & G.
 209; 21 L. J. Ch. 905; 16 Jur. 939.

ST. LEONARDS, L.C.—This is a peculiar contract,
 and, before giving my judgment upon it, I shall
 again look at Sir A. Hart's decision in *Power v.*
Sheil. I confess, however, that I do not under-
 stand the observations attributed to him, to the
 effect that an adult female cannot in equity con-
 tract herself absolutely out of dower. In my
 opinion there can be no doubt whatever of
 her right so to contract previously to her
 marriage, and to bar herself of all dower or
 thirds that may accrue to her from her husband's
 estate.—p. 216.

Dyke v. Rendall, *referred to*.
Cooper v. Cooper (1856) 6 Ir. Ch. R. 217, 224.
 —L.C.; Dwyers, In re (1863) 13 Ir. Ch. R. 431,
 440.—M.R.

Dyke v. Rendall, *discussed and applied*.
Pennefather v. Pennefather (1872) Ir. R. 6 Eq.
 171.—V.-C.; O'Rorke v. O'Rorke (1885) 17
 L. R. Ir. 153, 164.—PORTER, M.R.

Dyke v. Rendall, *discussed*.
Coyne v. Duigan (1893) [1894] 1 Ir. R. 138.—
 PORTER, M.R.; Lemon v. Mark (1898) [1899] 1
 Ir. R. 416, 422.—M.R.

Hamilton v. Jackson (1845) 2 Jo. & Lat.
 295; 8 Ir. Eq. R. 195.—L.C., *referred to*.
Dwyers, In re (1863) 13 Ir. Ch. R. 431, 439.—
 M.R.; Willis v. Willis (1865) 34 L. J. Ch. 313;
 34 Beav. 340; 13 W. R. 77.—M.R.; O'Rorke v.
 O'Rorke (1885) 17 L. R. Ir. 153, 165.—M.R.

Hamilton v. Jackson, *explained*.
Lemon v. Mark (1898) [1899] 1 Ir. R. 416,
 426, 441.—M.R. and C.A.

Killen v. Campbell (1848) 10 Ir. Eq. R. 461.
 —L.C.C.

Applied, Dwyers, In re (*supra*): *distinguished*.
Cody v. Cody (1880) 5 L. R. Ir. 620.—SULLIVAN
 M.R.; *explained*, Lemon v. Mark (1898) [1899]
 1 Ir. R. 416, 423.—M.R.

Willis v. Willis (1865) 34 L. J. Ch. 313; 34
 Beav. 340; 13 W. R. 77.—M.R., *discussed*.
Lemon v. Mark [1899] 1 Ir. R. 416, 426, 442.
 —M.R. and C.A.

Pennefather v. Pennefather (1872) Ir. R. 6
 Eq. 171.—CHATTERTON, V.-C., *referred to*.
Cody v. Cody (1880) 5 L. R. Ir. 620.—
 SULLIVAN, M.R., *discussed*.
O'Rorke v. O'Rorke (1885) 17 L. R. Ir. 153,
 165.—PORTER, M.R.

Cody v. Cody and O'Rorke v. O'Rorke,
explained.
Lemon v. Mark (1898) [1899] 1 Ir. R. 416,
 427.—PORTER, M.R.

Caruthers v. Caruthers (1794) 4 Bro. C. C.
 500.—M.R.
Applied, Simpson v. Gutteridge (1816) 1 Madd.

609, 613 (*supra*, col. 3156); *distinguished and*
referred to, Power v. Sheil (1828) 1 Moll. 296,
 311.—L.C.; *distinguished*, Corbet v. Corbet
 (1828) 5 Russ. 254 (col. 3156); *approved*, Dyke
 v. Rendall (1852) 21 L. J. Ch. 905; 2 De G. M.
 & G. 209, 218; 16 Jur. 939.—L.C.; *referred to*,
 O'Rorke v. O'Rorke (*supra*); Lemon v. Mark
 (*supra*, col. 3157).

Vernon's Case (1572) 4 Co. Rep. 1a, 4a.
Discussed, Eastwood v. Vinke (1731) 2
 P. Wms. 613, 617.—M.R.; Dyke v. Rendall
 (1852) 2 De G. M. & G. 209, 218 (*post*): *principle*
applied, Bolton Estates Act, In re, Russell v.
 Meyrick (1903) 72 L. J. Ch. 605; [1903] 2 Ch.
 461; 88 L. T. 851; 52 W. R. 87.—C.A. (*reversing*
 (1902) 72 L. J. Ch. 55; W. N. (1902) 214.
 —JOYCE, J.).

Bates v. Bates (1697) 1 Ld. Raym. 326;
 Salk. 254; Lutw. 729.—*considered*.
Lemon v. Mark (1898) [1899] 1 Ir. R. 416,
 435.—M.R.

Duncomb v. Duncomb (1705) 3 Levinz 437.
 —C.P., *recognised*.
Hooker v. Hooker (1733) Cas. t. Hardwicke 13.
 —L.C.

Duncomb v. Duncomb, *followed*.
Hodgson v. Ambrose (1780) Dougl. 337.—K.B.;
affirmed nom. Ambrose v. Hodgson (1781) 3 Bro.
 P. C. 416.—H.L. (E.).

Duncomb v. Duncomb, *discussed*.
Lemon v. Mark (1898) [1899] 1 Ir. R. 416,
 445.—C.A.

Vizard v. Longdale (or Longden) (1731) cited
 3 Atk. 8; S. C. Kelynge 17.—L.C.
Applied, Walker v. Walker (1747) 1 Ves. sen.
 54.—L.C.; *discussed*, Buckinghamshire (Earl) v.
 Drury (1761) 2 Eden 60, 66; 3 Bro. P. C. 492.—
 L.C.; *commented on*, Couch v. Stratton (1799) 4
 Ves. 391, 394; 4 R. R. 230.—L.C.; *discussed*,
 Creagh v. Creagh (1845) 8 Ir. Eq. R. 68.—L.C.;
 Hamilton v. Jackson (1845) 8 Ir. Eq. R. 195
 (*supra*, col. 3157).

Vizard v. Longdale (or Longden), *distin-*
guished.
Dyke v. Rendall (1852) 2 De G. M. & G. 209;
 21 L. J. Ch. 905; 16 Jur. 937.
 ST. LEONARDS, L.C.—In *Vizard v. Longdale*,
 . . . there was no statement that the provision
 was intended for the jointure of the wife, whereas
 in the present case there is an express recital
 that the sums paid and to be secured were for a
 "competent jointure and provision of main-
 tenance." I think it very clear, therefore, that
 the words used in the settlement before me are
 in themselves sufficient to operate in this Court
 in lieu of dower; but whether in the events
 which have happened they ought to be so con-
 strued is a different question.—p. 216.

Vizard v. Longden, *referred to*.
O'Rorke v. O'Rorke (1885) 17 L. R. Ir. 153,
 164.—PORTER, M.R.; Dwyers, In re (1863) 13
 Ir. Ch. R. 431, 438.—M.R.; Lemon v. Mark
 (1898) [1899] 1 Ir. R. 416, 422.—M.R.

Hooker v. Hooker (1733) Cas. t. Hardwicke
 13.—L.C., *recognised*.
Doe v. Scudamore (1800) 2 Bos. & P. 289.—C.P.

Hooker v. Hooker, *discussed*.
Lemon v. Mark (1898) [1899] 1 Ir. R. 416,
 432.—C.A.

Tinney v. Tinney (1743) 3 Atk. 8.—L.C., *referred to*.
Lemon v. Mark (1898) [1899] 1 Ir. R. 416, 429.—M.R.
Walker v. Walker (1747) 1 Ves. sen. 54.—L.C., *discussed*.
Thompson v. Watts (1862) 31 L. J. Ch. 445; 2 J. & H. 291; 8 Jur. (N.S.) 760; 6 L. T. 817; 10 W. R. 485.—WOOD, V.-C.; **Lemon v. Mark** (1898) [1899] 1 Ir. R. 416, 424.—M.R.
Cresswell v. Byron (1791) 3 Bro. C. C. 362.—L.C., *discussed*.
Creagh v. Creagh (1845) 8 Ir. Eq. R. 68.—SUGDEN, L.C.
Trevelyan v. Trevelyan (1826) 3 Bing. 616; 12 Moore 19; 5 L. J. (O.S.) K. B. 114.—K.B., *referred to*.
Lemon v. Mark (1898) [1899] 1 Ir. R. 416, 435.—M.R.
Moody v. King (1825) 2 Bing. 447; 10 Moore 223.—C.P., *applied*.
Smith v. Spencer (1856) 2 Jur. (N.S.) 778; 4 W. R. 729.—STUART, V.-C.; *affirmed*, 6 De G. M. & G. 631; 3 Jur. (N.S.) 193; 6 W. R. 136.—L.C.
Davila v. Davila (1716) 2 Vern. 724.—L.C., *discussed*.
Buckinghamshire (Earl) v. Drury (1761) 2 Eden 60, 67; 3 Bro. P. C. 492.—L.C.; **Thompson v. Watts** (1862) 31 L. J. Ch. 445; 2 J. & H. 291; 8 Jur. (N.S.) 760; 6 L. T. 817; 10 W. R. 485.—WOOD, V.-C.
Lansdowne v. Lansdowne (1820) 2 Bligh 60; 21 R. R. 43.—H.L. (IR.), *followed*.
Noel v. Rochfort (1836) 10 Bligh (N.S.) 483; 4 Cl. & F. 158.—H.L. (IR.).
Drewe v. Bidgood (1825) 2 Sim. & S. 424; 4 L. J. (O.S.) Ch. 38; 27 R. R. 255.—V.-C., *disapproved*.
Hayes v. Garvey (1845) 8 Ir. Eq. R. 90.—SUGDEN, L.C.
Parker v. Harvey (1726) 4 Bro. P. C. 604.—H.L. (E.), *applied*.
West's Estate, In re (1896) [1898] 1 Ir. R. 75, 82.—ROSS, J.; *reversed*, C.A.
3. VALIDITY, CONSIDERATION, AND EXECUTION.
Cooper v. Wormald (1859) 27 Beav. 266.—ROMILLY, M.R., *approved*.
Whitehead, Ex parte, Whitehead, In re (1884) 54 L. J. Q. B. 88; 52 L. T. 265; 33 W. R. 230.—CAVE, J.; *reversed*, (1885) 54 L. J. Q. B. 240; 14 Q. B. D. 419; 52 L. T. 597; 33 W. R. 471; 49 J. P. 405.—C.A.
Spurgeon v. Collier (1758) 1 Eden 55.—L.K., and **Trowell v. Shenton** (1878) 47 L. J. Ch. 738; 8 Ch. D. 318; 38 L. T. 369; 26 W. R. 837.—C.A. (*reversing* 38 L. T. 27.—HALL, V.-C.), *discussed*.
Holland, In re, Gregg v. Holland (1901) 70 L. J. Ch. 625, 627; [1901] 2 Ch. 145, 352; 49 W. R. 476.—FARWELL, J.
Spurgeon v. Collier and Trowell v. Shenton, considered.
Holland, In re, Gregg v. Holland, reversed.
Holland, In re, Gregg v. Holland (1902) 71 L. J. Ch. 518; [1902] 2 Ch. 360, 376; 86 L. T. 542; 50 W. R. 575; 9 Manson 239.—C.A.
v. WILLIAMS, L.J.—With regard to *Spurgeon*

v. Collier, Northington, L.K. came to the conclusion that the proof of a parol promise before marriage failed; and the opinion expressed by the L.K., that even if such promise had been proved to have existed it would not have supported a settlement made after marriage, was not necessary for the decision of the case. The case had nothing to do with creditors. The plaintiffs were not claiming through Collier, but against him, and the question was whether the rights of the plaintiffs against Collier in respect of the Hillingdon estate were to be defeated by an alleged purchase for value by some defendants named Alston, to whom Collier purported to convey in consideration of marriage. There was no recital of an ante-nuptial agreement, and the Court held that the attempted proof of an ante-nuptial agreement, failed in fact, and consequently that the deed was voluntary. The recital would not even have been evidence against the plaintiffs. . . . *Trowell v. Shenton* was a case in which it was held that an ante-nuptial agreement by an infant was not sufficient to take a post-nuptial settlement in which no reference is made to the ante-nuptial agreement out of the operation of 27 Eliz. c. 4, and that such post-nuptial settlement was therefore void against a subsequent purchaser for value. . . . The case was really decided on Lord Tenterden's Act, and not on the Statute of Frauds, and the result was that, there being no ratification in writing of the promise made during infancy, the conveyance purporting to be made in pursuance of that promise was voluntary, and void under 27 Eliz. c. 4, against a subsequent purchaser.—pp. 523, 524.

Dilkes v. Broadmead (1860) 29 L. J. Ch. 310; 2 Giff. 113; 6 Jur. (N.S.) 289; 8 W. R. 318.—STUART, V.-C.; *affirmed*, 30 L. J. Ch. 268; 2 De G. F. & J. 566; 7 Jur. (N.S.) 56; 3 L. T. 605; 9 W. R. 238.—L.C.
Distinguished, **Browne's Estate, In re** (1862) 13 Ir. Ch. R. 283.—C.A.; **BRADY, L.C.** *dismissing*; *applied*, **Adamson v. Hammond** (1873) 43 L. J. P. 17; L. R. 3 P. 141, 149; 29 L. T. 700.—SIR J. HANNEN. *And see* vol. i. col. 1108.

Campion v. Cotton (1810) 17 Ves. 263, 271.—M.R.
Referred to, **Colombine v. Penhall** (*post*); *not applied*, **Fraser v. Thompson** (1859) 4 De G. & J. 659; 7 W. R. 678.—L.C. and L.J.; *referred to*, **Downes, In re** [1898] 2 Ir. R. 635, 637.—C.A. (*reversing* [1898] 2 Ir. R. 302.—BOYD, J.).

Cadogan v. Kennett (1776) Cowper 432.—K.B.
Referred to, **Jarman v. Woollotton** (1790) 3 Term Rep. 618.—K.B.; **Moroney, In re** (1887) 21 L. R. Ir. 27, 68.—C.A.; **Downes, In re** [1898] 2 Ir. R. 635, 637.—C.A.

Colombine v. Penhall (1853) 1 Sm. & G. 228; 1 W. R. 272.—STUART, V.-C.
Distinguished, **Fraser v. Thompson** (1859) 1 Giff. 49, 64; 5 Jur. (N.S.) 669; 7 W. R. 607.—STUART, V.-C. (*reversed, supra*); *rule in, applied*, **Bulmer v. Hunter** (1869) 38 L. J. Ch. 543; L. R. 8 Eq. 46, 50; 20 L. T. 942.—MALINS, V.-C.; **Pennington, In re** (*post*).

Bulmer v. Hunter, applied.
Pennington, In re, Pennington, Ex parte (1888) 5 Morrell 268; 5 Times L. R. 29.—C.A.

Bulmer v. Hunter and Pennington, In re
and **Ex parte** (*supra*), referred to.

M'Jay v. M'Queen (*post*).

Revan v. Crawford (1877) 46 L. J. Ch. 729;
6 Ch. D. 29; 37 L. T. 322; 26 W. R. 49.
—C.A., referred to.

Macintosh v. Pogose [1895] 1 Ch. 505, 510;
64 L. J. Ch. 274; 13 R. 254; 72 L. T. 251; 43
W. R. 247; 2 Manson 27.—**STIRLING, J.**; **M'Jay**
v. M'Queen (1898) 1 Fraser 804.—**LORD**
ORDINARY (affirmed (1899), CT. OF SESS.).

Boughton v. Sandilands (1811) 3 Taunt. 342.
—C.P., discussed and not applied.

Robinson v. Dickenson (1828) 3 Russ. 399, 412;
7 L. J. (o.s.) Ch. 70.—L.C.; **Irwin v. Rogers**
(1848) 12 Ir. Eq. R. 159, 164.—L.C.

Rider v. Kidder (1805-6) 10 Vcs. 360; 12
Vcs. 202; 13 Vcs. 123.—L.C., distinguished.
George v. Howard (1819) 7 Price 646, 651; 21
R. R. 775.—EX.

Coulson v. Allison (1860) 2 Giff. 279; 6 Jur.
(N.S.) 1140.—**STUART, V.-C.**; affirmed, 2
De G. F. & J. 521; 3 L. T. 763.—L.C. and
L.J.; and **Rider v. Kidder**, commented on.
Ayerst v. Jenkins (1873) 42 L. J. Ch. 690;
L. R. 16 Eq. 275, 283; 29 L. T. 126.—**SELBORNE**,
L.C., for M.R.

Coulson v. Allison, applied.

Rider v. Kidder, referred to.

Phillips v. Probyn (1899) 68 L. J. Ch. 401;
[1899] 1 Ch. 811, 817; 80 L. T. 513.

NORTH, J.—The observations made by Lord
Campbell in *Coulson v. Allison*, to which Lord
Selborne referred in *Ayerst v. Jenkins* (*supra*),
are precisely in point. It is true that those
observations applied to the case of a transaction
not completed, and were said to be inapplicable
to a case of a transaction perfected by convey-
ance. But the reason for Lord Selborne's
decision was that the person claiming to set
aside the settlement was the representative of the
settlor, whom equity would not have assisted to
get rid of his own settlement. Lord Selborne
in citing *Rider v. Kidder*, a decision of Lord
Eldon, said that such a settlement would be void
as against creditors, but he held that equity
would not assist the plaintiff. In the case before
me I have not to consider what the position
would be if the heir-at-law of R. Sloper, or his
infant heir, were plaintiff. It is the trustees of
the settlement who, finding that they have rents
on their hands payable under the trusts of a
settlement, come to the Court asking to whom
they ought to be paid. I can find no estoppel,
such as existed in *Ayerst v. Jenkins*, against the
administrator and infant heir, to prevent the
Court from giving the assistance asked for.—p. 402.

Matthew v. Hanbury (1690) 2 Vern. 187.—
L.C., commented on.

M'Mahon v. Burchell (1846) 1 Coop. tem.
Cottenham 457, 513, n.—L.C.

Matthew v. Hanbury, dictum disapproved.

Ayerst v. Jenkins (1873) L. R. 16 Eq. 275; 42
L. J. Ch. 690; 21 W. R. 878; 29 L. T. 126.

SELBORNE, L.C., for M.R.—[*Dictum in Matthew*
v. Hanbury, that the Court may aid the executor
of a party culpable, where it would not have
aided the party culpable himself, held to be (if
correctly reported, which may reasonably be
doubted) "after all a mere dictum not necessary
to the decision," unsupported by later authority,
erroneous and contrary to law.]—p. 281.

Ayerst v. Jenkins, distinguished.

Pawson v. Brown (1879) 13 Ch. D. 202; 49
L. J. Ch. 193; 41 L. T. 339; 28 W. R. 652.

MALINS, V.-C.—Had it not been for the case of
Ayerst v. Jenkins, I should have had no hesita-
tion whatever. That was a suit to set aside a
settlement instituted by the personal representa-
tives of the settlor, whereas this is a special case
for the opinion of the Court, and in that case the
illegal consideration for the settlement was not
apparent upon the settlement. Then the
property was vested in trustees for the absolute
and unconditional benefit of the lady, without
any interest being reserved for the settlement
until the marriage, and without any trust in
favour of children. The only motive expressed
upon the deed was that the settlor was desirous
of making a provision for the lady, and the
instructions given by the settlor to his solicitor
to prepare the deed were that it should be a
"deed of gift," although the form of the instru-
ment prepared in pursuance of the instructions
was varied. There it was a completed transfer
of specific chattels, and the suit was not instituted
till ten years after the death of the settlor, and
after the lady had been married for some years to
another man. The lapse of time was a material
ground for upholding the settlement.—p. 206.

Ayerst v. Jenkins, distinguished.

Phillips v. Probyn (1899) 68 L. J. Ch. 401, 402;
[1899] 1 Ch. 811; 80 L. T. 513.—**NORTH, J.**
See supra, col. 3161.

North v. Ansell (1731) 2 P. Wms. 618.—
M.R., discussed and applied.

Campbell v. Ingilby (1856) 25 L. J. Ch. 761;
21 Beav. 567; 2 Jur. (N.S.) 410, 556; 4 W. R.
433.—M.R.; affirmed, (1857) 26 L. J. Ch. 654; 1
De G. & J. 393; 5 W. R. 837.—L.J.

Bayspoole v. Collins (1871) 40 L. J. Ch. 289;
L. R. 6 Ch. 228; 25 L. T. 282; 19 W. R.
363.—L.C., referred to.

Rosher v. Williams (1875) 44 L. J. Ch. 419;
L. R. 20 Eq. 210; 32 L. T. 387; 23 W. R. 561.—
MALINS, V.-C.

Bayspoole v. Collins, discussed and not
applied.

Crossman v. Reg. (1886) 18 Q. B. D. 256; 56
L. J. Q. B. 241; 55 L. T. 848; 35 W. R. 303.—
DENMAN and HAWKINS, JJ.

HAWKINS, J. (for the Court).—The observations
of Hatherley, L.C. [*Bayspoole v. Collins*] tend to
show that special reasons had prompted the
Court to hold that a very small and inadequate
consideration was sufficient to support a settle-
ment under the statute of Elizabeth [27 Eliz.
c. 4], reasons which have no existence in such
a case as the present, and which therefore
justify us in thinking that the question, what
is a voluntary settlement under the Customs and
Inland Revenue Act, 1881, is not to be determined
simply by a consideration of what would be held
to be a *bona fide* conveyance on good considera-
tion under sect. 4 of the statute of Elizabeth.
Price v. Jenkins (*post*, col. 3163) was also a case
under the statute of Elizabeth, which throws no
further light on the subject.—p. 264.

Teesdale v. Braithwaite (1876) 46 L. J. Ch.
396; 4 Ch. D. 85; 35 L. T. 590; 25 W. R.
222.—**BACON, V.-C.**; affirmed, (1877) 46
L. J. Ch. 725; 5 Ch. D. 630; 36 L. T. 601;
25 W. R. 546.—C.A., followed.

Foster and Lister, In re (1877) 46 L. J. Ch. 480;

6 Ch. D. 87, 97; 36 L. T. 582; 25 W. R. 553.—JESSEL, M.R. See *post*, col. 3169.

Teasdale v. Braithwaite, referred to.

Welman v. Welman (1880) 49 L. J. Ch. 736; 15 Ch. D. 570, 579; 43 L. T. 145.—MALINS, V.-C.

Teasdale v. Braithwaite, considered.

Shurmur v. Sedgwick; Cronfield v. Shurmur (1883) 24 Ch. D. 597; 53 L. J. Ch. 87; 49 L. T. 156; 31 W. R. 884.

BACON, V.-C.—The authority of *Teasdale v. Braithwaite* is quite consistent with the perfectly just principle that if the husband gives up anything the conveyance is one for value.—p. 605.

Teasdale v. Braithwaite, applied.

Schreiber v. Dinkel (1884) 54 L. J. Ch. 241, 243; 52 L. T. 130.—NORTH, J.; affirmed, 54 L. T. 911.—C.A.

Price v. Jenkins (1876) 46 L. J. Ch. 214; 4 Ch. D. 483; 36 L. T. 237; 25 W. R. 427.—HALL, V.-C.; reversed on a different ground, (1877) 46 L. J. Ch. 805; 5 Ch. D. 619; 37 L. T. 51.—C.A.

Price v. Jenkins.

Considered, Gale v. Gale (1877) 46 L. J. Ch. 809; 6 Ch. D. 144, 152; 36 L. T. 690; 25 W. R. 772.—FRY, J.; referred to, Greer, *In re* (1877) Ir. R. 11 Eq. 502.—MILLER, J.; applied, Doble, *Ex parte*, Doble, *In re* (1878) 38 L. T. 183; 26 W. R. 407.—BACON, C.J.; referred to, Trowell v. Shenton (1878) 8 Ch. D. 318, 321; 38 L. T. 27.—HALL, V.-C. (reversed, C.A., *supra*, col. 3159); Horrocks v. Rigby (1878) 47 L. J. Ch. 800; 9 Ch. D. 180, 184; 38 L. T. 782; 26 W. R. 714.—FRY, J.

Price v. Jenkins, distinguished.

Hillman, *Ex parte*, Pumfrey, *In re* (1878) 10 Ch. D. 622; 48 L. J. Bk. 77; 40 L. T. 177; 27 W. R. 567.—C.J.; affirmed (1879), C.A.

BACON, C.J.—No doubt there are a great many cases arising upon settlements in which the Court has endeavoured to ascertain what is and what is not an unfair transaction, by deciding the question what is a merely voluntary assignment. I have no inclination to interfere with any of those decisions, and least of all with the decision in *Price v. Jenkins*. . . . But what has that case to do with the Bankruptcy Act, in which there is a special provision that a settlement made by a trader within two years of his bankruptcy, unless it is made before marriage, or in favour of a purchaser or incumbrancer, in good faith and for valuable consideration, shall be void as against the trustee in bankruptcy?—p. 623.

JAMES, L.J. (in the C. A.).—*Price v. Jenkins* was a decision upon the statute 27 Eliz., and the object of it was to prevent a fraud.—p. 626.

Price v. Jenkins.

Commented on and distinguished, Hamilton v. Molloy (1880) 5 L. R. Ir. 339.—SULLIVAN, M.R.; dissented from, Lee v. Matthews (1880) 6 L. R. Ir. 530.—C.A.

Price v. Jenkins, not applied.

Ridder, *In re*, Ridder v. Ridder (1882) 52 L. J. Ch. 343; 22 Ch. D. 74, 81; 48 L. T. 396; 31 W. R. 93; 47 J. P. 279.—C.A.

JESSEL, M.R.—I give no opinion whether I should have come to the same conclusions as the judges who decided *Price v. Jenkins*. Treating that case as well decided, I think it has no

bearing on cases under the stat. 13 Eliz. c. 5.—p. 346.

COTTON, L.J. to the same effect.

Price v. Jenkins, commented on.

Marsh and Granville (Earl), *In re* (1883) 24 Ch. D. 11; 53 L. J. Ch. 84; 48 L. T. 947; 31 W. R. 845.—C.A. BAGGALLAY, COTTON and BOWEN, L.J.J.; affirming (1882) 52 L. J. Ch. 189.—FRY, J.

BOWEN, L.J.—I will only add one word with regard to the argument upon *Price v. Jenkins*, although it is not necessary to decide the point. *Price v. Jenkins* was a case in which there was an assignment of leasehold property with a liability to perform certain covenants attached to it, and it was held that the assignment was therefore a conveyance for valuable consideration. It does not follow that if there is in the same deed a conveyance of freeholds as well as an assignment of leaseholds, the decision in *Price v. Jenkins* establishes that the liability to the covenants in the leaseholds is sufficient to support the concurrent conveyance of freeholds as being a conveyance for valuable consideration. As at present advised, I think that to hold so would be to be imposed on by a piece of sealing-wax. We often find that what is in form one contract contains several perfectly separable contracts, and to hold that a conveyance of valuable freeholds can be made a conveyance for valuable consideration by throwing into the same piece of parchment a little bit of leasehold would be taking a most unfair advantage of a decision which was never meant to decide anything of the kind.—p. 25.

Price v. Jenkins, distinguished.

Shurmur v. Sedgwick; Crossfield v. Shurmur (1883) 53 L. J. Ch. 87; 24 Ch. D. 597, 606; 49 L. T. 156; 31 W. R. 884.—BACON, V.-C.

Price v. Jenkins, observed on.

Lulham, *In re*, Brinton v. Lulham (1884) 53 L. J. Ch. 928; 32 W. R. 1013; affirmed, (1885) 53 L. T. 9; 33 W. R. 788.—C.A.

KAY, J.—In *Price v. Jenkins*, the C. A. held that an assignment by way of settlement of leasehold property which contained no covenant on the part of the assignee to pay the rent or perform the covenants was nevertheless an assignment for value, so that it could not be destroyed by a subsequent sale of the leaseholds by the settlor under 27 Eliz. c. 4, James, L.J. saying, that the quantum of consideration was of no consequence. This was followed by the chief judge in bankruptcy in *Doble, Ex parte* (*post* col. 3165). In the later case of *Hillman, Ex parte* (*supra*, col. 3163), it was held that such an assignee was not a purchaser within the meaning of sect. 91 of the Bankruptcy Act, 1869. The late M.R., Sir G. Jessel, then observed, "That a voluntary conveyance is fraudulent is entirely judge-made law. The later judge-made law of *Price v. Jenkins* corrected the former, so far as was possible at that time." James, L.J. observed, "*Price v. Jenkins* was a decision upon the statute 27 Eliz., and the object of it was to prevent fraud." In *Ridder, In re* (*post*, col. 3166), both Bacon, V.-C. and the late M.R. speak somewhat doubtfully of the decision in *Price v. Jenkins*, and hold that such a settlement could be voluntary as against the creditors of the settlor, under the earlier statute of 13 Eliz. c. 5. Cotton, L.J. agrees in this, but speaks of *Price v. Jenkins* as a binding authority. In *Marsh and Granville*

(*Earl*), *In re* (*supra*, col. 3164), Bowen, L.J. intimated an opinion that if there were in the same deed a conveyance of freeholds, the acceptance of the burden of the leasehold property would not be a consideration as to them. This is anything but a satisfactory state of the law, but it compels me to hold against my own opinion, that this settlement, so far as regards the leaseholds comprised in it, was not voluntary.—p. 930.

Price v. Jenkins. *

Discussed, *Green v. Paterson* (1886) 56 L. J. Ch. 181; 32 Ch. D. 95, 104; 54 L. T. 738; 34 W. R. 724.—C.A.; *distinguished and not applied*, *Crossman v. Reg.* (1886) 56 L. J. Q. B. 211; 18 Q. B. D. 256, 264; 55 L. T. 848; 35 W. R. 303.—DENMAN and HAWKINS, JJ. (*see supra*, col. 3162); *followed*, *Cameron and Wells, In re* (1887) 37 L. J. Ch. 69; 37 Ch. D. 32, 38; 57 L. T. 645; 36 W. R. 5.—KAY, J.

Price v. Jenkins, followed.

Harris v. Tubb (1889) 42 Ch. D. 79; 58 L. J. Ch. 434; 60 L. T. 699; 38 W. R. 75.

KERKEWICH, J.—A more difficult argument to deal with is this, that that decision [*Price v. Jenkins*] is limited to cases under the statute of 27 Eliz. I cannot myself see that on the face of the report. It was a case under that statute, and no doubt there have been cases decided since (*Hillman, Ex parte* (*supra*, col. 3163), *Ridler, In re* (*supra*, col. 3163), and I think also *Green v. Paterson* (*supra*), in which the Court seems to have treated *Price v. Jenkins* as applicable to cases arising under that statute, and no other); but my difficulty is this, that I find no judgment of the C. A. anywhere saying that that is so. What has been said is no doubt consistent with that view; and it may be that when they are compelled to consider the matter they may hold that view; but they do not say so: and when I find, for instance, Cotton, L.J., in *Green v. Paterson* referring to *Price v. Jenkins*, not at great length, but still at sufficient length for the purposes of the case then before him, and giving some account of it, and referring to it as decided under the statute of 27 Eliz., but not saying in so many words that it is applicable to cases under that statute and to none other, I do not think that I am competent to supply those words and to say that it is applicable to no other cases. In Irish cases, where apparently the judges are not bound by the decision of the C. A. here, they have gone the other way and thought themselves at liberty to decide differently. It would not be right for me to listen to those cases, because they would have no authority here as against the decisions of our own C. A.—p. 82.

Price v. Jenkins, referred to.

Briggs and Spicer, In re (1891) 60 L. J. Ch. 514; [1891] 2 Ch. 127, 134; 64 L. T. 187; 39 W. R. 377; 55 J. P. 278.—STIRLING, J. *Synge v. Synge* (1894) 63 L. J. Q. B. 202; [1894] 1 Q. B. 466, 471; 9 R. 265; 70 L. T. 221; 42 W. R. 309; 58 J. P. 396.—C.A.; *Att.-Gen. v. Jacobs-Smith* (1895) 64 L. J. Q. B. 605; [1895] 2 Q. B. 341, 350; 14 R. 531; 72 L. T. 714; 43 W. R. 657; 59 J. P. 468.—C.A.

Doble, Ex parte, Doble, In re (1878) 38 L. T. 183; 26 W. R. 407.—BACON, C.J., *distinguished*.

Hillman, Ex parte, Pumfrey, In re (1879) 10 Ch. D. 622; 48 L. J. Bk. 77; 40 L. T. 177; 27 W. R. 567.—C.A.

JAMES, L.J.—In *Doble, Ex parte*, the persons in whose favour the settlement was made, covenanted to pay an annuity of 50*l.* to the settlor.—p. 624.

Doble, Ex parte, referred to.

Lulham, In re, Brinton v. Lulham (1884) 53 L. J. Ch. 928, 930. *See supra*, col. 3164.

Ridler, In re, Ridler v. Ridler (1882) 52

L. J. Ch. 343; 22 Ch. D. 74; 48 L. T. 396; 31 W. R. 93.—C.A.; *reversing* BACON, V.-C., *referred to*.

Lulham, In re, Brinton v. Lulham (1884) 53 L. J. Ch. 928, 930.—KAY, J. (*see supra*, col. 3164); *Green v. Paterson* (1886) 56 L. J. Ch. 181; 32 Ch. D. 95, 104; 54 L. T. 738; 34 W. R. 724.—C.A.

Ridler, In re, and Lulham, In re, Brinton v.

Lulham (*supra*), *referred to*.

Harris v. Tubb (1889) 58 L. J. Ch. 434; 42 Ch. D. 79, 82.—*See supra*, col. 3165.

Roe d. Hamerton v. Milton (1767) 2 Wils. 356.—C.P.

Applied, *Fitzmaurice v. Sadlier* (1847) 9 Ir. Eq. R. 595, 611.—L.C.; *referred to*, *Tarleton v. Liddell* (1851) 17 Q. B. 390, 415 (*post*); *Massy v. Travers* (1860) 10 Ir. C. L. R. 459, 469.—C.P.; *Att.-Gen. v. Rathdonnell* (Lord) (1893) 32 L. R. Ir. 574, 590.—EX. D.

Tarleton v. Liddell (1851) 20 L. J. Q. B.

507; 17 Q. B. 390; 15 Jur. 1170.—Q.B.; S. C. (1851) 4 De G. & Sm. 538.—V.-C., *discussed and distinguished*.

Paget v. Paget (1882) 9 L. R. Ir. 128.—CHATTERTON, V.-C.

Buckle v. Michell (1812) 18 Ves. 100; 11

R. R. 155.—M.R., *approved*.

Rosher v. Williams (*post*).

Townend v. Toker (1866) 35 L. J. Ch. 608;

L. R. 1 Ch. 446; 12 Jur. (N.S.) 477; 14 L. T. 531; 14 W. R. 806.—L.J.; *reversing* ROMILLY, M.R.

Explained, *Rosher v. Williams* (1875) 44 L. J. Ch. 419; L. R. 20 Eq. 240, 218; 32 L. T. 387; 23 W. R. 561.—MALINS, V.-C.; *applied*, *Lee v. Mathews* (1880) 6 L. R. Ir. 530.—C.A.

Townend v. Toker and Rosher v. Williams, distinguished.

Crossman v. Reg. (1886) 18 Q. B. D. 256; 56 L. J. Q. B. 241; 55 L. T. 848; 35 W. R. 303.—DENMAN and HAWKINS, JJ.

HAWKINS, J. (for the Court).—*Townend v.*

Toker was chiefly relied on for the purpose of showing that the quantum of consideration ought not to be considered. In that case the question at issue was whether a settlement was fraudulent and void as against a subsequent *bona fide* purchaser of the settled estate under the stat. 27 Eliz. c. 4. . . . It establishes no more than this, that in the case before them the L.J.J. thought the consideration being *bona fide*, a good one to support the conveyance then impeached, that is, a good one to support a contract; it decided no more than this, that the conveyance in question came within the proviso contained in sect. 4 of the statute of 27 Eliz. c. 4, as being made upon good consideration, and *bona fide*, and so not fraudulent and void under sect. 2 of the same Act (pp. 263, 264). . . . *Rosher v. Williams* . . . though it affords an illustration of what will not suffice to bring a case within sect. 4 of the statute of Elizabeth, and is expressive of the V.-C.'s

views and approval of *Townend v. Toker*, does not assist us to any conclusion.—p. 266.

Gardiner v. Gardiner (1861) 12 Ir. C. L. R. 565.—C.P.

Followed, *Borke's Estate*, In re (1865) 15 Ir. Ch. R. 316.—LONGFIELD, J.; *principle applied*, *Hamilton v. Molloy* (1880) 5 L. R. Ir. 339.—SULLIVAN, M.R.; *Lee v. Mathews* (*post*).

Borke's Estate, In re, *referred to*.

Lee v. Mathews (1880) 6 L. R. Ir. 530.—C.A.

Lee v. Mathews (1879) 6 L. R. Ir. 167.—C.P.D.; *reversed*, C.A. (*supra*).

Howard v. Shrewsbury (Earl) 36 L. J. Ch. 283; L. R. 3 Eq. 218; 15 W. R. 301.—ROMILLY, M.R.; *reversed*, (1867) 36 L. J. Ch. 908; L. R. 2 Ch. 760; 17 L. T. 358; 15 W. R. 1203.—C.A.

Filmer v. Gott (1774) 4 Bro. P. C. 230.—H.L. (E.), *discussed and distinguished*.

Whalley v. Whalley (1816) 1 Moriv. 436.—M.R.; and (1821) 3 Bligh 1.—H.L. (E.).

Whalley v. Whalley, *referred to*.

Gibbs v. Guild (1881) 51 L. J. Q. B. 228; 8 Q. B. D. 296, 304; 46 L. T. 135; 30 W. R. 407; 46 J. P. 310.—FIELD, J.; *affirmed*, (1882) 51 L. J. Q. B. 313; 9 Q. B. D. 59; 46 L. T. 248; 30 W. R. 591.—C.A.; HOLKER, L.J. *dissenting*. *And see "LIMITATIONS, STATUTES OF."*

Ellis v. Nimmo (1835) Ll. & G. Cas. t. Sugd. 333.—SUGDEN, L.C., *not followed*.

Holloway v. Headington (1837) 8 Sim. 324; 6 L. J. Ch. 199.

SHADWELL, V.-C.—However high the authority may be of the L.C. who decided *Ellis v. Nimmo*, that cause was reheard by his successor [Lord Plunket], who rejected the grounds of the former decision, and decided in the same way, but on different grounds. Therefore, there is the authority of one L.C. in its favour, and the authority of another L.C. against it. Consequently it is not a decision that binds.—p. 325.

Goodright d. Humphreys v. Moses (1775) 2 W. Bl. 1019.—C.P. 7 and **Doe d. Tunstill v. Bottrell** (1833) 2 L. J. K. B. 158; 5 B. & Ad. 131; 2 N. & M. 64; 39 R. R. 432.—K.B. (*see post*, col. 3169), *applied*.

Currie v. Nind (1835) 5 L. J. Ch. 169; 1 Myl. & Cr. 17.—M.R.

Goodright v. Moses.

Applied, *Butterfield v. Heath* (*post*); *not applied*, *Hewison v. Negus* (*post*); *disapproved*, *Foster and Lister*, In re (*post*).

Currie v. Nind (*supra*).

Applied, *Butterfield v. Heath* (1852) 22 L. J. Ch. 270; 15 Beav. 408.—M.R.; *not applied*, *Blake v. French* (*post*); *distinguished*, *Joyce v. Hutton* (*post*); *disapproved*, *Foster and Lister*, In re (*post*.)

Butterfield v. Heath (*supra*).

Confirmed but not applied, *Hewison v. Negus* (1853) 22 L. J. Ch. 655; 16 Beav. 594; 1 Eq. R. 230; 17 Jur. 567; 1 W. R. 262.—M.R. (*affirmed*, L.J.); *not applied*, *Blake v. French* (1855) 5 Ir. Ch. R. 246, 258.—L.C.; *distinguished*, *Joyce v. Hutton* (1861) 12 Ir. Ch. R. 71, 75.—L.C. and L.J.

Butterfield v. Heath, *disapproved*.

Foster and Lister, In re (1877) 6 Ch. D. 87; 46 L. J. Ch. 480; 36 L. T. 582; 25 W. R. 553.

JESSEL, M.R.—The case of *Goodright d. Humphreys v. Moses* (*supra*) was this: [His lordship

stated the facts and continued:] The question was whether the deed of 1747 was a voluntary conveyance. It was said the only consideration that could be considered to pass to the wife by the deed of 1747 "was the certainty of maintenance for herself and children during the life of her husband, which is not a legal but only a moral consideration." The remarkable part of the trust was that for the support and maintenance of Harris and wife, and their children, during the life of Harris. Then, afterwards it was for the maintenance of Elizabeth Harris and her children during her life. It seems to have been forgotten that Harris gave up something; he would have a life estate, and an estate by the curtesy, and he came under a legal obligation to maintain the wife and children. He might have been under a legal obligation that was personal to a limited extent to maintain his children under the Poor Law Acts, but this was a new obligation certainly. Having cut down, therefore, what was before a life estate, he had this limited interest. Therefore he gave value, and that seems to have been forgotten altogether. The wife had nothing during his life, and her estate, no doubt, was cut down after his death; she got less than she fec. It seems to have been assumed that the value given by the husband was immaterial, and not to be considered. There is not a word said about the value he gave. In the next place it is said that the certainty of the maintenance by the husband was not a legal but only a moral consideration. The mistake was this: she had a right to be maintained by her husband. That was the legal right, but only out of his means. This gave her a right to be maintained out of the estate, even although he had become bankrupt, or anything else. It is clear, therefore, that was a valuable consideration. However, we get this judgment, as reported at all events, from De Grey, C.J., "That the deed of 1747 was only a voluntary conveyance within the true meaning of the stat. 27 Eliz., being founded only upon a good and not upon a valuable consideration." With the greatest possible deference it was clearly valuable consideration, but the point that the husband gave value was not argued at all. In fact the points as to giving up the life estate, and as to his parting with his control over the alienation of the estate were not argued. That was altogether missed, and as to the value on the part of the wife, she clearly gave value. Then he says that it therefore cannot be set up against a *bona fide* purchaser. That is all that is said upon the point. It appears to me, therefore, it cannot be considered a decision on a point that was neither argued nor referred to in the judgment; and although I entirely differ from the judgment, if I may say so, thinking that it is erroneous, even on the point that was submitted, yet it might be from its great age and recognition binding upon me, even if I thought it was wrong; but it was not binding upon me as to a point that was neither argued nor decided. Then the next case referred to was *Currie v. Nind* (*supra*), which was a decision of Lord Cottenham, when he was M.R. I confess, speaking humbly, that I do not understand, altogether, or follow the judgment. But I am clear that the case did not call for a decision upon this point. [His lordship, having stated the facts, continued:] It was said that the settlement of 1774 was purely voluntary; and, inasmuch as the settlement was made under the

power, as far as the fee was concerned, it is difficult to see why it was not. The husband's concurrence was not required in order that the married woman should exercise an equitable power. She could exercise that alone. His life estate was provided for; and, therefore, he certainly gave no value. His concurrence was not value, because it was not wanted, and he did not give up his life estate, or rather estate during the coverture. On the contrary, it was enlarged. He got a survivorship estate. So that he gave nothing, and, therefore, how it could be a settlement for value one does not exactly see. The wife had power to appoint to whom she pleased, and the appointment was voluntary as far as she was concerned. It was only dealing with the copyhold inheritance after the life estate had expired. It seems to me that it was plainly voluntary. But it was argued in all sorts of ways, and the only point I have to consider is, What is the judgment? The M.R., after referring to the objections raised by the purchaser, says this: "Upon the second and third objections I am of opinion that the property in question, being the property of a married woman, and the settlement being made during her coverture, does not prevent the stat. 27 Eliz. from operating upon it." Whatever this is worth, I do not exactly know what it means. It does not apply to the fine. If he means that by a married woman executing a power and thereby making a conveyance that is voluntary, I agree with him; but if he means anything else, I do not know what it means. Then he says, "*Goodright d. Humphreys v. Moses* is decisive as to this; and no objection is made to the surrender as not being sufficient to pass such interest as the wife could by these means part with." What that means I do not know. She had only an equitable interest. That did not pass by the surrender at all, but by the prior deed. It was neither made better nor worse by her surrender. Then he says, "That copyholds are within the statute is now fully established by the late case of *Doe d. Tunstall v. Buttrick* (*supra*, col. 3167)." Whatever the value of that authority may be, it does not decide the point before me, and is not so intelligible as I should have expected a judgment of that great judge to be.—pp. 90—95.

[His lordship then referred to *Butterfield v. Heath*, and did not comment upon the judgment of the M.R., but discussed *Hewison v. Negus* (*post*), a judgment of the same judge, which was, he said, exactly to the opposite effect, and was, he thought, right in principle. It was followed in *Teasdale v. Braithwaite* (*post*), and his lordship decided in accordance with the two latter cases.]

Hewison v. Negus (1853) 22 L. J. Ch. 655; 16 Beav. 594; 1 Eq. R. 230; 17 Jur. 567; 1 W. R. 262.—M.R.; *affirmed*, 22 L. J. Ch. 657.—L.J., *followed*.

Teasdale v. Braithwaite (1876) 4 Ch. D. 85; 46 L. J. Ch. 396; 35 L. T. 590; 25 W. R. 222.—V.-C.; *affirmed*, C.A. *See ante*, col. 3162.

BACON, V.-C.—Then, according to the decision in *Hewison v. Negus*, that if there be a valid bargain between husband and wife it amounts to a valuable consideration to each of them, the case is taken out of the statute, and this settlement is a valid settlement, although the suppression of it was an act of fraud.—p. 91.

Hewison v. Negus, *followed*.

Foster and Lister, *In re* (1877) 46 L. J. Ch. 480; 6 Ch. D. 87, 96.—M.R. *See supra*, col. 3169.

Hewison v. Negus, *referred to*.

Butler v. Butler (1885) 55 L. J. Q. B. 55; 14 Q. B. D. 831, 834.—WILLS, J.; *affirmed*, 16 Q. B. D. 374; 54 L. T. 591; 34 W. R. 132.—C.A. *And see* *Blake v. French* (1855) 5 Ir. Ch. R. 246, 257.—L.C.

Foster and Lister, *In re*, (1877) 46 L. J. Ch. 480; 6 Ch. D. 87; 36 L. T. 582; 25 W. R. 553.—JESSEL, M.R.

Referred to, *Welman v. Welman* (1880) 49 L. J. Ch. 736; 15 Ch. D. 570, 579; 43 L. T. 145.—MALINS, V.-C.; *applied*, *Schreiber v. Dinkel* (1884) 54 L. J. Ch. 241, 243; 52 L. T. 130.—NORTH, J. (*affirmed*, 54 L. T. 911.—C.A.).

Prosser v. Edmonds (1835) 1 Y. & C. 481.—C.B.

Distinguished, *Wilson v. Short* (1848) 17 L. J. Ch. 289; 6 Hare 366; 12 Jur. 301.—V.-C.; *rule in, not applied*, *Dickinson v. Burrell* (1866) 35 Beav. 257; L. R. 1 Eq. 337, 341; 12 Jur. (N.S.) 199; 13 L. T. 660; 14 W. R. 412.—M.R.; *applied*, *Robb v. Dorrian* (1877) Ir. R. 11 C. L. 293, 307.—EX. CH.; *Keogh v. McGrath* (1880) 5 L. R. Ir. 478, 516.—M.R.; *referred to*, *Bradlaugh v. Newdegate* (1888) 52 L. J. Q. B. 454; 11 Q. B. D. 1, 12; 31 W. R. 792.—COLERIDGE, C.J.; *Alabaster v. Harness* [1894] 2 Q. B. 897.—HAWKINS, J., and 64 L. J. Q. B. 76; [1895] 1 Q. B. 339, 344; 14 R. 54; 71 L. L. 740; 43 W. R. 196.—C.A.

Ithell (or Jthell) v. Beane (1748-9) 1 Ves. sen. 215; 1 Dick. 213.—L.C., *observations not applied*.

Price v. Jenkins (1876) 46 L. J. Ch. 214; 4 Ch. D. 483, 489; 36 L. T. 237; 25 W. R. 427.—HALL, V.-C.; *reversed on a different ground*.—C.A. *See ante*, col. 3163.

Ithell (or Jthell) v. Beane, *discussed*.

Gale v. Gale (1877) 46 L. J. Ch. 809; 6 Ch. D. 144, 149; 36 L. T. 690; 25 W. R. 772.—FRY, J.

Townshend (Lord) v. Windham (1750) 2 Ves. sen. 1, 10.—L.C., *questioned*.

Chapman v. Emery (1775) 1 Cowp. 278.—K.B. MANSFIELD, C.J.—I rather doubt Lord Hardwicke's saying that, "Where a woman about to marry a second husband, makes a settlement of her estate upon the children by her first husband, such settlement has been held good.—p. 280. *And see* "*POWERS*," *ante*, col. 2209.

Chapman v. Emery, *discussed*.

Gale v. Gale (1877) 46 L. J. Ch. 809; 6 Ch. D. 144, 150 (*post*, col. 3171).

Nairn v. Prowse (1802) 6 Ves. 752; 6 R. R. 37.—M.R., *distinguished*.

Massy v. Travers (1860) 10 Ir. C. L. R. 459, 470.—C.P.; *Browne's Estate*, *In re* (1862) 13 Ir. Ch. R. 283.—C.A.; BRADY, L.C. *dissenting*.

Parkes v. White (1805) 11 Ves. 209.—L.C., *referred to*.

Scott v. Davis (1838) 4 Myl. & Cr. 87, 91; 2 Jur. 1057.—L.C.; *Hood-Barts v. Heriot* (1896) 65 L. J. Q. B. 352, 356; [1896] A. C. 174; 74 L. T. 353; 44 W. R. 481; 60 J. P. 612.—H.L. (E.).

Joyce v. Hutton (1860) 11 Ir. Ch. R. 123.—OUSAOK SMITH, M.R., *reversed*, (1861) 12 Ir. Ch. R. 71.—L.C. and L.J., *referred to*.

Green v. Paterson (1886) 32 Ch. D. 95; 56 L. J. Ch. 181; 54 L. T. 738; 34 W. R. 724.—C.A. FRY, L.J.—Under the marriage settlement

there the husband and wife both took interests, and by a post-nuptial settlement they both covenanted to assign their life interests for the benefit of the children. The children sued for the performance of the contract, and the M.L. dismissed their petition.—p. 107.

Spackman v. Timbrell (1837) 6 L. J. Ch. 147; 8 Sim. 253.—v.-c. *commented on*.
Pimm v. Insall (1849) 19 L. J. Ch. 1; 1 Mac. & G. 449; 1 H. & Tw. 487; 14 Jur. 357.—L.C.

Spackman v. Timbrell, *applied*.
Dilkes v. Broadmead (1860) 29 L. J. Ch. 310; 2 Giff. 113; 6 Jur. (N.S.) 289; 8 W. R. 318.—STUART, v.-c.; *affirmed*, (1860) 30 L. J. Ch. 268; 2 De G. F. & J. 566; 7 Jur. (N.S.) 56; 3 L. T. 605; 9 W. R. 238.—L.C.

Spackman v. Timbrell, *referred to*.
Browne's Estate, In re (1862) 13 Ir. Ch. R. 283.—C.A.; **BRADY**, L.C. dissenting.

Gale v. Gale (1877) 46 L. J. Ch. 809; 6 Ch. D. 144; 36 L. T. 690; 25 W. R. 772.—FRY, J., *referred to*.
Cameron and Wells, In re (1887) 57 L. J. Ch. 69; 37 Ch. D. 32, 38; 57 L. T. 645; 36 W. R. 5.—KAY, J.; **Tucker v. Bennett** (1887) 57 L. J. Ch. 507; 38 Ch. D. 1, 10; 58 L. T. 650.—C.A.; **Meredyth v. Meredyth and Leigh** (1895) 64 L. J. P. 54; [1895] P. 92; 11 R. 651; 72 L. T. 898; 43 W. R. 304.—JEUNE, P.

Gale v. Gale, *not followed*.
Att.-Gen. v. Jacobs-Smith (1895) 64 L. J. Q. B. 605; [1895] 2 Q. B. 341.—C.A. (*post*).

Mackie v. Herbertson (1884) 9 App. Cas. 303.—H.L. (SC.); *reversing* 10 Reittie 746; 20 Scott. L. R. 486, *referred to*.
Cameron and Wells, In re (1887) 57 L. J. Ch. 69; 37 Ch. D. 32, 37; 57 L. T. 645; 36 W. R. 5.—KAY, J.

Mackie v. Herbertson, *approved*.
De Mestre v. West (1891) 60 L. J. P. C. 66; [1891] A. C. 264; 64 L. T. 375; 55 J. P. 613.—P.C. *See post*, col. 3173.

Mackie v. Herbertson, *explained*.
Macdonald v. Scott [1893] A. C. 642, 657.—H.L. (SC.)

Mackie v. Herbertson and De Mestre v. West, *referred to*.
Att.-Gen. v. Rathdonnell (Lord) (1893) 32 L. R. Ir. 574; 590.—EX. D.

Mackie v. Herbertson and De Mestre v. West, *considered*.
Att.-Gen. v. Jacobs-Smith (1895) 64 L. J. Q. B. 605; [1895] 2 Q. B. 341, 350; 14 R. 531; 72 L. T. 714; 43 W. R. 657; 59 J. P. 468.—C.A.

Clayton v. Wilton (Earl) (or Winton (Earl)) (1813) 6 M. & S. 67, n.; 18 R. R. 307; (1818) 3 Madd. 302, n.; 18 L. R. 234.—L.C.

Approved and applied, **Sutton v. Chetwynd** (1817) 3 Meriv. 249.—M.R.; *followed*, **Clarke v. Wright** (1861) 30 L. J. Ex. 113; 6 H. & N. 849; 7 Jur. (N.S.) 1032; 9 W. R. 571; 4 L. T. 21.—EX. CH.; *doctrine not applied*, **Cullin's Estate**, In re (1864) 14 Ir. Ch. R. 506.—LONGFIELD, J.; *discussed*, **Price v. Jenkins** (1876) 46 L. J. Ch. 214; 4 Ch. D. 483, 489; 36 L. T. 237; 25 W. R. 427.—HALL, v.-c. (reversed on a different ground—C.A., *see ante*,

col. 3163): *explained*, **Gale v. Gale** (1877) 46 L. J. Ch. 809; 6 Ch. D. 144, 150; 36 L. T. 690; 25 W. R. 772.—FRY, J.; *applied*, **Sheridan's Estate**, In re (1878) 1 L. R. Ir. 54.—FLANAGAN, J.; *explained*, **Mackie v. Herbertson** (1884) 9 App. Cas. 303, 336.—H.L. (SC.); **De Mestre v. West** (1891) 60 L. J. P. C. 66; [1891] A. C. 264; 64 L. T. 375; 55 J. P. 613.—P.C. (*see post*, col. 3173): *referred to*, **Meredyth v. Meredyth and Leigh** (1895) 64 L. J. P. 54; [1895] P. 92; 11 R. 651; 72 L. T. 898.—JEUNE, P.

Clayton v. Wilton (Earl) (or Winton (Earl)), *followed*.

Att.-Gen. v. Jacobs-Smith (1895) 64 L. J. Q. B. 605; [1895] 2 Q. B. 341; 14 R. 531; 72 L. T. 714; 43 W. R. 657; 59 J. P. 468.—C.A. *See judgment*.

Newstead v. Searles (1737) 1 Atk. 265; West 287.—L.C.

Referred to, **Holliday v. Overton** (1852) 21 L. J. Ch. 769, 772; 15 Beav. 480; 16 Jur. 346.—M.R. (affirmed, 16 Jur. 751.—L.J.J.); *followed*, **Clarke v. Wright** (1861) 30 L. J. Ex. 113; 6 H. & N. 849; 7 Jur. (N.S.) 1032; 9 W. R. 571; 4 L. T. 21.—EX. CH.; *referred to*, **Smith v. Cherrill** (1867) L. R. 4 Eq. 390, 396; 36 L. J. Ch. 738; 16 L. T. 517; 15 W. R. 919.—MALINS, v.-c.; *discussed*, **Price v. Jenkins** (1876) 46 L. J. Ch. 214; 4 Ch. D. 483, 488 (*see ante*, col. 3163); *applied*, **Gale v. Gale** (1877) 46 L. J. Ch. 809; 6 Ch. D. 144, 148; 36 L. T. 690; 25 W. R. 772.—FRY, J.; *explained*, **Mackie v. Herbertson** (1884) 9 App. Cas. 303, 336.—H.L. (SC.); *commented on and not extended*, **Cameron and Wells**, In re (1887) 57 L. J. Ch. 69; 37 Ch. D. 32; 57 L. T. 645; 36 W. R. 5.—KAY, J.; *referred to*, **Tucker v. Bennett** (1887) 57 L. J. Ch. 507; 38 Ch. D. 1, 10; 58 L. T. 650.—C.A.; *explained and not applied*, **De Mestre v. West** (1891) 60 L. J. P. C. 66; [1891] A. C. 264.—P.C. *See post*, col. 3173.

Newstead v. Searles, *followed*.

Att.-Gen. v. Jacobs-Smith (1895) 64 L. J. Q. B. 605; [1895] 2 Q. B. 341, 348; 14 R. 531; 72 L. T. 714; 43 W. R. 657; 59 J. P. 468.—C.A.

Dickenson v. Wright (1860) 29 L. J. Ex. 150; 5 H. & N. 401; 2 L. T. 155; 8 W. R. 419.—EX.; *affirmed nom.* **Clarke v. Wright** (1861) 30 L. J. Ex. 113; 6 H. & N. 849; 7 Jur. (N.S.) 1032; 4 L. T. 21; 9 W. R. 571.—EX. CH.; **WILLIAMS**, J. *dissenting*.

Clarke v. Wright.

Discussed and not applied, **Browne's Estate**, In re (1862) 13 Ir. Ch. R. 283.—C.A.; **BRADY**, L.C. dissenting; *referred to*, **Cullin's Estate**, In re (1864) 14 Ir. Ch. R. 506.—LONGFIELD, J.; *not applied*, **Smith v. Cherrill** (1867) 36 L. J. Ch. 738, 741; L. R. 4 Eq. 390, 396; 16 L. T. 517; 15 W. R. 919.—MALINS, v.-c.; *commented on*, **Price v. Jenkins** (1876) 46 L. J. Ch. 214; 4 Ch. D. 483; 36 L. T. 237; 25 W. R. 427.—HALL, v.-c. (reversed on a different ground—C.A., *see ante*, col. 3163): *referred to*, **Gale v. Gale** (1877) 46 L. J. Ch. 809; 6 Ch. D. 144, 150.—FRY, J. (*supra*, col. 3171); **Sheridan's Estate**, In re (1878) 1 L. R. Ir. 54.—FLANAGAN, J.; *distinguished*, **D'Angibau**, In re, **Andrews v. Andrews** (1880) 49 L. J. Ch. 756; 15 Ch. D. 228, 242; 43 L. T. 135; 28 W. R. 930.—C.A.; *commented on*, **Cameron and Wells**, In re (1887) 57 L. J. Ch. 69; 37 Ch. D. 32, 37; 57 L. T. 645;

36 W. R. 5.—KAY, J.; *applied*, Tucker v. Bennett (1887) 57 L. J. Ch. 507; 38 Ch. D. 1, 11; 58 L. T. 650.—C.A.; SIR J. HANNEN dissenting; Godfrey v. Poole (1888) 57 L. J. P. C. 78; 13 App. Cas. 497, 504; 58 L. T. 685; 37 W. R. 357.—C.P.

Clarke v. Wright (*supra*), *dissented from*.

De Mestre v. West (1891) 60 L. J. P. C. 66; [1891] A. C. 264; 64 L. T. 375; 55 J. P. 613.—P.C.
LORD SELWYN.—The case which has been mainly relied upon as an authority for allowing this appeal is one in the Court of Ex. of *Dickenson v. Wright* (29 L. J. Ex. 151) which was affirmed in the Court of Ex. Ch. under the title of *Clarke v. Wright*. . . In the Court of Ex. Ch. their lordships find a very great conflict of opinion among the judges, and plainly the majority of the judges would have been for reversing the judgment below if they had not taken the same view of *Newstead v. Searles* (*supra*, col. 3172) and *Clayton v. Wilton* (*Lord*) (*supra*, col. 3171) which was taken by Channell, B. . . Under those circumstances it appears to their lordships to be their duty to advise Her Majesty in accordance with the view which they themselves take of *Newstead v. Searles* and *Clayton v. Wilton* (*Lord*), and which was taken by the H. L. in *Macfie v. Herbertson* (9 App. Cas. 303, *supra*, col. 3171). The order of the limitations in both those cases was such that the limitations which were not within the marriage consideration were covered by those which were, so that those which were within the marriage consideration could not take effect in the form and manner provided by the instrument, without also giving effect to the others. It was on that ground, and not from any special favour to provisions for the benefit of children who were not issue of the marriage, that their lordships consider both those cases to have been determined. If similar circumstances should occur again it may be inferred from what was said in the H. L. in *Macfie v. Herbertson*, that the same principle would be applied; and, indeed, the principle seems to be clear, for the settlement in any such case could not be defeated without defeating the interests of children unquestionably within the consideration of marriage. There is no authority for the proposition that under the statute (27 Eliz. c. 4) a particular limitation can be picked out of the middle of a settlement, or the shares of some persons who would take *pari passu* with others according to the terms of the settlement picked out, in order to be destroyed, in favour of a subsequent purchaser; leaving subsequent or concurrent interests of persons who were within the consideration of marriage under the same settlement undisturbed. The only question in their lordships' view which remains is whether in this case there are special circumstances which bring it within the principle of *Newstead v. Searles* and *Clayton v. Wilton* (*Lord*), so understood. . . Their lordships think . . . that there are not in this settlement any special provisions sufficient to bring it within *Newstead v. Searles*, and that the Court below was right in holding the case to fall within the general rule. —pp. 68, 69, 70.

Clarke v. Wright, *referred to*.

Att.-Gen. v. Rathdonnell (*Lord*) (1893) 32 L. R. Ir. 574, 590.—EX. D.; Att.-Gen. p. Jacobs-Smith (1895) 64 L. J. Q. B. 605; [1895] 2 Q. B. 341,

349; 14 R. 531; 72 L. T. 714; 43 W. R. 657; 59 J. P. 468.—C.A.

Cullen's Estate, In re (1864) 14 Ir. Ch. R. 506.—LONGFIELD, J., *referred to*.

Sheridan's Estate, In re (1878) 1 L. R. Ir. 54.—FLANAGAN, J.

Stackpoole v. Stackpoole (1843) 2 Con. & L. 489; 4 Dr. & War. 320; 6 Ir. Eq. R. 18.—STUDEN, L.C., *referred to*.

Sheridan's Estate, In re (1878) 1 L. R. Ir. 54.—FLANAGAN, J.

Smith v. Cherrill (1867) 36 L. J. Ch. 738; L. R. 4 Eq. 390; 16 L. T. 517; 15 W. R. 919.—MALINS, V.-C., *followed*.

Denison v. Tattersall (1868) 18 L. T. 303, 305.—MALINS, V.C.

Smith v. Cherrill, *referred to*.

Downes, In re [1898] 2 Ir. R. 302, 307.—BOYD, J.

Jenkins v. Kemishe (or *Kemish*, or *Kemys*, or *Keymis*) (1668) Hard. 395; Ch. Cas. 103; 1 Lev. 150; 1 Atk. 268, n.—L.K.

Explained, Osgood v. Stroud (or *Strode*) (1724) 10 Mod. 533; 2 P. Wms. 245.—L.C.; *referred to*, Sutton v. Chetwynd (1817) 3 Meriv. 249.—GRANT, M.R.; *Newstead v. Searles* (1737) West 287, 292; 1 Atk. 265.—L.C.; Goring v. Nash (1744) 3 Atk. 186.—L.C.; Price v. Jenkins (1876) 46 L. J. Ch. 214; 4 Ch. D. 483, 486; 36 L. T. 237; 25 W. R. 427.—HALL, V.-C. (reversed on a different ground, (1877) 46 L. J. Ch. 805; 5 Ch. D. 619; 37 L. T. 51.—C.A. See *ante*, col. 3163).

Watts v. Bullas (1702) 1 P. Wms. 60.—L.K.

Discussed, Goring v. Nash (1744) 3 Atk. 186.—L.C.; *applied*, Hall v. Lamb (1764) 2 Eden 292.—L.C.

Osgood v. Stroud (or *Strode*) (1724) 10 Mod. 533; 2 P. Wms. 245.—L.C.

Referred to, Stephens v. Trueman (1747-8) 1 Ves. sen. 73.—L.C.; *Idell* (or *Jthell*) v. Beane (1748-9) 1 Ves. sen. 215; 1 Dick. 213.—L.C.; *applied*, Hale v. Lamb (1761) 2 Eden 292.—L.C.; *referred to*, Price v. Jenkins (1876) 46 L. J. Ch. 214; 4 Ch. D. 483, 489.—V.-C. (see *supra*).

Vernon v. Vernon (1731) 2 P. Wms. 594.—L.C.; *affirmed*, 1 Bro. P. C. 267.—H.L. (W.).

Applied, Goring v. Nash (1744) 3 Atk. 186.—L.C.; Hale v. Lamb (1764) 2 Eden 292.—L.C.; *referred to*, Stephens v. Trueman (1747-8) 1 Ves. sen. 73.—L.C.

Jones v. Boulter (1786) 1 Cox 288.—EX., *applied*.

Fitzmaurice v. Sadlier (1847) 9 Ir. Eq. R. 595, 613.—L.C.

Johnson v. Legard (1822) T. & R. 281; 18 R. R. 234.—L.C.; *reversing* (1818) 3 Madd. 283.—M.R.; S. C. (1817) 6 M. & S. 60; 18 R. R. 301.—K.R.

Referred to, Sutton v. Chetwynd (*Lord*) (1817) 3 Meriv. 249.—M.R.; *commented on*, Clarke v. Wright (1861) 30 L. J. Ex. 113; 6 H. & N. 849; 7 Jur. (N.S.) 7032; 4 Ir. T. 21; 9 W. R. 571.—EX. CH.; WILLIAMS, J. dissenting; *applied*, Smith v. Cherrill (1867) 36 L. J. Ch. 738, 741; L. R. 4 Eq. 390, 395; 16 L. T. 517; 15 W. R. 919.—MALINS, V.-C.; *referred to*, Clarke v. Willott (1872) 41 L. J. Ex. 197, 200; L. R. 7 Ex. 313, 317; 21 W. R. 73.—EX.; Price v. Jenkins

(1876) 46 L. J. Ch. 214; 4 Ch. D. 483, 490.—v.-c. (see *supra*, col. 3174); Briggs and Spicer, In re, (1891) 60 L. J. Ch. 514; [1891] 2 Ch. 127, 134; 64 L. T. 187; 39 W. R. 377; 55 J. P. 278.—STIRLING, J.; Att.-Gen. v. Jacobs-Smith (1895) 64 L. J. Q. B. 605; [1895] 2 Q. B. 341, 350 (*post*, col. 3176).

Druce v. Denison (1801) 6 Ves. 385.—L.C., *applied*.

Gurly v. Gurly (1840) 2 Dr. & Wal. 463.—PLUNKET, L.C. (affirmed, (1842) 8 Cl. & F. 743.—H.L. (IR.)); Burgess' Trusts, In re (1860) 11 Ir. Ch. R. 164.—BRADY, L.C.

Druce v. Denison, *discussed*.

Thompson v. Watts (1862) 31 L. J. Ch. 445; 2 J. & H. 291; 8 Jur. (N.S.) 760; 6 L. T. 817; 10 W. R. 485.—WOOD, v.-c.; O'Brien v. Hearn (1870) Ir. R. 4 Eq. 103; 18 W. R. 514.—SULLIVAN, M.R. (affirmed, 18 W. R. 1404.—L.C.); Coyne v. Duigan (1893) [1894] 1 Ir. R. 138, 143.—PORTER, M.R.

Druce v. Denison, *on question of evidence*, *referred to*.

Grainger, In re, Dawson v. Higgins (1900) 69 L. J. Ch. 789; [1900] 2 Ch. 756, 769; 83 L. T. 209; 48 W. R. 673.—C.A.; RIGBY, L.J. dissenting; reversed *nom.* Higgins v. Dawson (1901) 71 L. J. Ch. 132; [1902] A. C. 1; 85 L. T. 763; 50 W. R. 337.—H.L. (E.).

Basevi v. Serra (1807) 14 Ves. 313; 3 Mcriv. 674.—M.R., *applied*.

Corsbie v. Free (1840) Cr. & Ph. 64; 5 Jur. 790.—COTTENHAM, L.C.

Lester v. Garland (1832) 1 L. J. Ch. 105; 5 Sim. 205; Mont. 471; 35 R. R. 146.—v.-c., *principle explained*.

Whitmore v. Mason (1861) 2 J. & H. 204, 214; 5 L. T. 631; 10 W. R. 168.—WOOD, v.-c.

Lester v. Garland, *discussed and applied*.

Mackintosh v. Pogose (1895) 64 L. J. Ch. 274; [1895] 1 Ch. 505; 13 R. 254; 72 L. T. 251; 43 W. R. 247; 2 Manson 27.—STIRLING, J.

Sutton v. Chetwynd (Lord) (1817) 3 Meriv. 249.—M.R.

Commented on, Davenport v. Bishopp (1843) 12 L. J. Ch. 492; 2 Y. & C. C. C. 451; 7 Jur. 1077.—v.-c. (affirmed, 1 Ph. 98.—L.C.); Clarke v. Wright (1861) 30 L. J. Ex. 113; 6 H. & N. 849; 7 Jur. (N.S.) 1032; 4 L. T. 21; 9 W. R. 571.—EX. CH.

Sutton v. Chetwynd (Lord) and Cormick v. Traupud (1818) 6 Dow 60.—H.L. (IR.), *referred to*.

De Mestre v. West [1891] A. C. 264; 60 L. J. P. C. 66; 64 L. T. 375; 55 J. P. 163.—P.C. SELBORNE, EARL OF.—The general rule has long been settled, that a voluntary conveyance, even though from the most honest motives and the most moral considerations, may be defeated, according to the construction which has been placed upon the stat. of 27 Eliz. c. 4, by a subsequent conveyance to a purchaser for value such as was made in this case. It has also been determined in a manner which it would be too late now to attempt to review—in the case, amongst others, of *Sutton v. Chetwynd (Lord)*, and in the Irish case of *Cormick v. Traupud*, both decided by the H. L.—that this rule is applicable to limitations in favour of volunteers under marriage settlements. Therefore, as the law is so

settled, some special reason, consistent with that law, must be shown for taking any particular case out of the rule. Whether their lordships would have established such a rule had the matter been new is not the question.—p. 267.

Sutton v. Chetwynd (Lord), *referred to*.

Att.-Gen. v. Jacobs-Smith (1895) 64 L. J. Q. B. 605; [1895] 2 Q. B. 341, 350; 14 R. 531; 72 L. T. 714; 43 W. R. 657; 59 J. P. 468.—C.A.

Davenport v. Bishopp (1843) 12 L. J. Ch.

492; 2 Y. & C. C. C. 451; 7 Jur. 1077; 60 R. R. 234.—KNIGHT BRUCE, v.-c.; *affirmed*, 1 Ph. 98.—L.C., *referred to*.

Barham v. Clarendon (Earl) (1852) 10 Hare 126, 133; 17 Jur. 336; 1 W. R. 96.—TURNER, v.-c.; Cramer v. Moore (1855) 3 Sm. & G. 141; 1 Jur. (N.S.) 915; 3 W. R. 347.—STUART, v.-c.; Joyce v. Hutton (1861) 12 Ir. Ch. R. 71, 79.—L.C. and L.J.; Westbury v. Clapp (1864) 3 N. R. 633; 12 W. R. 511.—WOOD, v.-c.; Touche v. Metropolitan Ry. Warehousing Co. (1871) L. R. 6 Ch. 671, 677.—HATHERLEY, L.C.

Davenport v. Bishopp, *considered*.

Paul v. Paul (1880) 15 Ch. D. 580; 50 L. J. Ch. 14; 43 L. T. 239; 29 W. R. 281.

MALINS, v.-c.—*Davenport v. Bishopp* was a contract between the husband and wife to settle any after-acquired property which the wife might become entitled to; but it being the wife's property, the contract was that, if there were no children of the marriage, then it was to go to the wife's niece. The suit was instituted by the husband, after the death of his wife, to have the trusts carried out by the conveyance of an estate, which the wife had become entitled to during her life, to the uses of the settlement. Then, on the question whether the decree for specific performance should be confined to the life estate of the husband, or should extend to the limitation to the niece, it was held that it should extend to the niece, on the ground that the right of the husband to a specific performance of the contract drew with it the right to a specific performance of the whole, at least as against the heir of the settlor, whatever it might have done against a purchaser for value.—p. 589.

Davenport v. Bishopp, *referred to*.

Cameron and Wells, In re (1887) 57 L. J. Ch. 69; 37 Ch. D. 32, 36; 57 L. T. 645; 36 W. R. 5.—KAY, J.

Davenport v. Bishopp, *applied*.

Drimmie v. Davies (1898) [1899] 1 Ir. R. 176, 187.—C.A. FITZGIBBON, WALKER and HOLMES, L.JJ.

Clifford (Lady) v. Burlington (Earl) (1700)

2 Vern. 379.—L.C., *referred to*.

Blandford (Marchioness) v. Marlborough (Dowager Duchess) (1743) 2 Atk. 545.—HARDWICKE, L.C.

Coventry (Lady) v. Coventry (Earl) (1724)

2 P. Wms. 222; 1 Stra. 596; 9 Mod. 12.—L.C., *referred to*.

Blandford (Marchioness) v. Marlborough (Dowager Duchess) (1743) 2 Atk. 545.—L.C.; Wilson v. Piggott (1794) 2 Ves. 351; 2 R. R. 246.—M.R.; Barham v. Clarendon (Earl) (1852) 10 Hare 126; 17 Jur. 336; 1 W. R. 96.—TURNER, v.-c.

Coventry (Lady) v. Coventry (Earl), *discussed*.

Lambert's Estate, In re [1901] 1 Ir. R. 261, 268, 281.—C.A. PORTER, M.R., FITZGIBBON and HOLMES, L.JJ.

Barrow v. Barrow (1858) 27 L. J. Ch. 678; 4 K. & J. 409; 4 Jur. (N.S.) 1049; 6 W. R. 741.—WOOD, V.-C., *referred to*.
Williams v. Bailly (1866) L. R. 2 Eq. 731, 734.—WOOD, V.-C.

Barrow v. Barrow, *applied*.

Smith v. Lucas (1881) 18 Ch. D. 531, 544; 45 L. T. 460; 30 W. R. 451.—JESSUP, M.R. (*see ante*, col. 3144); **Wilder v. Pigott** (1882) 52 L. J. Ch. 141; 22 Ch. D. 263, 264; 48 L. T. 112; 31 W. R. 377.—KAY, J.

Barrow v. Barrow, *explained and not applied*.

Cahill v. Cahill (1883) 8 App. Cas. 420, 432; 49 L. T. 605; 31 W. R. 861.—H.L. (1R.).

Barrow v. Barrow, *explained*.

M'Intyre's Trustees' Estate, In re (1888) 21 L. R. Ir. 421, 431.—CHATTERTON, V.-C.

Barrow v. Barrow and Wilder v. Pigott (1882) 52 L. J. Ch. 141; 22 Ch. D. 263; 48 L. T. 112; 31 W. R. 377.—KAY, J., *considered and applied*.

Greenhill v. North British and Mercantile Insurance Co. (1893) 62 L. J. Ch. 918; [1893] 3 Ch. 474, 482; 3 R. 674; 69 L. T. 526; 42 W. R. 91.—STIRLING, J.

Barrow v. Barrow, Wilder v. Pigott, and Greenhill v. North British and Mercantile Insurance Co., *applied*.

Hodson's Settlement, In re, Williams v. Knight (1894) 63 L. J. Ch. 609; [1894] 2 Ch. 421, 427; 3 R. 346; 71 L. T. 77; 42 W. R. 531.—CHITTY, J.

Barrow v. Barrow, Wilder v. Pigott, Hodson's Settlement, In re, Williams v. Knight and Greenhill v. North British and Mercantile Insurance Co., *discussed*.

Harle v. Jarman [1895] 2 Ch. 419; 64 L. J. Ch. 779; 13 R. 610; 73 L. T. 20; 43 W. R. 618.

NORTH, J., after discussing at length *Barrow v. Barrow, Wilder v. Pigott and Hodson's Settlement, In re*, continued: Therefore those three cases are quite clear and intelligible. There was a deed that an infant could enter into, subject to avoiding it after attaining twenty-one. An infant might choose not to avoid it, but, on the contrary, to be bound by it; and the fact that the infant on attaining twenty-one was married did not prevent that. There is one other case that has given me more difficulty in dealing with—that is the decision of Stirling, J., in *Greenhill v. North British, &c. Co.* There the facts were very different from those in this case; but I must say, on reading that case carefully, that the learned judge does seem to have come to the conclusion that there were sufficient acts done in that case to enable a woman to bind the reversionary interest in personality, while she was covert. He says: "In the present case an agreement for a settlement was come to before the marriage of Mr. and Mrs. Greenhill, and but for the provisions of the Statute of Frauds that agreement would have been completely binding on all parties. That statute prevented any action being brought on the agreement against Mrs. Greenhill, though she might have brought an action to enforce it against Mr. Greenhill"—that is, because he signed it and she did not, she not being bound at the time. "She did not bring an action, but by her acts she recognised the agreement, and elected to have the benefit of

it. To such a state of things the principles laid down in *Barrow v. Barrow* and *Wilder v. Pigott* appear to me to be applicable." . . . But those two cases do not seem to me to bear on it for the reasons I have just mentioned; because those were cases where an infant was bound subject to avoiding the deed, and nothing could be chosen but to avoid the deed. In the case before Stirling, J., Mrs. Greenhill was not an infant, no doubt; but, on the other hand, she had never executed the deed or signed the agreement, and therefore she was not bound. However, in that case Stirling, J. came to the conclusion that *Barrow v. Barrow* and *Wilder v. Pigott* were authorities that enabled him to come to the conclusion, upon the facts, to which he did come. I do not see that those cases really applied to that case or apply to this, although, no doubt, his decision may have been perfectly right, having regard to the different state of circumstances which was said to amount to confirmation in that case.—p. 428.

Williams v. Bailly (1866) L. R. 2 Eq. 731.—WOOD, V.-C., *explained*.

Powell v. Powell and Jones (1874) 43 L. J. Mat. 9; L. R. 3 P. 186, 189; 29 L. T. 466; 22 W. R. 62.—SIR J. HANNEN, GROVE, J. and POLLOCK, B.

Williams v. Bailly, *referred to*.

Gandy v. Gandy (1882) 7 P. D. 77, 79.—HANNEN, P. (reversed, 51 L. J. P. 41; 7 P. D. 168; 46 L. T. 607; 30 W. R. 673.—C.A.); **Cahill v. Cahill** (1883) 8 App. Cas. 420, 432; 49 L. T. 605; 31 W. R. 861.—H.L. (1R.); **Greenhill v. North British and Mercantile Insurance Co.** (*supra*, col. 3177); **Hodson's Settlement, In re, Williams v. Knight** (*supra*, col. 3177).

Grigby v. Cox (1750) 1 Ves. sen. 517.—L.C.

Discussed, **Hulme v. Tenant** (1788) 1 Bro. C. C. 16.—**THURLOW, L.C.**; **Berens' Settlement Trusts, In re, Berens v. Benyon** (1888) 59 L. T. 626.—**CHITTY, J.**; *referred to*, **Barron v. Willis** (1899) 68 L. J. Ch. 604; [1899] 2 Ch. 578, 585; 81 L. T. 321; 48 W. R. 26.—**COZENS-HARDY, J.** (reversed, (1900) 69 L. J. Ch. 532; [1900] 2 Ch. 121; 82 L. T. 729; 48 W. R. 579.—C.A.; latter decision affirmed nom. **Willis v. Barron** (1902) 71 L. J. Ch. 609; [1900] A. C. 271; 86 L. T. 85.—H.L. (2.)).

H. v. W. (1857) 3 K. & J. 382.—WOOD, V.-C., *referred to*.

Bishop v. Bishop, Judkins v. Judkins (1897) 66 L. J. P. 69, 76; [1897] P. 138; 76 L. T. 409; 45 W. R. 567.—C.A.

Cartwright v. Cartwright (1853) 22 L. J. Ch. 841; 3 De G. M. & G. 982; 17 Jur. 584; 1 W. R. 245.—L.J.; **H. v. W.** and **Cocksedge v. Cocksedge** (1844) 13 L. J. Ch. 384; 14 Sim. 244; 3 Jur. 659, 935.—V.-C., *distinguished*.

Marlborough (Dowager Duchess) v. Marlborough (Duke) (1900) [1901] 1 Ch. 165; 70 L. J. Ch. 244; 83 L. T. 578; 49 W. R. 275.—C.A.; affirming **BYRNE, J.**

RIGBY, L.J.—All these cases are alike in one respect. The parties to a marriage settlement, or what was equivalent to it, chose to bargain as to what should take place in the event of a future separation of the spouses. There can be no doubt that such a bargain is absolutely bad. All that was there held was that, if persons chose to bargain about an event which they are not entitled

to anticipate, their bargain will be bad. And in *Cartwright v. Cartwright*, in the C. A., this was carried so far that where a father was settling property on the marriage of his son, and he stipulated that, if a separation should take place between the husband and wife, the income should, from the time of the separation, during their joint lives be paid to the husband, the Court held that the son could not gain an advantage dependent upon the separation, which in fact afterwards took place. It was said that the son could not derive any interest under the fraudulent act of another, and that it was a fraud on the law for the father to enter into such a stipulation. I cannot see any resemblance between the present case and any of those three cases. They are perfectly intelligible in principle, but it is, I think, equally clear that the principle does not apply to the present case.—p. 171.

V. WILLIAMS, L.J.—In all three cases cited by Mr. Haldane there was to be found on the face of the instrument an express bargain for that which was contrary to public policy.—p. 171.

ROMER, L.J.—With regard to the point of so-called public policy, I need only say that there is nothing whatever contrary to public policy in a settlement providing or contemplating that a tenant for life may validly marry more than once, nor in its providing that, if he does, he may exercise certain powers over the settled property in order to provide for the wife and children of his subsequent marriages. Such a settlement is perfectly valid, and there is nothing in it contrary to public policy. The cases cited have nothing whatever to do with the case now before us.—p. 173.

4. PROPERTY SETTLED.

Moore v. Magrath (1774) Cowp. 9.—K.B.

Distinguished, *Rooke v. Kensington* (Lord) (1856) 24 L. J. Ch. 795; 2 K. & J. 753; 2 Jur. (N.S.) 755; 4 W. R. 829.—WOOD, V.-C.; *referred to*, *Young v. Smith* (1865) L. R. 1 Eq. 180, 184; 35 Beav. 87; 11 Jur. (N.S.) 963.—M.R.; *approved but distinguished*, *Jenner v. Jenner* (1866) L. R. 1 Eq. 361, 365; 35 L. J. Ch. 329; 12 Jur. (N.S.) 135; 14 W. R. 305.—WOOD, V.-C.

Moore v. Magrath, referred to.

Francis v. Minton (1867) 36 L. J. C. P. 201; L. R. 2 C. P. 543, 550; 16 L. T. 352; 15 W. R. 788.—C.P.

BOVILL, C.J.—In *Moore v. Magrath* the words were, "all other his lands, tenements and hereditaments," and "all other his estate," but they were held not to include an estate not referred to.—p. 203.

Moore v. Magrath, discussed and principle applied.

Crompton v. Jarratt (1885) 54 L. J. Ch. 1109; 30 Ch. D. 298, 306; 53 L. T. 603; 33 W. R. 913.—NORTH, J.; affirmed, C.A.

Jenner v. Jenner (1866) 35 L. J. Ch. 329;

L. R. 1 Eq. 361; 12 Jur. (N.S.) 135; 14 W. R. 305.—WOOD, V.-C., *referred to*.
Danby v. Coult & Co. (1885) 54 L. J. Ch. 577; 29 Ch. D. 500, 514; 52 L. T. 401; 33 W. R. 559.—KAY, J.

Jenner v. Jenner, discussed and principle applied.

Crompton v. Jarratt (1885) 54 L. J. Ch. 1109; 30 Ch. D. 298, 309; 53 L. T. 603; 33 W. R. 913.—NORTH, J.; affirmed, C.A. See judgment at length.

Johnson v. Webster (1854) 23 L. J. Ch. 480; 2 Sm. & G. 136; 18 Jur. 619.—STUART, V.-C.; *reversed*, (1854) 4 De G. M. & G. 474; 24 L. J. Ch. 300; 1 Jur. (N.S.) 145; 3 Eq. R. 99; 3 W. R. 84.—L.C.

Johnson v. Webster, applied.

Somerset (Duke), In re, Thynne v. St. Maur (1886) 55 L. T. 753.—CHITTY, J.

Johnson v. Webster, explained.

Nunn's Estate, In re (1888) 23 L. R. Ir. 286 301.—C.A.

Johnson v. Webster, rule in, applied.

Mackesy v. Mackesy (1895) [1896] 1 Ir. R. 511, 517.—PORTER, M.R.

Parkinson v. Dashwood (1861) 30 Beav. 49.

—M.R., *followed*.

Edwards v. Broughton (1863) 32 Beav. 667; 2 N. R. 476; 11 W. R. 1038.—ROMILLY, M.R.

Walsh v. Wason (1873) 42 L. J. Ch. 676;

L. R. 8 Ch. 482; 28 L. T. 457; 21 W. R. 554.—SELBORNE, L.C. and MELLISH, L.J., *discussed*.

Dennehy v. Delany (1876) Ir. R. 10 Eq. 377.—SULLIVAN, M.R.

Walsh v. Wason, referred to.

Noake's Will, In re (1880) 28 W. R. 762.—BACON, V.-C.

Townsend v. Westacott (1840) 2 Beav. 340;

9 L. J. Ch. 241; 4 Jur. 187; (1841) 4 Beav. 58.—M.R.

Approved, *Skarff v. Soulby* (1849) 19 L. J. Ch. 30; 1 Mac. & G. 364; 1 H. & Tw. 426; 13 Jur. 1109.—L.C.; *applied*, *Crossley v. Elworthy* (1871) 40 L. J. Ch. 480, 483; L. R. 12 Eq. 158, 166; 24 L. T. 607; 19 W. R. 842.—MALINS, V.-C.; *Mackay v. Douglas* (1872) 41 L. J. Ch. 539; L. R. 14 Eq. 106, 119; 26 L. T. 721; 20 W. R. 652.—MALINS, V.-C.

Townsend v. Westacott, applied.

Taylor v. Coenen (1876) 1 Ch. D. 636; 34 L. T. 18.

MALINS, V.-C.—Then I go upon the authority of *Townsend v. Westacott*, where even the proof of actual solvency at the time of making the settlement was held not to protect it if made in contemplation of insolvency, or where the settlor is largely indebted and subsequently becomes insolvent.—p. 641.

Skarff (or Scarf) v. Soulby (1849) 19 L. J.

Ch. 30; 1 Mac. & G. 364; 1 H. & Tw. 426; 13 Jur. 1109.—L.C., *applied*.

Jenkyn v. Vaughan (1856) 25 L. J. Ch. 338; 3 Drew. 419.—V.-C. (*post*, col. 3181).

Skarff v. Soulby, referred to.

Coultwas v. Swan (1870) 22 L. T. 539, 540; 18 W. R. 746.—STUART, V.-C. (affirmed, (1871) 19 W. R. 485.—HATHERLEY, L.C.); *Crossley v. Elworthy* (1871) 40 L. J. Ch. 480, 483; L. R. 12 Eq. 158, 166 (*supra*).

Jenkyn v. Vaughan (1856) 25 L. J. Ch. 338 ; 3 Drew. 419 ; 2 Jur. (N.S.) 109 ; 4 W. R. 214.—**KINDERSLEY, v.-c., applied.**
Freeman v. Pope (1869) 39 L. J. Ch. 148, 151 ; L. R. 9 Eq. 206, 210 ; 21 L. T. 816.—**JAMES, v.-c. ;** and (1870) 39 L. J. Ch. 689, 693 ; L. R. 5 Ch. 538, 545 ; 23 L. T. 208 ; 18 W. R. 906.—**L.C. and L.J. ; Crossley v. Elworthy** (1871) 40 L. J. Ch. 480, 484 ; L. R. 12 Eq. 158, 167 (*supra*).

Jenkyn v. Vaughan, referred to.
Lane-Fox, In re, Gimblett, Ex parte (1900) 69 L. J. Q. B. 722, 725 ; [1900] 2 Q. B. 508, 513.—**WRIGHT, J. (post).**

Spirett v. Willows (1864) 5 Giff. 49.—**v.-c., on appeal,** (1864) 3 De G. J. & S. 293 ; 34 L. J. Ch. 365 ; 11 Jur. (N.S.) 614 ; 11 L. T. 314 ; 13 W. R. 329.—**L.C., applied.**
Smith v. Cherrill (1867) 36 L. J. Ch. 738 ; L. R. 4 Eq. 390, 396 ; 16 L. T. 517 ; 15 W. R. 919.—**MALINS, v.-c.**

Spirett v. Willows, referred to. •
Golden v. Gillam (or Johnson, In re, Golden v. Gillam) (1881) 51 L. J. Ch. 154 ; 20 Ch. D. 389, 393 ; 46 L. T. 222.—**FRY, J. ; affirmed,** 51 L. J. Ch. 503.—**C.A.**

Spirett v. Willows, applied.
Lane-Fox, In re, Gimblett, Ex parte (1900) 69 L. J. Q. B. 722, 724 ; [1900] 2 Q. B. 508, 512 ; 83 L. T. 176 ; 48 W. R. 650 ; 7 Manson 295.—**WRIGHT, J. And see "FRAUD,"** vol. i. col. 1161.

Freeman v. Pope (1870) 39 L. J. Ch. 689 ; L. R. 5 Ch. 538 ; 23 L. T. 208 ; 19 W. R. 906.—**L.C. and L.J. ; affirming** (1869) 39 L. J. Ch. 148 ; L. R. 9 Eq. 206 ; 21 L. T. 816.—**v.-c.**

Referred to, Mackay v. Douglas (1872) 41 L. J. Ch. 539, 542 ; L. R. 14 Eq. 106, 120 ; 26 L. T. 721 ; 20 W. R. 652.—**MALINS, v.-c. ; principle applied, Taylor v. Coenen** (1876) 1 Ch. D. 636, 641 ; 34 L. T. 18.—**MALINS, v.-c. ; referred to, Golden v. Gillam (or Johnson, In re, Golden v. Gillam)** (1881) 51 L. J. Ch. 154 ; 20 Ch. D. 389, 393 ; 46 L. T. 222.—**FRY, J. (affirmed,** 51 L. J. Ch. 503.—**C.A.) ; applied, Maddever, In re, Three Towns Banking Co. v. Maddever** (1883) 52 L. J. Ch. 733 ; 27 Ch. D. 523, 526 ; 31 W. R. 411.—**NORTH, J. (affirmed, with a variation,** (1884) 53 L. J. Ch. 998 ; 52 L. T. 35 ; 33 W. R. 286.—**C.A.).**

Freeman v. Pope, considered.
Mercer, Ex parte, Wise, In re (1886) 55 L. J. Q. B. 558 ; 17 Q. B. D. 290 ; 54 L. T. 720.—**CAVE and GRANTHAM, JJ. ; affirmed, C.A.**

Freeman v. Pope, not applied.
Tetley, In re, Jeffrey, Ex parte (1896) 66 L. J. Q. B. 111 ; 75 L. T. 166 ; 3 Manson 226 ; affirmed on the facts, **C.A.**

v. WILLIAMS, J.—I have not forgotten or failed to look at the cases of the character of Freeman v. Pope and Mackay v. Douglas (supra), in which it was held that, where a man who nowadays settled his property in contemplation of entering upon a hazardous trade, that was a settlement made for the purpose of defeating and delaying creditors, although there might be no creditor in existence at the time when the settlement was sought to be voided who was a

creditor at the date when the settlement was made. But I do not think that the mere fact that a man is of extravagant habits at all brings the case within *Freeman v. Pope*, or creates any tangible probability that the man may become insolvent.—p. 116.

Freeman v. Pope and Mercer, Ex parte, Wise, In re (supra), referred to.
Lane-Fox, In re, Gimblett, Ex parte (1900) 69 L. J. Q. B. 722, 724 ; [1900] 2 Q. B. 508, 512 ; 83 L. T. 176 ; 48 W. R. 650 ; 7 Manson 295.—**WRIGHT, J.**

Freeman v. Pope, not applied.
Mercer, Ex parte, applied.
Holland, In re, Gregg v. Holland (1902) 71 L. J. Ch. 518, 526 ; [1902] 2 Ch. 360 ; 86 L. T. 542 ; 50 W. R. 575 ; 9 Manson 259.—**C.A.**

Copis v. Middleton (1818) 2 Madd. 410 ; 17 R. R. 226.—**v.-c. ; and Harman v. Richards** (1852) 22 L. J. Ch. 1066 ; 10 Hare 81.—**v.-c., referred to.**
Golden v. Gillam (or Johnson, In re, Golden v. Gillam) (1881) 51 L. J. Ch. 154 ; 20 Ch. D. 389, 391 ; 46 L. T. 222.—**FRY, J. ; affirmed,** 51 L. J. Ch. 503.—**C.A.**

Golden v. Gillam (or Johnson, In re, Golden v. Gillam), referred to.
Maddever, In re, Three Towns Banking Co. v. Maddever (1883) 52 L. J. Ch. 733 ; 27 Ch. D. 523, 525.—**NORTH, J. See supra, col. 3181.**

Martyn v. M'Namara (1843) 4 Dr. & War. 411 ; 2 Con. & L. 541.—**SUGDEN, L.C., applied.**
Taylor v. Coenen (1876) 1 Ch. D. 636, 640 ; 34 L. T. 18.—**MALINS, v.-c.**

Crossley v. Elworthy (1871) 40 L. J. Ch. 480 ; L. R. 12 Eq. 158 ; 24 L. T. 607 ; 19 W. R. 842.—**MALINS, v.-c., applied.**
Mackay v. Douglas (1872) 41 L. J. Ch. 539 ; L. R. 14 Eq. 106, 119 ; 26 L. T. 721 ; 20 W. R. 652.
MALINS, v.-c.—In Crossley v. Elworthy the settlor got into difficulties nine months after making the settlement, and I thought, following the previous decisions, that the burden was thrown upon him of showing that he was not only solvent but in a situation to justify his making a voluntary settlement.—p. 541.

Crossley v. Elworthy, applied.
Taylor v. Coenen (1876) 1 Ch. D. 636, 640 ; 34 L. T. 18.—**MALINS, v.-c.**

Crossley v. Elworthy, not applied.
Russell, Ex parte, Butterworth, In re (1882) 51 L. J. Ch. 521 ; 19 Ch. D. 588, 594 (*post*) ; **Mercer, Ex parte, Wise, In re** (1886) 55 L. J. Q. B. 558 ; 17 Q. B. D. 290, 296 ; 54 L. T. 720.—**CAVE and GRANTHAM, JJ. ; affirmed, C.A.**

Taylor v. Coenen (1876) 1 Ch. D. 636 ; 34 L. T. 18.—**MALINS, v.-c.**
Distinguished, Russell, Ex parte, Butterworth, In re (1882) 51 L. J. Ch. 521 ; 19 Ch. D. 588, 595 ; 46 L. T. 113 ; 30 W. R. 584.—**BACON, v.-c. (reversed, C.A.) ; referred to, Mouatt, In re, Kingston Cotton Mill Co. v. Mouatt** (1899) 68 L. J. Ch. 390 ; [1899] 1 Ch. 831, 834 ; 80 L. T. 406 ; 47 W. R. 506.—**STIRLING, J.**

Simmons v. Simmons (1847) 6 Hare 352 ; 12 Jur. 8.—**WIGRAM, v.-c., discussed.**
Whitehead, Ex parte, Whitehead, In re (1884) 54 L. J. Q. B. 88 ; 14 Q. B. D. 419, 421 ; 52 L. T.

265; 33 W. R. 230.—CAVE, J.; reversed, (1885) 54 L. J. Q. B. 240; 14 Q. B. D. 419; 52 L. T. 597; 33 W. R. 471; 49 J. P. 405.—C.A.

Pratt v. Jackson (1725) 2 P. Wms. 302.—KING, L.C.; *reversed*, (1726) 1 Bro. P. C. 222.—H.L. (E.).

Pratt v. Jackson, applied.
Le Farrant v. Spencer (1748) 1 Ves. sen. 97.—L.C.

Pratt v. Jackson, distinguished.
Seton-Smith, In re, Burnand v. Waite (1902) 71 L. J. Ch. 386, 388; [1902] 1 Ch. 717, 721; 86 L. T. 322; 50 W. R. 456.—BUCKLEY, J.

Rigg, In re, Wadham v. Rigg (1862) 2 Dr. & Sm. 78; 8 Jur. (N.S.) 206; 6 L. T. 180; 10 W. R. 365.—KINDERSLEY, V.-C., *referred to*.

Williams v. Thomas (1862) 31 L. J. Ch. 674; 2 Dr. & Sm. 29; 8 Jur. (N.S.) 250; 7 L. T. 184; 10 W. R. 417.

KINDERSLEY, V.-C.—In *Wadham v. Rigg*, I held that 300*l.* secured upon a promissory note belonging to the wife, and laid out by the husband in the purchase and fitting up of a house, was subject to the trusts of a settlement agreed to be made, and that, therefore, the wife had a right either to have the money or a charge on the property purchased.—p. 675.

Calmady v. Calmady (1719) 11 Vin. Abr. 181. pl. 21.—L.C.

Followed, Jervoise v. Jervoise (1853) 23 L. J. Ch. 703; 17 Beav. 566; 2 W. R. 91.—M.R.; *referred to*, Hare v. Pryce (1864) 11 L. T. 101; 12 W. R. 1072.—KINDERSLEY, V.-C.

Eyre v. Green (1846) 2 Coll. 527; 10 Jur. 184.—KNIGHT BRUCE, V.-C., *referred to*.
Ker v. Ker (1869) Ir. R. 4 Eq. 15, 29.—C.A.

Heap v. Tonge (1851) 20 L. J. Ch. 661; 9 Hare 90.—TURNER, V.-C., *referred to*.
Massy v. Travers (1860) 10 Ir. C. L. R. 459, 469.—C.P.

Campbell v. Ingilby (1856) 25 L. J. Ch. 761; 21 Beav. 567; 2 Jur. (N.S.) 410; 4 W. R. 433.—M.R.; *affirmed on a different ground*, (1857) 26 L. J. Ch. 654; 1 De G. & J. 393; 2 Jur. (N.S.) 556; 5 W. R. 837.—L.JJ.

Campbell v. Ingilby, referred to.
Anderson v. Abbott (1857) 23 Beav. 457; 3 Jur. (N.S.) 833; 5 W. R. 381.—M.R.

Campbell v. Ingilby, discussed.
Brown v. Brown (1866) L. R. 2 Eq. 481, 484; 14 L. T. 694.—ROMILLY, M.R.

Campbell v. Ingilby, distinguished and not applied.
Kingston v. Booth (1870) Ir. R. 4 Eq. 589, 605.—CHATTERTON, V.-C. *And see* Codrington v. Lindsay (*post*) and "ELECTION," vol. i. col. 964.

Brown v. Brown (1866) L. R. 2 Eq. 481; 14 L. T. 694.—M.R., *referred to*.
Codrington v. Lindsay (1873) 42 L. J. Ch. 526, 528; L. R. 8 Ch. 578, 587; 28 L. T. 177; 21 W. R. 182.—C.A.; *affirmed*, (1875) 45 L. J. Ch. 660; L. R. 7 H. L. 854; 34 L. T. 221; 24 W. R. 648.—H.L. (E.).

O.C.

Todd v. Moorhouse (1874) L. R. 19 Eq. 69; 32 L. T. 8; 23 W. R. 155.—JESSEL, M.R., *discussed*.

Leslie, In re, Leslie v. French (1883) 52 L. J. Ch. 762; 23 Ch. D. 552, 561; 48 L. T. 564; 31 W. R. 561.—FRY, L.J.; *adopted by* PEARSON, J.

Foley v. Burnell (1873) P Bro. C. C. 274, 278.—L.C.; *affirmed*, (1785) 4 Bro. P. C. 319; Romilly's Notes of Cases, 1.—H.L. (E.), *practice followed*.

Conduitt v. Soane (1844) 33 L. J. Ch. 390; 1 Coll. C. C. 285.—V.-C. *And see ante*, col. 2110.

Foley v. Burnell and Conduitt v. Soane, followed.

Temple v. Thring (1887) 56 L. J. Ch. 767.—NORTH, J.

Ellis v. Maxwell (1849) 12 Beav. 104.—M.R., *referred to*.

Temple v. Thring (1887) 56 L. J. Ch. 767, 768.—NORTH, J.

Fane v. Fane (1876) 46 L. J. Ch. 174; 2 Ch. D. 711.—MALINS, V.-C., *distinguished*.
D'Eyncourt v. Gregory (1876) 45 L. J. Ch. 741; 3 Ch. D. 635; 25 W. R. 6.—JESSEL, M.R.

Pepper's Trusts, In re (1884) 13 L. R. Ir. 108.—CHATTERTON, V.-C., *principle applied*.
Tuffnell v. O'Donoghue (1896) [1897] 1 Ir. R. 360, 367.—CHATTERTON, V.-C.

Foss v. Foss (1864) 15 Ir. Ch. R. 215.—M.R., *followed*.

Tuffnell v. O'Donoghue (1896) [1897] 1 Ir. R. 360, 368.—CHATTERTON, V.-C.

Parkes v. Bott (1838) 8 L. J. Ch. 14; 9 Sim. 388.—V.-C., *distinguished*.
Domville v. Lamb (1853) 1 W. R. 246.—WOOD, V.-C.

Plunkett v. Mansfield (1845) 2 Jo. & Lat. 344.—SUGDEN, L.C., *not followed*.
Armstrong's Trusts, In re (1857) 26 L. J. Ch. 658; 3 K. & T. 486; 3 Jur. (N.S.) 612; 5 W. R. 699.—WOOD, V.-C.

Laprimaudaye v. Teissier (1849) 19 L. J. Ch. 16; 12 Beav. 206; 13 Jur. 1040.—M.R.; and **Davis v. Elmes** (1838) 1 Beav. 131.—M.R., *applied*.

Mittam's Settlement Trusts, In re (1858) 4 Jur. (N.S.) 1077.—WOOD, V.-C. *And see* Cogan v. Duffield (1876) 45 L. J. Ch. 307; 2 Ch. D. 44; 34 L. T. 593; 24 W. R. 905.—C.A.

Plumbe v. Neild (1860) 29 L. J. Ch. 618; 6 Jur. (N.S.) 529; 8 W. R. 337.—KINDERSLEY, V.-C., *referred to*.
Hollis v. Allan (1866) 12 Jur. (N.S.) 638; 14 W. R. 980.—KINDERSLEY, V.-C.

Plumbe v. Neild, commented on.
Dale v. Hayes (1871) 40 L. J. Ch. 244, 246; 24 L. T. 12; 19 W. R. 299.—STUART, V.-C. (*See* "APPORTIONMENT," vol. i. col. 45).

Plumbe v. Neild, Hollis v. Allan, Dale v. Hayes; and Nicholson v. Nicholson (1861) 30 L. J. Ch. 617; 9 W. R. 676.—KINDERSLEY, V.-C., *discussed*.
Bouch, In re, Sproule v. Bouch (1885) 29 Ch. D. 635, 658; 54 L. J. Ch. 665; 52 L. T. 366;

33 W. R. 621.—C.A.; reversed, H.L. (E.). See "COMPANY," vol. i. col. 527.

5. LIMITATIONS AND INTERESTS CREATED.

Northumberland (Earl) v. Egremont (Earl) (1759) 1 Eden 435.—L.K., *referred to*.
Simpson v. Frew (1856) 5 Ir. Ch. R. 517, 522.—L.C.; **Leader's Estate**, In re (1886) 17 L. R. Ir. 279.—C.A.; **NAISH**, L.C. dissenting; (affirmed) *nom. Leader v. Duffey*.—H.L. (IR.) *post*, col. 3186).

Brome v. Berkley (1728) 2 P. Wms. 484; 1 Eq. Cas. Abr. 340.—L.C. and M.R.; *affirmed*, 6 Bro. P. C. 108.—H.L. (E.), *discussed*.

King v. Withers (1735) Cas. t. Talb. 117, 123.—L.C. *affirmed*, H.L. (E.).

Brome v. Berkley, *commented on*.
Smyth v. Foley (1838) 7 L. J. Ex. Eq. 34; 3 Y. & C. 142.—ALDERSON, B.

Stratton v. Best (1787) 1 Ves. 285; 2 Bro. C. C. 233.—L.C., *followed*.

Mence v. Bagster (1850) 4 De G. & Sm. 162.—V.-C.

Stratton v. Best, *referred to*.
Kenworthy v. Ward (1853) 11 Hare 196, 203; 1 Eq. R. 339; 17 Jur. 1047; 1 W. R. 493.—V.C.; **Carpenter**, In re, **Carpenter v. Disney** (1884) 51 L. T. 773, 776.—KAY, J.

Bustard v. Saunders (1843) 7 Beav. 92; 7 Jur. 98.—M.R., *not followed*.

Newell v. Newell (1871) L. R. 12 Eq. 432, 436; 40 L. J. Ch. 640; 25 L. T. 21; 19 W. R. 1001.—MALINS, V.-C.; reversed, 41 L. J. Ch. 432; L. R. 7 Ch. 253; 26 L. T. 175; 20 W. R. 308.—L.C.

Bustard v. Saunders, *discussed*.
Seyton, In re, **Seyton v. Satterthwaite** (1887) 56 L. J. Ch. 775; 34 Ch. D. 511, 515; 56 L. T. 479; 35 W. R. 373.—NORTH, J.

Lysaght v. M'Grath (1882) 11 L. R. Ir. 142.—C.A., *referred to*.

Champ v. Champ (1892) 30 L. R. Ir. 72, 86.—Q.B.D.

Lysaght v. M'Grath, *considered*.
Bennett's Estate, In re (1898) 1 Ir. R. 185, 194.—KENNY, J.

Meyler v. Meyler (1883) 11 L. R. Ir. 522.—CHATTERTON, V.-C., *discussed*.
Champ v. Champ (1892) 30 L. R. Ir. 72, 86.—Q.B.D.

Meyler v. Meyler, *followed*.
Whiston's Estate, In re, **Lovatt v. Williamson** (1894) 63 L. J. Ch. 273; [1894] 1 Ch. 661; 8 R. 175; 70 L. T. 681; 42 W. R. 327.—CHITTY, J.

Meyler v. Meyler and Whiston's Estate, In re, **Lovatt v. Williamson**, *applied*.
Bennett's Estate, In re [1898] 1 Ir. R. 185, 195.—KENNY, J.

Meyler v. Meyler, *referred to*.
Fitzgerald v. Fitzgerald (1901) [1902] 1 Ir. R. 477, 483.—PORTER, M.R.; *affirmed*, C.A.

Muggeridge's Trusts, In re (1860) 29 L. J. Ch. 288; Johns. 625; 6 Jur. (N.S.) 192; 1 L. T. 436; 8 W. R. 234.—WOOD, V.-C.; and **Freeman v. Bowen** (1865) 35 Beav. 17.—M.R., *distinguished*.

Montefiore v. Enthoven (1867) 37 L. J. Ch. 43, 45; L. R. 5 Eq. 35, 41; 17 L. T. 114; 16 W. R. 33.—MALINS, V.-C. And see "CONDITION," vol. i. col. 637.

Allen v. Jackson (1875) 45 L. J. Ch. 310; 1 Ch. D. 399; 33 L. T. 713; 24 W. R. 306.—C.A.; *reversing* 44 L. J. Ch. 336; L. R. 19 Eq. 631; 32 L. T. 251; 23 W. R. 487.—HALL, V.-C., *discussed*.

Hatton v. May (1876) 3 Ch. D. 148; 24 W. R. 754.—MALINS, V.-C.

Massy v. Hayes (1867) Ir. R. 1 Eq. 110; 15 W. R. 375.—C.A.; *affirmed nom. Massy v. Rowen* (1869) L. R. 4 H. L. 288.—H.L. (IR.).

Massy v. Rowen, *commented on*.
Graham's Trusts, In re (1872) 20 W. R. 289.—MALINS, V.-C.

Massy v. Rowen, *referred to*.
Peacock's Trusts, In re (1879) 48 L. J. Ch. 265; 10 Ch. D. 490, 496; 39 L. T. 661; 27 W. R. 500.—MALINS, V.-C.

Leader's Estate, In re (1886) 17 L. R. Ir. 279.—C.A.; **NAISH**, L.C. dissenting; *affirmed nom. Leader v. Duffey* (1888) 58 L. J. P. C. 13; 13 App. Cas. 294; 59 L. T. 9.—H.L. (IR.).

Leader's Estate, In re, *referred to*.
Cobden v. Bagwell (1888) 19 L. R. Ir. 150, 173.—PORTER, M.R.

Leader v. Duffey, *observations applied*.
Hamlet, In re, **Stephen v. Cunningham** (1888) 58 L. J. Ch. 242; 39 Ch. D. 426, 435; 59 L. T. 745; 37 W. R. 245.—C.A.

Hewet v. Ireland (1718) 1 P. Wms. 426; Gilb. Eq. R. 145.—L.C., *referred to*.

Doe d. James v. Hallett (1813) 1 M. & S. 124; 14 R. R. 417.—K.B.; **Barnes v. Jennings** (1866) L. R. 2 Eq. 448, 451; 35 L. J. Ch. 675; 14 W. R. 831.—WOOD, V.-C.

Hewet v. Ireland, *discussed*.
Locke v. Dunlop (1887) 39 Ch. D. 387; 56 L. J. Ch. 697; 57 L. T. 157; 36 W. R. 41; *affirmed*, (1888) 57 L. J. Ch. 1010; 59 L. T. 683.—C.A.

STIRLING, J.—Provision there was made by deed for securing 600*l.* in trust that the wife should have the interest during her life, and afterwards that it should be paid to such daughter or daughters as should be begotten by the husband or the wife, such payments to be made at their age of eighteen or marriage. A daughter had been born at the date of the execution of the deed, and no daughter was born afterwards, and the question was whether that daughter took. There the doctrine as to *procreantis* and *procreandis* is cited, and although the words of themselves imported futurity, the Court came to the conclusion that another meaning was given to them, expressly to avoid caprice and unintelligible disposition.—p. 399.

Doe d. Tanner v. Dorrvell (1794) 5 Term Rep. 518; 2 R. R. 662.—K.B., *principle applied*.
Doe d. Foquett v. Worsley (1801) 1 East 416; 6 R. R. 303.—K.B.

LE BLANC, J.—*Doe v. Dorrvell* cannot be distinguished in principle from the words here used; for whatever the intent might have appeared to be, yet being the case of a deed, the distinction was expressly taken that cross-remainders could not be implied.—p. 431.

Doe d. Foquett v. Worsley.
Applied, **Doe d. Littledale v. Smeddle** (1818) 2 B. & Ald. 126; 20 R. R. 377.—K.B.; **Doe d. Clift v. Birkhead** (1849) 18 L. J. Ex. 441; 4 Ex. 110, 125.—EX.

Doe d. Littledale v. Smeddle, *followed*.
Wall v. Wright (1837) 1 Dr. & Wal. 1.—
PLUNKET, L.C.

Doe v. Smeddle and Wall v. Wright, *discussed and followed*.
Smith's Estate, In re (1891) 27 L. R. Ir. 121.
—MONROE, J.

Howard's Trusts, In re (1858) 7 Ir. Ch. R. 344.—OUSACK SMITH, M.R.

Not followed, Denis' Trusts, In re (1875) Ir. R. 10 Eq. 10 Eq. 81, 89.—M.R., *explained and distinguished*, Biron's Contract, In re (1878) 1 L. R. Ir. 258, 267.—C.A.; *referred to*, Haverty v. Curtis (1894) [1895] 1 Ir. R. 23, 38.—M.R.

Dixon's Trusts, In re (1869) Ir. R. 4 Eq. 1.—C.A.; *reversing* Ir. R. 3 Eq. 22.—V.-C.

Applied, Donohue v. Brooks (1875) Ir. R. 9 Eq. 489, 496.—SULLIVAN, M.R.; Denis' Trusts, In re (1875) Ir. R. 10 Eq. 81, 86.—M.R.; *referred to*, Foster v. Wybrants (1876) Ir. R. 11 Eq. 40, 45.—M.R.; *explained*, Biron's Contract, In re (1878) 1 L. R. Ir. 258, 269.—C.A.; *applied*, Harrison's Estate, In re (1879) 3 L. R. Ir. 114, 126.—C.A.; *referred to*, Hancock's Trusts, In re (1888) 23 L. R. Ir. 34, 41.—V.-C. (varied (1889).—C.A.); Champ v. Champ (1892) 30 L. R. Ir. 72, 83.—Q.B.D.; *observations dissented from*, Hobbs v. Tuthill (1894) [1895] 1 Ir. R. 115, 121.—PORTER, M.R.; *followed*, Harris v. Loftus [1899] 1 Ir. R. 491, 499.—CHATTERTON, V.-C.

Denis' Trusts, In re (1875) Ir. R. 10 Eq. 81.—SULLIVAN, M.R., *referred to*.
Foster v. Wybrants (1876) Ir. R. 11 Eq. 40, 45.—M.R.

Denis' Trusts, In re, not applied.
Haverty v. Curtis (1894) [1895] 2 Ir. R. 23, 38.—M.R.

Denis' Trusts, In re, commented on.
Biron's Contract, In re (1878) 1 L. R. Ir. 258, 269.—C.A. See judgment of DEASY, L.J.

Denis' Trusts, In re, not followed.
Donohue v. Brooks (1875) Ir. R. 9 Eq. 489.—SULLIVAN, M.R., *referred to*.
Hobbs v. Tuthill (1894) [1895] Ir. R. 115, 121.—PORTER, M.R.

Denis' Trusts, In re, followed.
Harris v. Loftus [1899] 1 Ir. R. 491, 499.—CHATTERTON, V.-C.

Williams v. Jekyl; Elliot v. Jekyl (1755) 2 Ves. sen. 681.—L.C., *discussed and applied*.
Campbell v. Sandys (1803) 1 Sch. & Lef. 281.—REDESDALE, L.C.

Campbell v. Sandys, discussed.
Dixon's Trusts, In re (1869) Ir. R. 4 Eq. 1.—C.A. O'HAGAN, L.C. and CHRISTIAN, J.A.

Campbell v. Sandys, discussed and applied.
Harrison's Estate, In re (1879) 3 L. R. Ir. 114, 126.—C.A.

Biron's Contract, In re (1878) 1 L. R. Ir. 258.—C.A., *explained and distinguished*.
Harrison's Estate, In re (1879) 3 L. R. Ir. 114, 127.—C.A.

Swift v. Swift (1836) 5 L. J. Ch. 376; 8 Sim. 168.—V.-C., *distinguished*.

Harrison v. Symons (1866) 14 W. R. 959.
WOOD, V.-C. said that the only case for restricting the word "issue" to children in a deed was that of *Swift v. Swift*. There it was

almost impossible to construe it otherwise; and the name articles were executory, which brought the case nearly to that of a will. This being a deed, he did not feel justified in cutting down the word "issue."—p. 959.

Swift v. Swift, followed.
Biron's Contract, In re (1878) 1 L. R. Ir. 258.—C.A. BALL, L.C., CHRISTIAN and DEASY, L.J.J.

Harrison v. Symons (*supra*), *referred to*.
Warren's Trusts, In re (1884) 53 L. J. Ch. 787; 26 Ch. D. 208, 218; 56 L. T. 454; 32 W. R. 641.—PEARSON, J.

Hodsell v. Bussell (1739) 9 Mod. 236; S. C. *nom.* **Hodgeson v. Bussey**, 2 Atk. 89; Barnardiston 195; cited as **Hodsel v. Bussy**, 2 Ves. sen. 652.—L.C., *discussed*.

Theebridge v. Kilburne (1750-1) 2 Ves. sen. 233.—L.C.; Garth v. Baldwin (1755) 2 Ves. sen. 646, 661.—L.C.

Hodgeson v. Bussey, distinguished.
Kinch v. Ward (1825) 2 Sim. & S. 409, 417.—V.-C.

Hodgeson v. Bussey, distinguished.
Williams v. Lewis (1859) 28 L. J. Ch. 505; 6 H. L. Cas. 1013, 1022; 5 Jur. (N.S.) 323; 7 W. R. 349.—H.L. (E.).

CHELMSFORD, L.C.—*Hodgeson v. Bussey* was the case of a settlement, which, although it was executed, yet being evidently a provision for the children, showed a plain intention that it should not vest in the wife absolutely; and the super-added words, such as "executors, administrators, and assigns," showed clearly that "heirs of the body," which were those used, were not meant as words of limitation.—p. 506.

Hodsel v. Bussy, referred to.
Jeaffreson's Trusts, In re (1866) 35 L. J. Ch. 622; 1 L. R. 2 Eq. 276, 281; 12 Jur. (N.S.) 660; 14 W. R. 759.—WOOD, V.-C.

Peacock v. Spooner (1688) 2 Vern. 43, 195.—L.C.C.; *reversing* JEFFERIES, L.C., *applied*.

Dafforne v. Goodman (or Bolt) (1699) 2 Vern. 362; Pre. Ch. 96; 2 Free. C. C. 228, 231.—L.C.

Peacock v. Spooner, distinguished.
Webb v. Webb (1710) 1 P. Wms. 132; 2 Vern. 668.—HARCOURT, L.C.

Peacock v. Spooner, commented on.
Theebridge v. Kilburne (1750-1) 2 Ves. sen. 233.—L.C.

Peacock v. Spooner, distinguished.
Webb v. Webb (*supra*), *approved*.
Garth v. Baldwin (1755) 2 Ves. sen. 646, 660.—L.C.

Peacock v. Spooner and Dafforne v. Goodman (or Bolt) (*supra*), *held overruled*.

Webb v. Webb, followed.
Bartlett v. Green (1842) 12 L. J. Ch. 148; 13 Sim. 218; 6 Jur. 1099.—V.-C. *And see* Tothill v. Pitt (1766) 1 Madd. 488, 510.—M.R.; affirmed *nom.* Chatham (Earl) v. Tothill (1771) 7 Bro. P. C. 453.—H.L. (E.).

Locke v. Southwood (1831) 1 Myl. & Cr. 411.—L.C.; *affirmed nom.* **Bush v. Locke** (1835) 3 Cl. & F. 721; 9 Bligh (N.S.) 1; 39 R. R. 115.—H.L. (E.), *considered*.

Mathew's Estate, In re, Neary, Ex parte (1856) 2 Ir. Jur. (N.S.) 47.—INCUMBERED ESTATES COURT.

- Hawes v. Hawes** (1880) 14 Ch. D. 614; 43 L. T. 280.—JESSEL, M.R., *applied*.
Featherstone's Trusts, *In re* (1882), 52 L. J. Ch. 75; 22 Ch. D. 111, 115; 47 L. T. 538; 31 W. R. 89.—KAY, J.
- Hames v. Hames** (1838) 7 L. J. Ch. 123; 2 Keen 646.—M.R.; and **Collier v. Squire** (1827) 3 Russ. 467; 5 L. J. (O.S.) Ch. 186; 27 R. R. 112.—M.R., *referred to*.
Mackenzie v. Mackenzie (1851) 21 L. J. Ch. 465; 3 Mac. & G. 559; 15 Jur. 1091.—TRURO, L.C.
- Hames v. Hames**, *applied*.
Johnson v. Routh (1857) 27 L. J. Ch. 305; 3 Jur. (N.S.) 1048; 6 W. R. 6.—KINDERSLEY, V.-C.
- Johnson v. Routh**, *approved*, but *distinguished*.
Harrington (Countess) v. Atherton (1864) 4 N. R. 206; 10 Jur. (N.S.) 760; 10 L. T. 555; 12 W. R. 847.—ROMILLY, M.R.
- Harrington (Countess) v. Atherton**; *reversed*, (1864) 2 De G. J. & S. 352; 10 Jur. (N.S.) 1088; 11 L. T. 291; 13 W. R. 62.—L.JJ.
- Wellman v. Bowring** (1822) 1 Sim. & S. 24.—V.-C.; *affirmed*, (1826) 2 Russ. 374; 1 L. J. (O.S.) Ch. 27.—L.C., *discussed*.
Wellman v. Bowring (1830) 3 Sim. 328.—SHADWELL, V.-C.
- Bulmer v. Jay** (1834) 3 Myl. & K. 197.—L.C.; *affirming with a variation* (1832) 4 Sim. 48.—V.-C., *disapproved*.
Daniel v. Dudley (1841) 1 Ph. 1, 7.—L.C.
- Bulmer v. Jay**, *considered*.
Allen v. Thorpe (1843) 13 L. J. Ch. 5; 7 Beav. 72.—M.R.; **Att.-Gen. v. Malkin** (1846) 2 Ph. 64; 10 Jur. 955.—L.C.
- Bulmer v. Jay**, *disapproved*.
Page v. Soper (1853) 11 Hare 321; 22 L. J. Ch. 1044; 1 Eq. R. 540; 1 W. R. 518.
WOOD, V.-C.—**Bulmer v. Jay** has, to say the least, been disapproved of by Lord Cottenham, who, in **Daniel v. Dudley** (*post*), says that **Bulmer v. Jay** "stands alone."—p. 323.
- Daniel v. Dudley** (1840) 11 Sim. 163.—V.-C.; *compromised on appeal*, (1841) 1 Ph. 1.—L.C., *applied*.
Allen v. Thorp (1843) 13 L. J. Ch. 5; 7 Beav. 72.—LANGDALE, M.R.
- Daniel v. Dudley**, *not applied*.
Johnson v. Johnson (1843) 13 L. J. Ch. 79; 3 Hare 157, 164; 8 Jur. 77.—V.-C.
- Daniel v. Dudley**, *discussed*.
Att.-Gen. v. Malkin (1846) 2 Ph. 64; 10 Jur. 955.—L.C.
- Daniel v. Dudley**, *applied*.
Long v. Watkinson (1852) 21 L. J. Ch. 844; 17 Beav. 471; 16 Jur. 235.—M.R.
- Daniel v. Dudley**, *referred to*.
Page v. Soper (*post*); **Clay**, *In re* (*post*).
- Allen v. Thorp**, (*supra*).
Applied, **Long v. Watkinson** (*supra*); *referred to*, **Clay**, *In re*, **Clay v. Clay** (1885) 54 L. J. Ch. 648; 52 L. T. 641.—C.A.
- Page v. Soper** (1853) 22 L. J. Ch. 1044; 11 Hare 321; 1 Eq. R. 540; 1 W. R. 518.—WOOD, V.-C., *referred to*.
Onslow, *In re*, **Plowden v. Gayford** (1888) 57 L. J. Ch. 940; 39 Ch. D. 622, 625; 59 L. T. 308; 36 W. R. 883.—STIRLING, J.
- Briggs v. Upton** (1872) 41 L. J. Ch. 519; L. R. 7 Ch. 376; 27 L. T. 62; 21 W. R. 20.—HATHERLEY, L.C.
- Referred to*, **Best's Settlement Trusts**, *In re* (*post*); *distinguished*, **Wing v. Wing** (1876) 34 L. T. 941; 24 W. R. 878.—JESSEL, M.R.
- Robinson v. Evans** (1873) 43 L. J. Ch. 82; 29 L. T. 715; 22 W. R. 199.—JESSEL, M.R.; and **Bailey v. Wright** (1811) 18 Ves. 49.—M.R.; *affirmed* (1818) Swaust. 39.—L.C., *discussed*.
Best's Settlement Trusts, *In re* (1874) 43 L. J. Ch. 545, 550; L. R. 18 Eq. 686, 691; 22 W. R. 599.—HALL, V.-C.
- Robinson v. Evans**, *referred to*.
Wing v. Wing (*supra*).
- Best's Settlement Trusts**, *In re*, *applied*.
Smith v. Bliffe (1875) L. R. 20 Eq. 666, 668; 44 L. J. Ch. 755; 33 L. T. 200; 23 W. R. 851.—BACON, V.-C.
- Topping v. Howard** (1851) 4 De G. & Sm. 268; S. C. *nom.* **Tipping v. Howard**, 15 Jur. 911.—V.-C., *commented on*.
Stockdale v. Nicholson (1867) 36 L. J. Ch. 793; L. R. 4 Eq. 359, 368; 16 L. T. 767; 15 W. R. 986.
- MALINS, V.-C.—*In Topping v. Howard* there were three constructions, every one of which led to the same conclusion. It became, therefore, unnecessary or unimportant to decide any of them, and nothing was decided at all. That case, therefore, is no authority for anything whatever, and I cannot understand why it was ever reported.—p. 797.
- Cotton v. Scarancke** (1815) 1 Madd. 45; 15 R. R. 208.—V.-C., *applied*.
Grieves v. Rawley (1852) 22 L. J. Ch. 625; 10 Hare 63.—TURNER, V.-C.
- Cotton v. Scarancke**, *not applied*.
Halton v. Foster (1878) L. R. 3 Ch. 505; 37 L. J. Ch. 547; 18 L. T. 623; 16 W. R. 683.—L.JJ.
- SELWYN, L.J.—*Cotton v. Scarancke* decided nothing more than the question whether the half-blood were excluded. It was recognised as an authority on that question in **Grieves v. Rawley** (*supra*), but I don't think that it has any application to the present case.—p. 507.
- Watt v. Watt** (1796) 3 Ves. 244.—L.C., *referred to*.
Anderson v. Dawson (1808-9) 15 Ves. 532.—M.R.; **Bailey v. Wright** (1811) 18 Ves. 49, 55.—M.R. (*supra*); **Coogan v. Hayden** (1879) 4 L. R. Ir. 585, 593.—EX. D.
- Smith v. Smith** (1841) 12 Sim. 317, 326.—SHADWELL, V.-C., *dictum dissented from*.
Saunders' Trust, *In re* (1857) 3 K. & J. 152.
WOOD, V.-C.—[The *dictum* was that "unmarried" would mean "without ever having been married."] It appears to have been a *dictum* of the moment, not material to the question under consideration, and I cannot but think that had the case been argued so as to raise the question, the judgment of the V.-C. would have been in accordance with the view taken by the L.JJ. in **Norman's Trust**, *In re* [22 L. J. Ch. 720; 3 De G. M. & G. 965. *See post*, col. 3193.]—p. 157.

Wheeler v. Addams (1853) 17 Beav. 417; 1 W. R. 473.—M.R.

Followed, **Downes v. Bullock** (1858) 25 Beav. 54, 63.—M.R. (affirmed nom. **Bullock v. Downes**, 9 H. L. Cas. 1.—H.L. (E.)); *discussed*, **Wharton v. Barker** (1858) 4 K. & J. 483, 497; 4 Jur. (N.S.) 553; 6 W. R. 534.—WOOD, V.-C.; *distinguished*, **Travis v. Taylor** (1866) 12 Jur. (N.S.) 791; 14 W. R. 909.—KINDERSLEY, V.-C.; *applied*, **Day v. Day** (1870) Ir. R. & Eq. 385; 18 W. R. 417.—M.R.; *considered*, **Mortimer v. Slater** (*post*).

Day v. Day, *applied*.

Mortimer v. Slater (*or* **Mortimore**) (1877) 7 Ch. D. 322; 47 L. J. Ch. 134; 37 L. T. 520; 26 W. R. 134.—C.A.; *affirmed nom.* **Mortimore v. Mortimore** (1878) 48 L. J. Ch. 470; 4 App. Cas. 448; 26 W. R. 575.—H.L. (E.).

THESIGER, L.J.—The first of these classes is the one where the word “then,” the adverb of time, is attached to the description of the class, and in that case, as in **Wharton v. Barker** (*supra*) and **Long v. Blackhall** (3 Ves. 486), it was decided that the word “then” imported that the class was to be ascertained at the time so pointed out, *i.e.*, at the period of distribution. **Wheeler v. Addams** (*supra*) is to a certain extent an exception from that rule, but I think that may be explained, because we find in that case there is in the limitation an exception of the tenant for life, on whose death the limitation was to come into force. This showed that the class must be ascertained at an earlier period than his death. . . . The third class of cases is where the word “then,” the adverb of time, is used, but where we find it used, not in connection with the description of the class, but in connection with the time at which the estate is to come into being. In that class of cases, also, without any exception, we find that it has been decided that the class is to be ascertained at the time of the testator's death. That is to be found in **Cable v. Cable** (16 Beav. 507), **Bullock v. Downes** (9 H. L. Cas. 1), and in **Day v. Day**; and it is to be observed that in all these cases we do not find that any distinction is drawn from the fact of the use of the words, “as if he had died intestate.”—pp. 329, 330.

Day v. Day, *discussed*.

Valentine v. Fitzsimons (1893) [1894] 1 Ir. R. 93.—PORTER, M.R.

Pinder v. Pinder (1860) 29 L. J. Ch. 527; 28 Beav. 41; 6 Jur. (N.S.) 489.—M.R., *referred to*. **Chalmers v. North** (1860) 28 Beav. 175; 6 Jur. (N.S.) 490; 8 W. R. 426.—M.R.

Pinder v. Pinder, *distinguished*.

Travis v. Taylor (1866) 12 Jur. (N.S.) 791; 14 W. R. 909.—KINDERSLEY, V.-C.; **Bradley, In re, Brown v. Cottrell** (*post*, col. 3192).

Pinder v. Pinder, *followed*.

King's Settlement, In re, Gibson v. Wright (*post*, col. 3192); **Clarke v. Hayne** (1889) 42 Ch. D. 529, 533 (*see post*, col. 3192); **Peirson's Settlement, In re, Cusley v. De Wenzl** (1903) 88 L. T. 794; 51 W. R. 519.—BYRNE, J.

Chalmers v. North (1860) 28 Beav. 175; 3 L. T. 340; 8 W. R. 426.—M.R., *disapproved*.

Druitt v. Seaward, Ainsworth, In re, Ainsworth v. Seaward (1885) 31 Ch. D. 234; 55 L. J. Ch. 239; 53 L. T. 954; 34 W. R. 180.

PEARSON, J.—I do not mean to say that

Chalmers v. North was not rightly decided; the words of the will there were different from those of the present will. But I cannot agree with the reasoning of Romilly, M.R.—p. 236.

Chalmers v. North, *commented on*.

Druitt v. Seaward, Ainsworth, In re, Ainsworth v. Seaward, *followed*.

Bradley, In re, Brown v. Cottrell (1888) 58 L. T. 631.—STIRLING, J.

Chalmers v. North and Druitt v. Seaward, *referred to*.

King's Settlement, In re, Gibson v. Wright (1889) 60 L. T. 745.—CHITTY, J.

Druitt v. Seaward and Bradley, In re, Brown v. Cottrell (*supra*), *not followed*.

Clarke v. Hayne (*or* **Beach, In re, Clarke v. Hayne**) (1889) 42 Ch. D. 529; 59 L. J. Ch. 195; 61 L. T. 161; 37 W. R. 667.

KAY, J.—In **Pinder v. Pinder** (*supra*, col. 3191) the trusts of a settlement were, for the husband for life, wife for life, children of the marriage, and if none, for the wife, if she survived, but if the husband survived, then, after his death, for the appointees of the wife, and in default, for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled to the personal estate of the wife in case she had survived her husband and had died possessed of the same intestate, and to be divided among them according to the statute. Lord Romilly held that the word “then,” if it stood alone, might be read “thereupon,” or “on that occasion,” but that the additional words, “in case she had survived her husband and had died possessed of the same intestate,” showed that the class intended to take were the persons who would have been her next of kin if she had died immediately after her husband. In . . . **Chalmers v. North**, where the words were the same, his lordship came to the same conclusion. On the other hand, in **Druitt v. Seaward**, where the words were, “In trust for such person or persons who, under or by virtue of the statutes made for the distribution of estates of intestates, would, on her decease, have been entitled thereto in case she having survived her husband and had then died possessed thereof and intestate,” the next of kin of the wife at her own death were held entitled, although she had died in the lifetime of her husband. This was followed in **Bradley, In re**, where the limitation in a settlement, after trusts for the wife during joint lives, then for the husband for life, were for the wife absolutely if she survived, but if she died in the husband's lifetime, in trust for her appointees, and in default “for the person or persons who, under or by virtue of the statutes,” &c., “would, on the decease of the” wife, “have been entitled thereto in case she had survived the” husband, “and had then died possessed thereof intestate,” &c. In the two last-mentioned cases the learned judges who decided them did not profess to adopt the grammatical construction of the words, but held that the object was simply to exclude the husband; and for this reason they considered the wife's next of kin at the actual time of her death were intended. With great respect, adopting that theory, I see no reason for arriving at such a conclusion.—p. 533.

Druitt v. Seaward; Bradley, In re; King's Settlement, In re, Gibson v. Wright

and *Beach*, *In re, Clarke v. Hayne* (*supra*), referred to.

Pekson's Settlement, *Cayley v. De Wend* (1903) 88 L. T. 794; 51 W. R. 519.—BYRNE, J.

Norman's Trust, *In re*, 22 L. J. Ch. 582; 1 Eq. R. 53; 1 W. R. 220.—KINDERSLEY, V.-C.: reversed, (1853) 22 L. J. Ch. 720; 3 De G. M. & G. 965; 17 Jur. 444.—L.JJ.

Norman's Trust, *In re*, applied.

Pratt v. Mathew (1856) 25 L. J. Ch. 409; 22 Beav. 328.—M.R.; affirmed, 25 L. J. Ch. 686; 8 De G. M. & G. 522; 2 Jur. (N.S.) 1058; 4 W. R. 772.—L.JJ.

BOMILLY, M.R.—The meaning to be attached to the word "unmarried" is controlled by the authorities, and, particularly by *Norman's Trust*, *In re*, which lays down a distinct and definite rule. The term "unmarried" bears a different meaning, according as it is applied to a person who is married or unmarried at the time. . . . No fixed meaning, therefore, can be assigned to the word; it must be determined according to circumstances.—p. 411.

Norman's Trust, *In re*, referred to.

Saunders' Trust, *In re* (1857) 3 K. & J. 152, 157.—WOOD, V.-C. See *supra*, col. 3190.

Norman's Trust, *In re*, and *Saunders' Trust*, *In re*, applied.

Mitchell v. Colls (1860) Johns. 674; 29 L. J. Ch. 403; 6 Jur. (N.S.) 292; 8 W. R. 208.—WOOD, V.-C.; affirmed (*post*).

Norman's Trust, *In re*, and *Saunders' Trust*, *In re*, referred to.

Clarke v. Colls (1861) 9 H. L. Cas. 601, 614.—H.L. (E.); LORD WENSLEYDALE dissenting.

Norman's Trust, *In re*, referred to.

Blake's Estate, *In re* (1871) 19 W. R. 765.—C.A. (IR.). O'HAGAN, L.C. and CHRISTIAN, L.J.

Norman's Trust, *In re*, discussed.

Harbuan v. Maffett (1884) 13 L. R. Ir. 499.—PORTER, M.R.

Maugham v. Vincent (1840) 9 L. J. Ch. 329; 4 Jur. 452.—L.C., applied.

Pratt v. Mathew (1856) 25 L. J. Ch. 409; 22 Beav. 328; 4 W. R. 18.—M.R.; affirmed, L.JJ. (*supra*).

Maugham v. Vincent, referred to.

Mitchell v. Colls (1859) Johns. 674; 29 L. J. Ch. 403; 6 Jur. (N.S.) 292; 8 W. R. 208.—WOOD, V.-C.; *Clarke v. Colls* (1861) 9 H. L. Cas. 601, 613.—H.L. (E.); LORD WENSLEYDALE dissenting.

Hardman v. Maffett (1884) 13 L. R. Ir. 499.

—PORTER, M.R., judgment confirmed.

Deane's Trusts, *In re, Dudley v. Deane* (1899) [1900] 1 Ir. R. 332.—PORTER, M.R.

Hardman v. Maffett, referred to.

Woodhouse's Trusts, *In re* (1902) [1903] 1 Ir. R. 126, 134.—PORTER, M.R.; *Brydone's Settlement*, *In re, Cobb v. Blackburne* (1903) 72 L. J. Ch. 528; [1903] 2 Ch. 84, 93; 88 L. T. 614; 51 W. R. 497.—C.A.

Mitchell v. Colls (1859) 29 L. J. Ch. 403; Johns. 674; 6 Jur. (N.S.) 292; 8 W. R. 208.—WOOD, V.-C.; affirmed *nom.* **Clarke v. Colls** (1861) 9 H. L. Cas. 601.—H.L. (E.).

Clarke v. Colls.

Discussed, *Sanders' Trusts*, *In re* (1866) L. R. 1 Eq. 673, 680; 12 Jur. (N.S.) 351; 14 W. R.

576.—WOOD, V.-C.; applied, *Emmins v. Bradford*, *Johnson v. Emmins* (1880) 49 L. J. Ch. 222; 13 Ch. D. 493, 496; 42 L. T. 45; 28 W. R. 531.—JESSEL, M.R.; referred to, *Hardman v. Maffett* (1884) 13 L. R. Ir. 499.—PORTER, M.R.; discussed, *Blundell v. De Falbe* (1888) 57 L. J. Ch. 576; 58 L. T. 621.—NORTH, J.; referred to, *Chant*, *In re, Chant v. Lemon* (1900) 69 L. J. Ch. 601, 603; [1900] 2 Ch. 345, 347; 83 L. T. 341; 48 W. R. 646.—COZENS-HARDY, J.; *Woodhouse's Trusts*, *In re* (1902) [1903] 1 Ir. R. 126, 134.—PORTER, M.R.; applied, *Smith's Settlement*, *In re, Wilkins v. Smith* (1902) 72 L. J. Ch. 184, 188; [1903] 1 Ch. 373, 380; 87 L. T. 740; 51 W. R. 217.—SWINFEN EADY, J.

Clarke v. Colls, discussed and applied.

Brydone's Settlement, *In re, Cobb v. Blackburne* [1903] 2 Ch. 84, 90; 72 L. J. Ch. 528, 530; 88 L. T. 614; 51 W. R. 497.—C.A.; reversing KEKEWICH, J.

V. WILLIAMS, L.J.—In my judgment, we must in this case give to the words "without having been married" their natural meaning. It has been argued that we ought not to do so, because when you are dealing with such an instrument as a marriage settlement there is a presumption that the parties intend to benefit the issue of the marriage, and that that presumption is so strong that it compels us to construe these words differently from their natural meaning—a presumption so strong that it binds us to construe "*nunquam nupta*" as if it were simply "*in nupta*." I cannot agree to that. It seems to me obvious that Lord Cranworth did not in *Clarke v. Colls* recognise the existence of any such powerful presumption. . . . But it is said that the presumption was recognised in *Wilson v. Atkinson* (*see post*, col. 3195). As a matter of fact there were in that case special circumstances which clearly justified the conclusion at which the Court arrived, without having recourse to any such presumption. But it is said that Knight Bruce and Turner, L.JJ., in their judgments recognised the existence of the presumption, because Turner, L.J. said that "even if it be necessary to construe the terms of the trust for the next-of-kin independently, and without qualifying them by the subsequent declaration, still in my judgment the trust for the next-of-kin ought not to be so construed as to exclude children," and that in either view the illegitimate child was entitled to the fund. Of course, if it could be shown that the C. A. did in *Wilson v. Atkinson* recognise that presumption, and did say that in all cases of construction of a marriage settlement, and especially in the construction of a clause for the ultimate distribution of the wife's property in favour of her next-of-kin as against her issue, whatever the words used might be, they ought not to be construed so as to exclude the issue of the marriage, we should be bound by that decision and must follow it. I do not forget that Chitty, J., in *Stoddart v. Savile* (*post*, col. 3196) considered that *Wilson v. Atkinson* had laid down such a general rule, and that it was decided by both the L.JJ. upon the basis of the supposed presumption. Notwithstanding that view of Chitty, J., which was certainly more or less shared by Fry, J., I do not think that we ought to regard *Wilson v. Atkinson* as having recognised that presumption.—pp. 90, 91.

ROMER, L.J.—Under the circumstances, I need not go through the authorities. They have been

dealt with, and, if I may say so, very well dealt with, by Swinfen Eady, J., in *Smith's Settlement, In re (supra, col. 3194)*. I agree that it is not easy to say exactly what *Wilson v. Atkinson* must be taken as having decided, except that the settlement was of a peculiar character, and that undoubtedly one of the grounds of the decision was the very peculiar circumstances of the case.—p. 95.

COZENS-HARDY, L.J.—*Clarke v. Colls* turned upon the construction of a clause similar to the present clause, except that the word used was "unmarried," and it was pointed out that the word "unmarried" was a word of dubious import, that it might mean either "spinster" or "widow," and that, taking it to include the latter, there was no reason why children who had not attained a vested interest should not take under the limitation to next-of-kin of the wife as if she had died unmarried. But Lord Cranworth, who with Lord Campbell formed the majority of the lords, expressly said that the result would have been different if the words had been those which are found in the present settlement. As to *Wilson v. Atkinson* . . . I need not say more than this, that the decision itself was plainly correct—indeed, I should have thought that the case was barely arguable. I agree with the view taken by Jessel, M.R., in *Emmins v. Bradford (post, col. 3196)*, that *Wilson v. Atkinson* did not lay down any general principle by which the Court would be bound in construing any other document. I adopt the judgment of Jessel, M.R., in *Emmins v. Bradford*, and the judgments of the Irish M.R. in the two cases which have been cited [*Hardman v. Maffett* and *Deane's Trusts, In re (supra, col. 3193)*], and also the very recent judgment of Swinfen Eady, J., in *Smith's Settlement, In re*. No doubt there might be a context which would force the Court to give a different meaning to these words, and such a context was found in *Wilson v. Atkinson*.—p. 96.

Wilson v. Atkinson. 33 Beav. 536.—M.R.; *reversed*, (1864) 33 L. J. Ch. 576; 4 De G. J. & S. 455; 4 N. R. 451, 11 L. T. 220.—L.JJ.

Wilson v. Atkinson.

Applied, *Ball's Trust, In re* (1879) 48 L. J. Ch. 279; 11 Ch. D. 270, 271.—FRY, J. (*post, col. 3196*); *Upton v. Brown* (1879) 48 L. J. Ch. 756; 12 Ch. D. 872, 873.—FRY, J. (*post, col. 3196*); *explained*, *Emmins v. Bradford, Johnson v. Emmins* (1880) 49 L. J. Ch. 222; 13 Ch. D. 493.—JESSEL, M.R. (*post, col. 3196*); *not applied and reports commented on*, *Hardman v. Maffett* (1884) 13 L. R. Ir. 499.—PORTER, M.R.; *distinguished*, *Watson's Trusts, In re* (1886) 55 L. T. 316.—CHITTY, J.; *applied*, *Arden's Settlement, In re, W. N.* (1890) 204.—STIRLING, J.; *Stoddart v. Savile* (1893) 63 L. J. Ch. 467; [1894] 1 Ch. 480.—CHITTY, J. (*post, col. 3196*); *distinguished*, *Deane's Trusts, In re, Dudley v. Deane* (1899) [1900] 1 Ir. 332.—PORTER, M.R.; *applied*, *Mare, In re, Mare v. Howey* (1902) 71 L. J. Ch. 649; [1902] 2 Ch. 112; 87 L. T. 41.—KEKEWICH, J.

Wilson v. Atkinson, discussed.

Woodhouse's Trusts, In re (1902) [1903] 1 Ir. R. 126.—PORTER, M.R.; *Smith's Settlement, In re, Wilkins v. Smith* (1902) 72 L. J. Ch. 184, 186; [1903] 1 Ch. 373, 376; 87 L. T. 740; 51 W. R. 217.—SWINFEN EADY, J.; *Brydone's*

Settlement, In re, Cobb v. Blackburne (1903) 72 L. J. Ch. 528, 530; [1903] 2 Ch. 84.—C.A. *See supra, col. 3194*.

Ball's Trust, In re (1879) 48 L. J. Ch. 279; 11 Ch. D. 270; 40 L. T. 880; 27 W. R. 409.—FRY, J., and *Upton v. Brown* (1879) 48 L. J. Ch. 756; 12 Ch. D. 872; 41 L. T. 340; 28 W. R. 38.—FRY, J.

Disapproved, *Emmins v. Bradford, Johnson v. Emmins* (1880) 49 L. J. Ch. 222; 13 Ch. D. 493.—JESSEL, M.R. (*post*); *discussed*, *Hardman v. Maffett* (1884) 13 L. R. Ir. 499.—PORTER, M.R.; *distinguished*, *Watson's Trusts, In re* (1886) 55 L. T. 316.—CHITTY, J.; *followed*, *Arden's Settlement, In re, W. N.* (1890) 204.—STIRLING, J.; *Stoddart v. Savile* (1893) 63 L. J. Ch. 467; [1894] 1 Ch. 480.—CHITTY, J. (*post*); *Forbes, In re, Errington v. Sempell, W. N.* (1899) 6.—ROMER, J.; *distinguished*, *Deane's Trusts, In re, Dudley v. Deane* (1899) [1900] 1 Ir. R. 332.—PORTER, M.R.

Ball's Trust, In re, and Upton v. Brown, not followed.

Smith's Settlement, In re, Wilkins v. Smith (1902) [1903] 1 Ch. 373; 72 L. J. Ch. 184, 187; 87 L. T. 740; 51 W. R. 217.

SWINFEN EADY, J.—In *Ball's Trust, In re*, the settlement contained no provision for the issue of the marriage. It was not, as in the present case, a gift in default of children-taking a vested interest. Again, in *Upton v. Brown*, where the claimant was the son of the former marriage, Fry, J. gave (*inter alia*) the following reasons for his judgment: "Moreover, if I were to hold that this child is excluded, I must equally have held that his children were excluded if he had married and had died under twenty-one leaving children, and I must equally have excluded children of a third marriage of the mother, for whom the settlement makes no express provision." This latter reason which seems to have influenced the learned Judge I am unable to appreciate, because there could have been no third marriage unless the mother survived her husband, in which case the fund became hers absolutely. Of course the second marriage might have been dissolved, leaving the wife at liberty to contract a third marriage, but the learned Judge was not, as I think, referring to this contingency.—p. 378.

Ball's Trust, In re, and Upton v. Brown, not followed.

Brydone's Settlement, In re, Cobb v. Blackburne (1903) 72 L. J. Ch. 528; [1903] 2 Ch. 84.—C.A. *See supra, col. 3194*.

Emmins v. Bradford, Johnson v. Emmins (1880) 49 L. J. Ch. 222; 13 Ch. D. 493; 42 L. T. 45; 28 W. R. 531.—JESSEL, M.R., *discussed*.

Hardman v. Maffett (1884) 13 L. R. Ir. 499.—PORTER, M.R.; *Watson's Trusts, In re* (1886) 55 L. T. 316.—CHITTY, J.

Emmins v. Bradford, not followed.

Arden's Settlement, In re, W. N. (1890) 204.—STIRLING, J.

Emmins v. Bradford, disapproved.

Arden's Settlement, In re, followed.

Stoddart v. Savile (or Saville) (1893) 63 L. J. Ch. 467; [1894] 1 Ch. 480; 8 R. 372; 70 L. T. 552; 42 W. R. 361.—CHITTY, J. *And see post, col. 3197: =*

Stoddart v. Savile (or Saville) and **Arden's Settlement, In re** (*supra*), *followed*.
Forbes, In re, Errington v. Sempell, W. N. (1899) 6.—**ROMER, J.**

Emmins v. Bradford (*supra*, col. 3196), **Arden's Settlement, In re, Stoddart v. Saville, and Forbes, In re, Errington v. Sempell, discussed and distinguished.
Deane's Trusts, Dudley v. Deane, In re (1899) [1900] 1 Ir. R. 332.—**PORTER, M.R.****

**Stoddart v. Saville, Emmins v. Bradford and Deane's Trusts, In re, Dudley v. Deane, referred to.
Mare, In re, Mare v. Howey (1902) 71 L. J. Ch. 649; [1902] 2 Ch. 112, 116; 87 L. T. 41.—**KEKEWICH, J.****

**Deane's Trusts, In re, referred to.
Woodhouse's Trusts, In re (1902) [1903] 1 Ir. R. 126.—**PORTER, M.R.****

**Emmins v. Bradford, followed.
**Deane's Trusts, In re, referred to.
Stoddart v. Saville and Mare, In re, Mare v. Howey (*supra*), *not followed*.****

Smith's Settlement, In re, Wilkins v. Smith (1902) [1903] 1 Ch. 373; 72 L. J. Ch. 184; 87 L. T. 740; 51 W. R. 217.

SWINFEN KADY, J.—In *Emmins v. Bradford*, **Jessel, M.R.** said: "In the present case I rest my decision upon this, that the words are free from ambiguity, and that there is no context whatever to control them." *Emmins v. Bradford* was a very strong decision, because the effect of it was to exclude living children of a former marriage; . . . Now, *Emmins v. Bradford* has been twice followed in Ireland in the cases referred to [*Hardman v. Muffett* (*supra*, col. 3193), *Deane's Trusts, In re*]; but in the English case of *Stoddart v. Saville*, **Chitty, J.** followed **Fry, J.** [*Bull's Trust, In re*, and *Upton v. Brown* (*supra*, col. 3196)]. It will be observed that in *Stoddart v. Saville* there was no trust for the issue of the marriage. The lady had left one child of the marriage, and the trust was not, as in the present case, a trust in default of a child attaining a vested interest. In addition to the cases in the Weekly Notes [*Arden's Settlement, In re* (*supra*, col. 3196), and *Forbes, In re* (*supra*)], to which reference has been made, there is the case of *Mare, In re*, in which **Kekewich, J.** considered himself bound by *Wilson v. Atkinson* (*supra*, col. 3195) as governing the whole question, and said it was a clear decision of the C. A. covering the exact case. The authorities, therefore, are certainly conflicting.—p. 379.

Emmins v. Bradford, Deane's Trusts, In re, and Smith's Settlement, In re, Wilkins v. Smith, adopted.

Stoddart v. Saville and Mare, In re, not adopted.

Brydone's Settlement, In re, Cobb v. Blackourne (1903) 72 L. J. Ch. 528; [1903] 2 Ch. 84.—**C.A.** See *supra*, col. 3194.

Green v. Paterson (1886) 56 L. J. Ch. 181; 32 Ch. D. 95; 54 L. T. 738; 34 W. R. 424.—**C.A.** *referred to*.

Harris v. Tubb (1889) 58 L. J. Ch. 434; 42 Ch. D. 79, 82; 60 L. T. 699; 38 W. R. 75.—**KEKEWICH, J.** And see "COPYHOLDS" vol. i. col. 684.

Webber's Settlement, In re (1850) 19 L. J. Ch. 445; 17 Sim. 221.—**V.-C.**, *considered*.
Kidd v. Frasier (1851) 1 Ir. Ch. R. 118.—**L.C.**

Howard v. Harris (1683) 1 Vern. 190; 2 W. & T. 7th ed. p. 11.—**L.K.**, *referred to*.
Rice v. Noakes (1900) 69 L. J. Ch. 635; [1900] 2 Ch. 445, 452.—**C.A.** (*ante*, col. 1851).

Palmer's Settlement Trusts, In re (1875) 44 L. J. Ch. 247; L. R. 19 Eq. 320; 32 L. T. 9.—**MALINS, V.-C.**, *referred to*.
Cross v. Maltby (1875) L. R. 20 Eq. 378, 382; 33 L. T. 300; 23 W. R. 863.—**MALINS, V.-C.**

Snell v. Silcock (1800) 5 Ves. 469.—**L.C.**, *considered*.

Lucas v. Brandreth (*post*), **Holliday v. Overton** (1852) 21 L. J. Ch. 769; 14 Beav. 467; 15 Beav. 480; 16 Jur. 346.—**M.R.**; affirmed, 16 Jur. 751.—**L.JJ.**

Followed, **Lucas v. Brandreth** (No. 2) (1860) 28 Beav. 274; 6 Jur. (N.S.) 945; 2 L. T. 785.—**M.R.**; *discussed*, **Osborn v. Bellman** (1860) 2 Giff. 593; 6 Jur. (N.S.) 1325; 3 L. T. 263; 9 W. R. 11.—**STUART, V.-C.**

Holliday v. Overton and Lucas v. Brandreth (*supra*), *referred to*.
Tatham v. Vernon (1861) 29 Beav. 605; 7 Jur. (N.S.) 814; 4 L. T. 531; 9 W. R. 822.—**M.R.**

Holliday v. Overton, Lucas v. Brandreth, Tatham v. Vernon, and Middleton v. Barker (1873) 29 L. T. 643; W. N. (1873) 231.—**BACON, V.-C.**, *applied*.

Meyler v. Meyler (1883) 11 L. R. Ir. 522, 530.—**V.-C.**; **Whiston's Estate, In re, Lovatt v. Williamson** (1894) 63 L. J. Ch. 273; [1894] 1 Ch. 661, 664 (*ante*, col. 3185); **Hudson, In re, Kühne v. Hudson** (1895) 13 R. 546, 550; 72 L. T. 82.—**NORTH, J.** (see *post*, col. 3199); **Bennett's Estate, In re** [1898] 1 Ir. R. 185, 195.—**KENNY, J.**

Wright to Marshall, In re (1884) 54 L. J. Ch. 60; 28 Ch. D. 92; 51 L. T. 781; 33 W. R. 80.—**PEARSON, J.**

Referred to, **Du Cane v. Nettlefold's Contract, In re** (1898) 67 L. J. Ch. 393; [1898] 2 Ch. 96, 105; 78 L. T. 458; 46 W. R. 523.—**STIRLING, J.**; *followed*, **Cornwallis West and Munro's Contract, In re** (1903) 72 L. J. Ch. 499; [1903] 2 Ch. 150, 155; 88 L. T. 351; 51 W. R. 602.—**FARWELL, J.**

Tunstall v. Trappes, Tunstall's Case (1829) 3 Sim. 312.—**V.-C.**

Referred to, **Allin v. Crawshaw** (1851) 21 L. J. Ch. 873; 9 Hare 382.—**TURNER, V.-C.**; *distinguished*, **Mara v. Browne** (1895) 64 L. J. Ch. 594; [1895] 2 Ch. 69, 81; 72 L. T. 765.—**NORTH, J.** (reversed, 65 L. J. Ch. 225; [1896] 1 Ch. 199; 73 L. T. 638; 44 W. R. 330.—**C.A.**).

Anderson v. Dawson (1808) 15 Ves. 532.—**M.R.** *Distinguished*, **Godsal v. Webb** (1838) 7 L. J. Ch. 103; 2 Keen 99.—**M.R.**; *applied*, **Davenport, In re, Turner v. King** (1895) 64 L. J. Ch. 252; [1895] 1 Ch. 361, 364; 13 R. 167; 71 L. T. 875; 43 W. R. 217.—**KEKEWICH, J.**

Garde v. Garde (1843) 3 Dr. & War. 435; 2 Con. & L. 175.—**SOUTHEN, L.C.**, *considered*.
Lucas v. Brandreth (No. 2) (1860) 28 Beav. 274; 6 Jur. (N.S.) 945; 2 L. T. 785.—**M.R.**

Garde v. Garde, referred to.
Hudson, In re, Kühne v. Hudson (1895) 13 R. 546; 72 L. T. 892.

NORTH, J.—Now a great many exceptions to

the general rule of law are given in *Elphinstone*, *Norton* and *Clark* on Interpretation of Deeds, but the only one referred to is, that "a fee may be limited by words of reference," for which *Co. Litt.* 9 C., and *Garde v. Garde* are cited as authorities. Lord Coke puts the case very shortly, and does not give the words of reference. *Garde v. Garde*, however, affords a good illustration of how words of reference supply the want of clear words of limitation; but can we find such words of reference in the present case? There are words of description—"the share and interest to which the said E. H. Hudson is entitled, &c."—but what is there to show for what interest it is conveyed? . . . "Share and interest" is a mere description of the parcels conveyed. There is nothing to indicate heirs, and nothing to incorporate the word from any other instrument, and the Court must deal with the words it finds, although the result is to disappoint the intention of the parties: *Holliday v. Overton*, *Lucas v. Brundreth*, *Tatham v. Vernon*, *Middleton v. Barker*. [See *supra*, col. 3198].—pp. 549, 550.

Fisher v. Wigg (1700) 1 P. Wms. 14.—K.B. *HOLT, C.J. dissenting, followed.*
Morgan v. Morgan (1870) 39 L. J. Ch. 493; L. R. 10 Eq. 99, 103; 22 L. T. 595; 18 W. R. 744.—ROMILLY, M.R.

Fisher v. Wigg, explained.
Arthur v. Walker (1896) [1897] 1 Ir. R. 68.—PORTER, M.R.

Idle v. Cooke (1705) 1 P. Wms. 70; 2 Ld. Raym. 1144; Salk. 620.—K.B.
Applied, *Doc d. Littledale v. Smeddle* (1818) 2 B. & Ald. 126; 20 R. R. 377.—K.B.; *referred to*, *Morgan v. Morgan* (1870) L. R. 10 Eq. 99, 103 (*post*); *applied*, *Olivant v. Wright* (1878) 9 Ch. D. 646, 651 (*post*); *discussed*, *Arthur v. Walker* (1896) [1897] 1 Ir. R. 68.—PORTER, M.R.

Morgan v. Morgan (1870) 39 L. J. Ch. 493; L. R. 10 Eq. 99; 22 L. T. 595; 18 W. R. 744.—ROMILLY, M.R.; *followed.*
Mills v. Capel (1875) 44 L. J. Ch. 674; L. R. 20 Eq. 492, 697; 33 L. T. 158.—HALL, V.-C.

Morgan v. Morgan, distinguished.
Olivant v. Wright (1878) 9 Ch. D. 646; 47 L. J. Ch. 664; 38 L. T. 677.

BACON, V.-C.—The only difficulty I have among all the cases which have been cited, is that presented by *Morgan v. Morgan*. But at the same time I cannot disregard *Idle v. Cook* (*supra*), where the decision plainly was, that, there being a gift to the husband and wife for their lives and afterwards to their issue, and a gift over in default of such issue, that had not the effect of cutting down the absolute unqualified fee simple which was given by the previous trust contained in the surrender. I do not find that that case engaged the attention of Lord Romilly in *Morgan v. Morgan*. The only observation I can find in it is "notwithstanding *Idle v. Cook*." That, in my opinion, can be answered and disposed of by recollecting that the words are different, that the words in this case are "without leaving issue," and in *Morgan v. Morgan* they were "without issue."—p. 651.

Morgan v. Morgan, followed.
Olivant v. Wright, discussed.
Arthur v. Walker (1896) [1897] 1 Ir. R. 68.
 PORTER, M.R.—The words "without leaving

issue" led the learned judge [in *Olivant v. Wright*] to hold that the parties meant to create a fee simple, determinable in one event, i.e., of there being no issue living at the death of the tenant for life, an intention which would have been inconsistent with an estate tail. He does not purport to overrule *Morgan v. Morgan*. The rule on the subject is stated by Sir H. Elphinstone in his work on Deeds at p. 248, Rules 84, 85.—p. 83.

Hayter v. Rod (1817) 1 P. Wms. 360.—L.C., *referred to.*
Lawton v. Ford (1866) L. R. 2 Eq. 97, 105; 14 L. T. 320; 14 W. R. 575.—STUART, V.-C.

Greene v. Stoney (1849) 13 Ir. Eq. R. 301.—BRADY, L.C., *distinguished.*
Marshall's Estate, In re (1898) [1899] 1 Ir. R. 96, 102.—ROSS, J.

Phipps v. Ennismore (1829) 4 Russ. 131; 28 R. R. 27.—*distinguished.*
Knight v. Browne (1861) 30 L. J. Ch. 649; 7 Jur. (N.S.) 894; 4 L. T. 206; 9 W. R. 515.—WOOD, V.-C.

Phipps v. Ennismore, discussed and applied.
Browne's Estate, In re (1862) 13 Ir. Ch. R. 283.—C.A.; BRADY, L.C. dissenting.

Barham v. Clarendon (Earl) (1852) 10 Hare 126; 17 Jur. 336; 1 W. R. 96.—TURNER, V.-C.; and **Massy v. Travers** (1860) 10 Ir. C. L. R. 459.—C.P., *principle applied.*
Browne's Estate, In re (1862) 13 Ir. Ch. R. 283.—C.A.; BRADY, L.C. dissenting.

Brooke v. Pearson (1859) 27 Beav. 181; 5 Jur. (N.S.) 781; 7 W. R. 638.—M.R.
Applied, *Knight v. Browne* (*post*); *Detmold*, In re, *Detmold v. Detmold* (*post*); *referred to*, *Macintosh v. Pogose* (*post*).

Knight v. Browne (1861) 30 L. J. Ch. 649; 7 Jur. (N.S.) 894; 4 L. T. 206; 9 W. R. 515.—WOOD, V.-C.

Not applied, *Stephens*, Ex parte, *Pearson*, In re (1876) 3 Ch. D. 807, 810; 35 L. T. 68; 25 W. R. 126.—BACON, C.J.; *principle applied*, *Detmold*, In re, *Detmold v. Detmold* (1889) 58 L. J. Ch. 495; 40 Ch. D. 585, 588 (*post*); *referred to*, *Macintosh v. Pogose* (*post*).

Detmold, In re, **Detmold v. Detmold** (1889) 58 L. J. Ch. 495; 40 Ch. D. 585; 61 L. T. 21; 37 W. R. 442.—NORTH, J., *approved.*
Macintosh (or Mackintosh) v. Pogose (1895) 64 L. J. Ch. 274; [1895] 1 Ch. 505, 513; 13 R. 254; 72 L. T. 251; 43 W. R. 247; 2 Manson 27.—STIRLING, J.

Detmold, In re, *discussed and applied.*
Tetley, In re, *Jeffrey*, Ex parte (1896) 66 L. J. Q. B. 111; 75 L. T. 166; 3 Manson 226; *affirmed*, 3 Manson 321.—C.A.

V. WILLIAMS, J.—Now, in form, the trust in the present case giving the husband the life estate with a gift over in case of alienation, is, in a settlement for valuable consideration, unobjectionable—see *Detmold v. Detmold*. Counsel for the trustee in bankruptcy spoke of it as the so-called authority of *Detmold v. Detmold*. I do not know why he said that. It is a decision of North, J., and he seems to have dealt with the

very point; and I observe that in *Macintosh v. Pogose* (*supra*), which is the latest authority upon the subject, Stirling, J. refers to *Detmold v. Detmold* as a binding authority stating the law. *Detmold v. Detmold* decides that a settlement for valuable consideration in that form is unobjectionable. At all events, effect was given to the settlement notwithstanding the fact that subsequently to the alienation which divested the husband's estate the husband was made bankrupt. But it would seem that a clause giving a settlor a life interest until bankruptcy is void against creditors. The decision of Stirling, J., in *Macintosh v. Pogose* is an authority for this proposition. I gather from his judgment that it was an open question down to that decision, although Lord Cairns, in the H. L. had prior to that expressed an opinion that even in a settlement for valuable consideration such a proviso for determination of the settlor's estate would be void. I have not to decide that.—p. 114.

Detmold, In re, distinguished.

Holland, In re, *Gregg v. Holland* (1901) 70 L. J. Ch. 625, 631; [1901] 2 Ch. 145, 159; 49 W. R. 476.—*FARWELL, J.*; reversed, (1902) 71 L. J. Ch. 518; [1902] 2 Ch. 360; 86 L. T. 542; 50 W. R. 575; 9 *Mansons* 259.—C.A.

Milner v. Milner (1865) 34 Beav. 276.—*ROMILEY, M.R., applied.*

Heathcote's Trusts, In re (1873) L. R. 9 Ch. 48. n.—*MALINS, V.-C.*; reversed, (1873) 43 L. J. Ch. 259; L. R. 9 Ch. 45; 29 L. T. 445; 22 W. R. 42.—*L.J.J.*; latter decision reversed nom. *Ingram v. Soutten* (1874) 44 L. J. Ch. 55; L. R. 7 H. L. 408; 31 L. T. 215; 23 W. R. 363.—*H.L. (Ex.).*

Butler's Trusts, In re, Hughes v. Anderson (1888) 57 L. J. Ch. 643; 38 Ch. D. 286; 59 L. T. 386; 36 W. R. 817.—C.A., *referred to.*

Palmer v. Rich (1896) 66 L. J. Ch. 69; [1897] 1 Ch. 134, 140; 75 L. T. 484; 45 W. R. 205.—*STIRLING, J.*; *Hoban, In re, Lonergan v. Hoban* (1895) [1896] 1 Ir. R. 401.—*PORTER, M.R.*

Colleton v. Garth (1833) 2 L. J. Ch. 75; 6 Sim. 19; 38 R. R. 70.—*V.-C.*; and *Slatter v. Slatter* (1834) 1 Y. & C. 28.—C.B., *not applied.*

Gurly v. Gurly (1840) 2 Dr. & Wal. 463.—*PLUNKET, L.C.*; affirmed, (1842) 8 Cl. & F. 743.—*H.L. (IR.)*; *Burgess' Trusts, In re (post).*

Colleton v. Garth.

Applied, Thompson v. Watts (post); discussed, Coyne v. Durgan (post, col. 3202).

Gurly v. Gurly, discussed and applied.

Burgess' Trusts, In re (1860) 11 Ir. Ch. R. 164.—*BRADY, L.C.*

Gurly v. Gurly, discussed and applied.

Thompson v. Watts (1862) 31 L. J. Ch. 445; 2 J. & H. 291; 8 Jur. (N.S.) 760; 6 L. T. 817; 10 W. R. 485.

WOOD, V.-C.—In *Gurly v. Gurly* it was held that the words "in lieu, bar and satisfaction of any dower or thirds, which she could or might claim at common law out of all or any of the estates real, personal or freehold," of her husband barred the wife's claim under the Statute of Distributions, notwithstanding the addition of the words "at common law," the L.C. observing, that those words must mean the general

law of the land, whether by statute or custom. Now the expression has only occurred once, without the addition of the words "real or personal estate." That is *Colleton v. Garth (supra)*; but there the V.-C. does not give his decision at all upon the fact of personal estate not being mentioned. He says, that it is dower and dower alone that is in question; and looking to that settlement, there can be no doubt about it. An annuity was given charged upon land; it was called a jointure, and it was given as jointure, and in bar of "dower and thirds at common law." Though the annuity was not in law a jointure, still that was the term the settlor used and the sense he intended it to have, and a jointure would have deprived the widow of her dower or thirds at common law, and he was looking to real estate only. The case I have here is a case of provision out of real and personal estate.—p. 447.

Gurly v. Gurly and Burgess' Trusts, In re

(1860) 11 Ir. Ch. R. 164.—*L.C., referred to.*
O'Brien v. Hearn (1870) Ir. R. 4 Eq. 103; 18 W. R. 514.—*SULLIVAN, M.R.*; affirmed, 18 W. R. 1014.—*L.C. and L.J.*

Gurly v. Gurly, discussed.

Burgess' Trusts, In re, followed.

Coyne v. Duigan (1893) [1894] 1 Ir. R. 138, 143.—*PORTER, M.R.*

Gurly v. Gurly, referred to.

Naismith v. Boyes [1899] A. C. 495, 503; 1 *Fraser H. L.* 79.—*H.L. (SC.).*

Thompson v. Watts (1862) 31 L. J. Ch. 445;

2 J. & H. 291, 300; 8 Jur. (N.S.) 760; 6 L. T. 817; 10 W. R. 485.—*WOOD, V.-C., referred to.*

O'Brien v. Hearn (1870) Ir. R. 4 Eq. 103; 18 W. R. 514.—*M.R.*; affirmed, 18 W. R. 1014.—*L.C. and L.J.*

Thompson v. Watts, exposition of law approved and adopted.

Sambourne v. Barry (1871) Ir. R. 6 Eq. 28.—*SULLIVAN, M.R.*

Thompson v. Watts and Sambourne v. Barry, discussed.

Coyne v. Duigan (1893) [1894] 1 Ir. R. 138.—*PORTER, M.R.*

Ward v. Dyas (1835) Ll. & G. t. Sugl. 177.—*L.C.*

Applied, Denehy v. Delany (1876) Ir. R. 10 Eq. 377.—*M.R.*; *not applied, Champ v. Champ* (1892) 30 L. R. Ir. 72, 86.—*Q.B.D.*

Langham v. Nenny (1797) 3 Ves. 467.—*M.R., applied.*

Fleet v. Perrins (1869) 38 L. J. Q. B. 257; L. R. 4 Q. B. 500, 508; 9 B. & S. 575; 20 L. T. 814; 17 W. R. 862.—*EX. CH.*

Youde v. Jones (1844) 14 L. J. Ex. 70; 13

M. & W. 534.—*EX., approved.*
Youde v. Jones (1844) 14 Sim. 131; 8 Jur. 547.—*SHADWELL, V.-C.*

Tucker v. Loveridge (1858) 27 L. J. Ch. 731;

2 De G. & J. 650; 4 Jur. (N.S.) 939; 6 W. R. 786.—*L.J.J.*; *affirming* 1 Giff. 377.—*STUART, V.-C., discussed.*
Somerscot (Duke), In re, Thynne v. St. Maur (1886) 55 L. T. 753, 756.—*CHITTY, J.*

Hales v. Cox (1863) 32 Beav. 118; 1 N. R. 344; 8 L. T. 134; 11 W. R. 331.—M.R., *distinguished*.

Ker v. Ker (1869) Ir. R. 4 Eq. 15, 22.—C.A.; reversing Ir. R. 3 Eq. 489.—M.R.

Hales v. Cox, *discussed*.

Walhampton Estate, In re (1884) 26 Ch. D. 391; 53 L. J. Ch. 1000; 51 L. T. 280; 32 W. R. 874.

KAY, J.—In *Dolphin v. Aylward* (L. R. 4 H. L. 486) Lord Hatherley affirmed the well-established doctrine that the settlor can in no wise invalidate such a deed, except by a subsequent disposition by himself for value, and to the extent of that disposition, and in *Hales v. Cox* that doctrine was carried so far that it was held that persons claiming under such a settlement had a right to marshal the mortgagees under a subsequent mortgage which included other property.—p. 396.

Hales v. Cox, *referred to*.

Ker v. Ker (*supra*), *discussed*.

Jones, In re, Farrington v. Forrester (1893) 62 L. J. Ch. 996; [1893] 2 Ch. 461, 473; 3 R. 498; 69 L. T. 45.—NORTH, J.

Hales v. Cox.

Applied, Mallott v. Wilson (1903) 72 L. J. Ch. 664; [1903] 2 Ch. 494; 89 L. T. 522.—BYRNE, J.; *not applied*, McCarthy v. McCartie (1903) [1904] 1 Ir. R. 100, 117.—C.A.

6. EXECUTED SETTLEMENTS, HOW ENFORCED.

Wycherley v. Wycherley (1763) 2 Eden 175, 177.—L.C., *referred to*.

Hoblyn v. Hoblyn (1889) 41 Ch. D. 200, 206; 60 L. T. 499; 38 W. R. 12.—KAY, J.

Leach v. Dean (or Dene) (1640) 1 Ch. R. 78; L. R. 1 Ch. 461 n.—L.C.

Referred to, Pulvertoft v. Pulvertoft (1811) 18 Ves. 84, 91; 11 R. R. 151.—L.C.; *disapproved*, Townend v. Toker (1866) 35 L. J. Ch. 608; L. R. 1 Ch. 446, 461; 12 Jur. (N.S.) 477; 14 L. T. 531; 14 W. R. 806.—L.JJ.

Antrobus v. Smith (1805) 12 Ves. 39; 8 R. R. 278.—M.R.

Referred to, Colleen v. Missing (1815) 1 Madd. 176.—V.C.; *approved and principle applied*, Dillon v. Coppin (1839) 9 L. J. Ch. 87; 4 Myl. & Cr. 617, 671; 4 Jur. 427.—L.C.; *distinguished*, Blakeley v. Brady (1839) 2 Dr. & Wal. 311, 317. L.C.

Antrobus v. Smith, *applied*.

M'Fadden v. Jenkyns (1842) 11 L. J. Ch. 281; 1 Hare 459, 461; 6 Jur. 501.—WIGRAM, V.C.; affirmed, 12 L. J. Ch. 146; 1 Ph. 153; 7 Jur. 27.—L.C.

Antrobus v. Smith.

Discussed, Bridge v. Bridge (1852) 22 L. J. Ch. 189; 16 Beav. 315, 323; 15 Jur. 1031; 1 W. R. 4.—M.R.; *distinguished*, Airey v. Hall (1856) 3 Sm. & G. 315, 322; 2 Jur. (N.S.) 658; 4 W. R. 587.—V.C.

Antrobus v. Smith, *principle not applied*.

Parnell v. Hingston (1856) 3 Sm. & G. 337, 345; 2 Jur. (N.S.) 854; 5 W. R. 794.—WOOD, V.C.

Antrobus v. Smith, *referred to*.

Pearson v. Amicable Insurance Office (1859) 27 Beav. 229, 234.—M.R.; Moore v. Moore (1874) 43 L. J. Ch. 647; L. R. 18 Eq. 474, 483; 30 L. T. 752; 22 W. R. 729.—HALL, V.C.; Shield, In re, Pethybridge v. Burrow (1885) 53 L. T. 5, 8.—C.A.

Dillon v. Coppin (*supra*).

Applied, M'Fadden v. Jenkyns (1842) 11 L. J.

Ch. 281 (*supra*); *discussed*, Donaldson v. Donaldson (1854) 23 L. J. Ch. 788; Kay. 711; 2 W. R. 691.—WOOD, V.C.; *not applied*, Parnell v. Hingston (*supra*); *distinguished*, Pearson v. Amicable Insurance Office (*supra*).

Colman v. Sarrel (or Sarel) (1789) 1 Ves. 54; 3 Bro. C. C. 12.—L.C., *considered*.

Ellison v. Ellison (1802) 6 Ves. 656; 6 R. R. 19.—L.C.; Pulvertoft v. Pulvertoft (1811) 18 Ves. 84, 99; 11 R. R. 151.—L.C.; Alexander v. Wellington (Duke) (1831) 2 Russ. & M. 35; 9 L. J. (O.S.) Ch. 36; 2 St. Tr. (N.S.) 783; 34 R. R. 1.—L.C.; Garrard v. Lauderdale (Lord) (1831) 2 Russ. & M. 451; 30 R. R. 105.—L.C.; M'Fadden v. Jenkyns (1842) 11 L. J. Ch. 481; 1 Hare 459, 461; 6 Jur. 501.—V.C.; (affirmed, L.C., *see supra*, col. 3203); Meek v. Kettlewell (1842) 11 L. J. Ch. 293; 1 Hare 464, 469; 6 Jur. 550.—WIGRAM, V.C.; (affirmed, L.C., *see post*, col. 3205).

Evelyn v. Templar (1787) 2 Bro. C. C. 148.

—L.C., *referred to*.

Pulvertoft v. Pulvertoft (1811) 18 Ves. 84, 91; 11 R. R. 151.—L.C.

Evelyn v. Templar, *discussed*.

Walhampton Estate, In re (1884) 26 Ch. D. 391; 53 L. J. Ch. 1000; 51 L. T. 280; 32 W. R. 874.

KAY, J.—There the bill was filed by persons claiming under a voluntary settlement against a subsequent purchaser, who has paid his purchase-money to the settlor, seeking to make him pay it over again. But the settlement contained a power for the settlor to revoke the settlement and sell the property, and a covenant by him that the proceeds should be paid to the trustees of the settlement. The purchaser, therefore, as the settlement was revoked, was perfectly right in paying the proceeds to the settlor. The deed contemplated that any purchaser would do so. The covenant being voluntary could not be enforced in equity by way of specific performance, and the plaintiff, therefore, was not entitled to relief. Damages might have been obtained at law against the settlor for breach of the covenant, but he was dead insolvent. If the settlement had not contained a power of revocation, as the sale was an absolute sale of the property, the case would have been like *Daking v. Whimper* (*post*).—p. 395.

Daking v. Whimper (1859) 26 Beav. 568.—M.R., *not followed*.

Fletcher v. Kettelman (1871) 40 L. J. Ch. 624. ROMILLY, M.R. refused to follow the form in *Daking v. Whimper*, in making a declaration as to the invalidity of the settlement.

Daking v. Whimper, *distinguished*.

Walhampton Estate, In re (1884) 26 Ch. D. 391, 396 (*supra*).

Pulvertoft v. Pulvertoft (1811) 18 Ves. 84;

11 R. R. 151.—L.C., *referred to*.

Smith v. Garland (1817) 2 Meriv. 123; 16 R. R. 154.—GRANT, M.R.

Ellison v. Ellison (1802) 6 Ves. 656; 6 R. R. 19.—L.C.; and **Pulvertoft v. Pulvertoft**, *referred to*.

Alexander v. Wellington (Duke) (1831) 2 Russ. & M. 35; 9 L. J. (O.S.) Ch. 36; 2 St. Tr. (N.S.) 783; 34 R. R. 1.—L.C.; Garrard v. Lauderdale (Lord) (1831) 2 Russ. & M. 451; 30 R. R. 105.—L.C.; Bill v. Cureton (1835) 4 L. J. Ch. 98; 2

Myl. & K. 503, 510; 39 R. R. 258.—M.R.; Dillon v. Coppin (1839) 9 L. J. Ch. 87; 4 Myl. & Cr. 647, 671; 4 Jur. 421.—L.C.

Ellison v. Ellison and Pulvertoft v. Pulvertoft (*supra*).

Applied, M'Fadden v. Jenkyns (1842) 11 L. J. Ch. 281; 1 Hare 459, 461; 6 Jur. 501.—WIGRAM, V.-C.; (affirmed, 12 L. J. Ch. 146; 1 Ph. 153; 7 Jur. 27.—L.C.); *referred to*, Meek v. Kettlewell (1842) 11 L. J. Ch. 293; 1 Hare 464, 469; 6 Jur. 550.—V.-C.; (affirmed, (1843) 13 L. J. Ch. 28; 1 Ph. 342; 7 Jur. 1120.—L.C.)

Ellison v. Ellison and Pulvertoft v. Pulvertoft, *distinguished and not applied*.

Simmonds v. Pallas (*or* Palles) (1845) 8 Ir. Eq. R. 335; 2 Jo. & Lat. 489.

SUGDEN, L.C.—It is said that the case is within the principle of *Ellison v. Ellison*, *Pye, Ex parte* [18 Ves. 149; see "TRUST AND TRUSTEE," *post*], and *Pulvertoft v. Pulvertoft*, which nobody can dispute, are clear law and binding in this Court. They would decide the case if Mr. Simmonds has a right as a *cestui que trust* under this deed. But that would be to alter the entire transaction, because this is not a voluntary settlement in which, without reference to the claim of Simmonds, the parties thought right to make him a *cestui que trust* as a volunteer by a deed, with an actual transfer of the fund, under which the relation of trustee and *cestui que trust* could subsist. This is not that case, but it is a transaction between A and B, the benefit of which, to a certain extent, C is to have, but not as a *cestui que trust*. I think it clear that the authorities binding this case are *Garrard v. Lauderdale* (Lord) [2 Russ. & M. 451, *supra*, col. 3204. *And see* "TRUST AND TRUSTEE," *post*], and that class of cases.—p. 344.

Ellison v. Ellison, *principle applied*.

Kekewich v. Manning (1851) 31 L. J. Ch. 577; 1 De G. M. & G. 176; 16 Jur. 625.—L.J.; Donaldson v. Donaldson (1854) 23 L. J. Ch. 788; Kay 711; 1 Jur. (N.S.) 10; 2 W. R. 691.—WOOD, V.-C.; Joyce v. Hutton (1861) 12 Ir. Ch. R. 71, 78.—C.A.

Pulvertoft v. Pulvertoft, *referred to*.

Heap v. Tonge (1851) 20 L. J. Ch. 661; 2 Hare 90, 104.—V.-C.; Massy v. Travers (1860) 10 Ir. C. L. R. 459, 469.—C.P.; Clarke v. Willott (1872) 41 L. J. Ex. 197; L. R. 7 Ex. 313, 318; 21 W. R. 73.—EX.

Ellison v. Ellison (*supra*), *discussed*.

Paul v. Paul (1880) 15 Ch. D. 580; 50 L. J. Ch. 14; 43 L. T. 239; 29 W. R. 281.

MALINS, V.-C.—There is no proposition so absurd that it cannot be supported by some supposed authority, so I am referred to *Ellison v. Ellison*, a decision of Lord Eldon's which draws the distinction between cases where there is only a voluntary covenant to do a thing and cases where the act is perfected; and it is laid down that the assistance of the Court cannot be had without consideration to constitute a party *cestui que trust*, as upon a voluntary covenant to transfer stock; but if the legal conveyance is actually made constituting the relation of trustee and *cestui que trust*, or if the stock is actually transferred, though without consideration, the equitable interest will be enforced. All that Lord Eldon lays down there is, that a voluntary settlement, when actually carried into effect, as binding as if there were consideration.—p. 588.

Ellison v. Ellison, *referred to*.

Moore v. Ulster Bank (1877) Ir. R. 11 C. L. 512, 515.—Q.B.

Ward v. Audland (1837) 8 Sim. 571; 2 Jur. 652.—V.-C.; *affirmed*, C. P. Cooper, 146.—L.C., *referred to*.

Ward v. Audland (1845) 14 L. J. Ch. 145; 8 Beav. 201; 9 Jur. 384; 68 R. R. 65.—M.R.; S. C. (1847) 16 M. & W. 862.—EX.

Ward v. Audland.

Applied, Parnell v. Hingston (1856) 3 Sm. & G. 337, 345; 2 Jur. (N.S.) 854; 4 W. R. 794.—WOOD, V.-C.; *referred to*, Ker v. Ker (1869) Ir. R. 4 Eq. 15, 22.—C.A.; Jones, In re, Farrington v. Forrester [1893] 2 Ch. 461, 473.—NORTH, J. (*supra*, col. 3203). *And see* "GIFT," vol. i. col. 1187.

Hill v. Gomme (1839) 8 L. J. Ch. 350; 1 Beav. 540.—M.R.; *affirmed*, 9 L. J. Ch. 54; 5 Myl. & Cr. 250; 4 Jur. 165.—L.C., *referred to*.

Joyce v. Hutton (1860) 11 Ir. Ch. R. 123, 130.—M.R.; and (1861) 12 Ir. Ch. R. 71, 80.—L.C. and L.J.; Green v. Paterson (1886) 56 L. J. Ch. 181; 32 Ch. D. 95, 107; 54 L. T. 738; 34 W. R. 724.—C.A.

Fane v. Fane (1875) L. R. 20 Eq. 698.—HALL, V.-C., *referred to*.

Hoblyn v. Hoblyn (1889) 41 Ch. D. 200, 206; 60 L. T. 499; 38 W. R. 12.—KAY, J.

7. RECTIFICATION OF ARTICLES AND SETTLEMENTS.

Jenkins v. Quinchant (*or* **Pritchard v. Quinchant**) (1752) Amb. 147; 5 Ves. 596, n.—L.C.

Referred to, Rogers v. Earl (1757) Dick. 294.—M.R.; Barstow v. Kilvington (1800) 5 Ves. 593.—L.C.; Bedford (Duke) v. Abercorn (Marquis) (1836) 5 L. J. Ch. 230; 1 Myl. & Cr. 312.—L.C.; *distinguished*, Richards v. Fitzgerald (*post*).

Barstow v. Kilvington, *distinguished*.

Richards v. Fitzgerald (1846) 9 Ir. Eq. R. 486, 495.—EX. EQ. (IR.).

Bedford (Duke) v. Abercorn (Marquis), *referred to*.

Simpson v. Simpson (1838) 1 Jur. 688.—V.-C.

Bedford (Duke) v. Abercorn (Marquis).

Distinguished, Richards v. Fitzgerald (*supra*); *referred to*, Thompson v. Whitmore (1860) 1 J. & H. 268; 3 L. T. 845; 9 W. R. 297.—WOOD, V.-C.

Thompson v. Whitmore, *referred to*.

Hall-Dare v. Hall-Dare (1885) 55 L. J. Ch. 154; 31 Ch. D. 251, 255; 54 L. T. 120; 34 W. R. 82.—C.A.; Weir v. Van Tromp (1900) 16 Times L. R. 531.—BYRNE, J.

Levy v. Creighton (1870) 22 W. R. 436.—BACON, V.-C.; *reversed*, 22 W. R. 605.—JAMES and MELLISH, L.JJ.

Cooke v. Lamotte (1851) 21 L. J. Ch. 371; 15 Beav. 234.—M.R.

Distinguished, Turner v. Collins (1871) L. R. 7 Ch. 335, n.—MALINS, V.-C.; (varied, 41 L. J. Ch. 358; L. R. 7 Ch. 329; 25 L. T. 779; 20 W. R. 305.—HATHERLEY, L.C.); *referred to*, Carnegie v. Carnegie (1874) 30 L. T. 460, 462; 22 W. R. 495.—HALL, V.-C.; (affirmed, 30 L. T. 7; 22 W. R. 783.—C.A.); Henry v. Armstrong (1881) 18 Ch. D. 668; 44 L. T. 918; 30 W. R. 472.—KAY, J.

Cooke v. Lamotte, applied.

Berry v. Glazebrook (1891) 7 Times L. R. 574.—C.A. LINDLEY, BOWEN and FRY, L.JJ.

Cooke v. Lamotte, discussed.

Bischoff's Trustee v. Franks (1903) 89 L. T. 188.—WRIGHT, J.

Clark v. Girdwood (1877) 7 Ch. D. 9; 37 L. T. 614; 25 W. R. 575.—MALINS, V.-C., *principle applied*.

Lovesy v. Smith (1880) 49 L. J. Ch. 809; 15 Ch. D. 655, 663; 43 L. T. 240; 28 W. R. 979.—DENMAN, J.

M'Cormack v. M'Cormack (1877) 1 L. R. Ir. 119.—C.A. BALL, L.C., and CHRISTIAN, L.J.; *reversing* (1876) Ir. R. 11 Eq. 130.—CHATTERTON, V.-C., *referred to*.

Johnson v. Bragge (1900) 70 L. J. Ch. 41; [1901] 1 Ch. 28; 83 L. T. 621; 49 W. R. 198.—COZENS-HARDY, J.

De la Touche's Settlement, In re (1870) 40 L. J. Ch. 85; L. R. 10 Eq. 599.—JAMES, V.-C., *followed*.

Bird's Trusts, In re (1876) 3 Ch. D. 214 (*post*).

De la Touche's Settlement, In re, referred to.
Annesley v. Annesley (1893) 31 L. R. Ir. 457, 464.—CHATTERTON, V.-C.

Bird's Trusts, In re (1876) 3 Ch. D. 214.—

MALINS, V.-C., *discussed and distinguished*.
Hoffe's Estate Act, 1885, In re (1900) 82 L. T. 556; 48 W. R. 507.—KEKEWICH, J.

Bird's Trusts, In re, approved and followed.

Fitzgerald v. Fitzgerald [1902] 1 Ir. R. 477, 484, 493.—PORTER, M.R. and C.A.

Stock v. Vining (1858) 25 Beav. 235.—M.R., *followed*.

White v. White (1872) 42 L. J. Ch. 288; L. R. 15 Eq. 247, 249; 27 L. T. 752.

BACON, V.-C.—In *Stock v. Vining*, the M.R. proposed to put his initials to the alteration in the deed. If the M.R. added his initials in that case, and the parties so desire it, I will do the same thing here; but the decree [for rectification] is sufficient, and anything further will not make the matter better or worse.—p. 288. [The parties so desiring it, the V.-C. afterwards initialled the actual alterations in the deed.]

White v. White, referred to.

Hanley v. Pearson (1879) 13 Ch. D. 545, 549; 41 L. T. 673.—BACON, V.-C.

Morse's Settlement, In re (1855) 25 L. J. Ch. 192; 21 Beav. 174; 2 Jur. (N.S.) 6; 4 W. R. 148.—M.R., *not followed*.

Malet, In re (1862) 31 L. J. Ch. 455; 8 Jur. (N.S.) 226; 10 W. R. 332.—ROMILLY, M.R.

Elwes v. Elwes, 2 (aff. 545.—V.-C.; *affirmed*. (1861) 3 De G. F. & J. 667; 7 Jur. (N.S.) 747; 4 L. T. 500; 9 W. R. 820.—L.JJ., *discussed*.

Welman v. Welman (1880) 15 Ch. D. 570; 49 L. J. Ch. 736; 43 L. T. 145.

MALINS, V.-C.—As to *Elwes v. Elwes*, that was a case not seeking to set aside anything in a deed, but to insert a provision for raising 100,000*l.* for the benefit of daughters; and the Court came distinctly to the conclusion that there never was any intention that such a clause should be inserted.—p. 578.

Corley v. Stafford (Lord) (1857) 26 L. J. Ch. 865; 1 De G. & J. 238; 3 Jur. (N.S.) 1225; 5 W. R. 646.—L.JJ., *applied*.

Hastie v. Hastie (1875) 24 W. R. 242.—MALINS, V.-C.; *affirmed*, 2 Ch. D. 304; 34 L. T. 747; 24 W. R. 564.—C.A.

Corley v. Stafford (Lord), applied.

Clark v. Girdwood (1877) 7 Ch. D. 9; 37 L. T. 614; 25 W. R. 575.—V.-C.; *affirmed with a variation, C.A.*

MALINS, V.-C.—In *Corley v. Stafford (Lord)* the gentleman, who was a barrister, had been very many years on terms of great intimacy with the lady whom he was about to marry. She was eighty years of age, and he was twenty-four years younger. He undertook to prepare the marriage settlement, and accordingly he did prepare it, but he prepared it in a manner in which it ought not to have been prepared, giving himself a much greater interest than he ought to have had, or than it was the intention of the lady he should have. The point of the decision is that inasmuch as he undertook the duty of preparing the settlement, it was his duty to prepare such a settlement as a conveyancer would have approved, or the Court would have directed.—p. 18.

Fowler v. Fowler (1859) 4 De G. & J. 250.—L.C., *statement of law approved*.

King v. King-Harman (1873) Ir. R. 7 Eq. 446.—SULLIVAN, M.R.

Fowler v. Fowler, referred to.

Gun v. McCarthy (1884) 13 L. R. Ir. 304.—FLANAGAN, J.

Fowler v. Fowler and Sells v. Sells (1860)

29 L. J. Ch. 500; 1 Dr. & Sm. 42; 8 W. R. 327.—KINDERSLEY, V.-C., *discussed*.
Clark v. Girdwood (1887) 7 Ch. D. 9; 37 L. T. 614; 25 W. R. 575.—V.-C., *affirmed with a variation, C.A.*

MALINS, V.-C.—Cases were cited by Mr. Glasse, with most of which I entirely agree, that where this Court corrects a settlement it must be because it is framed in a manner contrary to the intention of all parties. He cited *Sells v. Sells*, where the question was whether the future property of the husband was to be included. The wife's advisers understood it was; the husband's advisers did not so understand it. Therefore, as there was not a contract on both sides that the property of the husband should be included, that falls under the rule that you cannot correct a settlement where the intention of one but not the intention of the other party is shown. I have had cited to me *Rooke v. Kensington (Lord)*, [25 L. J. Ch. 795; 2 K. & J. 753, see "MORTGAGE," *ante*, col. 1849]; *Bradford (Earl) v. Romney (Earl)* (*post*), and *Fowler v. Fowler*, and they all proceed upon the same principle.—p. 17.

Fowler v. Fowler and Sells v. Sells, principle explained.

Rake v. Hooper (1900) 83 L. T. 669.—KEKEWICH, J.

Bradford (Earl) v. Romney (Earl) (1862) 31 L. J. Ch. 497; 30 Beav. 431; 8 Jur. (N.S.)

403; 6 L. T. 208; 10 W. R. 414.—ROMILLY, M.R.

Approved, **Harris v. Pepperell** (1867) L. R. 5 Eq. 1, 4; 17 L. T. 191; 16 W. R. 68.—ROMILLY, M.R.; *referred to*, **Clark v. Girdwood** (1877) 7 Ch. D. 9, 18; 37 L. T. 614; 25 W. R. 575.—V.-C. (*supra*).

Hartopp v. Hartopp (1856) 25 L. J. Ch. 471 : 21 Beav. 259 ; 2 Jur. (N.S.) 794.—M.R. : and **Jenner v. Jenner** (1860) 2 Giff. 232 ; 6 Jur. (N.S.) 668 ; 8 W. R. 537.—STUART, V.-C. ; (*affirmed*, 2 De G. F. & J. 359 ; 30 L. J. Ch. 201 ; 6 Jur. (N.S.) 1814 ; 3 L. T. 488 ; 9 W. R. 109.—L.C.) ; *referred to*, **Turner v. Collins** (1871) 40 L. J. Ch. 614 ; L. R. 12 Eq. 438, 440 ; 25 L. T. 264.—MALINS, V.-C. ; varied, 41 L. J. Ch. 558 ; L. R. 7 Ch. 329 ; 25 L. T. 779 ; 20 W. R. 305.—HATHERLEY, L.C.

Jenner v. Jenner, *discussed*.
Lovell v. Wallis (1884) 50 L. T. 681.—KAY, J.

Jenner v. Jenner, *referred to*.
Hoblyn v. Hoblyn (1889) 41 Ch. D. 200 ; 60 L. T. 499 ; 38 W. R. 12.
KEKEWICH, J.—In **Jenner v. Jenner** the plaintiff asked for reform only, and no objection was taken to his suit on that ground.—p. 207.

Uvedale v. Halfpenny (1723) 2 P. Wms. 151 ; 9 Mod. 56.—M.R., *referred to*.
Heneage v. Hunloke (1742) 2 Atk. 456.—L.C.

Long v. Long (1824) 2 Sim. & S. 119.—V.-C. ; and **Austen v. Halsey** (1802) 2 Sim. & S. 123, n.—L.C., *principle applied*.
Money v. Money (1855) 3 Drew. 256 ; 3 Eq. R. 996 ; 3 W. R. 425.—KINDERSLEY, V.-C. ; **Hoare's Trusts**, In re (1862) 9 Jur. (N.S.) 167 ; 1 N. R. 161 ; 7 L. T. 523 ; 11 W. R. 181.—STUART, V.-C.

Barber v. Gamson (1821) 4 B. & Ald. 281.—K.B. ; and **Cook v. Tower** (1808) 1 Taunt. 372.—C.P., *approved and applied*.
Blackie v. Clark (1852) 15 Beav. 595 ; 22 L. J. Ch. 377.—ROMILLY, M.R.

Crowley v. Swindles (1670) Vaughan 173.—C.P. and **Scholefield v. Lockwood** (No. 2) (1863) 32 Beav. 436 ; 33 L. J. Ch. 106 ; 8 L. T. 409.—M.R. ; (*affirmed*, 4 De G. J. & S. 22 ; 9 L. T. 400 ; 9 Jur. (N.S.) 1258 ; 12 W. R. 114.—L.C.), *applied*.
Annesley v. Annesley (1893) 31 L. R. Ir. 457, 463.—CHATTERTON, V.-C.

Annesley v. Annesley, *followed*.
Fitzgerald v. Fitzgerald (1901) [1902] 1 Ir. R. 477, 484.—PORTER, M.R.

Burchell v. Clark (1876) 46 L. J. C. P. 115 ; 2 C. P. D. 88 ; 35 L. T. 690 ; 25 W. R. 334.—C.A. ; *reversing*, 45 L. J. C. P. 671 ; 1 C. P. D. 602 ; 35 L. T. 372 ; 25 W. R. 8.—C.P.D., *applied*.
Annesley v. Annesley (*supra*).

Stockley v. Stockley (1812) 1 V. & B. 23 ; 12 R. R. 184.—L.C. ; and **Harvey v. Cooke** (1827) 4 Russ. 34 ; 6 L. J. (O.S.) Ch. 84.—M.R., *referred to*.
Ashurst v. Mill (1848) 12 Jur. 693.—WIGRAM, V.-C. ; *affirmed*, 12 Jur. 1035.—L.C.

Exeter (Marquis) v. Exeter (Marchioness) (1837) 7 L. J. Ch. 240 ; 3 Myl. & Cr. 321 ; 2 Jur. 535.—L.C., *dictum not followed*.
White v. White (1872) L. R. 15 Eq. 247 ; 42 L. J. Ch. 288 ; 27 L. T. 752.—BACON, V.-C.

Walsh v. Trevanion (1850) 19 L. J. Q. B. 458 ; 15 Q. B. 733 ; 14 Jur. 1134.—Q.B. ; **S. C.** (1848) 16 Sim. 178 ; 12 Jur. 344.—V.-C., *discussed and distinguished*.
Rooke v. Kensington (Lord) (1856) 25 L. J. Ch. 795 ; 2 K. & J. 753 ; 2 Jur. (N.S.) 755 ; 4 W. R. 829.—WOOD, V.-C.

Walsh v. Trevanion, *referred to*.
Pallikelagatha Marcar v. Sigg (1880) L. R. 7 Ind. App. 83, 100.—P.C. *And see* "INFANT," vol. i. col. 1312.

Fyfe v. Arbuthnot (1857) 26 L. J. Ch. 646 ; 1 De G. & J. 406 ; 3 Jur. (N.S.) 651 ; 5 W. R. 793.—*discussed*.
Clarke, In re, **Coombe v. Carter** (1887) 56 L. J. Ch. 642 ; 35 Ch. D. 109, 113 ; 56 L. T. 467 ; 35 W. R. 388.—KAY, J. ; *affirmed*, 56 L. J. Ch. 981 ; 36 Ch. D. 348 ; 57 L. T. 823 ; 36 W. R. 293.—C.A.

Rogers v. Earl (1757) 1 Dick. 294.—M.R., *discussed and applied*.
Bold v. Hutchinson (1855) 25 L. J. Ch. 598 ; 5 De G. M. & G. 558, 568 ; 2 Jur. (N.S.) 97 ; 4 W. R. 3.—L.C.

Thomas v. Davis (1757) 1 Dick. 301.—M.R. ; and **Rogers v. Earl**, *referred to*.
Johnson v. Bragge (1900) 70 L. J. Ch. 41 ; [1901] 1 Ch. 48, 36 ; 83 L. T. 621 ; 49 W. R. 198.

COZENS-HARDY, J.—In **Thomas v. Davis** the bill was to rectify a mistake in a conveyance. The evidence of the attorney who received the instructions to prepare the deed, and did prepare the deed, was held admissible, though in that case not sufficient. . . . See also **Rogers v. Earl**, and **Sugden's Vendors and Purchasers** (14th ed.), p. 172.—p. 44.

Barrow v. Barrow (1854) 18 Beav. 529.—M.R. ; varied, (1854) 24 L. J. Ch. 267 ; 3 Eq. R. 149 ; 3 W. R. 122.—L.JJ.

Bold v. Hutchinson (1855) 25 L. J. Ch. 598 ; 5 De G. M. & G. 558 ; 2 Jur. (N.S.) 97 ; 4 W. R. 3.—L.C., *applied*.

Murray v. Parker (1854) 19 Beav. 305.—M.R., *referred to*.
King v. King-Harman (1873) Ir. R. 7 Eq. 446.—SULLIVAN, M.R.

Bold v. Hutchinson, *distinguished*.
Cobden v. Bagwell (1886) 19 L. R. Ir. 150, 176.—PORTER, M.R.

Honor v. Honor (1710) 1 P. Wms. 123 ; **S. C. nom. Honour v. Honour**, 2 Vern. 658.—L.C., *explained and distinguished*.
Partyn v. Roberts (1756) Amb. 315.—HARDWICKE, L.C.

Honor v. Honor, *referred to*.
Sackville-West v. Holmesdale (1870) 39 L. J. Ch. 505, 508 ; L. R. 4 H. L. 543, 554.—H.L. (E.) ; **HATHERLEY**, L.C. dissenting.

West v. Errissey (1726—1727) 2 P. Wms. 349 ; **S. C. nom. West v. Errissey**, 1 Bro. P. C. 225 ; 1 Comyns 412.—L. (E.).
Explained, **Legg v. Goldwire** (1736) Cas. t. Talb. 20.—L.C. ; *discussed*, **Roberts v. Kingsly** (1749) 1 Ves. sen. 238.—L.C. ; *distinguished*, **Partyn v. Roberts** (1756) Amb. 315.—L.C. ; **Cordwell v.**

Mackrill (1766) Amb. 515; 2 Eden 344.—L.C.; *discussed*, Jones v. Morgan (1783) 1 Bro. C. C. 206.—L.C.; Bold v. Hutchinson (1855) 25 L. J. Ch. 598; 5 De G. M. & G. 558, 567; 2 Jur. (N.S.) 97; 4 W. R. 3.—L.C.; Eastwood v. Lockwood (1867) 36 L. J. Ch. 573, 576; L. R. 3 Eq. 487, 492; 15 W. R. 611.—WOOD, V.-C.

West v. Erisey, *referred to*.

Martin, In re, Smith v. Martin (1885) 54 L. J. Ch. 1071, 1072; 53 L. T. 34.—KAY, J.

Legg v. Goldwire (1736) Cas. t. Talb. 20.—L.C., *referred to*.

Bold v. Hutchinson (1855) 25 L. J. Ch. 598; 5 De G. M. & G. 558, 567; 2 Jur. (N.S.) 97; 4 W. R. 3.—L.C.

Legg v. Goldwire, *application of, considered*.

Gundry, In re, Mills v. Mills [1898] 2 Ch. 504; 67 L. J. Ch. 641; 79 L. T. 438; 47 W. R. 137.—NORTH, J.

Lister v. Hodgson (1867) L. R. 4 Eq. 30; 15 W. R. 547.—ROMILLY, M.R., *explained and applied*.

M'Mechan v. Warburton (1894) [1896] 1 Ir. R. 435, 439.—CHATTERTON, V.-C.; affirmed, C.A.

Lister v. Hodgson, *discussed*.

Weir v. Van Tromp (1900) 16 Times L. R. 531.—BYRNE, J.

Lackersteen v. Lackersteen (1860) 30 L. J. Ch. 5.—WOOD, V.-C., *referred to*.

M'Mechan v. Warburton (1894) [1896] 1 Ir. R. 435.—CHATTERTON, V.-C.; affirmed, C.A.

Welman v. Welman (1880) 49 L. J. Ch. 736; 15 Ch. D. 570; 43 L. T. 145.—MALINS, V.-C., *explained*.

Paul v. Paul (1880) 50 L. J. Ch. 14; 15 Ch. D. 580, 590; 43 L. T. 239; 29 W. R. 281.—MALINS, V.-C. *See post*, col. 3214.

Anstruther v. Adair (1834) 2 Myl. & K. 513.—L.C.; *see* 39 R. R. 263, *approved and principle applied*.

Breadalbane (Marquis) v. Chandos (Marquis) (1837) 7 L. J. Ch. 28; 3 Myl. & Cr. 711.—L.C.

Breadalbane (Marquis) v. Chandos (Marquis) and Farquharson v. Seton (1828) 5 Russ. 45.—M.R., *referred to*.

Henderson v. Henderson (1843) 3 Hare 100.—WIGRAM, V.-C.; S. C. 13 L. J. Q. B. 274; 6 Q. B. 288; 9 Jur. 755.—Q.B.

Alexander v. Crosbie (1835) 1 L. & G. temp. Sugd. 145.—L.C.

Adhered to, Mortimer v. Shortall (1842) 2 Dr. & War. 363, 374; 1 Con. & L. 417.—L.C.; *discussed*, Rooke v. Kensington (Lord) (1856) 25 L. J. Ch. 795; 2 K. & J. 753; 2 Jur. (N.S.) 755; 4 W. R. 829.—WOOD, V.-C.; Jenner v. Jenner (1866) 35 L. J. Ch. 329; L. R. 1 Eq. 361, 366; 12 Jur. (N.S.) 138; 14 W. R. 305.—WOOD, V.-C.

Alexander v. Crosbie, *applied*.

Johnson v. Bragge (1900) 70 L. J. Ch. 41; [1901] 1 Ch. 28, 36; 83 L. T. 621; 49 W. R. 198.

COZENS-HARDY, J.—In *Alexander v. Crosbie*, which was a suit to rectify a settlement, Sir E. Sugden says: "In all cases, perhaps, in which the Court has reformed a settlement, there has been something beyond the parol evidence, such

for instance, as the instructions for preparing the conveyance or a note by the attorney, and the mistake properly accounted for; but the Court would, I think, act where the mistake is clearly established by parol evidence, even though there is nothing in writing to which the parol evidence may attach."—p. 44.

Harbidge v. Wogan (1846) 15 L. J. Ch. 281; 5 Hare 258; 10 Jur. 703.—V.-C., *referred to*.

Welman v. Welman (1880) 49 L. J. Ch. 736; 15 Ch. D. 570, 578; 43 L. T. 145.—MALINS, V.-C.

White v. Anderson (1850) 1 Ir. Ch. R. 419.—BRADY, L.C.

Discussed, Stack v. Royle (1861) 12 Ir. Ch. R. 246.—CUSACK-SMITH, M.R.; *followed*, Galavan v. Dunne (1879) 7 L. R. Ir. 144.—SULLIVAN, M.R.; *explained*, Cleary v. Fitzgerald, 7 L. R. Ir. 229.—C.A.; Bannatyne v. Ferguson (1895) [1896] 1 Ir. R. 149.—C.A.

Bunbury v. Lloyd (1844) 1 Jo. & Lat. 638.—SUGDEN, L.C., *discussed*.

White v. Anderson (1850) 1 Ir. Ch. R. 419.—BRADY, L.C.

Wolterbeek v. Barrow (1857) 23 Beav. 423; 3 Jur. (N.S.) 804.—M.R., *applied*.

Smith v. Iliffe (1875) 44 L. J. Ch. 755; L. R. 20 Eq. 666, 668 (*post*).

Wolterbeek v. Barrow, *explained*.

Tucker v. Bennett (1888) 57 L. J. Ch. 507; 38 Ch. D. 1, 14; 53 L. T. 650.—C.A. *See post*, col. 3213.

Smith v. Iliffe (1875) 44 L. J. Ch. 755; L. R. 20 Eq. 666; 33 L. T. 200; 23 W. R. 851.—BACON, V.-C., *referred to*.

Cogan v. Duffield (1875) 45 L. J. Ch. 74, 78; L. R. 20 Eq. 789, 802.—BACON, V.-C.; affirmed, (1876) 45 L. J. Ch. 307; 2 Ch. D. 44; 34 L. T. 593; 24 W. R. 905.—C.A.

Smith v. Iliffe, *followed*.

M'Cormack v. M'Cormack (1877) 1 L. R. Ir. 119.—C.A. BALL, L.C. and CHRISTIAN, L.J.

Smith v. Iliffe, *referred to*.

Hanley v. Pearson (1879) 13 Ch. D. 545; 41 L. T. 673.

[Counsel having urged that in *Smith v. Iliffe* his lordship ordered a settlement to be rectified upon the plaintiff's uncontradicted evidence.]

BACON, V.-C.—To the best of my recollection the evidence consisted of something more than the affidavit of the plaintiff alone, although this does not appear from the report.—p. 548.

[Warrington, who had been counsel for the plaintiff in that case, also thought there was further evidence.]

Smith v. Iliffe and Hanley v. Pearson, *referred to*.

Welman v. Welman (1880) 49 L. J. Ch. 736; 15 Ch. D. 570, 578; 43 L. T. 145.—MALINS, V.-C.

Smith v. Iliffe, *dissented from*.

Tucker v. Bennett (1887) 57 L. J. Ch. 507; 38 Ch. D. 1, 14; 53 L. T. 650.—C.A.; reversing 34 Ch. D. 754; 56 L. T. 119.—KEKEWICH, J.

COTTON, L.J.—In that case [*Smith v. Iliffe*] there was a marriage of an infant ward of Court long before the Infants' Settlement Act, and the settlement was one which the husband was

required to make depriving him of the rights which he would otherwise get by the marriage; but after some years the lady came and said that this was not what she intended. That really could not alter the settlement. It was not her settlement; it was a settlement insisted on by the Court for her, and I think it is evident that the matter could not have been presented to the V.-C. in such a way that he could consider whether it was right under the circumstances to vary the settlement. For what he said was this: "The case before the late M.R. of *Wolterbeek v. Barrow* (23 Beav. 423, *supra*, col. 3212), though it proceeded on facts which are not present here, is an authority as to the jurisdiction of the Court." What was *Wolterbeek v. Barrow*? It was a case where on the instructions for the settlement being produced, it was found they were contrary to what was contained in the deed executed. Now no one for a moment doubts that where it is shown that the actual contract and intention of the contracting parties was different from that which is expressed in the deed, the Court has jurisdiction to alter it. But there is an enormous difference between altering a settlement under those circumstances, and altering a settlement where there is no evidence whatever that there was a different intention at the time when the deed was executed, as in the case here. In my opinion we cannot consider that this case in any way supports the contention of the respondent here. If it intended to lay down any different principle as regards settlements to that which has hitherto prevailed, all I can say is that, with great respect to the V.-C., I cannot follow *Smith v. Iliffe*.—pp. 515, 516.

Worsley v. Worsley and Wignall (1869) 38 L. J. Mat. 43; L. R. 1 P. 648; 20 L. T. 546; 17 W. R. 743.—LORD PENZANCE, *not applied*.

Charlesworth v. Holt (1873) 43 L. J. Ex. 25; L. R. 9 Ex. 38, 42; 29 L. T. 647; 22 W. R. 94.—EX.

BRAMWELL, B.—As for the case before Lord Penzance, I think we cannot rely on it, because it is a decision on a deed which was made after the passing of the Divorce Act.—p. 29.

Worsley v. Worsley and Wignall, *not applied*.

Dormer (otherwise Ward) v. Ward (1900) 69 L. J. P. 65; [1900] P. 130, 137; 28 L. T. 469; 48 W. R. 524; reversed, 69 L. J. P. 144; [1901] P. 20; 83 L. T. 556; 49 W. R. 149.—C.A. See "HUSBAND AND WIFE," vol. i. col. 1223.

BARNES, J.—*Worsley v. Worsley and Wignall* . . . does not bear on the present case. In that case there was a separation deed between the husband and wife, and the husband afterwards obtained a decree of dissolution. He then applied to the Court to reduce the amount of his covenant in the deed, and the Court did so, holding the deed to be a post-nuptial settlement.—p. 69.

Hope v. Hope (1874) 44 L. J. Mat. 31; L. R. 3 P. 226; 31 L. T. 592; 23 W. R. 110.—SIR J. HANNEN, *discussed and distinguished*.

Hart v. Hart (1881) 50 L. J. Ch. 697; 18 Ch. D. 670, 681 45 L. T. 13 30 W. R. 8.—KAY, J.

Davies v. Davies and McCarthy (1868) 37 L. J. Mat. 17.—SIR J. WILDE, *referred to*.
Maudslay v. Maudslay (1877) 47 L. J. P. 26; 2 P. D. 256; 38 L. T. 323.—HANNEN, P., *applied*.

Oppenheim v. Oppenheim (1884) 9 P. D. 60; 53 L. J. P. 48; 32 W. R. 723.

BUTT, J.—The words of the statute [22 & 23 Vict. c. 61, s. 5] are sufficient to give me jurisdiction [to extinguish a joint power of appointment of new trustees], and *Davies v. Davies* is not really a decision to the contrary. In *Maudslay v. Maudslay* such an order was made by consent, and in this case there is no opposition.—p. 61.

Carstairs v. Carstairs, Billson, and Dickenson (1864) 33 L. J. Mat. 170; 3 Sw. & Tr. 538; 10 L. T. 696; 12 W. R. 1015.—SIR C. CRESSWELL, *referred to*.

Miller v. Miller (1869) 39 L. J. P. 4; L. R. 2 P. 13, 15; 21 L. T. 471; 18 W. R. 152.—LORD PENZANCE.

Callwell v. Callwell and Kennedy (1860) 3 Sw. & Tr. 259.—SIR C. CRESSWELL, *referred to*.

Le Sueur v. Le Sueur (1876) 45 L. J. P. 73; 1 P. D. 139, 143; 34 L. T. 511; 24 W. R. 616.—SIR J. HANNEN; **Niboyet v. Niboyet** (1878) 48 L. J. P. 1; 4 P. D. 1, 18; 39 L. T. 486; 27 W. R. 203.—C.A.; (BRETT, L.J. dissenting).

Corrance v. Corrance (1868) 37 L. J. Mat. 44; L. R. 1 P. 495; 18 L. T. 535; 16 W. R. 893.—LORD PENZANCE, *applied*.

Graham v. Graham and Griffith (1869) L. R. 1 P. 711; 20 L. T. 500; 17 W. R. 628.—LORD PENZANCE.

Corrance v. Corrance, *not applied*.

Ansdell v. Ansdell (1880) 49 L. J. P. 37; 5 P. D. 138, 140; 43 L. T. 224; 28 W. R. 332.—HANNEN, P. *And see* "HUSBAND AND WIFE," vol. i. col. 1223.

Glennell v. Glennell, W. N. (1884) 14.—PEARSON, J., *discussed*.

Lovell v. Wallis (1884) 50 L. T. 681.—KAY, J.

8. RESCISSION BY COURT.

Paul v. Paul (1880) 50 L. J. Ch. 14; 15 Ch. D. 580; 43 L. T. 239; 29 W. R. 281.—MALINS, V.-C., *not followed*.

Paul v. Paul (1881) 19 Ch. D. 47; 51 L. J. Ch. 5; 45 L. T. 437.

FRY, J.—The petitioners rely on the proposition that a settlor can revoke a trust which he has finally and conclusively declared in favour of a volunteer. This proposition is supported by the decision of my learned predecessor, Malins, V.-C., on a former petition in this suit which is reported. But for that decision I should have thought that the law on this subject was clear. I thought that a gift conclusively made to or in favour of a volunteer was incapable of being revoked by the donor, and I thought that one mode of making such a gift was by a completed declaration of trust in favour of the volunteer. In my opinion, the law has been conclusively settled in that way, and, therefore, notwithstanding the respect which I entertain for my learned predecessor, and the anxiety which I always feel to follow his decisions, I am constrained to make no order upon the petition.—p. 48.

Paul v. Paul, 15 Ch. D. 580, *overruled*.
Paul v. Paul (1882) 20 Ch. D. 742; 51 L. J. Ch. 839; 47 L. T. 210; 30 W. R. 801.—C.A., affirming *FRY, J. (supra)*.

Paul v. Paul, 20 Ch. D. 742, *discussed*.
Meredyth v. Meredyth and Leigh (1895) 64 L. J. P. 54; [1895] P. 92; 11 R. 651; 72 L. T. 898; 43 W. R. 304.—*JEUNE, P.*

Hoghton v. Hoghton (1852) 21 L. J. Ch. 482; 15 Beav. 278; 17 Jur. 99.—M.R.
Adhered to, *Cobbett v. Brock* (1855) 20 Beav. 524.—M.R.; *referred to*, *Jenner v. Jenner* (1860) 30 L. J. Ch. 201; 2 De G. F. & J. 359; 6 Jur. (N.S.) 1314; 3 L. T. 488; 9 W. R. 109.—*CAMPBELL, L.C.*; *Chambers v. Crabbe* (1865) 34 Beav. 457; 11 Jur. (N.S.) 277; 12 L. T. 46.—*ROMILLY, M.R.*; *discussed*, *Turner v. Collins* (1871) 41 L. J. Ch. 558; L. R. 7 Ch. 329, 338; 25 L. T. 779; 20 W. R. 305.—*HATHERLEY, L.C.*; *Carnegie v. Carnegie* (1874) 30 L. T. 460, 462; 22 W. R. 595.—*HALL, V.-C.* (affirmed, 31 L. T. 7; 22 W. R. 788.—C.A.); *Fane v. Fane* (1875) L. R. 20 Eq. 698, 709.—*HALL, V.-C.*; *Lovell v. Wallis* (1884) 50 L. T. 681.—*KAY, J.*; *Allcard v. Skinner* (1889) 56 L. J. Ch. 1052; 36 Ch. D. 145, 160; 57 L. T. 61; 36 W. R. 251.—*KEKEWICH, J.* (affirmed, C.A.; *COTTON, L.J.* dissenting).

Hoghton v. Hoghton, *considered*.
Hoblyn v. Hoblyn (1889) 41 Ch. D. 200; 60 L. T. 499; 38 W. R. 12.

KEKEWICH, J.—As regards the second point [that a bargain between father and son, if unfair, or unfairly effected, is not necessarily fatal to the entire arrangement] I need only refer to *Hoghton v. Hoghton*, where the Court was satisfied that there was a benefit to the father obtained without due protection to the son, and yet took pains to explain that in addition there were unreasonable provisions in the deed which assisted the Court to interfere. This is stated in a passage on p. 314, and is also, I think, a fair conclusion from the rest of the judgment, though it is sometimes difficult to determine whether the particular language should be more properly referred to the subject of re-settlements generally or exclusively to those in which the father gains a benefit. Lord Campbell read the judgment as I do: see *Jenner v. Jenner (supra)*. *Hoghton v. Hoghton* was relied on in *Turner v. Collins (supra)* as an authority that a transaction between father and son must be set aside wholly if at all, and could not be rectified by striking out an improper provision. That was not a case of re-settlement, but the L.C. (Lord Hatherley) accepted the analogy, and held that rectification was possible as against a party admitting it to be proper, notwithstanding that the transaction stood as a whole.—p. 207.

Hoghton v. Hoghton, *applied*.
Bischoff's Trustee v. Frank (1903) 89 L. T. 188.—*WRIGHT, J.*

Turner v. Collins (1871) 41 L. J. Ch. 558 (*supra*), *applied*.
McIntyre's Trustees' Estate, In re (1888) 21 L. R. Ir. 421, 436.—*CHATTERTON, V.-C.*

Turner v. Collins, *considered*.
Hoblyn v. Hoblyn (supra).

Cory v. Cory (1747) 1 Ves. sen. 19.—L.C.; and **Stewart v. Stewart** (1839) 6 Cl. & F. 911; Macl. & R. 401.—H.L. (SC.); S. C. 6 Cl. & F. 970.—H.L. (SC.), *discussed*.
Lovell v. Wallis (1884) 50 L. T. 681.—*KAY, J.*

Dutton v. Thompson (1888) 52 L. J. Ch. 661; 23 Ch. D. 278; 49 L. T. 109; 31 W. R. 596.—C.A., *rule in, not applied*.
Hoblyn v. Hoblyn (1889) 41 Ch. D. 200, 204; 60 L. T. 499; 38 W. R. 12.—*KEKEWICH, J.*

Dutton v. Thompson, *on question of costs, discussed*.

Merry v. Pownall (1898) 67 L. J. Ch. 162; [1898] 1 Ch. 306, 310; 78 L. T. 146; 46 W. R. 487.
KEKEWICH, J.—Where a man is seeking to set aside his own settlement, it is very hard to say, as against the trustees of the settlement, that they shall not have their costs. In *Dutton v. Thompson*, which was a case of a voluntary settlement, the V.-C. of the County Palatine gave judgment to set aside the settlement with costs against the trustee. And on appeal Jessel, M.R. said that, as the deed was set aside, there was no fund out of which to pay costs. But I think that later cases have modified that, and the strict rule that the fund was gone has not been held to apply.—p. 163.

Strathmore (Countess) v. Bowles (1788) 2 Bro. C. C. 345; 2 Cox 28.—*BULLER, J.*; *affirmed*, 1 Ves. 22; 1 R. R. 76.—L.C.; and *nom. Bowles v. Strathmore (Countess)* (1797) 6 Bro. P. C. 427.—H.L. (E.).

Explained, *Ball v. Montgomery* (1793) 4 Bro. C. C. 339; 2 Ves. 193; 2 R. R. 197.—L.C.; *St. George v. Wake* (1833) 1 Myl. & K. 610; *Coop. t. Brougham* 129.—L.C.; *discussed*, *Tullet v. Armstrong* (1840) 9 L. J. Ch. 41; 4 Myl. & Cr. 377, 390.—*COTTENHAM, L.C.*; *referred to*, *England v. Downs* (1840) 9 L. J. Ch. 313; 2 Beav. 522; 4 Jur. 526.—*LANGDALE, M.R.*

Strathmore (Countess) v. Bowles, *referred to*.
Hope v. Hope (1854) 5 Giff. 13; 11 Jur. 823; 2 W. R. 674.—*STUART, V.-C.*; *Downes v. Jennings* (1863) 32 L. J. Ch. 613; 32 Beav. 290.—M.R. *See post*, col. 3217.

Strathmore (Countess) v. Bowles, *principle explained and not applied*.

McKeogh v. McKeogh (1870) Ir. R. 4 Eq. 338; 18 W. R. 861.—*CHATTERTON, V.-C.*

Strathmore (Countess) v. Bowles, *distinguished and not applied*.

Lyon v. Lyon's Trustees (1901) 3 Fraser 653.—*CT. OF SESS.*

Ball v. Montgomery (1793) 4 Bro. C. C. 339; 2 Ves. 193; 2 R. R. 197.—L.C., *discussed*.
St. George v. Wake (1833) 1 Myl. & K. 610; *Coop. t. Brougham* 129; 36 R. R. 389.—L.C.

Carleton v. Dorset (Earl) (1686) Eq. Cas. Abr. 59; 2 Vern. 17.—L.C., *discussed*.

Strathmore (Countess) v. Bowles (post); *Goddard v. Snow* (1826) 1 Russ. 485; 25 R. R. 111.—M.R.; *St. George v. Wake (post)*.

King v. Cotton (1732) 2 P. Wms. 674; *Moseley* 261.—L.C. (*see S. C. (1726)* 2 P. Wms. 358; *Moseley* 259.—L.C.), *discussed*.
Strathmore (Countess) v. Bowles (1788) 2 Bro. C. C. 345; 2 Cox 28.—*BULLER, J. (supra)*.

King v. Cotton, *considered*.
Cecil v. Butcher (1821) 2 J. & W. 565; 22 R. R. 213.—M.R.; *St. George v. Wake* (1833) 1 Myl. & K. 610; *Coop. t. Brougham* 129; 36 R. R. 389.—L.C.

Goddard v. Snow (1826) 1 Russ. 485; 25 R. R. 111.—M.R., *considered*.
St. George v. Wake (1833) 1 Myl. & K. 610; Coop. t. Brougham 129; 36 R. R. 389.—M.C.

Goddard v. Snow, *referred to*.
England v. Downs (1840) 9 L. J. Ch. 313; 2 Beav. 522; 4 Jcr. 526.—LANGDALE, M.R.; **Griggs v. Staplee** (1848) 2 De G. & Sm. 572; 13 Jur. 29.—KNIGHT BRUCE, V.-C.

Goddard v. Snow and Taylor v. Pugh (1842) 12 L. J. Ch. 13; 1 Hare 608; 6 Jur. 890. WIGRAM, V.-C., *principle approved and applied*.
Chambers v. Crabb (1865) 34 Beav. 457; 11 Jur. (N.S.) 277; 12 L. T. 46.—M.R.

Lance v. Norman (1672) 2 Rep. Ch. 79; and **Howard v. Hooker** (1650) 2 Rep. Ch. 81, *discussed*.
St. George v. Wake (1833) 1 Myl. & K. 610; Coop. t. Brougham 129; 36 R. R. 389.—L.C.

St. George v. Wake, *referred to*.
Griggs v. Staplee (1848) 2 De G. & Sm. 572; 13 Jur. 29.—KNIGHT BRUCE, V.-C.

Blanchet v. Foster (1751) 2 Ves. sen. 264.—L.C., *discussed*.
Goddard v. Snow (1826) 1 Russ. 485; 25 R. R. 110.—M.R.; **St. George v. Wake** (1833) 1 Myl. & K. 116; Coop. t. Brougham 129; 36 R. R. 389.—L.C.

De Manneville v. Crompton (1813) 1 V. & B. 354; 12 R. R. 233.—L.C., *discussed*.
St. George v. Wake (*supra*); **Taylor v. Pugh** (1842) 12 L. J. Ch. 73; 1 Hare 608; 6 Jur. 890.—WIGRAM, V.-C.

Hunt v. Matthews (1686) 1 Vern. 408; Eq. Cas. Abr. 59, pl. 5.—L.C., *referred to*.
Goddard v. Snow (1826) 1 Russ. 485; 25 R. R. 111.—M.R.; **St. George v. Wake** (1833) 1 Myl. & K. 610; Coop. t. Brougham 129; 36 R. R. 389.—L.C.

Hunt v. Matthews, *commented on*.
Downes v. Jennings (1863) 32 L. J. Ch. 643; 32 Beav. 290; 9 Jur. (N.S.) 1264; 8 L. T. 341; 11 W. R. 522.

ROMILLY, M.R.—**Hunt v. Matthews** went further than any other case on this subject in support of the settlement against the husband; it was difficult to reconcile it with the principles laid down in *Strathmore (Countess) v. Bowles* (*supra*, col. 3216). In **Hunt v. Matthews**, however, the Court sustained a settlement made by a widow after a treaty for a second marriage had commenced. The settlement was made in favour of her children by a first marriage.—p. 646.

Poulson v. Wellington (1729) 2 P. Wms. 533.—L.C.; *affirmed*. H.L. (E.), *discussed*.
Goddard v. Snow (1826) 1 Russ. 485; 25 R. R. 111.—M.R.; **St. George v. Wake** (1833) 1 Myl. & K. 610; Coop. t. Brougham 129; 36 R. R. 389.—L.C.

Poulson v. Wellington, *discussed and distinguished*.
Griffith-Boscawen v. Scott (1884) 53 L. J. Ch. 571; 26 Ch. D. 358, 361; 50 L. T. 386; 32 W. R. 580.—KAY, J.

Poulson v. Wellington, *followed*.
Farnell's Settled Estates, In re (1886) 33 Ch. D. 599; 35 W. R. 250.—NORTH, J.

Prideaux v. Lonsdale (1863) 32 L. J. Ch. 317; 4 Giff. 159; 1 N. R. 565; 9 Jur. (N.S.) 488; 8 L. T. 109; 11 W. R. 531.—STUART, V.-C.; *affirmed*, 1 De G. J. & S. 433; 2 N. R. 144; 9 Jur. (N.S.) 507; 8 L. T. 554; 11 W. R. 705.—L.JJ.

Prideaux v. Lonsdale.
Applied, **Everitt v. Everitt** (1870) 39 L. J. Ch. 777; L. R. 10 Eq. 405, 410; 23 L. T. 136; 18 W. R. 1020.—JAMES, V.-C.; *distinguished*, **Phillips v. Munnings** (1871) 41 L. J. Ch. 211; L. R. 7 Ch. 244, 247; 20 W. R. 29.—L.C.; *commented on*, **Baker v. Loader** (1872) L. R. 16 Eq. 49, 58; 42 L. J. Ch. 113; 21 W. R. 167.—MALINS, V.-C.; *referred to*, **Welman v. Welman** (1880) 49 L. J. Ch. 736; 15 Ch. D. 570, 578; 43 L. T. 145.—MALINS, V.-C.

Wormald v. De Lisle (1840) 3 Beav. 18.—M.R.; and **Vernon v. Vernon** (1837) 2 Myl. & Cr. 145.—L.C., *referred to*.
Kelly v. Rogers (1855) 1 Jur. (N.S.) 514; 3 W. R. 442.—WOOD, V.-C.

Blenkinsopp v. Blenkinsopp (1850) 19 L. J. Ch. 425; 12 Beav. 568; 14 Jur. 777.—M.R.; *affirmed*, (1852) 21 L. J. Ch. 401; 1 De G. M. & G. 495; 16 Jur. 787.—L.JJ.
Applied, **Barnes's Banking Co., In re, Thornton, Ex parte** (1867) 36 L. J. Ch. 190; L. R. 2 Ch. 171, 176; 15 L. T. 523; 15 W. R. 292.—L.JJ.; **Moroney, In re** (1876) 21 L. R. Ir. 27, 64.—C.A.; *referred to, on question of costs*, **Sanderson v. Blyth Theatre Co.** (1903) 72 L. J. K. B. 761; [1903] 2 K. B. 533, 542; 89 L. T. 159; 52 W. R. 53.—C.A.

9. REVOCATION.

Page v. Horne (1846) 9 Beav. 570.—M.R.; **S. C.** (1848) 17 L. J. Ch. 200; 11 Beav. 227; 12 Jur. 340.—M.R., *discussed*.
Bond v. Walford (1886) 55 L. J. Ch. 667; 32 Ch. D. 238, 241; 54 L. T. 672.—PEARSON, J.

Clavering v. Clavering (1704) 2 Vern. 473; Pre. Ch. 235.—L.K.; *affirmed*, (1705) 7 Bro. P. C. 410.—H.L. (E.).

Approved, **Chadwick v. Doleman** (1705) 2 Vern. 528.—L.K. (*and see Stratford v. Powell* (1807) 1 Ball & B. 1.—MANNERS, L.C.); *referred to*, **Clavell v. Littleton** (1710) Pre. Ch. 305; Gilb. Eq. R. 37.—L.K.; **Birch v. Blagrove** (1755) Ambl. 264.—L.C.; **Worrall v. Jacob** (1817) 3 Meriv. 256, 270.—M.R.; **Oecil v. Butcher** (1821) 2 J. & W. 565, 574; 22 R. R. 213.—M.R.; **Ker v. Ker** (1869) Ir. R. 4 Eq. 15, 21.—L.C. and L.J.; **Jones, In re, Farrington v. Forrester** (1893) 62 L. J. Ch. 996; [1893] 2 Ch. 461, 473; 3 R. 498; 69 L. T. 45.—NORTH, J.

Croker v. Martin (1827) 1 Bligh (N.S.) 573; 1 Dow & Cl. 15; 30 R. R. 93.—H.L. (IR.).
Applied, **Anstey v. Newman** (1870) 39 L. J. Ch. 769.—ROMILLY, M.R.

• **Villers v. Beaumont** (1682) 1 Vern. 100.—L.C. and **Brookbank v. Brookbank** (1691) 1 Eq. Cas. Abr. 168, *referred to*.
 • **Bill v. Cureton** (1835) 4 L. J. Ch. 98; 2 Myl. & K. 503, 510; 39 R. R. 258.—M.R.

Thorne v. Thorne (1682) 1 Vern. 141.—L.K., *applied*.
Doe v. Lewis v. Davies (1837) 6 L. J. Ex. 176; 2 M. & W. 503; M. & H. 98.—EX.

Barlow v. Heneage (1702) Pre. Ch. 210.—L.K., *considered*.
Cecil v. Butcher (1821) 2 J. & W. 565, 574; 22 R. R. 213.—M.R.

Ward v. Lant (1701) Pre. Ch. 182.—L.K., *referred to*.
Birch v. Blagrave (1755) Ambl. 264.—L.C.

Ward v. Lant and Johnson v. Boyfield (1791) 1 Vern. 314.—L.C., *applied*.
Stratford v. Powell (1807) 1 Ball & B. 1.—MANNERS, L.C.

Ward v. Lant, distinguished.
Doe d. Roberts v. Roberts (1819) 2 B. & Ald. 367; *Daniel* 143; 20 R. R. 477.—K.B.

Ward v. Lant, considered.
Cecil v. Butcher (1821) 2 J. & W. 565, 574; 22 R. R. 213.—M.R.

Ward v. Lant, distinguished.
Way's Trusts, In re (1864) 2 De G. J. & S. 365, 372.—L.JJ. *See post*.

Birch v. Blagrave (1755) Ambl. 264.—L.C. *Distinguished.* *Doe d. Roberts v. Roberts* (1819) 2 B. & Ald. 367; 20 R. R. 477.—K.B.; S.C. *nom.* *Roberts v. Roberts* (1818) *Daniel* 143.—EX.; *considered.* *Cecil v. Butcher* (1821) 2 J. & W. 565, 576; 22 R. R. 213.—M.R.

Birch v. Blagrave and Cecil v. Butcher, distinguished.

Way's Trusts, In re (1864) 2 De G. J. & S. 365; 34 L. J. Ch. 49; 4 N. R. 453; 10 Jur. (N.S.) 1036; 11 L. T. 495; 13 W. R. 149.

TURNER, L.J.—In *Ward v. Lant* (*supra*), *Birch v. Blagrave*, and *Cecil v. Butcher*, the deeds were executed for particular purposes of the grantors without any intention of benefiting the grantees.—p. 372.

Platamone v. Staple (1815) (G. Cooper 250.—C.P.

Not followed. *Roberts v. Roberts* (1819) *Daniel* 145.—EX.; *discussed.* *Doe d. Roberts v. Roberts* (*supra*); *Cecil v. Butcher* (*supra*).

Roberts v. Roberts (*supra*) and **Doe d. Roberts v. Roberts, distinguished.**

Brackenbury v. Brackenbury (1820) 2 J. & W. 391; 22 R. R. 180.—L.C., *considered*.
Cecil v. Butcher (*supra*).

Doe v. Roberts and Brackenbury v. Brackenbury, distinguished.
Greene v. Bateman (1872) L. R. 5 H. L. 591.—H.L. (IR.).

Fletcher v. Fletcher (1814) 14 L. J. Ch. 66; 1 Hare 67; 8 Jur. 1040.—V.C.

Not applied. *Bridge v. Bridge* (1852) 22 L. J. Ch. 189; 16 Beav. 315, 321; 16 Jur. 1031; 1 W. R. 4. M.R.; *distinguished.* *Scales v. Maude* (1855) 25 L. J. Ch. 433; 6 De G. M. & G. 43, 53; 1 Jur. (N.S.) 1147; 3 W. R. 527.—L.C.; *discussed.* *Woodford v. Charnley* (1860) 28 Beav. 96, 101.—M.R.; *applied.* *Bonfield v. Hassell* (1863) 32 Beav. 217.—M.R.; *referred to.* *Patch v. Shore* (1863) 32 L. J. Ch. 185; 11 W. R. 142.—KINDERSLEY, V.C.; *Hobson v. Rioridan* (1886) 20 L. R. Ir. 255, 273.—C.A.; *Patrick, In re. Bills v. Tatham* (1890) 60 L. J. Ch. 111; [1891] 1 Ch. 82, 88; 63 L. T. 752; 39 W. R. 113.—C.A.

Cotton v. King (1726) 2 P. Wms. 358; Mosley 259.—L.C., *discussed*.
Cecil v. Butcher (1821) 2 J. & W. 565, 575; 22 R. R. 213.—M.R.

Cotton v. King, distinguished.
Way's Trusts, In re (1864) 34 L. J. Ch. 49, 52.—L.JJ. (*post*).

Hope v. Harman (1848) 11 Jur. 1097.—Q.B., *referred to*.
Way's Trusts, In re (*supra*).

Way's Trusts, In re (1864) 10 L. T. 776; 12 W. R. 1094.—M.R.; *reversed.* 34 L. J. Ch. 49; 2 De G. J. & S. 365; 4 N. R. 453; 10 Jur. (N.S.) 1066; 11 L. T. 495; 13 W. R. 149.—L.JJ.

Way's Trusts, In re, applied.
Hall v. Hall (1872) 41 L. J. Ch. 667; L. R. 14 Eq. 365, 377; 27 L. T. 115; 20 W. R. 797.—WICKENS, V.-C.; *reversed.* C.A. *See post*.

Way's Trusts, In re, referred to.
Lucan, In re. Hardinge v. Cobden (1890) 60 L. J. Ch. 40; 45 Ch. D. 470, 474; 63 L. T. 538; 39 W. R. 90.—CHITTY, J.

Worrall v. Jacob (1817) 3 Meriv. 256.—M.R., *referred to*.
Lee v. Thurlow (1824) 2 B. & C. 547, 554; 26 R. R. 453.—K.B.; *Hall v. Hall* (*supra*).

Lanham v. Pirie (1856) 26 L. J. Ch. 80; 2 Jur. (N.S.) 753; 28 L. T. 98; 4 W. R. 699.—STUART, V.-C.; *reversed.* (1857) 3 Jur. (N.S.) 704; 29 L. T. 171; 5 W. R. 540.—L.C. and L.JJ.

Bill v. Cureton (1835) 4 L. J. Ch. 98; 2 Myl. & K. 503; 39 R. R. 258.—M.R., *discussed and not applied*.

Davies v. Quartermain (1840) 4 Y. & C. 257.—EX. EQ.

Bill v. Cureton, referred to.
Henriques v. Bensusan (1872) 20 W. R. 350, 351.—MALINS, V.-C.

Naldred v. Gilham (1719) 1 P. Wms. 577.—L.C.

Distinguished. *Scar v. Ashwell* (1739) 3 Swanst. 411, n.—L.C.; *discussed.* *Boughton v. Boughton* (1739) 1 Atk. 625; 9 Mod. 212.—L.C.; *Bolton v. Bolton* (1739) 3 Swanst. 414, n.—L.C.; *Worrall v. Jacob* (1817) 3 Meriv. 256, 271.—M.R.; *Cecil v. Butcher* (1821) 2 J. & W. 565, 575; 22 R. R. 213.—M.R.; *applied.* *Unacke v. Giles* (1828) 2 Moll. 267.—HART, L.C.; *referred to.* *Way's Trusts, In re* (1864) 2 De G. J. & S. 365, 372; 34 L. J. Ch. 49; 4 N. R. 453; 10 Jur. (N.S.) 1066; 11 L. T. 495; 13 W. R. 149.—L.JJ.

Naldred v. Gilham and Nanney v. Williams (1856) 22 Beav. 452.—M.R., *discussed*.

Hall v. Hall (1873) 42 L. J. Ch. 414; L. R. 8 Ch. 430, 436; 28 L. T. 383; 21 W. R. 373.—C.A.
 JAMES, L.J.—One of the earliest cases, if not the earliest, in which the absence of a power of revocation was relied on was *Naldred v. Gilham*. In that case the M.R. had with great clearness decreed in favour of the settlement, and although that decree was reversed by Lord Macclesfield, it is plain from his judgment, not only that he did not mean to lay down any such general rule as that contended for in the present case, but that he had no idea that such a rule existed. It is said that in *Huquein v. Buseley* (14 Ves. 273.—L.C.; see "PRAUD," vol. i. col. 1156) it was laid down that the absence of a power of revocation was strong evidence that the party did not understand the transaction. But that expression must be read in connection with the context. . . . In *Nanney v.*

Williams there was the conclusive circumstance that the settlor actually struck out the word irrevocably, and that the deed as it was executed contained a recital that the testator was desirous of revocably settling the property. In that case, moreover, the solicitor, who prepared the deed, took a life interest in remainder with remainder to his children in tail. But even in that case the learned judge did not consider himself warranted in declaring the deed void without a very careful and elaborate examination of all the surrounding facts and circumstances.—p. 445.

Boughton v. Boughton (1739) 1 Atk. 625; 9 Mod. 212.—*P.C., referred to.*

Worrall v. Jacob (1817) 3 Meriv. 256, 271.—*M.R.*

Boughton v. Boughton, considered.

Cecil v. Butcher (1821) 2 J. & W. 565, 575; 22 R. R. 313.—*M.R.*

Boughton v. Boughton, referred to.

Patch v. Shore (1863) 32 L. J. Ch. 185; 11 W. R. 142.—*KINDERSLEY, V.-C.*

Anderson v. Elsworth (1861) 30 L. J. Ch. 922; 3 Giff. 154; 7 Jur. (N.S.) 1047; 4 L. T. 822; 9 W. R. 888.—*STUART, V.-C.*; and **Forslaw v. Welsby** (1860) 30 L. J. Ch. 331; 30 Beav. 243; 7 Jur. (N.S.) 299; 4 L. T. 170; 9 W. R. 225.—*M.R., discussed.*

Coutts v. Acworth (1869) 38 L. J. Ch. 694; L. R. 8 Eq. 558, 567; 21 L. T. 224; 18 W. R. 83.—*MALINS, V.-C.*

Forshaw v. Welsby, discussed.

Hall v. Hall (1873) 42 L. J. Ch. 444; L. R. 8 Ch. 430, 437; 28 L. T. 383; 21 W. R. 373.—*C.A. JAMES, L.J.*—In *Forshaw v. Welsby* . . . where the deed was set aside at the instance of the settlor himself, the Court came to the conclusion on all the facts and circumstances that the deed was in truth in the nature of a *donatio mortis causa*.—p. 446.

Toker v. Toker (1862) 31 Beav. 629; 9 Jur. (N.S.) 370.—*M.R.*; *affirmed*, (1863) 3 De G. J. & S. 487; 32 L. J. Ch. 322; 8 L. T. 777.—*L.JJ.*

Toker v. Toker, referred to.

Coutts v. Acworth (1869) 38 L. J. Ch. 694; L. R. 8 Eq. 558, 563; 21 L. T. 224; 17 W. R. 1121.—*MALINS, V.-C.*

Toker v. Toker, approved and applied.

Hall v. Hall (1873) 42 L. J. Ch. 444, 446; L. R. 8 Ch. 430, 437; 28 L. T. 383; 21 W. R. 373.—*C.A. L.C. and L.JJ. (see post, col. 3223)*; **Horan v. MacMahon** (1886) 17 L. R. Ir. 641, 653.—*C.A.*

Coutts v. Acworth (1869) 38 L. J. Ch. 694; L. R. 8 Eq. 558; 21 L. T. 224; 17 W. R. 1121.—*MALINS, V.-C., considered.*

Phillips v. Mullings (1871) 41 L. J. Ch. 211; L. R. 7 Ch. 244, 247 (*see post*); **Welman v. Welman** (1880) 49 L. J. Ch. 736; 15 Ch. D. 570, 577; 43 L. T. 145.—*MALINS, V.-C.*

Wollaston v. Tribe (1869) L. R. 9 Eq. 44; 21 L. T. 449; 18 W. R. 83.—*M.R., considered.*

Phillips v. Mullings (1871) L. R. 7 Ch. 244; 41 L. J. Ch. 211; 20 W. R. 129.

HATHERLEY, L.C.—It has, for instance, been almost laid down in *Coutts v. Acworth* (*supra*), that, where there is no power of revocation, the deed will be set aside; and *Wollaston v.*

Tribe and *Everitt v. Everitt* (*post*), have been relied on as favouring the same view. But whether there should be a power of revocation or not must depend upon the circumstances; and it cannot be laid down as a general rule that such a deed would be voidable unless it contained a power of revocation.—p. 247.

Wollaston v. Tribe, referred to.

Welman v. Welman (1880) 49 L. J. Ch. 736; 15 Ch. D. 570, 578; 43 L. T. 145.—*MALINS, V.-C.*; **Paul v. Paul** (1880) 50 L. J. Ch. 14; 15 Ch. D. 580, 590; 43 L. T. 239; 29 W. R. 281.—*MALINS, V.-C. (overruled, see ante, col. 3215)*; **James v. Couchman** (1885) 54 L. J. Ch. 838; 29 Ch. D. 212, 215; 52 L. T. 344; 33 W. R. 452.—*NORTH, J.*

Wollaston v. Tribe, doubted.

Tucker v. Bennett (1887) 38 Ch. D. 1; 57 L. J. Ch. 507; 58 L. T. 650.—*C.A.*

COTTON, L.J.—*Wollaston v. Tribe* was also the case of a marriage settlement, and there some years after the marriage, there having been no children, and the husband being dead, the lady came and gave evidence, showing that her instructions to her solicitor (she being apparently the only person who had taken part in the negotiations for the settlement) were not in accordance with the terms of the settlement. If the *M.R.* thought the evidence was uncontradicted and sufficient, it would be right to so decide, but I should very much hesitate to say that it was really acting in accordance with the principles which the Court has acted upon. It requires very clear and distinct evidence to show that there was some different intention at the time when the settlement was executed, and, with the exception of this, there is hardly a single case where many years after the settlement was executed, on mere parol evidence, uncontradicted because there was no one to contradict it, the Court has altered a deed because one of the parties afterwards desired that it should not stand as executed.—p. 14. **LOPES, L.J.** concurred. **SIR J. HANNEN** dissented.

Everitt v. Everitt (1870) 39 L. J. Ch. 777; L. R. 10 Eq. 405; 23 L. T. 136; 18 W. R. 1020.—*JAMES, V.-C.*

Referred to, **Phillips v. Mullings** (1871) 41 L. J. Ch. 211; L. R. 7 Ch. 244, 247; 20 W. R. 129.—*L.C. (see supra)*; *followed*, **James v. Couchman** (1885) 54 L. J. Ch. 838; 29 Ch. D. 212, 217; 52 L. T. 344; 33 W. R. 452.—*NORTH, J.*

Dixon v. Pyner (1886) 55 L. J. Ch. 566; 54 L. T. 748; 34 W. R. 528.—*KAY, J., followed.*

Harding, In re, **Rogers v. Harding** (1894) 63 L. J. Ch. 725; [1894] 3 Ch. 315; 7 R. 414; 71 L. T. 269; 42 W. R. 677.—*C.A.*

Mountford v. Keene (1871) 24 L. T. 925; 19 W. R. 708.—*ROMILEY, M.R., commented on.* **Hall v. Hall** (1873) 42 L. J. Ch. 444; L. R. 8 Ch. 430, 436; 28 L. T. 383; 21 W. R. 373.—*C.A.*

JAMES, L.J.—But there is one case, and one only before the *M.R.*, in which, as reported, the broad proposition relied on in this case appears to have been laid down. In *Mountford v. Keene* the *M.R.* is reported to have said that the decisions established that the burden lies on the person who takes any benefit under a voluntary deed of proving that the propriety of reserving a power of revocation was brought under the

notice of the party at the time when he executed the deed; but it is not probable that the M.R. intended to lay down that which he is here reported to have said wholly irrespective of the consideration that "there was a set of relatives quarrelling over the poor enfeebled semi-paralytic old man," and of the other circumstances in that case, which might have well warranted the conclusion that it was not the deliberate act of a person understanding sufficiently the nature of what he was doing. It could not, at all events, have been intended by the M.R. to have overruled his own very elaborate judgment in *Toker v. Toker* (81 Beav. 629), affirmed as that decision was by the C. A. (3 De G. J. & S. 487. See *supra*, col. 3221). The true rule is that which is laid down by Turner, L.J. in *Toker v. Toker*.—p. 445.

Phillips v. Mullings (1871) 41 L. J. Ch. 211; L. R. 7 Ch. 244; 20 W. R. 29.—L.C., referred to.

Hall v. Hall (1872) 41 L. J. Ch. 667, 672; L. R. 14 Eq. 365, 378.—WICKENS, V.-C. (reversed, *post*); **Welman v. Welman** (1880) 49 L. J. Ch. 736; 15 Ch. D. 570, 578; 43 L. T. 145.—MALINS, V.-C.

Hall v. Hall (1872) 41 L. J. Ch. 667; L. R. 14 Eq. 365; 27 L. T. 115; 20 W. R. 797.—WICKENS, V.-C.; reversed, (1873) 42 L. J. Ch. 444; L. R. 8 Ch. 430; 28 L. T. 383; 21 W. R. 373.—L.C. and L.J.

Hall v. Hall, distinguished.

Henshall v. Fereday (1873) 29 L. T. 46; 21 W. R. 570.—L.J.

Hall v. Hall, discussed and applied.

Horan v. MacMahon (1886) 17 L. R. Ir. 641, 650.—C.A.; reversing *ib.* 471.—M.R.

SEWERS.

Ripon (Earl) v. Hobart (1834) 3 My. & K. 169; 3 L. J. Ch. 145; 12 L. T. 665.—L.C., considered.

Fletcher v. Bealey (1885) 28 Ch. D. 688; 54 L. J. Ch. 121; 52 L. T. 541; 33 W. R. 745.

PEARSON, J.—The first case I will mention is *Ripon (Earl) v. Hobart*. In that case the parliamentary commissioners for cleansing and improving the river Witham and its navigation, and the drainage of the adjacent lands, asked for an injunction against the defendants, who were the trustees for draining another district, and who were commencing to erect a steam-engine for pumping water from the fens into the river Witham, substituting a steam-engine for the power which they had previously obtained by windmills, which had up to that time been used for the purpose. It was said that the steam-engine intended to be employed would be equivalent in power to twenty-seven windmills, and that the effect of using a steam-engine of that power would be to pump so much water into the navigation as to overpower it altogether. Lord Brougham, L.C. said: "If, indeed, this be a work which not only gives the power of doing mischief, but cannot be used, or can hardly be in the common course of things be used without working mischief; if, in short, it be a thing

which can scarcely be used without being abused, the case comes to be very different. For, in matters of this description, the law cannot make over-nice distinctions, and refuse the relief merely because there is a bare possibility that the evil may be avoided. Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person can incur them, although they do not amount to absolute certainty of damage. Nay, it will go farther, according to the same practical and rational view, and, balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief, should it be done, would be vast and overwhelming. Accordingly, if it appeared that the works in question could hardly be used without damage to the inferior districts, I might hold that erecting them was, in itself, a beginning of injury, though there might be a possibility of otherwise using them: and, if the damage, should it happen at all, were the destruction of the navigation, and the subjecting of the lower districts to a deluge, I might scrutinise less narrowly the probability of the engines being injuriously worked."—p. 696.

Ripon (Earl) v. Hobart, principle applied.

McMurray v. Cadwell (1889) 6 Times L. R. 77.—KEKEWICH, J.

Wenlock (Baroness) v. River Dee Co. (1888)

57 L. J. Ch. 946; 38 Ch. D. 534; 59 L. T. 485.—C.A., applied.

Redman v. Rymer (1889) 60 L. T. 885.—KEKEWICH, J., reversed, (1891) 65 L. T. 270.—C.A.

Stracey v. Nelson (1844) 13 L. J. Ex. 97; 12 M. & W. 535.—EX., applied.

Hinde v. Chorlton (1866) 36 L. J. C. P. 79, 85; L. R. 2 C. P. 104, 116; 12 Jur. (N.S.) 1008; 15 L. T. 472; 15 W. R. 226.—C.P.

Stracey v. Nelson, adopted.

Winch v. Thames Conservators (1872) 41 L. J. C. P. 241, 247; L. R. 7 C. P. 458, 468; 27 L. T. 95.—C.P.; affirmed, (1874) 43 L. J. C. P. 167; L. R. 9 C. P. 378; 31 L. T. 128; 22 W. R. 879.—EX. CH.

Stracey v. Nelson, discussed.

Coverdale v. Charlton (1878) 48 L. J. Q. B. 128, 133; 4 Q. B. D. 104, 124; 40 L. T. 88; 27 W. R. 257.—C.A.

Reg. v. Metropolitan Sewers Commissioners (1853) 1 El. & Bl. 694; 22 L. J. Q. B. 234;

17 Jur. 787; 1 W. R. 286.—Q.B., distinguished.

Bradby and Southampton Local Board, *In re* (1855) 24 L. J. Q. B. 239; 4 El. & Bl. 1014; 3 C. L. R. 771; 1 Jur. (N.S.) 778; 3 W. R. 413.—Q.B.

CAMPBELL, C.J.—In *Reg. v. Metropolitan Sewers Commissioners* the liability was denied, whereas here it is admitted, and the sole question is one purely of amount.—p. 241.

Reg. v. Metropolitan Sewers Commissioners, followed.

Reg. v. Burslem Local Board (1860) 6 Jur. (N.S.) 696; 1 El. & Bl. 1077; 29 L. J. Q. B. 242; 8 W. R. 584.—EX. CH.

WILLES, J.—I am not at all sure that there

was not some circumstance in the case before Wood, V.-C. [*Bradford Local Board v. Hopwood*, 6 W. R. 818] which does not appear in the report, and which might make his decision consistent with that of the Court of Q. B. in *Reg. v. Metropolitan Sewers Commissioners*.—p. 698.

Reg. v. Metropolitan Sewers Commissioners.
commented on.

Brierley Hill Local Board *v.* Pearsall (1884) 54 L. J. Q. B. 25; 9 App. Cas. 595; 51 L. T. 577; 33 W. R. 56; 49 J. P. 84.—H.L. (E.). LORDS SELBORNE, L.C., WATSON and FITZGERALD: affirming S. C. *nom.* Pearsall *v.* Brierley Hill Local Board (1883) 52 L. J. Q. B. 529; 11 Q. B. D. 735; 49 L. T. 486; 32 W. R. 141; 47 J. P. 628.—C.A. BRETT, M.R., LINDLEY and FRY, L.JJ.

Bradby and Southamton Local Board, In re (1855) 24 L. J. Q. B. 239; 4 E.L. & Bl. 1014; 3 C. L. R. 771; 1 Jur. (N.S.) 778; 3 W. R. 413.—Q.B., *considered and applied.*

Rhodes *v.* Airdale Drainage Commissioners (1876) 45 L. J. C. P. 337; 1 C. P. D. 380, 395; 31 L. T. 59.—C.P.D.; reversed, (1876) 45 L. J. C. P. 861; 1 C. P. D. 402; 35 L. T. 46; 24 W. R. 1053.—C.A.

Bradby and Southamton Local Board, In re, *commented upon.*

Brierley Hill Local Board *v.* Pearsall (1884) 54 L. J. Q. B. 25, 28; 9 App. Cas. 595, 601; 51 L. T. 577; 33 W. R. 56; 49 J. P. 84.—H.L. (E.).

Humphries v. Cousins (1877) 46 L. J. C. P. 438; 2 C. P. D. 239; 36 L. T. 180; 25 W. R. 371.—C.P.D., *approved.*

Firth *v.* Bowling Iron Co. (1878) 47 L. J. C. P. 358, 361; 3 C. P. D. 254, 259; 38 L. T. 568; 26 W. R. 558.—C.P.D.

Cornwall v. Metropolitan Sewers Commissioners (1855) 10 Ex. 771; 3 C. L. R. 417.—EX., *followed.*

Fisher *v.* Prowse (1862) 31 L. J. Q. B. 212; 2 B. & S. 770; 8 Jur. (N.S.) 1208; 6 L. T. 711.—Q.B.

Russell v. Shenton (1842) 11 L. J. Q. B. 289; 3 Q. B. 449; 2 G. & D. 573; 6 Jur. 1083.—Q.B., *referred to.*

Humphries *v.* Cousins (1877) 46 L. J. C. P. 438, 441; 2 C. P. D. 239, 245; 36 L. T. 180; 25 W. R. 371.—C.P.D. and C.A.

Russell v. Shenton, *adopted.*

Nelson *v.* Liverpool Brewery Co. (1877) 46 L. J. C. P. 675; 2 C. P. D. 311; 25 W. R. 877.—C.P.D.

Ward v. Lee (1857) 26 L. J. Q. B. 142; 7 E.L. & Bl. 426; 3 Jur. (N.S.) 557; 5 W. R. 403.—Q.B., *applied.*

Ruck *v.* Williams (1858) 27 L. J. Ex. 357; 3 H. & N. 308; 6 W. R. 622.—EX.

Ward v. Lee, *referred to.*

Mersey Docks *v.* Gibbs (1866) 35 L. J. Ex. 225, 235; L. R. 1 H. L. 93, 118; 11 H. L. Cas. 686; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.—H.L. (E.).

Rex v. Tower Hamlets Sewers Commissioners (1829) 7 L. J. (O.S.) K. B. 131; 9 B. & C. 517; 4 M. & Ry. 365.—K.B., *discussed.*

Hammersmith Bridge Trustees *v.* Hammersmith Overseers (1871) 40 L. J. M. C. 79, 83; L. R. 6 Q. B. 230, 238; 24 L. T. 267; 19 W. R. 750.—Q.B.

Rex v. Tower Hamlets Sewers Commissioners, *adopted.*

Griffiths *v.* Longdon Drainage Board (1871) 41 L. J. Q. B. 25, 29; L. R. 6 Q. B. 738, 743; 25 L. T. 126; 19 W. R. 1162.—Q.B.

Reg. v. Tower Hamlets Sewers Commissioners (No. 2) (1830) 9 L. J. (O.S.) M. C. 30; 1 B. & Ad. 232.—K.B., *referred to.*

Reg. *v.* White (1884) 54 L. J. M. C. 23; 14 Q. B. D. 358; 52 L. T. 116; 33 W. R. 248; 49 J. P. 294.—C.A.

Reg. v. Tower Hamlets Sewers Commissioners (No. 2), *applied.*

Easton *v.* Nar Valley Drainage Commissioners (1892) 8 Times L. R. 649.—CHARLES and GRANTHAM, JJ.

Soady v. Wilson (1835) 3 A. & E. 248, 252; 4 N. & M. 777; 1 H. & W. 256.—K.B., *followed.*

Hammersmith Bridge Co. *v.* Hammersmith Overseers (1871) 40 L. J. M. C. 79; L. R. 6 Q. B. 230; 24 L. T. 267; 19 W. R. 750.—Q.B.

Neave v. Wrather (or Weather) (1842) 12 L. J. Q. B. 32; 3 Q. B. 984; 3 G. & D. 221; 7 Jur. 168.—Q.B.; **Stafford v. Hamston** (1821) 5 Moore 608; 2 Br. & B. 691; 23 R. R. 543.—C.P., *followed.*

Biglin *v.* Wylie (1867) 36 L. J. Q. B. 307, 311.—Q.B.

SHELLEY'S CASE.

SHELLEY'S CASE, RULE IN:

Shelley's Case (1581) 1 Co. Rep. 93 b.—C.P., *referred to.*

Minshull *v.* Minshull (1737) 1 Atk. 411.—L.C.; Garth *v.* Baldwin (1755) 2 Ves. sen. 616, 657.—L.C.; Sayer *v.* Masterman (1756) Amb. 344.—L.C.C.; Wright *v.* Pearson (1758) 1 Eden 119, 127; Amb. 358.—L.K.; Jones *v.* Morgan (1783) 1 Bro. C. C. 206.—L.C.

Shelley's Case, *applied.*

Hayes *d. Foorde v. Foorde* (1770) 2 W. Bl. 698.—K.B.; Curtis *v.* Price (1805) 12 Ves. 89; 8 R. R. 303.—GRANT, M.R.

Shelley's Case, *referred to.*

Poole *v.* Poole (1804) 3 B. & P. 627.—C.P.; Doe *d. Gallini v. Gallini* (1833) 3 L. J. K. B. 71; 3 B. & Ad. 521; 2 N. & M. 619.—K.B.; Montgomery *v.* Montgomery (1845) 3 Jo. & Lat. 47, 59; 8 Ir. Eq. R. 740.—STUDEN, J.C.; Harvey *v.* Towell (1847) 17 L. J. Ch. 217; 7 Hare 231, 234; 12 Jur. 241.—V.-C.

Shelley's Case, *applied.*

Toller *v.* Attwood (1850) 20 L. J. Q. B. 40; 15 Q. B. 929, 951.—Q.B.

Shelley's Case, referred to.

Holliday *v.* Overton (1852) 21 L. J. Ch. 769; 15 Beav. 480; 16 Jur. 346.—M.R.; affirmed, 16 Jur. 751.—L.JJ.

Shelley's Case, discussed and applied.

Kavanagh *v.* Morland (1853) 23 L. J. Ch. 41; Kay 16, 24; 2 Eq. R. 771; 18 Jur. 185; 2 W. R. 8.—WOOD, V.-C.

Shelley's Case, referred to.

East *r.* Twyford (1853) 41 H. L. Cas. 517, 551.—H.L. (E.); Wright *v.* Vernon (1854) 2 Drew. 439, 456; 2 W. R. 693.—KINDERSLEY, V.-C.

Shelley's Case, not applied.

Cope *v.* Arnold (1854) 2 Sm. & G. 311, 320; 18 Jur. 506; 2 W. R. 482.—STUART, V.-C. and (1855) 24 L. J. Ch. 673; 4 De G. M. & G. 574; 1 Jur. (N.S.) 313; 3 W. R. 187.—CRANWORTH, L.C.: Parker *v.* Clark (1855) 3 Sm. & G. 161; 1 Jur. (N.S.) 605; 3 W. R. 471.—STUART, V.-C. (affirmed, 6 De G. M. & G. 104; 2 Jur. (N.S.) 335.—L.C.); Haddelsey *v.* Adams (1856) 25 L. J. Ch. 826, 830; 22 Beav. 266; 2 Jur. (N.S.) 724.—M.R.

Shelley's Case, applied.

Lewis *v.* Hopkins (1857) 3 Drew. 668; 5 W. R. 243.—V.-C. and L.C. (affirmed *nom.* Williams *v.* Lewis (1859) 28 L. J. Ch. 505; 6 H. L. Cas. 1013; 5 Jur. (N.S.) 323; 7 W. R. 349.—H.L. (E.)); Grimston *v.* Downing (1857) 4 Drew. 125, 131; 5 W. R. 767.—KINDERSLEY, V.-C.: Roddy *v.* Fitzgerald (1858) 6 H. L. Cas. 822, 883.—H.L. (IR.).

Shelley's Case, referred to.

Jordan *v.* Adams (1859) 29 L. J. C. P. 180; 6 C. B. (N.S.) 748; 6 Jur. (N.S.) 536.—C.P.; affirmed, 30 L. J. C. P. 161; 9 C. B. (N.S.) 483; 7 Jur. (N.S.) 973; 4 L. T. 775; 9 W. R. 593.—EX. CH.: MARTIN and CHANNELL, BB. dissenting.

Shelley's Case, applied.

Mills *v.* Seward (or Howard) (1861) 1 J. & H. 733; 7 Jur. (N.S.) 654.—WOOD, V.-C.: Johnson *v.* Rutherford (1861) 3 L. T. 649.—ROMILEY, M.R.: Spence *v.* Spence (1862) 31 L. J. C. P. 189; 12 C. B. (N.S.) 199; 6 L. T. 538; 10 W. R. 605.—C.P.

Shelley's Case.

Referred to, Davenport *v.* Davenport (1863) 1 H. & M. 775; 3 N. L. 26; 12 W. R. 6.—WOOD, V.-C.; *not applied*, Greaves *v.* Simpson (1864) 33 L. J. Ch. 641; 10 Jur. (N.S.) 609; 10 L. T. 418; 12 W. R. 773.—KINDERSLEY, V.-C.: Powell *v.* Boggis (1866) 35 Beav. 535, 541; 14 W. R. 670.—M.R.

Shelley's Case.

Referred to, Jeaffreson's Trusts, *In re* (1866) 35 L. J. Ch. 622; 1 L. R. 2 Eq. 276, 280; 12 Jur. (N.S.) 660; 14 W. R. 759.—WOOD, V.-C.; *applied*, Fuller *v.* Channier (1866) 35 L. J. Ch. 772; 1 L. R. 2 Eq. 682; 12 Jur. (N.S.) 642; 14 W. R. 913.—WOOD, V.-C. (*see post*, col. 3233).

Shelley's Case, 1 Co. Rep. 101 a., applied.

Clarke *v.* Clemmans (1866) 36 L. J. Ch. 171, 172; 15 W. R. 250.—MALINS, V.-C.

Shelley's Case, 1 Co. Rep. 93 b.

Not applied, Bradley *v.* Cartwright (1867) 36 L. J. C. P. 248; 1 L. R. 2 C. P. 511, 524; 16 L. T. 587; 15 W. R. 922.—C.P.; *applied*, Denman *v.* Jones (1867) 16 L. T. 787, 788.—MALINS, V.-C.: Warren *v.* Travers (1868) 1 L. R. 2 Eq. 455, 462.—M.R.; *referred to*, Avern *v.* Lloyd (1868) 37 L. J. Ch. 489; 1 L. R. 5 Eq. 383; 18 L. T. 282; 16 W. R. 669.—STUART, V.-C.

Shelley's Case, not applied.

Herrick *v.* Franklin (1868) 37 L. J. Ch. 908; 1 L. R. 6 Eq. 593, 596.—GIFFARD, V.-C. (*see post*); Bewley *v.* Carter (1869) 1 L. R. 4 Ch. 230, 237; 38 L. J. Ch. 283; 20 L. T. 381; 17 W. R. 300.—L.JJ.

Shelley's Case, referred to.

Baily *v.* De Crespigny (1869) 1 L. R. 4 Q. B. 180, 185; 38 L. J. Q. B. 98; 19 L. T. 681; 17 W. R. 494.—Q.B.: Sackville-West *v.* Holmesdale (1870) 39 L. J. Ch. 505; 1 L. R. 4 H. L. 543, 553.—H.L. (E.); HATHERLEY, L.C. dissenting.

Shelley's Case, not applied.

Brookman *v.* Smith (1871) 40 L. J. Ex. 161, 170; 1 L. R. 6 Ex. 291, 305; 24 L. T. 625; 19 W. R. 1029.—EX.; affirmed, (1872) 41 L. J. Ex. 114; 1 L. R. 7 Ex. 271; 26 L. T. 974; 20 W. R. 906.—EX. CH.

Shelley's Case, applied.

Cooper *v.* Kynoch (or Kynock) (1872) 41 L. J. Ch. 296; 1 L. R. 7 Ch. 398; 26 L. T. 566; 20 W. R. 503.—L.JJ.; reversing M.R.

Shelley's Case, applied.

Cooper *v.* Kynoch (or Kynock), *observed on*, White and Hindle's Contract, *In re* (1877) 7 Ch. D. 201; 47 L. J. Ch. 85; 37 L. T. 574; 26 W. R. 124.

MALINS, V.-C.—In this case the rule in *Shelley's Case* applies, as all the limitations are equitable. I am not aware that there is any difference whatever in the application of the rule in *Shelley's Case* to a deed and to a will. It is stated in the report of *Cooper v. Kynoch* that the construction might have been otherwise in a will, but this statement has reference to the estate in fee taken by the trustees, and not to the application of the rule in *Shelley's Case*.—p. 202.

Shelley's Case, not applied.

Smith *v.* Butcher (1878) 48 L. J. Ch. 136; 10 Ch. D. 113, 116; 27 W. R. 281.—JESSEL, M.R.

Shelley's Case, applied.

Herrick *v.* Franklin (1868) 37 L. J. Ch. 908; 1 L. R. 6 Eq. 593, 596.—V.-C., *explained*, Comfort *v.* Brown (1878) 10 Ch. D. 146; 48 L. J. Ch. 318; 27 W. R. 226.

BACON, V.-C.—It is said there is no instance in which the same rule [that in *Shelley's Case*] has been applied to personal estate. *De Beauvoir v. De Beauvoir* (3 H. L. Cas. 524, *see* "WILL") and *Gittings v. McDermott* (2 Myl. & K. 69, *see* "WILL") are instances; and there are hundreds of other instances in which the same rule has been applied in the same manner to personal estate. But it is said there was a case of *Herrick v. Franklin*, before the late Giffard, L.J., when V.-C., in which a contrary decision was come to. No one can hear the name of Giffard, L.J., mentioned without feeling the utmost respect for any decision of his. No one can doubt his profound knowledge of the law; but I do not think he has decided anything of the kind. The question arising there between real estate and personal estate, the personal estate being given for life clogged with and bound by a trust to apply a portion of it to the maintenance of a lunatic brother—the V.-C. in effect said:—"It is not the time for me to decide that matter. I will not decide that, because these two things are blended together, these legacies are not at

liberty to sell and dispose of the estate which is burdened with this trust. Hereafter when the time comes there may be a question between the persons who lay claim to the bequest, whether it goes to the next of kin or not."—p. 157.

Shelley's Case (*supra*), *referred to*.

Morgan v. Thomas (1882) 51 L. J. Q. B. 556; 9 Q. B. D. 643, 645; 47 L. T. 281; 31 W. R. 106.—C.A.: Marshall v. Giggell (1882) 51 L. J. Ch. 818; 21 Ch. D. 790, 795; 47 L. T. 859; 31 W. R. 63.—KAY, J.

Shelley's Case, *not applied*.

Hart's Estate, In re, Orford v. Hart, W. N. (1883) 164.—KAY, J.

Shelley's Case, *referred to*.

Macnamara v. Dillon (1883) 11 L. R. Ir. 29, 33.—CHATTERTON, V.-C.: Studd v. Cook (1883) 8 App. Cas. 577, 604.—H.L. (SC.).

Shelley's Case, *explained*.

Bowen v. Lewis (1884) 9 App. Cas. 850; 54 L. J. Q. B. 55; 52 L. T. 189.—H.L. (E.). EARL CAIRNS, LORDS BLACKBURN and FITZGERALD; SELBORNE, L.C. and LORD BRAMWELL dissenting. SELBORNE, L.C.—The rule in *Shelley's Case* ought not, in my opinion, to be extended, so as to defeat unnecessarily the expressed intention, by straining the interpretation of such words as "child or children," when they are capable of being understood in their usual and primary sense.—p. 898.

EARL CAIRNS.—I am bound to say that in my opinion the rule in *Shelley's Case* is not only not a technical rule, but it is the very opposite of a technical rule. . . . The foundation of the rule in *Shelley's Case*, as I understand it, is this: You have an indication of a general intention, which you gather from the whole of the will, that the estate shall travel through the issue generally of a certain person. You have that accompanied, no doubt, with a particular intention that the first taker shall take an estate for life; but in order to give effect not to a technical construction, which would limit the first taker to a life estate, but to give effect to the general intention of the testator, and to make the estate travel through the issue generally, as the testator intended it to do, you apply the rule in *Shelley's Case*. Otherwise, if you do not do that, the consequence is that the only other resource which you have is to give to the first taker in the series of issue an estate by purchase, in which case it will not go through the issue generally, but only through the descendants of that particular head of the issue.—p. 907.

Shelley's Case, *explained*.

Parry and Daggs, In re (1885) 31 Ch. D. 130; 55 L. J. Ch. 237; 54 L. T. 229; 34 W. R. 553.—C.A.

FRY, L.J.—From the earliest times the Courts have always leant against any device to render an estate inalienable. It is the policy of the law always to make estates alienable, and it is immaterial by what device it is attempted to prevent an owner from exercising the power of ownership. This lies at the foundation of the rule in *Shelley's Case*, in which words appearing to convey an independent gift were construed to be words of limitation.—p. 184.

Shelley's Case, *referred to*.

McGibbon v. Abbott (1885) 54 L. J. P. C. 39; 10 App. Cas. 653, 659; 54 L. T. 138.—P.C.

Shelley's Case, *discussed and applied*.

Richardson v. Harrison (1885) 16 Q. B. D. 85; 55 L. J. Q. B. 58; 54 L. T. 456.—C.A.

JESSEL, M.R.—I shall not say much about the rule in *Shelley's Case*. I have heard some judges say that, in their opinion, it was the most unjust decision that ever was come to. I shall not give that as my view; but it is a decision which I never could understand how anybody could come to. That, however, has nothing to do with the question before us. The doctrine has been a rule of law for too many hundred years, I suppose, for anybody to interfere with it. The question is, whether that rule applies to this case. If this case is within the rule we must apply it. There is a well-known doctrine about that rule, namely, that where the two estates, which otherwise would be joined together, as it were, by reason of the rule, are, the one of them legal, the other equitable, they cannot be joined, and the rule does not apply: the estates must be both equitable, or both legal. And the question as to this will is whether the two estates, which the defendants desire to join by virtue of the rule in *Shelley's Case*, are both equitable or are both legal: if they are, the rule applies; if the one is legal and the other equitable, it does not apply.—p. 103.

Shelley's Case.

Not applied, Atkinson v. L'Estrange (1885) 15 L. R. Ir. 340.—V.-C.; Pedder v. Hunt (1887) 56 L. J. Q. B. 212; 18 Q. B. D. 565, 566.—C.A. (*see post*, col. 3235); *applied*, Score, In re, Tolman v. Score (1887) 57 L. T. 40, 42.—KAY, J.; Sandes v. Cooke (1887-88) 21 L. R. Ir. 445, 449, 468.—PORTER, M.R. and C.A.; *referred to*, Neville v. Thacker (1888) 23 L. R. Ir. 344, 352.—PORTER, M.R. (affirmed, C.A.); *applied*, Bird and Barnard's Contract, In re (1888) 59 L. T. 166.—NORTH, J.; *referred to*, Allsop and Joy's Contract, In re (1889) 61 L. T. 213, 216.—CHITTY, J.; *not applied*, Evans v. Evans (1892) 61 L. J. Ch. 456; [1892] 2 Ch. 173.—C.A. (*see post*, col. 3233); *referred to*, Savile v. Savile (1895) [1896] 1 Ir. R. 249, 255.—M.R.

Shelley's Case, *discussed and applied*.

Harrison v. Harrison (1844) 14 L. J. C. P. 28; 7 Man. & G. 938.—C.P., *referred to*.

Van Gratten v. Foxwell (1897) 66 L. J. Q. B. 745; [1897] A. C. 658; 77 L. T. 170.—H.L. (E.).

LORD MACNAGHTEN.—The subject, which was discussed at the bar, so rarely comes up for discussion nowadays that I make no apology for reminding your lordships of the terms in which the rule [in *Shelley's Case*] was stated in the case from which it takes its name. The statement is this: "It is a rule in law, when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate, and not words of purchase." Every part of that statement is, I think, deserving of attention, from the opening words, which declare the rule to be a "rule of law," to the last clause, which says that heirs can never take by purchase in a case to which the rule applies. It is hardly necessary to observe that any expression which imports the whole succession of inheritable

blood has the same effect in bringing the rule into operation as the word "heirs," though perhaps it was not always so, and though it seems to have been thought at one time, and, indeed, it was argued as late as 1844, that, in the absence of technical words, the governing principle was not the rule in *Shelley's Case*, but the doctrine of *cy-près*—see 1 Rep. 106 b, n. 1. 5, and *Harrison v. Harrison*.—p. 751. See address at length. And see *post*, col. 3246.

LORDS HERSHELL and DAVEY also discussed *Shelley's Case*.

Shelley's Case, not applied.

Foxwell v. Van Grutten (1898) 78 L. T. 231.—BIGHAM, J.; and 79 L. T. 617.—C.A.; affirmed, H.L. (E.) (*post*).

BIGHAM, J.—The plaintiffs further contend that, if the grandchild is to be held as taking the reversion of the fee he does so not as purchaser, but as heir, because they say that the rule in *Shelley's Case* applies and vests this reversion in Mary, to whom by the same will an estate tail is given. The answer, however, to this contention is twofold. First, the devise is, in my opinion, an executory devise and not a remainder, because it was to take effect during the continuance of the estate tail; and, secondly, the beneficiaries under the devise were not the heirs of the body at large, but designated individuals of that class. Either of these circumstances is sufficient to prevent the operation of the rule in *Shelley's Case*.—p. 235.

Shelley's Case, referred to.

Bishop and Richardson's Contract, In re (1898) [1899] 1 Ir. R. 71, 77.—PORTER, M.R.; *Foxwell v. Van Grutten* (1900) 82 L. T. 272, 274; 48 W. R. 653.—H.L. (E.) (LORD DAVEY dissenting); *Sheridan v. O'Reilly* [1900] 1 Ir. R. 386, 389.—PORTER, M.R.: varied on one point, C.A.

Shelley's Case, considered.

Pellham-Clinton v. Newcastle (1900) 69 L. J. Ch. 875, 877; [1902] 1 Ch. 34, 37; 49 W. R. 12.—BUCKLEY, J. (*see* judgment at length); affirmed, (1901) 71 L. J. Ch. 53; [1902] 1 Ch. 34, 37; 85 L. T. 439; 50 W. R. 83.—C.A.; and (1903) 72 L. J. Ch. 424; [1903] A. C. 111; 88 L. T. 273; 51 W. R. 608.—H.L. (E.).

Shelley's Case.

Not applied, *Milman v. Lane* (1901) 70 L. J. K. B. 731; [1901] 2 K. B. 745, 749; 85 L. T. 180; 49 W. R. 545. C.A.; *applied*, *Youman's Will*, In re (1901) *Great Central Ry., Ex parte*, 70 L. J. Ch. 430; [1901] 1 Ch. 720; 84 L. T. 201; 49 W. R. 509.—JOYCE, J.; *Keane's Estate*, In re [1903] 1 Ir. R. 215, 224.—ROSS, J.

Milliner v. Robinson (1603) 1 Moore 682, pl. 939.—Q.B., *followed*.

Bell v. Bell (1864) 15 Ir. Ch. R. 517, 523.—M.R.; *Bird and Barnard's Contract*, In re (1888) 59 L. T. 166.—NORTH, J.

Pybus (or Pibus) v. Mitford (1674) 1 Vent. 372; S. C. 2 Lev. 75.—K.B.

Applied, *Bagshaw v. Spencer* (1748) 1 Ves. sen. 142, 153.—L.C.; *referred to*, *Thompson v. Gibson* (1841) 10 L. J. Ex. 241; 8 M. & W. 281.—EX.; *Cope v. Arnold* (1854) 2 Sm. & G. 311; 18 Jur. 506; 2 W. R. 482.—STUART, V.-C.; and (1855) 24 L. J. Ch. 673; 4 De G. M. & G. 574; 1 Jur. (N.S.) 313; 3 W. R. 187.—L.C.; *Folkard v. Metropolitan Ry.* (1873) 42 L. J. C. P. 162; L. R.

8 C. P. 470, 472; 29 L. T. 101; 21 W. R. 736.—C.P.: *Owen v. Gibbons* (1901) [1902] 1 Ch. 636; 84 L. T. 381.—FARWELL, J. (affirmed, 71 L. J. Ch. 338; 86 L. T. 571.—C.A.).

Archer's Case (1597) 1 Co. Rep. 63b, 66 b; Cro. Eliz. 453; 2 Anders. 37.—C.P.

Referred to, *Richards v. Bergavenny* (1695) 2 Vern. 324.—L.C.; *distinguished*, *Minshull v. Minshull* (1737) 1 Atk. 411, 413.—L.C.; *discussed*, *Hodsell v. Bussell* (1739) 9 Mod. 236.—L.C. (*ante*, col. 3188); *Ginger v. White* (1742) Willes 348, 354.—C.P.; *distinguished*, *Sayer v. Masterman* (1756) Amb. 344.—L.C.C.; *referred to*, *Wright v. Pearson* (1758) 1 Eden 119; Amb. 358.—L.C.; *distinguished*, *Fetherston's Lessee v. Fetherston* (1835) 3 Cl. & F. 67, 78; 9 Bligh (N.S.) 237.—H.L. (IR.); *referred to*, *Chambers v. Taylor* (1837) 6 L. J. Ch. 193; 2 Myl. & Cr. 376, 387.—L.C.; *applied*, *Willis v. Hiscox* (1839) 4 Myl. & Cr. 197, 201; 4 Jur. 738.—L.C.; *Chamberlayne v. Chamberlayne* (1856) 25 L. J. Q. B. 357; 6 El. & Bl. 625.—Q.B.; *referred to*, *Jordan v. Adams* (1859) 29 L. J. C. P. 180; 6 C. B. (N.S.) 748; 6 Jur. (N.S.) 536.—C.P. (affirmed, EX. CH., col. 3227).

Archer's Case, distinguished.

Johnson v. Rutherford (1861) 3 L. T. 649. ROMILLY, M.R.—There the difficulty arose from the use of the words "next heir male." But here we have no such words, and therefore no such difficulty.—p. 650.

Archer's Case, discussed.

Greaves v. Simpson (1864) 33 L. J. Ch. 641; 10 Jur. (N.S.) 609; 10 L. T. 448; 12 W. R. 773.—V.-C.; *Fuller v. Chamier* (*post*); *Evans v. Evans* [1892] 2 Ch. 173 (*post*, col. 3233).

Greaves v. Simpson, approved.

Bawsey (or Pawsey) v. Lowdall (1650) Styles 249; 1 Rolle's Abr. 627, *applied*. *Fuller v. Chamier* (1866) 35 L. J. Ch. 772; L. R. 2 Eq. 682, 683; 12 Jur. (N.S.) 642; 14 W. R. 913.

WOOD, V.-C.—I have simply a limitation to the ancestor and others for their lives expressly. . . . There are no words of limitation added to the gift to the next heir, and the intention of the will is reduced to this, that it is simply a gift to the next heir for ever. It only comes to that; and it seems to me that the case is to be considered as concluded in substance by the words which I shall read from a very valuable judgment of Eyre, C.J., which is reported in Ambler at great length. The case is *Dubber v. Trollope* (Amb. 453, 456, *post*, col. 3236) . . . It is a very valuable report, because the corrections made in Mr. Blunt's edition are from Mr. Sargeant Hill's manuscript, and the judgment is given very fully. [His lordship then read part of the judgment, and continued:] Now comes the case which seems to me to be conclusive of this case. He [*i.e.*, Eyre, C.J.] says, "Another case is in Styles 249; 1 Rolle's Abr. 627; *Bawsey (or Pawsey) v. Lowdall* . . . And this is not like to *Archer's Case* (*supra*), where the devise was to one for life, and after to his heir male, and the heirs male of such heir male; for there the inheritance is limited to the heirs of the body of such heir male; which shows, that the words 'for ever' were not made use of as a reason to help out the words 'heirs male' in the singular number, which was offered as an answer to these last cases." This is not very

clearly expressed, but what I understand it to mean is this, that it is not enough to have the words "for ever," although these words would be sufficient to create a fee. . . . I quite agree with what fell from Kindersley, V.-C., in *Greaves v. Simpson*, that the decision in *Archer's Case*, did not rest upon the ground that by the superadded words of limitation the heir took a different kind of estate from that which but for those words his ancestor would have taken under the rule in *Shelley's Case*. The principle, I think, is that, although the difficulty remains of it being a contingent remainder we see such a clear intention on the part of the testator as takes it out of the range of *Shelley's Case*. . . . Now it does seem to me that both upon the reasoning and upon the cases there stated, the Lord Chief Justice came to the conclusion that you could not except a limitation of the rule in *Shelley's Case*, simply because of his using the words "for ever."—pp. 775–6.

Greaves v. Simpson and Fuller v. Chamier (*supra*), *referred to*.

Evans v. Evans (1892) 61 L. J. Ch. 456; [1892] 2 Ch. 173.—C.A. See *post*.

Bayley v. Morris (1799) 4 Vcs. 788.—M.R., *referred to*.

Richards v. Bergavenny (Lady) (1695) 2 Vern. 824.—L.C., *distinguished*.

Chambers v. Taylor (1837) 6 L. J. Ch. 193; 2 Myl. & Cr. 376, 386.—L.C.

Richards v. Bergavenny (Lady) and Chambers v. Taylor, *referred to*.
Evans v. Evans (*post*).

Willis v. Hiscox (1838) 4 Myl. & Cr. 197; 4 Jur. 738.—L.C.

Applied, **Chamberlayne v. Chamberlayne** (1856) 25 L. J. Q. B. 187, 357; 6 Bl. & Bl. 625; 4 W. R. 614.—Q.B. and Ex. Ch.

Willis v. Hiscox and Chamberlayne v. Chamberlayne, *referred to*.

Jenkins v. Hughes (1860) 30 L. J. Ch. 870; 8 H. L. Cas. 571, 587; 6 Jur. (N.S.) 1043; 8 W. R. 667.—H.L. (Ex.); **Evans v. Evans** (*post*).

Bony v. Taylor (1814) 2 Roll. Abr. 253, pl. 3 and **Mills v. Seward** (or **Howard**) (1861) 1 J. & H. 733; 7 Jur. (N.S.) 654.—WOOD, V.-C., *referred to*.

Evans v. Evans [1892] 2 Ch. 173; 61 L. J. Ch. 456; 67 L. T. 152; 40 W. R. 465.—C.A.

LINDLEY, L.J.—It is to be observed that the limitation being in a deed executed in 1854, if the words "heirs and assigns" had not been added, the person or persons who would have taken the property would have taken as purchasers, but for life only, or they would have taken for life only, and therefore as purchasers. This was decided in *Chambers v. Taylor* (*supra*), and this decision goes far to show that the expression "person or persons who shall be his heir or heirs" is not equivalent to "his heir or heirs," and is not used to denote a class of persons who can be correctly described as his heirs generally. . . . The power of appointment does not exclude the application of the rule in *Shelley's Case* (*ante*, col. 3226): see, *inter alia*, *Richardson v. Harrison* (*post*, col. 3235). The expression "such heir as should be living at the death" occurred in *Richards v. Bergavenny (Lady)* (*supra*), and "heir for ever" in *Fuller v. Chamier* (*supra*, col. 3232) which was the case of a will. The

words "heir or heirs, and the heirs of such heir or heirs," occurred in *Bony v. Taylor*: but the other words are different, and the difference is very material. The expression "heirs of the body, and his, her, and their heirs and assigns as tenants in common," occurred in *Mills v. Seward*. In all of these the rule in *Shelley's Case* was held to apply, and they come very near the present case. On the other hand, there are cases, also very like them and like this, where the rule in *Shelley's Case* has been held not to apply; but in all of those the limitation was to heir in the singular; and this case is not quite covered by any other decision which I have been able to discover, aided by counsel on both sides. In *Archer's Case* (*supra*, col. 3232), the limitation was to the next heir male and the heirs male of his body. In *Greaves v. Simpson* (*supra*, col. 3232), real and personal property were given in trust for A. for life, and after his death in trust for his heir or heiress, his or her heirs and assigns for ever. Similar observations apply to *Willis v. Hiscox* (col. 3233), and to *Chamberlayne v. Chamberlayne* (col. 3233), which were referred to in the argument. These come as near the present case as any in the other class. . . . The rule in *Shelley's Case* has been said to give effect to the general, as distinguished from the particular intention of settlors and testators: see per Earl Cairns in *Bowen v. Lewis* (9 App. Cas. 890, 907, *ante*, col. 3229); but the rule has the demerit of sacrificing in almost every case an intention which is clear and unmistakable, to an intention which is by no means clear, and which is rather attributed to than expressed by the settlor or testator: see per Lord Bramwell (9 App. Cas. 921). But unsatisfactory as the rule is if attempted to be defended upon the ground that it gives effect to a settlor's or testator's intentions, it must not be forgotten that the rule produces a very beneficial practical effect by rendering property more marketable than it otherwise would be. The rule may be justified and approved on this ground, as was pointed out by Fry, L.J., in *Perry and Duggs, In re* (col. 3235). Had it not been for the good practical results of the rule, the Courts would probably have struggled to escape from it rather than have consistently upheld it whenever it has been technically correct to do so. No one can study the mass of decisions on this subject without being struck with the extent to which the rule in *Shelley's Case* has been carried, and with the comparatively few cases to which the doctrine laid down in *Archer's Case* has been held applicable. This is the more remarkable as the rule in *Archer's Case* gives effect to, while the rule in *Shelley's Case* almost always defeats, the particular intention of the settlor or testator. However, I have found no case in which the doctrine in *Archer's Case* has been applied to a limitation to heirs in the plural; but in this case, although the expression "heir or heirs" occurs, that expression is used in the sense of heir in the singular, as I have already pointed out. The conclusion at which I have arrived is in accordance with the passages cited from Mr. Butler's note in Coke upon Littleton (377 a.) from Mr. Peare's celebrated book (10th ed. vol. i. pp. 188, 189), and from Hayes' Conveyancing (5th ed. vol. i. p. 543). It is quite clear that these great conveyancers (and Mr. Hargrave, who is quoted by Butler) were of opinion that a limitation in the

form adopted in this deed would suffice to give Owen Evans' heir or heirs an estate in fee by purchase, and this deed has, I have no doubt, been framed as it is on the faith of the correctness of their opinion. I am glad to think that in upholding it I am not running counter to, but am, on the contrary, deciding in conformity with the opinion of such eminent men.—pp. 184–187.

BOWEN and KAY, L.JJ. to the same effect.

Richardson v. Harrison (1885) 55 L. J. Q. B. 58; 16 Q. B. D. 85; 54 L. T. 456.—C.A.; and **Parry and Daggs, In re** (1885) 55 L. J. Ch. 237; 31 Ch. D. 130; 54 L. T. 229; 34 W. R. 253.—C.A., *referred to*.

Evans v. Evans (1892) 61 L. J. Ch. 456; [1892] 2 Ch. 173.—C.A. See *supra*, col. 3233.

Richardson v. Harrison, applied.

Champ v. Champ (1892) 30 L. R. Ir. 72, 86.—Q. B. D.

White v. Collins (1719) 1 Com. 289.—C.P.

Distinguished, **Britton v. Twining** (1817) 3 Meriv. 176; 182; 17 R. R. 53.—M.R.; *discussed*, **Chambers v. Morris** (1837) 6 L. J. Ch. 193; 2 Myl. & Cr. 376, 387.—L.C.; **Montgomery v. Montgomery** (1845) 3 Jo. & Lat. 47, 51; 8 Ir. Eq. R. 740.—SUGDEN, L.C.; *considered*, **Jordan v. Adams** (1859) 29 L. J. C. P. 180, 186; 6 C. B. (N.S.) 748, 762; 6 Jur. (N.S.) 536.—C.P. (affirmed, (1860) 30 L. J. C. P. 161; 9 C. B. (N.S.) 483; 7 Jur. (N.S.) 973; 4 L. T. 775; 9 W. R. 593.—EX. CH.; MARTIN and CHANNELL, BB. dissenting).

White v. Collins, applied.

Pedder v. Hunt (1887) 18 Q. B. D. 565; 56 L. J. Q. B. 212; 56 L. T. 687; 35 W. R. 371.—C.A. FISHER, M.R., SIR J. HANNEN and FRY, L.J. FRY, L.J. (for the Court).—It was urged that the gift of an estate for life to T. Pedder, followed by a gift to his heir constitutes an estate in fee simple in T. Pedder under the rule in *Shelley's Case* (*ante*, col. 3226). But in our opinion this argument cannot prevail, for it appears to us to be clear law that where the limitation shows the testator's intent to have been that the heir shall take for life only, then the word "heir" is not to be treated as a word of limitation, and the rule does not apply. This point was determined in *White v. Collins*. . . In *Jordan v. Adams* (*supra*) the authority of *White v. Collins* was fully recognised, though there was a difference of opinion as to how far that decision affected the case then before the Court.—p. 572.

Legatt v. Sewell (1706) 2 Vern. 551.—L.K.;

S. C. nom. Legate v. Sewell, 1 P. Wms. 87; 1 Wils. 87; 1 Eq. Cas. Abr. 394, pl. 7.—K.B. and L.C.

Followed, **Glenorchy (Lord) v. Bosville** (1733) Cas. t. Talb. 4, 19.—L.C.; *discussed*, **Ginger v. White** (1712) Willes 318, 354.—C.P.; **Garth v. Baldwin** (1755) 2 Ves. sen. 616, 657.—L.C.; *applied*, **Rochfort v. Fitzmaurice** (1842) 2 Dr. & War. 1; 4 Ir. Eq. R. 375.—L.C.

Jones (Lady) v. Say and Seal (Lord) (1728) 1 Eq. Cas. Abr. 383; 8 Vin. Abr. 262.—KING. L.C.; *reversed in part nom. Say and Seal (Lord) v. Jones (Lady)* (1729) 3 Bro. P. C. 113.—H.L. (E.).

Jones (Lady) v. Say and Seal (Lord).

Referred to, **Sayer v. Masterman** (1756) Amb. 344.—L.C.C.; **Venables and Morris** (1797) 7 Term

Rep. 342, 347; 4 R. R. 455.—K.B.; **Harton v. Harton** (1798) 7 Term Rep. 652.—K.B.; *distinguished*, **Heather v. Winder** (1835) 5 L. J. Ch. 41.—LAWDALE, M.R.; *applied*, **Collier v. McBean** (1865) 34 L. J. Ch. 555.—M.R. (*post*).

Jones (Lady) v. Say and Seal (Lord), referred to.

Champ v. Champ (1892) 30 L. R. Ir. 72, 85.—Q. B. D.

Tipping v. Cozens (1694) 1^o Ld. Raym. 933; **S. C. nom. Tippin v. Cosin**, 1 P. Wms. 40, n.—K.B., *applied*.

Collier v. McBean (1865) 34 L. J. Ch. 555; 34 Beav. 426; 6 N. R. 192; 11 Jur. (N.S.) 592; 13 W. R. 766.—M.R.; *affirmed*, 35 L. J. Ch. 144; L. R. 1 Ch. 81; 13 L. T. 484; 14 W. R. 156.—L.JJ.

Dubber v. Trollope v. Trollope (1734) 2 Stra. 729; 2 Ld. Raym. 1437; 8 Vin. Abr. 233; Amb. 455, 462.—C.P.; *affirmed*, K.B.

Approved, **Minshull v. Minshull** (1737) 1 Atk. 411.—L.C.; *referred to*, **Robinson v. Robinson** (1751) 3 Atk. 736.—L.C. (see S. C., 2 Ves. sen. 225.—L.C.; 1 Burr. 38.—K.B.); **Sayer v. Masterman** (1756) Amb. 344.—L.C.C.; *applied*, **Doe v. Blandford v. Applin** (1790) 4 Term Rep. 82, 88; 2 R. R. 337.—K.B.; *discussed*, **Chambers v. Taylor** (1837) 6 L. J. Ch. 193; 2 Myl. & Cr. 376, 387.—L.C.; *applied*, **Fuller v. Chamier** (1866) 35 L. J. Ch. 772, 775; L. R. 2 Eq. 682, 685; 12 Jur. (N.S.) 642; 14 W. R. 918.—WOOD, V.-C. (see col. 3232); *referred to*, **Sheridan v. O'Reilly** [1900] 1 Ir. R. 386, 392.—M.R. (reversed in part, C.A.).

Colson v. Colson (1741–1744) 2 Atk. 246; 2 Str. 1125; 2 Eq. Cas. Abr. 318.—L.C. and K.B., *referred to*.

Sayer v. Masterman (1756) Amb. 344.—L.C.C.; **Wright v. Pearson** (1758) 1 Eden 119; Amb. 358.—L.K.

Colson v. Colson, followed.

Hodgson v. Ambrose (1780) Dougl. 337.—K.B.; *affirmed*, H.L. (see *post*, col. 3239).

Coulson v. Coulson, referred to.

Poole v. Poole (1804) 3 B. & P. 620, 628.—C.P.; **Roe v. Thong v. Bedford** (1815) 4 M. & S. 362; 16 R. R. 487.—K.B.; **Browncker (or Brouncker) v. Bagot** (1816) 19 Ves. 574; 1 Meriv. 271.—M.R.; **Jesson v. Wright** (1820) 2 Bligh 1, 56; 22 R. R. 1.—H.L. (E.); **Rochfort v. Fitzmaurice** (1842) 2 Dr. & War. 1; 4 Ir. Eq. R. 375, 380.—SUGDEN, L.C.; **East v. Twyford** (1853) 4 H. L. Cas. 517, 551.—H.L. (E.).

Bagshaw v. Spencer (1748) 1 Ves. sen. 142.—L.C.; **S. C.**, 2 Atk. 246, 570, 577.—L.C.

Referred to, **Theobridge v. Kilburne** (1750–1751) 2 Ves. sen. 233.—L.C.; *applied*, **Garth v. Baldwin** (1755) 2 Ves. sen. 646.—L.C.; **Wright v. Pearson** (1758) 1 Eden 119, 125; Amb. 358.—L.K.; **Le Rousseau v. Rede** (1761) 2 Eden 1.—L.C.; *referred to*, **Thong v. Bedford** (1783) 1 Bro. C. C. 313.—L.C.C.; *discussed*, **Jones v. Morgan** (1783) 1 Bro. C. C. 206.—L.C.; *commented on*, **Brydges v. Brydges** (1796) 3 Ves. 120.—M.R.; *referred to*, **Harton v. Harton** (1798) 7 Term Rep. 652; 4 R. R. 537.—K.B.; *discussed*, **Poole v. Poole** (1804) 3 B. & P. 627.—C.P. And see col. 3237.

Bagshaw v. Spencer, referred to.

Roe v. Thong v. Bedford (1815) 4 M. & S. 362; 16 R. R. 487.—K.B.

DAMPIER, J.—Lord Hardwicke in *Bagshaw v. Spencer*, when he took a difference between a trust in equity and a legal estate, agreed that upon a devise of a mere legal estate, the words must be taken as they stood, according to the strict legal determination.—p. 366.

Bagshaw v. Spencer, discussed.

Jervoise v. Northumberland (Duke) (1820) 1 J. & W. 559; 21 R. R. 229.—L.C.; Rochfort v. Fitzmaurice (1842) 4 Ir. Eq. R. 375, 380; 2 Dr. & War. 1.—SUGDEN, L.C. *And see Measure v. Gee* (1822) 5 B. & Ald. 910.—K.B.

Theebridge v. Kilburne (1750-1751) 2 Ves. sen. 233.—L.C., discussed and applied.

Verulam (Earl) v. Bathurst (1843) 12 L. J. Ch. 359; 13 Sim. 374, 386.

SHADWELL, V.-C.—*Garth v. Baldwin* (post) and *Theebridge v. Kilburne* are on all fours with this case. In *Theebridge v. Kilburne* the gift was of a term to the testator's daughter for life, and after her decease to the heirs of her body, if the term should so long endure. The whole was held to be vested in the daughter. In *Garth v. Baldwin* there was a devise of real and personal estate, in trust for A. for life, afterwards for B. for life, and afterwards for the heirs of his body. B. was held entitled to the absolute property of the personal estate.—p. 362.

Garth v. Baldwin (1755) 2 Ves. sen. 646.—L.C.

Applied, Sayer v. Masterman (1756) Ambl. 344.—L.C.C.; Le Rousseau v. Rede (1761) 2 Eden 1.—L.C.; *discussed*, Jones v. Morgan (1783) 1 Bro. C. C. 206.—L.C.; *referred to*, Thong v. Bedford (1783) 1 Bro. C. C. 313.—L.C.C.; Jervoise v. Northumberland (Duke) (1820) 1 J. & W. 559; 21 R. R. 229.—L.C.; *applied*, Verulam (Earl) v. Bathurst (1843) 12 L. J. Ch. 359, 362.—V.-C. (*supra*); *referred to*, Jeaffreson's Trusts, In re (1866) 35 L. J. Ch. 622, 623; L. R. 2 Eq. 276, 281; 12 Jur. (N.S.) 660; 14 W. R. 759.—WOOD, V.-C.

Wright v. Pearson (1758) Ambl. 358; 1 Eden 119.—L.K., referred to.

Jervoise v. Northumberland (Duke) (1820) 1 J. & W. 559; 21 R. R. 229.—L.C.; Mills v. Seward (or Howard) (1861) 1 J. & H. 733; 7 Jur. (N.S.) 654.—WOOD, V.-C.; Foxwell v. Van Grutten (1900) 82 L. T. 272, 276; 48 W. R. 653.—H.L. (E.) (*per* LORD DAVEY, dissenting).

Pelham (Lady) v. Gregory (1760) 1 Eden 518.—L.C.; S. C. 3 Bro. P. C. 204, approved.

Le Rousseau v. Rede (1761) 2 Eden 1.—WORTHINGTON, L.C.

Roe d. Dodson v. Grew (1767) 2 Wils. Ch. 322; Wilmut 272.—C.J., referred to.

Doe d. Davy v. Burnsall (1794) 6 Term Rep. 30; 3 R. R. 113.—K.B.; Alpess v. Watkins (1800) 8 Term Rep. 516.—K.B.; Seale v. Barter (1801) 2 B. & P. 485, 494; 4 R. R. 676.—C.P.; Lees v. Mosley (1836) 5 L. J. Ex. Eq. 78; 1 Y. & C. 589, 609.—EX. EQ.; Montgomery v. Montgomery (1845) 3 Jo. & Lat. 47, 55; 8 Ir. Eq. R. 470.—SUGDEN, L.C.

Roe v. Grew, applied.

Key v. Key (1852) 22 L. J. Ch. 641; 4 De G. M. & G. 73, 82; 1 Eq. R. 82; 17 Jur. 769.—L.JJ.

Roe v. Grew, referred to.

Woodhouse v. Herrick (1855) 24 L. J. Ch. 649; 1 K. & J. 552, 366; 3 Eq. R. 817; 3 W. R. 303.—WOOD, V.-C.

Roe v. Grew, not applied.

Hamilton v. West (1846) 10 Ir. Eq. R. 75, 82.—M.R.

Roe v. Grew, referred to.

Warren v. Travers (1868) Ir. R. 2 Eq. 455, 462.—M.R.

Roe v. Grew, applied.

Pelham-Clinton v. Newcastle (Duke) (1900) 69 L. J. Ch. 875; [1902] 1 Ch. 34; 49 W. R. 12.—BUCKLEY, J.; affirmed, C.A. and H.L. (post).

Roe v. Grew, discussed.

Pelham-Clinton v. Newcastle (Duke) (1901) 71 L. J. Ch. 53; [1902] 1 Ch. 40; 85 L. T. 439; 50 W. R. 83.—C.A.; affirmed, (1902) 72 L. J. Ch. 424; [1903] A. C. 111; 88 L. T. 273; 51 W. R. 608.—H.L. (E.).

ALVERSTONE, C.J.—Then with regard to *Roe v. Grew*, I wish again to say that I do not suggest that it is an authority conclusive of this case; but it does again seem to be a case in which the Court, looking at the whole will, came to the conclusion that there was an estate tail, for reasons which I in my judgment think to be applicable, if I may use no stronger expression, to the present will. The Court there thought that of two intentions of the testator—one to give his nephew (George) a life estate, and the other that so long as George had any issue male the estate should not go over, the estate being limited after George's death to the issue male of his body lawfully to be begotten, and heirs male of the body of such issue male—both could not take effect; and the Court came to the conclusion that the words as to issue male were so strong that they showed the general intention to be that all the sons of George should take in succession, and that to enable them to take George must be adjudged to take an estate tail, and that therefore they must override the particular words which would have indicated only a life estate in George.—p. 55.

V. WILLIAMS, L.J. to the same effect.

Perrin v. Blake (1770) 4 Burr. 2579; 1 W. Bl. 672; Dougl. 523; Hargrave's Law Tracts, 489.—K.B.; reversed, EX. CH.

Referred to, Mandeville v. Carrick (Lord) (1795) 3 Ridgw. P. C. 352, 369.—H.L. (IR.); Doe d. Small v. Allen (1800) 8 Term Rep. 497, 504.—K.B.; Poole v. Poole (1804) 3 B. & P. 627.—C.P.; *discussed*, Montgomery v. Montgomery (1845) 3 Jo. & Lat. 47, 51; 8 Ir. Eq. R. 740.—SUGDEN, L.C.; *not applied*, Phillips v. Phillips (1847) 10 Ir. Eq. R. 513.—M.R.; *considered*, Johnson's Trusts, In re (1866) L. R. 2 Eq. 716, 720; 12 Jur. (N.S.) 616.—WOOD, V.-C.

Perrin v. Blake, referred to.

Pedder v. Hunt (1887) 18 Q. B. D. 565; 56 L. J. Q. B. 212; 56 L. T. 687; 35 W. R. 371.—C.A.

FRY, L.J. (for the Court).—"Common sense will here tell us," says Blackstone, J., in his argument in *Perrin v. Blake* [Hargrave's Tracts, 505] "that when no estate of inheritance is devised to the heir male of the body, he cannot take by descent as heir." This observation of the learned judge is adopted by Carnie in his *Contingent Remainders*, vol. i. p. 153.—p. 572.

Perrin v. Blake, referred to.

Evans v. Evans (1892) 61 L. J. Ch. 456; [1892] 1 Ch. 173, 188; 67 L. T. 152; 40 W. R. 465.—C.A.; Van Grutten v. Foxwell (1897) 66

L. J. Q. B. 745, 751; [1897] A. C. 658; 77 L. T. 170.—H.L. (E.).

Simpson v. Turner (1700) 1 Eq. Cas. Abr. 200, 383; 8 Vin. Abr. 262.—L.C., *applied*.
Silverster d. Law v. Wilson (1788) 2 Term Rep. 444, 450; 1 R. R. 519.—K.B.

Shapland v. Smith (1780) 1 Bro. C. C. 75.—L.C., *considered*.
Silverster v. Wilson (*supra*).

Shapland v. Smith, commented on.
Vancouver v. Bliss (1805) 11 Ves. 458, 465; 8 R. R. 227.—ELDON, L.C.

Shapland v. Smith, referred to.
Jervoise v. Northumberland (Duke) (1820) 1 J. & W. 559, 569; 21 R. R. 229.—ELDON, L.C.; *Magennis v. Fallon* (1829) 2 Molloy 561, 580.—HART, L.C.

Shapland v. Smith, followed.
Colmore v. Tyndall (1828) 2 Y. & J. 605, 615; 31 R. R. 637.—C.B.

Hodgson v. Ambrose (1780) Dougl. 337.—K.B.; *affirmed nom.* **Ambrose v. Hodgson** (1781) 3 Bro. P. C. 416.—H.L. (E.), *discussed*.

Rochfort v. Fitzmaurice (1842) 4 Ir. Eq. R. 375, 380; 2 Dr. & War. 1.—L.C.; *Van Grutten v. Foxwell* [1897] A. C. 658, 670 (*post*). *And see Measure v. Gee* (1822) 5 B. & Ald. 910.—K.B.

Jones v. Morgan (1783) 1 Bro. C. C. 206.—L.C., *rule in approved and applied*.
Roe d. Thong v. Bedford (1815) 4 M. & S. 362, 365; 16 R. R. 487.—K.B.

Jones v. Morgan, referred to.
Jervoise v. Northumberland (Duke) (1820) 1 J. & W. 559; 21 R. R. 229.—L.C.; *Douglas v. Congreve* (1838) 8 L. J. Ch. 53; 1 Beav. 59, 71; 3 Jur. 120.—M.R.

Jones v. Morgan, discussed.
Fetherston's Lessee v. Fetherston (1835) 3 Cl. & F. 67, 77; 8 C. C. nom. *Jack v. Fetherston*, 9 Bligh (N.S.) 257.—H.L. (IR.); *Warren v. Travers* (1868) 14 R. 2 Eq. 455, 462.—M.R.; *Van Grutten v. Foxwell* (1897) 66 L. J. Q. B. 745, 752, 755; [1897] A. C. 658, 670; 77 L. T. 170.—H.L. (E.).

Jones v. Morgan, observation applied.
Foxwell v. Van Grutten (1900) 82 L. T. 272; 48 W. R. 653.—H.L. (E.); LORD DAVEY dissenting. LORD MAGNAGHTEN.—In my opinion the testator meant exactly what he said, and deliberately provided for the event which actually occurred. If I am told that, after all, that is a matter of opinion on which no certain judgment can be pronounced, I only take refuge in Lord Thurlow's maxim, that "the good sense of all these cases is to believe that, where persons have expressed themselves right, they knew what they meant" (*Jones v. Morgan*, 1 Bro. C. C. at p. 221).—p. 275.

Thong v. Bedford (1783) 1 Bro. C. C. 313.—L.C., *referred to*.
Roe d. Thong v. Bedford (1815) 4 M. & S. 362, 366; 16 R. R. 487.—K.B.

Doe d. Blendford v. Applin (1790) 4 Term Rep. 82; 2 R. R. 337.—K.B.
Referred to, *Doe d. Atkinson v. Featherstone* (1831) 1 B. & Ad. 944, 949; 9 L. J. (O.S.) K. B.

163; 35 R. R. 491.—K.B.; *applied*, *Heather v. Winder* (1835) 5 L. J. Ch. 41.—M.R.; *Kavanagh v. Morland* (1853) 23 L. J. Ch. 41, 44; Kay 16, 28; 2 Eq. R. 771; 18 Jur. 183; 2 W. R. 8.—WOOD, V.-C.; *referred to*, *Woodhouse v. Herrick* (1855) 24 L. J. Ch. 649; 1 K. & J. 352, 363; 3 Eq. R. 817; 3 W. R. 303.—WOOD, V.-C.

Doe d. Blandford v. Applin, not applied.
Allgood v. Blake (1872) 41 L. J. Ex. 217; L. R. 7 Ex. 339, 353; 21 W. R. 58.—EX.; *affirmed*, (1873) 42 L. J. Ex. 101; L. R. 8 Ex. 160; 29 L. T. 331; 21 W. R. 559.—EX. CH.

CLEASBY, B. (in the Ex.).—It is not at all necessary, in the present case, to act upon the rule of carrying into effect the general intent to the extent that it has been acted upon in such cases, as *Doe v. Applin* and *Doe v. Cooper* (1 East 229. *post*), where a particular provision clearly expressed has been rejected. The utmost extent to which, if at all, it need be applied is that modified form to which it is limited by Lord Redesdale in *Jesson v. Wright* (2 Bligh 51, *post*, col. 3243), and has been approved of by the Q. B. in *Doe v. Gallini* (5 B. & Ad. 621, *post*, col. 3242), *viz.*, that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise.—p. 225.

Doe d. Davy v. Burnsall (1794) 6 Term Rep. 30; 3 R. R. 113.—K.B.; S.-C. nom. **Davy v. Burnsall** (1798) 1 B. & P. 215.

Applied, *Doe d. Herbert v. Selby* (1824) 2 B. & C. 926; *referred to*, *Jack d. Westby v. Fetherstone* (1829) 2 Huds. & B. 320, 337.—K.B. (IR.) (*affirmed*, (1830).—EX. CH.); *followed*, *Lees v. Mosley* (1836) 5 L. J. Ex. Eq. 78; 1 Y. & C. 589, 611.—EX. EQ.; *considered*, *Montgomery v. Montgomery* (1845) 3 Jo. & Lat. 47, 59; 8 Ir. Eq. R. 740.—L.C.; *applied*, *Denman v. Jones* (1867) 16 L. T. 787.—MALINS, V.-C.; *approved*, *Moyle's Estate, in re* (1878) 1 L. R. Ir. 155, 162.—C.A.

Doe d. Candler v. Smith (1798) 7 Term Rep. 531; 4 R. R. 521.—K.B.

Applied, *Pierson v. Vickers* (1804) 5 East 548, 553; 2 Smith 160; 7 R. R. 760.—K.B.; *principle adopted*, *Doe d. Cole v. Goldsmith* (1816) 2 Taunt. 209; 2 Marshall 517; 17 R. R. 487.—K.B.; *referred to*, *Doe v. Featherstone* (1831) 1 B. & Ad. 944, 949.—K.B. (*post*); *applied*, *Phillips v. Phillips* (1847) 10 Ir. Eq. R. 573.—M.R.

Doe d. Bean v. Halley (1798) 8 Term Rep. 5.—K.B.

Referred to, *Doe d. Gallini v. Gallini* (1838) 5 B. & Ad. 621, 613; 39 R. R. 580.—K.B.; *not applied*, *Baker v. Tucker* (1850) 3 Il. L. Cas. 106, 180; 14 Jur. 777.—H.L. (IR.); *applied*, *Key v. Key* (1853) 4 De G. M. & G. 73, 82 (*supra*, col. 3237); *discussed*, *Allgood v. Blake* (1872) 41 L. J. Ex. 217, 229; L. R. 7 Ex. 339, 359.—EX. (*supra*); *applied*, *Shannon v. Good* (1884) 15 L. R. Ir. 284.—C.A.; *Neville v. Thacker* (1888) 23 L. R. Ir. 355, 364.—PORTER, M.R. and C.A.

Doe d. Cock v. Cooper (1801) 1 East 229; 6 R. R. 264.—K.B.

Applied, *Pierson v. Vickers* (1804) 5 East 548, 553; 2 Smith 160; 7 R. R. 760.—K.B.; *principle adopted*, (1816) *Doe d. Cole v. Goldsmith* (1816) 2 Taunt. 209; 2 Marshall 517; 17 R. R. 487.—K.B.; *referred to*, *Doe d. Atkinson v. Featherstone* (1831) 1 B. & Ad. 944, 949; 9 L. J. (O.S.) K. B. 163; 35 R. R. 491.—K.B.; *applied*,

Heather v. Winder (1835) 5 L. J. Ch. 41.—M.R.; *not applied*, Allgood v. Blake (1872) 41 L. J. Ex. 217, 225; L. R. 7 Ex. 339, 353; 21 W. R. 58.—EX. *See supra*, col. 3240.

Pierson v. Vickers (*supra*, col. 3240), *principle adopted*.

Doe d. Cole v. Goldsmith (col. 3240); Phillips v. Phillips (1847) 10 Ir. Eq. R. 513.—M.R.

Poole v. Poole (1804) 3 B. & P. 620.—C.P.

Distinguished, Fetherston's Lessee v. Fetherston (1835) 3 Cl. & F. 67, 80; 9 Bligh (N.S.) 237.—H.L. (IR.); *discussed*, Lees v. Mosley (1835) 5 L. J. Ex. Eq. 78; 1 Y. & C. 589, 599.—EX. EQ.; Winter v. Perratt (1843) 9 Cl. & F. 606, 687.—H.L. (E.); *rule in, applied*, Toller v. Attwood (1850) 20 L. J. Q. B. 40; 15 Q. B. 929.—C.B.

Poole v. Poole, *referred to*.

Van Grutten v. Foxwell (1897) 66 L. J. Q. B. 745, 755; [1897] A. C. 658, 673; 77 L. T. 170.—H.L. (E.) (*see post*, col. 3246); Keane's Estate, In re [1903] 1 Ir. R. 215, 224.—ROSS, J.

Doe d. Strong v. Goff (1809) 11 East 668.—K.B., *distinguished*.

Bennett v. Tankerville (Earl) (1811) 19 Ves. 170.—M.R.

Doe v. Goff, *held not to be law*.

Jesson v. Wright (1820) 2 Bligh 1, 55; 22 B. R. 1.—H.L. (E.); Fetherston's Lessee v. Fetherston (1835) 3 Cl. & F. 67, 76; 9 Bligh (N.S.) 237.—H.L. (IR.).

Doe v. Goff, *referred to*.

Tarback v. Tarback (1835) 4 L. J. Ch. 129.—M.R.; Lees v. Mosley (1835) 5 L. J. Ex. Eq. 78; 1 Y. & C. 589, 594.—EX. EQ.; Winter v. Perratt (1843) 9 Cl. & F. 606, 686.—H.L. (E.); Montgomery v. Montgomery (1845) 3 Jo. & Lat. 47, 53; 8 Ir. Eq. R. 740.—SUGDEN, L.C.; Warren v. Travers (1868) Ir. R. 2 Eq. 455, 466.—M.R.

Doe v. Goff, *held overruled*.

Roddy v. Fitzgerald (1858) 6 H. L. Cas. 823, 881.—H.L. (IR.); Van Grutten v. Foxwell (1897) 66 L. J. Q. B. 745; [1897] A. C. 658, 673; 77 L. T. 170.—H.L. (E.). *See post*, col. 3246.

Doe d. Gotton v. Stenlake (1810) 12 East 515; 11 R. R. 479.—K.B., *applied*.

Hugo v. Williams (1872) 41 L. J. Ch. 661; L. R. 14 Eq. 224; 26 L. T. 901.

MALINS, V.-C.—What then is the effect of a devise to A. and his heirs during their lives? It was decided in *Doe v. Stenlake* by the Court of K. B., and that decision had been acquiesced in ever since, that such a devise to A. and his heirs created a fee simple. . . . This is a limitation to a man and "the heirs male of his body for their lives." . . . Therefore this devise . . . gives an estate in tail male, and the words "during their lives" mean only that which is necessarily implied, that whoever takes under the limitation can only, in point of fact, have the enjoyment of it during his life; but it has not the effect of cutting down the estate of inheritance.—p. 662.

Doe d. Cole v. Goldsmith (1816) 7 Taunt.

209; 2 Marsh. 517; 17 R. R. 487.—K.B. *Applied*, Phillips v. Phillips (1847) 10 Ir. Eq. R. 513.—M.R.; *referred to*, Jeffery's Trusts, In re (1872) 42 L. J. Ch. 17; L. R. 14 Eq. 136, 139; 26 L. T. 821; 20 W. R. 667.—MALINS, V.-C.

Doe d. Bosnall v. Harvey (1825) 4 B. & C. 610; 7 D. & R. 78; 4 L. J. (O.S.) K. B. 18.—K.B., *referred to*.

Fetherston's Lessee v. Fetherston (1835) 3 Cl. & F. 67, 77.—S.C. *nom.* Jack v. Fetherston, 9 Bligh (N.S.) 257.—H.L. (IR.); Montgomery v. Montgomery (1845) 3 Jo. & Lat. 47, 53; 8 Ir. Eq. R. 470.—L.C.; Phillips v. Phillips (*supra*).

Doe v. Harvey, *applied*.

Key v. Key (1853) 22 L. J. Ch. 641; 4 De G. M. & G. 73, 82 (*supra*, col. 3237).

Doe v. Harvey, *not applied*.

Bowen v. Lewis (1884) 54 L. J. Q. B. 55; 9 App. Cas. 890, 903; 52 L. T. 189.—H.L. (E.), *per SELBORNE, L.C. dissenting*.

Doe v. Harvey, *referred to*.

Van Grutten v. Foxwell (1897) 66 L. J. Q. B. 745, 753; [1897] A. C. 658, 673; 77 L. T. 170.—H.L. (E.). *See post*, col. 3245.

Doe d. Gallini v. Gallini (1833) 3 L. J. K. B. 71; 5 B. & Ad. 621; 2 N. & M. 619.—K.B.; S. C. (1835) 4 L. J. Ex. 337; 3 A. & E. 340; 4 N. & M. 894; 39 R. R. 580.—K.B.

Discussed, Montgomery v. Montgomery (1845) 3 Jo. & Lat. 47, 54; 8 Ir. Eq. R. 740.—SUGDEN, L.C.; Phillips v. Phillips (*supra*); Roddy v. Fitzgerald (1858) 6 H. L. Cas. 823, 877.—H.L. (IR.); Clarke v. Clemmans (1866) 36 L. J. Ch. 171, 172; 15 W. R. 250.—MALINS, V.-C.; *principle applied*, Forsbrook v. Forsbrook (1867) L. R. 3 Ch. 93, 98; 16 W. R. 290.—CATRNS and ROLT, L.J.J.; Allgood v. Blake (1872) 41 L. J. Ex. 217, 225; L. R. 7 Ex. 339, 353; 21 W. R. 58.—EX. (*see supra*, col. 3240); *referred to*, Andrew v. Andrew (1875) 45 L. J. Ch. 232; 1 Ch. D. 410, 412; 34 L. T. 82; 24 W. R. 329.—HALT, V.-C. (reversed, C.A.); Hampton v. Holman (1877) 46 L. J. Ch. 246; 5 Ch. D. 183, 193; 36 L. T. 287; 25 W. R. 459.—JESSEL, M.R.

Doe d. Gallini v. Gallini, *rule in, explained and applied*.

Bowen v. Lewis (1884) 9 App. Cas. 890, 917; 54 L. J. Q. B. 55; 52 L. T. 189.—H.L. (E.).

LORD BLACKBURN.—I do not think that, since the decision of this House in *Roddy v. Fitzgerald* (6 H. L. Cas. 823, *post*, col. 3247) it is open to dispute that a rule is established. Whether we word the reason for it, as Lord Eldon did in *Jesson v. Wright* (2 Bligh 1, *post*, col. 3243), or, as Lord Wensleydale prefers it, as it was expressed in *Doe v. Gallini*, the rule is established that if a testator does express an intention that A. shall have the estate for life, and on the failure of the heirs of the body of A. the estate shall go over, the effect is that an estate tail is given to A. by necessary implication, as otherwise all the subsequent limitations would be too remote. Lord Cranworth says, in *Roddy v. Fitzgerald*, that one cannot but feel that in many cases the real wish of the testator, instead of being carried into effect, is defeated by this rule, and I think this is true.—p. 917.

Doe d. Gallini v. Gallini, *approved*.

Lalit Mohun Singh Roy v. Chakun Lal Roy (1897) L. R. 24 Ind. App. 76.—P.C.

Nash v. Coates (1832) 1 L. J. K. B. 187; 3 B. & Ad. 839; 37 R. R. 552.—K.B., *explained*.

Mills v. Seward (*or* Howard) (1861) 1 J. & H. 33; 7 Jur. (N.S.) 654.—WOOD, V.-C.

North v. Martin (1833) 6 Sim. 266; 38 R. R. 113.—V.C., *considered*.

Gummoe v. Howes (1856) 26 L. J. Ch. 323; 23 Beav. 184; 3 Jur. (N.S.) 176; 5 W. R. 219.—M.R.: *Jordan v. Adams* (1859) 29 L. J. C. P. 180, 187; 6 C. B. (N.S.) 748, 765; 6 Jur. (N.S.) 536.—C.P. (affirmed, (1860) 30 L. J. C. P. 161; 9 C. B. (N.S.) 483; 7 Jur. (N.S.) 973; 4 L. T. 775; 9 W. R. 598.—EX. CH.).

Douglas v. Congreve (1836) 6 L. J. Ch. 51; 1 Keen 410.—M.R.; **S. C.**, 7 L. J. C. P. 43; 4 Bing. N. C. 1; 5 Scott 223.—C.P., and 8 L. J. C. P. 53; 1 Beav. 59; 3 Jur. 120.—M.R.

Distinguished, **Butcher v. Butcher** (1851) 14 Beav. 222.—M.R.; *discussed*, **Ramsden v. Smith** (1854) 23 L. J. Ch. 757; 2 Drew. 298; 2 Eq. R. 660; 18 Jur. 566; 2 W. R. 435.—**KINDERSTLEY**, v.-c.; *referred to*, **D'Estampes' Settlement**, In re, **D'Estampes v. Crowe** (1884) 53 L. J. Ch. 1117, 1120; 51 L. T. 502; 32 W. R. 978.—KAY, J.

Doe d. Wright v. Jesson (1816) 5 M. & S. 95.—K.B., *reversed nom. Jesson v. Wright* (1820) 2 Bligh 1; 22 R. R. 1.—H.L. (E.).

Jesson v. Wright, applied.

Doe d. Bosnall v. Harvey (1825) 4 B. & C. 610; 7 D. & R. 78; 4 L. J. (o.s.) K. B. 18.—K.B.; **Reece v. Steel** (1828) 2 Sim. 233; 6 L. J. (o.s.) Ch. 120; 29 R. R. 88.—V.-C.: **Doe d. Atkinson v. Featherstone** (1831) 1 B. & Ad. 944, 948; 9 L. J. (o.s.) K. B. 163; 35 R. R. 491.—K.B.; **Dunk v. Fenner** (1831) 2 Russ. & M. 557, 565.—M.R.

Jesson v. Wright.

Referred to, **Doe d. Gallini v. Gallini** (1833) 3 L. J. K. B. 71; 5 B. & Ad. 621; 2 N. & M. 619.—K.B.; *applied*, **Henther v. Winder** (1835) 5 L. J. Ch. 41.—M.R.; *distinguished*, **Ryan v. Cowley** (1835) 1 L. & G. temp. Sugden 7.—L.C.; *held over-ruled*, **Fetherston's Lessee v. Fetherston** (1835) 3 Cl. & F. 67, 76; **S. C. nom. Jack v. Fetherston**, 9 Bligh (N.S.) 237.—H.L. (IR.); *discussed*, **Lees v. Mosley** (1836) 5 L. J. Ex. 78; 1 Y. & C. 589, 607. EX. BQ.: **Winter v. Perratt** (1843) 9 Cl. & F. 606, 686.—H.L. (E.); **Montgomery v. Montgomery** (1845) 3 Jo. & Lat. 47, 53; 8 Ir. Eq. R. 740.—SUGDEN, L.C.; *applied*, **Phillips v. Phillips** (1847) 10 Ir. Eq. R. 513.—M.R.; **Toller v. Attwood** (1850) 20 L. J. Q. B. 40; 15 Q. B. 929.—Q.B.; **Key v. Key** (1853) 22 L. J. Ch. 641; 4 De G. M. & G. 73, 82 (*supra*, col. 3237); *referred to*, **Woodhouse v. Herrick** (1855) 24 L. J. Ch. 649; 1 K. & J. 352, 363; 3 Eq. R. 817; 3 W. R. 303.—WOOD, V.-C.; *considered*, **Gummoe v. Howes** (1856) 26 L. J. Ch. 323; 23 Beav. 184; 3 Jur. (N.S.) 176; 5 W. R. 219.—M.R.; *referred to*, **Grimson v. Downing** (1857) 4 Drew. 125, 133; 5 W. R. 767.—**KINDERSTLEY**, v.-c.; *followed*, **Roddy v. Fitzgerald** (1858) 6 H. L. Cas. 822, 874.—H.L. (IR.); *not applied*, **Jordan v. Adams** (1859) 29 L. J. C. P. 180; 6 C. B. (N.S.) 748, 764; 6 Jur. (N.S.) 536.—C.P. (affirmed, EX. CH. *supra*); *referred to*, **Dodds v. Dodds** (1860) 11 Ir. Ch. R. 374.—C.A. *applied*, **Anderson v. Anderson** (1861) 30 Beav. 209; 7 Jur. (N.S.) 1067; 4 L. T. 198; 9 W. R. 492.—M.R.; *referred to*, **Jeaffreson's Trusts**, In re (1866) 35 L. J. Ch. 622, 623; L. R. 2 Eq. 276, 281; 12 Jur. (N.S.) 660; 14 W. R. 759.—WOOD, v.-c.; **Bradley v. Cartwright** (1867) 36 L. J. C. P. 218, 222; L. R. 2 C. P. 511, 520; 16 L. T. 587; 15 W. R. 922.—C.P.; **Warren v. Travers** (1868)

Ir. R. 2 Eq. 455, 466.—M.R.; *discussed*, **Colclough v. Colclough** (1870) Ir. R. 4 Eq. 263, 284.—C.A.; *applied*, **Allgood v. Blake** (1872) 41 L. J. Ex. 217, 225; L. R. 7 Ex. 339, 353; 21 W. R. 58.—EX. (*see supra*, col. 3240); **Clifford v. Brooke** (1876) Ir. R. 10 C. L. 179, 183.—Q.B. (affirmed *nom. Clifford v. Koe, post*); *discussed*, **Holman v. Holman** (1877) 46 L. J. Ch. 248; 5 Ch. D. 183, 191; 36 L. T. 287; 25 W. R. 459.—**JESSEL**, M.R.; **Clifford v. Koe** (1880) 5 App. Cas. 447, 458; 43 L. T. 322; 28 W. R. 638.—H.L. (IR.).

Jesson v. Wright, approved.

Bowen v. Lewis (1884) 9 App. Cas. 890; 54 L. J. Q. B. 55; 52 L. T. 189.—H.L. (E.).

LORD FITZGERALD.—Lord Eldon is reported to have said in *Jesson v. Wright* that his mind was overpowered by the cases and the subtlety of the distinctions between them. How truly I may apply that language to myself in the present instance; but from an early stage of the argument I have been of opinion that the decision in the Courts below was correct, and should be upheld, and I am obliged to confess an almost superstitious veneration for the rule in *Shelley's case* (*ante*, col. 3226), and for *Jesson v. Wright* and *Roddy v. Fitzgerald* (*post*, col. 3247).—p. 924. *And see supra*, col. 3242.

Jesson v. Wright, referred to.

Symons v. Leaker (1885) 54 L. J. Q. B. 480; 15 Q. B. D. 629, 632; 53 L. T. 227; 33 W. R. 875; 49 J. P. 775.—**FIELD** and **MASTY**, JJ.

Jesson v. Wright.

Applied, **Sandes v. Cooke** (1887-1888) 21 L. R. Ir. 445, 457.—**PORTER**, M.R. (affirmed, C.A.); *considered and followed*, **Van Grutten v. Foxwell** (1897) 66 L. J. Q. B. 745, 753; [1897] A. C. 658, 667; 77 L. T. 170.—H.L. (E.). *See post*, col. 3245.

Jesson v. Wright, referred to.

Pelham-Clinton v. Newcastle (Duke) (1900) 69 L. J. Ch. 875, 887; [1902] 1 Ch. 34, 41; 49 W. R. 12.—**BUCKLEY**, J.; affirmed, C.A. and H.L. *See post*, col. 3248.

Measure v. Gee (1822) 5 B. & Ald. 910.

—K.B., *applied*.

Mills v. Seward (*or Howard*) (1861) 1 J. & H. 733; 7 Jur. (N.S.) 654.—**WOOD**, V.-C.

Doe d. Atkinson v. Featherstone (1831) 1 B. & Ad. 944; 9 L. J. (o.s.) K. B. 163; 35 R. R. 491.—K.B., *referred to*.

Woodhouse v. Herrick (1855) 24 L. J. Ch. 649, 652; 1 K. & J. 352, 363; 3 Eq. R. 817; 3 W. R. 303.—**WOOD**, V.-C.

Fetherston's Lessee v. Fetherston (1835) 3 Cl. & F. 67; **S. C. nom. Jack v. Fetherston**, 9 Bligh (N.S.) 237.—H.L. (IR.).

Explained, **Lees v. Mosley** (1835) 5 L. J. Ex. 778; 1 Y. & C. 589, 602.—EX. BQ.; *rule in, applied*, **Toller v. Attwood** (1850) 20 L. J. Q. B. 40, 47; 15 Q. B. 929, 954.—Q.B.; *referred to*, **Warren v. Travers** (1868) Ir. R. 2 Eq. 455, 466.—M.R.; **Van Grutten v. Foxwell** (1897) 66 L. J. Q. B. 745; [1897] A. C. 658, 674; 77 L. T. 170.—H.L. (E.) (*post*, col. 3246).

Montgomery v. Montgomery (1845) 3 Jo. & Lat. 47; 8 Ir. Eq. R. 740.—**SUGDEN**, L.C.

Referred to, **Phillips v. Phillips** (1847) 10 Ir. Eq. R. 513.—M.R.; **Toller v. Attwood** (1850) 20 L. J. Q. B. 40; 15 Q. B. 929.—Q.B.; *explained*,

Kavanagh v. Morland (1853) 23 L. J. Ch. 41; Kay 16, 24; 2 Eq. R. 771; 18 Jur. 185; 2 W. R. 8.—WOOD, v.-c.; Woodhouse v. Herrick (1855) 24 L. J. Ch. 649, 651; 1 K. & J. 352, 362; 3 Eq. R. 217; 3 W. R. 303.—WOOD, v.-c.; Mills v. Seward (or Howard) (1861) 1 J. & H. 733; 7 Jur. (N.S.) 654.—WOOD, v.-c.; applied. Bradley v. Cartwright (1867) 36 L. J. C. P. 218, 222; L. R. 2 C. P. 511, 521; 16 L. T. 587; 15 W. R. 922.—C.P.; referred to, Warren v. Travers (1868) Ir. R. 2 Eq. 455, 462.—M.R.; Whitelaw v. Whitelaw (1880) 5 L. R. Ir. 120, 131.—M.R.; Morgan v. Thomas (1882) 51 L. J. Q. B. 289; 8 Q. B. D. 575, 577; 46 L. T. 431; 30 W. R. 658; 46 J. P. 423.—CAVE, J.; and 51 L. J. Q. B. 556; 9 Q. B. D. 643, 647; 27 L. T. 281; 31 W. R. 106.—C.A.; Shannon v. Good (1884) 15 L. R. Ir. 284.—C.A.

Montgomery v. Montgomery, observed on.

Williams v. Williams (1884) 33 W. R. 118; 51 L. T. 779.

CHITTY, J.—The word "issue" is, *prima facie*, a word of limitation, which can be turned into a word of purchase more easily than the word "heir," but the mere addition of words of limitation is not sufficient to turn it into a word of purchase. Lord St. Leonards appears to have laid it down in *Montgomery v. Montgomery* that a devise to A. for life, with remainder to his issue, with superadded words of limitation, in a manner inconsistent with a descent from A., will give to the word "issue" the operation of a word of purchase. But it seems to me that that *dictum* has no application to the present case, and that the rule laid down in Jarman on Wills (4th ed. vol. ii. p. 419) is right—namely, that "the addition of a limitation to the heirs general of the issue will not prevent the word 'issue' from operating to give an estate tail as a word of limitation."—p. 118.

Montgomery v. Montgomery, not applied.

Sandes v. Cooke (1887) 21 L. R. Ir. 445.—PORTER, M.R.; affirmed, C.A.

Montgomery v. Montgomery, discussed.

Bowen v. Lewis (1884) 54 L. J. Q. B. 55; 9 App. Cas. 890, 920; 52 L. T. 189.—H.L. (E.).

Montgomery v. Montgomery, criticised.

Van Grutfen v. Foxwell (1897) 66 L. J. Q. B. 745; [1897] A. C. 658, 672; 77 L. T. 170.—H.L. (E.).

LORD MACNAGHTEN.—The decision in *Jesson v. Wright* ((1820) 2 Bligh 1, *supra*, col. 3243) covers, I think, the whole field of the controversy. It makes it almost a work of supererogation to consult the earlier authorities. . . . For a time *Jesson v. Wright* was loyally followed. In *Doe v. Harrey* ((1825) 4 L. J. (O.S.) K. B. 18; 4 B. & C. 610, *supra*, col. 3242) the Court of K. B. acknowledged their error, and recalled their former decision. But very soon cases occurred, such as *Right v. Creber* ((1826) 4 L. J. (O.S.) K. B.; 5 B. & C. 806) in which proper effect does not seem to have been given to the authority of *Jesson v. Wright*. The most disappointing case of all, I think, is the Irish case of *Montgomery v. Montgomery*, before Sir Edward Sugden in 1845, on which Mr. Haldane so much relied. Everybody must acknowledge Sir E. Sugden's profound learning. He was himself one of the counsel for the appellant in *Jesson v. Wright*; but though successful in the appeal, he does not seem to have welcomed the short and simple grounds on which the decision was rested—see

Sugden on the Law of Real Property, 251, n. Perhaps the editor of Gilbert on Uses would have preferred that something should have been left of the old labyrinth through which he, at least, knew his way in the dark. His observations in *Montgomery v. Montgomery*, as he tells us, were made "with a view to clear up the doubts on this branch of the law." The result was unfortunate. No difficulties were cleared up; no doubtful points explained; and *Montgomery v. Montgomery* is never cited except when it is desired to minimise the effect of *Jesson v. Wright*, and it is always cited then. There is a good deal in the earlier part of the judgment which it is difficult to follow. In my opinion, it is not an accurate view of the decision of this House in *Jesson v. Wright* to say that it "only decided that the words 'heirs of the body' should operate as words of limitation where otherwise the issue could not take estates of inheritance." Except for the purpose of making that point good, I cannot understand why Sir E. Sugden should have suggested that *Doe v. Giff* ((1809) 11 East 668, *supra*, col. 3241) was not really overruled, and that "a similar case would be open to consideration." One of the two noble and learned lords who spoke in *Jesson v. Wright* condemned *Doe v. Giff* in plain and direct terms. The other said it was "difficult to reconcile" with the case before the House. Sir E. Sugden on this remarks that the Lord Chancellor did not say that it was impossible; he said it was difficult. But the language is Lord Eldon's, and, as was observed of another judge in another case, "it was a great deal for him to say." Over and over again in this House, *Doe v. Giff* has been treated as no longer law. In *Fetherston v. Fetherston* ((1835) 3 Cl. & F. 67, 76, *supra*, col. 3244), which, by the way, is not referred to in *Montgomery v. Montgomery*, Lord Brougham observed that it was "entirely displaced," and it is spoken of in the same way in *Winter v. Perrott* ((1843) 9 Cl. & F. 606, 686), and *Roddy v. Fitzgerald* ((1858) 6 H. L. Cas. 823, 879, *post*, col. 3247).—p. 753. . . . Lastly, I cannot think that the passages which Sir E. Sugden collected from the arguments of Blackstone, J., in *Perrih v. Blake* ((1770) 4 Burr. 2579, *ante*, col. 3238) and pieced together in his judgment in *Montgomery v. Montgomery*, convey an accurate representation of the meaning of that learned judge. Undoubtedly Blackstone, J. refers to the rule in *Shelley's Case* (*ante*, col. 3226) as a rule of a flexible nature. But he did not, I think, mean that the rule as we understand it, and as it was understood in *Roddy v. Fitzgerald*, was otherwise than imperative. You may have a gift of an estate of freehold to the ancestor, and in the same will a gift to the heirs, so that the case is within the letter of the rule, and yet the rule will not apply, because the legal meaning of the word "heirs" has to yield to an explanatory context—*Paole v. Paole* ((1804) 3 B. & P. 620, 624, *supra*, col. 3241). It seems to me that all that Blackstone, J. meant was what Lord Alvauley expressed when he said, "The rule is not so rigid as to preclude the testator himself from explaining the words used" (pp. 753-754). . . . The authority of *Jesson v. Wright* was restored, and its supremacy finally established, in *Roddy v. Fitzgerald*. And the question now in every case must be whether the expression requiring exposition, be it "heirs" or "heirs of the body," or any other expression

which may have the like meaning, is used as the designation of a particular individual or a particular class of objects, or whether, on the other hand, it includes the whole line of succession capable of inheriting.—p. 755.

Kavanagh v. Morland (1853) 23 L. J. Ch. 41; Kay 16; 2 Eq. R. 771; 18 Jur. 185; 2 W. R. 8.—WOOD, v.-c.

Approved, Woodhouse v. Herrick (1855) 24 L. J. Ch. 649; 1 K. & J. 352, 361; 3 Eq. R. 817; 3 W. R. 303.—WOOD, v.-c.; *discussed*, Roddy v. Fitzgerald (1858) 6 H. L. Cas. 823, 883.—H.L. (IR.); *referred to*, Colclough v. Colclough (1870) Ir. R. 4 Eq. 263, 284.—C.A.; *principle extended*, Whitelaw v. Whitelaw (1880) 5 L. R. Ir. 120, 131.—SULLIVAN, M.R.; *discussed*, Clifford v. Koe (1880) 5 App. Cas. 447, 456; 43 L. T. 322; 28 W. R. 633.—H.L. (IR.); *applied*, Morgan v. Thomas (1882) 51 L. J. Q. B. 239; 8 Q. B. D. 575, 578; 46 L. T. 431; 30 W. R. 658; 46 J. P. 423.—CAVE, J., and 51 L. J. Q. B. 556; 9 Q. B. D. 643, 647; 47 L. T. 281; 31 W. R. 106.—C.A.; Rotheram v. Rotheram (1884) 13 L. R. Ir. 429, 451.—C.A.; *not applied*, Shannon v. Good (1884) 15 L. R. Ir. 284, 306.—C.A.; Sandes v. Cooke (1887) 21 L. R. Ir. 445, 455.—M.R.; *affirmed*, C.A.

Coepe v. Arnold (1855) 24 L. J. Ch. 673; 4 De G. M. & G. 574, 588; 1 Jur. (N.S.) 313; 3 W. R. 187.—L.C.; *affirming* 2 Sm. & G. 311; 18 Jur. 506; 2 W. R. 482.—STUART, v.-c., *referred to*.

Van Grutten v. Foxwell (1897) 66 L. J. Q. B. 745; [1897] A. C. 658, 680; 77 L. T. 170.—H.L. (E.).

LORD MACNAGHTEN.—If the words "heirs of the body" are to have their proper meaning, the rule in *Shelley's Case* (*supra*, col. 3226) must apply, even though the testator has said in so many words that the heirs special were to take by purchase—*Coepe v. Arnold*.—p. 757.

Roddy v. Fitzgerald (1858) 6 H. L. Cas. 823.—H.L. (IR.); *affirming* 4 Ir. C. L. R. 74.—EX. CH.

Considered, Jordan v. Adams (1859) 29 L. J. C. P. 180; 6 C. B. (N.S.) 748, 761; 6 Jur. (N.S.) 536.—C.P. (*affirmed*, (1860) 30 L. J. C. P. 161; 9 C. B. (N.S.) 483; 7 Jur. (N.S.) 973; 4 L. T. 775; 9 W. R. 593.—EX. CH. MARTIN and CHANNELL, BB. dissenting); *distinguished*, Burke v. Tully (1864) 9 Ir. Jur. (N.S.) 344.—L.C.; *applied*, Sherwin v. Kenny (1864) 16 Ir. Ch. R. 138, 152.—M.R.; *referred to*, Bradley v. Cartwright (1867) 36 L. J. C. P. 218, 222; 1 L. R. 2 C. P. 511, 521 (*post*, col. 3248); Warren v. Travers (1868) Ir. R. 2 Eq. 455, 462.—M.R.; *applied*, Colclough v. Colclough (1870) Ir. R. 4 Eq. 263, 284.—C.A.; *referred to*, Nelley's Trusts, In re (1877) 26 W. R. 88, 89.—C.A.

Roddy v. Fitzgerald.

Rule of construction applied, Taylor v. St. Helen's Corporation (1877) 46 L. J. Ch. 857; 4 Ch. D. 264, 270; 37 L. T. 253; 25 W. R. 885.—C.A.; Leach v. Jay (1877) 46 L. J. Ch. 499; 6 Ch. D. 496, 498; 25 W. R. 574.—JESSEL, M.R.; (*affirmed*, (1878) 47 L. J. Ch. 876; 9 Ch. D. 42; 39 L. T. 242; 27 W. R. 99.—C.A.); *principle extended*, Whitelaw v. Whitelaw (1880) 5 L. R. Ir. 120, 129.—SULLIVAN, M.R.

O.C.

Roddy v. Fitzgerald, discussed.

Clifford v. Koe (1880) 5 App. Cas. 447, 456; 43 L. T. 322; 28 W. R. 633.—H.L. (IR.); Shannon v. Good (1884) 15 L. R. Ir. 284, 293, 306.—CHATERTON, v.-c. and C.A.; Rotheram v. Rotheram (1884) 13 L. R. Ir. 429, 449.—C.A.; Bowen v. Lewis (1884) 54 L. J. Q. B. 55; 9 App. Cas. 890, 901; 52 L. T. 189.—H.L. (E.) (*see supra*, col. 3244).

Roddy v. Fitzgerald.

Applied, Sandes v. Cooke (1887-1888) 21 L. R. Ir. 445, 457, 463.—PORTER, M.R. and C.A.; *referred to*, Van Grutten v. Foxwell (1897) 66 L. J. Q. B. 745, 753; [1897] A. C. 658, 672.—H.L. (E.). (*See supra*, col. 3246); Sheridan v. O'Reilly [1900] 1 Ir. R. 386, 391.—PORTER, M.R. (varied on one point, C.A.).

Roddy v. Fitzgerald, applied.

Pelham-Clinton v. Newcastle (Duke) 69 L. J. Ch. 875; [1902] 1 Ch. 34, 39; 49 W. R. 12; *affirmed*, C.A. and H.L., *post*.

BUCKLEY, J.—The decision of the H. L. in *Roddy v. Fitzgerald* is another authority directly in point upon this part of the case. There was a gift over "in failure of issue," and the House held that in such a case it is presumed that "issue" means "heirs of the body." Here the gift over is "in failure of which"—that is, "in failure of such issue male and their male descendants." It is, I think, therefore to be presumed that the word "issue" has been used by the testator as meaning "heirs of the body," and it is for the parties seeking to give it another meaning to show clearly from the context of the will that the testator intended to give it a different meaning.—p. 878.

Roddy v. Fitzgerald, discussed and applied.

Pelham-Clinton v. Newcastle (Duke) (1901) 71 L. J. Ch. 53, 55; [1902] 1 Ch. 34, 44; 85 L. T. 439; 50 W. R. 83.—C.A.; *affirmed*, (1902) 72 L. J. Ch. 424; [1903] A. C. 111; 88 L. T. 273; 51 W. R. 608.—H.L. (E.).

Jordan v. Adams (1859) 29 L. J. C. P. 180; 6 C. B. (N.S.) 748; 6 Jur. (N.S.) 536.—C.P.; *affirmed*, (1860) 30 L. J. C. P. 161; 9 C. B. (N.S.) 483; 7 Jur. (N.S.) 973; 4 L. T. 775; 9 W. R. 593.—EX. CH.; MARTIN and CHANNELL, BB. dissenting.

Jordan v. Adams, referred to.

Bradley v. Cartwright (1867) 36 L. J. C. P. 218; 1 L. R. 2 C. P. 511, 523; 16 L. T. 587; 15 W. R. 922.—C.P.

BOVILL, C.J. (for the Court).—We may also mention the case of *Jordan v. Adams*, in which the words "heirs male of the body" were held to be restricted to sons, by reason of a subsequent reference to "their father," and in every case, however general the words may be, they may be restrained and limited by the context wherever it clearly appears that they were intended to be used in a more restricted sense.—p. 223.

Jordan v. Adams.

Referred to, Pedder v. Hunt (1887) 56 L. J. Q. B. 212; 18 Q. B. D. 565, 572; 56 L. T. 637; 35 W. R. 371.—C.A. (*see ante*, col. 3235); *distinguished*, Savile v. Savile (1895) [1896] 1 Ir. R. 249, 269.—M.R.

Bradley v. Cartwright (1867) 36 L. J. C. P. 218; L. R. 2 C. P. 511; 16 L. T. 587; 15 W. R. 922.—C.P.

Referred to, **Warren v. Travers** (1865) Ir. R. 2 Eq. 445, 461.—M.R.: *principle reviewed and extended*, **Whitelaw v. Whitelaw** (1880) 5 L. R. Ir. 120, 131.—SULLIVAN, M.R.

Bradley v. Cartwright (*supra*), *explained and distinguished*.

Richardson v. Harrison (1885) 16 Q. B. D. 85; 55 L. J. Q. B. 58; 54 L. T. 456.—C.A.

COTTON, L.J.—The Court of C. P. merely decided that the words which were in question must be read in a restricted sense, and must be deemed to be words of purchase.—p. 108.

Batteste v. Maunsell (1876) Ir. R. 10 Eq. 97.—CHATTERTON, V.-C.: *partly affirmed and partly reversed*, Ir. R. 10 Eq. 314.—C.A.

Batteste v. Maunsell, *discussed*.

Robb v. Dorrian (1877) Ir. R. 11 C. L. 292, 327.—EX. CH.; **Lahiff**, In re [1903] [1904] 1 Ir. R. 147, 154.—C.A.

Hart's Estate, In re, Orford v. Hart (1883) W. R. 164.—KAY, J., *distinguished*.

Richardson v. Harrison (1885) 16 Q. B. D. 85; 55 L. J. Q. B. 58; 54 L. T. 456.—C.A.

COTTON, L.J.—Then I have to consider this question, namely, whether the gift to Eliza Hayley's right heirs was the gift of an equitable or legal estate, the previous life-interest devised to her being only an equitable estate. That is on the principle that the rule in *Shelley's Case* (*ante*, col. 3226) can be applied only where the estate for life and the estate in remainder are of the same quality, that is, both legal or both equitable. I am of opinion that in the present case both the estates are equitable estates, and I will dispose at once of *Hart's Estate, In re, Orford v. Hart*, before Kay, J., as inapplicable to this. It is unnecessary to determine whether that case was rightly or wrongly decided, because in it there was nothing to show that the estate was to be in the trustees beyond the life-interest of the devisee, the testator's daughter, in whose favour a separate use was created. There were no directions to sell. The question generally is, whether in the will it is apparent that the testator intended the trustees to have the legal estate for any limited period or for all time.—p. 108.

Bowen v. Lewis (1884) 54 L. J. Q. B. 55; 9 App. Cas. 890; 52 L. T. 189.—H.L. (E.), *not applied*.

Shannon v. Good (1884) 15 L. R. Ir. 284, 307.—C.A.; **Sandes v. Cooke** (1887) 21 L. R. Ir. 445, 451, 470.—PORTER, M.R. and C.A.

Bowen v. Lewis, *referred to*.

Evans v. Evans (1892) 61 L. J. Ch. 456; [1892] 2 Ch. 173; 67 L. T. 152; 40 W. R. 465.—C.A. See *ante*, col. 3234.

Bowen v. Lewis.

Applied, **Clancarty v. Clancarty** (1893) 31 L. R. Ir. 530, 585.—C.A.; *distinguished*, **Saville v. Saville** (1895) [1896] 1 Ir. R. 249, 260.—M.R.

Bowen v. Lewis, *referred to*.

Pelham-Clinton v. Newcastle (Duke) (1900) 69 L. J. Ch. 875, 879; [1902] 1 Ch. 34, 40; 49 W. R. 12; affirmed, C.A. See *post*, col. 3250.

Van Grutten v. Foxwell (1897) 66 L. J. Q. B. 745; [1897] A. C. 658; 77 L. T. 170.—H.L. (E.), *discussed and applied*.

Foxwell v. Van Grutten (1898) 78 L. T. 231.—BIGHAM, J.; and (1898) 79 L. T. 617.—C.A.; affirmed, (1900) 82 L. T. 272; 48 W. R. 653.—H.L. (E.); LORD DAVEY dissenting.

Van Grutten v. Foxwell, *referred to*.

Adams and Perry's Contract, In re [1899] 68 L. J. Ch. 259; [1899] 1 Ch. 554; 80 L. T. 149; 47 W. R. 326.—STIRLING, J.: **Crumpe v. Crumpe** (1898) [1899] 1 Ir. R. 359, 372.—C.A.; (affirmed, (1900) 89 L. J. P. C. 7; [1900] A. C. 127; 82 L. T. 130.—H.L. (IR.).)

Van Grutten v. Foxwell, *principle applied*.

Pelham-Clinton v. Newcastle (Duke) (1900) 69 L. J. Ch. 875, 879; [1902] 1 Ch. 34, 40; 49 W. R. 12.—BUCKLEY, J.; affirmed, (1901) 71 L. J. Ch. 53; 85 L. T. 439; 50 W. R. 83.—C.A.; and (1903) 72 L. J. Ch. 424; [1903] A. C. 111; 88 L. T. 273; 51 W. R. 608.—H.L. (E.).

Van Grutten v. Foxwell, *referred to*.

Keane's Estate, In re [1903] 1 Ir. R. 215, 225.—ROSS, J.

SHERIFF.

Smith v. Brown (1837) 6 L. J. Ex. 216; 2 M. & W. 851.—EX., *not applied*.
Allen v. Pink (1838) 7 L. J. Ex. 206; 4 M. & W. 140; 1 H. & H. 207.—EX.

Smith v. Brown, *applied*.

Carter v. Wright (1867) 16 W. R. 110.—EX.

Barratt v. Price [1833] 9 Bing. 566; 2 L. J. C. P. 56.—C.P., *discussed and approved*.

Thurland's Case (1566) Dyer 244, *not followed*.

Hooper v. Lane (1857) 6 H. L. Cas. 443; 27 L. J. Q. B. 75; 3 Jur. (N.S.) 1026; 6 W. R. 146.—H.L. (E.); affirming [1854] 23 L. J. Q. B. 372; 3 El. & Bl. 731.—EX. CH.

CRANWORTH, L.C.—I think that the doctrine propounded and acted on in *Barratt v. Price* is founded on solid good sense, and even if it be inconsistent with the early case in *Dyer* (241—244) referred to in the argument (*Thurland's Case*), I have no hesitation in advising your lordships to follow what can hardly be disputed to be the modern doctrine, acted on for the last twenty years and upwards, namely, that if the sheriff by the illegal act of himself or his officers has taken a person unlawfully into custody, so that the custody amounts to a false imprisonment, he cannot avail himself of that illegal detention to execute against the body of the prisoner other writs which he holds at the suit of other plaintiffs.—p. 554.

Dudden v. Long (1834) 1 Bing. N. C. 299; 1 Scott, 281; 3 D. P. C. 139.—C.P., *referred to*.

Smith v. Keal (1882) 9 Q. B. D. 340; 47 L. T. 142; 31 W. R. 76.—C.A.

Hooper v. Lane (1857) 6 H. L. Cas. 443; 27 L. J. Q. B. 75; 3 Jur. (N.S.) 1026; 6 W. R. 146.—H.L. (E.), *principle applied*.

Ockford v. Freston; **Chapman v. Freston** (1861) 30 L. J. Ex. 89.—EX.

Hooper v. Lane, observations adopted.

London Celluloid Co., *In re* (1888) 57 L. J. Ch. 843; 39 Ch. D. 190, 206; 59 L. T. 109; 86 W. R. 673; 1 Meg. 45.—C.A.

Humphrys v. Pratt (1831) 5 Bli. (N.S.) 154; 2 Dow & Cl. 288.—H.L. (1R.); *considered and distinguished.*

Collins v. Evans (1844) 5 Q. B. 820; 13 L. J. Q. B. 180; D. & M. 669; 8 Jur. 345.—EX. CH.

Humphrys v. Pratt, followed.

Childers v. Wooller (1860) 29 L. J. Q. B. 129; 6 Jur. (N.S.) 444; 2 L. T. 49; 8 W. R. 321.—Q.B.

Humphrys v. Pratt, explained and applied.

Dugdale v. Lovering (1875) 44 L. J. C. P. 197, 199; L. R. 10 C. P. 196, 199; 32 L. T. 155; 23 W. R. 391.—C.P.

Humphrys v. Pratt, discussed.

Sheffield Corporation v. Barclay (1903) 72 L. J. K. B. 777; [1903] 2 K. B. 580; 89 L. T. 227; 52 W. R. 54; 1 L. G. R. 794; 9 Com. Cas. 53; 68 J. P. 17.—C.A.

Evans v. Collins (1844) 12 L. J. Q. B. 339; 5 Q. B. 804; D. & M. 72; 7 Jur. 743.—Q.B., *considered.*

Childers v. Wooller (1860) 29 L. J. Q. B. 129; 6 Jur. (N.S.) 444; 2 L. T. 49; 8 W. R. 321.—Q.B.

Evans v. Collins, referred to.

Richardson v. Silvester (1878) 43 L. J. Q. B. 1; L. R. 9 Q. B. 34; 29 L. T. 395; 22 W. R. 74.—Q.B.

Evans v. Collins, considered and adopted.

Derry v. Peak (1889) 58 L. J. Ch. 864; 14 App. Cas. 337, 356, 367; 61 L. T. 265; 38 W. R. 33; 1 Meg. 292; 54 J. P. 148.—H.L. (E.).

Hodgkinson v. Hodgkinson (1834) 2 D. P. C. 535.—K.B., *overruled.*

Colston v. Berends (1835) 1 C. M. & R. 833.—EX. CH. PARKE, B.—You must not take that as an authority, as this Court has overruled that decision.—p. 834.

Radeliff v. Tate (1660) 1 Keb. 779, *overruled.*

Pate v. Roe (1807) 1 Taunt. 55. C.P. The Common Pleas denied the authority of the case in Keble.

Bessey v. Windham (1844) 6 Q. B. 166; 14 L. J. Q. B. 7; 8 Jur. 824.—Q.B., *dissented from.*

White v. Morris (1852) 11 C. B. 1015; 21 L. J. C. P. 185; 16 Jur. 500.

JERVIS, C.J.—It is an established rule of law—never doubted until *Bessey v. Windham*—that the mere production of the writ, and nothing more, will not enable the sheriff to show that a deed, good as against all except creditors, is fraudulent and void. He must show that he represents a creditor. For this purpose the bare production of the writ is not enough. The writ merely authorises and directs the sheriff to do a certain act, and his endorsement or return thereon is a mere statement that he has done as he was directed. There is no statement that a judgment exists; but only that somebody says that a judgment has been

obtained. I think that the production by the plaintiff of the writ in this case was not evidence for the defendants that a judgment existed. I am aware that, in coming to this conclusion, we cannot avoid conflicting with the decision of the Court of Queen's Bench in *Bessey v. Windham*, where it was held that the officer was protected by the warrant, although there was no evidence of the existence of any judgment.—p. 1028.

MAULE, CRESSWELL and WILLIAMS, JJ., to the same effect.

Morgans v. Bridges (1818) 1 B. & Ald. 647; 2 Stark. 314.—K.B.; and **Rex v. Hood** (1830) 1 M. C. C. 28.—C.C.B., *applied.*

Hoye v. Bush (1840) 10 L. J. M. C. 168; 2 Scott N. R. 86; 1 Man. & G. 775; 1 Drink. 15.—C.P.

Minshall v. Lloyd (1837) 6 L. J. Ex. 115; 2 M. & W. 450; M. & H. 125; 1 Jur. 336; 46 R. R. 638.—EX., *adopted.*

Roberts, *In re*, Foster, Ex parte (1878) 47 L. J. Bk. 101; 10 Ch. D. 100; 38 L. T. 888.—BACON, C.J., reversed, Roberts, *In re*, Brook, Ex parte, 48 L. J. Bk. 22; 10 Ch. D. 100; 39 L. T. 458; 27 W. R. 255.—C.A.

Chambers v. Bernasconi (1834) 1 C. M. & R. 347; 4 Tyr. 531; 3 L. J. Ex. 373.—EX. CH., *discussed and applied.*

Smith v. Blakey (1867) 36 L. J. Q. B. 156, 160; L. R. 2 Q. B. 326, 332; 8 B. & S. 157; 15 W. R. 492.—Q.B.

Chambers v. Bernasconi, observed upon.

Sturla v. Freccia; Polini v. Gray (1880) 50 L. J. Ch. 86, 93; 5 App. Cas. 623, 638; 43 L. T. 209; 29 W. R. 217; 44 J. P. 812.—H.L. (E.).

Brickhill (or Brickell) v. Hulse (1837) 7 L. J. Q. B. 18; 7 A. & E. 454; 2 N. & P. 426.—Q.B., *followed.*

Campbell v. Rothwell (1877) 47 L. J. Q. B. 144, 145; 38 L. T. 33.—DENMAN, J. *And see* vol. i. col. 1033.

Wymer v. Kemble (1827) 6 B. & C. 479.—K.B., *considered.*

Giles v. Grover (1832) 1 Cl. & F. 72; 6 Bli. (N.S.) 277; 9 Bing. 128, 180; 2 M. & Sc. 197.—H.L. (E.).

Wymer v. Kemble, considered.

Pearce, *In re*, Crosswaite, Ex parte (1885) 54 L. J. Q. B. 316; 14 Q. B. D. 966, 970; 52 L. T. 518; 33 W. R. 614; 2 Morrell 105.—CAVE, J.

Raphael v. Goodman (1838) 7 L. J. Q. B. 220; 8 A. & E. 565; 3 N. & P. 547; 1 W. W. & H. 363.—Q.B., *adopted.*

Barwick v. English Joint Stock Bank (1867) 36 L. J. Ex. 147; L. R. 2 Ex. 259; 16 L. T. 461; 15 W. R. 877.—EX. CH.

Lechmere v. Thorowgood (1688) Comb. 123.—K.B., *disapproved.*

Giles v. Grover (1832) 6 Bli. (N.S.) 277; 1 Cl. & F. 72; 2 M. & Sc. 197; 9 Bing. 128.

PATTESON, J.—It was held that the sheriff could not be made a trespasser by relation. All the reporters agree in stating that to be the point decided. Even Comberbach so states, although he makes Holt, J., say: "The

property in goods is vested by the delivery of the *fiery facias*, and the extent afterwards for the king comes too late; and this by the Statute of Frauds and Perjuries." This must be a mistake. It is contrary to Lord Holt's own position in *Smallcomb v. Cross* (1 Ld. Raym. 252); it is wholly beside the question before him, and makes him consider the Statute of Frauds as binding on the king who is not named in it. Lord Mansfield, in *Cooper v. Chitty* (1 Burr. 36), says that Lord Holt could never say that the property in the goods vested by the delivery of the *fiery facias*, and that the extent for the king afterwards came too late; and adds:—"No inception of an execution can bar the Crown." And Lord Ellenborough also points out the inaccuracy of Comberbach very forcibly in 4 East 539 (*Payne v. Drew*).—p. 302.

Att.-Gen. v. Capell (1686) 2 Show. 480.—EX., and **Smallcomb v. Buckingham** (1696) 5 Mod. 376; 1 Ld. Raym. 251, *dicta disapproved*.

Giles v. Grover (1832) 1 Cl. & F. 72; 6 Bli. (N.S.) 277; 2 M. & Sc. 197; 9 Bing. 128.—H.L. (N.). [*Dictum* in *Att.-Gen. v. Capell*:—"Extents have been held good that have been made upon goods actually levied by virtue of a *fiery facias*, and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered."]

PATTERSON, J.—Also in *Smallcomb v. Buckingham*, which is the same case as is elsewhere called *Smallcomb v. Cross*, there is a *dictum* to the same effect, and many others in other places, all which *dicta* I merely notice to put them in opposition to other *dicta* as to the vesting and alteration of property by seizure.—p. 90.

Giles v. Grover (*supra*), *applied*.

Johnson, In re, Rayner, Ex parte (1872) 41 L. J. Bk. 26, 30; 26 L. T. 306; 20 W. R. 456.—**BACON, C.J.**, affirmed, L.JJ.

Hunt v. Hooper (1844) 13 L. J. Ex. 183; 12 M. & W. 664; 1 D. & L. 626.—EX., *referred to*.

White v. Nutting (1896) [1897] 2 Ir. R. 241.—EX.D.

Withers v. Parker (1859) 28 L. J. Ex. 292; 4 H. & N. 524.—EX., affirmed, (1860) 29 L. J. Ex. 320; 5 H. & N. 725.—EX. CH.

Withers v. Parker, *followed*.

Witt v. Parker (1887) 46 L. J. Q. B. 450; 36 L. T. 538; 25 W. R. 518.—C.A.

Baerselman v. Langlands (1864) 34 L. J. Ch. 3; 3 H. & C. 433.—EX., *followed*.

Marks v. Hall (1866) L. R. 2 Q. B. 31; 36 L. J. Q. B. 40; 15 L. T. 242; 15 W. R. 155; 7 B. & S. 839.—Q.B.

Marks v. Hall (*supra*), *followed*.

Rogers v. Roberts (1866) 36 L. J. Ex. 40; L. R. 2 Ex. 35; 15 L. T. 254; 15 W. R. 340.—EX.

Rogers v. Roberts (*supra*), *followed*.

Buckland v. Tonkinson (1867) L. R. 2 C. P. 503, n.—C.P.

Aldred v. Constable (1844) 6 Q. B. 370; 8 Jur. 956.—Q.B., *adopted*.

Pearce, In re, Crosssthaite, Ex parte (1885)

54 L. J. Q. B. 316; 14 Q. B. D. 966, 969; 52 L. T. 518; 33 W. R. 614.—CAVE, J.

Wright v. Redgrave (1879) 11 Ch. D. 24; 40 L. T. 206; 27 W. R. 562.—C.A., *observations adopted*.

Aylwin v. Evans (1882) 52 L. J. Ch. 105; 47 L. T. 568.—**BACON, V.-C.**

Valpy v. Manley (1845) 14 L. J. C. P. 204; 1 C. B. 594; 9 Jur. 452.—C.P., *adopted*.

Doolli Chand v. Ram Kishen Singh (1881) L. R. 8 Ind. Ap. 93, 98.—P.C.

Lancashire Waggon Co. v. Fitzhugh (1861) 30 L. J. Ex. 231; 6 H. & N. 502; 3 L. T. 703.—EX., *considered*.

Hollins v. Fowler (1875) 44 L. J. Q. B. 169, 177; L. R. 7 H. L. 757, 770; 33 L. T. 73.—H.L. (E.).

Lancashire Waggon Co. v. Fitzhugh, *considered*.

Ganly v. Ledwidge (1876) Ir. R. 10 C. L. 33.—Q.B., **WHITESIDE, C.J.** *dissenting*.

Smallcombe v. Olivier (1844) 13 L. J. Ex. 305; 13 M. & W. 77; 2 D. & L. 117; 8 Jur. 606.—EX., *discussed*.

White v. Chitty (1866) 35 L. J. Ch. 343; L. R. 1 Eq. 372; 12 Jur. (N.S.) 181.—**WOOD, V.-C.**

Smallcombe v. Olivier, *followed*.

Lloyd v. Lloyd (1866) L. R. 2 Eq. 722, 724.—V.-C.

Reynolds v. Barford (1844) 13 L. J. C. P. 177; 7 Man. & G. 449; 8 Scott N. R. 233; 2 D. & L. 327; 8 Jur. 961.—C.P., *applied*.

Davis, In re, Pollen Trustees, Ex parte (1885) 55 L. J. Q. B. 217, 219; 54 L. T. 304; 34 W. R. 442; 3 Morrell 27.—CAVE, J.

Wright v. Lainson (1837) 6 L. J. Ex. 197; 3 M. & W. 44.—EX., *approved*.

Wintle v. Freeman (1841) 10 L. J. Q. B. 161; 11 A. & E. 539; 1 G. & D. 93.—Q.B.

DENMAN, C.J. Concurred in *Wright v. Lainson*.

Wintle v. Chetwynd (Lord) (1839) 7 D. P. C. 554; 1 W. W. & H. 581, *corrected*.

Wintle v. Freeman (1841) 11 A. & E. 539; 10 L. J. Q. B. 161; 1 G. & D. 93.—Q.B.

PATTERSON, J.—As to *Wintle v. Chetwynd*, what I am reported to have said there is not correct. The return, indeed, was bad; for the sheriff cannot show generally that he seized under two writs; he ought to show the amount due on the earlier writ, and the value of the goods seized. But if the report be correct (as I dare say it is), I was quite wrong in saying that it was impossible to seize under both writs. There may be many writs in the sheriff's hands at the time of seizure; and he seizes under all.—p. 548.

Beynon v. Garrat (1824) 1 C. & P. 154, *overruled*.

Holmes v. Clifton (1839) 8 L. J. Q. B. 247; 10 A. & E. 673; 4 P. & D. 112.—Q.B.

Per Curiam.—**Beynon v. Garrat**, if properly reported, cannot be maintained.—p. 675.

Christopherson v. Burton (1848) 18 L. J. Ex. 60; 3 Ex. 160.—EX., *adopted*.

Pearce, In re, Crosssthaite, Ex parte (1885)

54 L. J. Q. B. 316; 14 Q. B. D. 966, 969; 52 L. T. 518; 33 W. R. 814.—CAVE, J.

Mildmay v. Smith (1671) 2 Wms. Saund. 343 (5th ed.)—K.B., *explained*.

Stimson v. Farnham (1871) 41 L. J. Q. B. 52; L. R. 7 Q. B. 175; 25 L. T. 747; 20 W. R. 183.—Q.B.

COCKBURN, C.J.—The fundamental rule that in actions of tort there must be a wrongful act and damage resulting from it applies here, unless the case is an exception on the ground that the sheriff is concluded from denying the statement in his return. We have, therefore, to see whether there is any authority for assuming this to be an exception to the general conditions which govern actions of this kind, and the authority relied upon is the dictum of Lord Campbell in *Remmett v. Lawrence* (*infra*). Now the dictum was clearly unnecessary to the decision, though it is no doubt entitled to the respect due to everything which fell from that distinguished judge. Still it is not an authority which is binding upon us, and in *Levy v. Hale* (*infra*) it was distinctly held that the sheriff is not estopped in an action for a false return from proving the real facts to show that the plaintiff has sustained no damage. It is true that in *Mildmay v. Smith* and *Clark v. Withers*, it appears to have been held that the sheriff was not at liberty to controvert the facts stated in his return. But on turning to *Mildmay v. Smith*, we find that it was a case where the sheriff had returned that the goods were rescued while they were in his hands. . . . And in *Clark v. Withers*, it is simply stated that the sheriff is answerable for the value of the goods after he has seized them, and is bound to the value he has returned them to be of. Both these cases arose upon *scire facias*.—p. 54.

BLACKBURN, J., to the same effect.—MELLOR, J., concurred.

Clerk v. Withers (1704) 2 Ld. Raym. 1072, *distinguished*.

Stimson v. Farnham (1871) 41 L. J. Q. B. 52; L. R. 7 Q. B. 175, 179; 25 L. T. 747; 20 W. R. 183.—Q.B. See extract, *supra*.

Remmett v. Lawrence (1850) 20 L. J. Q. B. 25; 15 Q. B. 1004; 14 Jur. 1067.—Q.B., *followed*.

Levy v. Hale (1859) 29 L. J. C. P. 127; 6 Jur. (N.S.) 702; 1 L. T. 132; 8 W. R. 125.—C.P.

Remmett v. Lawrence, *dicta disapproved*.

Stimson v. Farnham (1871) 41 L. J. Q. B. 52; L. R. 7 Q. B. 175; 25 L. T. 747; 20 W. R. 183.—Q.B. See extract, *supra*.

Levy v. Hale (1859) 29 L. J. C. P. 127; 6 Jur. (N.S.) 702; 1 L. T. 132; 8 W. R. 125.—C.P., *adopted*.

Stimson v. Farnham (1871) 41 L. J. Q. B. 52, 54; L. R. 7 Q. B. 175, 179; 25 L. T. 747; 20 W. R. 183.—Q.B. See extract, *supra*.

Kemland v. Macauley (1791) Peake 9*, *discussed*.

Imray v. Magnay (1843) 12 L. J. Ex. 188; 11 M. & W. 267; 2 D. (N.S.) 531; 7 Jur. 240.—EX.

Warmoll v. Young (1826) 4 L. J. (O.S.) K. B. 293; 5 B. & C. 660; 8 D. & R. 452.—K.B., *discussed*.

Imray v. Magnay (1843) 12 L. J. Ex. 188; 11

M. & W. 267; 2 D. (N.S.) 531; 7 Jur. 240.—EX.

Imray v. Magnay (1843) 12 L. J. Ex. 188; 11 M. & W. 267; 2 D. (N.S.) 531; 7 Jur. 240.—EX., *considered and applied*.
Christopherson v. Burton (1848) 13 L. J. Ex. 60; 3 Ex. 160.—EX.

Imray v. Magnay, *questioned*.

Remmett v. Lawrence (1850) 15 Q. B. 1004; 20 L. J. Q. B. 25; 14 Jur. 1067.—Q.B.

CAMPBELL, C.J.—When a proper opportunity arises, I should like to have *Imray v. Magnay* reconsidered.—p. 1010.

PATTESON, J.—This case, therefore, leaves untouched the question which was raised in *Imray v. Magnay*, how the sheriff is bound to take notice that a prior judgment is fraudulent. Upon that point we need give no opinion here, as we do not think the sheriff is estopped.—p. 1011. ERLE, J. concurred.

Yea v. Lethbridge (1791) 4 Term Rep. 433, 435.—K.B., *held overruled*.

Hunt v. Round (1834) 2 D. P. C. 558.

PATTESON, J.—In *Yea v. Lethbridge* it was decided, that in an action against the sheriff for not taking sufficient pledges in replevin the plaintiff cannot recover damages beyond the value of the distress. That case, however, was overruled by *Concanen v. Lethbridge* (2 H. Bl. 36), in which it was held that the plaintiff might recover damages beyond the penalty of the bond, that is, for more than double the value of the goods distrained.—p. 561.

Batchelor v. Vyse (1834) 1 M. & Rob. 331.—C.P.; *overruled*, 4 Moo. & Scott 552.—C.P.

Farebrother v. Ansley (1808) 1 Camp. 343.—ELLENBOROUGH, C.J., *observations considered*.

Burrows v. Rhodes (1829) 68 L. J. Q. B. 545; [1899] 1 Q. B. 816, 828; 80 L. T. 591; 48 W. R. 13.—Q.B.D.

Lewis v. Gompertz (1840) 6 M. & W. 399; 9 L. J. Ex. 182.—EX., *approved*.

Walton v. Maskell (1844) 13 M. & W. 452; 14 L. J. Ex. 54; 2 D. & L. 410.—EX.

Evans v. Davies; Davies v. Evans (1843) 13 L. J. Ch. 11; 7 Beav. 81.—M.R., *followed*.

Heiron's Estate, In re, **Hall v. Ley** (1879) 48 L. J. Ch. 688; 12 Ch. D. 795; 27 W. R. 750.—HALL, V.-C.

Rex v. Adderley (1780) 2 Dougl. 463.—K.B., *distinguished*.

Webb v. Fairmaner (1838) 7 L. J. Ex. 140; 3 M. & W. 473; 6 D. P. C. 549.—K.B.

Cooper v. Chitty (1756) 1 W. Bl. 163; 1 Burr. 20.—K.B., *questioned*.

Rorke v. Dayrell (1791) 4 Term Rep. 402; 2 R. R. 417.—K.B.

KENYON, C.J.—With respect to what is supposed to have been said by Lord Mansfield, in *Cooper v. Chitty*, of Comberbach's having mistaken Lord Holt's opinion in *Lechmere v. Thoroughgood* (Comb. 123) ["The property of the goods is vested by the *scire facias*"], it is as

probable that the report of that observation is mis-stated.—p. 412.

[This comment is not referred to in *Giles v. Grover* (6 Bligh (N.S.) 278) (1832), when the lords are discussing this same point on p. 336.]

Cooper v. Chitty, explained.

Barr's Trusts, in re (1858) 27 L. J. Ch. 548; 4 Kay & J. 219; 4 Jur. (N.S.) 1013.—WOOD, V.-C. *And see post*, col 3259.

Cooper v. Chitty (supra). Seq.

Hollins v. Fowler (1875) 44 L. J. Q. B. 169; L. R. 7 H. L. 757, 765; 33 L. T. 73.—H.L. (E.).

Cooper v. Chitty, considered.

Gloucestershire Banking Co. v. Edwards (1887) 57 L. J. Q. B. 51; 20 Q. B. D. 107, 112; 58 L. T. 463; 36 W. R. 116.—C.A.

Doe d. Stevens v. Donston (1818) 1 B. &

Ald. 230; 19 R. R. 300.—K.B., *considered*.
Gloucestershire Banking Co. v. Edwards (1887) 57 L. J. Q. B. 51; 20 Q. B. D. 107, 112; 58 L. T. 463; 36 W. R. 116.—C.A.

Whiskard v. Wilder (1757) 1 Burr. 330.—K.B.; *approved*.

Arundell v. White (1811) 14 East 224.—K.B.

Whiskard v. Wilder, dictum disapproved.

Hill v. Heale (1806) 2 Bos. & P. N. R. 196.
MANSFIELD, C.J.—The case in *Burrow*, which has been referred to, does not appear to me to apply to this, though the *dictum* which it contains does. The question there related to the form of the declaration. Denison, J., who was a pleader of the first eminence, observed, that in practice, the form of the declaration was sometimes one way and sometimes another, and that he did not think the averment necessary. This was the sole question before the Court. But I should have great difficulty in agreeing with the doctrine imputed to the Court of K. B., that the statute of 12 Geo. I. is merely directory. I cannot help entertaining great doubts respecting that *dictum*. The sheriff must see by the writ whether it be indorsed or not, and I cannot think he could justify an arrest without it. But this was merely a *dictum* and not necessary to the opinion of the Court.—p. 201.

Whiskard v. Wilder, confirmed.

Sharpe v. Abbey (1828) 5 Bing. 193.—C.P.
BEST, C.J.—The case of *Whiskard v. Wilder* has recently been confirmed in this Court in *Wilcoxon v. Nightingale* (4 Bing. 501).—p. 195.
PARK, J.—It was also confirmed in *Arundell v. White* (14 East 224).—*Id.*

Masters v. Lowther (1852) 21 L. J. C. P. 130; 11 C. B. 948; 16 Jur. 347.—C.P., *applied*.

Grubb, in re, Sims, Ex parte (1876) 46 L. J. Bk. 103; 4 Ch. D. 521, 524; 36 L. T. 40.—BACON, C.J., affirmed, 46 L. J. Bk. 103; 5 Ch. D. 375; 36 L. T. 340; 25 W. R. 453.—C.A.

Masters v. Lowther, applied.

Roe v. Hammond (1877) 46 L. J. C. P. 791; 2 C. P. D. 300.—C.P.D.

Winter v. Miles (1809) 10 East 578; 1 Camp. 475, n.; 10 R. R. 391.—K.B., *discussed*.

Att.-Gen. v. Dakin (1870) 39 L. J. Ex. 113;

L. R. 4 H. L. 338; 23 L. T. 1; 18 W. R. 1111.—H.L. (E.).

Winter v. Miles, applied.

Combe v. De la Bere (1882) 22 Ch. D. 316, 341; 48 L. T. 298; 31 W. R. 258.—C.A.

Batson v. M'Lean (1813, 1815) 2 Chit. 48,

51; 23 R. R. 742.—K.B., *discussed*.
Att.-Gen. v. Dakin (1870) 39 L. J. Ex. 113, 118; L. R. 4 H. L. 338, 353; 23 L. T. 1; 18 W. R. 1111.—H.L. (E.).

Sparks v. Spink (1817) 7 Taunt. 311; 18

R. R. 492.—C.P., *adopted*.
Combe v. De la Bere (1882) 22 Ch. D. 316, 335.—CHITTY, J., affirmed, 22 Ch. D. 316; 48 L. T. 298; 31 W. R. 258.—C.A.

Att.-Gen. v. Donaldson (1842) 11 L. J. Ex. 338; 10 M. & W. 117.—EX., *applied*.

Att.-Gen. v. Dakin (1870) 39 L. J. Ex. 113, 118; L. R. 4 H. L. 338, 354; 23 L. T. 1; 18 W. R. 1111.—H.L. (E.).

Att.-Gen. v. Donaldson, dictum adopted.

Bonham, in re. Postmaster General, Ex parte (1870) 48 L. J. Bk. 84, 87; 10 Ch. D. 595, 601; 40 L. T. 16; 27 W. R. 325.—C.A.

Att.-Gen. v. Dakin (1870) 39 L. J. Ex. 113;

L. R. 4 H. L. 338; 23 L. T. 1; 18 W. R. 1111.—H.L. (E.), *explained*.
Combe v. De la Bere (1882) 22 Ch. D. 316, 341; 48 L. T. 298; 31 W. R. 258.—C.A.

Harvey v. Harvey (1884) 26 Ch. D. 644;

33 W. R. 76; 48 J. P. 468.—CHITTY, J., *referred to*.
Selons v. Croydon Rural Sanitary Authority (1885) 53 L. T. 209, 212.—CHITTY, J.

Harvey v. Harvey, applied.

Reg. v. Lambeth County Court Judge (1887) 36 W. R. 475.—WILLS and GRANTHAM, JJ.

Harvey v. Harvey, referred to.

Att.-Gen. v. Kissane (1893) 32 L. R. Ir. 220, 274.—C.A.

Lee v. Gansell (1774) Cowp. 1; Loft. 374.

—K.B., *followed*.
Lloyd v. Sandilands (1818) 8 Taunt. 250; 2 Moore 207; 19 R. R. 507.—C.P.

Lee v. Gansell, dictum adopted.

Thompson v. Ward (1871) 40 L. J. C. P. 169, 187; L. R. 6 C. P. 327, 358; 1 Hopw. & C. 530; 24 L. T. 679.—C.P.

Ratcliffe v. Burton (1803) 3 Bos. & P. 223;

6 R. R. 771, *explained*.
Hutchison v. Birch (1812) 4 Taunt. 619; 13 R. R. 703.—C.P.

HEATH, J.—If in *Ratcliffe v. Burton* I said that a demand was necessary before breaking an inner door, I do not recollect it: but as I have no reason to doubt the accuracy of the reporter, I shall presume that his account is right; but if so, the opinion was certainly extrajudicial, for it was unnecessary to decide in that case whether a previous demand was requisite or not, in order to take goods, or the person found in the house. The point there was, whether the sheriff could break the inner doors to search for a person not in the house.—p. 626.

Triquet v. Bath (1764) 3 Burr. 1478; 1 W. Bl. 471.—K.B., *referred to*.
The Charkieh (1873) 42 L. J. Ad. 17; L. R. 4 A. & E. 59.—ADM.; and Reg. v. Keyn. (1876) 2 Ex. D. 63, 130; 46 L. J. M. C. 17.—C.C.R.

Heathfield v. Chilton (1767) 4 Burr. 2015.—K.B., *referred to*.
The Charkieh (1873) 42 L. J. Ad. 17; L. R. 4 A. & E. 59.—ADM.

Cassidy v. Steuart (1841) 10 L. J. C. P. 57; 2 Man. & G. 437; 2 Scott N. R. 432; 9 D. P. C. 366; 5 Jur. 25.—C.P., *observed upon*.
Newcastle (Duke), In re, Morris, Ex parte (1869) L. R. 5 Ch. 172; 21 L. T. 380; 18 W. R. 79.—L.J.

Montague v. Harrison (1857) 27 L. J. C. P. 24; 3 C. B. (N.S.) 292; 4 Jur. (N.S.) 29; 6 W. R. 43.—C.P., *dictum applied*.
Gilpin v. Benjamin (or Cohen) (1869) 38 L. J. Ex. 50; L. R. 4 Ex. 132; 19 L. T. 830; 17 W. R. 885.—EX.

Magnay v. Burt (1843) 12 L. J. Q. B. 225; 5 Q. B. 381; D. & M. 652; 7 Jur. 1116.—EX. CH., *explained*.
Ames v. Waterlow (1869) 39 L. J. C. P. 41; L. R. 5 C. P. 53, 63; 21 L. T. 393; 18 W. R. 67.—C.P.

Moore v. Booth (1797) 3 Vcs. 350.—L.C., *followed*.
Jewitt, In re (1864) 33 L. J. Ch. 730; 33 Beav. 559; 10 Jur. (N.S.) 814; 10 L. T. 556; 12 W. R. 945.—ROMILLY, M.R.

McWilliams, In re (1803) 1 Sch. & Lef. 169.—L.C.; *discussed*.
Freston, In re (1883) 52 L. J. Q. B. 545; 11 Q. B. D. 545; 49 L. T. 290; 31 W. R. 804.—C.A.

McWilliams, In re, dicta adopted.
Harvey v. Harvey (1884) 26 Ch. D. 644, 652; 33 W. R. 76; 48 J. P. 468.—CHITTY, J.

McWilliams, In re, observation adopted.
Wickham, In re, Marony v. Taylor (1887) 56 L. J. Ch. 748, 751; 35 Ch. D. 272, 282; 57 L. T. 468; 35 W. R. 525.—C.A.

McWilliams, In re, adopted.
Edgcombe, In re, and Ex parte (1902) 71 L. J. K. B. 722; [1902] 2 K. B. 403; 87 L. T. 108; 50 W. R. 678; 9 Manson 227.—C.A.

List, Ex parte, (or List's Case) (1813) 2 V. & B. 373; 2 Rose 24, *followed*.
Pitman, In re, Dodd v. Holbrook (1865) 35 L. J. Ch. 175; 11 Jur. (N.S.) 969; 13 L. T. 426; 14 W. R. 125.—V.C.

Att.-Gen. v. Leathersellers' Co. (1844) 7 Beav. 157.—M.R., *distinguished*.
Freston, In re (1883) 52 L. J. Q. B. 545; 11 Q. B. D. 545; 49 L. T. 290; 31 W. R. 804.—C.A.
 BRETT, M.R., LINDLEY and FRY, L.JJ.

Eyre v. Barrow (1858) 27 L. J. Ch. 434; 4 Jur. (N.S.) 652; 6 W. R. 767.—STUART, V.C., *explained*.
Freston, In re (1883) 52 L. J. Q. B. 545; 11 Q. B. D. 545; 49 L. T. 290; 31 W. R. 804.—C.A.
 BRETT, M.R., LINDLEY and FRY, L.JJ.

Jewitt, In re (1864) 33 L. J. Ch. 730; 33 Beav. 559; 10 Jur. (N.S.) 814; 10 L. T. 556; 12 W. R. 945.—M.R., *explained*.
Freston, In re (1883) 52 L. J. Q. B. 545; 11 Q. B. D. 545; 49 L. T. 290; 31 W. R. 894.—C.A.

Pitman, In re, Dodd v. Holbrook (1865) 35 L. J. Ch. 175; 11 Jur. (N.S.) 969; 13 L. T. 426; 14 W. R. 125.—V.C., *distinguished*.
Freston, In re (1883) 31 W. R. 581.—GROVE and STEPHEN, JJ., *affirmed*, C.A. (*see supra*).

Goodwin v. Lordon (1834) 1 A. & E. 378; 3 N. & M. 879; 2 D. P. C. 504.—K.B., *distinguished*.
Gilpin v. Benjamin (or Cohen) (1869) L. R. 4 Ex. 132, 140; 38 L. J. Ex. 50; 19 L. T. 830; 17 W. R. 885.—EX.

Hare v. Hyde (1851) 20 L. J. Q. B. 185; 16 Q. B. 394; 15 Jur. 315.—Q.B., *distinguished*.
Gilpin v. Benjamin (or Cohen) (1869) 38 L. J. Ex. 50; L. R. 4 Ex. 132; 19 L. T. 830; 17 W. R. 885.—EX.

Dewhurst v. Kershaw (1863) 32 L. J. Ex. 146; 1 H. & C. 726; 7 L. T. 720; 11 W. R. 315.—EX., *overruled*.
Lloyd v. Harrison (1865) 34 L. J. Q. B. 97.—Q.B., *affirmed*, (1866) 35 L. J. Q. B. 153; 6 B. & S. 36; L. R. 1 Q. B. 502; 12 Jur. (N.S.) 701; 14 L. T. 799; 14 W. R. 737.—EX. CH.

[*Held*, per CROMPTON, MELLOR and SHEE, JJ., that the sheriff was justified in discharging the debtor on the production of the certificate, although the deed afterwards turned out to be invalid, and therefore was not liable to an action for escape. COCKBURN, C.J. dissented.]

COCKBURN, C.J.—As I have before observed, the question on this demurrer is, whether the sheriff was justified in taking upon himself to discharge the debtor, and returning that he was protected by the certificate from arrest. To this, for the reasons I have stated, there can, in my judgment, be but one answer; unless, indeed, we were prepared to overrule *Dewhurst v. Kershaw*, *Ilderton v. Jewell*, and *Leigh v. Pendlebury*, which, I think, it is not competent to us to do.—p. 117.

Dewhurst v. Kershaw, considered.
Ames v. Colnaghi (1868) L. R. 3 C. P. 359, 363; 37 L. J. C. P. 159; 18 L. T. 327; 16 W. R. 758.—C.P.

Ilderton v. Jewell (1863) 32 L. J. C. P. 256; 14 C. B. (N.S.) 655.—C.P., *affirmed*, (1864) 33 L. J. C. P. 148; 16 C. B. (N.S.) 142; 10 Jur. (N.S.) 747; 9 L. T. 815; 12 W. R. 530.—EX. CH., *overruled*.

Lloyd v. Harrison (1865) 34 L. J. Q. B. 97.—Q.B., *affirmed*, (1866) 35 L. J. Q. B. 153; L. R. 1 Q. B. 502; 6 B. & S. 36; 12 Jur. (N.S.) 701; 14 L. T. 799; 14 W. R. 737.—EX. CH.

Ilderton v. Jewell, referred to.
Ames v. Colnaghi (1868) 37 L. J. C. P. 159; L. R. 3 C. P. 359, 364; 18 L. T. 327; 16 W. R. 758.—C.P.

Leigh v. Pendlebury (1864) 33 L. J. C. P. 172; 15 C. B. (N.S.) 815; 10 Jur. (N.S.) 296; 10 L. T. 30; 12 W. R. 498.—C.P., *overruled*.

Lloyd v. Harrison (1865) 34 L. J. Q. B. 97.—Q.B., *affirmed*, (1866) 35 L. J. Q. B. 153; L. R. 1 Q. B. 502; 6 B. & S. 36; 12 Jur. (N.S.) 701; 14 L. T. 799; 14 W. R. 737.—EX. CH. *And see post*.

Leigh v. Pendlebury (*supra*), *referred to*.
Coles v. Turner (1866) 35 L. J. C. P. 169; L. R. 1 C. P. 373, 379; 12 Jur. (N.S.) 688; 14 W. R. 402.—EX. CH.

Leigh v. Pendlebury, *discussed*.
Hickrott v. Simmonds (1866) 35 L. J. Ch. 580; L. R. 2 Eq. 462; 14 L. T. 614.—M.R.

Leigh v. Pendlebury, *referred to*.
Ames v. Colnaghi (1868) L. R. 3 C. P. 359, 364; 37 L. J. C. P. 159; 18 L. T. 327; 16 W. R. 758.—C.P.

Lloyd v. Harrison (1866) 35 L. J. Q. B. 153; L. R. 1 Q. B. 502; 6 B. & S. 36; 12 Jur. (N.S.) 701; 14 L. T. 799; 14 W. R. 737.—EX. CH., *referred to*.

Staffordshire Joint Stock Banking Co. v. Emmott (1867) 36 L. J. Ex. 105; L. R. 2 Ex. 208, 224; 16 L. T. 175; 15 W. R. 1135.—EX.

Lloyd v. Harrison, *discussed and applied*.
Ames v. Colnaghi (1868) 37 L. J. C. P. 159; L. R. 3 C. P. 359; 18 L. T. 427; 16 W. R. 758.—C.P.

Lloyd v. Harrison, *applied*.
Rossi v. Bailey (1868) 37 L. J. Q. B. 204; L. R. 3 Q. B. 621; 19 L. T. 130.—Q.B.

Lloyd v. Harrison, *followed*.
Hargreaves v. Armitage (1868) L. R. 4 Q. B. 143; 38 L. J. Q. B. 46; 17 W. R. 140.—Q.B.

Lloyd v. Harrison, *distinguished*.
Ames v. Waterlow (1869) 39 L. J. C. P. 41, 46; L. R. 5 C. P. 53, 63; 21 L. T. 393; 18 W. R. 67.—C.P.

Lloyd v. Harrison, *distinguished, but principle applied*.
Allen v. Carter (1870) 39 L. J. C. P. 212; L. R. 5 C. P. 414, 419; 22 L. T. 586.—C.P.

Ames v. Colnaghi (1868) 37 L. J. C. P. 159; L. R. 3 C. P. 359; 18 L. T. 327; 16 W. R. 758.—C.P., *explained*.

Ames v. Waterlow (1869) L. R. 5 C. P. 53; 39 L. J. Ch. 41; 21 L. T. 393; 18 W. R. 67.

BOVILL, C.J.—The argument on the part of the plaintiff has proceeded upon the supposition that the Court had conclusively decided, in *Ames v. Colnaghi*, that the sheriff was bound of his own authority to discharge the debtor on the production of a certificate under the hand of the chief registrar, and the seal of the Court, of the filing and registration of a deed under sect. 192 of the Bankruptcy Act, 1861, and that if he refuses to discharge him from custody on his producing such certificate, he is liable to an action for trespass. The argument, however, is founded on a misconception of what the Court really decided in that case. The question presented for decision was, whether under the circumstances the debtor was entitled to be discharged; and that question the Court answered in the affirmative. The mode of discharge which is directly raised on the present occasion did not come in question there.—p. 58.

WILLES, J., who concurred, discussed the earlier cases.

KEATING, J.—The learned counsel altogether misconceived the intention of this Court in *Ames v. Colnaghi*. The question submitted in that case was, whether or not the plaintiff was entitled to be discharged, and all the Court decided was,

that he was so entitled. There are, no doubt, expressions to be found in the course of the judgment to the effect that the sheriff was bound to discharge him. But they are not to be construed as meaning that he must, at the peril of an action, discharge him. The Court would order his discharge and possibly the officer would be liable to the penalty imposed by sect. 113 of the Act of 1849.—p. 64. **BRETT, J.** concurred.

Holward v. Andre (1797) 1 B. & P. 32.—C.P., *overruled*.

Rex v. Middlesex (1807) 1 Taunt. 56.—C.P.

Per Curiam.—The case cited has been very properly overruled.—p. 57.

Williams v. Rose (1867) 37 L. J. Ex. 12; L. R. 3 Ex. 5; 17 L. T. 253.—EX., *discussed and explained*.

Rossi v. Bailey (1868) 37 L. J. Q. B. 204, 207; L. R. 3 Q. B. 621, 626; 19 L. T. 130.—Q.B.

Williams v. Rose, *considered*.

Allen v. Carter (1870) 39 L. J. C. P. 212, 214; L. R. 5 C. P. 414, 418; 22 L. T. 586.—C.P. See extract, *infra*.

Williams v. Rose, *distinguished*.

Dignam v. Bailly (1870) 40 L. J. Q. B. 68; L. R. 6 Q. B. 47; 23 L. T. 706; 19 W. R. 325; 10 B. & S. 891.—EX. CH.

Dignam v. Bailly (1869) 39 L. J. Q. B. 13; L. R. 5 Q. B. 53.—Q.B.; *reversed*, (1870) 40 L. J. Q. B. 68; L. R. 6 Q. B. 47; 23 L. T. 706; 19 W. R. 325; 10 B. & S. 891.—EX. CH.

Dignam v. Bailly, *discussed and explained*.

Rossi v. Bailey (1868) 37 L. J. Q. B. 204, 207; L. R. 3 Q. B. 621, 626; 19 L. T. 130.—Q.B.

Dignam v. Bailly, *adopted*.

Godwin v. Stone (1869) 38 L. J. Ex. 153; L. R. 4 Ex. 331; 20 L. T. 711.—EX.

Dignam v. Bailly, *considered*.

Allen v. Carter (1870) 39 L. J. C. P. 212, 214; L. R. 5 C. P. 414, 418; 22 L. T. 586.—C.P.

BRETT, J.—If the sheriff when he discharged the debtor knew facts which showed that the deed [made by the debtor under the Bankruptcy Acts] was not available, he is responsible [in an action for escape]. *Williams v. Rose* (*supra*) is strongly in point, as the replication alleged knowledge, and although *Dignam v. Bailly* by itself is perhaps not so strong, as the plaintiff did not allege knowledge, it is explained in *Rossi v. Bailey* (*supra*), where Blackburn, J. said there was no necessity to allege he knew because the certificate [of registration of the deed] and the *ca. sa.* [under which the debtor was arrested] necessarily show the facts, and therefore . . . where the facts are known to the sheriff, he is not authorised by the mere production of the certificate in releasing the debtor.—p. 216.

Stiles v. Rawlins (1804) 5 Esp. 133.—ELLENBOROUGH, C.J., *disapproved*.

Cousins v. Brown (1825) 1 B. & M. 291.

BEST, C.J.—In a recent case in this Court, *Stiles v. Rawlins* is shaken, if not overruled.—p. 292.

Planck v. Anderson (1792) 5 Term Rep. 37.—K.B.; and **Williams v. Mostyn** (1838) 7 L. J. Ex. 289; 4 M. & W. 145.—EX., *explained and distinguished*.

Clifton v. Hooper (1884) 8 Jur. 958.—Q.B.

Allingham v. Flower (1800) 2 B. & P. 246.—C.P., *overruled*.

Birn v. Bond (1816) 6 Taunt. 554.

GIBBS, C.J.—I do not see how *Allingham v. Flower* is consistent with the decisions in *Fuller v. Prest* (7 T. R. 109) and *Webb v. Matthew* (1 Bos. & P. 225); nor do I see how either of the last-mentioned cases is to be distinguished from the present.—p. 556.

Orby v. Hales (1694) 1 Ld. Raym. 3, *disapproved*.

Brown v. Compton (1800) 8 Term Rep. 424.—K.B.

KENYON, C.J.—With regard to the case in 1 Ld. Raym. 3, relied upon by the defendant's counsel, though it is also alluded to in 4 Mod. 353, it is directly against the *Marshalsea Case*, 10 Co. 76 a, and the current of authorities founded upon that, and therefore it cannot be considered as law.—p. 431.

Phelps v. Barrett (1817) 4 Price 23.—C.P., *disapproved*.

Lewis v. Morland (1818) 2 B. & Ald. 56.—K.B.

BAXLEY, J.—*Morris v. Hayward* (6 Taunt. 569; 2 Marsh. 280) is an authority to show, that although the sheriff is not bound to take bail upon an attachment, still if he does he may recover upon the bail bond. That indeed was the case of an attachment, out of chancery, but process issuing out of Courts of law and equity stands on the same foundation. That case was decided upon great consideration, and is at variance with the subsequent case of *Phelps v. Barrett*, the foundation of which was, that an attachment is a process in the nature of execution. But for the reasons I have already given it seems to me that an attachment is in the nature of mesne process, and that the principle on which that decision took place cannot be supported.—p. 63.

Arden v. Goodacre (1851) 20 L. J. C. P. 184; 11 C. B. 571; 2 L. M. & P. 383; 15 Jur. 776.—C.P., *referred to*.

MacLec v. Clarke (1866) 35 L. J. C. P. 247; 1 L. R. 1 C. P. 406; 1 H. & R. 479; 12 Jur. (N.S.) 708; 14 L. T. 408; 14 W. R. 655.—C.P.

Dew v. Parsons (1819) 2 B. & Ald. 562; 1 Chit. 295; 21 R. R. 404.—K.B., *referred to*.

Steele v. Williams (1853) 22 L. J. Ex. 225; 8 Ex. 625; 17 Jur. 464.—EX.

Dew v. Parsons, *adopted*.

Freeman v. Jeffries (1869) 38 L. J. Ex. 116, 120; 1 L. R. 4 Ex. 189, 198; 20 L. T. 533.—EX.

Townend v. Yorkshire (Sheriff) (1890) 59 L. J. Q. B. 156; 24 Q. B. D. 621; 62 L. T. 402; 38 W. R. 381; 54 J. P. 598.—COLERIDGE, C.J. and A. L. SMITH, J., *distinguished*.

Beeston, In re, Board of Trade, Ex parte (1898) 68 L. J. Q. B. 344; [1899] 1 Q. B. 626; 80 L. T. 66; 47 W. R. 475; 6 Manson 27.

WRIGHT, J.—On the question whether an appeal lies [to the judge in bankruptcy] from the taxing master on a question as to the fees to which the sheriff is entitled, I do not think that *Townend v. Yorkshire (Sheriff)* is an authority that no appeal will lie, where the question is one—not as it there was, of amount—but as it is

here, of principle. It seems to me to be entirely within *Hurley, In re* [1893; 10 Morrell 120] that an appeal does lie; and if it were necessary to decide the question, which it is not in the view I take of the matter, I should hold that I am bound by authority to say that it does lie; and also I should say for myself, that I think it lies.—p. 346.

Alchin v. Wells (1793) 5 Term Rep. 470; 2 R. R. 641.—K.B., *distinguished*.

Rex v. Robinson (1835) 4 L. J. Ex. 319; 2 C. M. & R. 334; 4 D. P. C. 447; 1 Gale 209; 5 Tyr. 1095.—EX.

Alchin v. Wells, *applied*.

Chapman v. Bowlby (1841) 10 L. J. Ex. 299; 8 M. & W. 249; 1 D. (N.S.) 83.—EX.

Alchin v. Wells, *explained*.

Harding v. Hall (1866) 14 L. T. 410; 14 W. R. 646.—EX.

Alchin v. Wells, *discussed and distinguished*.

Sneary v. Abdy (1876) 45 L. J. Q. B. 803; 1 Ex. D. 299; 34 L. T. 801.—DIV. CT.

Alchin v. Wells, *discussed and distinguished*.

Roe v. Hammond (1877) 46 L. J. C. P. 791; 2 C. P. D. 300.—C.P.D.

Alchin v. Wells, *referred to*.

Mortimore v. Cragg (1878) 47 L. J. C. P. 348; 3 C. P. D. 216; 38 L. T. 116; 26 W. R. 363.—C.A.

Alchin v. Wells, *recognised*.

Thomas, In re, Middlesex (Sheriff) Ex parte (1899) 68 L. J. Q. B. 245; [1899] 1 Q. B. 460; 80 L. T. 62; 47 W. R. 259; 6 Manson 1.—C.A.

Bilke v. Havelock (1813) 3 Camp. 374; 14 R. R. 758.—K.B., *adopted*.

Sneary v. Abdy (1876) 45 L. J. Ex. 803; 1 Ex. D. 299, 304; 34 L. T. 801.—DIV. CT.

Bilke v. Havelock, *dictum applied*.

Roe v. Hammond (1877) 46 L. J. C. P. 791; 2 C. P. D. 300, 307.—C.P.D.

Miller v. Parnell (1815) 6 Taunt. 370; 2 Marsh. 78.—C.P., *applied*.

Chapman v. Bowlby (1841) 10 L. J. Ex. 299; 8 M. & W. 249; 1 D. (N.S.) 83.—EX.; **Andrews v. Saunderson** (1857) 26 L. J. Ex. 208; 1 H. & N. 725; 3 Jur. (N.S.) 118.—EX.

Miller v. Parnell, *approved and explained*.

Debtor, In re, Judgment Creditor (or Smith) Ex parte (1902) 71 L. J. K. B. 664; [1902] 2 K. B. 260; 87 L. T. 314; 50 W. R. 609; 9 Manson 243.—C.A.

Dicas v. Warne (1833) 34 L. J. C. P. 60; 10 Bing. 341; 3 M. & Scott 814.—C.P., *distinguished*.

Chapman v. Bowlby (1841) 10 L. J. Ex. 299; 8 M. & W. 249; 1 D. (N.S.) 83.—EX.

Rex v. Robinson (1835) 4 L. J. Ex. 319; 2 C. M. & R. 334; 4 D. P. C. 447; 1 Gale 209; 5 Tyr. 1095.—EX., *discussed*.

Roe v. Hammond (1877) 46 L. J. C. P. 791; 2 C. P. D. 300.—C.P.D. *And see post*, col. 3265.

Rex v. Robinson (*supra*), *considered*.
Mortimore v. Cragg (1878) 47 L. J. C. P. 348, 351; 3 C. P. D. 216, 220; 38 L. T. 116; 26 W. R. 363.—C.A. See extract, *infra*, col. 3266.

Chapman v. Bowlby (1841) 10 L. J. Ex. 299; 8 M. & W. 249; 1 D. (N.S.) 83.—EX., *adopted*.

Sneary v. Abdy (1876) 45 L. J. Ex. 803; 1 Ex. D. 299, 302; 34 L. T. 801.—DIV. CT.

Chapman v. Bowlby, *discussed*.
Roe v. Hammond (1877) 46 L. J. C. P. 791; 2 C. P. D. 300.—C.P.D.

Chapman v. Bowlby, *adopted*.
Mortimore v. Cragg (1878) 47 L. J. C. P. 348, 351; 3 C. P. D. 216, 220; 38 L. T. 116; 26 W. R. 363.—C.A. See extract, *infra*, col. 3266.

Chapman v. Bowlby, *applied*.
Ford, In re and Ex parte (1886) 56 L. J. Q. B. 188; 18 Q. B. D. 369, 371; 56 L. T. 166; 3 M. B. R. 283.—Q.B.

Chapman v. Bowlby, *referred to*.
Debtor, In re, Judgment Creditor (*or* Smith) In re (1902) 71 L. J. K. B. 664; [1902] 2 K. B. 260; 87 L. T. 314; 50 W. R. 609; 9 Manson 243.—C.A.

Curtis v. Mayne (1842) 2 D. (N.S.) 37.—Q.B., *discussed and distinguished*.
Sneary v. Abdy (1876) 45 L. J. Ex. 803; 1 Ex. D. 299; 34 L. T. 801.—DIV. CT.

Nash v. Dickenson (1867) L. R. 2 C. P. 252.—C.P., *not followed*.

Bissicks v. Bath Colliery Co. (1877) 46 L. J. Ex. 611; 2 Ex. D. 459.—EX. D., affirmed (1878) 3 Ex. D. 174; 47 L. J. Ex. 408; 38 L. T. 163; 26 W. R. 215.—C.A.

COCKBURN, C.J.—I think that the decision of *Nash v. Dickenson* was on insufficient grounds. I say nothing about *Roe v. Hammond*, because that decision appears to have been founded on an anonymous case in Lofft's Report, which is not sufficient to support it. **CLEASBY, B.** concurred.

Nash v. Dickenson, *distinguished*.
Mortimore v. Cragg (1878) 47 L. J. C. P. 348; 3 C. P. D. 216, 219; 38 L. T. 116; 26 W. R. 363.—C.A. See extract, *infra*.

Sneary v. Abdy (1876) 45 L. J. Ex. 803; 1 Ex. D. 299; 34 L. T. 801.—EX. D., *explained*.
Roe v. Hammond (1877) 46 L. J. C. P. 791; 2 C. P. D. 300.—C.P.D.

Roe v. Hammond (1877) 46 L. J. C. P. 791; 2 C. P. D. 300.—C.P.D., *not followed*.
Bissicks v. Bath Colliery Co. (1877) 46 L. J. Ex. 611; 2 Ex. D. 459; 36 L. T. 800; 26 W. R. 215.—EX. D., affirmed, (1878) 47 L. J. Ex. 408; 3 Ex. D. 174; 38 L. T. 163; 26 W. R. 215.—C.A. See extract, *supra*.

Roe v. Hammond, *overruled*.
Mortimore v. Cragg (1878) 3 C. P. D. 216; 47 L. J. C. P. 348; 38 L. T. 116; 26 W. R. 363.—C.A.

BRAMWELL, L.J.—I do not wish to question

Nash v. Dickenson. That was a perfectly correct decision, because there was no seizure in that case. The sheriff there did not "levy," p. 218.

BRETT, L.J.—*Alchin v. Wells* is in point. The Court there say: "The sheriff who has levied is entitled to his poundage." It seems to me that *Roe v. Robinson* is to the same effect. Where the money has been obtained by the seizure, although there has been no sale, the sheriff has a right to his poundage. In *Chapman v. Bowlby*, both Abinger, C.B. and Parke, B. recognise the principle laid down in *Alchin v. Wells*, and hold that where, by the compulsion of the writ, the execution debtor has been forced to pay the debt, the sheriff is entitled to his poundage. The last case decided on the point was *Bissicks v. Bath Colliery Co.*, before Cockburn, C.J., and Cleasby, B., who acted upon the rule laid down in the previous cases. There is not one decision to the contrary, except *Roe v. Hammond* and the case under consideration.—p. 220. **COTTON, L.J.** concurred.

Bissicks v. Bath Colliery Co. (1878) 47 L. J. Ex. 408; 3 Ex. D. 174; 38 L. T. 163; 26 W. R. 215.—C.A., *approved*.
Mortimore v. Cragg (1878) 47 L. J. C. P. 348; 3 C. P. D. 216, 220; 38 L. T. 116; 26 W. R. 363.—C.A.

Bissicks v. Bath Colliery Co., *adopted*.
Smith v. Critchfield (1885) 54 L. J. Q. B. 366; 14 Q. B. D. 873, 880; 54 L. T. 122; 33 W. R. 920.—C.A.

Mortimore v. Cragg (1877) 2 C. P. D. 300.—C.P.D.; *reversed*, (1878) 47 L. J. C. P. 348; 3 C. P. D. 216; 38 L. T. 116; 26 W. R. 363.—C.A.

Hurley, In re (1893) 10 Morrell 120.—**WILLIAMS, J.**, *applied*.

Beeston, In re, Board of Trade, Ex parte (1899) 68 L. J. Q. B. 344; [1899] 1 Q. B. 626; 80 L. T. 66; 47 W. R. 475; 6 Manson 27.—C.A. [**LINDLEY, RIGBY and VAUGHAN WILLIAMS, L.J.J.**]

LINDLEY, L.J.—But eliminating those classes of cases—and we have nothing to do with them here—the trustee in bankruptcy is in no better position than the bankrupt himself. The consequence of that is that the trustee in this bankruptcy is not in a position to say that this possession money [claimed by the sheriff, who at the request of the debtor and with the assent of the execution creditor had remained in possession for some time without selling] is not as against him what it would be as against the bankrupt—namely, costs of execution. That is the short answer which I give to this case. That is the view, as I understand it, on which *Hurley, In re*, proceeded.—pp. 347, 348.

Miles v. Harris (1862) 31 L. J. C. P. 361; 12 C. B. (N.S.) 550; 6 L. T. 649.—C.P., *applied*.

Ludford, In re, Official Receiver v. Warwickshire Sheriff (1884) 53 L. J. Q. B. 415, 419; 13 Q. B. D. 415; 51 L. T. 240; 33 W. R. 152; 1 Morrell 131.—**CAYE, J.**

Miles v. Harris, *discussed*.
Thomas, In re, Middlesex Sheriff, Ex parte (1899) 68 L. J. Q. B. 245; [1899] 1 Q. B. 460; 80 L. T. 62; 47 W. R. 259; 6 Manson 1.—C.A.

Carter v. Hughes (1858) 27 L. J. Ex. 225; 2 H. & N. 714; 6 W. R. 212.—EX., *adopted*.
Hatton v. Haywood (1874) 43 L. J. Ch. 372; L. R. 9 Ch. 229, 235; 30 L. T. 279; 22 W. R. 356.—L.C. and L.J.; and **Mortimore v. Cragg** (1878) 47 L. J. C. P. 348; 3 C. P. D. 216; 38 L. T. 116; 26 W. R. 363.—C.A.

Carter v. Hughes, adopted.

Johns v. Pink (1899) 69 L. J. Ch. 98; [1900] 1 Ch. 296; 81 L. T. 712; 48 W. R. 247.

STIRLING, J.—Since 1 & 2 Vict. c. 110, it has been held in **Carter v. Hughes** that where a judgment creditor issued three writs of elegit on successive judgments, and the sheriff delivered to him possession of land under the first writ, he had no power to extend the same land under the second and third writs. In the present case the inquiry found that Mrs. Cole was "possessed" of certain land of the annual value of £200. In fact, she was so possessed; for though she had made a mortgage of the lands by sub-demise, the mortgagees had not taken possession, and she was in receipt of the rents and profits. . . . It appears to me that the land must be taken to have been delivered to the defendant to the extent of that interest, and not of the mere reversion expectant on the determination of the sub-demise.

Rawstorne v. Wilkinson (1815) 4 M. & S. 256; 16 R. R. 455.—K.B., *distinguished*.

Ludford, In re, Official Receiver v. Warwickshire (Sheriff) (1884) 53 L. J. Q. B. 418; 13 Q. B. D. 415; 51 L. T. 240; 33 W. R. 152; 1 Morrell 131.—CAVE, J.

Foster v. Blakelock (1826) 5 B. & C. 328; 4 L. J. (o.s.) K. B. 170; 8 D. & R. 48; 29 R. R. 258.—K.B., *disapproved*.

Stearn v. Mills (1833) 2 L. J. K. B. 106; 1 N. & M. 434; 4 B. & Ad. 657.—K.B.

Foster v. Blakelock, followed.

Walbank v. Quarterman (1846) 3 C. B. 91.—C.P.

Foster v. Blakelock, considered.

Royle v. Busby (1880) 50 L. J. Q. B. 196; 6 Q. B. D. 171, 175; 43 L. T. 717; 29 W. R. 315.—C.A. See extract, *infra*.

Maybery v. Mansfield (1846) 16 L. J. Q. B. 192; 9 Q. B. 754; 11 Jur. 60.—Q.B., *explained*.

Mailé v. Mann (1848) 17 L. J. Ex. 336; 2 Ex. 608; 6 D. & L. 42.—EX.

Maybery v. Mansfield, referred to.

Merriman v. Newman (1872) 20 W. R. 369.—EX.

Maybery v. Mansfield, followed.

Royle v. Busby (1880) 50 L. J. Q. B. 196; 6 Q. B. D. 171; 43 L. T. 717; 29 W. R. 315.—C.A. **SERLE, L.C.**—It was held in several cases which preceded **Brewer v. Jones** (*infra*, col. 3268), that a request by the solicitor that a particular bailiff might be employed to execute the writ was evidence of a contract by him to pay that bailiff's fees and possession money; and in one of those cases (**Foster v. Blakelock**, *supra*) the distinction was expressly pointed out by Bayley, J., between such a state of circumstances and that which exists where the

solicitor merely delivers the writ for execution to the sheriff. **Maybery v. Mansfield**, and **Seal v. Hudson** (*infra*) were cases in which there was in fact nothing more than the delivery of the writ to the sheriff, and in both those cases, it was held that there was no evidence of any contract, and that the solicitor was not liable. In **Brewer v. Jones**, the Court of exchequer arrived at an opposite conclusion, upon the authority (as it considered) of **Walbank v. Quarterman** (*infra*), and it is remarkable that the judges who pronounced that decision themselves regarded it as at variance with sound principle, and only justified it by that (supposed) precedent. **Walbank v. Quarterman**, however, was decided upon the authority of **Foster v. Blakelock**, in which the distinction already noticed was pointed out, and it was determined, upon a state of facts similar to that which existed in **Foster v. Blakelock**. It is therefore no precedent at all for **Brewer v. Jones**, which thus stands self-condemned as against sound principle, and is opposed to the judgment of a Court of co-ordinate jurisdiction, and of equal authority in **Maybery v. Mansfield**. We have no hesitation in following **Maybery v. Mansfield** in preference to **Brewer v. Jones**.—p. 174. **BAGGALLAY** and **BOWEN, L.JJ.** concurred.

Walbank v. Quarterman (1846) 3 C. B. 94.

—C.P., *followed*.

Mailé v. Mann (1848) 17 L. J. Ex. 336; 2 Ex. 608; 6 D. & L. 42.—EX.

Walbank v. Quarterman, followed.

Brewer v. Jones (1855) 24 L. J. Ex. 143; 10 Ex. 655; 3 C. L. R. 369; 1 Jur. (N.S.) 240.—EX.

Walbank v. Quarterman, distinguished.

Royle v. Busby (1880) 50 L. J. Q. B. 196; 6 Q. B. D. 171, 175; 43 L. T. 717; 29 W. R. 315.—C.A. See extract, *supra*.

Seal v. Hudson (1847) 4 D. & L. 760; 2

B. C. Rep. 55; 11 Jur. 610.—Q.B., *commented on*.

Mailé v. Mann (1848) 17 L. J. Ex. 336; 2 Ex. 608; 6 D. & L. 42.—EX.

Seal v. Hudson, followed.

Royle v. Busby (1880) 50 L. J. Q. B. 196; 6 Q. B. D. 171, 175; 43 L. T. 717; 29 W. R. 315.—C.A. See extract, *supra*.

Mailé v. Mann (1848) 17 L. J. Ex. 336; 2

Ex. 608; 6 D. & L. 42.—EX., *dictum applied*.

Langridge v. Lynch (1876) 34 L. T. 695.—DIV. CT.

Brewer v. Jones (1855) 24 L. J. Ex. 143; 10

Ex. 655; 3 C. L. R. 369; 1 Jur. (N.S.) 240; 3 W. R. 215.—EX., *distinguished*.

Merriman v. Newman (1872) 20 W. R. 369; 26 L. T. 397.—EX.

Brewer v. Jones, dissented from.

Royle v. Busby (1880) 50 L. J. Q. B. 196; 6 Q. B. D. 171; 43 L. T. 717; 29 W. R. 315.—C.A. See extract, *supra*.

Newman v. Merriman (1872) 26 L. T. 397;

20 W. R. 370.—EX., *referred to*.

Royle v. Busby (1880) 50 L. J. Q. B. 196; 6

Q. B. D. 171, 175; 43 L. T. 717; 29 W. R. 315.
—C.A.

Newman v. Merriman (*supra*), *distinguished*.
Thomas v. Peek (1888) 57 L. J. Q. B. 497; 20
Q. B. D. 727; 36 W. R. 606.—CAVE and SMITH,
JJ.

Royle v. Busby (1880) 50 L. J. Q. B. 196; 6
Q. B. D. 171; 43 L. T. 717; 29 W. R. 315.
C.A., *discussed*.
Kirk v. Purchase (1893) 32 L. R. Ir. 359, 366.
—Q.B.D.

Woolford's Trustee v. Levy (1892) 61 L. J.
Q. B. 546; [1892] 1 Q. B. 772; 66 L. T.
812; 40 W. R. 483; 56 J. P. 694.—C.A.,
dissented from.
Lee v. Dangar (1892) 61 L. J. Q. B. 780;
[1892] 2 Q. B. 337; 66 L. T. 548; 40 W. R.
469; 56 J. P. 678.—C.A.

Woolford's Trustee v. Levy. *See*
Dawson, In re, and Ex parte (1899) 65 L. J.
Q. B. 668; [1899] 2 Q. B. 54; 80 L. T. 498; 47
W. R. 524; 6 Manson 200.—WRIGHT, J.

Woolford (Trustee of) v. Levy, *applied*.
Thomas, In re, Middlesex (Sheriff), Ex parte
(1899) 68 L. J. Q. B. 245; [1899] 1 Q. B. 460;
80 L. T. 62; 47 W. R. 259; 6 Manson 1.—C.A.
LINDLEY, RIGBY and VAUGHAN WILLIAMS,
L.JJ.

LINDLEY, L.J.—It [the General Order of
Aug. 31, 1888, under the Sheriff's Act, 1887]
further provides that where an execution is
withdrawn, or stopped, the fees under the Order
shall be paid by the person issuing the execution
or the person at whose instance the sale is
stopped. As regards these last words, I think
counsel for the appellant was right, having
regard to the decision in *Woolford (Trustee of)*
v. Levy. The trustee in bankruptcy or the
official receiver did stop the sale, but that does
not carry him through. His contention amounts
to this—that all the fees under the Order shall
in such a case be paid, whether earned or not;
but of course the Order does not mean that.
The only sensible construction is that such fees
shall be paid as have been earned up to the time
of the stoppage of the execution, and the pound-
age has not been earned. There is nothing to
give the sheriff more than he got as the costs of
the execution under the former Act.—p. 248.

Brun (or Bell) v. Hutchinson (1844) 13
L. J. Q. B. 244; 2 D. & L. 43; 8 Jur. 895.
—Q.B., *adopted*.

Mortimore v. Cragg (1878) 3 C. P. D. 216, 218;
47 L. J. C. P. 348; 38 L. T. 116; 26 W. R. 863.
—C.A.

Lee v. Dangar (1892) 61 L. J. Q. B. 780;
[1892] 2 Q. B. 337; 66 L. T. 548; 40
W. R. 469; 56 J. P. 678.—C.A., *followed*.
Bagge v. Whitehead (1892) 61 L. J. Q. B. 778;
[1892] 2 Q. B. 355; 66 L. T. 815; 40 W. R. 472;
56 J. P. 548.—C.A.

Lee v. Dangar, *explained*.
Debtor, In re, Judgment Creditor (or Smith),
Ex parte (1902) 71 L. J. K. B. 664; [1902] 2
K. B. 260; 87 L. T. 814; 50 W. R. 609; 9 Man-
son 243.—C.A.

SHIPPING.

I. SHIPPING.

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2. OWNERS.
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4. SEAMAN.
5. SALE AND TRANSFER.
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I. SHIPPING.

1. BUILDING REPAIRS AND TONNAGE.

Roberts v. Havelock (1832) 3 B. & Ad. 404.
—K.B., *adopted*.

Appleby v. Myers (1867) 36 L. J. C. P. 331,
336; L. R. 2 C. P. 651, 660; 16 L. T. 669.—
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Roberts v. Havelock, *referred to*.
The Tergeste (1902) 72 L. J. P. 18; [1903]
P. 26; 87 L. T. 567; 9 Asp. M. C. 356.—PHILLI-
MORE, J.

Inglis v. Buttery (1878) 3 App. Cas. 552.—
H.L. (SC.), *referred to*.
Campbell v. C. (1880) 5 App. Cas. 787, 814.—
H.L. (SC.).

Jebson v. East and West India Dock Co.
(1875) 44 L. J. C. P. 181; L. R. 10 C. P.
300; 32 L. T. 321; 23 W. R. 624.—C.P.,
principle applied.
The Marpessa (1891) 61 L. J. Adm. 9; [1891]
P. 403; 66 L. T. 356; 40 W. R. 239; 7 Asp.
M. C. 155.—JEUNE, J.

Mucklow v. Mangles (1808) 1 Taunt. 318; 9 R. R. 784.—C.P., *distinguished*.
Woods v. Russell (1822) 5 B. & Ald. 942; 1 D. & R. 587; 24 R. R. 621.—K.B.

Mucklow v. Mangles, *commented on and principle not applied*.
Carruthers v. Payne (1828) 5 Bing. 270; 2 M. & P. 429; 7 L. J. (O.S.) C. P. 84; 30 R. R. 592.—C.P.

Mucklow v. Mangles, *explained and applied*.
Elliott v. Pybus (1834) 3 L. J. C. P. 182; 10 Bing. 512; 3 M. & Scott 389.—C.P.

Woods v. Russell (1822) 5 B. & Ald. 942; 1 D. & R. 587; 24 R. R. 621.—K.B., *not applied*.
Anglo-Egyptian Steam Navigation Co. v. Rennie (1875) 44 L. J. C. P. 130; L. R. 10 C. P. 271; 32 L. T. 467; 23 W. R. 626.—C.P. See extract, *infra*.

Woods v. Russell, *referred to*.
Lindsay, In re, Lambton, Ex parte (1875) 44 L. J. Bk. 81, 86; L. R. 10 Ch. 405, 414; 32 L. T. 380; 23 W. R. 662; 2 Asp. M. C. 525.—L.J.

Woods v. Russell, *referred to*.
Banbury and Cheltenham Ry. v. Daniel (1884) 54 L. J. Ch. 265, 268; 33 W. R. 321.—PEARSON, J.

Woods v. Russell, *approved*.
Seath v. Moore (1886) 55 L. J. P. C. 54; 11 App. Cas. 350; 54 L. T. 690; 5 Asp. M. C. 586.—H.L. (SC.).

Clarke v. Spence (1836) 5 L. J. K. B. 161; 4 A. & E. 448; 6 N. & M. 399.—K.B., *not applied*.
Anglo-Egyptian Steam Navigation Co. v. Rennie (1875) 44 L. J. C. P. 130; L. R. 10 C. P. 271; 32 L. T. 467; 23 W. R. 626.—C.P. See extract, *infra*.

Clarke v. Spence, *referred to*.
Clarke v. Milwall Dock Co. (1886) 55 L. J. Q. B. 378; 17 Q. B. D. 494, 498; 54 L. T. 814; 34 W. R. 698; 51 J. P. 5.—C.A.

Clarke v. Spence, *approved*.
Seath v. Moore (1886) 55 L. J. P. C. 54; 11 App. Cas. 350; 54 L. T. 690; 5 Asp. M. C. 586.—H.L. (SC.).

Laidler v. Burlinson (1837) 6 L. J. Ex. 160; 2 M. & W. 602.—EX., *referred to*.
Anglo-Egyptian Navigation Co. v. Rennie (1875) 44 L. J. C. P. 130, 137; L. R. 10 C. P. 271, 282; 32 L. T. 467; 23 W. R. 626.—C.P.

Wood v. Bell (1856) 6 El. & Bl. 355; 25 L. J. Q. B. 321; 2 Jur. (N.S.) 664; 4 W. R. 553.—EX. CH., *not applied*.
Anglo-Egyptian Steam Navigation Co. v. Rennie (1875) 44 L. J. C. P. 130, 137; L. R. 10 C. P. 271; 32 L. T. 467; 23 W. R. 626.—C.P.

DENMAN, J. (for the Court).—In support of this contention several cases were cited—especially *Clarke v. Spence* (*supra*), *Woods v. Russell* (*supra*) and *Wood v. Bell*. But, in truth, none of those cases afford material assistance towards the decision of the present case. They were all cases, not of a contract for work and materials to be supplied to a ship by way of repairs or

alterations, but contracts for building and supplying a ship; and the question which arose in all those cases was, whether the ship itself or the materials ready to be fitted to it had or had not passed to the purchaser at the time of the bankruptcy of the builder.—p. 137.

Wood v. Bell, *referred to*.
Banbury and Cheltenham Ry. v. Daniel (1884) 54 L. J. Ch. 265, 267; 33 W. R. 321.—PEARSON, J.

Wood v. Bell, *approved*.
Seath v. Moore (1886) 55 L. J. P. C. 54; 11 App. Cas. n., 350; 54 L. T. 690; 5 Asp. M. C. 586.—H.L. (SC.).

Anglo-Egyptian Navigation Co. v. Rennie (1875) 44 L. J. C. P. 130; L. R. 10 C. P. 271; 32 L. T. 467; 23 W. R. 626.—C.P., *applied*.

Seath v. Moore (1886) 11 App. Cas. 350, 359; 55 L. J. P. C. 54; 54 L. T. 690; 5 Asp. M. C. 586.—CT. OF SESS., affirmed, H.L. (SC.).

Holderness v. Rankin (1860) 29 L. J. Ch. 753; 2 De G. F. & J. 258; 6 Jur. (N.S.) 903; 8 W. R. 713.—L.J., *observation adopted*.

M'Bain v. Wallace & Co. (1881) 6 App. Cas. 588, 606; 45 L. T. 261; 30 W. R. 65.—H.L. (SC.).

Curtis v. Perry (1802) 6 Ves. 739; 6 R. R. 28.—L.C., *distinguished but observation approved*.

Yallop, Ex parte (1808) 15 Ves. 60; 10 R. R. 24.—ELDON, L.C.

Curtis v. Perry, *discussed and distinguished*.
Cecil v. Butcher (1822) 2 J. & W. 565, 572; 22 R. R. 213.—M.R.

Curtis v. Perry, *considered and applied*.
Chateaufort v. Capeyron (1882) 51 L. J. P. C. 37; 7 App. Cas. 127, 131; 46 L. T. 65; 4 Asp. M. C. 489.—P.C. See extract, *infra*.

Yallop, Ex parte (1808) 15 Ves. 60; 10 R. R. 24.—L.C., *followed*.
Liverpool Borough Bank v. Turner (1860) 29 L. J. Ch. 827; 1 J. & H. 159.—WOOD, V.-C. affirmed, CAMPBELL, L.C.

Yallop, Ex parte, *considered*.
Chateaufort v. Capeyron (1882) 51 L. J. P. C. 37; 7 App. Cas. 127; 46 L. T. 65; 4 Asp. M. C. 489.—P.C.

SIR BARNES PEACOCK (for the Court).—So strictly were the provisions of the earlier statutes relating to the transfer of British ships interpreted that it was held by Lord Eldon that the doctrine of implied trust in a Court of equity could not be extended to the case of a British registered ship where the title accrued *by an act of the parties* other than a transfer made in accordance with the provisions of the Merchant Shipping Acts. See *Yallop, Ex parte* (*supra*) and *Curtis v. Perry* (*supra*). His lordship, however, drew a clear distinction [in the above cases] between such a case and a trust implied by law not arising out of an act in which the parties claiming the beneficial interest had joined.—p. 40.

Brewster v. Clarke (1816) 2 Meriv. 75.—L.C., *applied*.
Hughes v. Morris (1852) 21 L. J. Ch. 761; 2 De G. M. & G. 349, 357; 16 Jur. 603.—L.J.J.

2. OWNERS.

Hibbs v. Ross, (1866) 35 L. J. Q. B. 193; L. R. 1 Q. B. 534; 9 B. & S. 655; 12 Jur. (N.S.) 812; 15 L. T. 67; 14 W. R. 914.—Q.B., *applied*.
The Troubadour (1866) L. R. 1 A. & E. 302, 304; 16 L. T. 156.—DR. LUSHINGTON; and **Wear River Commissioners v. Adamson** (1877) 47 L. J. Q. B. 193; 2 App. Cas. 743; 37 L. T. 543; 26 W. R. 217.—H.L. (55.).

Hibbs v. Ross, *considered*.
Powell v. McGlynn [1902] 2 Ir. R. 154.—K.B.D. and C.A.

Wilkins v. Despard (1793) 5 Term Rep. 112; 2 R. R. 559.—K.B., *considered*.
The Annandale (1877) 47 L. J. Adm. 3; 2 P. D. 179, 218; 37 L. T. 139, 364; 26 W. R. 38; 3 Asp. M. C. 504.—C.A.

The Elsebe (1804) 5 C. Rob. 174;—SIR W. SCOTT, *considered and applied*.
The Parlement Belge (1879) 48 L. J. Adm. 18, 23; 4 P. D. 129, 151; 40 L. T. 222; 27 W. R. 692.—ADM., reversed, C.A. (*post*, col. 3410).

Doddington v. Hallett (1750) 1 Ves. sen. 497.—L.C., *overruled*.
Young, Ex parte (1813) 2 V. & B. 242; 2 Rose 78, n.; 13 R. R. 73.—L.C.; and **Nicholson, In re, Harrison, Ex parte** (1814) 2 Rose 76.—L.C.

Doddington v. Hallett, *applied*.
Att.-Gen. v. Borrodaile (1814) 1 Price 148.—EX.

Doddington v. Hallett, *held overruled*.
Green v. Briggs (1845) 6 Hare 395; 17 L. J. Ch. 323; 12 Jur. 326.

WIGRAM, V.-C.—I collect from Story on Partnership (sect. 444), that upon principles of public policy and convenience, America has adopted **Doddington v. Hallett**. But, however that may be, it is certain that Lord Eldon, in *Ex parte Harrison* (*infra*), and in *Ex parte Young* (*infra*) deliberately overruled it.—p. 401.

Doddington v. Hallett, *discussed*.
The Vindobala (1887) 57 L. J. Adm. 37; 13 P. D. 42, 47; 58 L. T. 353; 6 Asp. M. C. 250.—BUTT, J., reversed, (1889) 58 L. J. Adm. 51; 14 P. D. 50; 60 L. T. 657; 37 W. R. 409; 6 Asp. M. C. 376.—C.A.

Christie, Ex parte (1804) 10 Ves. 105.—L.C., *applied*.
Green v. Briggs (1845) 17 L. J. Ch. 323; 6 Hare 395; 12 Jur. 326.—V.-C.

Young, Ex parte (1813) 2 V. & B. 242; 2 Rose 78, n.; 13 R. R. 73.—L.C.

Nicholson, In re, Harrison, Ex parte (1814) 2 Rose 76.—L.C., *commented on and applied*.

Green v. Briggs (1845) 17 L. J. Ch. 323; 6 Hare 395; 12 Jur. 326.—V.-C. *See extract, supra*.

Young, Ex parte, and Nicholson, In re, Harrison, Ex parte, *referred to*.
Leslie, In re, Leslie v. French (1883) 52 L. J. Ch.

762; 23 Ch. D. 552; 48 L. T. 564; 31 W. R. 561.—FRY, J., adopted by PEARSON, J.; and **The Vindobala** (1888) 57 L. J. Adm. 37; 13 P. D. 42, 47; 58 L. T. 353; 6 Asp. M. C. 250.—BUTT, J. (reversed), C.A. *See supra*.

Helme v. Smith (1831) 9 L. J. (O.S.) C. P. 206; 7 Bing. 709; 5 M. & P. 744.—C.P., *considered and observations adopted*.

Green v. Briggs (1845) 17 L. J. Ch. 323; 6 Hare 395; 12 Jur. 326.—V.-C.

WIGRAM, V.-C.—In that case [*Helme v. Smith*] it was decided that the managing owner may sue each shareholder for his proportion of the expenses before the adventure ends, which it was said in an ordinary partnership he could not do; and other cases to the same effect were cited. But there is no reason why this right should preclude the party who made an advance for his co-partner for joint purposes, from insisting, when the joint property comes to be divided, that in making the division each partner, before he receives his proportion of profits, shall be charged with his due proportion of the expenses of making them. The observations of Bosanquet, J., in *Helme v. Smith*, apply in some degree to that view of the case.—p. 326.

Moffat v. Farquharson (1788) 2 Bro. C. C. 338.—V.-C.; *overruled*. *See note, Ib.*—M.R.

Sharp v. Taylor (1849) 2 Ph. 801.—L.C., *applied*.

Williams v. Trye (1854) 23 L. J. Ch. 860; 18 Jur. 442; 2 W. R. 314.—M.R.

Sharp v. Taylor, *not applied*.
Liverpool Corporation v. Wright (1859) 28 L. J. Ch. 868; 1 Johns. 359; 5 Jur. (N.S.) 1156; 7 W. R. 728.—WOOD, V.-C.

Sharp v. Taylor, *discussed and applied*.
Beeston v. Beeston (1875) 45 L. J. Ex. 230, 233; 1 Ex. D. 13, 16; 33 L. T. 700; 24 W. R. 96.—EX.D.

Sharp v. Taylor, *referred to*.
South Wales Atlantic SS. Co., In re (1876) 2 Ch. D. 763, 771.—MALINS, V.-C., affirmed, 46 L. J. Ch. 177; 2 Ch. D. 763; 35 L. T. 294.—C.A.

Sharp v. Taylor, *discussed and observations questioned*.

Sykes v. Beadon (1879) 48 L. J. Ch. 522; 11 Ch. D. 170; 40 L. T. 243; 27 W. R. 464.—M.R.

JESSEL, M.R.—There was a question there [*i.e.*, in *Sharp v. Taylor*] as to whether certain sums of money earned contrary to the English Navigation Laws could be kept by the defendant. [His lordship then quoted the observations of Lord Cottenham on the point, and continued:] I must say, speaking with some hesitation, as I always do of any judgment of Lord Cottenham's, that that reasoning, to my mind, is inconclusive and unsatisfactory. The notion that because a transaction is closed a Court of equity is to interfere in dividing the proceeds of the illegal transaction is not only opposed to principle, but to authority, and to authority in the well-known case of the highwayman who sued for a division of the proceeds of the robbery. There, of course, it might have been answered that the transaction was

complete; and so also in the case he puts of one of two partners engaged in trade—as I read it, he meant smuggling goods. If two persons go partners as smugglers, can one maintain a bill against the other to have an account of the smuggling transaction? I should say certainly not. It is not sufficient to say that the transaction is concluded. It would be lending the aid of the Court to assert the rights of the parties in carrying out and completing an illegal contract. . . . I do not say that that at all affects the authority of *Sharp v. Taylor* as it stands, but I think it does affect very much the *dicta* which I have read, and that is the reason I have read it. It is no part of the duty of a Court of Justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract between the parties to that illegal contract. In my opinion, no action can be maintained for the one purpose more than for the other.—p. 533.

Sharp v. Taylor, applied.

Bridger v. Savage (1885) 54 L. J. Q. B. 464; 15 Q. B. D. 363, 367; 53 L. T. 129; 33 W. R. 891; 49 J. P. 725.—C.A.

The Vindobala, 57 L. J. P. 37; 13 P. D. 42; 58 L. T. 353.—*BUTT, J.*; *reversed*, (1889) 58 L. J. P. 51; 14 P. D. 50; 60 L. T. 657; 37 W. R. 409; 6 Asp. M. C. 376.—C.A.

Reed v. White (1804) 5 Esp. 122.—K.B. *observed upon*.

Robinson v. Read (1829) 7 L. J. (o.s.) K. B. 286; 9 B. & C. 449; 4 M. & Ry. 349.—K.B.

Robinson v. Read (1829) 9 B. & C. 449; 4 M. & Ry. 349; 7 L. J. (o.s.) K. B. 326.—K.B., *applied*.

The Huntsman, [1894] P. 214; 6 R. 698; 70 L. T. 386; 7 Asp. M. C. 431.—BARNES, J.

Davison v. Donaldson (1882) 9 Q. B. D. 623; 47 L. T. 564; 31 W. R. 277; 4 Asp. M. C. 601.—C.A., *applied*.

The Huntsman, [1894] P. 214; 6 R. 698; 70 L. T. 386; 7 Asp. M. C. 431.—BARNES, J.

Barnardiston v. Chapman (1715) *cited in*

4 East 121; Bul. N. P. 34.—K.B., *followed*.
Knight v. Coates (1838) 1 Ir. L. R. 53.—EX.

Sims v. Brittain (1832) 4 B. & Ad. 375; 1 N. & M. 594.—K.B., *distinguished*.

Coulthurst v. Sweet (1866) L. R. 1 C. P. 649, 655.—C.P.

WILLES, J.—The plaintiffs claimed to have the bark delivered to them on payment of the freight stipulated for by the bills of lading, viz., 3*l.* per ton nett weight delivered. Mackenzie, acting for the owners of the ship, declined to deliver it, except on payment of the freight upon the quantity mentioned in the bill of lading; and in order to obtain the bark, the plaintiffs were obliged to yield to his demand. They are clearly entitled to recover back the excess. It is a mistake to apply *Sims v. Brittain* and *Sims v. Bond* to cases of this kind, because money had and received is only a short form which the plaintiffs are entitled to adopt instead of suing for conversion.

Sims v. Bond (1833) 5 B. & Ad. 389; 2 N. & M. 608.—K.B., *applied*.

Foley v. Hill (1844) 13 L. J. Ch. 182; 1 Ph.

399; 8 Jur. 347.—L.C.; and *Cooke v. Seeley* (1848) 17 L. J. Ex. 286; 2 Ex. 246.—EX.

Sims v. Bond, distinguished.

Coulthurst v. Sweet (1866) L. R. 1 C. P. 649, 655.—C.P. See extract, *supra*.

Sims v. Bond, principle applied.

New Zealand Land Co. v. Ruston (1880) 49 L. J. Q. B. 842; 5 Q. B. D. 474, 479; 43 L. T. 473.—FIELD, J. (reversed, C.A.).

Sims v. Bond, referred to.

Cooke v. Eshelby (1887) 56 L. J. Q. B. 505; 12 App. Cas. 271, 278; 56 L. T. 773; 35 W. R. 629.—H.L. (E.).

Miller v. Mackay (1864) 34 Beav. 295.—

M.R., *distinguished*.

Hancock v. Heaton (1874) 30 L. T. 592; 22 W. R. 680.—V.C., affirmed, 22 W. R. 784.—L.J.

Rich v. Coe (1777) 2 Cowp. 636; 1 Term

Rep. 108, n.—K.B., *questioned*.

Priestly v. Fernie (1865) 3 H. & C. 977; 34 L. J. Ex. 172; 11 Jur. (N.S.) 813; 13 L. T. 208; 13 W. R. 1089.—EX.

BRAMWELL, B. (for the Court).—The case, then, must rest, not on principle, but on authority, and that authority is limited to a passage in Story on Agency. It is remarkable that he is of opinion that there was, by the Roman law, an option to sue either, but not both. If so, what he lays down is peculiar to "our law," and doubly anomalous. He gives no reason for it, but cites 2 Livermore on Agency, 267. He (Story) says the second action may be maintained unless "in the first action he has obtained complete satisfaction of his claim." On reference, however, to Livermore, we say it with respect, he really says nothing in support of such a proposition. What he says is:—"Masters of merchant vessels are personally answerable upon the contracts made by them in relation to the employment of the ship, to repairs, or to supplies furnished for the ship's use. For the law gives to the merchant who contracts with the master a twofold remedy against the owner and against the master." For this he cites *Rich v. Coe*, which, though a very questionable decision, justifies Livermore's propositions but not Story's. It only decides that the owners are liable upon an order by the master for necessities, though without their authority. It is true Lord Mansfield says the master, the owner, and the ship are trusted, but he says nothing to support what is contended for. It is remarkable Story does not cite this authority so cited by Livermore. *Melius est petere fontes quam sectari rivulos*.—p. 985.

Arthur v. Barton (1840) 6 M. & W. 138; 9

L. J. Ex. 187.—EX., *approved*.

Gunn v. Roberts (1874) L. R. 9 C. P. 331; 43 L. J. C. P. 233; 30 L. T. 424; 22 W. R. 652; 2 Asp. M. C. 250.—C.P.

BRETT, J.—Accordingly if it be found that the owner is present at the port and has the means or credit to obtain supplies, I think it is the law of England that the judge should direct the jury that there is no necessity for any authority on the part of the captain, and the jury would not be justified in finding that there was any such necessity. The same principle applies even when the owner is not present, if he has either in a port or in his own or a foreign

country constituted an agent to stand in his place, and intrusted such agent with his discretion to act in the management of the ship, and such agent has undertaken and has the necessary means or credit to do so. In such case the agent represents the owner, and the captain as servant of the owner is bound to act under his directions, and has no authority to act for himself in the matter. This view of the law appears to be supported by all the authorities. The leading case on the subject is *Arthur v. Barton*, and the opinion there expressed by Lord Abinger as a summary of all the previous authorities, has always been held as a correct expression of the law. That opinion has always been quoted with approbation ever since; it has never to my knowledge been questioned, and has been copied into all the text books, as, for example, Abbott on Shipping, 11th ed., p. 114; Smith's Mercantile Law, 7th ed., p. 128, and MacLachlan on Merchant Shipping, p. 131.—p. 336.

Robinson v. Lyall (1819) 7 Price 592.—EX., *disapproved*.

Beldon v. Campbell (1851) 6 Ex. 586; 20 L. J. Ex. 342.—EX.

MARTIN, B.—I thought the authorities went further than they really do, with the exception of *Robinson v. Lyall*. On consideration, I am of the same opinion as my brother Parke. The true principle is, that the master has not authority to borrow money after the work has been done for the purpose of paying the debt due for it. I think that is a sound and safe principle, and my impression is, that the principle laid down by Holroyd, J., in the case of *Robinson v. Lyall*, and afterwards adopted by the Court, is not true law.—p. 891.

Robinson v. Lyall, *referred to*.

The Karnak (1868) L. R. 2 A. & E. 289.—ADM., partly affirmed and partly reversed, P.C.

Frazer v. Marsh (1811) 13 East 238; 2 Camp. 517; 12 R. R. 336.—K.B., *distinguished*.

Steel v. Lester (1877) 47 L. J. C. P. 43; 3 C. P. D. 121; 37 L. T. 642; 26 W. R. 212; 3 Asp. M. C. 537.—D.

GROVE, J.—The case that seemed most in favour of the appellant's contention was *Frazer v. Marsh*. There it was held that the registered owner of a ship, having chartered her to the then captain at a rent for a certain number of voyages, is not liable for stores furnished to the ship by order of the charterer during the charter-party. But there was there an absolute demise and parting with the vessel; nor was the registration there of the same kind as the registration of the managing owner under the Merchant Shipping Act, 1875, which has for its object that there shall be someone responsible for the seaworthiness and proper management of the vessel. There are, therefore, two distinctions between *Frazer v. Marsh* and the present case.

Frazer v. Marsh, *considered and adopted*.

Scheibler v. Furness (1892) 62 L. J. Q. B. 201; [1893] A. C. 8; 1 R. 59; 86 L. T. 1; 7 Asp. M. C. 263.—H.L. (E.).

Chappell v. Bray (1860) 30 L. J. Ex. 24; 6

H. & N. 145; 3 L. T. 278; 9 W. R. 17.—EX., *discussed and distinguished*.

Hill v. Nuttall (1864) 17 C. B. (N.S.) 262.—C.P.

Brown v. Mallett (1848) 17 L. J. C. P. 227; 5 C. B. 599.—C.P., *rule in approved*.
Metcalfe v. Hetherington (1855) 5 H. & N. 719; 11 Ex. 257; 8 W. R. 475.—EX.

Brown v. Mallett, *distinguished*.

Manley v. St. Helen's Canal and Ry. (1858) 27 L. J. Ex. 159; 2 H. & N. 840; 6 W. R. 297.—EX.

Brown v. Mallett, *considered*.

Vivian v. Mersey Docks and Harbour Board (1869) 39 L. J. C. P. 3; L. R. 5 C. P. 19; 21 L. T. 362.—C.P.

Brown v. Mallett, *distinguished and limited*.
The Industrie (1871) 40 L. J. Adm. 26; 28; L. R. 3 A. & E. 303, 307; 19 W. R. 728; 1 Asp. M. C. 17.—ADM.

SIR R. PHILLIMORE.—The principle upon which *Brown v. Mallett* . . . was decided, clearly applies only to cases in which a vessel has been abandoned or ceased to be under the control or management of her owner or his servants. In the present case . . . I am of opinion that the defendants cannot contest their liability upon the suggestion that *The Industrie* had passed out of their control, without pleading facts to support that defence.—p. 28.

Brown v. Mallett, *considered*.

The Douglas (1882) 51 L. J. Adm. 89; 7 P. D. 151; 47 L. T. 15; 5 Asp. M. C. 15.—C.A.

COLLIERIDGE, C.J.—I do not think *Brown v. Mallett* and *White v. Crisp* (*infra*) trench upon our decision, for in those cases it was assumed that the possession and control over the sunken ship must remain in the owners, in order to make them liable. Those cases may stand with this, for in *Brown v. Mallett* the declaration did not show the owner of the barge to be in possession at the time of the collision; and in *White v. Crisp* (*infra*) the defendants had the control of the wreck.—p. 90.

Brown v. Mallett, *applied*.

The Utopia (1893) 62 L. J. P. C. 118; [1893] A. C. 492; 1 R. 394; 70 L. T. 47.—P.C.

Brown v. Mallett, *approved and applied*.

The Crystal (1894) 63 L. J. P. 146; [1894] A. C. 508; 71 L. T. 346.—H.L. (E.); and **The Snark** (1899) 68 L. J. P. 22; [1899] P. 74; 80 L. T. 25; 47 W. R. 398; 8 Asp. M. C. 483.—BARNES, J.

White v. Crisp (1854) 23 L. J. Ex. 317; 10 Ex. 312.—EX., *considered*.

The Douglas (1882) 51 L. J. Adm. 89; 7 P. D. 151; 47 L. T. 15; 5 Asp. M. C. 15.—C.A. *See extract, supra*.

White v. Crisp, *applied*.

The Utopia (1893) 62 L. J. P. C. 118; [1893] A. C. 492; 1 R. 394; 70 L. T. 47.—P.C.; and **The Crystal** (1894) 63 L. J. P. 146; [1894] A. C. 508; 71 L. T. 346.—H.L. (E.).

* **White v. Crisp**, *referred to*.

The Snark (1899) 68 L. J. P. 22; [1899] P. 74; 80 L. T. 25; 47 W. R. 398; 8 Asp. M. C. 483.—BARNES, J.

Dixon v. Sadler, 9 L. J. Ex. 48; 5 M. & W. 405.—EX.; affirmed *nom.* **Sadler v. Dixon** (1842) 11 L. J. Ex. 435; 8 M. & W. 895.—EX. CH.

Dixon v. Sadler, applied.

Davidson v. Burnand (1868) 38 L. J. C. P. 73; L. R. 4 C. P. 117, 121; 19 L. T. 782; 17 W. R. 121.—C.P.; The Duero (1869) 38 L. J. Adm. 69; L. R. 2 A. & E. 393, 397; 22 L. T. 37.—SIR R. PHILLIMORE; Quebec Marine Insurance Co. v. Commercial Bank of Canada (1870) 39 L. J. P. C. 53, 57; L. R. 3 P. C. 234, 241; 22 L. T. 559; 18 W. R. 769.—P.C.

Dixon v. Sadler, observation referred to.

Dudgeon v. Pembroke (1875) 1 Q. B. D. 96, 124.—EX. CH., reversed, (1877) 46 L. J. Ex. 409; 2 App. Cas. 284; 36 L. T. 382; 25 W. R. 499; 3 Asp. M. C. 393.—H.L. (E.).

Dixon v. Sadler, applied.

West India Telegraph Co. v. Home and Colonial Marine Insurance Co. (1880) 50 L. J. Q. B. 41, 47; 6 Q. B. D. 51, 58; 43 L. T. 420; 29 W. R. 92; 4 Asp. M. C. 341.—C.A.

Dixon v. Sadler, approved.

Hedley v. Pinkney & Sons' Steamship Co. (1894) 63 L. J. Q. B. 419; [1894] A. C. 222; 70 L. T. 630; 42 W. R. 497; 7 Asp. M. C. 135.—H.L. (E.).

Dixon v. Sadler, adopted.

Trinder v. Thames and Mersey Marine Insurance Co. (1898) [1898] 2 Q. B. 114; 67 L. J. Q. B. 666; 78 L. T. 485; 46 W. R. 561; 8 Asp. M. C. 373.—C.A.

Dixon v. Sadler, referred to.

The Vortigern (1899) 68 L. J. P. 49; [1899] P. 140; 80 L. T. 382; 47 W. R. 437; 8 Asp. M. C. 523.—C.A.

Ramsey v. Quin (1874) Ir. Rep. 8 C. L. 322, not followed.

Hedley v. Pinkney & Sons' Steamship Co. (1894) 63 L. J. Q. B. 419; [1894] A. C. 222; 6 R. 106; 70 L. T. 630; 42 W. R. 497; 7 Asp. M. C. 135.—H.L. (E.).

HERSCHELL, L.C.—It was argued that the master of a vessel, although in some respects the servant of the shipowner, possesses in relation to the crew powers and duties independent of him, and that the law which exempts a master from liability to his servant for the negligence of another servant engaged in a common employment with him did not apply in such a case. The only authority cited for this proposition was a case of *Ramsay v. Quinn*, in the Court of Common Pleas, Ireland. But in view of the judgment of this House in *Wilson v. Merry* [L. R. 1 H. L. (Sc.) 326], which was recently considered in *Johnson v. Lindsay* [61 L. J. Q. B. 90], I do not think it is possible to give effect to the contention of the appellant.—p. 421. LORDS WATSON and MACNAGHTEN concurring.

Barclay v. Cuculla-y-Gana (1784) 3 Dougl. 389.—K.B.; cited nom. **Barclay and Heygena**, 1 Term Rep. 33.—K.B.

Barclay v. Cuculla-y-Gana, dictum applied.

Wardle v. Bethune (1872) 41 L. J. P. C. 1, 10; L. R. 4 P. C. 33, 59; 8 Moore P. C. (N.S.) 223; 26 L. T. 81; 20 W. R. 374.—P.C.

Barclay v. Cuculla-y-Gana, considered and applied.

Nugent v. Smith (1875) 1 C. P. D. 423, 431; 45 L. J. C. P. 697; 34 L. T. 827; 24 W. R. 237; 3 Asp. M. C. 198.—C.A.

O.C.

Liver Alkali Co. v. Johnson (1874) 43 L. J.

Ex. 216; L. R. 9 Ex. 338; 31 L. T. 95; 2 Asp. M. C. 332.—EX. CH., referred to.
Scawell v. Farrant (1875) 44 L. J. Ex. 234; L. R. 10 Ex. 358, 363; 33 L. T. 278; 23 W. R. 840.—EX. CH.; **Nugent v. Smith (1876) 54 L. J. C. P. 697; 1 C. P. D. 423, 433; 34 L. T. 827; 3 Asp. M. C. 198.**—C.A.; **Kopitoff v. Wilson (1876) 45 L. J. Q. B. 436, 439; 1 Q. B. D. 377, 382; 34 L. T. 677; 24 W. R. 706; 3 Asp. M. C. 163.**—Q.B.D.

Liver Alkali Co. v. Johnson, followed.

Hill v. Scott (1895) 64 L. J. Q. B. 635; [1895] 2 Q. B. 371; 73 L. T. 210; 15 R. 553.—RUSSELL, C.J.; affirmed, C.A.

Nugent v. Smith (1875) 45 L. J. C. P. 19; 1 C. P. D. 19; 24 W. R. 237.—BRETT, J.; reversed, (1876) 45 L. J. C. P. 697; 1 C. P. D. 423; 34 L. T. 827; 3 Asp. M. C. 198.—C.A.

Nugent v. Smith, observations adopted.

Kopitoff v. Wilson (1876) 45 L. J. Q. B. 436, 439; 1 Q. B. D. 377, 382; 34 L. T. 677; 24 W. R. 706; 3 Asp. M. C. 163.—Q.B.D.

Nugent v. Smith, adopted.

Nichols v. Marsland (1876) 46 L. J. Ex. 174, 178; 2 Ex. D. 1, 6; 35 L. T. 725; 25 W. R. 173.—C.A.

Mors (or Morse) v. Slew (or Slue) (1871) 1

Vent. 190, 238; 3 Keb. 72, 112, 135, 866; T. Raym. 220; 1 Mod. 85.—K.B., commented on.

Lane v. Cotton (1761) 12 Mod. 472.—K.B. (and see *infra*).

HOLT, C.J.—In the case of *Morse v. Slew*, if the ship had been robbed at sea the master had not been answerable, yet he was chargeable at land.

Mors v. Slew, cited.

Redhead v. Midland Ry. (1869) 38 L. J. Q. B. 169, 171; L. R. 4 Q. B. 379, 382; 9 B. & S. 519; 20 L. T. 628; 17 W. R. 737.—EX. CH.

Mors v. Slew, explained.

Liver Alkali Co. v. Johnson (1874) 43 L. J. Ex. 216, 221; L. R. 9 Ex. 338, 340; 31 L. T. 95.—EX. CH., affirming 20 W. R. 633.—C.P.

Mors v. Slew, explained.

Nugent v. Smith (1876) 45 L. J. C. P. 697, 703; 1 C. P. D. 423, 430; 34 L. T. 827; 24 W. R. 237; 3 Asp. M. C. 198.—C.A.

COCKBURN, C.J.—The next case in point of date, and it is the first case in the books in which the liability of the owners of a sea-going ship comes in question, is the well-known case of *Morse v. Slew*, in which it was held, after a trial at bar, that where a ship lying in the Thames was boarded by robbers who took the plaintiff's goods, which had been loaded on board, in an action brought against the master, the plaintiff was entitled to recover. And it certainly surprises me that this case should be relied on as an authority for the position that the liability of a common carrier attaches to the shipowner or master where the ship is not a general ship. For though it is not expressly said that the ship in question was a general ship, which has led to the somewhat hasty assumption that she was not, the internal evidence shows conclusively that she was so. [His lordship then stated the various grounds for that view.] There seems,

therefore, no reasonable doubt that the ship was a general ship.—p. 703.

Mora v. Slew (*supra*), *adopted*.

Pandorf v. Hamilton (1886) 55 L. J. Q. B. 546; 17 Q. B. D. 670, 684; 55 L. T. 499; 35 W. R. 74; 6 Asp. M. C. 44.—C.A., reversed, H.L. (E.). See col. 3311.

Lane v. Cotton (1701) 12 Mod. 472; Salk 17, 143; Comyns 200; Carth. 487; Holt 582; 1 Ld. Raym. 646.—K.B., *referred to*. **Bennett v. Bayes** (1860) 29 L. J. Ex. 224; 5 H. & N. 391; 2 L. T. 156; 8 W. R. 320.—Ex.

Lane v. Cotton, *adopted*.

Mersey Docks v. Gibbs (1866) 11 H. L. Cas. 686; 35 L. J. Ex. 225; L. R. 1 H. L. 93, 111; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.—H.L. (E.).

Moore v. Midland Ry. (1875) Ir. R. 9 C. L. 20.—C.P., *adopted*.

Doolan v. Midland Ry. (1877) 2 App. Cas. 792, 804; 37 L. T. 317; 25 W. R. 882; 3 Asp. M. C. 685.—H.L. (IR.).

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Thompson v. Havelock (1808) 1 Camp. 527.—K.B., *applied*.

Morison v. Thompson (1874) 43 L. J. Q. B. 215; L. R. 9 Q. B. 480; 30 L. T. 869; 22 W. R. 859.—Q.B.; and **Shipway v. Broadwood** (1899) 68 L. J. Q. B. 360; [1899] 1 Q. B. 369; 80 L. T. 11.—C.A.

Diplock v. Blackburn (1811) 3 Camp. 43; 13 R. R. 744.—K.B., *applied*.

Morison v. Thompson (1874) 43 L. J. Q. B. 215; L. R. 9 Q. B. 480; 30 L. T. 869; 22 W. R. 859.—Q.B.

The Sir Chas. Napier (1880) 5 P. D. 73; 43 L. T. 364; 28 W. R. 718; 4 Asp. M. C. 321.—C.A., *referred to*.

Carnegie v. Carnegie (1886) 17 L. R. Ir. 430.—WARREN, J.; affirmed, C.A.

Hussey v. Christie (1808) 9 East 426; 13 Ves. 595.—K.B., *considered*.

Bristowe v. Whitmore (1861) 9 H. L. Cas. 393; 2 Jur. (N.S.) 291; 4 L. T. 622; 9 W. R. 621.—H.L. (E.).—LORDS WENSLEYDALE and CHELMSFORD *dissenting*.

Smith v. Plummer (1818) 1 B. & Ald. 575; 19 R. R. 391.—K.B., *considered*.

Bristowe v. Whitmore (1861) 9 H. L. Cas. 393; 2 Jur. (N.S.) 291; 4 L. T. 622; 9 W. R. 621.—H.L. (E.). LORDS WENSLEYDALE and CHELMSFORD *dissenting*.

Smith v. Plummer, *observed upon*.

The Mary Ann (1865) 35 L. J. Adm. 6; L. R. 1 A. & E. 8; 12 Jur. (N.S.) 31; 13 L. T. 384; 14 W. R. 136.—ADM.

Smith v. Plummer, *followed*.

Japp v. Campbell (1887) 57 L. J. Q. B. 79, 81.—SMITH, J.; and **The Castlegate** (1892) 62 L. J. C. P. 17; [1893] A. C. 38; 1 R. 97; 63 L. T. 99; 41 W. R. 349.—H.L. (IR.).

The Caledonia (1855) Swab. 17.—ADM., *referred to*.

The Feronia (1868).—ADM. (*post* col. 3284); and **The Sara** (1889).—H.L. (E.) (*post* col. 3285).

The Glentanner (1853) Swabey 415.—ADM., *considered*.

The Mary Ann (1865) 35 L. J. Adm. 6; L. R. 1 A. & E. 8; 12 Jur. (N.S.) 31; 13 L. T. 384; 14 W. R. 136.—ADM.; and **The Daring** (1868) 37 L. J. Adm. 29; L. R. 2 A. & E. 260, 264.—ADM.

The Glentanner, *overruled*.

The Sara, Hamilton v. Baker (1889) 58 L. J. P. 57; 14 App. Cas. 209; 61 L. T. 26; 38 W. R. 129; 6 Asp. M. C. 413.—H.L. (E.). See extract, *infra*.

The Princess Helena (1861) Lush. 190; 30 L. J. P. 137; 4 L. T. 869.—ADM., *overruled*.

The Arina (1887) 56 L. J. P. 57; 12 P. D. 418; 57 L. T. 121; 35 W. R. 654; 6 Asp. M. C. 441.—HANNEN, P. and BUTT, J.

BUTT, J. (for the Court; after discussing sects. 187 and 191 of the Merchant Shipping Act, 1854, continued).—We think, therefore, that the extra payment is not made part of the seamen's wages by sect. 187. Even were it otherwise—were the extra payment made part of the seamen's wages—it would by no means follow that sect. 191 makes a similar extra payment part of a master's wages. By the words of sect. 191 a master is to have, not the same *right to wages* as the seaman, but only the same rights, liens, and remedies for the *recovery* of his wages. It does not purport to give the master any additional wages, but only the same rights, liens, and remedies for the recovery of his wages as the seaman has for the recovery of his.

Bristow v. Whitmore, 28 L. J. Ch. 801; 1 Johns. 96; 6 Jur. (N.S.) 29; 32 L. T. (O.S.) 206.—WOOD, V.-C.; *reversed*, (1859) 28 L. J. Ch. 801; 4 De G. & J. 325; 6 Jur. (N.S.) 29; 1 L. T. 173; 7 W. R. 150.—CHELMSFORD, L.C.; *the latter decision reversed and the former restored*, (1861) 31 L. J. Ch. 467; 9 H. L. Cas. 393; 8 Jur. (N.S.) 291; 4 L. T. 622; 9 W. R. 621.—H.L. (E.).

Bristow v. Whitmore, *distinguished*.

The Two Ellens (1871) 40 L. J. Adm. 11, 15; L. R. 3 A. & E. 345, 359.—ADM.; affirmed, P.C.

Bristow v. Whitmore, *applied*.

The Orienta (1894) 63 L. J. P. 129; [1894] P. 271; 6 R. 730; 71 L. T. 343.—JEUNE, P.

The Gananoque (1862) Lush. 448.—ADM., *applied*.

The Feronia (1868) 37 L. J. Adm. 60, 63; L. R. 2 A. & E. 65, 73; 17 L. T. 619; 16 W. R. 585.—ADM.

The Chieftain (1863) Br. & L. 104, 212; 32 L. J. Adm. 106; 9 Jur. (N.S.) 388; 8 L. T. 120; 11 W. R. 537.—ADM., *discussed and distinguished*.

The Feronia (1868) 37 L. J. Adm. 60, 64; L. R. 2 A. & E. 65, 75; 17 L. T. 619; 16 W. R. 585.—ADM.; **The Fairport** (1882) 52 L. J. Adm. 21, 22; 8 P. D. 48, 54; 43 L. T. 536; 31 W. R. 616; 5 Asp. M. C. 62.—ADM.

The Chieftain, *disapproved*.

The Sara (1887) 56 L. J. P. 160; 12 P. D. 158; 57 L. T. 328; 35 W. R. 826.—C.A.; reversed, H.L. (E.) (*infra*, col. 3285).

The Chieftain, considered.

The *Oriente* (1894) 63 L. J. P. 129; [1894] P. 271; 6 R. 730; 71 L. T. 343.—JEUNE, P.

The Chieftain, distinguished.

The *Ruby* (1898) 67 L. J. P. 28; [1898] P. 59; 78 L. T. 235; 46 W. R. 687.—ADM.

JEUNE, P.—The question, then, is, does the plaintiff bring himself within the Admiralty Court Act, 1861? By sect. 10 the claim must be "by a seaman of any ship for wages earned by him on board the ship." . . . In the case of *The Chieftain*, Dr. Lushington, when dealing with the case of a captain who was employed a great deal on shore, looked at the nature of his duties, and held that he was entitled to a lien for wages. But having regard to the character of the duties of the plaintiff in this case [a ship's husband], I do not think that they are duties of the nature of those of a seaman even in the extended sense to be given to the term.

The Edwin (1864) Br. & L. 281; 33 L. J.

Adm. 197; 10 L. T. 658; 12 W. R. 992.—

ADM., referred to.

The *Feronia* (1868) 37 L. J. Adm. 60; L. R. 2 A. & E. 65, 74; 17 L. T. 619; 16 W. R. 585.—ADM.; The *Fairport* (1882) 52 L. J. P. 21; 8 P. D. 48; 48 L. T. 536.—ADM.; The *Sara* (1887) 56 L. J. P. 160; 12 P. D. 158; 57 L. T. 328; 35 W. R. 826; 6 Asp. M. C. 163.—C.A. (reversed, H.L. (E.), *infra*, col. 3285); The *Ripon City* (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M. C. 304.—BARNES, J.

The Mary Ann (1865) 35 L. J. Adm. 6;

L. R. 1 A. & E. 8; 12 Jur. (N.S.) 31;

13 L. T. 384; 14 W. R. 136.—ADM.,

considered.

The *Feronia* (1868) 37 L. J. Adm. 60; L. R. 2 A. & E. 65, 74; 17 L. T. 619; 16 W. R. 585.—ADM.; The *Daring* (1868) 37 L. J. Adm. 29; L. R. 2 A. & E. 260, 262.—ADM.; The *Harriet* (1868) 18 L. T. 804.—ADM.

The Mary Ann, approved and applied.

Laws v. Smith, The *Rio Tinto* (1884) 9 App. Cas. 356, 363; 50 L. T. 461; 5 Asp. M. C. 224.—P.C.

The Mary Ann, followed.

The *Ringdove* (1886) 55 L. J. P. 56; 11 P. D. 120; 55 L. T. 552; 34 W. R. 744.—ADM.

The Mary Ann, overruled.

The *Sara*, *Hamilton v. Baker* (1889) 14 App. Cas. 209; 58 L. J. P. 57; 61 L. T. 26; 38 W. R. 129; 6 Asp. M. C. 413.—H.L. (E.).

LORD WATSON.—In *The Mary Ann*, which was decided by Dr. Lushington in 1865, that learned judge held that the master's claim for disbursements on account of ship does bear a proper maritime lien. In arriving at that result, I do not think the learned judge relied solely upon the provisions of the [Admiralty Court] Act of 1861, although there are observations in his judgment which might admit of that construction. His reasoning leads me to infer that, if before the passing of the Act, claims for disbursements had been wholly excluded from the jurisdiction of his Court, and had been unaccompanied by a lien, Dr. Lushington would have held that the provisions of the Act were, *per se*, insufficient to create the right. . . . The real grounds of Dr. Lushington's decision in *The*

Mary Ann are to be found in the fact that, before the Act of 1861 his Court had a limited jurisdiction over claims for disbursements and in the assumption that, in such cases, the master had a maritime lien. Upon these premises the learned judge argues, with considerable force, that it must have been the intention of the legislature that under the enlarged jurisdiction conferred by sect. 10 of the later Act [of 1861] the master's claim for disbursements should have the same privileges which were attached to it under the limited jurisdiction established by the [Merchant Shipping] Act of 1854. . . . In my opinion the ratio of the judgment in *The Mary Ann* fails; because I am unable to hold that the enactments of sect. 191 of the Merchant Shipping Act can be interpreted as creating a maritime lien for disbursements; and the enactments of the statute of 1861, even when tested by Dr. Lushington's own principles, are in themselves insufficient to create such a right. In *The Feronia* (*infra*) the authority of *The Mary Ann* was followed by Sir Robert Phillimore, who refers to and admits the views of his predecessor. It was again followed in the case of *The Ringdove* (*post*, col. 3285) by Sir James Hannen, who stated that the reasoning of Dr. Lushington was not satisfactory to his mind. . . . It was strongly urged by the respondent's counsel that your lordships are now precluded by a series *rerum judicatarum*, from denying effect to the principle laid down in *The Mary Ann* and *The Feronia*. But I do not think that these authorities, which have been followed but not approved in the most recent cases, are of sufficient weight to establish a latent security of an exceptional character against purchasers and mortgagees.—p. 218.

LORD MACNAGHTEN.—The question whether the decision in *The Mary Ann*, and the practice of the Admiralty Court, which rests upon it can be supported, depends, I think, on the answer to be given to one or both of these further questions: (1) whether the decision in *The Glentanner* (*supra*, col. 3282) was right? and if so, (2) whether the existence of the rule laid down justified Dr. Lushington's inference as to the intention and effect of the Act of 1861. It is not, I think, necessary to go into the latter question, because I am of opinion that the decision of *The Glentanner* was based on a construction of the Act of 1854 which is plainly erroneous.—p. 225.

The Mary Ann, referred to.

The *Castlegate* (1892) 62 L. J. P. C. 17; [1893] A. C. 38; 1 R. 97; 68 L. T. 99; 41 W. R. 349; 7 Asp. M. C. 284.—H.L. (IR.).

The Mary Ann, applied.

The *Ripon City* (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98.—BARNES, J.

The Feronia (1868) 37 L. J. Adm. 60; L. R.

2 A. & E. 65; 17 L. T. 619; 16 W. R.

585.—ADM., considered.

The *Daring* (1868) 37 L. J. Adm. 29; L. R. 2 A. & E. 260, 262.—ADM.; The *Marco Pole* (1871) 24 L. T. 804; 1 Asp. M. C. 54.—ADM.; The *Jenny Lind* (1872) 41 L. J. Adm. 63; L. R. 3 A. & E. 529, 532; 26 L. T. 591; 20 W. R. 895; 1 Asp. M. C. 294.—ADM.; The *Mio Grande Do Sul Steamship Co.* (1877) 46 L. J. Ch. 277; 5 Ch. D. 282, 286; 36 L. T. 603; 25 W. R. 328; 3 Asp. M. C. 424.—C.A.; The *Ringdove* (1886) 55

L. J. P. 56; 11 P. D. 120, 122; 55 L. T. 552; 34 W. R. 744.—ADM.

The Feronia (*supra*), *overruled*.

The *Sara*, *Hamilton v. Baker* (1889) 58 L. J. P. 57; 14 App. Cas. 209; 61 L. T. 26; 38 W. R. 129; 6 Asp. M. C. 413.—H.L. (E.). See extract, *supra*.

The Feronia, *referred to*.

The *Orienta* (1891) 63 L. J. P. 129; [1894] P. 271; 71 L. T. 343; 6 R. 730.—JEUNE, P.

The Feronia, *applied*.

The *Ripon City* (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98.—BARNES, J.

The Limerick, 45 L. J. Adm. 97; 1 P. D. 202.—ADM.; *partly reversed*. (1876) 1 P. D. 411; 34 L. T. 708; 3 Asp. M. C. 206.—C.A.

The Limerick, *adopted*.

The *Sara* (1887) 56 L. J. P. 160; 12 P. D. 158; 57 L. T. 328; 35 W. R. 826.—C.A. (reversed, H.L. (E.)), see *infra*).

The Ringdove (1886) 55 L. J. P. 56; 11 P. D. 120; 55 L. T. 552; 34 W. R. 744.—ADM.. *overruled*.

The *Sara*, *Hamilton v. Baker* (1889) 58 L. J. P. 57; 14 App. Cas. 209; 61 L. T. 26; 38 W. R. 129; 6 Asp. M. C. 413.—H.L. (E.). See extract, *supra*.

The Sara, *Hamilton v. Baker* (1887) 56 L. J. P. 160; 12 P. D. 158; 57 L. T. 328; 35 W. R. 826; 6 Asp. M. C. 163.—C.A.; *reversed*, (1889) 58 L. J. P. 57; 14 App. Cas. 209; 61 L. T. 26; 38 W. R. 129; 6 Asp. M. C. 413.—H.L. (E.).

The Sara, *discussed*.

The *Castlegate* (1892) 62 L. J. P. C. 17; [1893] A. C. 38; 68 L. T. 99; 41 W. R. 349.—H.L. (IR.).

The Sara, *referred to*.

The *Orienta* (1894) 63 L. J. P. 129; [1894] P. 271; 6 R. 730; 71 L. T. 343.—JEUNE, P.

The Sara, *applied*.

The *Mocca* (1894) 64 L. J. P. 40; [1895] P. 95; 71 L. T. 711; 43 W. R. 209.—C.A.

The Sara, *referred to*.

The *Ripon City* (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M. C. 304.—BARNES, J.; and The *Tagus* (1902) 72 L. J. P. 4; [1903] P. 44; 87 L. T. 598; 9 Asp. M. C. 371.—PHILLIMORE, J.

The Beeswing (1885) 53 L. T. 554; 5 Asp. M. C. 484.—C.A., *distinguished*.

The *Turgot* (1886) 11 P. D. 21; 54 L. T. 276; 34 W. R. 552; 5 Asp. M. C. 548.—ADM.

HANNEN, P.—It was argued that the master had an implied authority to pledge the owner's credit as their agent *ex necessitate* in order to enable the ship to sail; and I was referred to *The Beeswing* as an authority for this contention. But the authority of the master depends on the facts, and as the charterers were bound to pay for the hire of the vessel during its detention, the owners had no interest in obtaining its immediate departure. Even if it had not been so, the plaintiff should have communicated by telegram with his owners before pledging their

credit for disbursements, which he knew they were not bound to make.—p. 24.

The Castlegate, *Morgan v. Castlegate SS. Co.*

(1892) 62 L. J. P. C. 17; [1893] A. C. 38; 1 R. 97; 68 L. T. 99; 41 W. R. 349; 7 Asp. M. C. 284.—P.C., *referred to*.

The *Utopia* (1893) 62 L. J. P. C. 118; [1893] A. C. 492; 1 R. 394.—P.C.; and The *Orienta* (1894) 63 L. J. P. 129; [1894] P. 271; 6 R. 730; 71 L. T. 343.—JEUNE, P. (affirmed, C.A.).

The Castlegate, *Morgan v. Castlegate SS. Co.*, *distinguished*.

The *Ripon City* (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M. C. 304.—BARNES, J. See extract, *infra*.

The Orienta (1894) 64 L. J. P. 32; [1895] P. 49; 11 R. 687; 71 L. T. 711; 7 Asp. M. C. 529.—C.A., *distinguished*.

The *Ripon City* (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M. C. 304.

GORELL BARNES, J.—The case is distinguishable from that of *The Orienta*. . . In the former (*The Orienta*) the master did not properly incur liabilities on account of the ship in the ordinary course of his employment; whereas in the present case he obtained the coals in the ordinary course of his employment as master of the vessel, and by so doing pledged the credit of Niel, McLean & Co. [who had been allowed by the defendants, the real owners, to have the control of the vessel] for them, and rendered himself liable on the bills drawn by him. . . The last and most difficult question raised by the second point has to be considered—namely, whether the master acquired a maritime lien which can be enforced by him against a vessel legally owned by the defendants and not by Neil, McLean & Co. The proposition maintained by defendants' counsel was that a maritime lien can only arise and be enforced against a vessel owned by persons who are personally liable to the party seeking to enforce the lien. . . The case principally relied on by the defendants was *The Castlegate*. . . The point now raised was not before the House [of Lords in that case], and the real decision was . . . that a master who, with knowledge of a charter-party under which the charterers are to provide and pay for coals, orders coals on their credit and draws on them for the value, and had, and knew that he had no authority, express or implied, to pledge the owner's credit for the coals, has not a maritime lien for the amount of his liability on the bills drawn for the price of the coals. . . it is thus apparent that the decision in the *Castlegate* does not govern the present case.—pp. 114, 116 and 117.

4. SEAMEN.

The Thomas Workington (1848) 5 W. Rob.

128.—ADM., *observations inapplicable*.

The *Roebuck* (1874) 31 L. T. 274, 283; 2 Asp. M. C. 387.—ADM.

The Thomas Workington, *observations applied*.

The *Macleod* (1880) 50 L. J. Adm. 6; 5 P. D. 254, 256; 29 W. R. 34.—ADM.

The Milford (1868) Swabey, 362; 4 Jur. (N.S.)

417; 6 W. R. 554, *observations questioned*.

The *Halley* (1867) 37 L. J. Adm. 1, 6; L. R.

2 A. & E. 3, 12; 16 W. R. 284.—ADM. (reversed), P.C., *infra*, col. 3407).

The Milford, followed.

Reg. v. Stewart, Olsen, Ex parte (1899) 68 L. J. Q. B. 582; [1899] 1 Q. B. 964; 80 L. T. 660; 47 W. R. 445; 63 J. P. 547.—DARLING and CHANNELL, JJ.

The Milford, considered.

Poll v. Dambe (1901) 70 L. J. K. B. 721; [1901] 2 K. B. 579.—K.B.D. (*infra*).

The Milford, followed.

Davidson v. Hill (1901) 70 L. J. K. B. 783; [1901] 2 K. B. 606; 85 L. T. 118; 49 W. R. 630; 9 Asp. M. C. 223.—K.B.D.

The Milford, discussed and upheld.

The Tagus (1902) 72 L. J. P. 4; [1903] P. 44; 87 L. T. 598; 9 Asp. M. C. 371.—PHILLIMORE, J.

Hart v. Alexander (1898) 36 Sc. L. R. 64.—CT. OF SESS. (SC.), *followed*.

Reg. v. Stewart, Olsen, In re (1899) 68 L. J. Q. B. 582; [1899] 1 Q. B. 964; 80 L. T. 660; 47 W. R. 445; 63 J. P. 547.—DARLING and CHANNELL, JJ.

Reg. v. Stewart, Olsen, In re (*supra*), distinguished and approved.

Poll v. Dambe (1901) 70 L. J. K. B. 721; [1901] 2 K. B. 579; 84 L. T. 870; 50 W. R. 28; 65 J. P. 774; 9 Asp. M. C. 220.—K.B.D.

PHILLIMORE, J. (for the Court).—We do not, however, decide this case upon the ground that no sections in Part II. of the [Merchant Shipping] Act of 1894, apply to foreign ships. We agree with Darling and Channell, JJ., in *Reg. v. Stewart*, that there may be acts done in relation to foreign ships which, when done by English subjects in England, come as much under the penal provisions of the Merchant Shipping Act, 1894, as if they were done in relation to English ships. We think that the case they had to deal with was one of such cases. We ground our decision upon the fact that this part of the Act (Part II.) contains a special provision for the case of desertion from foreign ships, and has thus shown that its general provisions are limited to desertion from British ships.

Reg. v. Stewart, Olsen, In re, referred to.

The Tagus (1902) 72 L. J. P. 4; [1903] P. 44; 87 L. T. 598; 9 Asp. M. C. 371.—PHILLIMORE, J.

Cutter v. Powell (1795) 6 Term Rep. 320; 3 R. R. 185.—K.B., *adopted*.

Appleby v. Myers (1867) 36 L. J. C. P. 331, 337; L. R. 2 C. P. 651, 660; 16 L. T. 669.—EX. CH.; Oxford v. Provan (1868) L. R. 2 P. C. 135, 156; 5 Moore P. C. (N.S.) 150.—P.C.

Cutter v. Powell, applied.

Button v. Thompson (1869) 38 L. J. C. P. 225, 228; L. R. 4 C. P. 330, 340; 20 L. T. 568; 17 W. R. 1069.—C.P.

Cutter v. Powell, referred to.

Robinson v. Mollett (1875) 44 L. J. C. P. 362, 369; L. R. 7 H. L. 802, 814; 33 L. T. 544.—H.L. (E.); Sumpter v. Hedges (1898) 67 L. J. Q. B. 545; [1898] 1 Q. B. 673; 78 L. T. 378; 46 W. R. 454.—C.A.

Beale v. Thompson, (1803) 3 Bos. & P. 405.—C.A.; reversed, (1804) 4 East 546.—EX. CH.

Beale v. Thompson, considered.

Button v. Thompson (1869) 38 L. J. C. P. 225; L. R. 4 C. P. 330; 20 L. T. 568; 17 W. R. 1069.—C.P.; BRETT, J. dissenting.

Button v. Thompson, distinguished.

Saunders v. Whittle (1876) 33 L. T. 816; 24 W. R. 406.—DIV. CT.

CLEASBY, B.—*Button v. Thompson* merely decided upon a particular contract, that a servant was entitled to wages earned during the month before that in which he absented himself. It is no authority that he would have been entitled to his current wages. Here the plaintiff was engaged by the week, and having left his service during a week, he could have no claim for the wages he would have earned at the end of it.

Edwards v. Steel (1897) 66 L. J. Q. B. 690;

[1897] 2 Q. B. 327; 77 L. T. 297; 45 W. R. 689; 8 Asp. M. C. 323.—C.A., *followed*.

Purves v. Straits of Dover S.S. Co. (1899) 68 L. J. Q. B. 925; [1899] 2 Q. B. 217; 81 L. T. 35; 47 W. R. 630; 8 Asp. M. C. 566.—C.A.

The Linda Flor (1857) Swab. 309; 4 Jur.

(N.S.) 172; 6 W. R. 197.—ADM., *adopted*.
The Thuringia (1872) 41 L. J. Adm. 44, 47; 26 L. T. 446; 1 Asp. M. C. 283.—ADM.

The Linda Flor, followed.

The Elin (1882) 51 L. J. P. 77; 8 P. D. 39; 49 L. T. 87; 31 W. R. 736; 5 Asp. M. C. 120.—SIR R. PHILLIMORE; affirmed, (1883) 52 L. J. P. 55; 8 P. D. 129; 49 L. T. 87; 31 W. R. 736; 5 Asp. M. C. 120.—C.A.

The Duna (1861) 5 L. T. 217.—ADM. IR followed.

The Elin (1882) 52 L. J. Adm. 55; 8 P. D. 129; 49 L. T. 87; 31 W. R. 736; 5 Asp. M. C. 120.—C.A.

The Golubechick (1840) 1 W. Rob. 143.—ADM., followed.

The Leon XIII.; Wardropp v. The Leon XIII. (1883) 52 L. J. A. 58; 8 P. D. 121; 48 L. T. 770; 31 W. R. 882; 5 Asp. M. C. 73.—C.A.

The Nina, La Blache v. Rangel, L. R. 2 A. & E. 44.—ADM.; reversed, (1868) 37 L. J. Adm. 17; L. R. 2 P. C. 38; 17 L. T. 585; 5 Moore P. C. (N.S.) 60.—P.C.

The Nina (*supra* in P.C.), followed.

The Leon XIII. (1883) 52 L. J. Adm. 58; 8 P. D. 121, 124; 48 L. T. 770; 31 W. R. 882; 5 Asp. M. C. 73.—C.A.

Ritchie v. Larsen (1899) 68 L. J. Q. B. 335;

[1899] 1 Q. B. 727; 80 L. T. 259; 47 W. R. 413.—CHANNELL and LAWRENCE, JJ., *approved*.

Rowlands v. Miller (1899) 68 L. J. Q. B. 338; [1899] 1 Q. B. 735; 80 L. T. 290; 47 W. R. 687; 63 J. P. 407.—CHANNELL and LAWRENCE, JJ.

The Great Eastern (1866) 36 L. J. Adm. 15;

L. R. 1 A. & E. 384; 17 L. T. 228.—ADM., *followed*.

The Blessing (1878) 3 P. D. 35, 38; 38 L. T. 259; 26 W. R. 404; 3 Asp. M. C. 561.—ADM.

The Lady Campbell (1826) 2 Hagg. Adm. 5.

—LORD STOWELL, *observations adopted*.
The Macleod (1880) 50 L. J. Adm. 6; 5 P. D. 254; 29 W. R. 31.—ADM.

The Exeter (1799) 2 C. Rob. 261.—ADM., *opinion adopted*.
The Roebuck (1874) 31 L. T. 274, 283; 2 Asp. M. C. 387.—SIR R. PHILLIMORE; **The Macleod** (1880) 5 P. D. 254.—SIR R. PHILLIMORE.

Great Northern Steamship Fishing Co. v. Edgehill (1883) 11 Q. B. D. 225.—Q.B.D., *observed upon*.
Sharp v. Rettie (1884) 11 Ct. of Sess. Cas. (4th ser.) 745.—CF. OF SESS. (SC.).

Leary v. Lloyd (1860) 3 E. & E. 178; 29 L. J. M. C. 194; 6 Jur. (N.S.) 1246—Q.B., *discussed*.
Poll v. Dambe (1901) 70 L. J. K. B. 721; [1901] 2 K. B. 579; 84 L. T. 870; 50 W. R. 28; 65 J. P. 774; 9 Asp. M. C. 220.—ALVERSTONE, C.J., LAWRENCE and PHILLIMORE, JJ.

5. SALE AND TRANSFER.

Hughes v. Morris, 9 Hare 636.—V.-C.; affirmed on other grounds, (1852) 21 L. J. Ch. 761; 16 Jur. 603.—L.J.

Hughes v. Morris, *adopted*.
Maddison v. Alderson (1883) 52 L. J. Q. B. 737, 744; 8 Appr. Cas. 467, 479; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.—H.L. (E.).

Liverpool Borough Bank v. Turner (1861) 30 L. J. Ch. 379; 2 De G. F. & J. 502; 7 Jur. (N.S.) 150; 3 L. T. 494; 9 W. R. 292.—L.C., *followed*.
General Provident Assurance Co., In re (1869) 38 L. J. Ch. 320, 322; 17 W. R. 514.—MALINS, V.-C.

Liverpool Borough Bank v. Turner, *discussed*.
Keith v. Burrows (1876) 45 L. J. C. P. 876; 1 C. P. D. 722, 731; 35 L. T. 508.—C.P.D. (reversed, C.A. and H.L. (E.), *infra*, col. 3341).

Liverpool Borough Bank v. Turner, *dicta applied*.
Caldow v. Pixell (1877) 46 L. J. C. P. 541, 543; 2 C. P. D. 562, 566; 36 L. T. 469; 25 W. R. 773.—C.P.D.; **Howard v. Bodington** (1877) 2 P. D. 203, 211.—ARCHES CT.

Liverpool Borough Bank v. Turner, *considered*.
Hughes v. Sutherland (1881) 50 L. J. Q. B. 567; 7 Q. B. D. 160, 162; 45 L. T. 287; 29 W. R. 867; 4 Asp. M. C. 459; 46 J. P. 6.—COLERIDGE, C.J. and MANISTY, J.

Liverpool Borough Bank v. Turner, *explained*.
Bathyan v. Bouch (1881) 50 L. J. Q. B. 421; 44 L. T. 177; 29 W. R. 665; 4 Asp. M. C. 380.—Q.B.D.

GROVE, J.—There are no decisions actually on the section itself, but the case of *The Liverpool Borough Bank v. Turner*, a decision on sect. 66 of the Merchant Shipping Act, 1854, was decided by two distinguished judges, Lord Hatherley (then V.-C. Wood) and Lord Campbell, on the ground that the words in the sixty-sixth section relating to mortgages were not inconsistent with the provisions of 8 & 9 Vict. c. 89, which had been decided, as I think, on good grounds, to mean that any passing of property should be void unless accompanied by the formalities

enjoined by that Act, and that the reasoning under the earlier statute could be imported into the discussion as to the meaning of the section in question. Now, if I were deciding a question on the sixth-sixth section, I should be bound by that decision, whatever my own opinion might happen to be. But then two reasons are alleged why this decision is not binding on me. One is, that the decision was on the sixty-sixth section, relating to mortgages, and not on the fifty-fifth section relating to transfers of ships. This sixty-sixth section enacts that a "ship, or any share therein, may be made a security for a loan or other valuable consideration, and the instrument creating such security, hereinafter termed a mortgage," shall be in a specified form. And the decision thereon was, that a registered British ship could not be made security for a loan except by mortgage which required registration. Though it is said that there is a considerable difference between this section and the fifty-fifth, yet I cannot help feeling much influenced by the expressions used by V.-C. Wood, who put the two cases of mortgage and transfer on the same footing, which, to a less extent, Lord Campbell also did. But I am not bound by these, which are only *obiter dicta*, and if I can find any substantial distinction I am bound to use my own judgment, and I am of opinion that there is such a distinction to be drawn which leads me to feel not bound by the *obiter dicta* of the judges in that case. The words in the fifty-fifth section, "shall be transferred," are, without doubt, restricted in their meaning to a sale; whereas the word "security" must *ex vi termini* mean equitable or legal agreements. In the sixty-sixth section it seems to be provided that no security of any kind can be created in respect of a ship but by way of mortgage, but the words in sect. 55 are exclusively referable to sales. Then, again, the learned judges who put sales and securities on the same footing, did so without hearing any arguments on the point, and their attention was not drawn to the difference between sect. 55 and sect. 66. I am, therefore, not bound by that decision, and indeed, am not sure, that if they had had the point argued out, they would have come to any such conclusion. The case also has been doubted by Baron Pollock in a recent case, *Stapleton v. Hymen* (*infra*, col. 3291), but a subsequent statute was passed, I cannot judicially say with the express object of remedying this effect of the *Liverpool Borough Bank v. Turner*, yet having every appearance of having been so passed, for it certainly makes a very great difference in the law on the subject in question, and the result is to get rid of that judgment; for by that judgment beneficial interests are not recognised except as applying to aliens and foreigners, a construction shown by the subsequent Act not to have been intended. By that later Act it is provided that beneficial interests, when used in the second part of the principal Act, include interest arising under contracts and other equitable interests, and that that Act intended that equities may be enforced against owners and mortgages of ships in respect of their interests therein in the same manner as they may be enforced against them in respect of any other personal property. It is plain, therefore, that this Act was purposely intended to go further and recognise beneficial

interests to an extent not recognised in *The Liverpool Borough Bank v. Turner*.—p. 424.

Liverpool Borough Bank v. Turner, principles adopted.

Chasteauneuf v. Capeyron (1882) 51 L. J. P. C. 37, 40; 7 App. Cas. 127, 131; 46 L. T. 65; 4 Asp. M. C. 489.—P.C.; *Great Eastern Steamship Co., In re, Williams' Claim* (1885) 53 L. T. 594; 5 Asp. M. C. 511.—CHITTY, J.

Liverpool Borough Bank v. Turner, distinguished.

Black v. Williams (1894) 64 L. J. Ch. 137; [1895] 1 Ch. 408; 13 R. 211; 43 W. R. 346; 2 Manson, 86.—V. WILLIAMS, J.

Stapleton v. Haymen (1864) 33 L. J. Ex.

170; 2 H. & C. 918; 10 Jur. (N.S.) 497; 9 L. T. 655; 12 W. R. 317.—EX., *applied*.

The Two Ellens (1871) 40 L. J. Adm. 11; L. R. 3 A. & E. 355; 24 L. T. 592; 1 Asp. M. C. 40.—ADM. (affirmed, P.C., *post*, col. 3467); and *Keith v. Burrows* (1876) 45 L. J. C. P. 876, 878; 1 C. P. D. 722, 732; 35 L. T. 508.—C.P.D. (reversed, C.A. and H.L. (E.), *post*, col. 3341).

Stapleton v. Haymen, referred to.

Batthyany v. Bouch (1881) 50 L. J. Q. B. 421, 424; 44 L. T. 177; 29 W. R. 665; 4 Asp. M. C. 380.—GROVE and LINDLEY, JJ. *See extract, supra*.

Stapleton v. Haymen, explained.

Hughes v. Sutherland (1881) 50 L. J. Q. B. 567; 7 Q. B. D. 160; 45 L. T. 287; 29 W. R. 867; 4 Asp. M. C. 459; 46 J. P. G.—Q.B.D. COLERIDGE, C.J.—I gather that in *Stapleton v. Haymen* the Chief Baron and the rest of the Court concurred in holding that equities could be created in ships as in anything else.

Pickering v. Dowson (1813) 4 Taunt. 779.—C.P., *followed*.

Kain v. Old (1824) 2 L. J. (O.S.) K. B. 102; 2 B. & C. 627; 4 D. & R. 52; 26 R. R. 497.—K.B.

Pickering v. Dowson, referred to.

Freeman v. Baker (1833) 3 L. J. K. B. 17; 5 B. & Ad. 797; 2 N. & M. 446; 5 Car. & P. 475.—K.B.

Mair v. Glennie (1815) 4 M. & S. 240.—K.B., *followed*.

Stocker v. Brocklebank (1851) 3 Mac. & G. 250; 20 L. J. Ch. 401; 15 Jur. 591.—L.C.

Mair v. Glennie, applied.

Harrington v. Churchward (1860) 29 L. J. Ch. 521; 6 Jur. (N.S.) 576; 8 W. R. 302.—WOOD, V.-C.

Ryle v. Haggie (1820) 1 Jac. & W. 234.—M.R., *adopted*.

Shepard v. Brown (1862) 9 Jur. (N.S.) 195; 7 L. T. 499; 11 W. R. 162.—STUART, V.-C.

Hill, Ex parte (1815) 1 Madd. 61.—V.-C., *applied*.

Green v. Briggs (1848) 17 L. J. Ch. 323; 6 Hare 395; 12 Jur. 326.—V.-C.

Hubbard v. Johnston (1810) 3 Taunt. 177, 222.—C.P., *applied*.

Beresford Succession, In re (1855) 5 Ir. C. L. R. 409.—EX.; *Att.-Gen. v. Hope* (1868) Ir. R. 3 C. L. 368.—EX.; *PIGOT, C.B. dissenting*.

Mestaer v. Gillespie (1805) 11 Ves. 621.—L.C., *referred to*.

Davenport v. Whitmore (1836) 2 My. & Cr. 177, 190.—L.C.; *Blair v. Bromley* (1847) 2 Ph. 354, 360; 16 L. J. Ch. 495; 11 Jur. 617.—L.C.; *Coombs v. Mansfield* (1855) 3 Drew. 193, 200; 24 L. J. Ch. 513; 3 Eq. R. 566; 1 Jur. (N.S.) 270; 3 W. R. 345.—KINDERSLEY, V.-C.

Mestaer v. Gillespie, applied

Willis v. Palmer (1860) 29 L. J. C. P. 194; 7 C. B. (N.S.) 340; 6 Jur. (N.S.) 732; 2 L. T. 626; 8 W. R. 295.—C.P.

Stainbank v. Sheppard (1853) 22 L. J. Ex. 341; 13 C. B. 418.—EX., *applied*.

Willis v. Palmer (1860) 29 L. J. C. P. 194; 7 C. B. (N.S.) 340; 6 Jur. (N.S.) 732; 2 L. T. 626; 8 W. R. 295.—C.P.

Stainbank v. Sheppard, dictum adopted.

The Onward (1873) 42 L. J. Adm. 61; L. R. 4 A. & E. 38; 23 L. T. 204; 21 W. R. 601; 1 Asp. M. C. 40.—ADM.

Gardner v. Cazenove (1856) 26 L. J. Ex. 17;

1 H. & N. 423; 5 W. R. 195.—EX., *applied*. *Willis v. Palmer* (1860) 29 L. J. C. P. 194; 7 C. B. (N.S.) 340; 6 Jur. (N.S.) 732; 2 L. T. 626; 8 W. R. 295.—C.P.

Gardner v. Cazenove, applied.

The Innisfallen (1866) 35 L. J. Adm. 110; L. R. 1 A. & E. 72, 76; 12 Jur. (N.S.) 653.—ADM.; *Rusden v. Pope* (1868) 37 L. J. Ex. 137; L. R. 3 Ex. 269; 18 L. T. 651; 16 W. R. 1122.—EX.; *BRAMWELL, B. dissenting*.

Eliza Cornish (or Segredo) (1853) 17 Jur.

738; 1 Spinks 36.—ADM., *disapproved*. *Cammell v. Sewell* (1860) 29 L. J. Ex. 350; 5 H. & N. 728; 6 Jur. (N.S.) 918; 2 L. T. 799; 8 W. R. 639.—EX. CH.

CROMPTON, J.—If that case be an authority for the proposition that a law of a foreign country of the nature of law of Norway, as proved in the present case, is not to be regarded by the Courts of this country, and that its effect as to the passing of property in a foreign country is to be disregarded, we cannot agree with the decision; and with all the respect due to so high an opinion in maritime transactions, we do not feel ourselves bound by it when sitting in a Court of error.—p. 353.

Eliza Cornish (or Segredo), referred to.

Reg. v. McCleverty, The Telegrafo (1871) 40 L. J. Adm. 18, 22; L. R. 3 P. C. 673, 686; 8 Moore P. C. (N.S.) 43; 24 L. T. 748; 30 W. R. 242; 1 Asp. M. C. 63.—P.C.

Cammell v. Sewell (1860) 29 L. J. Ex. 350;

5 H. & N. 728; 6 Jur. (N.S.) 918; 2 L. T. 799; 8 W. R. 639.—EX. CH., *referred to*. *Lloyd v. Guibert* (1865) 35 L. J. Q. B. 74; L. R. 1 Q. B. 115, 125; 6 B. & S. 100; 13 L. T. 602.—EX. CH.; *The Empire of Peace* (1869) 39 L. J. Adm. 12, 15; 21 L. T. 763.—ADM.; *Castrique v. Imrie* (1870) 39 L. J. C. P. 350; L. R. 4 H. L. 414, 429; 23 L. T. 48; 19 W. R. 1.—H.L. (E.); *Vadala v. Lawes* (1890) 25 Q. B. D. 310, 316; 63 L. T. 128; 38 W. R. 594.—C.A. *And see post*.

Cammell v. Sewell (supra), applied.

Alcock v. Smith (1892) 61 L. J. Ch. 161; [1892] 1 Ch. 238; 66 L. T. 126.—C.A.

Cammell v. Sewell, referred to.

Dulaney v. Merry (1901) 70 L. J. K. B. 377; [1901] 1 K. B. 536; 84 L. T. 156; 49 W. R. 331; 8 Mansf. 152.—CHANNELL, J.

Langton v. Horton (1842) 11 L. J. Ch. 233; 5 Beay. 9; 6 Jur. 357, 594.—M.R., distinguished.

Strong v. Foster (1856) 25 L. J. Q. P. 106; 17 C. B. 201; 4 W. R. 151.—C.P.

WILLES, J.—There is one very strong case, *Langton v. Horton*, where it was held that a bill of sale of a ship, absolute in its terms, might in equity be shown to be a mortgage. But the proceeding there was not on a contract in the bill of sale. Its existence was admitted, and the question was as to the purpose for which it was given. But in this case the dealing was with an instrument on the face of which the defendant appears to be a principal debtor. Now it has been laid down in the courts of law with reference to such instruments that a person signing a bill as principal debtor, must undertake all liabilities, as principal debtor as between himself and third parties, although as between himself and the party at whose instance he signed it, he is in fact only a surety, and that fact is known to the person to whom the bill was given.—p. 112.

The Nelly Schneider (1879) 3 P. D. 152; 39 L. T. 360; 27 W. R. 308; 4 Asp. M. C. 54.—ADM., followed.

The Hereward (1895) 64 L. J. P. 87; [1895] P. 284; 72 L. T. 903; 11 R. 798.—BRUCE, J.

6. MORTGAGE.

Salmon, In re, Gould, Ex parte (1885) 2 Morrell 137.—CAVE and WILLES, JJ., applied.

Coltman v. Chamberlain (1890) 59 L. J. Q. B. 563; 25 Q. B. D. 328; 39 W. R. 12.—CHARLES and WILLIAMS, JJ.

European and Australian Royal Mail Co. v. Royal Mail Steam Packet Co. (1858) 4 Kay & J. 676; 5 Jur. (N.S.) 310.—V.C., doubted.

Marriott v. Anchor Reversionary Co. (1861) 7 Jur. (N.S.) 713; 3 De G. F. & J. 177; 30 L. J. Ch. 571; 4 L. T. 590; 9 W. R. 726.—L.C. and L.JJ.

CAMPBELL, L.C.—I cannot concur in the unlimited right of the mortgagee to use the ship as the owner might do, notwithstanding the dicta of Wood, V.-C., in *European Co. v. Royal Mail Co.*, which have produced this marginal note, "A mortgagee of a ship has power, under the 70th section of the Merchant Shipping Act, 1856, to use as well as sell the ship, semble." I doubt whether the enactment in the statute referred to, as to the rights and liabilities of the mortgagee of the ship, which regulate the relation between the mortgagee and third persons, and protect him both from claims founded on contract and on tort till he has taken possession, are intended to vary or regulate the power of the mortgagee as between him and the mortgagor. At any rate they cannot be intended to empower the

mortgagee, at the expense and risk of the mortgagor, to send the ship to any quarter of the globe, and to employ her in any trade for which she may be adapted for any indefinite length of time. Is the burthen of repairs, and of paying the master and seamen, and of all the ship's disbursements, to be borne by the mortgagor? Is he to be charged for insurance? And if the ship is wrecked uninsured, is the loss to fall upon him, he being still liable for the balance of the unpaid mortgage money? Nor can I lay down the strict rule that the mortgagee can never lawfully employ the ship to earn freight, or that after taking possession he must allow her to lie idle till he may prudently sell her. He may take possession when she is prosecuting a voyage under a charter-party, and at the end of the voyage it is easy to conceive circumstances which would justify him in a temporary employment of the ship while waiting for a favourable opportunity to sell her.

Gibson v. Ingo (1847) 6 Hare 112.—V.C., followed.

The Celtic King (1894) 63 L. J. Adm. 37; [1894] P. 175; 6 R. 754; 70 L. T. 562; 7 Asp. M. C. 440.—BARNES, J.

Collins v. Lamport (1864) 34 L. J. Ch. 196; 11 Jur. (N.S.) 1; 11 L. T. 497; 13 W. R. 283.—L.C., followed.

The Innisfallen (1866) 35 L. J. Ad. 110; L. R. 1 A. & E. 72, 75; 12 Jur. (N.S.) 653.—ADM.

Collins v. Lamport, approved and limited.

Brown v. Tanner (1868) 37 L. J. Ch. 923; L. R. 3 Ch. 597; 18 L. T. 624; 16 W. R. 882.—L.JJ.

Collins v. Lamport, applied.

The Fanchon (1880) 50 L. J. Adm. 4; 5 P. D. 173; 42 L. T. 483; 29 W. R. 339; 4 Asp. M. C. 272.—ADM.; *The Celtic King* (1894) 63 L. J. Adm. 37; [1894] P. 175; 6 R. 754; 70 L. T. 562; 7 Asp. M. C. 440.—BARNES, J.; *The Heather Bell* (1901) 70 L. J. P. 36; [1901] P. 143; 84 L. T. 538; 49 W. R. 352.—JEUNE, P. (affirmed, 70 L. J. P. 57; [1901] P. 272; 84 L. T. 794; 49 W. R. 577.—C.A.).

The Celtic King (1894) 63 L. J. Adm. 37; [1894] P. 175; 6 R. 754; 70 L. T. 562; 7 Asp. M. C. 440.—BARNES, J., referred to.

The Heather Bell (1901) 70 L. J. P. 36; [1901] P. 143; 84 L. T. 538; 49 W. R. 352.—JEUNE, P. (affirmed, C.A.).

Liverpool Marine Credit Co. v. Hunter (1868) 37 L. J. Ch. 386; L. R. 3 Ch. 479; 18 L. T. 749; 16 W. R. 1090.—L.C., followed.

Maudslay, In re, Maudslay v. Maudslay (1900) 69 L. J. Ch. 347; [1900] 1 Ch. 603; 82 L. T. 378; 48 W. R. 568.—COZENS-HARDY, J.

Johnson v. Royal Mail Steam Packet Co. (1867) 37 L. J. C. P. 33; L. R. 3 C. P. 38; 17 L. T. 445.—C.P., dictum adopted.

Edmunds v. Wallingford (1885) 54 L. J. Q. B. 305; 14 Q. B. D. 811, 815; 52 L. T. 720; 33 W. R. 647; 49 J. P. 549.—C.A., affirming 1 Cal. & E. 354.—HUDDLESTON, B.

Johnson v. Royal Mail Steam Packet Co., distinguished.

The Ripon City or The Sylvia (1898) 67 L. J.

P. 30; [1898] P. 78; 78 L. T. 296; 46 W. R. 586; 8 Asp. M. C. 391.—JEUNE, P. *See* extract, *infra*.

Johnson v. Royal Mail Steam Packet Co.,
referred to.

The Heather Bell (1901) 70 L. J. P. 36; [1901] P. 143; 84 L. T. 538; 49 W. R. 352.—JEUNE, P. (affirmed, C.A., *see supra*).

The Orchis (1889) 59 L. J. Adm. 31; 15 P. D. 38; 62 L. T. 407; 38 W. R. 472; 6 Asp. M. C. 501.—C.A., *distinguished*.

The Ripon City or The Sylvia (1898) 67 L. J. P. 30; [1898] P. 78; 78 L. T. 296; 46 W. R. 586; 8 Asp. M. C. 391.

JEUNE, P.—What was, I think, an essential feature in those cases [*Johnson v. Royal Mail Co.* (*supra*) and *The Orchis*],—the personal liability of the defendants to pay the sum which the plaintiffs were considered to be compelled to pay and did pay—is wanting in the present instance.—p. 33.

The Orchis, referred to.

The Heather Bell (1901) 70 L. J. P. 36; [1901] P. 143; 84 L. T. 538; 49 W. R. 352.—JEUNE, P. (affirmed, C.A., *see supra*).

Williams v. Allsup (1861) 30 L. J. C. P. 353; 10 C. B. (N.S.) 417; 8 Jur. (N.S.) 57; 4 L. T. 550.—C.P., *referred to*.

The Scio (1867) L. R. 1 A. & E. 353, 355; 16 L. T. 642.—ADM.; The Harriet (1868) 18 L. T. 804.—ADM.; The Two Ellens (1871) 40 L. J. Adm. 11; L. R. 3 A. & E. 345.—P.C.

Williams v. Allsup, adopted.

The Ripon City (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M. C. 304.—BARNES, J.

7. BOTTOMRY.

The Emancipation (1840) 1 W. Rob. 124.—ADM.; and **The Indomitable** (1859) Swab. 446; 5 Jur. (N.S.) 632.—ADM., *applied*.

The Ilanbet (1899) 68 L. J. P. 121; [1899] P. 295; 81 L. T. 463; 48 W. R. 223; 8 Asp. M. C. 605.—BUCKNILL, J.

The Jacob (1802) 4 C. Rob. 245.—ADM., *commented on*.

Smith v. Bank of New South Wales, The Staffordshire (1872) L. R. 4 P. C. 194; 41 L. J. Adm. 49; 27 L. T. 46; 20 W. R. 557; 8 Moore P. C. (N.S.) 443.—P.C.

MELLISH, L.J.—The only case which has been cited was the case of *The Jacob*; it is unnecessary to say whether that was rightly decided, but it hardly appears to be an authority on the question, for there the subsequent freight had not been hypothecated; but Lord Stowell came to the conclusion that by deviating from the proper voyage, and from going away too early, the shipowner had wrongfully deprived the bottomry bondholder of the freight which really was pledged, namely, the freight to be earned in the current voyage, and that, therefore, it was right, the ship having got away before it could be seized, to hold that the subsequent freight could be seized. Their lordships gave no opinion, whether that was right or wrong, but that case does not appear to be an authority for giving a pledge of the subsequent freight.—p. 210.

The Laurel (1864) 11 Jur. (N.S.) 46; 13 W. R. 352; Br. & L. 317.—ADM., *applied*.

The Mary Ann (1865) L. R. 1 A. & E. 13.—ADM.

The Gratitude (1801) 3 C. Rob. 240.—ADM., *explained and distinguished*.

Benson v. Duncan (1849) 18 L. J. Ex. 169; 3 Ex. 644; 14 Jur. 218.—EX. CH.

PATTESON, J. (for the Court).—The case of *The Gratitude* dealt only with the authority of the master in respect of binding the cargo to the lender of the money—it determined nothing as to the relative rights of the owner of the ship and the owner of the cargo *inter se*; and any expression there used by Lord Stowell which might at first sight appear to have such a meaning, will be found on examination to be illustrative only, and not even professing to decide on any such relative rights.—p. 172.

The Gratitude, dictum not adopted.

The James Seddon (1866) 35 L. J. Adm. 117; L. R. 1 A. & E. 62; 12 Jur. (N.S.) 609; 14 W. R. 973.—ADM.

The Gratitude, applied.

The Soblomsten (1866) 36 L. J. Adm. 5, 7; L. R. 1 A. & E. 293, 299; 15 L. T. 393; 15 W. R. 591.—ADM.; The Karnak (1868) L. R. 2 A. & E. 289, 310; 37 L. J. Adm. 41.—ADM. (partly affirmed and partly reversed.—P.C.); Notara v. Henderson (1870) 39 L. J. Q. B. 157, 170; L. R. 5 Q. B. 346, 353; 22 L. T. 577.—Q.B. (affirmed, EX. CH.).

The Gratitude, recognised.

The Patria (1871) 41 L. J. Adm. 23; L. R. 3 A. & E. 436, 461; 24 L. T. 849; 1 Asp. M. C. 71.—ADM.

The Gratitude, dictum adopted.

The Onward (1873) 42 L. J. Adm. 61, 70; L. R. 4 A. & E. 38, 58; 28 L. T. 204; 21 W. R. 601; 1 Asp. M. C. 40.—ADM.

The Gratitude, adopted.

Metcalfe v. Britannia Ironworks Co. (1876) 45 L. J. Q. B. 837, 845; 1 Q. B. D. 613, 625; 35 L. T. 796.—Q.B.D. (affirmed, (1877) 46 L. J. Q. B. 443; 2 Q. B. D. 423; 36 L. T. 431; 25 W. R. 720; 3 Asp. M. C. 407.—C.A.); The Gaetano and Maria (1881) 51 L. J. P. 7; 7 P. D. 1, 4; 45 L. T. 510; 30 W. R. 108.—SIR R. PHILLIMORE (reversed, *infra*, col. 3301); The Pontida (1884) 53 L. J. Adm. 44; 9 P. D. 102; 51 L. T. 268; 5 Asp. M. C. 284.—BUTT, J. (affirmed, 53 L. J. Adm. 78; 9 P. D. 177; 51 L. T. 849; 33 W. R. 38; 5 Asp. M. C. 330.—C.A.).

The Vibilia (1829) 1 W. Rob. 1; 2 Hagg. 228.—ADM., *adopted*.

The Karnak (1868) 37 L. J. Adm. 41, 44; L. R. 2 A. & E. 289, 302.—ADM. (*see infra*).

The Prince of Saxe Coburg; Soares v. Rahn (1838) 3 Moore P. C. 1.—P.C., *explained*.

The Pontida (1884) 9 P. D. 177; 53 L. J. Adm. 78; 51 L. T. 849; 33 W. R. 38; 5 Asp. M. C. 330.—C.A.

BUTT, M.R.—The question of reasonable inquiry by the lender has never been the test of the liability of the shipowner. I think, with deference to the Privy Council, that their language in *The Prince of Saxe Coburg* was not quite so precise as could have been wished.

I think that the language in that case applies to the *bona fides* of the lender as affecting the validity of the bond *ab initio*, and whether it should be pronounced for at all. For if a bond is entered into without the least care or inquiry, or with the intention of imposing on the shipowner, it justifies the Court in declaring it to be void. But the rule that a bond though valid is so only to the extent to which money is needed for the actual necessities of the ship, is founded on the doctrine that by the law of England the master in a foreign port has no authority to bind the shipowner or cargo owner, except in case of necessity. The rule should be even more stringent as regards the cargo owner, for the master does not take goods on board as his agent, and is not his agent at all, unless an overruling necessity arises during the voyage. To assent to the argument urged on the part of the appellants would be to cut away the whole ground on which the authority of the master is based in a foreign port.—p. 180.

Benson v. Duncan (1849) 18 L. J. Ex. 169; 3 Ex. 644; 14 Jur. 218.—EX. CH., *adopted*.

The *Eugenie* (1878) L. R. 4 A. & E. 123, 126; 29 L. T. 314; 21 W. R. 957.—SIR R. PHILLIMORE.

Benson v. Duncan, *observations adopted*.

Atwood v. Sellar (1879) 48 L. J. Q. B. 465, 472; 4 Q. B. D. 342, 357; 41 L. T. 83; 27 W. R. 726.—Q.B.D., MANISTY, J. dissenting.

The Royal Stuart (1854) 2 Spinks 258.—ADM., *commented upon*.

The *Pontida* (1884) 53 L. J. Adm. 78; 9 P. D. 177, 181; 51 L. T. 849; 33 W. R. 38; 5 Asp. M. C. 330.—C.A.

The Osmanli (1849) 3 W. Rob. 198; 7 Not. of Cas. 322.—ADM., *considered*.

The *Karnak* (1868) 37 L. J. Adm. 41; L. R. 2 A. & E. 298, 305.—ADM. (partly affirmed and partly reversed, P.C., *see infra*).

The Salacia (1862) Lush. 545.—ADM., *adopted*.

The *Karnak* (1868) 37 L. J. Adm. 41; L. R. 2 A. & E. 298, 312.—ADM. (partly affirmed and partly reversed, P.C., *see infra*).

The Karnak, Droegge v. Stuart (1868) 37 L. J. Adm. 41; L. R. 2 A. & E. 289.—ADM.; *partly affirmed and partly reversed*, (1869) 38 L. J. Adm. 57; L. R. 2 P. C. 505; 6 Moore P. C. (N.S.) 186; 21 L. T. 159; 17 W. R. 1028.—P.C.

The Karnak, *approved*.

The *Empire of Peace* (1869) 39 L. J. Adm. 12 15; 21 L. T. 763.—ADM.

The Karnak, *applied*.

Currie v. Bombay Native Insurance Co. (1869) 39 L. J. P. C. 1, 7; L. R. 3 P. C. 72, 83; 6 Moore P. C. (N.S.) 302; 22 L. T. 317; 18 W. R. 296.—P.C.

The Karnak, *approved*.

The *Ida* (1872) 41 L. J. Adm. 85; L. R. 3 A. & E. 542, 550; 27 L. T. 457; 21 W. R. 39.—ADM.

The Karnak, *See*

The *Limerick* (1876) 1 P. D. 292, 299; 34 L. T. 708; 3 Asp. M. C. 206.—C.A.

The Karnak, *observations applied*.

The *Dora Forster* (1900) 69 L. J. Adm. 85; [1900] P. 241; 49 W. R. 271.—BARNES, J.

The Dante (1846) 2 W. Rob. 427.—ADM., *referred to*.

Stephens v. Broomfield, The *Great Pacific* (1869) 38 L. J. Adm. 45; L. R. 2 P. C. 516; 6 Moore P. C. (N.S.) 151; 21 L. T. 38; 17 W. R. 933.—P.C.

The Elephanta (1851) 15 Jur. 1185.—ADM., *applied*.

Stephens v. Broomfield, The *Great Pacific* (1869) 38 L. J. Adm. 45; L. R. 2 P. C. 516, 522; 6 Moore P. C. (N.S.) 151; 21 L. T. 38; 17 W. R. 933.—P.C.

The Oriental, Wallace v. Fielden, 3 W. Rob. 243.—ADM.; *reversed*, (1851) 7 Moore P. C. 398.—P.C.

The Oriental, *followed*.

The *Onward* (1878) 42 L. J. Adm. 61; L. R. 4 A. & E. 38; 28 L. T. 204; 21 W. R. 601; 1 Asp. M. C. 540.—ADM. *See extract, infra*, col. 3299.

The Oriental, and **The Onward**, *followed*.

Kleinwort v. Cassa Marittima di Genoa (1877) 2 App. Cas. 156; 36 L. T. 118; 25 W. R. 608; 3 Asp. M. C. 358.—P.C.

The Bonaparte, Wilkinson v. Wilson (1853) 8 Moore P. C. 459.—P.C., *corrected*.

Cargo ex Hamburg, Duranty v. Hart (1864) 10 Jur. (N.S.) 600; 33 L. J. Adm. 116; 2 Moore P. C. (N.S.) 289; Br. & L. 253; 10 L. T. 206; 12 W. R. 628.—P.C.

LORD CHELMSFORD (for the Court).—The important sentence in that judgment is to be found in p. 470, and is as follows:—"That it is an universal rule that the Master, if in a state of distress or pressure, before hypothecating the cargo, must communicate, or even endeavour to communicate, with the owner of the cargo, has not been alleged, and is a position that could not be maintained; but it may safely, both on authority and on principle, be said that, in general, it is his duty to do so, or it is his duty, in general, to attempt to do so." This sentence is followed by one which in the report is printed as follows:—"If, according to the circumstances in which he is placed it is reasonable that he should, it was rational to expect that he might obtain an answer within a time not inconvenient with reference to the circumstances of the case; it must be taken, therefore, upon authority and principle, that it is the duty of the master to do so, or at least to make the attempt." This passage is obviously inaccurate. The judgment was not written, but appears to have been printed from a shorthand writer's note. It is not, however, difficult to collect what really was said by the learned judge, and, with a slight correction of the text, it would stand thus:—"If, according to the circumstances in which he is placed it be reasonable that he should—if it be rational to expect that he may obtain an answer within a time not inconvenient with reference to the circumstances of the case, then it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt." That this is the true wording of the passage we have ascertained by communicating with Lord Justice Knight Bruce, who delivered the judgment. It is a

most important passage, and the complement and explanation of what goes before. The preceding sentence states that it is the duty of the master in certain circumstances to make an attempt to make the communication, and this sentence explains what the circumstances are in which this duty is imposed upon him. It shows what the learned judge understood by the expression "in general," if such words were used by him. The reporter has accurately stated in his marginal note the general rule established by the decision, though he has unfortunately omitted to correct the press in that portion of the judgment in which it is expressed. In the rule thus enunciated their lordships are unable to discern any novelty, either in the principle on which it rests, or in its application to the case.—p. 602.

The Bonaparte, adopted.

Lloyd v. Guibert (1865) 35 L. J. Q. B. 74, 78; L. R. 1 Q. B. 115, 125; 6 B. & S. 100; 13 L. T. 602.—EX. CH. (affirming 10 Jur. (N.S.) 949; 12 W. R. 953.—Q.B.); and *The Lizzie* (1868) L. R. 2 A. & E. 254, 258; 19 L. T. 71.—ADM.

The Bonaparte, followed.

Australasian Steam Navigation Co. v. Morse (1872) L. R. 4 P. C. 222; 8 Moore P. C. (N.S.) 482; 27 L. T. 357; 20 W. R. 728; 1 Asp. M. C. 407.—P.C.

SIR MONTAGUE SMITH (for the Court).—The possibility of communicating with the owners must, of course, depend on the circumstances of each case, involving the consideration of the facts which create the urgency for an early sale, the distance of the port from the owners, the means of communication which may exist, and the general position of the master in the particular emergency. Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it could be obtained, before the sale. When, however, there is ground for such an expectation, every endeavour, so far as the position in which he is placed will allow, should be made by the master to obtain the owner's instructions. (See the judgment of this Board by Knight Bruce, L.J., in the case of *The Bonaparte*; the corrected passage is given in the report of *The Cargo ex Hamburg, infra*, col. 3300).—p. 231.

The Bonaparte, distinguished.

The Onward (1873) 42 L. J. Adm. 61; L. R. 4 A. & E. 38; 28 L. T. 204; 21 W. R. 601; 1 Asp. M. C. 40.—ADM.

SIR R. PHILLIMORE.—On the other hand, the case of *The Bonaparte* was cited to establish the proposition that if owners of cargo had ample information of disasters which had befallen the vessel, there was a sufficient communication. But an examination of the communications made in that case to the owners enables me to reconcile the judgment in it with the preceding case of *The Oriental* (*supra*, col. 3298). In that case the owners of the cargo were specially apprised of the injury done, not only to the ship but to the cargo; and, moreover, their advice was specially requested as to what in the circumstances it would be best to do; and it was held that as they chose to pass by the whole matter in silence, and gave no instructions, which had been particularly and immediately requested, the communication was sufficient.—p. 217.

The Bonaparte, applied.

Kleinwort v. Cassa Marittima of Genoa (1877) 2 App. Cas. 156; 36 L. T. 118; 25 W. R. 608; 3 Asp. M. C. 358.—P.C.; *Acatos v. Burns* (1878) 47 L. J. Ex. 566, 570; 3 Ex. D. 282, 291; 26 W. R. 624.—C.A.

The Bonaparte, referred to.

The Gaetano and Maria (1881) 51 L. J. Adm. 7; 7 P. D. 1; 45 L. T. 511.—ADM., reversed, (1882) 51 L. J. Adm. 67; 7 P. D. 137; 46 L. T. 835; 30 W. R. 766; 4 Asp. M. C. 470.—C.A.

The Hamburg, Cargo Ex, Duncanty v. Hart

(1864) 2 Moore P. C. (N.S.) 289; 33 L. J. Adm. 116; Br. & Lush. 253; 10 Jur. (N.S.) 600; 10 L. T. 206; 12 W. R. 628.—P.C., considered and distinguished.

Lloyd v. Guibert (1865) 35 L. J. Q. B. 74, 78; L. R. 1 Q. B. 115, 125; 6 B. & S. 100; 13 L. T. 602.—EX. CH., affirming 10 Jur. (N.S.) 949; 12 W. R. 953.—Q.B.

The Hamburg, Cargo Ex, applied.

The Lizzie (1868) L. R. 2 A. & E. 254, 257; 19 L. T. 71.—ADM.

The Hamburg, Cargo Ex, referred to.

The Empire of Peace (1869) 39 L. J. Adm. 12, 15; 21 L. T. 763.—ADM.; *The San Roman* (1872) 41 L. J. Adm. 72, 77; L. R. 3 A. & E. 583, 593.—ADM., affirmed, (1873) 42 L. J. Adm. 46; L. R. 5 P. C. 301; 21 W. R. 393; 1 Asp. M. C. 603.—P.C.

The Hamburg, Cargo Ex, followed.

Australasian Steam Navigation Co. v. Morse (1872) 8 Moore P. C. (N.S.) 482; L. R. 4 P. C. 222; 27 L. T. 357; 20 W. R. 728; 1 Asp. M. C. 407.—P.C. See extract, *supra*, col. 3299.

The Hamburg, Cargo Ex, referred to.

Kleinwort v. Cassa Marittima of Genoa (1877) 2 App. Cas. 156; 36 L. T. 118; 25 W. R. 608; 3 Asp. M. C. 358.—P.C.

The Hamburg, Cargo Ex, applied.

Acatos v. Burns (1878) 47 L. J. Ex. 566; 3 Ex. D. 282, 291; 26 W. R. 624.—C.A.

The Hamburg, Cargo Ex, explained and distinguished.

The Gaetano v. Maria (1882) 51 L. J. Adm. 67; 7 P. D. 137; 46 L. T. 835; 30 W. R. 766; 4 Asp. M. C. 470.—C.A.

BRETT, L.J.—Sir R. Phillimore in the Court below thought that *The Hamburg* governed the present case. But I think that it does not govern this case at all; for Dr. Lushington there treated the ship as an English ship, and while administering the maritime law of England, expressed an opinion that he did not know what his decision would have been if there had been any evidence that the maritime law of some other country was different; but there was no such evidence, so that the point did not arise in that case. The P. C. agreed with that decision, and, therefore, in neither Court was it decided which law would have been administered if there had been a conflict of law. . . . Acting upon the principle laid down in *Lloyd v. Guibert* (*infra*, col. 3303), and also upon the principle which seems to me to arise from the mercantile contract itself, I think that whoever puts goods on board a foreign ship, puts them on board subject to be dealt with according to the law of

the ship's flag, unless the authority of the master is limited by any stipulation in the bill of lading or charter-party.—p. 72.

The Gaetano and Maria (1881) 51 L. J. P. 7; 7 P. D. 1; 45 L. T. 510; 30 W. R. 108.—SIR R. PHILLIMORE; *reversed*, (1882) 51 L. J. P. 67; 7 P. D. 137; 46 L. T. 835; 30 W. R. 766; 4 Asp. M. C. 470.—C.A.

The Gaetano and Maria, *followed*.

The August (1891) 60 L. J. P. 57; [1891] P. 328; 66 L. T. 32; 7 Asp. M. C. 110.—HANNEN, P.

The Gaetano and Maria, *applied*.

The Industrie (1893) 63 L. J. Adm. 84; [1894] P. 58; 6 R. 681; 70 L. T. 791; 42 W. R. 280; 7 Asp. M. C. 457.—C.A. ESHER, M.R., LOPES and KAY, L.J., reversing BARNES, J.

The Gaetano and Maria, *dictum adopted*.

The Gas Float Whitton, No. 2 (1895) 65 L. J. P. 17; [1896] P. 42; 73 L. T. 698; 44 W. R. 263.—C.A.

The Glenmanna, (1860) Lush. 115.—ADM., *dictum applied*.

The Generous (1868) 37 L. J. Adm. 37; L. R. 2 A. & E. 57, 63; 17 L. T. 552; 16 W. R. 519.—ADM.

The Priscilla (1859) Lush. 1; 5 Jur. (N.S.) 1421; 1 L. T. 272.—ADM., *considered*.

The Edward Oliver (1867) 36 L. J. Adm. 13; L. R. 1 A. & E. 379; 16 L. T. 575.—ADM.

The North Star (1860) Lush. 45; 29 L. J. Adm. 73; 2 L. T. 264.—ADM. *See*

The Daring (1868) 37 L. J. Adm. 29; L. R. 2 A. & E. 260, 263.—ADM.; and The Karnak (1868) 37 L. J. Adm. 41; L. R. 2 A. & E. 289, 302.—ADM. (partly reversed, P.C., *supra*, col. 3297).

The Edward Oliver (1867) 36 L. J. Adm. 13; L. R. 1 Adm. 379; 16 L. T. 575.—ADM., *explained*.

The Daring (1868) 37 L. J. Adm. 29; L. R. 2 A. & E. 260, 262.—ADM.

The Edward Oliver, *followed*.

The Eugenie (1873) L. R. 4 A. & E. 123; 29 L. T. 314; 21 W. R. 957; 2 Asp. M. C. 104.—SIR R. PHILLIMORE.

The Edward Oliver, *distinguished*.

The Chioggia (1897) 66 L. J. P. 174; [1898] P. 1; 77 L. T. 472; 46 W. R. 253; 8 Asp. M. C. 352.

BARNES, J. — In the present case the two funds belong to different persons — that is, the ship-owner and cargo-owners respectively, and, in my opinion, the necessities men have no right of marshalling. They have no equity to have the claims adjusted so as to compel the cargo-owners in effect to provide the means of discharging the claim for necessities. The case of *The Edward Oliver*, which was principally relied on by the counsel for the necessities men, does not apply, although the effect of that decision was to compel the cargo-owners to pay a balance which was greater by the exact sum paid to the master out of the proceeds of ship and freight. The master had a lien on the proceeds for the amount of his claim, and it was merely decided that the rule that a

master who has bound himself as well as the ship and freight for the payment of a *bottomry bond* is not entitled to payment of his own claim in priority to that of the bond-holders cannot be invoked by the cargo-owners, and will not be acted on where the bond-holder will not be prejudiced by the master being paid before him.—p. 176.

The Elpis (1872) 42 L. J. Ad. 43; L. R. 4 A. & E. 1; 27 L. T. 664; 21 W. R. 576; 1 Asp. M. C. 572.—ADM.: **The Cecillie** (1879) 4 P. D. 210; 40 L. T. 200; 4 Asp. M. C. 78.—ADM., *applied*.

The Haabet (1899) 68 L. J. P. 121; [1899] P. 295; 81 L. T. 463; 48 W. R. 223; 8 Asp. M. C. 605.—BUCKNILL, J.

8. CHARTER-PARTY.

Wake v. Harrop (1861) 30 L. J. Ex. 273; 6 H. & N. 768; 9 W. R. 788.—EX.; *affirmed*, (1862) 1 H. & C. 202; 31 L. J. Ex. 451; 8 Jur. (N.S.) 845; 7 L. T. 96; 10 W. R. 626.—EX. CH.

Wake v. Harrop, *applied*.

Guardhouse v. Blackburn (1866) 35 L. J. P. 116, 119; L. R. 1 P. & D. 109, 115; 12 Jur. (N.S.) 278; 14 L. T. 69; 14 W. R. 463.—P.

Wake v. Harrop, *discussed*.

Druiff v. Parker (1868) 37 L. J. Ch. 241; L. R. 5 Eq. 131, 137; 18 L. T. 46; 16 W. R. 557.—WOOD, V.-C.

Wake v. Harrop, *followed*.

Cowie v. Witt (1874) 23 W. R. 76.—C.P.

Wake v. Harrop, *applied*.

Nicoll v. Bell (1875) 32 L. T. 815.—Q.B.; and Clever v. Kirkman (1875) 33 L. T. 672; 24 W. R. 159.—C.P.D.

Parker v. Winlo (1857) 27 L. J. Q. B. 49; 7 El. & Bl. 942; 4 Jur. (N.S.) 584.—Q.B. *referred to*.

Williamson v. Barton (1861) 31 L. J. Ex. 170; 7 H. & N. 899; 8 Jur. (N.S.) 341; 5 L. T. 800; 10 W. R. 321.—EX.; Concordia Chemische Fabrik auf Actien v. Squire (1876) 34 L. T. 824, 826.—C.A.; Dahl v. Nelson (1881) 50 L. J. Ch. 411; 6 App. Cas. 38, 51; 44 L. T. 381; 29 W. R. 543; 6 Asp. M. C. 392.—H.L. (E.); Horsley v. Price (1883) 52 L. J. Q. B. 603, 605; 11 Q. B. D. 244, 247; 49 L. T. 101; 31 W. R. 786; 5 Asp. M. C. 106.—NORTH, J.; Allen v. Coltart (1883) 52 L. J. Q. B. 686, 688; 11 Q. B. D. 782, 786; 48 L. T. 944; 31 W. R. 841; 5 Asp. M. C. 104.—CAVE, J.

Peek v. Larsen (1871) 40 L. J. Ch. 763; L. R. 12 Eq. 378; 25 L. T. 580; 19 W. R. 1045; 1 Asp. M. C. 163.—M.R., *applied*.

Hayn v. Culliford (1878) 47 L. J. C. P. 755; 3 C. P. D. 410; 39 L. T. 288.—C.P.D., *affirmed*, (1879) 48 L. J. C. P. 372; 4 C. P. D. 182; 40 L. T. 536; 27 W. R. 541; 4 Asp. M. C. 128.—C.A.

Peek v. Larsen, *distinguished*.

Jones v. Hough (1879) 49 L. J. Ex. 211, 213; 5 Ex. D. 115, 120; 42 L. T. 108; 4 Asp. M. C. 248.—C.A.

COCKBURN, C.J.—It was there held that a

person who had put goods on board a general ship without any knowledge of the charter-party under which that ship was chartered, was, on discovering the nature of that charter-party, entitled to have his goods returned to him. That appears to be but reasonable; and if, in the present case, when the captain refused to sign the bills of lading, the plaintiffs had directed him to return the cargo to them, different considerations would have arisen; but they did not do anything of the kind. The captain was bound to take the cargo pursuant to the charter-party, that is, he was bound to sign a bill of lading in the usual form, and he was also bound to take the cargo to Bilbao. He did the latter and failed to do the former, but the plaintiffs made no protest as to this, and he proceeded with the full intention of delivering the cargo to their consignees, and so to fulfil the contract. Therefore I am of opinion that there has been no conversion of that cargo.—p. 213.

Peek v. Larsen, approved.

The Stornoway (1882) 51 L. J. Adm. 27; 46 L. T. 773; 4 Asp. M. C. 529.—SIR R. PHILLIMORE.

Manchester Trust Co. v. Furness (1895) [1895] 2 Q. B. 282.—MATHEW, J.; *affirmed*, 64 L. J. Q. B. 766; [1895] 2 Q. B. 539; 14 R. 739; 73 L. T. 110; 44 W. R. 178; 8 Asp. M. C. 57.—C.A.

Manchester Trust Co. v. Furness, followed.

Diederichsen v. Farquharson (1897) 67 L. J. Q. B. 103; [1898] 1 Q. B. 150; 77 L. T. 543; 46 W. R. 162; 8 Asp. M. C. 333.—C.A. SMITH, RIGBY and COLLINS, L.J.

Manchester Trust Co. v. Furness, referred to.

Molyneux v. Hawtry (1903) 72 L. J. K. B. 873; [1903] 2 K. B. 487; 89 L. T. 350; 52 W. R. 23.—C.A.

Lloyd v. Guibert (1865) 35 L. J. Q. B. 74;

L. R. 1 Q. B. 115; 6 B. & S. 100; 13 L. T. 602.—EX. CH., *referred to*.

The Karnak, Droege v. Stuart (1869) 38 L. J. Adm. 57, 59; L. R. 2 P. C. 505, 511; 6 Moore P. C. (N.S.) 136; 21 L. T. 159; 17 W. R. 1028.—P.C.; The Empire of Peace (1869) 39 L. J. Adm. 12, 15; 21 L. T. 763.—ADM.; Ellis v. McHenry (1871) 40 L. J. C. P. 109; L. R. 6 C. P. 228, 238; 23 L. T. 861; 19 W. R. 503.—C.P.

Lloyd v. Guibert, distinguished.

The Patria (1871) 41 L. J. Adm. 23; L. R. 3 A. & E. 436; 24 L. T. 849; 1 Asp. M. C. 71.—SIR R. PHILLIMORE.

Lloyd v. Guibert, observed upon.

The San Roman (1872) 41 L. J. Adm. 72, 77; L. R. 3 A. & E. 583, 593; 26 L. T. 948.—ADM., *affirmed*, (1873) 42 L. J. Adm. 46; L. R. 5 P. C. 301; 21 W. R. 393; 1 Asp. M. C. 603.—P.C.

Lloyd v. Guibert, adopted.

James v. L. & S. W. Ry. (1872) 41 L. J. Ex. 186, 187; L. R. 7 Ex. 287, 290; 27 L. T. 382; 21 W. R. 25; 1 Asp. M. C. 226.—EX. CH.; Nugent v. Smith (1875) 45 L. J. C. P. 19, 23; 1 C. P. D. 19, 24; 33 L. T. 731.—C.P.D., *reversed*, (1876) 45 L. J. C. P. 397; 1 C. P. D. 423; 34 L. T. 827; 24 W. R. 237; 3 Asp. M. C. 198.—C.A.

Lloyd v. Guibert, considered.

The M. Moxham (1875) 45 L. J. Adm. 36, 38; 1 P. D. 43, 51; 33 L. T. 463; 3 Asp. M. C. 95.—ADM. (*reversed*, C.A., *infra*, col. 3424).

Lloyd v. Guibert, adopted.

Moore v. Harris (1876) 45 L. J. P. C. 55, 62; 1 App. Cas. 318, 331; 34 L. T. 519; 24 W. R. 887; 3 Asp. M. C. 173.—P.C.

Lloyd v. Guibert, referred to.

Cohen v. South Eastern Ry. (1877) 25 W. R. 475; 2 Ex. D. 253; 46 L. J. Ex. 417; 36 L. T. 130; 3 Asp. M. C. 248.—C.A.

MELLISH, L.J.—That case went upon the principle that when a man is sent about the world, the authority he goes with is to contract according to the law of his own country.—p. 475.

Lloyd v. Guibert, referred to.

Chamberlain v. Napier (1880) 49 L. J. Ch. 628; 15 Ch. D. 614; 29 W. R. 794.—HALL, V.-C.

Lloyd v. Guibert, applied.

The Gaetano and Maria (1882) 7 P. D. 137; 51 L. J. Adm. 67; 46 L. T. 835; 30 W. R. 766; 4 Asp. M. C. 470.—C.A.

BRETT, L.J.—The case of *Lloyd v. Guibert* does not seem to me to govern this case absolutely, because the question there was whether or not a certain stipulation was implied in a contract. The contract was a contract of affreightment, and the question was whether there was to be implied into that contract a stipulation that if certain circumstances arose, and the master delivered up his ship and freight, the shipowner should not be made liable beyond the amount specified. The owner of the ship could only be relieved if there was such a stipulation in the contract of affreightment. There would have been no such stipulation if it was to be judged according to the law of the forum, that is, the law of the English Court. But there would be such a stipulation if the contract of affreightment was to be construed according to the law of the ship. It was there held that inasmuch as the contract of affreightment was made with the master or owner of a foreign ship abroad, the contract was the contract of the country of the ship; in other words, that it was governed by the law of the "flag" of the ship, and inasmuch as in the country of that flag such a contract of affreightment would have had such a stipulation in it, then the English Court would hold that it had this stipulation in it. That is not this case, because the matter here is not the question of the construction of a contract, but of what authority arises out of the fact of a contract having been entered into. Still, if the contract was held there to be a foreign contract because it was made with regard to the shipment of goods on board a foreign ship, the principle governs this case, and would authorise our saying that the authority which arises out of the contract of shipment is the authority which the law of the country of the ship would give to the master; and in accordance with that principle I think this case ought to be decided.—p. 146.

Lloyd v. Guibert, considered and distinguished.

Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co. (1883) 52 L. J. Q. B. 220, 228; 10 Q. B. D. 521, 540; 48 L. T. 546; 31 W. R. 445; 5 Asp. M. C. 65; 47 J. P. 260.—C.A.

LINDLEY, L.J.—There can, I think, be no doubt that the parties were contracting with reference to English law, and not with reference to the law of the country under whose flag the

ship sailed in order to obtain the privilege of trading with Java. This conclusion is not at all at variance with *Lloyd v. Guibert*, but rather in accordance with it. It is true that in that case the law of the flag prevailed; but the intention of the parties was admitted to be the crucial test; and the law of the ship's flag was considered as the law intended by the parties to govern their contract, as there was really no other law which they could reasonably be supposed to have contemplated.—p. 228.

Lloyd v. Guibert, applied.

Jacobs v. Crédit Iyonnais (1884) 53 L. J. Q. B. 156; 12 Q. B. D. 589; 50 L. T. 194; 32 W. R. 761.—C.A. BRETT, M.R. and BOWEN, L.J.

Lloyd v. Guibert, followed.

Missouri S.S. Co., *Monroe's Claim*, *in re* (1889) 58 L. J. Ch. 721; 42 Ch. D. 321; 61 L. T. 316; 37 W. R. 696.—C.A.

Lloyd v. Guibert, principle applied.

The August (1891) 60 L. J. P. 57; [1891] P. 328; 66 L. T. 32; 7 Asp. M. C. 110.—HANNEN, P.

Lloyd v. Guibert, applied.

Krell v. Henry (1903) 72 L. J. K. B. 794; [1903] 2 K. B. 749; 89 L. T. 328.—C.A.

Missouri Steamship Co., *in re*, *Monroe's Claim* (1889) 58 L. J. Ch. 721; 42 Ch. D. 321; 61 L. T. 316; 37 W. R. 696; 6 Asp. M. C. 423.—C.A., applied.

South African Breweries v. King (1899) 68 L. J. Ch. 530; [1899] 2 Ch. 173; 81 L. T. 76; 47 W. R. 681.—KEKEWICH, J., affirmed, 69 L. J. Ch. 171; [1900] 1 Ch. 273; 82 L. T. 32; 48 W. R. 289.—C.A. LINDLEY, M.R., WILLIAMS and ROMER, L.JJ.

Missouri Steamship Co., *in re*, *Monroe's Claim*, followed.

Royal Exchange Assurance Corporation v. Sjöforsakrings Aktiebolaget Vega (1901) 70 L. J. K. B. 874; [1901] 2 K. B. 567; 85 L. T. 241; 50 W. R. 25; 6 Com. Cas. 189; 9 Asp. M. C. 238.—BIGHAM, J.

Missouri Steamship Co., *in re*, applied.

Kaufman v. Gerson (1903) 72 L. J. K. B. 596; [1903] 2 K. B. 114; 88 L. T. 691; 51 W. R. 683.—WRIGHT, J.; reversed, C.A.

Steel Young & Co. v. Grand Canary Coaling Co. (1902) 87 L. T. 321; 7 Com. Cas. 213.—C.A. COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.; reversing PHILLIMORE, J.

Shield v. Wilkins (1850) 19 L. J. Ex. 238; 5 Ex. 304.—EX., applied.

The Alhambra (1881) 50 L. J. Adm. 36; 6 P. D. 68; 43 L. T. 636; 29 W. R. 655; 4 Asp. M. C. 410.—C.A.

Shield v. Wilkins, inapplicable.

Dahl v. Nelson (1881) 50 L. J. Ch. 411, 418; 6 App. Cas. 38, 50; 44 L. T. 381; 29 W. R. 543; 4 Asp. M. C. 392.—H.L. (E.).

Shield v. Wilkins, dictum adopted.

Nielsen v. Wait (1885) 14 Q. B. D. 516, 521.—POLLOCK, B.; affirmed, C.A., *post*, col. 3306.

Scrutton v. Childs (1877) 36 L. T. 212; 3 Asp. M. C. 373.—Q.B.D., held overruled.

The Nifa (1892) 62 L. J. P. 12; [1892] P. 411;

1 R. 540; 69 L. T. 56; 7 Asp. M. C. 324.—JEUNE, P. and SMITH, J.

SMITH, J.—In *Scrutton v. Childs* it does not seem that I took the right point, I was rather arguing whether the written part [of the charter-party] was to control the printed part. The point I should have taken which has been taken in all the cases since, is that the writing is not contradictory. You have got "taking to and from ship's rail" is to be at merchant's expense. To be loaded and unloaded as customary does not contradict it. It means that the loading and unloading are to be according to the custom of the port, but not as regards the expenses to be borne. I do not know whether *Scrutton v. Childs* has been expressly, in so many words, overruled; but my opinion is that it cannot stand after *Holman v. Wade* (Times, 11th May, 1877) and *Hayton v. Irwin* (5 C. P. D. 130).

Hayton v. Irwin (1879) 5 C. P. D. 130; 41 L. T. 666; 28 W. R. 665; 4 Asp. M. C. 212.—C.A., not applied.

Horsley v. Price (1883) 52 L. J. Q. B. 603, 606; 11 Q. B. D. 244, 250; 49 L. T. 101; 31 W. R. 786; 5 Asp. M. C. 106.—NORTH, J.

Hayton v. Irwin, followed.

The Nifa (1892) 62 L. J. P. 12; [1892] P. 411; 1 R. 540; 69 L. T. 56.—JEUNE, P. and SMITH, J.

The Alhambra, 49 L. J. P. 73; 5 P. D. 256; 43 L. T. 81; 29 W. R. 215.—ADM.; reversed, (1881) 50 L. J. P. 36; 6 P. D. 68; 43 L. T. 636; 29 W. R. 655; 4 Asp. M. C. 410.—C.A.

The Alhambra, observed upon.

Horsley v. Price (1883) 52 L. J. Q. B. 603; 11 Q. B. D. 244, 250; 49 L. T. 101; 31 W. R. 786; 5 Asp. M. C. 106.—NORTH, J.

The Alhambra, followed.

Reynolds v. Tomlinson (1896) 65 L. J. Q. B. 496; [1896] 1 Q. B. 526; 74 L. T. 591; 8 Asp. M. C. 150.—DAY, J. See extract, *infra*.

Nielsen v. Wait (1885) 55 L. J. Q. B. 87; 16 Q. B. D. 67; 54 L. T. 344; 34 W. R. 38; 5 Asp. M. C. 553.—C.A., distinguished.

Reynolds v. Tomlinson (1896) 65 L. J. Q. B. 496; [1896] 1 Q. B. 526; 74 L. T. 591; 8 Asp. M. C. 150.

DAY, J.—There is no question here of demurrage, but simply whether the captain was bound to proceed to Gloucester. That is a very different question to that considered in *Nielsen v. Wait*. If a place is not a safe port in the ordinary sense, it is not safe for any ship of this size with such a cargo to attempt to go to Gloucester. I know of no custom which can impose upon the captain the duty of unloading his ship and taking her up to a place without the whole cargo on board. . . . the County Court judge was, I think, wrong in holding that Gloucester was a safe port, having regard to the custom, because the custom is not, in my judgment, incorporated with any contract "that has been" made. The contract is to deliver at a safe port in the ordinary sense, not at a safe port rendered safe by custom. This, to my mind, brings the case entirely within the principle of *The Alhambra* (*supra*).—p. 498.

LAWRANCE, J. to the same effect.

Jones v. Hough (1880) 49 L. J. Ex. 211; 5 Ex. D. 115; 42 L. T. 108; 4 Asp. M. C. 248.—C.A., *followed*.
The Princess (1894) 6 R. 723; 70 L. T. 388; 7 Asp. M. C. 432.—JEUNE, P.

Jones v. Hough, *commented on*.
Rayner v. Rederiaktiebolaget Condor (1895) 64 L. J. Q. B. 540; [1895] 2 Q. B. 289; 15 R. 542; 73 L. T. 96; 8 Asp. M. C. 43.—MATHEW, J.

Hansen v. Harrold (1894) 63 L. J. Q. B. 744; [1894] 1 Q. B. 612; 9 R. 315; 70 L. T. 475; 7 Asp. M. C. 464.—C.A., *referred to*.
Williams v. Canton Insurance Office (1901) 70 L. J. K. B. 962; [1901] A. C. 462; 85 L. T. 317; 6 Com. Cas. 256.—H.L. (E.). **LORDS HALSBURY, L.C., MACNAGHTEN, DAVEY, BRAMPTON and LINDLEY**.

Leslie v. De la Torre (1795) *cited* 12 East 578, 583.—K.B., *doubted*.
Nash v. Armstrong (1861) 10 C. B. (N.S.) 259; 7 Jur. (N.S.) 1060; 30 L. J. C. P. 286; 9 W. R. 782.—C.P.

WILLES, J.—[*Leslie v. De la Torre*, where Lord Kenyon, C.J., decided that an agreement by charter-party being under seal, a parol agreement inconsistent with, and to a certain extent altering it, could not be set up.] I doubt the accuracy of the ruling attributed to Lord Kenyon in *Leslie v. De la Torre*.

Barriek v. Buba (1857) 26 L. J. C. P. 280; 2 C. B. (N.S.) 563.—C.P., *referred to*.

Frost v. Knight (1872) 41 L. J. Ex. 78; L. R. 7 Ex. 111; 26 L. T. 77; 20 W. R. 471.—EX. CH.; **Roper v. Johnson** (1873) 42 L. J. C. P. 65; L. R. 8 C. P. 167, 177; 28 L. T. 296; 21 W. R. 384.—C.P.; **Johnstone v. Milling** (1886) 55 L. J. Q. B. 162; 16 Q. B. D. 460, 470; 54 L. T. 629; 34 W. R. 238; 50 J. P. 694.—C.A.

Lyon v. Mells (1804) 5 East 428; 7 R. R. 726.—K.B., *explained*.

Chippendale v. Lancashire and Yorkshire Ry. (1851) 21 L. J. Q. B. 22; 15 Jur. 1106; 7 Railw. Cas. 824.—COLERIDGE and ERLE, JJ.

Lyon v. Mells, *explained*.

Redhead v. Midland Ry. (1869) 38 L. J. Q. B. 169, 175; L. R. 4 Q. B. 379, 391; 9 B. & S. 519; 20 L. T. 628; 17 W. R. 737.—EX. CH.

Lyon v. Mells, *discussed and applied*.

Liver Alkali Co. v. Johnson (1874) 43 L. J. Ex. 216, 222; L. R. 9 Ex. 338, 342; 31 L. T. 95; 2 Asp. M. C. 332.—EX. CH.

Lyon v. Mells, *discussed and applied*.

Kopitoff v. Wilson (1876) 45 L. J. Q. B. 436; 1 Q. B. D. 377, 381; 34 L. T. 677; 24 W. R. 706; 3 Asp. M. C. 163.—Q.B.D.

Lyon v. Mells, *discussed*.

Nugent v. Smith (1876) 45 L. J. C. P. 697, 704; 1 C. P. D. 423, 432; 34 L. T. 827; 24 W. R. 237; 3 Asp. M. C. 198.—C.A.; **Harris v. G. W. Ry.** (1876) 45 L. J. Q. B. 729, 736; 1 Q. B. D. 515, 519; 34 L. T. 647; 25 W. R. 63.—Q.B.D.

Lyon v. Mells, *applied*.

Steel v. State Line S.S. Co. (1877) 3 App. Cas. 72, 77; 37 L. T. 333; 3 Asp. M. C. 516.—H.L. (SC.); **The Glenfruin** (1885) 54 L. J. P. 49; 10 P. D. 103, 108; 52 L. T. 769; 33 W. R. 826; 5 Asp. M. C. 413.—BUTT, J.

Cohn v. Davidson (1877) 46 L. J. Q. B. 305; 2 Q. B. D. 455; 36 L. T. 244; 25 W. R. 369; 3 Asp. M. C. 374.—Q.B.D., *distinquished*.

The Rona (1884) 51 L. T. 28; 5 Asp. M. C. 259.—HANNEN, P. and FIELD, J.

FIELD, J.—I myself do not believe that Lush, L.J. (in the above case), intended to lay down any such doctrine as that a passenger, whose duty it is to use due care and skill, may be excused for a breach of that duty simply if he honestly exercises a judgment in doing it. That certainly was not the view which the Court (of which I had the honour of being a member) took of that, but we considered in that case, although the question itself was made a strong point by the Solicitor-General, that it might possibly, taken by itself, have misled the jury, yet when accompanied by the observations of the Lord Justice, in summing-up to the jury, it showed that no such damage was sustained. That was the true effect of *Cohn v. Davidson*, in my opinion. I cannot see that, in the present case, the master brings himself within that protection, because he took no means and exercised no judgment whatever.—p. 33.

Stanton v. Richardson (1872) 41 L. J. C. P. 180; L. R. 7 C. P. 421; 27 L. T. 513.—C.P.; *affirmed*, (1874) 43 L. J. C. P. 230; L. R. 9 C. P. 390; 30 L. T. 643.—EX. CH.; *the latter decision affirmed*, (1875) 45 L. J. C. P. 78; 33 L. T. 193; 24 W. R. 324; 3 Asp. M. C. 23.—H.L. (E.).

Stanton v. Richardson, *applied*.

Kopitoff v. Wilson (1876) 45 L. J. Q. B. 436, 439; 1 Q. B. D. 377, 381; 34 L. T. 677; 24 W. R. 706; 3 Asp. M. C. 163.—Q.B.D.

Stanton v. Richardson, *applied*.

Queensland and National Bank v. P. & O. Steam Navigation Co. (1898) [1898] 1 Q. B. 567; 67 L. J. Q. B. 402; 78 L. T. 67; 46 W. R. 324; 8 Asp. M. C. 338.—C.A.

Thin v. Richards (1892) 62 L. J. Q. B. 39; [1892] 2 Q. B. 141; 66 L. T. 584; 40 W. R. 617; 7 Asp. M. C. 165.—C.A., *explained*.

The Vortigern (1899) 78 L. J. P. 49; [1899] P. 140; 80 L. T. 382; 47 W. R. 437; 8 Asp. M. C. 523.—C.A. **RUSSELL, C.J., SMITH and COLLINS, L.JJ.**

SMITH, L.J.—But there is also the case in this Court in the year 1892 of *Thin v. Richards & Co.*, which I am unable to distinguish on principle from the present. . . . The doubt expressed by Lord Esher as to whether it was a voyage divided into stages seems to me to have been, not that a voyage could never be divided into stages if the necessity of the case required it, but whether in such a comparatively short voyage as from Oran to Liverpool the necessity of dividing the voyage into stages had been established by proof.—pp. 56, 57.

Thin v. Richards, *applied*.

Greenock S.S. Co. v. Maritime Insurance Co. (1902) [1903] 1 K. B. 367; 51 W. R. 447; 9 Asp. M. C. 364.—BIGHAM, J.; *affirmed*, C.A.

Behn v. Burness (1861) 31 L. J. Q. B. 73; 8 Jur. (N.S.) 358.—Q.B.; *reversed*, (1863) 32 L. J. Q. B. 204; 3 B. & S. 751; 9 Jur. (N.S.) 620; 8 L. T. 207; 11 W. R. 496.—EX. CH. *And see post*.

Behn v. Burness (*supra*), *observations adopted*.
Heilbutt v. Hickson (1872) 41 L. J. C. P. 228;
 L. R. 7 C. P. 438, 450; 27 L. T. 336; 20 W. R.
 1035.—C.P.; *Corkling v. Massey* (1873) 42 L. J.
 C. P. 153; L. R. 8 C. P. 395, 400; 28 L. T. 636;
 21 W. R. 680; 1 Asp. M. C. 18.—C.P.

Behn v. Burness, *followed*.
Oppenheim v. Fraser (1876) 34 L. T. 524; 3
 Asp. M. C. 146.—Q.B.D.; *Sheffield Silver Nickel*
and Plated Co. v. Unwin (1877) 46 L. J. Q. B.
 299, 304; 2 Q. B. D. 214, 223; 36 L. T. 246; 25
 W. R. 493.—Q.B.D.; *Lodwick v. Perth* (Earl)
 (1884) 1 Times L. R. 76.—GROVE, J.

Behn v. Burness, *referred to*.
Irish Land Commission v. Maquay (1891) 28
 L. R. Ir. 342.—EX. D. *And see* *Barnard v. Faber*
 (1893) 41 W. R. 193.—C.A. LINDLEY, BOWEN
 and A. L. SMITH, L.JJ.

Behn v. Burness, *principle applied*.
Bentsen v. Taylor (1893) 63 L. J. Q. B. 15;
 [1893] 2 Q. B. 274; 4 R. 510; 69 L. T. 487; 42
 W. R. 8; 7 Asp. M. C. 385.—C.A. ESHEB, M.R.,
 BOWEN and KAY, L.JJ.

Glaholm v. Hays (1841) 2 Man. & G. 257; 2
 Scott N. R. 471; 10 L. J. C. P. 98.—C.P.,
commented on.
Tarrabochia v. Hickie (1856) 1 H. & N. 183;
 26 L. J. Ex. 26.—EX.

BRAMWELL, B.—If the contract is to load at a
 particular port, the very language compels us to
 construe that as a condition precedent. So in the
 case of *Glaholm v. Hays*, where the agreement
 was that the vessel should sail on a particular
 day. In the present case the only thing which
 made me doubt was an expression of Maule, J., in
Glaholm v. Hays (which is a *dictum* rather than
 an authority). He says, in the course of the
 argument: "It will be said that if the sailing on
 the 4th February is a condition precedent, in this
 case the sailing within a reasonable time would
 also have been held to be a condition precedent.
 There is a difficulty in saying that one is to be a
 condition precedent and not the other. But the
 case of *Freeman v. Taylor* (8 Bing. 124), is an
 express authority that the sailing within a
 reasonable time is not a condition precedent."

Glaholm v. Hays, *doubt in explained*.
Dimech v. Corlett (1858) 12 Moore P. C. 199.
 —P.C.

Glaholm v. Hays, *referred to*.
Jackson v. Union Marine Insurance Co. (1874)
 44 L. J. C. P. 27; L. R. 10 C. P. 125, 133; 31
 L. T. 789; 23 W. R. 169; 2 Asp. M. C. 135.—
 EX. CH.; CLEASBY, B. *dissenting*.

Ollive v. Booker (1847) 17 L. J. Ex. 21; 1
 Ex. 416.—EX., *followed*.

Dimech v. Corlett (1858) 12 Moore P. C. 199.
 P.C., *explained*.

Behn v. Burness (1863) 32 L. J. Q. B. 204; 3
 B. & S. 751; 9 Jur. (N.S.) 620; 8 L. T. 207; 11
 W. R. 496.—EX. CH.

Ollive v. Booker, *referred to*.
Jackson v. Union Marine Insurance Co. (1874)
 44 L. J. C. P. 27; L. R. 10 C. P. 125; 31 L. T.
 789; 23 W. R. 169; 2 Asp. M. C. 435.—EX. CH.

Skandinav, The, 50 L. J. P. 46.—ADM.;
reversed, (1882) 51 L. J. P. 93.—C.A.

Crow v. Falk (1846) 8 Q. B. 467; 15 L. J.
 Q. B. 183; 10 Jur. 374.—Q.B., *disapproved*.
Bruce v. Nicolopulo (1855) 11 Ex. 129; 3
 C. L. R. 775; 24 L. J. Ex. 321; 3 W. R. 483.
 —EX.

POLLOCK, C.B.—I have read the case of *Crow*
v. Falk and cannot subscribe to it.—p. 134.
 ALDERSON and PLATT, BB. concurred.

Crow v. Falk, *considered*.
Valente v. Gibbs (1859) 6 C. B. (N.S.) 270; 28
 L. J. C. P. 229; 5 Jur. (N.S.) 1213; 7 W. R.
 500.—C.P.

COCKBURN, C.J.—*Crow v. Falk* is an authority
 in point, and, although it seems to have been
 reflected on by the Court of Exchequer in *Bruce*
v. Nicolopulo, it was not necessary on that occa-
 sion to overrule it, and I, for one, am not disposed
 to dissent from it.—pp. 284, 285.

Crow v. Falk, *not followed*.
The Carron Park (1890) 59 L. J. Adm. 74; 15
 P. D. 203; 63 L. T. 356; 39 W. R. 191; 6 Asp.
 M. C. 543.—HANNEN, P.

Bruce v. Nicolopulo (1855) 24 L. J. Ex. 321;
 11 Ex. 129; 3 C. L. R. 775; 3 W. R. 483.
 —EX., *distinguished*.

Cohn v. Davidson (1877) 46 L. J. Q. B. 305,
 307; 2 Q. B. D. 455, 460; 36 L. T. 244; 25
 W. R. 369; 3 Asp. M. C. 374.—Q.B.D.

Bruce v. Nicolopulo, *followed*.
The Carron Park (1890) 59 L. J. Adm. 74; 15
 P. D. 203, 206; 63 L. T. 356; 39 W. R. 191; 6
 Asp. M. C. 543.—HANNEN, P.

Barker v. McAndrew (1865) 34 L. J. C. P.
 191; 18 C. B. (N.S.) 759; 11 Jur. (N.S.)
 637; 12 L. T. 459; 13 W. R. 779.—C.P.,
approved and followed.

Harrison v. Garthorne (1872) 26 L. T. 508; 20
 W. R. 722; 1 Asp. M. C. 303.—Q.B.; *Hudson v.*
Hill (1874) 43 L. J. C. P. 273; 30 L. T. 556.
 —C.P.

Barker v. McAndrew, *distinguished*.
Cohn v. Davidson (1877) 46 L. J. Q. B. 305,
 307; 2 Q. B. D. 455, 460; 36 L. T. 244; 25 W. R.
 369; 3 Asp. M. C. 374.—Q.B.D.

Barker v. McAndrew, *applied*.
Nottebohm v. Richter (1886) 56 L. J. Q. B. 33;
 18 Q. B. D. 63, 66; 35 W. R. 300.—C.A.

Barker v. McAndrew, *followed*.
The Carron Park (1890) 59 L. J. Adm. 74; 15
 P. D. 203, 206; 63 L. T. 356; 39 W. R. 191; 6
 Asp. M. C. 543.—HANNEN, P.

Barker v. McAndrew, *approved and applied*.
Perth General Station Committee v. Ross
 (1897) [1897] A. C. 429; 66 L. J. P. C. 81; 77
 L. T. 226.—H.L. (SC.).

The Carron Park (1890) 59 L. J. P. 74; 15
 P. D. 203; 63 L. T. 356; 39 W. R. 191;
 6 Asp. M. C. 543.—HANNEN, P., *followed*.

Milburn v. Jamaica Fruit-importing and Trad-
ing Co. (1900) 69 L. J. Q. B. 860; [1900] 2
 Q. B. 540; 83 L. T. 321; 5 Com. Cas. 346.—
 C.A. A. L. SMITH, VAUGHAN WILLIAMS and
 ROMER, L.JJ.

The Carron Park, *applied*.
Bathbone v. MacIver (1903) 72 L. J. K. B.
 703; [1903] 2 K. B. 378; 89 L. T. 318; 52 W. R.
 68; 8 Com. Cas. 303.—C.A.

Aymar v. Astor (1826) 6 Cowen 266.—

AMER, *referred to*.

Pandorf v. Hamilton (1886) 55 L. J. Q. B. 546; 17 Q. B. D. 670, 683; 55 L. T. 499; 35 W. R. 70; 6 Asp. M. C. 44.—C.A., reversed, H.L. (E.). (*see infra*).

Pandorf v. Hamilton (1885) 16 Q. B. D. 629; 54 L. T. 536; 34 W. R. 488.—LOPES, L.J.; *reversed*, (1886) 55 L. J. Q. B. 546; 17 Q. B. D. 670; 55 L. T. 499; 35 W. R. 70; 6 Asp. M. C. 44.—C.A.; *which was reversed, nom. Hamilton v. Pandorf* (1887) 57 L. J. Q. B. 24; 12 App. Cas. 518; 57 L. T. 726; 36 W. R. 369; 52 J. P. 196; 6 Asp. M. C. 212.—H.L. (E.).

Hamilton v. Pandorf, dictum adopted.

Thames and Mersey Marine Insurance Co. v. Hamilton (1887) 56 L. J. Q. B. 626; 12 App. Cas. 484, 492; 57 L. T. 695; 36 W. R. 337; 6 Asp. M. C. 200.—H.L. (E.).

Hamilton v. Pandorf, dictum adopted.

The Bedouin (1893) 63 L. J. P. 30; [1894] P. 1; 6 R. 693; 69 L. T. 782; 42 W. R. 299; 7 Asp. M. C. 391.—C.A.

Hamilton v. Pandorf, distinguished.

Ballantyne v. Mackinnon (1896) 65 L. J. Q. B. 616; [1896] 2 Q. B. 455; 75 L. T. 95; 45 W. R. 70.—C.A.

Hamilton v. Pandorf, referred to.

Trinder v. Thames and Mersey Marine Insurance Co. (1898) 67 L. J. Q. B. 666; [1898] 2 Q. B. 114; 78 L. T. 485; 46 W. R. 561; 8 Asp. M. C. 373.—C.A.

Hamilton v. Pandorf, applied.

Blackburn v. Liverpool, Brazil, and River Plate Steam Navigation Co. (1901) 71 L. J. Q. B. 177; [1902] 1 K. B. 290; 85 L. T. 783; 50 W. R. 272.—WALTON, J.

Hamilton v. Pandorf, applied.

The Torbryan (1903) [1903] P. 35; 9 Asp. M. C. 358.—PHILLIMORE, J.; affirmed, C.A.

Hamilton v. Pandorf, dictum considered.

Fenton v. Thorley (1903) 72 L. J. K. B. 787; [1903] A. C. 443; 89 L. T. 314; 52 W. R. 81.—H.L. (E.).

Beatson v. Schank (1803) 3 East 233; 7 R. R. 436.—K.B., *referred to*.

Inman SS. Co. v. Bischoff (1882) 52 L. J. Q. B. 169; 7 App. Cas. 670, 672; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6.—H.L. (E.).

Touteng v. Hubbard (1802) 3 Bos. & P. 291.—C.P., *applied*.

Geipel v. Smith (1872) 41 L. J. Q. B. 153, 157; L. R. 7 Q. B. 404, 412; 26 L. T. 361; 20 W. R. 332.—Q.B.

Touteng v. Hubbard, dictum disapproved.

Jackson v. Union Marine Insurance Co. (1874) 44 L. J. C. P. 27, 29; L. R. 10 C. P. 125, 134; 31 L. T. 789; 23 W. R. 169; 2 Asp. M. C. 435.—EX. CH.

Medeiros v. Hill (1832) 1 L. J. C. P. 77; 8 Bing. 231; 1 M. & Sc. 311; 5 Caff. & P. 182.—C.P., *commented on*.

The Helen (1865) 35 L. J. Adm. 2, 6; L. R. 1 A. & E. 1, 7; 11 Jur. (N.S.) 1025; 13 L. T. 305; 14 W. R. 136.—ADM.

O.C.

Medeiros v. Hill, considered.

Jackson v. Union Marine Insurance Co. (1874) 44 L. J. C. P. 27, 29; L. R. 10 C. P. 125, 139; 31 L. T. 789; 23 W. R. 169; 2 Asp. M. C. 435.—EX. CH.

Geipel v. Smith (1872) 41 L. J. Q. B. 153; L. R. 7 Q. B. 404; 26 L. T. 331; 20 W. R. 332.—Q.B., *discussed*.

Rodoconachi v. Elliott (1873) 42 L. J. C. P. 247, 252; L. R. 8 C. P. 649, 665; 28 L. T. 840.—C.P., affirmed, (1874) 43 L. J. C. P. 255; L. R. 9 C. P. 518; 31 L. T. 289; 2 Asp. M. C. 399.—EX. CH.: **Jackson v. Union Marine Insurance Co.** (1874) 44 L. J. C. P. 27; 31; L. R. 10 C. P. 125, 138; 31 L. T. 789; 23 W. R. 169; 2 Asp. M. C. 435.—EX. CH.; **Dahl v. Nelson** (1881) 50 L. J. Ch. 411, 419; 6 App. Cas. 38, 53; 44 L. T. 381; 29 W. R. 543; 6 Asp. M. C. 392.—H.L. (E.).

Geipel v. Smith, applied.

Nobel's Explosives Co. v. Jenkins & Co. (1896) 65 L. J. Q. B. 638; [1896] 2 Q. B. 326; 75 L. T. 163; 8 Asp. M. C. 181.—MATHEW, J.

Barrie v. Peruvian Corporation (1897) 2 Com. Cas. 50.—MATHEW, J., *followed*.

Newman and Dale Steamship Co., and British and South American Steamship Co., In re (1902) 72 L. J. K. B. 110; [1903] 1 K. B. 262; 87 L. T. 614; 8 Com. Cas. 87; 9 Asp. M. C. 351.—BIGHAM, J.

Avery v. Bowden (1856) 26 L. J. Q. B. 3; 6 El. & Bl. 953; 3 Jur. (N.S.) 238; 5 W. R. 45.—EX. CH., *applied*.

Phillipson v. Hayter (1870) 40 L. J. C. P. 14, 16; L. R. 6 C. P. 38, 42; 23 L. T. 556; 19 W. R. 130.—C.P.; **Wilkinson v. Verity** (1871) 40 L. J. C. P. 141; L. R. 6 C. P. 206; 24 L. T. 32; 19 W. R. 604.—C.P.; **Frost v. Knight** (1872) 41 L. J. Ex. 78; L. R. 7 Ex. 111; 26 L. T. 77; 20 W. R. 471.—EX. CH.

Avery v. Bowden. See

Roper v. Johnson (1873) 42 L. J. C. P. 65; L. R. 8 C. P. 167, 177; 28 L. T. 296; 21 W. R. 384.—C.P.

Avery v. Bowden, explained and applied.

Hudson v. Hill (1874) 43 L. J. C. P. 273, 281; 30 L. T. 555.—C.P.

Avery v. Bowden, distinguished.

Byrne v. Van Tienhoven (1880) 49 L. J. C. P. 316, 320; 5 C. P. D. 344, 350; 42 L. T. 371; 44 J. P. 667.—C.P.D.

Avery v. Bowden. See

Johnstone v. Milling (1886) 55 L. J. Q. B. 162; 16 Q. B. D. 460, 470; 54 L. T. 629; 34 W. R. 238; 50 J. P. 694.—C.A.

Pole v. Cetovich (1860) 30 L. J. C. P. 102; 9 C. B. (N.S.) 430; 7 Jur. (N.S.) 604; 3 L. T. 438; 9 W. R. 279.—C.P., *distinguished*.

The Patria (1871) 41 L. J. Adm. 23, 30; L. R. 3 A. & E. 436; 24 L. T. 849; 1 Asp. M. C. 71.—ADM.

Pole v. Cetovich, applied.

The Teutonia (1872) 41 L. J. Adm. 57; L. R. 4 P. C. 171; 8 Moore P. C. (N.S.) 411; 26 L. T. 48; 20 W. R. 421.—P.C.

Davis v. Garrett (1830) 8 L. J. (o.s.) C. P. 253; 6 Bing. 716; 4 M. & P. 540; 31 R. R. 524.—C.P., *distinguished*.

Taylor v. G. N. Ry. (1866) 35 L. J. C. P. 210, 215; 12 R. 1 C. P. 385, 388; 12 Jur. (N.S.) 372; 14 L. T. 363; 14 W. R. 639; 1 H. & R. 471.—C.P.

Davis v. Garrett, *applied*.

Grill v. General Iron Screw Collier Co. (1866) 35 L. J. C. P. 321, 331; L. R. 1 C. P. 600, 613; 12 Jur. (N.S.) 727; 14 W. R. 893.—C.P., affirmed, (1868).—EX. CH. (*infra*, col. 3323).

Davis v. Garrett, *referred to*.

Harris v. G. W. Ry. (1876) 45 L. J. Q. B. 729, 736; 1 Q. B. D. 515, 534; 34 L. T. 647; 25 W. R. 63.—Q.B.D., LUSH, J. dissenting.

Davis v. Garrett, *approved and followed*.

Scaramanga v. Stamp (1880) 49 L. J. C. P. 674, 676; 5 C. P. D. 295, 299; 42 L. T. 840; 28 W. R. 691; 4 Asp. M. C. 295.—C.A.

Davis v. Garrett, *applied*.

Lilley v. Doubleday (1881) 51 L. J. Q. B. 310; 7 Q. B. D. 510; 44 L. T. 814; 46 J. P. 708.—Q.B.D.; **Svensden v. Wallace** (1885) 54 L. J. Q. B. 497; 10 App. Cas. 404, 412; 52 L. T. 901; 34 W. R. 369; 5 Asp. M. C. 453.—H.L. (E.); **Royal Exchange Shipping Co. v. Dixon** (1886) 56 L. J. Q. B. 266; 12 App. Cas. 11; 56 L. T. 206; 35 W. R. 461; 6 Asp. M. C. 92.—H.L. (E.). LORDS HALSBURY, L.C., BLACKBURN and WATSON.

Petersen v. Freebody (1895) 65 L. J. Q. B. 12; [1895] 2 Q. B. 294; 14 R. 493; 73 L. T. 163; 44 W. R. 5; 8 Asp. M. C. 55.—C.A., *distinguished*.

Aktieselskab Helios v. Ekman (1897) 66 L. J. Q. B. 538; [1897] 2 Q. B. 83; 76 L. T. 537.—C.A. ESHER, M.R., SMITH and CHITTY, L.JJ.

Wheeler v. Bavidge (1854) 23 L. J. Ex. 221; 9 Ex. 668; 2 C. L. R. 1077.—EX., *adopted*.

Jackson v. Union Marine Insurance Co. (1874) 44 L. J. C. P. 27, 36; L. R. 10 C. P. 125, 135; 31 L. T. 789; 23 W. R. 169; 2 Asp. M. C. 435.—EX. CH.

Le Blanch v. Granger (1866) 35 Beav. 187.—M.R., *applied*.

Adamson v. Gill (1868) 17 L. T. 464.—MALINS, V.-C., reversed 18 L. T. 278.—CAIRNS, L.J.

Heriot v. Nicholas (1864) 12 W. R. 844.—L.J., *referred to*.

Adamson v. Gill (1868) 18 L. T. 278.—CAIRNS, L.J.

Sevin v. Deslandes (1861) 30 L. J. Ch. 457; 7 Jur. (N.S.) 837; 3 L. T. 461; 9 W. R. 218.—M.R., *distinguished*.

Bucknall v. Tatem (1900) 83 L. T. 121.—C.A. SMITH and WILLIAMS, L.JJ.

SMITH, L.J.—The vessel was to proceed to Bussorah, and it was provided that the charterers should be at liberty to cancel the charter-party if the vessel was not there by the 18th June. The vessel was detained at Delagoa Bay unloading cargo until it was impossible for her to get to Bussorah by the 18th June. . . . Naturally, under the circumstances, the shipowners asked

the charterers for an extension of the time for cancellation of the charter, as it was impossible for them to perform their agreement to have the vessel at Bussorah by the 18th June. The charterers refused, and declined to say whether they would or would not load the vessel when she got to Bussorah, but said that, if they did so, the shipowners would have to accept a reduced rate of freight. It seems to me to be most unreasonable for the charterers, under those circumstances, to come to the Court and ask for an injunction, as of right, to prevent the shipowners from sending their vessel upon any voyage except a voyage to Bussorah under this charter-party. . . . The matter of an injunction of this kind was thoroughly threshed out in the cases of *De Mattos v. Gibson* (see *ante*, col. 1322), and *Serin v. Deslandes*, and I agree that, where there is a legal right, ordinarily, the person having that right can come to a Court of equity and obtain an injunction. The rule is, however, subject to this qualification, that the plaintiff must not have done anything which may disentitle him to come to a Court of equity to ask for an injunction. In this case I think that the plaintiffs have so acted as to disentitle them to an injunction.—p. 122.

Saville v. Campion (1819) 2 B. & Ald. 503; 21 R. R. 376.—K.B., *followed*.

Campion v. Colvin (1836) 3 Bing. N. C. 17; 3 Scott 338; 2 Hodges 116; 5 L. J. C. P. 317.—C.P.

Trinity House v. Clark (1815) 4 M. & S. 288.—K.B., *distinguished*.

Weir v. Union Steamship Co. (1900) 69 L. J. Q. B. 809; [1900] A. C. 525; 83 L. T. 91; 5 Com. Cas. 363.—H.L. (E.).

Omoa and Cleland Coal and Iron Co. v. Huntley (1877) 2 C. P. D. 464; 37 L. T. 184; 25 W. R. 675; 3 Asp. M. C. 501.—C.P.D., *held applicable*.

Weir v. Union Steamship Co. (1900) 69 L. J. Q. B. 809; [1900] A. C. 525; 83 L. T. 91; 5 Com. Cas. 363.—H.L. (E.).

Towse v. Henderson (1850) 19 L. J. Ex. 163; 4 Ex. 890.—EX., *adopted*.

Southampton Steam Colliery Co. v. Clarke (1870) 40 L. J. Ex. 8, 12; L. R. 6 Ex. 53, 57; 19 W. R. 214.—EX. CH.; **Cator v. Great Western Insurance Co. of New York** (1873) 42 L. J. C. P. 266, 272; L. R. 8 C. P. 552, 561; 29 L. T. 136; 21 W. R. 850; 2 Asp. M. C. 90.—C.P.

Towse v. Henderson, *applied*.

Weir v. Union Steamship Co. (1900) 69 L. J. Q. B. 809; [1900] A. C. 525; 83 L. T. 91; 5 Com. Cas. 363.—H.L. (E.). LORDS DAVEY, BRAMPTON and ROBERTSON.

Lucas v. Nockells (1833) 4 Bing. 729; 10 Bing. 157; 1 M. & P. 783; 2 Y. & J. 304; 1 Cl. & F. 438; 29 R. R. 721.—H.L. (E.), *distinguished*.

Sinclair v. Broughton (1882) L. R. 9 Ind. App. 152, 172; 47 L. T. 170.—P.C.

Lucas v. Nockells, *commented on*.

Allen v. Flood (1898) 67 L. J. Q. B. 119; [1898] A. C. 1, 20; 77 L. T. 717; 46 W. R. 258; 62 J. P. 595.—H.L. (E.).

Colvin v. Newberry (1828) 8 B. & C. 166; 6 L. J. (O.S.) K. B. 239.—K.B.; *reversed nom.* **Newberry v. Colvin** (1830) 4 M. & P. 876; 7 Bing. 190; 1 C. & J. 192; 1 Tyr. 55; 9 L. J. (O.S.) Ex. 13.—EX. CH.; *the latter decision affirmed nom.* **Colvin v. Newberry** (1832) 1 Cl. & F. 283; 6 Bligh (N.S.) 167.—H.L. (E.).

Colvin v. Newberry, distinguished.

Gilkison v. Middleton (1857) 2 C. B. (N.S.) 134; 26 L. J. C. P. 209.—C.P. See extract, *post*, col. 3339.

Colvin v. Newberry, discussed.

Sandeman v. Scurr (1866) 36 L. J. Q. B. 58; L. R. 2 Q. B. 96; 8 B. & S. 50; 15 L. T. 608; 15 W. R. 277.—Q.B.; **Wagstaff v. Anderson** (1880) 49 L. J. C. P. 485; 5 C. P. D. 171, 177; 44 L. T. 720; 28 W. R. 856.—C.A.

Colvin v. Newberry, considered.

Scheibler v. Furness (1893) 62 L. J. Q. B. 201; [1893] A. C. 8; 68 L. T. 1; 1 R. 59; 7 Asp. M. C. 263.—H.L. (E.).

Colvin v. Newberry, distinguished.

Manchester Trust Co. v. Turner (or Furness) (1895) 64 L. J. Q. B. 766; [1895] 2 Q. B. 539; 14 R. 739; 73 L. T. 110; 44 W. R. 178; 8 Asp. M. C. 57.—C.A.

LINDLEY, L.J.—In the case to which we were referred of *The Baumwoll Manufactur von Carl Scheibler v. Furness* (*infra*), the charter was such that the master was not the servant of the shipowner but of the charterer. . . . Counsel for the appellants have exerted themselves very ingeniously to persuade us, on the strength of the case of *Colvin v. Newberry*, that we ought to hold he is [here] the servant of the charterers. I do not think we ought. In the first place the facts of the two cases are totally different. The case of *Newberry v. Colvin* was a very curious case. The master there, as far as I understand it, had no principal at all. He was the person navigating the ship, he was the master, and he was doing everything on his own account, subject to some payment by the shipowner. . . . The true view I think is this—that the test is in each case that which was applied by the H. L. in *Scheibler v. Furness*, whose servant is the master—who is his undisclosed principal when he signs the bills of lading? My answer to that question is that, upon the true construction of the documents here, he was the servant of the shipowner.—pp. 769, 770.

Colvin v. Newberry, observations considered.

Weir v. Union SS. Co. (1899) [1900] 1 Q. B. 28; 81 L. T. 553; 9 Asp. M. C. 13.—C.A., WILLIAMS, L.J. doubting; affirmed, H.L.

Scheibler v. Gilchrest (1891) 60 L. J. Q. B. 605; [1891] 2 Q. B. 310; 65 L. T. 87.—CHARLES, J.; *reversed*, (1891) 61 L. J. Q. B. 121; [1892] 1 Q. B. 253; 66 L. T. 66; 7 Asp. M. C. 136.—C.A., *the latter decision affirmed nom.* **Scheibler v. Furness** (1892) 62 L. J. Q. B. 201; [1893] A. C. 8; 1 R. 59; 86 L. T. 1; 7 Asp. M. C. 263.—H.L. (E.).

Scheibler v. Furness (supra), distinguished.

Manchester Trust Co. v. Turner (or Furness) (1895) 64 L. J. Q. B. 766; [1895] 2 Q. B. 539;

14 R. 739; 73 L. T. 110; 44 W. R. 178; 8 Asp. M. C. 57.—C.A. See extract, *supra*, col. 3315.

Nova Scotia Steel Co. v. Sutherland Steam Shipping Co. (1899) 5 Com. Cas. 106.—BIGHAM, J., *considered*.

Tyrer and Hessler, In re (1901) 84 L. T. 655; 6 Com. Cas. 143.—KENNEDY and PHILLIMORE, JJ., *reversed, infra*.

Tyrer and Hessler, In re (1901) 84 L. T. 653; 6 Com. Cas. 143.—KENNEDY and PHILLIMORE, JJ.; *reversed*, (1903) 86 L. T. 697; 7 Com. Cas. 166.—C.A. WILLIAMS, ROMER and MATHEW, L.JJ.

9. BILL OF LADING.

Nichols v. Clent (1817) 3 Price 547.—EX., *distinguished*.

Bryans v. Nix (1839) 8 L. J. Ex. 137; 4 M. & W. 775; 1 H. & H. 480.—EX.

British Columbia, &c., Saw Mill Co. v. Nettle-ship (1868) 37 L. J. C. P. 235; L. R. 3 C. P. 499; 18 L. T. 291; 16 W. R. 1046.—C.P., *referred to*.

The Northumbria (1869) 39 L. J. Adm. 3; L. R. 3 A. & E. 6; 21 L. T. 681; 18 W. R. 188.—ADM.

British Columbia Saw Mill Co. v. Nettle-ship, dictum adopted.

Horne v. Midland Ry. (1872) 42 L. J. C. P. 59, 63; L. R. 8 C. P. 131, 145; 28 L. T. 312; 21 W. R. 481.—EX. CH.

British Columbia Saw Mill Co. v. Nettle-ship, principle applied.

Wagstaff v. Anderson (1879) 48 L. J. C. P. 759; 4 C. P. D. 283, 286; 41 L. T. 227.—DENMAN, J.; affirmed, (1880) 49 L. J. C. P. 485; 5 C. P. D. 171; 42 L. T. 720; 28 W. R. 856.—C.A.

British Columbia Saw Mill Co. v. Nettle-ship, applied.

The Crathie (1897) 66 L. J. P. 93; [1897] P. 178; 76 L. T. 534; 45 W. R. 631.—BARNES, J.

Brown v. Byrne (1854) 3 El. & Bl. 703; 2 C. L. R. 1599; 23 L. J. Q. B. 313; 18 Jur. 700; 2 W. R. 471.—Q.B., *explained*.

Hall v. Janson (1855) 4 El. & B. 500; 3 C. L. R. 737; 24 L. J. Q. B. 97; 1 Jur. (N.S.) 571; 3 W. R. 213.—Q.B.

CAMPBELL, C.J. (for the Court).—Reference was made in the argument to the recent case of *Brown v. Byrne*; but this Court by no means intended there to depart from the principles which we have now laid down; and the marginal note in the report would better express the view taken of the subject, by the judges who concurred in that decision, if it had said that the custom "was not inconsistent with the bill of lading," instead of saying that it "controlled the bill of lading."—p. 510.

Stuart v. British and American Steam Navigation Co. (1875) 32 L. T. 257; 2 Asp. M. C. 497.—EX., *considered*.

Potter v. Burrell (1896) 66 L. J. Q. B. 63; [1897] 1 Q. B. 97; 75 L. T. 491; 45 W. R. 145; 8 Asp. M. C. 200.—C.A.

Grant v. Norway (1851) 10 C. B. 665; 20 L. J. C. P. 93; 15 Jur. 296.—C.P., *approved*.

Coleman v. Riches (1855) 16 C. B. 161; 3 C. L. R. 795; 24 L. J. C. P. 125; 1 Jur. (N.S.) 596; 3 W. R. 453.—C.P.

Grant v. Norway, *followed*.

Thorman v. Burt (1886) 54 L. T. 349; 1 Cab. & E. 596; 5 Asp. M. C. 563.—C.A.

LINDLEY, L.J.—The bill of lading is signed as follows:—"By authority of the captain, Wilh. Gauswindt, as agent." That is clearly not the signature of the shipowner, who is the person against whom this counterclaim is made. Therefore the argument, based upon the third section of the Bills of Lading Act (18 & 19 Vict. c. 111), falls to the ground. The first section merely gives the indorsee of the bill of lading the right to sue upon the contract contained in it. Then, if we look outside the Act, the case of *Grant v. Norway* settles the point. The question to be decided was an extremely difficult one before that case, but that case settled it, and, as far as I am aware, has always been acted upon.—p. 350.

Grant v. Norway, *followed*.

Cox v. Bruce (1886) 56 L. J. Q. B. 121; 18 Q. B. D. 147; 57 L. T. 128; 35 W. R. 207; 6 Asp. M. C. 152.—C.A.; **Whitechurch, Ltd. v. Cavanagh** (1901) 71 L. J. K. B. 400; [1902] A. C. 117; 85 L. T. 349; 50 W. R. 218.—H.L. (E.). **LORDS HALSBURY, L.C., MACNAGHTEN, SHAND, JAMES, DAVEY, BRAMPTON and ROBERTSON.**

Grant v. Norway, *applied*.

Hambro v. Burnand (1903) 72 L. J. K. B. 662; [1905] 2 K. B. 399; 89 L. T. 180; 51 W. R. 652.—**BIGHAM, J.** (reversed, C.A.).

Hubbersty v. Ward (1853) 22 L. J. Ex. 118; 8 Ex. 330.—EX., *approved*.

Coleman v. Riches (1855) 24 L. J. C. P. 125; 16 C. B. 204; 3 C. L. R. 795; 1 Jur. (N.S.) 596; 3 W. R. 453.—C.P.

Bradley v. Dunnipace (1862) 32 L. J. Ex. 22; 1 H. & C. 521.—EX. CH., and **Blanchet v. Powell's Llantwit Collieries Co.** (1874) 43 L. J. Ex. 50; L. R. 9 Ex. 74; 30 L. T. 28; 22 W. R. 490; 2 Asp. M. C. 224.—EX., *referred to*.

Parsons v. New Zealand Shipping Co. (1901) 70 L. J. K. B. 404; [1901] 1 Q. B. 548; 84 L. T. 218; 49 W. R. 355; 6 Com. Cas. 41; 9 Asp. M. C. 170.—C.A. **SMITH, M.R., COLLINS and ROMER, L.JJ.**

Pyman v. Burt (1884) 1 Cab. & E. 207.—**HAWKINS, J.**, *discussed*.

Lishman v. Christie (1887) 56 L. J. Q. B. 538; 19 Q. B. D. 333; 57 L. T. 552; 35 W. R. 744; 6 Asp. M. C. 186.—C.A.

Pyman v. Burt, *applied*.

Taylor v. Roe (1893) 63 L. J. Ch. 282; [1894] 1 Ch. 413; 8 R. 295; 70 L. T. 232; 42 W. R. 426.—**STIRLING, J.**

Jessel v. Bath (1867) 36 L. J. Ex. 149; L. R. 2 Ex. 267; 15 W. R. 1041.—EX., *followed*.

Lebeau v. General Steam Navigation Co. (1872) L. R. 8 C. P. 88; 42 L. J. C. P. 1; 27 L. T. 447; 21 W. R. 146; 1 Asp. M. C. 435.—

C.P.; **The Ida** (1873) 29 L. T. 623, n.—ADM. (reversed, P.C., *see infra*).

Jessel v. Bath, *explained*.

Brown v. Powell Duffryn Steam Coal Co. (1875) 44 L. J. C. P. 289; L. R. 10 C. P. 562, 568; 32 L. T. 621; 23 W. R. 549; 2 Asp. M. C. 578.—C.P.

Jessel v. Bath, *followed*.

Thorman v. Burt (1886) 54 L. T. 349; 5 Asp. M. C. 563.—C.A. *See extract, supra*.

Jessel v. Bath, *referred to*.

Parsons v. New Zealand Shipping Co. (1900) 69 L. J. Q. B. 419; [1900] 1 Q. B. 714; 82 L. T. 327; 9 Asp. M. C. 33; 5 Com. Cas. 179.—**KENNEDY, J.**

The Prosperino Palasso (1873) 29 L. T. 622; 2 Asp. M. C. 158.—ADM., *disapproved*.

The Ida (1875) 32 L. T. 541; 2 Asp. M. C. 551.—P.C.

SIR H. S. KEATING (for J.C.).—Their lordships collect from the report of a case which has been laid before them (*The Prosperino Palasso*), that if the learned judge had come to the conclusion which their lordships have, that no evidence had been given by the plaintiffs of the conditions of the cargo when shipped, he would have found for the defendants. Their lordships cannot, indeed, suppose that the learned judge intended to lay down, as the marginal note to the case represents him, that there is a rule of law which requires that a plaintiff in such a case as this must show, in the first instance, that the goods were shipped in good order and condition, or fail in his suit. Undoubtedly there is no such rule of law.—p. 544.

Coulthurst v. Sweet (1866) L. R. 1 C. P. 649.—C.P., *explained and distinguished*.

Buckle v. Knoop (1867) 36 L. J. Ex. 49; L. R. 2 Ex. 125; 16 L. T. 231.—EX.; affirmed, 36 L. J. Ex. 223; L. R. 2 Ex. 333; 16 L. T. 571; 15 W. R. 999.—EX. CH.

Coulthurst v. Sweet, *referred to*.

Frazer v. Cuthbertson (1880) 50 L. J. Q. B. 277, 280; 6 Q. B. D. 93, 98; 29 W. R. 396.—Q.B.D.

Coulthurst v. Sweet, *dicta adopted*.

The Skandinav (1881) 50 L. J. Adm. 46.—ADM., reversed, 51 L. J. Adm. 93.—C.A.; **Gulf Line v. Laycock** (1901) 7 Com. Cas. 1.—**KENNEDY, J.**

Marwood v. Taylor, 5 Com. Cas. 343.—**BIGHAM, J.**; affirmed, (1901) 6 Com. Cas. 178.—C.A.

Marwood v. Taylor, *dicta adopted*.

Gulf Line v. Laycock (1901) 7 Com. Cas. 1.—**KENNEDY, J.**

Maori King v. Hughes (1895) 65 L. J. Q. B. 168; [1895] 2 Q. B. 550; 13 R. 646; 73 L. T. 141; 44 W. R. 2; 8 Asp. M. C. 65.—C.A., *referred to*.

Queensland National Bank v. P. & O. Steam Navigation Co. (1898) 67 L. J. Q. B. 402; [1898] 1 Q. B. 567; 78 L. T. 67; 46 W. R. 324; 8 Asp. M. C. 338.—C.A.

Maori King v. Hughes, applied.

Rathbone v. MacIver (1903) 72 L. J. K. B. 703; [1903] 2 K. B. 378; 89 L. T. 378; 52 W. R. 68; 8 Com. Cas. 303.—C.A.

Schmidt v. Royal Mail S.S. Co. (1876) 45

L. J. Q. B. 646; 4 Asp. M. C. 217, n.—Q.B.D., followed.

Crookes v. Allen (1880) 49 L. J. Q. B. 201; 5 Q. B. D. 38; 41 L. T. 800; 28 W. R. 304; 4 Asp. M. C. 216.—LUSH, J.

Schmidt v. Royal Mail Steamship Co., considered and applied.

Whitecross Wire Co. v. Savill (1882) 51 L. J. Q. B. 426, 429; 8 Q. B. D. 653, 660; 46 L. T. 643; 30 W. R. 588; 4 Asp. M. C. 531.—C.A.

*** Schmidt v. Royal Mail Steamship Co., dictum discussed and not applied.**

Burton v. English (1883) 53 L. J. Q. B. 133; 12 Q. B. D. 218, 221; 49 L. T. 768; 32 W. R. 655; 5 Asp. M. C. 187.—C.A.

Schmidt v. Royal Mail Steamship Co., applied.

The Marpessa (1891) [1891] P. 403.—JEUNE, J.

Schmidt v. Royal Mail Steamship Co., considered.

Milburn v. Jamaica Fruit, &c., Co. (1900) 69 L. J. Q. B. 860; [1900] 2 Q. B. 540; 83 L. T. 321; 5 Com. Cas. 346.—C.A.

Steel v. State Line Steamship Co. (1877) 8

App. Cas. 72; 37 L. T. 333; 3 Asp. M. C. 516.—H.L. (SC.). See

Hyman v. Nye (1881) 6 Q. B. D. 685, 690; 44 L. T. 919; 45 J. P. 554.—LINDLEY and MATHEW, JJ.; Tattersall v. National Steamship Co. (1884) 53 L. J. Q. B. 332; 12 Q. B. D. 297; 50 L. T. 299; 32 W. R. 566; 5 Asp. M. C. 206.—DAY and SMITH, JJ.

Steel v. State Line Steamship Co., applied.

The Glenfruin (1885) 54 L. J. P. 49; 10 P. D. 103, 108; 52 L. T. 769; 33 W. R. 826; 5 Asp. M. C. 413.—BUTT, J.

Steel v. State Line Steamship Co., distinguished.

Laertes, Cargo ex (1887) 56 L. J. P. 108; 12 P. D. 187, 191; 57 L. T. 502; 36 W. R. 111; 6 Asp. M. C. 174.—BUTT, J.

Steel v. State Line Steamship Co., dictum adopted.

Hamilton v. Pandorf (1887) 57 L. J. Q. B. 24; 12 App. Cas. 518, 526; 57 L. T. 726; 36 W. R. 369; 52 J. P. 196; 6 Asp. M. C. 212.—H.L. (E.); The Carron Park (1890) 58 L. J. Adm. 74; 15 P. D. 203, 207; 63 L. T. 356; 39 W. R. 191; 6 Asp. M. C. 543.—HANNEN, P.

Steel v. State Line Steamship Co., followed.

Gilroy v. Price (1892) [1893] A. C. 56; 1 R. 76; 68 L. T. 302; 7 Asp. M. C. 344.—H.L. (SC.). LORDS HERSCHELL, L.C., WATSON, HALSBURY, MORRIS and FIELD.

Steel v. State Line Steamship Co., approved.

Hedley v. Pinkney (1894) 63 L. J. Q. B. 419; [1894] A. C. 222; 6 R. 106; 70 L. T. 630; 42 W. R. 497.—H.L. (E.). LORDS HERSCHELL, L.C., WATSON and MACNAGHTEN.

Steel v. State Line Steamship Co., dictum commented on.

The Vortigern (1899) 68 L. J. P. 49; [1899] P. 140; 80 L. T. 382; 47 W. R. 437; 8 Asp. M. C. 523.—C.A. RUSSELL, C.J., SMITH and COLLINS, L.JJ.

Steel v. State Line Steamship Co., applied.

Ajum Goolam Hossen v. Union Marine Insurance Co. (1901) [1901] A. C. 362; 70 L. J. P. C. 34; 87 L. T. 366; 9 Asp. M. C. 167.—P.C.

Steel v. State Line Steamship Co., observations applied.

Rathbone v. McIver (1903) 72 L. J. K. B. 703; [1903] 2 K. B. 378; 89 L. T. 378; 52 W. R. 68; 8 Com. Cas. 303.—C.A.

Laveroni v. Drury (1852) 22 L. J. Ex. 2; 8

Ex. 166; 16 Jur. 1024; 1 W. R. 55.—EX., not applied.

Kay v. Wheeler (1867) 36 L. J. C. P. 180; L. R. 2 C. P. 802, 804; 16 L. T. 66; 15 W. R. 495.—EX. CH.

Laveroni v. Drury, adopted.

Nugent v. Smith (1875) 45 L. J. C. P. 19; 1 C. P. D. 19; 33 L. T. 731.—C.P.D., reversed, (1876) 45 L. J. C. P. 697; 1 C. P. D. 423; 34 L. T. 827; 24 W. R. 237; 3 Asp. M. C. 198.—C.A.

Laveroni v. Drury, explained and distinguished.

Hamilton v. Pandorf (1887) 57 L. J. Q. B. 24; 12 App. Cas. 518, 523; 57 L. T. 726; 36 W. R. 369; 52 J. P. 196; 6 Asp. M. C. 212.—H.L. (E.).

Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co., 51 L. J. Q. B. 393; 9 Q. B. D. 118; 46 L. T. 530; 4 Asp. M. C. 523.—Q.B.D.: varied, (1883) 52 L. J. Q. B. 220; 10 Q. B. D. 521; 48 L. T. 546; 31 W. R. 445; 5 Asp. M. C. 65; 47 J. P. 260.—C.A.

Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co., approved.

Woodley v. Michell (1883) 52 L. J. Q. B. 325; 11 Q. B. D. 47; 48 L. T. 599; 31 W. R. 651; 5 Asp. M. C. 71.—C.A.

Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co., applied.

Jacob v. Crédit Lyonnais (1884) 12 Q. B. D. 589, 596; 49 L. T. 38.—Q.B.D.; affirmed, 53 L. J. Q. B. 156; 12 Q. B. D. 589; 50 L. T. 194; 32 W. R. 761.—C.A.

*** Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co., dictum overruled.**

Wilson v. The Xantho (1887) 56 L. J. Adm. 116; 12 App. Cas. 503; 57 L. T. 701; 36 W. R. 353; 6 Asp. M. C. 207.—H.L. (E.).

Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co., opinion adopted.

Leduc v. Ward (1888) 57 L. J. Q. B. 379; 20 Q. B. D. 475, 480; 58 L. T. 908; 36 W. R. 537; 6 Asp. M. C. 290.—C.A. And see post, col. 3321.

Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.
(*supra*), *inapplicable*.

The *August* (1891) 60 L. J. P. 57; [5891] P. 328; 66 L. T. 32; 7 Asp. M. C. 110.—HANNEN, P.

Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.
referred to.

The *Englishman* and *The Australia* (1894) 63 L. J. P. 133; [1894] P. 239; 70 L. T. 846; 43 W. R. 62.—JUNE, P.; and Davidsson v. Hill (1901) 70 L. J. K. B. 788; [1901] 2 K. B. 606; 85 L. T. 118; 49 W. R. 630; 9 Asp. M. C. 223.—K.B.D.

Woodley v. Michell (1883) 52 L. J. Q. B. 325; 11 Q. B. D. 47; 48 L. T. 599; 31 W. R. 651; 5 Asp. M. C. 71.—C.A., *considered and applied*.

Pandorf v. Hamilton (1885) 16 Q. B. D. 629, 634; 54 L. T. 536; 34 W. R. 488.—LOPES, L.J., reversed, C.A., and restored, H.L. (E.). See *ante*, col. 3311.

Woodley v. Michell, *distinguished*.

Garston Sailing Ship Co. v. Hickie (1886) 56 L. J. Q. B. 38; 18 Q. B. D. 17; 55 L. T. 879; 35 W. R. 33; 6 Asp. M. C. 71.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Woodley v. Michell, *overruled*.

Wilson v. The *Xantho* (1887) 56 L. J. Adm. 116; 12 App. Cas. 503; 57 L. T. 701; 36 W. R. 353; 6 Asp. M. C. 207.—H.L. (E.). LORDS HERSCHELL and BRAMWELL.

Held, overruling *Woodley v. Michell*, that loss occasioned by the foundering of a ship through collision at sea, where the collision is not due to the fault of the carrying vessel, is within the exception of "Dangers and accidents of the seas" in a bill of lading.

The Xantho (1886) 55 L. J. Adm. 65; 11 P. D. 170; 55 L. T. 203; 35 W. R. 23; 6 Asp. M. C. 9.—C.A.; *reversed nom.* **Wilson v. The Xantho** (1887) 56 L. J. Adm. 116; 12 App. Cas. 503; 57 L. T. 701; 36 W. R. 353; 6 Asp. M. C. 207.—H.L. (E.).

Wilson v. The Xantho (1887) 56 L. J. Adm. 116; 12 App. Cas. 503; 57 L. T. 701; 36 W. R. 353; 6 Asp. M. C. 207.—H.L. (E.), *referred to*.

Hamilton v. Pandorf (1887) 57 L. J. Q. B. 24; 12 App. Cas. 518, 529; 57 L. T. 726; 36 W. R. 369; 52 J. P. 196; 6 Asp. M. C. 212.—H.L. (E.).

Wilson v. The Xantho, *discussed*.

The *Glendaroch* (1894) 63 L. J. Adm. 39; [1894] P. 226; 6 R. 686; 70 L. T. 344; 7 Asp. M. C. 420.—C.A. ESHER, M.R., LOPES and DAVEY, L.JJ.

ESHER, M.R.—Unless, therefore, there is something to justify this Court in disregarding the principles of the construction of bills of lading adopted in a long course of cases, the proposition to be found in "Carver on Carriage of Goods by Sea" (2nd ed.) p. 89, which appears to be the result of a careful consideration of those cases, is right. It is there said: "But if a loss apparently falls within an exception, the burden of showing

that the shipowner is not entitled to the benefit of the exception, on the ground of negligence, is upon the person so contending." I adopt that principle, and think that it is right. It is said that that is not the opinion given by Lord Herschell in *Wilson v. The Xantho*. I have a great respect for Lord Herschell's opinion, but, reading the words he used, I think that he positively declined to give any opinion upon the point. It is said that the tendency of his mind can be seen through his words, but as far as I can see he refuses to give any opinion; and I do not feel at all hampered by what is supposed to be his view, because I think that if ever the case comes before him he will not act in accordance with the supposition. I think, therefore, that the burden of proof of the defendant's negligences lies upon the plaintiffs.—p. 92.

Wilson v. The Xantho, *applied*.

Blackburn v. Liverpool, Brazil and River Plate Steam Navigation Co. (1901) 71 L. J. Q. B. 177; [1902] 1 K. B. 290; 85 L. T. 783; 50 W. R. 272.—WALTON, J.

Wilson v. The Xantho, *referred to*.

Dunn v. Bucknall (1902) 71 L. J. K. R. 963; [1902] 2 K. B. 614; 87 L. T. 497; 51 W. R. 100.—C.A.

Wilson v. The Xantho, *applied*.

The *Torbryan* (1902) [1903] P. 35; 9 Asp. M. C. 358.—PHILLIMORE, J.; affirmed, C.A.

Leduc v. Ward (1888) 57 L. J. Q. B. 379; 20 Q. B. D. 475; 58 L. T. 908; 36 W. R. 537; 6 Asp. M. C. 290.—C.A., *applied*.

Margetson v. Glynn (1892) 61 L. J. Q. B. 186; [1892] 1 Q. B. 337; 66 L. T. 142; 40 W. R. 264; 7 Asp. M. C. 148.—C.A., affirmed *nom.* Glynn v. Margetson.—H.L. (E.); and Lecky v. Ogilvy (1897) 3 Com. Cas. 29, 35.—C.A.

Laurie v. Douglas (1846) 15 M. & W. 746.—EX., *applied*.

Notara v. Henderson (1872) 41 L. J. Q. B. 158, 164; L. R. 7 Q. B. 225, 236; 26 L. T. 452; 20 W. R. 442; 1 Asp. M. C. 278.—EX. CH.

Laurie v. Douglas, *considered*.

The *Accomac* (1890) 59 L. J. Adm. 91; 15 P. D. 208; 63 L. T. 737; 39 W. R. 133; 6 Asp. M. C. 579.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.

LINDLEY, L.J.—I do not think that anybody accustomed to the use of ordinary language could, without torturing words, come to the conclusion that the negligence relied upon in this case was negligence "in the navigation" of the ship. We have been invited to come to a contrary conclusion upon the authority of *Laurie v. Douglas*. I certainly do not mean to say that *Laurie v. Douglas* was wrongly decided; it may be that the fact that there the vessel had broken away from her moorings may distinguish it from the case now before us; but if the decision in *Laurie v. Douglas* leads to a different conclusion from that at which we have arrived in this case, I can only say that I do not agree with it.—p. 93.

Grill v. General Iron Screw Collier Co. (1866) 35 L. J. C. P. 321; L. R. 1 C. P. 600;

12 Jur. (N.S.) 727; 14 W. R. 893.—C.P.; *affirmed*, (1868) 37 L. J. C. P. 205; L. R. 3 C. P. 476; 18 L. T. 485; 16 W. R. 796.—EX. CH.

Grill v. General Iron Screw Collier Co.,
considered and applied.

Giblin v. McMullen (1869) 38 L. J. P. C. 25, 28; L. R. 2 P. C. 317, 336; 5 Moore P. C. (N.S.) 434; 21 L. T. 214; 17 W. R. 445.—P.C.

Grill v. General Iron Screw Collier Co.,
adopted.

Oppenheim v. White Lion Hotel Co. (1871) 40 L. J. C. P. 231; L. R. 6 C. P. 515; 25 L. T. 93.—C.P.; Notara v. Henderson (1872) 41 L. J. Q. B. 158, 164; L. R. 7 Q. B. 225, 236; 26 L. T. 442; 20 W. R. 442; 1 Asp. M. C. 278.—EX. CH.; The Chasca (1875) 44 L. J. Adm. 17; L. R. 4 A. & E. 446; 32 L. T. 838; 2 Asp. M. C. 600.—ADM.; Scaramanga v. Stamp (1879) 48 L. J. C. P. 478; 4 C. P. D. 316; 41 L. T. 191.—LINDLEY, J.; *affirmed*, (1880) 49 L. J. C. P. 674; 5 C. P. D. 295; 42 L. T. 840; 28 W. R. 691; 4 Asp. M. C. 295.—C.A.

Grill v. General Iron Screw Collier Co.,
referred to.

Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co. (1883) 52 L. J. Q. B. 220, 230; 10 Q. B. D. 521, 542; 48 L. T. 546; 31 W. R. 445; 5 Asp. M. C. 65; 47 J. P. 260.—C.A.

Grill v. General Iron Screw Collier Co.,
approved.

Wilson v. The Xantho (1887) 56 L. J. Adm. 116; 12 App. Cas. 503, 510; 57 L. T. 701; 36 W. R. 353; 6 Asp. M. C. 207.—H.L. (E.).

Grill v. General Iron Screw Collier Co.,
followed.

The Glendarroch (1894) 63 L. J. P. 89; [1894] P. 226; 6 R. 686; 70 L. T. 844.—C.A.

Grill v. General Iron Screw Collier Co.,
referred to.

Trinder v. Thames and Mersey Marine Insurance Co. (1898) 67 L. J. Q. B. 666; [1898] 2 Q. B. 114; 78 L. T. 485; 46 W. R. 561; 8 Asp. M. C. 373.—C.A.

Grill v. General Iron Screw Collier Co.,
applied.

Price v. Union Lighterage Co. (1903) 72 L. J. K. B. 374; [1903] 1 K. B. 750; 88 L. T. 428; 51 W. R. 477; 9 Asp. M. C. 398; 8 Com. Cas. 155.—WALTON, J.

Grill v. General Iron Screw Collier Co.,
referred to.

Fenton v. Thorley (1903) 72 L. J. K. B. 787; [1903] A. C. 443; 89 L. T. 314; 52 W. R. 81.—H.L. (E.).

The Freedom (1871) L. R. 3 P. C. 594; 24 L. T. 452; 1 Asp. M. C. 136.—P.C., *dictum disapproved.*

The Chasca (1875) L. R. 4 A. & E. 446; 44 L. J. Adm. 17; 32 L. T. 838; 2 Asp. M. C. 600.—ADM.

SIR R. PHILLIMORE.—In questions arising on exceptions introduced into contracts of affreightment, the Court is bound to look to the real, and not merely, as in cases of marine insurance, to the proximate cause of the loss. The only

authority cited to the contrary has been a *dictum* in *The Freedom*, where the learned judge, who delivered the judgment to the Privy Council, says: "The words 'perils of the seas' in the bill of lading must of course be taken in the sense in which they are used in a policy of insurance. It is a settled rule of the law of insurance not to go into distinct causes, but to look exclusively to the immediate or proximate cause of the loss." This *dictum* was in no way necessary to the decision of the case before their lordships, and it appears to me that it was an erroneous *dictum* that must have found its way through inadvertence into their lordships' judgment.—p. 448.

The Freedom, considered and applied.

Sewell v. Burdick (1884) 54 L. J. Q. B. 156; 10 App. Cas. 74; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.).

Hayn v. Culliford (1878) 48 L. J. C. P. 372; 4 C. P. D. 182; 40 L. T. 536; 27 W. R. 541; 4 Asp. M. C. 128.—C.P.D., *distinguished.*

Norman v. Binnington (1890) 59 L. J. Q. B. 490; 25 Q. B. D. 475; 63 L. T. 108; 38 W. R. 702; 6 Asp. M. C. 528.—SMITH, CAVE and WILLIAMS, JJ.

Hayn v. Culliford, applied.

The Ferro (1892) 62 L. J. Adm. 48; [1893] P. 38; 1 R. 562; 68 L. T. 418; 7 Asp. M. C. 309.—JEUNE, P. and BARNES, J.

Hayn v. Culliford, distinguished.

Scheibler v. Furness (1892) 62 L. J. Q. B. 201; [1893] A. C. 8; 1 R. 59; 86 L. T. 1; 7 Asp. M. C. 263.—H.L. (E.).

Hayn v. Culliford, approved.

Meux v. G. E. Ry. (1895) 64 L. J. Q. B. 657; [1895] 2 Q. B. 387; 73 L. T. 247; 43 W. R. 680; 59 J. P. 662; 14 R. 620.—C.A.

The Accomac (1890) 59 L. J. Adm. 91; 15

P. D. 208; 63 L. T. 737; 39 W. R. 133; 6 Asp. M. C. 579.—C.A.; and **The Ferro** (1892) 62 L. J. Adm. 48; [1893] P. 38; 1 R. 562; 68 L. T. 418; 7 Asp. M. C. 309.—JEUNE, P. and BARNES, J., *distinguished*.
The Glenochil (1895) 65 L. J. Adm. 1; [1896] P. 10; 73 L. T. 416; 8 Asp. M. C. 219.—JEUNE, P. and BARNES, J.

Norman v. Binnington (1890) 59 L. J. Q. B.

490; 25 Q. B. D. 475; 63 L. T. 108; 38 W. R. 702; 6 Asp. M. C. 528.—CAVE, SMITH and WILLIAMS, JJ., *considered*.
Baerselman v. Bailey (1895) 64 L. J. Q. B. 707; [1895] 2 Q. B. 301; 11 R. 481; 72 L. T. 677; 43 W. R. 593; 8 Asp. M. C. 4.—C.A. ESSEY, M.R. and RIGBY, L.J.

The Glenochil (1895) 65 L. J. P. 1; [1896]

P. 10; 73 L. T. 416; 8 Asp. M. C. 218.—JEUNE, P. and BARNES, J., *followed*.
The Rodney (1900) 69 L. J. P. 29; [1900] P. 112; 82 L. T. 27; 48 W. R. 527; 9 Asp. M. C. 39.—JEUNE, P. and BARNES, J.

The Glenochil, considered and applied.

Rowson v. Atlantic Transport Co. (1903) 72 L. J. K. B. 811; [1903] 2 K. B. 666; 89 L. T. 204; 52 W. R. 85; 9 Com. Cas. 33.—C.A.

Moes v. Leith and London Shipping Co. (1867) 5 Ct. of Sess. Cas. (3rd series) 988, *followed*.

Horsley v. Baxter Brothers (1893) 20 Ct. of Sess. Cas. (4th series) 333.

Hotham v. East India Co. (1774) 1 Doug. 272. —K.B., *dicta disapproved*.

Thompson v. Brown (1817) 7 Taunt. 656.—C.P. GIBBS, C.J. (for the Court).—The maxim of law which meets one in this case is, that matters "which are contracted for by deed cannot be dissolved except by deed." The deed stipulates that the delivery shall be at London, and the question is whether Liverpool shall be substituted. The objection is, that the stipulation by deed cannot be dissolved by parol. At the same time, the doctrine of Lord Mansfield, C.J., and Buller, J., in the case of *Hotham v. East India Co.*, certainly is extremely strong. p. 670. . . . Those judges, in giving judgment on the case, were obliged to consider the effect of the charter-party, because it was on the effect of the charter-party that the issues must be decided, and they do in express terms say that if an agreement had been made in the course of the voyage, that the cargo should be delivered at a different port from that stipulated for in the charter-party, and if that substituted contract was performed, the compensation for it might be recovered in an action of covenant framed on the charter-party. It is very singular that in no subsequent case is that doctrine ever alluded to or introduced, though many cases must have occurred to which it would apply. Possibly the Courts have not thought it necessary further to consider a mere *dictum*; but I can find no judgment of any Court in which the Court has referred to those *dicta*. In one, and only in one, case do the counsel in argument allude to them, but the Court does not notice the argument. In such circumstances, therefore, we are to look to subsequent decisions, and see how far such *dicta*, though coming from so high an authority, have been recognised. On the other hand, we find in previous as well as in latter decisions many things which have an aspect the other way. p. 671. . . . Upon consideration of all these cases, we feel ourselves compelled to say that, notwithstanding the high authority of those *dicta* in the case of *Hotham v. East India Co.*, those cases "in which a contrary doctrine has prevailed are of higher authority."—p. 674.

Russell v. Niemann (1864) 34 L. J. C. P. 10; 17 C. B. (N.S.) 163; 10 L. T. 786; 13 W. R. 93.—C.P., *not applied*.

The Felix (1868) 37 L. J. Adm. 48, 50; L. R. 2. A. & E. 278, 278; 18 L. T. 587; 17 W. R. 102.—ADM.

Russell v. Niemann, adopted.

The Heinrich (1871) L. R. 3 A. & E. 424, 435; 24 L. T. 914; 1 Asp. M. C. 79.—ADM.

Russell v. Niemann, referred to.

The Wilhelm Schmidt (1871) 25 L. T. 34, 38; 1 Asp. M. C. 82.—ADM.

Russell v. Niemann, discussed.

Serrano v. Campbell (1890) 60 L. J. Q. B. 303; [1891] 1 Q. B. 283; 64 L. T. 615; 39 W. R. 356; 7 Asp. M. C. 48.—C.A. See extract, *infra*, col. 3348.

Russell v. Niemann, held applicable.

The Industrie (1893) 63 L. J. Adm. 82; [1894] P. 58; 6 R. 681; 70 L. T. 791; 42 W. R. 280;

7 Asp. M. C. 457.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

Russell v. Niemann and Serrano v. Campbell (*supra*), *followed*.

Diederichsen v. Farquharson (1897) 67 L. J. Q. B. 103; [1898] 1 Q. B. 150; 77 L. T. 543; 46 W. R. 162; 8 Asp. M. C. 333.—C.A. SMITH, RIGBY and COLLINS, L.JJ.

Newall v. Royal Exchange Shipping Co., 33 W. R. 342.—CAVE, J.; *reversed*, (1885) 33 W. R. 868.—C.A. BRETT, BAGGALLAY and BOWEN, L.JJ.

Evans v. Martlett (or Marlett) (1697) 1 Ld. Raym. 271; 12 Mod. 156; 3 Salk. 290.—K.B., *discussed*.

Burdick v. Sewell (1884) 53 L. J. Q. B. 359; 13 Q. B. D. 159, 164; 51 L. T. 453; 32 W. R. 740.—C.A. (reversed, H.L. (E.), *see* col. 3332).

Fearon v. Bowers (1753) 1 H. Bl. 364, n.—C.P., *referred to*.

Lickbarrow v. Mason (1790) 1 H. Bl. 357.—EX. CH. (*see* "SALE," *ante*, col. 3029); and **The Tigress** (1863) 33 L. J. Adm. 97; **Brown & Lush**, 38; 9 Jur. (N.S.) 361; 8 L. T. 117; 11 W. R. 538.—ADM.

Fearon v. Bowers, disapproved.

Glyn, Mills & Co. v. East and West India Dock Co. (1862) 7 App. Cas. 591; 52 L. J. Q. B. 146; 47 L. T. 309; 31 W. R. 206; 4 Asp. M. C. 580.—H.L. (E.).

LORD BLACKBURN.—In *Fearon v. Bowers*, decided in 1753, Lee, C.J., is reported to have ruled, "that it appeared by the evidence that, according to the usage of trade, the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading, which was done. The jury were therefore directed by the Chief Justice to find a verdict for the defendant." Lord Tenterden says (I quote from the 5th edition of *Abbott on Shipping*, the last published in his lifetime, Part III., Chap. IX., sect. 24), "But perhaps this rule might, upon further consideration, be held to put too much power into the master's hands." It is singular enough that 129 years should have elapsed without its having been necessary for any Court to say whether this rule was good law. It was suggested on the argument with great probability that, especially after the caution given immediately after the passage I have read (Part III., Chap. IX., sect. 25), masters have declined to incur the responsibility of deciding between two persons claiming under different parts of the bill of lading, so that the case has not arisen. If this rule were the law, it would follow, *a fortiori*, that if the master was entitled to choose between two conflicting claims, of both of which he had notice, and deliver to either holder, he must be justified in delivering to the only one of which he had notice. So that I think it is necessary to consider whether it is law, and I do not think it can be law, for the reason given by Lord Tenterden; it puts too much power in the master's hands. Where he has notice, or probably even knowledge of the other indorsement, I think he must deliver, at his peril, to the rightful holder, or interplead.—p. 610.

Mr. Justice Field seems to have taken a view of the facts as to the way in which the goods came

into the hands of the dock company different from that which I have taken, and consequently to have thought that the very important question suggested by Lord Westbury did not arise. Lord Justice Brett thinks that the master cannot be excused as against the first assignee of one part of the bill who has the legal right to the property, for delivering under *any* circumstances to one who produces another bill of lading bearing a genuine indorsement, unless he would be excused in *all* circumstances; in other words, unless *Learon v. Bowers* is good law to its full extent. In this I cannot agree. I think, as I have already said, that when the master has notice that there has been an assignment of another part of the bill of lading, the master must interplead or deliver to the one who he thinks has the better right, at his peril if he is wrong.—p. 613.

Wright v. Campbell (1767) 4 Burr. 2046; 1 H. Bl. 628.—K.B.

Discussed, Glyn, Mills & Co. v. East and West India Dock Co. (1882) 52 L. J. Q. B. 146; 7 App. Cas. 591, 617; 47 L. T. 309; 31 W. R. 206; 4 Asp. M. C. 480.—H.L. (E.); *Burdick v. Sewell* (1884) 53 L. J. Q. B. 399; 13 Q. B. D. 159, 164; 51 L. T. 453; 32 W. R. 740.—C.A., reversed, H.L. (E.) (see col. 3332).

Hibbert v. Carter (1787) 1 Term Rep. 745; 1 R. R. 388.—K.B., *approved*.

Lickbarrow v. Mason (1790) 1 H. Bl. 337.—EX. CH. See "SALE" *ante*, col. 3029.

Hibbert v. Carter, *discussed*.

Burdick v. Sewell (1884) 53 L. J. Q. B. 399; 13 Q. B. D. 159, 164; 51 L. T. 453; 32 W. R. 740.—C.A., reversed, H.L. (E.) (see col. 3332).

Halle v. Smith (1796) 1 B. & P. 563.—EX. CH.

Distinguished, *Patten v. Thompson* (1816) 5 M. & S. 350; 17 R. R. 356.—K.B.; *referred to*, *Bryans v. Nix* (1839) 5 L. J. Ex. 137; 4 M. & W. 775; 1 H. & H. 480.—EX.; *discussed*, *Burdick v. Sewell* (1884) 53 L. J. Q. B. 399; 13 Q. B. D. 159, 164; 51 L. T. 453; 32 W. R. 740.—C.A., reversed, H.L. (E.) (see col. 3332).

Wilmshurst v. Bowker (1833) 12 L. J. Ex. 475; 7 Man. & G. 882; 8 Scott N. R. 571.—EX. CH.

Explained, *Fraser v. Witt* (1868) L. R. 7 Eq. 64; 19 L. T. 440; 17 W. R. 92.—ROMILLY, M.R.; *followed*, *Shadwick. In re, Catling, Ex parte* (1873) 29 L. T. 431.—BACON, C.J.

Jenkyns v. Usborne (1844) 13 L. J. C. P. 196; 7 Man. & G. 678; 8 Scott N. R. 505.—C.P., *applied*.

Fuentes v. Montis (1868) 37 L. J. C. P. 137, 141; L. R. 3 C. P. 268, 278; 18 L. T. 21.—C.P.; affirmed, EX. CH. (see *ante*, col. 2544); *Cole v. North-Western Bank* (1875) 44 L. J. C. P. 233, 242; L. R. 10 C. P. 254, 373; 32 L. T. 733.—EX. CH. See extract, *ante*, col. 3023.

Phillips v. Clark (1857) 26 L. J. C. P. 168; 2 C. B. (N.S.) 156; 3 Jur. (N.S.) 467; 5 W. R. 582.—C.P., *referred to*.

Ohrloff v. Briscall, The Helene (1866) 35 L. J. P. C. 63; L. R. 1 P. C. 231, 238; 4 Moore P. C. (N.S.) 70; 12 Jur. (N.S.) 675; 14 L. T. 873; 15 W. R. 202; Br. & L. 429.—P.C.; *Czech v. General*

Steam Navigation Co. (1867) 37 L. J. C. P. 3; L. R. 3 C. P. 14; 17 L. T. 246; 16 W. R. 130.—C.P.; *Grill v. General Iron Screw Collier Co.* (1868) 37 L. J. C. P. 205; L. R. 3 C. P. 479; 18 L. T. 485; 16 W. R. 796.—EX. CH.; *The Duero* (1869) 38 L. J. Adm. 69; L. R. 2 A. & E. 393; 22 L. T. 37.—ADM.

Phillips v. Clark, *adopted*.

Gill v. Manchester Ry. (1873) 42 L. J. Q. B. 89; L. R. 8 Q. B. 186, 196; 28 L. T. 587; 21 W. R. 525.—Q.B., MELLOR, J. dissenting; and *Steel v. State Line S.S. Co.* (1877) 3 App. Cas. 72, 87; 37 L. T. 333; 3 Asp. M. C. 516.—H.L. (SC.).

Phillips v. Clark, *recognised*.

Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co. (1883) 52 L. J. Q. B. 220, 225; 10 Q. B. D. 521, 531; 48 L. T. 546; 31 W. R. 445; 5 Asp. M. C. 65; 47 J. P. 260.—C.A.

Phillips v. Clark, *explained*.

M. S. & L. Ry. v. Brown (1883) 53 L. J. Q. B. 124; 8 App. Cas. 703, 709; 50 L. T. 281; 32 W. R. 207; 48 J. P. 388.—H.L. (E.).

The St. Cloud (1863) Br. & L. 4; 8 L. T. 54.—ADM., *referred to*.

Sandeman v. Scurr (1866) 36 L. J. Q. B. 58, 64; L. R. 2 Q. B. 86, 97; 8 B. & S. 50; 15 L. T. 608; 15 W. R. 277.—Q.B.; *The Figlia Maggiore* (1868) 37 L. J. Adm. 52; L. R. 2 A. & E. 106, 110; 18 L. T. 532.—ADM.; *The Felix* (1868) 37 L. J. Adm. 48; L. R. 2 A. & E. 273, 277; 18 L. T. 587; 17 W. R. 102.—ADM.; *The Nepoter* (1869) 38 L. J. Adm. 63; L. R. 2 A. & E. 375; 22 L. T. 177; 18 W. R. 49.—ADM.; *Simpson v. Blues, The Madge Wildfire* (1872) 41 L. J. C. P. 121, 127; L. R. 7 C. P. 290, 297; 26 L. T. 697; 20 W. R. 680.—C.P.; *Cargo ex Argos* (1873) L. R. 5 P. C. 134, 154; 28 L. T. 745; 21 W. R. 707.—P.C., affirming 42 L. J. Adm. 94.—ADM.; *Hayn v. Culliford* (1878) 47 L. J. C. P. 755; 3 C. P. D. 410, 415; 39 L. T. 288.—DENMAN, J., affirmed, (1879) 48 L. J. C. P. 372; 4 C. P. D. 182; 40 L. T. 536; 27 W. R. 541; 4 Asp. M. C. 128.—C.A.

Smurthwaite v. Wilkins (1852) 31 L. J. C. P. 214; 11 C. B. (N.S.) 842; 5 L. T. 842; 7 L. T. 65; 10 W. R. 386.—C.P., *referred to*.

The Felix (1868) 37 L. J. Adm. 48; L. R. 2 A. & E. 273; 18 L. T. 587; 17 W. R. 102.—ADM.; *The Wilhelm Schmidt* (1871) 25 L. T. 34, 37; 1 Asp. M. C. 382.—ADM.; *Sewell v. Burdick* (1884) 54 L. J. Q. B. 156; 10 App. Cas. 74, 87; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.).

Short v. Simpson (1866) 35 L. J. C. P. 147; L. R. 1 C. P. 248; 13 L. T. 674; 14 W. R. 307.—C.P., *applied*.

The Nepoter (1869) 38 L. J. Adm. 63, 66; L. R. 2 A. & E. 375, 378; 22 L. T. 177; 18 W. R. 49.—ADM.

Short v. Simpson, *explained*.

Sewell v. Burdick (1884) 54 L. J. Q. B. 156; 10 App. Cas. 74, 87; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.).

Short v. Simpson, *approved*.

Bristol and West of England Bank v. Midland Ry. (1891) 61 L. J. Q. B. 115; [1891] 2 Q. B. 653; 65 L. T. 234; 40 W. R. 148.—C.A.

Meyerstein v. Barber (1866) 36 L. J. C. P. 48; L. R. 2 C. P. 38; 15 L. T. 355.—C.P.; *affirmed*, (1867) 36 L. J. C. P. 289; L. R. 2 C. P. 661; 16 L. T. 569.—EX. CH.: *the latter decision affirmed nom.* **Barber v. Meyerstein** (1870) 39 L. J. C. P. 187; L. R. 4 H. L. 317; 22 L. T. 808; 18 W. R. 1041.—H.L. (E.).

Barber v. Meyerstein, *applied*.
The John Bellamy (1870) 39 L. J. Adm. 28; L. R. 3 A. & E. 129; 22 L. T. 244.—ADM.; *Mors-le-Blanch v. Wilson* (1873) 42 L. J. C. P. 70, 76; L. R. 8 C. P. 227, 239; 28 L. T. 415; 1 Asp. M. C. 605.—C.P.

Barber v. Meyerstein, *discussed and explained*.

Glyn v. East and West India Dock Co. (1882) 52 L. J. Q. B. 146; 7 App. Cas. 591, 603; 47 L. T. 309; 31 W. R. 206; 4 Asp. M. C. 580.—H.L. (E.); *Sewell v. Burdick* (1884) 54 L. J. Q. B. 156; 10 App. Cas. 74, 80; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.).

Barber v. Meyerstein, *dictum adopted*.
Hilton v. Tucker (1888) 57 L. J. Ch. 973; 39 Ch. D. 669, 673; 59 L. T. 172; 36 W. R. 762.—KEKEWICH, J.

Czech v. General Steam Navigation Co. (1867) 37 L. J. C. P. 3; L. R. 3 C. P. 14; 17 L. T. 246; 16 W. R. 130.—C.P., *referred to*.
The Figlia Maggiore (1868) 37 L. J. Adm. 52; L. R. 2 A. & E. 106, 112; 18 L. T. 532.—ADM.; *The Freedom* (1869) L. R. 2 A. & E. 346, 348.—ADM.; *Taylor v. Liverpool and Great Western Steam Co.* (1874) 43 L. J. Q. B. 205; L. R. 9 Q. B. 546; 30 L. T. 714; 22 W. R. 752; 2 Asp. M. C. 275.—Q.B.; *Hayn v. Culliford* (1878) 47 L. J. C. P. 755; 3 C. P. D. 410, 418; 39 L. T. 288.—DENMAN, J. (*affirmed*, C.A.): *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883) 52 L. J. Q. B. 220; 10 Q. B. D. 521, 542; 48 L. T. 546; 34 W. R. 445; 5 Asp. M. C. 65.—C.A.

Czech v. General Steam Navigation Co., *adopted*.
Steinman v. Angier Line (1891) 60 L. J. Q. B. 425; [1891] 4 Q. B. 619; 64 L. T. 613; 39 W. R. 392.—C.A.

Czech v. General Steam Navigation Co., *followed*.
The Glendaroch (1894) 63 L. J. Adm. 89; [1894] P. 226; 6 R. 686; 70 L. T. 344; 7 Asp. M. C. 420.—C.A.

Czech v. General Steam Navigation Co., *applied*.
Barrow v. Williams (1890) 7 Times L. R. 38.—CHARLES, J.

Czech v. General Steam Navigation Co., *adopted*.
Price v. Union Lighterage Co. (1903) 72 L. J. K. B. 374; [1903] 1 K. B. 750, 754; 88 L. T. 428; 51 W. R. 477; 9 Asp. M. C. 398; 8 Cem. Cas. 155.—WATSON, J.

Dracachi v. Anglo-Egyptian Navigation Co. (1868) 37 L. J. C. P. 71; L. R. 3 C. P. 190; 17 L. T. 472; 16 W. R. 277.—C.P., *referred to*.

Burdick v. Sewell (1884) 53 L. J. Q. B. 399; 13 Q. B. D. 159, 171; 51 L. T. 453; 32 W. R. 740.—C.A.

Rodger v. Comptoir d'Escompte (1868) 5 Moore P. C. (N.S.) 538; 38 L. J. P. C. 30; L. R. 2 P. C. 303; 21 L. T. 33; 17 W. R. 468.—P.C., *distinguished*.

Chartered Bank of India, Australia, and China v. Henderson (1874) L. R. 5 P. C. 501; 30 L. T. 578.—P.C.

SIR BARNES PEACOCK (for the Court).—This case differs entirely from *Rodger's Case*, because the bill of lading in that case was not handed over at the time, but was handed over in pursuance of the agreement generally to hand over all bills. In this case it was handed over specially at the time, in consideration of the release and of the abandonment of proceedings for not delivering over the shipping documents. It therefore appears that the bank did obtain the legal right to the goods by the indorsement of the bill of lading for a valuable consideration, and whether they afterwards actually received possession of the goods or not they had a legal title to them without notice, and that legal title was not affected by the equity arising out of the circumstances under which the goods were sold by Messrs. Henderson & Co. to Lyall, Still & Co. This case comes entirely within the case of *Henderson & Co. v. The Comptoir d'Escompte de Paris*, in which their lordships held that the bank got the legal title to the goods, and that that legal title was not affected by the equity arising from the terms upon which the goods were originally sold.

Rodger v. Comptoir d'Escompte, *observations applied*.

The Emilian Marie (1875) 44 L. J. Adm. 9, 14; 32 L. T. 435; 2 Asp. M. C. 514.—ADM.

Rodger v. Comptoir d'Escompte, *followed*.
Love, In re, Watson, Ex parte (1877) 46 L. J. Bk. 97, 100; 5 Ch. D. 35, 44; 36 L. T. 75; 25 W. R. 489; 3 Asp. M. C. 396.—C.A.

Rodger v. Comptoir d'Escompte, *dissented from*.

Leask v. Scott (1877) 2 Q. B. D. 376; 46 L. J. Q. B. 576; 36 L. T. 784; 25 W. R. 654; 3 Asp. M. C. 469.—C.A.

BRAMWELL, L.J. (for the Court).—In support of his argument Mr. Webster cited *Rodger v. Comptoir d'Escompte de Paris* before the Judicial Committee of the P. C. We think that that case justifies his argument, and is in point. There may be differences in the facts of the two cases, but the *ratio decidendi* was clearly that advanced for the defendants in the present case. We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect, and rejoice if we could agree with it. But we cannot. There is not a trace of such distinction between cases of past and present consideration to be found in the books. It is true there is no decision the other way; but wherever the rule is laid down it is laid down without qualification, viz., that a transfer of a bill of lading for valuable consideration to a bona fide transferee defeats the right of stoppage *in transitu*.

Rodger v. Comptoir d'Escompte, *distinguished*.

Kendal v. Marshall (1883) 52 L. J. Q. B. 313, 317; 11 Q. B. D. 356, 366; 48 L. T. 951; 31 W. R. 597.—C.A.

Henderson v. Comptoir d'Escompte (1872)

42 L. J. P. C. 60; L. R. 5 P. C. 253;
29 L. T. 192; 21 W. R. 873; 2 Asp.
M. C. 98.—P.C., *followed*.
Chartered Bank of India, Australia and China
v. Henderson (1874) L. R. 5 P. C. 501; 30 L. T.
578.—P.C. *See extract, supra*.

The Nepoter (1869)

38 L. J. Adm. 63;
L. R. 2 A. & E. 375; 22 L. T. 177; 18
W. R. 49.—ADM., *dictum not adopted*.
Simpson v. Blues (1872) 41 L. J. C. P. 121,
127; L. R. 7 C. P. 290, 297; 26 L. T. 697;
20 W. R. 680.—C.P.

The Nepoter, considered.

Thrift v. Youle (1877) 46 L. J. C. P. 402;
2 C. P. D. 432; 36 L. T. 114; 3 Asp. M. C.
357.—C.P.D.

The Nepoter, observations adopted.

Sewell v. Burdick (1884) 54 L. J. Q. B. 156;
10 App. Cas. 74, 94; 52 L. T. 445; 33 W. R.
461; 5 Asp. M. C. 376.—H.L. (E.).

Ellershaw v. Magniac (1843)

6 Ex. 576, n.
—EX., *explained and distinguished*.
Gabarron v. Kreeft (1875) 44 L. J. Ex. 238,
242; L. R. 10 Ex. 274, 280; 33 L. T. 365; 24
W. R. 146; 3 Asp. M. C. 36.—EX.

Ellershaw v. Magniac, principle applied.

Mirabita v. Imperial Ottoman Bank (1878)
47 L. J. Ex. 418, 421; 3 Ex. D. 164, 169; 38
L. T. 597; 3 Asp. M. C. 591.—C.A.

Turner v. Liverpool Docks Trustees (1851)

20 L. J. Ex. 393; 6 Ex. 543.—EX. CH.,
adopted.
Schotsmans v. L. & Y. Ry. (1867) 36 L. J. Ch.
361, 364; L. R. 2 Ch. 332, 337; 16 L. T. 189;
15 W. R. 534.—L.C. and L.J.; Bernidson v.
Strang (1867) 36 L. J. Ch. 879; L. R. 4 Eq.
481, 492; 16 L. T. 583.—V.C. (varied, (1868)
37 L. J. Ch. 665; L. R. 3 Ch. 588; 19 L. T.
40; 16 W. R. 1025.—L.C.): and Shephard v.
Harrison (1869) 38 L. J. Q. B. 105; L. R. 4
Q. B. 196, 204.—Q.B. (affirmed, EX. CH. and
H.L.—*see infra*).

Turner v. Liverpool Docks Trustees, dis-

tinguished.
Gabarron v. Kreeft (1875) 44 L. J. Ex. 238,
243; L. R. 10 Ex. 274, 280; 33 L. T. 365; 24
W. R. 146; 3 Asp. M. C. 36.—EX.; and
Mirabita v. Imperial Ottoman Bank (1878) 47
L. J. Ex. 418; 3 Ex. D. 164, 173; 38 L. T.
597; 3 Asp. M. C. 591.—C.A.

Turner v. Liverpool Docks Trustees, applied.

Bruno, in re, Francis, Ex parte (1887) 56
L. T. 577; 6 Asp. M. C. 138; 4 Morrell 146.—
CAVE, J.

Shepherd v. Harrison (1871)

40 L. J. Q. B.
148; L. R. 5 H. L. 116; 24 L. T. 857;
20 W. R. 1.—H.L. (E.), *referred to*.
Gabarron v. Kreeft (1875) 44 L. J. Ex. 238;
L. R. 10 Ex. 274, 285; 33 L. T. 365; 24 W. R.
146; 3 Asp. M. C. 36.—EX.; Banco de Lima v.
Anglo-Peruvian Bank (1878) 8 Ch. D. 160, 170;
38 L. T. 180.—MALINS, V.C.; Mirabita v.
Imperial Ottoman Bank (1878) 47 L. J. Ex. 418,
423; 3 Ex. D. 164, 173; 38 L. T. 597; 3 Asp.
M. C. 591.—C.A.; Rew v. Payne (1885) 53 L. T.
932; 5 Asp. M. C. 515.—KAY, J. (*and see ante*,
vol. i. cols. 221, 222).

Taylor v. Liverpool and Great Western

Steam Co. (1874) 43 L. J. Q. B. 205; L. R.
9 Q. B. 546; 30 L. T. 714; 22 W. R. 752;
2 Asp. M. C. 275.—Q.B., *dictum adopted*.

Hayn v. Culliford (1878) 47 L. J. C. P. 755,
759; 3 C. P. D. 410, 418; 39 L. T. 288.—

DENMAN, J. (affirmed, (1879) 48 L. J. C. P.
372; 4 C. P. D. 182; 40 L. T. 536; 27 W. R.
541; 4 Asp. M. C. 128.—C.A.); Norman v.
Binnington, (1890) 59 L. J. Q. B. 490; 25
Q. B. D. 475; 63 L. T. 108; 38 W. R. 702; 6
Asp. M. C. 528.—CAVE, SMITH and WILLIAMS, JJ.

Taylor v. Liverpool and Great Western

Steam Co., referred to.
Steinman v. Angier Line (1891) 60 L. J. Q. B.
425; [1891] 1 Q. B. 619; 64 L. T. 613; 39
W. R. 392.—C.A.

Taylor v. Liverpool and Great Western

Steam Co., distinguished.
The Glendaroch (1894) 63 L. J. Adm. 89;
[1894] P. 226; 6 R. 686; 70 L. T. 344; 7 Asp.
M. C. 420.—C.A.

Burdick v. Sewell, 52 L. J. Q. B. 428; 10
Q. B. D. 363; 48 L. T. 705; 31 W. R. 796; 5
Asp. M. C. 79.—Q.B.D.; *reversed*, (1884) 53
L. J. Q. B. 399; 13 Q. B. D. 159; 51 L. T. 453;
32 W. R. 740.—C.A., *the latter decision reversed* *nom.*

Sewell v. Burdick (1885) 54 L. J. Q. B.
156; 10 App. Cas. 74; 52 L. T. 445; 33 W. R.
461; 5 Asp. M. C. 376.—H.L. (E.).

Sewell v. Burdick, adopted.

Rew v. Payne (1885) 53 L. T. 932, 935; 5 Asp.
M. C. 515.—KAY, J.; Rodocanachi v. Milburn
(1886) 56 L. J. Q. B. 202; 18 Q. B. D. 67, 75;
56 L. T. 594; 35 W. R. 241; 6 Asp. M. C. 100.—
C.A.

Sewell v. Burdick, applied.

Bristol Bank v. Midland Ry. (1891) [1891] 2
Q. B. 653; 65 L. T. 653; 40 W. R. 148.—C.A.

Sewell v. Burdick, dictum adopted.

Rimmer v. Webster (1902) 71 L. J. Ch. 561;
[1902] 2 Ch. 163; 86 L. T. 491; 50 W. R.
517.—FARWELL, J.

Hilton v. Tucker (1888)

57 L. J. Ch. 973;
39 Ch. D. 669; 59 L. T. 152; 36 W. R.
762.—KEKEWICH, J., *referred to*.

Mills v. Charlesworth (1890) 59 L. J. Q. B.
530; 25 Q. B. D. 421; 63 L. T. 508; 39 W. R.
1.—C.A., *reversed nom.* Charlesworth v. Mills.—
H.L. (E.), *ante*. *See* vol. i. col. 235.

Ah Kang v. Australasian Steam Navigation

Co. (1883) 9 Vict. L. R. C. 171.—C.L.,
distinguished.

Norman v. Binnington (1890) 59 L. J. Q. B.
490; 25 Q. B. D. 475, 480; 63 L. T. 108; 38
W. R. 702; 6 Asp. M. C. 528.—SMITH, CAVE
and WILLIAMS, JJ.

Nash v. De Freville (1900)

69 L. J. Q. B.
484; [1900] 2 Q. B. 72; 82 L. T. 642;
48 W. R. 434.—C.A., *referred to*.

Farquharson v. King (1901) 70 L. J. K. B.
985; [1901] 2 K. B. 697; 85 L. T. 264; 49
W. R. 673.—C.A.; *reversed, ante*, col. 2522.

The Tigress (1863)

32 L. J. Adm. 97; Br.
& L. 38; 9 Jur. (N.S.) 361; 8 L. T. 117;
11 W. R. 538.—ADM., *not applied*.

The Princess Royal (1870) 39 L. J. Adm. 43;
L. R. 3 A. & E. 41; 22 L. T. 39.—ADM. (*and*
see post).

The Tigress (*supra*), *adopted*.

The Patria (1871) 41 L. J. Adm. 23, 31; L. R. 3 A. & E. 486, 465; 24 L. T. 849.—ADM.

The Tigress, *dictum disapproved*.

Glyn v. East & West India Dock Co. (1880) 50 L. J. Q. B. 62, 70; 6 Q. B. D. 475, 488; 43 L. T. 584.—C.A. (*see ante*, col. 3030); affirmed, (1882) 52 L. J. Q. B. 146; 7 App. Cas. 591; 47 L. T. 309; 31 W. R. 206; 4 Asp. M. C. 580.—H.L. (E.).

The Patria (1871) 41 L. J. Adm. 23; L. R. 3 A. & E. 486; 24 L. T. 849.—ADM., *referred to*.

The San Roman (1872) 41 L. J. Adm. 72; L. R. 3 A. & E. 583, 594.—ADM. (affirmed, (1873) 42 L. J. Adm. 46; L. R. 5 P. C. 301.—P.C.); and Dapusto v. Wyllie, The Pieve Superiore (1874) 43 L. J. Adm. 20; L. R. 5 P. C. 482, 493; 30 L. T. 887; 22 W. R. 777; 2 Asp. M. C. 319.—P.C.

Sheridan v. New Quay Dock Co. (1858) 28 L. J. C. P. 58; 4 C. B. (N.S.) 618; 5 Jur. (N.S.) 248.—C.P., *applied*.

Biddle v. Bond (1865) 34 L. J. Q. B. 137; 6 B. & S. 225; 11 Jur. (N.S.) 425; 12 L. T. 178; 13 W. R. 561.—Q.B.

Sheridan v. New Quay Dock Co., *recognised*.

Seagrave v. Union Marine Insurance Co. (1866) 35 L. J. C. P. 172; L. R. 1 C. P. 305, 320; 1 H. & R. 302; 12 Jur. (N.S.) 358; 14 L. T. 479; 14 W. R. 690.—C.P.

Turner v. Liverpool Docks Trustees (1851) 20 L. J. Ex. 393; 6 Ex. 543.—EX. CH., *discussed and applied*.

Falk v. Fletcher (1865) 34 L. J. C. P. 146; 18 C. B. (N.S.) 403; 11 Jur. (N.S.) 176; 13 W. R. 346.—C.P.

Key v. Cotesworth (1852) 22 L. J. Ex. 4; 7 Ex. 595.—EX., *referred to*.

Falk v. Fletcher (1865) 34 L. J. C. P. 146; 18 C. B. (N.S.) 403; 11 Jur. (N.S.) 176; 13 W. R. 346.—C.P.

Key v. Cotesworth, *inapplicable*.

Torrance v. Bank of British North America (1873) L. R. 5 P. C. 246; 29 L. T. 109; 21 W. R. 329.—P.C.

Hoare v. Dresser, 26 L. J. Ch. 51; 2 Jur. (N.S.) 1151.—L.J.J.; *reversed*, (1859) 28 L. J. Ch. 611; 7 H. L. Cas. 290; 5 Jur. (N.S.) 371; 7 W. R. 374.—H.L. (E.).

Hoare v. Dresser. *See*

Shepherd v. Harrison (1871) 40 L. J. Q. B. 148; L. R. 5 H. L. 116; 24 L. T. 857; 20 W. R. 1; 1 Asp. M. C. 66.—H.L. (E.).

Cahn v. Pockett's Bristol Channel Steam Packet Co. (1898) 67 L. J. Q. B. 625; [1898] 2 Q. B. 61; 79 L. T. 55; 3 Com. Cas. 197.—MATHEW, J.; *reversed*, (1899) 68 L. J. Q. B. 515; [1899] 1 Q. B. 643; 80 L. T. 269; 47 W. R. 422; 8 Asp. M. C. 516; 4 Com. Cas. 168.—C.A.

Barrow v. Coles (1811) 3 Campb. 92; 13 R. R. 763.—K.B., *discussed*.

Bateman v. Green (1867) Ir. R. 2 C. L. 166.—Q.B.

Brandt v. Bowley (1831) 1 L. J. K. B. 14; 9 A. & E. 932.—K.B., *referred to*.

Bateman v. Green (1867) Ir. R. 2 C. L. 166.—Q.B.; Shepherd v. Harrison (1871) 40 L. J. Q. B. 148; L. R. 5 H. L. 116; 24 L. T. 857; 20 W. R. 1; 1 Asp. M. C. 66.—H.L. (E.).

Fox v. Nott (1861) 30 L. J. Ex. 259; 6 H. & N. 630; 7 Jur. (N.S.) 663.—EX., *referred to*.

Bateman v. Green (1867) Ir. R. 2 C. L. 166.—Q.B.

Fox v. Nott, *explained and distinguished*.

The Figlia Maggiore (1868) 37 L. J. Adm. 52, 53; L. R. 2 A. & E. 105, 111; 18 L. T. 532.—SIR R. PHILLIMORE.

Fox v. Nott, *explained*.

The Freedom (1871) L. R. 3 P. C. 594, 599; 24 L. T. 452; 1 Asp. M. C. 136.—P.C.

Fox v. Nott, *dicta adopted*.

Sewell v. Burdick (1884) 54 L. J. Q. B. 156; 10 App. Cas. 74, 86; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.).

Gurney v. Behrend (1854) 23 L. J. Q. B. 265; 3 El. & Bl. 622; 18 Jur. 856; 2 W. R. 425.—Q.B., *dictum explained*.

The Marie Joseph, Pease v. Gloahac (1866) 35 L. J. P. C. 66, 70; L. R. 1 P. C. 219, 228; 3 Moore P. C. (N.S.) 556; 12 Jur. (N.S.) 677; 15 L. T. 6; 15 W. R. 201; Br. & L. 449.—P.C.

Gurney v. Behrend, *applied*.

The Argentina (1867) L. R. 1 A. & E. 370, 376; 16 L. T. 743.—ADM.

Gurney v. Behrend, *approved*.

Coventry v. Gladstone (1867) L. R. 4 Eq. 493; 37 L. J. Ch. 30; 16 W. R. 304.

WICKENS, V.-C.—But then I have been pressed very much with the observations of Lord Campbell in *Gurney v. Behrend*, upon the question whether the plaintiffs acquired any title under this bill of lading thus delivered to them by Waite, who got it, as defendants contend, irregularly, and without their consent or knowledge, by a mistake on the part of their messenger. The defendants, however, had full authority to deliver it to Waite, as they thought fit. It was in the hands of their servants for the purpose, and the only question is, whether by the course of trade any such custom as that stated by the defendants—that it is the practice not to deliver the bill of lading to the intended vendee until he shall have taken up his acceptances on account thereof—has been established. So far, however, from that being the usual course, it is expressly referred to by Crompton, J., during the argument in *Gurney v. Behrend*, as being an exceptional course, only adopted in times of suspicion and peril. I can quite understand such a term being inserted in the contract, if any one should be foolish enough to consent to it; but I am not at all satisfied that any such custom as that alleged by the defendants has been established.—p. 503.

Gurney v. Behrend, *not applied*.

Bateman v. Green (1867) Ir. R. 2 C. L. 166.—Q.B.

Gurney v. Behrend. *See*

Hathesing v. Laing (1873) 43 L. J. Ch. 233; L. R. 17 Eq. 92; 29 L. T. 734; 2 Asp. M. C. 170.—BACON, V.-C.

10. FREIGHT.

Cargo ex Galam (1863) 33 L. J. Adm. 97; 2 Moore P. C. (N.S.) 216; Br. & L. 167; 3 N. R. 254; 10 Jur. (N.S.) 277; 9 L. T. 550; 12 W. R. 495.—P.C., *adapted*.

The **Soblomsten** (1866) 36 L. J. Adm. 5; L. R. 1 A. & E. 293; 15 L. T. 393; 15 W. R. 591.—ADM.

Cargo ex Galam, *distinguished*.

The **Daring** (1868) 37 L. J. Adm. 29; L. R. 2 A. & E. 260.—ADM.

Cargo ex Galam, *referred to*.

The **Veritas** (1901) 70 L. J. P. 75; [1901] P. 304; 85 L. T. 136; 50 W. R. 30; 9 Asp. M. C. 237.—BARNES, J.

The **Soblomsten** (1866) 36 L. J. Adm. 5; L. R. 1 A. & E. 293; 15 L. T. 393; 15 W. R. 591.—ADM., *referred to*.

The **Teutonia** (1871) L. R. 3 A. & E. 391, 418.—ADM.; and **Metcalf v. Britannia Ironworks Co.** (1876) 1 Q. B. D. 613, 619.—Q.B.D.

The **Soblomsten**, *explained*.

The **Livietta** (1883) 52 L. J. Adm. 81; 8 P. D. 209; 49 L. T. 411; 5 Asp. M. C. 451.—HANNEN, P.

Baillie v. Modigliani (1785) Park on Insurance, 53.—MANSFIELD, C.J., *distinguished*.

Hunter v. Prinsep (1808) 10 East 378; 10 R. R. 328.—K.B.

[Where during the chartered voyage the ship, after being captured and recaptured, had been wrecked at the port to which it had been taken by the recaptors, and a sale of the cargo directed by the Vice-Admiralty Court there on the application of the master acting *bona fide*, but without orders, and the proceeds remitted to the shipowner, it was held by Lord Ellenborough that the freighter might recover such proceeds in *assumpsit* for money had and received without allowing freight, inasmuch as the conversion, having been made by the master and not, as in **Baillie v. Modigliani**, by a Court of competent jurisdiction, was unlawful and discharged the claim of the shipowners for freight.]

Baillie v. Modigliani, *not applied*.

Hopper v. Burness (1876) 45 L. J. C. P. 377, 380; 1 C. P. D. 137, 142; 34 L. T. 528; 24 W. R. 612; 3 Asp. M. C. 149.—C.P.D.

Baillie v. Modigliani, *considered*.

Metcalf v. Britannia Ironworks Co. (1876) 45 L. J. Q. B. 837; 1 Q. B. D. 613, 621; 35 L. T. 796.—Q.B.D.; affirmed, (1877) 46 L. J. Q. B. 443; 2 Q. B. D. 423; 36 L. T. 451; 25 W. R. 720; 3 Asp. M. C. 407.—C.A.

Hunter v. Prinsep (1808) 10 East 378; 10 R. R. 328.—K.B., *applied*.

Hopper v. Burness (1876) 45 L. J. C. P. 377; 1 C. P. D. 137; 34 L. T. 528; 24 W. R. 612; 3 Asp. M. C. 149.—C.P.D.

See headnote to **Hunter v. Prinsep**, *supra*.

Hunter v. Prinsep, *considered*.

Metcalf v. Britannia Ironworks Co. (1876) 45 L. J. Q. B. 837; 1 Q. B. D. 613; 35 L. T. 796.—Q.B.D.; affirmed, C.A., *supra*.

Osgood v. Groning (1810) 2 Camp. 466; 11 R. R. 765.—K.B., *considered and applied*.

The **Teutonia** (1871) 41 L. J. Adm. 4, 13; L. R. 3 A. & E. 394, 418; 24 L. T. 521; 1 Asp. M. C. 32.—ADM.; affirmed, P.C. See col. 3373.

The **Friends** (1810) Edwards, 246.—ADM., *referred to*.

The **Teutonia** (1871) 41 L. J. Adm. 4, 14; L. R. 3 A. & E. 394, 419; 24 L. T. 521; 1 Asp. M. C. 32.—ADM. (affirmed, P.C., *infra*, col. 3373); **Metcalf v. Britannia Ironworks Co.** (1876) 45 L. J. Q. B. 837, 851; 1 Q. B. D. 613, 635; 35 L. T. 796.—Q.B.D., affirmed, C.A.

Shipton v. Thornton (1858) 8 L. J. Q. B. 73; 9 A. & E. 314; 1 P. & D. 216.—Q.B., *referred to*.

Hill v. Wilson (1879) 48 L. J. C. P. 764; 4 C. P. D. 323; 41 L. T. 412; 4 Asp. M. C. 198.—C.P.D.; **Attwood v. Sellar** (1879) 48 L. J. Q. B. 465; 4 Q. B. D. 342.—Q.B.D. (affirmed, C.A., *infra*, col. 3381); **Svensden v. Wallace** (1885) 54 L. J. Q. B. 497; 10 App. Cas. 404, 418; 52 L. T. 901; 34 W. R. 369; 5 Asp. M. C. 453.—H.L. (E.).

Shipton v. Thornton, *referred to*.

Assicurazioni Generali v. The Bessie Morris [1892] 1 Q. B. 571.—COLLINS, J.; affirmed, C.A.

Hopper v. Burness (1876) 45 L. J. C. P. 377; 1 C. P. D. 137; 34 L. T. 528; 24 W. R. 612; 3 Asp. M. C. 149.—C.P.D., *adopted*.

Hill v. Wilson (1879) 48 L. J. C. P. 764; 4 C. P. D. 329; 41 L. T. 412; 4 Asp. M. C. 198.—C.P.D.

Metcalf v. Britannia Ironworks Co. (1877)

46 L. J. Q. B. 443; 2 Q. B. D. 423; 36 L. T. 451; 25 W. R. 720; 3 Asp. M. C. 407.—C.A., *distinguished*.

Dahl v. Nelson (1881) 50 L. J. Ch. 411; 6 App. Cas. 38; 44 L. T. 381; 29 W. R. 543; 4 Asp. M. C. 392.—H.L. (E.).

Metcalf v. Britannia Ironworks Co., *distinguished*.

Horsley v. Price (1883) 52 L. J. Q. B. 603; 11 Q. B. D. 244; 49 L. T. 101; 31 W. R. 786; 5 Asp. M. C. 106.—NORTH, J.

Hill v. Wilson (1879) 48 L. J. C. P. 764; 4 C. P. D. 329; 41 L. T. 412; 4 Asp. M. C. 198.—C.P.D., *referred to*.

Assicurazioni Generali v. The Bessie Morris [1892] 1 Q. B. 571.—COLLINS, J.; affirmed, C.A.

De Silvale v. Kendall (1815) 4 M. & S. 37;

16 R. R. 373.—K.B., *considered*.

Allison v. Bristol Marine Insurance Co. (1876) 1 App. Cas. 209, 219; 34 L. T. 809; 24 W. R. 1039.—H.L. (E.).

De Silvale v. Kendall, *applied*.

Ragdoconachi v. Milburn (1886) 17 Q. B. D. 316, 322.—MANISTY, J., partly reversed, (1886) 56 L. J. Q. B. 202; 18 Q. B. D. 67; 56 L. T. 594; 35 W. R. 241; 6 Asp. M. C. 100.—C.A.; and **Dufourcet v. Bishop** (1886) 56 L. J. Q. B. 497; 18 Q. B. D. 373; 56 L. T. 633; 6 Asp. M. C. 149.—DENMAN, J.

Curling v. Long (1797) 1 Bos. & P. 634; 4 R. R. 747.—C.P., *dictum disapproved*.

Beale v. Thompson (1803) 3 Bos. & P. 405.—C.P.

ALVANSEY, C.J.—I admit that capture puts

an end to the contract; but I do not admit, nor do the cases establish that capture one day and recapture the next will put an end to the contract; and with great deference to that dictum of Eyre, L.C.J., in the case of *Curling v. Long*, I think that capture and recapture do not put an end to the voyage.—p. 430.

Ritchie v. Atkinson (1808) 10 East 295; 10 R. R. 307.—K.B., referred to.

McAndrew v. Chapple (1866) 35 L. J. C. P. 281; L. R. 1 C. P. 643; 12 Jur. (N.S.) 567; 14 L. T. 556; 14 W. R. 891.—C.P.; and *The Teutonia* (1871) 41 L. J. Adm. 4; L. R. 3 A. & E. 394; 24 L. T. 521; 1 Asp. M. C. 32.—ADM. (affirmed, P.C., *infra*, col. 3373).

Dakin v. Oxley (1864) 33 L. J. C. P. 115; 15 C. B. (N.S.) 646; 10 Jur. (N.S.) 655; 10 L. T. 268; 12 W. R. 557.—C.P., adopted.

Lloyd v. Guibert (1865) 35 L. J. Q. B. 74; L. R. 1 Q. B. 115; 6 B. & S. 100; 13 L. T. 602.—EX. CH.

Dakin v. Oxley, approved.

Brown v. Gaudet, Argos, Cargo ex (1873) L. R. 8 P. C. 159; 21 W. R. 707; 28 L. T. 745.—P.C., affirming 42 L. J. Adm. 49.—ADM.

The Norway, The Norway Owners v. Ashburner (1865) 3 Moore P. C. (N.S.) 245; Br. & Lf. 404; 11 Jur. (N.S.) 892; 13 L. T. 50; 13 W. R. 1085.—P.C., referred to.

The Figlia Maggiore (1868) 37 L. J. Adm. 52; L. R. 2 A. & E. 105; 18 L. T. 532.—ADM.; *The Felix* (1868) 37 L. J. Adm. 48; L. R. 2 A. & E. 273; 18 L. T. 587; 17 W. R. 102.—ADM.; *The Princess Royal* (1870) 39 L. J. Adm. 43; L. R. 3 A. & E. 41; 23 L. T. 49.—ADM.

The Norway, followed.

Robinson v. Knights (1873) 42 L. J. C. P. 211; L. R. 8 C. P. 465; 28 L. T. 820; 21 W. R. 683; 2 Asp. M. C. 10.—C.P.

The Norway, approved.

Merchant Shipping Co. v. Armitage (1873) 43 L. J. Q. B. 24; L. R. 9 Q. B. 99; 29 L. T. 809; 2 Asp. M. C. 185.—EX. CH.

The Norway, considered.

Campbell v. Commercial Banking Co. of Sydney (1879) 40 L. T. 137, 140.—P.C.

The Norway, discussed and not applied.

The Ettrick (1881) 50 L. J. Adm. 65; 6 P. D. 127.—ADM., affirmed, 6 P. D. 127; 45 L. T. 399; 4 Asp. M. C. 465.—C.A.

The Norway, applied.

Pirie v. Middle Dock Co. (1881) 44 L. T. 426, 429; 4 Asp. M. C. 388.—W. WILLIAMS, J.

The Norway, referred to.

Huth v. Lamport (1886) 55 L. J. Q. B. 239; 16 Q. B. D. 735; 54 L. T. 663; 34 W. R. 386; 5 Asp. M. C. 543.—C.A.

The Norway, adopted.

Williams v. Canton Insurance Office (1901) 70 L. J. K. B. 962; [1901] A. C. 462; 85 L. T. 317; 6 Com. Cas. 256.—H.L. (E.).

Duthie v. Hilton (1868) 38 L. J. C. P. 93; L. R. 4 C. P. 138; 19 L. T. 285; 17 W. R. 55.—C.P., applied.

Asfar v. Blundell (1895) 65 L. J. Q. B. 138; [1896] 1 Q. B. 123; 73 L. T. 648; 44 W. R. 130.—C.A.

Robinson v. Knights (1873) 42 L. J. C. P. 211; L. R. 8 C. P. 465; 28 L. T. 820; 21 W. R. 683; 2 Asp. M. C. 10.—C.P., approved.

Merchant Shipping Co. v. Armitage (1873) 43 L. J. Q. B. 24; L. R. 9 Q. B. 99; 29 L. T. 809; 2 Asp. M. C. 185.—EX. CH.

Merchant Shipping Co. v. Armitage, L. R. 8 C. P. 469, n.; 22 W. R. 11.—Q.B.; partly reversed, (1873) 43 L. J. Q. B. 24; L. R. 9 Q. B. 99; 29 L. T. 809; 2 Asp. M. C. 185.—EX. CH.

Merchant Shipping Co. v. Armitage, considered.

L. C. & D. Ry. v. S. E. Ry. (1893) 63 L. J. Ch. 93; [1893] A. C. 429; 1 E. 275; 69 L. T. 637; 58 J. P. 36.—H.L. (E.). LORDS HERSCHELL, L.C., WATSON, MORRIS and SHAND.

Merchant Shipping Co. v. Armitage, distinguished.

Horner. In re, Fooks v. Horner (1896) 65 L. J. Ch. 694; [1896] 2 Ch. 188; 74 L. T. 686; 44 W. R. 556.—CHITTY, J.

Merchant Shipping Co. v. Armitage, adopted.

Williams v. Canton Insurance Office (1901) 70 L. J. K. B. 962; [1901] A. C. 462; 85 L. T. 317; 6 Com. Cas. 256.—H.L. (E.).

The Cito (1881) 51 L. J. Adm. 1; 7 P. D. 5; 45 L. T. 663; 30 W. R. 836; 4 Asp. M. C. 468.—C.A., distinguished.

The Leptir (1885) 52 L. T. 768; 5 Asp. M. C. 411.—BUTT, J.

Havelock v. Geddes (1809) 10 East 555; 10 R. R. 380.—K.B., referred to.

Stanton v. Richardson (1872) 41 L. J. C. P. 180; L. R. 7 C. P. 421, 432; 27 L. T. 513.—C.P.; **Jackson v. Union Marine Insurance Co.** (1873) 42 L. J. C. P. 284; L. R. 8 C. P. 572, 579.—C.P., affirmed, EX. CH.; **Kopitoff v. Wilson** (1876) 45 L. J. Q. B. 436; 1 Q. B. D. 377; 34 L. T. 677; 24 W. R. 706; 3 Asp. M. C. 163.—Q.B.D.; **Tully v. Howling** (1877) 46 L. J. Q. B. 388; 2 Q. B. D. 182; 36 L. T. 163; 25 W. R. 290; 3 Asp. M. C. 61.—C.A.; **Inman SS. Co. v. Bischoff** (1882) 52 L. J. Q. B. 169; 7 App. Cas. 670; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6.—H.L. (E.).

Greeves v. West India and Pacific Steamship Co., 20 L. T. 914.—Q.B., reversed (1870) 22 L. T. 615.—EX. CH.

Boyd v. Mangles (1849) 18 L. J. Ex. 273; 3 Ex. 387; 16 M. & W. 337.—EX. For subsequent proceedings in Chancery, see *Mangles v. Dixon, infra*.

Mangles v. Dixon (1849) 19 L. J. Ch. 240; 1 Mac. & G. 437; 1 Hall & Tw. 542.—L.C.; reversed, (1852) 3 H. L. Cas. 702.—H.L. (E.).

Mangles v. Dixon, commented on.

Rodger v. Comptoir d'Escompte (1869) 38 L. J. P. C. 30; L. R. 2 P. C. 393, 405; 5 Moore P. C. (N.S.) 538; 21 L. T. 33.—P.C.; **Higgs v.**

Assam Tea Co. (1869) 38 L. J. Ex. 233; L. R. 14 Ex. 387, 396; 17 W. R. 1125.—EX.; Leask v. Scott (1877) 46 L. J. Q. B. 576; 2 Q. B. D. 376, 381; 36 L. T. 784; 25 W. R. 654.—C.A.

Mangles v. Dixon, discussed and applied.

Connolly v. Munster Bank (1887) 19 L. R. Ir. 119, 130.—V.-C.

Mangles v. Dixon, compared.

Watts v. Driscoll (1901) 70 L. J. Ch. 157, 159; [1901] 1 Ch. 294; 84 L. T. 97; 49 W. R. 146.—C.A. ALVERSTONE, C.J., RIGBY and V. WILLIAMS, L.JJ.

Marquand v. Banner (1856) 6 E. & B. 232; 25 L. J. Q. B. 313; 2 Jur. (N.S.) 708.—Q.B., distinguished.

Gilkison v. Middleton (1857) 2 C.B. (N.S.) 134; 26 L. J. C. P. 209.—C.P.

ORESWELL, J.—It seems to me that the case of *Marquand v. Banner* proceeded upon the authority of *Colvin v. Newberry* (ante, col. 3315), in which the H. L. affirmed the judgment of the Ex. Ch. in *Newberry v. Colvin* (col. 3315), which reversed the judgment of the K. B. in *Colvin v. Newberry* (col. 3315); but in that case the charterers were owners of the ship *pro tempore*. The contracts were made with the captain as owner, and not as agent. Here (in *Gilkison v. Middleton*) the captain was still the agent of the shipowners.

Marquand v. Banner, dissented from.

Erichsen v. Barkworth (1858) 5 Jur. (N.S.) 517; 28 L. J. Ex. 95.—EX. CH.

WILLEN, J. (in Ex. Ch.).—I do not agree to that decision. I apprehend the contract would pass under the bill of lading by the new Act; but that has not been decided yet.—p. 519.

Marquand v. Banner, distinguished.

Wagstaff v. Anderson (1879) 48 L. J. C. P. 759; 4 C. P. D. 283; 41 L. T. 227.—C.P.D.; affirmed, (1880) 49 L. J. C. P. 485; 5 C. P. D. 171; 42 L. T. 720; 28 W. R. 856.—C.A.

Split v. Bowles (1808) 10 East 279;

10 E. R. 296.—K.B., considered.

Cooke v. Hemming (1868) 37 L. J. C. P. 179, 189; L. R. 3 C. P. 334, 355; 18 L. T. 772; 16 W. R. 903.—C.P.; WILLES, J. dissenting.

Kerswill v. Bishop (1832) 1 L. J. Ex. 227; 2 Cr. & J. 529; 2 Tyr. 602.—EX., considered.

Rusden v. Pope (1868) 37 L. J. Ex. 137; L. R. 3 Ex. 269; 18 L. T. 651; 16 W. R. 1122.—EX., BRAMWELL, B. dissenting.

Kerswill v. Bishop, referred to.

Wilson v. Wilson (1872) L. R. 14 Eq. 32, 41; 41 L. J. Ch. 423; 26 L. T. 346; 20 W. R. 436.—MALINS, V.-C.

Kerswill v. Bishop, applied.

Anderson v. Butler's Wharf (1879) 48 L. J. Ch. 824, 828.—HALL, V.-C.

Miller v. Woodfall (1857) 27 L. J. Q. B. 120; 8 E. & B. 493.—Q.B., considered and adopted.

Keith v. Burrows (1877) 46 L. J. C. P. 801; 2 App. Cas. 636, 651; 37 L. T. 291; 25 W. R. 831; 3 Asp. M. C. 481.—H.L. (E.).

Lindsay v. Gibbs (1859) 28 L. J. Ch. 692; 22 Beav. 522; 2 Jur. (N.S.) 1039; 4 W. R. 788.—L.JJ., followed.

Brown v. Tanner (1866) L. R. 2 Eq. 806, 809; 14 L. T. 825.—V.-C. (reversed, L.JJ., see *infra*).

Lindsay v. Gibbs, commented on.

Wilson v. Wilson (1872) 41 L. J. Ch. 423; L. R. 14 Eq. 32; 26 L. T. 346; 20 W. R. 436.

MALINS, V.-C.—It is very true that the Master of the Rolls, in this case, says that where there is a charter-party inquiries should be made, and notice should be given. I am rather disposed to think that that is rather a dangerous doctrine, because I think the mortgagee of a ship has a right to say: "I am going to take the ship: I am going to realise my security: I know nothing whatever besides, for nobody has given me any notice." I am rather disposed to think that if he takes a mortgage of the ship, and registers it, he is not bound to make further inquiries; but however that may be, what the Master of the Rolls says is, that where the mortgagee knows there is a charter-party he should inquire of the charterer whether he has received notice of any incumbrance: that may be so, but it was impossible for this defendant to do that, because here there was no charter-party.—p. 427.

Lindsay v. Gibbs, adopted.

Keith v. Burrows (1876) 45 L. J. C. P. 876, 879; 1 C. P. D. 722, 734; 35 L. T. 508.—C.P.D.; reversed, C.A. and H.L. (E.) (see *infra*).

Gumm v. Tyrie (1865) 34 L. J. Q. B. 124; 6 B. & S. 298; 13 W. R. 436.—EX. CH., considered and applied.

Cellier v. Hinde (1867) 17 L. T. 341; 16 W. R. 184.—M.R.

Gumm v. Tyrie, dictum adopted.

Keith v. Burrows (1877) 2 App. Cas. 636, 654; 46 L. J. C. P. 801; 37 L. T. 291; 25 W. R. 831; 3 Asp. M. C. 481.—H.L. (E.).

Brown v. Tanner, L. R. 2 Eq. 806; 14 L. T. 825.—V.-C., reversed, (1868) 37 L. J. Ch. 923; L. R. 3 Ch. 597; 18 L. T. 624; 16 W. R. 882.—L.JJ.

Brown v. Tanner, considered.

Rusden v. Pope (1868) 37 L. J. Ex. 137, 140; L. R. 3 Ex. 269, 275; 18 L. T. 651; 16 W. R. 1122.—EX.; BRAMWELL, B. dissenting.

Brown v. Tanner, applied.

Wilson v. Wilson (1872) 41 L. J. Ch. 423, 426; L. R. 14 Eq. 32, 40; 26 L. T. 346.—MALINS, V.-C.; Anderson v. Butler's Wharf Co. (1879) 48 L. J. Ch. 824, 828.—HALL, V.-C.; and Japp v. Campbell (1887) 57 L. J. Q. B. 79, 81.—SMITH, J.

Brown v. Tanner, considered.

The Heather Bell (1901) 70 L. J. P. 36; [1901] P. 143; 84 L. T. 538; 49 W. R. 352.—JEUNE, P.; affirmed, *infra*.

Brown v. Tanner, explained and distinguished.

Shillito v. Biggart (1903) 72 L. J. K. B. 294; [1903] 1 K. B. 683; 88 L. T. 426; 51 W. R. 479; 8 Com. Cas. 137; 9 Asp. M. C. 396.

WALTON, J.—In *Brown v. Tanner*, the L.JJ. in 1868 had to deal with a question as to a mortgagee's right to freight. In delivering the judgment of the Court, Page Wood, L.J. said:

"It appears to us that this case must be determined in the appellant's favour on the ground of his having taken possession of the ship before the freight under the charter-party had become due. It is now settled beyond all dispute that the mortgagee of a ship becomes entitled to all the rights and liable to all the duties of an owner from the time of his taking possession. Amongst the rights so accruing to him is that of receiving all freight remaining due when possession is taken." The defendants rely upon the last sentence in this passage of the judgment as indicating that, in the opinion of the L.J., the mortgagee on taking possession became entitled to all freights then due and unpaid. I think, however, that the L.J. meant no more than that the mortgagee on taking possession became entitled to all unpaid freight which the ship was then in the course of earning. This seems clear from what follows in the judgment. . . . And the L.J. . . . comes to the conclusion that the freight had not been earned before the mortgagee took possession, and that therefore the mortgagee was entitled to it.

Rusden v. Pope (1868) 37 L. J. Ex. 137; L. R. 3 Ex. 269; 18 L. T. 651; 16 W. R. 1122.—EX., *applied*.

Wilson v. Wilson (1872) 41 L. J. Ch. 423, 426; L. R. 14 Eq. 32, 41; 26 L. T. 346; 20 W. R. 436; 1 Asp. M. C. 265.—MALINS, V.-C.

Rusden v. Pope, considered.
Duncan v. Cashim (1875) 44 L. J. C. P. 225, 227; L. R. 10 C. P. 554, 558; 32 L. T. 497; 23 W. R. 561.—C.P.; **Engelback v. Nixon** (1875) 44 L. J. C. P. 396, 400; L. R. 10 C. P. 645, 654; 32 L. T. 831.—C.P.

Rusden v. Pope, applied.
Anderson v. Butler's Wharf Co. (1879) 48 L. J. Ch. 824, 828.—HALL, V.-C.

Rusden v. Pope, applied.
Jennings v. Mather (1900) 70 L. J. Q. B. 53; [1901] 1 Q. B. 108; 83 L. T. 506.—Q.B.D.

Liverpool Marine Credit Co. v. Wilson (1872) 41 L. J. Ch. 798; L. R. 7 Ch. 507; 26 L. T. 717; 20 W. R. 665.—L.J., *applied*.
Keith v. Burrows (1876) 45 L. J. C. P. 876, 878; 1 C. P. D. 722, 733; 35 L. T. 508.—C.P.D., reversed, G.A. and H.L. (E.) (*see infra*); **Anderson v. Butler's Wharf Co.** (1879) 48 L. J. Ch. 824, 828.—HALL, V.-C.

Liverpool Marine Credit Co. v. Wilson, observations applied.
Shillito v. Biggart (1903) 72 L. J. K. B. 294; [1903] 1 K. B. 683; 88 L. T. 426; 51 W. R. 479; 8 Com. Cas. 137; 9 Asp. M. C. 396.—WALTON, J.

Keith v. Burrows (1876) 45 L. J. C. P. 876; 1 C. P. D. 722; 35 L. T. 508.—C.P.D.; reversed, (1877) 46 L. J. C. P. 452; 2 C. P. D. 163; 36 L. T. 567.—C.A.; *the latter decision affirmed*, (1877) 46 L. J. C. P. 801; 2 App. Cas. 636; 37 L. T. 291; 25 W. R. 831; 3 Asp. M. C. 481.—H.L. (E.).

Keith v. Burrows, applied.
Simpson v. Thomson (1877) 3 App. Cas. 279, 292; 38 L. T. 1; 3 Asp. M. C. 567.—H.L. (SC.); **Anderson v. Butler's Wharf Co.** (1879) 48 L. J. Ch. 824, 828.—HALL, V.-C.; **Swann v. Barber**

(1879) 49 L. J. Ex. 253, 256; 5 Ex. D. 130, 136; 42 L. T. 490; 28 W. R. 563; 4 Asp. M. C. 264.—C.A.; and **Japp v. Campbell** (1887) 57 L. J. Q. B. 79, 80.—SMITH, J.

Keith v. Burrows, applied.
The Red Sea (1895) 65 L. J. P. 9; [1896] P. 20; 73 L. T. 462; 44 W. R. 306.—C.A.

Keith v. Burrows, applied.
The Heather Bell (1901) 70 L. J. P. 36; [1901] P. 143; 84 L. T. 538; 49 W. R. 352.—JEUNE, P., and S. C. affirmed, (1901) 70 L. J. P. 57; [1901] P. 272; 84 L. T. 794; 49 W. R. 577; 9 Asp. M. C. 206.—C.A.

Keith v. Burrows, referred to.
Shillito v. Biggart (1903) 72 L. J. K. B. 294; [1903] 1 K. B. 683; 88 L. T. 426; 51 W. R. 479.—WALTON, J.

Cory Brothers v. Stewart (1886) 2 Times L. R. 508.—C.A., *head note too wide*.
The Heather Bell (1901) 70 L. J. P. 36; [1901] P. 143; 84 L. T. 538; 49 W. R. 352.—JEUNE, P.; affirmed, (1901) 70 L. J. P. 57; [1901] P. 272; 84 L. T. 794; 49 W. R. 577; 9 Asp. M. C. 206.—C.A.

Furness v. White (1894) 63 L. J. Q. B. 267; [1894] 1 Q. B. 483; 9 R. 252; 70 L. T. 463; 42 W. R. 290.—C.A.; reversed *nom.* **White v. Furness. The Inchulva** (1894) 64 L. J. Q. B. 161; [1895] A. C. 40; 11 R. 53; 72 L. T. 157; 7 Asp. M. C. 574.—H.L. (E.).

White v. Furness, referred to.
Montgomery v. Foy, Morgan & Co. (1895) 65 L. J. Q. B. 18; [1895] 2 Q. B. 321; 14 R. 575; 73 L. T. 12; 43 W. R. 691; 8 Asp. M. C. 36.—C.A.

Artaza v. Smallpiece (1793) 1 Esp. 23.—K.B., *disapproved*.
Cock v. Taylor (1811) 13 East 399; 2 Camp. 587; 12 R. R. 378.—K.B.
ELLENBOROUGH, C.J.—I cannot think that the opinion delivered in **Artaza v. Smallpiece** was well founded.—p. 402.

Cock v. Taylor (1811) 13 East 399; 2 Camp. 587; 12 R. R. 378.—K.B., *approved and considered*.
Sanders v. Vanzeller (1843) 12 L. J. Ex. 497; 4 Q. B. 260; 3 G. & D. 580.—EX. CH. *See extract, infra*.

Cock v. Taylor, explained and applied.
Allen v. Coltart (1883) 52 L. J. Q. B. 686; 11 Q. B. D. 782; 48 L. T. 944; 31 W. R. 841; 5 Asp. M. C. 104.—CAVE, J.

Moorsom v. Kymeg (1814) 2 M. & S. 303; 3 Camp. 549, n.; 15 R. R. 261.—K.B., *dictum disapproved*.
Sanders v. Vanzeller (1843) 4 Q. B. 260; 3 G. & D. 580; 12 L. J. Ex. 497.—EX. CH.
TINDAL, C.J. (for the Court).—But there is no authority for saying that, under such circumstances, there is a contract raised by law to pay the freight which another, viz., the consignee, has contracted with the shipowner to pay. Upon principle, it cannot be contended that the contract runs with the property in the goods and is transferred with it: and there is no decision to that effect. We do not dispute the propriety of the judgment in **Cock v. Taylor** (13 East 399)

which may be treated as the origin of questions of this nature; but that decision was merely that the receipt of the goods under the bill of lading was evidence of a new agreement; it is so spoken of by all the judges. In the subsequent case of *Wilson v. Kymer* (1 M. & S. 157), the previous mode of carrying on business between the parties was held to be evidence of the same nature; and it was left to the jury to consider whether they would imply a similar promise from the former habits of dealing, by the evidence of the defendant having obtained the goods under orders from the consignor, but having paid the freight; and though some of the judges, particularly Mr. Justice Le Blanc, in the subsequent case of *Moorson v. Kymer*, speak as if *Cock v. Taylor* (*supra*) had decided that the law would imply a promise, it is evident that the expression is an inaccurate one and not justified by the case itself. The ground on which the latter case is distinguished from the former by all the judges except Lord Ellenborough, viz., that there was a remedy for the same freight by the shipowner against the consignor, cannot certainly be supported.—p. 295.

Sanders v. Vanzeller (1843) 12 L. J. Ex. 497; 4 Q. B. 260; 3 G. & D. 580.—EX. CH., *considered*.

White v. Furness (1894) 64 L. J. Q. B. 161; [1895] A. C. 40; 11 R. 53; 72 L. T. 157.—H.L. (E.).

HERSCHELL, L.C.—Now, it is not disputed that where a consignee takes delivery under a bill of lading, and the master of the vessel by giving delivery abandons his lien, there is evidence from which a contract to pay freight may be inferred. This has been regarded as the law ever since *Sanders v. Vanzeller*; but in that case it was distinctly stated that it was not a presumption of law that such a contract existed, but only a presumption of fact.

Stindt v. Roberts (1848) 17 L. J. Q. B. 166; 5 D. & L. 460; 2 B. C. Rep. 212; 12 Jur. 518.—BAIL CT., *explained*.

Young v. Moeller (1855) 25 L. J. Q. B. 94; 5 El. & Bl. 755; 2 Jur. (N.S.) 393; 4 W. R. 149.—EX. CH.

Stindt v. Roberts, *referred to*.

Allen v. Coltart (1883) 52 L. J. Q. B. 686; 11 Q. B. D. 782; 48 L. T. 944; 31 W. R. 841; 5 Asp. M. C. 104.—CAVE, J.; and *Sewell v. Burdick* (1884) 54 L. J. Q. B. 156; 10 App. Cas. 74, 89; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.).

Moeller (or Möller) v. Young, 24 L. J. Q. B. 217; 5 El. & Bl. 7; 1 Jur. (N.S.) 934.—Q.B.; *reversed nom. Young v. Möller* (1856) 25 L. J. Q. B. 94; 5 El. & Bl. 755; 2 Jur. (N.S.) 393; 4 W. R. 149.—EX. CH.

Moeller v. Young, *explained and distinguished*.

Brown v. Tanner (1848) 37 L. J. Ch. 923, 926; L. R. 3 Ch. 567, 604; 18 L. T. 624; 16 W. R. 882; 1 Asp. M. C. 208.—L.JJ.

Moeller v. Young, *observations adopted*.

Allen v. Coltart (1883) 52 L. J. Q. B. 686; 11 Q. B. D. 782; 48 L. T. 944; 31 W. R. 841; 5 Asp. M. C. 104.—CAVE, J.

O.C.

Moeller v. Young, *referred to*.

Furness v. White (1893) 63 L. J. Q. B. 267; [1894] 1 Q. B. 483; 9 R. 252; 70 L. T. 463; 42 W. R. 290.—C.A.; DAVY, L.J. dissenting; *reverse*, H.L.

Garston Sailing Ship Co. v. Hickie (1885)

15 Q. B. D. 580; 53 L. T. 795; 5 Asp.

M. C. 499.—C.A., *discussed*.

Hunter v. Northern Marine Insurance Co. (1888) 13 App. Cas. 717.—H.L. (SC.).

HALSBURY, L.C.—The word “port” is undoubtedly ambiguous, but dealing with a policy of insurance I have no doubt that what is meant by the word “port” is what Lord Esher in *Sailing Ship Garston Co. v. Hickie* describes as what shippers of goods, charterers of vessels, and shipowners would mean by a port, that is to say, that a legal port might be according to the general understanding of the classes of persons described by Lord Esher, either restricted or enlarged by mercantile usage. . . . What the M.R. said in the case already quoted suggests what are the proper tests to apply where the question arises whether the vessel has or has not arrived at the port at which she is to deliver her cargo.—pp. 722, 723.

Garston Sailing Ship Co. v. Hickie, *applied*.

Goodbody and Balfour, In re (1900) 82 L. T. 484; 9 Asp. M. C. 69; 5 Com. Cas. 59.—C.A.

Smith v. Pyman (1891) 60 L. J. Q. B. 621;

[1891] 1 Q. B. 742; 64 L. T. 486; 39

W. R. 466; 7 Asp. M. C. 7.—C.A., *distinguished*.

Oriental S.S. Co. v. Tylor (1893) 63 L. J. Q. B. 128; [1893] 2 Q. B. 518; 4 R. 554; 69 L. T. 577; 42 W. R. 89; 7 Asp. M. C. 377.—C.A. Esher, M.R., Bowen and Kay, L.JJ.

BOWEN, L.J.—There [in *Smith v. Pyman*] the advance freight was to be paid “if required,” and therefore there was no absolute right to have it paid and no absolute right to have the bills of lading signed; it was only an option given to the shipowner. That was the ground upon which the Court explained in that case that the loss of the ship determined the right to advance freight, viz., that the advance freight depended upon an option to be exercised within a reasonable time, and the object being to allow, the charterers to insure showed that it was too late to exercise the option if it was too late for the charterers to insure. The present case is a case of an absolute right, not of an optional right to be enforced at a certain time or not at all. In the present case there is nothing to show that the bills of lading might not be presented and signed after the loss of the ship.—p. 133.

Oriental Steamship Co. v. Taylor (*supra*), *test in applied*.

Holford v. Acton Urban Council (1898) 67 L. J. Ch. 636; [1898] 2 Ch. 240; 78 L. T. 829.—STIRLING, J.

Marsh v. Pedder (1815) 4 Camp. 257.—K.B., *followed*.

Anderson v. Hillies (1852) 21 L. J. C. P. 150; 12 C. B. 499; 16 Jur. 819.—C.P.

Strong v. Hart (1827) 5 L. J. (O.S.) K. B. 82;

6 B. & C. 160; 9 D. & R. 189; 2 Car. & P.

55; 30 R. R. 272.—K.B., *distinguished*.

Robinson v. Read (1829) 7 L. J. (O.S.) K. B. 236; 9 B. & C. 449; 4 M. & Ry. 349.—K.B.

Strong v. Hart, followed.

Anderson v. Hillies (1852) 21 L. J. C. P. 150;
12 C. B. 499; 16 Jur. 819.—C.P.

Capper v. Forster (1837) 6 L. J. C. P. 332;
3 Bing. N. C. 938; 3 Scott 129; 3
Hodges 177.—C.P., *explained and dis-*
tinguished.

Southampton Steam Colliery Co. v. Clarke
(1868) 38 L. J. Ex. 54, 56; L. R. 4 Ex. 73, 79.—
EX.; affirmed, (1870) 40 L. J. Ex. 8; L. R. 6
Ex. 53; 19 W. R. 214.—EX. CH.

Southampton Steam Colliery Co. v. Clarke
(1870) 40 L. J. Ex. 8; L. R. 6 Ex. 53;
19 W. R. 214.—EX. CH., *referred to.*

Isis Steamship Co. v. Barr (1899) 68 L. J. Q. B.
980; [1899] 2 Q. B. 364; 81 L. T. 241.—C.A.;
V. WILLIAMS, L.J. *partly dissenting.*

Phillips v. Rodie (1812) 15 East 547; 13
R. R. 528.—K.B., *considered.*

Gray v. Carr (1871) 40 L. J. Q. B. 257; L. R.
6 Q. B. 522; 25 L. T. 215; 19 W. R. 1173.—
EX. CH.

Phillips v. Rodie, explained and dictum
adopted.

McLean v. Fleming (1871) L. R. 2 H. L. (Sc.)
128, 132; 25 L. T. 317; 1 Asp. M. C. 160.—H.L.
(Sc.).

Birley v. Gladstone (1814) 3 M. & S. 205;
15 R. R. 465.—K.B., *not applied.*

McLean v. Fleming (1871) L. R. 2 H. L. (Sc.)
128, 132; 25 L. T. 317; 1 Asp. M. C. 160.—
H.L. (Sc.).

Birley v. Gladstone, applied.

Gray v. Carr (1871) 40 L. J. Q. B. 257, 261;
L. R. 6 Q. B. 522, 530; 25 L. T. 215; 19 W. R.
1173.—EX. CH.

Gibson v. Sturge (1855) 24 L. J. Ex. 121;
10 Ex. 622; 3 C. L. R. 421; 1 Jur. (N.S.)
259; 3 W. R. 165.—EX., *disowned.*

Coulthurst v. Sweet (1866) L. R. 1 C. P. 649,
654.—C.P.

Gibson v. Sturge, followed.

Buckle v. Knoop (1867) 36 L. J. Ex. 223;
L. R. 2 Ex. 333; 16 L. T. 571; 15 W. R.
999.—EX. CH.

Gibson v. Sturge, referred to.

Tully v. Terry (1873) 42 L. J. C. P. 240, 243;
L. R. 8 C. P. 679, 684; 29 L. T. 36; 2 Asp.
M. C. 51.—C.P.

Gibson v. Sturge, observations adopted.

The Skandinav (1881) 50 L. J. Adm. 46.—
ADM.; reversed, 51 L. J. Adm. 93.—C.A.

Gilkison v. Middleton (1857) 26 L. J. C. P.
209; 2 C. B. (N.S.) 134.—C.P., *dissented*
from.

Kirchner v. Venus (1859) 12 Moore P. C. 361;
5 Jur. (N.S.) 395; 7 W. R. 455.—P.C.

Gilkison v. Middleton, applied.

Hayn v. Culliford (1878) 47 L. J. C. P. 755;
3 C. P. D. 410, 415; 39 L. T. 288.—C.P.D.;
affirmed, (1879) 48 L. J. C. P. 372; 4 C. P. D.
182; 40 L. T. 536; 27 W. R. 541; 4 Asp. M. C.
128.—C.A.

Neish v. Graham (1857) 27 L. J. Q. B. 15;
8 E. & B. 505; 4 Jur. (N.S.) 49.—Q.B.,
dissented from.

Kirchner v. Venus (1859) 12 Moore P. C. 361;
5 Jur. (N.S.) 395; 7 W. R. 455.—P.C.

How v. Kirchner (1857) 11 Moore P. C. 21;
6 W. R. 198.—P.C., *approved.*

Kirchner v. Venus (1859) 12 Moore P. C. 361;
5 Jur. (N.S.) 395; 7 W. R. 455.—P.C.

How v. Kirchner. See

Allison v. Bristol Marine Insurance Co. (1876)
1 App. Cas. 209; 34 L. T. 809; 24 W. R. 1039.
—H.L. (E.).

Kirchner v. Venus (1859) 12 Moore P. C.
361; 5 Jur. (N.S.) 395; 7 W. R. 455.—
P.C., *considered.*

Buckle v. Knoop (1867) 36 L. J. Ex. 49, 53;
L. R. 2 Ex. 129; 16 L. T. 231.—EX.; affirmed,
36 L. J. Ex. 223; L. R. 2 Ex. 333; 16 L. T.
571; 15 W. R. 999.—EX. CH.

Kirchner v. Venus, applied.

The Felix (1868) 37 L. J. Adm. 48, 51; L. R.
2. A. & E. 273, 280; 18 L. T. 587; 17 W. R. 102.
—ADM.; and Gray v. Carr (1871) 40 L. J. Q. B.
257; L. R. 6 Q. B. 522; 25 L. T. 215; 19 W. R.
1173.—EX. CH.

Kirchner v. Venus, explained.

McLean v. Fleming (1871) L. R. 2 H. L. Sc.
128, 132; 25 L. T. 317; 1 Asp. M. C. 160.—
H.L. (Sc.).

Kirchner v. Venus, dictum considered and
explained.

Allison v. Bristol Marine Insurance Co. (1876)
1 App. Cas. 209; 34 L. T. 809; 24 W. R. 1039.
—H.L. (E.).

LORD HATHERLEY.—I do not think that the
case of *Kirchner v. Venus* has any bearing upon
the case before your lordships. Of course, any
opinion of Lord Kingsdown is always cited by
those who can cite it as an authority at all for
their proposition, and it certainly carries with it
great weight. But Mr. Justice Brett, whose
opinion is of very great value, I think, in assist-
ing your lordships to arrive at a correct view of
this case, dealt with *Kirchner v. Venus* in the
mode in which, in my opinion, it ought to be
dealt with, and in which all judgments should
be dealt with, namely, by taking it as applied to
the subject-matter. What Lord Kingsdown there
says is this:—"In the first place, it is not that
prepayments are not freight, but that they are
not the same thing as freight, having all the
legal incidents of freight; and, in the second
place, there is the case of lien." Applying Lord
Kingsdown's opinion to the subject-matter, you
will not find him saying that prepaid freight is
not freight, because it is freight to all intents
and purposes. In settling the account you say,
"That is a part of the freight," in this case and
in every other case where freight comes to be
adjusted.—p. 239.

Kirchner v. Venus, explained.

Fisher v. Smith (1878) 48 L. J. Ex. 411, 416;
4 App. Cas. 1, 12; 39 L. T. 430; 27 W. R. 113.
—H.L. (E.).

Kirchner v. Venus, distinguished.

Great Indian Peninsula Ry. v. Turnbull (1885) 53 L. T. 325; 33 W. R. 874; 1 Cab. & E. 595; 5 Asp. M. C. 465.—DENMAN, J.

Kirchner v. Venus, not applied.

Smith v. Pyman (1891) 60 L. J. Q. B. 621; [1891] 1 Q. B. 742; 64 L. T. 436; 39 W. R. 466.—C.A.

Kirchner v. Venus, dictum held overruled.

Weir v. Girvin (1899) 69 L. J. Q. B. 168; [1900] 1 Q. B. 45; 81 L. T. 687; 48 W. R. 179; 9 Asp. M. C. 7; 5 Com. Cas. 40.—C.A.

Pearson v. Goschen (1864) 33 L. J. C. P.

265; 17 C. B. (N.S.) 352; 10 Jur. (N.S.) 903; 10 L. T. 758; 12 W. R. 1116.—C.P., approved.

McLean v. Fleming (1871).—H.L. (S.C.) (see *infra*); and Gray v. Carr (1871).—EX. (see *extract, infra*).

McLean v. Fleming (1871) L. R. 2 H. L. (Sc.)

128; 25 L. T. 317; 1 Asp. M. C. 160.—H.L. (Sc.), considered.

Gray v. Carr (1871) 25 L. T. 216; L. R. 6 Q. B. 522; 40 L. J. Q. B. 257; 19 W. R. 1173.—EX. CH.; BRANWELL, B. dissenting on this point.

BRETT, J.—Since this case was argued, and since this judgment was written, our attention has been called to the case of *McLean v. Fleming* in the House of Lords, and if I had thought that that case overruled anything I have said in this, I should have willingly bowed to it. But in that case, as I understand the judgment, the charter-party was in respect of the carriage of a uniform cargo, and the freight was payable at a fixed sum per ton, and the charter-party ascertained the amount of the cargo that was to be loaded. It then put upon the charterers the liability of loading full cargo, and gave a lien to the shipowner for dead freight. Now, under those circumstances, it was pointed out by some, if not all, of the learned lords who took part in the judgment that the damages for not loading a full cargo were, in point of fact, ascertained, because they would be the specified amount per ton upon the quantity that was really ascertained; and if that were so, that would properly be dead freight within the ordinary meaning of the term, and the lien being given in terms for dead freight, that case would be within the recognised rule; and as I understand their lordships, they declined to overrule the case of *Kirchner v. Venus* (*supra*, col. 3346), and expressly declined to overrule the case of *Pearson v. Goschen* (17 C. B. N. S. 352), which I think is decided on valuable principles, that ought to be generally applied. I therefore do not consider that that case overrules what I have said of this charter-party. With regard to the question of the bill of lading, even although the charter in this case did give a lien for dead freight, it seems to me that the authority in the House of Lords leaves the case untouched, because the House of Lords in the case before it came to the conclusion that the action was between those who were virtually the charterers and the shipowner, and, therefore, they decided the case on the charter-party alone and held only that the fact of bills of lading being given to a charterer cannot alter or affect his liability under the charter-party. It therefore

seems to me that that case does not affect this case, and I adhere to the judgment which I had already written.—p. 221.

McLean v. Fleming, applied.

Brown v. Powell Duffryn Steam Coal Co. (1875) 44 L. J. C. P. 289; L. R. 10 C. P. 562; 32 L. T. 621; 23 W. R. 549; 2 Asp. M. C. 578.—C.P.

McLean v. Fleming, referred to.

Whitechurch v. Cavanagh (1901) 71 L. J. K. B. 400; [1902] 1 C. 117, 126; 85 L. T. 349; 50 W. R. 218.—H.L. (E.).

Gray v. Carr (1871) 40 L. J. Q. B. 257; L. R.

6 Q. B. 522; 25 L. T. 215; 19 W. R. 1173.

EX. CH., observations adopted.

Christoffersen v. Hansen (1872) 41 L. J. Q. B. 217, 219; L. R. 7 Q. B. 509, 515; 26 L. T. 547; 20 W. R. 626; 1 Asp. M. C. 305.—Q.B.

Gray v. Carr, applied.

French v. Gerber (1876) 45 L. J. C. P. 880, 883; 1 C. P. D. 737, 743.—C.P.D.; affirmed, (1877) 46 L. J. C. P. 320; 2 C. P. D. 247; 36 L. T. 350; 25 W. R. 355; 3 Asp. M. C. 574.—C.A.

Gray v. Carr, explained and applied.

Porteus v. Watney (1878) 47 L. J. Q. B. 643; 3 Q. B. D. 534; 39 L. T. 195; 27 W. R. 30; 4 Asp. M. C. 34.—C.A.

Gray v. Carr, discussed.

Serraino v. Campbell (1890) 60 L. J. Q. B. 303; [1891] 1 Q. B. 283; 64 L. T. 615; 39 W. R. 356; 7 Asp. M. C. 48.—C.A.

ESHER, M.R.—I think that the real decision in that case [*Gray v. Carr*] was that the effect of the words "all other conditions as per charter-party," was to introduce into the bill of lading all the conditions of the charter-party to be performed by the receiver of the goods—that is by the consignee. . . . Then I think that *Gray v. Carr* followed *Russell v. Niemann* (*supra*, col. 3325). . . . I do not think the learned judge [Mr. Justice Wills in the latter case] intended to limit the words to the mere payment of freight and matters strictly of that kind; but I think his meaning was that which was adopted by the majority of the Court in *Gray v. Carr*.—p. 307.

LOPES and KAY, L.J.J. to the same effect.

Gray v. Carr, observations adopted.

Dunlop v. Balfour (1892) [1892] 1 Q. B. 507.—Q.B.D.; affirmed, C.A.

Gray v. Carr, referred to.

Diederichsen v. Farquharson (1897) 67 L. J. Q. B. 103; [1898] 1 Q. B. 150; 77 L. T. 543; 46 W. R. 162; 8 Asp. M. C. 333.—C.A.; RIGBY, L.J. dissenting.

Allison v. Bristol Marine Insurance Co.

(1873) 42 L. J. C. P. 334; 29 L. T. 38.—C.P.; reversed, (1874) 43 L. J. C. P. 311; L. R. 9 C. P. 559; 30 L. T. 877; 22 W. R. 920.—C.A.; the latter decision reversed, (1876) 1 App. Cas. 203; 34 L. T. 809; 24 W. R. 1039.—H.L. (E.).

Allison v. Bristol Marine Insurance Co**dictum adopted.**

Anderson v. Morice (1876) 46 L. J. Q. B. 11; 1 App. Cas. 713; 35 L. T. 566; 25 W. R. 14; 3 Asp. M. C. 390.—H.L. (E.).

Allison v. Bristol Marine Insurance Co.,
referred to.
Smith v. Pyman (1891) 60 L. J. Q. B. 621;
[1891] 1 Q. B. 742; 64 L. T. 436; 39 W. R. 466.
—C.A.

Apison v. Bristol Marine Insurance Co.,
considered.
Weir v. Girvin (1899) [1900] 1 Q. B. 45; 9
Asp. M. C. 13.—C.A.; affirmed, H.L.

Gardner v. Trenchman (1884) 54 L. J. Q. B.
515; 15 Q. B. D. 154; 53 L. T. 518; 5 Asp.
M. C. 558.—C.A., *explained.*

Serrano v. Campbell (1890) 59 L. J. Q. B.
452; 25 Q. B. D. 501; 63 L. T. 107; 39 W. R.
112.—HUDDLESTON, B.; and see S. C. affirmed,
60 L. J. Q. B. 303; [1891] 1 Q. B. 283; 64 L. T.
615; 39 W. R. 356; 7 Asp. M. C. 48.—C.A.

Gardner v. Trenchmann, *referred to.*
Diederichsen v. Farquharson (1897) 67 L. J.
Q. B. 103; [1898] 1 Q. B. 150; 77 L. T. 543; 46
W. R. 162; 8 Asp. M. C. 333.—C.A. SMITH,
RIGBY and COLLINS, L.JJ.

Small v. Moates (1833) 9 Bing. 574; 2 M. &
Scott 674.—C.P., *distinguished.*
Peek v. Larsen (1871) 40 L. J. Ch. 763; L. R.
12 Eq. 378; 25 L. T. 580; 19 W. R. 1045.—M.R.

11. DEMURRAGE.

Pederson v. Lotinga (1857) 28 L. T. (O.S.)
267; 5 W. R. 290.—Q.B., *considered.*
Oglesby v. Yglesias (1858) 27 L. J. Q. B. 356;
El. Bl. & El. 930; 6 W. R. 690.—Q.B.

Pederson v. Lotinga, *explained and followed.*
Christoffersen v. Hansen (1872) 41 L. J. Q. B.
217; L. R. 7 Q. B. 509; 26 L. T. 547; 20 W. R.
626; 1 Asp. M. C. 305.—Q.B.

Pederson v. Lotinga, *distinguished.*
Francesco v. Massey (1873) 42 L. J. Ex. 75;
L. R. 8 Ex. 101; 21 W. R. 440.—EX.

CLEASBY, B.—The charter-party [in the above
case] provided that at the port of loading, after
the agreed days for loading, the captain was to
receive £5 a day for demurrage, day by day.
For the port of discharge the language was
different. There was to be demurrage after the
laying days at £5 a day. It was considered that
the express agreement that the charterer should
pay £5 a day, day by day, showed that the
clause providing that the owners should rest on
their lien for freight and demurrage, must apply
to the demurrage at the port of discharge. The
judgments are founded upon the use of the words
“day by day,” in connection with the payment
of demurrage at the port of loading, and there is
nothing of that sort in the present case.

Pederson v. Lotinga, *considered and applied.*
French v. Gerber (1876) 45 L. J. C. P. 880,
883; 1 C. P. D. 737, 743.—C.P.D.; affirmed, (1877)
46 L. J. C. P. 320; 2 C. P. D. 247; 36 L. T.
350; 25 W. R. 355; 3 Asp. M. C. 574.—C.A.

Pederson v. Lotinga, *referred to.*
Dunlop v. Balfour (1892) [1892] 1 Q. B. 507.
—Q.B.D.; affirmed, C.A.

Oglesby v. Yglesias (1858) 27 L. J. Q. B.
356; El. Bl. & El. 930, 933; 6 W. R. 690.
—Q.B., *adopted.*

Milvain v. Perez (1861) 30 L. J. Q. B. 90;
3 El. & El. 495; 7 Jur. (N.S.) 336; 3 L. T. 736;
9 W. R. 269.—Q.B.

Oglesby v. Yglesias, *referred to.*
Bannister v. Breslau (1867) 36 L. J. C. P.
195; L. R. 2 C. P. 497, 500; 16 L. T. 418; 15
W. R. 840.—C.P.

Oglesby v. Yglesias, *applied.*
Christoffersen v. Hansen (1872) 41 L. J. Q. B.
217; L. R. 7 Q. B. 509, 513; 26 L. T. 547; 20
W. R. 626; 1 Asp. M. C. 305.—Q.B.

Oglesby v. Yglesias, *discussed.*
Francesco v. Massey (1873) 42 L. J. Ex. 75;
L. R. 8 Ex. 101; 21 W. R. 440.—EX.

Oglesby v. Yglesias, *adopted.*
Kish v. Cory (1875) 44 L. J. Q. B. 205; L. R.
10 Q. B. 553, 561; 32 L. T. 670; 23 W. R. 880;
2 Asp. M. C. 593.—EX. CH.

* **Oglesby v. Yglesias**, *considered.*
French v. Gerber (1876) 45 L. J. C. P. 880,
882; 1 C. P. D. 737, 742.—C.P.D.; affirmed, (1877)
46 L. J. C. P. 320; 2 C. P. D. 247; 36 L. T. 350;
25 W. R. 355; 3 Asp. M. C. 574.—C.A.

Oglesby v. Yglesias, *applied.*
Hugh v. Manzanos (1879) 48 L. J. Ex. 398;
4 Ex. D. 104, 106; 27 W. R. 536.—EX.D.

Oglesby v. Yglesias, *referred to.*
Dunlop v. Balfour (1892) [1892] 1 Q. B. 507.
—Q.B.D.; affirmed, C.A.

Bannister v. Breslau (1867) 36 L. J. C. P.
195; L. R. 2 C. P. 497; 16 L. T. 418; 15
W. R. 840.—C.P., *commented upon.*
Gray v. Carr (1871) 40 L. J. Q. B. 257; L. R.
6 Q. B. 522; 25 L. T. 215; 19 W. R. 1173;
1 Asp. M. C. 115.—EX. CH.

Bannister v. Breslau, *distinguished.*
Christoffersen v. Hansen (1872) 41 L. J. Q. B.
217, 219; L. R. 7 Q. B. 509, 514; 26 L. T. 547;
20 W. R. 626; 1 Asp. M. C. 305.—Q.B.

Bannister v. Breslau, *followed.*
Francesco v. Massey (1873); 21 W. R. 440;
42 L. J. Ex. 75; L. R. 8 Ex. 101.—EX.

Bannister v. Breslau, *discussed and dis-*
tinguished.
Lockhart v. Falk (1875) 44 L. J. Ex. 105;
L. R. 10 Ex. 132; 33 L. T. 96; 23 W. R. 753;
8 Asp. M. C. 8.—EX.

CLEASBY, B. (for the Court).—That decision
is certainly not applicable to the present case,
because we have in this charter-party a demur-
rage clause though not a precise one. In the
present case the clause provides that the ship
shall be discharged in ten working days and
afterwards has these words: “Demurrage at 2l.
per 100 tons register per day.” It has also been
decided that where there is a time specified for
loading and also a time for unloading fixed by
its being at the rate of so many tons a day and
afterwards a demurrage clause for a fixed number
of days at one agreed price per day, then in that
case the exemption clause applies to demurrage
whether at the port of loading or of discharge, but
it was thought clear that it did not apply to

detention beyond the ten days and demurrage days at the port of loading. This was *Francesco v. Massey* (*infra*, col. 3352). The effect of that decision is that where there is a clause for demurrage at a specified rate for a certain number of days, and a number of days being allowed for loading there can be demurrage in the proper sense at the port of loading, the exemption clause applies to demurrage there.

Bannister v. Breslauer, observed on.

Kish v. Cory (1876) L. R. 10 Q. B. 553; 44 L. J. Q. B. 205; 32 L. T. 670; 23 W. R. 880; 2 Asp. M. C. 593.—EX. CH.

COLERIDGE, C.J.—Now, in mercantile contracts which are drawn with reference to decided cases, it is important *stare decisis*, and whatever might have been my impression apart from the cases cited before us, I am not prepared to overrule them, and therefore I accept *Francesco v. Massey* (col. 3352) as a binding authority. *Bannister v. Breslauer*, which was referred to in the argument, was an action on a charter-party, in which no days for demurrage were specified, but it contained a clause that the charterer's liability should cease upon shipping the cargo, provided the same should be worth the freight on arrival at the port of discharge, the captain having an absolute lien on it for demurrage. A delay having occurred in loading, the shipowners sued the charterers. The Court of Common Pleas in effect held that, as the lien for demurrage could there apply only to detention, as distinguished from demurrage properly so called, the charterers were exempt from liability. The reasoning on which that case was decided has been questioned, and perhaps on strict examination does not appear perfectly accurate; but it seems to me that the decision itself was perfectly right, and, upon a charter-party containing a similar provision, I should be prepared to adhere to *Bannister v. Breslauer*.—p. 558.

Bannister v. Breslauer, questioned.

French v. Gerber (1876) 45 L. J. C. P. 880, 883; 1 C. P. D. 737, 743.—C.P.D.; affirmed, (1877) 46 L. J. C. P. 320; 2 C. P. D. 247; 36 L. T. 350; 25 W. R. 355; 3 Asp. M. C. 574.—C.A.

Bannister v. Breslauer, questioned.

Clink v. Radford (1891) 60 L. J. Q. B. 388; [1891] 1 Q. B. 625; 64 L. T. 491; 39 W. R. 355; 7 Asp. M. C. 10.—C.A.

ESHER, M.R.—It is not necessary that I should refer to the decided cases, except once more to strike at *Bannister v. Breslauer*, and to say that if that case decides that if the charter clause relieves the charterer from liability, notwithstanding that the shipowner is thereby left wholly unprotected against delay at the port of loading, it is contrary to the current of decided cases and cannot be supported.—p. 390.

BOWEN, L.J.—If *Bannister v. Breslauer* is to be supported at all it must be upon the ground that no other meaning can be given to "demurrage," and no other extent to the lien created, than that the one includes and the other extends to damages for detention at the port of loading.—p. 391. FRY, L.J. concurred.

Bannister v. Breslauer, referred to.

Dunlop v. Balfour (1892) [1892] 1 Q. B. 507.—Q.B.D.; affirmed, C.A.

Christoffersen v. Hansen (1872) 41 L. J. Q. B. 217; L. R. 7 Q. B. 509; 20 W. R. 626; 26 L. T. 547; 1 Asp. M. C. 305.—Q.B., distinguished.

Francesco v. Massey (1873) 42 L. J. Ex. 75; L. R. 8 Ex. 101; 21 W. R. 440.—EX.

Christoffersen v. Hansen, opinion approved.

Kish v. Cory (1875) 44 L. J. Q. B. 205, 207; L. R. 10 Q. B. 553, 559; 32 L. T. 670; 23 W. R. 880; 2 Asp. M. C. 593.—EX. CH.

Christoffersen v. Hansen, considered and applied.

French v. Gerber (1876) 45 L. J. C. P. 880, 883; 1 C. P. D. 737, 743.—C.P.D.; affirmed, (1877) 46 L. J. C. P. 320; 2 C. P. D. 247; 36 L. T. 350; 25 W. R. 355; 3 Asp. M. C. 574.—C.A.

Christoffersen v. Hansen, referred to.

Dunlop v. Balfour (1892) [1892] 1 Q. B. 507.—Q.B.D.; affirmed, C.A.

Francesco v. Massey (1873) 42 L. J. Ex. 75; L. R. 8 Ex. 101; 21 W. R. 440.—EX., discussed and distinguished.

Lockhart v. Falk (1875) 44 L. J. Ex. 105; L. R. 10 Ex. 132; 33 L. T. 96; 23 W. R. 753; 3 Asp. M. C. 8.—EX. See extract, *supra*, col. 3350.

Francesco v. Massey, approved and adopted.

Kish v. Cory (1876) 44 L. J. Q. B. 205; L. R. 10 Q. B. 553; 32 L. T. 670; 23 W. R. 880; 2 Asp. M. C. 593.—EX. CH. See extract, *supra*, col. 3351.

Francesco v. Massey, considered and applied.

French v. Gerber (1876) 45 L. J. C. P. 880, 883; 1 C. P. D. 737, 743.—C.P.D.; affirmed, (1877) 46 L. J. C. P. 320; 2 C. P. D. 247; 36 L. T. 350; 25 W. R. 355; 3 Asp. M. C. 574.—C.A.

Francesco v. Massey, referred to.

Dunlop v. Balfour (1892) [1892] 1 Q. B. 507.—Q.B.D.; affirmed, C.A.

Lockhart v. Falk (1875) 44 L. J. Ex. 105; L. R. 10 Ex. 132; 33 L. T. 96; 23 W. R. 753; 3 Asp. M. C. 8.—EX., approved.

Clink v. Radford (1891) 60 L. J. Q. B. 388; [1891] 1 Q. B. 625; 64 L. T. 491; 39 W. R. 355; 7 Asp. M. C. 10.—C.A.

Lockhart v. Falk, followed.

Dunlop v. Balfour (1892) 61 L. J. Q. R. 354; [1892] 1 Q. B. 507; 66 L. T. 455; 40 W. R. 371; 7 Asp. M. C. 181.—C.A.

Clink v. Radford (1891) 60 L. J. Q. B. 388; [1891] 1 Q. B. 625; 64 L. T. 491; 39 W. R. 355; 7 Asp. M. C. 10.—C.A., followed.

Hansen v. Harrold (1894) 63 L. J. Q. B. 744; [1894] 1 Q. B. 612; 9 R. 315; 70 L. T. 475; 7 Asp. M. C. 464.—C.A.

Dunlop v. Balfour (1892) 61 L. J. Q. B. 354; [1892] 1 Q. B. 507; 66 L. T. 455; 40 W. R. 371; 7 Asp. M. C. 181.—C.A., referred to.

Castlegate Steamship Co. v. Dempsey (1892) 61 L. J. Q. B. 620; [1892] 1 Q. B. 854; 66 L. T. 742; 40 W. R. 533.—C.A.

French v. Gerber (1876) 46 L. J. C. P. 320; 2 C. P. D. 247; 36 L. T. 350; 25 W. R. 355; 3 Asp. M. C. 574.—C.A., applied.

Barwick v. Burnyeat (1877) 36 L. T. 250; 25 W. R. 395; 3 Asp. M. C. 376.—DENMAN, J.

French v. Gerber, *referred to*.
Sanguinetti v. Pacific Steam Navigation Co.
 (1877) 46 L. J. Q. B. 105; 2 Q. B. D. 238, 252;
 35 L. T. 658; 25 W. R. 150; 3 Asp. M. C. 300.
 —C.A.

French v. Gerber, *referred to*.
Dunlop v. Balfour (1892) [1892] 1 Q. B. 507.—
 Q.B.D.; affirmed, C.A.

Sanguinetti v. Pacific Steam Navigation Co.
 (1877) 46 L. J. Q. B. 105; 2 Q. B. D. 238;
 35 L. T. 658; 25 W. R. 150; 3 Asp. M. C.
 300.—C.A., *applied*.
Barwick v. Burnyeat (1877) 36 L. T. 250; 25
 W. R. 395; 3 Asp. M. C. 376.—DENMAN, J.

Sanguinetti v. Pacific Steam Navigation Co.,
referred to.
Dunlop v. Balfour (1892) [1892] 1 Q. B. 507.—
 Q.B.D.; affirmed, C.A.

Hick v. Rodocanachi (1891) 61 L. J. Q. B.
 42; [1891] 2 Q. B. 626; 65 L. T. 300; 40
 W. R. 161; 7 Asp. M. C. 97; 56 J. P. 54.—C.A.,
affirmed nom. **Hick v. Raymond** (1892) 62 L. J.
 Q. B. 98; [1893] A. C. 22; 1 R. 125; 68 L. T.
 175; 41 W. R. 384; 7 Asp. M. C. 233.—H.L. (E.).

Hick v. Raymond, *followed*.
Carlton SS. Co. v. Castle Mail Packets Co.
 (1898) 67 L. J. Q. B. 795; [1898] A. C. 486; 78
 L. T. 661; 47 W. R. 65.—H.L. (E.); **Maclay v.**
Bakers (1900) 16 Times L. R. 401.—MATHEW, J.

Hick v. Raymond, *followed*.
Lyle Shipping Co. v. Cardiff Corporation (1900)
 69 L. J. Q. B. 889; [1900] 2 Q. B. 638; 83
 L. T. 329; 49 W. R. 85; Com. Cas. 397.—C.A.
See extract, infra, col. 3362.

Hick v. Raymond, *applied*.
Hulthen v. Stewart (1902) 71 L. J. K. B. 624;
 [1902] 2 K. B. 199; 86 L. T. 397; 50 W. R.
 538; 7 Com. Cas. 139.—C.A.

Wegener v. Smith (1854) 24 L. J. C. P. 25;
 15 C. B. 285; 3 C. L. R. 47.—C.P.
Discussed, **Gray v. Carr** (1871) 40 L. J. Q. B.
 257; L. R. 6 Q. B. 522; 25 L. T. 215; 19 W. R.
 1173; 1 Asp. M. C. 115.—EX. CH.; *approved*.
Porteus v. Watney (1878) 47 L. J. Q. B. 643; 3
 Q. B. D. 534; 39 L. T. 195; 27 W. R. 30; 4
 Asp. M. C. 34.—C.A.; *applied*. **Allen v. Coltart**
 (1883) 52 L. J. Q. B. 686; 11 Q. B. D. 782; 48
 L. T. 944; 31 W. R. 841; 5 Asp. M. C. 104.—
 CAVE, J.; *referred to*, **Sewell v. Burdick** (1884)
 54 L. J. Q. B. 156; 10 App. Cas. 74, 89; 52 L. T.
 445; 33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.);
considered, **County of Lancaster Ss. v. Sharp**
 (1889) 59 L. J. Q. B. 22; 24 Q. B. D. 158; 61
 L. T. 692; 6 Asp. M. C. 448.—HUDDLESTON, B.
 and MATHEW, J.; *applied*, **Serrano v. Campbell**
 (1890) 60 L. J. Q. B. 303; [1891] 1 Q. B. 283; 64
 L. T. 615; 39 W. R. 356.—C.A.

Chappell v. Comfort (1861) 31 L. J. C. P.
 58; 10 C. B. (N.S.) 802; 8 Jur. (N.S.)
 177; 4 L. T. 448; 9 W. R. 694.—C.P.
Applied, **Fry v. Chartered Mercantile Bank of**
India (1886) 35 L. J. C. P. 306; L. R. 1 C. P.
 689; 14 L. T. 709; 14 W. R. 920.—C.P.; *con-*
sidered, **Gray v. Carr** (1871) 40 L. J. Q. B. 257;
 L. R. 6 Q. B. 522; 25 L. T. 215; 19 W. R. 1173.
 —EX. CH.; **Porteus v. Watney** (1878) 47 L. J.
 Q. B. 643; 3 Q. B. D. 534; 39 L. T. 195; 27

W. R. 30.—C.A.; *referred to*, **Sewell v. Burdick**
 (1884) 54 L. J. Q. B. 156; 10 App. Cas. 74, 89;
 52 L. T. 445; 33 W. R. 461.—H.L. (E.).

Fry v. Chartered Mercantile Bank of India
 (1866) 35 L. J. C. P. 306; L. R. 1 C. P.
 689; 14 L. T. 709; 14 W. R. 920.—C.P.
Applied, **Gray v. Carr** (1871) 40 L. J. Q. B.
 257; L. R. 6 Q. B. 522.—EX. CH.; and **Porteus**
v. Watney (1878) 47 L. J. Q. B. 643; 3 Q. B. D.
 534.—C.A.; *considered*, **Manchester Trust Co. v.**
Furness (1895) 64 L. J. Q. B. 766; [1895] 2
 Q. B. 539.—C.A.; *referred to*, **Diederichsen v.**
Farquharson (1897) 67 L. J. Q. B. 103; [1898]
 1 Q. B. 150.—C.A.

Laing v. Holloway (1878) 47 L. J. Q. B.
 512; 3 Q. B. D. 437; 26 W. R. 769.—C.A.,
inapplicable.

The Glendevon (1898) 62 L. J. Adm. 123;
 [1893] P. 269; 1 R. 662; 70 L. T. 416; 7 Asp.
 M. C. 439.—JEUNE, P.

Commercial SS. Co. v. Boulton (1875) 44
 L. J. Q. B. 219; L. R. 10 Q. B. 346; 33
 L. T. 707; 23 W. R. 854; 3 Asp. M. C.
 (N.S.) 111.—Q.B., *referred to*.

The Katy, Gordon v. Walmsley (1894) 64
 L. J. Adm. 49; [1895] P. 56; 11 R. 683; 71
 L. T. 709; 43 W. R. 290; 7 Asp. M. C. 527.—C.A.

The Katy: Gordon v. Walmsley, 6 R. 725;
 71 L. T. 60.—JEUNE, P., *reversed in part*, (1894)
 64 L. J. P. 49; [1895] P. 56; 11 R. 683; 71
 L. T. 709; 43 W. R. 209; 7 Asp. M. C. 527.—C.A.

Rhymney SS. Co. v. Iberian Iron Ore Co.,
 (1898) 79 L. T. 240.—C.A.; *affirmed nom.* **Forest**
SS. Co. v. Iberian Iron Ore Co., (1899) 81 L. T.
 563; 9 Asp. M. C. 1; 5 Com. Cas. 83.—H.L. (E.).

Saxon SS. Co. v. Union SS. Co., (1898) 79
 L. T. 486; 8 Asp. M. C. 449.—RUSSELL, C.J.;
reversed, (1899) 68 L. J. Q. B. 914; 81 L. T. 246;
 8 Asp. M. C. 574.—C.A.; *the latter decision*
reversed, (1900) 69 L. J. Q. B. 907; 83 L. T. 106;
 5 Com. Cas. 381.—H.L. (E.).

Harper v. McCarthy (1906) 2 Bos. & P.
 (N.R.) 258.—C.P., *applied*.
Thiis v. Byers (1876) 45 L. J. Q. B. 511; 1
 Q. B. D. 244; 34 L. T. 526; 24 W. R. 611; 3
 Asp. M. C. 147.—Q.B.D.

Randall v. Lynch (1809) 2 Campb. 352; 12
 East 179; 11 R. R. 727.—K.B.
Adopted, **Ford v. Cotesworth** (1868) 38 L. J.
 Q. B. 52; L. R. 4 Q. B. 127, 136; 19 L. T. 634.
 —Q.B., affirmed, (1870) 39 L. J. Q. B. 188; L. R.
 5 Q. B. 544; 10 B. & S. 291; 23 L. T. 165; 18
 W. R. 1169.—EX. CH.; *approved*, **Thiis v. Byers**
 (1876) 24 W. R. 611; 45 L. J. Q. B. 511; 1 Q. B. D.
 244; 34 L. T. 526; 24 W. R. 611; 3 Asp. M. C.
 147.—Q.B.D.; *distinguished*, **Norden Steamship**
Co. v. Dempsey (1876) 45 L. J. C. P. 764, 767; 1
 C. P. D. 654, 660; 24 W. R. 984.—C.P.D.; *applied*,
Porteus v. Watney (1878) 47 L. J. Q. B. 643,
 647; 3 Q. B. D. 534, 542; 39 L. T. 195; 27
 W. R. 30; 4 Asp. M. C. 34.—C.A.; **Davies v.**
McVough (1879) 48 L. J. Ex. 686, 689; 4 Ex. D.
 265, 269; 43 L. T. 308; 28 W. R. 144; 4 Asp.
 M. C. 149.—C.A.; **Postlethwaite v. Freeland**
 (1880) 49 L. J. Ex. 630, 633; 5 App. Cas. 599,
 608; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C.
 302.—H.L. (E.).

Randall v. Lynch, referred to.

Dahl v. Nelson (1881) 50 L. J. Ch. 411, 423; 6 App. Cas. 38, 60; 44 L. T. 381; 29 W. R. 543; 4 Asp. M. C. 392.—H.L. (E.).

Randall v. Lynch, distinguished.

Gullischen v. Stewart (1883) 52 L. J. Q. B. 648; 11 Q. B. D. 186; 49 L. T. 198.—Q.B.D.; (affirmed, C.A., *infra*).

Randall v. Lynch, applied.

Budgett v. Binnington (1890) 60 L. J. Q. B. 1; [1891] 1 Q. B. 35; 39 W. R. 131; 6 Asp. M. C. 592.—C.A.

Gullischen v. Stewart (1884) 53 L. J. Q. B. 173; 13 Q. B. D. 317; 50 L. T. 47; 32 W. R. 763; 5 Asp. M. C. 200.—C.A., *applied*.

Serrano v. Campbell (1890) 60 L. J. Q. B. 303; [1891] 1 Q. B. 283; 64 L. T. 615; 39 W. R. 356; 7 Asp. M. C. 48.—C.A.; and Repetto v. Millar's Karri, &c. (1901) 70 L. J. K. B. 561; [1901] 2 K. B. 306; 84 L. T. 836; 49 W. R. 526. BIGHAM, J.

Rodgers v. Forresters (1810) 2 Camp. 483; 11 R. R. 773.—K.B., *considered*.

Ford v. Cotesworth (1868) 38 L. J. Q. B. 52, 56; L. R. 4 Q. B. 127, 136; 19 L. T. 634.—Q.B.; affirmed, (1870) 39 L. J. Q. B. 188; L. R. 5 Q. B. 544; 10 B. & S. 291; 23 L. T. 165; 18 W. R. 1169.—EX. CH.

Rodgers v. Forresters, followed.

Postlethwaite v. Freeland (1880) 5 App. Cas. 599; 49 L. J. Ex. 630; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C. 302.—H.L. (E.).

SELBORNE, L.C.—If your lordships should agree that the present appeal ought to be dismissed, you will, I think, be adhering to the principle of *Rodgers v. Forresters* and *Burmester v. Hodgson* (col. 3356), which does not appear to me to be inconsistent with that of the later authorities. Two recent cases were much relied upon in the arguments of the appellant's counsel—*Ford v. Cotesworth* (col. 3358) and *Wright v. New Zealand Shipping Co.* (col. 3360). That of *Ford v. Cotesworth* is, I think, perfectly consistent with the earlier cases. The judgment of the Court of Error turned upon a *risu major*, which the Court held to have impeded the master of the ship, as well as the agent of the charterer, from performing his part in the discharge of the vessel. But at the trial the jury was told by the Lord Chief Justice of England (in my opinion correctly, nor do I perceive that the Court of Error thought otherwise) that "the question whether the time was reasonable or unreasonable ought to be judged with reference to the means and facilities available at the port, and to the facilities and course of business at the port." In the other case, *Wright v. The New Zealand Shipping Co.*, which is at first sight much more favourable to the appellant, there were special circumstances on which the decision might very well have been founded, but to which (as it does not appear to me to have been, in fact, founded upon them) I do not more particularly refer. The distinctions between that case and the present (whether the doctrine laid down in it can be supported or not), are, that there no express reference was made in the contract to the custom of the port, and that, if such a reference ought to be implied, no custom

or other circumstances existed which would have made it impossible for the charterer, by the use of reasonable diligence, to provide himself with lighters for the discharge of the cargo earlier than he did.—p. 609.

Rodgers v. Forresters, applied.

Hick v. Tweedy (1890) 63 L. T. 765; 6 Asp. M. C. 599.—CHARLES, J.

Burmester v. Hodgson (1810) 2 Camp. 488;

11 R. R. 776.—K.B., *dictum not adopted*.

Ford v. Cotesworth (1868) 38 L. J. Q. B. 52, 56; L. R. 4 Q. B. 127, 136; 19 L. T. 634.—Q.B.; affirmed, (1870) 39 L. J. Q. B. 188; L. R. 5 Q. B. 544; 10 B. & S. 291; 23 L. T. 165; 18 W. R. 1169.—EX. CH.

Burmester v. Hodgson, followed.

Postlethwaite v. Freeland (1880) 49 L. J. Ex. 630; 5 App. Cas. 599; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C. 302.—H.L. (E.). See extract, *supra*.

Burmester v. Hodgson, referred to.

Dahl v. Nelson (1881) 50 L. J. Ch. 411, 423; 6 App. Cas. 38, 60; 44 L. T. 381; 29 W. R. 543; 4 Asp. M. C. 392.—H.L. (E.).

Burmester v. Hodgson, referred to.

Hick v. Raymond (1892) 62 L. J. Q. B. 98; [1893] A. C. 22, 35; 1 R. 125; 68 L. T. 175; 41 W. R. 384; 7 Asp. M. C. 233.—H.L. (E.).

Hill v. Idle (1815) 4 Camp. 327; 16 R. R. 797.—K.B., *distinguished*.

Hick v. Rodocanachi (1891) 61 L. J. Q. B. 42; [1891] 2 Q. B. 626, 637; 40 W. R. 161; 7 Asp. M. C. 97; 56 J. P. 54.—C.A.

Barret v. Dutton (1815) 4 Camp. 333; 16 R. R. 798.—K.B., *applied*.

Budgett v. Binnington (1890) 60 L. J. Q. B. 1; [1891] 1 Q. B. 35; 39 W. R. 131; 6 Asp. M. C. 592.—C.A.

Barret v. Dutton, referred to.

Hick v. Rodocanachi (1891) 61 L. J. Q. B. 42; [1891] 2 Q. B. 626, 638; 40 W. R. 161; 7 Asp. M. C. 97; 56 J. P. 54.—C.A.

Leer v. Yates (1811) 3 Taunt. 387; 12 R. R. 671.—MANSFIELD, C.J., *disapproved*.

Rogers v. Hunter (1827) M. & M. 63; 2 Car. & P. 601.—K.B.; and Dobson v. Droop (1830) M. & M. 441; 4 Car. & P. 112.—K.B.

Leer v. Yates, approved.

Straker v. Kidd (1878) 47 L. J. Q. B. 365; 3 Q. D. B. 223; 26 W. R. 511; 4 Asp. M. C. 34, n.—LUSH, J.; and Porteus v. Watney (1878) 47 L. J. Q. B. 643; 3 Q. D. B. 534; 39 L. T. 195; 27 W. R. 30; 4 Asp. M. C. 34.—C.A.

Rogers v. Hunter (1827) M. & M. 63; 2 Car. & P. 601.—K.B., *referred to*.

Straker v. Kidd (1878) 47 L. J. Q. B. 365; 3 Q. D. B. 223; 26 W. R. 511; 4 Asp. M. C. 34, n.—LUSH, J.; Porteus v. Watney (1878) 47 L. J. Q. B. 643; 3 Q. D. B. 534; 39 L. T. 195; 27 W. R. 30; 4 Asp. M. C. 34.—C.A.; Hick v. Rodocanachi (1891) 61 L. J. Q. B. 42; [1891] 2 Q. B. 626; 40 W. R. 161; 7 Asp. M. C. 97; 56 J. P. 54.—C.A.; and S. C. *nom.* Hick v. Raymond (1892) [1893] A. C. 22; 62 L. J. Q. B. 98; 1 R. 125; 68 L. T. 175; 41 W. R. 384; 7 Asp. M. C. 233.—H.L. (E.).

Dobson v. Droop (1830) M. & M. 441; 4 Car. & P. 112.—K.B., *dicta disapproved*.
Straker v. Kidd (1878) 47 L. J. Q. B. 365, 367; 3 Q. D. B. 223; 26 W. R. 511; 4 Asp. M. C. 34, n.—LUSH, J.; and **Porteus v. Watney** (1878) 47 L. J. Q. B. 643, 646; 3 Q. B. D. 534, 540; 39 L. T. 195; 27 W. R. 30; 4 Asp. M. C. 34.—C.A.

Brown v. Johnson (1842) 10 M. & W. 331; 11 L. J. Ex. 373; Cr. & M. 440.—EX., *followed*.
Tapscott v. Balfour (1872) L. R. 8 C. P. 46; 42 L. J. C. P. 16; 27 L. T. 710; 21 W. R. 245; 1 Asp. M. C. 501.—C.P.

Brown v. Johnson, *adopted*.
Thiis v. Byers (1876) 45 L. J. Q. B. 511; 1 Q. B. D. 244, 249; 34 L. T. 526; 24 W. R. 611; 3 Asp. M. C. 147.—Q.B.D.

Brown v. Johnson, *explained and not applied*.
Norden Steamship Co. v. Dempsey (1876) 45 L. J. C. P. 764, 767; 1 C. P. D. 654, 660; 24 W. R. 984.—C.P.D.

Brown v. Johnson, *followed*.
Davies v. McVeagh (1879) 48 L. J. Ex. 686, 689; 4 Ex. D. 265, 269; 41 L. T. 308; 28 W. R. 143; 4 Asp. M. C. 149.—C.A.

Brown v. Johnson, *inapplicable*.
Dahl v. Nelson (1881) 50 L. J. Ch. 411, 414; 6 App. Cas. 38, 43; 44 L. T. 381; 29 W. R. 543; 4 Asp. M. C. 392.—H.L. (E.).

Brown v. Johnson, *discussed*.
Nielsen v. Wait (1885) 16 Q. B. D. 67; 55 L. J. Q. B. 87; 34 W. R. 33; 54 L. T. 344; 5 Asp. M. C. 553.—C.A.

ESHER, M.R.—What are "running days?" It is a nautical phrase. "Running days" are those days on which a ship in the ordinary course is running. It is true that when they are lay days, they do not take effect under the charter-party until the ship has done running; but the parties are describing the days about which they are talking, namely, days in a port, according to the phraseology which they use with regard to a ship at sea. "Running days," therefore, mean the whole of every day when a ship is running. What is that? That is every day, day and night. There it is as plain as possible. They are the days during which, if the ship were at sea, she would be running. That means every day. Now, Lord Abinger, C.B., in **Brown v. Johnson**, pointed out that "days," inasmuch as they are working days, do in point of fact mean the same as "running days," because if so many days for loading and unloading are mentioned in a charter-party, not only working days are intended but every day, including Sundays and holidays. Therefore "running days" comprehend every day including Sundays and holidays, and "running days" and "days" are the same.—p. 72.

Robertson v. Jackson (1845) 15 L. J. C. P. 28; 2 C. B. 412; 10 Jur. 98.—C.P., *recognised*.

Lloyd v. Guibert (1865) 35 L. J. Q. B. 74, 78; L. R. 1 Q. B. 115, 126; 6 B. & S. 100; 13 L. T. 602.—EX. CH.; affirming 10 Jur. (N.S.) 949; 12 W. R. 953.—Q.B.

Robertson v. Jackson, *applied*.
Tapscott v. Balfour (1872) 42 L. J. C. P. 16, 19; L. R. 8 C. P. 46, 53; 27 L. T. 710; 21 W. R. 245; 1 Asp. M. C. 501.—C.P.

Harris v. Dreesman (1854) 23 L. J. Ex. 210.—EX., *referred to*.

Ford v. Cotesworth (1868) 38 L. J. Q. B. 52; L. R. 4 Q. B. 127; 19 L. T. 634.—Q. B. (affirmed EX. CH.); and **Postlethwaite v. Freeland** (1880) 49 J. J. Ex. 630, 639; 5 App. Cas. 599, 619; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C. 302.—H.L. (E.); **Hick v. Rodocanachi** (1891) 61 L. J. Q. B. 42; [1891] 2 Q. B. 626; 40 W. R. 161; 7 Asp. M. C. 97; 56 J. P. 54.—C.A. [affirmed H.L. (E.).]

Harris v. Dreesman, *applied*.
Krell v. Henry (1903) 72 L. J. K. B. 794; [1905] 2 K. B. 740; 89 L. T. 328; 52 W. R. 246.—C.A.

Bastifell v. Lloyd (1862) 31 L. J. Ex. 413; 1 H. & C. 388; 10 W. R. 721.—EX., *referred to*.

The Alhambra (1880) 49 L. J. Adm. 73; 5 P. D. 256, 264; 43 L. T. 31.—ADM. (reversed C.A.); (1881) 50 L. J. Adm. 36; 6 P. D. 68; 44 L. T. 637; 29 W. R. 655; 4 Asp. M. C. 410.—C.A.; **Dahl v. Nelson** (1881) 50 L. J. Ch. 411; 6 App. Cas. 38, 51; 44 L. T. 381; 29 W. R. 543; 4 Asp. M. C. 392.—H.L. (E.); **Horsley v. Price** (1883) 52 L. J. Q. B. 603, 605; 11 Q. B. D. 244, 247; 49 L. T. 101; 31 W. R. 786; 5 Asp. M. C. 106.—Q.B.D.; and **Allen v. Coltart** (1883) 52 L. J. Q. B. 686, 688; 11 Q. B. D. 782, 786; 48 L. T. 944; 31 W. R. 841; 5 Asp. M. C. 104.—CAVE, J.

Ford v. Cotesworth (1870) 39 L. J. Q. B. 188; L. R. 5 Q. B. 544; 10 B. & S. 991; 23 L. T. 165; 18 W. R. 1169.—EX. CH., *dicta not adopted*.

Argos, Cargo Ex (1873) L. R. 5 P. C. 134, 164; 28 L. T. 745; 21 W. R. 707; 2 Asp. M. C. 6.—P.C.

Ford v. Cotesworth, *followed*.
Cunningham v. Dunn (1878) 3 C. P. D. 443; 48 L. J. C. P. 62; 38 L. T. 631; 3 Asp. M. C. 359.—C.A.

Ford v. Cotesworth, *applied*.
Wright v. New Zealand Shipping Co. (1878) 4 Ex. D. 165, 170; 40 L. T. 413; 4 Asp. M. C. 118.—C.A.

Ford v. Cotesworth, *discussed*.
Nelson v. Dahl (1879) 12 Ch. D. 568, 583; 41 L. T. 365.—C.A.; affirmed *nom.* **Dahl v. Nelson** (1881) 50 L. J. Ch. 411; 6 App. Cas. 38; 44 L. T. 381; 29 W. R. 543; 4 Asp. M. C. 392.—H.L. (E.).

Ford v. Cotesworth, *explained and distinguished*.

Postlethwaite v. Freeland (1880) 49 L. J. Ex. 630, 633; 5 App. Cas. 599, 608; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C. 302.—H.L. (E.). See extract, *supra*, col. 3355.

Ford v. Cotesworth, *considered*.
Hick v. Raymond (1892) 62 L. J. Q. B. 98; [1893] A. C. 22; 1 R. 125; 68 L. T. 175; 41 W. R. 384; 7 Asp. M. C. 253.—H.L. (E.).

Ford v. Cotesworth, *referred to*.
Lyle Shipping Co. v. Cardiff Corporation (1900) 69 L. J. Q. B. 889; [1900] 2 Q. B. 638; 83 L. T. 329; 49 W. R. 85; 5 Com. Cas. 397; 9 Asp. M. C. 128.—C.A.

Tapscott v. Balfour (1872) 42 L. J. C. P. 16; L. R. 8 C. P. 46; 27 L. T. 710; 21 W. R. 245; 1 Asp. M. C. 501.—C.P., *distinguished*.

Ashcroft v. Crow Orchard Colliery Co. (1874) 43 L. J. Q. B. 194; L. R. 9 Q. B. 540; 31 L. T. 266; 22 W. R. 825; 2 Asp. M. C. 397.—Q.B.

Tapscott v. Balfour, *explained and distinguished*.

Postlethwaite v. Freeland (1880) 49 L. J. Ex. 630, 638; 5 App. Cas. 599, 618; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C. 302.—H.L. (E.).

Tapscott v. Balfour, *commented upon*.

Davies v. McVeagh (1879) 48 L. J. Ex. 686; 688; 4 Ex. D. 265, 269; 41 L. T. 308; 28 W. R. 143; 4 Asp. M. C. 149.—C.A.

Tapscott v. Balfour, *adopted*.

Kay v. Field (1882) 8 Q. B. D. 594, 598.—**POLLOCK, B.**, reversed, 52 L. J. Q. B. 17; 10 Q. B. D. 241; 47 L. T. 423; 31 W. R. 332; 4 Asp. M. C. 558.—C.A.

Tapscott v. Balfour, *distinguished*.

Stephens v. Harris (1887) 57 L. J. Q. B. 203, 210.—C.A.

Tapscott v. Balfour, *followed*.

Tharvis Sulphur Co. v. Morel (1891) 61 L. J. Q. B. 11; [1891] 2 Q. B. 647; 65 L. T. 659; 40 W. R. 58; 7 Asp. M. C. 106.—C.A. **ESHER, M.R.**, **BOWEN and KAY, L.JJ.**

Ashcroft v. Crow Orchard Colliery Co. (1874) 43 L. J. Q. B. 194; L. R. 9 Q. B. 540; 31 L. T. 266; 22 W. R. 825; 2 Asp. M. C. 397.—Q.B., *explained and distinguished*.

Postlethwaite v. Freeland (1880) 49 L. J. Ex. 630, 640; 5 App. Cas. 599, 622; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C. 302.—H.L. (E.).

Ashcroft v. Crow Orchard Colliery Co., *applied*.

Davies v. McVeagh (1879) 48 L. J. Ex. 686; 4 Ex. D. 265; 41 L. T. 308; 28 W. R. 143; 4 Asp. M. C. 149.—C.A.

Ashcroft v. Crow Orchard Colliery Co., *discussed*.

Nelson v. Dahl (1879) 12 Ch. D. 568, 588; 41 L. T. 365.—C.A.; affirmed in H.L. *See infra*, col. 3363.

Ashcroft v. Crow Orchard Colliery Co. and Ogmore SS. Co. v. Borner (1901) 6 Com. Cas. 101.—**JEUNE P. and BARNES, J.**, *considered*.

Harrowing v. Dupre (1902) 7 Com. Cas. 157.—**BIGHAM, J.**

This (or This) v. Byers (1876) 45 L. J. Q. B. 511; 1 Q. B. D. 344; 34 L. T. 526; 24 W. R. 611; 3 Asp. M. C. 147.—Q.B.D., *applied*.

Straker v. Kidd (1878) 47 L. J. Q. B. 365, 367; 3 Q. B. D. 223, 226; 26 W. R. 511; 4 Asp. M. C. 34. n.—Q.B.D.

This v. Byers, *discussed*.

Nelson v. Dahl (1879) 12 Ch. D. 568, 587; 41 L. T. 365.—C.A.; affirmed, H.L. (E.), *infra*, col. 3363.

This v. Byers, *inapplicable*.

Postlethwaite v. Freeland (1880) 49 L. J. Ex. 630, 638; 5 App. Cas. 599, 618; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C. 302.—H.L. (E.).

This (or This) v. Byers, *considered*.

Budgett v. Binnington (1890) 60 L. J. Q. B. 1; [1891] 1 Q. B. 35; 39 W. R. 131; 6 Asp. M. C. 592.—C.A.

LINDLEY, L.J. Under the contract the cargo was to be discharged within a certain number of days according to the terms of the charter-party. There was also a further stipulation that the charterers should take the risk of unloading from and alongside the ship. That stipulation is unconditional in its terms. The Court below called that contract an absolute contract—that is, the contract on the part of the consignees to pay demurrage for delay and detention of the ship during unloading was an absolute contract. Therefore, as there is no express condition, is there any implied condition of which the merchant freighters can avail themselves? In order to ascertain whether there is, we must consider the decisions on the subject. It was contended on behalf of the plaintiffs that there is an implied condition that the shipowners shall be ready and willing to perform their part of the contract; and that if they do not, then the freighters are exonerated. The authorities are, to my mind, conclusive that there is no such implied condition. If that proposition be true then *This v. Byers*, *Porteous v. Watney (infra)* and *Straker v. Kidd* (47 L. J. B. 365) were wrongly decided; but, in my opinion, they were rightly decided.—p. 7.

Cafferini v. Walker (1876) Ir. R. 10 C. L. 250.—EX. CH., and **McIntosh v. Sinclair** (1877) Ir. R. 11 C. L. 456.—EX., *considered*. **Nielsen v. Wait** (1885) 14 Q. B. D. 516.—**POLLOCK, B.**: affirmed, C.A. *See ante*, col. 3306.

Porteous v. Watney (1878) 47 L. J. Q. B. 643; 3 Q. B. D. 534; 39 L. T. 195; 27 W. R. 30; 4 Asp. M. C. 84.—C.A., *applied*. **Gullischen v. Stewart** (1883) 52 L. J. Q. B. 648; 11 Q. B. D. 186; 49 L. T. 198.—Q.B.D.; affirmed, C.A. *See col.* 3355.

Porteous v. Watney, *referred to*.

Allen v. Coltart (1883) 52 L. J. Q. B. 686; 11 Q. B. D. 782; 48 L. T. 944; 31 W. R. 841; 5 Asp. M. C. 104.—**CAVE, J.**

Porteous v. Watney, *applied*.

Budgett v. Binnington (1890) 60 L. J. Q. B. 1; [1891] 1 Q. B. 35; 39 W. R. 131; 6 Asp. M. C. 592.—C.A. *See extract, supra*.

Porteous v. Watney, *distinguished*.

Serraino v. Campbell (1890) 25 Q. B. D. 501, 504; 63 L. T. 107.—**HUDDESTON B.**; affirmed, (1891) 60 L. J. Q. B. 303; [1891] 1 Q. B. 283; 64 L. T. 615; 39 W. R. 356; 7 Asp. M. C. 48.—C.A.

Porteous v. Watney, *referred to*.

Hick v. Rodocanachi (1891) 61 L. J. Q. B. 42; [1891] 2 Q. B. 626, 642; 65 L. T. 300; 40 W. R. 161.—C.A. (affirmed H.L.).

Wright v. New Zealand Shipping Co. (1878)

4 Ex. D. 165; 40 L. T. 413; 4 Asp. M. C. 118.—*confirmed*.

Postlethwaite v. Freeland (1880) 49 L. J. Ex. 630; 5 App. Cas. 599; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C. 302.—H.L. (E.) *See extract, supra*, col. 3355.

Wright v. New Zealand Shipping Co., considered.

Hick v. Raymond (1892) 62 L. J. Q. B. 98; [1893] A. C. 22; 1 R. 125; 68 L. T. 177; 41 W. R. 384; 7 Asp. M. C. 233.—H.L. (E.).

Wright v. New Zealand Shipping Co., observed upon.

Lyle Shipping Co. v. Cardiff Corporation (1900) 69 L. J. Q. B. 889; [1900] 2 Q. B. 638; 83 L. T. 329; 49 W. R. 85; 5 Com. Cas. 397.—C.A. See extract, *infra*, col. 3362.

Davies v. McVeagh (1879) 48 L. J. Ex. 686; 4 Ex. D. 265; 41 L. T. 308; 22 W. R. 148.—C.A., considered.

Murphy v. Coffin (1883) 12 Q. B. D. 87; 32 W. R. 616.

MATHEW, J.—With all respect to the learned judges who decided *Davies v. McVeagh*, I think that case is inconsistent with all the decisions which were referred to by the defendant's counsel in argument in this case. It is to be observed that the attention of the Court in *Davies v. McVeagh* does not appear to have been called to the fact that, under the charter-party, the High Level Dock was the place of destination. On the contrary, it seems to have been assumed that the Wellington Dock was the place of destination. In the case of *Strahan v. Gabriel* (not reported) mentioned in the judgment of Brett, L.J., in *Nelson v. Dahl* (12 Ch. D. at pp. 589, 590), the facts were the same as in the present case, with the single exception that the charter-party did not give an option to the charterer with respect to the place of destination. The distinction that here an option is given to the charterer does not, in my view, prevent that case from covering this in principle.—p. 90.

DAY, J. agreed.

Davies v. McVeagh, followed.

The Carisbrook (1890) 59 L. J. Ad. 37; 15 P. D. 98; 62 E. T. 843; 38 W. R. 543; 6 Asp. M. C. 507.—BUTT, J. See extract, *post*, col. 3363.

Davies v. McVeagh, questioned.

Tharsis Sulphur Co. v. Morel (1891) 61 L. J. Q. B. 11; [1891] 2 Q. B. 647; 65 L. T. 659; 40 W. R. 58; 7 Asp. M. C. 106.—C.A. ESHER, M.R., BOWEN and KAY, L.JJ.

Postlethwaite v. Freeland (1880) 49 L. J. Ex. 630; 5 App. Cas. 599; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C. 302.—H.L. (E.), considered.

White v. SS. Winchester Co. (1886) 13 Ct. of Sess. Cas. (4th series) 524.

LORD SHAND.—In conclusion I may say that perhaps the main difficulty I have felt in reaching the result to which I have come, without much hesitation, in the present case, has arisen from the fact that the noble and learned Lord Blackburn has in the case of *Hudson v. Ede*, (*infra*, col. 3366), and in *Postlethwaite v. Freeland*, referred to quarantine in such terms as to support the argument that his lordship regarded detention from that cause as similar in its legal consequences, to detention caused by ice or other natural or ordinary impediments. But in the former of these cases his lordship, in referring to quarantine, regarded it only from the point of view that this might prevent the charterer

having his cargo forward, or bringing it alongside the ship, and does not seem to have had the care of the ship herself, being disqualified to receive cargo in view; while the latter merely contains a reference to a practice which has been sometimes followed, of providing that ship's quarantine or other impediments shall excuse the merchant. His lordship has not said that in the case of quarantine, where the ship is directly affected, such a provision is necessary for the charterer's protection.—p. 538.

Postlethwaite v. Freeland, applied.

Hick v. Tweedy (1890) 63 L. T. 765; 6 Asp. M. C. 599.—CHARLES, J.; and Castlegate SS. Co. v. Dempsey (1892) 61 L. J. Q. B. 620; [1892] 1 Q. B. 854; 66 L. T. 742; 40 W. R. 533; 7 Asp. M. C. 186.—C.A. ESHER, M.R., FRY and LOFES, L.JJ.

Postlethwaite v. Freeland, dictum applied.

The Jaederen (1892) 61 L. J. Adm. 89; [1892] P. 351; 1 R. 545; 68 L. T. 266; 7 Asp. M. C. 260.—BARNES, J.

Postlethwaite v. Freeland, considered.

Hick v. Raymond (1892) 62 L. J. Q. B. 98; [1893] A. C. 22; 1 R. 125; 68 L. T. 175; 41 W. R. 384; 7 Asp. M. C. 233.—H.L. (E.). LORDS HERSCHELL, L.C., WATSON, ASHBOURNE and FIELD.

Postlethwaite v. Freeland, referred to.

Smith v. Rosario Nitrate Co. (1893) [1894] 1 Q. B. 174; 9 R. 776; 70 L. T. 68.—C.A.

Postlethwaite v. Freeland, adopted.

Furness v. White (1893) 63 L. J. Q. B. 267; [1894] 1 Q. B. 483; 9 R. 252; 70 L. T. 463; 42 W. R. 290.—C.A. DAVEY, L.J. dissenting; reversed, H.L.

Postlethwaite v. Freeland, followed.

Lyle Shipping Co. v. Cardiff Corporation (1900) 69 L. J. Q. B. 889; [1900] 2 Q. B. 638; 83 L. T. 329; 49 W. R. 85; 5 Com. Cas. 397.—C.A. A. L. SMITH, VAUGHAN WILLIAMS and ROMER, L.JJ.

A. L. SMITH, L.J.—As regards *Wright v. New Zealand Shipping Co.* (col. 3360), in my judgment it is not now law, dissented from and discussed as it has been on different occasions, and especially by Lord Blackburn in *Postlethwaite v. Freeland*, and inconsistent as it is with the two cases in the H. L. If, however, *Wright v. New Zealand Shipping Co.* is to be upheld upon the ground suggested by Lord Herschell in *Hick v. Raymond* (col. 3353)—namely, that it was not shown in that case that the cargo-owner could not by reasonable precautions or exertions have procured the necessary lighters elsewhere or earlier, and so have avoided the delay which took place—then, if that be the ground of the decision, the case is not hostile to the defendants, for the findings in this case are that they had taken all reasonable precautions and exertions, and done their best as regards the discharge of the cargo, and the case has therefore no application to the present.—p. 893.

Postlethwaite v. Freeland, principle applied.

Hulthen v. Stewart (1902) 71 L. J. K. B. 624; [1902] 2 K. B. 199; 86 L. T. 397; 50 W. R. 538; 7 Com. Cas. 139.—C.A.

Nelson v. Dahl (1879) 12 Ch. D. 563; 41 L. T. 365.—C.A.; affirmed *nom.* **Dahl v. Nelson** (1881) 50 L. J. Ch. 411; 6 App. Cas. 38; 44 L. T. 381; 29 W. R. 543; 6 Asp. M. C. 392.—H.L. (E.).

Dahl v. Nelson, applied.

The Alhambra (1880) 49 L. J. Adm. 73; 5 P. D. 256, 265; 43 L. T. 31.—ADM. [reversed, (1881) 50 L. J. Adm. 36; 6 P. D. 68; 44 L. T. 636; 29 W. R. 655; 4 Asp. M. C. 410.—C.A.]; **Horsley v. Price** (1883) 52 L. J. Q. B. 603, 605; 11 Q. B. D. 244, 247; 49 L. T. 101; 31 W. R. 786; 5 Asp. M. C. 106.—NORTH, J.

Dahl v. Nelson, distinguished.

Allen v. Coltart (1883) 52 L. J. Q. B. 686, 688; 11 Q. B. D. 782, 786; 48 L. T. 944; 31 W. R. 841; 5 Asp. M. C. 104.—CAVE, J.

Dahl v. Nelson, referred to.

Murphy v. Coffin (1883) 12 Q. B. D. 87, 90; 32 W. R. 616.—MATHEW and DAY, JJ.

Dahl v. Nelson, applied.

Pyman v. Dreyfus (1889) 59 L. J. Q. B. 13; 24 Q. B. D. 152; 61 L. T. 724; 38 W. R. 447; 6 Asp. M. C. 444.—HUDDLESTON, B. and MATHEW, J.

Dahl v. Nelson, followed.

The Carisbrook (1890) 59 L. J. Adm. 37; 15 P. D. 98; 62 L. T. 843; 38 W. R. 543; 6 Asp. M. C. 507.—BUTT, J.

Dahl v. Nelson, inapplicable.

Tharsis Sulphur Co. v. Morel (1891) 61 L. J. Q. B. 11; [1891] 2 Q. B. 647; 65 L. T. 659; 40 W. R. 58; 7 Asp. M. C. 106.—C.A. **ESHER, M.R., BOWEN and KAY, L.JJ.**

Dahl v. Nelson, referred to.

Bulman v. Fenwick (1893) 63 L. J. Q. B. 123; [1894] 1 Q. B. 179; 69 L. T. 651; 42 W. R. 326; 7 Asp. M. C. 388.—POLLOCK, B.; affirmed, C.A.

Dahl v. Nelson, distinguished.

Monsen v. Macfarlane (1895) 65 L. J. Q. B. 57; [1895] 2 Q. B. 562; 73 L. T. 548.—C.A.; **KAY, L.J. dissenting.**

Dahl v. Nelson, referred to.

Carlton Steamship Co. v. Castle Mail Packets Co. (1897) 66 L. J. Q. B. 819; [1897] 2 Q. B. 485; 77 L. T. 332; 46 W. R. 68.—C.A.; **SMITH, L.J. dissenting.**

Murphy v. Coffin, (1883) 12 Q. B. D. 87; 32 W. R. 616.—MATHEW and DAY, JJ., referred to.

Pyman v. Dreyfus (1889) 59 L. J. Q. B. 13; 24 Q. B. D. 152; 61 L. T. 724; 38 W. R. 447; 6 Asp. M. C. 444.—HUDDLESTON, B. and MATHEW, J.

Murphy v. Coffin, dissented from.

The Carisbrook (1890) 59 L. J. Ad. 37; 15 P. D. 98; 62 L. T. 843; 38 W. R. 543; 6 Asp. M. C. 507.

BUTT, J.—I am asked on the authority of *Murphy v. Coffin*, a decision of a Divisional Court, to treat the conclusions in the case of *Daries v. McVeagh* *supra*, col. 3361 as of no value. The learned judges who decided the case of *Murphy v. Coffin* do not say that it did not apply, but they say boldly that they think it is a wrong decision, because it is inconsistent with other

cases, and because they think the attention of the Court of Appeal was not properly called to some facts in the case. With all deference to the Divisional Court I should be bound to prefer the judgment of the Court of Appeal if I had no opinion of my own; but I have a strong opinion that the Court of Appeal knew perfectly well what it was about when it decided the case of *Daries v. McVeagh*, and I therefore give judgment for the plaintiffs.—p. 38.

Murphy v. Coffin, approved.

Tharsis Sulphur Co. v. Morel (1891) 61 L. J. Q. B. 11; [1891] 2 Q. B. 647; 65 L. T. 659; 40 W. R. 58; 7 Asp. M. C. 106.—C.A. **ESHER, M.R., BOWEN and KAY, L.JJ.**

The Carisbrook (1890) 59 L. J. P. 37; 15 P. D. 98; 62 L. T. 843; 38 W. R. 543.—

BUTT, J., not followed.

Tharsis Sulphur Co. v. Morel (1891) 61 L. J. Q. B. 11; [1891] 2 Q. B. 647; 65 L. T. 659; 40 W. R. 58; 7 Asp. M. C. 106.—C.A.

The Carisbrook, held overruled.

Sanders v. Jenkins (1896) 66 L. J. Q. B. 40; [1897] 1 Q. B. 93.—COLLINS, J.

Tharsis Sulphur and Copper Co. v. Morel

(1891) 61 L. J. Q. B. 11; [1891] 2 Q. B. 647; 65 L. T. 659; 40 W. R. 58; 7 Asp. M. C. 106.—C.A., followed.

Good v. Isaacs (1892) 61 L. J. Q. B. 649; [1892] 2 Q. B. 555; 67 L. T. 450; 40 W. R. 629.—C.A.; and **Monsen v. Macfarlane** (1895) 65 L. J. Q. B. 57; [1895] 2 Q. B. 562; 73 L. T. 548.—C.A., **KAY, L.J. dissenting.**

Tharsis Sulphur and Copper Co. v. Morel, applied.

Carlton Steamship Co. v. Castle Mail Packets Co. (1897) 66 L. J. Q. B. 819; [1897] 2 Q. B. 485; 77 L. T. 332; 46 W. R. 68.—C.A.; **SMITH, L.J. dissenting.**

Tharsis Sulphur and Copper Co. v. Morel, observations not applied.

Dobell v. Green (1900) 69 L. J. Q. B. 454; [1900] 1 Q. B. 526; 82 L. T. 314; 9 Asp. M. C. 53; 5 Com. Cas. 161.—C.A.

Tharsis Sulphur and Copper Co. v. Morel, applied.

Modesto, Pineiro & Co. v. Dupre & Co. (1902) 86 L. T. 560; 7 Com. Cas. 105.—KENNEDY, J.

Budgett v. Binnington (1890) 25 Q. B. D.

320; 63 L. T. 493; 39 W. R. 13.—Q.B.D.; affirmed, 60 L. J. Q. B. 1; [1891] 1 Q. B. 35; 39 W. R. 131; 5 Asp. M. C. 592.—C.A.

Budgett v. Binnington, inapplicable.

Hick v. Rodocanachi (1891) 61 L. J. Q. B. 42; [1891] 2 Q. B. 626, 641; 65 L. T. 300; 40 W. R. 161.—C.A.

Budgett v. Binnington, observations adopted.

Castlegate Steamship Co. v. Dempsey (1892) 61 L. J. Q. B. 620; [1892] 1 Q. B. 854; 66 L. T. 742; 40 W. R. 533.—C.A.

Budgett v. Binnington, applied.

Aktieselskab Helios v. Eckman (1897) 2 Com. Cas. 70.—COLLINS, J.

Budgett v. Binnington, distinguished.

Maclay v. Bakers (1900) 16 Times L. R. 401.—MATHEW, J.

Castlegate SS. Co. v. Dempsey (1891) 61 L. J. Q. B. 263; [1892] 1 Q. B. 54; 65 L. T. 755; 40 W. R. 335; 7 Asp. M. C. 108.—**WRIGHT, J.**; *reversed*. (1892) 61 L. J. Q. B. 620; [1892] 1 Q. B. 854; 66 L. T. 742; 40 W. R. 533.—**C.A. Esher, M.R., Fry and Lopes, L.J.**

Castlegate SS. Co. v. Dempsey (*supra* in C.A.) *distinguished*.

The Alne Holme (1893) 62 L. J. Adm. 51; [1893] P. 173; 1 R. 607; 68 L. T. 862; 41 W. R. 572; 7 Asp. M. C. 344.—**JEUNE, P. and BARNES, J.**

Castlegate SS. Co. v. Dempsey, *referred to*.

Lyle Shipping Co. v. Cardiff Corporation (1900) 69 L. J. Q. B. 889; [1900] 2 Q. B. 638; 83 L. T. 329; 49 W. R. 85; 5 Com. Cas. 397; 9 Asp. M. C. 128.—**C.A.**

Little v. Stevenson (1896) 65 L. J. P. C. 69; [1896] A. C. 108; 74 L. T. 529.—**H.L. (SC.)**, *distinguished*.

Krog v. Burns (1903) 5 F. 1189.—**CT. OF SESS.**

Little v. Stevenson, *followed*.

Jones v. Green (1904) 73 L. J. K. B. 601; [1904] 2 K. B. 275; 90 L. T. 768; 9 Com. Cas. 20.—**C.A.**

Barker v. Hodgson (1814) 3 M. & S. 267; 15 R. R. 485.—**K.B.**, *dictum adopted*.

Hudson v. Ede (1867) 36 L. J. Q. B. 275; L. R. 2 Q. B. 566, 575; 16 L. T. 698.—**Q.B.**: affirmed. **EX. CH.** See *infra*, col. 3866.

Barker v. Hodgson, *adopted*.

Ford v. Cotesworth (1868) 38 L. J. Q. B. 52, 55; L. R. 4 Q. B. 127, 134; 19 L. T. 634.—**Q.B.**: affirmed, **EX. CH.**, *supra*, col. 3358.

Barker v. Hodgson, *distinguished*.

Clifford (Lord) v. Watts (1870) 40 L. J. C. P. 36, 43; L. R. 5 C. P. 577, 586; 22 L. T. 717; 18 W. R. 925.—**C.P.**

Barker v. Hodgson, *observations adopted*.

The Tētonia (1871) 41 L. J. Adm. 4, 10; L. R. 3 A. & E. 394, 413; 24 L. T. 521; 1 Asp. M. C. 32.—**ADM.**, affirmed, (1872) 8 Moore P. C. (N.S.) 411; 41 L. J. Adm. 57; L. R. 4 P. C. 171; 26 L. T. 48; 20 W. R. 421.—**P.C.**

Barker v. Hodgson, *adopted*.

Jackson v. Union Marine Insurance Co. (1873) 42 L. J. C. P. 284; L. R. 8 C. P. 572, 587.—**C.P.** [affirmed, (1874) 44 L. J. C. P. 27; L. R. 10 C. P. 125; 31 L. T. 789; 23 W. R. 169; 2 Asp. M. C. 435.—**EX. CH.**]; **Postlethwaite v. Freeland** (1880) 49 L. J. Ex. 630, 635; 5 App. Cas. 599, 612; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C. 302.—**H.L. (E.)**; **Jacobs v. Crédit Lyonnais** (1884) 53 L. J. Q. B. 156; 12 Q. B. D. 589, 603; 50 L. T. 194; 32 W. R. 761.—**C.A.** **BRETT, M.R. and BOWEN, L.J.**; and **Budgett v. Binnington** (1890) 60 L. J. Q. B. 1; [1891] 1 Q. B. 35; 39 W. R. 131; 6 Asp. M. C. 592.—**C.A. Esher, M.R., Lindley and Lopes, L.J.**

Kearon v. Pearson (1861) 31 L. J. Ex. 1; 7 H. & N. 386; 10 W. R. 12.—**EX.**, *adopted*.

Ford v. Cotesworth (1868) 38 L. J. Q. B. 52, 55; L. R. 4 Q. B. 127, 135; 19 L. T. 634.—**Q.B.** [affirmed, (1870) 39 L. J. Q. B. 188; L. R. 5 Q. B. 544; 10 B. & S. 991; 23 L. T. 165; 18 W. R. 1169.—**EX. CH.**]; **Jackson v. Union Marine Insurance Co.** (1873) 42 L. J. C. P. 284, 292; L. R. 8

C. P. 572, 587.—**C.P.** [affirmed, **EX. CH.**, *infra*, col. 3482].

Kearon v. Pearson, *explained and applied*.

Ashcroft v. Crow Orchard Colliery Co. (1873) 43 L. J. Q. B. 194, 196; L. R. 9 Q. B. 540, 543; 31 L. T. 266; 22 W. R. 825; 2 Asp. M. C. 397.—**Q.B.**

Kearon v. Pearson, *distinguished*.

Postlethwaite v. Freeland (1880) 49 L. J. Ex. 630, 639; 5 App. Cas. 599, 619; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C. 302.—**H.L. (E.)**.

Kearon v. Pearson, *not applied*.

Kay v. Field (1882) 8 Q. B. D. 594, 599; 46 L. T. 630; 4 Asp. M. C. 526.—**POLLOCK, B.**; *reversed*, **C.A.**, *infra*.

Kearon v. Pearson, *adopted*.

Grant v. Coverdale (1884) 53 L. J. Q. B. 462; 9 App. Cas. 470, 475; 51 L. T. 472; 32 W. R. 831; 5 Asp. M. C. 353.—**H.L. (E.)**.

Kearon v. Pearson, *distinguished*.

Nickoll v. Ashton (1901) 70 L. J. K. B. 600; [1901] 2 K. B. 126; 84 L. T. 804; 49 W. R. 513; 6 Com. Cas. 150; 9 Asp. M. C. 209.—**C.A.**

Hudson v. Ede (1868) 37 L. J. Q. B. 166;

L. R. 3 Q. B. 412; 18 L. T. 764; 16 W. R. 940; 8 B. & S. 640.—**EX. CH.**, *adopted*.

Postlethwaite v. Freeland (1880) 49 L. J. Ex. 630, 635; 5 App. Cas. 599, 613; 42 L. T. 845; 28 W. R. 833; 4 Asp. M. C. 302.—**H.L. (E.)**.

Hudson v. Ede, *distinguished*.

Kay v. Field (1882) 10 Q. B. D. 241; 52 L. J. Q. B. 17; 47 L. T. 423; 31 W. R. 332; 4 Asp. M. C. 588.—**C.A.**

Hudson v. Ede, *distinguished*.

Grant v. Coverdale (1884) 53 L. J. Q. B. 462; 9 App. Cas. 470; 51 L. T. 472; 32 W. R. 831; 5 Asp. M. C. 353.—**H.L. (E.)**

Hudson v. Ede, *considered*.

White v. SS. Winchester Co. (1886) 13 (1. of Sess. Cas. (4th series) 524 (*vide extract, supra*, col. 3361).

Hudson v. Ede, *applied*.

Stephens v. Harris (1887) 57 L. J. Q. B. 203.—**C.A.**; **Allerton Sailing Ship Co. v. Falk** (1888) 6 Asp. M. C. 287.—**CHARLES, J.**, *see extract, infra*, col. 3367; **The Alne Holme** (1893) 62 L. J. Adm. 51; [1893] P. 173; 1 R. 607; 68 L. T. 862; 41 W. R. 572; 7 Asp. M. C. 344.—**JEUNE, P. and BARNES, J.**

Hudson v. Ede, *followed*.

Smith v. Rosario Nitrate Co. (1893) [1894] 1 Q. B. 174; 9 R. 776; 70 L. T. 68; 7 Asp. M. C. 416.—**C.A. Esher, M.R., Lopes and Kay, L.J.**

Kay v. Field, 8 Q. B. D. 594; 46 L. T. 630; 4 Asp. M. C. 526.—**POLLOCK, B.**; *reversed*, (1883) 52 L. J. Q. B. 17; 10 Q. B. D. 241; 47 L. T. 423; 31 W. R. 332; 4 Asp. M. C. 588.—**C.A. BAGGALLAC, BRETT and LINDLEY, L.J.**

Kay v. Field, *followed*.

Coverdale v. Grant (1883) 11 Q. B. D. 543; 48 L. T. 701; 5 Asp. M. C. 74.—**C.A.**: affirmed, **H.L. (E.)** (*see infra*).

Kay v. Field. *approved.*

Stephens v. Harris (1887) 57 L. J. Q. B. 203, 206.—C.A.

Kay v. Field. *applied.*

The Alne Holme (1893) 62 L. J. Adm. 51; [1893] P. 173; 1 R. 607; 68 L. T. 862; 41 W. R. 572; 7 Asp. M. C. 344.—JEUNE, P. and BARNES, J.

Kay v. Field. *applied.*

Smith v. Rosario Nitrate Co. [1893] 2 Q. B. 323.—POLLOCK, B.

Coverdale v. Grant, 8 Q. B. D. 600; 46 L. T. 632; 4 Asp. M. C. 528.—POLLOCK, B.; *reversed*, (1883) 11 Q. B. D. 543; 48 L. T. 701; 5 Asp. M. C. 74.—C.A. BRETT, M.R., LINDLEY and FRY, L.J.; *the latter decision affirmed nom. Grant v. Coverdale* (1884) 53 L. J. Q. B. 462; 9 App. Cas. 470; 51 L. T. 472; 32 W. R. 831; 5 Asp. M. C. 353.—H.L. (E.). LORDS SELBORNE, L.C., WATSON, BRAMWELL and FITZGERALD.

Grant v. Coverdale. *applied.*

Stephens v. Harris (1887) 57 L. J. Q. B. 203, 207.—C.A.

Grant v. Coverdale. *distinguished.*

Allerton Sailing Ship Co. v. Falk (1888) 6 Asp. M. C. 287.

CHARLES, J.—But the difference between that case [*Grant v. Coverdale*] and this is, as it seems to me, that in dealing with the facts of that case the H. L. drew the inference that the cargo was one which might have been supplied from anywhere else besides from the places where in point of fact it was stored. . . . Now, in this case it seems to me that, according to known mercantile usage, as proved by witnesses on both sides, the only place from which a cargo of salt is brought to be loaded at Liverpool or Birkenhead is from the storehouses on the river Weaver, and that being so, *Hudson v. Ede* (*supra*, col. 3366) applies. . . . I think *Hudson v. Ede*, and not *Grant v. Coverdale*, governs the present case.—pp. 288, 289.

Grant v. Coverdale. *applied.*

The Alne Holme (1893) 62 L. J. Adm. 51; [1893] P. 173; 1 R. 607; 68 L. T. 862; 41 W. R. 572; 7 Asp. M. C. 344.—JEUNE, P. and BARNES, J.

Grant v. Coverdale. *distinguished.*

Jones v. Green (1904) 73 L. J. K. B. 601; [1904] 2 K. B. 275; 90 L. T. 768; 9 Com. Cas. 20.—C.A.

The Alne Holme (1893) 62 L. J. Adm. 51;

[1893] P. 173; 1 R. 607; 68 L. T. 862;

41 W. R. 572; 7 Asp. M. C. 344.—JEUNE,

P. and BARNES, J., *followed*.

Smith v. Rosario Nitrate Co. [1893] 2 Q. B. 323.—POLLOCK, B.

The Alne Holme. *referred to.*

Lockie and Craggs, *In re* (1901) 86 L. T. 388; 7 Com. Cas. 7.—WRIGHT, J.

Hulthen v. Stewart (1903) 72 L. J. K. B.

917; [1903] 1 C. 389; 89 L. T. 732; 8

Com. Cas. 297.—H.L. (E.), *applied*.

Sea Steamship Co. v. Price, Walker & Co. (1903) 8 Com. Cas. 292.—KENNEDY, J.

Erichsen v. Barkworth, 27 L. J. Ex. 472; 3 H. & N. 601.—EX.; *reversed*, (1858) 28 L. J. Ex. 95; 3 H. & N. 894; 5 Jur. (N.S.) 517; 7 W. R. 97.—EX. CH.

Erichsen v. Barkworth (*supra in EX. CH.*), *applied*.

Mors-le-Blanch v. Wilson (1873) 42 L. J. C. P. 70, 76; L. R. 8 C. P. 227, 239; 28 L. T. 415; 1 Asp. M. C. 605.—C.P.

Atty v. Parish (1804) 1 Bos. & P. N. R. 104.

—C.P., *doubted*.

Tilson v. Warwick Gas Light Co. (1825) 4 B. & C. 962; 7 D. & R. 370; 4 L. J. (O.S.) K. B. 53; 28 R. R. 529.—K.B.

BAYLEY, J.—I am not convinced by *Atty v. Parish* that where a contract appears on the face of a declaration to be such that the plaintiff may recover, whether the contract be by deed or not, that it is necessary to declare upon the deed if there be one. The strong impression upon my mind is that upon principle, although there be a deed between the parties, yet if there be a debt independent of the deed, the amount of which, however, is to be ascertained by the deed, the existence of the deed will not prevent the party from recovering that debt upon the common counts.—p. 968.

12. CARGO.

Kreuger v. Blanck (1870) 39 L. J. Ex. 160; L. R. 5 Ex. 179; 23 L. T. 128; 18 W. R. 813.—EX., *disapproved*.

Ireland v. Livingston (1872) 41 L. J. Q. B. 201; L. R. 5 H. L. 395; 27 L. T. 79.—H.L. (E.).

[BLACKBURN, J., advised the House of Lords to reconsider the decision of the Court of exchequer in *Kreuger v. Blanck*. The point was not considered.]

Hotham v. East India Co. (1787) 1 Term Rep.

638; 1 R. R. 333.—K.B., *adopted*.

Edwards v. Aberayron Mutual Ship Insurance Society (1876) 1 Q. B. D. 563, 581; 34 L. T. 457.—EX. CH., reversing 44 L. J. Q. B. 67; 23 W. R. 304.—Q.B.D.

Thomas v. Clarke (1818) 2 Stark. 450; 20

R. R. 714.—K.B., *applied*.

Morris v. Levison (1876) 45 L. J. C. P. 409; 1 C. P. D. 155; 34 L. T. 576; 24 W. R. 517; 3 Asp. M. C. 171.—C.P.D.

Morris v. Levison (1876) 45 L. J. C. P. 409;

1 C. P. D. 155; 34 L. T. 576; 24 W. R.

517; 3 Asp. M. C. 171.—C.P.D., *dis-*

tinguished.

Carnegie v. Connor (1889) 59 L. J. Q. B. 122;

24 Q. B. D. 45; 61 L. T. 691; 6 Asp. M. C. 447.

—HUDDLESTON, B. and MATHEW, J.

Morris v. Levison. *distinguished.*

Carnegie v. Connor (*supra*), *referred to*.

Miller v. Borner (1900) 69 L. J. Q. B. 429; [1900] 1 Q. B. 691; 82 L. T. 258; 48 W. R. 588; 9 Asp. M. C. 31; 5 Com. Cas. 175.—Q.B.D.

CHANNELL, J.—In this case the charter-party provides that a ship whose carrying capacity is 2,880 tons shall load "a cargo of ore, say, about 2,800 tons." The charterer provided a cargo of 2,840 tons, and the question is whether by doing so he performed the obligation imposed upon him by the charter-party. What is "about" so many tons—that is, how much margin is to be allowed on one side or the other—is no doubt strictly a question for the jury. It was so regarded in *Morris v. Levison*, and the Court there dealt with the question themselves, because

that case was reserved to them upon the terms that they might draw inferences of fact. Brett, J., treating the question as one of fact, there found that anything less than 3 per cent., one way or other, could be considered to be "about" the specified quantity, but that a greater margin could not be allowed. The question is no doubt strictly for the jury; but in this case the parties do not seem to have desired that it should go to the jury, and, indeed, it was hardly necessary that it should go to them, because it cannot be seriously disputed that the cargo provided was a cargo of "about" 2,800 tons. The important question is whether or not this charter-party differs from that which was under consideration in *Morris v. Levison*. The charter-party in that case provided that the vessel should load "a full and complete cargo . . . say, about 1,100 tons." The capacity of the vessel was 1,210 tons, which was greater than "about" the quantity specified in the charter. On the principle, that effect should be given to all the words of a contract, it was necessary to put a construction upon the words "say about 1,100 tons," that should, so far as possible, be consistent with the words "full and complete cargo." It was held that in the circumstances the former words should be read as meaning the largest amount they were capable of meaning—namely, 3 per cent. more than the amount specified. As pointed out in the subsequent case of *Carnegie v. Conner* (59 L. J. Q. B. 122; 24 Q. B. D. 45), the judgments of the Court in *Morris v. Levison* proceeded entirely upon the ground that there the charter-party contained the words "a full and complete cargo." In this charter-party, however, the expression used is not "a full and complete" cargo, but simply a "cargo." . . . Here the cargo is very nearly indeed a full and complete cargo for the vessel, and I therefore think that it was clearly a cargo for the vessel, and that it was unnecessary to leave it to the jury to say whether it was or was not a cargo; in fact there was no evidence to go to the jury that it was not a cargo.—p. 430.

Hills v. Sughrue (1846) 15 M. & W. 253.—EX., *discussed*.

Clifford (Lord) v. Watts (1870) 40 L. J. C. P. 36; L. R. 7 C. P. 577; 22 L. T. 717; 18 W. R. 925.—C.P.

Aitken v. Ernsthause (1894) 63 L. J. Q. B. 559; [1894] 1 Q. B. 773; 9 R. 758; 70 L. T. 822; 7 Asp. M. C. 462.—C.A., *followed*.

Weir v. Girvin (1899) [1900] 1 Q. B. 45; 9 Asp. M. C. 13.—C.A.; affirmed, 69 L. J. Q. B. 809; [1900] A. C. 525; 83 L. T. 91.—H.L. (E.).

Alston v. Herring (1856) 11 Ex. 822.—EX., *applied*.

Blower v. G. W. Ry. (1872) 41 L. J. C. P. 268, 271; L. R. 7 C. P. 655, 663; 26 L. T. 883; 20 W. R. 776.—C.P.; and **Budgett v. Binnington** (1890) 25 Q. B. D. 320, 327; 63 L. T. 493; 39 W. R. 13.—Q.B.D., affirmed, 60 L. J. Q. B. 1; [1891] 1 Q. B. 35; 39 W. R. 131; 6 Asp. M. C. 592.—C.A.

Hutchinson v. Guion (1858) 28 L. J. C. P. 63; 5 C. B. (N.S.) 149; 4 Jur. (N.S.) 1149; 6 W. R. 757.—C.P., *applied*.

Blower v. G. W. Ry. (1872) 41 L. J. C. P. 268, 271; L. R. 7 C. P. 655, 663; 26 L. T. 883; 20 W. R. 776.—C.A.

Stanton v. Austin (1872) 41 L. J. C. P. 218; L. R. 7 C. P. 651.—C.P., *principle applied*.
Davies v. McLean (1873) 21 W. R. 264; 28 L. T. 113.—C.P.

Burton v. English, 52 L. J. Q. B. 386; 10 Q. B. D. 426; 48 L. T. 730; 31 W. R. 566; 5 Asp. M. C. 84.—CAVE and DAY, JJ.; *reversed*, (1884) 53 L. J. Q. B. 133; 12 Q. B. D. 218; 49 L. T. 768; 32 W. R. 655; 5 Asp. M. C. 187.—C.A.

Burton v. English, *followed*.

Newall v. Royal Exchange Shipping Co. (1884) 33 W. R. 342.—CAVE, J., *reversed*, C.A. (*infra*).

Burton v. English, *referred to*.

Royal Exchange Shipping Co. v. Dixon (1886) 56 L. J. Q. B. 266; 12 App. Cas. 11; 56 L. T. 206; 35 W. R. 461; 6 Asp. M. C. 92.—H.L. (P.).

Burton v. English, *opinion referred to*.

Strang v. Scott (1889) 59 L. J. P. C. 1; 14 App. Cas. 601; 61 L. T. 597; 38 W. R. 452; 6 Asp. M. C. 419.—P.C.

Burton v. English, *explained and adopted*.

Norman v. Binnington (1890) 59 L. J. Q. B. 490; 25 Q. B. D. 475, 477; 63 L. T. 108; 38 W. R. 702; 6 Asp. M. C. 528.—Q.B.D.

Burton v. English, *dicta referred to*.

The Marpessa (1891) 61 L. J. Adm. 9; [1891] P. 403; 66 L. T. 356; 40 W. R. 239; 7 Asp. M. C. 155.—JEUNE, P.

Burton v. English, *dicta considered*.

The Brigella (1893) 62 L. J. Adm. 81; [1893] P. 189; 1 R. 616; 69 L. T. 834; 7 Asp. M. C. 337.—BARNES, J.

Burton v. English, *referred to*.

Ruabon Steamship Co. v. London Assurance (1899) 69 L. J. Q. B. 86; [1900] A. C. 6; 81 L. T. 585; 48 W. R. 225; 9 Asp. M. C. 2; 5 Com. Cas. 71.—H.L. (E.); and **Milburn v. Jamaica Fruit Co.** (1900) 69 L. J. Q. B. 860; [1900] 2 Q. B. 540; 83 L. T. 321; 5 Com. Cas. 346.—C.A.

Cuthbert v. Cumming (1855) 24 L. J. Ex. 310; 11 Ex. 405; 1 Jur. (N.S.) 686; 3 W. R. 553.—EX. CH., *discussed*.

Tancred v. Steel Co. of Scotland (1890) 15 App. Cas. 125; 62 L. T. 738.—H.L. (SC.).

Newall v. Royal Exchange Shipping Co.,

33 W. R. 342.—CAVE, J.; *reversed*, (1885) 33 W. R. 68.—C.A., *the latter decision affirmed nom.*
Royal Exchange Shipping Co. v. Dixon (1886) 56 L. J. Q. B. 266; 12 App. Cas. 11; 56 L. T. 206; 35 W. R. 461; 6 Asp. M. C. 92.—H.L. (E.).

Royal Exchange Shipping Co. v. Dixon, *referred to*.

Tancred v. Steel Company of Scotland (1890) 15 App. Cas. 125, 137.—H.L. (SC.).

Royal Exchange Shipping Co. v. Dixon, *referred to*.

Diederichsen v. Farquharson (1897) 67 L. J. Q. B. 103; [1898] 1 Q. B. 150; 77 L. T. 543; 46 W. R. 162; 8 Asp. M. C. 333.—C.A.; RIGBY, L.J. *dissenting*.

Sjofrds v. Luscombe (1812) 16 East 201.—K.B., *adopted*.

Jacobs v. Crédit Lyonnais (1884) 53 L. J. Q. B. 156; 12 Q. B. D. 589, 603; 50 L. T. 194; 32 W. R. 761.—C.A.

Jones v. Holm (1867) 36 L. J. Ex. 192; L. R. 2 Ex. 335; 16 L. T. 794; 16 W. R. 62.—EX., *applied*.

Jackson v. Union Marine Insurance Co. (1873) 42 L. J. C. P. 284, 287; L. R. 8 C. P. 572, 578.—C.P.; affirmed, EX. CH.

MacAndrew v. Chapple (1866) 35 L. J. C. P. 281; L. R. 1 C. P. 643; 12 Jur. (N.S.) 567; 14 L. T. 556; 14 W. R. 891.—C.P., *applied*.

Jackson v. Union Marine Insurance Co. (1874) 44 L. J. C. P. 27, 31; L. R. 10 C. P. 125, 147; 31 L. T. 789; 23 W. R. 169; 2 Asp. M. C. 435.—EX. CH.

MacAndrew v. Chapple, *explained and not applied*.

Kidston v. Monceau Ironworks (1902) 86 L. T. 556; 7 Com. Cas. 82.—KENNEDY, J.

Bradford v. Williams (1872) 41 L. J. Ex. 164; L. R. 7 Ex. 259; 26 L. T. 641; 20 W. R. 782.—EX., *discussed and applied*.

Corcoran v. Proser (1873) 22 W. R. 222.—EX. CH. (IR.); and **Honck v. Muller** (1881) 50 L. J. Q. B. 529; 7 Q. B. D. 92; 45 L. T. 202; 29 W. R. 830.—C.A.

Blaikie v. Stenbridge (1860) 29 L. J. C. P. 212; 6 C. B. (N.S.) 894; 6 Jur. (N.S.) 825; 2 L. T. 570; 8 W. R. 239.—EX. CH., *applied*.

The Catharine Chalmers (1874) 32 L. T. 847; 2 Asp. M. C. 598.—ADM.

Cross v. Pagliano (1870) 40 L. J. Ex. 18; L. R. 6 Ex. 9; 23 L. T. 420; 19 W. R. 159.—EX., *referred to*.

Gray v. Carr (1871) 40 L. J. Q. B. 257, 272; L. R. 6 Q. B. 522, 550; 25 L. T. 215; 19 W. R. 1173; 1 Asp. M. C. 115.—EX. CH.

Max v. Roberts (1810) 12 East 89; 2 Bos. & P. N. R. 454.—K.B., *applied*.

Re x. v. Everett (1828) 8 B. & C. 114; 2 Man. & R. 35; 6 L. J. (O.S.) M. C. 83.—K.B.

Morris v. Robinson (1824) 3 B. & C. 196; 5 D. & R. 34; 27 B. R. 322.—K.B., *observations adopted*.

Brinsmead v. Harrison (1871) 40 L. J. C. P. 281, 285; L. R. 6 C. P. 590.—C.P.; affirmed. EX. CH. (*See post*, "TROVER.")

Morris v. Robinson, *applied*.

Rice v. Reed (1899) 69 L. J. Q. B. 33; [1900] 1 Q. B. 54; 81 L. T. 410.—C.A.

Ewbank v. Nutting (1849) 7 C. B. 797.—C.P., *adopted*.

Coulthurst v. Sweet (1866) L. R. 1 C. P. 649, 655.—C.P.; **Barwick v. English Joint Stock Bank** (1867) L. R. 2 Ex. 259, 266; 36 L. J. Ex. 147; 16 L. T. 461; 15 W. R. 877.—EX. CH.; **Notara v. Henderson** (1872) 41 L. J. Q. B. 158, 164; L. R. 7 Q. B. 225, 236; 26 L. T. 442; 20 W. R. 442; 1 Asp. M. C. 278.—EX. CH.

Ewbank v. Nutting, *explained and distinguished*.

Weir v. Bell (1878) 47 L. J. Ex. 704, 708; 3 Ex. D. 238, 244; 37 L. T. 929; 26 W. R. 746.—C.A.

Ewbank v. Nutting, *referred to*.

Wagstaff v. Anderson (1880) 49 L. J. C. P. 485, 489; 5 C. P. D. 171, 178; 42 L. T. 720; 28 W. R. 856.—C.A.

Tronson v. Dent (1853) 8 Moore P. C. 419.—P.C., *adopted*.

The Freedom (1871) L. R. 3 P. C. 594, 602; 24 L. T. 452; 1 Asp. M. C. 136.—P.C.

Tronson v. Dent, *discussed*.

Notara v. Henderson (1872) 41 L. J. Q. B. 158; L. R. 7 Q. B. 225, 230; 26 L. T. 442; 20 W. R. 442; 1 Asp. M. C. 278.—EX. CH.

Tronson v. Dent. *See*

Argos, ex (1873) 42 L. J. Adm. 1; L. R. 5 P. C. 134, 165; 28 L. T. 77; 21 W. R. 420.—P.C.

Tronson v. Dent, *adopted*.

Atlantic Mutual Insurance Co. v. Huth (1880) 16 Ch. D. 474, 481; 44 L. T. 67; 29 W. R. 387.—C.A.

Covas v. Bingham (1853) 23 L. J. Q. B. 26; 2 El. & Bl. 836; 2 C. L. R. 212; 18 Jur. 596.—Q.B., *distinguished*.

Tamvaco v. Lucas (1859) 28 L. J. Q. B. 150; 1 El. & Bl. 581; 5 Jur. (N.S.) 731; 1 L. T. 161.—Q.B.

Covas v. Bingham, *applied*.

Tully v. Terry (1873) 42 L. J. C. P. 240, 243; L. R. 8 C. P. 679, 684; 29 L. T. 36; 2 Asp. M. C. 51.—C.P.

Blasco v. Fletcher (1863) 32 L. J. C. P. 284; 14 C. B. (N.S.) 147; 9 Jur. (N.S.) 1105; 9 L. T. 169; 11 W. R. 997.—C.P., *referred to*.

Lloyd v. Guibert (1865) 35 L. J. Q. B. 74, 76; L. R. 1 Q. B. 115, 121; 6 B. & S. 100; 13 L. T. 602.—EX. CH.

Blasco v. Fletcher, *discussed*.

Jackson v. Union Marine Insurance Co. (1873) 42 L. J. C. P. 284; L. R. 8 C. P. 572.—C.P. (affirmed, EX. CH. *See post*, col. 3482).

Blasco v. Fletcher, *not applied*.

The Kathleen (1874) 43 L. J. Adm. 39; L. R. 4 A. & E. 269, 277; 31 L. T. 204; 23 W. R. 350; 2 Asp. M. C. 367.—ADM.

Blasco v. Fletcher, *referred to*.

Assicurazioni Generali v. Bessie Morris SS. Co. (1892) 61 L. J. Q. B. 754; [1892] 1 Q. B. 571.—COLLINS, J., affirmed, C.A.

The Bahia (1863) Br. & L. 61.—ADM., *applied*.

The Princess Royal (1870) 39 L. J. Adm. 43; L. R. 3 A. & E. 41, 45; 22 L. T. 29.—ADM.

The Bahia, *followed*.

The Patria (1871) L. R. 3 A. & E. 436; 41 L. J. Adm. 23; 24 L. T. 849; 1 Asp. M. C. 71.—ADM.

The Bahia, *distinguished*.

The Pieve Superiore, Daputo v. Wyllie (1874) 22 W. R. 777; 43 L. J. Adm. 20; L. R. 5 P. C. 482; 30 L. T. 887; 2 Asp. M. C. 319.—P.C.

SIR MONTAGUE SMITH (for J.C.).—Their lordships, in pointing out the distinction between these cases and the present, must not be understood to question their authority.—p. 779.

The Bahia, adopted.

The Franconia (1877) 46 L. J. Adm. 33, 36 : 2 P. D. 163, 174 ; 36 L. T. 640 : 25 W. R. 796.—C.A.

The Teutonia, Duncan v. Koster (1852) 41

L. J. Adm. 57 ; L. R. 4 P. C. 171 : 8 Moore P. C. (N.S.) 411 ; 26 L. T. 48 ; 20 W. R. 421.—P.C., referred to.

The Patria (1871) 41 L. J. Adm. 23, 30 : L. R. 3 A. & E. 436, 458 ; 24 L. T. 849 ; 1 Asp. M. C. 71.—ADM.

The Teutonia, distinguished, but principle applied.

Waugh v. Morris (1873) 42 L. J. Q. B. 57 : L. R. 8 Q. B. 202 ; 28 L. T. 265 : 21 W. R. 438.—Q.B.

The Teutonia, referred to.

Argos, Cargo ex (1873) L. R. 5 P. C. 134, 162 ; 28 L. T. 745 : 21 W. R. 707.—P.C. : affirming 42 L. J. Adm. 49.—ADM.

The Teutonia, approved.

Anderson v. The San Roman Owners, The San Roman (1873) 42 L. J. Adm. 46 ; L. R. 5 P. C. 301 ; 12 W. R. 393 ; 28 L. T. 881 ; 1 Asp. M. C. 603.—P.C.

SIR MONTAGUE E. SMITH.—Their lordships agree with what was said before in the case of *The Teutonia*—that the owner of an English cargo on board a foreign ship cannot expect that the foreign master of the foreign ship will take greater precautions with respect to his goods, or will run greater risks in their defence, than he would with respect to goods of his own nation.

The Teutonia, considered.

The Pieve Superiore, Daputo v. Wyllie (1874) 43 L. J. Adm. 20 : L. R. 5 P. C. 482 ; 30 L. T. 887 ; 22 W. R. 777 ; 2 Asp. M. C. 319.—P.C.

The Teutonia, referred to.

Metcalfe v. Britannia Ironworks Co. (1876) 45 L. J. Q. B. 837 : 1 Q. B. D. 613, 636 ; 35 L. T. 796.—Q.B.D. : affirmed, (1877) 46 L. J. Q. B. 443 ; 2 Q. B. D. 423 ; 36 L. T. 451 ; 25 W. R. 720 ; 3 Asp. M. C. 407.—C.A.

Notara v. Henderson (1872) 41 L. J. Q. B.

158 ; L. R. 7 Q. B. 225 : 26 L. T. 442 ; 20 W. R. 442 ; 1 Asp. M. C. 278.—EX. CH., referred to.

Argos, Cargo ex (1873) L. R. 5 P. C. 134, 165 ; 28 L. T. 745 ; 21 W. R. 707.—P.C. ; G. N. Ry. v. Swaffield (1874) 43 L. J. Ex. 89, 91 : L. R. 9 Ex. 132, 138 ; 30 L. T. 562.—EX. ; The Kathleen (1874) 43 L. J. Adm. 39 ; L. R. 4 A. & E. 269, 277 ; 31 L. T. 204 ; 23 W. R. 350 : 2 Asp. M. C. 367.—ADM. ; Hingston v. Wendt (1876) 45 L. J. Q. B. 440, 445 ; 1 Q. B. D. 367, 372 ; 34 L. T. 181 ; 24 W. R. 664 ; 3 Asp. M. C. 126.—Q.B.D.

Notara v. Henderson, discussed.

Metcalfe v. Britannia Ironworks Co. (1876) 45 L. J. Q. B. 837, 845 ; 1 Q. B. D. 613, 626 ; 35 L. T. 796.—Q.B.D. : affirmed, (1877) 46 L. J. Q. B. 443 ; 2 Q. B. D. 423 ; 36 L. T. 451 ; 25 W. R. 720 ; 3 Asp. M. C. 407.—C.A.

Notara v. Henderson, applied.

Royal Mail Packet Co. v. English Bank of Rio Janeiro (1887) 57 L. J. Q. B. 31 ; 19 Q. B. D. 362 ; 36 W. R. 105.—WILLS and GRANTHAM, JJ.

*** Notara v. Henderson, observations adopted.**

Nobel's Explosives Co. v. Jenkins (1896) 65 L. J. Q. B. 638 ; [1896] 2 Q. B. 326 ; 75 L. T. 163.—MATHEW, J.

Notara v. Henderson, observations applied.

The Savona (1900) 69 L. J. P. 95 ; [1900] P. 252 ; 49 W. R. 303.—BARNES, J.

Paynter v. James (1867) L. R. 2 C. P. 348 ;

15 L. T. 660.—C.P., affirmed, (1868) 18 L. T. 449 ; 16 W. R. 768.—EX. CH.

Paynter v. James, adopted.

Stewart v. Rogerson (1871) L. R. 6 C. P. 424, 430.—C.P. ; and Miedbrodt v. Fitzsimon. The Energie (1875) 44 L. J. Adm. 25, 31 ; L. R. 6 P. C. 306, 314 ; 32 L. T. 579 ; 23 W. R. 932 ; 2 Asp. M. C. 555.—P.C.

The Energie, Miedbrodt v. Fitzsimon (1875)

44 L. J. Adm. 25 ; L. R. 6 P. C. 306 ; 32 L. T. 579 ; 23 W. R. 932 ; 2 Asp. M. C. 555.—P.C., observations applied.

The Clan Macdonald (1883) 52 L. J. Adm. 89, 8 P. D. 178, 183 ; 49 L. T. 408 ; 32 W. R. 154 ; 5 Asp. M. C. 148.—HANNEN, P.

Castle v. Playford, 39 L. J. Ex. 150 ; L. R. 5 Ex. 165 ; 22 L. T. 516 ; 18 W. R. 811.—EX. ; reversed, (1872) 41 L. J. Ex. 44 ; L. R. 7 Ex. 98 ; 26 L. T. 315 ; 20 W. R. 440 ; 1 Asp. M. C. 255.—EX. CH.

Castle v. Playford, followed.

Martineau v. Kitching (1872) 41 L. J. Q. B. 227, 235 ; L. R. 7 Q. B. 436, 451 ; 26 L. T. 836 ; 20 W. R. 769.—Q.B. ; Anderson v. Morice (1876) 46 L. J. Q. B. 11 ; 1 App. Cas. 713 ; 35 L. T. 506 ; 25 W. R. 14 ; 3 Asp. M. C. 290.—H.L. (E.).

Castle v. Playford, distinguished.

Stock v. Inglis (1882) 52 L. J. Q. B. 30 ; 9 Q. B. D. 708, 721 ; 74 L. T. 416.—FIELD, J. ; reversed on one point, C.A. and H.L. (E.). See col. 2958.

Ward v. New York Central Ry. (1871) 47

N. Y. 29, considered and applied. The Parana (1876) 1 P. D. 452, 464.—ADM. : reversed, C.A. (*infra*).

The Parana (1877) 2 P. D. 118 ; 36 L. T.

388 ; 25 W. R. 596 ; 3 Asp. M. C. 399.—C.A., distinguished.

The Thyatira (1883) 52 L. J. Adm. 85 ; 8 P. D. 155 ; 49 L. T. 406 ; 32 W. R. 276 ; 5 Asp. M. C. 147.—HANNEN, P.

The Parana, principle adopted.

Rodocanachi v. Milburn (1886) 17 Q. B. D. 316, 320.—MANISTY, J., varied, 56 L. J. Q. B. 202 ; 18 Q. B. D. 67 ; 56 L. T. 594 ; 35 W. R. 241 ; 6 Asp. M. C. 100.—C.A.

The Parana, distinguished.

The Argentino (1888) 58 L. J. P. 1 ; 13 P. D. 191, 199 ; 37 W. R. 210.—C.A., affirmed, H.L. (P.). See *infra*, col. 3415.

The Parana, applied.

Den of Ogil Co. v. Caledonian Ry. (1902) 5 Fraser 99.—CT. OF SESS. (*And see ante*, vol. i. col. 812.)

100; 8 Com. Cass. 33; 9 Asp. M. C. 336.—C.A.
COLLINS, M.R., STIRLING and HARDY, L.JJ.

Wagstaff v. Anderson (1880) 49 L. J. C. P. 485; 5 C. P. D. 171; 44 L. T. 720; 28 W. R. 856.—C.A., *dictum adopted*.

Rodoconachi v. Milburn (1886) 17 Q. B. D. 316; 320—MANISTY, J.; varied, C.A. (*see infra*.)

Rodoconachi (or Rodocanchi) v. Milburn, 17 Q. B. D. 316.—MANISTY, J.; varied, (1886) 56 L. J. Q. B. 202; 18 Q. B. D. 67; 56 L. T. 594; 35 W. R. 241; 6 Asp. M. C. 100.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

Rodoconachi v. Milburn, *applied*.

Bufourcet v. Bishop (1886) 56 L. J. Q. B. 497; 18 Q. B. D. 373; 56 L. T. 633; 6 Asp. M. C. 109.—DENMAN, J.; *The Leitrim* (1902) 71 L. J. P. 108; [1902] P. 256; 87 L. T. 240; 51 W. R. 158; 9 Asp. M. C. 317; 8 Com. Cas. 6.—BARNES, J.

Leuckhart v. Cooper (1836) 6 L. J. C. P. 131; 3 Bing. N. C. 99; 3 Scott 521.—C.P., *recognised*

Kaltenbach v. Lewis (1883) 52 L. J. Ch. 881; 24 Ch. D. 54; 79; 48 L. T. 844; 31 W. R. 731.—C.A., reversed in part, H.L. (E.). *See ante*, col. 2546.

13. STOPPAGE IN TRANSITU.

Feise v. Wray (1802) 3 East 93; 6 R. R. 551.—K.B., *distinguished*.

Nichols v. Hart (1831) 5 C. & P. 179.—TINDAL, C.J.

Feise v. Wray, *applied*.

Edwards v. Brewer (1837) 6 L. J. Ex. 125; 2 M. & W. 375.—EX.

Feise v. Wray, *adopted*.

Falk v. Fletcher (1865) 34 L. J. C. P. 146; 18 C. B. (N.S.) 403; 11 Jur. (N.S.) 176; 13 W. R. 346.—C.P.; *Ireland v. Livingston* (1870) 39 L. J. Q. B. 282; L. R. 5 Q. B. 516, 535.—EX. CH. [reversed, H.L. (E.)]; **Mollett v. Robinson** (1870) 39 L. J. C. P. 290; L. R. 5 C. P. 646, 657; 23 L. T. 185; 18 W. R. 1160.—C.P.; (affirmed, EX. CH., but reversed, H.L. (E.), *see ante*, col. 2524); and **Weguelin v. Cellier** (1873) 42 L. J. Ch. 758; L. R. 6 H. L. 286, 297; 22 W. R. 26.—H.L. (E.).

Feise v. Wray, *distinguished*.

Cassaborglou v. Gibb (1883) 58 L. J. Q. B. 538; 11 Q. B. D. 797; 48 L. T. 850; 32 W. R. 138.—C.A.

FRY, L.J.—*Feise v. Wray* was cited to show that in the case of the foreign agent buying for his English principal there is the relationship of vendor and purchaser, but Grove, J., there says: "What is this but the plain and common case of the consignor of goods who has not received payment for them stopping them in *transitu* before they get to the hands of the consignee? It is said that no such right exists in the case of a factor against his principal. If this were a case of a factor and principal merely, I should find difficulty in saying that it did.

O.C.

Feise v. Wray, *applied*.

Bruno, In re, Francis, Ex parte (1887) 56 L. T. 577.—CAVE, J.

Westzinthus, In re (1833) 3 L. J. K. B. 56; 5 B. & Ad. 817; 2 N. & M. 644.—K.B., *applied*.

Spalding v. Ruding (1843) 12 L. J. Ch. 503; 6 Beav. 376.—M.R.

Westzinthus, In re, *followed*.

Broadbent v. Barlow (1861) 30 L. J. Ch. 569; 3 De G. F. & J. 570; 7 Jur. (N.S.) 479; 4 L. T. 193.—CAMPBELL, L.C.

Westzinthus, In re, *adopted*.

Meyerstein v. Barber (1866) 36 L. J. C. P. 48; L. R. 2 C. P. 38, 53; 15 L. T. 355.—C.P.; affirmed, EX. CH. and H.L. (E.). *See col. 3320*.

Westzinthus, In re, *approved*.

Kemp v. Falk (1882) 53 L. J. Ch. 167; 7 App. Cas. 573; 47 L. T. 454; 31 W. R. 125; 5 Asp. M. C. 1.—H.L. (E.). (*See extract ante*, col. 3024); and **Sewell v. Burdick** (1885) 54 L. J. Q. B. 156; 10 App. Cas. 74, 80; 52 L. T. 445; 33 W. R. 461; 5 Asp. M. C. 376.—H.L. (E.).

The Marie Joseph, 12 L. T. 236; 13 W. R. 112.—ADM.; reversed *sub nom. Pease v. Gloahec*, (1869) 35 L. J. P. C. 66; L. R. 1 P. C. 219; 3 Moo. P. C. (N.S.) 556; Br. & L. 449; 12 Jur. (N.S.) 677; 15 L. T. 6; 15 W. R. 201.—P.C.

The Marie Joseph, *applied*.

The Argentina (1867) L. R. 1 A. & E. 370, 376; 16 L. T. 743.—ADM.; Overend, Gurney & Co., In re, Oakes, Ex parte (1867) 36 L. J. Ch. 233, 250; L. R. 3 Eq. 576, 629.—MALINS, V.-C. affirmed, 36 L. J. Ch. 949.—H.L. (E.).

Bethell v. Clark (1888) 57 L. J. Q. B. 302; 20 Q. B. D. 615; 59 L. T. 808; 36 W. R. 611; 6 Asp. M. C. 346.—C.A., *approved*.

Lyons v. Hoffnung (1890) 59 L. J. P. C. 79; 15 App. Cass. 391; 63 L. T. 293; 39 W. R. 590; 6 Asp. M. C. 551.—P.C.

Akerman v. Humphrey (1823) 1 Car. & P. 53.—NISI PRIUS; *observations applied*.

Jenkins v. Osborne (1844) 13 L. J. C. P. 196; 7 Man. & G. 678; 8 Scott N. R. 505; 8 Jur. 1139.—C.P.

14. AVERAGE.

Da Costa v. Newnham (1788) 2 Term Rep. 407.—K.B. *adopted*.

Lohre v. Aitchison (1877) 46 L. J. Q. B. 715, 720; 2 Q. B. D. 502, 508; 36 L. T. 794; 25 W. R. 42.—Q.B.D. *See infra*, in C.A. and H.L. (E.).

Da Costa v. Newnham, *disapproved*.

Svensden v. Wallace (1884) 53 L. J. Q. B. 385; 13 Q. B. D. 69; 50 L. T. 799; 5 Asp. M. C. 232.—C.A., affirmed, H.L. (E.). *See infra*, col. 3381.

Lohre v. Aitchison 46 L. J. Q. B. 715; 2 Q. B. D. 502; 36 L. T. 794; 25 W. R. 42.—Q.B.D.; reversed, (1878) 47 L. J. Q. B. 534; 3 Q. B. D. 558; 38 L. T. 802.—C.A.; the latter decision reversed *nom. Aitchison v. Lohre* (1879) 49 L. J. Q. B. 123; 4 App. Cas. 755; 41 L. T. 323; 28 W. R. 1; 4 Asp. M. C. 168.—H.L. (E.).

Aitchison v. Lohre, applied.

Dixon v. Whitworth (1879) 48 L. J. C. P. 538;
4 C. P. D. 371; 40 L. T. 718; 28 W. R. 184;
4 Asp. M. C. 326.—C.P.D.

Aitchison v. Lohre, considered.

Pitman v. Universal Marine Insurance Co.
(1882) 51 L. J. Q. B. 561; 9 Q. B. D. 192; 46
L. T. 863; 30 W. R. 906; 4 Asp. M. C. 544.—
C.A. BRETT, L.J., dissenting.

Aitchison v. Lohre, dicta applied.

Roshier, *in re*, Roshier v. Roshier (1884) 53
L. J. Ch. 722; 26 Ch. D. 801, 821; 51 L. T. 785;
32 W. R. 820.—PEARSON, J.

Aitchison v. Lohre, referred to.

Johnston v. Salvage Association (1887) 19
Q. B. D. 458, 460; 57 L. T. 218; 36 W. R. 56;
6 Asp. M. C. 167.—C.A. ESHER, M.R., LINDLEY
and LOPES, L.JJ.

Aitchison v. Lohre, referred to.

Gas Float Whitton No. 2, [1895] P. 301;
11 R. 812; 73 L. T. 319.—JEUNE, P. and
BRUCE, J.; Nourse v. Liverpool Sailing Ship
Owners' Association (1896) 65 L. J. Q. B. 507;
[1896] 2 Q. B. 16; 74 L. T. 543; 44 W. R. 500;
—C.A.; and Ballantyne v. Mackinnon (1896)
65 L. J. Q. B. 616; [1896] 2 Q. B. 455; 75 L. T.
95; 45 W. R. 70.—C.A.

Aitchison v. Lohre, dicta applied.

The Solway Prince (1896) 65 L. J. Adm. 45;
[1896] P. 120; 74 L. T. 32; 8 Asp. M. C. 128.
—JEUNE, P.

Plummer v. Wildman (1815) 3 M. & S. 482;

16 R. R. 334.—K.B., explained.

Hallett v. Wigram (1850) 9 C. B. 580; 19
L. J. C. P. 281.—C.P.

WILDE, C.J.—In Abbott on Shipping (8th ed.)
the learned author goes on to say: "Thus, if it
be necessary to unload the goods, in order to
repair the damage done to a ship by a tempest,
or by collision with another vessel, so as to enable
her to prosecute and complete her voyage, it has
been held that the expense of unloading, ware-
housing, and re-shipping the goods shall be
sustained by general contribution, because all
persons are interested in the execution of the
measures necessary to the completion of the
voyage." The reason there assigned might be
applicable to the case the author had in his
mind, *Plummer v. Wildman*; but as a general
proposition it is too large, it would throw upon
the skipper much of the expense which properly
belongs to the shipowner. In that case there were
undoubtedly some expressions of Lord Ellen-
borough which would seem to justify the pas-
sage; but in the subsequent case of *Power v.*
Whitmore (4 M. & Selw. 141), his lordship
explains that that decision proceeded upon the
ground that the master "was compelled to cut
away his rigging in order to preserve the ship,
and afterwards put into port to repair that which
he sacrificed." The expressions, therefore, in
Plummer v. Wildman are repudiated and ex-
plained away—p. 608.

Plummer v. Wildman, considered.

Harrison v. Baff of Australasia (1872) 41
L. J. Ex. 36; L. R. 7 Ex. 39; 25 L. T. 944; 20
W. R. 385; 1 Asp. M. C. 198.—EX.

Plummer v. Wildman, discussed.

Atwood v. Sellar (1880) 49 L. J. Q. B. 515, 517;
5 Q. B. D. 286, 291; 42 L. T. 644; 28 W. R. 604;
4 Asp. M. C. 283.—C.A.

Plummer v. Wildman, discussed.

Svensen v. Wallace (1884) 53 L. J. Q. B. 385;
13 Q. B. D. 69, 88; 50 L. T. 799; 5 Asp. M. C.
232.—C.A. BAGGALLAY, L.J. dissenting,
[affirmed, H.L. (E.). See *infra*, col. 3381.

Plummer v. Wildman, referred to.

The Bona (1895) [1895] P. 125.—JEUNE, P.;
affirmed, C.A.

**Worms v. Storey (1855) 25 L. J. Ex. 1; 11
Ex. 427.—EX., referred to.**

Notara v. Henderson (1872) 41 L. J. Q. B. 158;
L. R. 7 Q. B. 225, 236; 26 L. T. 442; 20 W. R.
442; 1 Asp. M. C. 278.—EX. CH.; Atwood v.
Sellar (1879) 48 L. J. Q. B. 465; 4 Q. B. D.
342, 356; 41 L. T. 83.—Q.B.D., affirmed, C.A.
(*infra*, col. 3381); Pirie v. Middle Dock Co.
(1881) 44 L. T. 426; 4 Asp. M. C. 388.—ADM.

Worms v. Storey, referred to.

Assicurazioni Generali v. The Bessie Morris
[1892] 1 Q. B. 571.—COLLINS, J.; affirmed, C.A.

Johnson v. Chapman (1865) 35 L. J. C. P.

23; 19 C. B. (N.S.) 563; 15 L. T. 70; 14
W. R. 264.—C.P., distinguished.
Shepherd v. Kottgen (1877) 47 L. J. C. P.
67, 69; 2 C. P. D. 578, 582.—C.P.D.; reversed,
47 L. J. C. P. 67; 2 C. P. D. 585; 37 L. T. 618;
26 W. R. 120; 3 Asp. M. C. 544.—C.A.

**Johnson v. Chapman, explained and distin-
guished.**

Pirie v. Middle Dock Co. (1881) 44 L. T. 426;
4 Asp. M. C. 388.—W. WILLIAMS, J.

Johnson v. Chapman, commented on.

Wright v. Marwood (1881) 7 Q. B. D. 62; 50
L. J. Q. B. 643; 45 L. T. 297; 29 W. R. 673;
6 Asp. M. C. 451.—C.A.

BRAMWELL, L.J. (for the Court).—That was
not a case of general average. The plaintiffs
had chartered the defendant's ship, loaded the
whole cargo, part of which by the charter was
to be, and was, deck cargo, and were held
entitled to a contribution from the ship, and
with reason. They were not seeking it from
other cargo owners, but from the shipowner who
shared the benefit, and ought in reason to share
the risk, of the deck cargo. As Mr. Benjamin
pointed out, the counsel for the shipowner never
contested the plaintiffs' right if it was a case of
sacrifice. The counsel for the plaintiffs, indeed,
did contend for what was not contested: why
one cannot see, unless to show that though deck
cargo, it was not wreck but sacrificed. But what
is the judgment? "The question is, what is
wreck?" (19 C. B. (N.S.), p. 581.) Mr. Justice
Willes discusses that. Then he says (p. 583): "In
this case there was a deck cargo. . . . When
you have established that it is a deck cargo law-
fully there by the contract of the parties, it
becomes subject to the rule of general average."
Now, certainly, that last sentence gives some
colour to the plaintiffs' contention. But the
learned judge should be understood as speaking
in relation to the subject-matter. It was not a
claim for general average as against any other
than the shipowner. It was a particular claim

against him, and is said to be subject to the "rule" of general average. If Mr. Justice Willes had said that it could have been maintained against other cargo owners, had there been any, it would have been wholly extrajudicial, for there were none. But he did not say nor mean to say so. For he says, "The deck cargo was within the contemplation of the parties," which would not be true of other cargo owners. The case, then, was not one of general average. It was as though the plaintiffs were owners of such cargo, and A. owner of other cargo, and A. had agreed to contribute if deck cargo was jettisoned.—p. 69.

Johnson v. Chapman, explained.

Milburn v. Jamaica Fruit Co. (1900) 69 L. J. Q. B. 860; [1900] 2 Q. B. 540; 83 L. T. 321; 5 Com. Cas. 346.—C.A.

Moran v. Jones (1857) 26 L. J. Q. B. 187; 7 E. & B. 523; 3 Jur. (N.S.) 663; 5 W. R. 503.—Q.B., explained and distinguished.

Walthew v. Mavrojani (1870) 39 L. J. Ex. 81, 83; L. R. 5 Ex. 116, 122; 22 L. T. 310.—EX. CH.

Moran v. Jones, applied.

Hingston v. Wendt (1876) 45 L. J. Q. B. 440, 445; 1 Q. B. D. 367, 372; 34 L. T. 181; 24 W. R. 664; 3 Asp. M. C. 126.—Q.B.D.

Moran v. Jones, disapproved.

Svensden v. Wallace (1884) 13 Q. R. D. 69; 53 L. J. Q. B. 385; 50 L. T. 799; 5 Asp. M. C. 232.—C.A. BAGGALLAY, L.J. dissenting.

[Affirmed by H. L. (*infra*, col. 3381), who, however, made no reference to *Da Costa v. Newnham* and *Moran v. Jones*.]

Moran v. Jones, considered.

Royal Mail Steam Packet Co. v. English Bank of Rio de Janeiro (1887) 57 L. J. Q. B. 31; 19 Q. B. D. 362; 36 W. R. 105.—WILLS and GRANTHAM, JJ.

Moran v. Jones, explained.

The Brigella (1893) 62 L. J. Adm. 81; [1893] P. 189; 1 R. 616; 69 L. T. 834; 7 Asp. M. C. 337.—BARNES, J.

Moran v. Jones, dictum adopted.

Montgomery v. Indemnity Mutual Marine Insurance Co. (1902) 71 L. J. K. B. 467; [1902] 1 K. B. 734; 86 L. T. 462; 50 W. R. 440.—C.A.

Moran v. Jones, followed.

Steamship Carisbrook Co. v. London, &c., Insurance Co. (1902) 71 L. J. K. B. 978; [1902] 2 K. B. 681; 87 L. T. 418; 50 W. R. 691; 7 Com. Cas. 235.—C.A.

Oppenheim v. Fry (1864) 33 L. J. Q. B. 267; 5 B. & S. 348; 10 L. T. 539; 12 W. R. 831.—EX. CH., explained.

The Brigella (1893) 62 L. J. Adm. 81; [1893] P. 189; 1 R. 616; 69 L. T. 834; 7 Asp. M. C. 337.—BARNES, J.

Job v. Langton (1876) 26 L. J. Q. B. 97; 6 E. & B. 779.—Q.B., referred to.

Walthew v. Mavrojani (1870) 39 L. J. Ex. 81; L. R. 5 Ex. 116, 121; 22 L. T. 310.—EX. CH.; Atwood v. Sellar (1880) 49 L. J. Q. B. 515; 5 Q. B. D. 286, 298; 42 L. T. 644; 28 W. R. 604; 4 Asp. M. C. 283.—C.A.; Svensden v. Wallace (1884) 53 L. J. Q. B. 385; 13 Q. B. D. 69; 50

L. T. 799; 5 Asp. M. C. 232.—C.A.; Royal Mail Packet Co. v. Bank of Rio Janeiro (1887) 57 L. J. Q. B. 31; 19 Q. B. D. 362, 371; 36 W. R. 105.—WILLS and GRANTHAM, JJ.

Walthew v. Mavrojani (1870) 39 L. J. Ex. 81; L. R. 5 Ex. 116; 22 L. T. 310.—EX. CH., referred to.

Atwood v. Sellar (1880) 49 L. J. Q. B. 515; 5 Q. B. D. 286, 298; 42 L. T. 644; 28 W. R. 604; 4 Asp. M. C. 283.—C.A.; Svensden v. Wallace (1884) 53 L. J. Q. B. 385; 13 Q. B. D. 69, 85; 50 L. T. 799; 5 Asp. M. C. 232.—C.A.; Royal Mail Steam Packet Co. v. Bank of Rio Janeiro (1887) 57 L. J. Q. B. 31; 19 Q. B. D. 362, 377; 36 W. R. 105.—WILLS and GRANTHAM, JJ.

Nimick v. Holmes (1855) 25 Pennsylvania St. Rep. 366, approved and followed.

Stewart v. West India and Pacific Steamship Co. (1873) 42 L. J. Q. B. 84; L. R. 8 Q. B. 88; 27 L. T. 820; 21 W. R. 381.—Q.B. (affirmed, EX. CH., *see infra*.)

Nimick v. Holmes, applied.

Pirie v. Middle Dock Co. (1881) 44 L. T. 426, 480; 4 Asp. M. C. 388.—W. WILLIAMS, J.

Nimick v. Holmes, referred to.

Whitecross Wire Co. v. Savill (1882) 51 L. J. Q. B. 426, 429; 8 Q. B. D. 653, 660; 46 L. T. 643; 30 W. R. 588; 4 Asp. M. C. 531.—C.A.

Stewart v. West India and Pacific Steamship Co. (1873) 42 L. J. Q. B. 84; L. R. 8 Q. B. 88; 27 L. T. 820; 21 W. R. 381.—Q.B.; *affirmed*, 42 L. J. Q. B. 191; L. R. 8 Q. B. 362; 28 L. T. 742; 21 W. R. 953; 1 Asp. M. C. 528.—EX. CH.

Stewart v. West India and Pacific Steamship Co., followed.

Hendricks v. Australasian Insurance Co. (1874) 43 L. J. C. P. 188; L. R. 9 C. P. 460; 30 L. T. 419; 22 W. R. 947.

Stewart v. West India and Pacific Steamship Co., considered.

Pirie v. Middle Dock Co. (1881) 44 L. T. 426; 4 Asp. M. C. 388.—W. WILLIAMS, J.

Stewart v. West India and Pacific Steamship Co., applied.

Whitecross Wire Co. v. Savill (1882) 51 L. J. Q. B. 426, 429; 8 Q. B. D. 653, 660; 46 L. T. 643; 30 W. R. 588; 4 Asp. M. C. 531.—C.A.

Shepherd v. Kottgen (1877) 47 L. J. C. P. 67; 2 C. P. D. 578, 585; 37 L. T. 618; 26 W. R. 120; 3 Asp. M. C. 544.—C.A., referred to.

Pirie v. Middle Dock Co. (1881) 44 L. T. 426, 428; 4 Asp. M. C. 388.—W. WILLIAMS, J.

Shepherd v. Kottgen, explained.

Iredale v. China Traders' Insurance Co. (1899) 68 L. J. Q. B. 1021; [1899] 2 Q. B. 356; 81 L. T. 231; 48 W. R. 48.—BIGHAM, J. (affirmed, C.A.)

Shepherd v. Kottgen, distinguished.

Montgomery v. Indemnity Mutual Marine Insurance Co. (1901) [1901] P. K. B. 147; 70 L. J. K. B. 45; 84 L. T. 57; 49 W. R. 221; 9 Asp. M. C. 141.—MATHEW, J.

Attwood v. Sellar (1880) 49 L. J. Q. B. 515; 5 Q. B. D. 286; 42 L. T. 644; 28 W. R. 604; 4 Asp. M. C. 283.—C.A., *applied*.
Pirie v. Middle Dock Co. (1881) 44 L. T. 426, 430; 4 Asp. M. C. 388.—W. WILLIAMS, J.

Attwood v. Sellar, *dictum discussed*.

Whitecross Wire Co. v. Savill (1882) 51 L. J. Q. B. 426, 429; 8 Q. B. D. 653, 661; 46 L. T. 643; 30 W. R. 588; 4 Asp. M. C. 531.—C.A.

Attwood v. Sellar, *disapproved?*

Svensden v. Wallace (1884) 53 L. J. Q. B. 385; 13 Q. B. D. 69; 50 L. T. 799; 5 Asp. M. C. 232.—C.A.; affirmed, H.L. (E.) (*see infra*.)

Attwood v. Sellar, *commented on*.

Svensden v. Wallace (1885) 54 L. J. Q. B. 497; 10 App. Cas. 404; 52 L. T. 901; 34 W. R. 369; 5 Asp. M. C. 453.—H. L. (E.).

LORD BLACKBURN.—I think, on examining the two adjustments, and exercising the power which I have assumed to be given, there can be no doubt that the cargo on board the ship, leaking to the extent which she did, was not safe even in harbour until the ship was so far lightened that she could be taken into dry dock. Should the expense of reloading her, after the repairs were made, be charged to freight, the goods having been taken out under such circumstances? I think it should. I am afraid I have not understood the reasoning on which Cockburn, C.J., in his judgment in *Attwood v. Sellar* comes to a different conclusion. If I have, I must express dissent from it.—p. 417.

Attwood v. Sellar, *distinguished*.

Anglo-Argentine Live Stock and Produce Agency v. Temperley Shipping Co. (1899) [1899] 2 Q. B. 403; 68 L. J. Q. B. 900; 81 L. T. 296; 48 W. R. 64; 8 Asp. M. C. 595.—C.A.

Attwood v. Sellar, *referred to*.

Balmogal Steamship Co. v. Marten (1901) 70 L. J. K. B. 1018; [1901] 2 K. B. 896; 85 L. T. 389; 50 W. R. 35; 6 Com. Cas. 298.—C.A.; **The Leitrim** (1902) 71 L. J. P. 108; [1902] P. 256; 87 L. T. 240; 51 W. R. 158.—BARNES, J.

Svensden v. Wallace, 52 L. J. Q. B. 397; 11 Q. B. D. 616; 48 L. T. 795.—LOPES, J.: *reversed*, (1884) 53 L. J. Q. B. 385; 13 Q. B. D. 69; 50 L. T. 799; 5 Asp. M. C. 232.—C.A. BRETT, M.R. and BOWEN, L.J.; BAGGALLAY, L.J. *dissenting*; *the latter decision affirmed*, (1885) 54 L. J. Q. B. 497; 10 App. Cas. 404; 52 L. T. 901; 34 W. R. 369; 5 Asp. M. C. 453.—H.L. (E.). LORDS BLACKBURN, WATSON and FITZGERALD.

Svensden v. Wallace, *opinion applied*.

Royal Mail Steam Packet Co. v. English Bank of Rio de Janeiro (1887) 57 L. J. Q. B. 31; 19 Q. B. D. 362; 36 W. R. 105.—WILLS and GRANTHAM, JJ.; **Iredale v. China Traders' Insurance Co.** (1900) 69 L. J. Q. B. 783; [1900] 2 Q. B. 515; 83 L. T. 299; 49 W. R. 107; 5 Com. Cas. 337; 9 Asp. M. C. 119.—C.A. SMITH, WILLIAMS and ROMER, L.JJ.

Svensden v. Wallace, *principle applied*.

The Brigella (1893) 62 L. J. Ad. 81; [1893] P. 189; 1 R. 616; 69 L. T. 834; 7 Asp. M. C. 337.—BARNES, J.

Ocean Steamship Co. v. Anderson, 53 L. J. Q. B. 161; 13 Q. B. D. 651; 50 L. T. 171; 32 W. R. 472.—C.A.; *reversed nom.* **Anderson v. Ocean Steamship Co.** (1884) 54 L. J. Q. B. 192; 10 App. Cas. 107; 52 L. T. 441; 33 W. R. 433; 5 Asp. M. C. 401.—H.L. (E.).

Anderson v. Ocean Steamship Co. (1884) 54 L. J. Q. B. 192; 10 App. Cas. 107; 52 L. T. 441; 33 W. R. 433; 5 Asp. M. C. 401.—H.L. (E.), *explained and distinguished*.

The Raisby (1885) 54 L. J. Adm. 65; 10 P. D. 114, 117; 53 L. T. 56; 33 W. R. 938; 5 Asp. M. C. 473.—HANNEN, P.

Anderson v. Ocean Steamship Co., *dicta applied*.

The Prinz Heinrich (1888) 57 L. J. Adm. 17; 13 P. D. 31, 34; 58 L. T. 593; 36 W. R. 511; 6 Asp. M. C. 273.—BRETT, J. *See extract, post*, col. 3395.

Hallett v. Bousfield (1811) 18 Ves. 187; 11 R. R. 184.—ELDON, L.C. *See*

Giles v. Grover (1832) 9 Bing. 128; 2 M. & Sc. 197; 1 Cl. & F. 72; 6 Bli. (N.S.) 277.—H.L. (E.).

Hallett v. Bousfield, *explained*.

Strang Steel & Co. v. Scott (1889) 59 L. J. P. C. 1; 14 App. Cas. 601; 61 L. T. 597; 38 W. R. 452; 6 Asp. M. C. 419; 5 T. L. R. 705.—P.C.

Dobson v. Wilson (1813) 3 Camp. 480; 14 R. R. 817.—ELLENBOROUGH, C.J., *observations adopted*.

Strang v. Scott (1889) 59 L. J. P. C. 1; 14 App. Cas. 601, 606; 61 L. T. 597; 38 W. R. 452; 6 Asp. M. C. 419; 5 T. L. R. 705.—P.C.

Schloss v. Heriot (1863) 32 L. J. C. P. 211; 14 C. B. (N.S.) 59; 10 Jur. (N.S.) 76; 8 L. T. 246; 11 W. R. 596.—C.P., *adopted*.

The Ettrick (1881) 50 L. J. Adm. 65; 6 P. D. 127, 129.—ADM., affirmed, 6 P. D. 127; 45 L. T. 399; 4 Asp. M. C. 465.—C.A.; **Pirie v. Middle Dock Co.** (1881) 44 L. T. 426, 429; 4 Asp. M. C. 388.—W. WILLIAMS, J.; **Strang v. Scott** (1889) 59 L. J. P. C. 1; 14 App. Cas. 601; 61 L. T. 597; 38 W. R. 452; 6 Asp. M. C. 419.—P.C.

Crooks v. Allen (1879) 49 L. J. Q. B. 201; 5 Q. B. D. 38; 41 L. T. 800; 28 W. R. 304; 4 Asp. M. C. 216.—LUSH, J., *dictum discussed*.

Burton v. English (1883) 53 L. J. Q. B. 133; 12 Q. B. D. 218; 49 L. T. 768; 32 W. R. 655; 5 Asp. M. C. 187.—C.A.

Crooks v. Allen, *considered*.

Huth v. Lamport (1885) 16 Q. B. D. 442, 445; 54 L. T. 334.—MATHEW and SMITH, JJ.; affirmed, (1886) 55 L. J. Q. B. 239; 16 Q. B. D. 735; 54 L. T. 663; 34 W. R. 386; 5 Asp. M. C. 593.—C.A.

Crooks v. Allen, *dictum adopted*.

Strang v. Scott (1889) 59 L. J. P. C. 1; 14 App. Cas. 601; 61 L. T. 597; 38 W. R. 452; 6 Asp. M. C. 419.—P.C.

Wright v. Marwood (1881) 50 L. J. Q. B. 443; 7 Q. B. D. 62; 45 L. T. 297; 29 W. R. 672; 4 Asp. M. C. 451.—C.A. *opinion dissented from*.

Burton v. English (1883) 53 L. J. Q. B. 133; 12 Q. B. D. 218; 49 L. T. 768; 32 W. R. 655; 5 Asp. M. C. 187.—C.A.

Wright v. Marwood, observations adopted.

Strang, Steel & Co. v. Scott (1889) 59 L. J. P. C. 1; 14 App. Cas. 601; 61 L. T. 597; 38 W. R. 452; 6 Asp. M. C. 419.—P.C.

Wright v. Marwood, dicta referred to.

The Marpessa (1891) 61 L. J. Adm. 9; [1891] P. 403; 66 L. T. 356; 40 W. R. 239; 7 Asp. M. C. 155.—JEUNE, J.

Wright v. Marwood, dicta considered.

The Brigella (1893) 62 L. J. Adm. 81; [1893] P. 189; 1 R. 616; 69 L. T. 834; 7 Asp. M. C. 337.—BARNES, J.

Strang, Steel & Co. v. Scott & Co. (1889) 59 L. J. P. C. 1; 14 App. Cas. 601; 61 L. T. 597; 38 W. R. 452; 6 Asp. M. C. 419.—P.C., *applied*.

The Carron Park (1890) 59 L. J. Adm. 74; 15 P. D. 203; 63 L. T. 356; 29 W. R. 191; 6 Asp. M. C. 543.—HANNEN, P.

Simonds v. White (1824) 2 L. J. (O.S.) K. B. 159; 2 B. & C. 805; 4 D. & R. 375; 26 R. R. 560.—K.B., *adopted*.

Lloyd v. Guibert (1865) 35 L. J. Q. B. 74; 78; L. R. 1 Q. B. 116, 126; 6 B. & S. 100; 13 L. T. 602.—EX. CH.

Simonds v. White, referred to.

The Patria (1871) 41 L. J. Adm. 23, 29; L. R. 3 A. & E. 436, 462; 24 L. T. 849; 1 Asp. M. C. 71.—ADM.

Simonds v. White, considered.

Attwood v. Sellar (1879) 48 L. J. Q. B. 465; 4 Q. B. D. 342; 41 L. T. 83.—Q.B.D. affirmed, C.A. (*ante*, col. 3381.)

Simonds v. White, observed upon.

Huth v. Lamport (1885) 16 Q. B. D. 442, 445; 54 L. T. 334.—MATHEW and SMITH, JJ.; affirmed, (1886) 55 L. J. Q. B. 239; 16 Q. B. D. 735; 54 L. T. 663; 34 W. R. 386; 5 Asp. M. C. 593.—C.A.

Simonds v. White, explained.

Wavertree Sailing Ship Co. v. Love (1897) 66 L. J. P. C. 77; [1897] A. C. 373; 76 L. T. 576; 8 Asp. M. C. 276.—P.C.

LORD HERSCHHELL.—The learned judges in the Court below rested their judgment mainly on the law laid down by Lord Tenterden in the case of *Simonds v. White*. . . . The words relied on are that the shippers must be understood to assent to the adjustment of general average "at the usual and proper place." In their lordships' opinion, however, these words do not refer to the preparation of an average statement, but to the actual settlement and adjustment of the general average contributions. The preparation of a general average statement which does not bind the shipper is not "the adjustment" of general average. In order to understand Lord Tenterden's language, it is necessary to bear in mind what would happen if all parties stood on their rights. The shipowner would hold the goods until he obtained the general average contribution to which they were subject. If the owner of the goods disputed his claim, he would appeal to the tribunals of the country to obtain possession of them on payment of what was due. These tribunals would have to determine whether the owner of the goods was entitled to them and what payment he must make to release them. It would naturally follow, as Lord Tenterden

said, that the parties must be understood as consenting to the adjustment according to the law there administered. But all this has, in their lordships' opinion, nothing to do with the mere employment by the shipowner of an average adjuster to prepare a statement on his behalf. In Lord Tenterden's time professional average adjusters were not as commonly to be found in the different ports of discharge as they are at present.—p. 80.

15. SALVAGE.

The Clifton, Kelly v. Bushby (1834) 3 Hagg.

Adm. 117; 3 Knapp, 373.—ADM.; *applied*, Arnold v. Cowie, The Glenduror (1871) L. R. 3 P. C. 589, 592; 24 L. T. 499; 1 Asp. M. C. 31.—P.C.; The Cleopatra (1878) 47 L. J. Adm. 72, 74; 3 P. D. 144, 149.—ADM.; The Brinhilda (1881) 45 L. T. 389; 4 Asp. M. C. 461.—P.C.

Hartford v. Jones (1799) 1 Ld. Raym. 393.—

K.B., *distinguished*.

Nicholson v. Chapman (1793) 2 H. Bl. 254.—C.P.

Hartford v. Jones, adopted.

Aitchison v. Lohre (1879) 49 L. J. Q. B. 123, 126; 4 App. Cas. 755, 761; 41 L. T. 323; 28 W. R. 1; 4 Asp. M. C. 168.—H.L. (E.).

Hartford v. Jones, considered.

Gas Float, Whitton (No. 2) (1895) 65 L. J. Adm. 17; [1896] P. 42; 73 L. T. 698; 44 W. R. 263; 8 Asp. M. C. 110.—C.A.; affirmed, H.L. (*infra*).

Hartford v. Jones, referred to.

The Fulham (1899) 68 L. J. P. 75; [1899] P. 251; 81 L. T. 19; 47 W. R. 598; 8 Asp. M. C. 559.—C.A. SMITH, WILLIAMS and KOMER, L.JJ.

Nicholson v. Chapman (1793) 2 H. Bl. 254.—

C.P., *distinguished*.

Hingston v. Wendt (1876) 45 L. J. Q. B. 440, 445; 1 Q. B. D. 367, 373; 34 L. T. 664; 24 W. R. 664; 3 Asp. M. C. 126.—Q.B.D.

Nicholson v. Chapman, adopted.

Aitchison v. Lohre (1879) 49 L. J. Q. B. 123, 125; 4 App. Cas. 755, 760; 41 L. T. 323; 28 W. R. 1; 4 Asp. M. C. 168.—H.L. (E.).

Nicholson v. Chapman and Raft of Timber (1844) 2 Wm. Rob. 251.—ADM., *considered*.

Gas Float, Whitton No. 2 (1895) 65 L. J. Adm. 17; [1896] P. 42; 73 L. T. 698; 44 W. R. 263; 8 Asp. M. C. 110.—C.A.; affirmed, H.L. (*infra*).

Gas Float, Whitton No. 2 (1895) [1895]

P. 301; 73 L. T. 319; 11 R. 812.—JEUNE, P. and BARNES, J.; *reversed*, (1895) 65 L. J. P. 17; [1896] P. 42; 73 L. T. 698; 44 W. R. 263; 8 Asp. M. C. 110.—C.A.; *the latter decision affirmed*, (1897) 66 L. J. P. 99; [1897] A. C. 337; 76 L. T. 663.—H.L. (E.).

The Orbona (1853) 1 Spinks Eccl. & Ad. 161.—ADM., *referred to*.

Scaramanga v. Stamp (1880) 49 L. J. C. P. 674; 5 C. P. D. 295; 42 L. T. 840; 28 W. R. 691; 4 Asp. M. C. 295.—C.A.

The Leda (1856) Swabey 40; 2 Jur. (N.S.)

119; 4 W. R. 322.—ADM., *adopted*.
Reg. v. Keyn (1876) 46 L. J. M. C. 17, 31; 2 Ex. D. 63, 90; 13 Cox C. C. 403.—C.C.R.

The Leda, followed.

The Mac (or Macadam) v. Saucy Polly (1882)
51 L. J. Adm. 81; 7 P. D. 126; 46 L. T. 907;
4 Asp. M. C. 555.—C.A.

The Mac (or Macadam) v. The Saucy Polly,
51 L. J. Adm. 20; 7 P. D. 38; 46 L. T. 206;
30 W. R. 552.—ADM.: *reversed*, (1882) 51
L. J. Adm. 81; 7 P. D. 126; 46 L. T. 907; 5
Asp. M. C. 555.—C.A.

The Mac v. Saucy Polly, dictum applied.

Corbett v. Pearce (1904) 73 L. J. K. B. 885,
891; [1904] 2 K. B. 422; 90 L. T. 781; 68 J. P.
387; 20 T. L. R. 473.—LORD ALVERSTONE, C.J.,
WILLS and KENNEDY, JJ.

The Benlarig (1888) 58 L. J. P. 24; 14
P. D. 3; 60 L. T. 238; 6 Asp. M. C. 360.—
BUTT, J., *followed*

The Le'panto (1892) [1892] P. 122; 66 L. T.
628; 7 Asp. M. C. 192.—JEUNE, J.; The August
Korff (1903) 72 L. J. P. 53; [1903] P. 166;
89 L. T. 194.—BUCKNILL, J.

The India (1842) 1 W. Rob. 406.—ADM.,
followed.

The Cheerful, (1885) 11 P. D. 3; 55 L. J.
Adm. 5; 54 L. T. 56; 34 W. R. 307; 5 Asp.
M. C. 525.

BUTT, J.—I must hold, to quote the language
of Dr. Lushington in *The India*, that "unless
the salvors by their services conferred actual
benefit on the saved property, they are not
entitled to salvage remuneration."—p. 5.

The Michael (1805) 2 Hag. Adm. 178, n.—
ADM., *applied*.

The Æolus (1873) 42 L. J. Adm. 14; L. R. 4;
A. & E. 29; 28 L. T. 41; 21 W. R. 704.—ADM.

The E. U. (1853) 1 Spinks Eccl. & Ad. 63.—
ADM., *considered*.

The Renpor (1883) 52 L. J. Adm. 49; 8 P. D.
115; 48 L. T. 887; 31 W. R. 640; 5 Asp. M. C.
135.—C.A. *See extract, infra*.

The E. U., dictum applied.

The Camellia (1883) 53 L. J. Adm. 12; 9 P. D.
27; 50 L. T. 126; 32 W. R. 495; 5 Asp. M. C.
197.—HANNEN, P.

The Duke of Manchester (1847) 6 Moore
P. C. 90; 10 Jur. 863; 2 W. Rob. 470;
4 N. of Cas. 582.—P.O., *followed*.

The Yan-Yean (1883) 52 L. J. Adm. 67; 8
P. D. 147; 150; 49 L. T. 186; 31 W. R. 950;
5 Asp. M. C. 135.—HANNEN, P.

The Undaunted (1860) 29 L. J. Adm. 176;
2 L. T. 520; Lush. 90.—ADM., *referred to*.

The Aztecs (1870) 21 L. T. 797.—ADM.: The
Nellie (1873) 29 L. T. 516; 2 Asp. M. C. 142.—
ADM.: The Killeena (1881) 51 L. J. Adm. 11;
6 P. D. 193; 45 L. T. 621; 30 W. R. 339; 4 Asp.
M. C. 472.—ADM.

The Undaunted, considered.

The Renpor (1883) 52 L. J. Adm. 49; 8 P. D.
115; 48 L. T. 887; 31 W. R. 640; 5 Asp. M. C.
98.—C.A.

BRETT, L.J.—The saving of life alone without
saving something more, such as ship or cargo,
which will realise a fund out of which salvage
may be paid, is not sufficient. It is said that
there are cases to the contrary, and that the con-
dition that something more than life must be

saved is got rid of where life alone is saved by
the exertions of the salvors at the request of the
captain, and that in such a case the owner is
bound to pay for the services so rendered. In
support of this, *The Undaunted* was cited, and it
was said that *The E. U.* (*supra*, col. 3385), the
authority upon which that case was decided,
was in favour of the plaintiff's contention; and
more particularly something which was said by
Dr. Lushington in the latter case. But the case
of *The Undaunted* does not carry the present case
sufficiently far; for the ship was there saved by
the salvors, so that there was a fund out of
which some salvage could be paid. The question
there was whether the plaintiffs could be paid
out of that fund, and the answer was that, inas-
much as they had exerted themselves at the
request of the captain towards salvage, they
could claim something out of the fund which
existed by reason of other people having saved
the ship. I will not say whether I agree with
that decision or not, but it differs from this, and
does not conflict with the fundamental law of
the Admiralty Court, which is, that no salvage
is due unless something is saved. *The E. U.* is
a similar case; but one of the supposititious
cases there put by Dr. Lushington, as to an
anchor being put on board a ship which is after-
wards lost, is supposed to carry this case. But
if that case was put, it is contrary to what has
been said in other cases, and it is remarkable
that the words "at the request of the captain"
are omitted. I doubt whether the supposititious
case would have been decided in favour of the
unsuccessful salvors. Neither *The E. U.* nor
The Undaunted, therefore, carry the plaintiffs
on the argument here.—p. 50.

The Atlas (1862) Lush. 518.—ADM., *followed*.

The August Korff (1903) 72 L. J. P. 53;
[1903] P. 166; 89 L. T. 194.—BUCKNILL, J.

The Nellie (1873) 29 L. T. 516; 2 Asp. M. C.
142.—ADM., *applied*.

The Camellia (1883) 53 L. J. Adm. 12; 9 P. D.
27; 50 L. T. 126; 32 W. R. 495; 5 Asp. M. C.
197.—HANNEN, P.

The Killeena (1881) 51 L. J. Adm. 11;
6 P. D. 193; 45 L. T. 621; 30 W. R. 339;
4 Asp. M. C. 472.—ADM., *dictum*
applied.

The Camellia (1883) 53 L. J. Adm. 12; 9 P. D.
27; 50 L. T. 126; 32 W. R. 495; 5 Asp. M. C.
197.—HANNEN, P.

The Renpor (1883) 52 L. J. Adm. 49; 8 P. D.
115; 48 L. T. 887; 31 W. R. 640; 5
Asp. M. C. 98.—C.A., *observations applied*.

The Mariposa (1896) 65 L. J. Adm. 104; [1896]
P. 273; 75 L. T. 54; 45 W. R. 191; 8 Asp. M. C.
159.—BARNES, J.

The Camellia (1883) 53 L. J. P. 12; 9 P. D.
27; 50 L. T. 126; 5 Asp. M. C. 197.—
HANNEN, P., *followed*.

The August Korff (1903) 72 L. J. P. 53; [1903]
P. 166; 89 L. T. 194.—BUCKNILL, J.

The Johannes (1860) Lush. 182; 30 L. J.
Adm. 91; 3 L. T. 757.—ADM., *applied*.

The Willem III. (1871) L. R. 3 A. & E. 487,
494; 25 L. T. 386; 20 W. R. 216; 1 Asp. M. C.
129.—ADM.

The Johannes, considered.

The Pacific (1898) 67 L. J. P. 65; [1898] P. 170; 79 L. T. 125; 46 W. R. 686; 8 Asp. M. C. 422.—JEUNE, P.

The Willem III. (1871) L. R. 3 A. & E. 487; 25 L. T. 386; 20 W. R. 216; 1 Asp. M. C. 129.—ADM., considered.

The Pacific (1898) 67 L. J. P. 65; [1898] P. 170; 79 L. T. 125; 46 W. R. 686; 8 Asp. M. C. 422.—JEUNE, P.

The Coromandel (1857) Swab. 205.—ADM., dictum explained.

Cargo ex Schiller (1877)—C.A. (*infra*).

The Cairo (1874) 43 L. J. Adm. 33; L. R. 4 A. & E. 184; 30 L. T. 535; 22 W. R. 742; 2 Asp. M. C. 257.—ADM., considered.

Cargo ex Schiller (1877)—C.A. (*infra*); and The Pacific (1898) 67 L. J. P. 65; [1898] P. 170; 79 L. T. 125; 46 W. R. 686; 8 Asp. M. C. 422.—JEUNE, P.

Cargo ex Schiller (1877) 2 P. D. 145; 36 L. T. 714; 3 Asp. M. C. 439.—C.A.; affirming 46 L. J. Adm. 9.—ADM., applied.

Cargo ex Sarpedon (1877) 3 P. D. 28, 34; 37 L. T. 505; 26 W. R. 374; 3 Asp. M. C. 509.—ADM.; The Renpor (1883) 52 L. J. Adm. 49; 8 P. D. 115; 48 L. T. 887; 31 W. R. 640; 5 Asp. M. C. 98.—C.A.

The Joseph Harvey (1799) 1 C. Rob. 306.—ADM., opinion adopted.

The Æolus (1873) 42 L. J. Adm. 14; L. R. 4 A. & E. 29; 28 L. T. 41; 21 W. R. 704.—ADM.

The Jonge Andries (1857) 11 Moo. P. C. 313; Swab. 303; 6 W. R. 198.—P.C., applied.

The Waverley (1871) 40 L. J. Adm. 42; L. R. 3 A. & E. 369; 24 L. T. 713; 1 Asp. M. C. 47.—ADM.

The Minnehaha, Ward v. McCorkill (1861)

15 Moore P. C. 133; 30 L. J. Adm. 211; Lush. 335; 7 Jur. (N.S.) 1257; 4 L. T. 810; 9 W. R. 925.—P.C., referred to.

The White Star (1866) L. R. 1 A. & E. 68, 69.—ADM.; The I. C. Potter (1870) 40 L. J. Adm. 9; L. R. 3 A. & E. 292; 23 L. T. 603; 19 W. R. 335.—ADM.; The Waverley (1871) 40 L. J. Adm. 42, 45; L. R. 3 A. & E. 369, 378; 24 L. T. 713; 1 Asp. M. C. 47.—ADM.; The Orient, Yeo v. Tatem (1871) 40 L. J. Adm. 29; L. R. 3 P. C. 696, 703; 8 Moore P. C. (N.S.) 74; 24 L. T. 918; 20 W. R. 6; 1 Asp. M. C. 108.—P.C.; The Robert Dixon (1879) 5 P. D. 54; 42 L. T. 334; 28 W. R. 716; 4 Asp. M. C. 246.—C.A.; and The Liverpool (1893) 1 R. 601; [1893] P. 154; 68 L. T. 719.—BARNES, J.

The White Star (*supra*), applied.

The I. C. Potter (1870) 40 L. J. Adm. 9; L. R. 3 A. & E. 292; 23 L. T. 603; 19 W. R. 335.—ADM.

The White Star and The I. C. Potter, applied.

The Waverley (1871) 40 L. J. Adm. 42; L. R. 3 A. & E. 369; 24 L. T. 713.—ADM.

The Pericles (1863) Br. & L. 80.—ADM.; and

The Lady Egidia (1862) Lush. 513.—ADM., principle applied.

The Liverpool (1893) 1 R. 601; [1893] P. 154; 68 L. T. 719; 7 Asp. M. C. 340.—BARNES, J.

The Annapolis, (or The Golden Light), (or H.M.S. Hayes), Lush. 355; 5 L. T. 37.—P.C., followed.

The Vandyck (1882) 47 L. T. 695; 5 Asp. M. C. 17.—C.A., affirming 7 P. D. 42.—ADM.

The Annapolis, applied.

The Liverpool (1893) 1 R. 601; [1893] P. 154; 68 L. T. 719; 7 Asp. M. C. 340.—BARNES, J.

The Annapolis, considered.

The Serbia, The Carinthia (1898) 67 L. J. P. 36; [1898] P. 36; 78 L. T. 54; 46 W. R. 492; 8 Asp. M. C. 353.—BARNES, J.

The Annapolis, followed.

The Emilie Galline (1903) 72 L. J. P. 39; [1903] P. 106; 88 L. T. 743.—BUCKNILL, J.

The Vandyck (1882) 47 L. T. 695; 5 Asp. M. C. 17.—C.A., followed.

The Emilie Galline (1903) 72 L. J. P. 39; [1903] P. 106; 88 L. T. 743.—BUCKNILL, J.

The Frederick (1838) 1 W. Rob. 16.—ADM., approved.

The Anders Knappe (1879) 48 L. J. Adm. 53; 4 P. D. 213; 40 L. T. 684; 4 Asp. M. C. 142.—SIR R. PHILLIMORE.

The Frederick, dictum discussed and not applied.

Akerblom v. Price (1881) 50 L. J. Q. B. 629; 7 Q. B. D. 129; 44 L. T. 837; 29 W. R. 797; 4 Asp. M. C. 441.—C.A.

The Saratoga (1861) Lush. 318.—ADM., referred to.

The England (1868) 38 L. J. Adm. 9; L. R. 2 P. C. 253; 5 Moore P. C. (N.S.) 344; 20 L. T. 46.—P.C.; Akerblom v. Price (1881) 50 L. J. Q. B. 629, 632; 7 Q. B. D. 129, 135; 44 L. T. 837; 29 W. R. 797; 4 Asp. M. C. 441.—C.A.; The De Bay, Bird v. Gibb (1883) 52 L. J. P. C. 57; 8 App. Cas. 559; 49 L. T. 414; 5 Asp. M. C. 156.—P.C.; The City of Chester (1884) 53 L. J. Adm. 90; 9 P. D. 182, 195; 51 L. T. 435; 33 W. R. 104; 5 Asp. M. C. 311.—C.A.

Akerblom v. Price (1881) 50 L. J. Q. B. 629; 7 Q. B. D. 129; 44 L. T. 837; 29 W. R. 797; 4 Asp. M. C. 441.—C.A., observations followed.

The Strathgarry (1895) 11 R. 783; [1895] P. 264; 72 L. T. 900; 8 Asp. M. C. 19.—BRUCE, J.

Akerblom v. Price, followed.

The Santiago (1900) 83 L. T. 439.—BARNES, J.

The General Palmer (1828) 2 Hagg. 176, 180.—ADM.; and The Johannes (1835) 6 Notes of Cases 238, n.—ADM., applied.

*The Mona (1894) 63 L. J. Adm. 137; [1894] P. 265; 6 R. 707; 21 L. T. 24; 43 W. R. 173; 7 Asp. M. C. 478.—BRUCE, J.

The Hedwig (1853) 1 Spinks Eccl. & Ad. 19.—ADM., applied.

The Racer (1874) 30 L. T. 904; 2 Asp. M. C. 317.—ADM.

Cargo ex Woosung, 44 L. J. Adm. 45; 33 L. T. 394; 3 Asp. M. C. 50.—ADM.; reversed, (1875) 1 P. D. 260; 35 L. T. 8; 25 W. R. 1; 3 Asp. M. C. 239.—C.A.

Cargo ex Woosung, followed.

The Mariposa (1896) 65 L. J. P. 104; [1896] P. 273; 75 L. T. 54; 45 W. R. 191; 8 Asp. M. C. 159.—BARNES, J.

The Cybele (1878) 47 L. J. P. 86; 3 P. D. 8; 37 L. T. 773; 26 W. R. 345; 3 Asp. M. C. 352.—C.A., *observed on*.

Young v. SS. Scotia (1903) 72 L. J. P. C. 115; [1903] A. C. 501; 89 L. T. 374.—P.C.

The Waterloo (1820) 2 Dods. 433.—ADM., *applied*.

The Collier (1866) L. R. 1 A. & E. 83; 12 Jur. (N.S.) 789; 16 L. T. 155.—ADM.; *The Thetis* (1869) 38 L. J. Adm. 42; L. R. 2 A. & E. 365, 368; 22 L. T. 276.—ADM.; *The Sappho* (1871) 40 L. J. Adm. 47; L. R. 3 P. C. 690; 8 Moore P. C. (N.S.) 66; 24 L. T. 795.—P.C.

The Waterloo, considered.

Scaramanga v. Stamp (1880) 49 L. J. C. P. 674; 5 C. P. D. 295, 301; 42 L. T. 840; 28 W. R. 691; 4 Asp. M. C. 294.—C.A.

The Maria Jane (1850) 14 Jur. 857.—ADM., *distinguished*.

The Collier (1866) L. R. 1 A. & E. 83; 12 Jur. (N.S.) 789; 16 L. T. 155.

DR. LUSHINGTON.—In the case of *The Maria*, the effect of the charter-party was to divest the owners of the possession and control of the vessel, and to transfer the same for the time to the charterer, who was required to provide and pay for the master and crew. And it was on this ground—the ground of the charterer being in possession of the salvaged vessel—that the judgment proceeded. The Court held, that the claim for salvage could not be maintained against the owners of the salvaged vessel by the charterer of that vessel in his other capacity as owner of the vessels rendering the salvage services, or by his servants on board those vessels. In the present case, the circumstances are obviously different. The charterers of *The Collier* were not in possession; the owners paid the wages of the crew.—p. 85.

The Maria Jane, commented on.

The Sappho (1871) L. R. 3 P. C. 690; 40 L. J. Adm. 47; 8 Moore P. C. (N.S.) 66; 24 L. T. 795. P.C., affirming 19 W. R. 24.—ADM.

MELLISH, L.J.—*The Maria Jane* . . . is said to be an authority that in no case where the ships belong to the same owners can any salvage remuneration be recovered. But when the facts of that case are looked at, their lordships do not think that Dr. Lushington intended to lay down any such general rule. There the ships belonging to the same owner were engaged in the African trade. It is stated in the judgment that it was part of the general arrangement that the ships of the same owner and the crews of the same owner should render mutual assistance to each other, and the real question seems to have been whether the services there rendered did go beyond that mutual assistance which, under the circumstances of the African trade, and according to the well-known usages of that trade, one ship was bound to render another. Dr. Lushington, after all, puts the case upon what appears to be the true principle, namely, whether the services rendered were services which, under their contract, the seamen were bound to perform, and for which they were remunerated by their wages.—p. 693.

The Collier (supra) and The Sappho (supra), applied.

The Scout (1872) 41 L. J. Adm. 42; L. R. 3 A. & E. 512; 26 L. T. 371.—ADM.

The Sappho, applied.

The Miranda (1872) 41 L. J. Adm. 82; L. R. 3 A. & E. 561; 27 L. T. 389.—ADM.

La Purissima Concepcion (1849) 3 W. Rob. 181.—ADM., *applied*.

Cargo ex Honor (1866) 35 L. J. Adm. 113, 115; L. R. 1 A. & E. 87, 91; 12 Jur. (N.S.) 773; 15 L. T. 677; 15 W. R. 10.—ADM.; *The Solway Prince* (1896) 65 L. J. Adm. 45; [1896] P. 120; 74 L. T. 32; 8 Asp. M. C. 128.—JEUNE, P.

Cargo ex Honor (supra), applied.

The Kate B. Jones (1892) [1892] P. 366; 69 L. T. 197; 7 Asp. M. C. 332.—BARNES, J.; *The Solway Prince* (1896) 65 L. J. Adm. 45; [1896] P. 120; 74 L. T. 32; 8 Asp. M. C. 128.—JEUNE, P.

The Warrior (1862) Lush. 476; 6 L. T. 133.—ADM., *followed*.

The Le Jonet (1872) 41 L. J. Adm. 95; L. R. 3 A. & E. 556; 27 L. T. 387; 21 W. R. 83.—ADM.

The Hope (1838) 3 Hagg. 423.—ADM., *distinguished*.

The Coriolanus (1890) 59 L. J. Adm. 59; 15 P. D. 103; 62 L. T. 844; 6 Asp. M. C. 514.—HANNEN, P.

The Coriolanus (supra), distinguished.

The Minneapolis (1901) 71 L. J. P. 28; [1902] P. 30; 86 L. T. 253.—BARNES, J.

The Inchmaree (1898) 68 L. J. P. 30; [1899] P. 111; 80 L. T. 201.—PHILLIMORE, J., *followed*.

The Friesland (1904) 73 L. J. P. 121; [1904] P. 345; 91 L. T. 324.—JEUNE, P.

The Portia (1845) 9 Jur. 167.—ADM., *referred to*.

The Chiltonford (1901) W. N. 48.—JEUNE, P.

The Emma (1844) 2 W. Rob. 315; 3 N. of Cas. 114.—ADM., *not followed*.

The Jonge Bastiaan (1804) 5 C. Rob. 124, 322.—ADM., *followed*.

The Longford (1881) 6 P. D. 60; 50 L. J. Adm. 28; 44 L. T. 254; 29 W. R. 491; 4 Asp. M. C. 385.

SIR R. PHILLIMORE.—If in the case of silver or bullion any such exception as that referred to in *The Emma* existed in practice, some mention would have been made in the report of the case of *The Jonge Bastiaan*, either of such exception or of some authorities tending to support it; but the case, as reported, contains nothing to lead to the conclusion that specie salvaged is not in the same position as any other salvaged cargo. It appears to me that the Court would be involved in great difficulty if it admitted any other principle in salvage cases than that every description of property salvaged must, whatever be its nature, contribute equally in proportion to its value towards payment of the amount of salvage remuneration awarded.—p. 66.

The Jonge Bastiaan, observations applied.

The Killeena (1881) 51 L. J. Adm. 11; 6 P. D. 193; 45 L. T. 621; 30 W. R. 339; 4 Asp. M. C. 472.—ADM.

The Pickwick (1852) 16 Jur. 669.—ADM., distinguished.

Crouan v. Stanier (1903) 73 L. J. K. B. 102; [1904] 1 K. B. 87; 52 W. R. 75; 9 Com. Cas. 27.—KENNEDY, J.

The Linda (1857) Swab. 306; 4 Jur. (N.S.) 146; 6 W. R. 196.—ADM., referred to.

The Maid of Kent (1881) 50 L. J. Adm. 71; 6 P. D. 178; 45 L. T. 718; 29 W. R. 897; 4 Asp. M. C. 476.—SIR R. PHILLIMORE.

The George Dean (1857) Swabey 290.—ADM., referred to.

The Georg (1894) [1894] P. 330; 71 L. T. 22; 7 Asp. M. C. 476.—BRUCE, J.

The Venus, Cargo ex. (1866) L. R. 1 A. & E. 50; 12 Jur. (N.S.) 379; 14 W. R. 460.—ADM., applied.

The Georg (1894) [1894] P. 330; 71 L. T. 22; 7 Asp. M. C. 476.—BRUCE, J.

The Markland (1871) L. R. 3 A. & E. 340; 24 L. T. 596; 1 Asp. M. C. 44.—ADM.; and**The James Armstrong (1875) L. R. 4 A. & E. 380; 33 L. T. 390.—ADM., applied.**

The Georg (1894) [1894] P. 330; 71 L. T. 22; 7 Asp. M. C. 476.—BRUCE, J.

The Salacia (1829) 2 Hagg. Adm. 262.—ADM., adopted.

The De Bay, Bird v. Gibb (1883) 52 L. J. P. C. 57, 59; 8 App. Cas. 559, 564; 49 L. T. 414; 5 Asp. M. C. 156.—P.C.; The City of Chester (1884) 53 L. J. Adm. 90; 9 P. D. 182, 195; 51 L. T. 485; 33 W. R. 104; 5 Asp. M. C. 311.—C.A.

The Jane (1831) 2 Hagg. Adm. 338.—ADM., referred to.

The True Blue, Papayanni v. Hocquard (1866) 4 Moore P. C. (N.S.) 96; L. R. 1 P. C. 250, 254.—P.C.; Scaramanga v. Stamp (1880) 49 L. J. C. P. 674; 5 C. P. D. 295; 42 L. T. 840; 28 W. R. 691; 4 Asp. M. C. 295.—C.A.; The City of Chester (1884) 53 L. J. Adm. 90; 9 P. D. 182, 195; 51 L. T. 485; 33 W. R. 104; 5 Asp. M. C. 311.—C.A.

The Martha (1838) 3 Hagg. Adm. 434.—ADM., not followed.

The City of Chester (1884) 53 L. J. Adm. 90; 9 P. D. 182, 199; 51 L. T. 485; 33 W. R. 104; 5 Asp. M. C. 311.—C.A.

The Sir Ralph Abercrombie, Carmichael v. Brodie (1867) 4 Moore P. C. (N.S.) 374; L. R. 1 P. C. 454.—P.C., applied.

Scaramanga v. Stamp (1880) 49 L. J. C. P. 674, 678; 5 C. P. D. 295, 303; 42 L. T. 840; 28 W. R. 691; 4 Asp. M. C. 295.—C.A.

The Thomas Blyth (1860) Lush. 16.—ADM., principle adopted.

The Baku Standard (1901) 70 L. J. P. C. 98; [1901] A. C. 549; 84 L. T. 788; 9 Asp. M. C. 197.—P.C.

The De Bay, Bird v. Gibb (1883) 52 L. J. P. C. 57; 8 App. Cas. 559; 49 L. T. 414; 5 Asp. M. C. 156.—P.C., considered.

The City of Chester (1884) 9 P. D. 182; 53 L. J. Adm. 90; 51 L. T. 485; 33 W. R. 104; 5 Asp. M. C. 311.—C.A.

LINDLEY, L.J.—It is true that the decisions of the Privy Council are not theoretically binding on this Court; but in cases of mercantile or Admiralty law, where the same principles are professedly followed in the colonies and in this country, it is, to say the least, highly undesirable that there should be any conflict between the decisions of the Judicial Committee and those of the High Court or Courts of Appeal in this country. Even if, therefore, I doubted the correctness of the decision in the case of *The De Bay*, I should be disposed to follow it rather than depart from it, and so introduce a diversity of practice where there ought to be no difference in the principle. But, in fact, the cases already referred to seem to me fully to warrant the decision in the case of *The De Bay*, and I do not regard it as introducing any new practice or principle. It must, however, always be borne in mind that the Court was dealing with a case in which the value of the property saved was very large compared with the whole sum awarded to the salvors, and that there was no circumstance to prevent the Court from awarding enough to cover the whole loss sustained by them. The conclusion to be drawn from these authorities is that where the property saved is ample in the sense already explained, and where there is no circumstance which the Court can see at once would prevent it from giving an amount of salvage sufficient to cover the loss sustained by the salvors, evidence has been received and ought to be received to show the amount of loss actually sustained by the owner of the salving ship by reason of the salving services, with a view to fix his remuneration at such a sum as will cover such loss and remunerate him for such further risk as he ought to be compensated for.—p. 207.

The De Bay, Bird v. Gibb, principle adopted.

The Baku Standard (1901) 70 L. J. P. C. 98; [1901] A. C. 549; 84 L. T. 788; 9 Asp. M. C. 197.—P.C.

The Sunnyside (1883) 52 L. J. Adm. 76; 8 P. D. 137; 49 L. T. 401; 31 W. R. 859; 5 Asp. M. C. 140.—ADM., followed.

The City of Chester (1884) 53 L. J. Adm. 90; 9 P. D. 182; 51 L. T. 485; 33 W. R. 104.—C.A.

The Peace (1856) Swabey 115; 4 W. R. 635.—ADM., followed.

The Elton (1891) 60 L. J. Adm. 69; [1891] P. 265; 65 L. T. 232; 39 W. R. 703; 7 Asp. M. C. 66.—JEUNE, J.

The Mary Pleasants (1857) Swabey 224.—ADM., adopted.

The Raisby (1885) 54 L. J. Adm. 65; 10 P. D. 114; 53 L. T. 56; 33 W. R. 938; 5 Asp. M. C. 473.—HANNEN, P.

The Mary Pleasants, referred to.

The Elton (1891) 60 L. J. Adm. 69; [1891] P. 265; 65 L. T. 232; 7 Asp. M. C. 66.—JEUNE, J.

The Elton (supra), commented on.

The Port Victor, cargo ex (1901) 70 L. J. P. 52; [1901] P. 243; 84 L. T. 677; 49 W. R. 578; 9 Asp. M. C. 182.—C.A.

The City of Berlin (1877) 47 L. J. Adm. 2; 2 P. D. 187; 37 L. T. 307; 25 W. R. 793; 3 Asp. M. C. 491.—C.A., referred to.

The Gipsy Queen (1895) 64 L. J. Adm. 86;

[1895] P. 176; 11 R. 766; 72 L. T. 454; 43 W. R. 359; 7 Asp. M. C. 586.—C.A.

The William Beckford (1801) 3 C. Rob. 355.—ADM., *applied*.

The Amérique (1874) L. R. 6 P. C. 468, 475; 31 L. T. 854; 23 W. R. 488; 2 Asp. M. C. 460.—P.C.; **The Glengyle** (1898) 67 L. J. P. 48; (1898) P. 97; 78 L. T. 139; 46 W. R. 308; 8 Asp. M. C. 341.—C.A., affirmed, (1898) 67 L. J. P. 87; [1898] A. C. 519; 78 L. T. 801.—H.L. (E.).

The Blendenhall (1814) 1 Dods. 414.—ADM., *dicta adopted*.

The Amérique (1874) L. R. 6 P. C. 468, 475; 31 L. T. 854; 23 W. R. 488; 2 Asp. M. C. 460.—P.C.

The Clarisse, Gann v. Brun (1856) 12 Moore P. C. 340; Swabey 129.—P.C., *applied*.

The Chetah (1868) 38 L. J. Adm. 1; L. R. 2 P. C. 205; 5 Moore P. C. (N.S.) 278; 19 L. T. 621.—P.C.; **The England** (1868) 38 L. J. Adm. 9; L. R. 2 P. C. 253; 5 Moore P. C. (N.S.) 344; 20 L. T. 46.—P.C.; **Arnold v. Cowie, The Glenduror** (1871) L. R. 3 P. C. 589, 592; 24 L. T. 499; 1 Asp. M. C. 31.—P.C.; **The Zeta** (1875) 44 L. J. Adm. 22; L. R. 4 A. & E. 460; 33 L. T. 477; 24 W. R. 180; 3 Asp. M. C. 73.—ADM.; **The Thomas Allen, Owners of the Thomas Allen v. Gow** (1886) 12 App. Cas. 118, 121; 56 L. T. 285; 6 Asp. M. C. 99.—P.C.

The Carrier Dove (1863) 2 Moore P. C. (N.S.) 243.—P.C., *principle applied*.

The Chetah (1868) 38 L. J. Adm. 1; L. R. 2 P. C. 205; 5 Moore P. C. (N.S.) 278; 19 L. T. 621; 17 W. R. 233.—P.C.; **The Glenduror** (1871) L. R. 3 P. C. 589, 592; 24 L. T. 499; 1 Asp. M. C. 31.—P.C.; **The Livia** (1872) 25 L. T. 887; 1 Asp. M. C. 234.—ADM.; **The Amérique** (1874) L. R. 6 P. C. 468, 471; 31 L. T. 854; 23 W. R. 488; 2 Asp. M. C. 460.—P.C.; **The Thomas Allen** (1886) 12 App. Cas. 118, 121; 56 L. T. 285; 6 Asp. M. C. 99.—P.C.

The Fusilier, Bligh v. Simpson (1865) 3 Moore P. C. (N.S.) 51; 34 L. J. Adm. 25; 11 Jur. (N.S.) 289; 12 L. T. 186; 13 W. R. 592.—P.C., *adapted*.

The Chetah (1868) 38 L. J. Adm. 1; L. R. 2 P. C. 205, 210; 5 Moore P. C. (N.S.) 278; 19 L. T. 621.—P.C.; **The Amérique** (1874) L. R. 6 P. C. 468, 471; 31 L. T. 854; 23 W. R. 488; 2 Asp. M. C. 460.—P.C.; **The Cargo ex Schiller** (1877) 2 P. D. 145, 149; 36 L. T. 714; 3 Asp. M. C. 439.—C.A.; **The Cargo ex Sarpedon** (1877) 3 P. D. 28, 33; 37 L. T. 505; 26 W. R. 374; 3 Asp. M. C. 509.—ADM.; **The Renpor** (1883) 52 L. J. Adm. 49; 8 P. D. 115; 48 L. T. 887; 31 W. R. 640.—C.A.

The Chetah (1868) 38 L. J. Adm. 1; L. R. 2 P. C. 205; 5 Moore P. C. (N.S.) 278; 19 L. T. 621.—P.C., *referred to*.

The Alice (1868) 38 L. J. Adm. 5; L. R. 2 P. C. 245; 19 L. T. 678; 17 W. R. 209.—ADM.; **The Woburn Abbey** (1869) 21 L. T. 707.—P.C.; **The Amérique** (1874) L. R. 6 P. C. 468; 31 L. T. 854; 23 W. R. 488.—P.C.

The Glenduror, Arnold v. Cowie (1871) L. R. 3 P. C. 589; 24 L. T. 499; 1 Asp. M. C. 31.—P.C., *principle applied*.

The Amérique (1874) L. R. 6 P. C. 468, 472; 31 L. T. 854; 23 W. R. 488; 2 Asp. M. C. 460.—P.C.

The Glenduror, Arnold v. Cowie, *approved and followed*.

The Thomas Allen (1886) 12 App. Cas. 118; 56 L. T. 285; 6 Asp. M. C. 99.—P.C.

The Maria Luisa (1856) Swab. 67; 2 Jur. (N.S.) 264; 4 W. R. 376.—ADM., *followed*.

The Jeune Paul (1867) 36 L. J. Adm. 11; L. R. 1 A. & E. 336; 16 L. T. 125; 15 W. R. 776.—ADM.

The Beulah (1842) 2 Notes of Cases 61; 1 W. Rob. 477.—ADM., *considered*.

The Ganges (1869) 38 L. J. Adm. 61; L. R. 2 A. & E. 370; 22 L. T. 72; 4 Asp. M. C. 317.—ADM.; **The Wilhelm Tell** (1892) 61 L. J. Adm. 127; [1892] P. 337; 69 L. T. 199; 41 W. R. 205; 7 Asp. M. C. 329.—BARNES, J.

The Louisa (1843) 2 W. Rob. 22; 2 Not. of Cas. 149.—ADM., *considered*.
The Wilhelm Tell (1892) 61 L. J. Adm. 127; [1892] P. 337; 1 R. 551; 69 L. T. 199; 41 W. R. 205; 7 Asp. M. C. 329.—BARNES, J.

The Enchantress (1860) 30 L. J. Adm. 15; Lush. 93; 2 L. T. 574.—ADM., *referred to*.

The Ganges (1869) 38 L. J. Adm. 61; L. R. 2 A. & E. 370; 22 L. T. 72; 4 Asp. M. C. 317.—ADM.; **The Waverley** (1871) 40 L. J. Adm. 42; L. R. 3 A. & E. 369; 24 L. T. 713; 1 Asp. M. C. 47.—ADM.; **The Afrika** (1880) 49 L. J. Adm. 63; 5 P. D. 192; 42 L. T. 403; 4 Asp. M. C. 266.—SIR R. PHILLIMORE; **The City of Chester** (1884) 53 L. J. Adm. 90; 9 P. D. 182, 199; 51 L. T. 485; 33 W. R. 104; 5 Asp. M. C. 311.—C.A.

The Enchantress, *considered*.

The Wilhelm Tell (1892) 61 L. J. Adm. 127; [1892] P. 337; 69 L. T. 199; 41 W. R. 205; 7 Asp. M. C. 329.—BARNES, J.

The Pride of Canada (1863) Br. & L. 208; 9 L. T. 546; 1 Asp. M. C. 486.—ADM., *followed*.

The Ganges (1869) 38 L. J. Adm. 61, 63; L. R. 2 A. & E. 370, 374; 22 L. T. 72; 4 Asp. M. C. 317.—ADM.

The Pride of Canada, *considered*.

The Wilhelm Tell (1892) 61 L. J. Adm. 127; [1892] P. 337; 1 R. 551; 69 L. T. 199; 41 W. R. 205; 7 Asp. M. C. 329.—BARNES, J.

The Ganges (1869) 38 L. J. Adm. 61; L. R. 2 A. & E. 370; 22 L. T. 72; 4 Asp. M. C. 317.—ADM., *considered*.

The Wilhelm Tell (1892) 61 L. J. Adm. 127; [1892] P. 337; 1 R. 551; 69 L. T. 199; 41 W. R. 205; 7 Asp. M. C. 329.—BARNES, J.

The Waverley (1871) 40 L. J. Adm. 42; L. R. 3 A. & E. 369; 24 L. T. 713; 1 Asp. M. C. 47.—ADM., *referred to*.

The Medina (1876) 45 L. J. Adm. 81; 1 P. D. 272.—ADM., affirmed, 2 P. D. 5; 35 L. T. 779; 25 W. R. 156; 3 Asp. M. C. 219.—C.A.

The Waverley, *followed*.

The Westbourne (1889) 58 L. J. Adm. 78; 14 P. D. 132; 61 L. T. 156; 38 W. R. 56; 6 Asp. M. C. 405.—C.A.

The Medina (1876) 45 L. J. Adm. 81; 2 P. D. 5; 35 L. T. 779; 25 W. R. 156; 3 Asp. M. C. 219.—C.A., *followed*.

The Silesia (1880) 50 L. J. Adm. 9; 5 P. D. 177; 43 L. T. 319; 29 W. R. 156; 4 Asp. M. C. 338.—SIR R. PHILLIMORE.

The Medina, *considered and distinguished*.
The *Marpesia* (1896) 65 L. J. Adm. 104;
[1896] P. 273; 75 L. T. 54; 45 W. R. 191.—
BARNES, J.

The Sarah (1878) 3 P. D. 39; 37 L. T. 831;
3 Asp. M. C. 542.—ADM., *not followed*.

The *Pasitheia* (1879) 5 P. D. 5.—ADM.

The Afrika (1880) 49 L. J. Adm. 63; 5 P. D.
192; 42 L. T. 403; 4 Asp. M. C. 266.—
ADM., *considered*.

The *Wilhelm Tell* (1892) 61 L. J. Adm. 127;
[1892] P. 337; 1 R. 551; 69 L. T. 199; 41 W. R.
205; 7 Asp. M. C. 329.—BARNES, J.

The Raisby (or Cardiff SS. Co. v. Barwick)
(1885) 54 L. J. Adm. 65; 10 P. D. 114; 53
L. T. 56; 33 W. R. 938; 5 Asp. M. C. 473.
—HANNEN, P., *distinguished*.

The *Cumbrian* (1887) 57 L. T. 205; 6 Asp. M. C.
151.

BUTT, J.—They (the plaintiffs) have paid into
court the sum of 51*l.* 13*s.* 7*d.*, which they say is
the ship's share, and they seek to avoid responsi-
bility for the balance on the ground that it is
payable by the cargo. That is not my opinion.
I think, as a matter of fact and of law, that
when that agreement was come to, it was intended
that the shipowners' liability and credit should
be pledged. I think that is so in all cases of
this sort, and I do not think that proposition is
really affected by *The Raisby*. There the agree-
ment was substantially this: "Tow me to port,
and the amount of remuneration shall be settled
by arbitration on shore." That is, all the parties
interested were to go before the arbitrator.—
p. 206.

The Raisby (or Cardiff SS. Co. v. Barwick),
distinguished.

The *Prinz Heinrich* (1888) 57 L. J. Adm. 17;
13 P. D. 31; 58 L. T. 593; 36 W. R. 511.

BUTT, J.—I am of opinion that where the cap-
tain of a ship reasonably and properly enters
into such an arrangement for the salvage of his
vessel, he binds the shipowners to pay the agreed
amount. The cargo is on board the vessel, and
the shipowners need not part with it until they
have obtained security for any payments which
they may have to make or have made in respect
of it. . . . It is said that *The Raisby* is opposed
to this view, but I am of opinion that it is
inapplicable to the facts of the present case.
In *The Raisby* Sir James Hannen points out that
the so-called agreement did not purport to ex-
tend the liability of the shipowners, and that it
did not carry the matter further than if the cap-
tain of *The Raisby* had simply accepted the
services of the salvaging ship. That shows the dis-
tinction between an agreement generally to tow
or to save a ship, and one for a salvage service
for a definite sum. Moreover, there are *dicta*
in *Anderson v. Ocean Steamship Co.* (*supra*,
col. 3382) in favour of the view I am now
expressing.—pp. 18, 19.

The Strathgarry (1895) [1895] P. 264; 72
L. T. 900; 11 R. 783; 8 Asp. M. C. 19.
—BRUCE, J., *distinguished*.

The *Altair* (1897) 66 L. J. P. 42; [1897] P. 105;
76 L. T. 333; 45 W. R. 622; 8 Asp. M. C. 224.—
BARNES, J.

The William and John (1863) 32 L. J. Adm.
102; Br. & L. 49; 9 Jur. (N.S.) 284; 8
L. T. 56; 11 W. R. 535.—ADM., *followed*.

Beadnell v. Beeson (1868) 37 L. J. Q. B. 471;
40 L. R. 3 Q. B. 439, 443; 9 B. & S. 315 18 L. T.
401; 16 W. R. 1008.—Q.B.

The William and John, *not applied*.

The *Herman Wedel* (1870) 39 L. J. Adm. 30,
32; 23 L. T. 876.—ADM.

The Louisa (1863) Br. & L. 59; 9 Jur. (N.S.)
676; 11 W. R. 614.—ADM., *not followed*.

The *Herman Wedel* (1870) 39 L. J. Adm. 30,
32; 23 L. T. 876.—ADM.

The Thomas Wood (1839) 1 W. Rob. 18.—
ADM., *not followed*.

The *Generous* (1868) 37 L. J. Adm. 37; L. R.
2 A. & E. 57; 17 L. T. 552; 16 W. R. 519.—ADM.

The Thomas Wood, *followed*.

The *Caledonia* (1873) L. R. 4 A. & E. 11, 12;
17 W. R. 626.—ADM.

The Generous (1868) 37 L. J. Adm. 37;
L. R. 2 A. & E. 57; 17 L. T. 552; 16
W. R. 519.—ADM., *not applied*.

The *Caledonia* (1873) L. R. 3 A. & E. 11, 12;
17 W. R. 626.—ADM.

Castellain v. Thompson (1862) 32 L. J. C. P.
79; 13 C. B. (N.S.) 105; 7 L. T. 424; 11
W. R. 147.—C.P., *distinguished*.

Hingston v. Wendt (1876) 45 L. J. Q. B. 440,
445; 1 Q. B. D. 367, 373; 34 L. T. 181; 24 W. R.
664; 3 Asp. M. C. 126.—Q.B.D.

Castellain v. Thompson, *applied*.

The *Solway Prince* (1896) 65 L. J. Adm. 45;
[1896] P. 120; 74 L. T. 32; 8 Asp. M. C. 128.—
JEUNE, P.

Duncan v. Dundee Shipping Co. (1878) 5
Rettie 742.—CT. OF SESS. (SC.); and *Five*
Steel Barges (1890) 59 L. J. Adm. 77; 15
P. D. 142; 63 L. T. 499; 39 W. R. 127;
6 Asp. M. C. 580.—HANNEN, P., *followed*.
Port Victor, Cargo ex (1901) 70 L. J. P.
52; [1901] P. 243; 84 L. T. 677; 49 W. R.
578; 9 Asp. M. C. 182.—C.A. ALVERSTONE, C.J.,
SMITH, M.R. and ROMER, L.J.

Milburn v. Jamaica Fruit Importing, &c.
Co. of London (1900) 69 L. J. Q. B. 860;
[1900] 2 Q. B. 540; 83 L. T. 321; 5 Com.
Cas. 346.—C.A. *See*

Port Victor, Cargo ex (1901) 70 L. J. P.
52; [1901] P. 243, 245; 84 L. T. 677; 49 W. R.
578; 9 Asp. M. C. 182.—C.A.

The William Hutt (1860) Lush. 25.—ADM.,
applied.

The *Demetrius* (1872) 41 L. J. Adm. 69; L. R.
3 A. & E. 523; 26 L. T. 329; 20 W. R. 761; 1
Asp. M. C. 251.—ADM.; The *Jacob Landstrom*
(1878) 4 P. D. 191; 40 L. T. 36; 4 Asp. M. C.
58.—ADM.

The William Hutt, *followed*.

The *Strathgarry* (1895) 64 L. J. Adm. 59;
[1895] P. 264; 11 R. 782; 72 L. T. 202; 7
Asp. M. C. 573.—BRUCE, J. *See extract, infra*,
col. 3397.

The Melpomene (1873) 42 L. J. Adm. 45;
L. R. 4 A. & E. 129; 29 L. T. 405; 21
W. R. 956; 2 Asp. M. C. 122.—ADM.,
not followed.

The *Jacob Landstrom* (1878) 4 P. D. 191, 193;
40 L. T. 36; 4 Asp. M. C. 58.—ADM.

The Melpomene, principle applied.

The Camellia (1883) 53 L. J. Adm. 12; 9 P. D. 27; 32 W. R. 495; 5 Asp. M. C. 197.—HANNEN, P.

The Melpomene, followed.

The Strathgarry (1895) 64 L. J. Adm. 59; [1895] P. 264; 11 R. 732; 72 L. T. 202; 7 Asp. M. C. 573.

BRUCE, J.—The practice of this Court in consolidating salvage actions has never been limited to cases where the rights of the various claimants depend entirely upon the same facts, or arise out of services of the same description, so much may clearly be gathered from the judgment in *The William Hutt* (*supra*, col. 3396) and from the judgment of Sir Robert Phillimore in *The Melpomene*. The matters which originally lead the Court to favour consolidation in salvage actions are considerations of convenience and economy.

The Melpomene, distinguished.

The Dart (1899) 80 L. T. 23; 8 Asp. M. C. 481.

PHILLIMORE, J.—The real point in that case, [*The Melpomene*] is that *The Resolute* was engaged and she did her part towards performing her engagement, and that owing to the neglect of those on the salvaged vessel to make the rope fast she failed. The case comes in the same category as those where a salvor is employed, but the services were not primarily taken because those who required salvage assistance had got other salvors. *The Resolute* was the claimant in the case of *The Melpomene*, and was one of the tugs. *The Melpomene's* people were neglectful, therefore, *The Resolute* did her part, and it was not her fault if she contributed nothing to the ultimate safety. I prefer to put the case upon this ground which I think is the true one, and if that be so it falls entirely into line with the other cases.—p. 25.

The Jacob Landstrom (1878) 4 P. D. 191; 40

—L. T. 36; 4 Asp. M. C. 58, *not followed*.

The Strathgarry (1895) 11 R. 732; 64 L. J. Adm. 59; [1895] P. 264; 72 L. T. 202; 7 Asp. M. C. 573.

BRUCE, J.—... At one time there was an inclination to relax the old practice of the Court, and not to insist upon consolidation when it was objected to by one or other of the parties. It was for a time considered that, by the exercise of its power to condemn in costs, a party who improperly refused to consent to consolidation, the Court would be able indirectly to prevent the parties being harassed by the unnecessary expense of double proceedings. This seems to have been the view expressed by Sir Robert Phillimore in *The Jacob Landstrom*. I am informed that the experience gained in the registry since 1878, has shown that very great difficulty is experienced in enforcing this rule as to costs; whilst in many cases the disallowance of costs after they have been incurred has been felt as a considerable hardship. I believe it to be much better to adhere to the old practice and to consolidate actions whenever it appears to be convenient to do so, without regard to the consent of the parties, and without holding out any threat as to costs which, in the absence of consolidation, must be incurred. The consent of the parties, which was all-important in the proceeding which is known as consolidation at common law, is not a governing fact in

consolidation as practised in the Admiralty Court.—pp. 734, 735.

The Hickman (1869) 39 L. J. Adm. 7; L. R. 3 A. & E. 15; 21 L. T. 472; 18 W. R. 151.—ADM., *approved*.

The Thracian (1872) 41 L. J. Adm. 71; L. R. 3 A. & E. 504; 25 L. T. 889; 20 W. R. 380; 1 Asp. M. C. 207.—ADM.

The Favorite (1844) 2 W. Rob. 255.—ADM. *adopted*.

Cargo ex Honor (1866) L. R. 1 A. & E. 87, 91; 35 L. J. Adm. 113; 12 Jur. (N.S.) 773; 15 L. T. 677; 15 W. R. 10.—DR. LUSHINGTON.

16. TOWAGE.

Goodman v. Boycott (1862) 2 B. & S. 1; 31 L. J. Q. B. 69; 8 Jur. (N.S.) 763; 6 L. T. 25.—Q.B., *approved in part*.

Bristol and West of England Bank v. Midland Ry. (1891) 61 L. J. Q. B. 115; [1891] 2 Q. B. 653; 65 L. T. 234; 40 W. R. 148; 7 Asp. M. C. 69.—C.A. LINDLEY, FRY and LOPES, L.JJ.

The Robert Dixon (1879) 5 P. D. 54; 42 L. T. 344; 28 W. R. 716.—C. A., *applied*.

The Altair (1897) 66 L. J. Adm. 42; [1897] P. 105; 76 L. T. 263; 45 W. R. 622; 8 Asp. M. C. 224.—BARNES, J.

17. COLLISION.

(Negligence.)

Dowell v. General Steam Navigation Co. (1855) 26 L. J. Q. B. 59; 5 El. & Bl. 195, 206; 1 Jur. (N.S.) 800; 3 W. R. 492.—Q.B., *principle applied*.

Tuff v. Warman (1858) 27 L. J. C. P. 322; 5 C. B. (N.S.) 573; 5 Jur. (N.S.) 222; 6 W. R. 693.—EX. CH.

Dowell v. General Steam Navigation Co. *applied*.

The Vera Cruz (1884) 53 L. J. Adm. 33; 9 P. D. 88; 51 L. T. 104; 32 W. R. 783; 5 Asp. M. C. 270.—BUTT, J.; *The Bernina* (1887) 56 L. J. P. 17; 12 P. D. 58, 89; 56 L. T. 258; 35 W. R. 314; 6 Asp. M. C. 75.—C.A., *affirmed*, (1888) 57 L. J. Adm. 65; 13 App. Cas. 1; 58 L. T. 423; 36 W. R. 870; 6 Asp. M. C. 257; 52 J. P. 212.—H.L. (E.).

The Margaret 50 L. J. P. 3; 5 P. D. 238; 42 L. T. 663.—ADM.; *reversed*, (1881) 50 L. J. P. 67; 6 P. D. 76; 44 L. T. 291; 29 W. R. 533; 4 Asp. M. C. 375.—C.A.

The Margaret, *applied*.

The Monte Rosa (1892) 62 L. J. Adm. 20 [1893] P. 29; 68 L. T. 299; 41 W. R. 304; 7 Asp. M. C. 326.—BARNES, J.

The Scotia (1890) 65 L. T. 324; 6 Asp. M. C. 541.—BUTT, J.; and **The Dunstanborough** (1891) [1892] P. 363, n., *distinguished*.

The Hornet (1892) [1892] P. 361; 1 R. 549; 68 L. J. 236; 7 Asp. M. C. 262.—JEUNE, P., and BARNES, J.

JEUNE, P.—In *The Scotia*, and in *The Dunstanborough*, it is clear that, if a man had been on board he could have prevented the accident altogether; and further, in *The Scotia*, he could have prevented the consequences of it by beaching the barge.—p. 365.

The Sisters (1876) 45 L. J. Adm. 39; 1 P. D. 117; 34 L. T. 338; 24 W. R. 412; 3 Asp. M. C. 122.—C.A., *dictum explained*.

The Englishman and The Australia (1894) 64 L. J. Adm. 74; [1894] P. 239; 11 R. 757; 72 L. T. 203; 43 W. R. 670; 7 Asp. M. C. 605.—JEUNE, P.

The Andalusian (1877) 46 L. J. Adm. 77; 2 P. D. 231.—ADM., *followed*.

The George Roper (1883) 52 L. J. Adm. 69; 8 P. D. 119; 49 L. T. 185; 31 W. R. 953; 5 Asp. M. C. 134.—BUTT, J.

The La Plata 1 Swabey 220.—ADM.; *reversed*, (1857) 1 Swabey 298.—P.C.

The Otter (1874) L. R. 4 A. & E. 203; 30 L. T. 43; 22 W. R. 557; 2 Asp. M. C. 208.—ADM., *applied*.

The Blue Bell (1895) 64 L. J. Adm. 71; [1895] P. 242; 11 R. 790; 72 L. T. 540; 7 Asp. M. C. 601.—JEUNE, P. and BRUCE, J.

The Thornley (1843) 7 Jur. 659.—ADM., *followed*.

The London (1863) Br. & L. 82; 9 Jur. (N.S.) 1330; 9 L. T. 348.—ADM.

The Thornley, *referred to*.

The Marpesia (1872) 8 Moore P. C. (N.S.) 468; L. R. 4 P. C. 212, 221; 26 L. T. 338; 1 Asp. M. C. 261.—P.C.

The Virgil (1843) 2 W. Rob. 205.—ADM., *followed*.

The Marpesia (1872) L. R. 4 P. C. 212; 8 Moore P. C. (N.S.) 468; 26 L. T. 338; 1 Asp. M. C. 261.—P.C. *See extract, infra*.

The Virgil, *applied*.

The Pladda (1876) 46 L. J. Adm. 61; 2 P. D. 34.—ADM.

The Virgil, *applied*.

The Schwan, The Albano (1892) [1892] P. 419; 69 L. T. 34; 7 Asp. M. C. 347.—C.A.

The Bolina (1844) 3 Notes of Cases 208.—ADM., *followed*.

The Marpesia (1872) L. R. 4 P. C. 212; 8 Moore P. C. (N.S.) 468; 26 L. T. 338; 1 Asp. M. C. 261.—P.C.

SIR J. COLVILLE (for J.C.)—The respondent's counsel suggested that there is some difference of practice between the Court of Admiralty and the Courts of common law in that matter. Their lordships, however, cannot find that there is any such difference. They take the law as they find it laid down by Dr. Lushington in two cases. In the case of *The Bolina*, Dr. Lushington says:—"With regard to inevitable accident, the onus lies on those who bring a complaint against a vessel and who seek to be indemnified—on them is the onus of proving that the blame does attach upon the vessel proceeded against; the onus of proving inevitable accident does not

necessarily attach to that vessel; it is only necessary when you show a *prima facie* case of negligence and want of due seamanship." Again, in *The Virgil* (*supra*, col. 3399), the same learned judge gives this definition of inevitable accident:—"In my apprehension an inevitable accident in point of law is this, viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. If a vessel charged with having occasioned a collision should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred, if he could have used measures of precaution that would have rendered the accident less probable."—p. 219.

The Bolina, *applied*.

The Schwan, The Albano, [1892] P. 419; 69 L. T. 34; 7 Asp. M. C. 347.—C.A.

The Itinerant (1844) 2 W. Rob. 236.—ADM., *referred to*.

The Marpesia (1872) 8 Moore P. C. (N.S.) 468; L. R. 4 P. C. 212, 221; 26 L. T. 338; 1 Asp. M. C. 261.—P.C.

The Volcano (1844) 2 W. Rob. 337.—ADM., *procedure followed*.

The William Lindsay (1873) L. R. 5 P. C. 338, 344; 29 L. T. 355; 2 Asp. M. C. 118.—P.C.

The London (1863) Br. & L. 82; 9 Jur. (N.S.) 1330; 9 L. T. 348.—ADM., *approved*.

The Marpesia (1872) 8 Moore P. C. (N.S.) 468; L. R. 4 P. C. 212; 26 L. T. 338; 1 Asp. M. C. 261.—P.C.

The Marpesia (1872) 8 Moore P. C. (N.S.) 468; L. R. 4 P. C. 212; 26 L. T. 338; 1 Asp. M. C. 261.—P.C., *applied*.

The Benmore (1873) 43 L. J. Adm. 5; L. R. 4 A. & E. 132, 134; 22 W. R. 190.—ADM.; **The Abraham** (1873) 28 L. T. 775; 2 Asp. M. C. 34.—ADM.

The Marpesia, *followed*.

The City of Cambridge (1876) 35 L. T. 781; 3 Asp. M. C. 307.—C.A.

The Marpesia, *referred to*.

The Pladda (1876) 46 L. J. Adm. 61; 2 P. D. 34, 38.—ADM.

The Marpesia, *approved*.

The Merchant Prince [1892] P. 179; 67 L. T. 251; 7 Asp. M. C. 208.—C.A. Esher, M.R., Fry and Lopes, L.JJ.

[The definition of "inevitable accident" in *The Marpesia* approved.]

The Marpesia, *applied*.

The Schwan, The Albano (1892) [1892] P. 419; 69 L. T. 34; 7 Asp. M. C. 347.—C.A. Esher, M.R., Fry and Lopes, L.JJ.

The William Lindsay (1873) L. R. 5 P. C. 338; 29 L. T. 355; 2 Asp. M. C. 118.—P.C. *See*

The Pladda (1875) 2 P. D. 36, n.; **The Virgo** (1876) 35 L. T. 519; 25 W. R. 397; 3 Asp. M. C. 285.—ADM.

The Annot Lyle (1886) 55 L. J. Adm. 62; 11 P. D. 114; 55 L. T. 576; 34 W. R. 647; 6 Asp. M. C. 50.—C.A., *followed*.

The Merchant Prince (1892) [1892] P. 179; 67 L. T. 251; 7 Asp. M. C. 208.—C.A. **ESHER, M.R., FRY and LOPES, L.JJ.**

The Annot Lyle and The Indus (1886) 56 L. J. Adm. 88; 12 P. D. 46; 56 L. T. 376; 35 W. R. 490; 6 Asp. M. C. 105.—C.A., *applied*.

The Schwan, The Albano [1892] P. 419; 69 L. T. 34; 7 Asp. M. C. 347.—C.A. **ESHER, M.R., FRY and LOPES, L.JJ.**

(*Presumption of Fault*.)

The Fenham (1870) 6 Moore P. C. (N.S.) 501; L. R. 3 P. C. 212; 23 L. T. 329.—P.C., *referred to*.

Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co. (1880) 5 App. Cas. 876, 892; 43 L. T. 610; 29 W. R. 173; 4 Asp. M. C. 567.—H.L. (E.).

The Fenham, observations not applied.

Cayzer v. Carron Co., The Margaret (1884) 54 L. J. Adm. 18; 9 App. Cas. 873, 882; 52 L. T. 361; 33 W. R. 281; 5 Asp. M. C. 371.—H.L. (E.).

The Hibernia (1874) 31 L. T. 805; 24 W. R. 50; 2 Asp. M. C. 454.—P.C., *observed upon*.

The Magnet (1875) L. R. 4 A. & E. 417, 426; 32 L. T. 129; 2 Asp. M. C. 478.—ADM.

The Hibernia, adopted.

The Fanny M. Carvill (1875) 44 L. J. Adm. 34, 36; 13 App. Cas. 455, n., 457, n.; 32 L. T. 646; 24 W. R. 62; 2 Asp. M. C. 569.—P.C.

The Hibernia, approved.

The Khedive; Stoomvaart, &c. v. P. & O. Co. (1880) 5 App. Cas. 876; 52 L. J. Adm. 1; 43 L. T. 610; 29 W. R. 173; 4 Asp. M. C. 567.—H.L. (E.).

The Hibernia, qualified.

China Merchants' Steam Navigation Co. v. Bignold (1882) 51 L. J. Adm. 92; 7 App. Cas. 512; 47 L. T. 485; 31 W. R. 303; 5 Asp. M. C. 39.—P.C.

[Their lordships held that the decision in *The Hibernia* may be considered as qualified to a certain extent by *The Fanny M. Carvill* (*infra*).]

The Fanny M. Carvill (1875) 44 L. J. Adm. 34; 13 App. Cas. 455, n.; 32 L. T. 646; 24 W. R. 62; 2 Asp. M. C. 565.—P.C., *explained*.

The Englishman (1877) 47 L. J. Adm. 9; 3 P. D. 18; 37 L. T. 412; 3 Asp. M. C. 506.—ADM.

SIR R. PHILLIMORE.—There is no doubt a difficulty in applying the principles laid down in that judgment to all cases coming before the Court; but, as I infer from the judgment of the Privy Council, the true principle to be applied is this, that the party guilty of the infringement of the regulation has the burden cast upon him of showing that it could not possibly have contributed to the collision.

The Fanny M. Carvill, adopted.

The Mary Hounsell (1879) 48 L. J. Adm. 54; 4 P. D. 204, 207; 40 L. T. 368.—ADM.

The Fanny M. Carvill, approved.

Stoomvaart Maatschappij Nederland v. P. & O. Steam Navigation Co., The Khedive (1880) 5 App. Cas. 876; 43 L. T. 610; 29 W. R. 173; 4 Asp. M. C. 567.—H.L. (E.).

The Fanny M. Carvill, and The Englishman (*supra*), *approved*.

China Merchants' Steam Navigation Co. v. Bignold (1882) 51 L. J. Adm. 92; 7 App. Cas. 512; 47 L. T. 485; 31 W. R. 303; 5 Asp. M. C. 39.—P.C.

The Fanny M. Carvill, considered.

The Glamorganshire (1888) 13 App. Cas. 454; 59 L. T. 572; 6 Asp. M. C. 344.—P.C.

The Fanny M. Carvill, applied.

The Hermod (1890) 62 L. T. 670; 6 Asp. M. C. 509.—BUTT, J.

The Fanny M. Carvill, approved.

The Duke of Buccleuch [1891] A. C. 310; 65 L. T. 422; 7 Asp. M. C. 68.—H.L. (E.).

The Khedive, Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co. (No. 1.) (1882) 5 App. Cas. 876; 43 L. T. 610; 29 W. R. 173; 4 Asp. M. C. 567.—H.L. (E.). *inapplicable*.

Seicluna v. Stevenson, The Rhondda (1883) 8 App. Cas. 549, 556; 49 L. T. 210; 5 Asp. M. C. 114.—P.C.

The Khedive (No. 1.). See

Woodley v. Michell (1883) 11 Q. B. D. 47, 52; 52 L. J. Q. B. 325; 48 L. T. 599; 31 W. R. 651; 5 Asp. M. C. 71.—C.A.

The Khedive (No. 1.), explained.

The Benares (1883) 9 P. D. 16; 53 L. J. Adm. 2; 49 L. T. 702; 32 W. R. 268; 5 Asp. M. C. 171.—C.A.

BAGGALLAY, L.J.—That case [*The Khedive*] appears to me to decide that actual necessity, and not simply considerations of discretion and expediency, will excuse a non-observance of the regulations. Further, it appears to me that their lordships in *The Khedive* based their judgment on the particular facts of that case, and that it was proved there that there had been a departure from Art. 16 of the Regulations of 1863.—p. 18.

The Khedive (No. 1.), inapplicable.

The Beryl (1884) 53 L. J. Adm. 75; 9 P. D. 137; 51 L. T. 554; 33 W. R. 191; 5 Asp. M. C. 321.—C.A.

The Khedive (No. 1.), discussed.

Cayzer v. Carron Co., The Margaret (1884) 54 L. J. Adm. 18; 9 App. Cas. 873, 881; 52 L. T. 361; 33 W. R. 281; 5 Asp. M. C. 371.—H.L. (E.).

The Khedive (No. 1.), applied.

The Main (1886) 55 L. J. Adm. 70; 11 P. D. 132, 134; 55 L. T. 15; 34 W. R. 678; 6 Asp. M. C. 37.—C.A.

The Khedive (No. 1.), observed upon.

The Ceto, Owners of the Lebanon v. Owners of the Ceto (1889) 14 App. Cas. 670, 678; 62 L. T. 1; 6 Asp. M. C. 479.—H.L. (E.).

The Khedive (No. 1), applied.

London Steamship Owners Insurance Co. v. Grampian S.S. Co. (1890) 59 L. J. Q. B. 549; 24 Q. B. D. 663; 62 L. T. 784; 38 W. R. 651; 6 Asp. M. C. 506.—C.A.

The Margaret, Cayzer v. Carron Co. (1883)

52 L. J. P. 65; 8 P. D. 126; 49 L. T. 332; 31 W. R. 843.—BUTT, J.; *reversed*, (1884) 53 L. J. P. 17; 9 P. D. 47; 50 L. T. 447; 32 W. R. 564; 5 Asp. M. C. 204.—C.A. BRET, M.R., BAGGALLAY and LINDLEY, L.JJ., *the latter decision reversed sub nom. Cayzer v. Carron Co.* (1884) 54 L. J. Adm. 18; 9 App. Cas. 873; 52 L. T. 361; 33 W. R. 281; 5 Asp. M. C. 371.—H.L. (E.).

The Margaret, applied.

The Monte Rosa (1892) 62 L. J. Adm. 20; [1893] P. 23; 68 L. T. 299; 41 W. R. 304; 7 Asp. M. C. 326.—BARNES, J.

The Margaret, referred to.

The Morgengry and The Blacklock (1899) 69 L. J. P. 3; [1900] P. 1; 81 L. T. 417; 48 W. R. 121; 8 Asp. M. C. 591.—C.A.

The Margaret, applied.

The Sanspareil (1900) 69 L. J. P. 127; [1900] P. 267; 82 L. T. 606; 9 Asp. M. C. 78.—C.A.

The Margaret, distinguished.

The Ovingdean Grange (1902) 71 L. J. P. 105; [1902] P. 208; 87 L. T. 15.—C.A.

The Duke of Buccleuch (1890) 15 P. D. 86;

62 L. T. 94; 6 Asp. M. C. 471.—C.A.; *affirmed*, [1891] A. C. 310; 65 L. T. 422; 7 Asp. M. C. 68.—H.L. (E.).

The Duke of Buccleuch, considered.

The Hermod (1890) 62 L. T. 670.—BUTT, J.

The Duke of Buccleuch, applied.

The Argo (1900) 82 L. T. 602; 9 Asp. M. C. 74.—C.A. SMITH, WILLIAMS and ROMER, L.JJ.

The Scotia (1866) 20 L. T. 375; 3 Asp. M. C. (O.S.) 223.—U.S. DISTRICT CT., followed.

The Nevada (1873) 27 L. T. 720; 1 Asp. M. C. 477.—V.—ADM. CT. NEW SOUTH WALES.

The Rising Sun (1837) Ware (Maine) 378, not applied.

The Thetis (1869) 38 L. J. Adm. 42; L. R. 2 A. & E. 365, 367; 22 L. T. 276.—ADM.

Fenton v. Dublin Steampacket Co. (1838) 8 L. J. Q. B. 28; 8 A. & E. 835; 1 P. & D. 103.—Q.B., followed.

Dalryell v. Tyrer (1858) EL. BL. & EL. 899; 28 L. J. Q. B. 52; 5 Jur. (N.S.) 335; 6 W. R. 684.—Q.B.

The Aline (1839) 1 W. Rob. 111.—ADM., applied.

The Halley (1867) 37 L. J. Adm. 1, 10; L. R. 2 A. & E. 3, 21; 16 W. R. 284.—ADM., (reversed, P.C. *infra*, col. 3407).

The Aline, explained.

The Maid of Kent (1881) 50 L. J. Adm. 71; 6 P. D. 178; 45 L. T. 738; 29 W. R. 897; 4 Asp. M. C. 476.—ADM.

The Mellona (1847) 3 W. Rob. 7.—ADM., referred to.

The Maid of Kent (1881) 50 L. J. Adm. 71; 6 P. D. 178; 45 L. T. 718; 29 W. R. 897.—ADM.

The Volant (1842) 1 W. Rob. 333, 387.—

ADM., *dictum disapproved*.

The Bold Buccleugh (1852) 7 Moore P. C. 267.—P.C.

SIR JOHN JERVIS.—But it is further said that the damage confers no lien upon the ship, and a *dictum* of Dr. Lushington, in the case of *The Volant*, is cited as an authority for this proposition. By reference to a contemporaneous report of the same case (1 Notes of Cases 508), it seems doubtful whether the learned judge did use the expression attributed to him by Dr. W. Robinson. If he did, the expression is certainly inaccurate, and being a *dictum* merely not necessary for the decision of that case, cannot be taken as a binding authority.—p. 283.

[*Dictum*.:—"Arrest offers the greatest security for obtaining substantial justice, in furnishing a security for prompt and immediate payment."]

The Volant, applied.

The St. Olaf (1869) 38 L. J. Adm. 41; L. R. 2 A. & E. 360; 20 L. T. 758; 17 W. R. 743.—ADM.; The Leon (1881) 50 L. J. Adm. 59; 6 P. D. 148; 44 L. T. 613; 29 W. R. 916; 4 Asp. M. C. 404.—ADM.; The Heinrich Björn (1885) 54 L. J. Adm. 33; 10 P. D. 44, 54; 52 L. T. 560; 33 W. R. 719; 5 Asp. M. C. 391.—C.A.; The Cella (1888) 57 L. J. Adm. 55; 13 P. D. 82, 83; 59 L. T. 125; 36 W. R. 540; 6 Asp. M. C. 293.—C.A.

The Volant, referred to.

The Africano (1894) 63 L. J. Adm. 125; [1894] P. 141; 6 R. 767; 70 L. T. 256; 42 W. R. 413; 7 Asp. M. C. 427.—JEUNE, P.

The Druid (1842) 1 W. Rob. 391.—ADM., not applied.

The Charkieh (1873) 42 L. J. Adm. 17, 34; L. R. 4 A. & E. 59, 97; 28 L. T. 513; 1 Asp. M. C. 581.—ADM.

The Druid, distinguished.

The Lemington (1874) 32 L. T. 69, 73; 23 W. R. 421; 2 Asp. M. C. 475.—ADM.

The Druid, observations adopted.

The Leon (1881) 50 L. J. Adm. 59; 6 P. D. 148; 29 W. R. 916; 4 Asp. M. C. 404.—ADM.

The Druid, referred to.

The Tasmania (1888) 57 L. J. Adm. 49; 13 P. D. 110; 59 L. T. 263; 6 Asp. M. C. 305.—HANNEN, P. See extract, *infra*.

The Druid, considered.

The Ripon City (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M. C. 304.—BARNES, J.

The Ticonderoga (1857) Swabey 215.—ADM., followed.

The Lemington (1874) 32 L. T. 69; 23 W. R. 421; 2 Asp. M. C. 475.—ADM.; The Mary (1879) 48 L. J. Adm. 66; 5 P. D. 14; 41 L. T. 351; 28 W. R. 95; 4 Asp. M. C. 183.—ADM.

The Ticonderoga, explained.

The Tasmania (1888) 57 L. J. Adm. 49; 13 P. D. 110; 59 L. T. 263; 6 Asp. M. C. 305.

HANNEN, P.—There is nothing in this judgment which leads to the conclusion that Dr. Lushington intended to retract what he had said in *The Druid* (*supra*). It amounts only

to this, that he thought that, whatever might be the case at common law, by the maritime law of nations, charterers, to whom the government of the ship is voluntarily handed over, represent the owners so as to bind the ship in cases of collisions, and the generality of his remarks must be controlled by the particular circumstances of the case before him.—p. 53.

The Ticonderoga, considered.

The Ripon City (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M. C. 304.—BARNES, J.

The Saracen, Bernard v. Hyne (1847) 6 Moore P. C. 56; 4 Notes of Cases 498; 2 W. Rob. 451.—P.C.—explained and not applied.

The Markland (1871) L. R. 3 A. & E. 340, 343; 24 L. T. 596; 1 Asp. M. C. 44.—ADM.

The Saracen and The Clara (1855) Swabey 1.—ADM., referred to.

The Africano (1894) 63 L. J. Adm. 125; [1894] P. 141; 6 R. 767; 70 L. T. 250; 42 W. R. 413; 7 Asp. M. C. 427.—JEUNE, P.

The Bold Buccleugh (1852) 7 Moore P. C. 267.—P.C., referred to.

The Mary Ann (1865) 35 L. J. Adm. 6; L. R. 1 A. & E. 8; 12 Jur. (N.S.) 81; 13 L. T. 384; 14 W. R. 136.—ADM.; The Halley (1867) 37 L. J. Adm. 1; L. R. 2 A. & E. 3, 21; 16 W. R. 284.—ADM., (reversed, P.C., see *infra*, col. 3407); The Feronia (1868) 37 L. J. Adm. 60; L. R. 2 A. & E. 65, 72; 17 L. T. 619; 16 W. R. 585.—ADM.; The Charles Amelia (1868) 38 L. J. Adm. 17; L. R. 2 A. & E. 330; 19 L. T. 429; 17 W. R. 624.—ADM.; The Mali Ivo (1869) 38 L. J. Adm. 34; L. R. 2 A. & E. 356; 20 L. T. 681.—ADM.; The St. Olaph (1869) 38 L. J. Adm. 41; L. R. 2 A. & E. 360; 20 L. T. 758; 17 W. R. 743.—ADM.

The Bold Buccleugh, observations adopted.

The Two Ellens (1871) 40 L. J. Adm. 11; L. R. 3 A. & E. 345, 357; 24 L. T. 592.—ADM.; affirmed, (1872) 41 L. J. Adm. 33; L. R. 4 P. C. 161; 8 Moore P. C. (N.S.) 398; 26 L. T. 1; 20 W. R. 592; 1 Asp. M. C. 298.—P.C.

The Bold Buccleugh, explained.

The Parlement Belge (1880) 5 P. D. 197, 219; 42 L. T. 273; 28 W. R. 642; 4 Asp. M. C. 234.—C.A.

The Bold Buccleugh, considered.

The City of Mecca (1881) 6 P. D. 106; 50 L. J. Adm. 53; 44 L. T. 750; 4 Asp. M. C. 412.—C.A.

JESSEL, M.R.—Reference has been made to the case of *The Bold Buccleugh* from which I will read a few words of the judgment delivered by Sir John Jervis. At page 284, he says: "Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process, and Mr. Justice Story (1 Sumner 78), explains that process to be a proceeding *in rem*, and adds that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only competent Court to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien

attaches, and whilst it must be admitted that where such a lien exists a proceeding *in rem* may be had, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists which gives a privilege or claim upon the thing to be carried into effect by legal process." Then he refers to what occurred in that case, and adds, that an action was brought in Scotland against the owners by name, very much like the action in the foreign Court below here; but there is something in addition, because when it comes within the jurisdiction they arrest the vessel to secure the debt, and then this applies exactly to this case, "the arrest by the steamer was only collateral to secure the debt." They did not get so far in Portugal. They tried but failed. Then he says: "We have already explained that in our judgment a proceeding *in rem* differs from one *in personam*, and it follows that the two suits being in their nature different, the pendency of the one cannot be pleaded in suspension of the other." That is, the formal proceedings in Scotland were against the person, although the vessel was arrested as security for the debt. It is really the form of the proceedings which must be looked at to ascertain whether it is a proceeding *in rem* or *in personam*, and it lends much greater force in the case before us when the attempt to arrest the vessel failed altogether. For this reason it seems to me we should go further than we should be warranted by any principle in going if we said that the judgment was not a personal judgment, and that the Court was entitled to order the arrest of the vessel as if it were an action *in rem* and a judgment *in rem*.—p. 113.

The Bold Buccleugh, adopted.

Stoomvaart Maatschappij Nederland v. P. & O. Steam Navigation Co. (1882) 52 L. J. Adm. 1, 12; 7 App. Cas. 795, 817; 47 L. T. 198; 31 W. R. 249; 5 Asp. M. C. 360, 567.—H.L. (E.).

The Bold Buccleugh, applied.

The Fairport (1882) 8 P. D. 48, 54.—ADM.

The Bold Buccleugh, explained and distinguished.

Laws v. Smith, the Rio Tinto (1883) 9 App. Cas. 356, 360; 50 L. T. 461; 5 Asp. M. C. 224.—P.C.

The Bold Buccleugh, commented upon and distinguished.

The Heinrich Björn, Northcote v. Owners of the Heinrich Björn (1886) 55 L. J. Adm. 80; 11 App. Cas. 270, 284; 55 L. T. 66; 6 Asp. M. C. 1.—H.L. (E.).

LORD BRAMWELL.—In *The Bold Buccleugh* it was assumed that a maritime lien existed in cases of collision within the body of a county, which could only be because it was given by 3 & 4 Vict. But two remarks are to be made on that case; one, that it was assumed without discussion; the other, that even if it was given it was in cases of collision; as I have said, it does not follow that it was so in the case of necessities.

The Bold Buccleugh, referred to.

The Tasmania (1888) 57 L. J. Adm. 49; 13 P. D. 110; 59 L. T. 263; 6 Asp. M. C. 305.—HANNEN, P.; The Africano (1894) 63 L. J. Adm. 125; [1894] P. 141; 6 R. 767; 70 L. T. 250; 42 W. R. 413; 7 Asp. M. C. 427.—JEUNE, P.

The Bold Buccleugh, considered.

The Ripon City (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M. C. 304.—BARNES, J.

The Bold Buccleugh, approved.

The Dunlossit, Currie v. McKnight (1896) 66 L. J. P. C. 19; [1897] App. Cas. 97; 75 L. T. 457; 8 Asp. M. C. 193.—H.L. (sc.).

The Bold Buccleugh, considered and applied.

The Veritas (1901) 70 L. J. P. 75; [1901] P. 304; 85 L. T. 136; 50 W. R. 30; 9 Asp. M. C. 237.—GORELL BARNES, J.

The Europa (1863) 2 Moore P. C. (N.S.) 1;

Br. & L. R. 89; 32 L. J. Adm. 188; 9 Jur. (N.S.) 690; 8 L. T. 368.—P.C., *applied*.

The Charles Amelia (1868) 38 L. J. Adm. 17, 19; L. R. 2 A. & E. 330, 334; 19 L. T. 429; 17 W. R. 624.—ADM.; The Two Ellens (1871) 40 L. J. Adm. 11; L. R. 3 A. & E. 345, 357; 24 L. T. 592.—ADM., affirmed, P.C. (see col. 3467); The Fairport (1882) 8 P. D. 48, 54.—ADM.

The Ida (1860) Lush. 6.—ADM., discussed and not applied.

The Princess Royal (1870) 39 L. J. Adm. 43, 45; L. R. 3 A. & E. 41, 47; 22 L. T. 39.—ADM.

The Ida and The Ruby Queen (1861) Lush. 266.—ADM., considered.

The Ripon City (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M. C. 304.—BARNES, J.

The Halley, Liverpool, Brazil, &c. Steam Navigation Co. v. Benham (1867) 37 L. J. Adm. 1; L. R. 2 Adm. 3; 16 W. R. 284.—ADM.; *reversed*, (1868) 37 L. J. Adm. 33; L. R. 2 P. C. 193; 18 L. T. 879; 16 W. R. 998; 5 Moore P. C. (N.S.) 263.—P.C.

The Halley, observed upon.

The Mali Ivo (1869) 38 L. J. Adm. 34; L. R. 2 A. & E. 356; 20 L. T. 681.—ADM.

The Halley, applied.

Phillips v. Eyre (1870) 40 L. J. Q. B. 28, 40; L. R. 6 Q. B. 1, 29; 10 B. & S. 1004; 22 L. T. 869.—EX. CH.; affirming 17 W. R. 375.—Q.B.

The Halley, distinguished.

Redpath v. Allan, The Hibernian (1872) 42 L. J. Adm. 8; L. R. 4 P. C. 511, 516; 9 Moore P. C. (N.S.) 340; 27 L. T. 725; 21 W. R. 276; 1 Asp. M. C. 491.—P.C.

The Halley, applied.

The M. Moxham (1876) 46 L. J. Adm. 17, 20; 1 P. D. 107, 111; 34 L. T. 559; 24 W. R. 650; 3 Asp. M. C. 191.—C.A.

The Halley, observations adopted.

The Star of India (1876) 45 L. J. Adm. 102; 1 P. D. 466; 35 L. T. 407; 25 W. R. 377; 3 Asp. M. C. 261.—ADM.

The Halley, explained and distinguished.

The Augusta (1887) 57 L. T. 326; 6 Asp. M. C. 161.—C.A.

The Halley, referred to.

The Tasmania (1888) 57 L. J. Adm. 49; 13 P. D. 110; 59 L. T. 263; 6 Asp. M. C. 305.—HANNEN, P.

O.C.

The Halley, applied.

The Mystery (1902) 71 L. J. P. 39; [1902] P. 115.—JEUNE, P. and BARNES, J.

The Halley, not applied.

The Dallington (1903) 72 L. J. P. 17; [1903] P. 77.—BUCKNILL, J.

The Lemington (1874) 2 Asp. M. C. 475; 32

L. T. 69; 23 W. R. 421.—ADM., *explained*. The Tasmania (1888) 57 L. J. Adm. 49; 13 P. D. 110, 117; 59 L. T. 263; 6 Asp. M. C. 305.—HANNEN, P.

The Lemington, considered.

The Ripon City (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M. C. 304.—BARNES, J.

The Bywell Castle (1879) 4 P. D. 219; 41

L. T. 747; 28 W. R. 293; 4 Asp. M. C. 207.—C.A., *observed upon*. Stoomvaart Maatschappij Nederland v. P. & O. Steam Navigation Co. (1880) 5 App. Cas. 876, 891; 42 L. T. 610; 29 W. R. 173; 4 Asp. M. C. 567.—H.L. (E.).

The Bywell Castle, considered.

Woodley v. Michell (1883) 52 L. J. Q. B. 325, 328; 11 Q. B. D. 47, 52; 48 L. T. 599; 31 W. R. 651; 5 Asp. M. C. 71.—C.A.

The Bywell Castle, dicta adopted.

The Tasmania (1890) 15 App. Cas. 223, 226; 63 L. T. 1; 6 Asp. M. C. 517.—H.L. (E.), *reversing* 14 P. D. 53; 37 W. R. 552.—C.A.

The Bywell Castle, discussed.

Delaney v. Dublin United Tramways Co. (1892) 30 L. R. Ir. 725.—C.A.

The Bywell Castle, approved.

The Utopia (1893) 62 L. J. P. C. 118; [1893] A. C. 492; 1 R. 394; 70 L. T. 47; 7 Asp. M. C. 408.—P.C.

The City of Mecca, 49 L. J. P. 17; 5 P. D. 28;

41 L. T. 444; 28 W. R. 260.—SIR R. (PHILIMORE); *reversed*, (1881) 50 L. J. P. 53; 6 P. D. 106; 44 L. T. 750.—C.A.

The City of Mecca, dictum adopted.

The Nautik (1895) 64 L. J. Adm. 61; [1895] P. D. 121; 11 R. 716; 72 L. T. 21; 43 W. R. 703; 7 Asp. M. C. 591.—BRUCE, J.

The Tasmania (1888) 57 L. J. Adm. 49; 13

P. D. 110; 59 L. T. 263; 6 Asp. M. C. 305.—HANNEN, P., *referred to*. The Ripon City (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M. C. 304.—BARNES, J.

Rex v. Watts (1798) 2 Esp. 675; 5 R. R. 766.—KENYON, C.J., referred to.

The Crystal (1894) 63 L. J. P. 146; [1894] A. C. 508, 528; 6 R. 258; 71 L. T. 346.—H.L. (E.).

Rex v. Watts, referred to.

The Snark (1899) 68 L. J. P. 22; [1899] P. 74; 80 L. T. 25; 47 W. R. 398; 8 Asp. M. C. 483.—BARNES, J.

The Prins Frederik (1820) 2 Dod. 451.—ADM.

Applied, The Charkieh, In re (1873) 42 L. J. Q. B. 75, 80; L. R. 8 Q. B. 197, 201; 28 L. T. 190; 21 W. R. 437.—Q.B.

The Prins Frederik, observed upon.

The Charkieh (1873) 42 L. J. Adm. 17, 33; L. R. 4 A. & E. 59, 94; 28 L. T. 513.—ADM.

The Prins Frederik, considered and applied.

The Parlement Belge (1880) 5 P. D. 197, 209; 42 L. T. 273; 28 W. R. 642; 4 Asp. M. C. 234.—C.A.

The Charkieh (1873) 42 L. J. P. 17; I. R.

4 A. & E. 59; 28 L. T. 513.—ADM., distinguished.

The Constitution (1879) 48 L. J. Adm. 13; 4 P. D. 39, 45; 40 L. T. 219; 27 W. R. 739; 4 Asp. M. C. 79.—ADM.

The Charkieh, discussed, and proposition adopted.

The Parlement Belge (1880) 5 P. D. 197, 215; 42 L. T. 273; 28 W. R. 642; 4 Asp. M. C. 234.—C.A.

The Charkieh, adopted.

The Heinrich Bjorn (1885) 54 L. J. P. 33; 10 P. D. 44, 54; 52 L. T. 560; 33 W. R. 719; 5 Asp. M. C. 391.—C.A.; affirmed, H.L. (E.), (*infra*, col. 3468).

The Charkieh, held overruled.

Mighell v. Sultan of Johore (1893) 63 L. J. Q. B. 593; [1894] 1 Q. B. 149; 9 R. 447; 70 L. T. 64; 58 J. P. 244.—C.A. Esher, M.R., LOPES and KAY, L.JJ.

ESHER, M.R.—The first point taken was that it was not sufficiently shown that the defendant was an independent sovereign power. . . . It was argued that the judge ought not to have been satisfied with that letter [a letter of the Secretary of State for the Colonies], but to have informed himself from historical and other sources as to the status of the Sultan of Johore. It was said that Sir R. Phillimore did so in *The Charkieh*. I know he did; but I am of opinion that he ought not to have done so; that when once there is an authoritative certificate of the Queen through her Minister of State as to the status of another Sovereign, that in the Courts of this country is decisive. Therefore this letter is conclusive that the defendant is an independent sovereign. For this purpose all sovereigns are equal. The independent sovereign of the smallest state stands on the same footing as the monarch of the greatest.

The Parlement Belge, 48 L. J. Adm. 18; 4 P. D. 129; 40 L. T. 222; 27 W. R. 692.—ADM.; reversed, (1880) 5 P. D. 197; 42 L. T. 273; 28 W. R. 642; 4 Asp. M. C. 234.—C.A.

The Parlement Belge, referred to.

Strousberg v. Costa Rica Republic (1880) 44 L. T. 199; 29 W. R. 125.—C.A. JESSEL, M.R., JAMES and LUSH, L.JJ.

The Parlement Belge, distinguished.

The Newbattle (1885) 54 L. J. Adm. 16; 10 P. D. 33, 35; 52 L. T. 15; 33 W. R. 318; 5 Asp. M. C. 356.—C.A.

The Parlement Belge, referred to.

The Longford (1889) 58 L. J. P. 33; 14 P. D. 34; 60 L. T. 373; 37 W. R. 372; 6 Asp. M. C. 371.—C.A. Esher, M.R., BOWEN and FRY, L.JJ.

The Parlement Belge, approved.

The Utopia (1893) 62 L. J. P. C. 118; [1893] A. C. 492; 1 R. 394; 70 L. T. 47; 7 Asp. M. C. 408.—P.C.

The Parlement Belge, followed.

Mighell v. Sultan of Johore (1893) 63 L. J. Q. B. 593; [1894] 1 Q. B. 149; 9 R. 447; 70 L. T. 64; 58 J. P. 244.—C.A. Esher, M.R., LOPES and KAY, L.JJ.

The Parlement Belge, considered.

The Ripon City (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M. C. 304.—BARNES, J.

GORELL BARNES, J.—In *The Parlement Belge*, it was held that an unarmed packet belonging to the sovereign of a foreign state, and in the hands of officers commissioned by him and employed in carrying mails, is not liable to be seized *in rem* to recover redress for a collision, and that this immunity is not lost by reason of the packet's also carrying merchandise and passengers for hire. The decision was that the Courts cannot exercise jurisdiction over the person of any Sovereign or over the public property of any State which is destined to its public use, though such sovereign or property is within this country. A passage from the judgment of the M.R. was relied on in the argument before me.

The Douglas, 51 L. J. P. 55; 46 L. T. 488; 30 W. R. 692.—ADM.; reversed, (1882) 51 L. J. P. 89; 7 P. D. 151; 47 L. T. 502; 5 Asp. M. C. 15.—C.A.

The Douglas, considered and applied.

Dormont v. Furness Ry. (1883) 52 L. J. Q. B. 331, 334; 11 Q. B. D. 496, 501; 49 L. T. 134; 5 Asp. M. C. 127.—KAY, J.

The Douglas, considered and applied.

The Utopia (1893) 62 L. J. P. C. 118; [1893] A. C. 492; 1 R. 394.—P.C.

The Douglas, referred to.

The Crystal (1894) 63 L. J. P. 146; [1894] A. C. 508; 71 L. T. 346.—H.L. (E.).

The Douglas, distinguished.

The Snark (1899) 68 L. J. P. 22; [1899] P. 74; 80 L. T. 25; 47 W. R. 398; 8 Asp. M. C. 483.—BARNES, J.; affirmed, C.A.

The Utopia (1893) 62 L. J. P. C. 118; [1893]

A. C. 492; 1 R. 394; 70 L. T. 47; 7 Asp. M. C. 408.—P.C., considered.

The Ripon City (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M. C. 304.—BARNES, J.

The Utopia, followed.

The Snark (1900) 69 L. J. P. 41; [1900] P. 105; 82 L. T. 42; 48 W. R. 279; 9 Asp. M. C. 50.—C.A. SMITH, RIGBY and COLLINS, L.JJ.

The Dunlossit, Currie v. McKnight (1897)

66 L. J. P. C. 19; [1897] App. Cas. 97; 75 L. T. 457; 8 Asp. M. C. 193.—C.A., considered.

The Ripon City (1897) 66 L. J. P. 110; [1897] P. 226; 77 L. T. 98; 8 Asp. M. C. 304.—BARNES, J.

The Dunlossit, Currie v. McKnight, *held inapplicable*.

Sailing Ship "Blairmore" Co. v. Macredie (1898) 67 L. J. P. C. 96; [1898] A. C. 593; 79 L. T. 217; 8 Asp. M. C. 429.—H.L. (SC.).

The Sarah (1862) Lush. 549. — ADM., *followed*.

Purkis v. Flower (1873) 43 L. J. Q. B. 33; L. R. 9 Q. B. 114; 30 L. T. 40; 22 W. R. 239; 2 Asp. M. C. 226.—Q.B.

(Persons Entitled to Recover.)

The Milan (1861) Lush. 388: 31 L. J. Adm. 105; 5 L. T. 590.—ADM., *dissented from*.

The City of Manchester (1880) 49 L. J. Adm. 81; 5 P. D. 221; 42 L. T. 521; 4 Asp. M. C. 412.—C.A.

JAMES, L.J.—Then, with regard to costs, the learned judge below did not deal with the costs as a matter in which he was exercising his judicial discretion. He was dealing with them as laying down the universal rule as established in *The Milan*, that wherever the owners of cargo succeed, they are entitled to the whole costs of the litigation. Now I cannot agree with that as a general rule. It seems to me that to do so would be to encourage unnecessary litigation.—p. 81.

The Milan, *adopted*.

Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co. (1883) 52 L. J. Q. B. 220, 228; 10 Q. B. D. 521, 537; 48 L. T. 546; 31 W. R. 445; 5 Asp. M. C. 65; 47 J. P. 260.—C.A.

The Milan, *followed*.

The Vera Cruz (1884) 53 L. J. Adm. 33; 9 P. D. 88, 96; 51 L. T. 104; 32 W. R. 783; 5 Asp. M. C. 270.—BUTT, J.

The Milan, *considered and applied*.

The Bernina (1887) 56 L. J. P. 17; 12 P. D. 58; 56 L. T. 258; 35 W. R. 314; 6 Asp. M. C. 75.—C.A.; affirmed, H.L. (E.) (*see infra*).

The Milan, *approved*.

The Karo (1887) 57 L. J. Adm. 8; 13 P. D. 24; 58 L. T. 188; 6 Asp. M. C. 245.—BUTT, J.

The Milan, *adopted*.

The Bernina, Mills v. Armstrong (1888) 57 L. J. Adm. 65; 13 App. Cas. 1, 10; 58 L. T. 423; 36 W. R. 870; 6 Asp. M. C. 257; 52 J. P. 212.—H.L. (E.).

The Milan, *distinguished*.

The Englishman and The Australia (1894) 63 L. J. P. 133; [1894] P. 239; 70 L. T. 846; 43 W. R. 62.—JEUNE, P.

The Milan, *doubted*.

The Frankland (1903) 70 L. J. P. 42; [1901] P. 161; 84 L. T. 395; 9 Asp. M. C. 196.—JEUNE, P.

The City of Manchester, 5 P. D. 3; 48 L. J. P. 70.—PHILLIMORE, J.; *reversed*, (1880) 49 L. J. P. 81; 5 P. D. 221; 42 L. T. 521; 4 Asp. M. C. 261.—C.A.

The City of Manchester, *followed*.

Forbes-Smith v. Forbes-Smith (1901) 70 L. J. P. 61; [1901] P. 258; 84 L. T. 789; 50 W. R. 6.—C.A.

The Ilos (1856) Swabey 100. — ADM., *approved and followed*.

The Minna (1868) L. R. 2 A. & E. 97.—ADM.

The Ilos and The Mirna, *discussed*.

The Duke of Buccleugh (1892) 61 L. J. P. 57; [1892] P. 201; 40 W. R. 455.—JEUNE, J.; affirmed with a variation, H.A.

(Damages.)

The Pensher (1857) Swab. 211. — ADM., *adopted*.

The Thuringia (1872) 41 L. J. Adm. 44, 47; 26 L. T. 446; 1 Asp. M. C. 283.—ADM.

Tindall v. Bell (1841) 11 L. J. Ex. 36; 10 M. & W. 255.—EX. and S.C., 12 L. J. Ex. 160; 11 M. & W. 228.—EX., *explained*.

The Legatus (1856) Swabey 168; 5 W. R. 154.—ADM.

Headnote.—The vessels C. and L. came into collision, in consequence of which salvage services were rendered to the C. The salvors brought a suit and recovered 50%. The L. was condemned in a suit for damages brought by the C., and on reference to the Registrar and Merchants as to the amount, they struck out the costs of the salvage suit incurred by the C., because her owners had made no tender to the salvors. On objection to their report, held that such costs are, by the practice of the Court, a proper item in the amount to be recovered in a suit for damage, and that there is no general principle laid down in *Tindall v. Bell* to induce the Court to depart from its usual practice.

Tindall v. Bell, *principle applied*.

Ronneberg v. Falkland Islands Co. (1864) 34 L. J. C. P. 34; 17 C. B. (N.S.) 1; 10 Jur. (N.S.) 940; 10 L. T. 530; 12 W. R. 714.—C.P.

Tindall v. Bell, *dictum adopted*.

Mors-le-Blanch v. Wilson (1873) 42 L. J. C. P. 70, 72; L. R. 8 C. P. 227; 28 L. T. 415; 1 Asp. M. C. 605.—C.P.

Tindall v. Bell, *not followed*.

Baxendale v. L. C. & D. Ry. (1874) 44 L. J. Ex. 20, 28; L. R. 10 Ex. 35, 45; 32 L. T. 330; 23 W. R. 167.—C.A.

The Columbus (1849) 3 W. Rob. 158.—ADM., *applied*.

British Columbia Saw Mills Co. v. Nettleship (1868) 37 L. J. C. P. 235, 240; L. R. 3 C. P. 499, 507; 18 L. T. 291; 16 W. R. 1046.—C.P.; The Argentino (1888) 58 L. J. P. 1; 13 P. D. 191, 195; 57 W. R. 210.—C.A., affirmed, H.L. (E.). *See infra*, col. 3413.

The Columbus, *considered*.

The Kate (1899) 68 L. J. P. 41; [1899] P. 165; 80 L. T. 423; 47 W. R. 669; 8 Asp. M. C. 539.—JEUNE, P.

The Clarence (1850) 3 W. Rob. 283.—ADM., *applied*.

The Argentino (1888) 58 L. J. P. 1; 13 P. D. 191, 204; 37 W. R. 210.—C.A., affirmed, H.L. (E.) (*infra*); The City of Peking (1890) 59 L. J. P. C. 88; 15 App. Cas. 438, 442; 63 L. T. 722; 39 W. R. 177; 6 Asp. M. C. 572.—P.C. *And see post*.

The Clarence (*supra*), *overruled in part*.

The Mediana (1899) 68 L. J. P. 26; [1899] P. 127; 80 L. T. 173; 8 Asp. M. C. 493.—C.A.; affirmed, H.L. See *infra*, col. 3414.

The Inflexible (1857) Swabey 200.—ADM., *adopted*.

The Argentino (1888) 58 L. J. P. 1; 13 P. D. 191, 196; 37 W. R. 210.—C.A., ESHER, M.R. dissenting; [affirmed, H.L. (E.)]. See *infra*; The City of Peking (1889) 59 L. J. P. C. 88; 15 App. Cas. 438, 449; 63 L. T. 722; 39 W. R. 177; 6 Asp. M. C. 572.—P.C.

The Black Prince (1862) Lush. 568.—ADM., *applied*.

The Argentino (1888) 58 L. J. P. 1; 13 P. D. 191, 204; 37 W. R. 210.—C.A., affirmed, H.L. (E.). See *infra*.

The Black Prince, *approved*.

The City of Peking (1890) 59 L. J. P. C. 88; 15 App. Cas. 438; 63 L. T. 722; 39 W. R. 177; 6 Asp. M. C. 572.—P.C.

The Star of India (1876) 45 L. J. Adm. 102; 1 P. D. 466; 35 L. T. 407; 25 W. R. 377; 3 Asp. M. C. 261.—ADM.

Not applied, The City of Chester (1884) 53 L. J. Adm. 90; 9 P. D. 182, 199; 51 L. T. 485; 33 W. R. 104; 5 Asp. M. C. 311.—C.A.; *distinguished*, The Argentino (1888) 58 L. J. P. 1; 13 P. D. 191, 199; 37 W. R. 210.—C.A., affirmed, H.L. (E.) (*infra*).

The Consett (1880) 5 P. D. 229; 5 Asp. M. C. 34, n.—ADM., *applied*.

The Argentino (1888) 58 L. J. P. 1; 13 P. D. 191; 37 W. R. 210.—C.A., affirmed, H.L. (E.) (*infra*).

The Risoluto (1883) 52 L. J. Adm. 46; 8 P. D. 109; 48 L. T. 909; 31 W. R. 657; 5 Asp. M. C. 93.—ADM., *referred to*.

The Argentino (1888) 58 L. J. P. 1; 13 P. D. 191, 199; 37 W. R. 210.—C.A., affirmed, H.L. (E.) (*infra*).

The Rutland (1886) [1896] P. 195, n. (2). —HANNEN, P., *explained and applied*.

The Greta Holme (1897) 66 L. J. Adm. 166; [1897] A. C. 596; 77 L. T. 23; 8 Asp. M. C. 317.—H.L. (E.). HALSBURY, L.C., LORDS WATSON, HERSCHELL, MACNAGHTEN, MORRIS and SHAND.

The Rutland, *overruled in part*.

The Mediana (1899) 68 L. J. P. 26; [1899] P. 127; 80 L. T. 173; 8 Asp. M. C. 193.—C.A., affirmed, (1900) 69 L. J. P. 35; [1900] A. C. 113; 82 L. T. 95; 48 W. R. 398; 8 Asp. M. C. 41.—H.L. (E.).

The Argentino (1887) 57 L. J. P. 25; 13 P. D. 61; 58 L. T. 643; 36 W. R. 814.—HANNEN, P.; *varied*, (1888) 58 L. J. P. 1; 13 P. D. 191; 37 W. R. 210.—C.A.; *the latter decision affirmed* (1889) 59 L. J. Adm. 17; 14 App. Cas. 519; 61 L. T. 706; 6 Asp. M. C. 433.—H.L. (E.).

The Argentino, *rule applied*.

The City of Lincoln (1889) 59 L. J. Adm. 1; 15 P. D. 15; 62 L. T. 49; 38 W. R. 854; 6 Asp. M. C. 475.—C.A. ESHER, M.R., LINDLEY and LOPES, L.JJ.

The Argentino, *adopted*.

The City of Peking (1889) 59 L. J. P. C. 88; 15 App. Cas. 438, 442; 63 L. T. 722; 39 W. R. 177; 6 Asp. M. C. 572.—P.C.

The City of Peking (1890) 59 L. J. P. C. 88; 15 App. Cas. 438; 63 L. T. 722; 39 W. R. 177; 6 Asp. M. C. 572.—P.C., *distinguished*.

The Mediana (1900) 69 L. J. P. 35; [1900] A. C. 113; 82 L. T. 95; 48 W. R. 398; 9 Asp. M. C. 41.—H.L. (E.). LORDS HALSBURY, L.C., MACNAGHTEN, MORRIS, SHAND, JAMES and BRAMPTON.

HALSBURY, L.C.—The only difficulty I have had in this case has been in regard to the case in the Privy Council—*The City of Peking*, I think, with some labour, I have discovered the clue which guided the learned judges in coming to the conclusion that they did. . . . The principle of the decision, as I gather from that passage [15 App. Cas. at p. 447], is that the defendants had already paid for the use of it [*The Melbourne*] and for the use of the crew and for the navigation of it, and, therefore, if during that period when the defendants were actually called upon by the registrar's report to pay for the use of *The Melbourne* they had had to pay 95l. a day also for the detention of *The Saghlian*, it is very obvious that they would have been paying twice over, and therefore not unnaturally, I think, the Court came to the conclusion in that case, not as a principle of law at all, but as applicable to the particular facts of that case, that, to put in plain terms what I understand to be the effect of the judgment, you cannot have damages for that detention, because you have already got paid for the use of the substituted vessel in the form of the damages that the registrar has assessed. If that is the principle of the case, of course it is not inconsistent with, but, on the contrary on the same lines with the judgment which the Court of Appeal has given in the present case.—pp. 38, 39.

(Division of Loss.)

Gale v. Laurie (1826) 4 L. J. (o.s.) K. B. 149; 5 B. & C. 156; 7 D. & R. 711.—K.B., *adopted*.

The Khedive, Stoomvaart Maatschappij Nederland v. P. & O. Steam Navigation Co. (1882) 52 L. J. Adm. 1, 9; 7 App. Cas. 795, 811; 47 L. T. 198; 31 W. R. 249; 5 Asp. M. C. 360, 567.—H.L. (E.).

Gale v. Laurie, *applied*.

Coltman v. Chamberlain (1890) 59 L. J. Q. B. 563; 25 Q. B. D. 328; 39 W. R. 12.—CHARLES and WILLIAMS, JJ.

De Vaux v. Salvador (1836) 5 L. J. K. B. 134; 4 A. & E. 420; 6 N. & M. 713.—K.B., *referred to*.

Xenos v. Wickham (1867) 36 L. J. C. P. 313, 320; L. R. 2 H. L. 296, 315; 16 L. T. 800; 16 W. R. 38.—H.L. (E.).

De Vaux v. Salvador, *applied*.

Inman Steamship Co. v. Bischoff (1882) 52 L. J. Q. B. 169, 177; 7 App. Cas. 670, 686; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6.—H.L. (E.).

De Vaux v. Salvador, *dictum adopted*.

The Khedive, Stoomvaart Maatschappij Nederland v. P. & O. Steam Navigation Co. (1882) 52

L. J. Adm. 1; 5; 7 App. Cas. 795, 804; 47 L. T. 198; 31 W. R. 249; 5 Asp. M. C. 360, 567.—H.L. (E.).

De Vaux v. Salvador, referred to.

London Steamship Owners Insurance Co. v. Grampian Steamship Co. (1889) 59 L. J. Q. B. 108; 24 Q. B. D. 32, 37; 61 L. T. 774.—MATHEW and WILLS, JJ., affirmed, (1890) 59 L. J. Q. B. 549; 24 Q. B. D. 663; 62 L. T. 784; 38 W. R. 651; 6 Asp. M. C. 506.—C.A.

De Vaux v. Salvador, explained and applied.

Field Steamship Co. v. Burr (1898) 67 L. J. Q. B. 528; [1898] 1 Q. B. 821; 78 L. T. 293; 46 W. R. 490; 8 Asp. M. C. 384.—BIGHAM, J., affirmed, (1899) 68 L. J. Q. B. 426; [1899] 1 Q. B. 579; 80 L. T. 445; 47 W. R. 341; 8 Asp. M. C. 529.—C.A.

Hay v. Le Neve (1824) 2 Shaw Sc. Ap. 395.—H.L. (SC.), referred to.

Stoomvaart Maatschappij Nederland v. P. & O. Steam Navigation Co. (1882) 52 L. J. Adm. 1, 6; 7 App. Cas. 795, 804; 47 L. T. 198; 31 W. R. 249; 5 Asp. M. C. 360.—H.L. (E.); Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co. (1882) 51 L. J. Q. B. 393; 9 Q. B. D. 118, 125; 46 L. T. 530.—Q.B.D.; (varied, C.A. See col. 3820); Cayzer v. Carron Co. (1884) 54 L. J. Adm. 18; 9 App. Cas. 873, 881; 52 L. T. 361; 33 W. R. 281; 5 Asp. M. C. 371.—H.L. (E.); The Bernina (1887) 12 P. D. 58, 76; 56 L. T. 258.—C.A., affirmed, H.L. (E.). (See col. 1953).

The Seringapatam (1848) 3 W. Rob. 38.—ADM., applied.

Chapman v. Royal Netherlands Steam Navigation Co. (1879) 48 L. J. Ch. 449, 457; 4 P. D. 157, 177; 40 L. T. 433; 27 W. R. 554.—C.A.

The Seringapatam, questioned.

The Khedive, Stoomvaart Maatschappij Nederland v. P. & O. Steam Navigation Co. (1882) 52 L. J. Adm. 1; 7 App. Cas. 795; 47 L. T. 198; 31 W. R. 249; 5 Asp. M. C. 360.—H.L. (E.).

The Seringapatam, referred to.

Japanese Government v. P. & O., &c., Co. [1895] A. C. 644.—P.C.

The Woodrop (1815) 2 Dodds. 83.—ADM., referred to.

Stoomvaart Maatschappij Nederland v. P. & O. Steam Navigation Co. (1882) 52 L. J. Adm. 1; 7 App. Cas. 795; 47 L. T. 198; 31 W. R. 249; 5 Asp. M. C. 360, 567.—H.L. (E.).

The Demetrius (1872) 41 L. J. Adm. 69; L. R. 3 A. & E. 523; 26 L. T. 329; 20 W. R. 761; 1 Asp. M. C. 251.—ADM., explained and applied.

The Hector (1883) 52 L. J. Adm. 51, 53; 8 P. D. 218, 224; 48 L. T. 890; 31 W. R. 881; 5 Asp. M. C. 101.—C.A.

Chapman v. Royal Netherlands Steam Navigation Co. (1879) 48 L. J. Ch. 449; 4 P. D. 157; 40 L. T. 433; 27 W. R. 554; 4 Asp. M. C. 107.—C.A., inapplicable.

The Ettrick (1881) 6 P. D. 127, 137; 45 L. T. 399; 4 Asp. M. C. 465.—C.A., affirming 50 L. J. Adm. 65.—ADM.

Chapman v. Royal Netherlands Steam Navigation Co., overruled.

The Khedive, Stoomvaart Maatschappij Nederland v. P. & O. Steam Navigation Co. (1882) 52

L. J. Adm. 1; 7 App. Cas. 795; 47 L. T. 198; 31 W. R. 249; 4 Asp. M. C. 567.—H.L. (E.).

The Khedive, Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co. (No. 2) (1883) 52 L. J. Adm. 1; 7 App. Cas. 795; 47 L. T. 198; 31 W. R. 249; 4 Asp. M. C. 567.—H.L. (E.), not applied.

The Hector (1883) 52 L. J. Adm. 51; 8 P. D. 218; 48 L. T. 890; 31 W. R. 881; 5 Asp. M. C. 101.—C.A.

The Khedive (No. 2), applied.

Hettihewage Siman Appu v. Queen's Advocate (1884) 53 L. J. P. C. 72; 9 App. Cas. 571, 588; 51 L. T. 401.—P.C.

The Khedive (No. 2), referred to.

The Getrade, The Baron Aberdare (1888) 13 P. D. 105, 108; 59 L. T. 251; 36 W. R. 616; 6 Asp. M. C. 315.—C.A., affirming (1887) 56 L. J. Adm. 106.—HANNEN, P.

The Khedive (No. 2) applied.

London Steamship Owners' Insurance Co. v. Grampian Steamship Co. (1890) 59 L. J. Q. B. 549; 24 Q. B. D. 663, 666; 62 L. T. 784; 38 W. R. 651; 6 Asp. M. C. 506.—C.A.

(Limitation of Liability.)

The Andalusian (1878) 47 L. J. Adm. 65; 3 P. D. 182; 39 L. T. 204; 27 W. R. 172; 4 Asp. M. C. 22.—ADM. See 61 & 62 Vict. c. 14, s. 1.

The Andalusian. See

The Brunel (1899) 69 L. J. P. 8; [1900] P. 24; 81 L. T. 500; 48 W. R. 243; 9 Asp. M. C. 10.—C.A.

The Creadon (1886) 54 L. T. 880; 5 Asp. M. C. 585.—BUTT, J., followed.

The Schwan, The Albano (1892) [1892] P. 419; 69 L. T. 34; 7 Asp. M. C. 347.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

The Wild Ranger (1862) Lush. 573; 32 L. J. Adm. 49; 9 Jur. (N.S.) 134; 7 L. T. 725; 11 W. R. 255.—ADM., followed.

The Leon (1881) 50 L. J. Adm. 59; 6 P. D. 149; 44 L. T. 613; 29 W. R. 916; 4 Asp. M. C. 404.—ADM.

Hill v. Andus (1855) 24 L. J. Ch. 229; 1 K. & J. 263; 3 Eq. R. 422; 3 W. R. 230.—WOOD, V.-C., not applied.

The Amalia (1863) 32 L. J. Adm. 191; Br. & L. 151; 1 Moore P. C. (N.S.) 471; 2 N. R. 533; 9 Jur. (N.S.) 1111; 8 L. T. 805; 12 W. R. 24.—P.C.; and The Normandy (1870) 39 L. J. Adm. 48; L. R. 3 A. & E. 152, 157; 23 L. T. 631; 18 W. R. 903.—ADM.

• Hill v. Andus, discussed.

James v. L. & S. W. Ry. (1872) 41 L. J. Ex. 186; L. R. 7 Ex. 287; 27 L. T. 382; 21 W. R. 25; 1 Asp. M. C. 226.—EX. CH.

WILLES, J.—So far as applies to proceedings in the Court of Chancery under these acts, I may observe that, in *Hill v. Andus*, the bill does not appear to have been dismissed, though it seems as if Wood, V.-C., was ready to dismiss the bill, because there was no admission of liability. But the decision was simply that no injunction ought to be granted to restrain the trial of a particular

cause. That is perfectly intelligible, because the Court of Chancery would have had no ordinary jurisdiction to try such a cause; but to treat it as a dismissal of the bill, and a refusal to interfere altogether, unless there was a general admission of liability in the first instance, would lead to the most serious consequences, because, except by means of the intervention of the Court of Chancery, there is no mode of arriving at the amount at which the limitation of liability is to be fixed, or of making the distribution of the amount when fixed. But whatever may be the jurisdiction of the Court of Chancery with respect to such matters, it is not material in this case to define that jurisdiction of the Court of Chancery, because the defendants have here first of all to establish the jurisdiction of the Court of Admiralty, before any difficulty has to be dealt with as to the mode by which that jurisdiction is to be enforced.—p. 187.

The Amalia (1863) 1 Moore P. C. (N.S.) 471; 32 L. J. Adm. 191; Br. & L. 151; 2 N. R. 533; 9 Jur. (N.S.) 1111; 8 L. T. 805; 12 W. R. 24.—P.C., *applied*.

Lloyd v. Guibert (1865) 35 L. J. Q. B. 74, 17; L. R. 1 Q. B. 115, 124; 6 B. & S. 100; 13 L. T. 602.—EX. CH., affirming 10 Jur. (N.S.) 949; 12 W. R. 953.—Q.B.

The Amalia, *dictum applied*.

The Halley (1868) 5 Moore P. C. (N.S.) 262; 37 L. J. Adm. 33; L. R. 2 P. C. 193; 18 L. T. 879; 16 W. R. 998.—P.C.

The Amalia, *followed*.

The Normandy (1870) 39 L. J. Adm. 48; L. R. 3 A. & E. 152; 23 L. T. 631; 18 W. R. 903.—ADM.

The Amalia, *applied*.

Ellis v. McHenry (1871) 40 L. J. C. P. 109, 115; L. R. 6 C. P. 228, 236; 23 L. T. 861; 19 W. R. 503.—C.P.

The Amalia, *explained*.

James v. L. & S. W. Ry. (1872) 41 L. J. Ex. 82, 90; L. R. 7 Ex. 187, 194; 26 L. T. 187.—EX. affirmed, 41 L. J. Ex. 186; L. R. 7 Ex. 287; 27 L. T. 382; 21 W. R. 25; 1 Asp. M. C. 226.—EX. CH.

The Amalia, *commented upon*.

The Karo (1887) 57 L. J. Adm. 8; 13 P. D. 24; 58 L. T. 188; 6 Asp. M. C. 245.—BUTT, J.

Straker v. Hartland (1864) 34 L. J. Ch. 122; 2 H. & M. 570; 10 Jur. (N.S.) 1143; 11 L. T. 622.—WOOD, V.-C.

The Northumbria (1869) 39 L. J. Adm. 3; L. R. 3 A. & E. 6, 11; 21 L. T. 681; 18 W. R. 188.—ADM.

The Amalia (No. 2) (1864) 5 N. R. 164, n.; 34 L. J. Adm. 21; 13 W. R. 111.—ADM., *explained*.

The Northumbria (1869) L. R. 3 A. & E. 6; 39 L. J. Adm. 3; 21 L. T. 681; 18 W. R. 188.

SIR R. PHILLIMORE.—Under the rule of *restitutio in integrum* the cargo-carrying vessel did not obtain interest from the date of the collision, because she received it in the shape of freight at the port of delivery. But where the amount of the liability is limited, and the sufferer does not receive full compensation, the reason which fixes the date of the probable arrival at the port of

delivery as the date from which interest shall run does not apply. In the case of *The Amalia* Dr. Lushington remarked: "Upon what grounds then was interest given? Interest was not given by reason of indemnification for the loss, for the loss was the damage which had accrued; but interest was given for this reason, namely, that the loss was not paid at the proper time. If a man is kept out of his money it is a loss in the common sense of the word, but a loss of a totally different description, and clearly to be distinguished from a loss which has occurred by damage done at the moment of collision." This case was cited as an authority for the opposite opinion, but in truth it is not so; the judge in that case gave all that was prayed, and no decision on this point was involved in his judgment.—p. 13.

Glaholm v. Barker (1866) 35 L. J. Ch. 259; L. R. 1 Ch. 223; 12 Jur. (N.S.) 82; 13 L. T. 653; 14 W. R. 296.—C.A., *followed*.

L. & S. W. Ry. v. James (1872) 42 L. J. Ch. 337, 341; L. R. 8 Ch. 241, 251; 28 L. T. 48; 21 W. R. 151; 1 Asp. M. C. 526.—C.A.

L. & S. W. Ry. v. James (1872) 42 L. J. Ch. 337; L. R. 8 Ch. 241; 28 L. T. 48; 21 W. R. 151; 1 Asp. M. C. 526.—C.A., *principle applied*.

Wahlberg v. Young (1876) 45 L. J. C. P. 783, 785; 24 W. R. 846; 4 Asp. M. C. 27, n.—C.P.D.

L. & S. W. Ry. v. James, *referred to*.

Doolan v. Midland Ry. (1877) 2 App. Cas. 792, 808; 37 L. T. 317; 25 W. R. 882; 3 Asp. M. C. 685.—H.L. (IR.).

The Northumbria (1869) 39 L. J. Adm. 3; L. R. 3 A. & E. 6; 21 L. T. 681; 18 W. R. 188.—ADM., *followed*.

Smith v. Kirby (1875) 1 Q. B. D. 131; 24 W. R. 207.—Q.B.D.; **The Gertrude**, **The Baron Aberdare** (1887) 56 L. J. Adm. 106; 12 P. D. 204, 206; 57 L. T. 883; 6 Asp. M. C. 224.—ADM., affirmed, 13 P. D. 105; 59 L. T. 251; 36 W. R. 616; 6 Asp. M. C. 315.—C.A.; **The Grathic** (1897) 66 L. J. P. 93; [1897] P. 178; 76 L. T. 534; 45 W. R. 631.—BARNES, J.

The Northumbria, *applied*.

The Kate (1899) 68 L. J. P. 41; [1899] P. 165, 173; 80 L. T. 423; 47 W. R. 669; 8 Asp. M. C. 539.—JEUNE, P.

The Northumbria (No. 2) (1869) 39 L. J. Adm. 24; L. R. 3 A. & E. 24; 21 L. T. 683; 18 W. R. 356.—ADM., *referred to*.

The Normandy (1870) 39 L. J. Adm. 48; L. R. 3 A. & E. 152, 157; 23 L. T. 631; 18 W. R. 903.—ADM.

The Northumbria (No. 2), *questioned*.

James v. L. & S. W. Ry. (1872) L. R. 7 Ex. 287; 41 L. J. Ex. 186; 27 L. T. 382; 21 W. R. 25; 1 Asp. M. C. 226.—EX. CH.

BLACKBURN, J.—With regard to *The Northumbria*, I at first thought it rightly decided, but I feel bound to say that Mr. Harrison's argument has shaken my opinion, and I have considerable doubt now whether the learned judge arrived at a correct conclusion. I had thought that when a suit was commenced money paid into Court in lieu of bail might well be regarded as "proceeds;" but, as Mr. Harrison pointed out, the money is simply paid in by way of security to

pay the sum claimed in the particular suit. The difference is very material. Because if the ship were under arrest, or the proceeds of the ship, another claimant might attach them, but he could not attach a sum paid in lieu of bail to answer a particular claim. I therefore feel much doubt about that case, but I do not decide the question, because it is not necessary to do so.—p. 295.

Smith v. Kirby (1875) 1 Q. B. D. 131; 24 W. R. 207.—Q.B.D., *applied*.

The *Gertrude*, The *Baron Aberdare* (1887) 56 L. J. Adm. 106; 12 P. D. 204, 206; 57 L. T. 883; 6 Asp. M. C. 224.—ADM., *affirmed*, 13 P. D. 105; 59 L. T. 251; 36 W. R. 616; 6 Asp. M. C. 315.—C.A.; The *Crathie* (1897) 66 L. J. Adm. 93; [1897] P. 178; 21 L. T. 681; 18 W. R. 188.—BARNES, J.

Rankine v. Raschen (1877) 4 Ct. of Sess. Cas. (4th series) 724.—CT. OF SESS. (SC.). *followed*.

The *Crathie* (1897) 66 L. J. Adm. 93; [1897] P. 178; 76 L. T. 534; 45 W. R. 631.—BARNES, J.

The Obey (1866) L. R. 1 A. & E. 102; 12 Jur. (N.S.) 817.—ADM., *applied*.

The *Empusa* (1879) 48 L. J. Adm. 36; 5 P. D. 6; 41 L. T. 383; 28 W. R. 263; 4 Asp. M. C. 185.—ADM.

The Warkworth (1884) 53 L. J. Adm. 65; 9 P. D. 145; 51 L. T. 558; 33 W. R. 112; 5 Asp. M. C. 326.—C.A., *not applied*.

Carmichael v. Liverpool Sailing Ship Owners' Mutual Indemnity Association (1887) 56 L. J. Q. B. 428; 19 Q. B. D. 242, 246; 57 L. T. 550; 35 W. R. 793; 6 Asp. M. C. 184.—C.A.

The Warkworth, *explained and applied*.

Canada Shipping Co. v. British Shipowners' Association (1889) 58 L. J. Q. B. 343; 22 Q. B. D. 727; 60 L. T. 863; 6 Asp. M. C. 388.—CHARLES, J., *affirmed*, 58 L. J. Q. B. 462; 23 Q. B. D. 342; 61 L. T. 312; 38 W. R. 87; 6 Asp. M. C. 422.—C.A.

Burrell v. Simpson (1876) 4 Ct. of Sess. Cas. (4th series) 177, *explained*.

The *Franconia* (1878) 39 L. T. 57; 3 P. D. 164; 27 W. R. 128; 4 Asp. M. C. 1.—C.A.

JAMES, L.J.—First of all, with regard to the case of *Burrell v. Simpson*, which has been cited to us as decided by the Scotch Court—a Court of co-ordinate jurisdiction on the Act of Parliament in question, which Act applies to all parts of the United Kingdom—that case was also cited to the Court below, and upon it apparently the learned judge proceeded. When that case, however, is considered, it is really no authority, because the point which has been raised in this case as to the difference between a crew space between decks and one above the upper deck was never before the Court at all. It was no matter of argument before them, and was not referred to in any way in their judgment, and I should rather gather myself from the absence of all reference to it and from the nature of the ship that in point of fact the crew space there was a crew space which was clearly within the section of the original Act [sect. 21 of the Merchant Shipping Act, 1854], and that the only point really in dispute as to the tonnage was, whether in a steamship

the gross tonnage was to be taken with or without the deduction for crew space in any event, that is, was it to be the total capacity of the ship or the register tonnage, with the addition of the amount of the deduction on account of engine-room? That seemed to me to be the only point there—that the gross tonnage on a steamer, whatever it is, would have been the same thing as the entire tonnage for registration had she been a sailing ship; that there was in reality no question before the Court as to the construction of the Act of Parliament.—p. 57.

The Franconia, 38 L. T. 719; 26 W. R. 743.—ADM.; *reversed*, (1878) 3 P. D. 164; 39 L. T. 57; 27 W. R. 128; 4 Asp. M. C. 1.—C.A.

The Franconia, *explained*.

The *Palermo* (1884) 10 P. D. 21; 54 L. J. P. 46; 52 L. T. 390; 33 W. R. 643.

BUTT, J.—On behalf of the defendants it was contended that in the case of *The Franconia* the Court of Appeal had in effect held that the owner of a foreign ship was not entitled to make these deductions (under the Merchant Shipping Act, 1854), unless all the provisions of the Merchant Shipping Act, 1867, had been complied with. Having considered the case of *The Franconia*, I do not understand it to decide what was contended for by the defendants' counsel. It decided not that the German ship in that action was not entitled to deduct from the registered tonnage the spaces allotted to the crew which were inclosed, and which were above the upper deck, that being the deduction contemplated by the Act of 1854, but that she was not entitled to further deductions provided by the more recent Act of 1867, unless she had in all respects complied with the requirements of the Act.—p. 23.

The Franconia, *distinguished*.

The *Zanzibar* (1892) 61 L. J. Adm. 81; [1892] P. 233; 68 L. T. 297; 40 W. R. 702; 7 Asp. M. C. 258.—JEUNE, J.

The Franconia, *explained*.

The *Petrel* (1893) 62 L. J. Adm. 92; [1893] P. 320; 1 R. 651; 70 L. T. 417; 7 Asp. M. C. 434.—JEUNE, P.

The Franconia, *followed*.

The *Cathay* (1900) 69 L. J. P. 89; 82 L. T. 823; 9 Asp. M. C. 100.—BARNES, J.

The Palermo (1884) 54 L. J. Adm. 46; 10 P. D. 21; 52 L. T. 390; 33 W. R. 643;

5 Asp. M. C. 369.—BUTT, J., *applied*.

The *Zanzibar* (1892) 61 L. J. Adm. 81; [1892] P. 233; 68 L. T. 297; 40 W. R. 702; 7 Asp. M. C. 258.—C.A.; The *Petrel* (1893) 62 L. J. Adm. 92; [1893] P. 320; 1 R. 651; 70 L. T. 417; 7 Asp. M. C. 434.—JEUNE, P.

The Palermo, *followed*.

The *Cathay* (1900) 69 L. J. P. 89; 82 L. T. 823; 8 Asp. M. C. 100.—BARNES, J.

The Umbilo (1890) 60 L. J. Adm. 7; [1891]

P. 118; 64 L. T. 328; 39 W. R. 336; 7 Asp. M. C. 26.—HANNEN, P., *distinguished*.

The *Zanzibar* (1892) 61 L. J. Adm. 81; [1892] P. 233; 68 L. T. 297; 40 W. R. 702; 7 Asp. M. C. 258.—JEUNE, J. *And see post*, col. 3491.

The Umbilo (supra), explained.

The Petrel (1893) 62 L. J. Adm. 92; [1893] P. 320; 1 R. 651; 70 L. T. 417; 7 Asp. M. C. 434.—JEUNE, P.

The Umbilo, distinguished.

The Pilgrim (1895) 64 L. J. P. 78; [1895] P. 117; 11 R. 718.—BRUCE, J.

The Zanzibar (1892) 61 L. J. P. 81; [1892]

P. 233; 68 L. T. 297; 40 W. R. 702; 7

Asp. M. C. 258.—JEUNE, J., *considered.*

The Cordilleras (1893) 73 L. J. P. 13; [1904] P. 90; 89 L. T. 673; 9 Asp. M. C. 506.—BARNES, J.

The Belcairn (1885) 55 L. J. P. 3; 10 P. D.

161; 53 L. T. 686; 34 W. R. 55; 5 Asp.

M. C. 503.—C.A., *distinguished.*

The Kronprinz (or The Ardandhu) (1887) 56 L. J. Adm. 49; 12 App. Cas. 256; 56 L. T. 345; 35 W. R. 783; 6 Asp. M. C. 124.—H.L. (E.). LORDS HALSBURY, L.C., BRAMWELL, HERSHELL and MACNAGHTEN.

LORD BRAMWELL.—In *The Belcairn*, what was really decided was that the judgment was a bar to any further claim being made, or to the same claim being made over again; that the judgment having been pronounced by the Court it was *res judicata*, and that the claim was gone. Of course, therefore, it could not be set up against the fund. That was the distinction between that case and this; there the claim had ceased to exist, here it has not.—p. 50.

The Ardandhu (1886) 55 L. J. P. 9; 11 P. D. 40; 54 L. T. 819.—C.A.; *affirmed nom.*

The Kronprinz (1887) 56 L. J. P. 49; 12 App. Cas. 256; 56 L. T. 345; 35 W. R. 783; 6 Asp. M. C. 124.—H.L. (E.).

*(Tug and Tow.)**The Gleadon* (1861) 14 Moore P. C. 97;

Irish. 168; 4 L. T. 157.—P.C., *distinguished.*

Union Steamship Co. v. The Aracan; The American, and The Syria (1874) L. R. 6 P. C. 127; 43 L. J. Adm. 30; 31 L. T. 42; 22 W. R. 927; 2 Asp. M. C. 350.—P.C.

SIR ROBERT COLLIER (for J.C.).—The question remains whether *The Syria*, though free from blame in fact, must nevertheless be held to blame by intendment of law. The decision of the learned judge upon this point appears to be based upon the principle shortly stated by Lord Kingsdown, in the passage which has been before cited as that in which *The Cleadon* was decided, viz., that the motor power was in the tug, the governing power in the ship towed. The judge of the Admiralty Court applying this principle to the present case held that *The American* and *The Syria* constituted one vessel in intendment of law. This is no doubt an accurate representation of the relations usually subsisting in this country between the tug and the tow.—p. 132. . . . The master of *The American* appears to have undertaken to tow *The Syria* under circumstances quite exceptional. Their lordships collect that he determined to take home *The Syria* partly because he thought it his duty to his employers, who owned both vessels, partly with a view to obtain salvage from the owners of *The Syria's* cargo

(which he succeeded in doing). There is no evidence of his having been hired by the captain of *The Syria*, or having acted in any way under the captain of *The Syria's* control. On the contrary, it would appear that the governing power was wholly with *The American*. Under these circumstances their lordships are of opinion that the principle on which *The Cleadon* was decided does not apply to this case.—p. 133.

The Cleadon, followed.

The Englishman and The Australia (1894) 63 L. J. P. 133; [1894] P. 239; 70 L. T. 846; 43 W. R. 62.—JEUNE, P.

The Duke of Sussex (1841) 1 W. Rob. 270;

1 Not. of Cas. 161.—ADM., *referred to.*

The Energy (1870) 39 L. J. Adm. 25; L. P. 3 A. & E. 48, 52; 23 L. T. 601; 18 W. R. 1009.—ADM.; *The Mary* (1879) 48 L. J. Adm. 66; 5 P. D. 14, 17; 41 L. T. 351; 28 W. R. 95; 4 Asp. M. C. 183.—ADM.

The American, and The Syria; Union Ship Co. v. Owners of the Aracan, 43 L. J. Adm. 25; L. R. 4 A. & E. 226; 22 W. R. 845.—ADM.; *reversed*, (1874) 43 L. J. Adm. 30; L. R. 6 P. C. 127; 31 L. T. 42; 22 W. R. 927; 2 Asp. M. C. 350.—P.C.

The American and The Syria, distinguished but rule applied.

The Niobe (1887) 57 L. J. Adm. 33; 13 P. D. 55, 59; 59 L. T. 257; 36 W. R. 812; 6 Asp. M. C. 300.—HANNEN, P.

The American and the Syria, distinguished.

The Englishman and The Australia (1894) 63 L. J. Adm. 133; [1894] P. 239; 70 L. T. 846; 43 W. R. 62.—JEUNE, P.

The Mary (1879) 48 L. J. Adm. 66; 5 P. D.

14; 41 L. T. 351; 28 W. R. 95; 4 Asp.

M. C. 183.—ADM., *distinguished.*

The Englishman and The Australia (1894) 63 L. J. Adm. 133; [1894] P. 239; 70 L. T. 846; 43 W. R. 62.—JEUNE, P.

The Singuasi (1880) 50 L. J. Adm. 5; 5

P. D. 241; 43 L. T. 768; 4 Asp. M. C.

383.—ADM.; *The Niobe* (1888) 57 L. J.

Adm. 33; 13 P. D. 55; 59 L. T. 257;

36 W. R. 812; 6 Asp. M. C. 300.—

HANNEN, P., *followed.*

The Englishman and The Australia (1894) 63 L. J. Adm. 133; [1894] P. 239; 70 L. T. 846; 43 W. R. 62.—JEUNE, P.

The Niobe, applied.

The Morgengry and The Blackcock (1899) 69 L. J. P. 3; [1900] P. 1, 10; 81 L. T. 417; 48 W. R. 121; 8 Asp. M. C. 591.—C.A.

The Avon and Thomas Joliffe (1890) [1891]

P. 7; 63 L. T. 712; 39 W. R. 176; 6 Asp.

M. C. 605.—BUTT, J., *followed.*

The Englishman and The Australia (1894) 63 L. J. P. 133; [1894] P. 239; 70 L. T. 846; 43 W. R. 62.—JEUNE, P.

The Avon and Thomas Joliffe, inapplicable.

The Frankland (1901) 70 L. J. P. 42; [1901] P. 161, 166; 84 L. T. 395; 9 Asp. M. C. 196.—JEUNE, J.

The Englishman and The Australia (1894) 63 L. J. P. 133; [1894] P. 239; 70 L. T. 846; 43 W. R. 62.—JEUNE, P., *distinguished*.

The Morgengry (1899) 69 L. J. P. 3; [1900] P. 1; 81 L. T. 417; 48 W. R. 121; 8 Asp. M. C. 591.—C.A. SMITH and WILLIAMS, L.JJ.

The Englishman and The Australia (No. 2) (1894) 64 L. J. Adm. 74; (1895) P. 212; 11 R. 757; 72 L. T. 203; 43 W. R. 670; 7 Asp. M. C. 605.—BRUCE J., *referred to*.

The Frankland (1901) 70 L. J. P. 42; [1901] P. 161; 84 L. T. 395; 9 Asp. M. C. 196.—JEUNE, P.

The Julia, Bland v. Ross (1860) 14 Moore P. C. 210; Lush. 224.—P.C., *confirmed*.
General Iron Screw Co. v. Moss (1861) 15 Moore P. C. 122.—P.C.

The Julia, approved and adopted.

The Alice (1868) 5 Moore P. C. (N.S.) 333; 38 L. J. Adm. 5; L. R. 2 P. C. 245; 19 L. T. 678; 17 W. R. 209.—P.C.; **The Energy** (1870) 39 L. J. Adm. 25; L. R. 3 A. & E. 48; 23 L. T. 601; 18 W. R. 1009.—ADM.; **The Esk and The Njord** (1870) 7 Moore P. C. (N.S.) 276; L. R. 3 P. C. 437; 24 L. T. 167; 1 Asp. M. C. 1.—P.C.; **Smith v. St. Lawrence Tow Boat Co.** (1873) L. R. 5 P. C. 308; 28 L. T. 885; 21 W. R. 569; 2 Asp. M. C. 41.—P.C.

The Julia, not applied.

The Glaunibanta and The Transit (1876) 1 P. D. 283; 34 L. T. 934; 24 W. R. 1033; 3 Asp. M. C. 339.—C.A.

The Julia, approved.

Spaight v. Tedcastle (1881) 6 App. Cas. 217; 44 L. T. 589; 29 W. R. 761; 4 Asp. M. C. 406.—H.L. (E.).

The Julia, referred to.

The Altair (1897) 66 L. J. P. 42; [1897] P. 105; 76 L. T. 263; 45 W. R. 622; 8 Asp. M. C. 224.—BARNES, J.

Smith v. St. Lawrence Tow Boat Co. (1873)

L. R. 5 P. C. 308; 28 L. T. 885; 21 W. R. 569.—P.C., *explained*.

Spaight v. Tedcastle (1881) 6 App. Cas. 217, 222; 44 L. T. 589; 29 W. R. 761; 4 Asp. M. C. 406.—H.L. (E.).

Smith v. St. Lawrence Tow Boat Co., followed.

The Altair (1897) 66 L. J. P. 42; [1897] P. 105; 76 L. T. 263; 45 W. R. 622; 8 Asp. M. C. 224.—BARNES, J.

Spaight v. Tedcastle (1881) 6 App. Cas. 217;

44 L. T. 589; 29 W. R. 761; 4 Asp. M. C. 406.—H.L. (E.), *observations applied*.

The Margaret, Cayzer v. Carron Co. (1884) 54 L. J. Adm. 18; 9 App. Cas. 873, 886; 52 L. T. 361; 33 W. R. 281; 5 Asp. M. C. 371.—H.L. (E.).

Spaight v. Tedcastle, considered.

The Bernina (1887) 56 L. J. P. 17; 12 P. D. 53, 76; 56 L. T. 258; 35 W. R. 314.—C.A., *affirmed*, H.L. (E.) (*supra*, col. 1953).

Spaight v. Tedcastle, applied.

The Niobe (1888) 57 L. J. Adm. 33; 13 P. D. 55, 59; 59 L. T. 257; 36 W. R. 812; 6 Asp. M. C. 300.—HANNEN, P.

Spaight v. Tedcastle, referred to.

The Altair (1897) 66 L. J. P. 42; [1897] P. 105; 76 L. T. 263; 45 W. R. 622; 8 Asp. M. C. 224.—BARNES, J.

The Quickstep (1890) 59 L. J. Adm. 65; 15

P. D. 196; 63 L. T. 713; 6 Asp. M. C. 603.—HANNEN, P. and BUTTS, J. *See*

The Snark (1900) 69 L. J. Adm. 41; [1900] P. 105; 82 L. T. 42; 48 W. R. 279; 9 Asp. M. C. 50.—C.A.

(*Foreign Ships*).

The M. Moxham, 45 L. J. Adm. 36; 1 P. D. 43; 33 L. T. 463; 24 W. R. 283.—ADM.; *reversed*, (1876) 46 L. J. Adm. 17; 1 P. D. 107; 34 L. T. 559; 24 W. R. 650.—C.A.

The M. Moxham, distinguished.

Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co. (1883) 52 L. J. Q. B. 220; 10 Q. B. D. 521, 536; 48 L. T. 546; 31 W. R. 445; 47 J. P. 260.—C.A.

The M. Moxham, considered.

British South Africa Co. v. Companhia de Moçambique (1893) 63 L. J. Q. B. 70; [1893] A. C. 602; 6 R. 1; 69 L. T. 604.—H.L. (E.).

The M. Moxham, explained.

British Wagon Co. v. Gray (1895) 65 L. J. Q. B. 75; [1896] 1 Q. B. 35; 73 L. T. 498; 44 W. R. 113.—C.A.

The M. Moxham, applied.

Machado v. Fontes (1897) 66 L. J. Q. B. 542; [1897] 2 Q. B. 231; 76 L. T. 588; 45 W. R. 565.—C.A. LOPES and RIGBY, L.JJ.

The M. Moxham, approved.

Carr v. Francis (1901) 71 L. J. K. B. 361 [1902] A. C. 176, 184; 85 L. T. 144; 50 W. R. 257.—H.L. (E.).

Smith v. Condry (1843) 1 How. Rep. (U. S.)

28, *observed upon*.

The Halley: Liverpool, Brazil, & Steam Navigation Co. v. Benham (1868) 37 L. J. Adm. 33; L. R. 2 P. C. 193; 18 L. T. 879; 16 W. R. 998; 5 Moore P. C. (N.S.) 263.—P.C.

The Carl Johan (1821) *cited*, 1 Hagg. 113.—

ADM., *referred to*.

The Girolamo (1834) 3 Hagg. 186.—ADM.; **The Halley** (1867) 37 L. J. Adm. 1, 6; L. R. 2 A. & E. 3, 13; 17 L. T. 329.—ADM., (*reversed*, P. C., *supra*); **Reg. v. Keyn** (1876) 46 L. J. M. C. 17, 95; 2 Ex. D. 63, 225; 13 Cox C. C. 403.—C.C.R.

Cope v. Doherty (1858) 27 L. J. Ch. 600;

2 De G. & J. 614; 4 Jur. (N.S.) 699; 5 W. R. 695, *referred to*.

Reg. v. Keyn (1876) 46 L. J. M. C. 17, 54; 2 Ex. D. 63, 139; 13 Cox C. C. 403.—C.C.R.

The Saxonia (1861) Lush. 410; 15 Moore

P. C. 262; 31 L. J. Adm. 201; 8 Jur. (N.S.) 315; 10 W. R. 431.—P.C., *explained*

and distinguished.

Reg. v. Keyn (1876) 46 L. J. M. C. 17, 32; 2 Ex. D. 63, 93; 13 Cox C. C. 403.—C.C.R.

The Zollverein (1856) Swabey 96; 2 Jur.

(N.S.) 429; 4 W. R. 355.—ADM., *applied*.

The Halley (1867) 37 L. J. Adm. 1; L. R. 2 A. & E. 3; 16 W. R. 234.—ADM., *reversed*,

P. C. (*supra*, col. 3407); Reg. v. Keyn (1876) 46 L. J. M. C. 17, 64; 2 Ex. D. 63, 160; 13 Cox, C. C. 443.—C.C.R.; The Leon (1881) 50 L. J. Adm. 59; 6 P. D. 149; 44 L. T. 613; 29 W. R. 916; 4 Asp. M. C. 404.—ADM.

The Zollverein (*supra*), *dicta applied*.

Adam v. British and Foreign Steamship Co. (1893) 67 L. J. Q. B. 844; [1898] 2 Q. B. 430; 79 L. T. 31.—DARLING, J.

Schooner Exchange v. M'Faddon (1812) 7 Cranch 116.—AMER. *adopted*.

The Charkieh (1873) 42 L. J. Adm. 17, 30; L. R. 4 A. & E. 59, 89; 28 L. T. 513; 1 Asp. M. C. 581.—ADM.

Schooner Exchange v. M'Faddon, *dictum adopted*.

Reg. v. Keyn (1876) 46 L. J. M. C. 17, 20; 2 Ex. D. 63, 71; 13 Cox C. C. 403.—C.C.R.

Gladstone v. Musurus Bey (1862) 32 L. J. Ch. 155; 1 H. & M. 495; 9 Jur. (N.S.) 71; 7 L. T. 477; 11 W. R. 180.—WOOD, V.-C. *discussed and distinguished*.

Smith v. Weguelin (1869) 38 L. J. Ch. 465; L. R. 8 Eq. 198, 214; 20 L. T. 724; 17 W. R. 904.—M.R.

Gladstone v. Musurus Bey, *adopted*.

Lariviere v. Morgan (1872) L. R. 7 Ch. 555, n.; 26 L. T. 340.—V.-C., affirmed, 41 L. J. Ch. 746; L. R. 7 Ch. 550; 26 L. T. 859; 20 W. R. 731.—L.C., the latter decision reversed, H.L. (E.). See *ante*, vol. i. col. 1363.

Gladstone v. Musurus Bey, *applied*.

The Cherkieh (1873) 42 L. J. Adm. 17, 35; L. R. 4 A. & E. 59, 98; 28 L. T. 513; 1 Asp. M. C. 581.—ADM.

Gladstone v. Musurus Bey, *distinguished*.

Twycross v. Dreyfus (1877) 46 L. J. Ch. 510, 514, n.; 5 Ch. D. 605, 614; 36 L. T. 752.—V.-C., affirmed, C.A.

(Compulsory Pilotage.)

Thames Conservators v. Hall (1868) 37 L. J. C. P. 163; L. R. 3 C. P. 415; 18 L. T. 361; 16 W. R. 971.—C.P., *observations adopted*.

Dodds v. Shepherd (1876) 45 L. J. Ex. 457; 1 Ex. D. 75; 34 L. T. 358; 24 W. R. 322.—EX. D.

Thames Conservators v. Hall, *not applied*.

Parsons v. Tinling (1877) 2 C. P. C. 119, 123; 46 L. J. C. P. 230; 35 L. T. 851; 25 W. R. 255.—C.P.D.

Thames Conservators v. Hall, *observations applied*.

Williams, In re, Jones v. Williams (1887) 57 L. J. Ch. 264; 36 Ch. D. 573, 578; 57 L. T. 756; 36 W. R. 34.—NORTH, J.

Bennet v. Moita (1817) 7 Taunt. 258.—C.P., *held overruled*.

Rodrigues v. Melhuish (1854) 10 Ex. 110; 24 L. J. Ex. 26; 2 W. R. 518.—EX.

PARKE, B.—Assuming the obligation to take a pilot on board to be cast upon the captain by this Act of Parliament, on the ground that the payment of the rates is in the nature of a penalty.

the owners must show that at the time the vessel was proceeding to sea. They must also show that the act was exclusively that of the pilot. In *Bennet v. Moita* it was held that where a pilot is on board an injury occasioned by negligence in the navigation of the vessel *prima facie* is attributable to the pilot, and that he, and not the owner, is responsible for it, but this doctrine was overruled by a case before the Privy Council of *Hammond v. Rogers* (*infra*, col. 3428).—p. 115.

Rodrigues v. Melhuish, *applied*.

The Maria (1867) L. R. 1 A. & E. 358, 361; 16 L. T. 717; 15 W. R. 1113.—ADM.; The Woburn Abbey (1869) 38 L. J. Adm. 28; 20 L. T. 621.—ADM.

Rodrigues v. Melhuish, *distinguished and dicta applied*.

Wood v. Smith, The City of Cambridge (1874) 43 L. J. Adm. 11; L. R. 5 P. C. 451, 456; 30 L. T. 439; 22 W. R. 578.—P.C.

Rodrigues v. Melhuish, *followed*.

The Cachapool (1881) 7 P. D. 217; 46 L. T. 171; 4 Asp. M. C. 502.—PHILLIMORE, SIR R.

Rodrigues v. Melhuish, *considered*.

The Servia, The Corinthia (1898) 67 L. J. P. 36; [1898] P. 36; 78 L. T. 54; 46 W. R. 492; 8 Asp. M. C. 353.—BARNES, J.

The Gipse King (1847) 2 W. Rob. 537.—ADM., *adopted*.

The City of Cambridge, Wood v. Smith (1874) 43 L. J. Adm. 11; L. R. 5 C. P. 451, 460; 30 L. T. 439; 22 W. R. 578.—P.C.

The Gipse King, *followed*.

The Margaret (1880) 50 L. J. Adm. 3; 5 P. D. 238; 42 L. T. 663.—ADM., reversed, C.A. (*ante*, col. 3398).

The Gipse King, *applied*.

The Rigborg's Minde (1853) 52 L. J. Adm. 74; 8 P. D. 132; 49 L. T. 232; 5 Asp. M. C. 123.—C.A.

The Gipse King and The Rigborgs Minde, *applied*.

The Monte Rosa (1892) 62 L. J. Adm. 20; [1893] P. 23; 1 R. 557; 68 L. T. 299; 41 W. R. 304; 7 Asp. M. C. 326.—BARNES, J.

The Killarney (1862) 30 L. J. Adm. 41; Lush. 427; 6 L. T. 908.—ADM., *referred to*.

General Steam Navigation Co. v. British Colonial Steam Navigation Co. (1869) 38 L. J. Ex. 97; L. R. 4 Ex. 238, 247; 20 L. T. 581; 17 W. R. 741.—EX. CH.

The Killarney, *followed*.

The Hankow (1879) 48 L. J. Adm. 29; 4 P. D. 197; 40 L. T. 335; 4 Asp. M. C. 97.—SIR R. PHILLIMORE

The Annapolis, The Johanna Stoll (1861) Lush. 295; 30 L. J. Adm. 241; 4 L. T. 417.—ADM., *applied*.

General Steam Navigation Co. v. British and Colonial Steam Navigation Co. (1869) 38 L. J. Ex. 97; L. R. 4 Ex. 238, 247; 20 L. T. 581; 17 W. R. 741.—EX. CH.; The Woburn Abbey (1869) 38 L. J. Adm. 28; 20 L. T. 621.—ADM.

The Lion (1869) 38 L. J. P. C. 51; L. R. 2 P. C. 525, 532; 6 Moore P. C. (N.S.) 163; 21 L. T. 41; 17 W. R. 993.—P.C.; Reg. v. Keyn (1876) 46 L. J. M. C. 17, 92; 2 Ex. D. 63, 219; 13 Cox C. C. 403.—C.C.R.; The Princeton (1878) 47 L. J. Adm. 33; 3 P. D. 90, 95; 38 L. T. 260; 3 Asp. M. C. 562.—ADM.

The Woburn Abbey (1869) 38 L. J. Adm. 28; 20 L. T. 621; 3 Asp. M. C. (O.S.) 240.—ADM., *applied*.

The Princeton (1878) 47 L. J. Adm. 33; 3 P. D. 90, 95; 38 L. T. 260; 3 Asp. M. C. 562.—ADM.

The Woburn Abbey and The Princeton (*supra*), *considered*.

The Servia, The Carinthia (1898) 67 L. J. P. 36; [1898] P. 36; 78 L. T. 54; 46 W. R. 492; 8 Asp. M. C. 353.—BARNES, J.

General Steam Navigation Co. v. British and Colonial Steam Navigation Co. (1869) 38 L. J. Ex. 97; L. R. 4 Ex. 238; 20 L. T. 581; 17 W. R. 741.—EX. CH., *adopted*.

The Lion (1869) 38 L. J. Adm. 51, 54; L. R. 2 P. C. 525, 531; 6 Moore P. C. (N.S.) 163; 21 L. T. 41; 17 W. R. 993.—P.C. (See extract, *infra*, col. 3431.)

General Steam Navigation Co. v. British and Colonial Steam Navigation Co., *not applied*.

The Hankow (1879) 48 L. J. Adm. 29; 4 P. D. 197; 40 L. T. 335; 4 Asp. M. C. 97.—ADM.

General Steam Navigation Co. v. British and Colonial Steam Navigation Co., *explained and distinguished*.

The Guy Mannering (1882) 51 L. J. Adm. 57; 7 P. D. 132; 46 L. T. 905; 30 W. R. 835; 4 Asp. M. C. 553.—C.A.

General Steam Navigation Co. v. British and Colonial Steam Navigation Co., *followed*.

The Charlton (1895) 11 R. 825; 73 L. T. 49; 8 Asp. M. C. 29.—C.A.

General Steam Navigation Co. v. British and Colonial Steam Navigation Co. and The Charlton, *distinguished*.

The Servia, The Carinthia (1898) 67 L. J. P. 36; [1898] P. 36; 78 L. T. 54; 46 W. R. 492; 8 Asp. M. C. 353.—BARNES, J.

The City of Cambridge, Wood v. Smith (1874) 43 L. J. Adm. 11; L. R. 5 P. C. 451; 30 L. T. 439; 22 W. R. 578.—P.C., *applied*.

The Princeton (1878) 47 L. J. Adm. 33; 3 P. D. 90; 38 L. T. 260; 3 Asp. M. C. 562.—ADM.

The City of Cambridge, *considered*.

The Servia, The Carinthia (1898) 67 L. J. P. 36; [1898] P. 36; 78 L. T. 54; 46 W. R. 492; 8 Asp. M. C. 353.—BARNES, J.

The Guy Mannering (1882) 51 L. J. Adm. 57; 7 P. D. 132; 46 L. T. 905; 30 W. R. 835; 4 Asp. M. C. 553.—C.A., *adopted*.

The Augusta (1887) 57 L. T. 326; 6 Asp. M. C. 161.—C.A.; and The Agnes Otto (1887) 56 L. J.

Adm. 45; 12 P. D. 56; 56 L. T. 746; 35 W. R. 550; 6 Asp. M. C. 119.—BUTT, J.

The Cachapool (1881) 7 P. D. 217; 46 L. T. 171; 4 Asp. M. C. 502.—ADM., *considered*.

The Servia, The Carinthia (1898) 67 L. J. P. 36; [1898] P. 36; 78 L. T. 54; 46 W. R. 492; 8 Asp. M. C. 353.—BARNES, J.

The Servia, The Carinthia (*supra*), *considered*.

The Mercedes de Larrinaga (1904) 73 L. J. P. 65; [1904] P. 215; 90 L. T. 520.—BARNES, J.

The Diana (1842) 4 Moore P. C. 11.—P.C., *principle applied*.

The Iona (1867).—P.C. (*post*, col. 3429).

The Christiansa, Hammond v. Rogers (1850) 7 Moore P. C. 160.—P.C., *applied*.

Rodrigues v. Melhuish (1854) 10 Ex. 110; 24 L. J. Ex. 26; 2 W. R. 518.—EX. (see extract, *ante*, col. 3425); The Argo (1859) Swab. 462.—ADM.; The Iona (1867) 4 Moore P. C. (N.S.) 336; L. R. 1 P. C. 426, 432; 16 L. T. 158.—P.C.; The Velasquez (1867) 36 L. J. Adm. 19, 21; L. R. 1 P. C. 494, 498; 4 Moore P. C. (N.S.) 426; 16 L. T. 777; 16 W. R. 89.—P.C.

The Christiansa, *recognized and approved*.

Wood v. Smith, The City of Cambridge (1874) L. R. 5 P. C. 451; 43 L. J. Adm. 11; 30 L. T. 439; 22 W. R. 578.—P.C.

SIR MONTAGUE E. SMITH (for the Court).—The relative duties of the crew and pilot were discussed in two cases, which are to be found in the 7th Moore. The first is *The Christiansa*. In that case Mr. Baron Parke, in giving the judgment of the committee, says, "The duties of the master and the pilot are in many respects clearly defined. Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiencies of the ship and her equipments, the competency of the master and crew, and their obedience to the orders of the pilot in everything that concerns his duty, and, under ordinary circumstances, we think that his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only . . . The pilot had unquestionably the sole direction of the vessel in those respects where his local knowledge is presumably required. The direction, the course, the manœuvres of the vessel when sailing belong to him, and the Trinity Masters, therefore, rightly decided that the neglect to set the staysail and jib, after *The Christiansa* was driven from her anchorage, was the fault of the pilot alone. It was also his sole duty to select the proper anchorage place, and mode of anchoring, and preparing for anchoring, as was held to be clear in the case of *The Gipsy King* (*supra*, col. 3426)." And in *The Lochlibo* (*infra*, col. 3429), Lord Kingsdown in giving the judgment of the committee in that case, it being a question whether the vessel ought to have sailed through the Downs, says: "It was contended at the bar that in this case the impropriety of sailing through the Downs was so manifest that the captain ought to have refused, in spite of the pilot's opinion, to permit the ship to proceed, but we cannot assent to

this. It would be very dangerous to hold that there can be any divided authority in the ship with reference to the same subject; and whether the ship was to anchor or to proceed was a matter which we think belonged exclusively to the pilot to decide."—p. 459.

The Lochlibo, 3 W. Rob. 310.—ADM.; *reversed on the facts*, (1851) 7 Moo. P. C. 427.—P.C.

The Lochlibo (*supra*, in P.C.), *approved*.

Wood v. Smith, *The City of Cambridge* (1874) 43 L. J. Adm. 11; L. R. 5 P. C. 451; 30 L. T. 439; 22 W. R. 578.—P.C. See extract, *supra*, col. 3428.

The Lochlibo, *approved*.

The Oakfield (1886) 11 P. D. 34; 55 L. J. Adm. 11; 54 L. T. 578; 34 W. R. 687; 5 Asp. M. C. 575.—HANNEN, P.

HANNEN, P.—Thus the question remains whether the part played by the captain was such an interference with the pilot as to take away the responsibility. It was pointed out by Dr. Lushington in the *The Lochlibo* that a suggestion made to the pilot does not take away the responsibility from him. It rests with the pilot to form an opinion in regard to the captain's suggestion, and it is only when the captain gives an order contrary to that of the pilot that he takes the responsibility for the manoeuvres on himself and removes it from the pilot.—p. 36.

The Argo (1859) Swabey 462.—ADM., *applied*.

The Monte Rosa (1892) 62 L. J. Adm. 20; [1893] P. 23; 1 R. 557; 68 L. T. 299; 41 W. R. 304; 7 Asp. M. C. 326.—BARNES, J.

The Bilbao (1860) Lush. 149; 3 L. T. 338.—ADM.

Adopted, *Everard v. Kendall* (1870) 39 L. J. C. P. 234, 237; L. R. 5 C. P. 428, 434; 22 L. T. 408; 18 W. R. 892.—C.P.; *explained and distinguished*, *The Cynthia* (1876) 46 L. J. Adm. 58, 61; 2 P. D. 52, 57; 36 L. T. 189; 3 Asp. M. C. 378.—ADM.; *referred to*, *The Vera Cruz* (1884) 53 L. J. Adm. 33; 9 P. D. 88, 99; 51 L. T. 104; 32 W. R. 783; 5 Asp. M. C. 270.—C.A.

The Iona, London and Edinburgh Shipping Co. v. Owners of the Emily Fanny (1867) 4 Moore P. C. (N.S.) 336; L. R. 1 P. C. 426; 16 L. T. 158.—P.C., *explained and applied*.

The Velasquez (1867) 36 L. J. Adm. 19, 21; L. R. 1 P. C. 494, 499; 4 Moore P. C. (N.S.) 426; 16 L. T. 777; 16 W. R. 89.—P.C.

The Iona, *applied*.

The Minna (1868) L. R. 2 A. & E. 97.—ADM.

The Iona, *approved*.

The Calabar, Moss v. African Steamship Co. (1868) L. R. 2 P. C. 238, 241; 19 L. T. 768.—P.C.

The Iona, *applied*.

The Cynthia (1876) 46 L. J. Adm. 58, 61; 2 P. D. 52, 57; 36 L. T. 189; 3 Asp. M. C. 378.—ADM.

The Iona, *observed upon*.

Clyde Navigation Co. v. Barclay (1877) 36 L. T. 379; 1 App. Cas. 790; 3 Asp. M. C. 390.—H.L. (SC.).

LORD CHELMSFORD.—There has been some little confusion in the cases as to the *onus probandi*. In the case of *The Iona*, which was relied upon in the judgment of the Court below, and mentioned in the argument at the bar, Kindersley, V.-C., is reported to have said: "It is not enough for the owners to prove that there was fault or negligence in the pilot: they must prove to the satisfaction of the Court which has to try the question that there was no default whatever on the part of the officers and crew of their vessel, or any of them, which might have been in any way conducive to the damage." The learned Vice-Chancellor imposes on the owners a sort of negative proof which it is impossible for them to give. If, instead of saying, "They must prove that there was no default," he had said, "It must be proved that there was no fault on the part of the officers and crew," he would have been perfectly correct. The condition of exemption that the owners should prove that the accident arose entirely from the fault of the pilot, is one which must be fairly and reasonably interpreted. The owners having proved fault on the part of the pilot sufficient to cause, and in fact causing the calamity, must, therefore, in the absence of proof of contributory fault of the crew, be held to have satisfied the condition on which exemption depends, and are not to be called on to adduce proof of a negative character, to exclude the mere possibility of contributory default. It may be that in the course of the evidence of the owners to fix the responsibility solely upon the pilot, certain acts or omissions on the part of the crew may come out, and it will then be incumbent on the owners to show satisfactorily that those acts or omissions in no degree contributed to the accident.—p. 379.

The Iona, *disapproved*.

The Daioz (1877) 47 L. J. Adm. 1; 37 L. T. 137; 3 Asp. M. C. 477.—C.A.

The Velasquez (1867) 36 L. J. Adm. 19; L. R. 1 P. C. 494; 4 Moore P. C. (N.S.) 426; 16 L. T. 777; 16 W. R. 89.—P.C., *approved*.

The Benmohr (1904) 52 W. R. 686.—BARNES, J.

Clyde Navigation Co. v. Barclay (1876) 1 App. Cas. 790; 36 L. T. 379; 3 Asp. M. C. 390.—H.L. (SC.), *followed*.

The Daioz (1877) 47 L. J. Adm. 1; 37 L. T. 137; 3 Asp. M. C. 477.—C.A.

Clyde Navigation Co. v. Barclay, *observed upon*.

Spaight v. Tedcastle (1881) 6 App. Cas. 217; 44 L. T. 589; 29 W. R. 671; 4 Asp. M. C. 406.—H.L. (E.).

Clyde Navigation v. Barclay, *considered*.

The Indus (1886) 56 L. J. Adm. 88; 12 P. D. 46; 56 L. T. 376; 34 W. R. 490; 6 Asp. M. C. 105.—C.A. **ESHER, M.R., LINDLEY and LOPES, L.JJ.**

ESHER, M.R.—*Clyde Navigation Co. v. Barclay* comes to this, that where there is a *prima facie* case made out by the plaintiff, and the answer is compulsory pilotage, and where the defendant gives evidence which *prima facie* proves that the accident was solely the fault of the pilot, the plaintiff cannot require the defendant to go on to prove that he, the defendant, was not guilty of some negligence contributing to the accident. The burden is then upon the plaintiff to give some evidence of such contributory negligence.

That case does not interfere with the doctrine, which has been so long acted upon, as to what the defendant must prove in such a case.—pp. 89, 90.

The Ripon (1885) 54 L. J. Adm. 56; 10 P. D. 65; 52 L. T. 438; 33 W. R. 659; 5 Asp. M. C. 365.—**BUTT, J.**, explained.

The Monte Rosa (1892) 62 L. J. Adm. 20; [1893] P. 23; 1 R. 557; 68 L. T. 299; 41 W. R. 304; 7 Asp. M. C. 326.—**BARNES, J.**

Lucey v. Ingram (1840) 9 L. J. Ex. 196; 6 M. & W. 302.—**EX.** followed.

The Stettin (1862) 31 L. J. Adm. 208; Br. & Lush. 199; 6 L. T. 613.—**P.C.**, explained.

General Steam Navigation Co. v. Colonial Steam Navigation Co. (1869) L. R. 4 Ex. 238; 38 L. J. Ex. 97; 20 L. T. 581; 17 W. R. 741.—**EX. CH.**

BYLES, J. (for the Court).—Our judgment does not conflict with the decision of the Judicial Committee of the Privy Council in the case of *The Stettin*; for in that case the pilot appears originally to have been taken on board where and when by law there was no necessity to take him. It would be superfluous for us to express any opinion on the case of *Lucey v. Ingram*, or its applicability to the case now under consideration.—p. 247.

Lucey v. Ingram, explained.

The Stettin, followed.

The Lion (1869) 38 L. J. Adm. 51; L. R. 2 P. C. 525; 6 Moore P. C. (N.S.) 163; 21 L. T. 41; 17 W. R. 993.—**P.C.**

LORD ROMILLY.—Accordingly, contrasting the extended exoneration in 6 Geo. 4. c. 125, s. 55, with the more limited exoneration in 17 & 18 Vict. c. 104, s. 388, and the policy suggested by Parke, B., as the ground of the former, with that suggested by Byles, J., in *General Steam Navigation Co. v. British Colonial Steam Navigation Co.* (*supra*, col. 3427), with reference to the latter, their lordships are of opinion that the true interpretation of the enactment by which the present case is governed depends on this, whether the employment of the pilot was compulsory, and that it cannot be affected by anything decided in *Lucey v. Ingram*, and that the authority or soundness of the decision in *The Stettin* is not in any way prejudiced by the omission to notice the case of *Lucey v. Ingram*.

Lucey v. Ingram, explained and not applied.

The Guy Mannering (1882) 51 L. J. Adm. 57; 7 P. D. 132, 135; 46 L. T. 905; 30 W. R. 835; 4 Asp. M. C. 553.—**C.A.**

The Stettin, disapproved.

The Hankow (1879) 48 L. J. Adm. 29; 4 P. D. 197, 202; 43 L. T. 337; 4 Asp. M. C. 97.—**ADM.**

Dodds v. Embleton (1826) 9 D. & R. 27; 5 L. J. (O.S.) K. B. 65.—**K.B.**, approved.

Tyne Improvement Commissioners v. General Steam Navigation Co. (1866) L. R. 2 Q. B. 65; 36 L. J. Q. B. 22; 8 B. & S. 66; 15 L. T. 487; 15 W. R. 178.—**EX. CH.**

The Hanna (1866) 36 L. J. Adm. 1; L. R. 1 A. & E. 283; 15 L. T. 334; 15 W. R. 263.—**ADM.**, followed.

The Vesta (1882) 51 L. J. P. 25; 7 P. D. 240; 46 L. T. 492; 30 W. R. 705; 4 Asp. M. C. 515.—**SIR R. PHILLIMORE.**

The Agricola (1843) 2 W. Rob. 10; 7 Jur. 157.—**ADM.**, adopted.

The Lion (1869) 38 L. J. Adm. 51, 55; L. R. 2 P. C. 525, 532; 6 Moore P. C. (N.S.) 163; 21 L. T. 41; 17 W. R. 993.—**P.C.**

The Agricola, not applied.

Courtney v. Cole (1887) 56 L. J. M. C. 141; 19 Q. B. D. 447; 57 L. T. 409; 36 W. R. 8; 6 Asp. M. C. 169; 52 J. P. 20.—**Q.B.D.**

The Agricola, followed.

The Winestead (1895) 64 L. J. P. 51; [1895] P. 170; 72 L. T. 91; 11 R. 720; 7 Asp. M. C. 547.—**BRUCE, J.**; and **The Glanystwyth** (1899) 68 L. J. P. 37; [1899] P. 118; 80 L. T. 204; 8 Asp. M. C. 513.—**JEUNE, P.**

The Lloyds (or Sea Queen) (1863) Br. & L. 359; 32 L. J. Adm. 197; 9 L. T. 236.—**ADM.**, not applied.

Courtney v. Cole (1887) 56 L. J. M. C. 141; 19 Q. B. D. 447; 57 L. T. 409; 36 W. R. 8; 6 Asp. M. C. 169; 52 J. P. 20.—**Q.B.D.**

The Lloyds (or Sea Queen), followed.

The Winestead (1895) 64 L. J. P. 51; [1895] P. 170; 72 L. T. 91; 11 R. 720; 7 Asp. M. C. 547.—**BRUCE, J.**; and **The Glanystwyth** (1899) 68 L. J. P. 37; [1899] P. 118; 80 L. T. 204; 8 Asp. M. C. 513.—**JEUNE, P.**

Courtney v. Cole (1887) 56 L. J. M. C. 141; 19 Q. B. D. 447; 57 L. T. 409; 36 W. R. 8.—**Q.B.D.**, distinguished.

The Winestead (1895) 64 L. J. P. 51; [1895] P. 170; 72 L. T. 91; 11 R. 720; 7 Asp. M. C. 547.—**BRUCE, J.**

The Winestead (1895) 64 L. J. P. 51; [1895] P. 170; 72 L. T. 91; 7 Asp. M. C. 547; 11 R. 720.—**BRUCE, J.**, followed.

The Glanystwyth (1899) 68 L. J. P. 37; [1899] P. 118; 80 L. T. 204; 8 Asp. M. C. 513.—**JEUNE, P.**

The Rutland (1896) 65 L. J. P. 91; [1896] P. 281; 75 L. T. 48; 45 W. R. 55.—**C.A.**; affirmed, (1897) 66 L. J. Adm. 105; [1897] A. C. 333; 76 L. T. 662.—**H.L. (E.).**

The Rutland and The Sutherland (1887) 56 L. J. Adm. 94; 12 P. D. 154; 57 L. T. 631; 36 W. R. 13; 6 Asp. M. C. 181.—**HANNEN, P.**, distinguished.

The Glanystwyth (1899) 68 L. J. P. 37; [1899] P. 118; 80 L. T. 204; 8 Asp. M. C. 513.—**JEUNE, P.**

The Earl of Auckland (1861) Lush. 387; 15 Moore P. C. 304; 5 L. T. 558; 10 W. R. 124.—**P.C.**, considered.

The Bristol City (1901) 71 L. J. P. 5; [1902] P. 10; 85 L. T. 694; 50 W. R. 383; 9 Asp. M. C. 274.—**JEUNE, P.**

The Earl of Auckland, followed.

The Cayo Bonito (1902) 86 L. T. 867; 51 W. R. 269; 67 J. P. 158.—**BARNES, J.**

The Vesta (1882) 51 L. J. Adm. 25; 7 P. D. 240; 46 L. T. 492; 30 W. R. 705.—**ADM.**, distinguished.

The Cayo Bonito (1902) 86 L. T. 867; 51 W. R. 269; 67 J. P. 158.—**BARNES, J.**

The Temora (1860) Lush. 17; 1 L. T. 418.—**ADM.**, inapplicable.

The Hanna (1866) 36 L. J. Adm. 1; L. R.

1 A. & E. 283; 15 L. T. 334; 15 W. R. 263.—ADM.

The Temora (supra), referred to.

General Steam Navigation Co. v. British Colonial Steam Navigation Co. (1869) 38 L. J. Ex. 97, 99; L. R. 4 Ex. 238, 247; 20 L. T. 581; 17 W. R. 741.—EX. CH.

The Temora, considered.

The Warsaw (1898) 67 L. J. P. 50; [1898] P. 127; 78 L. T. 327; 46 W. R. 638; 8 Asp. M. C. 399.—BARNES, J.

The Johann Sverdrup (1886) 56 L. J. Adm. 63; 12 P. D. 43; 56 L. T. 256; 35 W. R. 300; 6 Asp. M. C. 73.—C.A., *distinguished.*

The Warsaw (1898) 67 L. J. P. 50; [1898] P. 127; 78 L. T. 327; 46 W. R. 638; 8 Asp. M. C. 399.

GORELL BARNES, J.—Although it is stated in the judgment of the learned judges who decided that case [*The Johann Sverdrup*] that the effect of sect. 16 of the said order was to abolish compulsory pilotage in the Tyne, they were not dealing with the case of a vessel carrying passengers between ports in the British islands. . . . It was held that the [Tyne Pilotage Officer Confirmation] Act of 1865 superseded the pilotage provisions of the Act of 1801, and that no obligation to employ a pilot was imposed by the said 16th section upon any vessel, whether British or foreign. It will be seen that no question was raised or considered as to the effect of sect. 354 of the Merchant Shipping Act, 1854, for which sect. 604 of the Act of 1894 is now substituted. The order of 1865 was made under the powers conferred by sect. 39 of the Merchant Shipping Act, 1862 (replaced by certain sections of the Act of 1894), and confirmed by the Act of 1865, and, although it superseded the local Act of 1801, and substituted new regulations for those contained in that Act, there is nothing in it inconsistent with sect. 354 of the Act of 1854 or sect. 604 of the Act of 1894 [by which pilotage is made compulsory upon vessels carrying passengers between ports in the British islands].—p. 52.

The Neptune the Second (1814) 1 Dod. 467.

—ADM., *not followed.*

The Protector (1839) 1 W. Rob. 45.—ADM.

DR. LUSHINGTON.—[The learned judge refused to follow this case on the ground that Lord Stowell's attention had not been called to the statute 52 Geo. 3, c. 39, which had just then been passed. "The decision in that case, therefore, is necessarily of no authority with respect to that statute, and, of course, could not be with respect to one which passed subsequently."—p. 49.

The Neptune the Second, applied.

The Halley (1867) 37 L. J. Adm. 1; L. R. 2 A. & E. 3, 14; 16 W. R. 284.—ADM., *reversed*, P.C. (*supra*, col. 3407).

The Girolamo (1834) 3 Hagg. Adm. 186.—

ADM.; and *The Protector* (1839) 1 W. Rob. 45.—ADM., *dicta adopted.*

The Mary (1879) 48 L. J. Adm. 66; 5 P. D. 14; 41 L. T. 351; 28 W. R. 95.—ADM.

(The Regulations.)

The Libra (1881) 6 P. D. 139; 45 L. T. 161;

4 Asp. M. C. 429.—C.A., *explained.*

The Margaret (1884) 9 P. D. 47.—C.A.

BRETT, M.R.—In *The Libra*, the rule [No. 23, Thames Rules] had to be applied to a vessel which sighted the other in the reach, while above the point, and before she began to round; it is now argued that the rule does not apply to the present case, since it is said that in *The Libra* this Court intimated that the rule would not apply to a vessel already on the point. But that is not the effect of the decision in *The Libra*. I think that the rule applies though the vessel is off, or more correctly speaking on, the point when she first ought to have seen the other vessel. Clearly, if the vessel is not already on or off the point, she ought, so far as she can, not to go on to the point until the other vessel comes round and is clear. But if she is already on the point what is she to do? In my opinion, she ought to remain as nearly as she can in the same place with respect to her course up and down the river.—p. 49.

The Owen Wallis (1874) 43 L. J. Adm. 36;

L. R. 4 A. & E. 175; 30 L. T. 41; 22

W. R. 695.—ADM., *adopted.*

The Swallow (1876) 36 L. T. 231, 232.—ADM., *reversed*, C.A.

The Edith (1876) Ir. R. 10 Eq. 345.—C.A., *followed.*

The Dunelm (1884) 53 L. J. Adm. 81; 9 P. D. 164, 176; 51 L. T. 214; 32 W. R. 970; 5 Asp. M. C. 304.—C.A.

The Dunelm (1884) 53 L. J. P. 81; 9 P. D.

164; 51 L. T. 214; 32 W. R. 970; 5 Asp.

M. C. 304.—C.A., *referred to.*

The Chusan (1885) 53 L. T. 60; 5 Asp. M. C. 476.—BUTT, J.

The Dunelm, observations applied.

The Tweedsdale (1889) 58 L. J. Adm. 41; 14 P. D. 164, 169; 61 L. T. 371; 37 W. R. 783; 6 Asp. M. C. 430.—BUTT, J.

The Concordia (1866) L. R. 1 A. & E. 93;

12 Jur. (N.S.) 77; 14 L. T. 896.—ADM.,

explained.

The Carlotta (1899) 68 L. J. P. 87; [1899] P. 223; 80 L. T. 664.—BARNES, J.

The Esk and The Niord (1871) 7 Moore

P. C. (N.S.) 276; L. R. 3 P. C. 436; 24

L. T. 167; 1 Asp. M. C. 1.—P.C., *dis-*

tinguished.

The Franconia (1876) 2 P. D. 8; 35 L. T. 721; 25 W. R. 197; 3 Asp. M. C. 295.—C.A.

The Velocity (1869) L. R. 3 P. C. 44; 39

L. J. Adm. 20; 6 Moore P. C. (N.S.) 263;

21 L. T. 686; 18 W. R. 264.—P.C.,

followed.

Malcolmson v. General Steam Navigation Co. (1872) L. R. 4 P. C. 519; 9 Moore P. C. (N.S.) 352; 27 L. T. 769; 21 W. R. 273; 1 Asp. M. C. 484.—P.C.

The Velocity, explained and distinguished.

The Franconia (1876) 2 P. D. 8, 14; 35 L. T. 721; 25 W. R. 197; 3 Asp. M. C. 295.—C.A.

The Velocity, considered

The Oceano (1878) 3 P. D. 60.—C.A.
JAMES, L.J. (for the Court).—It was suggested to us that the decision of the Privy Council in *The Velocity* had established that the rule as to crossing ships did not apply to the river Thames. It is difficult to conceive how a decision of the Privy Council on the general maritime rules in

1869, could be held so to nullify an express provision in the local legislation promulgated in the year 1872, specially and exclusively for the regulation of the navigation of the Thames itself. It may be convenient further to notice that there seems to be a great misapprehension, induced probably by the marginal or headnote of the case, as to what was really decided by that case . . . all that was really decided was, that in the particular part of the Thames, and under the particular circumstances which the Court had to deal with in that case, a vessel was not by that rule exonerated from the consequences of her omission to do what good seamanship required her to do. And this is made quite clear in the subsequent case of *The Ranger* (*infra*).—p. 64.

The Velocity, referred to.

The *Pekin* (1897) 66 L. J. P. C. 97; [1897] A. C. 532; 77 L. T. 443.—P.C.; and The *Carlotta* (1899) 68 L. J. P. 87; [1899] P. 223; 80 L. T. 664.—BARNES, J.

The Ranger (1872) 9 Moore P. C. (N.S.) 352; L. R. 4 P. C. 519; 27 L. T. 769; 21 W. R. 273.—P.C., referred to.

The *Oceano* (1878) 3 P. D. 60.—C.A. (see extract, *supra*); and The *Pekin* (1897) 66 L. J. P. C. 97; [1897] A. C. 532; 77 L. T. 443.—P.C.

The Ranger, explained.

The *Carlotta* (1899) 68 L. J. P. 87; [1899] P. 223; 80 L. T. 664.—BARNES, J.

The Carlotta, applied.

The Lighter No. 3 (1902) 17 T. L. R.—BARNES, J.

The Franconia (1876) 2 P. D. 8; 35 L. T. 721; 25 W. R. 197; 3 Asp. M. C. 295.—C.A., definition questioned.

The *Peckforton Castle* (1878) 3 P. D. 11; 47 L. J. Adm. 69; 37 L. T. 816; 26 W. R. 346; 3 Asp. M. C. 533.—C.A.

[Definition of BRETT, L.J.—Can we then form a definition of the difference between crossing ships and overtaking ships? It seems to me that this may be a very good definition . . . that if the ships are in such a position, and are on such courses, and at such distances, that if it were night the hinder ship could not see any part of the side lights of the forward ship, then they cannot be said to be crossing ships, although their courses may not be exactly parallel. It would not do. I think, to limit the angle of the crossing too much, but a limit to that extent, it seems to me, is a very useful and practical rule. And then, if the hinder of the two ships is going faster than the other, she is an overtaking ship.]

JAMES, L.J.—I also desire to add that the result of the argument induces me to come to the conclusion that I doubt whether the definition laid down in *The Franconia* can be laid down as a rule to be so generally applicable as appears to have been intimated in that case.—p. 17.

The Franconia, followed.

The *Main* (1886) 34 W. R. 678; 55 L. T. 15; 55 L. J. Adm. 70; 11 P. D. 132; 6 Asp. M. C. 37.—C.A.; The *Imbro* (1889) 58 L. J. P. 49; 14 P. D. 73; 60 L. T. 936; 37 W. R. 559; 6 Asp. M. C. 392.—BUTT, J.

The Great Eastern (1864) 3 Moore P. C. (N.S.) 31; 11 L. T. 5.—P.C., applied.

The *Agra* (1867) 36 L. J. Adm. 16; L. R. 1 P. C. 501; 4 Moore P. C. (N.S.) 435; 16 L. T. 755; 16 W. R. 735.—P.C.

The Peckforton Castle (1878) 47 L. J. Adm. 69; 3 P. D. 11; 37 L. T. 816; 26 W. R. 346; 3 Asp. M. C. 533.—C.A., opinion in question.

The *Main* (1886) 55 L. J. Adm. 70; 11 P. D. 132; 55 L. T. 15; 34 W. R. 678; 6 Asp. M. C. 37.—C.A.

The Reiher (1881) 30 W. R. 190; 4 Asp. M. C. 478.—SIR R. PHILLIMORE, *disapproved*.

The *Main* (1886) 34 W. R. 678; 55 L. J. Adm. 70; 11 P. D. 132; 55 L. T. 15.—C.A.

HERSCHELL, L.C.—I entirely concur as to *The Reiher*. The words of qualification there inserted are not to be found in the rule.

The Seaton (1883) 53 L. J. Adm. 15; 9 P. D. 1; 49 L. T. 747; 32 W. R. 600; 5 Asp. M. C. 191.—BUTT, J.

Referred to, The *Imbro* (1889) 58 L. J. Adm. 49; 14 P. D. 73; 60 L. T. 936; 37 W. R. 559; 6 Asp. M. C. 392.—BUTT, J.; *followed*, The *Molière* (1893) 62 L. J. Adm. 102; [1893] P. 217; 1 R. 639; 69 L. T. 263; 7 Asp. M. C. 364.—JEUNE, P.

The Main (1886) 55 L. J. P. 70; 11 P. D. 132; 55 L. T. 15; 34 W. R. 678; 6 Asp. M. C. 37.—C.A., *followed*.

The *Imbro* (1889) 58 L. J. P. 49; 14 P. D. 73; 60 L. T. 936; 37 W. R. 559; 6 Asp. M. C. 392.—BUTT, J.; The *Molière* (1893) 62 L. J. Adm. 102; [1893] P. 217; 1 R. 639; 69 L. T. 263; 7 Asp. M. C. 364.—JEUNE, P.

The Palinurus (1887) 13 P. D. 14; 58 L. T. 533; 36 W. R. 768; 6 Asp. M. C. 271.—HANNEN, P.; *affirmed*, 57 L. J. Adm. 21; 37 W. R. 266.—C.A.

The Palinurus.

Followed, The *Imbro* (1889) 58 L. J. P. 49; 14 P. D. 73; 60 L. T. 936; 37 W. R. 559; 6 Asp. M. C. 392.—BUTT, J.; *explained*, The *Stakesby* (1890) 59 L. J. Adm. 72; 15 P. D. 166; 63 L. T. 115; 39 W. R. 80; 6 Asp. M. C. 532.—HANNEN, P.

The Imbro (1889) 58 L. J. P. 49; 14 P. D. 73; 60 L. T. 936; 37 W. R. 559; 6 Asp. M. C. 392.—BUTT, J., *considered*.

The *Stakesby* (1890) 59 L. J. P. 72; 15 P. D. 166; 63 L. T. 115; 39 W. R. 80; 6 Asp. M. C. 532.—HANNEN, P.

The Imbro, followed.

The *Molière* (1893) 62 L. J. Adm. 102; [1893] P. 217; 25 W. R. 197; 3 Asp. M. C. 295.—C.A.

The Gannet (1899) 68 L. J. P. 99; [1899] P. 230.—C.A.; *reversed on facts*, (1900) 69 L. J. P. 49; [1900] A. C. 234; 82 L. T. 329; 8 Asp. M. C. 43.—H.L. (E.).

The Frankland, Morton v. Hutchinson (1872) 9 Moore P. C. (N.S.) 365; L. R. 4 P. C. 529; 27 L. T. 633; 1 Asp. M. C. 489.—P.C., principle applied.

The *Kirby Hall* (1883) 52 L. J. Adm. 31; 8 P. D. 71; 48 L. T. 797; 31 W. R. 658; 5 Asp. M. C. 90.—ADM.; The *Dordogne* (1884) 10 P. D.

6, 9; 54 L. J. Adm. 29; 51 L. T. 650; 33 W. R. 360; 5 Asp. M. C. 328.—BUTT, J.; affirmed, C.A.

The Frankland (*supra*), referred to.

The Ceto (1889) 14 App. Cas. 670; 62 L. T. 1; 6 Asp. M. C. 479.—H.L. (E.).

The Rhondda (1883) 8 App. Cas. 549, 552; 49 L. T. 210; 5 Asp. M. C. 114.—P.C., referred to.

The Ceto (1889) 14 App. Cas. 670; 62 L. T. 1; 6 Asp. M. C. 479.—H.L. (E.).

The Kirby Hall (1883) 52 L. J. Adm. 31; 8 P. D. 71; 48 L. T. 797; 31 W. R. 658; 5 Asp. M. C. 90.—ADM., applied.

The Dordogne (1884) 10 P. D. 6, 9; 54 L. J. Adm. 29; 51 L. T. 650; 33 W. R. 360; 5 Asp. M. C. 328.—BUTT, J.; affirmed, C.A.

The Kirby Hall and The John Macintyre (1884) 53 L. J. Adm. 115; 9 P. D. 135; 51 L. T. 185; 33 W. R. 190; 5 Asp. M. C. 278.—C.A., referred to.

The Ceto (1889) 14 App. Cas. 670; 62 L. T. 1; 6 Asp. M. C. 479.—H.L. (E.), LORDS SALBORNE and FITZGERALD dissenting.

The Beryl, 9 P. D. 4; 49 L. T. 748; 32 W. R. 648; 5 Asp. M. C. 193.—BUTT, J.; varied, (1884) 9 P. D. 137; 53 L. J. Adm. 75; 51 L. T. 554; 33 W. R. 191; 5 Asp. M. C. 321.—C.A.

The Beryl, observation adopted.

The Dordogne (1884) 54 L. J. Adm. 29; 10 P. D. 6, 10; 51 L. T. 650; 33 W. R. 360; 5 Asp. M. C. 550.—C.A.

The Beryl, approved.

Baker v. The Theodore H. Rand (1887) 56 L. J. P. 65; 12 App. Cas. 247; 56 L. T. 343; 35 W. R. 781; 6 Asp. M. C. 122.—H.L. (E.).

The Beryl, referred to.

The Ceto (1889) 14 App. Cas. 670; 62 L. T. 1; 6 Asp. M. C. 479.—H.L. (E.).

The Beryl, adopted.

The Memnon (1889) 62 L. T. 84; 6 Asp. M. C. 317.—H.L. (E.).

The Dordogne (1884) 54 L. J. Adm. 29; 10 P. D. 6; 51 L. T. 650; 33 W. R. 360; 5 Asp. M. C. 550.—C.A., commented on.

The Ebor (1886) 11 P. D. 25; 54 L. T. 200; 34 W. R. 448; 5 Asp. M. C. 560.—C.A.

ESHER, M.R.—During the hearing of this case much has been said in regard to the case of *The Dordogne*, and the construction of Art. 13. In that case the construction of that article was discussed, and the question arose whether "moderate" was to be considered an absolute term, or relative according to the circumstances. It was there held that "moderate" did not mean moderate speed absolutely, but that moderate speed meant moderate according to circumstances, so that what is moderate speed at one time is not moderate at another. We did not attempt to lay down any specific distance in any case, or say that if two vessels were within a mile of each other, or a mile and a-half, the article was to be interpreted according to that fact. I illustrated that rule by the example of a vessel going up or down a narrow river, where

she would know she ought to have only just enough way on her to keep her steerage way. I also mentioned the case of a vessel on the open sea, but in the track of ships, in a fog, when she should go very slowly, though not so slowly as if she were in a narrow river.—p 26.

The Dordogne and The Ebor, referred to.

The Ceto (1889) 14 App. Cas. 670; 62 L. T. 1; 6 Asp. M. C. 479.—H.L. (E.).

The Ceto (1889) 14 App. Cas. 670; 62 L. T. 1; 6 Asp. M. C. 479.—H.L. (E.), applied.

The Knarwater (1894) 63 L. J. Adm. 65; 6 R. 784.—C.A.

The Ceto, discussed.

The Lancashire (1892) 63 L. J. Adm. 80; [1894], A. C. 1; 6 R. 46; 69 L. T. 663; 7 Asp. M. C. 376.—H.L. (E.).

The Ceto; The Knarwater (*supra*) and **The Lancashire** (*supra*), applied.

The Lord Bangor (1895) 65 L. J. Adm. 6; [1896] P. 28; 11 R. 822; 73 L. T. 414; 8 Asp. M. C. 217.—JEUUNE, P.

Maclaren v. Compagnie Française de Navigation à Vapeur (1884) 53 L. J. Adm. 43; 9 App. Cas. 640; 50 L. T. 372; 32 W. R. 880; 5 Asp. M. C. 216.—H.L. (SC.), distinguished.

The Ceto, Owners of the Lebanon v. Owners of the Ceto (1889) 14 App. Cas. 670, 678; 62 L. T. 1; 6 Asp. M. C. 479.—H.L. (E.).

Maclaren v. Compagnie Française de Navigation à Vapeur, approved.

The Ngapoota (1897) 66 L. J. P. C. 88; [1897] A. C. 391.—P.C.

The Lord Bangor (1895) 65 L. J. P. 6; [1896] P. 28; 73 L. T. 414; 8 Asp. M. C. 217.—JEUUNE, P., distinguished.

The Challenge (1903) 73 L. J. P. 2; 89 L. T. 481.—BARNES, J.

The George Arkle (1861) Lush. 332.—P.C., applied.

The Esk and the Gitana (1869) 38 L. J. Adm. 33; L. R. 2 A. & E. 350, 352; 20 L. T. 587; 17 W. R. 1064.—ADM.

The Esk and the Gitana (1869) 38 L. J. Adm. 33; 2 A. & E. 350; 20 L. T. 587; 17 W. R. 1064.—ADM., applied.

The Englishman (1877) 47 L. J. Adm. 9; 3 P. D. 18; 37 L. T. 412; 3 Asp. M. C. 506.—ADM.; and *The Romance* (1900) [1901] P. 15; 83 L. T. 488.—BARNES, J.

London, The (1863) Br. & Lush. 82; 9 Jur. (N.S.) 1330; 9 L. T. 348; 6 Not. of Cas. 29.—ADM., approved.

The Marpesia (1872) L. R. 4 P. C. 212; 8 Moore P. C. (N.S.) 468; 26 L. T. 333; 1 Asp. M. C. 261.—P.C.

The Chanorry (1873) 42 L. J. Adm. 58; 28 L. T. 284; 1 Asp. M. C. 569.—ADM., dissented from.

The Earl Spencer (1875) 23 W. R. 661; L. R. 4 A. & E. 431; 32 L. T. 370; 2 Asp. M. C. 523.—ADM.; affirmed, 33 L. T. 235.—P.C.

SIR R. PHILLIMORE.—I am of opinion that the exhibition of a stern light is not obligatory on

the vessel ahead. This opinion must be taken as corrective of any *dicta* uttered by me in the case of *The Channery*.—p. 663.

The Earl Spencer, applied.

The City of Brooklyn (1876) 1 P. D. 276, 277, n.; 34 L. T. 932; 24 W. R. 1056; 3 Asp. M. C. 230.—ADM.; affirmed, C.A.

The Essequibo (1888) 57 L. J. Adm. 29; 13 P. D. 51; 58 L. T. 596; 6 Asp. M. C. 276.—HANNEN, P., *approved*.

The Basset Hound (1894) 6 R. 764; 71 L. T. 12; 7 Asp. M. C. 467.—C.A., ESHER M.B., KAY and SMITH, L.JJ.

The Leverington (1886) 55 L. J. P. 78; 11 P. D. 117; 55 L. T. 386; 6 Asp. M. C. 7.—C.A., *distinguished*.

The Pekin (1897) 66 L. J. P. C. 97; [1897] A.C. 532; 77 L. T. 443; 8 Asp. M. C. 367.—P.C.

SIR FRANCIS JEUNE.—But vessels may no doubt be crossing vessels within Art. 22 in a river. It depends on their presumable courses. . . . The question, therefore, always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at that moment. . . . It was reasonable for those on *The Pekin*, as without fault on their part, they did not hear the double blast of *The Normandie* before they took action with their helm, to assume that *The Normandie* would take the outside channel, in which case their courses would not cross, or would take the southern side of the inside channel, in which case their courses would indeed cross, but not so as to involve risk of collision. The above considerations show the distinction between the present case and that of *The Leverington*, which was relied on by the appellants. In that case the vessels were held by the Court of Appeal to be, as they unquestionably were, crossing vessels within the meaning of Art. 22.—p. 98.

The Minnie (1894) 11 R. 705; [1894] P. 336; 71 L. T. 715; 7 Asp. M. C. 521.—C.A. and **The Corennie** (1894) [1894] P. 338, n.—BARNES, J., *discussed*.

The Oporto (1896) 65 L. J. Adm. 12; 75 L. T. 599; 8 Asp. M. C. 213.—BARNES, J.; S. C. 66 L. J. Adm. 49; [1897] P. 249.—C.A.

The Commerce (1850) 3 W. Rob. 287.—ADM., *commented upon*.

The William Frederick, The Byfoged Christensen (1879) 4 App. Cas. 669; 41 L. T. 535; 28 W. R. 233; 4 Asp. M. C. 201.—P.C.

SIR JAMES COLVILLE.—Their lordships desire to remark that, though the principle involved in the case of *The Commerce* may be in itself a sound one, it is one which should be applied very cautiously, and only where the circumstances are clearly exceptional. They conceive that to leave to masters of vessels a discretion as to obeying or departing from the sailing rules is dangerous to the public, and that to require them to exercise such discretion, except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied upon as constituting a case of at least contributory negligence.—p. 672.

O.C.

The Warrior (1872) L. R. 3 A. & E. 553; 27 L. T. 101; 21 W. R. 82; 1 Asp. M. C. 400.—ADM., *followed*.

The American and The Syria (1874) 43 L. J. Adm. 25; L. R. 4 A. & E. 226, 232; 31 L. T. 42.—ADM., *reversed*.—P.C.

The Tasmania (1889) 14 P. D. 53; 30 L. T. 692; 37 W. R. 552; 6 Asp. M. C. 381.—C.A.; *reversed*, (1890) 15 App. Cas. 223; 63 L. T. 1; 6 Asp. M. C. 517.—H.L. (E.).

The Tasmania (*supra*, in C.A.), *distinguished*.
The Higgate (1890) 62 L. T. 841; 6 Asp. M. C. 512.—HANNEN, P.

The Tasmania (*supra*, in H.L.), *followed*.

The Pleiades v. The Jane (1891) 60 L. J. P. C. 59; [1891] A. C. 259; 65 L. T. 169; 7 Asp. M. C. 41.—P.C.; and *Karunaratne v. Ferdinandus* (1902) 71 L. J. P. C. 76; [1902] A. C. 405; 86 L. T. 329.—P.C.

(Local Rules.)

The Odessa (1882) 46 L. T. 77; 4 Asp. M. C. 493.—C.A., *followed*.

The Lady Wodehouse (1886) 2 Times L. R. 252.—C.A.

The J. R. Hinde (1892) 61 L. J. Adm. 91; [1892] P. 231; 67 L. T. 832; 7 Asp. M. C. 257.—JEUNE, J., *applied*.

The Six Sisters (1900) 60 L. J. P. 139; [1900] P. 302.—BARNES, J.

The River Derwent (1899) 62 L. T. 45; 6 Asp. M. C. 467.—C.A.; *affirmed*, (1891) 64 L. T. 509; 7 Asp. M. C. 37.—H.L. (E.).

The River Derwent, applied.

The New Pelton (1891) 60 L. J. Adm. 78; [1891] P. 258; 65 L. T. 494; 7 Asp. M. C. 81.—JEUNE, J.

The River Derwent, distinguished.

The John Hollway (1899) 69 L. J. P. 15; [1900] P. 37; 81 L. T. 726; 48 W. R. 416; 9 Asp. M. C. 36.—BUCKNILL, J.

Elmore v. Hunter (1877) 47 L. J. M. C. 8; 3 C. P. D. 116; 38 L. T. 179.—C.P.D., *referred to*.

Rolls v. Newell (1890) 59 L. J. Q. B. 423; 25 Q. B. D. 335, 338; 63 L. T. 384; 39 W. R. 96; 6 Asp. M. C. 563; 55 J. P. 702.—Q.B.D.

Elmore v. Hunter, inapplicable.

Kennard v. Cory (1898) 67 L. J. Q. B. 809; [1898] 2 Q. B. 578; 78 L. T. 816; 47 W. R. 30; 62 J. P. 580.—Q.B.D.

Perkins v. Gingell (1885) 50 J. P. 277.—DAY and SMITH, JJ., *followed*.

Goldsmith v. Slattery (1890) 63 L. T. 273; 6 Asp. M. C. 561.—HUDDLESTON, B. and GRANTHAM, J.

The B. L. Alston, 7 P. D. 49; 46 L. T. 208; 30 W. R. 707; 4 Asp. M. C. 409.—ADM.; *reversed*, (1883) 8 P. D. 5; 48 L. T. 469; 5 Asp. M. C. 43.—C.A.

The B. L. Alston, referred to.

The Philadelphia (1899) 69 L. J. P. 31; [1900] P. 43; 81 L. T. 728.—BUCKNILL, J.; *affirmed*, (1900) 69 L. J. P. 701; [1900] P. 262; 82 L. T. 601; 48 W. R. 514; 9 Asp. M. C. 72.—C.A.

The Harvest (1886) 55 L. J. Adm. 35; 11 P. D. 90; 55 L. T. 202; 6 Asp. M. C. 5.—C.A., *referred to*.

The Winstanley (1896) 65 L. J. Adm. 121; [1896] P. 297; 75 L. T. 133; 8 Asp. M. C. 150.—C.A. LORD ESHER, M.R., SMITH and RIGBY, L.JJ.

The Harvest, explained.

The John O'Scott (1897) 66 L. J. Adm. 47; [1897] P. 64; 76 L. T. 222; 8 Asp. M. C. 235.—C.A. ESHER, M.R., LOPES and CHITTY, L.JJ.

LORD ESHER, M.R.—The construction put upon the rule—[by-law 20 of the Bye-laws for the Regulation of the River Tyne, 1884] in *The Harvest* seems to be this: The incoming vessel is not to come so near as not to leave room for vessels going out of the river and if she is coming from the southward before she turns in, she must leave a fairway for all vessels going out of the port. Therefore, it is not a rule to be measured with compasses on the chart. It is a practical rule. The incoming ship must give room enough. She must not run up so close as only to leave just room.—p. 48.

(*Jurisdiction and Practice.*)

Smith v. Brown, (1871) 40 L. J. Q. B. 214; L. R. 6 Q. B. 729; 24 L. T. 808; 19 W. R. 1165.—Q.B., *approved*.

The Madge Wildfire, Simpson v. Blues (1872) 41 L. J. C. P. 121; L. R. 7 C. P. 290; 20 W. R. 680; 26 L. T. 697.—C.P. See extract, *post*, col. 3456.

Smith v. Brown, followed.

James v. L. & S.W.Ry. (1872) 41 L. J. Ex. 82; 89; L. R. 7 Ex. 187, 196; 26 L. T. 187.—EX.; affirmed, 41 L. J. Ex. 186; L. R. 7 Ex. 237; 27 L. T. 382; 21 W. R. 25; 1 Asp. M. C. 226.—EX. CH.

Smith v. Brown, discussed and distinguished.

Cargo ex Argos (1873) 42 L. J. Adm. 1, 7; L. R. 5 P. C. 154, 154; 28 L. T. 77; 21 W. R. 420.—P.C.

Smith v. Brown, considered.

Flower v. Bradley (1874) 44 L. J. Ex. 1; 31 L. T. 702; 23 W. R. 74; 2 Asp. M. C. 489.—EX.

Smith v. Brown, discussed.

The Franconia (1877) 46 L. J. Adm. 33; 2 P. D. 163; 36 L. T. 640; 25 W. R. 796.—C.A.

Smith v. Brown, dictum adopted.

Mackonochie v. Penzance (Lord) (1881) 50 L. J. Q. B. 611, 622; 6 App. Cas. 424, 447; 44 L. T. 479; 29 W. R. 633; 45 J. P. 584.—H.L. (E.).

Smith v. Brown, discussed.

The Vera Cruz, Seward v. The Vera Cruz (1884) 10 App. Cas. 59; 54 L. J. P. 9; 52 L. T. 474; 33 W. R. 477; 5 Asp. M. C. 386; 49 J. P. 324.—H.L. (E.).

LORD BLACKBURN.—If the question now raised had been that which the Court of Queen's Bench, of which I was then a member, treated as raised in *Smith v. Brown*—that really was a case under Lord Campbell's Act, and under Lord Campbell's Act only, but was treated as general—if the question now raised had been whether personal damage to a man who lived was within that 7th section of the enactment, I should have had, as I then had, some doubt about the matter,

and it would have carried me so far that if that had been the question now raised, I certainly should have wished to hear the case argued out to the end before giving an opinion upon it one way or the other. But the question raised here being exclusively whether the liability of a ship-owner as a person, under Lord Campbell's Act, to make good damages for the negligence of his servant who happens to be the master of the ship, comes within the words "damage done by any ship," I decidedly say I do not think it does.—p. 72.

The Franconia (1877) 46 L. J. Adm. 33; 2 P. D. 163; 36 L. T. 640; 25 W. R. 796.—C.A., *dissented from*.

The Vera Cruz (No. 2) (1884) 9 P. D. 96.—C.A.; affirmed, H.L. (E.). (*see infra*).

[When the C. A. is equally divided so that the decision appealed against stands unreversed, the result of the case in the C. A. affects the actual parties to the litigation only, and the Court, when a similar case is brought before it, is not bound by the result of the previous case.

Counsel for the respondent argued that the Court* was bound by the decision in *The Franconia*.

The Court then proceeded to dissent from *The Franconia*.]

BOWEN, L.J.—I am confident that there is no right of action under Lord Campbell's Act in the Admiralty Division, and I agree with the judgments of Lord Bramwell and the M.R., delivered in *The Franconia*.—p. 100.

The Franconia, not followed.

The Vera Cruz, Seward v. The Vera Cruz (1884) 54 L. J. P. 9; 10 App. Cas. 59; 52 L. T. 474; 33 W. R. 477; 5 Asp. M. C. 386; 49 J. P. 324.—H.L. (E.). See extract, *supra*.

The Vera Cruz (1884) 9 P. D. 96.—C.A.; affirmed *nom.* **The Vera Cruz, Seward v. The Vera Cruz** (1884) 54 L. J. P. 9; 10 App. Cas. 59; 52 L. T. 474; 33 W. R. 477; 5 Asp. M. C. 386; 49 J. P. 324.—H.L. (E.).

The Vera Cruz, distinguished.

The Englishman and the Australia, (1894) 63 L. J. P. 133; [1894] P. 239; 70 L. T. 846; 43 W. R. 62.—JEUNE, P.

The Vera Cruz, observations adopted.

The Theta (1894) 63 L. J. Adm. 160; [1894] P. 280; 6 R. 712; 71 L. T. 25; 43 W. R. 160; 7 Asp. M. C. 480.—BRUCE, J.

The Vera Cruz, applied.

Adam v. British and Foreign Steamship Co. (1898) 67 L. J. Q. B. 844; [1898] 2 Q. B. 430; 79 L. T. 31.—DARLING, J.

The Vera Cruz, referred to.

The Swift (1901) 70 L. J. P. 47; [1901] P. 168, 171; 85 L. T. 346.—JEUNE, P.

The Ida (1860) Lush. 6; 1 L. T. 417.—ADM., *disapproved*.

The Zeta, Mersey Docks and Harbour Board v. Turner (1893) 63 L. J. Adm. 17; [1893] A. C. 468; 1 R. 307; 69 L. T. 630; 57 J. P. 660.—H.L. (E.); reversing 40 W. R. 535.—C.A. See extract, col. 3443.

The Sarah (1862) Lush. 549.—ADM., followed.

Parkis v. Flower (1873) 43 L. J. Q. B. 33; L. R. 9 Q. B. 114; 30 L. T. 40; 22 W. R. 239; 2 Asp. M. C. 226.—Q.B.

The Sarah, approved.

The Zeta, Mersey Docks and Harbour Board v. Turner (1893) 63 L. J. Adm. 17; [1893] A. C. 468; 1 R. 307; 69 L. T. 630; 57 J. P. 660.—H.L. (E.). See extract, *infra*.

The Robert Pow (1863) 32 L. J. Adm. 164; Br. & L. 99; 9 L. T. 237.—ADM., distinguished.

The Uhla (1867) 37 L. J. Adm. 16, n.; L. R. 2 A. & E. 29, n.; 19 L. T. 89.—ADM.

The Robert Pow, followed.

The Energy (1870) 39 L. J. Adm. 25; L. R. 3 A. & E. 48; 23 L. T. 601; 18 W. R. 1009.—ADM.

The Robert Pow, dictum adopted.

Smith v. Brown (1871) 40 L. J. Q. B. 214, 219; L. R. 6 Q. B. 729, 735; 24 L. T. 808; 19 W. R. 1165; 1 Asp. M. C. 53.—Q.B.

The Robert Pow, disapproved.

The Zeta, Mersey Docks and Harbour Board v. Turner (1893) 63 L. J. Adm. 17; [1893] A. C. 468; 1 R. 307; 69 L. T. 630; 57 J. P. 660.—H.L. (E.); reversing 40 W. R. 535.—C.A.

HERSCHELL, L.C.—I think it will be convenient in the first place, to consider whether the proposition which formed the basis of Dr. Lushington's judgment in *The Robert Pow*, that cases of damage by collision (by which, as I have said, I think he meant collision between two ships) were alone within the jurisdiction of the Court of Admiralty at the time the statute of 1840 became law can be maintained.

I may observe at the outset that it is difficult to understand if "damage" had, as suggested, a well understood meaning sufficient to authorise or indeed render necessary a restriction of the words "damage received" in sect. 6 of the Act of 1840, why a similar restriction of the words "damage done" in the Act of 1861 was not equally requisite. As I have already pointed out the learned judge did in his judgment in *The Robert Pow*, state that the same restriction ought to be applied in construing both statutes; but as regards the statute of 1861 he afterwards deliberately receded from this position.

The Sarah was decided by the same learned judge in the year previous to the decision of *The Robert Pow*, and the law laid down was certainly very different. . . . It seems to me impossible to reconcile. . . . the decision in this case with the *ratio decidendi* in *The Robert Pow*, for it is difficult to see why, if the Court had inherent jurisdiction to deal with damage caused to a ship through its coming into contact with a keel, damage resulting to a ship from its being forced into contact with the ground, should be outside its jurisdiction.

It is said that in *The Ida*, decided in 1860—two years before *The Sarah*—Dr. Lushington stated the law very differently. . . . Dr. Lushington in the course of his judgment said: "The Court it must be remembered, has never exercised a general jurisdiction over damage, but over causes of collision only, and this is no

collision in the proper sense of the term." If I am to estimate the relative weight of these conflicting statements of the law, it seems to me that the view expressed in the later case of *The Sarah* is more important and authoritative. . . .

When I turn to prior authorities. . . . I can find no authority which supports the limitation of the jurisdiction of the Court of Admiralty laid down in *The Ida* and *The Robert Pow*.—pp. 22, 23.

The Robert Pow, applied.

The Mecca (1894) 64 L. J. Adm. 40; [1895] P. 95; 11 R. 742; 71 L. T. 711; 43 W. R. 209; 7 Asp. M. C. 529.—C.A.

The Uhla (1867) 37 L. J. Adm. 16, n.; L. R. 2 A. & E. 29, n.; 19 L. T. 89.—ADM., distinguished.

Smith v. Brown (1871) 40 L. J. Q. B. 214, 219; L. R. 6 Q. B. 729, 735; 24 L. T. 808; 19 W. R. 1165; 1 Asp. M. C. 53.—Q.B.

The Zeta, Turner v. Mersey Docks (1891)

[1891] P. 216; 65 L. T. 230; 7 Asp. M. C. 322.—BUTT, P.; reversed, (1892) 61 L. J. P. 130; [1892] P. 285; 40 W. R. 535.—C.A. FRY, L.J. dissenting; latter decision reversed nom. **The Zeta, Mersey Docks and Harbour Board v. Turner** (1893) 63 L. J. P. 17; [1893] A. C. 468; 1 R. 307; 69 L. T. 630; 57 J. P. 660; 7 Asp. M. C. 369.—H.L. (E.).

The Zeta, applied.

The Mecca (1894) 64 L. J. Adm. 40; [1895] P. 95; 11 R. 742; 71 L. T. 711; 43 W. R. 209; 7 Asp. M. C. 529.—C.A.

The Zeta, observations followed.

The Theta (1894) 63 L. J. Adm. 160; [1894] P. 280; 6 R. 712; 71 L. T. 25; 43 W. R. 160; 7 Asp. M. C. 480.—BRUCE, J.

The Zeta, considered and distinguished.

The Veritas (1901) 70 L. J. P. 75; [1901] P. 304; 85 L. T. 136; 50 W. R. 30.—BARNES, J.

The Zeta, adopted.

Davidsson v. Hill (1901) 70 L. J. K. B. 788; [1901] 2 K. B. 606; 85 L. T. 110; 49 W. R. 630; 9 Asp. M. C. 223.—KENNEDY and PHILLIMORE, JJ.

The North American and the Tecla Carmen

(1856) 12 Moore P. C. 331; Swab. 358; Lush. 79.—P.C., and **The Ann** (1860) 13 Moore P. C. 198; Lush. 55; 3 L. T. 128; 8 W. R. 567.—P.C., principle adhered to.

The East Lothian (1861) 14 Moore P. C. 177; Lush. 241; 4 L. T. 487.—P.C.

The North American, adopted.

Chapman v. Royal Netherlands Steam Navigation Co. (1879) 48 L. J. Ch. 449, 457; 4 P. D. 157, 177; 40 L. T. 433; 27 W. R. 554; 4 Asp. M. C. 107.—C.A.

The North American, approved.

Stoomvaart Maatschappij Nederland v. P. & O. Steam Navigation Co. (1882) 52 L. J. Adm. 1, 6; 7 App. Cas. 795, 806; 47 L. T. 198; 31 W. R. 249; 5 Asp. M. C. 567.—H.L. (E.).

The East Lothian, Kilgour v. Alexander

(1861) 14 Moore P. C. 177; Lush. 241; 4 L. T. 487.—P.C., referred to.
The Why Not (1868) 38 L. J. Adm. 26; L. R.

2 A. & E. 265; 18 L. T. 861.—ADM.; *The Orient*,
Yeo v. Tatem (1871) 40 L. J. Adm. 29; L. R. 3
 P. C. 696, 703; 8 Moore P. C. (N.S.) 74; 24
 L. T. 918; 20 W. R. 6; 1 Asp. M. C. 108.—P.C.

The John Boyne (1877) 3 Asp. M. C. 341;
 36 L. T. 29; 25 W. R. 756.—ADM., *ap-
 plied*.

Armstrong v. Gaselee (1889) 58 L. J. Q. B.
 149; 22 Q. B. D. 250; 59 L. T. 891; 37 W. R.
 462; 6 Asp. M. C. 353.—HUDDLESTON, B. and
 WILLS, J.

The Biola (1876) 34 L. T. 185; 24 W. R.
 524; 5 Asp. M. C. 125.—ADM., *not fol-
 lowed*.

The Radnorshire (1880) 49 L. J. Adm. 48; 5
 P. D. 172; 43 L. T. 319; 29 W. R. 476; 4 Asp.
 M. C. 338.—SIR R. PHILLIMORE.

Joyce v. Capel (1838) 38 Car. & P. 370.—Q.B.,
considered,
Powell v. McGlynn [1902] 2 Ir. R. 154.—K.B.D.
 and C.A.

The Triune (1834) 3 Hagg. Adm. 114.—
 ADM., *considered*.

The Volant (1842) 1 W. Rob. 383.—ADM.;
Reg. v. City of London Court Judge [1892] 1
 Q. B. 273; 66 L. T. 235; 10 W. R. 215.—C.A.;
 and *The Dictator* (1892) 61 L. J. P. 73; [1892]
 P. 304; 67 L. T. 563.—JEUNE, J.

The Temiscouata (1855) 2 Spinks 208.—
 ADM., *followed*.

The Freedom (1871) L. R. 3 A. & E. 495, 498;
 25 L. T. 392; 1 Asp. M. C. 136.—ADM.

The Dictator (1892) 61 L. J. P. 73; [1892]
 P. 304; 67 L. T. 563; 7 Asp. M. C. 251.
 —JEUNE, J., *referred to*.

The Ripon City (1897) 66 L. J. P. 110; [1897]
 P. 226; 77 L. T. 98; 8 Asp. M. C. 304.—
 BARNES, J.

The Dictator, *approved and followed*.

The Gempra (1899) 68 L. J. P. 110; [1899]
 P. 285; 81 L. T. 379; 8 Asp. M. C. 585.—C.A.
 SMITH and WILLIAMS, L.JJ.

The Dictator, *referred to*.

Cargo ex Port Victor [1901] P. 243, 249.—
 JEUNE, P., *affirmed C.A.*; and *the Veritas* [1901]
 P. 304, 310.—ROMER, J.

The Charlotte (1848) 3 W. Rob. 68; 6 Not.
 of Cas. 279.—ADM., *approved*.

The Strathnaver (1875) 1 App. Cas. 58; 34
 L. T. 148; 3 Asp. M. C. 113.—P.C.

SIR R. PHILLIMORE.—It may be useful to state
 what is really the law with respect to services
 rendered to a vessel in danger or apparent
 danger. The law is laid down in the case of
The Charlotte by Dr. Lushington. He says:
 "It is not necessary, I conceive, that the dis-
 tress should be actual or immediate, or that the
 danger should be imminent and absolute."—
 p. 65.

The Evangelismos, Xenos v. Aldersley (1858)
 12 Moore P. C. 352; Swabey 378.—P.C.,
adhered to.

Wilson v. The Queen (1866) L. R. 1 P. C. 405.
 —P.C.

The Evangelismos, distinguished.

The Cathcart (1867) L. R. 1 A. & E. 314, 333;
 16 L. T. 211.—ADM.

The Evangelismos, applied.

The Margaret and Jane (1869) 38 L. J. Adm.
 38; L. R. 2 A. & E. 345; 20 L. T. 1017; 17
 W. R. 1064.—ADM.

The Evangelismos, approved.

The Strathnaver (1875) 1 App. Cas. 58; 34
 L. T. 148; 3 Asp. M. C. 113.—P.C.

SIR R. PHILLIMORE.—It appears to their
 lordships that the general principles of law are
 correctly laid down in that judgment, and it is
 their intention to adhere to them.—p. 66.

The Evangelismos, applied.

The Collingrove, The Numida (1885) 54 L. J.
 Adm. 78; 10 P. D. 158; 53 L. T. 681; 34 W. R.
 156; 5 Asp. M. C. 483.—HANNEN, P.

The Evangelismos and The Strathnaver
(supra), *applied*.

The Walter D. Wallet (1893) 62 L. J. Adm.
 88; [1893] P. 202; 1 R. 627; 69 L. T. 771; 7
 Asp. M. C. 398.—JEUNE, P.

The Thomas Lea (1868) 38 L. J. Adm. 37;
 20 L. T. 1017.—ADM., *held overruled*.

The Benmore (1873) 43 L. J. Adm. 5; L. R.
 4 A. & E. 132; 22 W. R. 190.

SIR R. PHILLIMORE.—It is true that the
 practice of the Admiralty Court has been to call
 upon the defendants to begin in cases where no
 charge of negligence is made against the plain-
 tiff, and the only defence raised upon the
 pleadings is inevitable accident; but I think,
 after the recent decision of the Judicial Com-
 mittee of the Privy Council in the case of *The*
Marpesta (L. R. 4 P. C. 212; 26 L. T. 333; 8
 Moore P. C. (N.S.) 468), I can no longer allow
 the practice to prevail. I rule that the plaintiffs
 must begin.—p. 6.

[*Cf. The Otter* (1874) (L. R. 4 Adm. 203; 22
 W. R. 557; 30 L. T. 43; 2 Asp. M. C. 4).]

The River Lagan (1888) 57 L. J. P. 28; 58
 L. T. 773; 6 Asp. M. C. 281.—HANNEN, P.,
followed.

The Mystery (1902) 71 L. J. P. 39; [1902]
 P. 115; 86 L. T. 359; 50 W. R. 414; 9 Asp.
 M. C. 281.—JEUNE, P. and BARNES, J.

The Schwan (1874) 43 L. J. Adm. 18; L. R.
 4 Ad. & E. 187; 30 L. T. 537; 22 W. R.
 743.—ADM., *followed*.

The Daioz (1877) 47 L. J. P. 1; 37 L. T. 137;
 3 Asp. M. C. 477.—C.A.

The Daioz (1877) 47 L. J. Adm. 1; 37 L. T.
 137; 3 Asp. M. C. 477.—C.A., *referred to*.

General Steam Navigation Co. v. London and
Edinburgh Shipping Co. (1877) 47 L. J. Ex. 77;
 2 Ex. D. 467; 36 L. T. 743; 25 W. R. 694; 3
 Asp. M. C. 454.—EX. D.; *Morris v. Freeman*
 (1878) 47 L. J. P. 79; 3 P. D. 65, 69; 33 L. T.
 125; 27 W. R. 62.—HANNEN, P.; *The Matthew*
Cay (1879) 49 L. J. Adm. 47; 5 P. D. 49; 41
 L. T. 759; 28 W. R. 262; 4 Asp. M. C. 224.—
 SIR R. PHILLIMORE.

General Steam Navigation Co. v. London
and Edinburgh Shipping Co. (1877) 47
 L. J. Ex. 77; 2 Ex. D. 467; 36 L. T.
 743; 25 W. R. 694; 3 Asp. M. C. 454.—
 EX. D., *referred to*.

Morris v. Freeman (1878) 47 L. J. P. 79; 3

P. D. 65; 70: 39 L. T. 125; 27 W. R. 62.—
HANNEN, P.; *Bowley v. Bell* (1878) 48 L. J. Q. B. 161; 4 Q. B. D. 95; 39 L. T. 607; 27 W. R. 247.—Q.B.D.; *Myers v. Defries* (1879) 48 L. J. Ex. 446; 4 Ex. D. 176, 186; 40 L. T. 795; 27 W. R. 791.—C.A.

The Swansea v. The Condor (1879) 48 L. J. Adm. 33; 4 P. D. 115; 40 L. T. 442; 27 W. R. 748; 4 Asp. M. C. 115.—C.A., *referred to*.

The Matthew Cay (1879) 49 L. J. Adm. 47; 5 P. D. 49, 51; 41 L. T. 759; 28 W. R. 262; 4 Asp. M. C. 224.—ADM.; **The Hector** (1883) 52 L. J. Adm. 51; 8 P. D. 218, 220; 37 W. R. 491; 5 Asp. M. C. 1013.—C.A.; **The Naples** (1886) 55 L. J. Adm. 64; 11 P. D. 124; 55 L. T. 584; 35 W. R. 59; 6 Asp. M. C. 30.—BUTT, J.

The Hector (1883) 52 L. J. Adm. 51; 8 P. D. 218; 37 W. R. 491; 5 Asp. M. C. 1013.—C.A., *followed as to costs*.

The Quickstep (1890) 59 L. J. Adm. 65; 15 P. D. 196; 63 L. T. 713; 6 Asp. M. C. 603.—HANNEN, P. and BUTT, J.

The Ruby (1890) 15 P. D. 139; 63 L. T. 735; 6 Asp. M. C. 577.—BUTT, J., *followed*.

The Carl XV. (1892) 61 L. J. P. 61; [1892] P. 132; 40 W. R. 576.—BUTT, P.: *affirmed*, 61 L. J. Adm. 111; [1892] P. 324.—C.A.

The Herald (1890) 63 L. T. 324; 6 Asp. M. C. 542.—BUTT, J., *followed*.

The Asia (1890) 60 L. J. Adm. 38; [1891] P. 121; 64 L. T. 327; 7 Asp. M. C. 25.—HANNEN, P.

The Consett (1880) 5 P. D. 77; 42 L. T. 33; 28 W. R. 622; 4 Asp. M. C. 230.—C.A., *followed*.

The Savernake (1880) 49 L. J. Adm. 71; 5 P. D. 166; 29 W. R. 123; 5 Asp. M. C. 34, n.—ADM.; **The Marw** (1882) 7 P. D. 201, 203; 48 L. T. 28; 31 W. R. 248; 5 Asp. M. C. 33.—ADM.

The Empress Eugénie (1860) Lush. 138.—ADM., *overruled*.

The Friedeberg (1885) 54 L. J. Adm. 75; 10 P. D. 112; 52 L. T. 837; 33 W. R. 687; 5 Asp. M. C. 426.—C.A.

BRETT, M.R.—The Court of Admiralty always had jurisdiction over the costs of an action; and even if it had not, the jurisdiction has now been given by the Judicature Acts, and Order 45 has affirmed the discretion which the Court of Admiralty always had. . . . Therefore, with all deference to that eminent judge Dr. Lushington, I think that the moment he laid down the rule that where on a reference the plaintiff did not succeed in obtaining a certain proportion of his claim he was to be deprived of, or even have to pay, costs, he did what he had no legal power to do, and thereby fettered not only his own discretion, but that also of his successors. I doubt whether the rule which has been referred to is a good rule, and whether it would not in many cases work a good deal of injustice.

The Julia Fisher (1877) 2 P. D. 115; 36 L. T. 257; 25 W. R. 756; 3 Asp. M. C. 380.—ADM., *explained and not applied*.

Lake v. Haseltine (1885) 55 L. J. Q. B. 205.—HUDDLESTON, B. and WILLS, J.

Tennant v. Ellis (1880) 50 L. J. Q. B. 143; 6 Q. B. D. 46; 43 L. T. 506; 29 W. R. 121.—Q.B.D., *referred to*.
The Dragoman (1895) 11 Times L. R. 428.—BRUCE, J.

Larivière v. Morgan (1872) 41 L. J. Ch. 746; L. R. 7 Ch. 550; 26 L. T. 859; 20 W. R. 731.—L.C.; *reversed*, L. R. 7 H. L. 423.—H.L. (E.).

Larivière v. Morgan, *referred to*.

The Charkieh (1873) 42 L. J. Adm. 17; L. R. 4 A. & E. 59; 28 L. T. 513; 1 Asp. M. C. 581.—SIR R. PHILLIMORE; **Twycross v. Dreyfus** (1877) 46 L. J. Ch. 510; 5 Ch. D. 614; 36 L. T. 752.—C.A.

18. PASSENGER SHIPS.

Reg. v. Dublin J.L. (1884) 15 Cox C. C. 379; 14 L. R. Ir. 1.—Q.B.D. (IR.), *distinguished*.
Hedges v. Hooker (1889) 60 L. T. 822; 37 W. R. 491; 53 J. P. 613; 6 Asp. M. C. 386.—COLERIDGE, C.J. and HAWKINS, J.

Haigh v. Royal Mail Steam Packet Co. (1883) 52 L. J. Q. B. 640; 49 L. T. 802; 5 Asp. M. C. 189; 48 J. P. 230.—C.A., *referred to*.
Woodgate v. G. W. Ry. (1884) 51 L. T. 826, 830; 33 W. R. 428; 49 J. P. 196.—HAWKINS and SMITH, JJ.; **McCartan v. N. E. Ry.** (1885) 54 L. J. Q. B. 441, 443.—Q.B.

Thompson v. Farrer (1882) 51 L. J. Q. B. 534; 9 Q. B. D. 372; 47 L. T. 117; 4 Asp. M. C. 562.—C.A., *dictum adopted*.
Howard v. Clarke (1888) 20 Q. B. D. 553; 58 L. T. 401; 52 J. P. 310.—MATHEW and SMITH, JJ.

19. WHARFINGER.

The Moorcock (1889) 58 L. J. P. 73; 14 P. D. 64; 60 L. T. 654; 37 W. R. 439.—C.A., *distinguished*.

The Calliope (1890) 60 L. J. P. 28; [1891] A. C. 11; 63 L. T. 781; 39 W. R. 641; 6 Asp. M. C. 585; 55 J. P. 357.—H.L. (E.).

HALSBURY, L.C.—I cannot entertain a doubt, when I look at the form of the statement of claim as it originally stood, that the cause of action was originally founded upon the notion that this vessel was invited to a berth, in the strict and proper sense of that word, at which it was unfit for a vessel under any circumstances to lie, and that, by reason of the inequality and unfitness of the berth, the vessel being brought there was strained and injured. If that had been the complexion of the case, I certainly entertain no doubt that the law as laid down in the earlier cases and in the later case of *The Moorcock* would have been applicable to that state of things. . . . the contention is that this obligation exists, and that, to put it plainly, there was a hard substance left in front of their berth which ought to have been cleared away, and that by reason of its not having been cleared away this accident happened. With regard to that, which is in plain terms the contention which has been made, all I shall say upon that part of the case is that I do not know whether that is so or not, but one difficulty is that there is no evidence.—pp. 29, 31.

The Moorecock, rule in approved.

Hamlyn v. Wood (1891) 60 L. J. Q. B. 734; [1891] 2 Q. B. 488; 65 L. T. 286; 49 W. R. 24.—C.A.

The Moorecock, followed.

Butler v. McAlpine [1904] 2 Ir. R. 445.—C.A.

The Moorecock, distinguished.

Parker v. Plomesgate Rural Council (1904) 9 Com. Cas. 107.—WALTON, J.

The Calliope (1888) 59 L. T. 901; 6 Asp. M. C. 359.—BUTT, J.; *reversed*, (1889) 58 L. J. P. 76; 14 P. D. 138; 61 L. T. 656; 38 W. R. 155; 6 Asp. M. C. 440.—C.A.; *the latter decision reversed*, (1890) 60 L. J. P. 28; [1891] A. C. 11; 63 L. T. 781; 39 W. R. 641; 55 J. P. 357; 6 Asp. M. C. 585.—H.L. (E.).

20. PORTS, PIERS AND LIGHTHOUSES.

Falmouth (Earl) v. George (1828) 5 Bing. 286; 2 M. & P. 457; 7 L. J. (O.S.) C. F. 40; 30 R. R. 597.—C.P., *considered*.

Brecon Markets Co. v. Neath and Brecon Ry. (1872) 41 L. J. C. P. 257; L. R. 7 C. P. 555.—C.P. [affirmed EX. CH.].

Jenkins v. Harvey (1835) 5 L. J. Ex. 17; 1 C. M. & R. 877; 1 Gale 23; 5 Tyr. 326.—EX., *applied*.

Benjamin v. Andrews (1858) 5 C. B. (N.S.) 299; 27 L. J. M. C. 310; 4 Jur. (N.S.) 41; 6 W. R. 692.—C.P.

Jenkins v. Harvey, adopted.

Brecon Markets Co. v. Neath and Brecon Ry. (1872) 41 L. J. C. P. 257; L. R. 7 C. P. 555; 27 L. T. 316.—C.P.; affirmed, 42 L. J. C. P. 63; L. R. 8 C. P. 157.—EX. CH.; Norfolk (Duke) v. Arbutnot (1879) 48 L. J. C. P. 737; 4 C. P. D. 290, 312.—C.P.D.; affirmed, (1880) 49 L. J. C. P. 782; 5 C. P. D. 390; 43 L. T. 302; 44 J. P. 796.—C.A.; and Brocklebank v. Thompson (1903) 72 L. J. Ch. 626; [1903] 2 Ch. 344.—JOYCE, J.

Romney Marsh Bailiffs v. Trinity House Corporation (1872) 41 L. J. Ex. 106; L. R. 7 Ex. 247.—EX. CH., *observations applied*.

The George and Richard (1871) L. R. 3 Adm. 466; 24 L. T. 717; 20 W. R. 246; 1 Asp. M. C. 50.—ADM.; and Gilbert v. Trinity House Corporation (1886) 56 L. J. Q. B. 85; 17 Q. B. D. 795, 803; 35 W. R. 30.—DAY and WILLS, JJ.

Dennis v. Tovell (1872) 42 L. J. M. C. 33; L. R. 8 Q. B. 10; 27 L. T. 482; 21 W. R. 170; 2 Asp. M. C. 402.—Q.B., *followed*.

The Merle (1874) 31 L. T. 447; 2 Asp. M. C. 402.—ADM.

Dennis v. Tovell, not followed.

River Wear Commissioners v. Adamson (1876) 1 Q. B. D. 546; 46 L. J. Q. B. 83; 35 L. T. 118; 24 W. R. 872.—C.A.; affirmed, H.L. (*infra*).

Dennis v. Tovell, overruled.

Wear River Commissioners v. Adamson (1877) 2 App. Cas. 743; 47 L. J. Q. B. 193; 37 L. T. 543; 26 W. R. 217; 3 Asp. M. C. 521.—H.L. (E.).

[In the C. A. the case was not specifically mentioned in the judgments, but the decision of

the Court below, which had proceeded on the authority of *Dennis v. Tovell*, was unanimously reversed.]

[Lord Cairns did not concur in the reasoning of the Court of Appeal, but thought their conclusion right. Lord Hatherley could not concur in the reasons of the Court of Appeal; nor, otherwise than with extreme doubt, in the opinion of Lord Cairns: Lord O'Hagan's reasoning was not precisely that of the Court of Appeal, though he supported their conclusion. He held *Dennis v. Tovell* inapplicable. Lord Blackburn dissented from *Dennis v. Tovell*, and affirmed the judgment of the Court of Appeal with great doubt and hesitation. Lord Gordon dissented from the majority.]

Eglinton (Earl) v. Norman (1877) 46 L. J. Ex. 557; 36 L. T. 888; 25 W. R. 656; 3 Asp. M. C. 471.—C.A., *referred to*.

Wear River Commissioners v. Adamson (1877) 2 App. Cas. 743, 773; 47 L. J. Q. B. 193; 37 L. T. 543; 26 W. R. 217; 3 Asp. M. C. 521.—H.L. (E.).

Eglinton (Earl) v. Norman, overruled.

The Crystal Arrow SS. Co. v. Tyne Commissioners (1894) 63 L. J. Adm. 146; [1894] A. C. 508; 6 R. 258; 71 L. T. 346; 7 Asp. M. C. 513.—H.L. (E.).

[*Held* that the owner of a wreck within sect. 56 of the Harbours, Docks and Piers Clauses Act, 1847, is the owner at the time that the wreck is removed and disposed of, not the person who was owner at the time the destruction occurred.]

Wear River Commissioners v. Adamson, 29

L. T. 530; 22 W. R. 47.—Q.B.D.; *reversed* (1876) 46 L. J. Q. B. 83; 1 Q. B. D. 546; 35 L. T. 118; 24 W. R. 872.—C.A.; *the latter decision affirmed*, (1877) 47 L. J. Q. B. 193; 2 App. Cas. 743; 37 L. T. 543; 26 W. R. 217; 3 Asp. M. C. 521.—H.L. (E.).

Wear River Commissioners v. Adamson, distinguished.

Eglinton (Earl) v. Norman (1877) 46 L. J. Ex. 557; 36 L. T. 888; 25 W. R. 656; 3 Asp. M. C. 471.—C.A.

Wear River Commissioners v. Adamson, observations adopted.

Stoomvaart Maatschappij Nederland v. P. & O. Steam Navigation Co. (1880) 5 App. Cas. 876, 890; 52 L. J. Adm. 1; 43 L. T. 610; 29 W. R. 173; 4 Asp. M. C. 567.—H.L. (E.).

Wear River Commissioners v. Adamson, principle applied.

Western Counties Ry. v. Windsor and Annopolis Ry. (1882) 51 L. J. P. C. 43, 48; 7 App. Cas. 188; 46 L. T. 351.—P.C.

Wear River Commissioners v. Adamson, discussed.

The *Zeith* (1883) 11 L. R. Ir. 270.—C.A., *disapproved*.

The Crystal Arrow SS. Co. v. Tyne Commissioners (1894) 63 L. J. Adm. 146; [1894] A. C. 508; 6 R. 258; 71 L. T. 346; 7 Asp. M. C. 513.—H.L. (E.).

The Crystal (1894) 63 L. J. P. 146; [1894] 66 L. J. P. 166; [1897] A. C. 596; 77 L. T. A. C. 508; 71 L. T. 346; 7 Asp. M. C. 513; 6 R. 258.—H.L. (E.), *distinguished*.
Howard, Smith & Sons v. Wilson (1896) 65 L. J. P. C. 66; [1896] A. 579; 75 L. T. 81; 8 Asp. M. C. 197.—P.C.

The Crystal, applied.

Barraclough v. Brown (1897) 66 L. J. Q. B. 672; [1897] A. C. 615; 76 L. T. 797; 8 Asp. M. C. 290; 62 J. P. 275.—H.L. (E.).

Parnaby v. Lancaster Canal Co. (1839) 9

L. J. Ex. Ch. 338; 11 A. & E. 223; 3 P. & D. 162.—EX. CH., *principle approved*.

Johnson v. Midland Ry. (1849) 18 L. J. Ex. 366; 4 Ex. 367; 6 Railw. Cas. 61.—EX.; Gibbs v. Liverpool Docks Trustees (1858) 27 L. J. Ex. 321.—EX. CH.

Parnaby v. Lancaster Canal Co., approved.

Mersey Docks Trustees v. Gibbs (1864) 11 H. L. Cas. 686; 35 L. J. Ex. 225; L. R. 1 H. L. 93; 12 Jur. (N.S.) 571; 14 L. T. 677; 14 W. R. 872.—H.L. (E.).

Parnaby v. Lancaster Canal Co., followed.

Winch v. Thames Conservators (1874) 43 L. J. C. P. 167; L. R. 9 C. P. 378; 31 L. T. 128; 22 W. R. 879.—EX. CH.

Parnaby v. Lancaster Canal Co., distinguished.

Gallin v. L. & N. W. Ry. (1875) 44 L. J. Q. B. 89; L. R. 10 Q. B. 212; 32 L. T. 550; 23 W. R. 308.—Q.B.; Forbes v. Lee Conservancy Board (1879) 48 L. J. Ex. 402; 4 Ex. D. 116, 122; 28 W. R. 688.—EX. D.

Parnaby v. Lancaster Canal Co., applied.

Fleming v. Manchester Corporation (1881) 44 L. T. 517, 519; 45 J. P. 423.—STEPHEN, J.; Reg. v. Williams (1884) 53 L. J. P. C. 64; 9 App. Cas. 418; 51 L. T. 546.—P.C. (*see extract, ante*, col. 1974); Lowther v. Curwen (1887) 58 L. T. 168, 172.—KAY, J.

Parnaby v. Lancaster Canal Co., distinguished and not applied.

Reg. v. G. W. Ry. (1893) 62 L. J. Q. B. 572; 9 R. 127; 69 L. T. 572.—COLERIDGE, C.J. and CAVE, J.; and S. C. affirmed, C.A. FISHER, M.R. BOWEN and KAY, L.JJ.

Gilbert v. Trinity House Corporation (1886)

56 L. J. Q. B. 85; 17 Q. B. D. 795; 35 W. R. 80.—DAY and WILLS, JJ., *considered and not applied*.

Dunbar v. Ardee Union (1896) [1897] 2 Ir. R. 76.—C.A.

The Harrington (1888) 57 L. J. Adm. 45;

13 P. D. 48; 59 L. T. 72; 6 Asp. M. C. 282.—HANNEN, P., *approved*.

The Emerald, The Greta Holme (1896) 65 L. J. P. 69; [1896] P. 192; 74 L. T. 645; 8 Asp. M. C. 138.—C.A. FISHER, M.R. SMITH and RIGBY, L.JJ.

The Emerald, The Greta Holme (1896) 65

L. J. P. 69; [1896] P. 192; 74 L. T. 645; 8 Asp. M. C. 138.—C.A.; *reversed on one point*. (1897)

The Emerald, (supra, in C.A.) overruled in part.

The Mediana (1899) 68 L. J. P. 26; [1899] P. 127; 80 L. T. 173; 8 Asp. M. C. 493.—C.A.; affirmed, (1900) 69 L. J. P. 35; [1900] A. C. 113; 82 L. T. 95; 43 W. R. 398; 9 Asp. M. C. 41.—H.L. (E.).

The Emerald, (supra, in H.L.) approved and applied.

The Mediana (1899) 68 L. J. P. 26; [1899] P. 127; 80 L. T. 173; 8 Asp. M. C. 493.—C.A.; affirmed in H.L., (*supra*).

Michell v. Brown (1858) 28 L. J. M. C. 53;

1 E. & E. 264; 5 Jur. (N.S.) 707; 7 W. R. 80.—Q.B., *applied*.

Whitehead v. Smithers (1877) 46 L. J. M. C. 234, 236; 2 C. P. D. 553; 557; 37 L. T. 378.—C.P.D.

Smithett v. Blythe (1830) 1 B. & Ad. 509;

9 L. J. (O.S.) K. B. 39.—K.B.; and **Weymouth Corporation v. Nugent (1865) 5** B. & S. 22; 34 L. J. M. C. 81; 11 Jur. (N.S.) 465; 11 L. T. 672; 13 W. R. 335.—Q.B., *referred to*.

Hornsey Urban Council v. Hennell (1902) 71 L. J. K. B. 479; [1902] 2 K. B. 73; 86 L. T. 423; 50 W. R. 521; 66 J. P. 643.—ALVERSTONE, C.J., DARLING and CHANNELL, JJ.

Gladstone v. Gildart (1809) 2 Taunt. 97.—

C.P.; affirmed *nom. Gildart v. Gladstone (No. 2)* (1810) 12 East 439.—EX. CH. *And see S. C. infra*.

Gildart v. Gladstone (No. 1) (1809) 11 East

675.—EX. CH., *applied*.

Stockton and Darlington Ry. v. Barrett (1844) 11 Cl. & F. 590, 607.—H.L. (E.).

Gildart v. Gladstone (No. 1), adopted.

Pryce v. Monmouthshire Canal and Ry. Cos. (1879) 49 L. J. Ex. 130, 135; 4 App. Cas. 197, 205; 40 L. T. 630; 27 W. R. 666.—H.L. (E.).

Hull Dock Co. v. Browne (1831) 2 B. & Ad.

43.—K.B., *applied*.

Stockton and Darlington Ry. v. Barrett (1844) 11 Cl. & F. 590, 607.—H.L. (E.).

Henderson v. Mersey Docks (1887) 56 L. J.

Q. B. 473; 19 Q. B. D. 123; 57 L. T. 173; 36 W. R. 29; 6 Asp. M. C. 156.—C.A.; *reversed nom. Mersey Docks v. Henderson (1888) 13* App. Cas. 595; 59 L. T. 697.—H.L. (E.).

Lord Advocate v. Blantyre (Lord) (1879)

4 App. Cas. 770.—H.L. (SC.), *opinion adopted*.

Lord Advocate v. Lovat (1880) 5 App. Cas. 273, 314.—H.L. (SC.).

Lord Advocate v. Blantyre (Lord), recognised.

Blantyre (Lord) v. Clyde Navigation Trustees (1881) 6 App. Cas. 273, 287.—H.L. (SC.).

Lord Advocate v. Blantyre (Lord), adopted.

Lee River Conservators v. Button (1881) 6 App. Cas. 685, 692.—H.L. (E.).

Lord Advocate v. Blantyre (Lord), *referred to*.
 Lord Advocate v. Wemyss (1899) [1900] A. C. 48.—H.L. (SC.).

Dick v. Badart (1883) 10 Q. B. D. 387; 48 L. T. 391; 5 Asp. M. C. 49; 47 J. P. 422.
 —CAVE, J., *explained and applied*.
 Pidler v. Betty (1888) 59 L. T. 230, 233; 53 J. P. 2.—DENMAN and HAWKINS, JJ.

Thompson v. N. E. Ry. (1862) 31 L. J. Q. B. 194; 2 B. & S. 106, 119; 8 Jur. (N.S.) 991; 6 L. T. 127; 19 W. R. 404.—EX. CH., *referred to*.

The Excelsior (1868) 37 L. J. Adm. 54; L. R. 2 A. & E. 268, 271; 15 L. T. 87.—ADM.; Lax v. Darlington Corporation (1879) 5 Ex. D. 28, 31; 49 L. J. Ex. 105; 41 L. T. 489; 28 W. R. 221.—C.A.

21. SHIPBROKERS AND AGENTS.

Graves v. Legg (1854) 23 L. J. Ex. 228; 9 Ex. 709; 2 C. L. R. 1266.—EX.; affirmed, (1857) 26 L. J. Ex. 316; 2 H. & N. 210; 3 Jur. (N.S.) 519; 5 W. R. 597.—EX. CH., *adopted*.

Carter v. Scargill (1875) L. R. 10 Q. B. 564, 568; 32 L. T. 694.—Q.B.; Oppenheim v. Fraser (1876) 34 L. T. 524.—Q.B.D.; Bettini v. Gye (1876) 45 L. J. Q. B. 209; 1 Q. B. D. 183, 186; 34 L. T. 246; 24 W. R. 551.—Q.B.D.

Graves v. Legg, *adopted*.
 Wear River Commissioners v. Adamson (1877) 47 L. J. Q. B. 193; 2 App. Cas. 743; 37 L. T. 543; 26 W. R. 217.—H.L. (E.).

Graves v. Legg, *rule applied*.
 Kidston v. Monceau Ironworks (1902) 86 L. T. 556; 7 Com. Cas. 82.—KENNEDY, J.

22. ADMIRALTY LAW AND PRACTICE.

Coombes' Case (1785) 1 Leach C. C. 388.—ADM., *questioned and distinguished*.

Badische Anilin und Soda Fabrik v. Basle Chemical Works, Bindschedler (1897) 67 L. J. Ch. 141; [1898] A. C. 200; 77 L. T. 573; 46 W. R. 255.—H.L. (E.).

Australian Direct Steam Navigation Co., In re (1875) 44 L. J. Ch. 676; L. R. 20 Eq. 325.—JESSEL, M.R., *distinguished*.

Rio Grande do Sul Steamship Co., In re (1877) 5 Ch. D. 282; 46 L. J. Ch. 277; 36 L. T. 603; 25 W. R. 328; 3 Asp. M. C. 424.—C.A.

BRETT, J.A.—Had there not been mortgagees in possession, the case would have been within the authority of *In re Australian Direct Steam Navigation Co.*, and the case might have been disposed of entirely in the Court of Chancery. But the title of the mortgagees makes a great difference.—p. 286.

Australian Direct Steam Navigation Co., In re, *discussed*.

Belfast Shipowners' Co., In re (1893) [1894] 1 Ir. R. 321.—CHATTERTON v.-C. and C.A.

Wharton v. Pits (1692) 2 Salk. 548.—K.B., *overruled*.

Velthasen v. Ormsby (1789) 3 T. R. 315.—K.B.

Wharton v. Pits, *held overruled*.

London Corporation v. Cox (1867) L. R. 2 H. L. 239; 36 L. J. Ex. 225; 16 W. R. 44.—H.L. (E.).

WILLES, J.—The writ of prohibition at suit of a party is not, as it was thought to be by some

eminent judges at the close of the seventeenth century (see per Holt, C.J., *Clay v. Snelgrove*, and the decision of the same judge in *Wharton v. Pits*, overruled in *Velthasen v. Ormsby*), in the discretion of the Court.—p. 278.

Clay v. Snelgrove (1700) 1 Ld. Raym. 576; 12 Mod. 405; Holt 595; Carth. 518.—K.B., *held overruled*.

London Corporation v. Cox (1867) 36 L. J. Ex. 225, 241; L. R. 2 H. L. 239, 278; 16 W. R. 44.—H.L. (E.). See extract, *supra*.

Velthasen v. Ormsby (1789) 3 Term Rep. 315.—K.B., *approved*.

London Corporation v. Cox (1867) 36 L. J. Ex. 225, 241; L. R. 2 H. L. 239, 278; 16 W. R. 44.—H.L. (E.). See extract, *supra*.

The Jane and Matilda (1823) 1 Hagg. Ad. 187.—ADM., *approved*.

Reg. v. City of London Court Judge (1890) 59 L. J. Q. B. 427; 25 Q. B. D. 339; 63 L. T. 492; 38 W. R. 638.—COLERIDGE, C.J. and WILLES, J.; affirmed, (1891) 61 L. J. Q. B. 337; [1892] 1 Q. B. 273; 66 L. T. 135; 40 W. R. 215; 7 Asp. M. C. 140.—C.A.

Love v. Baker (1665) 2 Freem. 125; 1 Ch. Cas. 67; Nels. 103.—L.C., *held overruled*.

Portarlington (Lord) v. Soulby (1834) 3 My. & K. 104.—BROUGHAM, L.C.

The Fortuna (1808) Edwards 56.—ADM., *inapplicable*.

Cargo ex Argos (1873).—P.C. (*post*, col. 3458).

The Ruckers (1801) 4 C. Rob. 73.—ADM., *distinguished*.

The Sylph (1867) 37 L. J. Adm. 14; L. R. 2 A. & E. 24, 27; 17 L. T. 519.—ADM.

The Ruckers, *adopted*.
 The Franconia (1877) 46 L. J. Adm. 33; 2 P. D. 163; 36 L. T. 640; 25 W. R. 796.—C.A.

The Agincourt (1824) 1 Hagg. Adm. 271.—LORD STOWELL, *distinguished*.

The Sylph (1867) 37 L. J. Adm. 14; L. R. 2 A. & E. 24, 27; 17 L. T. 519.—ADM.

The Lowther Castle (1825) 1 Hagg. Adm. 384.—LORD STOWELL, *distinguished*.

The Sylph (1867) 37 L. J. Adm. 14; L. R. 2 A. & E. 24; 17 L. T. 519.—ADM.

The Malvina (1862) Lush. 493; Br. & L. 57. ADM., *adopted*.

The Sylph (1867) 37 L. J. Adm. 14; L. R. 2 A. & E. 24; 17 L. T. 519.—ADM.; Smith v. Brown (1871) 40 L. J. Q. B. 214; L. R. 6 Q. B. 729; 24 L. T. 808; 19 W. R. 1165.—Q.B.; Reg. v. City of London Court Judge (1882) 51 L. J. Q. B. 305; 8 Q. B. D. 602; 30 W. R. 566.—Q.B.D.; The Vera Cruz (1884); 9 P. D. 96.—C.A. (*see ante*, col. 3442); The Zeta (1893) 63 L. J. Adm. 17; [1893] A. C. 468; 69 L. T. 630; 7 Asp. M. C. 369.—H.L. (E.); The Veritas (1901) 70 L. J. P. 75; [1901] P. 304; 85 L. T. 136; 50 W. R. 30.—BARNES, J.

The Diana (1862) Lush. 539.—ADM., *applied*.
 The Sylph (1867) 37 L. J. Adm. 14; L. R. 2 A. & E. 24; 17 L. T. 519.—ADM.

The Diana, *followed*.

Reg. v. City of London Court Judge (1882) 51 L. J. Q. B. 305; 8 Q. B. D. 609; 30 W. R. 566.—Q.B.D.

The Sylph (1867) 37 L. J. Adm. 14; L. R. 2 A. & E. 24; 17 L. T. 519.—ADM., *adopted*.

The Guldfaxe (1868) 38 L. J. Adm. 12; L. R. 2 A. & E. 325; 19 L. T. 748; 17 W. R. 578.—ADM.; **The Beta** (1869) 38 L. J. Adm. 50; L. R. 2 P. C. 447, 449; 20 L. T. 988; 17 W. R. 933.—P.C. (*And see infra*.)

The Sylph and The Guldfaxe (*supra*), *followed*.

The Explorer (1870) 40 L. J. Adm. 41; L. R. 3 A. & E. 289; 23 L. T. 604; 19 W. R. 166.—ADM.

The Sylph and The Guldfaxe, *dissented from*.

Smith v. Brown (1871) 40 L. J. Q. B. 214; L. R. 6 Q. B. 729; 24 L. T. 808; 19 W. R. 1165.—Q.B. *See extract, infra*.

The Sylph and The Guldfaxe, *questioned*.

Simpson v. Blues (1872) L. R. 7 C. P. 290; 20 W. R. 680; 41 L. J. C. P. 121; 26 L. T. 697.—C.P. *See extract, infra*.

The Sylph and The Guldfaxe, *approved*.

The Franconia (1877) 46 L. J. Adm. 33; 2 P. D. 163; 36 L. T. 640; 25 W. R. 796.—C.A.; BRAMWELL and BRETT, L.JJ. *dissenting*.

The Guldfaxe, *held overruled*.

Adam v. British and Foreign Steamship Co. (1898) 67 L. J. Q. B. 844; [1898] 2 Q. B. 430; 79 L. T. 81; 8 Asp. M. C. 420.—DARLING, J.

The Beta (1869) 38 L. J. Adm. 50; L. R. 2 P. C. 447; 20 L. T. 988; 17 W. R. 933.—P.C., *applied*.

The Nepoter (1869) 38 L. J. Adm. 63; L. R. 2 A. & E. 375; 22 L. T. 177; 18 W. R. 49.—ADM.

The Beta, *dissented from*.

Smith v. Brown (1871) L. R. 6 Q. B. 729; 40 L. J. Q. B. 214; 24 L. T. 808; 19 W. R. 1165; 1 Asp. M. C. 53.—Q.B.

COCKBURN, C.J.—We are aware that in holding that the Court of Admiralty has not acquired jurisdiction in cases within the 9 & 10 Vict. c. 93, we are taking upon ourselves to overrule cases decided by very high authority. In the case of *The Sylph* (*supra*), the present judge of the Admiralty Court held that a diver who had been caught by the paddle-wheel of a steamer, and had suffered personal injury, might maintain a suit in that Court. In the subsequent case of *The Guldfaxe* (*supra*), the same learned judge held—though, as he himself declared, “not without doubt and hesitation”—that a claim arising on Lord Campbell’s Act was within the jurisdiction of the Court. In the still later case of *The Beta*, the plaintiff having brought his suit in the Court of Admiralty, in respect of personal injuries sustained through a collision between a ship on board of which he was serving and the defendants’ vessel, the defendants excepted to the jurisdiction; and the judge having rejected their petition, and the case having been brought before the Judicial Committee of the Privy Council on appeal, that Court, without even calling on the counsel for the respondents, dismissed the appeal with costs. We have, of course, felt greatly pressed by the weight of the decision of a Court of such high authority; but we have been unable to bring ourselves to adopt the same view. The grounds of the decision, which appear to us to have been arrived at

somewhat hastily, are very briefly given in the report of the case: and the difficulties which have stood in our way of taking the same view of the effect of the 7th section of the 9 & 10 Vict. c. 93, and which have led us to an opposite conclusion, do not appear to have been present to the minds of the members of the Committee who took part in the decision . . . after having given the case our best consideration, we arrive at the conclusion that the legislature, in omitting all reference to loss of life or personal injury, such as is to be found in the Merchant Shipping Acts, cannot properly be taken to have intended to give jurisdiction in respect of such matters by the use of the term “damage,” and thereby materially to alter the rights accruing under Lord Campbell’s Act, we feel bound, notwithstanding the weight of the authority we have referred to, to give effect to our opinion by giving judgment for the plaintiffs in prohibition.—p. 736.

The Beta, *questioned*.

Simpson v. Blues (1872) 41 L. J. C. P. 121, 128; L. R. 7 C. P. 290, 299; 26 L. T. 697; 20 W. R. 680.—C.P.

BRETT, J. (for the Court).—Again, the case of *The Sylph* (*supra*), affirmed on appeal by the Privy Council in *The Beta*, in which it was held, that a claim for compensation for personal injuries caused by negligent management of a ship might be maintained by a suit *in rem* in the Admiralty Court against the ship by virtue of the words, “The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship,” which are contained in sect. 7 of 24 Vict. c. 10, and the case of *The Guldfaxe* (*supra*) would be, if unimpeached, authorities to a great extent against the conclusion of which we in this case arrive. But these cases have been seriously impeached by the case of *Smith v. Brown* (*supra*, col. 3441), in the decision and reasoning and observations of which we entirely concur.—p. 299.

The Beta, *approved*.

The Franconia (1877) 46 L. J. Adm. 33; 2 P. D. 163; 36 L. T. 640; 25 W. R. 796.—C.A.; BRAMWELL and BRETT L.JJ. *dissenting*.

The Dowse (1870) 39 L. J. Adm. 46; L. R. 3 A. & E. 135; 22 L. T. 627; 18 W. R. 1008.—ADM., *applied*.

Simpson v. Blues (1872) 41 L. J. C. P. 121, 127; L. R. 7 C. P. 290, 298; 26 L. T. 697; 20 W. R. 680.—C.P.; **Cargo ex Argos** (1873) 42 L. J. Adm. 1, 7; L. R. 5 P. C. 134, 154; 28 L. T. 77; 21 W. R. 420.—P.C.

The Dowse, *followed*.

Allen v. Garbutt (1880) 50 L. J. Q. B. 141; 6 Q. B. D. 165; 29 W. R. 287; 4 Asp. M. C. 520, n.—Q.B.D. *See extract, infra*, col. 3460.

The Dowse, *considered*.

The Rona (1882) 51 L. J. Adm. 65; 7 P. D. 247; 46 L. T. 601; 30 W. R. 614; 4 Asp. M. C. 520.—SIR R. PHILLIMORE.

Everard v. Kendall (1870) 39 L. J. C. P. 234; L. R. 5 C. P. 428; 22 L. T. 408; 18 W. R. 392.—C.P., *followed*.

The Dowse (1870) 39 L. J. Adm. 46; L. R. 3 A. & E. 135; 22 L. T. 627; 18 W. R. 1008.—ADM.

Everard v. Kendall, considered and applied.

Simpson v. Blues (1872) 41 L. J. C. P. 121, 128; L. R. 7 C. P. 290, 298; 26 L. T. 697; 20 W. R. 680.—C.P.

Everard v. Kendall, adopted.

Cargo ex Argos (1873) 42 L. J. Adm. 1, 7; L. R. 8 P. C. 134, 154; 28 L. T. 77; 21 W. R. 420.—P.C.; *Flower v. Bradley* (1874) 44 L. J. Ex. 1; 31 L. T. 702; 23 W. R. 74; 2 Asp. M. C. 489.—ADM.

Everard v. Kendall, followed.

Allen v. Garbutt (1880) 50 L. J. Q. B. 141; 6 Q. B. D. 165; 29 W. R. 287; 4 Asp. M. C. 520, n.—Q.B.D.

Everard v. Kendall, considered.

The Rona (1882) 51 L. J. Adm. 65; 7 P. D. 247; 46 L. T. 601; 30 W. R. 614; 4 Asp. M. C. 520.—SIR R. PHILLIMORE.

Everard v. Kendall, inapplicable.

Hedges v. London and St. Katharine Docks Co. (1885) 55 L. J. M. C. 46; 16 Q. B. D. 597, 603; 54 L. T. 427; 34 W. R. 503; 5 Asp. M. C. 539; 50 J. P. 580.—HUDDLESTON, B. and WILLS, J.

Everard v. Kendall, dictum adopted.

Robson v. The Kete (1888) 57 L. J. Q. B. 546; 21 Q. B. D. 13; 59 L. T. 557; 36 W. R. 910; 6 Asp. M. C. 330.—WILLS and GRANTHAM, JJ.

Everard v. Kendall, approved.

Reg. v. City of London Court Judge (1891) 61 L. J. Q. B. 337; [1892] 1 Q. B. 273; 66 L. T. 135; 40 W. R. 215; 7 Asp. M. C. 140.—C.A. ESHER, M.R., LOPES and KAY, L.JJ.

The Explorer (1870) 40 L. J. Adm. 41; L. R.

3 A. & E. 289; 23 L. T. 604; 19 W. R. 166.—ADM., *discussed*.

The Franconia (1877) 2 P. D. 163, 167.—ADM.: affirmed, 46 L. J. Adm. 33; 2 P. D. 163; 36 L. T. 640; 25 W. R. 796.—C.A. BRAMWELL and BRETT, L.JJ. *dissenting*.

The Explorer, held overruled.

Adam v. British and Foreign Steamship Co. (1898) 67 L. J. Q. B. 844; [1898] 2 Q. B. 430; 79 L. T. 31; 8 Asp. M. C. 420.—DARLING, J.

The Explorer, approved and adopted.

Davidson v. Hill (1901) 70 L. J. K. B. 788; [1901] 2 K. B. 606, 615; 85 L. T. 118; 49 W. R. 630; 9 Asp. M. C. 223.—KENNEDY and PHILLIMORE, JJ.

Simpson v. Blues (1872) 41 L. J. C. P. 121;

L. R. 7 C. P. 290; 26 L. T. 697; 20 W. R. 680.—C.P., *disapproved of*.

Cargo ex Argos, Brown v. Gaudet (1872) L. R. 5 P. C. 134; 42 L. J. Adm. 1; 28 L. T. 77; 21 W. R. 420.—P.C.

SIR MONTAGUE SMITH (for the Court).—Their lordships have felt that the judgment of the Court of Common Pleas, in *Simpson v. Blues* is entitled to great consideration from the authority due to the Court and the force with which the reasons for the decision are stated, and they would have been glad to have been able to rest upon it. The Queen's ordinary Courts of Law, which hold the power of prohibition, must in the end decide questions of jurisdiction; and when their opinion has been fully declared, it must

and ought to be acquiesced in: but if, when the question has been brought before them on appeal, their lordships now yielded to the decision of the Common Pleas, they would in effect, conclude an important question of jurisdiction in a manner contrary to the opinion of the judge of the High Court of Admiralty—and as at present advised, their own—upon the authority of the judgment of one only of the Common Law Courts, pronounced on a summary application from which there was no appeal. They think, before this conclusion is reached, an opportunity should be given for further consideration of the statute.—p. 154.

Simpson v. Blues, referred to.

Flower v. Bradley (1874) 44 L. J. Ex. 1; 31 L. T. 702; 23 W. R. 74; 2 Asp. M. C. 489.—ADM.

Simpson v. Blues, approved.

Gunnestad v. Price, Fullmore v. Wait (1875) 44 L. J. Ex. 44; L. R. 10 Ex. 65; 32 L. T. 492; 23 W. R. 470; 2 Asp. M. C. 543.—EX. See extract, *infra*.

Simpson v. Blues, dissented from.

The Franconia (1877) 46 L. J. Adm. 33, 36; 2 P. D. 163, 173; 36 L. T. 640; 25 W. R. 796.—C.A.

Simpson v. Blues, disapproved.

The Alina (1880) 49 L. J. Adm. 40; 5 Ex. D. 527; 42 L. T. 517; 29 W. R. 94; 4 Asp. M. C. 256.—C.A. See extract, *infra*.

Simpson v. Blues, referred to.

The Rona (1882) 51 L. J. Adm. 65; 7 P. D. 247; 46 L. T. 601; 30 W. R. 614; 4 Asp. M. C. 520.—SIR R. PHILLIMORE.

James v. L. & S.W. Ry. (1872) 41 L. J. Ex.

186; L. R. 7 Ex. 287; 27 L. T. 382; 21 W. R. 25.—EX. CH., *referred to*.

The Franconia (1877) 46 L. J. Adm. 33; 2 P. D. 163, 173; 36 L. T. 640; 25 W. R. 796.—C.A. (overruled in *The Vera Cruz*; see col. 3442).

Cargo ex Argos, Brown v. Gaudet (1872) 42

L. J. Adm. 1; L. R. 5 P. C. 134; 28 L. T. 77; 21 W. R. 420.—P.C., *applied*.

G. N. Ry. v. Swaffield (1874) 43 L. J. Ex. 89, 91; L. R. 9 Ex. 132, 138; 30 L. T. 562.—EX.

Cargo ex Argos, not followed.

Flower v. Bradley (1874) 44 L. J. Ex. 1; 31 L. T. 702; 23 W. R. 74; 2 Asp. M. C. 489.—ADM.

Cargo ex Argos, dissented from.

Gunnestad v. Price, Fullmore v. Wait (1875) L. R. 10 Ex. 65; 44 L. J. Ex. 44; 32 L. T. 492; 23 W. R. 470; 2 Asp. M. C. 543.—EX.

BRAMWELL, B.—But what they are claiming they claim as of right, and not as a matter dependent on the opinion of any superior Court as to where the action should be brought. This being my view, and it being always a matter in which the difficulty might be obviated by leave being granted to sue in the superior courts (which, I think no judge would ever refuse), and it being in the power of the legislature to state what was or is its intention, the subject is perhaps not worth much discussion, with all respect be it said, to the two great authorities who have differed. But if we are to choose

between them, it seems to me that the Court of Common Pleas was right. The difficulties in the way of the Privy Council are most forcibly put in their judgment: to those are added most cogent arguments in the judgment of the Court of Common Pleas against the expediency of giving Admiralty jurisdiction in such cases as those in question, either to the High Court of Admiralty or the County Court. Shortly, the objections are, that on the construction contended for by the defendants, the County Court has Admiralty jurisdiction in cases in which the Admiralty Court has no original jurisdiction; that the High Court would have an appellate jurisdiction when it has not original jurisdiction; that there could be transferred to it from the County Court cases which it could not originally entertain, and so it could hear and decide cases not properly within its own jurisdiction or that of the County Court. To these objections are to be added, not as aiding the construction of the statute, but as helping to the probable intention of the legislature, the objections, so forcibly stated in the judgment of the Common Pleas, to Admiralty procedure being applied to such cases as those in question. These different considerations were felt so strongly by the Privy Council, that they would perhaps have decided as the Common Pleas did, but for the necessity of finding an application for words, for which they saw none if the Common Pleas were right. With great respect, it seems to me that a meaning may be given to the words, without the admittedly preposterous consequences the defendants contend for.—p. 73.

Cargo ex Argos, followed.

Gunnestad v. Price, disapproved.

The *Alina* (1880) 5 Ex. D. 227; 49 L. J. Adm. 40; 42 L. T. 517; 29 W. R. 94; 4 Asp. M. C. 256.—C.A.

JESSEL, M.R.—In the case of *Simpson v. Blues* (*supra*, col. 3457), where there were four judges, Willes, Byles, Brett and Grove, JJ., no one alleged, although something of that kind had fallen from Willes, J., on a previous occasion, that the words [of sect. 2 of 31 & 35 Vict. c. 71] were anything but clear in themselves, and the ground of the decision was totally different. In the case of the Privy Council, again (*The Cargo ex Argos*), we have four ordinary judges of the Privy Council, and all four agreed that the words were clear. Then when the case came again before a common law Court in *Gunnestad v. Price*, there were only two judges present, Baron Cleasby and Baron Bramwell. Baron Cleasby does not state the words to be otherwise than clear in themselves, but I admit that Baron Bramwell does, and he says that he considers them ambiguous. Whether or not they are ambiguous is a question, of course, not to be lightly passed over with the opinion of Baron Bramwell the other way, and, therefore, I wish to say a word or two on the grounds which induced him to think them ambiguous.—(p. 231)

[The Master of the Rolls then discusses Baron Bramwell's judgment at great length.] Now, with the greatest possible respect for Lord Justice Bramwell—and no one entertains a greater respect for him than I do—it shows how these different consequences strike different minds. Not only do they not appear to me to be either absurd or preposterous, but I

cannot see any objection to them at all. I cannot see any objection on the ground that the Appeal Court has no original jurisdiction over the same subject-matter: I cannot see any objection on the ground that the County Court should have Admiralty jurisdiction where the Court of Admiralty has no jurisdiction; nor can I see any objection on the ground which is the third and only one remaining, that the Court of Admiralty should transfer to itself especially difficult causes relating to maritime matters, though the Court itself had no original jurisdiction to deal with such a cause. That being my opinion, it appears to me that there is no absurdity and nothing preposterous in these consequences to induce us to overrule or control the plain meaning of the Act of Parliament. It does, therefore, lead me to the conclusion that the decision of the Privy Council is the correct decision.—p. 236.

Cargo ex Argos, inapplicable.

Allen v. Garbutt (1880) 50 L. J. Q. B. 141; 6 Q. B. D. 165; 29 W. R. 287; 4 Asp. M. C. 520, n.—Q.B.D. (See extract, *infra*.)

Cargo ex Argos, considered.

The Rona (1882) 51 L. J. Adm. 65; 7 P. D. 247; 46 L. T. 601; 30 W. R. 614; 4 Asp. M. C. 520.—SIR R. PHILLIMORE.

Cargo ex Argos, explained and not applied.

Reg. v. Southend County Court Judge (1884) 53 L. J. Q. B. 423; 13 Q. B. D. 142, 146; 32 W. R. 754.—HAWKINS and SMITH, JJ.

Cargo ex Argos, dictum considered.

Reg. v. City of London Court Judge (1891) [1892] 1 Q. B. 273, 304; 61 L. J. Q. B. 337; 66 L. T. 135; 40 W. R. 215; 7 Asp. M. C. 140.—C.A.

Cargo ex Argos, referred to.

The Theodora (1897) 66 L. J. Adm. 50; (1897) P. 279; 76 L. T. 627.—JEUNE, P. and BARNES, J.

The Alina (1880) 49 L. J. Adm. 40; 5 Ex. D. 227; 42 L. T. 517; 29 W. R. 94; 4 Asp. M. C. 256.—C.A., distinguished.

Allen v. Garbutt (1880) 6 Q. B. D. 165; 50 L. J. Q. B. 141; 29 W. R. 287; 4 Asp. M. C. 520, n.—Q.B.D.

MANISTY, J. (for the Court).—Upon referring to that case, it will be found that it was a decision as to the effect of the Act of 1869 with reference to an action for a breach of a charter-party, as to which jurisdiction was given to the County Court in express terms by sect. 2, subsect. 1 of the Act of 1869. The Court of Appeal followed and adopted the decision of the Privy Council in the cases of *Cargo ex Argos* (*supra*) and *The Helwons* (L. R. 5 P. D. 134), decided in 1872. These decisions have reference to the construction of the Act of 1869, and do not touch the present question, which depends upon the construction of the Act of 1868. *The Douce* (*supra*, col. 3456) is in point as to the construction of the Act of 1868, and we should probably have felt bound to follow it, even if we had doubted its correctness, but we do not entertain any such doubt.—p. 167.

The Alina, followed.

The Rona (1882) 7 P. D. 247; 51 L. J. Adm. 65; 46 L. T. 601; 30 W. R. 614; 4 Asp. M. C. 520.—SIR R. PHILLIMORE.

The Alina, applied.

Rex v. City of London Court Judge (1891) 61 L. J. Q. B. 337; [1892] 1 Q. B. 273; 66 L. T. 135; 40 W. R. 215; 7 Asp. M. C. 140.—C.A. Esher, M.R., Lopes and Kay, L.J.J.; Pugsley v. Ropkins (1892) 61 L. J. Q. B. 645; [1892] 2 Q. B. 184; 67 L. T. 369; 40 W. R. 596; 7 Asp. M. C. 215.—C.A. Esher, M.R., Fry and Lopes, L.J.J.

Allen v. Garbutt (1880) 50 L. J. Q. B. 141;

6 Q. B. D. 165; 29 W. R. 277; 4 Asp. M. C. 520, n.—Q.B.D., *considered*.
The Rona (1882) 51 L. J. Adm. 65; 7 P. D. 247; 46 L. T. 601; 30 W. R. 614; 4 Asp. M. C. 520.—SIR R. PHILLIMORE.

Allen v. Garbutt, approved.

Reg. v. City of London Court Judge (1891) 61 L. J. Q. B. 337; [1892] 1 Q. B. 273; 66 L. T. 135; 40 W. R. 215; 7 Asp. M. C. 140.—C.A. Esher, M.R., Lopes and Kay, L.J.J.

The Rona (1882) 51 L. J. Adm. 65; 7 P. D.

247; 46 L. T. 601; 30 W. R. 614; 4 Asp. M. C. 520.—ADM., *referred to*.

The Theodora (1897) 66 L. J. P. 50; [1897] P. 279; 76 L. T. 627; 46 W. R. 157.—JEUNE, P. and BARNES, J.

Reg. v. City of London Court Judge (1890)

59 L. J. Q. B. 427; 25 Q. B. D. 339; 63 L. T. 492; 38 W. R. 638; 6 Asp. M. C. 547.—COLERIDGE, C.J. and WILLS, J., *distinguished*.

The Ruby (1898) 67 L. J. P. 28; [1898] P. 59; 78 L. T. 235; 46 W. R. 687; 8 Asp. M. C. 421.—JEUNE, P.

The County of Durham (1890) 60 L. J. P. 5;

[1891] P. 1; 64 L. T. 146; 39 W. R. 303; 6 Asp. M. C. 606.—HANNEN, P. and BUTT, J.; and Pugsley v. Ropkins (1892) 61 L. J. Q. B. 645; [1892] 2 Q. B. 184; 67 L. T. 369; 40 W. R. 596; 7 Asp. M. C. 215.—C.A., *explained*.

The City of Agra (1898) 67 L. J. P. 81; [1898] P. 198; 78 L. T. 307.—BARNES, J.

Alcock v. Cooke (1829) 5 Bing. 340; 2 M. & P.

625; 7 If J. (o.s.) C. P. 126; 30 R. R. 625.—C.P., *commented on*.

G. E. Ry. v. Goldsmith (1884) 9 App. Cas. 927; 54 L. J. Ch. 162; 52 L. T. 270; 33 W. R. 81; 49 J. P. 260.—H.L. (E.).

SELBORNE, L.C.—With regard to *Alcock v. Cooke*, it is a case which may be perfectly correct in the principles which it lays down; but it is a very singular fact, that, if there ever was a case in which the Court went out of its way to lay down principles which were not needful for the decision of the particular matter before it, it was the case of *Alcock v. Cooke*; because there the question was whether wreck could be claimed by the owner of a property called Sutton, which was alleged to be part of a manor named Greet-ham, which manor was within property of the Duchy of Lancaster. Wreck was not mentioned in the grant, and the Court, upon looking at Domesday Book, are stated in the report, page 346, to have been of opinion that Sutton was not within the manor. One would have thought that the whole foundation of the case would then have disappeared; nevertheless the Court went on to express its opinion as to what the

state of the case would have been if wreck had been granted by the grant under which the party claimed; and it is said that inasmuch as this was clearly proved that at the date of the grant wreck was outstanding, so to say, leased as belonging to a larger property to another person who was in possession under the lease, which was for a term of years, such a grant of what was not at the time in the possession of the Crown would have been void. Well, I am not at all concerned to enter upon the question whether that was so or not. I only observe that that has no bearing upon the present case.—p. 940.

Le Caux v. Eden (1781) Dougl. 594;—K.B., applied.

London Corporation v. Cox (1867) 36 L. J. Ex. 225, 232; L. R. 2 H. L. 239, 262; 16 W. R. 44.—H.L. (E.).

Le Caux v. Eden, commented upon.

The Sylph (1867) L. R. 2 A. E. 24, 28; 37 L. J. Adm. 14; 17 L. T. 519.—ADM.

Le Caux v. Eden, dicta applied.

Sullivan v. Spencer (Earl) (1872) Ir. R. 6 C. L. 173.—Q.B.

The Lanarkshire (1855) 2 Spinks 189.—ADM., applied.

The Mali Ivo (1869) 38 L. J. Adm. 34; L. R. 2 A. & E. 356, 359; 20 L. T. 681.—ADM.; and Walsh v. Lincoln (Bishop) (1874) L. R. 4 A. & E. 242, 253.—ARCHBISH.

The Margaret (1829) 2 Hagg. Adm. 275.—ADM., referred to.

The Cawdor (1900) 69 L. J. P. 23; [1900] P. 47; 81 L. T. 705; 48 W. R. 293; 9 Asp. M. C. 19.—C.A. SMITH, RIGBY and COLLINS, L.J.J.

The Talca (1880) 5 P. D. 169; 42 L. T. 61; 29 W. R. 123; 4 Asp. M. C. 226.—ADM., doubted.

The Vindobala (1889) 58 L. J. P. 51; 14 P. D. 50; 60 L. T. 657; 37 W. R. 409; 6 Asp. M. C. 376.—C.A.

The See Reuter (1812) 1 Dodds. 22.—SIR W. SCOTT, applied.

The Evangelistria (1876) 46 L. J. Adm. 1; 2 P. D. 241; 35 L. T. 410; 25 W. R. 255; 3 Asp. M. C. 264.—ADM.

Smith, In re, City of Mecca, In re (1876) 45 L. J. Adm. 92; 1 P. D. 300; 35 L. T. 380; 24 W. R. 903; 3 Asp. M. C. 259.—ADM., followed.

The Vivar (1877) 2 P. D. 29; 35 L. T. 782; 25 W. R. 379, 453; 3 Asp. M. C. 308.—SIR R. PHILLIMORE; affirmed, C.A.

The Evangelistria (1876) 46 L. J. Adm. 1; 2 P. D. 241; 35 L. T. 410; 25 W. R. 255; 3 Asp. M. C. 264.—ADM., followed.

The Vivar (1877) 2 P. D. 29; 35 L. T. 782; 25 W. R. 379, 453; 3 Asp. M. C. 308.—SIR R. PHILLIMORE; affirmed, C.A.

The Evangelistria, distinguished.

The Agincourt (1877) 47 L. J. Adm. 37; 2 P. D. 239.—SIR R. PHILLIMORE.

The Idas (1863) Br. & L. 65.—ADM., *applied*.
The Lady of the Lake (1870) 39 L. J. Adm. 40; L. R. 3 A. & E. 29; 21 L. T. 683; 18 W. R. 528.—ADM.

The Neptune, Hodges v. Sims (1835) 3 Knapp P. C. 94.—P.C., *followed*.
The New Eagle (1846) 2 W. Rob. 441.—ADM.

The Neptune, referred to.
The Dowse (1870) 39 L. J. Adm. 46; L. R. 3 A. & E. 135; 22 L. T. 627; 18 W. R. 1008.—ADM.

The Neptune, considered.
The Two Ellens (1871) 40 L. J. Adm. 11, 14; L. R. 3 A. & E. 355; 24 L. T. 592; 1 Asp. M. C. 40.—ADM.; affirmed, P.C. (*see infra*, col. 3467); **The Riga** (1872) 41 L. J. Adm. 39, 41; L. R. 3 A. & E. 516, 520; 26 L. T. 202; 20 W. R. 927; 1 Asp. M. C. 246.—ADM.

The Neptune, followed.
The Two Ellens, Johnson v. Black (1872) 8 Moore P. C. (N.S.) 398; 41 L. J. Adm. 38; L. R. 4 P. C. 161; 26 L. T. 1; 20 W. R. 592; 1 Asp. M. C. 208.—P.C.

The Neptune, applied.
James v. L. & S. W. Ry. (1872) 41 L. J. Ex. 186, 189; L. R. 7 Ex. 287, 292; 27 L. T. 382; 21 W. R. 25; 1 Asp. M. C. 226.—EX. CH.; **Alley v. Garbutt** (1880) 50 L. J. Q. B. 141; 6 Q. B. D. 165; 29 W. R. 287; 4 Asp. M. C. 520, n.—Q.B.D.; **The Rio Tinto, Laws v. Smith** (1884) 9 App. Cas. 356, 359; 50 L. T. 461; 5 Asp. M. C. 224.—P.C.; **The Heinrich Björn** (1885) 54 L. J. P. 33; 10 P. D. 44, 51; 52 L. T. 560; 33 W. R. 719; 5 Asp. M. C. 391.—C.A.; affirmed, H.L. (E.). *See infra*, col. 3468.

The Alexander (1841-2) 1 W. Rob. 288, 346.—ADM., *held erroneous*.
The Two Ellens (1871) 40 L. J. Adm. 11; L. R. 3 A. & E. 345; 24 L. T. 592.—ADM.; affirmed, (1872) 41 L. J. Adm. 33; L. R. 4 P. C. 161; 8 Moore P. C. (N.S.) 398; 26 L. T. 1; 20 W. R. 592; 1 Asp. M. C. 208.—P.C.

The Alexander, observations adopted.
The Riga (1872) 41 L. J. Adm. 39, 40; L. R. 3 A. & E. 516, 519; 26 L. T. 202; 20 W. R. 927; 1 Asp. M. C. 246.—ADM.

The Alexander, adopted.
The Pieve Superiore (1874) 43 L. J. Adm. 20; L. R. 5 P. C. 482, 492; 30 L. T. 887; 22 W. R. 777; 2 Asp. M. C. 319.—P.C.

The Alexander, observations adopted.
The Rio Tinto (1884) 9 App. Cas. 356, 360; 50 L. T. 461; 5 Asp. M. C. 224.—P.C.

The Alexander, observed upon and applied.
The Heinrich Björn (1885) 55 L. J. Adm. 80; 11 App. Cas. 270, 284; 55 L. T. 66; 6 Asp. M. C. 1.—H.L. (E.).

The Flecha (1854) 1 Spinks F. & Ad. 438.—ADM., *considered*.
The Heinrich Björn (1886) 55 L. J. Adm. 80; 11 App. Cas. 270, 279; 55 L. T. 66; 6 Asp. M. C. 1.—H.L. (E.).

The Wataga (1856) Swab. 165; 5 W. R. 155.—ADM., *adopted*.
The Feronia (1868) 37 L. J. Adm. 60, 63; L. R. 2 A. & E. 65, 73; 17 L. T. 619; 16 W. R. 585.—ADM.

The Wataga, followed.
The Anna (1876) 46 L. J. Adm. 15; 4 P. D. 253; 34 L. T. 895; 3 Asp. M. C. 337.—C.A.

The Wataga, dictum adopted.
The Heinrich Björn (1885) 54 L. J. P. 33; 10 P. D. 44, 52; 52 L. T. 560; 33 W. R. 719; 5 Asp. M. C. 391.—C.A.; affirmed, H.L. (E.). *See infra*, col. 3468.

The Wataga and The Anna, observed upon.
The Mecca (1894) 64 L. J. Adm. 40; [1895] P. 95; 11 R. 742; 71 L. T. 711; 43 W. R. 209; 7 Asp. M. C. 529.—C.A.

The Perla (1857) Swab. 230; 4 Jur. (N.S.) 741.—ADM., *applied*.
The Yan-Yean (1833) 8 P. D. 147, 149; 52 L. J. Adm. 67; 49 L. T. 186; 31 W. R. 950; 5 Asp. M. C. 135.—HANNEN, P.

The West Friesland (1859) 18 Moore P. C. 185; Swab. 454.—P.C., *distinguished*.
The Underwriter (1868) 25 L. T. 279; 1 Asp. M. C. 127.—ADM.

The West Friesland, applied.
The Riga (1872) 41 L. J. Adm. 39; L. R. 3 A. & E. 516, 520; 26 L. T. 202; 20 W. R. 927; 1 Asp. M. C. 246.—ADM.

The West Friesland, distinguished.
Laws v. Smith, The Rio Tinto (1884) 9 App. Cas. 356, 361; 50 L. T. 461; 5 Asp. M. C. 224.—P.C.

The West Friesland, overruled.
Northcote v. The Heinrich Björn Owners, The Heinrich Björn (1886) 55 L. J. Adm. 80; 11 App. Cas. 270, 280; 55 L. T. 66; 6 Asp. M. C. 1.—H.L. (E.).

The Onni (1860) Lush. 154; 3 L. T. 447.—ADM., *applied*.
The Riga (1872) 41 L. J. Adm. 39; L. R. 3 A. & E. 516, 520; 26 L. T. 202; 20 W. R. 927; 1 Asp. M. C. 246.—ADM.; **The Anna** (1876) 46 L. J. Adm. 15; 1 P. D. 253; 34 L. T. 895.—ADM.

The Comtesse de Fregeville (1861) Lush. 329; 4 L. T. 713.—ADM., *distinguished*.
The Underwriter (1868) 25 L. T. 279; 1 Asp. M. C. 127.—ADM.

The Comtesse de Fregeville, observed upon.
The Riga (1872) L. R. 3 A. & E. 516; 41 L. J. Adm. 39; 26 L. T. 202; 20 W. R. 927; 1 Asp. M. C. 246.

SIR R. PHILLIMORE.—The attention of the Court (in this case) does not seem to have been drawn to the previous case of *The Onni* (*supra*), nor to the 24 Vict. c. 10, which had been passed in the month preceding the decision in *The Comtesse de Fregeville*, to which it seems to me very important to advert. The 4th section of that statute gives the Court a jurisdiction over "claims for building, equipping, or repairing any ship," claims which would answer to those of the old material man, as known in this Court before the decision in *The Neptune* (*supra*, col. 3463). The 5th section of the same statute gives the

Court a distinct jurisdiction over "any claim for necessities supplied to any ship" in certain cases. Since this statute, in *The Bonne Amélie* (*infra*), in 1865, it was decided that the travelling expenses of an agent to attend a trial in a case of collision were not necessities; and in *The Aaltze Willemina* (*infra*), in 1866, the Court refused to consider money advanced to a master to pay average necessities. In both these cases, however, and in other former cases, the Court seems to have considered that money advanced for the purchase of necessities stood on the same footing as necessities.—p. 521.

The Bonne Amélie (1865) 35 L. J. Adm. 115; L. R. 1 A. & E. 19; 14 L. T. 191; 6 Asp. M. C. 149.—ADM.; and **The Aaltze Willemina** (1866) L. R. 1 A. & E. 107.—ADM., referred to.

The Riga (1872) L. R. 3 A. & E. 516; 41 L. J. Adm. 39; 26 L. T. 208; 20 W. R. 927; 1 Asp. M. C. 246.—ADM. (see extract, *supra*).

The Ella A. Clark (1863) Br. & L. 32; 32 L. J. Adm. 211; 9 Jur. (N.S.) 312; 8 L. T. 119; 11 W. R. 524.—ADM., held overruled on one point.

The Two Ellens (1871) 40 L. J. Adm. 11; L. R. 3 A. & E. 355; 24 L. T. 592; 1 Asp. M. C. 40.—ADM.; affirmed, P.C. See *infra*, col. 3467.

The Ella A. Clark, applied.

Allen v. Garbutt (1880) 50 L. J. Q. B. 141; 6 Q. B. D. 165; 29 W. R. 287; 4 Asp. M. C. 520, n.—Q.B.D.

The Ella A. Clark, distinguished.

The Rio Tinto, Laws v. Smith (1884) 9 App. Cas. 356, 361; 50 L. T. 461; 5 Asp. M. C. 224.—P.C.

The Ella A. Clark, overruled.

The Heinrich Björn (1885) 10 P. D. 44; 54 L. J. P. 33; 52 L. T. 560; 33 W. R. 719; 5 Asp. M. C. 391.—C.A.; affirmed, H.L. (E.) (*infra*).

FRY, L.J. (for the Court).—In 1871, in *The Two Ellens* (*infra*, col. 3467), Sir R. Phillimore had to determine whether, as the law was then and is now, the material man has a maritime lien upon a British ship under the statute of 1861; and after reviewing several of the decisions of Dr. Lushington, he expressed his inability to acquiesce in the reasoning on which the judgment in *The Pacific* (*infra*, col. 3466) was founded, or to reconcile that reasoning with the judgment in *The Ella A. Clark*. "The two statutes ought," he said, "I should have ventured to think, to be constructed as being *in pari materia*." He further said that he should have thought that, in the case of material men, there was an inchoate lien before the institution of the suit, but nevertheless he determined to follow Dr. Lushington in the case of *The Pacific*, and held that there was no such lien. The case was naturally carried to the P. C., when the decision of the Court below, to the effect that no maritime lien was created by the statute of 1861 against a British ship, was upheld.—p. 59.

The result of this long catena of authorities is hardly satisfactory; it shows that for several years Dr. Lushington repelled the notion that the statutes of 1840 created any maritime lien in favour of the material man; it shows that in one or more cases he admitted the opposite view, but that at a yet later date he reverted to the earlier conclusion; and that in the one case, that

of *The Ella A. Clark*, in which he formally decided in favour of the lien, he did so on a principle of construction, namely, that when the legislature gave a proceeding *in rem*, then it created a maritime lien, and that this principle was rejected by the learned judge himself in the next case of *The Pacific*, and by the P. C. in the case of *The Two Ellens*.

It appears to us that, upon the whole, the current of authorities is against the existence of the lien. . . .

In our opinion the two statutes of 1840 and 1861 ought (notwithstanding the observations of Mellish, L.J., in *The Two Ellens*) to be construed as *in pari materia*, and we think that the decision of the P. C. in that case lends confirmation to the conclusion at which we arrive, namely, that whilst the statute of 1840 has enabled the material man to enforce his claim in the Admiralty Court, and as one means has given him a right to arrest the ship, it has given him no maritime lien, and consequently no right against the ship till action brought.—p. 60.

The Ella A. Clark, overruled.

The Heinrich Björn, Northcote v. The Heinrich Björn (1886) 55 L. J. Adm. 80; 11 App. Cas. 270; 55 L. T. 66; 6 Asp. M. C. 1.—H.L. (E.); affirming (1885) 54 L. J. Adm. 33; 52 L. T. 560; 33 W. R. 719; 5 Asp. M. C. 391.—C.A.

The Skipwith (1864) 10 Jur. (N.S.) 445; 10 L. T. 43.—ADM., commented on.

The Pacific (1864) 10 Jur. (N.S.) 1110; 33 L. J. Adm. 120; 10 L. T. 541; Br. & Lush. 243.

DR. LUSHINGTON.—I think I am bound to notice the case of *The Skipwith*, as reported, and I have no reason to say not correctly reported. It may be that in that case some of the observations made by me, either really or apparently, are not reconcilable with this judgment. The observations may have been correctly reported, but erroneously applied to the facts of the case, as I am now able to ascertain them. I regret that the case of *The Skipwith* was not brought before the Court in a more formal shape, and that it was not more maturely considered; but, if I was in error in that case, assuredly I would never for a mere nominal consistency persist in it.—p. 1111.

The Skipwith, held overruled.

The Harriet (1868) 18 L. T. 804.—ADM.

The Skipwith, held overruled.

The Two Ellens (1871) 40 L. J. Adm. 11, 14; L. R. 3 A. & E. 355, 356; 24 L. T. 592; 1 Asp. M. C. 40.—ADM., affirmed, P.C. (*infra*, col. 3467). *The Rio Tinto*, *Laws v. Smith* (1884) 9 App. Cas. 356, 362; 50 L. T. 461; 5 Asp. M. C. 224.—P.C.

The Pacific (1864) Br. & L. 243; 33 L. J. Adm. 120; 10 Jur. (N.S.) 1110; 10 L. T. 541.—ADM., adopted.

The Troubadour (1866) L. R. 1 A. & E. 302, 304; 16 L. T. 156.—ADM. *The Scio* (1867) L. R. 1 A. & E. 353, 355; 16 L. T. 642.—ADM.; *The Harriet* (1868) 18 L. T. 804.—ADM.; *The Two Ellens*, *Johnson v. Black* (1872) 8 Moore P. C. (N.S.) 398; 41 L. J. Adm. 33; L. R. 4 P. C. 161; 26 L. T. 1; 20 W. R. 592; 1 Asp. M. C. 208.—P.C.; *Simpson v. Blues* (1872) 41 L. J. C. P. 121, 126; L. R. 7 C. P. 290, 295; 26 L. T. 597; 20 W. R. 680.—C.P.; *Dapnetto v. Wallie*,

The Pieve Superiore (1874) 43 L. J. Adm. 29; L. R. 5 P. C. 482, 492; 30 L. T. 887; 22 W. R. 777; 2 Asp. M. C. 319.—P.C.; Allen v. Garbutt (1880) 50 L. J. Q. B. 141; 6 Q. B. D. 165; 29 W. R. 287; 4 Asp. M. C. 520, n.; Laws v. Smith, The Rio Tinto (1884) 9 App. Cas. 356, 362; 50 L. T. 461; 5 Asp. M. C. 224.—P.C.

The Pacific, discussed and applied.

The Heinrich Björn (1885) 54 L. J. P. 33; 10 P. D. 44, 51; 52 L. T. 560; 33 W. R. 719; 5 Asp. M. C. 391.—C.A.; affirmed, H.L. (E.) (*infra*). See extract, *infra*, col. 3465.

The Pacific, approved.

Hamilton v. Baker, The Sara (1889) 58 L. J. Adm. 57; 14 App. Cas. 209, 219; 61 L. T. 26; 38 W. R. 129; 6 Asp. M. C. 413.—H.L. (E.).

The Ocean (1845) 2 W. Rob. 368; 9 Jur. 381.

—ADM., adopted.

The Feronia (1868) 37 L. J. Adm. 60, 63; L. R. 2 A. & E. 65, 73; 17 L. T. 619; 16 W. R. 585.—ADM.

The Ocean, observations adopted.

The Heinrich Björn (1885) 54 L. J. P. 33; 10 P. D. 44, 55; 52 L. T. 560; 33 W. R. 719; 5 Asp. M. C. 391.—C.A.

The Ocean, observed upon.

The Mecca (1894) 64 L. J. Adm. 40; [1895] P. 95; 11 R. 742; 71 L. T. 711; 43 W. R. 209; 7 Asp. M. C. 529.—C.A.

The Two Ellens, Johnson v. Black (1872) 41

L. J. Adm. 33; L. R. 4 P. C. 161; 8 Moore P. C. (N.S.) 398; 26 L. T. 1; 20 W. R. 592; 1 Asp. M. C. 208.—P.C., applied.

The Pieve Superiore, Dapuetto v. Wyllie (1874) 43 L. J. Adm. 20; L. R. 5 P. C. 482, 489; 30 L. T. 887; 22 W. R. 777; 2 Asp. M. C. 319.—P.C.; The Aneroid (1877) 47 L. J. Adm. 15; 2 P. D. 189; 36 L. T. 748; 3 Asp. M. C. 418.—ADM.; The Rio Tinto, Laws v. Smith (1884) 9 App. Cas. 356, 362; 50 L. T. 461; 5 Asp. M. C. 224.—P.C.

The Two Ellens, discussed.

The Heinrich Björn (1885) 54 L. J. P. 33; 10 P. D. 44; 52 L. T. 560; 33 W. R. 719; 5 Asp. M. C. 391.—C.A.; affirmed, H.L. (E.) (*infra*). (See extract, *supra*, col. 3465).

The Two Ellens, discussed.

The Heinrich Björn, Northcote v. The Heinrich Björn (1886) 55 L. J. Adm. 80; 11 App. Cas. 270; 55 L. T. 66; 6 Asp. M. C. 1.—H.L. (E.).

The Two Ellens, explained and adopted.

The Sara (1887) 56 L. J. P. 160; 12 P. D. 158, 163; 57 L. T. 328; 35 W. R. 826.—C.A.; reversed, H.L. (E.) (*see infra*).

The Two Ellens, approved and applied.

The Cella (1888) 57 L. J. Adm. 55; 13 P. D. 82, 87; 59 L. T. 125; 36 W. R. 540; 6 Asp. M. C. 293.—C.A.

The Two Ellens, observations adopted.

The Sara, Hamilton v. Baker (1889) 58 L. J. Adm. 57; 14 App. Cas. 209, 225; 61 L. T. 26; 38 W. R. 129; 6 Asp. M. C. 413.—H.L. (E.).

The Riga (1872) 41 L. J. Adm. 39; L. R. 3 A. & E. 516; 26 L. T. 202; 20 W. R. 927; 1 Asp. M. C. 246.—ADM., not applied.

The Jenny Lind (1872) 41 L. J. Adm. 63; L. R. 3 A. & E. 529; 26 L. T. 591; 20 W. R. 895; 1 Asp. M. C. 294.—ADM.

The Rio Tinto (1884) 9 App. Cas. 356; 50 L. T. 461; 5 Asp. M. C. 224.—P.C., discussed.

The Heinrich Björn, Northcote v. The Heinrich Björn (1886) 55 L. J. Adm. 80; 11 App. Cas. 270; 55 L. T. 66; 6 Asp. M. C. 1.—H.L. (E.).

The Heinrich Björn, 52 L. J. P. 33; 8 P. D. 151; 49 L. T. 405; 32 W. R. 279.—ADM.; reversed, (1885) 54 L. J. P. 33; 10 P. D. 44; 52 L. T. 560; 33 W. R. 719; 5 Asp. M. C. 391.—C.A.; the latter decision affirmed, (1886) 55 L. J. Adm. 80; 11 App. Cas. 270; 55 L. T. 66; 6 Asp. M. C. 1.—H.L. (E.).

The Heinrich Björn, explained.

The Ringdove (1886) 55 L. J. P. 56; 11 P. D. 120; 55 L. T. 552; 34 W. R. 744.—HANNEN, P.

The Heinrich Björn, considered.

The Sara (1887) 56 L. J. P. 160; 12 P. D. 158, 163; 57 L. T. 328; 35 W. R. 826.—C.A., reversed, H.L. (E.) (*supra*).

The Heinrich Björn, approved and applied.

The Cella (1888) 57 L. J. Adm. 55; 13 P. D. 82, 85; 59 L. T. 125; 36 W. R. 540; 6 Asp. M. C. 293.—C.A.

The Heinrich Björn, discussed and applied.

Westrup v. Great Yarmouth Steam Carrying Co. (1889) 59 L. J. Ch. 111; 43 Ch. D. 241, 244; 61 L. T. 714; 38 W. R. 505; 6 Asp. M. C. 443.—KAY, J.

The Heinrich Björn, referred to.

The Africano (1894) 63 L. J. Adm. 125; [1894] P. 141; 6 R. 767; 70 L. T. 250; 42 W. R. 413; 7 Asp. M. C. 427.—JEUNE, P.

The Heinrich Björn, observed upon.

The Mecca (1894) 64 L. J. Adm. 40; [1895] P. 95; 11 R. 742; 71 L. T. 711; 43 W. R. 209; 7 Asp. M. C. 529.—C.A.

The Cella (1888) 57 L. J. Adm. 55; 13 P. D.

82; 59 L. T. 125; 36 W. R. 540; 6 Asp. M. C. 293.—C.A., held inapplicable.

The Africano (1894) 63 L. J. Adm. 125; [1894] P. 141; 6 R. 767; 70 L. T. 250; 42 W. R. 413; 7 Asp. M. C. 427.—JEUNE, P.

The India (1863) 32 L. J. Adm. 185; 9 Jur.

(N.S.) 417; 9 L. T. 234; 11 W. R. 536.—ADM., overruled.

The Mecca (1894) 64 L. J. Adm. 40; [1895] P. 95; 11 R. 742; 71 L. T. 711; 43 W. R. 209; 7 Asp. M. C. 529.—C.A.

The William F. Stafford (1860) Lush. 69;

29 L. J. Adm. 109; 2 L. T. 301.—ADM., adopted.

The Markland (1871) L. R. 3 A. & E. 340, 343; 24 L. T. 596; 1 Asp. M. C. 44.—ADM.

The William F. Stafford, observed upon.

The St. Lawrence (1880) 49 L. J. Adm. 82; 5 P. D. 250.—ADM.

The Desdemona (1856) Swabey, 158.—ADM., and **The William F. Stafford**, *referred to*.
The Africano (1894) 63 L. J. Adm. 125; [1894] P. 141; 6 R. 767; 70 L. T. 250; 42 W. R. 413; 7 Asp. M. C. 427.—JEBUNE, P.

The Gustaf (1862) Lush. 506.—ADM., *applied*.

The Markland (1871) L. R. 3 A. & E. 340, 343; 24 L. T. 596; 1 Asp. M. C. 44.—ADM.; Simpson v. Blues (1872) 41 L. J. C. P. 121, 126; L. R. 7 C. P. 290, 295; 26 L. T. 697; 20 W. R. 680.—C.P.; **The Livietta** (1883) 52 L. J. Adm. 81, 733; 8 P. D. 209, 213; 49 L. T. 411; 5 Asp. M. C. 157.—HANNEN, P.; **The Immacolata Concezione** (1883) 53 L. J. Adm. 18; 9 P. D. 37, 42; 50 L. T. 539; 32 W. R. 705; 5 Asp. M. C. 208.—BUTT, J.; **The Heinrich Björn** (1885) 54 L. J. P. 33; 10 P. D. 44, 56; 52 L. T. 560; 33 W. R. 719; 5 Asp. M. C. 391.—C.A. (affirmed, H.L. (E.). See *supra*, col. 3468).

De Lovio v. Boit (1815) 2 Gallison 398.—AMER.

Approved and applied, **The Sylph** (1867) 37 L. J. Adm. 14; L. R. 2 A. & E. 24, 26; 17 L. T. 519.—ADM.; *referred to*, **The Patria** (1871) 41 L. J. Adm. 23, 29; L. R. 3 A. & E. 436, 462; 24 L. T. 849.—ADM.; *observed upon*, Smith v. Brown (1871) 40 L. J. Q. B. 214, 217; L. R. 6 Q. B. 729; 24 L. T. 808; 19 W. R. 1165; 1 Asp. M. C. 53.—Q.B.

The Ricardo Schmidt, L. R. 1 P. C. 268; 4 Moore P. C. (N.S.) 121; 36 L. J. P. C. 3; 12 Jur. (N.S.) 895; 15 W. R. 236.—P.C., *approved*.

Reg. v. Casaca (1880) 49 L. J. P. C. 41; 5 App. Cas. 548; 43 L. T. 290; 4 Asp. M. C. 308.—P.C.

(Practice.)

The Whilhelmine (1842) 1 W. Rob. 335.—ADM., *applied*.

The Euxine (1871) 41 L. J. Adm. 17; L. R. 4 P. C. 8, 15; 25 L. T. 516; 20 W. R. 561; 8 Moore P. C. (N.S.) 189; 1 Asp. M. C. 155.—P.C.

The Mullingar (1872) 1 Asp. M. C. 252; 26 L. T. 326.—ADM. (IR.), *approved*.

The Longford (1889) 58 L. J. P. 33; 14 P. D. 34; 60 L. T. 373; 37 W. R. 372; 6 Asp. M. C. 371.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

The Heart of Oak (1860) 29 L. J. Adm. 78.—ADM., *adopted*.

Chapman v. Royal Netherlands Steam Navigation Co. (1879) 48 L. J. Ch. 449, 4 P. D. 157, 177; 40 L. T. 433; 27 W. R. 554; 4 Asp. M. C. 107.—C.A.

The Jeff Davis (1867) L. R. 2 A. & E. 1; 17 L. T. 151.—ADM., *applied*.

The Heinrich (1872) 41 L. J. Adm. 68; L. R. 3 A. & E. 505, 510; 26 L. T. 372; 20 W. R. 759; 1 Asp. M. C. 79.—ADM.; **Birchall v. Pugin** (1875) 44 L. J. C. P. 278; L. R. 10 C. P. 397; 32 L. T. 495; 23 W. R. 923.—C.P.

The Jeff Davis, *explained and distinguished*.

The Livietta (1883) 52 L. J. P. 81, 83; 8 P. D. 209, 214; 49 L. T. 411; 5 Asp. M. C. 151.—HANNEN, P.

The Heinrich (1872) 41 L. J. P. 68; L. R. 3 Adm. 505; 26 L. T. 372; 20 W. R. 759.—ADM., *distinguished*.

The Livietta (1883) 52 L. J. P. 81; 8 P. D. 209, 214; 49 L. T. 411; 5 Asp. M. C. 151.—HANNEN, P.

The Cassiopeia (1879) 48 L. J. Adm. 39; 4

P. D. 188; 40 L. T. 869; 27 W. R. 703; 4 Asp. M. C. 148.—C.A., *distinguished*.

Holland v. Leslie (1894) 63 L. J. Q. B. 679; [1894] 2 Q. B. 450; 9 R. 743; 71 L. T. 33; 42 W. R. 577.—C.A.

The Corner (1864) Br. & L. 161; 33 L. J. Adm. 16; 12 L. T. 62.—ADM., *followed*.

The Don Ricardo (1880) 49 L. J. Adm. 28; 5 P. D. 121; 42 L. T. 32; 28 W. R. 431; 4 Asp. M. C. 225.—SIR R. PHILLIMORE.

The Corner, *referred to*.

The Crimdon (1900) 69 L. J. P. 103; [1900] P. 171; 82 L. T. 660; 48 W. R. 623; 9 Asp. M. C. 104.—BARNES, J.

The Mali Ivo (1869) 38 L. J. Adm. 34; L. R. 2 A. & E. 356; 20 L. T. 681.—ADM., *recognised*.

The Delta, **The Erminia Foscolo** (1876) 45 L. J. Adm. 111; 1 P. D. 393, 404; 35 L. T. 376; 25 W. R. 46; 3 Asp. M. C. 256.—SIR R. PHILLIMORE.

The Mali Ivo, *considered*.

McHenry v. Lewis (1882) 21 Ch. D. 202; 52 L. J. Ch. 16; 46 L. T. 567.—CHITTY, J.; affirmed, (1883) 52 L. J. Ch. 325; 22 Ch. D. 397; 47 L. T. 549; 31 W. R. 305.—C.A.

CHITTY, J.—Then the defendants refer to the cases of *The Mali Ivo*, *The Caterina Chiazzare* (*infra*), and *The Delta* (*infra*). From these cases it will be found that the proposition the defendant relied on was a dictum of Sir R. Phillimore's, before whom all these cases came. But these actions were actions *in rem*, and there were proceedings *in rem* in a foreign country. And the proposition on the part of Sir R. Phillimore, though he did not act upon it in any of the cases, was not simply that the Court would stay proceedings, but that there would be a case upon which to put the plaintiffs to their election. I think, as far as I am concerned, these observations of his may be disposed of by the remark, that the actions were actions *in rem*, and obviously it would be inconvenient to have two Courts deciding finally and conclusively as is the case when the proceedings are *in rem* with reference to the same subject-matter.—p. 205.

The Mali Ivo, *commented on*.

The Christianborg (1885) 54 L. J. Adm. 84; 10 P. D. 141; 53 L. T. 612; 5 Asp. M. C. 491.—C.A.

The Caterina Chiazzare (1876) 45 L. J. Adm. 105; 1 P. D. 368; 34 L. T. 588; 3 Asp. M. C. 130.—ADM., *recognised*.

The Delta (1876) 45 L. J. P. 111; 1 P. D. 393; 35 L. T. 376; 25 W. R. 46; 3 Asp. M. C. 256.—SIR R. PHILLIMORE.

The Caterina Chiazzare, *considered*.

McHenry v. Lewis (1882) 52 L. J. Ch. 16; 21 Ch. D. 202; 46 L. T. 567.—CHITTY J.; affirmed, C.A. See extract, *supra*.

The Catterina Chiazzare, commented on.

The Christiansborg (1885) 54 L. J. Adm. 84; 10 P. D. 141; 53 L. T. 612; 5 Asp. M. C. 491.—C.A.

The Delta, The Erminia Foscolo (1869) 45 L. J. P. 111; 1 P. D. 393; 35 L. T. 376; 25 W. R. 46; 3 Asp. M. C. 256.—ADM., *considered*.

McHenry v. Lewis (1882) 52 L. J. Ch. 16; 21 Ch. D. 202; 46 L. T. 567.—CHITTY, J.; *affirmed*, C.A. *See extract, supra*.

The Peshawur (1883) 52 L. J. Adm. 30; 8 P. D. 32; 48 L. T. 796; 31 W. R. 660; 5 Asp. M. C. 89.—ADM., *commented on*.

The Christiansborg (1885) 54 L. J. Adm. 84; 10 P. D. 141; 53 L. T. 612; 5 Asp. M. C. 491.—C.A.

The Christiansborg (1885) 54 L. J. Adm. 84; 10 P. D. 141; 53 L. T. 612; 5 Asp. M. C. 491.—C.A., *discussed and applied*.

Mutrie v. Binney (1887) 35 Ch. D. 614, 628.—NORTH, J., *reversed*, 35 Ch. D. 614; 56 L. T. 455; 36 W. R. 131.—C.A.

The Christiansborg, applied.

The Reinbeck (1889) 60 L. T. 209, 211; 6 Asp. M. C. 366.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

The Christiansborg, distinguished.

The Mannheim (1896) 66 L. J. Adm. 6; [1897] P. 13; 75 L. T. 424; 8 Asp. M. C. 210.

GORELL BARNES, J.—[After stating the effect of *The Christiansborg* continued:] The present case appears to me totally different from any preceding case. No foreign legal proceedings have in this case been instituted by the plaintiffs against the defendants. The defendants' ship never arrested at all, but this guarantee, which forms the basis of the defendants' application, was signed by the agents of the defendant ship declaring their willingness "to give bail on behalf of the captain of the *Mannheim* for payment of 50,000 guilders, with interest and expenses, for which the captain of the *Mannheim* might be condemned in virtue of sentence given by the competent authority for the indemnity of damages sustained by the captain of the *Salisbury*"—which really means the plaintiffs—"through the collision of the steamer." Their domicile is declared to be at the office of the party in Holland. In accepting that guarantee it seems to me that the plaintiffs have done nothing to debar themselves from arresting this ship.—p. 7.

The Christiansborg, followed.

The Jasep (1896) 12 Times L. R. 373.—JEUNE, P.

The Christiansborg, distinguished.

The Gemma (1899) 68 L. J. P. 110; [1899] P. 285; 81 L. T. 379; 8 Asp. M. C. 585.—C.A. SMITH and WILLIAMS, L.JJ.

The Gemma (1899) 68 L. J. P. 110; [1899] P. 285; 81 L. T. 379; 8 Asp. M. C. 585.—BUCKNILL, J.; *reversed*, C.A.

The Infexible (1856) Swabey 52.—ADM., *distinguished*.

Secretary of State for India v. Hewitt (1888) 60 L. T. 334, 335; 6 Asp. M. C. 384.—HUDDLESTON, P.

O.C.

The Never Despair (1884) 53 L. J. Adm. 30; 9 P. D. 34; 50 L. T. 369; 32 W. R. 599; 5 Asp. M. C. 211.—HANNEN, P., *rule explained*.

The Mersey (1901) 70 L. J. P. 100; [1901] P. 369; 85 L. T. 584.—JEUNE, P.

Frayes v. Worms (1865) 14 C. B. (N.S.) 149.—C.P.

Adopted, *Allison v. Bristol Marine Insurance Co.* (1876) 1 App. Cas. 209, 229; 34 L. T. 809; 24 W. R. 1039.—H.L. (E.); *applied*, *Rodocanachi v. Milburn* (1886) 17 Q. B. D. 316, 322.—MANISTY, J., partly *reversed*, C.A.

The Freedom (1869) 38 L. J. Adm. 25; L. R. 2 A. & E. 346; 20 L. T. 1018; 18 W. R. 48.—ADM., *observed upon*.

The Rory (1882) 51 L. J. Adm. 73; 7 P. D. 117, 120; 46 L. T. 757; 4 Asp. M. C. 537.—C.A.

The Rory, 51 L. J. P. 22.—ADM.; *reversed*, (1882) 51 L. J. P. 73; 7 P. D. 117; 46 L. T. 757; 4 Asp. M. C. 537.—C.A.

The Monarch (1839) 1 W. Rob. 21.—ADM., *dictum adopted*.

The Orient (1869) 39 L. J. Adm. 10; 21 L. T. 762.—SIR R. PHILLIMORE.

The Monarch, applied.

The Georg (1894) [1894] P. 330; 71 L. T. 22; 7 Asp. M. C. 476.—BRUCE, J.

The Mona (1894) 63 L. J. Adm. 137; [1894] P. 265; 6 R. 707; 71 L. T. 24; 43 W. R. 173; 7 Asp. M. C. 478.—BRUCE, J., *referred to*.

The Vulcan (1898) 67 L. J. P. 101; [1898] P. 222; 47 W. R. 123.—JEUNE, P. and BARNES, J.

The Clyde (1856) Swab. 23.—ADM., *considered*.

The Kate (1899) 68 L. J. P. 41; [1899] P. 165; 80 L. T. 423; 47 W. R. 669.—JEUNE, P.

The Franz et Elise (1861) Lush. 377; 5 L. T. 290; 1 Asp. M. C. 155.—ADM., *held overruled*.

The Nina (1867) L. R. 2 Ad. & E. 44; 37 L. J. Adm. 17.—ADM.; *affirmed except as to costs*, (1868) 37 L. J. Adm. 17; L. R. 2 P. C. 38; 17 L. T. 585; 5 Moore P. C. (N.S.) 60.—P.C.

SIR R. PHILLIMORE.—It is to be observed, also, that the case of the *Franz et Elise* has been decided according to the old practice, subsequently to the passing of this statute, and also that a similar argument, used, I believe, by myself, arose out of sect. 191 of the Merchant Shipping Act, 1854, and was expressly overruled in March, 1861 (*The Herzogin Marie*, Lush. p. 293).—p. 52.

The Franz et Elise, followed.

The Zufall (1875) 44 L. J. Adm. 16; 32 L. T. 571; 23 W. R. 328; 2 Asp. M. C. 589.—SIR R. PHILLIMORE.

The Franz et Elise, distinguished.

The Don Ricardo (1880) 49 L. J. Adm. 28; 5 P. D. 121; 42 L. T. 32; 28 W. R. 431; 4 Asp. M. C. 225.—SIR R. PHILLIMORE.

The Glannibanta, (or The Transit) (1876) 1 P. D. 283; 34 L. T. 934; 24 W. R. 1033; 3 Asp. M. C. 339.—C.A., *approved*.

Biggsby v. Dickinson (1876) 35 L. T. 679; 46 L. J. Ch. 280; 4 Ch. D. 24; 25 W. R. 89.—C.A.

The Doctor Van Thunnen Tellow (1869) 20 L. T. 960; 3 Asp. M. C. (O.S.) 244; 17 W. R. 899.—ADM.; **The Elizabeth** (1870); 39 L. J. Adm. 53; L. R. 3 A. & E. 33; 21 L. T. 729.—ADM., *commented on.*
The Falcon (1878) 47 L. J. Adm. 56; 3 P. D. 100; 38 L. T. 294; 26 W. R. 696; 3 Asp. M. C. 566.

SIR R. PHILLIMORE.—I have no note of my judgment in *The Doctor Van Thunnen Tellow*, but I am represented as having said, "The enactment [County Courts Admiralty Jurisdiction Act, 1868] is badly drawn. In my opinion, the 31st section must be held to apply to appeals where an amount has been decreed to be due, that is, to appeals by defendants only." It is clear that that is an extra-judicial dictum, and not necessary for the decision of that case. In the case of *The Elizabeth*, the Court certainly decided that it was competent to the plaintiffs or the defendants to appeal. Now, I think, that neither of these decisions can be considered as governing the case before me, because the circumstance of the plaintiff, who is the appellant, having instituted his action for an amount less than 50*l.* is not one which seems to me to be decided by either of these judgments.

[His lordship decided that by the 31st section a plaintiff claiming an amount not exceeding 50*l.* in an Admiralty case in a County Court was precluded from appealing.]

The Falcon (1878) 47 L. J. P. 56; 3 P. D. 100; 38 L. T. 294; 26 W. R. 696; 3 Asp. M. C. 566.—ADM., *followed.*
The Burma (1899) 80 L. T. 839; 8 Asp. M. C. 549.—BARNES and BUCKNILL, JJ.

The Forest Queen (1870) 40 L. J. Adm. 17; L. R. 3 A. & E. 299; 23 L. T. 544; 19 W. R. 167.—ADM., *approved.*
The Ganges (1880) 5 P. D. 247; 43 L. T. 12; 4 Asp. M. C. 317.—C.A.

The Ganges (1880) 5 P. D. 247; 43 L. T. 12; 4 Asp. M. C. 317.—C.A., *applied.*
Tracey v. Pretty (1901) 70 L. J. K. B. 234; [1901] 1 Q. B. 444; 83 L. T. 767; 49 W. R. 282; 65 J. P. 156; 9 Cox C. C. 593.—ALVERSTONE, C.J., GRANTHAM, BRUCE and DARLING, JJ.; PHILLIMORE, J., *dissenting.*

The Hero (1891) 60 L. J. Adm. 99; [1891] P. 294; 65 L. T. 499; 40 W. R. 143; 7 Asp. M. C. 86.—BUTT, P. and JEUNE, J., *applied.*

The Tynwald (1894) 64 L. J. Adm. 1; [1895] P. 142; 11 R. 690; 71 L. T. 731; 43 W. R. 509; 7 Asp. M. C. 539.—JEUNE, P. and BRUCE, J.

The Hero, *referred to.*
The Theodora (1897) 66 L. J. Adm. 50; [1897] P. 279; 76 L. T. 627; 46 W. R. 157; 8 Asp. M. C. 259.—JEUNE, P. and BARNES, J.

The Eden (1891) 61 L. J. P. 68; [1892] P. 67; 66 L. T. 387; 40 W. R. 415; 7 Asp. M. C. 174.—BUTT, P. and JEUNE, J., *approved.*

The Delano (1894) 64 L. J. P. 8; [1895] P. 40; 71 L. T. 544; 43 W. R. 65; 6 R. 810.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

The Eden, *applied.*
The Tynwald (1894) 64 L. J. Adm. 1; [1895] P. 142; 11 R. 690; 71 L. T. 731; 43 W. R. 509; 7 Asp. M. C. 539.—JEUNE, P. and BRUCE, J.

The Eden, *referred to.*
The Theodora (1897) 66 L. J. Adm. 50; [1897] P. 279; 76 L. T. 627; 46 W. R. 157; 8 Asp. M. C. 259.—JEUNE, P. and BARNES, J.

The Delano (1894) 64 L. J. P. 8; [1895] P. 40; 71 L. T. 544; 43 W. R. 65; 6 R. 810.—C.A., *applied.*
The Tynwald (1894) 64 L. J. Adm. 1; [1895] P. 142; 11 R. 690; 71 L. T. 731; 43 W. R. 509; 7 Asp. M. C. 539.—JEUNE, P. and BRUCE, J.

The Delano, *referred to.*
The Theodora (1897) 66 L. J. Adm. 50; [1897] P. 279; 76 L. T. 627; 46 W. R. 157; 8 Asp. M. C. 259.—JEUNE, P. and BARNES, J.

The Tynwald (1894) 64 L. J. Adm. 1; [1895] P. 142; 71 L. T. 731; 43 W. R. 509.—ADM., *referred to.*
The Theodora (1897) 66 L. J. Adm. 50; [1897] P. 279; 76 L. T. 627; 46 W. R. 157; 8 Asp. M. C. 259.—JEUNE, P. and BARNES, J.

(Contn.)

The Thracian (1872) 41 L. J. Adm. 71; L. R. 3 A. & E. 504; 25 L. T. 889; 20 W. R. 380; 1 Asp. M. C. 207.—ADM., *not followed.*

The William Symington (1884) 54 L. J. P. 4; 10 P. D. 1; 51 L. T. 461; 33 W. R. 371; 5 Asp. M. C. 293.—BUTT, J.

The Olive (1859) Swab. 423; 5 Jur. (N.S.) 445.—DR. LUSHINGTON, *referred to.*
The Jeff Davis (1867) L. R. 2 A. & E. 1; 17 L. T. 151.—ADM.

The Laurel (1864) Br. & L. 191; 33 L. J. Adm. 17; 9 L. T. 457.—ADM., *referred to.*
The Karnak (1868) L. R. 2 A. & E. 289.—ADM.; partly affirmed and partly reversed, P.C.

The Karla (1865) Br. & L. 367; 13 W. R. 295.—ADM., *distinguished.*
The City of Brussels (1873) 42 L. J. Adm. 72; L. R. 4 A. & E. 194, 197; 29 L. T. 312; 22 W. R. 71; 2 Asp. M. C. 192.—SIR R. PHILLIMORE.

II. MARINE INSURANCE.

1. POLICIES.

Kensington v. Inglis (1807) 8 East 273; 9 R. R. 438.—EX. CH., *referred to.*
Bacon v. Simpson (1837) 7 L. J. Ex. 34; 3 M. & W. 78.—EX.

Hill v. Patten (1807) 8 East 373.—K.B., *explained.*
Noble v. Ward (1867)—EX. CH. (*see references and extract, infra*).

French v. Patten (1808) 9 East 351; 1 Campb. 72.—K.B., *applied.*
Reed v. Deerc (1827) 7 R. & C. 261; 2 Car. & P. 624; 31 R. R. 190.—K.B.

French v. Patten, *explained.*
Noble v. Ward (1867) L. R. 2 Ex. 135; 36 L. J. Ex. 91; 15 L. T. 672; 15 W. R. 520.—EX. CH.

BLACKBURN, J.—There the original contract, which was in writing, had itself been altered on the face of it, and the case was decided on the principle of *Master v. Miller* (4 Term Rep. 320).

London Marine Insurance Association, In re, Smith's Case (1869) 38 L. J. Ch. 681; L. R. 4 Ch. 611; 21 L. T. 97; 17 W. R. 941.—L.J., *distinguished*.

Albert Average Association, In re, Blyth's Case (1872) L. R. 13 Eq. 529; 20 W. R. 504.—ROMILLY, M.R.; Teignmouth, &c., Mutual Shipping Association, In re, Martin's Claim (1872) 41 L. J. Ch. 679; L. R. 14 Eq. 148; 26 L. T. 684; 1 Asp. M. C. 325.—BACON, V.-C.

London Marine Insurance Association, In re, Smith's Case, referred to.

Marine Mutual Insurance Association v. Young (1880) 43 L. T. 441, 444; 4 Asp. M. C. 357.—POLLOCK, B.

London Marine Insurance Association, In re, Smith's Case, distinguished.

Barrow-in-Furness Mutual Ship Insurance Co. v. Ashburner (1884) 52 L. T. 898.—MATHEW and DAY, JJ., affirmed, (1885) 54 L. J. Q. B. 377; 54 L. T. 58; 5 Asp. M. C. 527.—C.A.

Buchanan & Co. v. Faber (1899) 4 Com. Cas. 223.—BIGHAM, J., *considered*.

Gedger v. Royal Exchange Assurance (1900) 69 L. J. Q. B. 506; [1900] 2 Q. B. 214; 82 L. T. 463; 9 Asp. M. C. 57; 5 Com. Cas. 229.

KENNEDY, J.—In that case the policy sued on contained the p.p.i. clause. In a note in the report it is stated that my brother Bigham after consultation with Mathew, J., intimated that he would, with the consent of the parties, hear the case as if the policy did not contain the p.p.i. clause. . . . But what I am invited to do here is something quite different from that which was asked by the parties and permitted by my brother Bigham in that case. That was, in effect, to treat the vitiating clause as deleted. What I am invited to do is to treat the policy as valid with the vitiating clause retained as part of it. If that were done here which the Court did in *Buchanan v. Faber*, if I dealt with this policy as if it contained no p.p.i. clause, the plaintiffs, so far from being helped, would obviously be involved in a fatal difficulty. They admittedly never had any insurable interest; the absence of such an interest has been pleaded by the defendants; and the only possible reply to this defence lies in the presence in the policy of the p.p.i. clause. If that is treated as gone, the plaintiff's case goes with it.

Stephens v. Australasian Insurance Co. (1872) 42 L. J. C. P. 12; L. R. 8 C. P. 18; 27 L. T. 585; 21 W. R. 228; 1 Asp. M. C. 458.—C.P., *adopted*.

Elsworth v. Alliance Marine Insurance Co. (1873) 42 L. J. C. P. 305, 333; L. R. 8 C. P. 596, 614; 29 L. T. 479; 2 Asp. M. C. 125.—C.P.; Allison v. Bristol Marine Insurance Co. (1876) 1 App. Cas. 209, 216; 34 L. T. 809; 24 W. R. 1039; 3 Asp. M. C. 178.—H.L. (E.), with the judges; Imperial Marine Insurance Co. v. Fire Insurance Corporation (1879) 48 L. J. C. P. 424; 4 C. P. D. 166; 40 L. T. 166; 27 W. R. 680; 4 Asp. M. C. 71.—C.P.D.; and Parsons v. New Zealand Shipping Co. (1901) 70 L. J. K. B. 404; [1901] 1 K. B. 548, 567; 84 L. T. 218; 49 W. R. 355; 6 Com. Cas. 41; 9 Asp. M. C. 170.—C.A. SMITH, L.J., *distinguishing*.

Chippendale v. Holt (1895) 1 Com. Cas. 197.—MATHEW, J., *referred to*.

China Traders' Insurance Co. v. Royal Exchange Assurance Corporation (1898) 67 L. J. Q. B. 736; [1898] 2 Q. B. 187; 78 L. T. 783; 46 W. R. 497; 8 Asp. M. C. 409.—C.A.; and Marten v. Steamship Owners' Underwriting Association (1902) 71 L. J. K. B. 718; 87 L. T. 208; 50 W. R. 587; 7 Com. Cas. 195; 9 Asp. M. C. 339.—BIGHAM, J.

Warwick v. Slade (1811) 3 Camp. 127.—K.B., *referred to*.

Xenos v. Wickham (1867).—H.L. (E.), *infra*; and Cory v. Patton (1872) L. R. 7 Q. B. 304; 26 L. T. 161; 20 W. R. 364; 1 Asp. M. C. 225.—Q.B. (*see extract, infra*).

Xenos v. Wickham 33 L. J. C. P. 15; 13 C. B. (N.S.) 381.—EX. CH., *reversed*, (1866) 36 L. J. C. P. 313; L. R. 2 H. L. 296; 16 L. T. 800; 16 W. R. 38.—H.L. (E.).

Xenos v. Wickham, *referred to*.

Bullen v. Sharp (1865) 35 L. J. C. P. 105, 120; L. R. 1 C. P. 86, 114; 12 Jur. (N.S.) 247; 14 L. T. 72; 14 W. R. 338; 1 H. & R. 117.—EX. CH.

Xenos v. Wickham, *considered*.

Cory v. Patton (1872) 41 L. J. Q. B. 195, n.; L. R. 7 Q. B. 304; 26 L. T. 161; 20 W. R. 364; 1 Asp. M. C. 225.—Q.B. (*see extract, infra*).

Xenos v. Wickham, *discussed and followed*.

Morrison v. Universal Marine Insurance Co. (1878) 42 L. J. Ex. 115; L. R. 8 Ex. 197; 21 W. R. 774; 1 Asp. M. C. 503.—EX. CH.

Xenos v. Wickham, *adopted*.

Fisher v. Liverpool Marine Insurance Co. (1873) 42 L. J. Q. B. 224; L. R. 8 Q. B. 469; 28 L. T. 867.—Q.B., affirmed, (1874) 43 L. J. Q. B. 114; L. R. 9 Q. B. 418; 30 L. T. 501; 22 W. R. 951; 2 Asp. M. C. 454.—EX. CH.

Xenos v. Wickham, *applied*.

Babington v. O'Connor (1887) 20 L. R. Ir. 246, 254.—Q.B.D.

Xenos v. Wickham, *referred to*.

French's Estate, In re (1887) 21 L. R. Ir. 283, 293.—MONROE, J., *reversed*, C.A.

Mackenzie v. Coulson (1869) L. R. 8 Eq. 368.

—V.-C., *held incorrect*.

Cory v. Patton (1872) L. R. 7 Q. B. 304; 41 L. J. Q. B. 195, n.; 26 L. T. 161; 20 W. R. 364; 1 Asp. M. C. 225.—Q.B.

BLACKBURN, J. (for the Court).—The non-disclosure of a fact, after the policy was made in equity, could have no more effect than a similar non-disclosure after it was made in law. The present is an intermediate case, and the question which must now be determined seems to us to be whether, after the negotiation is complete and the contract made, in fact and in good faith, and the underwriter is under a moral obligation to execute a formal policy, the assured is bound by good faith to give information to the assurer of a matter which would make him aware that his bargain was a bad one, information which ought to have no effect on him, but would expose him to a temptation to break his contract, which as far as the law is concerned, he may do with impunity, because for fiscal purposes the legislature has forbidden the Court, either of law

or equity, to enforce the contract. To the question thus stated the answer seems obvious, that he is not bound to lead his neighbour into temptation. Until lately, no question of this sort could be raised in any Court, for the rules of evidence required that the contract, being written, should be proved by the production of the writing, the slip; and Lord Ellenborough, in *Warwick v. Slade* (3 Camp. 127), accurately expressed the effect of the statutes then in force, when he said, "The revenue laws forbid me to look to what is called the slip;" and such continued to be the law down to and after the time when *Xenos v. Wickham* (*supra*), was argued in the House of Lords; and the judges who (on the 8th May, 1867) gave their opinions, in the House of Lords, used language showing that they thought that the law was as stated by Lord Ellenborough; and so it was. These passages were quoted and relied on in the argument before us. But in that very year, on the 31st May, 1867, the 30 Vict. c. 23, received the royal assent. This statute was not brought to the notice of James, V.-C., in *Mackenzie v. Coulson*, according to the construction put upon it by this Court in *Ionides v. Pacific Insurance Co.* (*post*, col. 3507); that Act completely changed the law, and repealed all those Acts which had ordered that the slip was not so much as to be looked at in a Court of justice, putting it on a footing very similar to that of an unsigned memorandum of a contract within the Statute of Frauds, or a lease for more than for three years not under seal viz., that it was void and not enforceable at law or in equity, but might be given in evidence wherever, though not valid, it was material. It is open to the defendant in a Court of Error to question the accuracy of the reasoning on which the judgment in *Ionides v. Pacific Insurance Co.* proceeded, but we think that while it stands unreversed it leads irresistibly to the conclusion that the judgment in the present case should be for the plaintiffs.—p. 309.

Mackenzie v. Coulson, referred to.

Spalding v. Crocker (1897) 2 Com. Cas. 189, 193.—MATHEW, J.

Crocker v. Sturge (1896) 2 Com. Cas. 43.—

MATHEW, J., *considered*.

Spalding v. Crocker (1897) 2 Com. Cas. 189.—MATHEW, J.

Cory v. Patton, (1872) 41 L. J. Q. B. 195, n.;

L. R. 7 Q. B. 304; 26 L. T. 161; 20 W. R. 364; 1 Asp. M. C. 225.—Q.B., *considered*.

Morrison v. Universal Marine Insurance Co. (1872) 42 L. J. Ex. 17, 27; L. R. 8 Ex. 40, 55; 27 L. T. 791; 21 W. R. 196.—EX., reversed, EX. CH. (*infra*, col. 3478).

Cory v. Patton. See

Cory v. Patton (No. 2) (1874) 43 L. J. Q. B. 181; L. R. 9 Q. B. 577; 30 L. T. 758; 23 W. R. 46; 1 Asp. M. C. 225.—Q.B.

Cory v. Patton, followed.

Lishman v. Northern Maritime Insurance Co. (1875) 12 L. R. 10 C. P. 179; 44 L. J. C. P. 185; 32 L. T. 170; 23 W. R. 733.—EX. CH.

Cory v. Patton, referred to.

Fisher v. Liverpool Marine Insurance Co. (1873) 42 L. J. Q. B. 224, 229; L. R. 8 Q. B. 469, 474; 28 L. T. 867.—Q.B., affirmed, EX. CH. *See supra*, col. 3476.

Cory v. Patton, applied.

Home Marine Insurance Co. v. Smith (1898) 67 L. J. Q. B. 554; [1898] 1 Q. B. 829, 835.—MATHEW, J.; affirmed, C.A.

Morrison v. Universal Marine Insurance Co.

42 L. J. Ex. 17; L. R. 8 Ex. 40; 27 L. T. 791; 21 W. R. 196.—EX.; reversed, (1873) 42 L. J. Ex. 115; L. R. 8 Ex. 197; 21 W. R. 774; 1 Asp. M. C. 503.—EX. CH.

Home Marine Insurance Co. v. Smith (1898)

67 L. J. Q. B. 777; [1898] 2 Q. B. 351;

78 L. T. 734; 46 W. R. 661; 8 Asp. M. C.

408.—C.A., *applied*.

Royal Exchange Assurance Corporation v. Sjöforsakrings Aktie - Bolaget Vega (1902) 71

L. J. K. B. 739; [1902] 2 K. B. 384; 87 L. T.

356; 50 W. R. 694; 7 Com. Cas. 205; 4 Asp.

M. C. 329.—C.A. COLLINS, M.R., MATHEW and

HARDY, L.JJ.; affirming BIGHAM, J.

Sanderson v. Symonds (1819) 1 Br. & B. 426;

4 Moore 42; 21 R. R. 675.—C.P., *explained*.

Aldous v. Cornwell (1868) 37 L. J. Q. B. 201;

L. R. 3 Q. B. 573; 9 B. & S. 607; 16 W. R. 1045.

—Q.B.

LUSH, J. (for the Court).—The real ground of the decision in *Sanderson v. Symonds* was that the defendant was not, and could not, be prejudiced by the alteration. Why the Court should have limited the doctrine there laid down to policies of insurance, it is not easy to understand. We cannot discover any reason for making a distinction between that and any other species of contract.

Sanderson v. Symonds, discussed.

Suffell v. Bank of England (1882) 51 L. J.

Q. B. 401, 407; 9 Q. B. D. 555, 569; 47 L. T.

146; 30 W. R. 932; 46 J. P. 500.—C.A.

Sanderson v. Symonds, applied.

Goodbody and Balfour, In re (1900) 82 L. T.

484; 9 Asp. M. C. 69; 5 Com. Cas. 59.—C.A.

SMITH, COLLINS and WILLIAMS, L.JJ.

2. DURATION OF RISK.

Nonnen v. Kettlewell (1812) 16 East 176.—

K.B., *followed*.

Carr v. Montefiori (1864) 5 B. & S. 408; 33

L. J. Q. B. 256; 10 Jur. (N.S.) 1069; 11 L. T.

157; 12 W. R. 870.—EX. CH.

Sparrow v. Caruthers (1744) 2 Strange 1236.

—K.B., *commented on*.

Hurry v. Royal Exchange Assurance Co. (1801)

2 Bos. & P. 430; 6 R. R. 804; affirming 3 Esp.

289; 5 R. R. 639.

HEATH, J.—With respect to the case of *Sparrow v. Caruthers*, I think it ought not to be extended: it was only a *visi prius* decision, it has been cited several times but never recognised, and whenever it has been cited great pains have been taken to distinguish it from the cases before the Court, though perhaps not always with success. I do not mean, however, to quarrel with that decision: a case precisely similar is not likely to arise again, since it is not customary for the owners of goods, to send their own lighters, but always to employ public lighters.—p. 435.

Sparrow v. Caruthers, disapproved and distinguished.

Paul v. Insurance Co. of North America (1899)

15 Times L. R. 534.—MATHEW, J.

Strong v. Natally (1804) 1 Bos. & P. (N.R.)

16.—C.P., *disapproved and distinguished.*

Paul v. Insurance Co. of North America (1899) 15 Times L. R. 534.—MATHEW, J.

Lockyer v. Offley (1786) 1 Term Rep. 252; 1 R. R. 194.—K.B., *applied.*

Lidgett v. Secretan (1870) 39 L. J. C. P. 196; L. R. 5 C. P. 190.—BOVILL, C.J.; **Cory v. Burr** (1883) 52 L. J. Q. B. 657; 8 App. Cas. 393, 405; 49 L. T. 78; 31 W. R. 894; 5 Asp. M. C. 109.—H.L. (E.).

Udde v. Walters (1811) 3 Campb. 16; 13 R. R. 737.—K.B., *observations adopted.*

Birrell v. Dryer (1884) 9 App. Cas. 345, 351; 51 La T. 130; 5 Asp. M. C. 267.—H.L. (SC.).

Cambles v. Ocean Marine Insurance Co. of Bombay, 45 L. J. Ex. 115; 1 Ex. D. 8; 33 L. T. 606; 24 W. R. 178.—EX. D.; *reversed*, (1876) 45 L. J. Ex. 366; 1 Ex. D. 141; 34 L. T. 189; 24 W. R. 384; 3 Asp. M. C. 180.—C.A.

Flint v. Flemyng (1830) 8 L. J. (O.S.) K. B. 350; 1 B. & Ad. 45.—K.B., *explained.*

Denoon v. Home, &c., Assurance Co. (1872) 41 L. J. C. P. 162, 169; L. R. 7 C. P. 341, 349; 26 L. T. 628; 20 W. R. 970; 1 Asp. M. C. 309.—C.P.

Flint v. Flemyng, *dictum adopted.*

Allison v. Bristol Marine Insurance Co. (1876) 1 App. Cas. 209, 250; 34 L. T. 809; 24 W. R. 1039; 3 Asp. M. C. 178.—H.L. (E.); and **Inman SS. Co. v. Bischoff** (1882) 52 L. J. Q. B. 169, 173; 7 App. Cas. 670, 678; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6.—H.L. (E.).

Flint v. Flemyng, *adopted.*

The Thyatira (1883) 52 L. J. Adm. 85, 87; 8 P. D. 155, 157; 49 L. T. 406; 5 Asp. M. C. 147.—HANNEN, P.

Beckett v. West of England Marine Insurance Co. (1871) 25 L. T. 739; 1 Asp. M. C. 185.—Q.B., *distinguished.*

Hydarnes Steamship Co. v. Indemnity Mutual Marine Insurance Co. (1895) 64 L. J. Q. B. 353; [1895] 1 Q. B. 500; 14 R. 216; 72 L. T. 103; 7 Asp. M. C. 553.—C.A. ESHER, M.R., LOPES and RIGBY, L.JJ.

3. NATURE OF RISK.

Thompson v. Taylor (1795) 6 Term Rep. 478; 3 R. R. 233.—K.B., *followed.*

Foley v. United Fire, &c., Insurance Co. (1870) L. R. 5 C. P. 155; 39 L. J. C. P. 206; 22 L. T. 108; 18 W. R. 437.—EX. CH.

KELLY, C.B.—It is said that the interest only attaches on a policy like this, that the risk only attaches when the voyage on which the freight is to be earned has commenced; and it is insisted that the risk here could not commence before the cargo was discharged. If that argument be correct, it amounts to this, that there never can be an effective insurance on freight to be earned on a voyage from a given port, until the ship is in a condition to receive goods on board. But we find a long series of cases, beginning with *Thompson v. Taylor*, and coming down to the recent case of *Barber v. Fleming* (*infra*, col. 3480), which conclusively establish the contrary. The real doctrine is this: if the voyage, by means of

which the chartered freight is to be earned has commenced, there is an inchoate interest in the freight, and the risk attaches, provided the language of the charter, taken with the policy, will warrant that view of the case. (*Barber v. Fleming* stated at length). . . . The Court of Queen's Bench held that as the ship had sailed in ballast from Bombay, with the sole object of going to Howland's Island in order to earn the freight under the charter from thence to the United Kingdom, the interest in the chartered freight had commenced, and the plaintiff was entitled to recover for a total loss. There it is clear, the vessel could only commence earning the freight at Howland's Island, and yet the plaintiff was held to have an insurable interest in the chartered freight, which was covered by the policy. It is true that in that case the ship sailed in ballast from Bombay, whereas here the vessel sailed with cargo from Calcutta to Mauritius. But the question is, what was it that gave the owner the inchoate right to the chartered freight? *Thompson v. Taylor* is quite conclusive.—p. 160.

Barber v. Fleming (1869) 39 L. J. Q. B. 25; L. R. 5 Q. B. 59; 10 B. & S. 879; 18 W. R. 254.—Q.B., *followed.*

Foley v. United Fire and Marine Insurance Co. (1870) 39 L. J. C. P. 206; L. R. 5 C. P. 155; 22 L. T. 108; 18 W. R. 437.—EX. CH. See extract, *supra*.

Barber v. Fleming, *adopted.*

Rankin v. Potter (1873) 42 L. J. C. P. 169, 183; L. R. 6 H. L. 83, 114; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.).

Barber v. Fleming, *followed.*

Mercantile Steamship Co. v. Tyser (1881) 7 Q. B. D. 73, 75; 29 W. R. 790; 5 Asp. M. C. 6, n.—COLERIDGE, C.J.

Hadkinson v. Robinson (1803) 3 Bos. & P. 388; 7 R. R. 786.—C.P., *followed.*

Mercantile Steamship Co. v. Tyser (1881) 7 Q. B. D. 73, 76; 29 W. R. 790; 5 Asp. M. C. 6, n.—COLERIDGE, C.J.

Hadkinson v. Robinson, *applied.*

Inman Steamship Co. v. Bischoff (1882) 52 L. J. Q. B. 169, 172; 7 App. Cas. 670, 676; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6.—H.L. (E.).

Hadkinson v. Robinson, *principle applied.*

The Alps (1893) 62 L. J. Adm. 59; [1893] P. 109; 1 R. 587; 68 L. T. 624; 41 W. R. 527; 7 Asp. M. C. 337.—BARNES, J.

Hadkinson v. Robinson, *distinguished.*

Miller v. Law Accident Insurance Co. (1903) 72 L. J. K. B. 428; [1903] 1 K. B. 712, 720; 88 L. T. 370; 51 W. R. 420; 8 Com. Cas. 161; 9 Asp. M. C. 386.—C.A.

Everth v. Smith (1814) 2 M. & S. 278; 15 R. R. 246.—K.B., *adopted.*

Inman Steamship Co. v. Bischoff (1882) 52 L. J. Q. B. 169, 172; 7 App. Cas. 670, 675; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6.—H.L. (E.).

Everth v. Smith, *explained.*

The Main (1894) 63 L. J. Adm. 69; [1894] P. 320; 6 R. 775; 70 L. T. 247; 7 Asp. M. C. 424.—BARNES, J.

Mordy v. Jones (1825) 3 L. J. (o.s.) K. B. 250; 4 B. & C. 394; 6 D. & R. 479; 28 R. R. 305.—K.B., *explained and approved*.
Philpott v. Swann (1861) 30 L. J. C. P. 358; 11 C. B. (N.S.) 270.—C.P.

Mordy v. Jones, *distinguished*.
Notary v. Henderson (1872) 41 L. J. Q. B. 158; L. R. 7 Q. B. 225, 234; 26 L. T. 442; 20 W. R. 442; 1 Asp. M. C. 278.—EX. CH.

McSwiney v. Royal Exchange Assurance Corporation (1849) 18 L. J. Q. B. 193; 14 Q. B. 634.—Q.B., *considered*.
Wilson v. Jones (1867) 36 L. J. Ex. 78, 81; L. R. 2 Ex. 139, 146; 15 L. T. 669; 15 W. R. 435.—EX. CH.

McSwiney v. Royal Exchange Assurance Corporation, *referred to*.
Anderson v. Morice (1875) 44 L. J. C. P. 341, 350; L. R. 10 C. P. 609, 622; 33 L. T. 355.—EX. CH., affirmed, H.L. (E.) (*infra*, col. 3494).

McSwiney v. Royal Exchange Assurance Corporation, *adopted*.
Stock v. Inglis (1882) 52 L. J. Q. B. 30, 37; 3 Q. B. D. 708, 722; 47 L. T. 416.—FIELD, J., reversed, C.A., the latter decision affirmed, H.L. (E.) (*supra*, col. 2958); **Inman Steamship Co. v. Bischoff** (1882) 52 L. J. Q. B. 169, 172; 7 App. Cas. 670, 676; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6.—H.L. (E.).

McSwiney v. Royal Exchange Assurance Corporation, *applied*.
The Alps (1893) 62 L. J. Adm. 59; [1893] P. 109; 1 R. 587; 68 L. T. 624; 41 W. R. 527; 7 Asp. M. C. 337.—BARNES, J.

Paterson v. Harris (1861) 30 L. J. Q. B. 354; 1 B. & S. 336; 7 Jur. (N.S.) 1276; 9 W. R. 743.—Q.B.
Distinguished, **Wilson v. Jones** (1866) 35 L. J. Ex. 94, 96; L. R. 1 Ex. 193, 199; 14 L. T. 65.—EX., affirmed, (1867) 36 L. J. Ex. 78; L. R. 2 Ex. 139; 15 L. T. 669; 15 W. R. 435.—EX. CH., *adopted*, **Dudgeon v. Pembroke** (1874) 43 L. J. Q. B. 220; L. R. 9 Q. B. 581, 595; 31 L. T. 31; 22 W. R. 914.—Q.B., reversed C.A. and restored H.L. (E.). See *infra*, col. 3504.

Philpott v. Swann (1861) 30 L. J. C. P. 358; 11 C. B. (N.S.) 270.—C.P.
Followed, **Mercantile SS. Co. v. Tyser** (1881) 7 Q. B. D. 73, 76; 29 W. R. 790; 5 Asp. M. C. 6, n.—COLERIDGE, C.J.; *adopted*, **Inman SS. Co. v. Bischoff** (1882) 52 L. J. Q. B. 169, 172; 7 App. Cas. 670, 675; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6.—H.L. (E.).

Taylor v. DuBar (1869) 38 L. J. C. P. 178; L. R. 4 C. P. 206; 17 W. R. 382.—C.P., *applied*.
Inman Steamship Co. v. Bischoff (1882) 52 L. J. Q. B. 169, 172; 7 App. Cas. 670, 676; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6.—H.L. (E.).
Pink v. Fleming (1890) 59 L. J. Q. B. 559; 25 Q. B. D. 396; 63 L. T. 413; 6 Asp. M. C. 554.—C.A. ESHER, M.R., LINDLEY and BOWEN, L.JJ.; **The Alps** (1893) 62 L. J. Adm. 59; [1893] P. 109; 1 R. 587; 62 L. T. 624; 41 W. R. 527; 7 Asp. M. C. 337.—BARNES, J.; and **Cunningham v. Maritime Insurance Co.** (1898) [1899] 2 Ir. R. 257, 260.—Q.B.D.

Good v. London Steamship Owners' Mutual Protecting Association (1871) L. R. 6 C. P. 563; 20 W. R. 33.—C.P., *discussed*.
Hayn v. Culliford (1878) 47 L. J. C. P. 755, 758; 3 C. P. D. 410, 417; 39 L. T. 288.—BEN-MAN, J., affirmed, (1879) 48 L. J. C. P. 372; 4 C. P. D. 182; 40 L. T. 536; 27 W. R. 541; 4 Asp. M. C. 128.—C.A.

Good v. London Steamship Owners' Mutual Protecting Association, *followed*.
Carmichael v. Liverpool Sailing Ship Owners' Indemnity Association (1886) 56 L. J. Q. B. 208; 19 Q. B. D. 242, 245; 56 L. T. 863; 6 Asp. M. C. 130.—SMITH and WILLS, JJ., affirmed, (1887) 56 L. J. Q. B. 428; 19 Q. B. D. 242; 57 L. T. 550; 35 W. R. 793; 6 Asp. M. C. 184.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Good v. London Steamship Owners' Mutual Protecting Association, *observations applied*.
The Ferro (1892) 62 L. J. Adm. 48; [1893] P. 38; 1 R. 562; 68 L. T. 418; 7 Asp. M. C. 309.—JEUNE, P. and BARNES, J.

Jackson v. Union Marine Insurance Co. (1874) 44 L. J. C. P. 27; L. R. 10 C. P. 125; 31 L. T. 789; 23 W. R. 169; 2 Asp. M. C. 435.—EX. CH., *explained and distinguished*.
Hudson v. Hill (1874) 43 L. J. C. P. 273, 278; 30 L. T. 555.—C.P.

Jackson v. Union Marine Insurance Co., *distinguished*.
King v. Parker (1876) 34 L. T. 887.—EX. D.

Jackson v. Union Marine Insurance Co., *observations adopted*.
Poussard v. Spiers (1876) 45 L. J. Q. B. 621, 624; 1 Q. B. D. 410, 414; 34 L. T. 572; 24 W. R. 819.—Q.B.D.

Jackson v. Union Marine Insurance Co., *considered and applied*.
Dahl v. Nelson (1881) 50 L. J. Ch. 411, 419; 6 App. Cas. 38, 53; 44 L. T. 381; 29 W. R. 453; 4 Asp. M. C. 392.—H.L.

Jackson v. Union Marine Insurance Co., *applied*.
Inman Steamship Co. v. Bischoff (1882) 52 L. J. Q. B. 169, 172; 7 App. Cas. 670, 676; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6.—H.L. (E.); **The Alps** (1893) 62 L. J. Adm. 59; [1893] P. 109; 1 R. 587; 68 L. T. 624; 41 W. R. 527; 7 Asp. M. C. 337.—BARNES, J.

Jackson v. Union Marine Insurance Co., *discussed*.
Bensaude v. Thames and Mersey Marine Insurance Co. (1896) 1 Com. Cas. 395.—COLLINS, J.

Jackson v. Union Marine Insurance Co., *referred to*.
Turnbull v. Hull Underwriters' Association (1900) 69 L. J. Q. B. 588; [1900] 2 Q. B. 402; 82 L. T. 818; 5 Com. Cas. 248; 9 Asp. M. C. 93.—MATHEW, J.

Jackson v. Union Marine Insurance Co., *considered (in argument)*.
Herne Bay Steamboat Co. v. Hutton (1903) 72 L. J. K. B. 879; [1903] 2 K. B. 683; 89 L. T. 422; 52 W. R. 183; 9 Asp. M. C. 472.—C.A.

Jackson v. Union Marine Insurance Co., *considered and applied.*

Krell v. Henry (1908) 72 L. J. K. B. 794; [1908] 2 K. B. 740; 89 L. T. 828.—C.A.

Inman Steamship Co. v. Bischoff (1882) 52 L. J. Q. B. 169; 7 App. Cas. 670; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6.—H.L. (E.), *observations applied.*

The Alps (1893) 62 L. J. Adm. 59; [1893] P. 109; 1 R. 587; 63 L. T. 624; 41 W. R. 527; 7 Asp. M. C. 337.—BARNES, J.

Inman Steamship Co. v. Bischoff, applied.

The Bedouin (1893) 63 L. J. Adm. 30; [1894] P. 1; 6 R. 693; 69 L. T. 782; 42 W. R. 292; 7 Asp. M. C. 391.—C.A. Esher, M.R., LOPES and KAY, L.JJ.

Inman Steamship Co. v. Bischoff, principle applied.

Asfar v. Blundell (1895) 65 L. J. Q. B. 138; [1896] 1 Q. B. 123, 133; 73 L. T. 648; 44 W. R. 130; 8 Asp. M. C. 106.—C.A.

Inman Steamship Co. v. Bischoff, observations applied.

Brankelow SS. Co. v. Canton Insurance Office (1899) 68 L. J. Q. B. 811; [1899] 2 Q. B. 178, 184; 81 L. T. 6; 47 W. R. 611.—C.A.; and see S. C. affirmed *nom.*; Williams v. Canton Insurance Office (1901) 70 L. J. K. B. 962; [1901] A. C. 462, 472; 85 L. T. 317; 6 Com. Cas. 256.—H.L. (E.).

Carmichael v. Liverpool Sailing Shipowners' Mutual Indemnity Association (1887)

56 L. J. Q. B. 428; 19 Q. B. D. 242; 57 L. T. 550; 35 W. R. 793; 6 Asp. M. C. 184.—C.A., *distinguished.*

Canada Shipping Co. v. British Shipowners' Mutual Protection Association (1889) 23 Q. B. D. 342; 58 L. J. Q. B. 462; 61 L. T. 312; 38 W. R. 87; 6 Asp. M. C. 422.—C.A. Esher, M.R., LINDLEY and BOWEN, LJJ.

ESHER, M.R.—It appears to me that the paraphrase there given of the word "navigation" accurately expressed the ordinary meaning of the word. It was there said that, if there was negligence on the part of the shipowner or his servants before the navigation of the ship commenced, which had the effect of causing the ship to be unsafely navigated during the navigation with regard to the safety of the goods, that would make the navigation "improper navigation." The ship was there sent to sea in such a condition that she could not be safely navigated with regard to the safety of the cargo, and therefore she was in fact improperly navigated. If the meaning so given to the term "improper navigation" be correct, then can it be said that the loss here was caused by improper navigation? In my opinion it cannot. The ship in this case was in a perfectly proper condition so far as regarded her capacity for being sailed with safety to the goods on board. The damage happened from something inside the ship, having nothing whatever to do with her sailing qualities, viz., the holds happening to be in a dirty condition.—[1894] 343, 344.

Carmichael v. Liverpool Sailing Shipowners' Mutual Indemnity Association, distinguished.

Dobell v. SS. Rossmore Co. (1895) 64 L. J. Q. B. 777; [1895] 2 Q. B. 408; 14 R. 538;

73 L. T. 74; 44 W. R. 37; 8 Asp. M. C. 83.—C.A.

Carmichael v. Liverpool Sailing Shipowners' Mutual Indemnity Association, applied.

Blackburn v. Liverpool Brazil and River Plate Steam Navigation Co. (1901) 71 L. J. K. B. 177; [1902] 1 K. B. 290; 85 L. T. 783; 50 W. R. 272; 7 Com. Cas. 10; 9 Asp. M. C. 263.—WALTON, J.

Pink v. Fleming (1890) 59 L. J. Q. B. 559; 25 Q. B. D. 396; 63 L. T. 413; 6 Asp. M. C. 554.—C.A., *followed.*

Reischer v. Borwick (1894) 63 L. J. Q. B. 753; [1894] 2 Q. B. 548; 9 R. 558; 71 L. T. 238; 7 Asp. M. C. 493.—C.A. LINDLEY, LOPES and DAVEY, LJJ.

The Alps (1893) 62 L. J. Adm. 59; [1893] P. 109; 1 R. 587; 63 L. T. 624; 41 W. R. 527; 7 Asp. M. C. 337.—BARNES, J., *followed.*

The Bedouin (1893) 63 L. J. Adm. 30; [1894] P. 1; 6 R. 693; 69 L. T. 782; 42 W. R. 292; 7 Asp. M. C. 391.—C.A. Esher, M.R., LOPES and KAY, LJJ.

The Alps, referred to.

Brankelow SS. Co. v. Canton Insurance Office (1899) 68 L. J. Q. B. 811; [1899] 2 Q. B. 178, 188; 81 L. T. 6; 47 W. R. 611.—C.A.; affirmed, H.L.

The Bedouin (supra), adopted.

Asfar v. Blundell (1895) 65 L. J. Q. B. 138; [1896] 1 Q. B. 123; 73 L. T. 648; 44 W. R. 130; 8 Asp. M. C. 106.—C.A.

The Bedouin, observation approved.

Williams v. Canton Insurance Office (1901) 70 L. J. K. B. 962; [1901] A. C. 462; 85 L. T. 317; 6 Com. Cas. 256.—H.L. (E.), affirming 47 W. R. 611; 8 Asp. M. C. 563.—C.A.

Carruthers v. Sydebotham (1815) 4 M. & S. 77; 16 R. R. 392.—K.B., *referred to.*

Thames and Mersey Marine Insurance Co. v. Hamilton (1887) 56 L. J. Q. B. 626; 12 App. Cas. 484, 496; 57 L. T. 695; 36 W. R. 337; 6 Asp. M. C. 200.—H.L. (E.).

Cullen v. Butler (1816) 5 M. & S. 461; 4 Camp. 289; 17 R. R. 400.—K.B., *referred to.*

Thames and Mersey Marine Insurance Co. v. Hamilton (1887) 56 L. J. Q. B. 626; 12 App. Cas. 484; 57 L. T. 695; 36 W. R. 337; 6 Asp. M. C. 200.—H.L. (E.).

Cullen v. Butler, commented on.

Wilson v. The Xantho (1887) 56 L. J. Adm. 116; 12 App. Cas. 503, 509; 57 L. T. 701; 36 W. R. 353; 6 Asp. M. C. 207.—H.L. (E.).

Cullen v. Butler, referred to.

Jackson v. Mumford (1902) 8 Com. Cas. 61, 70; 51 W. R. 91.—KENNEDY, J., affirmed, C.A.

Fletcher v. Inglis (1819) 2 B. & Ald. 315; 20 R. R. 448.—K.B., *inapplicable.*

Letchford v. Oldham (1879) 49 L. J. Q. B. 458, 461; 5 Q. B. D. 538, 543.—FIELD, J.; affirmed (1880) 49 L. J. Q. B. 458; 5 Q. B. D. 538; 28 W. R. 789.—C.A.

Fletcher v. Inglis (*supra*), referred to.

Thames and Mersey Marine Insurance Co. v. Hamilton (1887) 56 L. J. Q. B. 626; 12 App. Cas. 484, 495; 57 L. T. 695; 36 W. R. 337; 6 Asp. M. C. 200.—H.L. (E.).

Phillips v. Barber (1821) 5 B. & Ald. 161; 24 R. R. 317.—K.B., referred to.

Thames and Mersey Marine Insurance Co. v. Hamilton (1887) 56 L. J. Q. B. 626; 12 App. Cas. 484, 495; 57 L. T. 695; 36 W. R. 337; 6 Asp. M. C. 200.—H.L. (E.).

Davidson v. Burnand (1868) 38 L. J. C. P. 73; L. R. 4 C. P. 117; 19 L. T. 782; 17 W. R. 121.—C.P., referred to.

Thames and Mersey Marine Insurance Co. v. Hamilton (1887) 56 L. J. Q. B. 626; 12 App. Cas. 484; 57 L. T. 695; 36 W. R. 337; 6 Asp. M. C. 200.—H.L. (E.).

West India and Panama Telegraph Co. v. Home and Colonial Marine Insurance Co. (1880) 50 L. J. Q. B. 41; 6 Q. B. D. 51; 43 L. T. 420; 29 W. R. 92; 4 Asp. M. C. 341.—C.A., disapproved.

Thames and Mersey Marine Insurance Co. v. Hamilton (1887) 56 L. J. Q. B. 626; 12 App. Cas. 484; 57 L. T. 695; 36 W. R. 337; 6 Asp. M. C. 200.—H.L. (E.). LORDS HALSBURY, L.C., BRAMWELL, HERSCHELL and MACNAGHTEN.

LORD HERSCHELL.—The respondents placed their main reliance upon *The West India Telegraph Co. v. The Home and Colonial Insurance Co.*, and naturally so, because the majority of the C. A. thought the present case undistinguishable from it. Lord Selborne and L. C. J. Cockburn in that case held that the damage done by the explosion of the boiler of a steamer was covered by the general words of a marine policy. . . . The real ground of Lord Selborne's judgment appears to have been the analogy between damage done by the excessive pressure of the winds in the case of a sailing vessel, and the excessive pressure of steam in the boiler when the motive-power used to propel the vessel is steam. I am not satisfied that this analogy is a sound one; but, even if it be so I am unable to see how it can be treated as an authority in the present case, still less as concluding it. The water in the donkey-engine, the over pressure of which caused the damage, was certainly not to the steamer "what the winds are to a sailing vessel," and the damage was not, as it seems to me, in any way similar to the injury done to a sailing vessel by a storm of wind.—p. 633.

Hamilton v. Thames and Mersey Marine Insurance Co. 55 L. J. Q. B. 390; 17 Q. B. D. 195; 34 W. R. 674.—C.A.; reversed *nom.* **Thames and Mersey Marine Insurance Co. v. Hamilton** (1887) 56 L. J. Q. B. 626; 12 App. Cas. 484; 57 L. T. 695; 36 W. R. 337; 6 Asp. M. C. 200.—H.L. (E.). LORDS HALSBURY, L.C., BRAMWELL, HERSCHELL and MACNAGHTEN.

Thames and Mersey Marine Insurance Co. v. Hamilton, referred to.

Lund v. Thames and Mersey Marine Insurance Co. (1901) 17 T. L. R. 566.—MATHEW, J.

Thames and Mersey Marine Insurance Co. v. Hamilton, applied.

Blackburn v. Liverpool, &c. Steam Navigation Co. (1901) 71 L. J. K. B. 177; [1902] 1 K. B.

290, 293; 85 L. T. 783; 50 W. R. 272; 7 Com. Cas. 10; 9 Asp. M. C. 263.—WALTON, J.

Thames and Mersey Marine Insurance Co. v. Hamilton, not applied.

Jackson v. Mumford (1902) 8 Com. Cas. 61; 70; 51 W. R. 91.—KENNEDY, J.; affirmed, C.A.

Taylor v. Dewar (1864) 33 L. J. Q. B. 141; 5 B. & S. 58; 10 Jur. (N.S.) 361; 10 L. T. 267; 12 W. R. 579.—Q.B., adopted.

Xenos v. Wickham (1867) 36 L. J. C. P. 313, 320; L. R. 2 H. L. 296, 315; 16 L. T. 800; 16 W. R. 38.—H.L. (E.); The Sylph (1867) 37 L. J. Adm. 14, 16; L. R. 2 A. & E. 24, 29; 17 L. T. 519.—ADM.

Taylor v. Dewar, considered and applied.

The Guldfaxe (1868) 38 L. J. Adm. 12; L. R. 2 A. & E. 325; 19 L. T. 740; 17 W. R. 578.—ADM.

Taylor v. Dewar, discussed.

The North Britain, Roberts v. Ocean Marine Insurance Co. (1893) 63 L. J. Adm. 33; [1894] P. 77; 6 R. 673; 70 L. T. 210; 42 W. R. 243; 7 Asp. M. C. 413.—C.A. LINDLEY, SMITH and DAVEY, L.JJ.

SMITH, L.J.—*Taylor v. Dewar* has held that under a clause very similar to this (the first limb of the clause) the underwriters were not liable for those damages which the assured had had to pay for personal injuries occasioned to those on board the ship run down, and that the proper construction of it was that the underwriters had only to pay the assured such damages as he had to pay in respect to the loss or damage done to the ship run down, or possibly to her freight or cargo, which for this purpose might be treated as part of herself. The Queen's Bench differed from the Scotch case of *Coey v. Smith* (*infra*), which held that the clause covered damages which the assured had to pay for personal injuries done to those on board the ship run down, as well as for the damage done to the ship itself. This case, in my judgment, instead of assisting the plaintiffs (the assured), as far as it goes assists the defendants (the underwriters), for it might be argued from it that the expenses incurred in raising a ship were not expenses incurred in respect of the loss or damage done to the ship run down.—p. 35.

Coey v. Smith (1860) 22 Ct. of Sess. Cas. (2nd series) 955, referred to.

The North Britain, Roberts v. Ocean Marine Insurance Co. (1893) 63 L. J. Adm. 33; [1894] P. 77; 6 R. 673; 70 L. T. 210; 42 W. R. 243; 7 Asp. M. C. 413.—C.A. LINDLEY, SMITH and DAVEY, L.JJ. See extract, *supra*.

The North Britain (1893) 63 L. J. P. 33; [1894] P. 77; 70 L. T. 210; 42 W. R. 243; 6 R. 673; 7 Asp. M. C. 413.—C.A., approved.

The Engineer (1898) 67 L. J. P. 61; [1898] A. C. 382; 78 L. T. 473; 46 W. R. 530; 8 Asp. M. C. 401.—H.L. (E.).

McCowan v. Baine, The Niobe (1891)

[1891] A. C. 401; 65 L. T. 502; 7 Asp. M. C. 89.—H.L. (SC.), applied.

Margetts and Ocean Accident and Guarantee Corporation, In re (1901) 70 L. J. K. B. 762; [1901] 2 K. B. 792; 85 L. T. 94; 49 W. R. 669; 9 Asp. M. C. 217.—RIDLEY and PHILLIMORE, JJ.

The Niobe, referred to.

The Devonian (1901) P. 221, 229.—JEUNE, P.: affirmed, C.A.

The Warwick (1890) 15 P. D. 189; 63 L. T. 561; 6 Asp. M. C. 545.—HANNEN, P. and BUTT, J., applied.

Margetts and Ocean Accident and Guarantee Corporation, In re (1901) 70 L. J. K. B. 762; [1901] 2 K. B. 792; 85 L. T. 94; 49 W. R. 609; 9 Asp. M. C. 217.—MIDLEY and PHILLIMORE, JJ.

Rodoconachi (or Rodocanachi) v. Elliott (1874) 43 L. J. C. P. 255; L. R. 9 C. P. 518; 31 L. T. 239; 2 Asp. M. C. 399.—EX. CH., discussed and distinguished.

Wingate v. Foster (1878) 47 L. J. Q. B. 525, 527; 3 Q. B. D. 582, 585; 38 L. T. 737; 26 W. R. 350; 3 Asp. M. C. 598.—C.A.

Rodoconachi v. Elliott, dictum considered and applied.

Johnston v. Hogg (1883) 52 L. J. Q. B. 343; 10 Q. B. D. 432; 48 L. T. 435; 31 W. R. 768; 5 Asp. M. C. 51.—CAVE, J.

Rodoconachi v. Elliott, applied.

Nobel's Explosives Co. v. Jenkins & Co. (1896) 65 L. J. Q. B. 638; [1896] 2 Q. B. 326; 75 L. T. 163; 8 Asp. M. C. 181.—MATHEW, J.

Rodoconachi v. Elliott, observed upon.

Ruys v. Royal Exchange Assurance (1897) 66 L. J. Q. B. 534; [1897] 2 Q. B. 135, 140; 77 L. T. 23.—COLLINS, J.

Rodoconachi v. Elliott, adopted.

Robinson Gold Mining Co. v. Alliance Insurance Co. (1901) 70 L. J. K. B. 892; [1901] 2 K. B. 919, 927; 6 Com. Cas. 244.—PHILLIMORE, J.

Rodoconachi v. Elliott, distinguished.

Miller v. Law Accident Insurance Society (1902) 71 L. J. K. B. 551; [1902] 2 K. B. 694; 50 W. R. 474; 7 Com. Cas. 151.—BIGHAM, J.: affirmed on other grounds (1903), C.A.

Burnett v. Kensington (1797) 7 Term Rep. 210; 1 Esp. 416; Peake Add. Cas. 71; 4 R. R. 424.—K.B., adopted.

The Glenlivet (1893) 62 L. J. P. 55; [1893] P. 164, 169; 68 L. T. 860; 41 W. R. 671.—BARNES, J.; affirmed, C.A.

Burnett v. Kensington, explained and distinguished.

The Alsace Lorraine (1893) 62 L. J. Adm. 107; [1893] P. 209; 1 R. 632; 69 L. T. 261; 42 W. R. 112; 7 Asp. M. C. 362.—BARNES, J.

Thornely v. Hebson (1819) 2 B. & Ald. 513; 21 R. R. 381.—K.B., considered and distinguished.

Stringer v. English and Scottish Marine Insurance Co. (1870) 39 L. J. Q. B. 214; L. R. 5 Q. B. 599, 607; 10 B. & S. 770; 22 L. T. 802; 18 W. R. 1207.—EX. CH.; and Cossman v. West (1887) 57 L. J. P. C. 17; 13 App. Cas. 160; 58 L. T. 122; 6 Asp. M. C. 233.—P.C.

Roux v. Salvador (1836) 6 L. J. Ex. 282; 3 Bing. N.C. 266; 4 Scott 1; 2 Hodges 209.—EX. CH., observations adopted.

Stringer v. English and Scottish Marine Insurance Co. (1869) 38 L. J. Q. B. 321, 323; L. R. 4 Q. B. 676, 686.—Q.B.: affirmed, EX. CH. See *infra* col. 3488.

Roux v. Salvador, applied.

Rankin v. Potter (1873) 42 L. J. C. P. 169, 182; L. R. 6 H. L. 83, 112; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.); Browning v. Provincial Insurance Co. of Canada (1873) L. R. 5 P. C. 263, 275; 28 L. T. 853; 21 W. R. 587; 2 Asp. M. C. 35.—P.C.; Saunders v. Baring (1876) 34 L. T. 419, 421; 3 Asp. M. C. 133.—Q.B.D.

Roux v. Salvador, referred to.

Kaltenbach v. Mackenzie (1878) 48 L. J. C. P. 9; 3 C. P. D. 467; 39 L. T. 215; 26 W. R. 844.—C.A.

Roux v. Salvador, followed.

Cossman v. West (1887) 57 L. J. P. C. 17; 13 App. Cas. 160; 58 L. T. 122; 6 Asp. M. C. 233.—P.C.

Roux v. Salvador, explained and distinguished.

The Alsace Lorraine (1893) 62 L. J. Adm. 107; [1893] P. 209; 1 R. 632; 69 L. T. 261; 42 W. R. 112; 7 Asp. M. C. 362.—BARNES, J.

Roux v. Salvador, applied.

Asfar v. Blundell (1895) 64 L. J. Q. B. 573; [1895] 2 Q. B. 196; 73 L. T. 30; 15 R. 481.—MATHEW, J.; S. C. 65 L. J. Q. B. 138; [1896] 1 Q. B. 123; 73 L. T. 648; 44 W. R. 130.—C.A.

Roux v. Salvador, considered.

Trinder v. Thames and Mersey Marine Insurance Co. (1898) 67 L. J. Q. B. 666; [1898] 2 Q. B. 114; 78 L. T. 485; 46 W. R. 561; 8 Asp. M. C. 373.—C.A.

Roux v. Salvador, distinguished.

Cunningham v. Maritime Insurance Co. [1899] 2 Ir. R. 257.—Q.B.D.

Farnworth v. Hyde (1866) 36 L. J. C. P. 33; L. R. 2 C. P. 204; 11 Jur. (N.S.) 349; 15 L. T. 395; 15 W. R. 340.—EX. CH., adopted.

Browning v. Provincial Insurance Co. of Canada (1873) L. R. 5 P. C. 263, 275; 28 L. T. 853; 21 W. R. 587; 2 Asp. M. C. 35.—P.C.; Rankin v. Potter (1873) 42 L. J. C. P. 169, 176; L. R. 6 H. L. 83, 102; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.).

Farnworth v. Hyde. See

Kaltenbach v. Mackenzie (1878) 48 L. J. C. P. 9; 3 C. P. D. 467, 485; 39 L. T. 215; 26 W. R. 844; 4 Asp. M. C. 39.—C.A.

Farnworth v. Hyde, approved.

Cossman v. West (1887) 57 L. J. P. C. 17; 13 App. Cas. 160, 176; 58 L. T. 122; 6 Asp. M. C. 233.—P.C.

Stringer v. English and Scottish Marine

Insurance Co. (1870) 39 L. J. Q. B. 214; L. R. 5 Q. B. 599; 22 L. T. 802; 18 W. R. 1201; 10 B. & S. 770.—EX. CH. referred to. Castrique v. Imrie (1870) 39 L. J. C. P. 350, 354; L. R. 4 H. L. 414, 428; 23 L. T. 48; 39 W. R. 1.—H.L. (E.).

Stringer v. English and Scottish Marine Insurance Co., adopted.

Browning v. Provincial Insurance Co. of Canada (1873) L. R. 5 P. C. 263, 275; 28 L. T. 853; 21 W. R. 587; 2 Asp. M. C. 35.—P.C.; Rankin v. Potter (1873) 42 L. J. C. P. 169, 184; L. R. 6 H. L. 83, 116; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.).

Stringer v. English and Scottish Marine Insurance Co. (*supra*) applied.

Levy v. Merchant's Marine Insurance Co. (1885) 52 L. T. 263, 265; 1 Cab. & E. 474; 5 Asp. M. C. 407.—MATHEW, J.: *Cossman v. West* (1887) 57 L. J. P. C. 17; 13 App. Cas. 160; 58 L. T. 122; 6 Asp. M. C. 233.—P.C.

De Mattos v. Saunders (1872) L. R. 7 C. P. 550; 27 L. T. 120; 20 W. R. 801.—C.P., applied.

Letchford v. Oldham (1880) 49 L. J. Q. B. 458; 5 Q. B. D. 538, 542; 28 W. R. 789.—FIELD, J.; affirmed, C.A. BRETT, COTTON and THESIGER, L.JJ.

De Mattos v. Saunders, distinguished.

Cossman v. West (1887) 57 L. J. P. C. 17; 13 App. Cas. 160; 58 L. T. 122; 6 Asp. M. C. 233.—P.C.

De Mattos v. Saunders, applied.

Cunningham v. Maritime Insurance Co. [1899] 2 Ir. R. 257, 262.—Q.B.D.

Havelock v. Hancill (1789) 3 Term Rep. 277; 1 R. R. 703.—K.B., explained.

Cory v. Burr (1883) 52 L. J. Q. B. 657, 661; 8 App. Cas. 393, 399; 49 L. T. 78; 31 W. R. 894; 5 Asp. M. C. 109.—H.L. (E.).

Havelock v. Hancill, considered.

Robinson Gold Mining Co. v. Alliance Marine and General Assurance Co. (1902) 71 L. J. K. B. 942; [1902] 2 K. B. 489; 86 L. T. 858; 51 W. R. 105; 7 Com. Cas. 219.—C.A. COLLINS, M.R., MATHEW and HARDY, L.JJ.

Earle v. Rowcroft (1806) 8 East 126; 9 R. R. 385.—K.B., distinguished.

Grill v. General Iron Screw Collier Co. (1866) L. R. 1 C. P. 600, 610; 35 L. J. C. P. 321; 14 L. T. (N.S.) 711.—C.P.; affirmed, (1868) 37 L. J. C. P. 205; L. R. 3 C. P. 476; 18 L. T. 485; 16 W. R. 796.—EX. CH.

Earle v. Rowcroft, approved.

Cory v. Burr (1883) 52 L. J. Q. B. 657, 660; 8 App. Cas. 393, 399; 49 L. T. 78; 31 W. R. 894; 5 Asp. M. C. 109.—H.L. (E.).

Earle v. Rowcroft, referred to.

Westport Coal Co. v. McPhail (1898) 67 L. J. Q. B. 674; [1898] 2 Q. B. 130; 78 L. T. 490; 46 W. R. 566; 8 Asp. M. C. 378.—C.A.

Jones v. Nicholson (1854) 23 L. J. Ex. 330; 10 Ex. 28; 2 C. L. R. 1236.—EX., referred to.

Westport Coal Co. v. McPhail (1898) 67 L. J. Q. B. 674; [1898] 2 Q. B. 130; 78 L. T. 490; 46 W. R. 566; 8 Asp. M. C. 378.—C.A., HALSBURY, L.C., SMITH and COLLINS, L.JJ.

Livie v. Janson (1810) 12 East 648; 11 R. R. 513.—K.B., considered.

Lidgett v. Secretan (1871) 40 L. J. C. P. 257, 261; L. R. 6 C. P. 616, 625; 24 L. T. 942; 19 W. R. 1088; 1 Asp. M. C. 95.—C.P.

Livie v. Janson, applied.

Cory v. Burr (1881) 51 L. J. Q. B. 95; 8 Q. B. D. 318; 45 L. T. 713.—FIELD and CAVE, JJ.; [affirmed, C.A. and H.L. (E.), see *infra*]; Pitman v. Universal Marine Insurance Co. (1882) 51 L. J. Q. B. 561; 9 Q. B. D. 192; 46 L. T. 863;

30 W. R. 906; 4 Asp. M. C. 544.—LINDLEY, J.; affirmed, C.A. JESSEL, M.R., BRETT and COTTON, L.JJ.

Livie v. Janson, questioned.

Ionides v. Universal Marine Insurance Co. (1863) 14 C. B. (N.S.) 259; 32 L. J. C. P. 170; 10 Jur. (N.S.) 18; 8 L. T. 705; 11 W. R. 858.—C.P.

WILLES, J.—I cannot pass away from the case of *Livie v. Janson* without referring to Mr. Phillips's very able and learned work on Insurance, vol. i. p. 673, when he throws doubt upon the authority of Lord Ellenborough's decision, referring to cases in the American Courts where the principle of that case has not been applied to the case of an absolute loss of a portion of the thing insured. Without, however, going the length of saying that *Livie v. Janson* is *per* law, I am clear that it can only apply to a case where the vessel is deteriorated, and not to a case where there has been a loss of the subject-matter of the insurance by the perils of the sea.—p. 294.

Cory v. Burr (1883) 52 L. J. Q. B. 657; 8 App. Cas. 393; 49 L. T. 78; 31 W. R. 894; 5 Asp. M. C. 109.—H. L. (E.), inapplicable.

Cossman v. West (1887) 57 L. J. P. C. 17; 13 App. Cas. 160, 176; 58 L. T. 122; 6 Asp. M. C. 233.—P.C.

Cory v. Burr, considered.

Robinson Gold Mining Co. v. Alliance Marine and General Assurance Co. (1902) 71 L. J. K. B. 942; [1902] 2 K. B. 489; 86 L. T. 858; 51 W. R. 105; 7 Com. Cas. 219.—C.A. COLLINS, M.R., MATHEW and HARDY, L.JJ.

Cory v. Burr, principle applied.

Miller v. Law Accident Insurance Co. (1903) 72 L. J. K. B. 428; [1903] 1 K. B. 712; 88 L. T. 370; 51 W. R. 420; 8 Com. Cas. 161; 9 Asp. M. C. 386.—C.A.

Pipon v. Cope (1808) 1 Camp. 434; 10 R. R. 720.—K.B., explained.

Trinder v. Thames and Mersey Marine Insurance Co. (1898) 67 L. J. Q. B. 666; [1898] 2 Q. B. 114; 78 L. T. 485; 46 W. R. 561; 8 Asp. M. C. 373.—C.A.

Toulmin v. Anderson (1808) 1 Taunt. 227.—C.P., distinguished.

Hentig v. Staniforth (1816) 5 M. & S. 122; 17 R. R. 293.—K.B.

Butler v. Wildman (1820) 3 B. & Ald. 398; 22 R. R. 435.—K.B., referred to.

Thames and Mersey Marine Insurance Co. v. Hamilton (1887) 56 L. J. Q. B. 626; 12 App. Cas. 484; 57 L. T. 695; 36 W. R. 337; 6 Asp. M. C. 200.—H.L. (E.).

Butler v. Wildman, dictum adopted.

Royal Mail Steam Packet Co. v. English Bank of Rio de Janeiro (1887) 57 L. J. Q. B. 31; 19 Q. B. D. 362, 373; 36 W. R. 105.—WILLES and GRANHAM, JJ.

Butler v. Wildman, applied.

The Knight of St. Michael (1898) 67 L. J. P. 19; [1898] P. 30; 78 L. T. 90; 46 W. R. 396; 8 Asp. M. C. 360.—BARNES, J.

Devaux v. l'Anson (1839) 8 L. J. C. P. 284 : 5 Bing. N. C. 519 : 7 Scott 507 : 2 Am. 82 : 3 Jur. 678.—C.P., *applied*.

West India Telegraph Co. v. Home and Colonial Marine Insurance Co. (1880) 50 L. J. Q. B. 41, 46 : 6 Q. B. D. 51, 56 : 43 L. T. 420 : 29 W. R. 92 : 4 Asp. M. C. 341.—C.A.

Devaux v. l'Anson, *referred to*.

Thames and Mersey Marine Insurance Co. v. Hamilton (1887) 56 L. J. Q. B. 626 : 12 App. Cas. 484, 490 : 57 L. T. 695 : 36 W. R. 337 : 6 Asp. M. C. 200.—H.L. (E.).

Boyd v. Dubois (1811) 3 Camp. 133.—K.B., *commented on*.

Carr v. Montefiore (1864) 12 W. R. 136 : 33 L. J. Q. B. 57 : 10 L. T. 294.—Q.B., *affirmed*, 33 L. J. Q. B. 256 : 5 B. & S. 408 : 10 Jur. (N.S.) 1069 : 11 L. T. 157 : 12 W. R. 870.—EX. CH.

COCKBURN, C.J.—We need give no opinion upon the case of *Boyd v. Dubois*, though it certainly does seem to me a very strong thing to say, that where articles containing the germ of their probable destruction, such, for example, as hemp, are placed in a damaged condition on board a vessel, the insurer need not be told of it. However, we need not positively decide whether that case is right or wrong. Here a part of the cargo was wetted, but that part was landed and doubtless got dry before it was replaced in the ship. But, even assuming that some damage was done, it is very likely that neither Da Costa Brothers, nor Jacobs & Co., had any knowledge of the circumstance.

Furtado v. Rogers (1802) 3 Bos. & P. 191, 196 : 6 R. R. 752.—C.P., *adopted*.

Janson v. Driefontein Consolidated Gold Mines (1902) 71 L. J. K. B. 857 : [1902] A. C. 484 : 87 L. T. 372 : 51 W. R. 142 : 7 Com. Cas. 268.—H.L. (E.).

I. INTEREST OF ASSURED.

Godin v. London Assurance Co. (1758) 1 Burr. 489.—K.B.

Considered, *Ebbsworth v. Alliance Marine Insurance Co.* (1873) 42 L. J. C. P. 305, 322, 331 : L. R. 8 C. P. 596, 624 : 29 L. T. 479 : 2 Asp. M. C. 125.—C.P. (*differing in opinion*) : *principle applied*, *North British and Mercantile Insurance Co. v. London, Liverpool, and Globe Insurance Co.* (1877) 46 L. J. Ch. 537, 542 : 5 Ch. D. 569, 587 : 36 L. T. 629.—C.A.

Stockdale v. Dunlop (1840) 9 L. J. Ex. 83 : 6 M. & W. 224 : 4 Jur. 681, *referred to*.

Johnson v. Macdonald (1842) 12 L. J. Ex. 99 : 9 M. & W. 600 : 6 Jur. 264.

Stockdale v. Dunlop, *discussed*.

Felthouse v. Brindley (1862) 31 L. J. C. P. 204 : 11 C. B. (N.S.) 369 : 6 L. T. 157 : 10 W. R. 423.—C.P., *affirmed*, (1863) 7 L. T. 835 : 11 W. R. 429.—EX. CH.

Stockdale v. Dunlop, *applied*.

Stock v. Inglis (1882) 52 L. J. Q. B. 30 : 9 Q. B. D. 708, 720 : 47 L. T. 416 : 31 W. R. 455 : 4 Asp. M. C. 596.—FIELD, J., *reversed*, C.A. (*see* col. 3458).

Glover v. Black (1763) 3 Burr. 1394 : 1 W. Bl. 306, 399, 405, 422.—K.B., *discussed*.

Simmonds v. Hodgson (1829) 7 L. J. (O.S.) C. P. 239 : 6 Bing. 114 : 3 M. & P. 385.—C.P., (*see* extract, *infra*, col. 3493), (*reversed*, EX. CH., *see* extract, *infra*, col. 3493).

Glover v. Black, *discussed and distinguished*.

Mackenzie v. Whitworth (1875) 32 L. T. 163 : 44 L. J. Ex. 81 : L. R. 10 Ex. 142.—EX. : *affirmed*, C.A. (*infra*, col. 3494).

POLLOCK, B.—Our attention was called to the earlier decision of Lord Mansfield in the case of *Glover v. Black*, and in that case no doubt it was held that persons who advanced money on *respondentia* could not insure without stating who was the lender of the money upon *respondentia*, nor by merely stating the fact that it was upon goods. It is worth while, perhaps, to observe, with all respect to a decision like this, that long before that there had been great jealousy apparently not unnatural with regard to insurance both by those who borrowed and those who lent money on bottomry and *respondentia*, because it was a very common thing not merely to borrow money for the exigencies of the voyage, but a merchant would very often ship goods as a mere adventurer and borrow money which he was able to take advantage of, and would then insure himself, having all the while no interest in the voyage. And then very often, too, the lender of the money insured not only the money which he had lent but also the maritime interest which would be added to it if the voyage were successfully accomplished. All the writers seem to have set their faces against this. It is discussed in the works of both Emerigon and Pothier, and forms the subject of Art. 347 in the Code de Commerce. That being so, the case came before one of our Courts and it was very fully discussed, and undoubtedly it was found then to be the custom and general usage of merchants. All that Lord Mansfield said was, that he was very much inclined at first to support the policy, and in conclusion, he said that the ground of the present resolution of the Court was that it was established now as the law and practice of merchants that *respondentia* and bottomry must be mentioned and specified in the policy of insurance, but at the same time he declared that the Court did not mean to determine generally that no special interest in goods might be given in evidence in other cases than those of *respondentia* and bottomry if the circumstances of the case should admit of it. It seems to me that Lord Mansfield intended to make that exception, and it is somewhat remarkable that some years after a case occurred of insurance on *respondentia* interest, in which the words were merely on "goods, specie and effects." I allude to the case of *Gregory v. Christie*, *infra*. In that case it was held that the assured having insured in general words, "goods, specie and effects," was entitled to recover.—p. 168.

Gregory v. Christie (1784) 3 Dougl. 419 ; cited also in 1 Park on Marine Insurance,

7th ed., pp. 14 and 23.—K.B., *referred to*. *Mackenzie v. Whitworth* (1875) 44 L. J. Ex. 81 : L. R. 10 Ex. 142 : 32 L. T. 163.—EX. : *affirmed*, C.A. (*infra*, col. 3494).

Robertson v. Ewer (1786) 1 Term Rep. 127; 1 R. R. 164.—K.B., *applied*.
Field SS. Co. v. Burr (1899) 68 L. J. Q. B. 426; [1899] 1 Q. B. 579; 80 L. T. 445; 47 W. R. 341; 8 Asp. M. C. 529.—C.A.

Walpole v. Ewer, Park, Ins. 423 (4th ed.), *overruled*.

Simmonds v. Hodgson (1829) 6 Bing. 114; 3 M. C. P. 385; 7 L. J. (O.S.) C. P. 239.—C.P.; reversed, EX. CH. (*see infra*).

PARK, J.—In *Glover v. Black* (*supra*, col. 3492); it was decided that when the interest of the assured is in *bottomry* or *respondentia*, it must be mentioned in the policy; but the interest here is of a nature totally different from *bottomry* or *respondentia*. Lord Kenyon was new in his office when *Walpole v. Ewer* was decided, and the decision did not give satisfaction. Mr. Justice Buller, in *Newman v. Cazalet* (Park Ins. 424), differed, but put the decision on the ground of usage in the particular case; and Lord Ellenborough, in *Power v. Whitmore* (4 M. & S. 141), decided contrary to *Walpole v. Ewer*.—p. 121.

Simmonds (or Simonds) v. Hodgson (1829) 7 L. J. (O.S.) C. P. 239; 6 Bing. 114; 3 M. & P. 385.—C.P.; reversed, (1832) 1 L. J. K. B. 51; 3 B. & Ad. 50.—EX. CH.

Kellner v. Le Mesurier (1803) 4 East 396; 1 Smith 72; 7 R. R. 581.—K.B.; **Gamba v. Le Mesurier** (1803) 4 East 407; 7 R. R. 590.—K.B.; **Brandon v. Curling** (1803) 4 East 410; 1 Smith 72; 7 R. R. 592.—K.B., *adopted*.

Driefontein Consolidated Gold Mines v. Janson (1901) 70 L. J. K. B. 881; [1901] 2 K. B. 419; 85 L. T. 104; 49 W. R. 660; 6 Com. Cas. 198.—C.A. SMITH, M.R., and ROMER, L.J., WILLIAMS, L.J. *dissenting*; and S. C. affirmed *nom.* Janson v. Driefontein Consolidated Gold Mines (1902) 71 L. J. K. B. 857; [1902] A. C. 484; 87 L. T. 372; 51 W. R. 142; 7 Com. Cas. 268.—H.L. (E.).

Lucena v. Craufurd (1802) 3 Bos. & P. 75.—EX. CH.; reversed, (1806) 2 Bos. & P. (N.R.) 269; 6 R. R. 623.—H.L. (E.); S. C. on new trial (1808) 1 Taunt. 325.—H.L. (E.) (*infra*).

Lucena v. Craufurd (1802, 1806) 3 Bos. & P. 75; 2 Bos. & P. (N.R.) 269; 6 R. R. 623.—EX. CH. and H.L. (E.), *observations adopted*.

Wilson v. Jones (1867) 36 L. J. Ex. 78, 83; L. R. 2 Ex. 139, 150; 15 L. T. 669; 15 W. R. 435.—EX. CH.; **Lloyd v. Fleming** (1872) 41 L. J. Q. B. 93; L. R. 7 Q. B. 299; 25 L. T. 824; 20 W. R. 296; 1 Asp. M. C. 192.—Q.B.

Lucena v. Craufurd, fully discussed and *applied*.

Ebbsworth v. Alliance Marine Insurance Co. (1873) 42 L. J. C. P. 305, 318; L. R. 8 C. P. 596, 617; 29 L. T. 479; 2 Asp. M. C. 125.—C.P.

Lucena v. Craufurd, *recognised*.

Anderson v. Morice (1876) 46 L. J. C. P. 11, 14; 1 App. Cas. 713, 723; 35 L. T. 566; 25 W. R. 14; 3 Asp. M. C. 290.—H.L. (E.).

Lucena v. Craufurd, *discussed*.

Mackenzie v. Whitworth (1875) 45 L. J. Ex. 233; 1 Ex. D. 36, 43; 33 L. T. 655; 24 W. R. 287; 2 Asp. M. C. 490.—C.A.

Lucena v. Craufurd, *referred to*.
Allkins v. Jupe (1877) 46 L. J. C. P. 824, 828; C. P. D. 375, 384; 36 L. T. 851.—C.P.D.

Lucena v. Craufurd (No. 2) (1808) 1 Taunt. 325.—H.L. (E.), *distinguished*.
Watson v. Swann (1862) 31 L. J. C. P. 210; 11 C. B. (N.S.) 756.—C.P.

Routh v. Thompson (1809) 11 East 428.—K.B.; S. C. (1811) 13 East 274; 10 R. R. 539.—K.B., *distinguished*.
Watson v. Swann (1862) 31 L. J. C. P. 210; 11 C. B. (N.S.) 756.—C.P.

Routh v. Thompson, *observations inapplicable*.
Mackenzie v. Whitworth (1875) 45 L. J. Ex. 233, 237; 1 Ex. D. 36, 43; 33 L. T. 655; 24 W. R. 287; 2 Asp. M. C. 490.—C.A.

Routh v. Thompson, *referred to*.
Connecticut Fire Insurance Co. v. Kavanagh (1892) 61 L. J. P. C. 50; [1892] A. C. 473; 67 L. T. 508.—P.C.

Mackenzie v. Whitworth (1875) 44 L. J. Ex. 81; L. R. 10 Ex. 142; 32 L. T. 163.—EX.; *affirmed*, 45 L. J. Ex. 233; 1 Ex. D. 36; 33 L. T. 655; 24 W. R. 287; 2 Asp. M. C. 490.—C.A.

Mackenzie v. Whitworth, *applied*.
Dixon v. Whitworth (1879) 48 L. J. C. P. 538; 4 C. P. D. 371, 375; 40 L. T. 718; 28 W. R. 184; 4 Asp. M. C. 326.—C.P.D.; reversed, C.A., (*infra*).

Dixon v. Whitworth, 4 C. P. D. 371; 48 L. J. C. P. 538; 40 L. T. 718; 28 W. R. 184; 4 Asp. M. C. 326.—LINDLEY, J.; reversed, (1880) 49 L. J. C. P. 408; 43 L. T. 365.—C.A.

Dixon v. Whitworth, *discussed*.
The Mary Thomas (1893) 63 L. J. P. 49; [1894] P. 108.—BARNES, J.; affirmed, C.A.

Thomsen v. Royal Exchange Assurance Corporation (1813) 1 M. & S. 30; 14 R. R. 388.—K.B., *followed*.

Broomfield v. Southern Insurance Co. (1870) L. R. 5 Ex. 192; 39 L. J. Ex. 186; 22 L. T. 371; 18 W. R. 810.—EX.

[*Held*, following above case, that the doctrine of constructive total loss was not applicable to a policy of insurance on bottomry.]

Stephens v. Bloomfield (1869) L. R. 2 P. C. 516; 38 L. J. Adm. 45.—P.C., *followed*.
Broomfield v. Southern Assurance Co. (1870) L. R. 5 Ex. 192; 39 L. J. Ex. 186; 22 L. T. 371; 18 W. R. 810.—EX.

Seagrave v. Union Marine Insurance Co. (1866) 35 L. J. C. P. 172; L. R. 1 C. P. 305; 1 H. & R. 302; 12 Jur. (N.S.) 358; 14 L. T. 479; 14 W. R. 690.—C.P., *adopted*.
Anderson v. Morice (1874) 44 L. J. C. P. 10, 17; L. R. 10 C. P. 58, 73; 31 L. T. 655.—C.P.; affirmed on this point EX. CH. and H.L. (E.) (*see infra*).

Anderson v. Morice (1874) 44 L. J. C. P. 10; L. R. 10 C. P. 58; 31 L. T. 655.—C.P.; *partly affirmed and partly reversed* (1875) 44 L. J. C. P. 341; L. R. 10 C. P. 609; 33 L. T. 375.—EX. CH.; the latter decision affirmed on both points, (1876) 46 L. J. C. P. 11; 1 App. Cas. 713; 35 L. T. 566; 25 W. R. 14; 3 Asp. M. C. 290.—H.L. (E.).

Anderson v. Morice (*supra* in C.P.), *followed*.
Pickup v. Thames and Mersey Marine Insurance Co. (1878) 47 L. J. Q. B. 749; 3 Q. B. D. 594; 39 L. T. 341; 26 W. R. 689; 4 Asp. M. C. 43.—C.A.

Anderson v. Morice (*supra* in H.L.), *explained*.
Pryce v. Monmouthshire Canal Companies (1878) 49 L. J. Ex. 130, 143; 4 App. Cas. 197, 219; 40 L. T. 630; 27 W. R. 666.—H.L. (E.)

Anderson v. Morice, *observations applied*.
Inglis v. Stock (1885) 54 L. J. Q. B. 582; 10 App. Cas. 263, 274; 52 L. T. 821; 33 W. R. 877; 5 Asp. M. C. 422.—H.L. (E.)

Anderson v. Morice, *distinguished*.
Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co. (1886) 56 L. J. C. P. 19; 12 App. Cas. 128; 56 L. T. 173; 35 W. R. 636; 6 Asp. M. C. 94.—P.C. LORDS BRAMWELL, HOBHOUSE and HERSHELL, SIR BARNES PEACOCK and SIR RICHARD COUCH. SIR BARNES PEACOCK (for the Court).—Their lordships, notwithstanding the great diversity of opinions expressed in that case [*Anderson v. Morice*] are not prepared to throw any doubt as to the correctness of the decision. But admitting it as an authority to the fullest extent, they consider that it is not applicable to the circumstances of the present case. In each of these cases the insurance was on a "cargo," a word which, as already pointed out, is susceptible of different meanings in different contracts, and which must be interpreted with reference to the context.—p. 23.

Anderson v. Morice, *approved*.
Ajum Goolam Hossen & Co. v. Union Marine Insurance Co. (1901) 70 L. J. P. C. 34; [1901] A. C. 362; 84 L. T. 366; 9 Asp. M. C. 167.—P.C. LORDS HOBHOUSE, MACNAGHTEN, DAVEY, ROBERTSON and LINDLEY.

Smith v. Reynolds (1856) 1 H. & N. 221; 25 L. J. Ex. 337; 4 W. R. 644.—EX., *followed*.
De Mattos v. North (1868) L. R. 3 Ex. 185; 37 L. J. Ex. 116; 18 L. T. 797.—EX.; and *Mortimer v. Broadwood* (1869) 20 L. T. 398; 17 W. R. 653.—C.P.

Smith v. Reynolds, *applied*.
Allkins v. Jupe (1877) 46 L. J. C. P. 824, 828; 2 C. P. D. 375, 384; 36 L. T. 851.—C.P.D.

Smith v. Reynolds, *followed*.
Berridge v. Man On Insurance Co. (1887) 56 L. J. Q. B. 223; 18 Q. B. D. 346; 56 L. T. 375; 35 W. R. 343; 6 Asp. M. C. 104.—C.A. *ESHER, M.R., BOWEN and FRY, L.JJ.*
ESHER, M.R.—The first question is whether this policy is within the statute (19 Geo. 2, c. 37). The cases of *Smith v. Reynolds*, *De Mattos v. North* (*infra*), and *Allkins v. Jupe* (*infra*) show that for this purpose the thing on which the assurance is made is the thing physically at risk from the perils insured against, the loss of which involves the loss of the subject-matter of the insurance, that is to say, in this case, the ship.

Smith v. Reynolds, *applied*.
Gedge v. Royal Exchange Assurance Corporation (1900) 69 L. J. Q. B. 506; [1900] 2 Q. B. 214; 82 L. T. 463; 9 Asp. M. C. 57; 5 Com. Cas. 229.—KENNEDY, J.

De Mattos v. North (1868) 37 L. J. Ex. 116; L. R. 3 Ex. 185; 18 L. T. 797.—EX., *followed*.
Mortimer v. Broadwood (1869) 20 L. T. 398; 17 W. R. 653.—C.P.

De Mattos v. North, *applied*.
Allkins v. Jupe (1877) 46 L. J. C. P. 824, 828; 2 C. P. D. 375, 384; 36 L. T. 851.—C.P.D.

De Mattos v. North, *followed*.
Berridge v. Man On Insurance Co. (1887) 56 L. J. Q. B. 223; 18 Q. B. D. 346; 56 L. T. 375; 35 W. R. 343; 6 Asp. M. C. 104.—C.A. *See extract, supra*.

De Mattos v. North, *applied*.
Gedge v. Royal Exchange Assurance Corporation (1900) 69 L. J. Q. B. 506; [1900] 2 Q. B. 214; 82 L. T. 463; 9 Asp. M. C. 57; 5 Com. Cas. 229.—KENNEDY, J.

Mortimer v. Broadwood (1869) 20 L. T. 398; 17 W. R. 653.—C.P., *applied*.
Allkins v. Jupe (1877) 46 L. J. C. P. 824, 828; 2 C. P. D. 375, 384; 36 L. T. 851.—C.P.D.

Allkins v. Jupe (1877) 46 L. J. C. P. 824; 2 C. P. D. 375; 36 L. T. 851.—C.P.D., *followed*.
Berridge v. Man On Insurance Co. (1887) 56 L. J. Q. B. 223; 18 Q. B. D. 346; 56 L. T. 375; 35 W. R. 343; 6 Asp. M. C. 104.—C.A. *See extract, supra*.

Allkins v. Jupe, *applied*.
Gedge v. Royal Exchange Assurance Corporation (1900) 69 L. J. Q. B. 506; [1900] 2 Q. B. 214; 82 L. T. 463; 9 Asp. M. C. 57; 5 Com. Cas. 229.—KENNEDY, J.

Forbes v. Aspinall (1811) 13 East 323; 12 R. R. 352.—K.B., *followed*.
Denoon v. Home and Colonial Assurance Co. (1872) 41 L. J. C. P. 162, 170; L. R. 7 C. P. 341, 352; 26 L. T. 628; 20 W. R. 970; 1 Asp. M. C. 309.—C.P.

Forbes v. Aspinall, *rule applied*.
Rankin v. Potter (1873) 42 L. J. C. P. 169, 199; L. R. 6 H. L. 83, 143; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.)

Forbes v. Aspinall, *explained*.
The Main (1894) 63 L. J. Adm. 69; [1894] P. 320; 6 R. 775; 70 L. T. 247; 7 Asp. M. C. 424.
BARNES, J.—That case is an authority for the well-known proposition that where parties contemplate the freight insured to be on a full and complete cargo, and where, in fact, only a part cargo is shipped, and, therefore, the latter is all that was at risk, there must be what is called an opening of the valuation. This is not in strictness an opening of the valuation, but is merely a reduction in proportion to the amount of cargo shipped, the valuation still being held binding on what was in fact shipped. I think that judgment is based on the principle that both parties had agreed that the freight valued was the freight on a full cargo; and as this full cargo was not shipped, the value of what was at risk only must be taken. It is no authority for the contention that if the value of the freight on what was about to be shipped is estimated too highly originally and the assured is mistaken in

his valuation, the valuation ought to be reduced. The truth seems to me to be that the freight upon what is not shipped is never at risk, and, therefore, to that extent the underwriters cannot be made responsible—pp. 71, 72.

Forbes v. Aspinall, dictum adopted.

Roddick v. Indemnity Mutual Marine Insurance Co. (1897) [1895] 1 Q. B. 836.—KENNEDY, J.; affirmed, C.A.

Bell v. Gilson (1798) 1 B. & P. 345; 4 R. R. 823.—C.P., held overruled.

Esposito v. Bowden (1857) 7 El. & Bl. 763; 27 L. J. Q. B. 17; 3 Jur. (N.S.) 1209; 5 W. R. 732.—EX. CH.

WILLES, J. (for the Court).—A declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and such intercourse, except with the licence of the Crown, is illegal. Doubt was thrown upon the law on this subject by *Bell v. Gilson* (1798), where Buller and Heath, J.J. (Rooke, J., dissentiente) held, that an insurance of goods purchased in Holland during hostilities between England and Holland, on board a neutral ship, was lawful. That case, however, was, in the year 1800, overruled, Lord Kenyon being Chief Justice, by the Court of King's Bench, in *Potts v. Bell* (8 T. R. 548), which, together with the great case of *The Hoop* (1 C. Rob. 196) (1799), before Lord Stowell, then Sir William Scott, upon the authority of which *Potts v. Bell* was decided, has restored and finally established the rule already mentioned, that one of the consequences of war is the absolute interdiction of all commercial intercourse or correspondence between the subjects of the hostile countries, except by the permission of their respective sovereigns.—p. 779.

Irving v. Manning (1847) 1 H. L. Cas. 287; 6 C. B. 391.—H.L. (E.), followed.

Barker v. Janson (1868) 37 L. J. C. P. 105; L. R. 3 C. P. 303; 17 L. T. 473; 16 W. R. 399.—C.P.

Irving v. Manning, commented on.

Rankin v. Potter (1873) 42 L. J. C. P. 169, 200; L. R. 6 H. L. 83, 144; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.).

Irving v. Manning, dictum adopted.

Aitchison v. Lohre (1879) 49 L. J. Q. B. 123, 126; 4 App. Cas. 755, 761; 41 L. T. 323; 28 W. R. 1; 4 Asp. M. C. 168.—H.L. (E.).

Irving v. Manning, explained.

Burnand v. Rodocanachi (1880) 49 L. J. C. P. 732, 735; 5 C. P. D. 424, 426; 29 W. R. 339.—C.P.D.; reversed C.A. and H.L. (E.) (*infra*, col. 3499).

Irving v. Manning, applied.

Robertson v. Stewart (1809) 15 F. C. 165.—discussed.

Blairmore Sailing Ship Co. v. Macredie (1898) 67 L. J. P. C. 96; [1898] A. C. 593; 79 L. T. 217.—H.L. (SC.). LORDS HALSBURY, L.C., WATSON, MERSCHALL and SHAND.

Irving v. Manning, applied.

Balmoral Steamship Co. v. Marten (1902) 71 L. J. K. B. 819; [1902] A. C. 511; 87 L. T. 247; 51 W. R. 175; 7 Com. Cas. 292.—H.L. (E.). LORDS MACNAGHTEN, SHAND, BRAMPTON, ROBERTSON and LINDLEY.

Irving v. Manning, applied.

Angel v. Merchants' Marine Insurance Co. (1903) 72 L. J. K. B. 498; [1903] 1 K. B. 811; 88 L. T. 717; 51 W. R. 530; 8 Com. Cas. 179.—C.A.

Esposito v. Bowden (1855) 24 L. J. Q. B. 210; 4 El. & Bl. 903; 1 Jur. (N.S.) 729.—Q.B.; partly reversed (1857) 27 L. J. Q. B. 17; 7 El. & Bl. 763; 3 Jur. (N.S.) 1209; 5 W. R. 732.—EX. CH.

Esposito v. Bowden (supra in EX. CH.), applied.

The Teutonia (1871) 41 L. J. Adm. 4, 10; L. R. 3 A. & E. 394, 413; 24 L. T. 521; 1 Asp. M. C. 32.—ADM.; affirmed, P.C. See *supra*, col. 3373.

Esposito v. Bowden, dictum applied.

Janson v. Driefontein Consolidated Mines (1902) 71 L. J. K. B. 857; [1902] A. C. 484; 87 L. T. 372; 51 W. R. 142; 7 Com. Cas. 268.—H.L. (E.).

Tobin v. Harford (1864) 34 L. J. C. P. 37; 17 C. B. (N.S.) 528; 10 Jur. (N.S.) 859; 10 L. T. 817; 12 W. R. 1062.—EX. CH., followed.

Duncan v. Home and Colonial Assurance Co. (1872) 41 L. J. C. P. 162, 170; L. R. 7 C. P. 341, 352; 26 L. T. 628; 20 W. R. 970; 1 Asp. M. C. 309.—C.P.

Barker v. Janson (1868) 37 L. J. C. P. 105; L. R. 3 C. P. 303; 17 L. T. 473; 16 W. R. 399.—C.P., adopted.

Potter v. Rankin (1868) 37 L. J. C. P. 257, 261; L. R. 3 C. P. 562, 566; 18 L. T. 712; 16 W. R. 1049.—C.P.; reversed, EX. CH. & H.L. (E.) (*infra*, col. 3522).

Barker v. Janson, principle applied.

Lidgett v. Secretan (1871) 40 L. J. C. P. 257, 262; L. R. 6 C. P. 616, 628; 24 L. T. 942; 19 W. R. 1088; 1 Asp. M. C. 95.—C.P.

Barker v. Janson, applied.

The Main (1894) 63 L. J. Adm. 69; [1894] W. 320; 6 R. 775; 70 L. T. 247; 7 Asp. M. C. 424.—BARNES, J.

Barker v. Janson, followed.

Woodside v. Globe Marine Insurance Co. (1895) 65 L. J. Q. B. 117; [1896] 1 Q. B. 105; 73 L. T. 626; 44 W. R. 187; 8 Asp. M. C. 118.—MATHEW, J.

Lidgett v. Secretan (1871) 40 L. J. C. P. 257; L. R. 6 C. P. 616; 24 L. T. 942; 19 W. R. 1088; 1 Asp. M. C. 95.—C.P., considered.

Pitman v. Universal Marine Insurance Co. (1882) 51 L. J. Q. B. 561; 9 Q. B. D. 192; 46 L. T. 863; 30 W. R. 906; 4 Asp. M. C. 544.—C.A.

Lidgett v. Secretan, applied.

The Main (1894) 63 L. J. Adm. 69; [1894] P. 320; 6 R. 775; 70 L. T. 247; 7 Asp. M. C. 424.—BARNES, J.

Lidgett v. Secretan, followed.

Woodside v. Globe Marine Insurance Co. (1895) 65 L. J. Q. B. 117; [1896] 1 Q. B. 105; 73 L. T. 626; 44 W. R. 187; 8 Asp. M. C. 118.—MATHEW, J.

Lidgett v. Secretan, distinguished.

The *Dora Forster* (1900) 69 L. J. P. 85; [1900] P. 241; 49 W. R. 271.

[*Headnote of the Dora Forster*.—Where under a time policy a ship has sustained damage by perils insured against, and has been repaired abroad under an arrangement by which the ship is pledged for the cost of the repairs, but no personal liability is incurred by the shipowners for those repairs, and the ship is subsequently lost on the voyage home, the underwriters are not liable to pay the cost of repairs in particular average, in addition to the total loss.]

BARNES, J.—This case is of quite a different class from *Lidgett v. Secretan* . . . because there never was a loss for which the owners of this ship could make any claim.

North of England Iron Steamship Insurance

Association v. Armstrong (1870) 39 L. J.

Q. B. 81; L. R. 5 Q. B. 244; 21 L. T.

822; 18 W. R. 520.—Q.B., *questioned*.

Burnand v. Rodocanachi (1882) 7 App. Cas. 333; 51 L. J. Q. B. 548; 47 L. T. 277; 31 W. R. 65; 4 Asp. M. C. 576.—H.L. (B.).

LORD BLACKBURN.—I think it is plain that the reasons for which the value has been held to be conclusive, extend no further than this, that for the purposes of the contract between the parties the policy may be valued at so much. Whether that principle was rightly applied in the case of the *North of England Insurance Association v. Armstrong*, it is not necessary now to say. I own that if I had a similar case to decide, sitting in the Court of Error, I should pause before I said it was rightly decided.—p. 342.

Williams v. North China Insurance Co.

(1876) 1 C. P. D. 757; 35 L. T. 884; 3 Asp. M. C. 342.—G.A., *applied*.

The *Main* (1894) 63 L. J. Adm. 69; [1894] P. 320; 6 R. 775; 70 L. T. 247; 7 Asp. M. C. 424.—BARNES, J.

The Main (1894) 63 L. J. P. 69; [1894] P.

320; 6 R. 775; 70 L. T. 247; 7 Asp. M. C. 424.—BARNES, J., *referred to*.

Balmoral Steamship Co. v. Marten (1902) 71 L. J. K. B. 819; [1902] A. C. 511; 87 L. T. 247; 51 W. R. 175; 7 Com. Cas. 292.—H.L. (E.).

Page v. Fry (1800) 2 Bos. & P. 240; 5 R. R.

583.—C.P.; and *Hiscox v. Barrett* (1747) Park Ins. 603, n. (7th ed.); 16 East 145.

—C.J., *not followed*.

Bell v. Ansley (1812) 16 East 111; 14 R. R. 322.—ELLENBOROUGH, C.J.

Page v. Fry, and Hiscox v. Barrett, not followed.

Cohen v. Hannam (1813) 5 Taunt. 101; 14 R. R. 702.—C.P.

MANFIELD, C.J. (for the Court). The simple question in this case is, of the avowment of interest. It happened that Emanuel and Solomon Cohen were partners; and the action is brought in the name of Emanuel, and there is an avowment in each count that the interest is in one of them, and the declaration is in the ordinary form, as if the assurance had been made for one and for his sole benefit; and the plaintiff has recovered in this action for the whole loss as if the

whole interest was in him. No doubt, in a different form of declaration, he might have recovered for his moiety. The verdict is certainly wrong, for it gives him, who is entitled to a moiety only, the whole; therefore the verdict cannot stand. There are contrary decisions; namely, *Page v. Fry*, and the case before Lee, C.J. (*Hiscox v. Barrett*), on the one side, and there is the case of *Bell v. Ansley* (*infra*), in the K.B., which contradicts those authorities. We are of opinion, that the verdict cannot be supported, not merely for the sake of uniformity of judgment in both Courts, but also because the avowment is contrary to truth. . . . But according to the cases of *Page v. Fry*, and *Hiscox v. Barrett* it would be sufficient to aver the interest in any manner which would show it was not a gaming policy. But what is not sufficient; it is necessary to show who are the real contracting parties. If this were not necessary, this action would not be analogous to any other; for in all other cases it is necessary to show who are the real contracting parties, otherwise the plaintiff cannot recover. If, therefore, it were sufficient, as in *Page v. Fry* it was said to be, to show such an interest as would make it not a gaming policy, it would materially differ the action upon a policy of insurance from all other actions on contracts. We are, therefore, of opinion that the judgment given in the case of *Bell v. Ansley* is right, and well founded.—pp. 107, 108.

Page v. Fry, held overruled.

Ebsworth v. Alliance Marine Insurance Co. (1873) 42 L. J. C. P. 305, 333; L. R. 8 C. P. 596, 644; 29 L. T. 479; 2 Asp. M. C. 125.—C.P.

Bell v. Ansley (1812) 16 East 141; 14 R. R.

322.—K.B., *approved*.

Cohen v. Hannam (1813) 5 Taunt. 101; 14 R. R. 702.—C.P. *See extract, supra*.

Bell v. Ansley, observed upon.

Ebsworth v. Alliance Marine Insurance Co. (1873) 42 L. J. C. P. 305, 333; L. R. 8 C. P. 596, 644; 29 L. T. 479; 2 Asp. M. C. 125.—C.P.

Cohen v. Hannam (1813) 5 Taunt. 101; 14

R. R. 702.—C.P., *observed upon*.

Ebsworth v. Alliance Marine Insurance Co. (1873) 42 L. J. C. P. 305, 333; L. R. 8 C. P. 596, 644; 29 L. T. 479; 2 Asp. M. C. 125.—C.P.

Hagedorn v. Oliverson (1814) 2 M. & S. 485;

15 R. R. 317.—K.B., *followed*.

Cory v. Patton (1874) L. R. 9 Q. B. 577; 43 L. J. Q. B. 181; 30 L. T. 758; 23 W. R. 46; 1 Asp. M. C. 225.—Q.B.

BLACKBURN, C.J. (for the Court).—The only question now before us is whether the fact, appearing on the trial, that the ship was initiated subject to ratification by the assured, constitutes a material difference from the facts as appearing on the record when the former judgment was given, and, by reason that the contract was still open, as was contended on the argument before us, entitled the underwriter to have the loss communicated to him. Upon this point we have entertained considerable doubt, but as the case of *Hagedorn v. Oliverson* appears to us to be in point, and to govern the present case, we think ourselves bound by that decision, leaving the

defendant to take the case to a Court of Appeal if he shall be so advised.—p. 581.

Hagedorn v. Oliverson, *considered*.
Bolton v. Lambert (1889) 58 L. J. Ch. 425; 4 P. Ch. D. 295; 60 L. T. 687; 37 W. R. 434.—Q.A.

5. WARRANTIES.

Brine v. Featherstone (1813) 4 Taunt. 869; 14 R. R. 689.—C.P., *discussed and explained*.
De Wolf v. Archangel Insurance Co. (1874) 43 L. J. Q. B. 147; L. R. 9 Q. B. 451, 454; 39 L. T. 605; 22 W. R. 801; 2 Asp. M. C. 273.—Q.B.

Oliver v. Cowley (1765) Park on Insurance (8th ed.) 470, cited 17 C. B. (N.S.) 74.—
LORD MANSFIELD, *dissented from*.
Koebel v. Saunders (1864) 17 C. B. (N.S.) 71; 33 L. J. C. P. 310; 10 Jur. (N.S.) 920; 10 L. T. 695; 12 W. R. 1106.—C.P.

WILLES, J.—*Oliver v. Cowley* 1 utterly repudiate as an authority.—p. 77.

[*Oliver v. Cowley* had been cited to show that the plea of unseaworthiness was good.]

Annen v. Woodman (1810) 3 Taunt. 299; 12 R. R. 663.—C.P., *distinguished*.
Cohn v. Davidson (1877) 46 L. J. Q. B. 305; 2 Q. B. D. 455, 461; 36 L. T. 244; 25 W. R. 369; 3 Asp. M. C. 374.—C.P.

Douglas v. Scougall (1816) 4 Dow 269; 16 R. R. 69.—H.L. (SC.), *dicta adopted*.
Dudgeon v. Pembroke (1875) 1 Q. B. D. 96, 109; 34 L. T. 36.—EX. CH.; (reversed, H.L. (E.)), *see col. 3504*.

Weir v. Aberdeen (1819) 2 B. & Ald. 323; 20 R. R. 450.—K.B., *disapproved*.

Forshaw v. Chabert (1821) 6 Moore 369; 3 Br. & B. 158; 23 R. R. 596.—C.P.
Quebec Marine Insurance Co. v. Commercial Bank of Canada (1870) 7 Moore P. C. (N.S.) 1; L. R. 3 P. C. 234; 39 L. J. P. C. 53; 22 L. T. 559.—P.O.

LORD PENZANCE (for J.C.).—The second ground taken by the respondents is founded upon the language attributed to a great authority (Lord Tenterden) in the case of *Weir v. Aberdeen*, to the effect that if a defect, though it exists at the time the vessel sailed, and exists to such an extent and is of such a character as to render the vessel unseaworthy, be remedied before any loss arises, the underwriters still remain responsible. This is a proposition of perilous latitude. It is impossible not to see that such a doctrine would tend, if carried to its legitimate consequences, to fritter away the value of this warranty altogether. It is all very well to talk of trivial and small things, but it is very difficult to define what should fall within the category of small or trivial things, and what should exceed it. It may, however, be safely observed, without going more narrowly into that subject, that the case of *Weir v. Aberdeen* did not proceed upon the language that is attributed to Lord Tenterden—whether he was fully and rightly reported or not—but the judgment proceeded, as it appears to their lordships, distinctly upon the principle that the underwriters had been aware of the unseaworthiness and had assented to the vessel putting back to the port to cure herself of the defect, and therefore they were held responsible. They had assented in writing on the policy to maintain their liability notwithstanding the violation of the warranty. If the statements attributed to the chief justice were to

be held to be the ground of decision in that case, the case itself would come in direct conflict with many other cases, and especially the case of *Forshaw v. Chabert* (3 B. & B. 158), in which a defect existed at the time the vessel sailed, was completely remedied at Jamaica, the port into which the vessel put for that purpose, and after the defect the vessel was lost on the voyage from Jamaica to Liverpool; and yet the underwriters were held not responsible.

Gibson v. Small (1853) 4 H. L. Cas. 353; 1 C. L. R. 363; 17 Jur. 1131.—H.L. (E.), *distinguished*.

Couch v. Steel (1854) 3 El. & Bl. 402; 23 L. J. Q. B. 121; 2 C. L. R. 940; 18 Jur. 515; 2 W. R. 170.—Q.B.

CAMPBELL, C.J.—Mr. Milward has referred to some expressions used by Parke, B., in *Gibson v. Small* (on page 404); but they do not at all warrant the position that there is an implied contract with every seaman that the vessel is seaworthy, and that if it is not an action will lie.—p. 407.

Gibson v. Small, *considered and supplemented*.
Thompson v. Hopper (1856). (*see infra*, col. 3503); *Fawcett v. Sarsfield* (1856) 25 L. J. Q. B. 249; 6 El. & Bl. 192; 2 Jur. (N.S.) 665.—Q.B.

Gibson v. Small, *dicta applied*.
Redhead v. Midland Ry. (1867) 36 L. J. Q. B. 181, 193; L. R. 2 Q. B. 412, 435; 16 L. T. 485.—Q.B.; affirmed, (1869) 38 L. J. Q. B. 169; L. R. 4 Q. B. 379; 9 B. & S. 519; 20 L. T. 628; 17 W. R. 737.—EX. CH.

Gibson v. Small, *applied*.
Stanton v. Richardson (1872) 41 L. J. C. P. 180; L. R. 7 C. P. 421; 27 L. T. 513.—C.A.; affirmed, EX. CH. and H.L. (E.) (*ante*, col. 3308).

Gibson v. Small, *approved*.
Dudgeon v. Pembroke (1877) 2 App. Cas. 284; 46 L. J. 409; 36 L. T. 382; 25 W. R. 499; 3 Asp. M. C. 393.—H.L. (E.).

LORD PENZANCE (LORDS O'HAGAN, BLACKBURN and GORDEN concurring).—I do not propose to trouble your lordships by reviewing the arguments on this question, because I consider that the case of *Gibson v. Small*, supplemented as it was by *Thompson v. Hopper* (*infra*), and *Fawcett v. Sarsfield* (*infra*), must be considered to have set at rest the controversies on this subject, and to have finally decided that the law does not, in the absence of special stipulations in the contract, infer in the case of a time policy any warranty that the vessel at any particular time shall have been seaworthy. In pronouncing the judgment of the majority of the Court in the latter case, Lord Campbell said, "for the reasons which I gave in the case of *Gibson v. Small*, and which I have given in the case of *Thompson v. Hopper*, I think there is no implied warranty of seaworthiness in any time policy." From that time, upwards of twenty years ago, to the present, these decisions have been acted upon and submitted to, and thousands of time policies have been effected, and millions in losses adjusted under them; and whatever may be argued as to the soundness of the conclusions then arrived at, or however desirable it may be, as a matter of public policy and concern, that some such obligation of keeping his vessel, as far as it is within his power, seaworthy, should be cast on a shipowner, the law

must, I submit to your lordships, be considered as settled by those decisions, and any change made in it must be by legislative authority alone.—p. 244.

Gibson v. Small, applied.

Kopitoff v. Wilson (1876) 45 L. J. Q. B. 436, 439; 1 Q. B. D. 377, 381; 34 L. T. 677; 24 W. R. 706; 3 Asp. M. C. 163.—Q.B.D.

Gibson v. Small, opinion approved.

Steel v. State Line Steamship Co. (1877) 3 App. Cas. 72, 77; 37 L. T. 333; 3 Asp. M. C. 516.—H.L. (SC.).

Thompson v. Hopper (1856) 25 L. J. Q. B. 240; 6 El. & Bl. 172.—Q.B.; S. C. (1856) 26 L. J. Q. B. 18; 6 El. & Bl. 937; 3 Jur. (N.S.) 133.—Q.B.; reversed, (1858) 27 L. J. Q. B. 441; El. Bl. & El. 1038; 6 W. R. 857.—EX. CH.

Thompson v. Hopper, proposition explained.

Anderson v. Morice (1874) 44 L. J. C. P. 10; L. R. 10 C. P. 58, 69; 31 L. T. 605.—C.P.; partly affirmed and partly reversed, EX. CH. and H.L. (E.). See *supra*, col. 3494.

Thompson v. Hopper, approved.

Dudgeon v. Pembroke (1877) 46 L. J. Ex. 409; 2 App. Cas. 284; 36 L. T. 382; 25 W. R. 499.—H.L. (E.). See extract, *supra*, col. 3502.

Thompson v. Hopper, applied.

Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co. (1882) 51 L. J. Q. B. 393; 9 Q. B. D. 118, 126; 46 L. T. 530.—Q.B.D. (varied, C.A., *ante*, col. 3320).

Thompson v. Hopper, discussed.

Trinder, Anderson & Co. v. Thames and Mersey Marine Insurance Co. (1898) 67 L. J. Q. B. 666; [1898] 2 Q. B. 114; 78 L. T. 485; 46 W. R. 561; 8 Asp. M. C. 373.—C.A. HALSBURY, L.C., SMITH and COLLINS, L.JJ.

The Vortigern (1899) 68 L. J. P. 49; [1899] P. 140; 80 L. T. 382; 47 W. R. 437; 8 Asp. M. C. 523.—C.A., applied.

Greenock SS. Co. v. Maritime Insurance Co. (1903) 72 L. J. K. B. 868; [1903] 2 K. B. 657; 89 L. T. 200; 9 Com. Cas. 41.—C.A., affirming 51 W. R. 447; 9 Asp. M. C. 364.—BIGHAM, J.

Fawcus v. Sarsfield (1856) 25 L. J. Q. B. 249; 6 El. & Bl. 192; 2 Jur. (N.S.) 665.—Q.B., proposition explained.

Anderson v. Morice (1874) 44 L. J. C. P. 10, 15; L. R. 10 C. P. 58, 69; 31 L. T. 605.—C.P.; partly affirmed and partly reversed, EX. CH. and H.L. (E.). See *supra*, col. 3494.

Fawcus v. Sarsfield, approved.

Dudgeon v. Pembroke (1877) 46 L. J. Ex. 409; 2 App. Cas. 284; 36 L. T. 382; 25 W. R. 499.—H.L. (E.). See extract, *supra*, col. 3502.

Cunard v. Hyde (1858) 27 L. J. Q. B. 408; El. Bl. & El. 670; 5 Jur. (N.S.) 40.—Q.B.; S. C. (1859) 29 L. J. Q. B. 6; 2 El. & Bl. 1; 5 Jur. (N.S.) 408.—Q.B.

Cunard v. Hyde, distinguished.

Wilson v. Rankin (1865) 35 L. J. Q. B. 87; L. R. 1 Q. B. 162; 13 L. T. 564; 14 W. R. 198.—EX. CH.

O.C.

Cunard v. Hyde, and Wilson v. Rankin followed.

Dudgeon v. Pembroke (1874) 43 L. J. Q. B. 220; L. R. 9 Q. B. 581; 31 L. T. 31; 22 W. R. 917.—Q.B.; reversed, C.A., and restored, H.L. (E.). See *infra*.

Biccard v. Shepherd (1861) 34 Moore P. C. 471; 5 L. T. 504; 10 W. R. 136.—P.C.

See

Foley v. Tabor (1861) 2 F. & F. 663.—ERLE, C.J.

Biccard v. Shepherd, cited in argument.

Quebec Marine Insurance Co. v. Commercial Bank of Canada (1870) 39 L. J. P. C. 53; L. R. 3 P. C. 234; 7 Moore P. C. (N.S.) 1; 22 L. T. 559; 18 W. R. 769.—P.C.; and Dudgeon v. Pembroke (1877) 46 L. J. Ex. 409; 2 App. Cas. 284; 36 L. T. 382; 25 W. R. 499; 3 Asp. M. C. 393.—H.L. (E.).

Biccard v. Shepherd, held applicable.

Thin v. Richards (1892) 32 L. J. Q. B. 39; [1892] 2 Q. B. 141; 66 L. T. 584; 40 W. R. 617; 7 Asp. M. C. 165.—C.A. ESHER, M.R., FRY and LOPES, L.JJ.

Quebec Marine Insurance Co. v. Commercial Bank of Canada (1870) 39 L. J. P. C. 53; L. R. 3 P. C. 234; 22 L. T. 559; 18 W. R. 769.—P.C., applied.

The Vortigern (1899) 68 L. J. P. 49; [1899] P. 140; 80 L. T. 382; 47 W. R. 437; 8 Asp. M. C. 523.—C.A. RUSSELL, C.J., SMITH and COLLINS, L.JJ.

Quebec Marine Insurance Co. v. Commercial Bank of Canada, dictum adopted.

Sleigh v. Tyser (1900) 69 L. J. Q. B. 626; [1900] 2 Q. B. 333; 82 L. T. 804; 5 Com. Cas. 271.—BIGHAM, J.

Dudgeon v. Pembroke, 43 L. J. Q. B. 220; L. R. 9 Q. B. 581; 31 L. T. 31; 22 W. R. 914.—Q.B.; reversed, (1876) 1 Q. B. D. 96; 34 L. T. 36.—C.A.; the latter decision reversed, (1877) 46 L. J. Q. B. 409; 2 App. Cas. 284; 36 L. T. 382; 25 W. R. 499; 3 Asp. M. C. 393.—H.L. (E.).

Dudgeon v. Pembroke, followed.

West India Telegraph Co. v. Home and Colonial Marine Insurance Co. (1880) 50 L. J. Q. B. 41, 47; 6 Q. B. D. 51, 57; 43 L. T. 420; 29 W. R. 92; 4 Asp. M. C. 341.—C.A.

Dudgeon v. Pembroke, referred to.

Ballantyne v. Mackinnon (1896) 65 L. J. Q. B. 616; [1896] 2 Q. B. 455; 75 L. T. 95; 45 W. R. 70.—C.A.

Dudgeon v. Pembroke, discussed.

Trinder, Anderson & Co. v. Thames and Mersey Marine Insurance Co. (1898) 67 L. J. Q. B. 666; [1898] 2 Q. B. 114; 78 L. T. 485; 46 W. R. 561; 8 Asp. M. C. 373.—C.A. HALSBURY, L.C., SMITH and COLLINS, L.JJ.

Watson v. Clark (The Midsummer Blossom)

(1813) 1 Dow 336; 14 R. R. 73.—H.L. (SC.), referred to.

Parker v. Pots (1815) 3 Dow 23; 15 R. R. 1.—H.L. (E.).

Watson v. Clark, commented on.

Pickup v. Thames Insurance Co. (1878) 3 Q. B. D. 594; 47 L. J. Q. B. 749; 39 L. T. 341; 26 W. R. 689; 4 Asp. M. C. 43.—C.A.

BRETT, L.J.—The case cited to us is *Watson v. Clark*. That case is more often cited for the question of law which Lord Eldon enunciated than for his treatment of the facts. It is cited as an authority for the principle that if a ship was seaworthy at the commencement of the voyage, although she became otherwise only one hour after sailing, the warranty is complied with, and the underwriter is liable. The case also deals with the question of presumption arising from the facts. But Lord Eldon and Lord Redesdale were sitting as a Court of appeal from a decision of a Court which decided both law and fact, and they were called upon, therefore, as upon a rehearing, not only to determine what the law was, but also whether they agreed with the Court below upon the facts; and thus it is that they give their reasons for agreeing with the finding as to the facts. And when we find Lord Eldon and Lord Redesdale pointing out in the clearest terms a process of reasoning which is almost irresistible, it is a very good guide to a jury to point out to them that process of reasoning as one which they ought to follow. But we have never heard that this case was an authority for showing that a presumption of fact is really a proposition of law.—p. 601.

Pickup v. Thames and Mersey Marine Insurance Co. (1878) 47 L. J. Q. B. 749; 3 Q. B. D. 594; 39 L. T. 341; 26 W. R. 689; 4 Asp. M. C. 43.—C.A., *approved*.

Ajum Goolam Hossen v. Union Marine Insurance Co. (1901) 70 L. J. P. C. 34; [1901] A. C. 362; 84 L. T. 366; 9 Asp. M. C. 167.—P.C.

Bird v. Appleton (1800) 8 Term Rep. 562; 5 R. R. 468.—K.B., *explained*.

Baring v. Royal Exchange Assurance Co. (1804) 5 East 99; 7 R. R. 657.—K.B.

Bird v. Appleton, inapplicable.

Castrique v. Imrie (1870) 39 L. J. C. P. 350, 357; L. R. 4 H. L. 414, 434; 23 L. T. 48; 19 W. R. 1.—H.L. (E.).

Brown v. Tierney (1809) 1 Taunt. 517; 10 R. R. 599.—C.P., *questioned*.

Levy v. Vaughan (1812) 4 Taunt. 387; 13 R. R. 643.—C.P.

MANSFIELD, C.J.—It is very desirable that the decision of the Courts should agree, and the case of *Brown v. Tierney* is very much shaken by that of *Dalglish v. Brooke* (15 East 306).—p. 394.

6. CONCEALMENT AND MISREPRESENTATION.

Stribley v. Imperial Marine Insurance Co.

(1876) 45 L. J. Q. B. 396; 1 Q. B. D. 507; 34 L. T. 281; 24 W. R. 701; 3 Asp. M. C. 134.—Q.B.D., *observed upon*.

Blackburn v. Vigors (1887) 57 L. J. Q. B. 114; 12 App. Cas. 531; 57 L. T. 730; 36 W. R. 449; 6 Asp. M. C. 216.—H.L. (E.).

Holland v. Russell (1861) 30 L. J. Q. B. 308; 1 B. & S. 424; 4 L. T. 547.—Q.B.; *affirmed*, (1863) 32 L. J. Q. B. 297; 4 B. & S. 14; 8 L. T. 468; 11 W. R. 757.—EX. CH.

Holland v. Russell, distinguished.

Newall v. Tomlinson (1871) L. R. 6 C. P. 405, 409; 25 L. T. 382.—C.P.

Holland v. Russell, adopted.

Pollard v. Bank of England (1871) 40 L. J. Q. B. 233, 238; L. R. 6 Q. B. 623, 631; 25 L. T. 415; 19 W. R. 1168.—Q.B.

Holland v. Russell, applied.

Bavins v. London and South Western Bank (1899) 69 L. J. Q. B. 164; [1900] 1 Q. B. 270; 81 L. T. 655; 48 W. R. 211; 5 Com. Cas. 1.—C.A. SMITH, COLLINS and WILLIAMS, L.JJ.

Holland v. Russell, applied.

Continental Caoutchouc and Gutta-Percha Co. v. Kleinwort (1904) 90 L. T. 474; 52 W. R. 489; 5 Com. Cas. 240; 20 L. T. R. 403.—C.A.

Noble v. Kennoway (1780) 2 Dougl. 510.—K.B., *observed upon*.

Zwinger v. Samuda (1817) 7 Taunt. 265; 1 Moore 12; Holt N. P. 395; 18 R. R. 476.—C.P.; and Fleet v. Marton (1871) 41 L. J. Q. B. 49; L. R. 7 Q. B. 126; 26 L. T. 181; 20 W. R. 97.—Q.B.

Vallance v. Dewar (1808) 1 Camp. 503; 10 R. R. 738.—K.B., *explained*.

De Wolf v. Archangel Insurance Co. (1874) 43 L. J. Q. B. 147, 150; L. R. 9 Q. B. 451, 456; 39 L. T. 605; 22 W. R. 801; 2 Asp. M. C. 273.—Q.B.

Carter v. Boehm (1766) 3 Burr. 1905; 1 W. Bl. 593.—K.B., *discussed and approved*.

Bates v. Hewitt (1867) 36 L. J. Q. B. 282, 286; L. R. 2 Q. B. 595, 608; 15 W. R. 1172.—Q.B.

Carter v. Boehm, principle applied.

Harrower v. Hutchinson (1870) 39 L. J. Q. B. 229, 233; L. R. 5 Q. B. 584, 590; 10 B. & S. 469; 22 L. T. 684.—EX. CH.

Carter v. Boehm, observations adopted.

Gandy v. Adelaide Insurance Co. (1871) 40 L. J. Q. B. 239, 245; L. R. 6 Q. B. 746, 756; 25 L. T. 742; 1 Asp. M. C. 188.—Q.B.; Rowley v. L. & N. W. Ry. (1873) 42 L. J. Ex. 153, 160; L. R. 8 Ex. 221, 231; 29 L. T. 180; 21 W. R. 869.—EX. CH.; BRETT, J. dissenting.

Carter v. Boehm, dictum discussed.

Davenport v. Charsley (1886) 54 L. T. 372, 374; 34 W. R. 391.—KAY, J.

Carter v. Boehm, dictum adopted.

Bristol Alerated Bread Co. v. Muggs (1890) 59 L. J. Ch. 472; 44 Ch. D. 616, 622; 62 L. T. 416; 38 W. R. 393.—KAY, J.

Carter v. Boehm, referred to.

Seaton v. Heath (1895) 68 L. J. Q. B. 631; [1899] 1 Q. B. 782; 80 L. T. 579; 47 W. R. 487.—C.A. SMITH, COLLINS and ROMER, L.JJ.

Carter v. Boehm, adopted.

Gedge v. Royal Exchange Assurance Corporation (1900) 69 L. J. Q. B. 206; [1900] 2 Q. B. 214; 82 L. T. 463; 9 Asp. M. C. 57; 5 Com. Cas. 220.—KENNEDY, J.

Harrower v. Hutchinson, 38 L. J. Q. B. 185;

L. R. 4 Q. B. 523; 20 L. T. 556; 18 W. R. 731.—Q.B.; *reversed*, (1870) 39 L. J. Q. B. 229; L. R. 5 Q. B. 584; 22 L. T. 684; 10 B. & S. 469.—EX. CH.

Harfower v. Hutchinson, applied.

Tate v. Hyslop (1885) 54 L. J. Q. B. 592; 15 Q. B. D. 368, 376; 53 L. T. 581; 5 Asp. M. C. 487.—C.A.

Ionides v. Pacific Fire and Marine Insurance

Co. (1871); 41 L. J. Q. B. 33; L. R. 6 Q. B. 674; 25 L. T. 490.—Q.B.; affirmed, (1872) 41 L. J. Q. B. 190; L. R. 7 Q. B. 517; 26 L. T. 738; 21 W. R. 22; 1 Asp. M. C. 330.—EX. CH.

Ionides v. Pacific Fire and Marine Insurance Co., explained and distinguished.

Anderson v. Pacific Fire and Marine Insurance Co. (1872) L. R. 7 C. P. 65; 26 L. T. 130; 20 W. R. 280; 1 Asp. M. C. 220.—C.P.

Ionides v. Pacific Fire and Marine Insurance Co., questioned but followed.

Co. v. Patton (1872) 41 L. J. Q. B. 195, A.; L. R. 7 Q. B. 304; 26 L. T. 161; 20 W. R. 364; 2 Asp. M. C. 302.—Q.B. See extract, ante, cols. 3476, 3477.

Ionides v. Pacific Fire and Marine Insurance Co., inapplicable.

Stephens v. Australasian Insurance Co. (1872) 42 L. J. C. P. 12, 15; L. R. 8 C. P. 18, 23; 27 L. T. 585; 21 W. R. 228; 1 Asp. M. C. 458.—C.P.

Ionides v. Pacific Fire and Marine Insurance Co., adopted.

Fisher v. Liverpool Marine Insurance Co. (1873) 42 L. J. Q. B. 224; L. R. 8 Q. B. 469; 28 L. T. 867.—Q.B.; affirmed, (1874) 43 L. J. Q. B. 114; L. R. 9 Q. B. 418; 30 L. T. 501; 22 W. R. 951; 2 Asp. M. C. 454.—EX. CH.

Ionides v. Pacific Fire and Marine Insurance Co., applied.

Lishman v. Northern Maritime Insurance Co. (1875) 44 L. J. C. P. 185; L. R. 10 C. P. 179; 32 L. T. 170; 23 W. R. 733.—EX. CH.

Ionides v. Pacific Fire and Marine Insurance Co., dictum adopted.

Citizens' Insurance Co. of Canada v. Parsons (1881) 51 L. J. P. C. 11, 25; 7 App. Cas. 96, 125; 45 L. T. 721.—P.C.

Ionides v. Pacific Fire and Marine Insurance Co., observations adopted.

Davies v. National Fire and Marine Insurance Co. of New Zealand (1891) 60 L. J. P. C. 73; [1891] A. C. 485; 65 L. T. 560.—P.C.

Ionides v. Pacific Fire and Marine Insurance Co., applied.

Home Marine Insurance Co. v. Smith (1898) 67 L. J. Q. B. 554; [1898] 1 Q. B. 829.—MATHEW, J.; affirmed, C.A.

Ionides v. Pender (1874) 43 L. J. Q. B. 227; L. R. 9 Q. B. 331; 30 L. T. 547; 22 W. R. 884; 2 Asp. M. C. 266.—Q.B., principle applied.

Rivaz v. Gerussi (1880) 50 L. J. Q. B. 176; 6 Q. B. D. 222, 230; 44 L. T. 79; 4 Asp. M. C. 377.—C.A.; and Tate v. Hyslop (1885) 54 L. J. Q. B. 592; 15 Q. B. D. 368, 379; 53 L. T. 581; 5 Asp. M. C. 487.—C.A.

Tate v. Hyslop (1885) 54 L. J. Q. B. 592; 15 Q. B. D. 368; 53 L. T. 581; 5 Asp. M. C. 487.—C.A., distinguished.

The Belouin (1893) 63 L. J. P. 30; [1894] P. 1; 6 R. 693; 69 L. T. 782; 42 W. R. 299; 7 Asp. M. C. 391.—BARNES, J.; affirmed, C.A.

Berthon v. Loughman (1817) 2 Stark. 258.—overruled.

Campbell v. Rickards (1833) 5 B. & Ad. 840; 2 N. & M. 542; 2 L. J. K. B. 204.—K.B.

Rickards v. Murdock (1830) 8 L. J. (O.S.) K. B. 210; 10 B. & C. 527.—K.B., overruled.

Campbell v. Rickards (1833) 5 B. & Ad. 840; 2 N. & M. 542; 2 L. J. K. B. 204.—K.B.

Thornton v. Knight (1849) 16 S.M. 509; 13 Jur. 180.—V.C., distinguished.

Brooking v. Maudslay, Son and Field (1888) 57 L. J. Ch. 1001; 38 Ch. D. 636; 58 L. T. 852; 36 W. R. 664; 6 Asp. M. C. 296.—STIRLING, J.

Brooking v. Maudslay (1888) 57 L. J. Ch. 1001; 38 Ch. D. 636; 58 L. T. 852; 36 W. R. 664; 6 Asp. M. C. 296.—STIRLING, J., referred to.

London Association of Shipowners v. London and India Docks Joint Committee (1892) 62 L. J. Ch. 294; [1892] 3 Ch. 242; 2 R. 23; 67 L. T. 238; 7 Asp. M. C. 195.—C.A.; and West v. Sackville (Lord) (1903) [1903] 2 Ch. 378.—KEKEWICH, J.; reversed, C.A.

7. VOYAGE.

Gist v. Mason (1786) 1 Term Rep. 84; 1 R. R. 154.—K.B., commented on.

Bell v. Gilson (1798) 1 Bos. & P. 345; 4 R. R. 823.

BULLER, J.—In later times I well remember to have seen many policies tried professedly on enemy's property, without ever hearing the objection raised. Lord Mansfield did all in his power to prevent so dishonourable a defence being made. When the case of *Gist v. Mason* came on, I more than once conversed with Lord Mansfield on the subject, being desirous to obtain his opinion on the legality of such insurances. On the legality, however, I never could get him to reason. He often said that in former times it was considered for the interest of the country to insure enemy's property, and on the persuasion of its being for the interest of the country, he always discountenanced any objection on that head. But he never went beyond the ground of expedience.—p. 354.

Denison v. Modigliani (1794) 5 Term Rep. 580.—K.B., distinguished.

Moss v. Byrom (1795) 6 Term Rep. 379; 3 R. R. 208.—K.B.

LAWRENCE, J.—The case of *Denison v. Modigliani* is distinguishable from the present for the reason given by my lord (Kenyon), namely, that in that case there was a legal letter of marque on board to enable the captain to take prizes. But here the letter of marque was not obtained for the purpose of enabling the ship to cruise, but of procuring seamen on board; when the seamen were procured then the letter of marque ceased to have its effect, and then it was the same as if there had been no letter of marque on board at all.—p. 383.

Muller v. Thompson (1811) 2 Camp. 610; 12 R. R. 753.—K.B., adopted.**Flindt v. Waters (1812) 15 East 260; 3 R. R. 457.—K.B., referred to.**

Janson v. Driefontein Consolidated Mines (1902) 71 L. J. K. B. 857; [1902] A. C. 484; 87 L. T. 372; 51 W. R. 142; 7 Com. Cas. 268.—H.2. (E.).

(Deviation.)

Gregory v. Christie (1784) Park, Insurance (7th ed.) 49; 3 Dougl. 419.—K.B., *disapproved*.

Urquhart v. Barnard (1809) 1 Taunt. 450; 10 R. R. 574.—C.P.

MANSFIELD, C.J. (for the Court).—In the case of *Gregory v. Christie*, Lord Mansfield, C.J., says, "The policy in question differs from others because it contains a permission to trade, as well as to touch and stay, at any ports or places, which is not usual in policies of this nature; for in general they only permit them to touch and stay, which words can only be intended to give a permission so to do if necessity obliges them." This cannot be the true construction. The clause is not required for that purpose; for every ship without any memorandum for that purpose has liberty to do what is necessary in order for the preservation of the vessel and the lives of those on board her, as to take in provisions to save the crew from starving, or to prevent her from sinking by going into port to be repaired. Such acts, though done without the sanction of these words, are no deviation. I know not who was the author of that note, and perhaps it may have been incorrectly taken. The meaning of these words then has never been defined. . . . Among the cases on this subject, which are all collected in Park, 6th ed., 388, is that of *Stitt v. Wardell* (*infra*), which has been cited in the argument. Lord Kenyon does not there at all define what is the meaning of the "liberty to touch and stay," but expresses his opinion that if that breaking bulk had happened at Cork, where the ship was entitled to touch, instead of in Dublin harbour, the policy would equally have been avoided. But as this was a sudden answer to a sudden question put by the plaintiff's counsel, what would have happened if the ship had gone into Cork, it is not a comment entitled to have much weight as an explanation of the term "liberty to touch and stay."—p. 456.

Gregory v. Christie considered and distinguished.

Mackenzie v. Whitworth (1875) 44 L. J. Ex. 81, 85; L. R. 10 Ex. 142, 151; 32 L. T. 163.—EX. (affirmed, C.A.).

Stitt v. Wardell (1798) 2 Esp. 610.—K.B., *disapproved*.

Urquhart v. Barnard (1809) 1 Taunt. 450; 10 R. R. 574.—C.P. See extract, *supra*.

Stitt v. Wardell, and Sheriff v. Potts (1803) 5 Esp. 96.—K.B., *held overruled*.

Laroche v. Oswin (1810) 12 East 131; 11 R. R. 337.—K.B.

ELLENBOROUGH, C.J.—The risk insured was neither enhanced nor varied, but something was done in the course of the voyage which made no difference in either, and therefore was no discharge of the underwriters' liability. The cases of *Stitt v. Wardell* and *Sheriff v. Potts*, in which a different opinion had prevailed, was duly considered and overruled by the Court in *Raine v. Bell* (*infra*), which governs the present.—p. 133.

Raine v. Bell (1808) 9 East 195; 9 R. R. 533.—K.B., *followed*.

Laroche v. Oswin (1810) 12 East 131; 11 R. R. 337.—K.B.

Sea Insurance Co. of Scotland v. Gavin (1829) 4 Bli. (N.S.) 578; 2 Dow & Cl. 129.—H.L. (SC.), *applied*.
Hunter v. Northern Marine Insurance Co. (1888) 13 App. Cas. 717, 733.—H.L. (SC.).

8. LOSSES.

Cocking v. Fraser (1785) 4 Dougl. 295.—K.B., *questioned*.

Cologan v. London Assurance Co. (1816) 5 M. & S. 447; 17 R. R. 390.—K.B.

ELLENBOROUGH, C.J.—As to the other point, if it were material, I should incline to the opinion of Lord Alvanley in *Dyson v. Rowcroft* (*infra*), in preference to that of Lord Mansfield in *Cocking v. Fraser*.—p. 455.

Cocking v. Fraser, disapproved.

Asfar v. Blundell (1895) 64 L. J. Q. B. 573; [1895] 2 Q. B. 196; 73 L. T. 30; 15 R. 481.—MATHEW, J.

Dyson v. Rowcroft (1803) 3 Bos. & P. 474; 7 R. R. 809.—C.P., *approved*.

Cologan v. London Assurance Co. (1816) 5 M. & S. 447; 17 R. R. 390.—K.B. See extract, *supra*.

Birkley v. Presgrave (1801) 1 East 220; 6 R. R. 256.—K.B., *dictum adopted*.

Harrison v. Bank of Australasia (1872) 41 L. J. Ex. 36, 40; L. R. 7 Ex. 39, 49; 25 L. T. 944; 20 W. R. 385; 1 Asp. M. C. 198.—EX.; **Svensden v. Wallace** (1884) 53 L. J. Q. B. 385; 13 Q. B. D. 69, 73; 50 L. T. 799.—C.A., (affirmed, H.L., *ante*, col. 3381); **The Brigella** (1893) 62 L. J. Adm. 81; [1893] P. 189; 1 R. 616; 69 L. T. 834; 7 Asp. M. C. 337.—BARNES, J.; and **The Bona** (1895) 64 L. J. Adm. 62; [1895] P. 125; 11 R. 707; 71 L. T. 870; 43 W. R. 290; 7 Asp. M. C. 557.—C.A.

Birkley v. Presgrave, adopted.

Milburn v. Jamaica Fruit Importing Co. (1900) 69 L. J. B. 860; [1900] 2 Q. B. 540; 83 L. T. 321; 5 Com. Cas. 346.—C.A.

Birkley v. Presgrave, dictum explained.

The Leitrim (1902) 71 L. J. P. 108; [1902] P. 256; 87 L. T. 240; 51 W. R. 558.—BARNES, J.

Power v. Whitmore (1815) 4 M. & S. 141; 16 R. R. 416.—K.B., *applied*.

Simmonds v. Hodgson (1829) 6 Bing. 114; 3 M. & P. 385; 7 L. J. (O.S.) C. P. 239.—C.P. (see extract, *ante*, col. 3493); and **Hallett v. Wigrain** (1850) 9 C. B. 580; 19 L. J. C. P. 281.—C.P. See extract, *ante*, col. 3377.

Power v. Whitmore, distinguished.

Dent v. Smith (1869) 38 L. J. Q. B. 144, 156; L. R. 4 Q. B. 414, 450; 20 L. T. 868; 17 W. R. 646.—Q.B.

Power v. Whitmore, considered.

Harrison v. Bank of Australasia (1872) 41 L. J. Ex. 36, 40; L. R. 7 Ex. 39, 49; 25 L. T. 944; 20 W. R. 385; 1 Asp. M. C. 198.—EX.

Power v. Whitmore, dictum adopted.

Messina v. Petrocchino (1872) 41 L. J. P. C. 27, 31; L. R. 4 P. C. 144, 157; 26 L. T. 561; 20 W. R. 451.—P.C.

Power v. Whitmore, not adopted.

Harris v. Scaramanga (1872) 41 L. J. C. P. 170, 178; L. R. 7 C. P. 481, 495; 26 L. T. 797; 20 W. R. 777; 1 Asp. M. C. 339.—C.P.

Power v. Whitmore, discussed.

Attwood v. Sellar (1880) 49 L. J. Q. B. 515, 518; 5 Q. B. D. 286, 292; 42 L. T. 644; 28 W. R. 604; 4 Asp. M. C. 283.—C.A.

Power v. Whitmore, considered.

Svensden v. Wallace (1884) 53 L. J. Q. B. 385; 13 Q. B. D. 69, 91; 50 L. T. 799.—C.A. (affirmed, H.L., *ante*, col. 3381).

Power v. Whitmore, distinguished.

The Bona (1895) 64 L. J. Adm. 62; [1895] P. 125; 11 R. 707; 71 L. T. 870; 43 W. R. 290; 7 Asp. M. C. 557.—C.A.

Corrington v. Roberts (1806) 2 Bos. & P. (N.R.)

378; 9 R. R. 669.—C.P., *distinguished*.
The Bona (1895).—C.A., *supra*.

Benson v. Chapman (1849) 2 H. L. Cas. 696;

8 C. B. 950; 13 Jur. 969.—H.L. (E.), *applied*.

The Lizzie (1868) L. R. 2 A. & E. 254, 256; 19 L. T. 71.—ADM.

Benson v. Chapman, inapplicable.

Barber v. Fleming (1869) L. R. 5 Q. B. 59, 74; 39 L. J. Q. B. 25; 10 B. & S. 879; 18 W. R. 254.—Q.B.; Rankin v. Potter (1873) 42 L. J. C. P. 169, 187; L. R. 6 H. L. 83, 122; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.).

Benson v. Chapman, dictum explained.

Attwood v. Sellar (1879) 48 L. J. Q. B. 465; 4 Q. B. D. 342, 357; 41 L. T. 83.—Q.B.D.; affirmed, (1880) 49 L. J. Q. B. 515; 5 Q. B. D. 286; 42 L. T. 644; 28 W. R. 604; 4 Asp. M. C. 283.—C.A.

Benson v. Chapman, considered and applied.

Assicurazioni Generali v. SS. Bessie Morris [1892] 1 Q. B. 571.—COLLINS, J.; affirmed, C.A.

Moss v. Smith (1850) 19 L. J. C. P. 225; 9 C. B. 94; 14 Jur. 1003.—C.P., adopted.

Farnworth v. Hyde (1866) 36 L. J. C. P. 33, 39; L. R. 2 C. P. 204, 225; 11 Jur. (N.S.) 349; 15 L. T. 395; 15 W. R. 340.—EX. CH.; Rankin v. Potter (1873) 42 L. J. C. P. 169, 184; L. R. 6 H. L. 83, 115; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.); Aitchison v. Lohre (1879) 49 L. J. Q. B. 123, 126; 4 App. Cas. 755, 762; 41 L. T. 323; 28 W. R. 1; 4 Asp. M. C. 168.—H.L. (E.); Dahl v. Nelson (1881) 50 L. J. Ch. 411, 419; 6 App. Cas. 38, 52; 44 L. T. 381; 29 W. R. 543; 4 Asp. M. C. 392.—H.L. (E.); Shepherd v. Henderson (1881) 7 App. Cas. 49, 69.—H.L. (SC.).

Moss v. Smith, observations applied.

Assicurazioni Generali v. SS. Bessie Morris (1892) 61 L. J. Q. B. 754; [1892] 2 Q. B. 652; 67 L. T. 218; 41 W. R. 83.—C.A.

Moss v. Smith, discussed and applied.

Angel v. Merchants' Marine Insurance Co. (1903) 72 L. J. K. B. 498; [1903] 1 K. B. 811; 88 L. T. 717; 51 W. R. 530; 8 Com. Cas. 179.—C.A.

Rosetto v. Gurney (1851) 20 L. J. C. P. 257;

11 C. B. 176; 15 Jur. 1177.—C.P., *approved*.
Farnworth v. Hyde (1866) L. R. 2 C. P. 204; 36 L. J. C. P. 33; 11 Jur. (N.S.) 349; 15 L. T. 395; 15 W. R. 340.—EX. CH.

Rosetto v. Gurney, adopted.

Meyer v. Ralli (1876) 45 L. J. C. P. 741, 745; 1 C. P. D. 358, 368; 35 L. T. 838; 24 W. R. 963; 3 Asp. M. C. 324.—C.P.D.

Rosetto v. Gurney, discussed.

Svensden v. Wallace (1885) 54 L. J. Q. B. 497; 10 App. Cas. 404, 417; 52 L. T. 901; 34 W. R. 369; 5 Asp. M. C. 453.—H.L. (E.).

Hall v. Janson (1855) 24 L. J. Q. B. 97; 4

E. & B. 500; 3 C. L. R. 737; 1 Jur. (N.S.) 571; 3 W. R. 213.—Q.B., *discussed and applied*.

Attwood v. Sellar (1880) 49 L. J. Q. B. 515; 5 Q. B. D. 286, 297; 42 L. T. 644; 28 W. R. 604; 4 Asp. M. C. 283.—C.A.

Hall v. Janson, discussed and distinguished.

Svensden v. Wallace (1884) 53 L. J. Q. B.; 13 Q. B. D. 69, 86; 50 L. T. 799.—C.A.; affirmed, H.L. (E.). See *ante*, col. 3381.

Hall v. Janson, discussed.

Allison v. Bristol Marine Insurance Co. (1876) 1 App. Cas. 209; 221; 34 L. T. 809; 24 W. R. 1039.—H.L. (E.).

Spence v. Union Marine Insurance Co.

(1868) 37 L. J. C. P. 169; L. R. 3 C. P. 427; 18 L. T. 632; 16 W. R. 1010.—C.P., *adopted*.

Harris v. Truman (1881) 50 L. J. Q. B. 633, 641; 7 Q. B. D. 340, 358; 45 L. T. 255.—Q.B.D.; affirmed, (1882) 51 L. J. Q. B. 338; 9 Q. B. D. 264; 46 L. T. 844; 30 W. R. 533.—C.A.

Spence v. Union Marine Insurance Co.,

adopted.
Smurthwaite v. Hannay (1894) 63 L. J. Q. B. 737; [1894] A. C. 494; 6 R. 299; 71 L. T. 157; 43 W. R. 113.—H.L. (E.).

Dent v. Smith (1869) 38 L. J. Q. B. 144

L. R. 4 Q. B. 414; 20 L. T. 868; 17 W. R. 646.—Q.B., *followed*.

Messina v. Petrocchchino (1872) 41 L. J. P. C. 27; L. R. 4 P. C. 144; 26 L. T. 561; 20 W. R. 451.—P.C.

Dent v. Smith, commented upon.

Harris v. Scaramanga (1872) 41 L. J. C. P. 170, 179; L. R. 7 C. P. 481, 498; 26 L. T. 797; 20 W. R. 777; 1 Asp. M. C. 339.—C.P.

Harris v. Scaramanga (1872) 41 L. J. P. C.

170; L. R. 7 C. P. 481; 26 L. T. 797; 20 W. R. 777; 1 Asp. M. C. 339.—C.P., *followed*.

Hendricks v. Australasian Insurance Co. (1874) L. R. 9 C. P. 460; 43 L. J. C. P. 188; 30 L. T. 419; 22 W. R. 947; 2 Asp. M. C. 44.—C.P.

Harris v. Scaramanga, followed.

Mavro v. Ocean Marine Insurance Co., 43 L. J. C. P. 339; 31 L. T. 186.—C.P.; affirmed, (1875) L. R. 10 C. P. 414; 44 L. J. C. P. 229; 32 L. T. 743; 23 W. R. 758; 2 Asp. M. C. 590.—EX. CH.

Harris v. Scaramanga, applied.

The Brigella (1893) 62 L. J. Adm. 81; [1893] P. 189; 1 R. 616; 69 L. T. 834; 7 Asp. M. C. 337.—BARNES, J.

Harris v. Scaramanga, principle applied.

De Hart v. Compania Anonima de Seguros, Aurora (1903) [1903] 2 K. B. 503; 72 L. J. K. B. 818; 89 L. T. 154; 52 W. R. 36; 8 Com. Cas. 314.—C.A.

Cator v. Great Western Insurance Co. of New York (1873) 42 L. J. C. P. 266; L. R. 8 C. P. 552; 29 L. T. 136; 21 W. R. 850; 2 Asp. M. C. 90.—C.P., *distinguished*.
Brown v. Fleming (1902) 7 Com. Cas. 245.—BIGHAM, J.

Hendriks v. Australasian Insurance Co. (1874) 43 L. J. C. P. 188; L. R. 9 C. P. 430; 30 L. T. 419; 22 W. R. 947; 2 Asp. M. C. 44.—C.P., *followed*.

Mavro v. Ocean Marine Insurance Co. (1874) 43 L. J. C. P. 339; L. R. 9 C. P. 595; 37 L. T. 186.—C.P., affirmed, (1875) 44 L. J. C. P. 229; L. R. 10 C. P. 414; 32 L. T. 743; 23 W. R. 758; 2 Asp. M. C. 590.—RX. EH.

Brigella, The (1893) 62 L. J. Adm. 81; [1893] P. 189; 1 R. 616; 69 L. T. 834; 7 Asp. M. C. 337.—BARNES, J., *not followed*.

Montgomery v. Indemnity Mutual Marine Insurance Co. (1900) 70 L. J. K. B. 45; [1901] 1 K. B. 147; 84 L. T. 57; 49 W. R. 221; 9 Asp. M. C. 141; 6 Com. Cas. 19.—MATHEW, J.

The Brigella, disapproved.
Montgomery v. Indemnity Mutual Marine Insurance Co. (1902) 71 L. J. K. B. 467; [1902] 1 K. B. 764; 86 L. T. 462; 50 W. R. 440; 7 Com. Cas. 120.—C.A. WILLIAMS, STIRLING and COZENS-HARDY, L.JJ.

Shawe v. Felton (1801) 2 East 109.—K.B., *adopted*.

Lidgett v. Secretan (1870) 39 L. J. C. P. 196, 201; L. R. 5 C. P. 190, 199; 22 L. T. 272.—C.P.; **Burnand v. Rodocanachi** (1880) 49 L. J. C. P. 732; 5 C. P. D. 424; 29 W. R. 339.—C.P.D.; reversed, C.A. and H.L. (E.). *See ante*, col. 3499.

Shawe v. Felton, adopted.
Woodside v. Globe Marine Insurance Co. (1895) 65 L. J. Q. B. 117; [1896] 1 Q. B. 105; 73 L. T. 626; 44 W. R. 187.—MATHEW, J.

Scott v. Bourdillion (1806) 2 Bos. & P. (N.R.) 213.—C.P.; and **Moody v. Surridge** (1798) 2 Esp. 633, *referred to*.

Hart v. Standard Marine Insurance Co. (1889) 58 L. J. Q. B. 284; 22 Q. B. D. 499, 503; 60 L. T. 649; 37 W. R. 366; 6 Asp. M. C. 368.—C.A.

Blackett v. Royal Exchange Assurance Co. (1832) 2 C. & J. 244; 2 Tyr. 266; 1 L. J. Ex. 101.—EX., *commented on*.

Myers v. Sari (1860) 3 El. & El. 306; 30 L. J. Q. B. 9; 7 Jur. (N.S.) 97; 9 W. R. 95.—Q.B.

COCKBURN, C.J.—Mr. Lush indeed says that, because the words have a plain general meaning, parol evidence is not admissible to explain them; and cites, as an authority for that contention, the case of *Blackett v. Royal Exchange Assurance Co.*, in which Lord Lyndhurst, C.B., delivering the judgment of the Court, held that a policy upon ship covering boats by its general terms, could not be restricted in its operation by parol evidence of a usage at Lloyd's that boats slung on the ship's quarter were not protected by the insurance. I, of course, am bound by that case so far as it goes; but I am not disposed to carry it any further, or to apply it to any circumstances not exactly similar. I think the case goes to the extreme verge of the law; for I am

unable to see why the evidence was not admissible to show that, by general understanding among insurers, the word "boats" did not mean all boats.—p. 317.

Blackett v. Royal Exchange Assurance Co., referred to.

Lidgett v. Secretan (1871) 40 L. J. C. P. 257, 264; L. R. 6 C. P. 616, 630; 24 L. T. 942; 19 W. R. 1088; 1 Asp. M. C. 95.—C.P.

Blackett v. Royal Exchange Assurance Co., approved and distinguished.

Stewart v. Merchants' Marine Insurance Co. (1885) 55 L. J. Q. B. 81; 16 Q. B. D. 619; 53 L. T. 892; 34 W. R. 208; 3 Asp. M. C. 506.—C.A.

ESHER, M.R.—The next case in order of time *Blackett v. Royal Exchange Assurance Co.*, arose in this country. It came before the Court of Exchequer when Lord Lyndhurst was chief Baron who, great and excellent as he was in many respects, was scarcely a great mercantile lawyer. Still, the decision must be followed, especially as it was given in 1832, and has never since been overruled. It was the case of a voyage policy on the ship *Thames*, "at and from London to Calcutta," with the memorandum "free from average under 3 per cent. unless general;" and the Court, in a considered judgment, held that the different losses occurring during the same voyage must be added together, although they were in fact distinct losses arising from different causes. That is to say, they followed the rule in a policy on ship which had been recognised with regard to policies on goods. I shall venture to criticise the judgment to this extent, that the Court do not appear to have considered the business aspect of the case. They decided upon the ordinary rule of construction applicable to other instruments—that the memorandum was in the nature of an exception—an exception in favour of the assured, and that where a stipulation or a contract is in favour of one of the parties it is to be construed most strictly against him. I shall presently give my reasons for not applying such rules to a mercantile instrument such as this; but the case is a binding authority with regard to a voyage policy.

Young v. Turing (1841) 2 Scott N. R. 752; 2 Man. & G. 593.—EX. CH., *dictum adopted*.

Burnand v. Rodocanachi (1880) 49 L. J. C. P. 732, 735; 5 C. P. D. 424, 426; 29 W. R. 339.—C.P.D.; reversed, C.A. and H.L. (E.). *See ante*, col. 3499.

Young v. Turing, applied.

Pitman v. Universal Marine Insurance Co. (1882) 51 L. J. Q. B. 561, 565; 9 Q. B. D. 192, 201; 46 L. T. 863; 30 W. R. 906; 4 Asp. M. C. 544.—LINDLEY, J.; affirmed, C.A.

Young v. Turing, dictum disapproved.

Angel v. Merchants' Marine Insurance Co. (1903) 72 L. J. K. B. 498; [1903] 1 K. B. 811; 88 L. T. 717; 51 W. R. 530; 8 Com. Cas. 179.—C.A.

Brooks v. Oriental Insurance Co. (1828) 7 Pick. (Mass.) Rep. 258, *disapproved*.

Stewart v. Merchants' Marine Insurance Co. (1885) 16 Q. B. D. 619; 55 L. J. Q. B. 81; 53

L. T. 892; 34 W. R. 208; 5 Asp. M. C. 506.—C.A.

ESHER, M.R. (for the Court).—Questions of wear and tear or damage from sea perils are, no doubt, more easily decided in the case of the ship than of the goods. But with regard to a great many injuries to the ship, it is just as difficult to say when the whole injury took place. If one injury is the loss of her topmast, and the other the blowing away of her sail in a different storm, it is very easy to distinguish between them, but in the case of other damages, as when the ship is strained in a storm, and in the same voyage there is another storm, it would be difficult to say whether there was a new strain whether in the same or in a different part of the ship or a further strain beyond what occurred in the first storm. So that I think the difficulties with regard to wear and tear and damage from sea perils arise in the case of ship as well as in the case of goods, and that the memorandum was adopted to avoid trifling disputes. In old times I have no doubt that the 3 per cent. was a very fair amount to cover these small losses. Ships were much smaller than they are now, and their value was less, but their size and value have now increased to such a degree that 3 per cent., as compared with the value of the ship, will cover very considerable losses, but merchants and insurers, with that indolence which belongs to mercantile transactions, have not taken the trouble to alter the rate of percentage, and part of the argument in this case was that in the case of a valuable ship even less than 3 per cent. may represent a considerable sum. But this fact cannot alter the construction of the memorandum, which must be construed in the same way as when it was first introduced, and when there was not the same limitation in the case of time policies as there is now. The first case to be dealt with is the American case of *Brooks v. Oriental Insurance Co.* It came before a judge whose decisions I have often read with admiration, and from whom I have certainly received great assistance, Mr. Justice Putnam. It was a time policy on ship, there were successive losses, and the second question was, "Are distinct successive losses to be added together to make up the 5 per cent.?" The judgment is, "We are of opinion that distinct and successive losses are not to be added together in order to make up the 5 per cent., and that the damage from disasters happening at one time or in one continued gale or storm is to be considered by itself. If this were otherwise, the insurers would be called upon to pay for a great many trifling losses which should be borne by the assured, as coming within the common wear and tear of the ship."

I cannot accede to this reasoning, for one continued gale or storm may last three days and nights, and it would not be easy to say whether the losses were distinct. Suppose the ship scrapes a rock and is damaged in her keel, and suppose that on the second or third day of that continued storm she loses her mast, this damage would have nothing to do with the injury to her keel. The two injuries are as distinct as if they occurred in separate storms. It was argued that we ought to adopt the rule laid down in this case, and that each distinct loss must be dealt with by itself, though happening on the same voyage; but, as I have said, I cannot adopt the reasoning of Putnam, J.

Donnell v. Columbian Insurance Co. (1836)

2 Sumn. 366.—(AMER.), *approved*.

Stewart v. Merchants' Marine Insurance Co. (1885) 55 L. J. Q. B. 81, 16 Q. B. D. 619; 53 L. T. 892; 34 W. R. 208; 5 Asp. M. C. 506.—C.A.

ESHER, M.R.—Then we have a very elaborate judgment of Story, J., in America, in *Donnell v. Columbian Insurance Co.* In that case the policy was on the ship, and was a voyage policy. There was a series of stoppages, but the voyage insured was from Baltimore to ports in succession and thence to a port of discharge in Europe or the United States. Story, J., came to the conclusion that the losses must be added together to see whether they came within the memorandum. He gives another rule of construction, which, if one were to apply it to this policy, might carry the decision one way. He says, this memorandum is an exception from a loss which is applicable to the whole voyage, and he says it is a rule of construction that the exception must be applied to the same subject-matter as that from which it is excepted. It will be seen that the case is one of a voyage policy on ship, and therefore what it really decides is that losses on the same voyage are to be added together. So that it agrees with *Blackett v. Royal Exchange Insurance Co.* (*supra*, col. 3513). There are, therefore, two instances which decide that where the policy is a voyage policy on ship the losses must be added together, and they are opposed to the view taken in the other American case, that each loss in the same voyage is to be considered by itself. So far as a voyage policy is concerned, I think these two decisions must be followed.—p. 624.

Harrison v. Bank of Australasia (1872) 41

L. J. Ex. 36; L. R. 7 Ex. 39; 25 L. T. 944; 20 W. R. 385; 1 Asp. M. C. 198.—

EX., *principle adopted*.

Svensden v. Wallace (1884) 53 L. J. Q. B. 385; 13 Q. B. D. 69; 50 L. T. 799.—C.A.; and *Royal Mail Steam Packet Co. v. English Bank of Rio de Janeiro* (1887) 19 Q. B. D. 362; 57 L. J. Q. B. 31; 36 W. R. 105.—Q.B.D.

Stewart v. Merchants' Marine Insurance Co.

(1885) 54 L. J. Q. B. 387; 14 Q. B. D. 355.—STEPHEN, J.; *reversed*, (1885) 55 L. J. Q. B. 81; 16 Q. B. D. 619; 53 L. T. 892; 34 W. R. 208; 5 Asp. M. C. 506.—C.A.

Stewart v. Merchants' Marine Insurance Co., *explained and distinguished*.

Price v. Al Ships' Small Damage Insurance Association (1889) 58 L. J. Q. B. 269, 273; 22 Q. B. D. 580, 588; 61 L. T. 278; 37 W. R. 566; 6 Asp. M. C. 435.—C.A.

Price v. Al Ships' Small Damage Insurance Association (1889) 58 L. J. Q. B. 269;

22 Q. B. D. 580; 61 L. T. 278; 37 W. R. 566; 6 Asp. M. C. 435.—C.A., *referred to*.

The Knight of St. Michael (1898) 67 L. J. P. 19, 22; [1898] P. 30; 78 L. T. 90; 46 W. R. 396; 8 Asp. M. C. 360.—BARNES, J.

Thames and Mersey Marine Insurance Co. v.

Pitts (1893) [1893] 1 Q. B. 476; 5 R. 168; 68 L. T. 524; 41 W. R. 346; 7

Asp. M. C. 302.—DAY and COLLINS, JJ., *explained and distinguished*.

The Alsace-Lorraine (1893) 62 L. J. Adm. 107, 110; [1893] P. 209; 1 R. 632; 69 L. T. 261; 42 W. R. 112; 7 Asp. M. C. 362.—BARNES, J.

The Glenlivet (1893) 62 L. J. P. 55; [1893] P. 164; 68 L. T. 860; 41 W. R. 671.—BARNES, J., *varied*, (1893) 63 L. J. Adm. 45; [1894] P. 48; 6 R. 665; 69 L. T. 706; 42 W. R. 97; 7 Asp. M. C. 395.—C.A.

The Glenlivet, *referred to*.
The Alsace-Lorraine (1893) 62 L. J. P. 107; [1893] P. 209; 1 R. 632; 69 L. T. 261; 42 W. R. 112.—BARNES, J.

Dickenson v. Jardine (1868) 37 L. J. C. P. 321; L. R. 3 C. P. 639; 18 L. T. 717; 16 W. R. 1169.—C.P., *applied*.

Dixon v. Whitworth (1879) 48 L. J. C. P. 538; 4 C. P. D. 371, 378; 40 L. T. 718; 28 W. R. 184; 4 Asp. M. C. 326.—C.P.D.; Scaramanga v. Marquand (1885) 52 L. T. 764, 765; 1 Cab. & E. 500.—HUDDLESTON, B.; affirmed, (1885) 53 L. T. 810; 5 Asp. M. C. 506.—C.A.

Dickenson v. Jardine, *distinguished*.

The Mary Thomas (1893) 63 L. J. P. 49; [1894] P. 108; 6 R. 792; 71 L. T. 104; 7 Asp. M. C. 495.—C.A. LINDLEY, SMITH and DAVEY, L.JJ.

Dickenson v. Jardine, *referred to*.

The Knight of St. Michael (1898) 67 L. J. P. 19; [1898] P. 30; 78 L. T. 90; 46 W. R. 396; 8 Asp. M. C. 360.—BARNES, J.

Dickenson v. Jardine and The Mary Thomas, (*supra*), *considered*.

Balmoral SS. Co. v. Marten (1901) 70 L. J. K. B. 1018; [1901] 2 K. B. 896; 85 L. T. 389; 50 W. R. 35; 6 Com. Cas. 298.—C.A., affirmed, (1902) 71 L. J. K. B. 819; [1902] A. C. 511; 87 L. T. 247; 51 W. R. 173; 7 Com. Cas. 292.—H.L. (E.).

Dickenson v. Jardine, *distinguished*.

Montgomery v. Indemnity Mutual Marine Insurance Co. (1902) [1902] 1 K. B. 734; 71 L. J. K. B. 467; 86 L. T. 462; 50 W. R. 440; 7 Com. Cas. 120.—C.A.

Pitman v. Universal Marine Insurance Co.

(1882) 51 L. J. Q. B. 561; 9 Q. B. D. 192; 46 L. T. 863; 30 W. R. 906; 4 Asp. M. C. 544.—C.A., *explained and adopted*.

Marine Insurance Co. v. China Trans-Pacific Steamship Co. (1886) 56 L. J. Q. B. 100; 11 App. Cas. 573, 590; 55 L. T. 491; 35 W. R. 169; 4 Asp. M. C. 68.—H.L. (E.).

Pitman v. Universal Marine Insurance Co., *followed*.

Bristol Steam Navigation Co. v. Indemnity Mutual Marine Insurance Co. (1887) 57 L. T. 101; 6 Asp. M. C. 173.—MATHEW and CAVE, JJ.

Pitman v. Universal Marine Insurance Co., *discussed*.

Ruabon Steamship Co. v. London Assurance (1899) 69 L. J. Q. B. 86; [1900] A. C. 6; 81 L. T. 585; 48 W. R. 225; 9 Asp. M. C. 2; 5 Com. Cas. 71.—H.L. (E.).

Pitman v. Universal Marine Insurance Co., *referred to*.

Balmoral Steamship Co. v. Marten (1902) 71 L. J. K. B. 819; [1902] A. C. 511; 87 L. T. 247; 51 W. R. 173; 7 Com. Cas. 292.—H.L. (E.).

Marine Insurance Co. v. China Trans-Pacific Co. (1886) 56 L. J. Q. B. 100; 11 App. Cas. 573; 55 L. T. 491; 35 W. R. 169; 6 Asp. M. C. 68.—H.L. (E.), *distinguished*.

Ruabon Steamship Co. v. London Assurance (1899) 69 L. J. Q. B. 86; [1900] A. C. 6; 81 L. T. 585; 48 W. R. 225; 9 Asp. M. C. 2; 5 Com. Cas. 71.—H.L. (E.).

Marine Insurance Co. v. China Trans-Pacific Co., *distinguished*.

The Acanthus (1891) 71 L. J. P. 14; [1902] P. 17; 85 L. T. 696.—JEUNE, P.

Ruabon Steamship Co. v. London Assurance

(1897) 66 L. J. Q. B. 841; [1897] 2 Q. B. 456; 77 L. T. 402.—MATHEW, J.; *affirmed*, (1898) 67 L. J. Q. B. 548; [1898] 1 Q. B. 722; 78 L. T. 402; 46 W. R. 417; 8 Asp. M. C. 369.—C.A. CHITTY and COLLINS, L.JJ., SMITH, L.J. *dissenting*; the latter decision reversed, (1899) 69 L. J. Q. B. 86; [1900] A. C. 6; 81 L. T. 585; 48 W. R. 225; 9 Asp. M. C. 2; 5 Com. Cas. 71.—H.L. (E.).

Ruabon Steamship Co. v. London Assurance, *principle applied*.

The Acanthus (1901) 71 L. J. P. 14; [1902] P. 17; 85 L. T. 696.—JEUNE, P.

Johnson v. Sheddon (1802) 2 East 581; 6 R. R. 516.—K.B., *followed*.

Francis v. Boulton (1895) 65 L. J. Q. B. 153; 73 L. T. 578; 44 W. R. 222; 8 Asp. M. C. 79.—MATHEW, J.

Williams v. London Assurance Co. (1813) 1

M. & S. 318; 14 R. R. 441.—K.B., *approved*. Carisbrook Steamship Co. v. London and Provincial Marine and General Insurance Co. (1902) 71 L. J. K. B. 978; [1902] 2 K. B. 681; 87 L. T. 418; 50 W. R. 691; 7 Com. Cas. 235; 9 Asp. M. C. 332.—C.A. COLLINS, M.R., STIRLING and HARDY, L.JJ.

Todd v. Reid, (1821) 4 B. & Ald. 210.—K.B., *adopted*.

Catterall v. Hindle (1866) L. R. 1 C. P. 186; 190.—C.P.; reversed, ex. ch., *see infra*, col. 3519.

Todd v. Reid and Bartlett v. Pentland (1830)

8 L. J. (o.s.) K. B. 264; 10 B. & C. 760.—K.B., *adopted*.

Pearson v. Scott (1878) 47 L. J. Ch. 705; 9 Ch. D. 198; 38 L. T. 747; 26 W. R. 796.—FRY, J.

Scott v. Irving (1830) 9 L. J. (o.s.) K. B.

89; 1 B. & Ald. 605.—K.B., *adopted*.

Pearson v. Scott (1878) 47 L. J. C. P. 705; 9 Ch. D. 198; 38 L. T. 747; 26 W. R. 796.—FRY, J.

Scott v. Irving, *referred to*.

Elgood v. Harris (1896) 66 L. J. Q. B. 53; [1896] 2 Q. B. 491; 75 L. T. 419; 45 W. R. 158.—COLLINS, J.

Poingdestre v. Royal Exchange Assurance

Co. (1826) Ry. & M. 378; 27 R. R. 759.—C.P., *applied*.

Lohre v. Aitchison (1877) 46 L. J. Q. B. 715; 2 Q. B. D. 502, 508; 36 L. T. 794; 25 W. R. 42.—Q.B.D.; reversed, C.A., but restored, H.L. (E.). *See supra*, col. 3376.

Stewart v. Aberdeen (1838) 7 L. J. Ex. 292; 4 M. & W. 211; 1 H. & H. 284.—EX., *commented upon*.

Belford Union v. Pattison (1856) 26 L. J. Ex. 115; 1 H. & N. 523; 3 Jur. (N.S.) 116; 5 W. R. 121.—EX. CH.

Stewart v. Aberdeen, observations applied.
Catterall v. Hindle (1867) L. R. 2 C. P. 368.—EX. CH.

Stewart v. Aberdeen, referred to.
Elgood v. Harris (1896) 66 L. J. Q. B. 53; [1896] 2 Q. B. 491; 75 L. T. 419; 45 W. R. 158.—COLLINS, J.

Sweeting v. Pearce (1861) 30 L. J. C. P. 109; 9 C. B. (N.S.) 534; 7 Jur. (N.S.) 806; 5 L. T. 79; 9 W. R. 343.—EX. CH., *referred to*.
Catterall v. Hindle (1867) L. R. 2 C. P. 368, 370.—EX. CH.,

Sweeting v. Pearce, applied.
Pearson v. Scott (1878) 47 L. J. Ch. 705; 9 Ch. D. 198; 38 L. T. 747; 26 W. R. 796.—FRY, J.; and **Pape v. Westacott** (1893) 63 L. J. Q. B. 222; [1894] 1 Q. B. 272; 9 R. 55; 70 L. T. 18; 42 W. R. 141.—C.A.

Sweeting v. Pearce, dictum adopted.
Legge v. Byas (1901) 7 Com. Cas. 16, 19.—WALTON, J.

Sweeting v. Pearce, confirmed.
Matvieff v. Crosfield (1903) 1 W. R. 365; 8 Com. Cas. 120.—KENNEDY, J.

Great Indian Peninsular Ry. v. Saunders (1862) 31 L. J. Q. B. 206; 2 B. & S. 266; 9 Jur. (N.S.) 198; 6 L. T. 297; 10 W. R. 520.—EX. CH., *distinguished*.

Kidston v. Empire Insurance Co. (1867) 36 L. J. C. P. 156, 160; L. R. 2 C. P. 357, 366; 12 Jur. (N.S.) 665; 16 L. T. 119; 15 W. R. 769.—EX. CH.; **Meyer v. Ralli** (1876) 45 L. J. C. P. 741, 747; 1 C. P. D. 358, 372; 35 L. T. 838; 24 W. R. 963; 3 Asp. M. C. 324.—C.P.D.

Great Indian Peninsular Ry. v. Saunders, adopted.
Dixon v. Whitworth (1879) 48 L. J. C. P. 538; 4 C. P. D. 371, 376; 40 L. T. 718; 28 W. R. 184; 4 Asp. M. C. 326.—C.P.D.

Great Indian Peninsular Ry. v. Saunders, referred to.
The Glenlivet (1893) 62 L. J. P. 55; [1893] P. 164; 68 L. T. 860; 41 W. R. 671.—BARNES, J.; *affirmed*, C.A.

Great Indian Peninsular Ry. v. Saunders, explained.
The Pomeranian (1895) 65 L. J. Adm. 39; [1895] P. 349.—BARNES, J.

Booth v. Gair (1863) 33 L. J. C. P. 99; 15 C. B. (N.S.) 291; 9 Jur. (N.S.) 1226; 9 L. T. 386; 12 W. R. 106.—C.P., *distinguished*.

Kidston v. Empire Insurance Co. (1866) 36 L. J. C. P. 156, 160; L. R. 2 C. P. 357, 366; 12 Jur. (N.S.) 665; 16 L. T. 119; 15 W. R. 769.—EX. CH.; **Meyer v. Ralli** (1876) 45 L. J. C. P. 741, 747; 1 C. P. D. 358, 373; 35 L. T. 838; 24 W. R. 963; 3 Asp. M. C. 324.—C.P.D.

Booth v. Gair, explained.
The Pomeranian (1895) 65 L. J. Adm. 39; [1895] P. 349.—BARNES, J.

Kidston v. Empire Marine Insurance Co. (1867) 36 L. J. C. P. 156; L. R. 2 C. P. 357; 12 Jur. (N.S.) 665; 16 L. T. 119; 15 W. R. 769.—EX. CH., *applied*.

Lee v. Southern Insurance Co. (1870) 39 L. J. C. P. 218, 224; L. R. 5 C. P. 397, 405; 22 L. T. 443; 18 W. R. 863.—C.B.; **Meyer v. Ralli** (1876) 45 L. J. C. P. 741, 747; 1 C. P. D. 358, 372; 35 L. T. 838; 24 W. R. 963; 3 Asp. M. C. 324.—C.P.D.; and **Dixon v. Whitworth** (1879) 48 L. J. C. P. 538, 541; 4 C. P. D. 371, 376; 40 L. T. 718; 28 W. R. 184; 4 Asp. M. C. 326.—C.P.D.

Kidston v. Empire Marine Insurance Co. distinguished.
Aitchison v. Lohre (1879) 49 L. J. Q. B. 123, 128; 4 App. Cas. 755, 766; 41 L. T. 323; 28 W. R. 1; 4 Asp. M. C. 168.—H.L. (E.).

Kidston v. Empire Marine Insurance Co. referred to.
Johnston v. Salvage Association (1887) 19 Q. B. D. 458, 460; 57 L. T. 218; 36 W. R. 56; 6 Asp. M. C. 167.—C.A.

Kidston v. Empire Marine Insurance Co. referred to.
The Brigella (1893) 62 L. J. Adm. 81; [1893] P. 189; 1 R. 616; 69 L. T. 834; 7 Asp. M. C. 337.—BARNES, J.

9. ABANDONMENT.

Parmeter v. Todhunter (1808) 1 Camp. 541.—K.B., *dictum disapproved*.

Currie v. Bombay Native Insurance Co. (1869), 39 L. J. P. C. 1; L. R. 3 P. C. 72; 6 Moo. P. C. (N.S.) 302; 22 L. T. 317; 18 W. R. 296.

LORD CHELMSFORD (for J.C.).—Upon the argument before their lordships, the Solicitor-General for the respondents very properly admitted that the notice of abandonment was in its terms sufficient. The case upon which the Recorder founded his judgment of the insufficiency of the notice was a *visi prius* case of **Parmeter v. Todhunter**, in which there having been a verbal notice that the ship insured had been captured, recaptured, and carried into Grenada, and that the underwriters were required to settle as for a total loss, and to give directions as to the disposition of the ship and cargo, Lord Ellenborough said, "The abandonment must be express and direct, and I think the word 'abandon' should be used to render it effectual." But whatever strictness of construction may have been applied to notices of abandonment in former times, it never could have been absolutely necessary to use the technical word "abandon"; any equivalent expressions which informed the underwriters that it was the intention of the assured to give up to them the property insured upon the ground of its having been totally lost, must always have been sufficient.

M'Carthy v. Abel (1804) 5 East 388; 1 Smith 524; 7 R. R. 711.—K.B., *followed*.
Everth v. Smith (1814) 2 M. & S. 278, 15 R. R. 246.—K.B.

M'Carthy v. Abel, applied by MARTIN, B.
Rankin v. Potter (1873) 42 L. J. C. P. 169, 200; L. R. 6 H. L. 83, 145; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.).

Anderson v. Wallis (1813) 2 M. & S. 240; 3 Camp. 440.—K.B., *followed*.
Everth v. Smith (1814) 2 M. & S. 278; 15 R. R. 246.—K.B.

Anderson v. Wallis, *adopted*.
Rodoconachi v. Elliott (1874) 43 L. J. C. P. 255; L. R. 9 C. P. 518; 31 L. T. 239; 2 Asp. M. C. 393.—EX. CH.

Hamilton v. Mendes (or **Meidez**) (1761) 2 Burr. 1198; 1 W. Bl. 276.—MANSFIELD, C.J., *applied*.
Godsall v. Boldero (1807) 9 East 72.—K.B.

Hamilton v. Mendes (or **Mendez**), *dictum adopted*.
Rankin v. Potter (1873) 42 L. J. C. P. 169, 190; L. R. 6 H. L. 83, 127; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.); and **Shepherd v. Henderson** (1881) 7 App. Cas. 49, 71.—H.L. (SC.).

Hamilton v. Mendes (or **Meidez**), *considered*.
Ruys v. Royal Exchange Assurance Corporation (1897) 66 L. J. Q. B. 534; [1897] 2 Q. B. 135; 77 L. T. 23.—COLLINS, J.

Mitchell v. Edie (1787) 1 Term Rep. 608.—K.B., *explained and applied*.
Rankin v. Potter (1873) 42 L. J. C. P. 169, 186; L. R. 6 H. L. 83, 120; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.).

Mitchell v. Edie, *referred to*.
Saunders v. Baring (1876) 34 L. T. 419, 421; 3 Asp. M. C. 133.—C.P.D.

Gernon v. Royal Exchange Assurance (1815) 6 Taunt. 383; 2 Marsh. 88; Holt 49; 16 R. R. 630.—C.P., *adopted*.
Stringer v. English and Scottish Marine Insurance Co. (1869) 38 L. J. Q. B. 321, 324; L. R. 4 Q. B. 676, 687.—Q.B.; affirmed, EX. CH., *supra*, col. 3488.

Gernon v. Royal Exchange Assurance, *adopted*.
Rankin v. Potter (1873) 42 L. J. C. P. 169, 196; L. R. 6 H. L. 83, 138; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.).

Cologan v. London Assurance Co. (1816) 5 M. & S. 447; 17 R. R. 390.—K.B., *dicta adopted*.
Rankin v. Potter (1873) 42 L. J. C. P. 169, 186; L. R. 6 H. L. 83, 119; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.).

Cologan v. London Assurance Co., *dictum adopted*.
Ruys v. Royal Exchange Assurance Corporation (1897) 66 L. J. Q. B. 534; [1897] 2 Q. B. 135; 77 L. T. 23.—COLLINS, J.

Knight v. Faith (1850) 19 L. J. Q. B. 509; 15 Q. B. 649; 14 Jur. 1114.—Q.B., *dictum adopted*.
Lidgett v. Secretan (1871) 40 L. J. C. P. 257, 264; L. R. 6 C. P. 616, 630; 24 L. T. 942; 19 W. R. 1088; 1 Asp. M. C. 95.—C.P.

Knight v. Faith, *discussed*.
Rankin v. Potter (1873) 42 L. J. C. P. 139, 192; L. R. 6 H. L. 83, 102; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.).

Knight v. Faith, *distinguished*.
Pisman v. Universal Marine Insurance Co. (1882) 51 L. J. Q. B. 561; 9 Q. B. D. 192; 46 L. T. 863; 30 W. R. 906; 4 Asp. M. C. 544.—LINDLEY, J., affirmed, C.A.

Knight v. Faith, *referred to*.
Trinder v. Thames and Mersey Marine Insurance Co. (1898) 67 L. J. Q. B. 666; [1898] 2 Q. B. 114; 78 L. T. 485; 46 W. R. 561; 8 Asp. M. C. 373.—C.A.

Potter v. Rankin (1868) 37 L. J. C. P. 257; L. R. 3 C. P. 562; 18 L. T. 712; 16 W. P. 1049.—C.P.; *reversed*, (1870) 39 L. J. C. P. 147; L. R. 5 C. P. 341; 22 L. T. 347; 18 W. R. 607.—EX. CH.; *the latter decision affirmed nom.* **Rankin v. Potter** (1873) 42 L. J. C. P. 169; L. R. 6 H. L. 83; 29 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.).

Rankin v. Potter, *distinguished*.
Beckett v. West of England Marine Insurance Co. (1871) 25 L. T. 739, 742; 1 Asp. M. C. 185.—Q.B.

Rankin v. Potter, *dicta adopted*.
Jackson v. Union Marine Insurance Co. (1874) 44 L. J. C. P. 27, 31; L. R. 10 C. P. 125, 137; 31 L. T. 789; 23 W. R. 169; 2 Asp. M. C. 435.—EX. CH.; CLEASBY, B. dissenting.

Rankin v. Potter, *dictum approved*.
Lyman Steamship Co. v. Bischoff (1882) 52 L. J. Q. B. 169, 176; 7 App. Cas. 670, 683; 47 L. T. 581; 31 W. R. 141; 5 Asp. M. C. 6.—H.L. (E.).

Rankin v. Potter, *explained*.
Kaltenbach v. Mackenzie (1878) 48 L. J. C. P. 9; 3 C. P. D. 467; 39 L. T. 215; 26 W. R. 844; 4 Asp. M. C. 39.—C.A.

BRETT L.J.—In **Rankin v. Potter** the law was established that where at the time when the assured receives information which would otherwise oblige him to give notice of abandonment, at the same time he hears that the subject-matter of the insurance had been sold so as to pass the property away, inasmuch as there was nothing of the subject-matter of the insurance which he could abandon, notice of abandonment was not necessary. No doubt the reason given for this was that notice at that time and under such circumstances would be a mere idle ceremony, it could be of no use. That was the point decided in **Rankin v. Potter**. In those particular circumstances it was held that notice of abandonment need not be given because there was nothing to abandon. That in one sense is true, but if the goods had been sold it is obvious there must be something to abandon, that is the proceeds of the sale; the money which is the proceeds of the sale, when the insurance is settled, is abandoned, but there is nothing of the subject-matter of insurance to abandon; there is no ship to abandon, there are no materials of the ship to abandon, there are no goods to abandon; therefore notice of abandonment under those circumstances was said to be futile. But **Rankin v. Potter** went no further; it did not decide—because the point was not raised—that if at the time when the assured had to make up his mind and when otherwise he ought to abandon, there was no sale of the subject-matter of the insurance, the assured would be

excuse from giving notice of abandonment if he was able to show that had he given such notice, in the result it would have turned out to be of no use.—p. 13.

Rankin v. Potter, referred to.

The Alps (1893) 62 L. J. P. 59; [1893] P. 109; 68 L. T. 624; 41 W. R. 527.—BARNES, J.

Rankin v. Potter, discussed.

Trinder, Anderson & Co. v. Thames and Mersey Marine Insurance Co. (1898) 67 L. J. Q. B. 666; [1898] 2 Q. B. 114; 78 L. T. 485; 46 W. R. 561.—C.A.

Rankin v. Potter, considered and distinguished.

Carisbrook Steamship Co. v. London and Provincial Marine and General Insurance Co. (1902) 71 L. J. K. B. 978; [1902] 2 K. B. 681; 87 L. T. 418; 50 W. R. 691; 7 Com. Cas. 235; 9 Asp. M. C. 332.—C.A.

Rankin v. Potter, referred to.

Angel v. Merchants' Marine Insurance Co. (1903) 72 L. J. K. B. 498; [1903] 1 K. B. 811; 88 L. T. 717; 51 W. R. 530; 8 Com. Cas. 179.—C.A., V. WILLIAMS, L.J. doubting.

Kaltenbach v. Mackenzie (1877) 33 L. T. 942.—COLERIDGE, C.J.; reversed, (1878) 48 L. J. C. P. 9; 3 C. P. D. 467; 39 L. T. 215; 26 W. R. 844; 4 Asp. M. C. 39.—C.A.

Kaltenbach v. Mackenzie, discussed.

Trinder, Anderson & Co. v. Thames and Mersey Marine Insurance Co. (1898) 67 L. J. Q. B. 666; [1898] 2 Q. B. 114; 78 L. T. 485; 46 W. R. 561.—C.A.

Shepherd v. Henderson (1881) 7 App. Cas. 49, 69, 71.—H.L. (SC.), dicta approved.
Blairmore Sailing Ship Co. v. Macredie (1898) 67 L. J. P. C. 96; [1898] A. C. 593; 79 L. T. 217; 8 Asp. M. C. 429.—H.L. (SC.).

Davy v. Milford (1812) 15 East 559; 15 R. R. 279, n.—K.B., explained.

Janson v. Ralli (1856) 25 L. J. Q. B. 300; 6 Bl. & Bl. 422; 2 Jur. (N.S.) 566; 4 W. R. 568.—EX. CH.

JERVIS, C.J.—The point decided, in *Davy v. Milford*, is expressed with tolerable correctness in the marginal note. . . . That this note correctly expresses the opinion of the Court, and that their decision in no respect turned upon the fact of the flax having been shipped in separate mats, distinctly appears from the language of the judgment at p. 566.—p. 305.

Janson v. Ralli (1856) 25 L. J. Q. B. 300; 6 Bl. & Bl. 422; 2 Jur. (N.S.) 566; 4 W. R. 568.—EX. CH., distinguished.

Gator v. Great Western Insurance Co. of New York (1873) 42 L. J. C. P. 266, 271; L. R. 8 C. P. 552, 559; 29 L. T. 136; 21 W. R. 850; 2 Asp. M. C. 90.—C.P.

Bainbridge v. Neilson (1808) 10 East 329; 1 Camp. 237; 10 R. R. 316.—K.B., questioned.

Smith v. Robertson (1814) 2 Dow 474; 14 R. R. 16.—H.L. (SC.).

Bainbridge v. Neilson, followed.

Naylor v. Taylor (1829) 9 B. & C. 718; 4 M. & Ry. 526.—K.B.

TENTHEDEN, C.J. (for the Court).—If the abandonment is to be viewed with regard to the

ultimate state of facts, as appearing before the action brought, according to the opinion of the Court in *Bainbridge v. Neilson*, there has not, for the reasons already given, been a total loss. Doubts were expressed as to the propriety of the decision in *Bainbridge v. Neilson* by a very high authority, in the case of *Smith v. Robertson* (*infra*). But notwithstanding those doubts, the rule, as laid down in *Bainbridge v. Neilson*, was adopted and acted upon by the Court in the two subsequent cases of *Patterson v. Ritchie* (*infra*), and *Brotherton v. Barber* (*infra*): we consider the point to have been well settled, and the rule established by these authorities.—p. 724.

Bainbridge v. Neilson, followed.

Blairmore Co. v. Macredie (1897) 24 Ct. of Sess. Cas. (4th series) 893.—CT. OF SESS.; reversed, *infra*, col. 3525.

Bainbridge v. Neilson, applied.

Ruys v. Royal Exchange Assurance Corporation (1897) 66 L. J. Q. B. 534; [1897] 2 Q. B. 135; 77 L. T. 23.—COLLINS, J.

Bainbridge v. Neilson, referred to.

Blairmore Sailing Ship Co. v. Macredie (1898).—H.L. (SC.), *infra*, col. 3525.

Falkner v. Ritchie (1814) 2 M. & S. 290; 15 R. R. 253.—K.B., followed.

Blairmore Co. v. Macredie (1897) 24 Ct. of Sess. Cas. (4th series) 893.—CT. OF SESS. (SC.) (reversed, *infra*, col. 3525).

Falkner v. Ritchie, referred to.

Ruys v. Royal Exchange Assurance Corporation (1897) 66 L. J. Q. B. 534; [1897] 2 Q. B. 135; 77 L. T. 23; 8 Asp. M. C. 294.—COLLINS, J.; and Blairmore Sailing Ship Co. v. Macredie (1898).—H.L. (SC.), *infra*, col. 3525.

Smith v. Robertson (1814) 2 Dow 474; 14 R. R. 174.—H.L. (SC.), commented on.

Naylor v. Naylor (1829).—K.B. (*infra*).

Smith v. Robertson, applied.

Provincial Insurance Co. of Canada v. Leduc (1874) 43 L. J. P. C. 49; L. R. 6 P. C. 224, 241; 31 L. T. 142; 22 W. R. 929.—P.C.

Smith v. Robertson, referred to.

Ruys v. Royal Exchange Assurance Corporation (1897) 66 L. J. Q. B. 534; [1897] 2 Q. B. 135; 77 L. T. 23; 8 Asp. M. C. 294.—COLLINS, J.; and Sailing Ship Blairmore Co. v. Macredie (1898).—H.L. (SC.), *infra*, col. 3525.

Patterson v. Ritchie (1815) 4 M. & S. 393.

—K.B. and Brotherton v. Barber (1816) 5 M. & S. 418.—K.B., adopted.
Naylor v. Naylor (1829).—K.B. (*infra*); and Ruys v. Royal Exchange Assurance Corporation (1897) 66 L. J. Q. B. 534; [1897] 2 Q. B. 135; 77 L. T. 23.—COLLINS, J.

Naylor v. Taylor (1829) 9 B. & C. 718; 4 M. & Ry. 526.—K.B., commented upon.

The Helen (1865) 35 L. J. Adm. 2, 6; L. R. 1 A. & E. 1, 7; 11 Jur. (N.S.) 1025; 13 L. T. 305; 14 W. R. 136.—ADM.

Naylor v. Taylor, dictum adopted.

Ruys v. Royal Exchange Assurance Corporation (1897) 66 L. J. Q. B. 534; [1897] 2 Q. B. 135; 77 L. T. 23; 8 Asp. M. C. 294.—COLLINS, J.

Blairmore Sailing Ship Co. v. Macredie, 24 Ct. of Sess. Cas. (4th series) 893.—CT. OF SESS. (SC.): *reversed*, (1898) 67 L. J. P. C. 96; [1898] A. C. 593; 79 L. T. 217; 8 Asp. M. C. 429.—H.L. (SC.).

Conway v. Gray (1809) 10 East 536.—K.B., *overruled*.

Aubert v. Gray (1862) 3 B. & S. 169; 32 L. J. Q. B. 50; 9 Jur. (N.S.) 714; 7 L. T. 469; 11 W. R. 27.—EX. CH.

ERLE, C.J. (for the Court).—We were much pressed with the argument that the case of *Conway v. Gray* has been constantly acted on by all the parties interested in insurance law. The answer is, that the fact is disputed. The treatises lead to a contrary conclusion; and even if the assertion were true, still the plaintiffs ought to have our judgment, provided we think that the decision of the inferior Court, which would bind till it was overruled, was contrary to law; and that is our opinion.—p. 182.

Conway v. Gray, *referred to*.

Janson v. Driefontein Consolidated Mines (1902) 71 L. J. K. B. 857; [1902] A. C. 484; 87 L. T. 372; 51 W. R. 142; 7 Com. Cas. 268.—H.L. (E.).

Aubert v. Gray (1862) 3 B. & S. 163, 169; 32 L. J. Q. B. 50; 9 Jur. (N.S.) 714; 7 L. T. 469; 11 W. R. 27.—EX. CH., *referred to*.

Robinson Gold Mining Co. v. Alliance Assurance Co. (1901) 70 L. J. K. B. 892; [1901] 2 K. B. 919; 85 L. T. 419; 50 W. R. 109; 6 Com. Cas. 244.—PHILLIMORE, J.; affirmed, (1902) 71 L. J. K. B. 942; [1902] 2 K. B. 489; 86 L. T. 858; 51 W. R. 105; 7 Com. Cas. 219.—C.A.

Aubert v. Gray, *adopted*.

Janson v. Driefontein Consolidated Mines (1902) 71 L. J. K. B. 857; [1902] A. C. 484; 87 L. T. 372; 51 W. R. 142.—H.L. (E.).

Crew v. G. W. Steamship Co. (1887) 3 Times L. R. 394.—A. L. SMITH, J., *referred to*.

Robinson Gold Mining Co. v. Alliance Assurance Co. (1901) 70 L. J. K. B. 892; [1901] 2 K. B. 919; 85 L. T. 419; 50 W. R. 109; 6 Com. Cas. 244.—PHILLIMORE, J.; affirmed, C.A. (*see supra*).

Driefontein Consolidated Gold Mines (1900)

69 L. J. Q. B. 771; [1900] 2 Q. B. 339; 83 L. T. 79; 48 W. R. 619; 5 Com. Cas. 296.—MATHEW, J., *referred to*.

Robinson Gold Mining Co. v. Alliance Assurance Co. (1901) 70 L. J. K. B. 892; [1901] 2 K. B. 919; 85 L. T. 419; 50 W. R. 109; 6 Com. Cas. 244.—PHILLIMORE, J.

Driefontein Consolidated Gold Mines v.

Janson (1900) 69 L. J. Q. B. 771; [1900] 2 Q. B. 339; 83 L. T. 79; 48 W. R. 619; 5 Com. Cas. 296.—MATHEW, J.; affirmed, (1901) 70 L. J. K. B. 881; [1901] 2 K. B. 419; 85 L. T. 104; 49 W. R. 660; 6 Com. Cas. 198.—C.A., SMITH, M.R., and ROMER, L.J., v. WILLIAMS, L.J. *dissenting*; the latter decision affirmed *nom.* **Janson v. Driefontein Consolidated Gold Mines** (1902) 71 L. J. K. B. 857; [1902] A. C. 484; 87 L. T. 72; 51 W. R. 142; 7 Com. Cas. 268.—H.L. (E.).

10. SAME BY MASTER.

Cobequid Marine Insurance Co v. Barteau: (1875) L. R. 6 C. P. 319; 32 L. T. 510; 23 W. R. 892; 2 Asp. M. C. 536.—P.C. *discussed*.

Hall v. Jupe (1880) 49 L. J. C. P. 727; 41 L. T. 411; 4 Asp. M. C. 328.—C.P.

Mordy v. Jones (1825) 3 L. J. (O.S.) K. B. 250; 4 B. & C. 394; 2 D. & R. 479; 28 R. R. 305.—K.B., *recognised*.

Philpott v. Swann (1861) 30 L. J. C. P. 358; 11 C. B. (N.S.) 270; 7 Jur. (N.S.) 1291; 5 L. T. 183.—C.P.

Mordy v. Jones, *considered and adopted*.

Notara v. Henderson (1872) 41 L. J. Q. B. 158; 163 L. R. 7 Q. B. 225, 234; 26 L. T. 442; 20 W. R. 442; 1 Asp. M. C. 278.—EX. CH.

11. ASSIGNMENT OF POLICY.

North of England Pure Oilcake Co. v. Archangel Maritime Insurance Co. (1875)

44 L. J. Q. B. 121; L. R. 10 Q. B. 249; 42 L. T. 561; 24 W. R. 162; 2 Asp. M. C. 571.—Q.B., *dictum adopted*.

Rayner v. Preston (1881) 50 L. J. Ch. 472; 18 Ch. D. 1; 44 L. T. 787; 29 W. R. 546.—C.A.

Pellas v. Neptune Marine Insurance Co., 48 L. J. C. P. 370; 4 C. P. D. 139; 40 L. T. 428; 27 W. R. 679.—C.P.D. DENMAN and LOPES, JJ.; *reversed*, (1879) 49 L. J. C. P. 153; 5 C. P. D. 34; 28 W. R. 405; 42 L. T. 35.—C.A. BRAMWELL, BRETT and COTTON, L.JJ.

Pellas v. Neptune Marine Insurance Co. (*supra* in C.A.), *referred to*.

Gray v. Webb (1882) 51 L. J. Ch. 815; 21 Ch. D. 802; 46 L. T. 913; 31 W. R. 8.—KAY, J.

Ralli v. Universal Marine Insurance Co., 31 L. J. Ch. 297; 2 J. & H. 159; 5 L. T. 390; 8 Jur. (N.S.) 227; 10 W. R. 154.—WOOD, V.-C.; *reversed*, (1861) 31 L. J. Ch. 313; 4 De G. F. & J. 1; 8 Jur. (N.S.) 495; 6 L. T. 34; 10 W. R. 278.—L.JJ.

12. SUBROGATION.

Randal v. Cockran (1748) 1 Ves. sen. 98.—L.C., *principle applied*.

Yates v. Whyte (1838) 7 L. J. C. P. 116; 4 Bing. N. C. 272; 5 Scott 640.—C.P.

Randal v. Cockran, *considered and applied*.

Dickenson v. Jardine (1868) 37 L. J. C. P. 321; L. R. 3 C. P. 639, 643; 18 L. T. 717; 16 W. R. 1169.—C.P.

Randal v. Cockran, *adopted*.

Stringer v. English and Scottish Marine Insurance Co. (1869) 38 L. J. Q. B. 321, 326; L. R. 4 Q. B. 676, 692.—Q.B.; affirmed, EX. CH. (*supra*, col. 3488).

Randal v. Cockran, *dictum adopted*.

Raykin v. Potter (1873) 42 L. J. Q. B. 169; 186 L. R. 6 H. L. 83, 118; 28 L. T. 142; 22 W. R. 1; 2 Asp. M. C. 65.—H.L. (E.).

Randal v. Cockran, *adopted*.

Simpson v. Thompson (1877) 3 App. Cas. 279, 293; 38 L. T. 1; 3 Asp. M. C. 567.—H.L. (SC.).

Randal v. Cockran, applied.

Midland Insurance Co. v. Smith (1881) 50 L. J. Q. B. 329, 333; 6 Q. B. D. 561, 567; 45 L. T. 411; 29 W. R. 850; 45 J. P. 699.—W. WILLIAMS, J.

Randal v. Cockran, approved.

Burnand v. Rodocanachi (1882) 51 L. J. Q. B. 548; 5 App. Cas. 333; 47 L. T. 277; 31 W. R. 65; 4 Asp. M. C. 576.—H.L. (E.).

Randal v. Cockran, referred to.

Castellain v. Preston (1883) 52 L. J. Q. B. 366; 11 Q. B. D. 380; 49 L. T. 29; 31 W. R. 557.—C.A.

Case v. Davidson (1816) 5 M. & S. 79.—K.B.; *affirmed*, (1820) 2 Br. & B. 379; 8 Price 542; 5 Moore 196; 17 R. R. 280.—EX. CH.

Case v. Davidson, applied.

Keith v. Burrows (1877) 46 L. J. C. P. 801, 811; 2 App. Cas. 636, 656; 37 L. T. 291; 25 W. R. 831; 3 Asp. M. C. 481.—H.L. (E.); Midland Insurance Co. v. Smith (1881) 50 L. J. Q. B. 329; 6 Q. B. D. 561, 567; 45 L. T. 411; 29 W. R. 850; 45 J. P. 699.—WILLIAMS, J.; The Red Sea (1895) 65 L. J. Adm. 9; [1896] P. 20; 73 L. T. 462; 44 W. R. 306; 8 Asp. M. C. 102.—C.A. Esher, M.R. and Lopes, L.J.

Yates v. Whyte (1838) 7 L. J. C. P. 116; 4 Bing. N. C. 272; 5 Scott 640.—C.P., *applied*.

Dickenson v. Jardine (1868) 37 L. J. C. P. 321, 325; L. R. 3 C. P. 639, 644; 18 L. T. 717; 16 W. R. 1169.—C.P.; Stringer v. English and Scottish Marine Insurance Co. (1869) 38 L. J. Q. B. 321, 326; L. R. 4 Q. B. 676, 692.—Q.B.; *affirmed*, EX. CH. (*supra*, col. 3488).

Yates v. Whyte, followed.

Bradburn v. G. W. Ry. (1874) 44 L. J. Ex. 9; L. R. 10 Ex. 1; 31 L. T. 464; 23 W. R. 48.—EX.

Yates v. Whyte, discussed.

Jebson v. East and West India Dock Co. (1875) 44 L. J. C. P. 181, 184; L. R. 10 C. P. 300, 305; 32 L. T. 321; 23 W. R. 624; 2 Asp. M. C. 505.—C.P.

Yates v. Whyte, followed.

Simpson v. Thomson (1877) 3 App. Cas. 279, 284; 38 L. T. 1; 3 Asp. M. C. 567.—H.L. (SC.).

Yates v. Whyte, adopted.

Midland Insurance Co. v. Smith (1881) 50 L. J. Q. B. 329, 332; 6 Q. B. D. 561, 567; 45 L. T. 411; 29 W. R. 850; 45 J. P. 699.—WILLIAMS, J.

Stewart v. Greenock Marine Insurance Co.

(1848) 2 H. L. Cas. 159; 1 Macq. H. L. 328.—H.L. (SC.), *explained and dictum adopted*.

Rankin v. Potter (1873) 42 L. J. C. P. 169, 192, 205; L. R. 6 H. L. 83, 130; 29 L. T. 142; 22 W. R. 10; 2 Asp. M. C. 65.—H.L. (E.).

Stewart v. Greenock Marine Insurance Co., discussed and applied.

Keith v. Burrows (1877) 46 L. J. C. P. 801, 812; 2 App. Cas. 636, 657; 37 L. T. 291; 25 W. R. 831; 3 Asp. M. C. 481.—H.L. (E.).

Stewart v. Greenock Marine Insurance Co., applied.

Midland Insurance Co. v. Smith (1881) 50 L. J. Q. B. 329, 332; 6 Q. B. D. 561, 567; 45 L. T. 411; 29 W. R. 850; 45 J. P. 699.—WILLIAMS, J.

Stewart v. Greenock Marine Insurance Co., distinguished.

Sea Insurance Co. v. Hadden (1884) 53 L. J. Q. B. 252; 13 Q. B. D. 706, 717; 50 L. T. 657; 32 W. R. 841; 5 Asp. M. C. 230.—C.A.

Stewart v. Greenock Marine Insurance Co., applied.

The Red Sea (1895) 65 L. J. Adm. 9; [1896] P. 20; 73 L. T. 462; 44 W. R. 306; 8 Asp. M. C. 102.—C.A. Esher, M.R. and Lopes, L.J.

13. ACTION ON POLICY.

Powles v. Innes (1843) 12 L. J. Ex. 163; 11 M. & W. 10.—EX., *adopted*.

Watson v. Swann (1862) 31 L. J. C. P. 210; 11 C. B. (N.S.) 756.—C.P.; Lloyd v. Fleming (1872) 41 L. J. Q. B. 93; L. R. 7 Q. B. 299; 25 L. T. 824; 20 W. R. 296; 1 Asp. M. C. 192.—Q.B.

Powles v. Innes, applied.

North of England Oilcake Co. v. Archangel Insurance Co. (1875) 44 L. J. Q. B. 121, 123; L. R. 10 Q. B. 249, 255; 32 L. T. 561; 24 W. R. 162; 2 Asp. M. C. 571.—Q.B.; and Rayner v. Preston (1881) 50 L. J. Ch. 472, 479; 18 Ch. D. 1, 12; 44 L. T. 787; 29 W. R. 546.—C.A.

Sutherland v. Pratt (1843) 13 L. J. Ex. 246;

12 M. & W. 16.—EX., *observations adopted*.
Ebsworth v. Alliance Marine Insurance Co. (1873) 42 L. J. C. P. 305, 314; L. R. 8 C. P. 596; 609; 29 L. T. 479; 2 Asp. M. C. 125.—C.P.

Watson v. Swann (1862) 31 L. J. C. P. 210; 11 C. B. (N.S.) 756.—C.P., *adopted*.

Browning v. Provincial Insurance Co. of Canada (1873) L. R. 5 P. C. 263, 272; 28 L. T. 853; 21 W. R. 587; 2 Asp. M. C. 35.—P.C.; Ebsworth v. Alliance Marine Assurance Co. (1873) 42 L. J. C. P. 305, 315; L. R. 8 C. P. 596, 610; 29 L. T. 479; 2 Asp. M. C. 125.—C.P.

Watson v. Swann, referred to.

Keighley v. Durant (1901) 70 L. J. K. B. 662; [1901] A. C. 240; 84 L. T. 777.—H.L. (E.).

Goldschmidt v. Marryat (1809) 1 Camp. 559.—MANSFIELD, C.J., *discussed*.

China Traders Insurance Co. v. Royal Exchange Assurance Corporation (1898) 67 L. J. Q. B. 736; [1898] 2 Q. B. 187; 78 L. T. 783; 46 W. R. 497; 8 Asp. M. C. 409.—C.A. SMITH, CHITTY and WILLIAMS, L.JJ.

Rayner v. Ritson (1865) 35 L. J. Q. B. 59; 6 B. & S. 888; 14 W. R. 81.—Q.B., *applied*.

China Trans-Pacific Steamship Co. v. Commercial Union Assurance Co. (1881) 51 L. J. Q. B. 132; 8 Q. B. D. 142; 45 L. T. 647; 30 W. R. 224.—C.A.

Rayner v. Ritson, discussed.

China Traders Insurance Co. v. Royal Exchange Assurance Corporation (1898) 67 L. J. Q. B. 736; [1898] 2 Q. B. 187; 78 L. T. 783; 46 W. R. 497; 8 Asp. M. C. 409.—C.A. SMITH, CHITTY and WILLIAMS, L.JJ. *See extract, infra*, col. 3529.

West of England and South Wales District Bank v. Canton Insurance Co. (1877) 2 Ex. D. 472.—EX., *approved*.
China Trans-Pacific Steamship Co. v. Commercial Union Assurance Co. (1881) 51 L. J. Q. B. 132; 8 Q. B. D. 142; 45 L. T. 647; 30 W. R. 224.—C.A.

West of England and South Wales District Bank v. Canton Insurance Co., *applied*.
London and Provincial Marine and General Insurance Co. v. Chambers [1900] 5 Com. Cas. 241.—KENNEDY, J.

China Trans-Pacific S.S. Co. v. Commercial Union Assurance Co. (1881) 51 L. J. Q. B. 132; 8 Q. B. D. 142; 45 L. T. 647; 30 W. R. 224.—C.A., *discussed*.

China Traders Insurance Co. v. Royal Exchange Assurance Corporation (1898) 67 L. J. Q. B. 736; [1898] 2 Q. B. 187; 78 L. T. 783; 46 W. R. 497; 8 Asp. M. C. 409.—C.P. SMITH, CHITTY and WILLIAMS, L.JJ. *See extract, infra*.

Henderson v. Underwriting and Agency Association (1891) 60 L. J. Q. B. 406; [1891] 1 Q. B. 557; 64 L. T. 774; 39 W. R. 528.—CAVE and JEUNE, JJ., *distinguished*.

China Traders Insurance Co. v. Royal Exchange Assurance Corporation (1898) 67 L. J. Q. B. 736; [1898] 2 Q. B. 187; 78 L. T. 783; 46 W. R. 497; 8 Asp. M. C. 409.—C.A. SMITH, CHITTY and WILLIAMS, L.JJ. *See extract, infra*.

Henderson v. Underwriting and Agency Association, *followed*.
Village Main Reef Gold Mining Co. v. Stearns (1900) 5 Com. Cas. 246.—KENNEDY, J.

Nord Deutsche Versicherungs Gesellschaft v. Merchants Marine Insurance Co. (unreported), *distinguished*.
China Traders Insurance Co. v. Royal Exchange Assurance Corporation (1898)—C.A. (*see infra*).

Willis & Co. v. Baddeley (1892) 61 L. J. Q. B. 769; [1892] 2 Q. B. 324; 67 L. T. 206; 40 W. R. 577.—C.A., *distinguished*.

China Traders Insurance Co. v. Royal Exchange Assurance Corporation (1898) 67 L. J. Q. B. 736; [1898] 2 Q. B. 187; 78 L. T. 783; 46 W. R. 497; 8 Asp. M. C. 409.—C.A.

A. L. SMITH L.J.—If, then, this had been a case between the original underwriter and original assured, there could not have been a doubt about it, and there does not seem to have been a doubt raised in any reported case until the year 1890, when Mathew and Cave, JJ., in the unreported case of *Nord Deutsche Versicherungs Gesellschaft v. Merchants Marine Insurance Co.* refused to make an order for ships papers, as it was a case of re-insurance. This case was cited in *Willis & Co. v. Baddeley* which came before the C. A. in 1892. There the real question was whether, where the agent of a principle resident abroad was bringing an action in his own name, the defendant was entitled to discovery to the same extent as if the principal were a party to the action; but Bowen, L.J., and I both expressed our opinion that we were not prepared to agree with the decision of Mathew and Cave, JJ., in the unreported case as to the production of ships'

papers in cases of re-insurance. . . . It was also said that in the unreported case of *Royal Exchange Assurance Corporation v. Faber* in 1897, Collins, J., at Chambers, made an order for ships' papers in a case of re-insurance. For myself, I think he was quite right in making the order. . . . *Henderson v. Underwriting and Agency Association* (*supra*, col. 3529) is obviously distinguishable. The claim there was not on a policy of marine insurance. The transit was partly by land, and the words "of the seas" were struck out of the clause enumerating the perils insured against, the words "of transit or conveyance" being substituted for them. Cave, J., rightly refused to apply the well-known practice as to the production of ships' papers, which had always been applied to actions on policies of marine insurance only, to a policy of insurance on goods during a transit on land.—p. 738.

Duncan v. Worrall (1822) 10 Price 31.—EX. CH., *referred to*.

Brooking v. Maudslay (1888) 57 L. J. Ch. 1001; 38 Ch. D. 636; 58 L. T. 852; 36 W. R. 664; 6 Asp. M. C. 296.—STIRLING, J.

14. INSURANCE BROKERS.

Bousfield v. Cresswell (1810) 2 Camp. 545; 11 R. R. 794.—K.B., *applied*.

The Lord of the Isles, Williams v. Knight (1894) 64 L. J. Adm. 15; [1894] P. 342; 11 R. 736; 71 L. T. 92; 7 Asp. M. C. 500.—BRUCE, J.

Power v. Butcher (1829) 10 B. & C. 329.—K.B., *observations adopted*.

Xenos v. Wickham (1867) 36 L. J. C. P. 313, 323; L. R. 2 H. L. 296, 319; 16 L. T. 800; 16 W. R. 38.—H.L. (E.).

Power v. Butcher, *approved*.

Universo Insurance Co. of Milan v. Merchants' Marine Insurance Co. (1897) 66 L. J. Q. B. 564; [1897] 2 Q. B. 93; 76 L. T. 748; 45 W. R. 627.—C.A., ESHER, M.R., SMITH and CHITTY, L.JJ.

Turpin v. Bilton (1843) 12 L. J. C. P. 167; 5 Man. & G. 455; 6 Scott. N. R. 447; 7 Jur. 950.—C.P., *referred to*.

Xenos v. Wickham (1867) 36 L. J. C. P. 313, 320; L. R. 2 H. L. 296, 314; 16 L. T. 800; 16 W. R. 38.—H.L. (E.).

Turpin v. Bilton, *considered*.

Great Western Insurance Co. v. Cunliffe (1874) 1 L. R. 9 Ch. 525, 532, n.; 30 L. T. 113.—BACON, V.-C.; reversed, C.A.

Baring v. Stanton (1876) 3 Ch. D. 502; 35 L. T. 652; 25 W. R. 237; 3 Asp. M. C. 294.—C.A., *distinguished*.

Bartram v. Lloyd (1903) 88 L. T. 286.—BRUCE, J.

Maanss v. Henderson (1801) 1 East 335.—K.B., *adopted*.

Maspons v. Mildred (1882) 51 L. J. Q. B. 604, 609; 9 Q. B. D. 530, 541; 47 L. T. 313; 30 W. R. 862.—C.A.

Westwood v. Bell (1815) 4 Camp. 349; 16 R. R. 800.—K.B., *distinguished*.

Fisher v. Smith (1876) 34 L. T. 912.—EX.; reversed, C.A. and H.L. (E.) (*ante*, col. 1560).
 KELLY, C.B.—The only case at all like it . . . is that of *Westwood v. Bell*. There undoubtedly

a sub-agent was held to be entitled to a lien as against the principal in respect of certain premiums which he had paid. But a distinction, and a marked and obvious one, between that case and the case now before the Court is that in *Wright v. Bell* the party there, the sub-agent in the situation of the present defendant, did not know that there was any principal at all behind the person who had actually employed him in the business. —p. 376.

Bromley v. Williams (1863) 32 L. J. Ch. 716; 32 Beav. 177; 9 Jur. (N.S.) 240; 8 L. T. 78; 11 W. R. 392.—M.R., *referred to*.
Marine Mutual Insurance Association v. Young (1880) 43 L. T. 441; 4 Asp. M. C. 357.—POWELL, B.

Bromley v. Williams, followed.
Wood v. McCarthy (1893) 62 L. J. Q. B. 373; [1893] 1 Q. B. 775; 5 R. 408; 69 L. T. 431; 41 W. R. 523.—Q.B.D.

15. INSURANCE COMPANIES.

United Kingdom Mutual Steamship Assurance Association v. Nevill (1887) 56 L. J. Q. B. 522; 19 Q. B. D. 110; 35 W. R. 746; 6 Asp. M. C. 226, n.—C.A., *distinguished*.
Ocean Iron Steamship Insurance Association v. Leslie (1888) 22 Q. B. D. 722; 57 L. T. 722; 6 Asp. M. C. 226.—MATHEW, J.

United Kingdom Mutual Steamship Assurance Association v. Nevill, distinguished.
Ocean Iron Steamship Insurance Association v. Leslie (*supra*), *approved*.
Great Britain 100 A1 Steamship Insurance Association v. Wyllie (1889) 58 L. J. Q. B. 614; 22 Q. B. D. 710; 60 L. T. 916; 37 W. R. 407; 6 Asp. M. C. 398.—C.A. ESHER, M.R., BOWEN and FRY, L.JJ.

United Kingdom Mutual Steamship Assurance Association v. Nevill, considered.
Montgomerie v. United Kingdom Mutual Steamship Association (1891) 60 L. J. Q. B. 429; [1891] 1 Q. B. 370; 64 L. T. 323; 35 W. R. 351.—WRIGHT, J.

United Kingdom Mutual Steamship Assurance Association v. Nevill, distinguished.
Ocean Iron Steamship Insurance Association v. Leslie, followed.
British Marine Mutual Insurance Co. v. Jenkins [1899] 69 L. J. Q. B. 177; [1900] 1 Q. B. 299; 82 L. T. 297; 9 Asp. M. C. 265 Com. Cas. 143.—BIGHAM, J.

Great Britain 100 A1 Steamship Insurance Association v. Wyllie (1889) 58 L. J. Q. B. 614; 22 Q. B. D. 710; 60 L. T. 916; 37 W. R. 407; 6 Asp. M. C. 398.—C.A. *followed*.
British Marine Mutual Insurance Co. v. Jenkins (1899) 69 L. J. Q. B. 177; [1900] 1 Q. B. 299; 82 L. T. 297; 9 Asp. M. C. 265 Com. Cas. 143.—BIGHAM, J.

Alexander v. Campbell 41 L. J. Ch. 478; 27 L. T. 25; 1 Asp. M. C. 373.—BACON, V.-C.; *reversed on one point* (1872) 27 L. T. 462; 1 Asp. M. C. 447.—L.JJ.

Lion Mutual Marine Insurance Association v. Tucker (1883) 53 L. J. Q. B. 185; 12 Q. B. D. 176; 49 L. T. 764; 32 W. R. 546.—C.A., *referred to*.

United Kingdom Mutual Steamship Insurance Association v. Nevill (1887) 56 L. J. Q. B. 522; 19 Q. B. D. 110; 35 W. R. 746; 6 Asp. M. C. 226, n.—C.A.

Lion Mutual Marine Insurance Association v. Tucker, approved and applied.
Bangor and North Wales Mutual Marine Protection Association, In re; Baird's Case [1899] 68 L. J. Ch. 521; [1899] 2 Ch. 593; 80 L. T. 870; 47 W. R. 695; 7 Manson 160.—WRIGHT, J.